1916
Feb. 14.

HIS MAJESTY THE KING, UPON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF;

AND

ROBERT E. GRASS AND SARAH M. GRASS, EXECUTOR AND EXECUTRIX OF RULIFF GRASS, DECEASED, AND MARSHALL BIDWELL MORRISON,

DEFENDANTS.

Expropriation—Conflicting theories of value—Voluntary sale—Test of market value.

When in establishing the amount of compensation payable for land expropriated evidence is adduced by one of the parties to show that the land at the time of the expropriation had a potential commercial value inhering in an undeveloped water-power, while the evidence of the other party is directed to show that the land had only a value for agricultural purposes, the Court may accept the price paid for the property at a recent voluntary sale as the proper test of actual market value at the time of the taking.

INFORMATION, filed by His Majesty's Attorney-General for the Dominion of Canada, for the expropriation of certain lands for the purposes of the Trent Valley Canal.

The case came on for trial at Belleville on October 6th, 7th and 8th, 1915. It was argued at Ottawa on October 16th, 1915.

C. A. Masten, K.C., and *A. Abbott,* for plaintiff.

E. G. Porter, K.C., for defendants.

Mr. Porter, for the defendants—The first consideration that I would present is with respect to the title and what rights these defendants had on April 10, 1908, when the Government took possession. Now, the defendants' title in one aspect of the case, de-

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pends upon the patent from the Crown. During the course of the trial it was agreed between counsel that whatever rights or title the original grantee from the Crown obtained by the grant, that my client now possesses the same rights.

[*Mr. Masten*—For the purpose of this argument it was agreed subsequently that the usual clause should be inserted in the judgment, that the money should be paid upon the title being demonstrated—in other words, we are not questioning the title here.]

Mr. Porter—This patent uses the words "water's edge."

[THE COURT—They are often found in grants where the line runs to the shore; being bounded by the river, the grantee is to have the riparian rights.]

That is why I say "water's edge." When it is to the bank it leaves an intervening space, but that question does not arise here because here it is the "water's edge" of the river. The *habendum* clause reads as follows:

"To have and to hold the said parcel or tract of "land to him the said William Allan, his heirs and "assigns for ever; saving, nevertheless, to us, our "heirs and successors, all mines of gold, silver, cop- "per, tin, lead, iron and coal that shall or may now "or hereafter be found on any part of the said par- "cel or tract of land hereby given and granted as "aforesaid; and saving and reserving to us, our heirs "and successors, all white pine trees that shall or "may now or hereafter grow, or be growing on any "part of the said parcel or tract of land hereby "granted as aforesaid."

[THE COURT—Would that take away your pine tree claim?]

No. We have the right to all the pine that is there for all purposes—the statute gives us that. Then, what I submit upon that branch of the case is that, apart from any other consideration, with the admission that has been made, my clients have shown not only the title to the land, to the river, by express grant, but there being no reservation in the grant to affect that right, that, therefore, they have taken not only the land that is granted, but whatever other rights the common law would attach to that, and those common law rights, I submit, cover the water to the thread or middle of the stream, whether navigable or not.

Apart altogether from the question of ownership of the bed of the river, or the use of the waters for power purposes, we being the owners of this land by grant from the Crown, and by being bounded by the river, that river gave to the land the additional or special value that land not situate upon a river or accessible to water would not have.

[THE COURT—Whatever rights the *Fishmongers'* case[1] gives you?]

I am speaking of the right or convenience that would attach to that land.

[THE COURT—As outlined by the *Fishmongers'* case?]

Bathing and boating lend additional value.

[THE COURT—But you are not the owner of the bed of the river, unless you have a specific grant?]

Apart from being the owner altogether, we have rights that are appurtenant to these lands. That brings me to the question of the rights of my clients under this patent by the common law; and upon that

[1] *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662.

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point I cannot do better than refer to the case of the *Keewatin Power Company v. Town of Kenora.*[1] That was an appeal from the judgment of Mr. Justice Anglin, who wrote a very elaborate judgment the other way.

