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 BETWEEN:
 HIS MAJESTY THE KING,..... PLAINTIFF;
 AND
 WALTER E. DEAN AND MICHAEL }
 BARONI } DEFENDANTS.

Expropriation—Agreement between owner and another to convey land expropriated to a limited company to be formed, not an option to purchase and does not give an interest in the land to such person.

Land belonging to the defendant Dean was expropriated by the plaintiff on March 6, 1934. Defendant Baroni claimed an interest in the said

land by virtue of an agreement in writing between himself and defendant Dean, and alleged that he sustained damages in a substantial amount by reason of the expropriation. The agreement dated December 9, 1932, described the defendant Dean as vendor and defendant Baroni as purchaser and sets out "that the vendor in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, hereby offers and agrees to sell to the purchaser who agrees to purchase from the vendor the said property hereinbefore described for the sum of \$3,260, said sum to be paid on the terms and conditions hereinafter more fully set out. . ." The agreement further stated that the offer was to remain open until June 9, 1933. On June 5, 1933, this was extended to April 5, 1934, and on March 26, 1934, Baroni, by a letter to Dean, purported to exercise the option, though such letter was not intended to express his ability or intention then to do so.

The chief "terms and conditions" of the agreement provided that the purchaser was to procure the incorporation of a joint stock company for the purpose of constructing and maintaining a hotel and beer parlour, store and lodging cabins on the said land; the vendor to contribute to the company the sum of \$3,260, the purchase price of the land and to take in full payment therefor stock in the company, the purchaser agreeing to purchase from the vendor after a certain period and at the request of the vendor, for a price not less than \$3,260, the capital stock of the vendor in the company. The purchaser also agreed to put forward an application for a beer licence under the Manitoba Liquor Control Act. The vendor agreed upon the option being exercised to transfer the land to the company.

Held: That the agreement was not an option to purchase the land in question, granted to Baroni by Dean, and did not give to Baroni an estate or interest in the land; the agreement did not mean and was not intended to mean that Baroni was himself to become the purchaser of the land.

2. That the agreement merely expressed an understanding reached on the part of both defendants, to enter contingently into a joint commercial venture, each having different obligations to perform to make the proposed undertaking possible and effective.

INFORMATION by the Crown to have certain property of defendant Dean expropriated for a national park, valued by the Court. Defendant Baroni claimed an interest in the land and asked for damages sustained by him through the expropriation.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Winnipeg.

J. H. Howden, K.C. for the plaintiff.

A. Sullivan, K.C. and *W. A. Cuddy* for defendant Baroni.

G. E. Tritschler for defendant Dean.

The facts and questions of law raised are stated in the reasons for judgment.

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THE PRESIDENT, now (February 11, 1936) delivered the following judgment:

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The lands in question here, were expropriated by the plaintiff, for the purposes of a national park, on March 6, 1934, under the provisions of subsections 3 and 4 of section 6 of The National Parks Act, chap. 33 of the Statutes of Canada 1930, and section 3 of the Expropriation Act, chap. 64 of the Revised Statutes of Canada 1927, and the principal matter for determination is the compensation to be allowed the owner or owners of the lands taken. The lands taken were contiguous to the southern boundary of Riding Mountain National Park and comprised the northeast quarter of section 24, in township 19, range 19, west of the principal meridian in the Province of Manitoba, and which comprised one hundred and sixty-three acres more or less. The plaintiff tendered the defendant Dean, the registered owner of the land, \$1,100 in full compensation for the lands taken and for all loss or damage arising therefrom, which amount that defendant refused to accept, and he now claims the sum of \$10,000. The information also pleads that the Crown is willing to pay to the defendant, or to whomsoever this Court may adjudge to be entitled thereto, the sum of \$1,100.

In the information exhibited on behalf of the Attorney-General of Canada it is pleaded that subsequent to the taking of the lands in question, one Michael Baroni claimed to have had, at the date of the said taking, an interest in the said lands and he subsequently filed a statement of defence in answer to such information claiming an interest in the said lands and for the expropriation of which, and for damages resulting therefrom to him, he now claims the sum of \$10,000.

Baroni alleges in his statement of defence that he had at the date of the expropriation, and still has, an estate or interest in the said lands by reason of a written agreement entered into between himself and the defendant Dean, and that in pursuance of the said agreement he, Baroni, had an immediate project on foot relating to the user of the said lands, as a hotel, summer resort, and commercial undertaking by reason of which the said land had a special value to him, and he alleges that the said agreement, and project were frustrated by the expropriation and ouster, and

by reason therefor he has sustained damages to the amount of at least \$10,000.

