

1927
Nov. 9.
Dec. 1.

ALBERT VALENCOURTSUPPLIANT;
AND
HIS MAJESTY THE KING.....RESPONDENT.

Expropriation—Petition of Right—Licensee—Deprivation of use and occupation—Compensation—Elements of compensation

Where one is in occupation of part of a street under license from the municipality, by the provisions of which license he was obliged to vacate upon notice before a given date, and when by reason of the expropriation of the property he was forced to vacate before such date, he becomes entitled to compensation for his loss of the use and occupation thereof for the period he was deprived of it by such expropriation, as well as for the extra inconvenience and expense occasioned by reason of having to make an immediate move instead of having the whole life of the license to do so, but not to include the cost of moving.

PETITION OF RIGHT to recover from the Crown \$19,463.23 as compensation for the loss of the use and occupation of a street and for his removal as a result of the expropriation of the land.

The action was tried before the Honourable Mr. Justice Audette at Welland.

W. M. German, K.C., for suppliant.

James E. Day, K.C., for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now (December 1, 1927), delivered judgment.

The suppliant, by his Petition of Right, seeks to recover the sum of \$19,463.25 for the deprivation of the use and occupation of a certain part of Aqueduct street, in the city of Welland, and the removal therefrom of his boiler and blacksmith shops, resulting from the temporary expropriation, by the Crown, of that part of said street for the use of the Welland Ship Canal.

The suppliant holds no paper title to the land on the street in question, but had taken possession of the same in the circumstances and manner hereinafter mentioned. The Crown, by exhibit 4, taking the Municipal Corporation of the city of Welland as the owners of that street, notified them of having expropriated the same in the usual manner, the whole as appears by that exhibit.

Some time about the year 1877 one Herbert Griffith erected upon that part of Aqueduct street in question, his boiler works and blacksmith shops. Griffith having, in 1886, become financially embarrassed, an execution was issued against his property on Aqueduct street, and the sheriff acting thereunder sold to the suppliant the buildings, the machinery and tools, the latter subject to mortgage. No land was sold by the sheriff, no title was given him; but a receipt (which cannot at this time be found) for the moneys paid was given the purchaser.

From that day on the suppliant conducted the same class of business on that part of the street.

It is well to note that a certain part of these buildings is erected on the Crown's land adjoining the canal.

On the 14th April, 1926, and on the 25th November, 1926, the Crown duly expropriated this land or portion of street, for the limited period of three years only, beginning on the 14th April, 1926, and ending on the 13th April, 1929, after which period the said land was to revert absolutely in the Municipality of the City of Welland.

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On the 16th December, 1925, the suppliant bought the Carter property, being lots nos. 27 and 29, on the west side of Aqueduct street, for the sum of \$2,000. This purchase appears to have been made in prevision of his being turned out and ousted from Aqueduct street, as he says in his evidence: "I knew I would have to move in time"; and he adds that the period of two years or so was fixed in the agreement or undertaking with Council, hereinafter mentioned, because the aqueduct was to be then laid on that street.

That part of the street occupied by the suppliant was never fenced and there was always a space for traffic—a space, as will be seen by reference to the plan, allowing pedestrians and even horses and carts to pass onto the Government land.

The suppliant, in due course, having asked leave from the Municipal Corporation for the erection of buildings upon the Carter lot and to remove his buildings from Aqueduct street thereunto, the Municipal Council, evidently with the object of forestalling any litigation, passed the following Resolution reading as follows (Exhibit E.):—

TO WHOM IT MAY CONCERN:

This is to certify that the following is a copy of a resolution passed at the regular meeting of the City Council on Dec. 15, 1925.

Moved by Jas. A. Hughes,

Seconded by S. O. Mason,

That the request of Mr. Valencourt *re* the removal of certain sections of his plant be granted, and that Mr. Valencourt sign and agree to remove the remaining buildings on Aqueduct street, subject to six months from the City Council, notice of removal shall not take effect prior to January 1, 1928.

In compliance with this Resolution the suppliant gave the undertaking which has been filed as exhibit F.

It is well to observe that these two exhibits E. and F. establish conclusively that Aqueduct street is vested in the Municipality and that the suppliant has no title thereto.

Now the claim to a street or highway, as set out in this case, need not be discussed at length.

Once a highway always a highway is an old established maxim for, the public cannot release their rights, and there is no extinctive presumption of prescription.

Dawes v. Hawkins (1); *Cubit v. Maxse* (2); *Piggott v. Goldstraw* (3); *Nash v. Glover* (4); *Regina v. Hunt* (5); *Toronto Electric L. Co. v. Toronto* (6); 16 Hals. 151, 152; *Kline v. Cornwall* (7).

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There can be no doubt that the suppliant has established by the Resolution of the Municipality (Exhibit E) that he became thereunder a licensee and ceased to be a trespasser upon Aqueduct street. He received from the Municipality the permission to remain upon part of that street, subject to revocation. However, that permission or license, without consideration, permitted him to carry on at that place without possessing any estate therein. It was a permission to do lawfully what otherwise would have amounted to trespass. He was not a trespasser at the date of the expropriation.

Now at no time had the suppliant a right to encroach and build any portion of his shops upon the Crown property, and the Crown, at the date of expropriation and before, had the right to oust him of the occupation of its land.

However, I must find it is otherwise with respect to the street vested in the municipality and that in this respect he had a license from the proper authority to occupy it and that, in the result, the expropriation only accelerated by some 20 months, more or less, the time at which he would be compelled to get off the street.

Therefore the compensation, and the only compensation, which he thus becomes entitled to receive in this case is one for being compelled to leave from Aqueduct street 20 months or so before his time, bearing in mind he has, in any case, to leave at once and to move his buildings at once from the part of the Crown's property which is trespassed upon. That compensation must not cover the cost of removing, but only the value of his occupation during the period he was deprived of it by the expropriation. He may have purchased the Carter property 20 months before it was needed and he might have enjoyed the forbearance of

- (1) (1860) 8 C.B.N.S. 848 at 858.
- (2) (1873) L.R. 8 C.P. 704.
- (3) (1901) 84 L.T.R. 94.
- (4) (1876) 24 Gr. 219.
- (5) (1865) 16 U.C.C.P. 145.
- (6) (1915) 21 D.L.R. 859; affirmed by Privy Council; (1916) 31 D.L.R. 577.
- (7) (1874) 21 Gr. 129.

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the purchase moneys with return during that time. This occupation had a value to him; he could have moved during that period, at his pleasure and convenience. And if in the meantime he had vision of large profits made in this removal by consolidating his efforts in making it more costly than necessary, by employing skilled mechanics to do labour work, he himself only is to blame and will have to bear such cost.

For this acceleration in moving, be it 20 months more or less, taking all the circumstances of the case into consideration, and acting as I conceive a jury using its common sense might do in a case of this kind, I hereby fix the compensation for the value of the occupation of such land and for all damages arising out of the expropriation at the sum of \$900 with interest thereon from the 14th of April, 1926, to the date hereof, which the suppliant is entitled to be paid upon giving a satisfactory receipt or acquittance therefor. The whole with costs against the respondent.

Judgment accordingly.