THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF;

v.

JOHN M. KILBOURN,

DEFENDANT.

1919
May 26.

*Expropriation—Riparian rights — Water-powers — Public work—7 Wm. IV., ch. 66—9 Vict., ch. 37, sec. 7—B. N. A. Act, sec. 108—Valuation of water-powers.*

The River Trent, by a series of statutes, was appropriated by the Crown for the purpose of constructing the Trent Canal. At the time of Confederation the whole river from Rice Lake to the Bay of Quinte had become part of the canal system.

*Held,* that the river had, under the circumstances, become a public work of Canada and passed by sec. 108 of the *B. N. A. Act* to the Dominion at the time of Confederation.

2. That the title of defendant to lots on the river did not carry with it the *solum* or bed of the river, and therefore the defendant had no legal right to compel the dam erected above his lots on the river to be maintained by the Crown.

3. In estimating the value of a water-power the cost of exploiting the same must be considered. That being so, even if the river in question were not a public work no value as enuring to the defendant could be placed upon the water-power, as it would cost more to develop than the results to be attained would justify.

*The King v. Grass,* (1916), 18 Can. Ex. 177, referred to.

THIS was an information exhibited by the Attorney-General of Canada for the expropriation of certain lots in the town of Campbellford.

*Mr. Johnston,* K.C., for the plaintiff, contended that the River Trent was appropriated by the Crown

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for the purpose of constructing the Trent Canal; that the statutes vested the whole river in Public Works Department and gave it the character of a public work. And by sec. 108, *B. N. A. Act,* it passed to the Dominion at the time of Confederation; and, moreover, this river had been declared by statute a navigable river in fact; that the rule of "*ad medium aquae a filae*" is not without exception; that assuming that the River Trent is non-tidal, then the title of a grantee of land bordering thereon runs to the middle thread of the river. But this is a presumption which is rebuttable and in this instance is rebutted by the exclusion of 44 acres from the grant, taken out of the 200 acres of the lot. He further contends that the defendant's title was subject to reservations contained in the original grant from the Crown, which original grant reserved the water, and that, therefore, Kilbourn had no right to the water so reserved; that the owners of the several lots between defendant and the dam further up the river had a right also to the use of the water, and that there was nothing to limit the amount of water or power they could take.

*Mr. McKay,* K.C., for defendant, contended that the statute 6 Wm. IV., ch. 29, only provides for certain expenditures, and the appointment of commissioners—and that there is nothing in all the Acts cited to vest the River Trent—except such lands as they actually took, and that the river was not a public work; these statutes give them authority to construct a canal, which was not limited to the line of the river; they could acquire and hold the boundary of the canal, but it vested in the Crown only what they actually took. He contended that defendant's lands were injuriously affected and that the water

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rights being part of the land shared therewith. He further contended his client was owner of the bed of the river opposite his property and had a right to maintain the dam in question, and had a right to excavate to continue the raceway to and onto his property, and in consequence was entitled to the water-power which could be obtained by such works.

Defendant cited the following authorities: *Lyon v. Fishmongers Co.*,[1] *North Shore R. Co. v. Pion*,[2] *Att'y.-Gen'l. of B. C. v. Att'y.-Gen'l. of Canada* (*Burrard Inlet* case),[3] *Embrey v. Owen*,[4] *Caldwell v. McLaren*,[5] *Lord v. Commissioners of Sydney*,[6] *Miner v. Gilmour*,[7] *Cedar Rapids Case & Lacoste*,[8] *Stockport Waterworks Co. v. Potter*,[9] *Wood v. Waud*,[10] *Durham R. Co. v. Walker*,[11] *Attrill v. Platt*,[12] *Bullen v. Denning*,[13] *Savill Bros. v. Bethell*.[14]

The facts are fully set forth in the reasons for judgment.

The case came on for hearing before the Honourable Mr. Justice Cassels, at Toronto, on January 20 and 21, 1919.

