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*Feb. 17.
*Feb. 22.

WILLIAM SAMUEL CUNARD AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

HIS MAJESTY THE KING (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation of land—Water lots—Expectation of enhanced value —Crown grant—Statutory authority.

Land in Halifax, N.S., including a lot extending into the harbour, was expropriated for the purposes of the Intercolonial Railway. The title to the water lot was originally by grant from the Government of Nova Scotia, but no statutory authority for making such grant was produced. The lot could have been made much more valuable by the erection of wharves and piers for which, however, as they would constitute an obstruction to navigation, a license from the Dominion Government would have to be obtained. $10,000 was tendered as the value of all the land expropriated and the owners, claiming much more, appealed from the judgment of the Exchequer Court allowing that amount.

Held, Duff J. dissenting, that the owners were not entitled to compensation based on the enhanced value that could be given to the water lot by the erection of wharves and piers and the expectation that a license would be granted therefor, and if they were the amount tendered was, in the circumstances, sufficient.

Quœre. Can a Crown grant of lands be made without statutory authority?

Held, per Duff J., that there was such authority in this case.

Judgment of the Exchequer Court (12 Ex. C.R. 414) affirmed.

APPEAL from a decision of the Exchequer Court of Canada (1), declaring the title to certain property of the defendants to be vested in His Majesty and the

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies. Idington, Duff and Anglin JJ.

(1) 12 Ex. C.R. 414.

sum of $10,000 tendered in payment therefor to be sufficient.

The facts are sufficiently stated in the above headnote.

Harris K.C. for the appellants referred to *Wood* v. *Esson*(1); *Holman* v. *Green*(2); *In re Lucas Chesterfield Gas and Water Board*(3), at pages 25 and 31.

Newcombe K.C., Deputy Minister of Justice, for the respondent, cited Coulson & Forbes on Water (2 ed.), p. 19; Chitty's Prerogatives of the Crown 145; *Original Hartlepool Collieries Co.* v. *Gibb*(4).

THE CHIEF JUSTICE and GIROUARD J. concurred in the opinion of Mr. Justice Anglin.

DAVIES J.—I agree that the appeal should be dismissed. The substantive question to be determined was whether or not the sum of $10,000 awarded as damages by the Exchequer Court for the lands of the plaintiff expropriated by the respondent was sufficient. A careful examination of the evidence given has satisfied me that the sum allowed was a liberal one. The appellants, however, contended that the trial judge has erred in the construction he had put upon the decision of this court in *Wood* v. *Esson*(1), and had refused, in assessing damages, to allow the appellant anything for the exclusive right he possessed as grantee from the Crown of the lands in question to obtain from the Dominion Government a license to construct wharves

(1) 9 Can. S.C.R. 239.
(2) 6 Can. S.C.R. 707.
(3) [1909] 1 K.B. 16.
(4) 5 Ch. D. 713.

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or piers in the waters of the harbour over the lands granted which might be an obstruction to navigation.

I think the learned judge, if correctly reported, has not accurately stated the point decided in *Wood* v. *Esson*(1). That point is, I think, substantially and correctly stated in the head-note to the report of that case, namely, that the Crown could not, without legislative sanction, grant the right to place in a public harbour below low-water-mark any obstruction or impediment which would prevent the full and free right of navigation. The decision goes no further than that.

The learned judge therefore probably did not consider and give weight to the appellant's right as grantee of the soil to apply for and possibly to obtain a license from the Dominion Government under the statutes authorizing such licenses to build out in the waters of the harbour over the lands within his grant even to the obstruction of navigation.

But it is quite clear from his judgment that the learned judge allowed the appellant much more than the lands taken were, in his opinion, worth because of the offer of $10,000 made for them by the Crown. He gave judgment for this amount, not because he thought it fair value; it is evident he thought it excessive; but because the Crown had fixed and tendered that amount.

After carefully considering Mr. Harris's argument and the evidence, with special reference to the situation and surroundings of the land, I have concluded that this amount is full and liberal compensation for any right the appellant possessed in these lands, in-

(1) 9 Can. S.C.R. 239.

cluding any such contingent right as he claims the Exchequer Court had omitted to consider.

Under these circumstances I would dismiss the appeal with costs.

IDINGTON J.—The appellants chose to present a case to the learned trial judge of a claim for compensation, and to rest the valuation thereof entirely upon the theory of their absolute right to the land to do therewith what they might see fit in the way of erecting docks and piers to accommodate shipping.

They now seek in appeal to set up an entirely new kind of case based upon an alleged exclusive right, under the Crown grant to their predecessor in title, to apply to the Crown or Parliament for leave to make such erections interfering with, or in the possible judgment of the Crown, represented by the Governor in Council, or of Parliament, likely to interfere with the public rights of navigation.

