HIS MAJESTY THE KING, PLAINTIFF,

1921
March 10.

AND

THE HUDSON'S BAY COMPANY AND OTHERS, DEFENDANTS.

Expropriation—Property and civil rights—Provincial Statutes—Land Registering Act, B.C., sec. 104—Expropriation Act, secs. 25, 26—B.N.A. Act, sec. 92—Taxes.

Held. 1. Property and civil rights being matters within the exclusive powers of the provincial legislature, the Exchequer Court of Canada in ascertaining the estate or interest of persons claiming compensation for property expropriated by the Dominion Crown will have regard to the laws affecting such estate and interest in the province where the property is situated.

2. Certain land expropriated by the Dominion Crown was leased for a period of 5 years under an instrument not registered as required by section 104 of the Land Registering Act, B.C.

Held: That the unregistered lease did not vest any estate or interest in the lessee within the meaning of sections 25 and 26 of the Expropriation Act, R.S.C. 1906, c. 143, and that the lessee was not entitled to compensation in respect of the expropriation.

3. Defendants sought to recover from the Crown an amount paid by them for municipal taxes on the property after the expropriation.

Held: That such a claim did not come within the scope of the present Information, and that the Court therefore had no jurisdiction to entertain the claim thereunder.

INFORMATION exhibited by Attorney-General for Canada to have it declared that certain properties expropriated at Esquimalt, B.C., for dry dock, were vested in the Crown and to have the value thereof fixed by the Court.

January 24th, 25th, 26th and 27th, 1921.

Case now heard before the Honourable Mr. Justice Audette at Victoria, B.C.

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H. W. R. Moore for plaintiff.

H. W. Robertson and *H. G. Lawson* for defendants Hudson Bay Co. and trustees for the Puget Sound Agricultural Company.

E. Miller for the Alunite Mining and Products Co.

The facts are stated in the reasons for judgment.

AUDETTE J. now (this 10th March, 1921) delivered judgment.

This is an information, exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to two of the defendants, were, under the provisions of the Expropriation Act, taken and expropriated for the purposes of a public work of Canada, namely, a dry dock, at Esquimalt, B.C., by depositing on the 4th February, 1920, a plan and description of such lands, in the office of the Registrar General of Titles at the city of Victoria, B.C.

Three parcels of land were so expropriated and they are respectively described in the information under the head of firstly, secondly and thirdly.

The lands first and secondly described belonged at the date of the expropriation to the defendant, the Puget Sound Agricultural Company, represented herein by trustees, and the lands thirdly described belonged to the Hudson's Bay Company.

The Crown, by the information, offers to pay the defendants, or whomsoever shall prove to be entitled thereto, the sum of $2,000 per acre for the said lands and real property and damages, if any, resulting from

the expropriation. At the opening of the case, the plaintiff also produced in evidence exhibits 3, 4, 5 and 6, thereby establishing that the above-mentioned amount had been tendered the defendants before the institution of the action and had been refused.

The Puget Sound Agricultural Company, by the amended statement of defence, claims compensation at the rate of $5,000 per acre, together with the sum of $870.71, being the proportion of the taxes from the 4th February, 1920, to the 31st December, 1920, paid by them and assessed against their lands by the corporation of the township of Esquimalt previous to the filing of the information.

The Hudson's Bay Company, by the amended statement of defence, claims compensation at the rate of $5,000 per acre, together with $382.71 paid as taxes under the same conditions and circumstances mentioned in the previous paragraph.

There is the further claim of the Alunite Mining and Products Company, Limited, as lessees of the lands owned by the Hudson's Bay Company. This claim will be hereafter dealt with by itself.

The only question in controversy between the plaintiff and the two first defendants, proprietors of the lands taken, is one of the *quantum* of compensation to be paid under the circumstances of the case.

(His Lordship here cites from the evidence as to value and continues.)

