

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The North Shore Railway Company v. Pion and others, from the Supreme Court of Canada; delivered 1st August 1889.*

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Present:

THE EARL OF SELBORNE.  
LORD WATSON.  
LORD BRAMWELL.  
LORD HOBHOUSE.  
SIR RICHARD COUCH.

[*Delivered by the Earl of Selborne.*]

The Appellants in this case are a Canadian Railway Company, against whom an action was brought by the Respondents, tanners at Quebec, in October 1883. The Respondents carried on their business upon riparian land belonging to them, which had a frontage of considerable length to the St. Charles, a tidal navigable river within the limits of the Harbour of Quebec. The Appellants in 1883 made their railway upon the foreshore of that river, by means of an embankment extending along the entire length of the Respondents' frontage, not, however, taking any part of the Respondents' land; and in this embankment they left one opening, 15 feet wide and 12 or 13 feet high, opposite to the tannery, through which the river was accessible at low tides and at some (but not all) high tides. With that exception they cut off all access to the water from the Respondents' land, which before those

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works were executed was always accessible for boats at high water along its whole frontage. The Appellants also made another opening, just outside the boundary of the Respondents' land, and opposite to the end of a public street, through which the Respondents might, except at certain high tides, have found access by means of that street to the water. No compensation or indemnity was paid or offered by the Appellants to the Respondents; who brought their action, complaining that they had been unlawfully shut out from their access to the river, and asking for damages, and that the Company might be compelled to demolish and remove the obstruction.

On the 26th of March 1885 Mr. Justice Casault, the Judge of the Superior Court of Lower Canada, gave judgment for the Plaintiffs, not ordering the demolition or removal of the Railway Company's works, but giving \$5,500 as damages for the permanent deterioration and diminution in value of the Plaintiffs' land, independently of the trade carried on upon it. On appeal, the Court of Queen's Bench for Lower Canada, by a majority of four out of five Judges, reversed that judgment. The grounds of reversal, as stated on the face of the order, were, that the Company had not taken any part of the Plaintiffs' land nor caused it any physical damage ("*dommage matériel*"), but "had only, " by constructing their railway between the " Plaintiffs' property and the river, deprived " them of the power which they had previously " had of communicating freely with the river, " and of the advantages of the navigation for " the purposes of their business; and that this " power of access to the river was not an ex- " clusive advantage, but, on the contrary, might " be exercised by all the Queen's subjects, and " conferred upon the Plaintiffs no more than

“indirect advantages, without giving them the right to an indemnity for the loss of those advantages.”

The Plaintiffs appealed to the Supreme Court of Canada, which, on the 20th of June 1887 (also by a majority of four out of five Judges), reversed the judgment of the Court of Queen’s Bench, and restored and affirmed that of the Superior Court of Lower Canada. The present appeal to Her Majesty in Council is from that judgment.

It appears clear to their Lordships, that the judgment of the Court of Queen’s Bench, which the Supreme Court reversed, could not be maintained upon the grounds assigned for it, unless the rights which belong by the law of Lower Canada to the owners of riparian lands, on the banks of a river which is not navigable, are denied to them when the river is (as in this case) navigable and tidal. Unless that proposition can be established, what was said by Lord Cairns in the case of *Lyon v. Fishmongers’ Company* (1 App. Ca., 671) must be as true and as applicable at Quebec as in England. Distinguishing the public right of navigation from the rights belonging to the owner of the riparian land as such, His Lordship said,—“When this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place, and it becomes a form of enjoyment of the land and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction.”

In the view of their Lordships, this case raises for decision two, and only two, substantial ques-

tions,—first, whether the land of the Respondents (Plaintiffs below) has suffered, by the execution of the Railway Company's works, any such damage or injury as to make an indemnity due to them from the Company; and secondly, whether the Respondents have taken the proper course for obtaining that indemnity, if it is their right. In their Lordships' judgment, the first of those questions must, upon the facts, be answered in the Respondents' favour, unless it can be made out that, by reason of some distinction in the law of Lower Canada between navigable or tidal and non-navigable rivers, they had not those rights as riparian owners in the *locus in quo*, which they would have had if the river had not been navigable. Upon this point their Lordships consider that the burden of proof was upon the Appellants; the Supreme Court has held the contrary; and their Lordships could not advise Her Majesty to reverse the judgment of that Court, unless satisfied that it was erroneous.

