THE CITY OF MONTREAL (DEFENDANT) APPELLANT;

1922
*Oct. 26, 27.
*Feb. 6.

AND

THE DANIEL J. McANULTY REALTY CO. (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Expropriation—Subdivision lots—Five lots taken for municipal sewage plant—Damages to remaining lots—Compensation—Nuisance—Fees of counsel and expert witnesses—Art. 407, 1589 C.C.—Montreal City Charter, (Q) 62 V, c. 58, s. 421.

In 1911, the respondent bought a block of land, 347 arpents in superficies, which it laid out as a residential building subdivision containing about fifteen streets and over 3,300 lots, which was treated as one holding. For the benefit of this subdivision the respondent, in contracts of sale or agreements to purchase lots, imposed conditions prohibiting uses of the lots which might depreciate adjoining parts of the property and, with the exception of one street, restricting the buildings to be erected thereon to residential buildings constructed at least ten feet from the front of the lots. During 1912, 1913, and 1914, about a third of the lots were disposed of subject to these restrictions. In February, 1916, the city of Montreal gave public notice of the expropriation of five of these lots required for the construction of an Imhoff tank, which is a sewage filtration plant. A board of arbitrators having been named in accordance with the provisions of the city charter, the respondent claimed before it compensation in respect of, first: the actual value of the lots taken; and secondly damages arising from the expropriation because of the consequent reduction in the selling value of the other lots unsold. The allowance of $896.66 for the value of each of the five lots was not contested; but the arbitrators having declined to recognize the claim under the second head and also having refused to allow the respondent what it has paid for counsel fees and expert witnesses, the respondent brought action to set aside the award.

Held, that the respondent was entitled, over and above the actual value of the five lots expropriated, to compensation for consequent depreciation in the value of its adjacent lands. Although there was as much connection between the lots taken and those still owned and controlled by the respondent as existed between the lands taken and those left in the hands of the expropriated owners in the *Cowper Essex Case* (14 App. Cas. 153) and the *Sisters of Charity Case* ([1922] 2 A.C. 315), (the *Holditch Case* ([1916] 1 A.C. 536, being therefore quite inapplicable), the decision in the present case should not rest upon these decisions owing to differences in language

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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between the relevant clauses of the governing statutes. (Brodeur J., however, expressing no opinion on such differences). The respondent's right to compensation for injurious affection of land must be decided by applying the principles of the general law of the province of Quebec contained in article 407 C.C. which carries that right unless it is excluded by special laws (Art. 1589 C.C.); and such right is assumed by Article 421 of the Montreal City Charter, paragraph 1 of which confers the right to expropriate lands "required for any municipal purposes whatsoever," paragraph 2 authorizing the arbitrators to take into consideration any increased value of the lands still remaining with the owner and setting the same off against the "inconvenience, loss or damages resulting from expropriation," and paragraph 3 prescribing the rule or measure by which indemnity for expropriation is to be ascertained and providing that the compensation shall include "damages resulting from the expropriation."

Held, also, that in view of the provisions of the city charter, s. 436, as amended by (Q) 4 Edward VII, c. 49, s. 21, the respondent was not entitled to claim, as part of its compensation, counsel fees and the costs of expert witnesses.

APPEAL from the judgment of the Court of King's Bench, Appeal side, province of Quebec, affirming the judgment of the Superior Court and maintaining the respondent's action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Chs. Laurendeau K.C. and *G. St. Pierre K.C.* for the appellant.

Geo. H. Montgomery K.C. and *Paul St.-Germain K.C.* for the respondent.

THE CHIEF JUSTICE.—I concur with my brother Anglin.

IDINGTON J.—The respondent, as its name implies, being a company engaged in buying and re-selling at a profit, if possible, had acquired a large tract of land for the purpose of re-selling subdivisions thereof under a scheme whereby it was clearly designed to create a residential district free from any of the undesirable results likely to flow from the acquisition by any one of any part thereof, and using that so acquired for purposes of a character likely to be obnoxious to others, merely wishing to acquire and use for purposes of dwelling there.

Such a scheme is sometimes aided by city by-laws and, short of that, is generally carried out by restrictive covenants binding him acquiring any part from using that he acquires in a way to destroy, or tend to destroy, the residential character so desired to be created.

Needless perhaps to say that such a scheme generally enhances the prices at which the lands would be sold in separate subdivisions and also facilitates the ready sale thereof.

The respondent had continuously and consistently acted upon this scheme and secured its due execution by selling only with such restrictive covenants on the part of each purchaser of any part of the subdivisions as to secure such result.

In course of doing so it had sold over a thousand lots each and every one of the purchasers being so bound. It thus became a very valuable asset in connection with the remaining lots in the way of selling same.

When matters stood in that position the appellant saw fit to use its powers of expropriation for the purposes of acquiring five of said subdivisions to be used for the construction of an Imhoff Tank in connection with the city sewerage and in obedience to the representations of the Provincial Board of Health and surrounding municipalities against the city's mode of dealing with its sewage.

The Board of Commissioners having charge of the compensation to be awarded the respondent in respect of such expropriations, by a majority refused to allow anything to respondent in way of compensation or damages in respect of this invasion of its rights in the premises impairing the efficacy of said scheme and tending to destroy the selling value of its remaining property.

The respondent then brought this action in the Superior Court to restrain the homologation of the award and set same aside unless and until due consideration given by the board to the respondent's right in said regard.

There was another but minor item of complaint in regard to expenses to which I will later refer.

Meantime I wish to deal only with the measure of compensation or damages arising from what I have above referred to.

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The article 421 of the City Charter, which governs the rights of the parties in that regard, is as follows:—

> Indemnity, in case of expropriation, shall include the actual value of the immoveable, part of immoveable or servitude expropriated and the damages resulting from the expropriation but, when fixing the indemnity to be paid, the commissioners may take into consideration the increased value of the immoveables from which is to be detached the portion to be expropriated and offset the same by the inconvenience, loss or damage resulting from the expropriation.

It is to be observed that the language used herein is not that of the English Lands Clauses Consolidation Act of 1845 which has given rise to so very much litigation to determine the meaning of the words "injuriously affected."

The words "and the damages resulting from the expropriation" are more elastic and comprehensive than in the said English Act or our own Canadian Railway Act.

If given a rational interpretation the language used in this article can be made to do justice between the parties concerned.

The learned trial judge in said action, and the King's Bench in appeal, have, in my opinion, in this regard, taken the correct view. From the latter's judgment this appeal is taken.

The case of *Canadian Northern Ontario Railway Company* v. *Holditch* (1), and in the appeal from our decision (2), upholding the judgment of this court, is much relied upon by appellant.

I most respectfully submit that there is no resemblance in principle between the cases. There the question was the broad one that if a railway had expropriated a single or several lots in no way connected with the other lots in the same survey, or the ownership thereof, the proprietors of these lots, so expropriated, could not claim anything in respect of the others.

