Privy Council Appeal No. 64 of 1921.

The Sisters of Charity of Rockingham - - - - - *Appellants*

v.

The King - - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 29TH JUNE, 1922.

Present at the Hearing:

LORD BUCKMASTER.
LORD ATKINSON.
LORD SUMNER.
LORD PARMOOR.

[*Delivered by* LORD PARMOOR.]

This appeal raises an important point as to the right of the appellants to claim compensation on the ground that a portion of their property, which has not been taken for the construction of public works, has been "injuriously affected" by the construction of a railway shunting yard, which in part extends over lands which have been taken from them under statutory powers. The material facts may be shortly stated. The property of the appellants, prior to the expropriation of any part thereof, on the 7th March, 1913, by the Minister of Railways and Canals for the Dominion, consisted of lands situated on the east and west side of a public road which had been in existence from time immemorial, and of a railway which was originally constructed from 1850 to 1854. The lands expropriated were situated entirely on the east side of the railway, in and on the margin of Bedford Basin, which constituted part of the public harbour of Halifax. These lands consisted of two small promontories. The appellants have been paid the value of the

lands taken, and have been compensated for all consequential damage, other than damage to their lands on the west side of the railway. These are the lands which are alleged to have been "injuriously affected," but the claim of the appellants has been disallowed both in the Exchequer Court and in the Supreme Court of Canada. Considerable buildings have been erected on the lands on the west side of the railway for educational and charitable objects by the appellants, who are a religious order incorporated by an Act of Parliament of Nova Scotia. It is not necessary, however, to describe these buildings in any detail. Their size and cost are not material to the only question before their Lordships, which is whether the appellants have a right to make any claim for compensation beyond that already allowed.

In the Courts below, and in their petition of right, the appellants further based their claim to compensation partly on a right of way, which they alleged to exist over the railway between their property situated on the east side of the railway and that situated on the west side. Their Lordships give no opinion whether such a right could be established across the railway, and all documents which might have proved the conditions, which existed when the railway was made, have been lost. In the opinion of their Lordships there was no evidence of sufficient adverse user, and no ground for disturbing the findings on this point in the Courts below. So far as the claim for compensation has been based on the existence of this right, it cannot be maintained, and in the further consideration of the case it will be assumed that no such right exists, and that the lands on the east, and west side of the railway are severed by the railway track. The appellants further claimed that although the harbour of Halifax, of which Bedford Basin is a part, is a public harbour, within the meaning of the schedule of the British North America Act, 1867, yet that the appellants having constructed, on a portion of the bed of the harbour, a wharf and an esplanade, at which goods and provisions were landed for the use of the school, with the assent and licence of the crown, such assent and licence had under the circumstances become irrevocable, and that they were entitled for the purposes of compensation to regard the bed of the harbour underlying the wharf and esplanade as their property. This claim, however, does not appear to have been pressed at the hearing in the Exchequer Court, and during the hearing of the appeal their Lordships intimated that it could not be maintained.

Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is "injuriously affected," unless he can establish a statutory right. The claim, therefore, of the appellants, if any, must be found in a Canadian statute. The learned Judge, in the Exchequer Court, states that the Canadian Courts have followed the decisions

in the English Courts under the Lands Clauses Acts, and that he thinks that he is bound by the English decisions. This statement of the learned Judge was not questioned in the Supreme Court of Canada, or at the hearing before their Lordships. In the case of *Holditch* v. *Canadian Northern Ontario Railway Co.*, 1916, 1 A.C. 536, it is clear that the decision of their Lordships was based on the principle of English decisions, and that there was a special reference to the case of *Cowper Essex* v. *Acton Local Board* (14 A.C. 153). Their Lordships have applied the English decisions, so far as they are applicable, in the construction of the Canadian statute.

The Canadian statute gives exclusive jurisdiction to the Exchequer Court to hear and determine every claim against the crown, either for property taken for any public purpose or for damage to property "injuriously affected by the construction of any public work." The words "injuriously affected by the construction of any public work" are to be found in Sections 22, 26, 27, of the same statute. In Section 15 the words are "damages occasioned by the construction of any public work," but this section is not applicable to the circumstances of the present appeal, its object being to authorize agreements between a claimant and the Minister. There are sections in the English Railways Clauses and Lands Clauses Acts which do not appear in the Canadian Act, but the words "injuriously affected by the construction of any public work" are to be found in Section 6 of the Railways Clauses Consolidation Act, 1845, and substantially similar words are to be found in Section 68 of the Lands Clauses Act, 1845. Section 6 of the Railways Act enacts that the company shall make to the owners, &c., interested in any lands taken or used for the purposes of the railway, or *injuriously affected by the construction thereof*, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, etc., by reason of the exercise as regards such lands, of statutory powers vested in the company. The latter portion of this section is not to be found in the Canadian statute.