[THE COURT—It is a very fine judgment.]

Upon that authority and the patent I put in, I have shown that my clients are the owners of the land, and that it carries the ownership to the middle of the stream. Have my clients any further rights? I refer to ch. 129 of the R. S. O., 1914, sec. 4, and my submission is that this statute attaches and gives an additional right to my clients, other than those granted by the common law in these words:

"4. (1) A person desiring to use or improve a "water privilege, of which or a part of which he is "the owner or legal occupant, for any mechanical, "manufacturing, milling or hydraulic purposes by "erecting a dam and creating a pond of water, in- "creasing the head of water in any existing pond or "extending the area thereof, diverting the waters of "any stream, pond or lake into any other channel, "constructing any raceway or other erection or work "which he may require in connection with the im- "provement and use of the privilege, or by altering, "renewing, extending, improving, repairing or main- "taining any such dam, raceway, erection or work, "or any part thereof, shall have the right to enter "upon any land which he may deem necessary to "be examined and to make an examination and sur- "vey thereof, doing no unnecessary damage and "making compensation for the actual damage "done."

[1] (1908), 16 O.L.R. 184.

And sub-sec. 2 provides the machinery by which that right may be exercised upon application to the County Judge and filing a plan.

[THE COURT—This all applies to unnavigable rivers.]

I submit it is not limited in that way at all. If the title to the water and to the bed of the river is in the Dominion Government, then I say that this legislation would not affect it. But if, on the other hand, it is in the Province of Ontario, then the Dominion Government cannot interfere with it. We have the right to link up or connect our water power with any other possible development there in the river by paying compensation such as the County Judge would fix under this Act. And that is important to remember in this view of the case.

It probably will be argued by my learned friend that the head or water-power that my clients possess was so small or so insignificant as not to warrant development. Even if that were so, this statute, if it gives us a right to develop the power at that point, then it is possible for us to develop it just as it is to-day, and it is a valuable water-power.

Prior to the passage of the *B. N. A. Act* there were no potential rights in the Dominion, because at that time there existed the Provinces of Upper and Lower Canada.

[THE COURT—Before Confederation we had the old Province of Canada.]

But as to the Province of Canada, the lands in Upper and Lower Canada belonged to each of such Provinces. What I am arguing is this, the *B. N. A. Act* preserved to those provinces everything that they possessed up to the time of the passage of that

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Act, other than the identical things that were excepted. The ownership of lands was in Upper Canada, as the ownership in the Province of Quebec was in Lower Canada. The ownership of the lands carries with it, as a principle of law, the waters and the right to use the waters. The *B. N. A. Act* declares, in so many words, that the property of the provinces shall continue to belong to the provinces, excepting what is specified in the statute as being taken away from them. One thing taken away is the canals. It does not follow the wording of the old statute, but just mentions canals, with lands and water-powers connected therewith.

My argument upon that is this, that would only take out of the provinces such public works as might be called a canal at that time, and nothing more; and I submit the evidence is clear and distinct here, that even as late as in 1908, when lands were taken possession of, that there was nothing on the River Trent which could be called a canal. The evidence is that at one point, Chisholm's Rapids, there had been a lock constructed away back years ago, but beyond that no work had been done to make the River Trent or any part of it a canal. Now, let me press that further. Would it be reasonable, or could one with any justification, call the River Trent a canal, because there was a lock or a few hundred feet of a canal made in the river at that time? Would it not be just as proper to call the River St. Lawrence the St. Lawrence Canal? Surely no one would think of doing that. There is a string of canals all along the St. Lawrence River, but it remains a river just the same, the St. Lawrence River, and these public works along and upon it are canals that would come

within the operation or construction of that statute. Just so in regard to the River Trent. The River Trent still remains the River Trent, but if there are any works upon that river in the nature of canals, so far as those works are concerned, they would be called canals, and would be under the control of the Government, but beyond that, I submit, the statute does not go. Cites the *Fisheries case*,[1] *Burrard Power Co. v. The King*.[2]

My submission is, that under the operation of sec. 117 of the *B. N. A. Act*, the property in provincial rivers, such as the River Trent, is expressly reserved to the Province.

