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

1909
Sept. 9.

AND

THE INVERNESS RAILWAY AND COAL COMPANY, LIMITED..... } DEFENDANTS.

Expropriation—Land and land covered with water—Public harbour—Special adaptability—Piers and channel fallen into disrepair—Basis of compensation.

For the purpose of forming a public harbour certain uplands together with certain beach lands were expropriated from the defendants by the Crown. Some years before, the defendants had constructed two piers, and had dredged an entrance from tide-water to the pond where such piers were situated; but at the time of the expropriation both of the piers had been allowed to fall into disrepair and the entrance or channel had been completely filled up with sand. The defendants claimed compensation, amongst other things, for the special adaptability of the property expropriated for harbour purposes, and for the value of the stone remaining in the piers at the time of the expropriation. There was no evidence to show that there was any competition of purchasers for the purpose for which the land had been taken by the Crown, or that there was any possibility of tht defendants obtaining a purchaser who would use the land for that purpose.

Held, (following *in re Lucas and Chesterfield Gas and Water Board* (1909) 1. K. B. 16) that the defendants had not made out a case for compensation in respect of their claim for special adaptability.

2. *Held*, (following *Streatham and General Estates Co.* v. *The Commissioners of Her Majesty's Works and Public Buildings.* (52 J. P. 615 and 4 T. L. R. 766) that the value of the stone could not be taken into account.

THIS was an information filed by the Attorney-General of Canada for the expropriation of lands for the purpose of a public harbour.

The facts are stated in the judgment.

June 19th and 21st, 1909.

The case came on for hearing at Halifax, N.S.

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Argument of Counsel.

H. Mellish K. C., for the defendants, contended that the tender of the Crown was too small. It allowed nothing for the special adaptibility of the property for shipping purposes. It is an easy matter for a harbour to be constructed with the two piers remaining there as built by the defendants. The piers with the stone in them as they stand will at least save the Government an expenditure of $12,000 in making the harbour. There is 6,000 cubic yards of stone in the piers, and it is of the greatest utility for the purpose required. The salient feature of the damages in this case is that the lands had a special adaptability for commercial purposes by reason of the water frontage. Cites *Re Lucas and Chesterfield Gas and Water Board* (1).

R. T. MacIlreith, for the plaintiff, contended that the property did not possess a marketable value for shipping purposes. There was no reasonable probability that a purchaser could be found within a reasonable time who would pay a price beyond the merely normal, or agricultural value. Under such circumstances *Lucas and Chesterfield Gas and Water Company* (*supra*) did not apply.

The value for the purposes of compensation under the statute must be taken to be the value at the date of the expropriation. At that date the defendants had allowed their channel to be completely obstructed with sand, and the crib work of the piers to become very largely decayed. Cites *Vezina* v. *The Queen*, (2); *The King* v. *Shives* (3).

CASSELS, J., now (September 9th, 1909), delivered judgment.

This is an information filed on behalf of His Majesty the King by the Attorney-General of Canada to have the

(1) (1909) 1 K. B. 16. (2) 17 S. C. R. 1;
(3) 9 Ex. C. R. 200.

value of certain lands and lands covered by water ascertained.

The property sought to be expropriated consists of about twenty acres of dry land and thirty two acres of land covered with water. The expropriation is for the purpose of forming a harbour at the town of Inverness, situate on the west coast of Cape Breton.

The date of the expropriation is the 29th April, 1909. At the trial it was suggested that the description of the lands taken did not accord with the lands expropriated as shewn by the plan. It was agreed to by counsel that the plan should govern, and if the description as furnished is erroneous a new description should be prepared in accordance with the lands as delineated on the plan.

The lands in question comprise three acres of what is known as uplands, situated to the southwest of the former piers constructed for the purpose of making a channel into what is known as McIsaac's pond; about seventeen acres of beach lands situated between the Gulf of St. Lawrence to the north and McIsaac's pond on the south, and of about thirty-two acres of land covered with water comprising a portion of what is referred to in the evidence as McIsaac's pond. The other portion of McIsaac's pond necessary for the purpose of a harbour and situate to the west of that part of the pond owned by the Inverness Railway and Coal Company, Limited, is owned by one D. J. McDonald, the value of McDonald's interest to be ascertained in an action against him tried at the same sittings as the action in question.

