

1895
 Nov. 23.

HER MAJESTY THE QUEEN.....PLAINTIFF;
 AND
 SAMUEL MOSS AND THE SUPER-
 INTENDENT-GENERAL OF IN- } DEFENDANTS.
 DIAN AFFAIRS..... }

Public work—Injurious affection—Destruction of highway—Measure of damages—Obstruction to navigation.

Where lands are taken for a public work, and other lands, held with those so taken, are injuriously affected by the construction of the work, the measure of damages is, in general, the value of the lands taken and the depreciation in value of such other lands.

2. The claimant's lands were situated upon an island connected with the mainland by a highway carried over a structure in waters that were, in law, navigable, but had not been used for the purpose of navigation, being only some five or six feet in depth. The obstruction had been acquiesced in for many years. The Crown had repaid to the land owners on the island money the latter had expended in repairing the highway over this structure, and the municipality had also expended money in repairing the highway where it crossed such waters. By the construction of a public work this highway was flooded and destroyed. The Crown, however, treated it as a public way, and substituted another way for it that mitigated, but did not wholly prevent, the depreciation in value of the claimant's property.

Held, that even if the legislature had not authorized the obstruction in such navigable waters, the claimant was entitled to compensation for the depreciation caused by the construction of the public work, inasmuch as such depreciation did not arise from any proceeding taken by the Crown for the removal of such obstruction.

THIS was an information by the Crown for the expropriation of certain lands in the township of Cornwall, Stormont County, Ontario, for the purposes of the construction of the Sheik's Island Dam.

The facts are stated in the reasons for judgment.

The case was tried at Cornwall on the 5th, 6th and 7th days of November, 1895.

G. Leitch, Q.C. for the defendant *Moss*: The inhabitants of the island were entitled to use the old bridge *ex necessitate*. They enjoyed the user of this bridge for nearly seventy years. Besides this the stream was not navigable, and the Crown never had a right to remove the bridge as an obstruction to navigation. A prescriptive right to the use of the bridge as part of the highway had accrued beyond a doubt before the destruction of the highway. Compensation must be made.

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Argument
 of Counsel.

W. D. Hogg, Q.C. and *J. Bergin*, Q.C. for the Crown and the Superintendent-General of Indian Affairs:— This bridge is laid across part of the bed of the stream of the St. Lawrence river, therefore the islanders could not acquire any rights by prescription that would interfere with the *jus publicum*. The local legislature could not authorize such an interference. The obstruction to navigation could have been abated at any time, and the Crown having now removed it no right to compensation subsists on behalf of anyone. (*Dixon v. Snetsinger* (1); *Queddy River Driving Boom Co. v. Davidson* (2).

Mr. *Leitch*, replied.

THE JUDGE OF THE EXCHEQUER COURT now (November 23rd, 1895) delivered judgment.

The defendant Samuel Moss is in possession of a farm situate on Sheik's Island in the township of Cornwall and county of Stormont. The fee in the land on Sheik's Island is in the Crown for the benefit of the Iroquois Indians of Saint Regis, and Moss, and other occupiers of lands thereon, hold their lands as assignees under a lease of such lands to their predecessors in title for a term of nine hundred and ninety-nine years. The farm that Moss is in possession of contained, in

(1) 23 U.C.C.P. 235.

(2) 10 Can. S.C.R. 222.

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January, 1894, one hundred and thirteen and a half acres. On the 12th of that month the Crown, through the Minister of Railways and Canals, for the use and enlargement of the Cornwall Canal, a public work of Canada, expropriated ten acres and eighty-five one-hundredths of an acre of the land theretofore forming part of this farm; and the parties have agreed upon the compensation to be paid for the land so taken by the Crown, and for damages occasioned by the severance, as well as upon the amount that is to be deducted therefrom and paid to the Superintendent-General of Indian Affairs in respect of the Indian title. The only questions to be determined are:—Is the defendant Moss entitled also to compensation for the depreciation in value of his farm occasioned by the construction of the public work, and, if so, the amount of such compensation. The latter question presents under the evidence little or no difficulty. There can, I think, be no doubt that when the works that are now in progress and for which the lands mentioned were taken, are completed the defendant's farm will be lessened or depreciated in value by the amount claimed, namely one thousand dollars.

Sheik's Island lies at the foot of the Longue Sault Rapids of the Saint Lawrence River. At this point the river divides itself into three channels or branches, Sheik's Island lying between the north channel and the middle channel. The north channel forms part of the navigable waters of the Saint Lawrence, though it does not appear to have been used for the purposes of navigation, the normal depth of water therein being some five or six feet. Since 1833, and perhaps from a time anterior to that, the inhabitants of the Island have had communication with the mainland by a bridge across this channel at or near the village of Moulinette; and in the construction at this point of the

Cornwall Canal in 1833 or 1834, a way was provided by a tunnel under the canal by which the highway from the Island across this bridge was carried to the north or Moulinette side of the canal. This bridge was carried away in 1851, and was then rebuilt upon a new site, a short distance from that previously occupied. In rebuilding the bridge the inhabitants made use of what was called a dam that had been made for milling purposes, and which was built in the middle of the channel and part of the way across the same. In 1861 the Government of the Province of Canada paid to a number of the inhabitants of the Island one thousand dollars to indemnify them for work and money expended on the bridge, and the municipal authorities have from time to time expended money in repairing the bridge and maintaining the highway which connect and form the only means of communication between the island and the mainland. This bridge and partial dam formed no doubt an obstruction to the navigation of the channel such as such navigation was; and there is nothing to show that there was ever any legislative authority to justify or legalize the obstruction, unless the clause in *The Expropriation Act* (1) to which I shall presently refer is sufficient for that purpose. The channel was not used for the purposes of navigation. It was necessary and proper that the lessees of the island should have a way to the mainland, and every one, including the Crown, no doubt acquiesced in the maintenance of the obstruction. In the execution of the present work of enlarging the Cornwall Canal two large dams have been constructed across the north channel, one at the west or upper and the other at the east or lower end of Sheik's Island, and when the works are completed the canal will be turned into and

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(1) 52 Vict. c. 13, s. 34.

