

1921
May 3.

HIS MAJESTY THE KING PLAINTIFF;

AND

ALBERT HYE DEFENDANT.

Expropriation—Litigious right—Compensation.

By reason of the erection of the Quinze Lake Dam, and the consequent raising of the level of the water in the lake, parts of certain properties in the neighbourhood were flooded.

The Crown expropriated the right to so flood these properties including the one in question herein, which at the time of the expropriation belonged to one V. Subsequently, (November 1st, 1918) V. sold the property to H. together with V's right to recover the compensation from the Crown for all damages caused him by said flooding and by the expropriation. The Crown exhibited an information acknowledging liability and seeking to have the amount of the compensation fixed, and made H. the defendant.

Held: That the assignment from V. to H. was not an assignment of litigious rights; and that, on the facts, H. was entitled to recover compensation for damages to his said land by flooding, and by the expropriation of the easement to flood.

Olmsted v. the King, 53 S.C.R. 450 distinguished where the action was one sounding in tort.

INFORMATION exhibited by the Attorney-General for Canada to have the easement and right to flood certain lands expropriated under the Expropriation Act valued by the Court.

March 23rd, 1921.

Case was begun before the Honourable Mr. Justice Audette, at Haileybury, and on April 22nd, 1921, was concluded at the city of Ottawa.

R. V. Sinclair, K.C., and Louis Cousineau, for plaintiff.

E. B. Devlin, K.C., and J. W. Ste Marie, K.C., for defendant.

The facts are stated in the reasons for judgment.

AUDETTE J. now (May 3rd, 1921) delivered judgment.

This is an Information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the right to flood the land described in the information, and belonging to the defendant, was, under the provisions of the Expropriation Act, taken and expropriated, for the purposes of the construction and operation of the Quinze Lake Dam and Reservoir, a public work of Canada, by depositing, both on the 26th October, 1917, and the 26th March, 1920, plans and descriptions, of the said lands, in the office of the Registrar of Deeds for the County or Registration Division of the County of Temiscaming.

The reason of the deposit of the amended plan and description of the said lands on the 26th March, 1920, was, as stated at bar, because the description deposited in 1917 was not considered sufficient to comply with the requirements of the Expropriation Act. The two plans are identical.

The date of expropriation will be taken, for all purposes, to be the 26th October, 1917.

The Crown has tendered and by the Information offers the sum of \$105.50 as compensation for the expropriation of this right to flood the said land and for all damages resulting from the same.

The defendant by his statement in defence claims the sum of \$2,000.00.

The defendant's title is admitted.

After the conclusion of the hearing of the cases of *The King v. A. Carufel*, under No. 3606 and *The King v. A. Grignon*, under No. 3609, counsel at bar, in the present case, agreed to the following admission, reading as follows, viz.:

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Admission—It is hereby admitted by the defendant that all the general evidence as to value of the different classes of land in the locality in question, as testified to in the two cases (viz., No. 3606, *The King v. A. Carufel*, and No. 3609, *The King v. A. Grignon*) shall be common to this case.

And it is admitted by the Crown that all the evidence of a similar nature adduced on its behalf in the two above mentioned cases, shall be common to the present case, the Crown, however, undertaking to file a statement showing the particulars of how their expert witnesses have arrived at the amount of their valuation.

It is further admitted that the plan Exhibit No. 5 herein, which is the particular plan applicable to this case, will be admitted without further evidence and taken as proved.

It is also agreed between counsel for the respective parties that the evidence of Henry H. Robertson given in these two previous cases mentioned under Nos. 3606 and 3609 will be taken as also given in this case, that is according to his own view, of what would be the area of the land flooded.

At the date of the expropriation the lands in question belonged to one Vien, who, on the 1st November, 1918, sold the same to the present defendant, as it then stood, with the right to recover from the Crown the compensation for the flooding of the said lands.

Counsel at bar, on behalf of the Crown, contended that, under the case of *Olmsted v. The King* (1), a claim for damages arising out of flooding of land cannot be transferred or assigned. However, the present case does not come within the ambit of *Olmsted v. The*

(1) 53 S.C.R. 450.