Section 68 of the Lands Clauses Act begins, "If any party shall be entitled to any compensation in respect of lands or of any interest therein which shall have been taken for or *injuriously affected by the execution of the works*." There is some doubt on the English decisions whether Section 68 alone would give a right to compensation for the injurious affection of lands by the execution of public works, or whether such section should be regarded as a procedure section, but this distinction is not of importance in considering the Canadian statute. Lord Chelmsford, in *Ricket* v. *The Metropolitan Railway Company* (L.R. 2 H.L. 175), after referring to Section 68 of the Lands Clauses Act, and Section 6 of the Railways Clauses Act, says, "There appears to be no difference in the language of the 68th section of the former Act and the 6th section of the later Act." The real questions, however, to be determined in the present appeal are whether under

the special circumstances of the case, the appellants can maintain a claim for damage to their property on the west side of the railway, on the ground that it has been injuriously affected by the construction of a public work over the two promontories, and, if so, what is the principle to be applied in assessing the amount. The actual amount, if any, is for the decision of the Exchequer Court, and cannot be raised before their Lordships.

If the railway shunting yard, of which complaint has been made, had been constructed on land, no part of which had been expropriated from the appellants, the appellants would not have been entitled to claim compensation, although, in fact, such construction had seriously depreciated the value of their property on the west side of the railway. Where no land of the same owner has been taken, the words "injuriously affected" only include damage or loss, which would have been actionable but for statutory powers, and such damage or loss must be occasioned by the construction of the authorized works, as distinct from their user. These limitations were adopted in a series of early English cases, and confirmed in the House of Lords in the case of *Hammersmith and City Railway Co.* v. *Brand* (L.R. 4 H.L. 171). Lord Cairns dissented from this interpretation of the statutory right to compensation, but the decision in this case states the principle to be applied in English law. It is authoritative, and cannot be altered without fresh legislation. If, therefore, the land taken for the shunting yard had belonged wholly to some owner other than the appellants, the appellants could not have claimed compensation on the ground that their property on the east side of the railway had been "injuriously affected"; but part of the land so taken was the property of the appellants, and it is on this ground that the appellants base their claim to compensation.

The first of the reported English decisions which deals with the question of injuriously affecting lands by the construction of public works, where the mischief of which complaint is made, is caused by what is done on lands taken from the same owner, is "*In re Stockport, etc., Railway Co.*" (33 L.J.Q.B. 251), (1864). This decision has been considered in a number of subsequent cases. For a time it gave rise to considerable difference of judicial opinion, but the law as applied by Mr. Justice Crompton has been twice considered, and approved in the House of Lords, *Buccleuch* v. *Metropolitan Board of Works*, 1872 (5 H.L. 418) and *Cowper Essex* v. *Local Board of Acton*, 1889 (*supra*). In the *Stockport* case, a company had taken land, the property of L., and proposed to make their railway so close to a cotton mill belonging to him, that, by reason of the proximity of the railway, and the danger of fire from trains using the line, the building could only be insured at an increased premium, and was rendered of less saleable value. Mr. Justice Crompton states the principle as follows :—

> "Where the damage is occasioned by what is done upon other land which the company have purchased, and such damage would not have been

> actionable as against the original proprietor, as in the case of the sinking of a well and causing the abstraction of water by percolation, the Company have a right to say, 'We had done what we had a right to do as proprietors, and do not require the protection of any Act of Parliament ; we therefore have not injured you by virtue of the provisions of the Act ; no cause of action has been taken away from you by the Act.' Where, however, the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say, 'It is by the Act of Parliament, and the Act of Parliament only, that you have done the acts which have caused the damage ; without the Act of Parliament everything you have done, and are about to do, in the making and using the railway would have been illegal and actionable, and is therefore matter for compensation according to the rule in question.' "

The rule to which Mr. Justice Crompton refers is that an owner is not entitled to compensation, except for matters, which, but for statutory powers, would have given a right to action, and he brings the case before him within this rule. In assessing the amount of compensation due to an owner of lands for damage, caused by the construction of works on other land taken from him, Mr. Justice Crompton justified the inclusion of mischief which arises both in the making and using of the railway, on the ground that but for the Act of Parliament both the making and the using of the railway would have been illegal, and that he was only applying the general principle already established to the circumstances of the case before him.

The principle stated by Mr. Justice Crompton in the *Stockport* case was considered in *Buccleuch* v. *the Metropolitan Board of Works* (*supra*), and a distinction was drawn between that case and the cases of the *Hammersmith and City Railway Co.* v. *Brand*, and *The City of Glasgow Union Railway Co.* v. *Hunter* (2 H.L. Sc. 78). Lord Chelmsford, referring to these cases, says :—

> " In neither of these cases was any land taken by the railway company connected with the lands which were alleged to be so injured, and the claim for compensation was for damage caused by the use, and not by construction of the railway. But if in each of the cases lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke or noise, occasioned by passing trains."