Counsel for defendants then discussed the question of damages.

Mr. Masten, for the plaintiff—The whole case depends upon whether the water in question is navigable or not. If it is navigable, then the Ontario statute applies, and there is no ownership beyond the edge of the water. However, I will not anticipate the course of my argument.

The first point I propose to deal with is with respect to the statutes, demonstrating, if I can, that legally this is a navigable river, whether in fact and in truth it is physically navigable or not. By the declarations of the Parliament and Legislature of Canada, by force of the words of the statute, it has been made in law a navigable river, even if no boat could ever go down it.

The first Act to which I wish to refer is ch. 66 of 7 William IV., 1837. It is recited in sec. 1 that it is highly important that a line of communication should

[1] *Atty-Gen. for Canada v. Atty.-Gen. for Ontario, et al*, [1898] A.C. 700 at 710, 711.
[2] 43 Can. S.C.R. 27, [1911] A.C. 87.

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be formed between the waters of the Bay of Quinte and Rice Lake, by improving the navigation of the River Trent. Commissioners are appointed to carry out the provisions of the Act.

By sec. 14, the Commissioners are given power to rent or to lease, for any time not exceeding 21 years . . . the use of any water which they may permit to be taken and drawn from the said canal or canals for hydraulic purposes, giving the owners of the land through which such canal or canals may pass the option of using such water at the price fixed by the said Commissioners.

Then the next statute that I refer to is in 1846, 9 years afterwards, ch. 37 of 9 Victoria—Canada. That statute establishes a commission to superintend, manage and control the public works of the province. The commissioners are given the "control and management of constructing, maintaining and repairing of canals, harbours, roads or parts of roads, bridges, slides and other public works and buildings now in progress or which have been or shall be constructed or maintained at the public expense out of the provincial funds."

Then, sec. 18 enables them to enter on property to make surveys, etc. Sec. 23 provides that the several public works and buildings enumerated 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 purposes of the Act. Amongst the works mentioned in the schedule is the "Rice Lake and the River Trent, from thence to its mouth, including the locks, dams and slides between those points."

By the heading of Schedule A to the Act last referred to, these public works are vested in the Crown: "(a) That portion of the Otonabee River, between Peterborough and Rice Lake, with the lock and dam at Whitla's Rapids. (b)The Rice Lake and River Trent from thence to its mouth, including the locks, dams and slides between those points."

Then, in that connection, I would institute a comparison between those words and the language of the items relating to the Ottawa River in the same schedule:

"All such portions of the Ottawa River from the "City of Ottawa upwards, have been or shall be im- "proved at the expense of the Province"; and with that of the next item: "The lock and other improve- "ments on the River Richelieu." There we have a limitation to the particular portions which have been improved, whereas in the case of Rice Lake and the River Trent the language is broad and general, and included the whole area without exception.

The Schedule A also contains under the head of "Public Works" generally, the following: "And all other canals, lakes, dams, slides, bridges, roads or other public works, of a like nature, constructed or to be constructed, repaired or improved at the expense of the Province."

Now, this was a public work to be constructed. I am picking out the particular phraseology applicable to the River Trent. This was a public work contemplated from the year 1857, to be constructed for the improvement of navigation, vested for the particular purpose for navigation in the Crown, under the control of the commissioners, as specially described it falls within the words: "Public works to be constructed at the expense of the Province."

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Now, the effect of the foregoing legislation was to vest in the Crown, in right of the Province of Canada, the whole of the Trent River from Rice Lake to Lake Ontario, as one canal or river improvement. If so, that river passed to the Dominion at Confederation by virtue of sec. 108, and items 1 and 5 of schedule 3 of the *B. N. A. Act.*

[THE COURT—There is an action pending in this Court between the Government of Ontario and the Dominion of Canada about this Trent River. Both parties admit it is navigable. Ontario contends they are entitled to the surplus water over and above what the Dominion has used for the locks, and they claim the same also in respect to the River Niagara.]

