

IN THE MATTER OF THE PETITION OF RIGHT OF

1915  
Sept. 7.

BERTHA I. HILYARD AND AMELIA G. GROSVENOR,

SUPPLIANTS;

AND

HIS MAJESTY THE KING,

RESPONDENT.

*Railway Bridge—Work for general advantage of Canada—Mortgage—Conveyance of lands affected thereby—Surplus land.*

The F. & St. J. Bridge Company, operating a work for the general advantage of Canada, and to which the general Railway Act applies, obtained under a special Act a loan of \$300,000 from the Crown, for which a mortgage was duly created under the provisions of the said Act. Subsequently the company, under the pretence of disposing of surplus land, sold some of the land so mortgaged to one of the directors of the company.

*Held*, that nothing passed under the said conveyance.

PETITION of Right to recover the value of land, together with the rent during the time the same is alleged to have been in possession of the Crown.

The facts are stated in the reasons for judgment.

The case was heard before the Honourable Mr. Justice Audette, at Fredericton, N.B., on the tenth day of June, 1915.

*P. J. Hughes*, for the suppliants.

*R. B. Hanson*, for the Crown.

Mr. *Hanson* contended that with respect to lot "A," the Crown claims under the legislation, the mortgage and by possession. The main cause of action lays with respect to the lot of land upon which the station is situate, that is with respect to lot "A."

With respect to lot "B" the Crown is not in possession although it claims title, and asks for a declaration in respect of that lot.

In regard to lot "C," the Crown is not in possession and he did not think the Crown was in a position to lay claim to it.

With respect to lots "B" and "C," he would ask the Court to find for the Crown on the action as laid, that is to say, the Crown is not liable in damages.

He would ask the court to find in regard to the question of title in respect to lot "B"—the Crown owns the land and the suppliant is wrongfully in possession.

The first question involved in the action is to determine what lands are conveyed by the mortgage and thereby subject to its provisions? The broad question involved is whether or not the conveyances made subsequent to the execution of the mortgage from the Company to the Crown, conveyed the lands free from the provisions of the mortgage, and whether or not the lands now belong to the Crown under the mortgage, the legislation of 1904 and the entry made in 1905.

It is necessary to decide whether or not the lands come within the description contained in the mortgage, viz.: "All and singular its bridge and approaches thereto hereinbefore mentioned and described, whether made or to be made; also its right, title and interest in and to all and singular its property, etc."

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The property is said to be "hereinbefore mentioned "and described," but in the mortgage there is no mention or description other than the general description above recited. At the time the mortgage was given the Bridge Co. was possessed of no lands. Is this general description wide enough to cover all lands which afterwards was conveyed to the Bridge Co.? It can hardly mean that, *but it undoubtedly covers all the real property which had been acquired or was to be acquired for the purposes of the erection of the Bridge, its approaches and its connection with adjacent lines such as the C.P.R. and lands necessary for the erection of station houses, sidings and other railway appurtenances.*

The courts have drawn a distinction between lands required for the "undertaking" and "surplus lands." The latter may be sold or mortgaged without special legislative authority, or they may be seized in execution; but the "undertaking" of the Company could not be sold or mortgaged or seized on execution. (1)

In England on a petition for sale of surplus lands belonging to a railway company, the Court has ordered an inquiry as to what were surplus lands, and what were necessary for the undertaking. (2)

It is submitted that the best evidence that can be obtained of what the Bridge Co. and the Dominion Government considered necessary and proper to be acquired for the purposes of the undertaking, is not what the Company subsequently did; but what the company said it required by its official plans and maps and book of reference submitted by the Company and approved by the Department of Railways and Canals and filed as required by the statute.

(1) See *Stagg v. Medway Navigation Chatham & Dover Railway*, 36 L.J., Co. 72 L.J., Ch. D., 177; L.R. 1903, Chan. p. 323, at pp. 328-9.

1 Ch. D., 169. *Gardner v. London*, (2) See *Ex parte Grissell*, L.R. 2 Ch., 385.

The Company could not have conveyed this land even if it had not been subject to the mortgage, as it would be *ultra vires* of the company.

