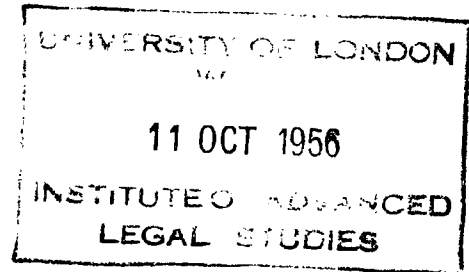


29376



In the Privy Council.

ON APPEAL

From the Court of Queen's Bench for Lower Canada.

BETWEEN

THE ATLANTIC AND NORTH WEST RAILWAY
COMPANY - - - - -

Appellants;

AND

PETER WOOD, et al & s qual - - - - - *Respondents.*

CASE FOR THE RESPONDENTS.

This is an Appeal from an Order or Judgment of the Court of Queen's Bench for Lower Canada, dated the 26th of April, 1893, maintaining an Appeal by the Respondents from a Judge of the Superior Court of the Province of Quebec, District of Montreal, rendered the 17th of 5 November, 1891, and dismissing an Appeal of the Appellants to the said Superior Court, from an award by arbitrators of \$16,308 as com- 10 pensation to the Respondents, Trustees of the Calvary Congregational Church of the city of Montreal, for all damages caused to the Respondents by the exercise by the Appellants of the powers therein mentioned in regard to the land therein mentioned.

The facts of the case are as follows :—

1. The Respondents are the Trustees of Calvary Congregational Church, Montreal, and as such are owners in possession of the property

of that Church, part of Lot 1,604 of St. Antoine Ward of the City of Montreal, fronting on Guy Street. The purchase of the property by the Church was decided upon and authorised by a resolution of the Church at a meeting held on June 22nd, 1874. In pursuance of this resolution the property was originally acquired for the Church in the name of Charles Cushing, Notary, one of the Respondents under a deed of sale executed at Montreal on July 29th, 1874, from Andrew Morton and others. By the deed the whole of Lot 1,604 on the official plan and book of reference of the St. Antoine Ward, containing 96 feet in width in front on Guy Street and in the rear, and 160 feet in depth, was conveyed to the said Charles Cushing.

Record, p. 46.

Record, p. 36.

Record, p. 36.

2. The congregation proceeded to erect a church upon the front portion of the lot fronting Guy Street, and subsequently the said Charles Cushing, still holding for the Church, sold two cottages and lots forming part of the rear of Lot 1,604, to Messrs. Lawson and Hannah respectively, a strip of land 12 feet wide remaining, extending from the front portion of Lot 1,604 to a lane in the rear, over which strip a right of passage was given to Lawson and Hannah.

Record, pp. 100, 101.

3. By deed, dated 10th April, 1879, the said Charles Cushing formally conveyed the remaining portion of the said Lot 1,604 (with the church then erected upon it) after the sale to Lawson and Hannah, and subject to the said right of way given to them over the said strip of land (which, however, was not precisely defined in the said deed) to the Respondents, the Trustees of the Church. The said Charles Cushing had before this conveyance bought for his own benefit part of the adjacent Lot 1,605 from M. C. Mullarky, and had sold it again to various purchasers, giving to the purchasers rights of way over the said strip of land.

Record, p. 38.

Record, p. 101.

Record, p. 102.

4. By deed, dated the 18th of March, 1887, the said Charles Cushing in terms conveyed the said strip of land, part of Lot 1,604, which then formed a way or passage, and a right of way or passage over which had been granted to the said Lawson and Hannah, to the Respondents, Trustees of the said Church. Such strip of land had, subject to the right of way over it, all along formed in equity the property of the said Trustees.

Record, p. 43.

5. In 1887 the Appellants deposited the plan and book of reference of the properties required for their line entering the City of Montreal to the Windsor Street Terminus. On the plan so deposited, the property of the Church is shown on the front portion of Lot 1,604, and is marked A ; the portions sold to Hannah and Lawson are marked with their respective names, the portion called the lane, being the said strip of land, is shown on part of Lot 1,604, and the part of it crossed by the railway is marked No. 67. From this it will be seen that, leaving out of the question the portion called the lane, a small triangular piece of the south corner of what is absolutely the property of the Church is taken by the Appellants. See sketch of property expropriated.

Record, p. 34.

Record, pp. 75, 104.