King, (*ubi supra*) where the action was one sounding in tort. The assignment of such a claim would be in the nature of an assignment of litigious rights. What is sought to recover herein, is the compensation for the easement of flooding that the Crown has expropriated, and in which the information, acknowledging liability, seeks to have the amount of compensation duly fixed, under the provisions of the Expropriation Act.

It is not a case which can be qualified as one involving litigious rights, in the true acceptance of such terms. It is a case flowing from the right and interest that a subject has in a property compulsorily taken and in respect of which the Crown admits liability, and the plaintiff does not suffer as a result of such mutation of property. *Neville v. London and Express Newspapers, Ltd.* (1). The rights and interests expropriated are appurtenant to real estate, and for which the right to compensation is recognized both by the deposit of the plans and description and by the information herein. And the compensation money for such rights and interests is, by sec. 22 of the Expropriation Act, converted by mere operation of law, into a claim to the same. *Re Lucas & Chesterfield Gas and Water Board* (2).

It is not the case of a property changing hands after the entire fee has been expropriated. The expropriation is limited to an easement to flood over bench mark 866, which left Vien, the defendant's predecessor in title, as the owner of the land itself, even after the expropriation. The land has not been expropriated and therefore the property never became *extra commercium*. *Lamontagne v. the King* (3). Vien had a perfect right to sell his property under the circum-

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(1) 35 T.L.R. 167.

(2) [1909] 1 K.B. 16.

(3) 16 Ex. C.R. 203, at 211.

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stances, even after the easement had been expropriated, and as his assignee has been brought into Court by the Crown in these proceedings, I see no reason why the compensation should not be paid to him. The compensation for this easement has never been satisfied and the right and interest thereto can be assigned, as distinguished from a litigious right as mentioned in the *Olmsted case*.

To avoid unnecessary repetition, the reasons for judgment given this day by me in the case of *The King v. Adelard Carufel*, under No. 3606 are hereby made part hereof and more especially in respect to the general observation respecting the nature of the expropriation, the area taken and the compensation so far as applicable.

The expropriation of the easement is with respect to 21.10 acres, of which 1½ acre under cultivation and the balance 19.60 in bush land. For the 1½ acre under cultivation I will allow at \$60 an acre, the sum of \$90.00; for the 19.60 at \$5, \$98.00; for the 7.15 acres that *enclavés*. isolated from rest of farm by the severance, at \$5 an acre, \$35.75.

His communication to the east of his farm resulting from the severance of this 7.15 is also a serious matter and for that element of compensation and for the difficulty arising from the want of a bridge and the extra expenses in fencing I will allow, as covering also all elements of compensation, the further sum of two hundred dollars, making in all the sum of \$423.75 as a just and fair compensation under the circumstances.

Counsel at bar, on behalf of the Crown, has laid stress on the fact that as this farm changed hands for the sum of \$250, that this sale should be used as a criterion of the value of land in that neighbourhood.

He also pressed, on the argument of the 18 other cases, that in fixing the compensation therein the present sale should be taken into consideration. I am unable to accede to this view for the obvious reason that the defendant's evidence in the present case is not common to the other cases, but is limited to the present one. It is the opinion evidence of witnesses on both sides only that is common to all these cases. Moreover, the sale in question took place after the property had been damaged and when settlers were leaving that part of the country, as established by general evidence.

Therefore there will be judgment as follows, viz.:

1°. The right to flood the lands in question is declared vested in the Crown as of the 26th October, 1917.

2°. The compensation for the right to so flood the lands in question and for all damages whatsoever resulting from the said expropriation is hereby fixed at the total sum of \$423.75 with interest thereon from the 26th October, 1917, to the date hereof.

3°. The defendant, upon giving to the Crown a good and satisfactory title, free from all hypothecs, mortgages and incumbrances whatsoever, is entitled to recover from and be paid by the plaintiff the sum of \$423.75 with interest as above mentioned and costs.

Judgment accordingly.

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