The claim presented proceeded entirely upon the assumption of the existence of a complete realization of such possible expectations, an entirely different thing from the unrealized and speculative kind of claim now presented to us.

In respect of this latter claim I fail to see any evidence upon which any court could properly and intelligently proceed in the way of awarding any fixed sum by way of compensation therefor in excess of that sum tendered by respondent. If I were to try to estimate the value of the property in question on the assumption of an incomplete title, but yet carrying the right now claimed and make such allowance, as I understand might on the authority cited, if applicable, and in reason fairly to be considered, and have regard

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to all the evidence adduced, I would not be disposed to put a higher or perhaps as high a value as that tendered.

I might well hold either of these views as sufficient to dispose of the appeal.

Appellants urge, however, that the learned judge erred in his view of the law bearing upon the grant by the Crown and the right created thereby.

Assume for a moment he did. He did not in the slightest prevent the appellants from launching and making out a proper case. Indeed, at the outset he stated his view of the law and gave appellants every chance then to act as advised.

It was after the appellants' case was closed and duly answered, that they, finding the learned judge's view against them, sought in reply to set up another case, under pretext of meeting some evidence given by respondent's witnesses, as to the likelihood of obstruction to navigation by erections of a kind such as needed to render the property worth anything.

All that part of the evidence for respondent, though not objected to, can be treated as if never given and the case to my mind still stands in the result as I have stated.

But was the learned judge at all in error? Did any such error as is alleged affect his view of the matter?

It does not seem to me that the alleged error could have had from what he says any effect.

Moreover, as to the alleged error as he says, it was conceded that there was no Act of the provincial legislature authorizing the Government to grant the water lot.

Again, counsel on this appeal had in his opening

argument to say he was unable to shew any such statute, but later referred us to Revised Statutes of Nova Scotia, 3rd series, ch. 26, sec. 708, and the Nova Scotia Statutes of 1843.

I would not be inclined from a consideration of these Acts to suppose the grant in question was within the purview of either of them.

I am somewhat shaken in this by seeing (what we were not referred to) that an Act to amend the earlier Act refers to and specifically deals with grants of any water lot or portion of land covered with water or adjoining the shores of any of the bays, harbours, rivers or creeks of this province.

This Act was temporary and how the legislation ended is not clear.

But one thing is clear, that the words "land" and "lands" both by the "Interpretation Act" of the said Revised Statutes and by the use of such words in the Letters Patent making the grant in question, meant and were intended to mean, every interest in that land described therein that could possibly be conveyed.

It never was the purpose of anybody to convey merely what appellants now set up.

It possibly was intended by some one to give all, but this court long ago held such an attempt void. It clearly was an improvident attempt. I cannot see how if, for such reason, it failed of its purpose, as is practically conceded, it can now be set up and used for any other beneficial purpose than intended, merely because and if in law it may have had the technical effect of transferring the legal estate as Sir Henry Strong suggested in *Wood* v. *Esson*(1), at p. 243.

The matter has not been argued out so that we can

(1) 9 Can. S.C.R. 239.

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definitely determine, with safety, either that the grant was so wholly illegal and void as to be treated as a nullity or as liable to be revoked by means of writ of *scire facias,* or writ of intrusion or information in Chancery or other appropriate legal procedure to put an end to what never should have been issued, or, as contended for, a grant to operate in a way never intended yet as of the exclusive right to apply for supplementary grants to complete what once was improperly intended should be done or given.

In any of these or other ways the matter may possibly be looked at, I can see no foundation for the pretension set up as resultant therefrom.

The cases of *Alcock* v. *Cooke*(1), and of *Gledstanes* v. *Earl of Sandwich*(2), may be referred to on the point, not taken in argument, of the intended nature and extent of the grant, failing to coincide with that limited claim now said to have passed.

As to the power of a colonial governor where representative institutions exist the argument in the case of *Reg.* v. *Clarke*(3), indicated it must in absence of specific instructions be restricted to that authorized by statute. The court did not adopt the theory put forward here.

It was pointed out to appellant's counsel on the argument that a search in the Archives here would disclose the instructions in question herein, but we have not heard of any having been discovered to support this grant.

In any event I fail to see how a claim as of right to compensation can be founded on such a title. Such equities, and other good reasons which may have

(1) 5 Bing. 340.

(2) 4 M. & Gr. 995; 5 Scott N.R. 689.

(3) 7 Moo. P.C. 77.

moved the Crown to make the tender, are covered and protected by the judgment in allowing that sum.