Having thus analysed the evidence adduced on both sides, I am now confronted by the task of finding the proper mean between the divergent valuations of the witnesses for the plaintiffs and the defendants. The court has to steer a safe course between Sylla and Charybdis—between the optimist and the pessimist in values.

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The owners, after the expropriation, should be neither richer nor poorer than before. It is intended they should be compensated to the extent of their loss, and that loss should be tested by what was the value of the property to them, and not by what will be its value to the expropriating party.

This property in Esquimalt Harbour, is situate between the railway and the water, the difference in level between them being somewhere about 67 feet, and is of a rocky, rugged, surface, the topography or configuration of the same being very uneven, with the exception of two or three acres, on the west.

As residential property, it has many disadvantages, in that the land is so uneven, and that there is no road leading to the western and central pieces, and that to build such a road a very large amount of money would have to be expended besides the cost of survey for subdivision, and the building of an aqueduct. Moreover, it being immediately in the neighbourhood of an Indian Reserve, would, for such a purpose, make it very undesirable. With respect to that class of property, we have evidence on behalf of the owners that in 1920 there was no demand, no market for an unimproved residential property. The neighbourhood of a noisy ship-yard, with oil and other dirty substance spreading on the beach—as was realized on the day of the visit to the premises, would also add to the disadvantage for residential purposes.

Approaching the property as an industrial site, its configuration must also be taken into consideration and more especially the very large amount of money that would have to be expended before making it available for such purposes. The amounts are so large, that a prospective purchaser—excepting the

Crown putting up a public work—would hesitate before purchasing—in fact a business man would in preference choose some other water front if he really required a spur and a levelled area, and would not readily purchase.

I have had the advantage, accompanied by counsel for all parties, of viewing the premises in question, and after considering the evidence it appears to me inconceivable that the lands in question could be assessed at this blanket value of $5,000—if one stops to consider the almost prohibitive expenditure that would be required to make it available for industrial purposes—the residential purposes being considered the less advantageous use of the two, under the circumstances. The expenditure is so great to place the property in a state of development for either residential or industrial purposes, that it goes to the market value of the land itself.

But there is more in this case. The two parcels of lands, east and west, belonging to the Puget Sound Agricultural Company, although partly water front, as above mentioned, do not carry with it the right to erect a wharf—a right that can only be obtained from the Crown who is now expropriating. Not having this right, as stated by witnesses heard on behalf of the owners, that makes a great deal of difference in arriving at the market value of the land. The parcel of land held by the Hudson's Bay Company has a pre-confederation right to erect a wharf of 100 feet in length—by a narrow width, as shown upon the ground. That of itself makes this piece of land more valuable than the other two.

There is no evidence that the eastern and western parcels ever earned any revenues. The central piece never brought large revenues—the lease in force at

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the time of the expropriation constitutes the best revenue it ever yielded and this is on account of the spacious building erected thereon.

The Crown has tendered and also offered, by the information, $2,000 an acre for the three parcels of land, in full satisfaction for the same, the real property and all damages, if any, resulting from the expropriation.

While I have come to the conclusion to accept these $2,000 an acre for the land taken, as an ample and fair compensation under the circumstances, I cannot apply that quantum to all three pieces. The eastern piece is of irregular shape, besides its irregular surface, terminating in a pointed or jib lot, tending to decrease its value—with 1·02 acres not water front and 1·07 acres adjoining water only at high tide. The western lot has a road of access, and comes within the general description given above. For these two pieces of land together, as belonging to the same proprietor, I accept as ample compensation this offer of $2,000—although part of the western piece can hardly have that value.

But, if the eastern and western parcels are worth $2,000 an acre, as tendered and offered by the Crown, the central parcel with a large and substantial building and the right to build a wharf 100 feet long, is obviously worth more than $2,000 an acre. Accepting that basis I will fix a value of $2,000 an acre for the lands owned by the Puget Sound Agricultural Company, and $2,500 for the lands owned by the Hudson's Bay Company, together with the sum of $12,000 for the substantial stone warehouse thereon erected.