I may be herein permitted to quote from what I said in that case. I said at p. 272 of the said reports as follows:—

> The second of these sections, 193, is as follows:
> "193. The notice served upon the party shall contain:
> "(a) a description of the lands to be taken, or of the powers intended to be exercised with regard to any lands therein described; and,

(1) (1914) 50 Can. S.C.R. 265. (2) [1916] 1 A.C. 536.

"(*b*) a declaration of readiness to pay a certain sum or rent as the case may be, as compensation for such lands or for such damages."

Read this as if both lands and power were combined though apparently disjoined, and whence can we draw the power of the arbitrators to assess and award damages in respect of other lands? Each lot taken by appellant is an independent, separate and complete property in itself. It is easily conceivable that a number of such properties might be so united together as to render them one compact whole, but that is not what in fact exists here.

In the Act upon which the *Cowper-Essex Case* (1) turned, it will be observed that the injuries to "lands held therewith" and "other lands" than taken and the "severing" of those from lands taken, are expressly provided for as subjects of compensation.

I abide by these expressions of opinion and applying them to the case in hand I do find, as set forth above, a connection between the ownership of those lots of which the compensation for, or damages resulting from, the expropriation thereof, has to be determined, and the other lots yet unsold.

And I may also quote from the opinion of Lord Sumner, delivering the judgment of the Judicial Committee, as follows:—

> They were sold out and out. No restrictive covenants were taken. There was no building scheme other than the lay out shown on the registered plan, and this derived its fixity from the legislation affecting it, and not from any notice to the purchaser or any private obligation entered into by him. It is plain that, so far as in them lay, the proprietors of this building estate had parcelled it out in lots, made an end of its unity (other than bare unity of ownership) and elected once for all to treat this multitude of lots as a commodity to trade in. .
>
> The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance.
>
> * * * * *
>
> There was one owner of many holdings, but there was not one holding, nor did his unity of ownership "conduce to the advantage or protection" of them all as one holding.

This language of Lord Sumner not only makes clearer than I had what might be such a connecting link between that expropriated and what remained unexpropriated as to allow consideration thereof as basis for such like claims as set up herein.

(1) [1889] 14 App. Cas. 153.

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I cannot see what the question (seriously discussed by counsel for appellant herein) of whether or not a servitude has been created, has to do with this case.

The respondent has acquired rights he may enforce and protect his purchasers by way of injunction, whether a servitude exists or not.

There is another principle applicable to all such cases and which needs not to rely upon such narrow distinctions as may be said to be involved in that view.

It is this, that the compensation must be based on what the land is worth to him from whom it is taken and thus include such incidental bases of compensation as may be here in question by virtue especially of the language in art. 421 above quoted. And it is very usual in such cases of most ordinary character to add 10 per cent to the valuation to cover much less important items than respondent sets up herein and the former has in many cases been maintained by this court.

This case may not need to be rested at all, from that point of view, upon the term "damages" alone, or as interpreted in other cases depending upon other statutes.

The law and the relevant decisions thereupon may be found set forth in Cripps on Compensations, at pages 102 *et seq.* of the 5th edition.

I am suggesting these alternatives not so much that I feel the judgment below needs them for its support, as that I see in the results ahead a possible world of litigation for the parties concerned according to the view taken of the relevant law upon which the respondent's claim is rested.

The judgment appealed from is, in my opinion, in this regard, absolutely correct whichever way we look at it.

The cross-appeal on the other question of costs of preparation and at the trial before the board, I would dispose of by saying that it has been correctly disposed of by the court below. Possibly if in that court I might not have given general costs of the appeal when the party appellant failed in what seemed to me the substantial grounds of appeal but our jurisprudence is against meddling with decisions merely as to costs.

I would give no costs of this cross-appeal but I would dismiss the appeal herein with costs.

DUFF J.—This appeal presents a question as to the application of sec. 421 of the Montreal Charter which, so far as material, is in the following words:—

421. (62 Victoria, chapter 58, as amended by 3 George V, chapter 54, section 20)—The city of Montreal may hereafter even without any previous application from the proprietors or other interested parties, but on a report from the Board of Commissioners, approved by the absolute majority of the members of the council, acquire by mutual agreement or by expropriation of any immovable, part of immovable or servitude situated within the limits of its territory or outside of the same, which it may require for any municipal purposes whatsoever, including the opening, widening and extension of its streets through the territory of another municipality, and, to that end, may acquire the land it may deem suitable by mutual agreement or by expropriation, by following the procedure indicated in the charter.

Indemnity, in case of expropriation, shall include the actual value of the immovable, part of immovable or servitude expropriated and the damages resulting from the expropriation; but when fixing the indemnity to be paid, the commissioners may take into consideration the increased value of the immovables from which is to be detached the portion to be expropriated and offset the same by the inconvenience, loss or damages resulting from the expropriation.

The respondent company is the owner of a property known as "Montreal Park," a property consisting of some 347 acres which was divided into some 3,300 lots and placed upon the market. Sales ceased about 1914, up to which time about one-third of the property had been sold. In February, 1916, the appellant municipality gave public notice that it would apply for the appointment of commissioners to determine the price and indemnity to be paid for certain immovables which the city proposed, under section 421 et seq. of its charter to acquire for the construction of an "Imhoff Tank." The immovables described included four of the lots forming part of Montreal Park and, at a later date, a fifth of these lots was added. The respondent company claimed compensation in respect of first: the value of the lots taken, and 2nd, damages arising from the expropriation in consequence of the reduction in the selling value of other lots in Montreal Park. The arbitrators declined to recognize the claim under the second head. Mr. Justice Maclennan, of the Superior Court, whose judgment was affirmed by the

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Court of King's Bench, sustained the claim of the respondent holding that damages ought to have been assessed under that head. The corporation appeals. The undisputed fact is that the market price of some, at all events, of the unsold lots of Montreal Park have suffered and will suffer depreciation by reason of the municipal work. And the question is whether this loss is something in respect of which the respondent company is entitled to compensation as comprised within the elements of damage denoted by the phrase " the damages resulting from expropriation."

Mr. Laurendeau on behalf of the appellant municipality, contending for a negative answer to this question, puts his case in this way. Art. 421, he argues, defining the measure of the compensation the owner of an expropriated immovable is entitled to receive, limits such compensation to the damages arising " from the expropriation " in addition to the " actual value " of the immovable; and this does not, he says, include a right to compensation in respect of the use of the property taken, that is to say, for damages occasioned by the execution of the municipal purpose for which it is taken. The execution of the municipal purpose may or may not involve something which is an actionable nuisance. If it can be lawfully carried out by the municipality without calling into play any authority other than that lawfully exercisable by a proprietor, then the right of the municipality to carry it out is merely one of its rights as proprietor and in respect of doing so no compensation is justly payable beyond the actual market value of the land.