It is submitted that a railway company obtains its franchises for the use of the public and it cannot convey away any portion of its property acquired for that purpose or for the use of the railway without Legislative authority.

This question was decided in England in 1879 in the case of *Mulliner v. Midland Railway Co.*(1)

Mr. *Hughes* contended that the suppliants were entitled to the fee simple in lot "A" by reason of the deed from the Bridge Company.

The mortgage is a mortgage which purports to convey property. They had nothing at the time, and this mortgage was never recorded until years afterwards. Under *The Registry Act* the mortgage should have been recorded. The question of whether this lot comes within the terms of the mortgage is of course material. He submitted that if this lot were not acquired in its entirety for the purposes of the undertaking, that if any portion were surplus lands, that the railway company had perfect freedom to convey away surplus lands free from the mortgage. The company was quite free to divest itself of these lands, free and clear from the terms of the mortgage given to the Dominion Government. He submitted that the Pennyfather lot outside the 30-foot strip was surplus lands as conveyed by this company. The Pennyfather lot, lot "A," is really divided in three distinct sections on the plan. There is a 30-foot strip occupied by the railway which the company retains under its deed. He would make no mention about that. There is the triangular piece lying immediately adjacent Univer-

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(1) 48 L.J. Ch., 258; II Chan. Div. 611.

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sity Avenue and Sunbury Street. That latter piece was acquired in 1888 and has never, up to the present time, been acquired by the railway, and in fact it was fenced in for the greater part of the time. As to the balance of the lot we have contradictory evidence.

The book of reference is only approved with respect to the part in green, and there are no green lines about the Pennyfather lot on the plan. As to the triangular piece, he submitted there was never any possession by the Crown.

[THE COURT. If ever there was a case in which the Statute of Limitations should apply, it is a case like this.]

The Statute of Limitations, in order to prevail, must be proved in a certain way. The possession must be complete, must be continuous, and it must be a possession which is entirely in the party claiming the title through it. It must be absolute in that respect. It would have to be such a complete possession, such an exclusive possession in the Government or the Canada Eastern Railway, as would fall within the terms of the rule conferring title in such cases.(1)

Temple was exercising control over the lot, not as a member of the Bridge Company or as a Director of the Bridge Company, but in his individual capacity He had employed a man frequently to keep up the fence.(2)

Under the *General Railway Act*, surplus lands could be alienated—see sec. 9, sub-sec. 40. And there are decisions that surplus lands do not come within the terms of a mortgage which is given on an undertaking.

(1) See *The Mayor of St. John v. Littlehale*, 5 Allen, p. 121; *Humphries v. Samuel Helmes*, 5 Allen, p. 59.

(2) See *Estabrooks v. Towse*, 22 N.B. R.L., 10.

With respect to the fact that surplus property is not covered by the mortgage—see *Hamlin v. European & North-American Railway Co.*(1)

*Mississippi Valley Railway v. Chicago.*(2)

*Jones v. Habersham.*(3)

The court will not take private property away and convert it to public use without paying for it.(4)

Now these cases abundantly support the contention that this Act will not be construed as creating a forfeiture.

AUDETTE, J. now (September 7th, 1915) delivered judgment.

The suppliants, by their Petition of Right, seek to recover, as residuary legatees under the last Will and Testament of their father, the late Honourable Thomas Temple, the sum of \$15,800, as representing the value of the land described in the second and fourth paragraphs of their Petition of Right, together with the rent during the time the same is alleged to have been in the possession of the Crown.

For convenience of reference the piece of land described in the second paragraph of the Petition has been, all through the evidence, called *Lot "A"*; and the piece of land first described in paragraph 4 thereof, *Lot "B"*; and the land secondly described in said paragraph 4, *Lot "C."* The same course is adopted herein.

As a prelude to the consideration of the facts involved in this case, it is well to state that under 48-49 Vic. Ch. 26 (Dom.) (1885), the "Fredericton and Saint

(1) 4 Am. & Eng. Railroad Cases, 503, and notes at page 512.