Now, whether or not it is called the Trent Valley Canal, it forms part of one navigable system, and I submit would come within the sphere of works contemplated in the proposed Georgian Bay Canal. Looked at from the standpoint of the Government when the statute of 1837 was passed, it is one canal, one undertaking. It is for the purpose of navigation, and the fact that it is vested in the Dominion is borne out not only by the pleadings in the case that your Lordship has referred to, but by the expenditure that has been going on under Parliamentary authorities on Dominion property ever since Confederation. That takes the Trent out of the class of rivers belonging to the Province as contemplated by the *Fisheries* case.[1]

Then, passing to the consideration of the statutes, I come then to the next question whether this river is navigable in fact, and in that connection it has seemed to me that it might possibly be argued dif-

[1] *Atty.-Gen. for Canada v. Atty.-Gen. for Ontario, et al,* [1898] A.C. 700.

ferently in respect to rivers in Ontario and Quebec. The law is not as clear in Ontario, and in some cases there seems to be an indication that the old common law rule prevails, *viz.*, that only tidal rivers were navigable and that there was no other kind navigable. The term "navigable" was discussed in the Supreme Court of Canada. I refer first to the case of the *Attorney-General of Quebec v. Fraser*.[1]

"A river is navigable when, with the assistance "of the tide, it can be navigated in a practicable "and profitable manner, notwithstanding that, at "low tides, it may be impossible for vessels to enter "the river on account of the shallowness of the "water at its mouth." That is in the head note. I cite this case more particularly for the discussion of the term "navigable" by Mr. Justice Girouard, pages 596 and 597.

Then, the next case I refer to is *Tanguay v. Canadian Electric Light Company*.[2] Mr. Justice Girouard said in that case: "Floatable must mean something "different from navigable, for if it means the same "thing, then one of the two words is unnecessary. "Navigable is intended to refer to craft that re- "quires the direction of man and carry a crew. It "comprises rafts as well as vessels, because rafts "need the management of men on board. They float, "it is true, but every vessel does. The words 'float- "able' and 'navigable' are coupled together to pro- "vide for two distinct situations, first, the floating "of vessels and rafts, which is navigation; and, sec- "ond, the floating of loose logs and pieces of timber,

[1] (1906), 37 Can. S.C.R. 577 and 596.
[2] (1908), 40 Can. S.C.R. 1 at p. 32.

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"which is floatage, and is generally done in this "country by gangs of men called 'drivers'; other- "wise the word 'floatable' would have no sense."

The next case to which I would refer is a Quebec case, *Hurdman v. Thompson.*[1] "Une rivière est "navigable et flottable nonobstant que la naviga- "tion en soit interrompue en plusieurs endroits par "des chutes et des rapides."

The next case is an Ontario case, *Keewatin Power Co. v. Town of Kenora,*[2] and the pages I particularly refer to on the question of navigability are 242 to 244 and 263 to 264. Your Lordship will find at page 242 somewhat of a digest of a number of cases in Ontario and in New Brunswick relating to what is "navigability", gathered by Mr. Justice Anglin in his very admirable judgment. He says: "It is the "adaptation of a stream to purposes of navigation, "and not the being adopted in use, that renders it "a navigable river." Anglin, J., cites *Regina v. Meyers,*[3] *Esson v. McMaster.*[4] I understand Mr. Justice Anglin's view to be that a river might be navigable up to a certain point. He divided the river into two parts, navigable up to a certain point, and unnavigable above that point.

[THE COURT—*MacLaren v. The Attorney-General of Quebec,*[5] I think, settled that.]

I would refer your Lordship to the case of *Bell v. The Corporation of Quebec.*[6]

[1] (1895), 4 Que. Q.B. 409.
[2] (1906), 13 O.L.R. 237.
[3] (1853), 3 U.C.C.P. 305, 318.
[4] (1842), 1 Kerr N.B. 501.
[5] (1912), 46 Can. S.C.R. 656, 8 D.L.R. 800.
[6] (1879), 5 App. Cas. 84 at 90, 93.

