

THE QUEEN APPELLANT. 1889
 AND *Oct. 29.
 THE ST. JOHN WATER COMMIS- }
 SIONERS (CLAIMANTS) } RESPONDENTS. 1890
 *June 19.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Appeal from report of official referee—Damages to property from works executed on Government railway—Parol undertaking to indemnify owners for costs of repairs by officer of the crown—Effect of.

Held, affirming the judgment of the Exchequer Court, that where by certain work done by the Government Railway authorities in the City of St. John the pipes for the water supply of the City were interfered with, claimants were entitled to recover for the cost reasonably and properly incurred by their engineer in good faith, to restore their property to its former safe and serviceable condition, under an arrangement made with the Chief Engineer of the Government Railway, and upon his undertaking to indemnify the claimants for the cost of the said work. Strong and Gwynne JJ. dissenting on the ground that the Chief Engineer had no authority to bind the crown to pay damages beyond any injury done.

APPEAL from a judgment of the Exchequer Court of Canada.

The facts of the case are sufficiently stated in the report of the case in the Exchequer Court (1) and in the judgments hereinafter given.

McLeod Q.C., and *Hogg* Q.C., for appellant.

Barker Q.C. for respondent.

SIR W. J. RITCHIE C.J.—This is an appeal from the judgment of the Exchequer Court confirming the report of the official referee in favor of the Water commis-

*PRESENT :—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

(1) 2 Can. Ex. C. R. 78.

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sioners. The Intercolonial Railway had made certain alterations in the railway works at St. John, which necessitated repairs to the water service at the railway station. The case depends upon the arrangement made between Gilbert Murdock, the superintendent of the water supply, and Mr. Archibald, the chief engineer of the Intercolonial Railway, of which the two parties give very different accounts. Mr. Murdock says that he was not aware that the railway contemplated making the changes that they did, and he further says:—

I never received any notice ; it was first reported to me by one of my own men, who told me what was being done to the track ; then I reported the matter to our commissioners.

Q.—Would the lowering of the grade result in exposing your pipe ? A.—Yes. As soon as I heard of what was being done I reported to our commissioners, telling them that our pipes were being exposed. Then a meeting of the commissioners was held and my report was submitted to that meeting, when the commissioners proposed the placing of an injunction upon the work that was done for the reason that they had not been notified.

Q.—In consequence of what the commissioners did, were you not instructed to go and see Mr. Archibald ? A.—Yes. I was then instructed to proceed to Moncton, for the purpose of interviewing Mr. Archibald as to what was being done at the station, and to ascertain from him what were the nature of the changes.

Mr. Murdock then proceeded to state that he went to Moncton and saw Mr. Archibald, and in discussing the price of the work he told Mr. Archibald that he thought it would cost \$3,000 or \$4,000, at which Mr. Archibald seemed surprised and he then gives this account of what took place :

Mr. Archibald then very fairly said he did not wish to do anything to injure our works and that he would see that nothing was done to injure them. He then asked me if I would look after the matter on his account and do whatever was necessary to be done, and do it fairly as between the Railway Department and our commissioners. I said that as a matter of friendship I would do so.

Mr. Murdock then states that the work was pro-

ceeded with until completed, and on cross-examination he says :

I never saw any engineer. I was left entirely to my own judgment and I acted all through on the strength of the conversation I had with Mr. Archibald. In consequence of this I endeavored to do the work as honestly and fairly between the two bodies as possible, without receiving any remuneration beyond my regular salary.

An again he says :

I proceeded on the directions I received from Mr. Archibald.

Q.—What were the directions ? A.—That I was to do the work to the best of my judgment.

Q.—What did you do ? A.—Acting on these directions, I did the best I could.

M. Archibald gave a different account of this ; but the statement of the engineer and superintendent of the commissioners, Gilbert Murdock, is corroborated by the fact that he reduced the conversation with Archibald to writing and made a memo. of it in his diary, and by the further fact that he sent from Moncton to Mr. Smith, Chief Commissioner in St. John, particulars of the arrangement with Archibald. As to the necessity for the work being done, the following appears in Mr. Murdock's evidence :—

Q.—When this change was made by the commissioners, in Dorchester street, was it not thought that an overhead crossing would be put up ? A.—While this work was going on, in consequence of their being no engineer to attend to it and in consequence of Mr. Archibald's absence, no one knew whether Dorchester street was to be closed as Southwark street had been, whether it was to be a level crossing as Mill street had been, or whether it was to be bridged. All these points were up for discussion, and as there was no one to give the necessary information we were left entirely in the dark, so had to come to our own conclusions as to what was to be done to the street after the railway was completed and the pipes were laid.