I think the appeal should be dismissed with costs.

DUFF J. (dissenting).—The first question raised by this appeal touches the nature of the appellant's interest in the property expropriated. The property consists chiefly of about 12 acres of the bed of the harbour of Halifax; the appellant's title rests upon a grant of the year 1868 purporting to be made under the sanction of the Governor in Council of Nova Scotia. The learned trial judge, following, as it seemed to him, the decision of this court in *Wood* v. *Esson*(1), held this grant to be void. I do not agree with the learned judge's view of that case and I have no doubt that in 1865 the Governor in Council had power to authorize the grant in question. In the year 1849 an arangement was made whereby "all Her Majesty's casual and territorial revenues" were placed under the control of the House of Assembly of Nova Scotia, the Assembly in turn assuming the burden of the civil list of the province. The arrangement is recited in an Act of the Assembly which is chapter 1 of the statutes of that year, and the Act provides (by section 10) that the casual and territorial revenues vested in the control of the legislature should include (*inter alia*) all

> sums of money * * * arising * * * from * * * "any grant" of any of the Crown lands or Royalties of Her Majesty within the province "of whatsoever nature or description";

and (by section 14) that the sale and management of Crown lands should, notwithstanding the Act, "remain and be vested in such officers as Her Majesty" should

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deem proper or *as might "be directed by any Act of the province."* The statute referred to by Mr. Harris, chapter 26, R.S.N.S. 1864, appears (by sections 7 and 8) to vest in the Governor in Council full authority over the sale of "ungranted lands" of the Crown.

It is true that these sections do not deal nominatim with the subject of the disposal of lands forming part of the bed of an arm of the sea below low water mark; but the language is clearly broad enough to embrace such lands, and on its true construction must, I think, be held to do so. Such lands being within the territory of Nova Scotia were *primâ facie* the property of the Crown, and to that extent were governed by the provisions of 12 Vict. ch. 1. It has never been doubted, so far as I know, that the Crown could at common law by matter of record convey such lands to a subject. The statute of 1702 by which the common law power of the Crown to dispose of the Crown lands was very much restricted may possibly have been carried into Nova Scotia with the general body of English law. Since the Treaty of Paris, 1763, and in consequence probably of article IV. of that Treaty Nova Scotia appears to have been regarded by the courts there as a colony acquired not by conquest or cession, but by settlement; *Uniacke* v. *Dickson*(1), 1848; but if that statute did originally apply to the Crown lands in Nova Scotia — it is clear that its provisions (long before 1864) had by the effect of local legislation ceased to govern the disposal of them; 3 Vict. ch. 12; 6 Vict. ch. 45; 10 Vict. ch. 61; 9 Vict. ch. 6; R.S. ch. 28 (1859). In any case, whatever view might have been taken touching the scope of the sections 7 and 8 of the Act of 1864, when read by themselves, there

(1) James (N.S.) 287.

is demonstrative evidence in an Act passed in 1843 (9 Vict. ch. 6) that the phrase "Crown lands" was as early as that date used in the legislation of Nova Scotia in a sense extending to the beds of navigable waters vested in the Crown within the territorial limits of the province, and in the absence of something restricting this the primary meaning of them we must give the words the same effect in the later Act.

The effect of a grant of such lands under proper authority is dealt with in two well-known passages which in view of the interpretation that has been put upon *Wood* v. *Esson*(1), may be worth quoting. First from Lord Westbury in *Gann* v. *Free Fishers of Whitstable,* in 1865(2), at pp. 207-8:

> The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with the right of navigation, which belongs by law to the subjects of the realm. The right to anchor is a necessary part of the right of navigation, because it is essential for the full enjoyment of that right. If the Crown therefore grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right.

And secondly, Lord Blackburn, in *Orr Ewing* v. *Colquhoun*(3), at pp. 861 and 862:

> I think it clear law in England that, except at the instance of a person (including the Crown) whose property is injured, or of the Crown in respect of an injury to a public right, there is no power to prevent a man making an erection on his own land, though covered with water, merely on a speculation that some change might occur that would render that piece of land, though not now part of the water way, at some future period available as part of it. I think that the land being covered by water is in such a case a mere accident,

(1) 9 Can. S.C.R. 239. (2) 11 H.L. Cas. 192.
(3) 2 App. Cas. 839.

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and that the defenders are as much at liberty to build on the bed of the river (if thereby they occasion no obstruction) as they would be to build on an island which might at some future period be swept away.

