IN THE MATTER OF THE RAILWAY ACT; AND IN THE MATTER OF THE DETROIT AND WINDSOR SUBWAY COMPANY

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* March 10
* May 11

STEPHEN KOLODZI AND LOTTIE KOLODZI (CLAIMANTS) ..... APPELLANTS;

AND

THE DETROIT AND WINDSOR SUBWAY COMPANY ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Expropriation of land—Tunnel construction—Power to expropriate part of subsoil—Expropriating company's incorporating Act, 17 Geo. V, c. 83 (Dom.); Railway Act, 1919, c. 68 (Dom.)—Quantum of compensation awarded.

The respondent company was empowered by its incorporating Act, 17 Geo. V, c. 83 (Dom.), to construct a tunnel under the Detroit river, and for that purpose proceeded to expropriate a "parallelopipedon" or core of earth running through and forming part of appellants' land, of a uniform depth or thickness of 33⅓ feet and at depths from ground surface to top of portion taken of about 38 to 34 feet. The said Act provided that "the Company may expropriate and take any lands actually required for the construction * * * or may expropriate and take an easement in, over, under or through such lands without the necessity of acquiring a title in fee simple thereto * * * and all the provisions of *The Railway Act, 1919,* applicable to such taking and acquisition, shall apply as if they were included in this Act * * * *The Railway Act, 1919,* shall, so far as is not inconsistent with the special provisions of this Act, unless the context otherwise requires, apply to the Company and to its works and undertakings and wherever in *The Railway Act, 1919,* the word "railway" occurs, it shall, for the purposes of the Company, mean the subways and tunnels authorized by this Act." The present appeal was from the judgment of the Appellate Division, Ont., 65 Ont. L.R. 398, dismissing the appellants' appeal from the award of compensation to them, made by Coughlin, Co. C.J., as arbitrator.

Held: (1) Respondent had power to expropriate (as it purported to do) a part only of the subsoil, without also expropriating all the soil and the building above it. The said incorporating Act, also the *Railway Act,* ss. 2 (15), 215 (par. a); *Hill* v. *Midland Ry.* Co., 21 Ch. D. 143; *Metropolitan Ry. Co.* v. *Fowler,* [1893] A.C. 416, at 425, referred to. No rule to a contrary effect, based upon the dictum in *Farmer* v. *Waterloo & City Ry. Co.,* [1895] 1 Ch. 527, at 531, was applicable in this case.

(2) Upon the evidence, the amount awarded to appellants by the arbitrator should not be disturbed.

Judgment of the Appellate Division, Ont. (*supra*) affirmed.

* PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

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APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing the present appellants' appeal from the award made by Coughlin, Co. C.J., as arbitrator, for compensation to them for that part of their land expropriated by the respondent for the construction of a tunnel between the city of Windsor, Ontario, and the city of Detroit, Michigan, and for damages resulting therefrom to the remainder of the land. The material facts of the case and the questions in issue are sufficiently stated in the judgment of Cannon J. now reported. The appeal was dismissed with costs.

R. S. Robertson, K.C., and *W. D. Roach* for the appellants.

H. H. Davis, K.C., and *J. B. Aylesworth* for the respondent.

DUFF, J.—The statute of the respondents, in my opinion, empowers them to "expropriate and take" any lands required for the authorized purposes under a title in fee simple or any "easement" required for such purposes.

The pertinent words are:

> The Company may (*a*) expropriate and take any lands actually required for the construction, maintenance and operation of the subways or tunnels authorized by this Act.

Land, as a physical object, may, of course, have boundaries horizontal as well as vertical, curvilinear as well as rectilinear.

I can discover nothing in the statute prescribing the manner in which the lands to be taken are to be bounded; nor anything which says that the company, "actually" requiring a particular piece of land, is under a legal obligation, for the purpose of expropriating it, to "expropriate and take" a much larger piece of land (which is not "actually required"), in order to extend its domain *ab centro usque ad coelum*. Such a result could only be reached by adding words which are not found in the enactment.

(1) (1930) 65 Ont. L.R. 398.

As to the supposed rule of construction based upon a dictum of Kekewich J. in *Farmer* v. *Waterloo & City Ry. Co.* (1), I prefer not to discuss that dictum in the abstract, although at present I see no reason to differ from what Masten, J.A., says about it (2). In construing the statute before us, we are bound to take into account the character of the authorized works and the nature of the powers reasonably necessary for the prosecution of such an undertaking according to the usual methods. In view of these considerations, there is no room for the application of such a rule.

