

House of Commons Debates, 45 Victoria,

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Disallowance of streams bill.

Mr. McCarthy.

[1] When the House rose at six o'clock, I was proceeding to consider that part of the Bill which deals with compensation. Perhaps I might first be permitted to state, however, what I understand to be the meaning of the word "compensation," when applied to the sovereign right of expropriation. Now, I do not pretend to dispute, and I am quite willing to admit in the amplest possible manner, so far as my judgement goes, that this *Act* of Parliament was, subject to one consideration, within the power of the Local Legislature. If the one consideration be overlooked there is power in the Local Legislature as in every other sovereign body - and the Local Legislature is sovereign so far as its jurisdiction extends - to expropriate property for public purposes. But, Sir, as I understand the doctrine of expropriation, as we call it, or as it is better known on the other side of the line, the exercise of its power of eminent domain, there are two limitations to the exercise of that power.

[2] The first and most important is that it should be exercised only in the public interest. There is no right, in the exercise of the power of eminent domain, to take from one man his property and hand it over to another unless it be in the public interest.

[3] The next important qualification in the doctrine - and perhaps it is more than the other, and at all events to the individual - is that the expropriation should be only on payment of full compensation.

[4] Now, that compensation as you know, is always given where expropriation is exercised in the ordinary and familiar instances of railway companies or bridge companies. Under a *Railway Act*, before property can be taken for public purposes, the fair value of the property is to be given to the proprietor, and that fair value is arrived at in the manner pointed out by the *Act* by arbitrators selected, one by the company, one by the individual whose property is taken from him, and the third by one of the Courts of the land. But it is perfectly plain that where this doctrine is perhaps better understood than anywhere else, in the United States, no exercise of the power of eminent domain is legal or constitutional, according to their law, unless it is accompanied by compensation - payment in money at the time, not payment postponed to any future date.

[5] Now, I am not unaware that there is no such limitation in our law; I am not unaware that, according to the doctrine of the British Parliament, the power we have and the power of the Local Legislatures have in their spheres comprehends the power, though not the right, to take away a man's property without compensating him. But I challenge my hon. friends opposite to point

out in the history of British legislation any instance in which the right of a person whose property is taken from him to receive compensation has been departed from. Although there is the absolute power, that power has been so exercised under our free form of government that it has not been found necessary to limit it as it is limited in the United States.

[6] Now, I wish to point out another feature of this measure - that not merely, as I shall endeavour to show, is it an exercise of the power of eminent domain without adequate and proper compensation, but it is also an Act of Parliament relating peculiarly to past events. It is retroactive in its enacting clause; it does not speak merely for the future, but it legislates for the past and thus two principles of sound legislation - principles of paramount importance - have been violated.

[7] First, property has been taken from an individual without adequate or proper compensation; and second, the *Act* is retroactive in its effect, and in point of fact, determined the litigation then existing between the parties, and which gave rise to this measure. The power of eminent domain is said to be the supreme right of property appertaining to the Sovereign - the power by which private property acquired by the citizens under the sovereign's protection - may be taken, or its use controlled for the public benefit without regard for the wishes of the owner. The doctrine is thus stated by Judge Colley:

It is the rightful authority which must rest in every sovereignty to regulate and control these rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefits as the public safety, convenience, or necessity may demand.

[8] The limit to that power is this:

That compensation shall be made therefore; and this compensation must be pecuniary in its character, because it is in the nature of a payment for a pecuniary purchase.

[9] It is said by a learned Judge, in one case in which the matter was discussed, that:

This authority amounts to nothing more than a power to oblige a private individual to sell and convey while the public interests required it.

[10] Mr. Chancellor Kent, in his able commentaries, thus speaks of it:

The settled and fundamental doctrine is that the Government has no right to take private property for public purposes without giving just compensation; and it seems to be necessarily implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception concurrently in point of time with the actual right of eminent domain.

[11] Again Judge Colley says:

While the owner is not to be disseized until compensation is provided; neither, on the other hand, when the public authorities have taken such steps as to finally settle upon the appropriation, ought to be left in a state of uncertainty to what for compensation until some future time when they may see fit to occupy it.

[12] Well, Sir, to quote once more:

But, whatever be the necessity and however important to the public use, compensation must be made in money, and not in incidental benefits, in order to meet the true spirit of the constitutional provision upon that subject.

[13] The general rule is clear, that although steps preliminary to expropriation may be taken without providing compensation:

Before any definite act be done towards the construction of improvement which is in the nature of the assertion of ownership, payment must be made or tendered or a certain and adequate remedy be provided, and unless that is done in the Act authorizing the work, the Statute is wholly unconstitutional and void.

[14] I have troubled the House with these extracts because I think that they lay down correct principles of legislation. I do not mean to say, Sir - and I have carefully avoided, I think, stating - that these regulations apply to our legislation here; but what I do mean to say is, that the same spirit which regulates the written law on the other side has governed and always governs British legislation. I defy my hon. friends opposite to point, in all the Statute-books of British legislation, to an *Act* of this character, intended to deprive a man of his property without giving him adequate and suitable compensation.