The Crown offered as full compensation for all the lands taken, and damages to adjoining lands, the sum of $1,500. By their defence the defendants claimed the sum of $7,000 for the value of the lands taken, and $2,000 for injury to the adjoining property.

At the trial an amendment was allowed increasing the claim for value to $17,000 instead of $7,000, it being

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shown that it was a clerical slip making the claim $7,000 instead of $17,000.

The claim of the defendants is for $17,000 and $2,000, in all $19,000.

The defendants, the Inverness Railway and Coal Company, Limited, are the owners of the greater portion of the town of Inverness, and are working coal mines. Most of the lands owned by them were purchased for them by the County of Inverness. The lands in question were purchased from one Hussey who acted as agent for some Swiss capitalists. It appears from the evidence of Bernasconi that in 1897 two piers were constructed by Hussey extending from McIsaac's pond to the Gulf of St. Lawrence, and a certain amount of dredging performed permitting an entrance from the gulf to the pond, and through the pond to a wharf at the eastern end of the pond. By means of this work a harbour was formed and vessels of light draught could enter from the gulf and be loaded at the wharf. Since the acquisition by the defendants a railway has been constructed running along the west coast of Cape Breton The defendants ship the coal mined by them over this railway as far as the Strait of Canso where the coal is loaded on to vessels.

The entrance constructed from the gulf to McIsaac's pond has for years been allowed to fall into disuse, and at the time of the commencement of the expropriation proceeding the channel was completely filled up with sand. The woodwork on the piers from the low water mark to the top has rotted.

Considerable evidence was given at the trial to show the quantity of stone in the piers. Arens, the engineer of the defendants, places the quantity at about 6,000 yards above low water level. Bernasconi the engineer for the Crown places the quantity at 3,000 yards, of a value of 45 cents a yard, after allowing 15 cents a yard for removal.

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For the defendants it is contended that compensation should be allowed on the basis of the special adaptability of the premises in question for harbour purposes. It was not claimed by Mr. Mellish that the stone should be paid for as stone.

The Crown has admitted the title of the defendants, and I therefore assume they or their predecessors in title acquired a right to construct the piers in question.

In my view the question of special adaptability should not be taken into account. I do not think the defendants bring themselves within the rules enumerated by the Court of Appeal in England in *re Lucas and Chesterfield Gas and Water Board* (1), decided by Bray, J. at the trial (2). In this latter case the authorities are collected and commented on. Most of them will be found in *Browne & Allan's Law of Compensation*, (3) There could be no competition as in the case of water reservoirs which might supply several different localities, and where competition might arise.

In this case the market value of the land and land covered by water has to be arrived at. If in fact its peculiar adaptability for harbour purposes be taken into account it would add to its market value. I am left in ignorance on this point. The price paid by the defendants for this particular harbour right has not been furnished. I do know that they have allowed it to be disused and filled up, and no harbour existed at the time of the expropriation. According to the evidence of Arens, the engineer of the defendants, it would cost $150,000 to dredge for harbour purposes, and $40,000 additional for the construction of piers, and McDonald's interest in the pond would have to be acquired.

I deal with the question irrespective of special adaptability for harbour purposes. The value of the stone I do not take into account. See *Streatham & General*

(1) [1908] 1 K. B., p. 571. (2) [1909] 1 K. B., p. 16.
(3) 2nd. ed. p.

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Estate Co. v. *The Commissioners of Her Majesty's Works and Public Buildings* (before the Divisional Court) (1) (and before the Court of Appeal) (2).

In a case of this nature it is difficult no doubt for counsel to furnish evidence as to values. I am inclined to accept the evidence of the witnesses for the Crown. McLean, McInnes and McIsaac place a value of $75 an acre for the three acres of upland to the west of the pier. McIsaac places a value on the 17 acres of beach at $30, and on the 32 acres of land covered with water, at $35 an acre.

In all 3 acres at $75.00		$	225 00
17	" 30.00		510 00
32	" 35.00		1,120 00
		$	1,855 00

If the defendants are allowed $2,000 and interest, I think they will be fully compensated.

The defendants are entitled to their costs.

Judgment accordingly.

Solicitor for the plaintiffs: *W. H. Fulton.*

Solicitor for the respondent: *R. T. MacIlreith.*

(1) (1838) 52 J. P. 615. (2) 4 Times L. R. 766.