The land owner's protection lies in his right to compensation for severance.

On the questions of fact involved, the conclusions of the Appellate Division (3) seem to me to be well founded.

The appeal should be dismissed with costs.

NEWCOMBE, J.—I agree, for the reasons stated by my brothers Duff and Cannon, that this appeal should be dismissed with costs.

RINFRET and LAMONT JJ. concurred with Cannon J.

CANNON, J.—This appeal is asserted from the judgment of the Second Division of the Appellate Court of the Supreme Court of Ontario (3), which dismissed with costs the appeal of the appellants from the award of His Honour Judge Coughlin, Judge of the County Court of the County of Essex, fixing at the sum of $5,160, with costs, the compensation for that part of the appellants' land expropriated by the respondent for the construction of a tunnel between the city of Windsor, in the province of Ontario, and the city of Detroit, in the state of Michigan, and for damages resulting therefrom to the remainder of the land.

By a notice of expropriation, the respondent notified the appellants that it required for the construction of its tunnel, and offered $5,000 as compensation for, the following land:

All and singular that certain parcel or tract of land and premises, situate, lying and being in the City of Windsor, in the County of Essex and Province of Ontario, being composed of part of Lot number 4, according to Registered Plan No. 91. The part to be taken is of a

(1) [1895] 1 Ch. 527, at 531.
(2) (1930) 65 Ont. L.R. 398, at 402-403.
(3) (1930) 65 Ont. L.R. 398.

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uniform depth or thickness of thirty-three feet six inches (33' 6") measured vertically, the upper face of which is thirty-eight feet ten inches (38' 10") below the top of the sidewalk at the south limit of Sandwich street, and rises with a uniform grade of 3·97%, going southerly from Sandwich street. The vertical projection of the above described parcel, at the surface of the ground, was also specified.

The offer having been refused, an arbitration became necessary to fix the compensation to which the appellants were entitled for the expropriation of what has been called a "parallelopipedon" or core of earth running through and forming part of the appellants' land at a depth from the surface of the ground to the top of the portion taken of some 38 feet at the northerly boundary of the appellants' land and sloping upwards at a uniform grade to a depth of about 34 feet from the surface at the southerly boundary thereof.

The arbitrator applied the word "easement" to the section of land expropriated from appellants and mentioned that the surface area of the land above the easement is 2,101 square feet; and the learned County Judge then proceeds:

In the presentation of the Kolodzi claim the factors contributing to the claim for compensation were separated into two divisions, namely, First: Compensation for prospective damages to the building at present upon the Kolodzi land by the construction and operation of the tunnel; and second: Compensation for the taking of the easement and for all damages resulting therefrom or from the construction or operation of the tunnel exclusive of the damages included in the first division. With respect to both divisions I have not taken into account damages which might be caused through the negligence of the Company or its servants or agents as such damages if suffered by the Claimant would be recoverable by suit against the Company.

With reference to the first division I find that the building on the Kolodzi lands is a three storey brick building upwards of forty years old, in fair condition, and now used as a hotel. I accept Mr. Page's valuation of the building—approximately $17,000 as being a correct valuation.

The expert evidence as to the effect of the construction of the proposed tunnel on this building varies very widely,—from a 50-50 chance of complete ruin on the one side to an almost complete absence of any risk of damage on the other. It seems foolish to have to now make a finding on widely divergent expressions of opinion with respect to a matter which in a few months' time will be absolutely determined by facts then existing. But as no agreement has been come to by the parties to so wait, I must proceed to determine the matter on the evidence produced before me. I am of opinion that in the absence of negligence on the part of the Subway Company, its servants or agents, there is practically no risk of the collapse of the Kolodzi building. There is, in my opinion, a likelihood of some damage occurring and a possibility, not a probability, that some at present unforeseen contingency may, without any negligence on the part of the Company, result in substantial damage to the building.

I think it is fair to conclude that a prospective purchaser would reduce the price he would otherwise be prepared to pay for the building by 20% of its value as ascertained above, namely, $3,400.

With reference to the second division above mentioned it has been urged that the existence of such an easement as that taken, even though no immediate damage should be suffered and though no future damage could be definitely predicted, has an immediate depressing effect with respect to the price obtainable for the land subject to the easement. I am satisfied that this contention is entitled to some consideration. It is urged that if the tunnel were not there there would be a prospect that the land would some day be used as a site for an office building or some other high structure. On this last mentioned point I am satisfied on the evidence given that within a few years at the most, when whatever subsidence may result from the construction of the tunnel has terminated, a ten storey building may be erected with the same safety and cost as if the tunnel were not there. The inability to build a still higher structure would in my opinion diminish the present value of the property to but a very slight degree.