*Strachan Johnston*, K.C., and *G. A. Payne*, for plaintiff.

*Robert McKay*, K.C., and *W. H. Wright*, for defendant.

1 (1876), 1 App. Cas. 662 at 682.
2 (1889), 14 App. Cas. 612.
3 [1906] A.C. 552.
4 (1851), 6 Ex. 353, 155 E.R. 579.
5 (1884), 9 App. Cas. 392.
6 (1859), 12 Moore's P.C. 473, 14 E.R. 991.
7 (1858), 12 Moore's P.C. 156, 14 E.R. 861.
8 16 D.L.R. 168, [1914] A.C. 569.
9 (1864), 3 H. & C. 300, 159 E.R. 545.
10 (1849), 3 Ex. 748, 154 E.R. 1047.
11 (1841), 2 Q.B. 940, 114 E.R. 364.
12 (1884), 10 Can. S.C.R. 425, 481.
13 (1826), 5 B. & C. 842, 108 E.R. 313.
14 [1902] 2 Ch. 523 at 537, 538.

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CASSELS, J. (May 26, 1919) delivered judgment.

An information exhibited on behalf of His Majesty, by the Attorney-General of Canada, plaintiff, and John M. Kilbourn, defendant, to have it declared that certain lands formerly the property of the defendant are vested in His Majesty, and to have the compensation ascertained.

The expropriation plan was registered on November 22, 1910.

The lands in question are said to comprise about thirty-six hundredths of an acre. These lands are situate in the town of Campbellford, and front upon the River Trent, which flows through the said town. The lands expropriated comprise part of lots 8, 9, 10, 11, 12, 13, 14, 15 and 16 in what is called the east factory block.

A point of contention at the trial was that lot 16, marked upon the plan designated "Cady's plan" as lots 16 and 17, and the description in the deed to Kilbourn would include as part of lot 16, this lot marked lot 17. The question as to whether or not lot 16 includes what is called lot 17 on Cady's plan is not of very great moment. Later on, however, as counsel in the course of the trial have dwelt on this particular question, I will deal with it.

The Crown has expropriated 17,613 square feet. The total area of all the lots in question is 30,527 square feet.

The defendant in his defence as originally filed, claimed the sum of $6,000 as compensation for the

portion of the lands expropriated and all damages. By the amendment he changed this amount, and now claims the sum of $20,000.

An interesting question is raised in this case which in my view is not of much moment. The defendant claims a large sum of money for loss of water-power which he claims he acquired as owner of the lots in question, and of which he alleges he has been deprived by the removal of a dam which penned back the waters of the River Trent, causing the waters to flow through the raceway referred to. In my view even if the contention of the defendant were well founded there is practically no value in these particular lots for power purposes. I am of opinion, however, that he acquired no title to the bed of the river or the waters of the river except as an ordinary riparian owner and had no right to have the dam maintained.

The River Trent, by a series of statutes, was appropriated by the Crown as part of the public works required for the Trent Canal. The canal starts from Rice Lake and enters into the Bay of Quinte at Trenton.

I am indebted to the present Mr. Justice Masten when at the bar for the information contained in his argument in the case of *The King v. Grass.*[1] I have referred to the various statutes and verified Mr. Justice Masten's citations.

By ch. 66 of 7 William IV., 1837, it is recited in sec. 1, "that it is highly important that a line of "communication should be formed between the "waters of the Bay of Quinte and Rice Lake, by "improving the navigation of the River Trent."

[1] 18 Can. Ex. 177 at 183.

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Commissioners were appointed to carry out the provisions of that statute. I pass over the statute of 4 and 5 Vict., ch. 38, as it was repealed by a later statute, 9 Vict., ch. 37 (Canada), 1846. By this latter statute a commission was established to superintend, manage and control the public works of the province. By sec. 7 of this statute, the commissioners are given the "control and management of con-"structing, maintaining and repairing of canals, "harbours, roads or parts of roads, bridges, slides "and other public works and buildings now in pro-"gress or which have been or shall be constructed "or maintained at the public expense out of the pro-"vincial funds."

