1958
Feb. 24
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BETWEEN:

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

ALICE AGNES HALL formerly ALICE AGNES NICHOLS ..... } DEFENDANT.

Practice—Pleadings—Amendment—Withdrawal of admission in expropriation proceedings refused when made with intention should be acted upon by Crown—Rules 115 and 119, General Rules and Orders of Exchequer Court—Expropriation Act, R.S.C. 1952, c. 106, s. 9—"Lands taken for the use of Her Majesty shall be laid off by metes and bounds".

Expropriation proceedings to acquire certain lands of the defendant were initiated on January 25, 1954 by the deposit in the Registry Office of the County in which the lands were situate of a plan and description of such land and such description was by metes and bounds. On November 24, 1954 the defendant gave up possession to the Crown. On March 8, 1955 she executed under seal an "Acknowledgement" which set out that she was formerly owner of the lands thereinafter described which lands had been duly expropriated by Her Majesty the Queen in right of Canada and she (the defendant) acknowledged having received $34,000 on account of the compensation due her with respect to the said expropriation. On November 27, 1956 the Crown filed the usual Information in expropriation proceedings. In the first paragraph thereof it was alleged that the lands described in paragraph 2 were taken under the *Expropriation Act,* R.S.C. 1952, c. 106, by Her Majesty the Queen for the purpose of a public work of Canada, by the deposit of a plan and description in the relevant Registry Office and that such land by such deposit thereby became vested in Her Majesty the Queen. In the Statement of Defence filed the defendant admitted the statements in paragraphs 1 and 2 of the Information. At the opening of the trial however the defendant moved for leave to amend the defence by withdrawing the admission relative to paragraph 1 of the Information and by adding a new paragraph to the Statement of Defence stating that the lands described in paragraph 2 of the Information were not validly taken under the *Expropriation Act* because they were not

"laid off by metes and bounds" as required by s. 9 in the deposit of the plan and description referred to in paragraph 1 of the Information.

Held: That the acknowledgement signed under seal by the defendant that her property had been *duly* expropriated by the Crown, was a representation or admission by her with the intention that it would be acted upon, in order that she should receive a substantial part of the compensation moneys. That representation was acted upon and she was paid the sum of $34,000 upon the execution of the acknowledgement. The clear inference was that if she had not made the representation and admission, she would not have been paid any portion of the compensation moneys. In such circumstances, the admission made by the defendant is conclusive against her in all cases between her and the Crown and she should not now be allowed an opportunity of repudiating her own representation. *Canada Permanent Mortgage Corpn. v. Toronto* [1951] O.R. 726 approving *Steward v. North Metropolitan Tramways Co.* (1886) 16 Q.B.D. 556 referred to.

MOTION for leave to amend the Statement of Defence.

The motion was heard before the Honourable Mr. Justice Cameron at Ottawa.

J. Mirsky, Q.C. and *K. E. Eaton* for the motion.

F. P. Varcoe, Q.C. and *G. W. Ainslie contra.*

CAMERON J. now (February 27, 1958) delivered the following judgment:

This case was set down for hearing on Monday last, February 24. At the opening of the trial, counsel for the defendant moved for leave to amend the Statement of Defence in two particulars. The case itself is an expropriation matter, the Crown having filed the usual Information on November 27, 1956. Paragraph 1 of the Information was as follows:

1. The lands described in paragraph 2 herein were taken, together with other lands under the *Expropriation Act,* c. 106, Revised Statutes of Canada 1952, by Her Majesty the Queen, for the purpose of a public work of Canada, by the deposit of a plan and description in the Registry Office for the Registry Division of the County of Carleton, in the Province of Ontario, on the 25th day of January, 1954, as No. 10948, and such land by such deposit, thereby became vested in Her Majesty the Queen.

Paragraph 1 of the Statement of Defence, filed on December 6, 1956, reads as follows:

1. The defendant admits the statement in paragraphs 1, 2, 3 and 4 of the Information filed herein.

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Until this motion was launched, the sole issue in the case was the determination of the compensation money to be paid for the lands taken. The motion asks for leave to amend the defence by withdrawing the admission relative to para. 1 of the Information and by adding a new para. 5 to the Statement of Defence as follows:

> The defendant says that the lands described in paragraph 2 of the Information were not validly taken under the *Expropriation Act* because they were not laid off by metes and bounds as required by section 9 of the said Act in the deposit of the plan and description referred to in paragraph 1 of the Information.

During the course of the argument, counsel for the Crown pointed out—and I think rightly so—that the proposed para. 5 in this form would be entirely inconsistent with the other paragraphs of the defence. Accordingly, counsel for the defendant intimated that he would ask that the paragraph be preceded by the word "alternatively" and that the word "in" before the words "the deposit" be changed to "before or by".

The motion is supported by the affidavit of Mr. Mirsky of counsel for the defendant, and a member of the firm of Messrs. Mirsky, Soloway, Assaly & Houston, solicitors for the defendant, and includes the following paragraphs:

> 3. That on Wednesday, the 19th day of February, 1958, it first came to my attention, through Mr. Eaton, that compliance with Section 9 of the *Expropriation Act* had been raised before Mr. Justice Thorson in an action in this Court, wherein one, Florence Crawford appears as suppliant and Her Majesty the Queen, respondent. An extract of the discussion before Mr. Justice Thorson, between Mr. Justice Thorson and Counsel, is hereto attached and marked Exhibit "A" to this my affidavit.
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> 4. In drafting the Defence herein, on the last mentioned date it became apparent that I was obviously in error in admitting Paragraph 1 of the information, by reason of the fact that the information filed by the Plaintiff, the plan and description filed by the Plaintiff do not comply with the requirements of Section 9 of the *Expropriation Act*. I was honestly mistaken in so making the admission. I now desire to withdraw the admission on behalf of the Defendant because the facts so admitted, as a matter of law, are incorrect, and this affidavit is made in support of an application for permission to so withdraw the admission.