In *Miner v. Gilmour* (12 Moore, 157), this tribunal determined, after two arguments (in 1858), that with respect to riparian rights (in that case the river was not tidal or navigable), there was "no material distinction between the law of Lower Canada and the law of England." Lord Kingsdown, delivering the judgment of the Committee, said:—"By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes, and for his cattle; but, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below

“him.” The question, whether this general law was, in England, applicable to navigable and tidal rivers arose, and (with the qualification only that the public right of navigation must not be obstructed or interfered with) was decided in the affirmative by the House of Lords, in *Lyon v. the Fishmongers Company* (1, App. Ca.). That decision was arrived at not upon English authorities only, but on grounds of reason and principle, which (if sound, as their Lordships think them) must be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*. The reasons assigned by Chief Justice Dorion in the Court of Queen’s Bench for the judgment of that Court were not addressed to any distinction in principle between riparian rights on the banks of navigable or tidal and on those of non-navigable rivers, but they treated the complaint as if it turned upon a claim to use, not the Plaintiffs’ riparian land, but the beach or foreshore belonging to the Crown, for access to the river. If this had been so, and if the Plaintiffs’ land had been at all times divided from the river by a dry beach or foreshore in the nature of a public highway, open to all the Queen’s subjects, the same question might have arisen here, which was considered and determined in England in the case of the Metropolitan Board of Works *v. M’Carthy* (7, English and Irish Appeals, p. 243). But that is not the state of facts with which their Lordships have to deal. The *grève*, or foreshore, is not mentioned in the Plaintiffs’ declaration, which alleges an obstruction of the Plaintiffs’ access to “the river St. Charles,” and the construction of a *quai*, about 15 feet high, completely shutting off the Plaintiffs’ access to the said “river”; and that

the Plaintiffs' access from their property "to the "said river" had been rendered impossible. The fact being established by the evidence, that the Plaintiffs' bank was always accessible with boats at high water, what was said in *Lyon v. Fishmongers' Company* (1, App. Ca., 683), is equally applicable here:—"It is true that the bank of "a tidal river, of which the foreshore is left "bare at low water, is not always in contact "with the flow of the stream; but it is in such "contact for a great part of every day in the "ordinary and regular course of nature, which "is an amply sufficient foundation for a natural "riparian right."

The only ground of distinction suggested between a non-navigable river (such as that in *Miner v. Gilmour*) and a navigable or tidal river, forming at high water the boundary of riparian land, was that in the case of a non-navigable river the riparian owner is proprietor of the bed of the river *ad medium filum aquæ*, which, in the case of a navigable river such as the St. Charles, belongs to the Crown. The same distinction was contended for in *Lyon v. the Fishmongers' Company*; but the House of Lords, on grounds with which their Lordships concur, thought it immaterial. Lord Cairns rejected the proposition that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream; he adopted the words of Lord Wensleydale in *Chasemore v. Richards* (7, H. L., 382):—"The "subject of right to streams of water flowing "on the surface has been of late years fully dis- "cussed, and by a series of carefully considered "judgments placed upon a clear and satisfactory "footing. It has now been settled that the right to "the enjoyment of a natural stream of water on "the surface, *ex jure naturæ*, belongs to the pro- "prietary of the adjoining lands, as a natural