On the other hand, he argues, if the municipality in order to execute the municipal purpose is obliged to do something constituting as against its neighbours an actionable wrong, they have their legal remedies and the expropriated owner among them with reference to any injury he may thereby suffer in relation to the property retained by him. There is nothing, he argues, in art. 421, abridging the legal rights of the municipality's neighbours. In a word, Mr. Laurendeau contends that in the circumstances of the present case the arbitrators rightly took the view that the respondent company stands, with respect to the use to which the property taken is to be put by them, in

precisely the same position as that of any other neighbouring proprietor, no better, no worse.

This contention raises a most important question and I shall first consider it exclusively with reference to the language of this article 421, read, of course, in the light of the Civil Code and of principles which must be taken from authoritative decisions to govern the character of the right to compensation under the law of Quebec. The right to compensation is given by art. 407 of the Civil Code, an article which reproduced art. 545 of the Code Napoléon which in its terms is merely declaratory of a settled principle of the ancient law of France. It is in these words:—

> 407. No one can be compelled to give up his property except for public utility and in consideration of a just indemnity previously paid.

Art. 421, then, proceeds upon the fundamental assumption that the expropriated owner is entitled to a "just indemnity." Now there is one principle of compensation law affecting the question as to what is comprised in a just indemnity which is well settled in the Province of Quebec. It is stated in these words by Lord Buckmaster in *Fraser* v. *Fraserville* (1);

> the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired

The Privy Council was here applying art. 5795 of the Revised Statutes of Quebec (The Cities and Towns Act) where the arbitrators are directed to ascertain the

> value of the immovable together with whatever goes in compensation of the value of such immovable;

and he is stating a principle which had been adopted and acted upon by the Court of King's Bench following the judgment of the Privy Council in *Cedar Rapids Manufacturing & Power Co.* v. *Lacoste* (2), in which Lord Dunedin dealing with a case in which the compensation provisions of the Dominion Railway Act applied, said:

(1) [1917] A.C. 187 at p. 194 (2) [1914] A.C. 569, at p. 576.

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The law of Canada as regards the principle upon which compensation for lands taken is to be awarded (it should be carefully noted that Lord Dunedin's observation is limited to the case in which land is actually taken) is the same as the law of England * * * * (and he proceeds) the value to be paid for is the value to the owner * * * * not to the taker

It seems almost too obvious for remark that if the public authority desiring property for a public purpose and treating with an owner for the purchase of a part of a property owned by him to be devoted to that purpose, a consideration of greater or less importance according to the circumstances entering into the determination of the price may be the nature of the purpose for which the part to be taken is required. If it is to be taken for a gas works, for example, the owner will naturally require a price which will, in some degree at all events, compensate him for the depreciation in value to his other property which remains in his hands. If he is in a position to dictate terms, nobody would call it an unreasonable thing that an owner in such circumstances should exact a price which would fully compensate him for the depreciation in value suffered by the property retained.

Without analyzing too closely the phrases "actual value" in art. 421 and "damages resulting from expropriation," I cannot escape the conclusion that these words, read in the light of the article quoted above and of the principle that the value to be ascertained is the value "to" the owner, are sufficient to evince an intention to provide in such circumstances for full compensation; and it appears to me, moreover, not to be doubtful that such elements of depreciation as I have indicated, are elements which enter into the account for the purpose of determining the amount of such compensation. It is of little importance whether you bring such elements under the head of "actual value" as being an indemnity for depriving the owner of the power which his ownership in itself confers upon him to prevent the execution of the public work upon his land, or whether you treat it as falling under "damages resulting from expropriation."

It is true that this article itself makes no provision apparently for compensation to persons whose lands are not taken but who nevertheless suffer injury in their business or property by reason of the execution of a municipal work; but that can afford no sound reason for declining to give effect to the principle embodied in the article of the code according to the measure defined by the article of the charter.

The argument on behalf of the appellant municipality proceeds indeed upon the postulate that "expropriation" within the meaning of art. 421 is employed in the restricted sense of signifying merely the transfer of title from the proprietor of the immovable to the municipality.

I shall briefly indicate some of the reasons which appear to me to forbid acceptance of that view. The authority given is an authority to take for some municipal purpose and in assessing compensation it must be assumed that the municipality is not abusing its power, but will devote the property taken to the purpose for which it is authorized to take it. The nature of the project is published to the world and the mere fact of taking the property for a given purpose may by reason of the public anticipations in respect of the nature of the work which is to be carried out have such an effect in giving character to the locality as to diminish or enhance the value of adjoining property. It matters not, as the Law Lords point out in *Cowper-Essex Case* (1) that such a result may be due to an unreasonable prejudice against localities subjected to the presence of such works. Undesirability and consequential depreciation of value arising from such circumstances is a common experience and such depreciation is something which can be quantitatively estimated. And I can think of no reason why, being as it is one of the consequences of the process of "expropriation," using "expropriation" in the sense of the process of taking the property for the municipal purpose for which it is required—it should be excluded from the class of damages falling within the purview of the article. The extent of such depreciation is, of

(1) 14 App. Cas. 153.

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course, a question of fact, and as such a question for the arbitrators.

This view is confirmed—it receives indeed the strongest confirmation from the proviso in the second paragraph of art. 421, authorizing the Commissioners to take into consideration the increased value of the immovable still remaining in the possession of the owner resulting from the expropriation, and setting the same off against the "inconvenience, loss or damages resulting from expropriation." Expropriation here is evidently not used in the sense merely of translation of title,—indeed it seems to include not only the process of expropriation as above mentioned (the process of taking for a stated municipal purpose) but apparently the execution of that purpose as well.

The appellant municipality invokes as against this view the law laid down by Lord Sumner in delivering the judgment of the Judicial Committee in *Holditch's Case* (1). Before discussing the effect of that judgment I think it is convenient to consider a little the question how far some of the principles and specific rules laid down by the courts in England in the application of statutes relating to compulsory purchase of land are pertinent to questions arising under art. 421.

At the outset it may be noted that there is an important distinction to be drawn between the particular rules deducible from such decisions resting upon special provisions of the English statutes and the reasoning upon which great judges like Lord Cairns, Lord Watson and Lord Macnaghten have proceeded in applying general principles of compensation to particular circumstances. Whether or not specific rules are binding must depend upon the provisions of the statute to be construed; but the reasoning by which these great judges have governed themselves in the application of general principles to particular cases, can hardly fail to afford some measure of guidance in parallel cases where cognate principles come into operation.

Many years ago the Dominion courts, the courts of Ontario and the courts of Quebec began to treat the specific

(1) [1916] 1 A.C. 536.

rules laid down with reference to the construction and effect of statutory provisions such as the proviso to section 16 of the Railway Clauses Act, 1845, and sections 49 and 63 of the Lands Clauses Act, 1845, as applicable to the construction and application of Canadian statutes dealing with the subject of expropriation. This practice rather widely prevailed, but I shall limit myself to a reference to the decisions upon two statutes, viz., the Dominion Railway Act and the Dominion Expropriation Act; and to the two propositions established in *Hammersmith and City Ry. Co.* v. *Brand* (1) and *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (2), respectively, viz., 1st: that "injurious affection" caused to land no part of which is taken for the purpose of a railway arising from the mere use of the railway as distinguished from the construction of the work does not give rise to a claim for compensation under the Railway Clauses Act, 1845, and 2nd: that where land is taken, a claim for compensation may arise under secs. 49 and 63 of the Lands Clauses Act, 1845, in respect of "injurious affection" of the part not taken by reason not only of the construction, but by reason also of the anticipated user of the authorized works as well.

