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Sept. 14.

DANIEL GILLESPIE, J. WILLIAM GILLESPIE AND D. PAUL GILLESPIE.. SUPPLIANTS;

AND

HIS MAJESTY THE KING...............RESPONDENT.

Expropriation—Foreshore — Title — Special adaptability of property for wharf purposes— Value to owner—Compensation.

In this case certain lands which fronted on a public harbour owned by the Crown in right of the Dominion of Canada were expropriated for the purpose of forming the shore end of a wharf extending out into such harbour. The suppliants had no grant and claimed no title to the beach or the land covered with water at medium high tide. The suppliants claimed that the special adaptability of the lands for wharf purposes should be considered as adding a very large value to the same in assessing compensation.

Held, that as the suppliants did not own the land covered by water nor the beach, that such special adaptability was not to be considered.

THIS was a case of expropriation of land for the purposes of a public wharf.

The facts are stated in the reasons for judgment.

June 23rd, 1909.

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

T. R. Robertson for the suppliants, argued that under the decision in *Lucas and Chesterfield Gas & Water Board* (1), the special adaptibility of the land for wharf purposes had to be considered by the Court and damages assessed in respect of it. He referred also to *In re Gough and Water Board* (2).

H. Mellish, K. C., for respondent, contended that the remaining property of the defendants had been benefited by the expropriation. Heretofore useless land will now become valuable by the construction of the wharf.

(1) [1909] 1 K. B., 16. (2) [1904] 1 K. B., 417

Mr. Robertson replied, citing *Coulson & Forbes on Waters*, (1).

CASSELS, J., now (September 14th, 1909), delivered judgment.

This was a petition of right tried at Halifax on the 23rd June, 1909.

The suppliants Daniel Gillespie, J. William Gillespie and D. Paul Gillespie claim as against the Crown the sum of $2,500 damages for the value of certain lands expropriated for the purpose of forming the shore end of a wharf extending out into the harbour of Parrsboro at the upper end of the basin of Minas in the Province of Nova Scotia.

The area of land taken by the Public Works Department is one rood, eight poles, slightly over one-fourth of an acre.

The evidence as to that portion of the Basin of Minas where the wharf is constructed forming a portion of the harbour of Parrsboro is meagre.

It was asserted by counsel for the Crown, and not contradicted, that the title to the soil is vested in the Crown as representing the Dominion. This is not contradicted, by counsel for the suppliants, and the evidence tends to show that the water at the point in question formed a part of the harbour prior to Confederation. The only evidence adduced was on the part of the suppliants. Dyas says vessels had always used the beach at the point in question when covered with water for harbourage purposes. Locke, an official of the Department, states he surveyed the harbour, and places the entrance to the harbour at a point further east than the place in question.

In Bligh's Orders in Council, cap. 80, page 706, an order in council is set out defining the limits of the harbour. It appears that the order in council is dated the

(1) Ed. 1902, p. 14.

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30th October, 1880. It was passed pursuant to 36 Vict. cap. 9, sec. 14 as amended by 37 Vict., cap. 34, sec. 14. The harbour is stated to extend east to Moose Creek. I think, although the evidence is not clear, that this Moose Creek is shown on the plan, Exhibit No. 11, further to the east than the location of the wharf marked at point "L" on the plan, Exhibit No. 11. I think it should be held that the place in question formed part of the harbour of Parrsboro and is vested in the Crown for the Dominion under *The British North America Act.* If it did not form part of the harbour, then at the time of Confederation it would have been vested in the Crown representing the Province of Nova Scotia under the judgment of the Board of the Privy Council in the *Fisheries Case* (1).

The suppliants claim no title to land covered with water at medium high tide water.

The navigability of the harbour depends on the flow of the tide which rises to a very great height at the point in question. The wharf in question is about half a mile from the centre of Parrsboro town, a town containing between 3,000 and 4,000 inhabitants, and is situate within its limits. The contention of the suppliants is that the place where the wharf is constructed is the only reasonably available spot in the locality for a wharf. An equally available situation for a wharf is about three chains further west, but a wharf built at that point would require to have an additional length of 125 feet to reach deep water. A wharf or wharves could be built further east, but would be exposed to the prevailing westerly and southwesterly winds sweeping in from the Bay of Fundy; and a wharf exposed to these winds would cost a much larger sum of money, as an L would have to be constructed to afford shelter at such a wharf. The wharf at the point in question is protected by the neck of land on the point of which Partridge Island Lighthouse is erected.

(1) [1898] A. C. 700.

The advantage of the wharf at the point in question is claimed to be that there is a period of navigability for about four hours permitting steamboats to reach the wharf, unload, or land, and depart and return with the same tide.

Possession of the land in question was taken by the Crown on the 30th April, 1902, and the wharf constructed. The plan and description were filed on 9th April, 1907.

The suppliants base their claim for the large sum claimed on the fact of the special adaptability of the land in question for wharf purposes. The Crown denies the title of the suppliants. The title in one Owen McGuirk is admitted, but it is contended that the land in question did not form part of lot six, and did not pass by his will. Owen McGuirk died prior to the 25th May, 1900 (See Will and Certificate, Exhibit No. 6). Between the beach lot in question and lot six, as set out on the plan, a public highway appears to have been reserved but not in fact laid out on the ground.