“ incident to the right to the soil itself, and that  
 “ he is entitled to the benefit of it, as he is to all  
 “ the other natural advantages belonging to the  
 “ land of which he is the owner. He has the  
 “ right to have it come to him in its natural  
 “ state, in flow, quantity, and quality, and to go  
 “ from him without obstruction, upon the same  
 “ principle that he is entitled to the support of  
 “ his neighbour’s soil for his own in its natural  
 “ state.” It was said in the same case of *Lyon*  
*v. Fishmongers’ Company*, p. 683), “ It is, of  
 “ course, necessary for the existence of a riparian  
 “ right that the land should be in contact with  
 “ the flow of the stream ; but lateral contact is as  
 “ good, *jure naturæ*, as vertical ; and not only  
 “ the word ‘ riparian,’ but the best authorities,  
 “ such as *Miner v. Gilmour*, and the passage  
 “ which one of your Lordships has read from  
 “ Lord Wensleydale’s judgment in *Chasemore v.*  
*Richards*, state the doctrine in terms which  
 “ point to lateral contact rather than vertical.”  
 This is followed by the words already cited as to  
 its being sufficient that this contact should exist  
 daily, in the ordinary and regular course of  
 nature, though it may not continue during the  
 whole of any day.

Their Lordships have considered the autho-  
 rities referred to in support of this part of the  
 Appellants’ argument, and they are of opinion  
 that none of them tend to establish the non-  
 existence of riparian rights upon navigable or  
 tidal rivers in Lower Canada, or to show that  
 the obstruction of such rights without Par-  
 liamentary authority would not be an actionable  
 wrong, or that, if in a case like the present the  
 riparian owner would be entitled to indemnity  
 under a statute authorizing the works on con-  
 dition of indemnity, the substituted access by  
 openings such as those which the Appellants  
 in this case have left would be an answer

to the claim for indemnity. The French law prevailing in Lower Canada recognizes generally, in cases of this nature, the right of *accès* and *sortie*; and under that law any substantial obstruction of it, by persons in other respects authorized, would give (*primâ facie*) a right to indemnity. The only authorities relied upon by the Appellants to which their Lordships think it necessary now to refer, are two Lower Canada cases, the *Queen v. Baird* (4, Lower Canada Reports, p. 325), and *Starnes v. Molson* (1, Montreal Law Reports, pp. 425—431), and a modern French case *in re Joanne Rousseray*, quoted from the Second Part of Sirey's Decisions of the Imperial Courts in 1865.

In the *Queen v. Baird* there was upon the facts, as proved, no question of riparian right, or of any obstruction of access to the river. The dispute related to land which the nuns of a certain religious house at Quebec had reclaimed from the foreshore of the river, so that the water ceased to flow over it (4, Lower Canada Reports, p. 339), and to which the Crown had afterwards established its title. The only question was whether the Crown could grant it to other persons without giving that religious house a right of preference or pre-emption, and this question was determined in favour of the Crown. In the grant actually made, there was a condition, reserving free access to the inhabitants there, and to the public generally, to pass and repass at all times over the wharves and roads. That case throws no light upon the present controversy.

In *Starnes v. Molson* (decided in 1885) riparian land fronting upon the river St. Lawrence was taken by a Railway Company, and a separate sum was assessed as indemnity for the loss of the river frontage belonging to that land. This the Court held to be wrong, on the ground,



apparently, that nothing ought to have been valued, except the land taken to which that frontage belonged. It is not clear to their Lordships that the Court, in that case, meant to determine that the land ought to have been valued as if it had no frontage to the River St. Lawrence, or as if it possessed no riparian rights. If the decision ought to be regarded as having any such consequence, their Lordships could not hold themselves bound by it upon the present appeal.

The French case of Rousseray was considered by Mr. Justice Taschereau to be in point to the present; but their Lordships are unable to concur in that opinion. Even if it ought to be assumed (which is far from certain) that the law on which it was decided was in substance identical with the old French law in force in Lower Canada before the British Conquest, that case turned upon considerations which, in their Lordships' judgment, make it irrelevant to the question before them. It was the case of an *opus manufactum*, or pier, projecting into the bed of the river Seine, which a riparian owner had erected under a revocable license from the proper authorities. Those authorities afterwards executed works in the river which obstructed or prevented its use; and it was held that, as they could revoke the license whenever they pleased, the riparian owner had such use by tolerance only, and not of right, and that there was no claim for compensation.