These two propositions were long ago held to govern the application of the compensation clauses of the Dominion Railway Act notwithstanding the fact that there were obvious differences in language between those clauses and the clauses of the English statutes out of which the rules developed. In *Holditch's Case* (3) Lord Sumner refers to this course of decision and observes that the differences in language between the compensation clauses of the Dominion Act and the proviso to sec. 16 of the Railway Clauses Act of 1845 are of no importance. Lord Dunedin, as I have pointed out, in 1914 in *Cedar Rapids Manufacturing & Power Co.* v. *Lacoste* (4) treated it as settled that generally speaking the principles governing the right of compensation under the Dominion Railway Act were the same as those which were established in England under the Lands Clauses Consolidation Act.

(1) [1868] L.R. 4 H.L. 171.
(2) [1868] L.R. 3 Ex. 306.
(3) [1916] 1 A.C. 536, at p. 544.
(4) [1914] A.C. 569.

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As regards the effect of the compensation clauses of the Dominion Railway Act then, the authority of the English decisions affirmed by these judgments of the Privy Council, rests upon a solid foundation, a virtual similarity between the two systems of legislation and a settled course of decision by the courts of this country under which the English decisions were given effect to as pertinent and binding.

The other statute to which I shall refer is the Expropriation Act, c. 143, R.S.C. That statute assumes a right to compensation for lands taken and for lands "injuriously affected by the construction" of public works (secs. 22 and 26) and provides a procedure for assessing such compensation. There is nothing in this statute authorizing compensation for "injurious affection" arising from use as distinguished from construction. There is nothing, in other words, in the statute itself explicitly dealing with the case covered by secs. 49 and 63 of the Lands Clauses Act, 1845, of "injurious affection" of an owner's land by reason of construction and user of a public work upon lands formerly held therewith and severed therefrom. Nevertheless in the case of the *Sisters of Charity of Rockingham* v. *The King* (1), Lord Parmoor, delivering the judgment of the Judicial Committee, applied the decisions in England under sections 49 and 63 of the Lands Clauses Act, 1845, and in particular the decisions in *Cowper-Essex's Case* (2) and in the *Stockport Case* (3), in order to determine the right of an owner to compensation in respect of injurious affection arising from the running of a railway upon a part of the land of the owner which had been severed from the rest. In that case it had been explicitly stated by the learned judge of the Exchequer Court in delivering judgment and it had been assumed in all the judgments delivered in this court that the English decisions might properly be resorted to for determining the application of the Expropriation Act, and this was founded upon the circumstance mentioned by the learned judge of the Exchequer Court and emphasized by Lord Parmoor, that in a series of cases extending over a number

(1) [1922] 2 A.C. 315. (2) 14 App. Cas. 153.
(3) 33 L.J. (Q.B.) 251.

of years the decisions in England had been treated as binding upon the courts in applying the Act.

As regards these two statutes then, the Dominion Railway Act and the Dominion Expropriation Act, the law is settled; but, of course, it does not follow that the decisions upon the two English statutes mentioned can be treated as providing a code of rules governing the application of every expropriation statute passed by a legislature in this country. In England they would not be regarded as controlling section 308 of the Public Health Act and in *Fletcher* v. *Birkenhead Corporation* (1) the Court of Appeal declined to follow the decision in *Brand's Case* (2) as governing the construction of sections 6 and 17 of the Waterworks Clauses Act of 1847. In *City of Toronto* v. *Brown* (3), I had occasion to examine the whole subject for the purpose of passing upon a contention that section 437 of the Ontario Municipal Act, requiring municipal councils to make "due compensation" to the owners of land taken or "injuriously affected by the exercise of the powers" of a council, was limited in its application by reference to the rule laid down as above mentioned in *Brand's Case* (2); and the decision of this court was that the plain language of the Ontario statute giving a right of compensation for the injurious consequences of the exercise of the powers of the municipality could not be restricted in its operation by a reference to a rule derived by the House of Lords from the proviso to section 16 of the Railway Clauses Act, 1845.

Coming now to article 421; it is limited, of course, in its application to cases in which property is taken, but I can find nothing in the article which requires us in applying it to enter upon such considerations as necessarily arise or must be taken into account in applying sections 49 and 63 of the Lands Clauses Act of 1845. There is nothing here limiting damages arising from expropriation to such matters as might properly be described as "injurious affection" of other lands, still less to the "injurious affection" of lands from which the lands taken are severed or with which the lands taken have been held, and there is no

(1) [1907] 1 K.B. 205. (2) L.R. 4 H.L. 171.
(3) [1917] 55 Can. S.C.R. 153.

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course of decision such as that affecting the construction of the Expropriation Act or of the Railway Act. I think it is important that one should be cautious in attempting to express an opinion not necessary to the decision in the case before one, as to the scope of such general expressions as are to be found in this article, and I refrain from doing so, but it follows, I think, from the circumstances just mentioned that the rule pronounced by the Judicial Committee in *Holditch's Case* (1) is not a rule which the courts are bound to apply in passing upon a claim to compensation under article 421.

On the other hand, I am bound to say that if one were entitled to govern oneself by *Holditch's Case* (1), *Cowper-Essex's Case* (2) and the case of the *Sisters of Charity* (3), there appears to be abundant evidence of the existence in relation to Montreal Park of that unity of possession and control, conducing to the advantage or protection of the property as one holding, which was held to exist in *Cowper-Essex's Case* (2), and to be absent in *Holditch's Case* (1).

The appeal should be dismissed with costs.

ANGLIN J.—Are the respondents, from whom five lots forming part of a residential building subdivision in the city of Montreal have been expropriated by the appellant municipality for the construction of a sewage tank, entitled to compensation for consequent depreciation in the value of their adjacent lands, which also form part of such building subdivision? This question is the subject of the main appeal.

Are the respondents entitled to recover from the municipality their outlay for counsel fees, witness fees, and other costs incurred in maintaining their claim to compensation before the Board of Commissioners—a right accorded them by the Superior Court but denied them by the Court of King's Bench? This question is raised by a cross-appeal.

The allowance of $896.66 made to the respondents by the commissioners for the actual value of each of the five lots expropriated is not contested.

(1) [1916] 1 A.C. 536. (2) 14 App. Cas. 153.
(3) [1922] 2 A.C. 315.