6. The said triangular piece of land is entirely omitted in the reference numbers of the plan by which the properties intended to be expropriated by the Appellants are respectively distinguished. And it was suggested on behalf of the Appellants before the Arbitrators that the railway did not encroach upon the piece of land, but this is not the case, and should they make an embankment for their railway they must necessarily use it.

Record, p. 104.

Deposition of Charles Cushing.

7. In the proceedings of expropriation which the Appellants instituted against other properties for their line in the vicinity, they entirely ignored the rights of the Respondents, they took no steps to expropriate the said triangular piece of land, or the part of the said lane of which they had taken possession, and they treated it that the Respondents had only a right of passage if any right at all in the lane, and that by building their line on trestle work over the lane, as they proposed to do, they could avoid payment of any compensation. Accordingly the Respondents, on the 30th March, 1887, served a protest on the Appellants not to trespass on the property of the Respondents, and subsequently applied to the Superior Court for an Injunction, which was granted, and the Appellants were ordered to institute proceedings in expropriation under the Railway Act. This they accordingly did and served the notice next mentioned.

Record, p. 70.

8. On the 25th October, 1888, the Appellants filed a notice of expropriation, addressed to the Respondents, of their intention to exercise their powers in regard to the said lane or passage, part of Lot 1,604, the

Record, p. 25.

said powers to be so exercised being the building and maintaining above and over the said lane of a structure on which were to be carried two railway tracks, the supports of the structure being erected, not on the said lane, but on adjoining land, and no part of the said structure being nearer the present surface of the said land than 12 feet, leaving the said land free and clear, with an opening to its full width of 10 feet up to its full height, and offering to pay the sum of \$25.00 as compensation for all damage caused to the Respondents by the exercise of the said powers in regard to the said land. In such notice the Appellants entirely ignored the said triangular piece of land of which they had taken possession, and the rights of the Respondents in relation thereto, and they also treated it that the Respondents had only a right of passage, if any right at all, in the said lane. 5

Record, p. 26.

9. The Respondents refused the said offer of \$25.00 and the Appellants, having nominated R. D. McGibbon as their arbitrator, the Respondents appointed John L. Brodie as their arbitrator for the purpose of ascertaining the compensation to be paid to them for damages in accordance with the Railway Act, and Charles James Fleet was agreed upon as third arbitrator. 15

Record, p. 18.

The usual arbitration proceedings followed, and on the 14th February, 1890, the Arbitrators made their award, whereby the said J. L. Brodie and C. J. Fleet, being a majority in number, awarded the sum of \$16,308 as compensation for all damages caused to the Respondents by the exercise by the said applicants of their powers in regard to the said land. 20

10. At the date of the said award the Appellants had actually constructed the said line on the said trestles, and were running their trains along it in close proximity to the said Respondents' church, and they had taken possession of the said triangular piece of land. 25

Record, p. 14.

11. On the 28th February, 1890, the Appellants petitioned the Superior Court for the District of Montreal to annul and set aside the said award as illegal, irregular and excessive, and leave to issue a writ of summons in conformity with the petition was granted, and such writ was issued on the 11th March, 1890. 30

Record, p. 17.

12. The Appeal was heard on the 10th February, 1891, and on the 17th November, 1891, the Court gave Judgment, reducing the amount of

Record, p. 12.

the award to the sum of \$1,367, and ordered each party to pay their own costs of the Appeal.

13. The contention mainly relied on by the Appellants in the said Court was that no land of the Respondents was taken, and accordingly that
 5 they were not entitled to any indemnity, and that a nominal sum of \$25 offered by the Appellants was sufficient, whereas the Appellants claimed
 first, that, as owners of the strip of land used as a lane, they were, notwithstanding any servitude existing therein, entitled to indemnity for being deprived of the lane and damage to their remaining property; secondly,
 10 that a portion of their land—namely, the said triangular piece—was taken by the Company, and for that they were entitled to indemnity and damage to their remaining property.

14. The Judgment of the said Court decided in favour of the
 Appellants as to the land taken on both points, and held that the Trustees
 15 were entitled only to damage for the land, part of the said lane actually taken, and for certain damage to their remaining property.