The cost on the issue between the Crown and the Puget Sound Agricultural Company will be in favour of the Crown, and the costs on the issue between the Crown and the Hudson's Bay Company, will be in favour of the latter.

Coming now to the claim made by the defendants in respect of the taxes for 1920, and which I find were improvidently paid—when a general remittance was made in respect of all lands held by them in that municipality, I have obviously come to the conclusion that such a claim cannot come within the scope of the present action. It is a distinct and separate claim over which the court, under the present information, has no jurisdiction, but which must be the subject matter of a separate action brought against the Crown after obtaining a *fiat*. The Crown is not amenable to taxes. (See Section 125 B.N.A. Act).

TENANCY.

There is further to be considered in the case the claim of the Alunite Mining and Products Company, Limited, which company at the date of expropriation were lessees of the lands owned by the Hudson's Bay Company, above referred to, and upon which there was a large building and a small delapidated wharf of one hundred feet in length.

On the 2nd July, 1919, the Hudson's Bay Company leased to the Alunite Company, the warehouse and lands above referred to for the term of five years, at the annual rental of $720 during the first year of the term; $1,080 during the second year; $1,200 during the third year of the term; and $1,500 during the fourth and the fifth years of the term—such yearly rentals to be payable by equal half yearly payments in advance on the 2nd July and 2nd January, in each year.

The lessees had no right to sub-let or assign the lease. They were, however, allowed to make such repairs, as mentioned in the deed, to the warehouse in question, towards which expense the lessors contributed to the amount of $500.

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During the summer of 1919, the lessees started to work at the repairs, when shortly afterwards they became aware the Crown was going to expropriate and no work was done after Christmas of that year—the full repairs being not quite completed at that date. The lessees contemplated extending the wharf another one hundred feet, provided leave could be obtained from the Crown, and they looked upon the site as favourable for the development of their business, such as alleged in the lease, considering the facilities, as expressed by witness Baird, for a spur line.

The plaintiff having expropriated on the 4th February, 1920, they looked around for another site, and although the evidence discloses that there were water front properties available in Esquimalt Harbour and around Victoria, they contend they could not be suited and went to Vancouver, where they entered into a lease of a property for 21 years, renewable up to 63 years, and erected a building upon these new demised premises. They did not order machinery until they were settled at Vancouver, as they had not the money to pay for it, says witness Baird.

Under the circumstances, the lessees, by their statement in defence claim the sum of $63,900.00. The Crown did not tender or offer any compensation.

Coming to the question of the *quantum* of such compensation, one must realize that, as Nichols, on Eminent Domain, p. 714, says: "To fix the market value of an unexpired term is no simple matter. Leases commonly are not assignable without the consent of the landlord, and so infrequently sold, and vary so much in length of term, rent reserved and other particulars as well as the character of the property, that it is almost impossible to apply the customary tests of market value to a leasehold interest."

However, we have in this case the great advantage of having to deal with a lessee who is not carrying on his business—who does not operate shops and has not a going concern; but who at the very inception of his lease becomes aware that the property is to be expropriated for public purposes. He becomes aware of it within a month or two after signing his lease, although the expropriation only takes place on the 4th February, 1920—the lease bearing date the 2nd July, 1919.

The lessee cannot claim expected profits, but he can be allowed the reasonable expenses of seeking new locations, the loss of time, the cost of moving, the refund of repairs, and all such expenditure incidental to such cancellation of the lease, and the loss occasioned thereby. They had the right to remain in undisturbed possession to the end of the term.

In this case, apart from the amount paid for rent, for improvements and repairs, moving, etc., there was no direct evidence to show what was the value of this unexpired period of the lease.