The agreement in writing between Dean and Baroni is dated December 9, 1932. It first recites that the defendant Dean, the vendor, is the owner of the same lands as are here expropriated; that Baroni, described as the purchaser, desires to purchase such lands for purposes later set forth in the agreement; that Dean is willing to dispose of his lands on the terms and conditions later set forth in the agreement; that for the consideration of one dollar Dean agrees to sell to Baroni the lands in question for \$3,260, such sum to be paid on the terms and conditions thereafter set out in the agreement. Then follow the terms and conditions of sale and purchase and it is perhaps preferable that the same be fully set forth, even though lengthy, as any attempt to summarize them would probably fail to convey their real sense. They are as follows:—

1. The purchaser agrees and undertakes to arrange to organize a Joint Stock Company under the Laws of the Province of Manitoba the original members of which are to consist of Walter E. Dean, of Sandy Lake, Manitoba, Evelin Dean, wife of the said Walter E. Dean, M. Baroni, of Neepawa, Manitoba, Mrs. M. Baroni, wife of the said M. Baroni and if the necessary arrangements can be made, H. Stead of Neepawa, Manitoba.

2. The objects of the said company shall (but not limiting itself to) be to construct and maintain on the lands hereinbefore described a hotel and beer parlour, general store, lodging cabins and all the necessary buildings and outbuildings in connection therewith for the accommodation and entertainment of tourists, campers, etc.

3. The said company shall be under the supervision and general management of M. Baroni the purchaser herein.

4. The said company shall employ Walter E. Dean the vendor herein in the capacity of resident manager and caretaker at a salary to be mutually agreed upon and consistent with the duties he has to perform and the position he shall occupy the company may also employ Mrs. W. E. Dean, in a capacity it may see fit and at a fair rate of remuneration to be mutually agreed upon and in conformity with the duties she shall be assigned to.

5. The resident manager shall be supplied with a residence or lodging in conformity with his position.

6. The vendor herein being a veteran of the Great War, 1914-18 and being disabled by services overseas and subject to spells of sickness and at times unable to perform duties assigned to him shall nevertheless receive his usual wages during the seasons that the hotel shall be open.

7. The vendors contribution to the stock of the said company shall be the sum of \$3,260, being the purchase price of the lands hereinbefore referred to and full payment thereof shall be taken in stock share certificates.

8. At any time after the expiration of two years from the vendor receiving notice as hereinafter provided the purchaser herein agrees and

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undertakes at the request of the vendor to purchase at not less than \$3,260 the capital stock of the vendor in said company.

9. Should the said H. Stead hereinbefore referred to supply any material, labour, etc., for the purposes of the said company he shall receive payment for the same in paid-up shares in the said company to the value of the said material, labour, etc.

10. The purchaser herein agrees and undertakes that in the event of taking up this option he shall be personally responsible to see that no workman's or mechanic liens of any sort or description are filed against the said property in connection with the building and equipping of the buildings to be erected on the said premises.

11. The purchaser agrees and undertakes that as soon as possible after the date hereof he shall make the necessary arrangements by the submission of plans and specifications to the Liquor Control Commission of the Province of Manitoba for an hotel and beer parlour and on the approval of said plans and specifications, and the assurance of the said Liquor Control Commission that there are no objections to the issuing of a beer licence in accordance with the terms of the Manitoba Liquor Control Act and that such licence will issue on completion of the said buildings in so far as the said Commission is concerned, work shall be commenced as soon as weather conditions shall permit and the supply of material can be obtained on the clearing of the grounds and construction of the necessary buildings for the purposes of the said company.

12. In the event of this option not being taken up in the time hereinafter stated the purchaser agrees and undertakes to pay to the vendor a further sum of fifty (\$50) xx/100 dollars as compensation for any loss of time, solicitor's fees and disbursements, etc., to which the vendor may have been put to by reason of this agreement.

13. On this option being taken up the vendor agrees and undertakes to supply in the name of the company hereinbefore referred to a deed or transfer of land with the usual statutory covenants and free from all encumbrances subject to the conditions and reservations contained in the original grant from the Crown. Said deed or transfer to be prepared by the vendor's solicitors at the expense of the purchaser.

14. The legitimate expenses of the purchaser in arranging the formation of the company shall be chargeable to the company if and when formed but the same shall be paid by the issue of fully paid share certificates of the company.

15. In the event of failure to organize the said company and this option not being taken up the vendor shall not be called upon to meet any expenses in connection therewith and shall receive payment of the monies mentioned in clause 11 hereof.