Taking the sum of all possibilities which might operate to produce a psychological effect on the mind of an intending purchaser in reducing the price he would otherwise pay, I place the compensation with respect to all the elements referred to in the second division at 10% of the value of the land exclusive of the buildings.

I find the value of the land alone to be $17,600, making the compensation under this head $1,760.

Adding the above amounts of $3,400 and $1,760 together makes a total of $5,160 which sum I award the claimants Kolodzi and I direct that the costs of the arbitration be paid by the Company.

In arriving at the above amounts I have paid some attention to the offers made by the Company or by persons acting in their interest as some evidence of the psychological effect of the easement and of the prospect of damages on the market value of the servient property.

The appellants served a notice of appeal from the award in which they set forward the following grounds :

1. That the learned Judge, as Arbitrator, erred in finding that the value of the Claimants' land would be depreciated by reason of the easement in favour of the Respondent by only ten (10) per cent. of the value of the land, exclusive of the building.

2. That the amount awarded by the learned Judge, as Arbitrator, for damages for depreciation by reason of the presence of the easement as aforesaid, is an arbitrary sum not supported by the evidence and that, upon the evidence, the learned Arbitrator should have found that such depreciation will be greatly in excess of the amount awarded.

3. That the learned Judge, as Arbitrator, having found as a fact that there is a likelihood that the construction of the tunnel by the Respondent through the Claimants' land below the building thereon will cause some damage, and that there is a possibility of substantial damage to the building being caused thereby, erred in concluding, as a result of such finding, that the damage to the claimants by reason thereof is only twenty (20) per cent. of the value of the building, and that having made that finding of fact he should have awarded the Claimants a sum approximating the total value of the building.

4. And upon such further grounds as may be alleged by Counsel on the hearing of the appeal.

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We concur with the Court of Appeal (1), and especially with the reasons of Honourable Justice Masten that, upon the evidence, the quantum of the allowance could not effectively be attacked. The reasons of the arbitrator appear to be entirely satisfactory and the evidence would not warrant any disturbance of the amount of the award. The appellants, while retaining the ownership of the building, are claiming 100% of its value, as prospective damages.

Counsel for the appellants, however, here and before the Court of Appeal, raised a point not covered by the notice of appeal and argued that the Special Act under which the respondent derived its power of expropriation did not permit it to expropriate any part of the substratum; but it was bound to take the whole of the land, from the centre of the earth to the sky and that consequently the whole proceedings were vitiated *ab initio* and the award invalid.

Although the Court of Appeal might have disposed of this point by refusing to entertain it, the parties were, however, heard upon it and Mr. Justice Riddell accepted the appellants' view in his dissenting judgment. We must therefore give due consideration to this phase of the appeal.

With all respect for the dissenting opinion, we believe that the question must be determined by referring to our own *Railway Act* and the Special Act incorporating the company, 17 Geo. V, c. 83, which reads as follows, in part:

Whereas a petition has been presented praying for the incorporation of a company to construct and operate subways or tunnels for vehicular, pedestrian, railway and other purposes, beneath the bed of the Detroit river from the city of Windsor, the town of Sandwich and the town of Walkerville to the city of Detroit as hereinafter set forth, and it is expedient to grant the prayer of the said petition: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

* * * * *

12. The Company may,—(*a*) lay out, construct, complete, maintain, work, manage and use subways or tunnels under the Detroit river, for vehicular, pedestrian, railway and other purposes, with the necessary approaches from convenient points on the Canadian side in or near the city of Windsor, the town of Sandwich and the town of Walkerville, to points in or near the city of Detroit, in the state of Michigan, one of the United States of America;

(*b*) construct, maintain and operate elevators, lifts, escalators, and other means of ingress to and egress from the said subways or tunnels;

* * * * *

15. The Company may,—(*a*) expropriate and take any lands actually required for the construction, maintenance and operation of the subways

(1) (1930) 65 Ont. L.R. 398.

or tunnels authorized by this Act, or may expropriate and take an easement in, over, under or through such lands without the necessity of acquiring a title in fee simple thereto, after the plan of such lands has been approved by the Governor in Council; and all the provisions of *The Railway Act, 1919,* applicable to such taking and acquisition, shall apply as if they were included in this Act; and all the provisions of *The Railway Act, 1919,* which are applicable, shall in like manner apply to the ascertainment and the payment of the compensation for or damages to land arising out of such taking and acquisition, or the construction or maintenance of the works of the Company;

* * * * *

21. *The Railway Act, 1919,* shall, so far as is not inconsistent with the special provisions of this Act, unless the context otherwise requires, apply to the Company and to its works and undertakings and wherever in *The Railway Act, 1919,* the word "railway" occurs, it shall, for the purposes of the Company, mean the subways and tunnels authorized by this Act.