In disposing of the controversy as to the right of the respondents to compensation for depreciation in the value of their adjacent property the courts below have treated the English decisions on the Lands and Railways Clauses Consolidation Acts of 1845 (notably the *Cowper-Essex Case* (1)), and on the Dominion Railway Act, to which the principle of those decisions has been held to apply (*Holditch* v. *Canadian Northern Ry.* (2); *Sisters of Charity of Rockingham* v. *The King* (3)), as governing authorities on the construction of the relevant provisions of the charter of the city of Montreal.

If the principles of those English decisions should be applied, in my opinion upon the facts in evidence there was sufficient connection between the lots taken and other lots in the building subdivision still owned and controlled by the respondents to bring this case within the authority of the *Cowper-Essex Case* (1), and the very recent *Sisters of Charity of Rockingham Case* (3), and to render inapplicable the decision in the *Holditch Case* (2).

> The lands taken (were) so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance.

> The respondents
>
> retained such control over the development and use alike of the parcels sold and the parcels unsold as made a real and prejudicial difference between (their) ability to deal with what remained to (them) after the compulsory taking of land and (their) ability to deal as a whole with both it and the land taken before such compulsory taking.

See also *Toronto Suburban Railway Co.* v. *Everson* (4)

The freedom of the five lots after their expropriation from the restrictions, which it was the policy of the owners to impose upon all lots purchased in the building subdivision, necessarily affects detrimentally the value of some, if not all, other lots in the subdivision. The public use to which it is proposed to put the lands so taken, and upon which the statutory authorization for such taking depends is calculated to cause further depreciation, which, I agree, is matter that the commissioners must take into account in determining the compensation to be allowed. To that

(1) 14 App. Cas. 153.
(2) [1916] 1 A.C. 536.
(3) [1922] 2 A.C. 315, at p. 322.
(4) [1916] 54 Can. S.C.R., 395.

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extent the views expressed in the *Cowper-Essex Case* (1) as to what should be included in compensation for injurious affection, especially by Lord Macnaghten, at p. 177, are in point, if such compensation is recoverable under the provisions of the Montreal City Charter.

But, with great respect, I am of the opinion that the English decisions relied upon afford little assistance in determining the rights of expropriated landowners under that charter to compensation in respect of injury to adjacent property held by them. The right to expropriate lands "required for any municipal purposes whatsoever" is conferred on the city of Montreal by paragraph 1 of article 421 of its charter (62 V., c. 58). The right to compensation or indemnity for such expropriation is given by article 407 C.C.:

> No one can be compelled to give up his property except for public utility and in consideration of a just indemnity previously paid.

The right to indemnity for expropriation is assumed by the City Charter, which, by the 3rd paragraph of article 421 (a "special law" within article 1589 C.C.), prescribes the rule or measure by which such indemnity is to be ascertained—what it is to include—the manner or method of the expropriation being likewise prescribed by other articles of section XX of the charter. Paragraph 3 of article 421 reads as follows:

> Indemnity, in case of expropriation, shall include the actual value of the immoveable, part of immoveable or servitude expropriated and the damages resulting from the expropriation; but, when fixing the indemnity to be paid, the commissioners may take into consideration the increased value of the immoveables from which is to be detached the portion to be expropriated and offset the same by the inconvenience, loss or damages resulting from the expropriation.

The language of that enactment differs widely from that of the statutory provisions dealt with in the English cases. We find nothing in article 421 at all resembling the phrase, "lands injuriously affected by the execution of the works" (section 68 of the Lands Clauses Act, 1845), or the phrase "injuriously affected by the construction thereof" i.e., of the railway (section 6, Railways Clauses Act, 1845), which form the basis of the English decisions that injury to the claimant's property (apart from any particular use to

(1) 14 App. Cas. 153.

which it may be put or any personal inconvenience suffered by the owner) must be shewn. *Ricket* v. *Metropolitan Railway Co.* (1). Here, in addition to "the actual value" of the property taken, paragraph 3 of article 421 provides that the compensation shall include "damages resulting from the expropriation."

Again we find in article 421 of the Montreal Charter neither such words as "lands held therewith," i.e., with the lands taken (section 49 of the Lands Clauses Consolidation Act, 1845) nor language such as that contained in section 63 of that Act—

> the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner.

In the English Lands and Railway Clauses Consolidation Acts lands taken and lands injuriously affected form the subjects of separate provisions; in the Montreal charter the value of the property expropriated and "damages resulting from the expropriation" are covered by the same sentence—*uno flatu*. By the Montreal charter one of the city recorders becomes *ex-officio* president of the board; the city council nominates two of its assessors as additional members; and, although their names are to be suggested by the landowners, the city alone is empowered to apply for the appointment by the Superior Court of the two other members required to constitute the board (article 429). Under the English Acts the landowners may take all the steps necessary to obtain compensation. But a more radical difference, I think, exists in regard to the basis of the right to compensation for what is known in English law as injurious affection. Whatever may be the case in regard to the right of the owner under the English common law to be paid for land taken from him for a public purpose by due authority of law (*Attorney General* v. *De Keyser's Royal Hotel* (2); *Commissioner of Public Works* v. *Logan* (3); *Western Counties Ry. Co.* v. *Windsor & Annapolis Ry. Co.* (4)), the right, where it exists, to additional compensation for injurious affection of other land held with that

(1) [1867] L.R. 2 H.L. 175.
(2) [1920] A.C. 508.
(3) [1903] A.C. 355, at p. 363.
(4) (1882) App. Cas. 178, at p. 189.

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taken, like the more restricted right of a proprietor whose property has been injured by a public undertaking but from whom nothing has been taken, is in England purely statutory.

If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, although the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by statute. *East Fremantle* v. *Annois* (1).

Article 407 of the Quebec Civil Code is a textual production of article 545 of the Code Napoleon (which embodied and somewhat enlarged the principle of the French constitution of 1791), and expresses a fundamental principle of the common law of France (Merlin Rep. vbo. Retrait d'utilité publique), which "*pourrait même être considéré comme un principe de droit public,*" (Baudry-Lacantinerie (3 ed.) Des Biens no. 214).

That law prevailed in Lower Canada before the enactment of the Civil Code, *Mayor of Montreal* v. *Drummond* (2). Under article 407 C.C., as under article 595 C.N., the "just indemnity" to which an expropriated owner is entitled must cover not merely the intrinsic value of the portion of that owner's property actually taken but also that of advantages attached to its possession of which the expropriation will deprive him (S.36.1.12; S.72.2.25) and especially any diminution in value of the rest of the property not taken. S.36.2.127; S.75.1.428 and n.1.; S.77.1.277. Although these decisions deal more particularly with the laws of 1833 and 1841, they merely apply to them a principle well recognized, "La jurisprudence et la doctrine sont fixées dans ce sens," S.77.1.277, n.3; Picard, Expropriation, L'indemnité, pp. 292-3, 299.

"Juste," c'est-à-dire suffisante pour compenser le prejudice subi par l'exproprié; autrement, l'expropriation sera une spoliation. Baudry-Lacantinerie, ibid.