15. On the 26th of November, 1891, the Respondents appealed to the
 Court of Queen's Bench, Appeal side, from the said Judgment. There
 was no Cross-Appeal on the part of the Appellants, and it must be taken
 20 therefore that they acquiesced in the right of the Respondents, as owners of the lane and the said small triangular piece of land, to come under the Railway Act, and to be entitled to damages for being deprived of this land, and any consequent damages contemplated by the Act.

16. The Appeal was heard on the 27th of January, 1893, and on
 25 the 26th April, 1893, the Court maintained the Appeal with costs.

17. Although by the said notice of intended expropriation the powers
 to be exercised by the Appellants are nominally restricted to the limits of the lane mentioned in the said notice, yet by the measurement specifically given in such notice of 50 feet 4 inches as the length of the southern
 30 boundary of the expropriated land, from which measurement the Appellants have never desisted, there is, as appears from the plan, an infringement of 2 feet and 4 inches upon the land of the Respondents, in addition to that expropriated within the limits of the said lane.

Record, p. 130.
 Record, p. 141.
 Record, p. 157.
 Record, p. 210.
 Record, p. 215.
 Record, p. 218.

18. It is stipulated by Section 92 of the Railway Act that, for all damage sustained by the expropriated party in consequence of the exercise by the Appellants of their powers, full compensation shall be made, and it appears from the evidence on behalf of the Respondents before the arbitrators (see in particular the depositions of Robert MacAulay and Linus Orton Thayer, of Robert George Hood, of Eliza Lusty, R. W. McLaughlin and the Rev. Wm. M. Barbour) and indeed was not seriously disputed by the Appellants, that the maintenance by the Appellants of the train service over the said trestles has already caused and will cause direct damage, loss and inconvenience to the Respondents, and greatly injure the use and enjoyment of, if it does not render entirely useless, their remaining property for church purposes, to which use it had been applied and dedicated for many years prior to the date of the expropriation notice. 5

Record, p. 94.
 Record, p. 175.

19. It also appears from the depositions of Charles Cushing and of Mr. Beaudry, that the value of the remaining property of the Respondents, which has a frontage of 96 feet on Guy Street, with the church thereon erected, was before the construction of the railway at least \$30,000, and that the land alone was worth at least 75 cents a foot, making a total of \$9,174 for the land alone, and the cost of the erection or value of the church was about \$21,000, and that the cost of erecting a similar church on another site in the year 1888 would amount to between \$20,000 to \$25,000. See Depositions of R. G. Hood, J. A. U. Beaudry, W. T. Thomas, and Charles Fyfe. 15 20

Record, p. 157.
 Record, p. 175.
 Record, p. 197.
 Record, p. 205.

20. Accordingly the award of the sum of \$16,308 to the Respondents as compensation was in no sense excessive. 25

Record, p. 366.

21. On the 19th May, 1893, the Appellants obtained leave to appeal to Her Majesty in Her Privy Council, against the Order of the Court of Queen's Bench, on their giving security as thereby provided, as they have since done. 30

22. The Respondents submit that the said Appeal ought to be dismissed for the following, among other

REASONS.

- 5
1. Because, as owners of the said lane or passage, and of the said small triangular piece of land, they were entitled to indemnity by the Appellants for being deprived of the land occupied by the line, and for the damage caused to their adjoining property.
- 10
2. Because the amount of the damage awarded by the arbitrators was rightly arrived at after a full hearing of witnesses and of all material facts, and was in respect of as well the loss by the Respondents of the said land as of the damage sustained by them by reason of the severing of such land from their other property, and of the fact that their other property was injuriously affected by reason of the exercise of the powers of the Appellants, and there was no
- 15
- 20
- injustice in the award.
- 25
3. Because the powers conferred on the Appellants included not only the right of taking the said land, but of laying lines upon it and of operating a train service thereon, and the arbitrators acted within their powers in taking into consideration not only the value of the premises taken, but the direct damage caused and to be caused to the remainder of the property of the Respondents by the intended use of what was so taken.
- 30
4. Because, as appears from the evidence before the Arbitrators, the amount awarded as damages was fair and reasonable.

VERNON R. SMITH.

In the Privy Council.

ON APPEAL

*From the Court of Queen's Bench for Lower
Canada.*

THE ATLANTIC AND NORTH WEST
RAILWAY COMPANY - *Appellants;*

AND

PETER WOOD et al ès qual - *Respondents.*

Respondents' Case.

BIRCHAM & CO.,
46, Parliament Street,
Westminster.