And further on the following appears :—

Q.—Was it your opinion at the time that these repairs or changes were being made in the railway, that in consequence of the work there a number of stop-cocks should be placed there in order to shut off the water in the way you have mentioned ? A.—I considered them

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really essential. I did not put them in for ornament or to increase the cost. I would have done the same had I been doing the work on our own account."

And he afterwards gave the following evidence:—

Q.—You were speaking before adjournment of your experience, and you said, that the alterations which were made at the station rendered it necessary for the water supply of and in consequence of the increased traffic over the road at that point to make the changes which you made? A.—Yes.

Q.—And under these circumstances you considered these stop-cocks necessary to be put in? A.—Yes.

Q.—And in consequence of the alterations which were made at the station you considered the placing of the stop-cocks a necessity? A. Under the changed conditions, I considered it necessary to place stop-cocks there.

Q.—Why did you consider them necessary? A.—On account of the extra risk and the greater responsibility we had to run in regard to both port and the city. There was also an extra amount of traffic passing over the road at this point, and this required us to take extra precautions to prevent any accident taking place.

Q.—As a matter of prudence and professional skill, was it in your opinion necessary to do what was done by you? In my judgment it was absolutely necessary—that is, for the protection of the place and for the safety of everybody.

Archibald then allowed the work to go on without plans or rendering any assistance to Murdock, leaving the work entirely to the discretion and judgment of Murdock.

Here we have, then, a professional man, an engineer who had been thirty-eight years in the employment of the water commissioners of St. John, giving this account for the necessity of the work and the agreement entered into with Mr. Archibald; it is shown that he was left without assistance and the whole burden was put upon his shoulders, and upon his alone. Certainly it must be admitted, and I state it without fear of contradiction, that no person could be more competent to do the work than a man who had been in charge of the water service of St. John since the year 1849. He

swears that he acted honestly and faithfully, and there is not a word to indicate that he did not act in good faith. All the work charged for was no doubt actually done and the prices for the materials supplied were paid for at reasonable rates. I think the observations of the referee as to the evidence of the civil engineers who were brought there to make estimates and to cut down the expenditure were very just. After epitomizing the evidence and pointing out the work that was done and the reasons assigned for the changes that were made, he says :—

The engineer was called on behalf of respondent to say that the change would have been made differently and at much less cost. In my opinion Mr. Murdock was the best judge of the necessities of the case.

And he proceeds to state the contention of the claimants and the inconvenience of having the work done in a different way from what it was done. In another place the referee says :—

The respondent, taking the view that it was only necessary to lower the pipes on Dorchester street within a certain distance on either side of the railway track, brings forward four civil engineers to testify as to what, in their opinion, is required to place the pipes in as good a position as they were before being stripped ;

then, after stating the work necessary to be done in this respect—the expensive character of the required changes—he proceeds as follows :—

Who was the person most competent to judge of what was prudent and necessary to be done in view of the altered circumstances ? Certainly, it was Mr. Gilbert Murdock, who has an experience of the requirements and thorough knowledge of the water system of St. John and Portland for a period extending over forty years, and who has all the responsible duties of chief engineer resting upon him, and not persons who naturally must possess but a slight and superficial knowledge of the system and having no responsibilities regarding it. Even Mr. Keating, witness for the respondent, admits this in his evidence, for he says, that Mr. Murdock, with all his knowledge of the water works system, was in a better position, and had a better means of knowing what was prudent and advisable to be done.

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I entirely adopt that language as being in entire accordance with my own view of the case; a skilled man has done the work and swears that he did it honestly and faithfully, and made no expenditure not necessary for the purposes of the work to be done. Even Mr. Keating, an intelligent man and a civil engineer, admits this, and it cannot be disputed. Then there was an objection made as to the time taken for the work, delay in getting castings, &c., which was satisfactorily explained by Mr. Murdock.