(2) 2 Am. & Eng. Railroad Cases, p. 414.

(3) 107 U.S. R., p. 174.

(4) *Harrod v. Worship*, 1B. & S.,

381. *Ex parte Sheil*, 4 Ch. Div. 789.

*Ex parte Jones*, L.R. 10 Ch. App., 663.

*Wells v. London, Tilbury*, 5 Ch. Div.

126. *Randolph v. Milman*, L.R. 4 C.P., 107.

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Mary's Bridge Company" was duly incorporated with full powers to construct a bridge across the river St. John, between the City of Fredericton, in the County of York, in the Province of New Brunswick, and the Parish of St. Mary's or across the river St. John, between the parish of Kingsclear and the Parish of Douglas, in the said County and Province. And the said undertaking was by the said Act, declared to be a work for the general advantage of Canada. By section 1 of the said Act it also appears that *Thomas Temple*, M. P. Egerton, R. Burpee, Alexander Gibson, the elder, *Alexander Gibson*, the younger, and *Fred. S. Hilyard*, were the original incorporating shareholders.

The Company having applied to the Government of Canada for an advance of money to aid them in the construction and completion of the said bridge and works, the Government of Canada was authorized, by 50-51 Vict. Ch. 26 (1887) to make such advance in the manner therein mentioned.

The suppliants filed the following admission, for the purposes of the trial of this case only, viz.:—

"(11) That the lands and premises mentioned and referred to in the second paragraph of the Suppliants' Petition of Right were by Deed bearing date the eighth day of June, A.D. 1888, conveyed to the Fredericton & St. Mary's Railway Bridge Company, a Body Corporate under and by virtue of the provisions of Chapter 26, 48-49, Victoria, Statutes of Canada, 1885, by one Richard Pennyfather, and remained vested in said Company from the said eighth day of June, A.D. 1888, to the date of the conveyance referred to in the second paragraph of the Suppliants' Petition of Right.

"(2) That the lands and premises firstly mentioned and referred to in the fourth paragraph of the said

“Petition of Right, were by Deed bearing date the  
“thirtieth day of June, 1900, conveyed to the said  
“Fredericton & St. Mary’s Railway Bridge Company  
“by one Archibald F. Randolph, and remained vested  
“in said company from that time to the date of the  
“conveyance referred to in the said fourth paragraph  
“of the Petition of Right.

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“(3) That the said the Fredericton & St. Mary’s  
“Railway Bridge Company applied to the Government  
“of Canada for an advance of money to aid the said  
“company in the construction and completion of its  
“work, that is to say—the Railway Bridge across the  
“River St. John, at the City of Fredericton, and the  
“approaches thereto and works connected therewith  
“under the Provisions of Chapter 26, 50–51, Victoria,  
“Statutes of Canada, 1887, and in consequence of such  
“application, and in pursuance of the powers given in  
“said last mentioned Act, an Order of the Governor-  
“in-Council of Canada was passed on or about the  
“twenty-fifth day of August, A.D. 1887, relating to  
“the aid to be granted to the said Company for the  
“construction of its said works.

“(4) That the Governor-in-Council, under the  
“authority of the said Act, and of the said Order-in-  
“Council, agreed to make, and did make, advances to  
“the said Company to the extent of \$300,000, and that  
“the said Company in pursuance of said Act and  
“Order-in-Council, and in order to secure the repay-  
“ment of the said sum of money, did make, execute  
“and deliver to Her Majesty, the Queen, the Mortgage  
“Deed bearing date the twelfth day of October, A.D.  
“1887; and the said Indenture is recorded in the office  
“of the Registrar of Deeds in and for the County of  
“York in Book Y—4, pages 492 to 507 inclusive,  
“under Official Number 44250, on the fourteenth day

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“of June, A.D. 1895. Suppliants admit in evidence  
 “the copy of said Mortgage now in possession of the  
 “Respondent.