It would therefore seem to be unnecessary in Quebec to look in a statute authorizing expropriation for a special provision for compensation for injurious affection of land

(1) [1902] A.C. 213, at p. 217. (2) [1876] 1 App. Cas. 384, at p. 403.

held with that taken. Art. 407 C.C. carries that right unless it is excluded by the special law (Art. 1589 C.C.). There is no similar statutory provision of universal application in English law.

But quite apart from this important difference the whole scheme and arrangement of the indemnity provisions of the English Lands and Railways Clauses Act of 1845 on the one hand and those of Art. 421 (3), etc., of the Montreal charter on the other, are so different and the terms in which they are respectively couched are so unlike that it would be quite unsafe to treat decisions on the former as governing the construction of the latter.

In *North Shore Ry. Co.* v. *Pion* (1), in dealing with the Quebec Railway Act of 1880, a statute much more nearly *in pari materia* with the English Lands Clauses and Railway Clauses Consolidation Acts than is the Montreal City Charter, their Lordships of the Judicial Committee said:—

> The provisions and structure of that Act are too widely different from those of the English Lands Clauses and Railway Clauses Consolidation Acts to enable their Lordships to derive aid from the cases which have been decided upon those English Acts. In the English Acts special and separate provision is made for lands not taken, but injuriously affected, and the procedure for obtaining compensation, applicable both to lands taken and to lands injuriously affected, is defined so as to enable the landowner, as well as the company, to take, or cause to be taken, in all cases the necessary steps for that purpose. But in the Quebec Act of 1880 this is not so.

I am for these reasons, with great respect, of the opinion that in determining whether under Art. 407 C.C. and par. 3 of Art. 421 of the Montreal Charter the respondents are entitled to compensation in respect of depreciation in the value of other lots in the subdivision owned by them due to the expropriation of the five lots taken by the appellants for a sewage tank we cannot look for guidance to the English cases so much discussed at bar and relied upon in the courts below. We have to construe the words " damages resulting from the expropriation " in the setting in which they occur in Art. 421, and having regard to the scope and purpose of that legislation and the general law of the province of Quebec as to compensation or indemnity in cases of expropriation.

(1) (1889) 14 App. Cas. 612, at p. 624.

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In *Cité de Montréal* v. *Robillard* (1), the court of Queen's Bench held that "damages resulting from the expropriation" are confined to damages sustained by the owner whose lands are taken. I see no reason to question the soundness of that decision. The terms of Art. 429

—compensation to be paid to the proprietor whose building or land is to be expropriated—

seem to confirm this view, which also appears to have been held by the Judicial Committee in *Mayor of Montreal* v. *Drummond* (2). On the other hand the damages to be compensated for must "result from the expropriation." They do not extend to injurious affection "by the exercise of the (other) powers" conferred by the statute. (Compare ss. 49 and 63 of the Lands Clauses Consolidation Act, 1845, and ss. 6 and 16 of the Railways Consolidation Act, 1845.) In *Robillard's Case* (1), however, although the Court of Queen's Bench expressed the further view (p. 303) that the damage to be compensated for must be

such as is directly connected with the land expropriated,

it added that "other damage caused by the expropriation," while restricted to that sustained by the party expropriated, is not limited to the land taken and its actual value but includes damages caused to his remaining land as, in their opinion (p. 304), Art. 421 of the Montreal Charter,

is a similar provision to that embodied in the statutes for railway expropriation here, under which we held in *Wood* v. *A. & N.W. Ry. Co.* (3), that a party expropriated was entitled not only to the value of his land taken but to damage caused to his remaining lands by the operation of the train service.

Without conceding the similarity of paragraph 3 of Art. 421 of the Montreal Charter to the compensation provisions of the Railway Act construed in the *Wood Case* (1), and without expressing any view on the question whether the scope of the words "and damages resulting from the expropriation" is or is not exhausted thereby, under the circumstances here in evidence, those words in my opinion certainly cover such depreciation in value as the taking

(2) [1896] Q.R. 5 Q.B. 292. (2) 1 App. Cas. 384, at p. 405.
(3) [1893] Q.R. 2 Q.B. 335.

of the five lots for a sewage tank has caused to other lots comprised in the same subdivision still held by the respondents after the expropriation. That depreciation was "damage caused by the expropriation," and is "directly connected with the land expropriated." The view that this is the proper construction of par. 3 of Art. 421 is strengthened by its concluding provision that

> the Commissioners may take into consideration the increased value of the immoveable from which is to be detached the portion to be expropriated, and offset the same by the inconvenience, loss or damage resulting from the expropriation.

If an increase in the value of adjacent immovables due to the expropriation is to be taken account of, it would seem only reasonable that depreciation in the value of the same immovables likewise caused should form part of the loss or damages against which such increase in value may be offset.

Nor is it necessary in my opinion that the restrictive covenants taken by the respondents from purchasers should have the effect of subjecting the respective lots sold to a servitude in favour of the rest of the property comprised in the subdivision. If such a servitude were created and some of the lots already sold had been taken by the appellants the respondents might have had a claim for "the actual value of the * * * servitude expropriated." What they are claiming for is "damages resulting from the expropriation" to their remaining property. No question of servitude is involved. The sole matter to be determined is whether depreciation in the value of such adjacent land caused by the expropriation is damage resulting therefrom within the purview of paragraph 3 of article 421. Under the circumstances in evidence I think it is.

Nor is the fact, pressed at bar, that the maintenance of the proposed sewage tank is likely to be only temporary now material, if substantial injury has been caused by taking part of the respondents' land for it. While that fact may affect the *quantum* of, it cannot entirely defeat the right to, compensation. *Lingké* v. *Mayor, etc., of Christ-Church* (1).

(1) [1912] 3 K.B. 595.

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In estimating the compensation it must of course be assumed that all proper precautions will be taken to prevent the use and operation of the tank becoming a nuisance to the neighbourhood. While any omission of due care resulting in injury would probably be actionable, it cannot afford a ground for statutory compensation since it would be an abuse of the statutory power and without its protection.

In determining how far, under the Montreal Charter, the purposes for which the municipality is expropriating should be taken into account in estimating "the damage resulting from the expropriation," I prefer to adopt the reasoning of Lord Macnaghten in the *Cowper-Essex Case* (1), already referred to, and the line of decisions in Belgium mentioned in Picard on Expropriation, L'indemnité (vol. 1, pp. 293-8), rather than the narrower ideas expressed in such works as De Lalleau on Expropriation (vol. 1, no. 302), though the latter are no doubt founded on French jurisprudence. Crépon, Code annoté de l'Expropriation, p. 253, nos. 164, *bis.*, *et seq.*—s.v. nos. 143 and 152.

For the reasons stated by Martin and Rivard JJ. in the Court of King's Bench, I am satisfied that the right to recover counsel fees, witness fees, etc., asserted by the respondents has been expressly taken away by article 436 of the City Charter, as enacted by 4 Edward VII, c. 49.