16. This offer is to remain open until the hour of six p.m. Friday, June 9th, A.D. 1933, and is to be irrevocable until the said mentioned date, and, if accepted in writing and in the manner hereinafter provided, on or before the said date, shall thereupon constitute a binding agreement of purchase and sale subject to the terms and conditions hereinbefore set out. The purchaser shall examine the title at his own expense within five days from the date of the acceptance and shall be deemed to have accepted the title except as to any written objections made within such time.

17. This offer may be accepted by a letter delivered to the vendor, or mailed, postage prepaid and registered, addressed to the vendor at Sandy Lake, Manitoba, and deposited in a post office other than the

Sandy Lake post office so as to reach the Sandy Lake post office not later than 6 p.m. Friday, June 9th, 1933.

18. Time shall be the essence of this agreement.

The time within which Baroni might exercise the right of purchase under the agreement, was, on June 5th, 1933, extended for the period of ten months, or until April 5th, 1934; on March 26th, 1934, Baroni wrote Dean to the effect that he was "ready, willing, and able to carry out the said option agreement." This letter, I understood counsel for Baroni to say, was sent to preserve any legal rights Baroni might have had under the agreement and was not intended to express his ability or intention then to exercise the so-called option, if the expropriation had not taken place.

The agreement, a strange document, is said to be an option of purchase of the lands in question, granted to Baroni by Dean, and it is claimed that while subsisting, it operates to give Baroni an interest in the lands in question. I do not think the agreement is truly open to that construction, nor does it, in my opinion, give to Baroni an estate or interest in the lands. The fact that Baroni happens to be described as "Purchaser" in the agreement and Dean as "Vendor" does not of itself reveal the true meaning of the agreement. The agreement is not in my opinion the case of the ordinary option to purchase lands or property from an owner, nor, are the authorities mentioned in such a case as *Davidson v. Norstrant* (1), applicable here; nor is it comparable to the case of a lease containing an agreement by the lessor to convey the land to the lessee at the expiration of the term, upon the payment of a stipulated price, which vests in the lessee a right to purchase which passes with the lease to his administrator, who may assign it, and the assignee may complete the purchase by the payment of the price within the time limited.

In any event Dean did not agree to convey the lands to Baroni, but to a company to be organized upon the performance or occurrence of certain conditions precedent, and further I should think, upon the company agreeing to perform other conditions mentioned in the agreement, in favour of Dean and his wife. The agreement, it seems to me, merely expresses an understanding reached on the part of Dean and Baroni, to enter contingently into a joint commercial venture such as is described

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in paragraph 2 of the agreement, each having different obligations to perform to make the proposed undertaking possible and effective; that, I think, is the business sense of the agreement. A condition precedent was that Baroni was to obtain from the Manitoba Liquor Control Commission a beer licence, or an assurance of such, for the hotel premises proposed to be constructed on the lands in question; this Baroni failed to obtain, and the only evidence on this point is the unsupported belief on his part that he might obtain such a licence sometime; up to the commencement of these proceedings he had failed to obtain any dependable assurance that he could obtain it, and I believe the evidence of Mr. Smart that Baroni, who was really the promoter of the project, had stated to him that temporarily at least he had abandoned the idea of proceeding with the project because he could not secure an assurance that the beer licence would be obtained. No witness from the Manitoba Liquor Control Commission was called. Baroni at no time prior to the expropriation was in a position to compel specific performance against Dean, and the proposed company had not then come into existence, and my recollection is that it was never organized. Had the joint venture been advanced as contemplated by the agreement, Dean was to convey his lands to a third party, the proposed incorporated company, and he was to receive in consideration therefor shares in the capital stock of that company in the amount stated in the agreement. Baroni was not in any event to have any interest in the land other than as a shareholder in the company; presumably he was to secure the capital necessary to construct and furnish the hotel and beer parlour, and possibly other buildings, though even that is not clear, and it is not clear that he was obligated to Dean to become a shareholder of the company, other than that he was to be one of the charter members of it, which here means little. If the project became a reality Baroni obligated himself to purchase Dean's shares in the company, for a stated price, after a certain period, and this was the only obligation enforceable by Dean against Baroni. The agreement does not mean, and was not intended to mean, that Baroni was himself to become the purchaser of the land. I do not think therefore that it can be held that the agreement gave Baroni an interest in

the lands in question and he is therefore not entitled to any compensation from the Crown by reason of the expropriation.

[The learned President considered the evidence adduced respecting the value of the land expropriated and concluded.]

I think if I allow the defendant Dean \$2,400 he will be fairly and adequately compensated, and this amount I allow with interest from the date of the expropriation, and he will have his costs of the action. I do not think I can properly decline to direct an order for costs against the defendant Baroni but in the circumstances I trust the same will not be exacted.

Judgment accordingly.

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