“(5) That the said Fredericton & St. Mary’s Railway  
 “Bridge Company located its line of Railway which it  
 “was authorized to do through the lands and premises  
 “mentioned and described in the second paragraph of  
 “the Suppliants’ Petition of Right, and acquired by  
 “purchase from one Richard Pennyfather by Deed  
 “dated the eighth day of June, 1888, the said lands  
 “and premises so mentioned and described in the  
 “second paragraph of the Suppliants’ Petition of  
 “Right, and laid out and located its line of Railway  
 “across same as aforesaid, and subsequently laid out  
 “and located a station and station grounds on a part  
 “thereof.

“6. That the said Fredericton & St. Mary’s Railway  
 “Bridge Company failed to pay the amount of prin-  
 “cipal and interest due His Majesty on the said  
 “Mortgage Deed hereinbefore referred to within one  
 “year from the tenth day of August, 1904, as provided  
 “by Chapter 4, 4 Edward VII, Statutes of Canada,  
 “1904; and that an officer or agent of the Govern-  
 “in-Council on behalf of His Majesty did enter and  
 “purport to take possession of the property of the  
 “said Fredericton & St. Mary’s Railway Bridge  
 “Company described in the said Mortgage, as pro-  
 “vided by the last mentioned Act.”

By the 6th section of 50-51 Vict. Ch. 26, which  
 came into force on the 23rd June, 1887, it is enacted  
 that:

“The said advances and interest thereon shall be a  
 “first charge and lien on, and shall be secured by a  
 “mortgage on all the property, real and personal, of  
 “the Company, and on all their rights, franchises,

"easements and privileges; and in case the Company  
 "make default in payment of the interest on the said  
 "advances for the space of one year after the same  
 "becomes due, or in case they fail to repay to the  
 "Government of Canada the said advances within  
 "fifteen years from the date of the advance of the  
 "first sum, then and in either case all their property,  
 "real and personal, and all their rights, franchises,  
 "easements and privileges shall be and become by the  
 "default, and without any proceedings for condemna-  
 "tion, foreclosure or possession, forfeited to the Crown,  
 "and Her Majesty, by Her officers or agents, may  
 "thereupon enter and take possession of the same, and  
 "the same shall thenceforth be the property, rights,  
 "franchises, easements and privileges of Her Majesty,  
 "as represented by the Government of Canada."

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Pursuant to the Act of 1904 (4 Ed. VII, Ch. 4)  
 which came into force on the 10th August, 1904,  
 following the default of the Company and the forfeit-  
 ure of its property in favour of the Crown, as recited  
 in the preamble of the said Act, an Order-in-Council  
 was passed, on the 20th August, 1904, whereby auth-  
 ority is given for entering upon and taking possession  
 of the said property. And it is admitted, by both  
 parties, that the Crown, in pursuance of the said Act  
 and Order-in-Council, took possession of the said  
 property, on the 19th April, 1905, as further evidenced  
 by posting up a copy of Exhibit "H," on the said  
 date, by an officer of the Intercolonial Railway.

Under the provisions of sections 7 and 8 of *The  
 Consolidated Railway Act, 1879*, Ch. 9 and the amending  
 Acts, which are incorporated in the special Act of 1885,  
 the Company was authorized to purchase, hold and  
 take land, and (sec. 8) a map and plan of such land,  
 with general description of the same, with the names

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of the owners and occupiers thereof, were duly made, examined, certified and filed in the office of the Department on the 21st May, 1888, amending a previous one bearing date 27th February, 1888, and a copy of the former appears to have been deposited with the Clerk of the Peace on the 26th May, 1888. These plans and book of reference cover the whole of the Pennyfather lot "A," and portions of lots "B" and "C."

