Privy Council Appeal No. 42 of 1913.

The Cedars Rapids Manufacturing and Power Company - - - - - *Appellants,*

v.

Sir Alexandre Lacoste and others - - *Respondents.*

FROM

THE SUPERIOR COURT OF QUEBEC.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3rd FEBRUARY 1914.

Present at the Hearing.

LORD DUNEDIN. LORD SHAW.
LORD ATKINSON.

[*Delivered by* LORD DUNEDIN.]

The Appellants are a Company incorporated by a Statute of the Parliament of Canada in 1904, empowered to construct and develop water powers in or adjacent to the River St. Lawrence in the Parish of St. Joseph of Soulanges in the Province of Quebec, and to take by way of expropriation lands within the Parish actually required for such development.

With a view to such development the Appellants served notices of expropriation on the Respondents, who, as executors of the estate de Beaujeu, were proprietors of the subjects to which such notices applied. These subjects were three in number, to wit (1) the Ile aux Vaches, (2) the Ile Bédard, and (3) Reserved Rights over the

Pointe du Moulin. For these subjects the Appellants by the said notices offered to pay respectively $2,800, $200, and $1,700, and named an arbitrator in the event of these sums not being accepted. The Respondents did not accept these sums, and named on their part an arbitrator. The third arbitrator, or umpire, was named according to law by the judge of the Superior Court.

The three arbitrators after visiting the properties heard witnesses and received documents, and finally, by a majority, consisting of the arbitrator appointed by the Appellants and the arbitrator appointed by the judge of the Superior Court, awarded as compensation the sums offered by the Appellants. The third arbitrator appointed by the Respondents dissented and intimated that he would have been prepared to award the sums of $62,000, $34,000, and $80,000 respectively.

Against the findings (1) and (3), *i.e.*, for $2,800 for the Ile des Vaches and $1,700 for the reserved rights at Pointe du Moulin, there lay, under the Canadian law, an appeal on the merits to the Superior Court of Quebec; and an appeal was taken by the Respondents.

Against finding (2), owing to the award being less than $600 no appeal lay. But a direct action, in the Superior Court, to set aside the award *in toto*, was brought by the Respondents. The appeals and the direct action were heard together before Chief Justice Davidson of the Superior Court. He allowed the appeals and substituted for the sums awarded the sums proposed to be awarded by the dissenting arbitrator. In the case of the Ile Bédard he set aside the award and directed a new arbitration.

From these decisions the present appeal is brought by special leave to this Board.

It now becomes necessary to describe generally the subjects taken.

The Ile aux Vaches is an island situated to the north of the medium filum of the St. Lawrence River, at a point about 40 miles above Montreal, of the extent of 28¼ arpents--an arpent representing slightly more than one acre. Ile Bédard is a smaller island also to the north of the medium filum, having an area of 3½ acres, and situate 7,600 feet down the river from the Ile des Vaches. Further down again, and 700 feet from the Ile Bédard, comes the Pointe du Moulin, which is a point jutting out into the river to such an extent that approximately a straight line drawn from the southern side of the Ile aux Vaches through the Ile Bédard will cut the point in question. The whole of the riverain land at the Pointe du Moulin originally belonged to the Respondents' predecessors. They have sold all the lands at the Pointe du Moulin, subject to a reservation in the following terms :—

"Le vendeur, es qualité, se réserve—1°. Un chemin de vingt quatre pieds de largeur sur toute la profondeur du susdit terrain depuis le chemin de la Reine jusqu'au Fleuve St. Laurent.

"2°. Un emplacement sur la susdite terre suffisamment grand pour la construction d'un moulin, d'une manufacture ou de toutes autres bâtisses propres à des fins industrielles.

"Ces deux réserves sont faites à perpétuité et l'acquéreur, ses hoirs et ayants cause seront obligés de payer toutes taxes municipales ou scolaires qui à l'avenir seront imposées sur les terrains ci-dessus réservés, sans pouvoir prétendre à aucune indemnité ou compensation.

"Le vendeur es qualité aura le droit de prendre possession des réserves susmentionnées quand il le jugera à propos, et, de plus, il se réserve tous les débris de l'ancien moulin et le droit de les enlever en aucun temps sans que son

passage à cet effet sur la terre susvendue soit considéré comme l'ouverture de l'exercice de la réserve en premier lieu mentionnée "d'un chemin, &c., &c., &c.