Such grants, that is to say, do not unless there is statutory authority for it, invest the grantee with any lawful right to obstruct the public in the exercise of the right of navigation with which, when vested in the Crown, the subject of the grant was burdened; but subject to that burden the grantee acquires whatever interest the grant professes to convey. I do not think there is anything in the decision of *Wood* v. *Esson*(1) which conflicts with this statement of the law. Some of the observations of Mr. Justice Henry are doubtless open to the meaning the learned trial judge attributes to them, but there seems to be nothing to support them in the judgments of the other members of the court and with respect they cannot, I think, be regarded as stating the rule by which we must be governed.

The next question is whether the learned trial judge having misdirected himself on the question already discussed the case should be remitted to the Court of Exchequer for a fresh consideration of the amount of compensation to be awarded. On this point I find myself in disagreement with my learned brothers. I think there is a substantial element of compensation in respect of which the learned trial judge, who has seen the witnesses, is in a much better position to form an opinion than we are; and that in justice to the parties concerned they should have an opportunity of taking that opinion.

The contention of the appellants is that this property affords special facilities for shipping on account of being adjacent on one side to the Intercolonial

Railway and on the other to the harbour of Halifax, and that it is specially adapted for use as a site for a wharf or for other purposes in connection with which such facilities would be of great value. I think that contention is well founded, and I think, moreover, that it is not at all clear on the evidence that this element of value has been compensated for.

The points upon which the counsel for the respondent dwell as indicating that this element of value is largely fanciful or at all events greatly exaggerated are these: First, it is said that since the appellants have no right to cross the railway and no means of compelling the railway to provide shipping facilities for this property, the property must be taken as against the railway authorities to be inaccessible on the landward side. Then it is said that this property, in so far as it comprises a part of the bed of the harbour, is situated at a place where the harbour is very narrow and where the whole space is actually used and required to ensure safe and convenient navigation; and thirdly, it is said that the erection of a structure on the bed of the harbour there (since it would interfere with the exercise of the public right of navigation) would be a nuisance unless sanctioned by the Governor in Council in the manner provided for in the "Navigable Waters Protection Act" (ch. 115, R.S.C.); and that since the property is required by the Minister of Railways for public purposes, authority under that Act for such a purpose could never be obtained.

As to the first and third of these contentions they both appear to me to be quite unsound. One principle by which the courts have always governed themselves in estimating the compensation to be awarded for pro-

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perty taken under compulsory powers is this: you are to apply yourself to the consideration of the circumstances as if the scheme under which the compulsory powers are exercised had no existence. The proper application of that principle to chapter 143, R.S.C., seems to me to be this—you are to estimate the value as if the property were not required for the public purpose to which the Minister, who is taking the proceedings, intends to devote it. The circumstance that it is so required is not to enter into the computation of value as either enhancing or diminishing it.

On this principle there appears to be no foundation for either of these two contentions. Whether means of communication to and from the landward side or shipping facilities over the railway on that side could be obtained is a question of fact for the tribunal assessing the compensation, but there is no *à priori* probability that they could not be obtained, and so far as I can see nothing in the evidence to suggest any reason to suppose the existence of any obstacle. So with the possibility of procuring the sanction required under chapter 115; that also is a question of fact and a question which must be examined on its merits apart from the purpose for which the Minister requires the property and just as if the compulsory powers were being exercised by some local authority having no sort of connection with the Governor in Council.

The second contention raises a question of substance. The argument as put before us appeared to rest upon the hypothesis that every structure raised upon the bed of a navigable water which might in any sensible degree restrict the area available for the purposes of navigation must be in law a public nuisance

as constituting an invasion of the public right of navigation. That proposition does appear to receive some countenance from some observations of Strong C.J., in *The Queen* v. *Moss*(1), at p. 332; but those observations were not necessary to the decision of the case, and, if they have the meaning attributed to them, then I must respectfully dissent from them. That the question whether a given structure so placed is or is not a public nuisance is a question of fact to be decided upon all the circumstances has long been settled. In *Attorney-General* v. *Terry* (2), Sir Geo. Jessel adopts as an accurate statement of the law a passage from the argument of Sir Wm. Follett in *King* v. *Ward*(3), at p. 395, in which that great lawyer stated the test for determining the question of nuisance or no nuisance where erections are made in a harbour below high water mark and in places where ships might perhaps have sailed, to be this—

> whether upon the whole they produce public benefit—not giving the terms public benefit too extended a sense, but applying them to the public frequenting the port.

There is nothing in chapter 115, R.S.C., section 7, touching the erection of structures which do not offend against this rule; therefore I cannot accept the argument as it is put. It may, of course, be argued that on the evidence as it stands the proper conclusion is that the water lots in question could not be utilized in a commercial sense without offering an obstruction to the actual navigation of that part of the harbour as it is now used, and that there is no evidence whatever of any counterbalancing public benefit. On the whole, I

(1) 26 Can. S.C.R. 322. (2) 9 Ch. App. 423.
(3) 4. A. & E. 384.