There are provisions enabling the commissioners to enter on property and make surveys, etc. Sec. 23 of this statute, which is of importance, provides, "that the several public works and buildings enum-"erated in the schedule to this Act, and all materials "and other things belonging thereto, or prepared "and obtained for the use of the same, shall be and "are hereby vested in the Crown, . . . and under "the control of the said commissioners for the pur-"poses of the Act."

Schedule "A" to this Act is headed "Public works vested in the Crown by this Act"; and then below is the heading, "Navigation, Canals and Slides," Included in this schedule is the "Rice Lake and the River Trent, from thence to its mouth, including the locks, dams and slides between those points."

This statute in consolidated in the Statutes of Canada (1859), ch. 28, and in the same language as the statute to which I have previously referred.

By the *Confederation Act*, sec. 108, the public works and property of each province enumerated in

the third schedule to this Act shall be the property of Canada. The third schedule to this Act states, "Provincial public works and property to be the "property of Canada." 1. "Canals with lands and "water-power connected therewith."

Counsel for the defendant in the case in question dealt at considerable length upon the point that opposite the lands in question owned by the defendant, the river was non-navigable in fact, and that the title of the defendant extended to the middle of the river.

After the best consideration I can give to the case I am of opinion that the whole of the River Trent, from Rice Lake to the Bay of Quinte, became part of the canal system. It was essential for the construction and maintenance of the canal that the River Trent should be vested in the Crown. It was declared to be a navigable river and became a public work of Canada, and in my opinion passed to the Dominion by the *Confederation Act*.

On August 25, 1852, the Crown granted to David Campbell, clergy reserve lot number 10, in the 6th concession of the Township of Seymour. This patent is the source of the title under which the defendant Kilbourn claims.

In the patent there is a reservation as follows: "Exclusive of the waters of the River Trent, which "are hereby reserved, together with free access to "the shores thereof for all vessels, boats and per- "sons."

The acreage of the lot granted to Campbell by the patent is 156 acres.

It is contended by Mr. Johnston, representing the Crown, that the lot 10 in question comprised 200

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acres, and he refers to the evidence of Proctor to prove this fact.

Mr. James, a provincial land surveyor, measures the area of land covered by the river bed, and states that it comprises 44 acres of land. From this Mr. Johnston contends that the reservation in the patent of the waters of the Trent included the reservation of the bed of the River Trent. There is considerable force in this contention.

At the time of this grant, as I have mentioned, the River Trent became part of the canal system and was declared to be part of the public works of the old Province of Canada, and I have but little doubt that the object of reserving the waters of the River Trent was to prevent any misunderstanding as to title being granted which would prevent the Crown from perhaps diverting all of these waters for the purposes of the canal.

The case of *Kirchhoffer v. Stanbury*[1] was tried before the late Chancellor Spragge in the autumn of 1868. Judgment was delayed for the reasons stated by the learned chancellor in his reasons for judgment, until the year 1878. It was apparently not necessary for the learned chancellor to deal with this question. The suit in question was instituted to have a construction placed in the bed of the river removed. It was obvious, as the learned chancellor pointed out, that if those claiming under Major Campbell did not own the bed of the river the action would necessarily fail, and therefore the question did not arise. In his reasons for judgment, the learned chancellor refers to the effect of the grant. He puts it in this way, p. 416:

[1] 25 Gr. 413.

"The position of the plaintiffs is a peculiar one. "The patent to Major David Campbell, which is put "in by the plaintiffs, is of land in the Township of "Seymour, 'exclusive of the waters of the River "Trent, which are hereby reserved, together with "free access to the shores thereof for all vessels, "boats and persons.'"

The learned chancellor states: "Not a very accur- "ate mode of reservation. It would, however, prob- "ably operate though the *waters* only are reserved "as a reservation of the bed of the river."