Following the passing of the Act of 1887 an Indenture or deed of mortgage was executed on the 12th October, 1887, whereby the said Company, "granted, bargained, "sold, released, transferred and conveyed unto Her "Majesty, Her Successors and Assigns, all and singular "its said bridge and approaches thereto thereinbefore "mentioned and described, whether made or to be "made, also all its right, title and interest in and to, "all and singular its property, real and personal, of "whatsoever nature and description, now possessed, or "to be hereafter acquired in connection with and "including its said bridge and approaches thereto "made or to be made, and other works to protect the "same and its appurtenances, all its rights, privileges, "franchises and easements, all buildings used or to be "used in connection with the said bridge and "approches thereto, and other works or the business "thereof, and all lands and grounds on which "the same may stand or connected therewith "now owned, possessed or contracted for, or which "may hereafter be owned, possessed or contracted for "by the Company; also all locomotives, tenders, cars, "rolling stock, machinery, tools, implements, fuel, "materials, and all other equipments for the construct- "ing, maintaining, operating, repairing, and replacing "the said bridge, approaches thereto, and other works,

“or appurtenances, or any part thereof now owned, possessed or contracted for or which may be hereafter owned, acquired, possessed or contracted for by the company.”

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This Indenture was made under statutory authority and was registered on the 14th June, 1895. And section 1 of the Act of 1887 provides that such mortgage *creates a first lien and charge upon the property real and personal, franchises, rights, easements and privileges of the said Company.* And by section 6 of the same Act, it is further provided that all the said property, etc., shall be and become by the default, and without any proceedings for condemnation, foreclosure or *possession*, forfeited to the Crown, and Her Majesty, and Her Officers or Agent, may thereupon enter and take possession of the same and the same shall thenceforth be the property of the Crown.

Lot “A” was duly purchased by the Company on the 8th June, 1888. Can it be contended that the Company could, on the 28th July, 1888, in direct violation of the above-mentioned statutory enactments and the mortgage deed, ignore the rights of the party who had advanced the Company the \$300,000, and convey these mortgaged lands to Thomas Temple, not only an ordinary shareholder of the Company, but one of the incorporating shareholders under the Act of 1885, and moreover the Manager of the Company, under the pretext that the mortgage deed was not registered or recorded until the 14th June, 1895. That question must be answered in the negative. Why! Temple, as an officer of the Company cannot on the one hand receive and take the \$300,000, and on the other say I am a third party without notice, and I am buying from my company Lot “A” which I have mortgaged as an officer of the company. It is not equitable, to

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use a mild word, and I know of no law to support such a proposition, as he had due notice of the transaction. The statute of 1887 is a public statute of which the people at large must take notice. And, moreover, Thomas Temple (or his heirs who claim under him and who cannot be in a better position than he was) is estopped from setting up the plea of want of registration, because he had notice of the mortgage. Indeed, it appears from the evidence of Mr. Alexander Gibson, Jr., who was also one of the incorporating shareholders mentioned in the Act of 1885, that Mr. Temple was a Director of the Company till he died—that his father and Mr. Temple were the whole company. His father was the President and Mr. Temple was the General Manager from whatever time the Company was incorporated until he died.

It must be found under the evidence that Lot "A" belonged to the Company on the 28th July, 1888; that it had no right or power to transfer the same after having given the mortgage above referred to. Mr. Thomas Temple, in view of the public Act of 1887, under which he and his heirs had notice of the mortgage, is precluded from invoking the want of registration of the said deed, if under the Act registration were necessary. Moreover, that position is strengthened by the fact that Mr. Temple was one of the original shareholders, a Director, and the Manager of the Company. The books of the company could not be produced, notwithstanding searches made.

It is true the Company, under the provisions of sub-sec., 40 of sec. 9, of *The Consolidated Railway Act, 1879*, had the right to sell surplus land acquired under the circumstances mentioned in that section; but it must be found that the Company held these lands subject to the provisions and conditions mentioned in

the statute of 1887 and the mortgage, and that while it had the power to sell or alienate under ordinary circumstances, that is when it had a clear and unincumbered title, it could not do so under the circumstances created by the statute and the mortgage. There was a statutory transfer of the fee to the mortgagee, vesting the property in the Crown before the alleged conveyance was made to Thomas Temple.