Then the referee goes on to say :

The work had been thrown upon them suddenly and Mr. Murdock was left alone in the matter, and had to exercise his own judgment altogether, there being none of the engineering staff of the railway on the ground during the whole time of the work. I cannot conceive that Mr. Murdock would have made the changes he did unless he acted under the firm conviction that he had the concurrence of the railway authorities in what he was doing, and the fact that no objection was made at any time during the process of the work would naturally lead him to believe that the respondent was acting in good faith, that he was fully carrying out what he considered the arrangements with Mr. Archibald and acting in his interest, and doing only what he considered was requisite under the changed condition of things. Mr. Murdock had no special interest in the matter beyond doing what he considered his duty honestly towards both parties, and he swears that no benefit accrued to him pecuniarily or otherwise ;

and the conclusion the referee came to was to recommend to the court that the claimants be paid the amount of their claim.

Now, assuming that there was an error of judgment who should bear the loss of it? Should it be the commissioners of St. John or the railway authorities who left everything in the hands of Murdock and offered him no assistance? If he exercised good faith then the railway authorities had no right to complain, and I am satisfied that Mr. Murdock, experienced as he was in matters of this kind and, as I believe him to be, a perfectly honest and intelligent man, should not have the

imputation cast on him now that he went out of his way to benefit the water commissioners which would be a stigma which I think he ought not to bear. The judgment of the referee was affirmed by the Exchequer Court and should not, I think, be disturbed. In my opinion the appeal should be dismissed.

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STRONG J.—This is a claim made by the respondents for damage caused to their works in consequence of alterations made in the line and permanent way of the Intercolonial Railway in lowering the pipes and making changes in the water works by the Intercolonial Railway authorities.

Strong J.

The case (originally commenced by Petition of Right in the Exchequer Court) was referred to one of the official referees, who reported in favor of allowing compensation to the respondents amounting to \$2,655.62. From this report there was an appeal to the Exchequer Court where the referee's report was confirmed. The learned judge of the Exchequer Court, in the judgment which he pronounced in the appeal from the referee, after referring to the report for a statement of the facts, proceeds as follows:—

There is no question but that the claimants' property was injuriously affected by the alteration and improvements made in 1884 by the Minister of Railways and Canals in the yard and tracks of the Intercolonial Railway at and near the St. John Station, and that the claimants were entitled to take such steps and to execute such works as were necessary to make their property as good, safe and serviceable as it was before the interference therewith and to recover from the defendant the expense thereby incurred. They were not entitled, however, to improve the water system and service of the City of Portland at the crown's expense. They were entitled to be fully indemnified for any injury done, but to nothing more.

The learned judge then proceeds to point out that the respondents in the works which they executed exceeded the limits indicated

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and that a very considerable proportion of the claim made is for works and materials which have added to the permanent value and utility of the claimants' property, but which cannot be fairly said to have been rendered necessary by anything done by the Minister of Railways or the officers of the Department.

I entirely agree in this portion of the judgment of Judge Burbidge, both as regards the statement made of the result of the evidence showing that more work had been done and allowed for by the referee than was requisite to put the respondents in *statu quo*, and also in the learned judge's view of the law, that beyond mere compensation and indemnity for actual injury the respondents were not *primâ facie* entitled to recover. I cannot, however, bring myself to agree with the learned judge when he goes beyond this and confirms the referee in awarding an amount considerably beyond what would have been requisite to have given the respondents full indemnity and compensation. The excess beyond this amount was awarded because it was considered to have been proved that the Government engineers had acquiesced in the work done by the respondents in excess of what was required to restore their works to their original condition. Although it appears to me that the evidence of such acquiescence is far from conclusive I do not proceed upon the mere insufficiency of the proof, but upon the entire want of any authority in the engineers to bind the crown, assuming that they acquiesced in the fullest manner.

The title to compensation is of course statutory, but as such it is limited to an indemnity, and beyond this compensation to the extent of an indemnity I know of no authority short of Parliament by which the crown can be bound to pay damages in excess of compensation. Even granting that such may have been done by the Governor General in Council or by the direction and sanction of the Minister of Railways, no such order in council, direction or sanction is proved, and in the

absence of any of these authorities I am unable to see to what source the legal liability of the crown to make good the excess beyond an indemnity can be referred.

The amount in question is not, it is true, large, but we must bear in mind that this decision will make a precedent, and I conceive we should thus make a very dangerous precedent were we to determine that the crown might be bound beyond its statutory liability by the agreements and acquiescence of its subordinate officers.

