CASES 1889

DETERMINED IN THE

EXCHEQUER COURT OF CANADA.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... } PLAINTIFF;

1893
Dec. 14.

AND

HENRY MARTIN FOWLDS, WILLIAM JOHN FOWLDS, AND FREDERICK WILLIAM F. FOWLDS, CARRYING ON BUSINESS UNDER THE NAME, STYLE AND FIRM OF JAS. S. FOWLDS & BROS..... } DEFENDANTS.

Expropriation — Navigable stream—Public easement—Riparian rights—Damages.

The public easement of passage in a navigable stream is so far in derogation of the rights of riparian owners as to enable the Crown to make any use of the water or bed of the stream which the legislature deems expedient for improving the navigation thereof.

2. Defendants, who were prosecuting a milling business on certain waters forming part of the Trent Valley Canal, asserted a claim against the Crown for a quantity of land taken for the improvement of the navigation of such waters, and also claimed a large sum for damages alleged to have been sustained by them (1) as riparian owners by reason of the taking of the land on both sides of a head-race preventing any future enlargement of the width of such head-race, and (2) from the fact that they would not be able in the future to use to the full extent all the power which the mill-pond contained because they could not cut race-ways from the pond into the river through the expropriated part.

Held, that while the defendants were entitled to compensation for the quantity of land taken by the Crown they could not recover for

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any injury to the remaining land arising from the utilization of the waters of the stream for the purpose of improving navigation.

Semble, that where no particular estate was sought to be expropriated in a *Notice and Tender* to claimants under sec. 10 of 50-51 Vict. c. 17 (repealed by 52 Vict. c. 13), it is to be presumed that the Crown intended to take whatever estate, &c., claimants had in the lands expropriated.

THIS was a case arising out of a claim for compensation for certain lands taken for the purposes of the Trent Valley Canal, and for damages sustained by the defendants as riparian owners.

The facts of the case are stated in the judgment.

The case was tried before Mr. Justice Falconbridge, Judge *pro hâc vice*, on November 17th and 18th, 1892.

McCarthy, Q. C. (with whom was *H. S. Osler*) for the defendants: The rights of the parties have to be determined by the notice and tender which the Minister of Railways and Canals has served upon the defendants. Under the statute the Minister has the power to take any estate he pleases, but whatever estate he so takes must appear in the notice. In the notice here the Minister purports to take the fee simple from the defendants. No mention or exception is made of any easement the Crown pretended to have in the lands, and it should not be considered by the court in assessing compensation. When the Crown takes the lands under the statute (50-51 Vict. c. 17) and does what the statute directs in order to acquire title from the owner, then the question to be determined by the court is one of compensation, not title. This notice may be likened to the notice to treat which prevails in matters of railway expropriation between subject and subject in England. [Cites *Cripps on Compensation* (1).]

(1) Pp. 56, 61 and 63.

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Argument of Counsel.

Then, in assessing compensation the capabilities as well as the present use of the property have to be considered. [Cites *Lewis on Eminent Domain* (1); *Boom Company* v. *Patterson* (2).]

Robinson, Q. C., for the plaintiff, contended that the defendants' ownership of the land did not give them any riparian rights because they had been enjoyed by the Crown in derogation of rights of the defendants' predecessor in title.

Secondly, any claim that might have existed for interference with these rights was barred by the acts of the defendants' predecessor in title.

Thirdly, the Crown had a perfect right under 6 Wm. IV. c. 35, secs. 6, 8, 10 and 12; 7 Wm. IV. c. 53 and R. S. C. c. 36 s. 7, to make the river improvements complained of. [Cites *Lewis on Eminent Domain* (3).]

Fourthly, the rule is that you are to compensate people for property of this kind upon what its market value, for any reasonably immediate use, was at the very moment of taking. I submit that the English and American authorities are all in that direction. [Cites *Lewis on Eminent Domain* (4); *Re Macklem and Niagara Falls Park* (5).]

Hogg, Q. C., followed for the plaintiff, and dealt with the evidence.

McCarthy, Q. C., in reply, cited *Ripley* v. *G. N. Railway Co.* (6); *Morgan* v. *Metropolitan Ry Co.* (7); *R.* v. *Corporation of Mersey, &c., Navigation Co.* (8); *Parson Water Co.* v. *Knapp* (9); *Kane* v. *Baltimore* (10); *Varick* v. *Smith* (11); 6 Wm. IV c. 35 s. 6.