It appears that a dam had been erected above the lands in question. There are several lots from 1 to 16, namely, 7 lots further up towards the dam than the lands owned by Kilbourn. Kilbourn's lots commences with lot 8. Raceways were provided for both on the east and on the west side of the river, and mills and other factories had been erected, power to which on the east side was furnished from the raceway situate between those lots and Mill Street.

The Hon. James Cockburn, Kirchhoffer and Robert Cockburn had apparently erected this dam without permission from the Crown, and being in doubt as to their right so to do, they applied to the Crown for a license to maintain this dam, and a license bearing date December 9, 1869, was given. (Exhibit No. 12). It recites the grant of a patent in the year 1852 of lot 10, in the sixth, to David Campbell—and recites as follows:

"And whereas, it is represented unto us that the "said lot of land extends across the River Trent "and includes lots on both sides thereof;

"And whereas, it is further represented unto us "that the said David Campbell subsequently con- "veyed the same to the Honourable James Cock-

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"burn, Nesbitt Kirchhoffer, and Robert Cockburn, "Esquires, their heirs and assigns, and further "that the last mentioned parties have heretofore "constructed a dam for manufacturing purposes, "across the River Trent, at the intersection there- "by of the said lot of land, and they have applied "for a license from us to authorize them to main- "tain the said dam and the erections and construc- "tions thereto appertaining, etc.;

"And whereas, it is deemed advisable to grant "the license so applied for;

"Now know ye in consideration of the premises "we have given and granted, and do by these pres- "ents give and grant unto the said Honourable "James Cockburn, Nesbitt Kirchhoffer and Robert "Cockburn, Esquires, their heirs and assigns, full "power, leave, license and authority, to keep erect- "ed and maintained across the River Trent at the "Village of Campbellford, in the said Township of "Seymour, at the intersection of the said lot of land "by said river, the said dam heretofore constructed "and now being thereon, and all the works, erec- "tions, matters and things thereto belonging or "therewith enjoyed."

There is a proviso to the license "that no com- "pensation shall be claimed by the said the Honour- "able James Cockburn, Nesbitt Kirchhoffer, and "Robert Cockburn, Esquires, or either of them or "their heirs or assigns of, from or against us, our "heirs and successors, or any other person or per- "sons whomsoever *in respect* of the power, leave, "license and authority hereby granted, in case the "license hereby granted shall be at any time ter- "minated or revoked or be the subject of any legis- "lation as hereinbefore mentioned."

On August 24, 1911, the license was revoked. The revocation recites: "And whereas, the removal of the said dam has now become necessary for the proper navigation of the River Trent."

The plan expropriating the lots in question was registered on November 22, 1910. I do not think this affects the question, as whatever title the defendant, Kilbourn, had in the lots in question entitling him to have the dam maintained and to the water-power, was all subject to be revoked if the interests of the canal so required. The Crown did revoke the license and removed the dam. It is not for me to question the judgment of the officials of the Crown as to whether or not it was proper that the dam should be removed in the interest of navigation. At the time of the revocation the raceway had been excavated, as I have mentioned, as far as lot No. 8. It has never been excavated in front of or beyond lot No. 8.

Under the title through which the defendant claims, the defendant had a legal right to excavate and continue the raceway passing between his lots and Mill Street, if so advised. He had never done so, nor do I think he ever contemplated such a work. It would have cost a large amount of money, and if continued there would have been almost no horse-power available for his property. I will endeavour to show this later from the evidence.

On January 1, 1865, there was a deed of partition executed between the tenants in common, and amongst other things the water lots are referred to as the water lots referred to in the plan of George W. Ranney. Some of these water lots passed to one of the tenants in common, others to Kirchhoffer, and other water lots to the other tenants in common.

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The defendant has proved his title to these water lots other than lot 17, as to which there is no dispute.