There can be no doubt either that the whole of Lot "A" was required for the purposes of the undertaking—that it had been so used in different ways, with perhaps some doubt with respect to the small triangular piece which the evidence established to have been in use or occupied by no one. However, such fact would not take it out of the hands of the Company which could not part with it for the reason above mentioned. The suppliants have no title to it or to any part of Lot "A."

Having so found it is unnecessary to discuss the questions of possession and statute of limitations, in respect of which a deal of evidence has been adduced and from which it is shown the Company practically and for all purposes needed all of Lot "A" for the purpose of the undertaking, and none of it could be called surplus land. It is now all used. No part of Lot "A" can be called surplus land, and were it surplus land it could not be conveyed without the interference of the mortgagees in the deed. The power of alienation had gone under the Act. And there is no evidence that the Company bought any surplus land. This is all surmise and inference brought in on the argument, but there is not a tittle of evidence that the Company ever bought lands that are surplus lands.

Coming now to the consideration of lots "B" and "C" it may be *in limine* stated that it is admitted,

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after evidence adduced in that respect, that the Crown was not in possession of either of these lots. It is further admitted that since 1905 certain lots in part "B" were at one time offered for sale by public auction, and that the federal government did claim them, and forbid the sale. Before the forfeiture they were in the Bridge Company.

Lot "B" was conveyed by the Company on the 9th August, 1905, to the Temple estate, long after the mortgage deed had been registered. It will be noticed that the 9th of August was the day before (under sec. 4 of the Act of 1904) the expiry of the extension of one year within which they were given the right by payment to be relieved of the forfeiture already existing. Indeed under sec. 6 of the Act of 1887, it is provided that the "said advances and interest thereon should be a first charge and lien on all the property real and personal of the company." And further that "by the default" of the company to pay, and without any proceedings for condemnation, foreclosure or possession, all its property, etc., shall be forfeited to the Crown.

Following this enactment of the Act of 1887, comes the recital in the preamble of the Act of 1904, where it is stated that by reason of the default in payment, all the property, etc., became forfeited to the Crown. And Lot "B" was subsequently sold by the Company, on the 9th August, 1905, when these enactments were in full force and effect—subject, however, to an extension of time for payment until the 10th August, 1905. This deed, it will be noticed was executed one day before the expiry of the further delay of one year, or the extension of payment, and after the entry by the Crown on the 19th April, 1905. Was that done with the intention to endeavour to defeat the Crown's interest in the said lands?

The Company had no legal authority to make such conveyance under the circumstances, and nothing passed under the deed.

Coming now to the consideration of Lot "C," it will be sufficient to say that, as above stated, the Crown was never in possession of the same, and Counsel for the Crown having stated that the Crown was not in a position to lay claim to it—limiting his demand to a finding only upon the title to Lot "B," Counsel for the Crown further stating that Lot "C" was never vested in the Bridge Company.

Therefore there will be judgment, as follows:

1. With respect to Lot "A," nothing passed under the conveyance of the 28th July, 1888, from the Company to Thomas Temple, and the lands therein mentioned are declared vested in the Crown, as formerly forming part of the Company's land, under and by virtue of the Act of 1887, the mortgage made thereunder and by the legislation of 1904 and the entry of 1905. Therefore the suppliants are not entitled to any portion of the relief sought by their Petition of Right in respect to Lot "A."

2. With respect to Lot "B," this Court doth declare that the title to it is in the Crown, and that the Crown has never been in possession of the same. Therefore the suppliants are not entitled to any portion of the relief sought by their Petition of Right in that respect.

3. With respect to Lot "C," there will be judgment pursuant to the consent or admission of Counsel, declaring that the Crown is not in possession of the same, and that the claim for rents and profits in respect of the same is dismissed. And further, as the Crown is declaring, by Counsel, not to lay claim to the same and that it never vested in the Company, there will be judgment pursuant to the admission and

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declaring the suppliants entitled to recover or lay title to the same.

4. There will be no costs to either party.

*Judgment accordingly.*

Solicitor for suppliants: *Percy A. Guthrie.*

Solicitors for respondent: *Slipp & Hanson.*

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