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Then, the fact of navigability is not confined to tidal waters, but extends by the law of Ontario into non-tidal waters and into fresh water rivers.*

The next case I refer to for a similar purpose is that of *Gage v. Bates.*[1] This action was brought to try the right to an inlet on Burlington Bay. The plaintiff claimed title by patent dated March 19, 1798, and contended that it conveyed the inlet; and that the "bank" referred to in the patent was part of the bay, and not part of the inlet, and that consequently the public had no right thereon. Defendant contended that the inlet was part of the bay, and that the patent did not cover, but excluded the inlet; and further, that the *locus in quo* be navigable waters, even if the Crown could grant it at all, the public have the right to use and fish in it. Held, that the *locus in quo* is a navigable river, and therefore the public have a right to the free use thereof as such.

I refer to it on the one simple point that in Ontario navigable waters were, if navigable in fact, physically navigable, they were legally navigable, and that is the meaning of the word "navigable" when it is used in the *Cochrane Act,* to which I have referred.[2]

In *Bell v. The Corporation of Quebec, supra,* it was held that the river in question there was navigable. The discussion of what did not interfere with navigability was very strong: "The general char-"acter of the river at this place may be thus de-"scribed—numerous shoals exist in it, its bed is

* It was the first case in which it was made plain that the old common law rule that only tidal waters were navigable was held not to apply. That was at the upper part of Lake Erie.

[1] (1858), 7 U.C.C.P. 116.
[2] Ch. 31 R.S.O., 1914.

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"studded with rocks or boulders, which are a source "of danger to any craft which may ground upon it, "very high tides happen twice in the year, caused "by the melting of the snow in spring, and by the "rains in autumn, and it is only at the times of "these extraordinary tides that barges can at all "ascend the river, and then not without difficulty "and danger of grounding." Nevertheless it was held that it was navigable.

The next case I would cite is that of *Dixson v. Snetsinger*.[1] That was a case near Sheek's Island, in the St. Lawrence. It was held there that the River St. Lawrence above tide water is a navigable river, the bed of which is vested in the Crown; and, therefore, that under a grant of lots 31 and 32 in the first concession of the Township of Cornwall, described as bounded by the water's edge, no part of the bed of the river passed to the grantee.

I wish to refer again to *Rowe v. Titus*.[2] The headnote of that case is as follows:

"All rivers above the flow of the tide which may "be used for the transportation of property, as for "floating rafts and driving timber and logs—and "not merely such as will bear boats for the accom- "modation of travellers—are highways by water, "and subject to the public use; and in determining "whether a river is public or private, its length and "depth at ordinary times, and its capacity for float- "ing rafts, etc., are proper to be considered.

"In an action for obstructing a river by erecting "a mill dam, it is not a proper question for the jury, "whether the benefit derived by the public from the

[1] (1873), 23 U.C.C.P. 235.
[2] (1849), 1 Allen N.B. 326.

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"mill is sufficient to outweigh the inconvenience oc-
"casioned by the dam.

"Evidence of special damage in not being able to "fulfil a contract for the delivery of logs, is not "admissible where the damage alleged in the de-"claration is that the plaintiff was prevented from "getting the logs to market, and thereby lost the "freight and sale thereof."

[THE COURT—It was a question of timber and logs?]

Yes, it was on the point of floatability. It was not a question of the ownership of the bed of the stream, it was a question of the use of it for floating logs and obstruction of that use.

[THE COURT—There are statutes in the Province of Quebec, and, I suppose, they must have them in Ontario, that is to say, everyone has a right to cut down logs and put them in the river and pass them down, and if they do any damage in and about this they will have to pay.]

The case of *McLaren v. Caldwell*[1] was a case on that point. I think that is all I can usefully refer your Lordship to on the question of navigability. Then, as to the evidence of the fact of navigability. We have the proof of the passing of huge rafts, 180 feet long by 48 feet in width. We have the information of the men who were coming down with rafts, and they were always carrying with them a boat and being able to use it from place to place—and the evidence that the water opposite this place had an average depth of three feet. We have the evidence of boats being used for fishing purposes, with a jack-light and spearing in the spring. We have also the

[1] (1882), 8 Can. S.C.R. 435.

