IN THE MATTER OF THE PETITION OF RIGHT OF

1916
Nov. 10.

ERNEST THEBERGE,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Public work—Railways—Contractor—Sand deposits—Expropriation.

Damages suffered by a landowner from sand deposits in the course of construction of a Crown railway are only recoverable as against the contractors. The injury not having resulted from any expropriation of land is not actionable against the Crown under the *Expropriation Act*, and having happened 10 acres away from the railway was not "on a public work" within the meaning of sec. 20 of the *Exchequer Court Act*, and therefore not actionable against the Crown under the latter statute.

PETITION OF RIGHT to recover damages for an injury to land.

Tried before the Honourable Mr. Justice Audette, at Quebec, November 10, 1916.

E. Belleau, K.C., for suppliant.

E. Gelly, for respondent.

AUDETTE, J. (November 10, 1916) delivered judgment.

The suppliant brought his petition of right to recover the sum of $300 for alleged damages suffered to his farm from sand, earth and coal which, through the Crown's employees, were dumped into a creek passing in a culvert under the right of way of the

1916

THEBERGE v. THE KING.

Reasons for Judgment.

National Transcontinental Railway, and which were carried on to part of his farm under cultivation about ten acres from the railway.

The damages in question are claimed to have been suffered during the years 1911-12, 1912-13, and 1914-15.

The National Transcontinental Railway was in the course of construction, and in the hands of the contractors up to the date at which the Crown began to operate the same on November 23rd, 1914.

The question to be decided, under the circumstances of the case, is whether these damages were caused by the contractors or by the Crown.

It is conceded at bar by the suppliant's counsel that the damages suffered during the construction of the railway are only recoverable as against the contractors, following the decision in the case of *Marcotte v. Davies.*[1]

It is established by the evidence that some of the sand so carried upon the suppliant's property came, for a certain portion, as ascertained from indications upon the premises, from a large sandhill upon the suppliant's property. The toe of that hill abuts on the creek and the steep slopes thereof are practically denuded of vegetation.

The piece of land in question was, before the construction of the railway, flooded in the spring and in freshets.

The farm in question was purchased by the suppliant in 1910 for the sum of $600 and comprises one and one-half arpents in front by 28 arpents in depth, and the suppliant contends that upon that farm only one and one-half by four and a half arpents were under cultivation, the balance being rocky

[1] 41 Que. S.C. 444.

1916

THEBERGE v. THE KING.

Reasons for Judgment.

and wooded. The damages claimed are in respect of the part under cultivation.

Mostly all the evidence adduced on behalf of the suppliant establishes damages suffered before the operation of the railway by the Crown in November, 1914, and for which the Crown is obviously not liable. The only evidence extant upon which the existence of damages subsequent to November, 1914, would be the evidence of the suppliant himself given in a general way, without specifying anything, when he says that "the same thing occurred in 1915"; and he adds at the end of his evidence that in 1915 "he did not touch his land,"—meaning, I assume, he did not remove any sand that might have been carried thereon.

Witness Zephirin Laflamme, a section-man, also testified that in 1915 some sand slid from this embankment near the culvert in question; but that he did not then go upon the suppliant's land, at the point marked "A" on the plan, to ascertain if any damages were suffered. However, he adds, this sand-slide was not of enough importance to necessitate any repairs.

On behalf of the Crown witness Lefebvre says, that in October, 1915, he was sent to ascertain if the suppliant were suffering any damages from the operation of the railway. He then paid a visit to the *locus in quo*, and starting from the culvert he noticed near the same an erosion of about 10 yards; but cannot say when it took place. He travelled from the culvert to the next place marked "A" on the plan and ascertained there was grass growing nearly everywhere at that place, excepting, however, at certain spots where it appeared to him some earth had been taken away, but he did not know under what

1916

THEBERGE v. THE KING.

Reasons for Judgment.

circumstances and on what occasion. There was then, according to him, no damages.

In view of the fact that the overwhelming weight of the evidence adduced by the suppliant was directed to damages suffered before November 23rd, 1914, when the Crown took possession, I find that there is not enough evidence on the record upon which I could find that there was any damage suffered from causes originating since November, 1914, and that if any appreciable damages were suffered since then it cannot be distinguished from the result of those suffered before that date.

Having thus primarily disposed of the facts of the case there remains the question of law standing in the way of the suppliant and which did not attract or invite the argument of counsel at bar.

This case is in its very essence an action in tort and such an action does not lie against the Crown, excepting under special statutory authority.

The case does not involve any expropriation of land and the injurious affection flowing therefrom, and does not come under the *Expropriation Act*. The suppliant, to succeed, must bring his case within the ambit of either sub-sec. (c) or sub-sec. (f) of sec. 20 of the *Exchequer Court Act*.

Under sub-sec. (c) the injury to property must be: first, on a public work; secondly, occasioned by an officer or servant of the Crown acting within the scope of his duties and employment; and thirdly, the injury must result from such negligence.

Following the decisions in *Chamberlin v. The King*;[1] *Paul v. The King*;[2] *Olmstead v. The King*;[3]

[1] 42 Can. S.C.R. 350.
[2] 38 Can. S.C.R. 126.
[3] 30 D.L.R. 345, 53 Can. S.C.R. 450.

1916

THEBERGE v. THE KING.

Reasons for Judgment.

and *Piggott v. The King*,[1] I must arrive at the conclusion that as the damages suffered were so suffered ten acres (as stated by witnesses) away from the public work, the National Transcontinental Railway, he cannot recover. The injury to property was not "on the public work." Absurd as this conclusion might appear, the jurisprudence has now been clearly established and settled upon that point.

There is some oral evidence by one witness that that part of the railway in question herein was operated by the I. C. R., but more than verbal evidence by one witness would be required to arrive at the conclusion that that part of the Transcontinental is now operated and forms part of the Intercolonial Railway. And were it operated as part of the Intercolonial Railway it would be still doubtful as to whether or not 10 acres from the public work would bring the case within the provisions of sub-sec. (f) of sec. 20 of the *Exchequer Court Act*, and within the words "upon, in or about" of said section.

Under the circumstances the suppliant is not entitled to any portion of the relief sought by the petition of right herein.

Action dismissed.

Solicitors for suppliant: *Belleau, Baillargeon & Belleau.*

Solicitors for respondent: *Gelly & Dion.*

[1] 32 D.L.R. 461, 53 Can. S.C.R. 626.