Before arriving at any conclusion upon the amount of the compensation, I cannot refrain from saying that it is almost inconceivable that a company could most improvidently install expensive machinery, contemplates enlarging the small wharf in question, and building a spur at a most prohibitive price, etc., with a lease for the short life of five years. This is especially true, when it is considered that one of the executive officers of the company admitted they did not order the machinery before they were installed at Vancouver, because they had not the money to pay for it—and when another witness stated in his examination, in January, 1921, that they expected to be in operation within two years. That would bring them to 1923 and the lease would expire in 1924. Decidedly

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the company is better off with a lease for a life of practically 63 years. Under those circumstances with a long lease there would seem to be some justification to expend, the amount stated, on the undertaking of such works. The Vancouver lease is decidedly a better commercial proposition.

Taking all the circumstances into consideration and going over the bill of particulars, which has been explained by evidence at trial, I would have come to the conclusion to allow the Alunite Mining and Products Company Limited, the sum of $1,800.00 with interest and costs, but for the provincial law standing in my way.

Counsel at bar, for the plaintiff, sets up that the lessees have no legal right to recover, no right of action, because their lease was not registered as required by sec. 104 of the Land Registering Act of British Columbia, ch. 127 of R.S.B.C. 1911, and which reads as follows:—

"104. No instrument executed and taking effect after the thirtieth day of June, 1905, and no instrument executed before the first day of July, 1905, to take effect after the said thirtieth day of June, 1905, purporting to transfer, charge, deal with, or affect land or any estate or interest therein (except a leasehold interest in possession for a term not exceeding three years), shall pass any estate or interest, either at law or in equity, in such land until the same shall be registered in compliance with the provisions of this Act; but such instrument shall confer on the person benefited thereby, and on those claiming through or under him, whether by descent, purchase, or otherwise, the right to apply to have the same registered. The provisions of this section shall not apply to assignments of judgments. 1906, c. 23, s. 74, 1908, c. 29, s. 6."

The liability of the Crown in the present controversy, is to be determined by the laws of the province where the cause of action arose (1). *The King* v. *Desrosiers* (2) *The King* v. *Armstrong*, (3).

But for the provincial statute, the lessees would have come under secs. 25 and 26 of the Expropriation Act and would have been entitled to compensation. Be that as it may, I must give effect to the Provincial Statute and find that, under the circumstances, the lessees' claim must be dismissed. Taking, however, into consideration, the hardship of the lessees' situation I will allow no costs to either party.

Therefore, there will be judgment, as follows:—

1st. The lands and property expropriated herein are declared vested in the Crown as of the date of the expropriation, the 4th February, 1920.

2nd. The compensation for the land and property taken and for all damages whatsoever, if any, resulting from the expropriation, is hereby fixed at the total sum of $47,110.00 with interest from the 4th February, 1920, to the date hereof, and payable in the manner and proportion and only upon the sums hereinafter mentioned.

3rd. The defendant the Hudson's Bay Company are entitled to recover from the plaintiff the sum of $12,450.00 for the lands, and $12,000 for the warehouse, with interest as above mentioned, upon their giving to the Crown a good and satisfactory title free from all charges, mortgages or incumbrances whatsoever.

4th. The defendants, Russell Stephenson, Leonard Daneham, Cunliffe and Robert Molesworth Kinderly, trustees for the Puget Sound Agricultural Company,

(1) B.N.A. Act, sec. 92, subsec. 13.
(2) 41 S.C.R. 78.
(3) 40 S.C.R., 229, at 248.

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are entitled to recover the sum of $22,660.00 *without interest* (see sec. 31, Expropriation Act), upon giving to the Crown a good and satisfactory title free from all charges, mortgages and incumbrances whatsoever.

5th. The claim of the Alunite Mining and Products Company, Limited, is hereby dismissed; but under the circumstances without costs.

6th. The plaintiffs are entitled to costs on the issues as between them and the Puget Sound Agricultural Company.

7th. The defendants the Hudson's Bay Company are entitled to costs as against the plaintiff.

Judgment Accordingly.

Solicitor for plaintiff: *H. W. Moore.*

Solicitor for defendants Hudson Bay Co. & Puget Sound Agricultural Co.: *Bodwell & Lawson.*

Solicitors for defendants Alunite Mining and Products Co.: *Mackay & Miller.*