Both the appeal and the cross-appeal should be dismissed with costs.

BRODEUR J.—La première question qui nous est soumise est de savoir si les arbitres auraient dû indemniser la compagnie McAnulty pour les dommages résultant de ce qu'elle appelle le morcellement de sa propriété.

La cité de Montréal prétend qu'il n'y a pas de morcellement de propriété par l'expropriation, qu'elle n'est tenue de payer que pour les cinq lots expropriés et que les autres lots pour lesquels l'expropriée réclame une indemnité ne font pas partie de ces cinq lots, qu'ils en ont été effectivement détachés par un cadastre de subdivision qui avait été fait par l'expropriée plusieurs années auparavant.

(1) 14 App. Cas. 153.

La compagnie McAnulty prétend, au contraire, que tous ces lots ne forment qu'une seule exploitation qui donne lieu au cas d'expropriation de quelques-uns d'entr'eux à l'indemnité résultant du morcellement.

La preuve constate que tous ces lots de terre formaient originairement une ferme en culture, que la compagnie McAnulty s'en est portée acquéreur en 1911, qu'elle a payé une partie du prix de vente comptant, que la balance du montant d'achat est restée hypothéquée sur tout l'immeuble, que la propriété a été subdivisée par la compagnie McAnulty en plus de trois mille lots à bâtir que ont été placés en vente sur le marché sous le nom de "Montreal Park," et que l'on dispose de ces lots par promesses de vente qui contiennent des restrictions quant à la manière dont ils devront être construits et exploités.

Les commissaires chargés de fixer l'indemnité ont décidé de ne pas accorder de dommages ou d'indemnité pour les autres lots que les cinq qui avaient été expropriés.

Il me paraît bien évident que l'expropriation a causé des dommages sérieux et appréciables aux autres lots. La construction de cette fosse Imhoff qui a motivé l'expropriation est destinée à traiter les égouts et déprécie nécessairement la valeur des terrains avoisinants.

L'article 407 du Code Civil énonce le principe général que nul ne peut être contraint de céder sa propriété pour cause d'utilité publique à moins qu'il ne soit justement indemnisé.

Que doit comprendre l'indemnité?

La valeur du terrain exproprié et les dommages accessoires résultent directement de l'expropriation; et l'on range généralement dans cette dernière catégorie la dépréciation provement du morcellement de la propriété; l'article 421 de la charte de la Cité de Montréal, sous laquelle les arbitres procédaient, énonce le même principe en disant que l'indemnité doit comprendre la valeur réelle de l'immeuble ou partie d'immeuble exproprié "et les dommages résultant de l'expropriation."

Sommes-nous en présence d'un immeuble exproprié ou *de partie* d'un immeuble exproprié? En d'autres termes, ces terrains du "Montreal Park" forment-ils une seule exploitation? S'ils ne forment qu'une seule exploitation,

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alors l'expropriation des cinq lots en question constituerait un morcellement (severance).

Il est bien vrai que la subdivision des terrains et leur cadastrage peut former en soi un morcellement de la propriété et lui enlever dans certain cas le caractère d'exploitation unique. C'est ce qui avait été dit dans la cause de *Canadian Northern Ry.* v. *Holditch* (1). Mais dans cette cause de Holditch la subdivision avait eu lieu sans aucune réserve, le propriétaire de ces différents lots avait donné à chacun d'eux une existence distincte et séparée qui leur avait fait perdre le caractère de seule et même exploitation. Aussi le Conseil Privé (2), appelé à examiner notre décision, disait par la bouche de Lord Sumner, en discutant les faits de cette cause de Holditch:

> They (the lots) were chiefly distinguished by the numbers assigned to them and the name of the street on which they fronted. *They were sold out and out. No restrictive covenants were taken. There was no building scheme, other than the lay-out shown on the registered plan,* and this derived its fixity from the legislation affecting it, and not from any notice to the purchaser or any private obligation entered into by him. It is plain that, so far as in them lay, the proprietors of this building estate had parcelled it out in lots, made an end of its unity (other than bare unity of ownership) and elected once for all to treat this multitude of lots as a commodity to trade in.

A la page 543, Lord Sumner continue en parlant des terrains Holditch:—

> There was one owner of many holdings, but there was not one holding, nor did his unity of ownership "conduce to the advantage or protection" of them all as one holding.

Sous quelques rapports, les faits de la cause de Holditch (2) ressemblent à ceux de la présente cause. Dans les deux cas, il y a achat de terrains pour opérations spéculatives et subdivision des lots; mais les dissemblances se manifestent quand, dans le cas Holditch, les terrains sont vendus sans conditions, et qu'il n'y a pas de plan d'ensemble pour la construction des bâtisses. Dans le cas de la propriété McAnulty, les terrains sont vendus avec des restrictions, les bâtiments doivent avoir une certaine uniformité, et le tout constitue une étendue de terre connue sous le nom de *Montreal Park.*

(1) 50 Can. S.C.R. 265.

(2) [1916] 1 App. Cas. 542.

Il me semble alors que la décision Holditch ne peut pas être avantageusement invoquée par la cité de Montréal. Les faits que ont été prouvés dans la cause de *Cowper-Essex* v. *Acton Local Board* (1) me paraissent plus conforme à ceux que nous constatons dans la présentte cause.

Dans cette cause de *Cowper-Essex* (1), le propriétaire conservait sur l'amélioration et l'usage des parties vendues et non vendues un contrôle tel, qu'il éprouvait, comme disait Lord Summer

> a real and prejudicial difference between his ability to deal with what remained to him after the compulsory taking of the land and his ability to deal as a whole with both it and the land taken before such compulsory taking.

Pour ces raisons, l'appel doit être renvoyé avec dépens.

La somme réclamée par la compagnie McAnulty parait à première vue très élevée; mais il ne faut pas oublier que les Commissaires ont le droit, en fixant l'indemnité, de prendre en considération la plus-value donnée au terrain par l'ouvrage projeté (art. 421 Charte). Je présume que cette fosse Imhoff pour la construction de laquelle on a pris certains lots facilitera l'égout de tous les lots pour lesquels on réclame des dommages.

Une autre question a été soulevée par un contre-appel, c'est de savoir si la compagnie McAnulty a droit d'être indemnisée pour ses dépenses de procureurs et de témoins.

Cette question avait été décidée en 1892 dans un sens favorable à l'indemnitaire dans une cause de *Sentenne* v. *Cité de Montréal* (2). Mais en 1899 la legislature a déclaré que la cité de Montréal n'était pas tenue de payer aucun frais de témoins, de sténographe ou d'avocats dans les procédures en expropriation. Cette disposition de la loi est tellement formelle qu'il n'y a pas lieu d'appliquer la décision Sentenne.

Ce contre-appel est donc mal fondé et doit être renvoyé avec dépens.

MIGNAULT J.—Two questions are involved under the appeal and the cross-appeal in this case.