I have looked at Exhibit A to that affidavit and it appears therefrom that in the *Crawford* case—which is a Petition of Right in which the suppliant sought to set aside certain expropriation proceedings on the ground of their invalidity—that the learned President indicated that he would consider an application by the suppliant therein

to amend his petition by alleging that the lands were not laid off by metes and bounds, as required by the opening words of s. 9 of the *Expropriation Act*, and that therefore the expropriation was invalid.

In the present case, it would seem that the motion is made so as to enable the defendant to raise a similar question. I take it that the submission would be that the opening words of s. 9, "Lands taken for the use of Her Majesty shall be laid off by metes and bounds" mean that the expropriated property must be staked out on the ground by the Crown and that such a step is a condition precedent to a valid expropriation. The hoped-for result would be, I take it, that the expropriation made in 1954 would be set aside, and that in later expropriation proceedings the value would be ascertained as of such later date.

The power of the Court to grant amendments upon application under the terms of Rules 115 and 119 of the General Rules and Orders of the Court, is very wide. These Rules are similar to the corresponding English Rules and on this point reference may be made to the decision of the Ontario Court of Appeal in *Canada Permanent Mortgage Corporation v. Toronto*[1], in which Hope J. A. referred with approval to *Steward v. North Metropolitan Tramways Co.*[2] in which the Master of the Rolls said:

> The rule of conduct of the Court in such a case is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made.

In the present case, however, I am of the opinion that the motion should not be granted. I have reached that conclusion because of certain other facts which in my view are of such a nature as to estop the defendant from now denying that the expropriation was valid, or that the lands in question had not thereby become vested in the Crown.

As has been stated, the expropriation proceedings were initiated by the deposit of a plan and description in the Registry Office on January 25, 1954, and such description of the property was by metes and bounds. Then, on

[1] [1951] O.R. 726.
[2] (1886) 16 Q.B.D. 556.

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November 24, 1954, the defendant gave up possession to the Crown. As shown by the exhibit attached to the affidavit of William Cherry, filed, the defendant on March 8, 1955, executed under seal an "Acknowledgment", the essential parts of which are as follows:

ACKNOWLEDGMENT

I, Agnes Alice Nichols (Hall), of the city of Ottawa, in the county of Carleton, married woman, formerly the owner of the following lands: (here follows a description of the expropriated property.)
which said lands have been duly expropriated by Her Majesty the Queen in right of Canada, hereby acknowledge having received from Her Majesty the Queen in Right of Canada the sum of THIRTY-FOUR THOUSAND ($34,000.00) dollars on account of compensation moneys due us with respect to the said expropriation.

I further declare that there are no tenancies from which I am receiving rents affecting the lands and premises expropriated.

IN WITNESS HEREOF I have hereunder set my hand and seal this 8th day of March A.D. 1955.

Pursuant to the said agreement and on the same date the defendant was paid thirty-four thousand dollars on account of compensation moneys for the said property. Further, at some date after taking possession—the precise date is not shown—the Crown levelled all buildings on the property, comprising a house, garage and possibly some others. Then, as has been pointed out, the Statement of Defence, with the admission that the property became vested in the Crown as of January 25, 1954, has remained of record for well over a year.

In my view, the Acknowledgment signed under seal by the defendant that her property had been *duly* expropriated by the Crown, was a representation or admission by her with the intention that it could be acted upon, in order that she should receive a substantial part of the compensation moneys. That representation was acted upon and she was paid the sum of $34,000 upon the execution of the Acknowledgment. The clear inference is that if she had not made the representation and admission, she would not have been paid any portion of the compensation moneys. In such circumstances, the admission made by the defendant is conclusive against her in all cases between her and the Crown and she should not now be

allowed an opportunity of repudiating her own representation (see *Taylor on Evidence,* 2nd Ed., Vol. 1, para. 839). If, as is possibly the case, the buildings were levelled after the date of the acknowledgment, the grounds for finding an estoppel are even stronger.

The point is discussed in *Odgers on Pleadings and Practice,* 16th Ed., at p. 203, where it is stated:

> In some cases the law will not allow a litigant to attempt to prove allegations which are directly contrary to that which has already been decided against him, or to that which he has himself deliberately represented to be the fact. He is said to be "estopped" from proving such matters. An estoppel debars a party from raising a particular contention in an action, when to raise it would be inequitable or contrary to the policy of the law. It binds not only the original parties but also all who claim under them. It is not a cause of action but a rule of evidence.

And at p. 204:

> If under his hand and seal a man asserts a thing to be, he cannot set up the contrary in any litigation between him and the other party to that deed. Both parties are bound by the language of the deed; and so are all claiming under them. But there will be no estoppel if the deed was obtained by fraud or duress, or is tainted with illegality.

For these reasons the motion for leave to amend will be dismissed. I have refrained from giving any consideration to certain sections of the *Expropriation Act* (such as ss. 7(5), 9, 12 and 23) which would have had to be considered if there had been no admission or representation in the formal Acknowledgment.

The costs of the motion will be to the plaintiff in any event.

Judgment accordingly.