Most of the other French authorities cited, and also the case before this tribunal of Mayor of Montreal *v.* Drummond, related not to riparian rights, but to the extent to which the owner of a house fronting a public street could claim compensation from the public authority for the indirect effect upon his convenience, as owner of such house, of obstructions or alterations in the

street, made by that authority, at points more or less remote from his frontage. None of them had any tendency to show that if the direct and immediate access to the street from his house had been wholly or in part cut off, so as to take away or substantially diminish his right of *accès* to, or of *sortie* from, the house itself, this would not have been a proper subject of indemnity. The contrary was treated as law by the Judicial Committee in *Mayor of Montreal v. Drummond*, 1, App. Ca., p. 406, and *Bell v. Corporation of Quebec*, 5, App. Ca., pp. 97 and 98.

Their Lordships, therefore, concur in the view of the first question in this case taken by the Supreme Court of Canada. It remains to be considered whether the Respondents' action was properly brought. That depends mainly upon the provisions of the Quebec Railway Consolidation Act of 1880.

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.

That Act throws upon the Company, in all cases, the obligation of depositing maps and plans, and, till these are deposited, the railway is not to be proceeded with. Of this, when it is done, notice must be given in certain newspapers, and then, after one month, the Company (under

Section 9, Sub-section 11) may apply to the owners of lands or to parties empowered to sell lands, "or interested in lands which may suffer " damage from the taking of materials or the " exercise of any of the powers granted to " the railway;" and thereupon agreements may be made between them "touching the said lands, " or the compensation to be paid for the same, or " for the damages, or as to the mode in which " such compensation shall be ascertained;" and if the parties differ, then all questions which arise between them shall be settled, as provided in the following sub-sections of Clause 9.

Of these, it is only necessary to refer to four: the first of which (Sub-section 12) provides, that the deposit of the map and plans shall be deemed a general notice to all parties of the lands which will be required for the railway and works; the second (Sub-section 13) that a special notice, to be served upon the landowner, shall contain an offer on the part of the Company of what they deem a fair compensation "for such lands, or " for such damages," and the nomination of an arbitrator to act for the Company, if the offer is not accepted; and such notice is to be accompanied by the certificate of a sworn surveyor of the Province that the sum offered is, in his opinion, a fair remuneration for the land and for the damages caused. Then follow clauses regulating the procedure by arbitration when the Company's offer has been made and is not accepted, and enabling the arbitrators to award a sum of money or an annual rent. Then comes Sub-section 28; providing that "upon payment or legal tender " of the compensation or annual rent awarded or " agreed upon to the party entitled to receive " the same, or upon the deposit in Court of the " amount of such compensation in the manner " after mentioned, the award or agreement shall

“ vest in the Company the power forthwith to  
 “ take possession of the lands, or to exercise the  
 “ right, or to do the thing, for which such com-  
 “ pensation or annual rent has been awarded or  
 “ agreed upon;” with power for a Judge to give  
 effect to the right so vested in the Company, in  
 case of resistance or forcible opposition.

These provisions all depend on the original  
 notice, required to be given by the Company;  
 and the landowner is not expressly authorized to  
 take any step himself in default of the proper  
 procedure by the Company, except (by Sub-  
 section 37) in three specified cases, which do not  
 include the simple case of damage to land not  
 taken or used, by the exercise of the powers  
 granted to the Company. That sub-section is in  
 these words:—“ If the Company has taken pos-  
 “ session of any land, or performs any work  
 “ thereon, or has removed materials therefrom,  
 “ without the amount of compensation having  
 “ been agreed upon or determined by arbitration,  
 “ the owner of the land or his representative may  
 “ himself cause the valuation of the land, or of  
 “ the materials taken, to be made, without pre-  
 “ judice to other legal recourse, if possession has  
 “ been taken without his consent.”