1. Were the expropriation commissioners justified in

(1) 14 App. 153.
(2) [1892] Q.R. 2 Q.B. 297.

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refusing compensation for depreciation of the respondent's lots not taken because these lots are distinct and separate from the expropriated lots and because, in the opinion of the commissioners, the depreciation would not result from the expropriation, but from the establishment and operation of an Imhoff tank on the expropriated lots?

2. Were the commissioners justified in refusing to comprise in the compensation counsel fees and the charges of the expert witnesses produced by the expropriated party?

These two questions are questions of law and the parties might have avoided the considerable expense of printing the voluminous testimony before the commissioners by agreeing on the statement of facts contained in the judgments and which they do not dispute. This is a remark that could be repeated in many cases where points of law alone are involved and where the parties could notably reduce the cost of the proceedings by sensibly agreeing on the essential facts.

I will now examine these two questions, the first being the subject of the appeal, the second of the cross-appeal.

First question. The right of the respondent to damages for depreciation of its lots which were not taken, turns on the proper construction of the expropriation provisions of the Montreal City Charter.

In the two courts below it was apparently considered that this question involved a choice between the decisions of the House of Lords and of the Judicial Committee respectively in *Cowper-Essex* v. *Local Board for Acton* (1), and *Holditch v. Canadian Northern Ontario Railway Co.* (2). I do not mean, when I use the word "choice," that it was thought that these decisions were in conflict, but merely that they applied to different circumstances. In the former case, as well as in the recent case of *The Sisters of Charity of Rockingham* v. *The King* (3), the expropriated party, a portion of whose land was taken, was held to be entitled to compensation for the depreciation of the residue, not taken, of his land due to the anticipated legal use of works which might be constructed upon the lands taken. I may perhaps be permitted to add that the judgment in

(1) 14 App. Cas. 153. (2) [1916] 1 A.C. 536.
(3) [1922] 2 A.C. 315.

the *Sisters' Case* (1) contains a very useful and comprehensive statement of the English case law in matters of compensation. In the *Holditch Case* (2) compensation was refused for injurious affection by noise, smoke or vibration to lands separate and disjoined from those taken.

With respect I think that the expropriation provisions of the Montreal City Charter sufficiently differ from the enactments considered in the three cases above mentioned to leave us free to place a construction on these provisions uncontrolled, I do not say not aided, by the English decisions on The Land Clauses Consolidation Act, 1845, The Railway Clauses Consolidation Act, 1845, as well as by decisions of the Judicial Committee in compensation cases arising under the Railway Act of Canada.

The expropriation provisions under which the appellant took the respondent's lands are contained in sections 421 and following of the Montreal City Charter, as enacted by 3 Geo. V, ch. 54, section 20. Section 421 allows the city to expropriate lands for any municipal purpose, and paragraph 3 is very explicit as to the indemnity to which the owner is entitled:

> Indemnity, in case of expropriation, shall include the actual value of the immoveable, part of immoveable or servitude expropriated and the damages resulting from the expropriation; but, when fixing the indemnity to be paid, the commissioners may take into consideration the increased value of the immoveables from which is to be detached the portion to be expropriated and offset the same by the inconvenience, loss or damages resulting from the expropriation.

Two elements therefore make up this "indemnity."

1. The actual value of the immovable expropriated, and there is no dispute as to this value;

2. The damages resulting from the expropriation.

"Damages resulting from the expropriation" is a very wide and comprehensive term and would include damages from severance or from injurious affection. It can no doubt be considered that the law-makers of the province of Quebec, when enacting expropriation provisions, have in mind the cardinal principle of Quebec property law, Art. 407 C.C., that

> no one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid.

(1) [1922] 2 A.C. 315.

(2) [1916] 1 A.C. 536.

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But, standing by itself, paragraph 3 of section 421 amply suffices to determine any question with regard to the respondent's right to compensation, which as stated comprises, besides the actual value of the immovable, the damages resulting from the expropriation.

The facts here, according to the judgment of the learned trial judge, are that in 1911 the respondent bought a block of land, 347 arpents in superficies, which it laid out as a residential building subdivision containing about 15 streets and over 3,300 lots, which was treated as one holding. For the benefit of this subdivision the respondent, in contracts of sale or agreements to purchase lots, imposed conditions prohibiting uses of the lots which might deteriorate adjoining parts of the property, and restricting, with the exception of one street, the buildings to be erected thereon to residential buildings constructed at least 10 feet from the front of the lots. Whether these restrictions did or did not constitute real servitudes appears to me immaterial, for they undoubtedly gave the respondent a control over the whole subdivision even after the alienation of some of the lots. During 1912, 1913 and 1914, about a third of the lots were disposed of subject to these restrictions. In February, 1916, the city of Montreal gave public notice of the expropriation of five of these lots required for the construction of an Imhoff tank, which is a sewage filtration plant. The learned trial judge found that the fact alone that the purpose of the expropriation was for the construction and operation of a sewage plant injuriously affected the remaining lots, diminished their value and made their sale more difficult, if not impossible, and specially as regards the lots in the immediate vicinity of the expropriated property.

With this finding of fact there can be no difficulty in coming to the conclusion that this depreciation of the remaining lots is a " damage resulting from the expropriation " and should have been considered by the commissioners. I therefore agree with the judgment of the two courts setting aside the award.

Second question.—Whatever might have been the right of an expropriated party to claim as damages resulting from the expropriation, counsel fees and the cost of expert

witnesses, the Quebec legislature has expressly enacted by section 436 of the Montreal City Charter, as amended by 4 Edward VII, ch. 49, sec. 21, that

> the city is not bound to pay the fees of counsel or witnesses or any incidental costs or disbursements, other than those hereinafter mentioned, for proceedings before the commissioners or before the courts, either for the appointment of commissioners or the homologation of their report or for the withdrawal on behalf of the person indemnified of the sums of money deposited in the prothonotary's office.
>
> The commissioners, appointed by the court and by law shall be entitled to fees as follows:
>
> For appraising vacant immovable property, hearing witnesses, and making award: for each immovable.....$10 00
> For appraising immoveable property, containing buildings, hearing witnesses, and making award: for each immoveable.... 15 00
> For appraising tenants' claims: for each award..... 10 00

This enactment is somewhat obscure on account chiefly of its defective punctuation. The original section 436, as contained in 62 Vict., ch. 58, clearly stated that no fee for witnesses, stenographers, advocates or counsel for any proceedings before the commissioners should be payable by the city. In the substituted section the legislature was dealing with both the non-liability of the city for fees of counsel and witnesses, and with the right of the commissioners to charge certain fees, and, saving the expressly mentioned costs, it imposes no liability on the city to pay for fees of counsel or witnesses. I have no hesitation whatever in adopting on this point the reasoning of the learned judges of the court of appeal.

For these reasons I would dismiss the appeal and the cross-appeal with costs.

Appeal dismissed with costs.

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