Owen McGuirk's will reads:—

"Fourthly I give and bequeath to Charles Henry McGuirk Lot No. 6 in said Deed dated 23rd of March, 1881, from Caroline Ratchford to Owen McGuirk as *shore lands.*"

This deed of the 23rd March, 1881, granted the lands as follows:—

"All those certain tracts, pieces or parcels of land lying and being in Parrsboro aforesaid on the eastern side of Partridge Island River known as lot numbered five, six and seven in the division made by I. Olney Lewis, deputy surveyor of the lands originally granted to James Cameron and John Law, the said lots fronting on a line of road received for the accommodation of all the lots in said division, and which extends from the south of lot No. One at the inside of the beach, north forty degrees west eighteen chains to the western angle of lot No. Nine

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in the same division, each lot having a frontage of two chains on said reserved road, and extending back the same width, north fifty degrees east thirteen chains more or less to the southwestern side of another road reserved along marsh on the front of McGuirk's land, the latter road to have also a right of way to the main road to Mill Village and likewise to the shore of said river. Also so much of the marsh and gravel beach in front of the lots five, six and seven as will be comprehended within an extension of the side lines of said lots to the said river, together with all and singular the easements, tenements, hereditaments and appurtenances to the same belonging or in anywise appertaining, with the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim, property and demand both at law and in equity of the said Caroline Ratchford, Julia Anne Ratchford and Charles Edward Ratchford, of, in, to or out of the same or any part thereof."

The division plan cannot be found. The suppliants contend that the effect of this will coupled with the deed is to extend lot six so as to comprise the land in question, and that Owen McGurk in devising the lands as shore lands intended to pass the beach. I incline to the view that this contention is correct. If the beach in question did not pass by the will, then Owen McGuirk died intestate as to these beach lands in question and the title passed to his heirs. All the heirs have conveyed to the suppliants prior to the filing of the petition. The Crown in the description attached to the registered plan describes the beach lands in question as part of lot six. I find that the suppliants have proved their title.

As to the damages to be allowed, Mr. *Robertson* in his argument presented a very forcible and plausible case in favour of his contention that the special adaptability of the land in question for wharf purposes should be con-

sidered as adding a very large value to the land expropriated.

Reliance is placed upon the case of *Lucas and Chesterfield Gas & Water Board* (1), and the class of cases there cited, most of which are reported in full in *Browne & Allan's Law of Compensation* (2). (In most of these cases the intrinsic value of the land taken was on or in the land itself). The land formed by itself, or in connection with other lands, a natural reservoir. There were also possible purchasers, as in the *Countess Ossalinsky* case (3).

In the *Lucas* case Vaughan Williams, L.J., refers to the property in question as "the natural and peculiar adaptability thereof for the construction of a reservoir" (3). At p. 25 he refers to the case of lands adjoining large works the owner of which would likely be willing to pay a larger price, etc. There would be no right of expropriation in the case put. At page 27 it is laid down:—

"Arbitrators are not to value the land with reference to the particular purpose for which it is required......... You must not look at the particular purpose which the defendants...........are going to put land to when they take it under parliamentary powers.........for any special purpose".

Again, at page 28:—

They should "value the possibility and not the realized possibility".

Fletcher-Moulton, L.J., at page 29, says that it must be estimated on "the value to him and not on the value to the purchaser".

And at page 31:—

"The decided cases seem to me to have hit upon the correct solution of this problem. To my mind they lay down the principle that where the special value exists only for the particular purchaser who has obtained powers

(1) [1909] 1 K.B. 16. (2) 2nd Ed. p. 659.
(3) [1909] 1K.B. 24.

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of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it."

Cripp's Law of Compensation (1) at page 117, puts it thus :—

"An owner is entitled to have the price of his land fixed in reference to the probable use which will give him the best return, and the term 'special adaptability' only denotes that the probable use from which the best return may be expected is special in its character."

Cases such as *Paint* v. *The Queen* (2) merely affirm the proposition that what has to be arrived at is the market value, having regard to the potential or prospective capabilities. Land used as a farm within a short distance from a large city may be expropriated. If it were merely valued as farm lands the owner would lose the added value of the almost certain possibility of, within a short period, the lands coming into the market as city lots.

Had the suppliants in this case owned the water lot as well as the beach and merely required assent to the erection of a wharf and interference with navigation, the case might be different.

The Crown in this case owns the land covered with water opposite the land expropriated, and has exercised its right to construct a wharf.

To allow the contention of the suppliants would be to allow the value to the Crown, and not to value the property at its proper value to the owner. It is said that in any event the minimum value should be $900 as recommended by Locke. I do not agree. It is quite evident that Locke had in view the gain to the Crown. It would be an absurdity to allow such a sum for one fourth of an acre of nearly useless land, if my view of the law is correct. If I am in error then I should say $900 is the

(1) 5th Ed. 1905.

(2) 2 Ex. C.R. 149, affirmed 18 S.C.R. 718.

maximum amount. The Crown refused to accept Locke's recommendation.

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It is difficult on the evidence to place any value on the fourth of an acre in question.

I think if the suppliants are allowed $50, each party paying their own costs, justice will be done.

Judgment accordingly.

Solicitor for suppliants: *J. L. Ralston.*

Solicitor for respondent: *H. Mellish.*