"L'acquéreur, ses hoirs et ayants-cause n'auront aucunement le droit de se servir des pouvoirs d'eau qui se trouvent sur le bord de la grève du St. Laurent dans le voisinage de la terre susvendue ou sur icelle, le vendeur es qualité, en faisant, par les présentes, une réserve expresse."

The river being a navigable river, the bed belongs, according to the law of Canada, to the Crown, and no riparian owner can construct works in the bed without the consent of the Crown.

The river at this place is in rapid.

The total fall measured from the top of the Ile aux Vaches down to the lowest point of the Pointe du Moulin is about 28 feet. The scheme of the Appellants' works is to construct a dyke in the bed of the river from Ile aux Vaches to Ile Bédard and then on to the lowest point of the Pointe du Moulin. That will impound the whole waters of the river to the north of the dyke. To be able to do this they obtained, by agreement with the Dominion Government, a right to erect the works and to abstract the water. They further propose to submerge by cutting away all jutting-out portions of the Pointe du Moulin till the last jutting-out piece, on which they are to erect their power-station, thus providing for an uninterrupted flow of the river towards their power-house, and availing themselves of the total fall of 28 feet.

The law of Canada as regards the principles upon which compensation for land taken is to be awarded is the same as the law of England, and it has been explained in numerous cases—nowhere with greater precision than in the case of Lucas *v.* Chesterfield Gas and Water Board (L.R., 1909, 1 K.B., 16), where Lord Justices

Vaughan Williams and Moulton deal with the whole subject exhaustively and accurately.

For the present purpose it may be sufficient to state two brief propositions. 1. The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. 2. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined.

Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability, as pointed out by Lord Justice Moulton in the case cited, is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intending undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realised possibility.

Applying these principles, it is in the opinion of their Lordships impossible to support the judgment appealed against. The greater part of the judgment of the learned Chief Justice is concerned with demonstrating that the arbitrators in the award they had given had gone on evidence which went to agricultural value alone (using that term as including the water power of the mill used as an ordinary mill). In this criticism so far their Lordships think

the learned Chief Justice was right. But when he comes to fix the value to be substituted for that given by the majority of the arbitrators he accepts the figures given by the dissenting arbitrator and confessedly bases them on the evidence given by the witnesses for the Respondents (Appellants before him).

Their Lordships have sought in vain in this testimony for any evidence directed to the true question as they have expressed it above. All the testimony is based on the fallacy that the value to the owner is a proportional part of the value of the realised undertaking as it exists in the hands of the undertaker. There are other fallacies as well, but that is the leading one, and is sufficient utterly to vitiate their testimony.

It would be tedious to quote too much of the evidence, but the following may be taken as samples:—

Exhibit A10 is a report from Isham Randolph, Engineer. He was examined as a witness, and his evidence is really only a development and amplification of his report. His qualifications as an engineer are undoubted, and his opinion on engineering matters worthy of the greatest respect. But you need go no further than the first sentence to see how completely he has misunderstood the legal position:—

"I consider that as component parts of a hydro-electric power development having head works at Ile aux Vaches and power plant on the point indicated . . . the said Ile aux Vaches and the said point of land have very greatvalue, and should make the owners participants in the earnings of the development, or else they should receive in advance a compensation based approximately upon the net earnings of the power development in the ratio of the head controlled by these two properties, to the total head capable of being developed."

Arthur Surveyer, another engineering witness, deals separately with the different subjects. As to Ile aux Vaches, he deals with it thus :—

First, he says, if the island were not there and there were shoal water, it would cost $39,000 to build a dam, which would represent part of the island. Second, when that was done there would be a loss of 1·7 foot of head, as compared with the present works, which would mean a loss to the Company of an annual rent of $1,050, which, capitalised at 5 per cent., comes to $21,000. Third, he says, the protective value of the island to the works below it is absolute. To ensure the same result, if the island were not there, by means of an insurance, you would have to pay underwriters a premium, which, capitalised, amounts to $17,000; and, fourth, he estimates that the smooth water below it, which the presence of the Ile aux Vaches ensures, amounts to a saving during the construction of the works below it of $6,000. Adding these sums together, he puts the value of the Ile aux Vaches at $83,000.