By the deed of partition of January 1, 1865, these water lots are described as the water lots shown on the plan of Ranney. This deed of partition also refers to other water lots apparently above the lots in question, which are referred to as shown on a plan by Cady. This plan of Cady apparently was prepared and registered on May 8, 1865, (Exhibit 10), subsequently to the deed of partition.

I am informed by counsel that Ranney's plan cannot be found. It is said that search has been made everywhere for it without any result, and the plan is not registered. It, therefore, leaves the question as to whether or not what is called lot 17 was included as part of lot 16 in doubt. It is not of much value, and very little turns upon it.

Now, as to the value of these nine lots for water-power purposes. It may be well to mention that Kilbourn purchased the nine lots in question in the year 1905 for the sum of $900, or $100 for each lot. He is a barrister of standing and a shrewd man of business, and on January 8, 1917, (See Exhibit "E") he writes a letter to the Minister of Railways, in which among other things he states that he is the owner of the lots, 8 to 16 inclusive, in the east factory block. "Possession has been taken of these lots by "your Department for canal purposes and the em- "bankment of the canal has been put upon all of "them, practically destroying the lots. I believe "the canal is now practically finished and presume "you will be in a position to make compensation for "the lots. I would be willing to accept $4,000 for "the property."

I refer to this letter to show first that to the knowledge of Kilbourn the portion of his lots expropriated had been taken for canal purposes. He admits in his evidence that when he bought he knew that the Crown was going to improve the navigation of the Trent. I also refer to it to show the great difference between his present demand for $20,000 and the sum he was willing to take on January 8, 1917.

Dealing first with the question of the value of this property for water-power purposes. Duncan William McLachlan was a witness examined by the Crown. He was division engineer for the Trent Canal at Campbellford, in the year 1910. I have mentioned before that from the dam to the commencement of Kilbourn's lots there are seven other properties taking or entitled to take water from the raceway, the raceway having been extended to lot 8, the commencement of Kilbourn's property.

Mr. McLachlan states as follows:

"Q. Before returning to the amount of power "that these users up the raceway took, I want you to "state how much horse-power, assuming the aver- "age flow of the river to be 1,253 cubic second feet, "there would be available for the total raceway? A. "There would be available 626 cubic feet per second. "(This would be on the east side. The other 626 on "the west side). Q. I was referring to the power "taken by Smith and Doxie in cubic second feet. "Mr. Kerry in his figures used horse-power? A. "Might I explain a question? Mr. Kerry quoted my "report in these matters—and I have gone back to "my original report and simply taken the equival- "ent amounts in water which appear in my original "report which were not given. Q. Your report

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"states that Smith & Sons took 162 horse-power off "the raceway, what is the equivalent of that in cubic "second feet? A. I think it would be better to state "the actual measurement. The actual measurement "at the full gauge opening was 261 cubic feet per "second for Smith. Q. And Doxie? A. 48, making "309. Q. And Dixon? A. 26. Q. And Weston? A. "86 is the actual measurement. Q. And the Town of "Campbellford? A. 59. Q. That was a total of "580 cubic second feet? A. Exactly. Q. And the "available capacity in the raceway was 629 cubic "second feet? A. That is correct. Q. That would "leave how many cubic second feet? A. 46 feet per "second. Q. That would be the maximum that "would be available for Kilbourn, having regard "only to the actual user by those above? A. Cor-"rect."

To my mind it is absurd to believe that anyone would go to the expense necessary to construct the raceway and continue it in front of the defendant's lots for this amount of power. The raceway would have to be excavated out of rock.

I think, moreover, that the evidence of the witness for the defendant confirms this view. It must not be lost sight of either that the quantity of water fluctuates according to the seasons. During a portion of the year there would be very little water.