If this decision is applied to the circumstances of the present appeal, it would, in the opinion of their Lordships sanction a claim to compensation for the probable or apprehended use of the two promontories as part of a railway shunting yard. No doubt a difficulty arises in the assessment of amount where the mischief complained of arises, not only on the land which has been taken from the appellants, but also on land over which they had no ownership claim ; but this is no reason for refusing to entertain a claim, so far as the damage claimed can be shown to arise from the apprehended legal use of the lands taken from them.

The subsequent case of *Cowper Essex* v. *Local Board of Acton* (*supra*) cannot be differentiated from the case under appeal. It accepts the decision of Mr. Justice Crompton as an accurate

exposition of English compensation law. When this case was before the Court of Appeal, it was held that the intervention of a railway, which was wholly the property of the Railway Company and in which the claimant seeking compensation had no interest, made a valid distinction from the *Stockport* case, and that that case ought not to be extended. The Master of the Rolls further expressed an opinion that the *Stockport* case was in itself wholly wrong. When the case came before the House of Lords, the principle of the *Stockport* case was confirmed and approved, Lord Macnaghten saying, that, in his opinion, it had stood the test of criticism, that in practice he believed it had always been followed, and that it was perfectly right. As in this case the land taken was separated from the lands alleged to be injuriously affected by a railway, and there is no evidence that there was any right of way over the railway between the lands of the same owner on either side. It was held, however, to be sufficient that the lands taken and the lands alleged to be injuriously affected, were held by the same owner under such conditions that the unity of ownership conduced to the advantage of the property being comprised in one holding. Lord Watson, after referring to previous cases says :—

> "It appears to me to be the result of these authorities, which are binding upon this House, that a proprietor is entitled to compensation for depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers."

In a further passage Lord Watson says :—

> "I am prepared to hold, where several pieces of land, owned by the same person, are so near to each other, and so situated that the possession and control of each gives an enhanced value to all of them, they are lands held together within the meaning of the Act, so that if one piece is compulsorily taken, and converted to uses which depreciate the value of the rest, the owner has a right to compensation."

In the same case the Lord Chancellor says that where the future use of the part of a proprietor's land taken from him may damage the remainder, then such damage may be injuriously affecting the proprietor's other lands, though it would not be injurious affection of the land of neighbouring proprietors, from whom nothing has been taken for the purpose of the intended works. Applying then the principle of this decision to the case under appeal, it is clear that the possession and control of the two promontories did give an enhanced value to the land of the same owners on the west side of the railway, and that so far as the depreciation of the value of the lands on the west side of the railway is due to the anticipated legal use of works which may be constructed over the two promontories, the appellants are in the position of owners whose land has been injuriously affected by the construction of public works. It appears that before the hearing of the case the railway shunting yard had been laid out,

and that the actual use of the land comprised in the two promontories was inconsiderable. In the opinion of their Lordships, however, actual user at the time, when the compensation case is heard is not the basis on which the amount of compensation should be assessed. It may be that at the time when the compensation case is heard no works have been constructed, and in any case the appellants are entitled to claim compensation, which must be claimed once for all, for depreciation in the value of their lands on the west side of the railway, in so far as such depreciation is due to the anticipated legal use of authorised works which may be constructed upon the two promontories. The limitation of the amount of compensation to the anticipated construction of authorised works upon lands actually taken from the appellants has a special importance in a case like the present, where the shunting yard has been largely laid out on land which has not been taken from the appellants, and which has never been part of their property. This limitation, which is plainly expressed in all the leading English decisions, is again restated in *Horton* v. *Colwyn Bay, and Colwyn Urban District Council* (1908 1 K.B.D. 327), in which it was held that as the acts of user, the contemplation of which caused the depreciation, would be done on lands not the property of the claimant, the claimant was not entitled to any compensation. The problem of applying the above principles in a case where the mischief complained of has arisen partly on lands taken from the claimants, and partly on other lands outside their property, can only be settled by a consideration of all the circumstances in a particular case. Clearly in this case the appellants are entitled to a less amount of compensation than if all the lands taken in the laying out of the shunting yard had belonged to them, but on the other hand, the fact that other lands are comprised in the scheme in addition to the lands taken from the appellants, does not deprive the appellants of their right to compensation, so long as their claim is not extended beyond mischief which arises from the apprehended legal user of the two promontories as part of a railway shunting yard.

It is not possible on the information available before their Lordships to give further assistance on the assessment of the amount of compensation due to the appellants.

Their Lordships will humbly advise His Majesty that the judgments of the Exchequer Court and the Supreme Court of Canada should be reversed, and that the case be remitted to the Exchequer Court, and that the costs of this appeal and in the Courts below be paid by the respondent.

In the Privy Council.

THE SISTERS OF CHARITY OF ROCKINGHAM

v.

THE KING

DELIVERED BY LORD PARMOOR.

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