

THE QUEEN ON THE INFORMATION OF }
 THE ATTORNEY-GENERAL FOR THE } PLAINTIFF;
 DOMINION OF CANADA.... }

1899
 Jan. 18.

AND

ARCHIBALD STEWART AND OTHERS..DEFENDANTS.

Expropriation—Filing new plan—Information—Crown's right to discontinue—Costs—Fiat.

Where issue has been joined and the trial fixed in an expropriation proceeding, the Crown may obtain an order to discontinue upon payment of defendants' costs; but the court will not require the Crown to give an undertaking for a *fiat* to issue upon any petition of right which the defendant may subsequently present.

MOTION to amend the information in an expropriation proceeding, or, in the alternative, to discontinue the action.

The facts upon which the motion was based appear in the reasons for judgment.

January 10th, 1899.

S. H. Blake Q.C. and *H. W. Lawlor* in support of motion;

M. O'Gara Q.C. and *B. B. Osler Q.C.* contra.

THE JUDGE OF THE EXCHEQUER COURT now (January 16th, 1899) delivered judgment.

The affidavits by which the motion to amend the pleadings herein is supported and opposed disclose an important issue of fact which must be disposed of before the respective rights of the parties can be determined, and that question, stated briefly and in substance, is, it seems to me, this:

Do the plan and description of the lands taken deposited of record in the office of the Registrar of Deeds for the County of Russell, on the 27th day of

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December, 1898, describe and show the lands which the Minister of Railways intended in January, 1898, to take, and which but for some omission, misstatement or erroneous description in the plan and description deposited on the 13th day of January, 1898, he would have taken ?

On the proper answer to that question, which no doubt might be stated in other terms, but to the same effect, depends, it seems to me, the further question, which is one of law, whether the deposit of the corrected plan and description is within the statute and therefore valid ?

The question of fact indicated is not one which I ought in my opinion to determine either way on this application. It will, I have no doubt, constitute one of the main issues between the parties in whatever form the present controversy is continued, and one can readily see that it may be necessary to have more evidence than is now before the court, before it can be properly determined. I do not wish to say more than that. I do not care to discuss the facts now.

But while I ought not, I think, to find on the question of fact at this stage of the proceeding, I ought to afford the Crown an opportunity to raise the question by an amendment made on proper terms, if that may be done without prejudice to the defendants.

As to the proposed amendment I am unable to allow it. It seems to me that it would if made greatly prejudice and embarrass the defendants, not so much for what is added, as for what is struck out. It strikes out of the information the allegations that show what was done in reference to the deposit of the plan and description on the 13th of January, 1898. I should not—I say it subject to argument, however—see the same difficulty if the information as filed were allowed to stand, and an amendment were made by an addition.

thereto that would show that since the filing thereof Her Majesty's Attorney-General for Canada had learned that the lands referred to therein had been erroneously described, and that the proceedings represented by the deposit of the corrected plan and description were taken; and with such other allegations and conclusions as might be necessary fairly to raise the issue between the parties. That is the only amendment that I should feel justified in allowing, and that of course upon terms as to costs, and as to affording the defendants an opportunity to answer.

If that should not be satisfactory I should be brought to the question of discontinuance, which I should allow upon payment to the defendants of their costs. I should not impose any terms as to the granting of a fiat. That would not, it seems to me, be fitting or proper.

Order accordingly.

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