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through this channel, which will then cease to be one of the channels of the Saint Lawrence, and will become a part of the Cornwall Canal, the water level of which is at this point much higher than the level of the Saint Lawrence River. The result of this will be that the highway from the island to the mainland will be submerged and destroyed, and the inhabitants of the island will be deprived of the means of communication that they have had with the village of Moulinette, at which place they have been accustomed to attend church, to send their children to school, and to transact their business as farmers. To meet this difficulty the Minister of Railways and Canals proposes, and it is part of the work contemplated and in progress, to substitute a highway to the village of Mille Roches, some three or four miles east of Moulinette. This proposed highway will be carried over the lower dam and then across the canal by a bridge. This substituted highway will mitigate the inconveniences to which any person in the occupation of lands upon the island would otherwise be put, and will lessen the depreciation in the value of land on the island which would otherwise occur by reason of the construction of the public work. But notwithstanding this highway to Mille Roches, it must, I think, be conceded that, when the proposed works are completed, the part of the defendant Moss' farm that has been left to him will, by reason of such works, be depreciated in value to the extent of one thousand dollars. By the 3rd section of *The Expropriation Act*, clause (*f*), the Minister of Railways and Canals is given power, among other things, in such a case as this, to divert permanently any road, street or way, but before discontinuing any public road he is to substitute another convenient road in lieu thereof. It is by virtue of this power, so I understand it, that the

Minister proposes to divert or destroy the road or way from the island to the village of Moulinette and to substitute therefor the proposed road or way to the village of Mille Roches. Then the Act to which I have referred contemplates that the owner of land taken for a public work shall be paid compensation not only for the land taken, but for damages occasioned thereto by the construction of the public work (ss. 15 and 22), and it is not in this case contended that the defendant would not be entitled to damages but for one thing. It is said that the bridge and highway across the north channel of the river was an obstruction to navigation; that it was not a lawful structure or erection in and over such channel, and that the Crown has a right to submerge it and destroy it, without paying damages to anyone. That, if conclusive against the defendant, would of course apply only to such portions of the bridge and highway as are an actual obstruction to navigation, and not to other portions of the highway which are equally flooded and destroyed.

But we need not, I think, concern ourselves with what the rights of the Crown might have been had proper proceedings been taken to have this bridge and highway removed, or what it might without such proceedings have done had there been occasion to remove the bridge to improve the navigation of the north channel of the river. That is not what is being done. This channel, as we have seen, has been dammed off from the St. Lawrence, and has ceased to be a channel of the river, and has, or rather will, become a part of the Cornwall Canal. The Minister treats the highway in question as a public road, and proposes to follow the statute and substitute a way to Mille Roches in lieu thereof; and I see no reason to depart from the statute in assessing the compensation to the land owners where a part of their lands has been taken for the

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public work, and the remainder injuriously affected by the construction thereof. The highway, from the island to Moulinette, was one of the things that made the lands on the island valuable. By its destruction in the construction of a public work such lands are lessened in value. That depreciation is mitigated, but not wholly met by the making of a way to Mille Roches. If no part of the defendant's land had been taken he might have been without remedy. It is not necessary to discuss that question. But a part having been taken, the measure of damages is, I think, the value of the land taken and the depreciation in value of other lands, held with those so taken, occasioned by the construction of the public work.

I am the better pleased to be able to come to this conclusion, because I think that the bridge in question is within the spirit, if not the letter, of the concluding clause of the 34th section of *The Expropriation Act*, which provides that every bridge, wharf or public work theretofore constructed with the public money of Canada in or over navigable water should be, and be deemed to be a lawful work or structure.

There will be the usual declaration that the lands mentioned in the information are vested in the Crown, and the amount of the compensation money will be assessed at \$2,025.35, as follows :—

|                                                                                                  |             |
|--------------------------------------------------------------------------------------------------|-------------|
| For land taken for the public work, and damages resulting from severance, as agreed upon . . . . | \$ 922 25   |
| Interest thereon from Jan. 12th, 1894, to Nov. 23rd, 1895 . . . . .                              | 103 10      |
| Other damages, resulting from the construction of the public work as mentioned . . . . .         | 1,000 00    |
|                                                                                                  | \$ 2,025 35 |

Of this sum of \$2,025.35, the sum of \$17.50 is to be paid to the Superintendent-General of Indian Affairs,

in respect of the Indian title in the lands taken, and the balance of \$2,007.85 to the defendant, Samuel Moss.

The defendant Moss will be allowed the costs of the issue as to damages resulting from the diversion of the highway to Moulinette and the substitution of the way to Mille Roches.

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*Judgment accordingly.*

Solicitor for the plaintiff: *John Bergin.*

Solicitors for the defendant Moss: *Leitch, Pringle & Harkness.*

Solicitors for the Superintendent-General of Indian Affairs: *O'Connor & Hogg.*