Clause 2 of the *Railway Act,* R.S.C., 1927, chapter 170, is also relevant:

2. In this Act, and in any Special Act as hereinafter defined, in so far as this Act applies, unless the context otherwise requires,

(15) "lands" means the lands, the acquiring, taking or using of which is authorized by this or the Special Act, and includes real property, messuages, lands, tenements and hereditaments of any tenure, *and any easement, servitude, right, privilege or interest in, to, upon, under, over or in respect of the same.*

The words from "and any easement" to the end of the subsection were added by chapter 68 of the statutes of 1919, section 2, and introduced a radical change in the nature and extent of a railway company's right of expropriation. The right to expropriate a mere easement was then given expressly for the first time. Therefore, it would appear that the *Railway Act,* as amended, would have justified, without the special powers given by its Act of incorporation, the taking of that part of the appellants' lands actually required for the passage of the tunnel. Section 215, paragraph (*a*) of the same *Railway Act* confirms our view, when it directs that the notice of expropriation to be served shall contain either a description of the land to be taken or of the *power to be exercised* with regard to any land therein described.

We believe that the respondent had power to expropriate a part only of the sub-soil without also expropriating all the soil and building above it.

The learned arbitrator gave the name of easement to the acquisition in fee simple of the parallelopipedon (i.e., a prism whose six faces are parallelograms) beneath the surface of defendants' land. The company is clearly author-

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ized by section 15 of its charter to expropriate and take an easement in, over, under, or through any land, provided that portion is actually required for the construction, maintenance and operation of its tunnel. The easement of tunnelling seems to have been recognized in England as early as 1882 in *Hill* v. *Midland Railway Company*, (1), where the heading mentions the "easement of tunnelling under land"; Fry, J., in referring to plaintiff's argument, uses the word "easement" to describe the "right to construct a tunnel" and finds that the word "lands" in the English *Lands Clauses Act* "is declared to extend to tenements and hereditaments of any tenure" and asks himself "whether this easement, or the right to construct this tunnel, is or is not a hereditament." "It is a right to enter upon the land to construct a tunnel, and to enjoy and use that land for particular purposes"; and the learned justice added what may be applied to this case *mutatis mutandis:*

> But then it is said (and said with perfect truth) that there are decisions which shew that generally easements are not included within the word "lands" in the 85th section (of the English *Lands Clauses Act*). But why are they not included? Not because they are not hereditaments within the meaning of the 85th section, but simply because there is usually no power to take an easement. That is the defect in the ordinary scheme of legislation with regard to railways which prevents easements coming within the scope of the definition of the word "lands".

This defect, in this case, has been remedied by this new subsection 15 of clause 2 of our *Railway Act* and the charter of the respondents.

The respondents were authorized to expropriate and use a portion of the subsoil for the construction of their tunnel; and we say, paraphrasing Lord Watson, in *Metroplitan Railway Company* v. *Fowler* (2), that the nature of the Company's power depends upon the provisions of the Act authorizing their undertaking. As matters stand, the owners of the soil (the appellants) are practically divested of interest in that part of it which has been converted into a tunnel. They have no right to occupy it and their exclusion is not for a limited period but for all time coming. To expropriate means to appropriate compulsorily, i.e., to take and keep a thing by exclusive right; and, we consider, under the Act, the authority conferred upon the company is to take and exclusively possess as much of the sub-soil

(1) (1882) 21 Ch. D. 143. (2) [1893] A.C., 416, at 425.

under such lands as may be actually required for the purposes of the undertaking.

For these reasons, and for those given in his carefully prepared judgment by Masten, J.A., we are of opinion that the notice of expropriation was well given, that the proceedings were regular and that the award should not be interfered with.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Roach, Riddell & Dore.*

Solicitors for the respondents: *Bartlet, Bartlet, Barnes, Aylesworth & McGladdery.*

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*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

(1) (1930) 2 M.P.R. 350.