The defendant examined in support of his claim one John George Kerry. He is a civil engineer, and had a great deal to do with the water-powers in question. He bases his evidence upon the construction of a storage dam up the river, at a distance above the point in question of from 30 to 100 miles. He states that the conservation would be above the

navigable portion of the stream. "Briefly, I went "into that very carefully, and I figure that storage "to the extent of about 500,000 acre feet was neces- "sary to regulate the flow." His estimate is that the whole conservation should be carried out at the rate of $2 per acre foot, or at a total cost of approximately $1,000,000. He divides this cost among the different owners, and finds the amount chargeable to Kilbourn's property would be the sum of $6,000. He puts the cost to Kilbourn, the total cost, at from thirty-four-odd thousand dollars to twenty-six thousand dollars. He is asked:

"Q. Your general estimate is a wide thing. There "is a new dam and new works, and a lot of other "things. The point before me is what is the loss to "Kilbourn, his taking the property as it was. If "you take the old raceway as it stood in 1910, and "extended it past Kilbourn's property, what would "it cost? A. With that change the estimate would "be reduced to $26,000. Q. It would cost how much? "A. $26,000 to extend the raceway and put in the "turbines."

HIS LORDSHIP.—"So that Kilbourn before he could "utilize this property for manufacturing, he would "have to spend $26,000 on the property? A. Yes."

He states further on as follows: "Q. It would not "be possible for Kilbourn to develop any power in "connection with these lots except by virtue of a "dam far above Kilbourn's property? A. That is "correct. Q. On these lots themselves it is not pos- "sible to develop any power? A. No. Q. Now you "make an estimate of the cost of developing power "on Kilbourn's property, and that was based, you "said, on the possibility of certain conservation

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"works being carried out. How far above Camp-"bellford would those conservation works be? A. "Roughly speaking, anywhere from 30 to 100 miles. "Q. And it is not possible, as far as you know, or it "would not have been possible in 1910, to regulate "in any practical manner the flow of the river with-"out going very far upstream? A. The proper "place to put the regulation works is far up "stream."

It seems to me that such an idea cannot enter into the consideration of the present case. I have pointed out that the River Trent has been taken for canal purposes. How is Kilbourn to get such a scheme as a conservation dam, as described by Kerry, carried into effect, and the expenditure of a large sum of money for a scheme which might turn out to be of no value?

I am, therefore, of opinion, for the reasons I have given in regard to the River Trent being a public work, and also for the reason that if not a public work, there is no value in the water-power, that this part of the case raised by the defendant fails.

The question is then raised that for building purposes the property is of large value. I have mentioned the fact that in 1905 the amount paid by Kilbourn was the sum of $900. The Crown has expropriated 17,613 square feet out of a total of 30,527 square feet. Kilbourn has received for a part of what was left after the expropriation of lots 12 and 13 for the cheese factory the sum of $700. He is also left with the balance of the other lots for what they are worth. For building purposes it is necessary to consider that in front of all of these lots, and between Mill Street and the property in question, is

the space of 20 feet laid out for the proposed extension of the raceway. The title to this raceway has not been vested in Kilbourn. It may be, however, that for practical purposes he would always have the right of access from Mill Street to the residences, if any, erected on these different lots. The lots themselves have a frontage of 50 feet, with a depth of from 60 feet to less, and it is apparent that a considerable portion of these lots in the freshets is overflowed. The evidence of the witnesses is, as usual, conflicting. There is evidence of sales of particular properties such as for the post-office site, etc., and it appears that erected on this property and also on other properties referred to in the evidence there were buildings of no value.

After analyzing the evidence carefully, I am of opinion that the sum tendered by the Crown of $1,200 is ample compensation, to include everything the defendant could reasonably hope to have obtained for the property, more particularly having regard to that portion of the property not expropriated.

Judgment will issue declaring that the tender of $1,200, with interest to date of tender, is ample to cover everything that the defendant can reasonably claim, including any allowance, if he be entitled to it, for compulsory expropriation. There will be no interest subsequent to the tender, and the defendant must pay the costs of the action.

*Judgment accordingly.*

Solicitor for plaintiff: *G. A. Payne.*

Solicitors for defendant: *Kilbourn & Kilbourn.*