1918
Sept.5.

IN THE MATTER OF THE PETITION OF RIGHT OF

EMILE THERRIAULT, OF THE PARISH OF ST. JOSEPH DE LA RIVIERE BLEUE, FARMER,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Expropriation—Transcontinental railway—Works on adjoining land —Unforeseen damages—Right to further compensation.

The suppliant, in 1910, sold the Commissioners of the Transcontinental Railway an area of his farm for the purposes of the railway. The agreement containing the following clause, "and in consideration of the above ,the vendor relinquishes to the purchaser all claims which he and his legal representatives could have upon the said land, and releases, moreover, the purchasers from all demands and claims for depreciation or arising from the expropriation and taking possession of the said land by the purchasers or even arising from the construction, keeping in repair and putting in operation, on the said land, of the line of the National Transcontinental Railway."

The respondents since constructed certain works upon lots belonging to suppliant's neighbours to divert the water along the railway, and by reason of such works the suppliant's farm was damaged on account of the overflow of such water.

Held that the damages so complained of did not arise from the taking of the defendant's land, and that the compensation in 1910 did not embrace or cover damages which could neither be foreseen, contemplated nor even guessed, at the time, and that the damages covered by the above clause must be such as could have been foreseen, and that the suppliant was entitled to compensation.

2. Where the owner of a superior heritage alters its natural state to the injury of the owner of the inferior under Art. 501, C.C.P.Q., he is liable to the latter, not as for a simple tort, but as for a breach of a duty imposed by law. *City of Quebec v. The Queen,* (1894), 24 Can. S.C.R. 420, referred to.

3. Where compensation has been paid for damages arising from an expropriation, it constitutes no answer to a claim for damages arising out of a new taking or new works constructed where the last-mentioned damages could not at the time of the first expropriation be foreseen or regarded as likely to happen.

Tried before the Honourable Mr. Justice Audette, at Fraserville, P.Q., July 3, 4, 5, 1918.

E. Lapointe, K.C., and *C. A. Stein,* K.C., for suppliant.

E. H. Cimon, for Crown.

AUDETTE, J. (September 5, 1918) rendered judgment.

The suppliant brought his petition of right seeking to recover, from the Crown, the sum of $1,000, for damages to his property, arising out of the taking of a large volume of water from the neighboring lots or farms, and from the diversion of streams or watercourses flowing thereon, onto his property with a large quantity of sand, which spread upon and buried a certain area of his farm.

As appears by Exhibit "B", on October 9, 1910, the suppliant sold to the Commissioners of the Transcontinental Railway, an area of his farm of (5.40) five and forty hundredths acres, for the purposes of the railway, and was paid for the same the sum of $450, including all damages. In this indenture will be found the following clause, viz.:

"Et en considération de ce que dessus le vendeur "renonce envers l'acquéreur à toutes réclamations "qu'il, et ses représentants légaux pourraient avoir "sur le dit terrain et décharge de plus les acquéreurs "de toutes demandes et réclamations pour dépreciation ou provenant de l'expropriation et de la prise "de possession du dit terrain par les acquéreurs ou "encore provenant de la construction, de l'entretien "et de la mise en opération sur le dit terrain de la "ligne du chemin de fer National Transcontinental."

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The main question to be decided is whether or not the damages complained of herein are or are not covered by this clause.

These damages occur both at the western and eastern parts of the farm.

Dealing first with the west, it appears that at the beginning of the construction of the railway, the respondent constructed a trestle, running as high as fifty feet at places, on the right of way, and later on, in 1911 and 1912, says the engineer in charge, they began to fill this trestle, and for that purpose opened a borrow-pit to the west. The eastern end of the pit begins at point "C" on plan No. 1, running west. From point "C" to Riviere Bleue on the east there is a distance of, approximately, 4½ arpents. They began borrowing earth, at nothing, at point "C", working west, on rising ground, leaving a depth of about 20 feet at the west end of this borrow-pit, which is about half a mile long.

Within that western borrow-pit there are two watercourses, one at about three arpents and the other at about five arpents from "C" on the plan. Two culverts were, at the origin, constructed to take care of these watercourses, which ran—according to their natural courses—from north to south, across the right of way. Later on, when they began borrowing for the filling of the trestle, they dug this pit 7 or 8 feet lower than these culverts, with the result that these watercourses emptied in the pit, and afterwards found their way to the suppliant's land.

At one point in the pit, at the origin, they left some sand, which acted as a retaining wall preventing the water from running on to the suppliant's lot, No. 58, —but after a while, in the Spring, the volume of water having increased, it mined this sand wall and

finally carried it away, with additional sand, onto lot 58, between point "C" and the Riviere Bleue.