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think, that is the effect of the evidence, and although it would have been more satisfactory to have had the view of the trial judge upon it, I think the proper finding is that such structures as would be required to make the site productive of profit would constitute an unlawful, although probably very slight, interference with navigation unless authorized under the Act referred to.

In that view is any value to be attached to the possibility of obtaining such authority? The circumstance alone that such authority is required to legalize the structure would not appear to be entitled to much weight in determining the answer to this last question; and the evidence does not seem to indicate the probability of any such interference with navigation as would lead to a refusal of the necessary sanction if the scheme for which such sanction should be sought should appear to be likely to add materially to the public convenience in the use of the port. It is difficult to believe that the objection, the only objection suggested in the evidence, that schooners bound for Bedford Basin to discharge ballast beating against a head wind would find their passage impeded, is one which would present a serious obstacle to any plan designed to secure substantial improvement in the facilities for the use of the port as such. Upon this question I should have preferred to have the views of persons in a position to state the plans of the railway department respecting the use to which this property is to be put and respecting the expedients by which the suggested objection is to be overcome. In the absence of such evidence I am not disposed to attribute much weight to this objection. On the whole, I think the appraisal of this element of value which the learned judge has

not considered had better be left to the Court of Exchequer and the case referred back for that purpose.

ANGLIN J.—Assuming that the grant of 1865 vested in the appellants the subsoil of the water lot therein described, it is clear that they did not acquire a right to use this property for purposes or in a manner that would interfere with navigation or obstruct navigable waters. So much is certainly decided by *Wood* v. *Esson* (1). It may be that prior to the taking of the expropriation proceedings the appellants had some possibility—great or slight—of obtaining, under R.S.C. ch. 115, sec. 4, a Crown license to erect wharves upon the property in question, notwithstanding the interference with navigation which would be involved. That with such a right to build wharves and a right of access thereto across the Intercolonial Railway the interest of the appellants in their water-lot-property would be very valuable is clear upon the evidence. Its value without such rights, however, it is equally clear, is comparatively trifling.

The sum of $10,000 tendered by the Crown and awarded by the learned judge of the Exchequer Court is certainly in excess by many hundred dollars of the actual value of the property taken by the Crown if there were no possibility of the appellants securing the rights above mentioned. The learned judge allowed them this amount only because he did not see fit to allow a smaller compensation than that tendered by the Crown. The complaint of the appellants is that he refused to make them any allowance in respect of any increase in the value of the property because of the

(1) 9 Can. S.C.R. 239.

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possibility of their obtaining from the Crown a right of access to it across the Intercolonial Railway, and a license to erect thereon wharves, etc.

We have before us in evidence the circumstances surrounding this property. We are in as good a position as the learned judge of the Exchequer Court was, or could be upon a reference back to him, to appreciate the chance of the appellants' obtaining these rights from the Crown, and to value that chance. The circumstances in evidence—the narrowness of the channel opposite the appellants' lands and the requirements of the Intercolonial Railway owned by the Government of Canada—make it practically certain that the Crown would refuse an application for these rights by the appellants or by any purchaser from them. No judge or arbitrator would, in my opinion, be justified in placing upon the possibility or chance of obtaining such rights more than a nominal value.

Assuming that the learned judge erred in treating the grant to the appellants of the water lot in question as absolutely void, and that he was also technically wrong in declining to take into consideration the possibility or chance of their obtaining from the Crown rights of access over the Intercolonial and a license to erect wharves which would obstruct navigation; *Re Lucas and The Chesterfield Gas and Water Board* (1); *Re Fitzpatrick and The Town of New Liskeard* (2); it is clear that if he had considered the appellants to be owners of the subsoil of the water-lot, and if he had made them an allowance for any interest which they could have in the property under the grant of 1865, if valid, and also for the chance or possibility of their obtaining rights of access over the railway

(1) [1909] 1 K.B. 16. (2) 13 Ont. W.R. 806.

and a Crown license to obstruct navigation, the amount of the judgment in their favour would certainly not have been increased.

It follows that no substantial wrong has been done the appellants and that no purpose would be served by remitting this case to the Exchequer Court in order that the value of the appellants' interest in the subsoil of the water lot and of the possibility of their obtaining rights and privileges from the Crown might be there estimated.

For these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *W. A. Henry.*

Solicitor for the respondent: *R. T. MacIlreith.*