It is difficult to conceive evidence more honeycombed by fallacy than this. Besides the general fallacy already mentioned, it appropriates to an island the proprietorship of which carries with it no rights over the bed of the river, and no connection with the property on the bank opposite it, the whole value of the "head" of water which is ex adverso of it. It measures the value of the island by the cost of an opus manufactum, which might be made if the island was not there; and, lastly, it values both temporarily and permanently the "protective" action of the

island, totally forgetful that the works might be stopped one foot short of the island, no part of the island taken, and yet the protective value would be there all the same.

Dealing with the reserved rights at the Pointe, he bases his calculation on loss of profits to the taking Company, and also forgets that the power to cut away the protruding parts of the other portions of the Pointe, which alone makes possible the unrestricted flow, is a power that flows from the Government contract and the taking of the riparian lands, and has nothing to do with the reserved water rights of these claimants.

And Mr. Robertson, another engineer, when asked as to the Ile aux Vaches:—

"Q. You were valuing it at the value it would possess for the Cedars Rapids Manufacturing Company?—A. Yes, that in my opinion would be the value tothem."

Further quotation is unnecessary. All the witnesses persist in looking at the three subjects as forming parts of a completed whole—and they estimate their value as proportional parts of that whole whose value they calculate by what it will bring in by way of profit to the Undertakers. Their Lordships may quote the words of Lord Justice Vaughan Williams in the case cited as applicable to this case:—

"The element which the arbitrator may take into consideration is not the fact that the land has in fact been taken, and that the probability (*i.e.*, of purchasers requiring the land for such purposes) has been realised by the promoters having obtained compulsory powers to take the land in question, but only the value of the probability as it existed before these promoters had obtained their powers. . . . it appears that the Umpire has treated the probability and the realised probability as identical for the purposes of valuation, he has gone on a wrong basis and we ought to send the award back to him."

Indeed, the mistake goes further in this case even than in that. For in that case there was only one subject. Here there are three subjects detached, and the value which the witnesses attribute to them is only reached by joining them up, a process which depends on powers obtained not from the claimants, and for the enhanced value of which result the claimants have no right to be compensated.

The real question to be investigated was, for what would these three subjects have been sold, had they been put up to auction without the Cedars Power Company being in existence with its acquired powers, but with the possibility of that or any other company coming into existence and obtaining powers.

It is on account of the latter consideration that their Lordships, while unable to accept the Judgment under appeal, are also unable to restore the Judgment of the arbitrators. Unfortunately, the Appellants led no evidence except as to bare agricultural value. Now, with regard to the Ile aux Vaches and the reserved water rights, it seems possible that there may be some value over and above the bare value. If the situation be naturally favourable to the establishment of power works like those of the Appellants then it is possible that the ~~Respondents~~ appellants and others might have been prepared to offer an enhanced value on this account, taking the chances of a situation in which they might or might not obtain the requisite parliamentary powers to work out a commercial scheme. But the value emerging through a grant of such powers having been actually given cannot after the event be taken into account. And also with regard to the reserved water rights there must be no confusion made. It is not that the water power of the Appellants will be *derived* from the reserved water rights ; but it is that a water power

like that of the Appellants could not be developed and located to such advantage without extinguishing the reserved water rights of the Respondents. These considerations, however, point to the possibility of something more being given for the subjects than the bare value; or in other words, that if they had been put up to auction as beforesaid, there was a probability of a purchaser who was looking out for special advantages being content to give this enhanced value in the hope that he would get the other powers and acquire the other rights which were necessary for a realised scheme.

As regards the Ile Bédard the Board is, however, satisfied that on the materials placed before them, the arbitrators' conclusion was reasonable and that the case as now presented does not leave any substantial ground for thinking that any enhancement for the possible reasons indicated would occur. This case accordingly ought to be ended now.

Their Lordships will therefore advise His Majesty to direct that with regard to the Ile Bédard the judgment complained of be reversed with costs in the Court below to the Appellants the Cedars Rapids Company; and (2) that with regard to the Ile aux Vaches and the reserved power and mill site, the judgment complained of be set aside and the Court directed to remit the matter to the arbitrators to hear evidence and make an award in accordance with the principles herein set forth: no costs being allowed to either party in the arbitration already held or in the Court below; and further, that neither party ought to have costs before this Board.

In the Privy Council.

THE CEDARS RAPIDS MANUFACTURING AND POWER COMPANY

v.

SIR ALEXANDRE LACOSTE AND OTHERS.

DELIVERED BY LORD DUNEDIN.

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