1923
Oct. 22.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

T. W. MAGEE AND OTHERS.....DEFENDANTS.

Expropriation—Land under water—Changing nature of a creek—Possession —Title—Lost grant—Practice—Costs.

1. Where in 1765 an aboiteau (dyke) was constructed in a creek as a permanent work, which has ever since retained its permanent character, and which changes the nature thereof from one used or susceptible of being used for navigation into what is practically an inland creek, the bed thereof may be acquired by possession; and the defendants and their predecessors in title having been in possession thereof as against the Crown for upward of 60 years such adverse possession gave them title thereto.
2. While the practice (following *McLeod* v. *The Queen*, 2 Ex. C.R. 106) is not to allow costs to defendant where the amount recovered does not exceed that tendered as compensation to defendant, yet where the Crown files an undertaking at the trial whereby the defendant recovers some substantial benefit or advantage over and above the compensation, costs may be allowed him.

INFORMATION by the Attorney General of Canada to have certain lands expropriated by the Crown for the purpose of enlarging a yard of the Canadian National Railways valued by the court.

June 15th and 16th, 1923.

Case now heard before the Honourable Mr. Justice Audette, at St. John.

C. F. Inches, K.C. and *E. C. Weyman* for plaintiff.

J. K. Kelly and *W. A. Ross* for defendants.

The facts are stated in the reasons for judgment.

1923

THE KING v. MAGEE.

AUDETTE J., this 22nd October, 1923, delivered judgment.

This is an information exhibited by the Attorney General of Canada, whereby it appears that certain lands, belonging to the defendants, were taken and expropriated by the Crown, under the provisions and authority of The Expropriation Act (R.S.C. 1906, ch. 143), for the purpose of enlarging the yard of the Canadian National Railways, at St. John, N.B., known as "The Island Yard," by depositing of record, both on the 4th March and 9th July, 1920, plans and description of the said lands in the office of the Registrar of Deeds for the city and county of St. John, N.B.

The total area expropriated, as shewn by the amended information is 20.422 acres (twenty and four hundred and twenty-two thousandths acres) for which the Crown offers $400 per acre or $8,168.80 with interest from the date of expropriation to the date of the tender.

The defendants, by their statement of defence, claim the sum of $110,000 with interest and costs.

[His Lordship here discusses the question of value, the facts affecting the same and the principles of law to be followed in estimating the compensation. He cites the case of the *King* v. *Trudel* (1) in which it was decided that

> the estimation of compensation to be awarded to the owners of the lands should be made according to the value of the lands to such owners at the date of the expropriation. The prospective potentialities of the land should be taken into account, but it is only the existing value of such advantages at the date of the expropriation that falls to be determined,

as well as the cases of *Fitzpatrick* v. *Township of New Liskeard* (2), *and Dodge* v. *The King* (3) as to the most cogent evidence of market value, and the *Cedar Rapids Case* (4) to the effect that in estimating the value of the land, it is the value to the owner and not to the taker which is to be estimated, and proceeds.]

It was contended at bar, on behalf of the Crown, that the land in the creek and under water is vested in the plaintiff and that the defendants should not be compensated for the same. As far back as about 1765 the aboiteau in question in this case was constructed as a permanent work and has ever since retained its permanent character. This

(1) [1914] 49 S.C.R. 501.
(2) [1909] 13 Ont. W.R. 806.
(3) [1906] 38 S.C.R. 149.
(4) [1914] A.C. 569, at p. 576.

1923
THE KING
v.
MAGEE.
Audette J.

aboiteau reclaimed a large portion of the lands in that neighbourhood and changed the nature of the creek to one used, or susceptible of being used, for navigation into what is practically an inland creek. That the defendants and their predecessors in title appear to have been in possession as against the Crown for upward of 60 years, and such adverse possession would seem to give the present holders title thereto. Moreover, from the evidence of assertion of ownership and possession since the erection of the aboiteau in 1765, a lost grant might, if necessary, be presumed in favour of the defendants or their predecessors in title. *Tweedie* v. *The King* (1).

Therefore, in consideration of all the circumstances of the case, the above mentioned facts, and more especially that the surrounding lands were sold under similar expropriation at the same time for the sum of $350 to $400 an acre, I have come to the conclusion to fix the compensation for such lands at the sum of $400 an acre, and for the full area of 20.422 acres.

The defendants are further entitled to the execution of the undertaking filed on behalf of the Crown and which reads as follows, namely:—

Whereas the defendants herein by their statement in defence filed on the second day of December, A.D. 1921, by section 7 of the said statement in defence, allege *inter alia,* that at the time of the filing of the expropriation plans herein they owned, possessed and enjoyed a right of way from the Great Marsh Road over and across lots numbers one and thirteen on said plans to lands to the northward of said lots numbers one and thirteen, for which no tender had been made by the said plaintiff, and which said right of way had been destroyed by the said expropriation.

Now this undertaking witnesseth that the Attorney General of Canada on behalf of His Majesty the King hereby undertakes to grant to the defendants, their heirs and assigns, a right of way from their property shown on the plan hereto annexed as lying between the Great Marsh Road and the Canadian National Railways, to the said lands to the northward of said lots numbers one and thirteen, along, across and over that part of the common road shown in red on the said plan hereto annexed which lies between the southern boundary of the Canadian National Railways and the said lands to the northward of said lots numbers one and thirteen, said right of way thus undertaken to be given to be used in common with His Majesty, his successors and assigns, and with all other persons now entitled to use the same, and that His Majesty will, as may

(1) [1915] 52 S.C.R. 197.

reasonably be required, execute such conveyance or assurance if any as may be necessary to give full effect to this consent or undertaking.

Dated this fifteenth day of June, A.D. 1923.

C. F. INCHES,
of counsel for plaintiff.

This undertaking is a valuable one, notwithstanding it leaves with the defendants the maintenance of the road.

The Crown's counsel declared at bar that the plaintiff did not object to an allowance of interest on the compensation from the 22nd June, 1922, to date. However, in view of the fact that while only $400 an acre is allowed as tendered, yet the owners recover over and above that sum what is given through this undertaking; therefore there will be interest allowed as of the date of the expropriation to the date hereof.

There is the further question of the dower of the defendant Nanette C. Magee. The compensation moneys will be made payable to the three defendants upon giving to the Crown a good and clear title, free from all incumbrances, and a release to any claim flowing from such dower. Failing, however, the defendants to give such release there will be a reference to the Registrar of the Court to ascertain, apportion and determine the interest flowing from such dower, as there is presently no evidence on the record and nothing before the court to enable it to deal with the same.

Coming to the consideration of the question of costs which, I must confess, primarily appears somewhat complexing under the circumstances of the case, when the amount tendered is practically allowed and the amount claimed is extravagant. *McLeod* v. *The Queen* (1). However, considering that the defendants, through the undertaking, recover something over and above that amount and that in a case of expropriation the subject is brought into court somewhat against his will, I will exercise my discretion in allowing the defendants their costs of the action, save, however, three-quarters of the costs of their evidence.

I have considered the case under the facts set forth in the information as amended at trial. The information has not as yet been amended; but direction is hereby given that the formal judgment must not issue until after the

(1) [1889] 2 Ex. C.R. 106.

1923

THE KING
v.
MAGEE.

Audette J.

information has been duly amended, pursuant to the order given at trial.

[Judgment was rendered declaring lands vested in the Crown, and the defendants entitled to have performed the undertaking of the Crown, and fixing the compensation for lands taken at $8,168.80 with interest and costs.]

Judgment accordingly.