Upon consideration of these provisions, their  
 Lordships think it clear that no authority was  
 given, or intended to be given, to the Railway  
 Company to exercise its powers in such a manner  
 as to inflict substantial damage upon land not  
 taken without compensation.

The Appellant Company, although its maps  
 and plans were duly deposited, never made the  
 application to the Respondents contemplated  
 and authorized by Section 9, Sub-section 11, and  
 never gave them any notice, or made them any  
 offer, or named an arbitrator, as required by  
 Sub-section 13. No compensation for the damage

done to the Respondents' land was awarded or agreed upon, and (of course) no payment, tender, or deposit of such compensation was made.

The effect of provisions similar to those of the Quebec Act of 1880 was lately considered by the Judicial Committee in the case of the Corporation of Parkdale *v.* West (12, App. Ca., p. 602). In that case certain Railway Companies had lowered the roadway of a public street in front of the Plaintiff's property at Toronto, so as to deprive him of the access to the street which he had previously enjoyed; and it was held to be a condition precedent of the right to exercise, as against him, the powers of the Act, that the Company should have taken the prescribed means of ascertaining the compensation due to the Plaintiff, and have paid, tendered, or deposited the amount of such compensation, which they had not done; and under those circumstances, the execution of the work was held to be unlawful, and to give the Plaintiff a right of action for damages. The nature of the injury done in the present case was similar, with the difference only that there the access obstructed was to a street, here to a river. In both cases alike, the damage to the Plaintiffs' property was a necessary, patent, and obvious consequence of the execution of the work.

That authority appears to their Lordships to be in point, unless there is some sufficient reason why they should not follow it. It has been suggested that it is in conflict with an earlier decision of this tribunal, in *Jones v. Stanstead Railway Company* (L. R., 4, P. C., p. 98), and that the point did not require determination in the Parkdale case, in which no maps or plans had been deposited, and the execution of the works of the Railway Companies was, on that ground, clearly *ultra vires*.

The Lords of the Committee who decided the Parkdale case thought their decision reconcilable with *Jones v. Stanstead Railway Company*; and, although it is true that the other ground mentioned might have been sufficient to dispose of that appeal, both points were taken in the argument, and the judgment was pronounced upon both. The words of Section 9, Sub-sections 11 and 28, of the Act by which the present case must be governed, are the same as those of the corresponding Act on which the Parkdale case depended; they deal, *uno statu*, with compensation for land taken and for damage to land not taken; and it cannot be denied that their natural *prima facie* import is to make the ascertainment, and payment, tender, or deposit of compensation a condition precedent of "*vesting in the Company the power,*" in the one case to "take possession of the land," and in the other to "exercise the right, or to do the thing for which the compensation shall have been awarded or agreed upon." Their Lordships find it very difficult to say that these words operate as a condition precedent in the one case but not in the other, at least when the damage to land not taken is (as in the present and in the Parkdale case) a necessary, patent, and obvious consequence of the construction of the works. It may well be that if the statute gives a right to compensation for damage of a different kind, which at the time when the Company had to give its notices and take the other necessary steps to enable it to execute its works could not be foreseen, a different rule must be applicable, by necessary implication from the provisions, on the one hand entitling the landowner to compensation, and authorizing, on the other, the construction of the works. It could not be meant, in such a case, to nullify those provisions,

against either the landowner or the Company, by making them dependent upon impossible conditions. But it does not follow that conditions, precedent according to their natural import, should not be held to be such as to all those matters to which their application, as conditions precedent, is reasonably practicable.