(1) Sec. 478, 479.
(2) 98 U.S. R. 403.
(3) Sec. 71.
(4) Secs. 478, 479. 480.
(5) 14 Ont. App. 20.
(6) L. R. 10 Ch. 435.
(7) L. R. 3 C. P. 553.
(8) 9 B. & C. 95.
(9) 33 Kan. 752, 755, 756.
(10) 15 Md. 240.
(11) 5 Paige (N. Y. Ch.) 137, 146, 147.

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FALCONBRIDGE, J. now (December 14th, 1893) delivered judgment.

The case of Her Majesty is presented with great fulness and particularity in the information.

The issues tendered by the answer are as follows:

(1). Paragraph 4.—The defendants deny that the Commissioners appointed to carry out works on the Trent River, under 6 Wm. 4 c. 35, & 7 Wm. 4 c. 58, entered on property now belonging to defendants; or caused any survey to be made of that portion of the land hereinbefore referred to as in the 3rd paragraph of the information alleged.

(2). Paragraph 5.—They deny that any reservation of any part of the lands acquired by them from Hon. James Crooks was made or marked for Her Majesty by Her Surveyor-General of Woods within the condition in the 7th paragraph of the information set forth and referred to.

(3). Paragraph 6.—They say that the claim of said James Crooks for compensation for injury done to his said mills upon the said property which is referred to in the 9th paragraph of the said information was wholly with reference to the water-power as affected by the construction of the Public Works referred to, and the immediate injury caused by the construction of the said Public Works and that such claim and the award of the arbitrators had no relation whatever to the expropriation of any part of said property, nor did it award or purport to award any compensation for or in respect of the lands herein sought to be expropriated.

(4). Paragraphs 7 & 8.—They deny having been guilty of laches, acquiescence or delay.

(5). Paragraph 9.—They deny that Her Majesty has been in possession or that she is entitled to claim the benefit of the Statute of Limitations.

It is admitted that the $2,000 offered by the Crown is a sufficient amount of compensation for the land alone; but the defendants claim a very much larger sum besides for damages alleged to be sustained by them, 1st, as riparian owners by reason of appropriation of land on both sides of the head-race, preventing any enlargement of the present width of the head-race, and 2ndly, that they will not be able to use to the full extent all the power which the pond

contains, because they cannot cut race-ways from the pond into the river through the expropriated part and must utilize their power entirely on the land to the east of the expropriation. And the defendants submit that it is reasonable to ask that one-half of the power be assigned to the expropriated part and one-half to the rest of the land to the east, and that they should be indemnified, therefore, for the loss of the use to which they say they could have put that property in the future.

With reference to the first item, it was suggested by one of the defendants in giving evidence that the Government owning the land might at any time exclude the water from going through the head-race; but Mr. Hogg, of Counsel for the Crown, stated that the Government did not intend to expropriate land under water where the bridge is over the race-way. This can be put in some binding form if desired, and I shall exclude that particular from consideration.

I do not give effect to the contention that if any easement already existed in the Crown, it must necessarily be excepted from the notice.

I am of the opinion that the works having been constructed not earlier than 1837,—after the passing of the Act 6 Wm. IV. c. 35, Mr. Crooks' right to claim compensation accrued as against the Crown for any damage sustained by him in consequence thereof, and that the defendants are bound by the acts of their predecessor in title.

And it seems to me that the rule laid down in *Lewis on Eminent Domain* (1), and in the cases there cited, is against the defendants' contention as to the water-power or in any other view of their alleged rights as riparian proprietors.

Even if the law were in favour of the defendants,

(1) S. 71.

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they would still be confronted with a serious practical question, viz., the value at the time of taking.

No doubt, there are enormous capabilities for leasing or selling water-power, but the same capabilities have existed there and elsewhere along the river for all time, and they have been only sparsely and intermittently sold or used.

The demand has been, to use the language of the learned Chief Justice of Ontario in *re Macklem* v. *Niagara Falls Park* (1), "most languid if not wholly non-existent."

The rule as to the value of property for particular uses is very well put by the Supreme Court of United States in *Boom Co.* v. *Patterson* (2), where it is said "the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

Judged by this standard and by what defendants can do with the land that remains to them, I find that it would require a more sanguine view of the situation than that which I take, to give damages beyond the value of the land.

There will be judgment for Her Majesty The Queen in terms of the claim appended to the information, with costs.

Judgment accordingly,

Solicitors for plaintiff: *O'Connor, Hogg & Balderson.*

Solicitors for defendants: *McCarthy, Osler, Hoskin & Creelman.*

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(1) 14 Ont. App. at p. 27. (2) 98 U. S. R. 408.