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evidence given that there would be no difficulty in establishing a ferry opposite these lands at almost any part.

Under the circumstances, and in view of the decisions making it plain that navigation in Ontario is a question of fact, I submit this river is clearly navigable. If, then, the river is navigable, I then invoke the statute to which I have made reference, *viz.*, ch. 31 R. S. O., 1914. The evidence is quite clear that there was no development in this case at all, so that it does not come within any of the exceptions in sec. 3 of the Act. Then, if for any other reason, which I cannot imagine to exist, the statute does not apply, I fall back on the case of *The King v. Wilson*,[1] and to the principles there laid down by Mr. Justice Cassels at pages 287 to 292. The point I would now make is this. I have said everything I wanted to say in regard to the law of navigability, and in regard to this river being navigable in fact. But the point I am coming to, assuming it to be established as a navigable river, is that there is no power to interfere with navigation by the construction of a dam or otherwise—even the putting of a stick in it, as your Lordship mentioned—excepting upon obtaining an order from the Governor-in-Council—and unless there is positive evidence, something to lead the mind of the Court in some direction to prove that it would be granted or would not.

All the cases are discussed by Mr. Justice Cassels at pages 287 to 292, and I need not trouble your Lordship. It emphasizes this phase of the matter and makes it plain that if this is a navigable river,

[1] (1914), 15 Can. Ex. 283, 22 D.L.R. 585.

and there was no Order-in-Council authorizing any erections, there was no legal right in this defendant with respect to establishing a dam, and, therefore, it is not an element of damage.

[THE COURT—Provided the river is navigable.]

Exactly, that is, after all, what it comes back to.

Counsel then discussed the facts of the case as to damages.

Mr. Porter replied.

Case tried at Belleville, Ontario, October 6, 7, 8, 1915.

AUDETTE, J. (February 14, 1916) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia,* that certain lands, belonging to the defendants were taken by His Majesty the King, under the provisions of the *Expropriation Act,* for the purposes of a public work, to wit: the construction of the Trent Canal, by depositing, on June 29, 1910, a plan and description of such lands, in the office of the Registrar of Deeds for the County of Hastings, Province of Ontario.

While the plan and description were so deposited on June 29, 1910, it is admitted by both parties that the Crown took possession of the lands in question on April 10, 1908; therefore, it must be found, under the provisions of sec. 22 of the *Expropriation Act,* that these lands became vested in the Crown on April 10, 1908.

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The defendants' property appears, from the deeds of record, to be composed of fifty-six acres, of which the Crown by these proceedings has taken an area of nineteen and twenty-three hundredths (19.23) acres.

The defendants' title is founded upon a Crown grant of August 3, 1799, to William Allan, their predecessor in title.

The Crown by the information offers the sum of $576.90 for the land taken and for all damages resulting from the expropriation. Furthermore, an undertaking, to which mention will be hereafter made, has been filed, at trial, under the provisions of sec. 30 of the *Expropriation Act*, whereby the damages resulting from the manner in which the lands have been taken will be greatly reduced.

The defendants, by their statement in defence, claim the sum of $30,000.

The land expropriated herein is taken on the front of the Trent River for a distance of about 145 roods, or about 2,390 feet, as, however, shown upon plan filed of record. It was vacant land when Morrison bought, and it remained so up to the expropriation. From the upper part of the land to the lower part thereof on the river, there is a difference in level of about two or three feet. The existence of this head of two to three feet has prompted promoters and speculators to value this property at a very high figure, notwithstanding that evidence adduced, even on behalf of the defendants, established that a power could not for any practical purpose, be developed on the defendants' property, unless they owned the other side of the river. Further evidence establish-

ed that a water-power with such a small head is not commercially practicable. I fear the defendants were the unhappy victims of promoters, and that this delusive water-power would be limited, as stated in the evidence, to the requirement of these lands being flooded as part of a bigger scheme.

