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 Sep. 18.

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

AND

JAMES MCKENZIE, MARY MC- }  
 KENZIE AND JOHN STEWART... } DEFENDANTS.

*Expropriation of land—R.S.C. c. 39—Agreement to accept a certain sum  
 as compensation—Specific performance.*

Defendants entered into a written agreement to sell and convey to the Crown, by a good and sufficient deed, a certain quantity of land, required for the purposes of the Cape Breton Railway, for the sum of \$1,250. At the date of such agreement the centre line of the railway had been staked off through the defendants' property, and they were fully aware of the location of the right of way and the quantity of land to be taken from them for such purposes. Thereafter, and within one year from the date of such agreement, the land in dispute was set out and ascertained, and a plan and description thereof duly deposited of record, in pursuance of the provisions of *R.S.C. c. 39*. Upon the defendants refusing to carry out their agreement on the ground that the damages were greater than they anticipated, and the matter being brought into court on the information of the Attorney-General, the court assessed the damages at the sum so agreed upon.

*Quere* :—Is the Crown in such a case entitled to specific performance ?

THIS was an information, filed by Her Majesty's Attorney-General for the Dominion of Canada, praying, *inter alia*, for a decree for specific performance of an agreement made between the defendants and the Crown touching certain lands required for the purposes of the Cape Breton Railway.

The property from which the land in dispute was taken is situated in the town of Sydney, Cape Breton. On the 3rd day of December, 1887, the defendant Mary McKenzie, wife of the defendant James McKenzie, was owner of an estate in fee simple therein,—the

defendant John Stewart holding a mortgage thereon to secure payment of a sum of \$500 owed him by the said first named defendants. By an agreement entered into upon that date by the defendants James McKenzie and Mary McKenzie, they agreed to sell and convey such property by a good and sufficient deed to the Crown, for the purposes of the Cape Breton Railway, in consideration of the sum of \$1,250. At the time of entering into this agreement the said defendants were fully aware of the location of the railway and the quantity of land to be taken from them for the right of way. After such land had been duly set out and ascertained and a plan and description of the same deposited of record with the Registrar of Deeds for the county wherein the land was situated, in pursuance of the provisions of the *Revised Statutes of Canada*, c. 39, the said defendants declined to carry out their agreement,—alleging that the damages were greater than they had anticipated at the time of entering into the same. The Minister of Railways and Canals thereupon adopted the proceedings usual in a case of expropriation.

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By the information filed in the case the Attorney-General averred the sufficiency of the amount of compensation so agreed upon by the said defendants, and asked for a declaration by the court that the land was vested in the Crown in virtue of the proceedings taken under *The Expropriation Act*, 52 Vic., c. 13,—adding an alternative prayer for a decree for specific performance of the agreement mentioned.

The defendants by their pleas denied the agreement set out in the information, and claimed a sum of \$4,000 as compensation for the lands so taken.

Issue joined.

September 16th and 17th, 1890.

*Borden*, Q.C. for plaintiff;

*Gillies* and *Drysdale* for defendants.

1890 BURBIDGE, J. now (September 18th, 1890) delivered  
 THE QUEEN judgment.

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In the view I take of this case it is not necessary to consider the question as to whether or not the Crown is entitled to a decree for the specific performance of the agreement of 3rd. December, 1887. I do not, however, accede to the contention made for the defendants that I should wholly disregard such agreement in coming to a conclusion as to the amount of compensation to which they are entitled. I do not think that James McKenzie and his wife were induced to enter into the same by any misrepresentations or other unfair methods. The former had, I think, the means and the opportunity of ascertaining what land was to be taken from them for the railway, and how the property was to be affected thereby. For any misapprehension under which he may have rested, he must himself, I think, accept the responsibility. The centre line of the railway was at the time of the making of the agreement indicated by stakes set in the property. He knew that the right of way was to be 100 feet in width. The plan exhibited to him by Mr. McKeen showed the land to be taken and the location of the railway, which it is clear has not since been altered. The agreement was followed by the filing with the proper Registrar of Deeds, and within a year, of a plan and description corresponding in respect of the land taken and the location of the railway with that exhibited to him at the time the agreement was come to, a fact to which, perhaps, some additional importance attaches by reason of the terms of the 6th section of the *Revised Statutes of Canada* c. 39, now in substance to be found in 52 Vic. c. 13 s. 19.

I also desire to add that I come to the conclusion that I am about to state independently of the undertaking given by the Crown to re-convey to the defen-

dants a portion of the land taken, though I am glad to be in a position to give effect to such undertaking as I think it will be of advantage to the defendants.

I find and declare:—

1. That the lands and premises described in the information in this case are vested in Her Majesty as therein set out :

2. That the defendants are entitled to be paid the sum of \$1,250 ; which is a sufficient compensation to them for the lands taken, and for the injurious affection of their other lands in the pleadings and evidence mentioned :

3. That the defendants are entitled to have re-conveyed to them the land mentioned and described in the undertaking filed in court.

I am inclined to the view that the Crown is entitled to costs, but for the present I reserve that question ; and it may be that, under all the circumstances of the case, the Crown will not move for judgment therefor.

I reserve leave to either party to move for further directions.

*Judgment for plaintiff ; costs reserved.*

Solicitor for plaintiff: *W. Graham ;*

Solicitor for defendants : *J. A. Gillies.*

REPORTER'S NOTE.—The case of *The Queen v. McKinnon, et al* arose upon a state of facts similar in all material respects to those which govern the above case, and judgment (BURBIDGE, J. 24th September, 1890) was given therein for the Crown upon the same grounds as indicated by the learned judge in the foregoing reasons for judgment.

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