

IN THE MATTER OF THE PETITION OF RIGHT OF

PIERRE FONTAINE SUPPLIANT;

AND

HIS MAJESTY THE KING,.....RESPONDENT.

1917
March 3.

Railways—Expropriation—Farm crossing—Contract—Servitude—Impossible to exercise—Value.

Apart from any statute the suppliant was entitled, under indenture with the Crown, to a crossing from one part of his farm to another. The land expropriated from the suppliant having been converted into a railway yard with, at the date of the trial, eighteen tracks, it became impossible to give the crossing contracted for.

Held, it having become practically impossible to give the crossing and to exercise such servitude, the suppliant was declared entitled to the value thereof, upon releasing and discharging the Crown from the obligation of constructing the same.

PETITION OF RIGHT to recover damages for the deprivation of a crossing on the Intercolonial Railway.

The case was heard before the Honourable Mr. JUSTICE AUDETTE, at Québec, February 6, 8. and 9, 1917.

V. DeBilly, for suppliant; *E. Belleau*, K.C. and *M. Dupré*, for Crown.

AUDETTE, J. (March 3, 1917) delivered judgment.

The suppliant is the owner of a certain piece of land which at the time of his purchase, May 16, 1899, formed part of lot 254 of the parish of St. Jean Chrysostome, in the County of Levis, P.Q., less a certain portion thereof which had previously been sold for the right of way of the Intercolonial Railway.

His residence and barn are situate on the northern side of the King's highway, at about 150 feet from the same. The piece of land to the south thereof, that is between the highway and the Drummond County Railway, (what the suppliant called in his evidence the Grand Trunk) has been subdivided in building lots and has been all sold, and between the Grand Trunk and the Intercolonial Railway to

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the south, the land has also been subdivided and partly sold with the exception of 18 to 20 lots remaining unsold. At the southern end of this piece of land, as will more clearly appear on the plan filed herein as Exhibit No. 6, there is a certain piece of land between the yellow lines which never belonged to the suppliant, such piece having been excepted from his deed of purchase as having been at that time sold for railway purposes. However, when he purchased there was a farm crossing over that piece of land appearing between the yellow lines.

On January 19, 1903, the suppliant sold to the Crown that piece of land to the south of this land between the yellow lines, as more fully described in the deed of sale filed herein as Exhibit No. 4. That piece of land so sold extended south from the yellow line to the white line on the plan, to the south of which the suppliant still owns 40 to 45 acres, out of which almost half is now under cultivation and the balance is wooded.

In this indenture of January 19, 1903, there is a reservation which reads as follows:—"The vendor expressly reserves for himself and assigns the right to a crossing or a right of passage on foot and with vehicles *when it shall be needed* through the lot of land presently sold to communicate through the railway track from one side of the railway line to the other, from one side of his property to the other part thereof for all the ends and purposes of his land, as the whole is provided by section 191 of the "Railway Act of Canada, 1888."

For two years following this sale to the Crown the suppliant made use of the crossing which already existed between the yellow lines, thus connecting the piece so sold to the northern part of his property. However, since that time the crossing has disappeared and is not in existence, and the railway authorities having turned the piece of land so expropriated from the suppliant into a railway yard, with about 18 tracks, upon which a number of loaded and empty cars are allowed to remain for long periods, with the result that the old crossing has disappeared and would be absolutely blocked, and the Crown is unable to give the suppliant a level practical crossing. A viaduct would be financially prohibitive. See Art. 559, C.C. Que.,

which reads as follows:—"A servitude ceases when the "things subject thereto are in such a condition that it can "no longer be exercised."

Under these circumstances, the suppliant, brought his petition of right to recover the sum of \$1,500. The amount of \$500 as representing alleged damages suffered in the past by the deprivation of a crossing, and the amount of \$1,000 as representing the decrease in the value of his property for the entire deprivation of such crossing, stating further that upon the payment of the sum of \$1,000 the suppliant will abandon his right to the crossing.

To get from his house to these 40 or 45 acres to the south, the suppliant has to travel about one mile or three-quarters of a mile more than he would otherwise do if he had the crossing in question. Nearly half of that land to the south is under cultivation and the carting and drawing in respect of the working of the same has been given in the evidence, and it included the yearly drawing of about 50 loads of round boulders picked up from that part under cultivation, thereby establishing, beyond controversy, that the land is not at least of the very best quality.

It is unnecessary in the present case to give any consideration to the statutory rights of a crossing or as to whether or not the several areas forming the present property are disjoined or held in unity, under the decision of *Holditch v. Canadian Northern Ry. Co.*¹

The case rests upon contract and the rights of the parties must be found and determined within the provisions of the contract which is filed herein as Exhibit No. 4.

Under that contract the suppliant is entitled to the crossing when *needed*, "to communicate through the railway "track from one side of the railway line to the other, from "one side of his property to the other part thereof for all "the ends and purposes of his land." He exercised his contractual right and declared his "need" before applying for his petition of right. His right to such a crossing is manifest and obvious. The Crown is unable to give it to him, and does not intend to do so in view of its practical

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¹ [1916] 1 A.C. 536, 27 D.L. R. 14.

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impossibility, as I may say, and that should be the end of that branch of the case. What is then the fair compensation for the deprivation of such a crossing, for the past, present and future, taking all the circumstances of the case into consideration, and assessing the damages once for all? The value of the crossing is to be assessed as of the date of the deed of sale, and interest upon that amount in lieu of damages for the past should be allowed as representing the loss for the deprivation of the same in the past.

Taking the above circumstances into consideration, I hereby assess the value of the said crossing, of the damages resulting from the deprivation of the same, once for all, at the sum of five hundred dollars, with interest thereon from January 19, 1905. The interest is allowed from the date at which the suppliant had no crossing, as mentioned in the evidence.

Therefore, there will be judgment declaring that the suppliant is entitled to recover in lieu of the crossing, as above mentioned, the said sum of \$500 with interest thereon, at the rate of five per cent. per annum from January 19, 1905, and costs, upon giving to the Crown a good and satisfactory release and discharge from the obligation of constructing the crossing mentioned in the deed of January 19, 1903.

Judgment for suppliant.

Solicitors for suppliant: *Bernier, Bernier & DeBilly.*

Solicitors for respondent: *Dupré & Gagnon.*