The contention arising out of the possibility of such water-power has given rise to very conflicting evidence as to the value of the land taken. There is the optimistic evidence based upon promoters' schemes and upon speculative views, and there is the pessimistic evidence based upon the value of the land taken as fit only for pasture. The conflict is material: What indeed can help out of the difficulty if not the sale of this very property or a part thereof within a reasonable time of the date of the expropriation?

From the documentary evidence of record, it will appear (see Exhibit No. 4) that on April 28, 1899, Ruliff Grass acquired for the sum of $500 the whole of the fifty-six acres of which 19.23 acres have been expropriated by the present proceedings.

From Exhibit B, it will further appear that on January 13, 1909, a deed was passed conveying in fee simple an undivided half interest in the said fifty-six acres above mentioned, for the sum of $2,000 to the defendant Morrison. The latter, however, testified that this sale was made under an agreement dating as far back as 1905 (but which was not produced in evidence), and that this agreement in writing under the hand of the late Ruliff Grass was handed to the latter when the deed was passed in 1909, although Grass gave an option in 1906 without the association of Morrison.

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The suggestion of this small water-power, which in the course of the evidence, has been declared by some witness as not commercially practicable, has been used to inflate the speculative value of this property, and has given rise to very important forensic questions during the trial and argument such as the consideration of the question of the navigability of a river in Ontario under the Common Law of England, as introduced in 1792; and as to whether the title to this portion of the River Trent in question did not pass to the Federal Government at Confederation under sec. 108 of the *B. N. A. Act*, 1867. But in the view taken of the case, it is unnecessary for me to get into these questions, because it is of no substantial concern unless it were to discuss it in an academic manner, and that is not the duty of a Court of Justice and would only involve superfluous litigation.

Indeed, is not the best test of the market value of this property, as distinguished from the speculative value, the very price paid by the defendant Morrison so close to the date of the taking possession? And the value of the property at that time was practically the same at the time of the expropriation. Then defendant Morrison tells us he acquired that interest in the property with Ruliff Grass for the very purpose of developing this famous water-power. "That was," he said, "the idea I had, and that was the idea Mr. Grass had. I bought for the purpose of developing this water-power." Therefore this property at that date was sold and bought having in view all its prospective capabilities and potentialities, whatsoever they were, for the sum of $2,000 for the half interest in the fifty-six acres.

The sum of $2,000 paid by the defendant Morrison establishes the value of this property of fifty-six acres at that date at about $4,000, and the lands taken herein cover an area of 19.23 acres. As the best part, that is, the water-front, is taken, I will assess the compensation, covering all rights derived from such frontage, at the sum of $2,500, together with $500 damages resulting from the ditch, the fences on Frankford Road, and for all legal damages whatsoever resulting from the expropriation, making the sum of $3,000. To this amount will be added 10 per cent. for the compulsory taking against the will of the owners, making in all the sum of $3,300.

The public work constructed by the Crown has in the result placed, at the disposal of the owners of the balance of the property, available power which can be used for any purposes and does not therefore injure the balance of the property. If it does anything, indeed, it goes to enhance such value, which should be taken into consideration under sec. 50 of the *Exchequer Court Act*.

Therefore, there will be judgment as follows, to wit:

1st. The lands expropriated herein are declared vested in the Crown from the 10th day of April, 1908.

2nd. The compensation for the land taken and for all damages resulting from the expropriation is fixed at the sum of $3,300, with interest thereon from April 10, 1908, to the date hereof.

3rd. The defendants are entitled to be paid by the plaintiff the said sum of $3,300, with interest as above mentioned, upon giving to the Crown a good and sufficient title, free from all mortgages and encumbrances whatsoever.

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4th. The defendants are further entitled to the rights, powers and privileges mentioned in the undertaking filed at the trial herein.

5th. The defendants are also entitled to the costs of the action.

Judgment accordingly.

Solicitor for plaintiff: *A. Abbott.*

Solicitors for defendants: *Porter & Carnew.*