In my opinion the appeal should be allowed and the case referred back to the Exchequer Court to ascertain the proper amount due for compensation, estimated on proof of the expenditure which would have been required to restore the respondents' works to the state they were in before being interfered with for the purposes of the railway.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed with costs.

GWYNNE J.—The learned judge of the Exchequer Court has found as matter of fact, and in this I entirely concur with him, "that a very considerable portion of the claims of the respondents is for work and materials which added to the permanent value and utility of their property, but which cannot be fairly said to have been rendered necessary by anything done by the Minister of Railways, or the officers of his Department." He lays down very accurately, in my opinion, the principle of law applicable to the case in his judgment, as follows:—

There is no question but that the claimants' property was injuriously affected by the alterations and improvements made in 1884, by the Minister of Railways and Canals, in the yards and tracks of the Intercolonial Railway at and near the St. John station, and that the

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claimants were entitled to take such steps, and to execute such works, as were necessary to make their property as safe, good and serviceable as it was before the interference therewith, and to recover from the defendant the expense thereby incurred.

They were not entitled, however, to improve the water system and service of the City of Portland at the crown's expense. They were entitled to be fully indemnified for any injury done, and for nothing more. Now it appears clear to me that the claimants, in the extent and character of the works which they executed and the expense which they incurred, exceeded the limit which I have indicated.

The learned judge then proceeds in the language first above extracted from his judgment, but concludes however, with hesitation it is true, as he says, in affirming the claim of the water commissioners for a reason in which I cannot concur, namely, that under the circumstances which occurred and the conversations which took place between the commissioners and their engineers on the one part, and the engineer of the railway on the other, the engineer of the commissioners is to be regarded as having been employed by the Department of Railways to execute the work in such manner as he thought fit at the expense of the Department. The suppliants' petition of right is not framed as in assertion of a claim that the work done by the suppliants and charged for was necessary for the mere purpose of reinstating their works in as good a condition after the completion of the improvements which were being made on the Intercolonial Railway as they were in before such improvements were undertaken. The suppliants, on the contrary, base their claim on the 6th, 7th, 10th and 11th paragraphs of their petition of right upon a contract alleged to have been entered into between them and the Dominion Government by Her Majesty, substantially to the effect that, if the suppliants would make such changes in their works and water mains and in the situation and level thereof as might be reasonable and necessary to render and keep the same in a service-

able and efficient state after the alterations on the railway should be completed, Her Majesty would pay to and reimburse the suppliants the costs and value of such changes. And they aver that after they had made the changes in their works they were ratified and adopted by Her Majesty, who afterwards promised the suppliants to pay to them the costs and value thereof.

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That considerable changes and improvements in the water works were made for the express purpose of improving the water supply and of giving to the citizens a better supply and greater security than they had before, and which were not necessary for the mere purpose of reinstating the works in as good a condition as they were in before, was not, in my opinion, disputed on the evidence, but it was contended that all that was done and charged to the Minister of Railways was necessary to the changes and improvements made in the water works, which changes and improvements were, as was contended, agreed upon before they were undertaken by and between the Minister, through the medium of Mr. Archibald the engineer of the Intercolonial Railway, and the commissioners of the Water Works and their engineer, Mr. Murdock.

Between Mr. Archibald and Mr. Murdock there is an unfortunate conflict as to what did take place between them ; but the case does not, in my opinion, turn upon a question as to which of their memories is most likely to be in error, for I think that neither the commissioners or their engineer had any right to suppose that the engineer of the railway had a right to bind the Government, if he did affect to do so, by whatever it was which passed between Mr. Archibald and the commissioners or their engineer. They had no right to suppose that Mr. Archibald could bind the Government by anything he should say to any greater

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extent than should be necessary to reinstate the water works in as good a condition as they were in before, and to this extent the claim of the respondents has not been disputed, but as the water works were improved to a much greater extent the Dominion Government cannot, in my opinion, be made answerable for any works done in excess of what was necessary to reinstate the works in as good condition as they were in before—and therefore this appeal should be allowed. As a majority of the court, however, are of a contrary opinion I have not gone into the question as to how much the claim of the respondents was in excess of what in my opinion they had a right to charge for.

PATTERSON J. concurred with the Chief Justice.

Appeal dismissed with costs.

Solicitor for appellant : *E. McLeod.*

Solicitor for respondents : *F. E. Barker.*