As a result, 7 or 8 arpents of the suppliant's land have been damaged. The sand at certain points has entirely buried the fences, which were about five feet high. There is no doubt that, as the result of such works, the waters of the two watercourses and the surface water of 500 or 600 acres, formerly draining into these watercourses and flowing to the south of the railway, now will empty into the Riviere Bleue, through this damaged area of the suppliant's farm. These waters run even during the summer season.

Having found that the earth on the western pit was becoming hard, the respondent opened another borrow-pit to the east on lots 59 and 60; but that also was done after the construction of a culvert, which then took care of the water, taking it to the south, on its natural course.

However, here again the excavation in this pit, of a length of over half a mile, was made about two feet lower than the culvert and the waters of lots 59, 60, 61 and 62, increased by the uncovering of some large springs in the pit, followed the different undulations of the land, as shewn by the black line, indicated on plan No. 1, by letters F, B, and G, and spread on the suppliant's land. The volume of water coming from the east is also considerable.

The ditch marked D, on the plan, formerly took care of the water, at that point, on the suppliant's land; but it has now been blocked and obstructed by the high railway embankment. The engineer testified that no culvert was built at that point, because it would have been too expensive to do so, the embankment being so high and heavy.

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There is no embankment opposite the eastern pit. Following the black line, indicated on the plan by letters F, B and G, it will be seen that the water runs, for a certain space, on the right of way, and while a ditch of 2½ by 1½ feet, was originally constructed at that point, it has increased, by erosion through the large volume of water, to 9 or 10 feet by 12 feet in width.

As a result of these eastern waters, the suppliant contends that the only road on his farm is mined by these waters; that it remains under water for a while in the spring and in the freshets; that they delay vegetation, and prevent him from seeding a certain acreage, which has to be always in hay instead of oats, etc. All of this going to decrease the value of his farm and its productive capacity.

It obviously results from the working of these borrow-pits, in the manner mentioned, that the suppliant's land, on the west, takes care of the water-courses, diverted from their natural courses,—together with the surface water of 500 or 600 acres, which empty on the farm with sand, and is a source of material depreciation to his farm.

On the east,—coupled with the waters coming from unearthed springs in the pit, the waters of lots 59, 60, 61 and 62, through such defective digging of the pit, are diverted from their natural course and spread, in a large quantity, upon his farm.

It must therefore be found, that when the Commissioners of the Transcontinental Railway took possession of the suppliant's 5.40 acres, and when it was represented to him, as testified in his evidence, they represented they were taking his land for the (*passage*) right of way of the Transcontinental Railway, it could not at that time be foreseen or contemplated

that he would suffer the damages in question in this case. Indeed, the construction of the culverts alone would convey to him the idea that the watercourses and the surface water would be taken care of in the usual manner.

The taking of these 5.40 acres, for the right of way, was one distinct and separate act, from that of the other works and diversion of watercourses on lands which did not belong to him. He had the right to assume that these culverts were not constructed for naught, and that they would take care of the waters.

The damages claimed do not arise from the expropriation, or rather from the taking, of the defendant's land and could not form part of such damages as would arise from such taking; but they are the result of works on neighboring lots or properties. See *Jackson v. The Queen.*[1]

The compensation of $450 paid him, under the indenture of October 9, 1910, did not embrace or cover damages which could neither be foreseen, contemplated, nor even guessed at the time.

If, after one compensation has been settled, further damage is caused by new works not carried out at the time of the assessment of this compensation, but at some future or subsequent time, compensation would no doubt be allowed in respect of such further damage. *Lancashire & Yorkshire R. Co. v. Evans;*[2] *Stone v. Corporation of Yeovil;*[3] *Attorney-General v. Metropolitan Ry. Co.*[4]

Undoubtedly the damages covered by the deed of

[1] (1886), 1 Can. Ex. 144.
[2] (1851), 15 Beav. 322, 51 E.R. 562.
[3] (1876), 1 C.P.D. 691; (1876), 2 C.P.D. 99.
[4] [1894] 1 Q.B. 384.