This does not appear to their Lordships to be contrary to anything really decided in the case of *Jones v. Stanstead Railway Company*. The Judicial Committee had to deal in that case with a claim of the same kind which the House of Lords, *in re Hammersmith Railway Company v. Brand*, determined to be incompetent under the English Acts; a claim to compensation for deterioration in value of a bridge over the river Richelieu belonging to the Plaintiff, by reason of the Company having carried their railway across that river by another bridge near the Plaintiff's. "This injurious effect" (said their Lordships) "does not arise necessarily " from the construction of the bridge, but may " do so from the use of it; and it is apparent " that if the railway had never been completed, " or if no disturbance had taken place by its " carrying traffic which would otherwise have " come to his bridge, the Appellant would not " have been injuriously affected, or entitled to " compensation at all " (L. R., 4 P. C., p. 120). It might well have been determined in that case, upon the principle of the *Hammersmith Railway Company v. Brand*, (for their Lordships thought the English authorities in point), that the Plaintiff had no right to compensation. But there was another English authority of the *Queen v. Cambrian Railway Company*, afterwards overruled, (see L. R., 6 Q. B., 422, and 2 Q. B. Div., 224), which induced them to assume, for the purposes of their judgment, that the claim to compensation might possibly be capable of being maintained.

The principle on which they proceeded was, that the ascertainment and payment or tender of compensation, before executing the works, could not reasonably be held, on the construction of the statute under which that railway was made, to be a condition precedent in cases in which "injuries might happen subsequently to the building of the railway, and as an unforeseen consequence of the works." "It is not reasonable," they said, "to suppose that the Legislature intended that the Company should, *in cases like these*, be subject to actions as wrongdoers, and to the legal liability of having their works stopped, because compensation had not been first made to all persons injuriously affected by the consequences of their operations" (L. R., 4, P. C., pp. 119, 120). They thought, however, that the condition (expressed in the same terms as those of the Quebec Act of 1880) might properly be held precedent as to the taking of lands for making the railway. If so, it is difficult to deny to the same words, used *uno flatu* as to the taking of lands, and as to the exercise of powers causing damage to lands not taken, the same operation and effect, as far as the nature of the case will allow. It is true, that there are expressions in the judgment delivered in *Jones v. Stanstead Railway Company* which might seem to restrict the condition precedent to lands taken, as distinguished from lands injuriously affected. But their Lordships are not satisfied that it was intended to lay down a proposition wider than that necessary for the particular case.

Their Lordships will, in the present case, advise Her Majesty to act upon the more recent decision of this tribunal; the consequence of which is that they must hold this action to have been properly brought, on the ground that the Appellants did not take the steps necessary, under the Act of 1880,



to "vest" in them "the power to exercise the "right, or do the thing," for which, if those steps had been duly taken, compensation would have been due to the Respondents under the Act. This relieves their Lordships from the necessity of considering whether, if the condition were not precedent, when the Company have failed to do what they ought to have done in order to have the amount of compensation settled under those provisions of the Act which they alone can put in force, and in a case to which Section 9, Sub-section 37, is not applicable, the landowner to whom indemnity is due would be bound, instead of bringing an action, to proceed by way of mandamus to the Company to give notice, make an offer, and appoint an arbitrator, with a view to arbitration under the Act,—a point on which there are observations at the end of the judgment in *Jones v. Stanstead Railway Company* which ought not, in their Lordships' opinion, to be held conclusive, if that question should hereafter arise. It is also unnecessary to consider whether the objection "that the only remedy the Appellants had was by arbitration, under the statute, and not by action," was taken in sufficient time.

Their Lordships do not in this case proceed upon the assumption that the consent of the Lieutenant Governor and Council of Quebec was not duly given to the use made by the Railway Company of the foreshore of the river St. Charles for the construction of their works. If it were necessary to determine that point, the facts would appear to their Lordships rather to justify the presumption, that all necessary consents of all the public authorities of the Province were given; and any other view would seem to be inconsistent with the first recital in the judgment restored and affirmed by the Supreme Court.

A demolition of the Company's works not having

been ordered, it appears to their Lordships (as it did in the Parkdale case) that it was proper to give damages as for a permanent injury to the Plaintiffs' land.

The result of their Lordships' judgment is that they will humbly advise Her Majesty to affirm the decision of the Supreme Court, and to dismiss this appeal, with costs.

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