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purchase must be such as could have been then foreseen.[1]

The case of *Lawrence v. G.N.R.*[2] cited at page 310 of *Hudson,* is quite apposite to the present circumstances, and reads as follows:

"Owing to the construction of a railway, which "was carried along an embankment, the flood waters "of an adjacent river were unable to spread themselves over the low lands alongside the river, as "formerly, and flowed over a bank, which formerly "protected the plaintiff's land, on to that land. "Before the railway was constructed, and before the "plaintiff became possessed of the land overflowed "by the flood waters, the owner of this and of adjacent land, from whom the plaintiff derived title, "agreed with the railway company to refer to arbitration the sum to be paid by the company for the "purchase of part of such adjacent land and as compensation for all injury and damage to his remaining estate, 'by severance or otherwise': Held, that "the compensation awarded under this agreement "*related only to such damage, known or contingent,* "by reason of the construction of the railway at other "places as was apparent and capable of being ascertained and estimated at the time when the compensation was awarded; that it *did not embrace* contingent and possible damages which might arise afterwards by the works of the company at other places "and which could not be foreseen by the arbitrator; "and that the compensation for the damage arising "to the plaintiff in the present circumstances was "not included in the compensation awarded."[3]

[1] *Hudson on Compensation,* I., p. 310.

[2] (1851), 16 Q.B. 643, 117 E.R. 1026.

[3] See also *Browne & Allan, Law of Compensation,* 130, 135; *Cripps on Compensation,* 154, 155.

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The respondent had, under sub-sec. (f) of sec. 3, of the *Expropriation Act,* the inherent power to divert and alter the course of these streams or water-courses; but that was an act distinct and separate from the taking of the suppliant's land under the deed of 1910, and the damages claimed herein did not arise from such taking, but from such diversion and from works subsequently executed on neighboring lots or properties, and were not included in the compensation of 1910. The construction of the culverts in question must also have led to the presumption they were so constructed to take care of the waters in question. Therefore the damages claimed herein were neither foreseen nor contemplated by the parties to the deed of 1910, and the damages satisfied under that deed, did not embrace contingent and possible damages which might arise afterwards by the works of the railway at other places.

Moreover, under Art. 501 of the Civil Code, P.Q., which is a reproduction of Art. 640 of the Code Napoleon, the proprietor of the higher land can do nothing to aggravate the servitude of the lower land, with respect to waters flowing on the higher part. Therefore, as held by Strong, C.J., and Fournier, J., in the case of the *City of Quebec v. The Queen,*[1] the Crown would be liable in damages for the injury complained of in this case not as for a tort, but for a breach of its duty as owner of the superior heritage by altering its natural state to the injury of the inferior proprietor. In support of that proposition will be found in the reasons for judgment of Sir Henry Strong in that case, a number of authorities establishing the Crown's liability under these circumstances. See also *Denholm v. Guelph & Goderich*

[1] (1894), 24 Can. S.C.R. 420, 421.

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R. Co.;[1] and *Martel v. C.P.R.*..[2] Moreover, such remedy would be found under sub-section (d) of sec. 20 of the *Exchequer Court Act*, as held in the case of the *City of Quebec, supra.*

The suppliant in his evidence claims $400 for the damages resulting from the western borrow-pit and $600 for the eastern borrow-pit.

There are 7 or 8 acres affected on the west. This acreage is of low and wet land and could only have been effectively used for agricultural purposes after establishing proper drainage. The damage is real. Although the fee in the land remains with the suppliant, at present such land has very little value and it is a question as to whether it could acquire value in the future. In 1916, when the respondent's engineer went upon the premises to make an inspection of these damages, the ground was so soft, on the western side, that he had to throw some wooden posts on the ground to walk over, as he was sinking to his knees. He further says that his idea was to expropriate that part covered by the sand on the western side and construct a drain to take the water to the Riviere Bleue. In the result, the suppliant cannot use this piece of land for agricultural purposes.

The damages arising from the eastern borrow-pit are not, under the evidence, of a very tangible nature. However, as already mentioned, he has to take care of a much larger volume of water which mines his road, floods part of his farm, delays and impedes his agricultural exploitation of the same. This is further aggravated by the closing of ditch D by the embankment.

[1] (1914), 17 Can. Ry. Cas. 316.
[2] (1895), 11 Rev. de Jur. 133.

The suppliant's witnesses place a value of $50 to $70 an acre on the west, and one of them values the damages on the west at $300 to $400, while some of the witnesses decline to place any estimate regarding the damages on the east. It is true that it appears from the evidence that the Crown paid from $75 to $80 an acre for the land expropriated in that locality; but we must not overlook that this price covered and embodied the damages resulting from the expropriation, which could be ever so much more than the actual value of the land taken. On behalf of the Crown, one witness fixes the value of the farms in that neighborhood, without buildings, at about $12 an acre.

I will assess all damages in question herein, east and west, at the sum of $440, an amount which will amply compensate the suppliant.

Therefore the suppliant is entitled to recover from the respondent the sum of $440 in satisfaction of all claims, once for all, for damages past, present and future, resulting from the works and construction in question herein, and with costs.

Judgment accordingly.

Solicitors for suppliant: *Lapointe, Stein* and *Levesque.*

Solicitor for respondent: *E. H. Cimon.*