[15] Now, Sir, does this *Act* in any way come up to the terms of what I venture to say it should be, in order to bring it within the principles of sound legislation. The first section of the *Act* declares that notwithstanding any effect of the judgments of the Courts up to that time, all streams during the spring, summer and autumn freshets were open to everybody to float and transmit saw-logs and timber of other kinds. The second clause of the *Act* says: "that any person may go on the land and construct in any such rivers, creeks or streams any improvements he thinks proper, in order to facilitate the passage of timber." The third provision says, that the rights therein given, and the provision therein made - contained in the foregoing sections 1st and 2nd - shall extend to and apply to all rivers, creeks and streams mentioned in the 1st section of the *Act*, that is to all rivers, creeks and streams which whether floatable or navigable in the state of nature, or not, have been made floatable or navigable by artificial means by any one; and the 4th section purports, or pretends to give compensation, and how does it read? The Lieutenant Governor may fix the amount which any person collecting tolls under this *Act* shall be at liberty to charge saw logs and different

kinds of timber, or rafts, or crafts, and may from time to time, vary the same; and the Lieutenant-Governor in Council, in fixing such tolls, is to regard certain matters.

[16] Now, how does this matter stand practically? This property is as I pointed out before Recess, when this *Act* of Parliament was passed, was the property of Mr. McLaren. On the passage of this *Act*, it ceased to be his private, and became public property. It ought not, every hon. Member, I think, will admit, to have been transferred to the public, unless the public had paid compensation for it, or unless there was certain and sure means pointed out by the Statute by which that compensation was to be recovered. I do not think that any hon. Member in this House or that any fair-minded man in this country will for one moment content, even supposing that the use of this river was all important in a public sense, even supposing that it was a great wrong on Mr. McLaren's part to use it solely for his own purposes, and denying its use for everybody else, that it ought to have been taken from him for public purposes, without his being paid a compensation for his property and proprietary rights.

[17] Well, Sir, what does this *Act* do? It says that tolls may be collected, and more, what has been done? Property which was McLaren's today was tomorrow public property. It is worth so much money call it \$100,000, or anything you like, whatever it may be; but where is he to get that money, the interest on that money, or the principal. It is said he may get it by tolls. But wherein is any person compelled to use that stream? Does it follow that this stream will be used by any person? Is there any certain, sure way, such as constitutional writers point out, by which this money, or the interest or the capital, or any other compensation will be given to him for depriving him of his property, which this Statute affects.

[18] I think, Sir, it is perfectly plain that the pretence of giving him compensation is illusory. It is perfectly certain that, across the border, this State would be deemed unconstitutional and void. It is perfectly clear that the authorities say, if this law was enacted by any State of the Union, that it would be, according to their constitution - and it would be declared in the Courts in that country - void and of no effect. It is not here, because the British Parliament is omnipotent because the Legislature within its sphere, is omnipotent; because when the *Act* goes on the Statue-book, and is assented to by royal authority, it becomes the law of the land, no matter how unjust its provisions may be in depriving a man of his property and giving it up to public uses; but this is not according to the spirit of the constitution. It is not according to the way in which the laws are administered. It is not according to what is believed to be right and honest between man and man, that for public or any other purposes, a person should be despoiled of his estate.

[19] Well, Sir, my hon. friend stated it was an outrage that a man, by making an improvement upon stream or some portion of it, should close that stream, so that no person else could use it, thus he said: "The toil and labor expended in getting out timber, would be lost because it could not be got to market." As proof, and

perhaps the strongest proof, I can offer to show that the Bill was undoubtedly passed for the purpose of injuring one man and enriching another, I will show the House what is perfectly well known to every man engaged in the lumber business, that there was no necessity for this legislation at all. If it was essential in the public interest that this river should be open to the public, Sir, there is a law on the Statute-book of the Province of Ontario, which is referred to in this *Act*, and which says that any five men can by taking certain steps become incorporated, and being incorporate, may acquire from any proprietor improvements on any river or stream; that they may expropriate; that upon payment, just as a railway company can, they can expropriate the river improvements, on the payment of the just value, and can hold the stream and collect tolls and work them, if they find it profitable.

[20] Well, Sir, what are we forced to think? Either that Caldwell could not get any other four persons to join him in expropriating this property, that he knew it would not pay him to do so, or that it would not pay for the investment of the capital necessary, or that the Local Government, in order to favor one man, their supporter, deliberately passed this *Act* of Parliament to deprive McLaren of his property, and, in point of fact, to hand it over to one other person who desired to use the stream, and this was Caldwell. Another statement has been made, and a good deal has been attempted to be made of it; it is this: that Caldwell was practically denied the right to bring his timber to market by this stream. If this were so, it would not be any justification for such an *Act* of Parliament. But the contrary is the fact. The limit belonging to Caldwell, was worked long before Caldwell had it. It was, and had been, the property of Hon. Mr. Skead, and during the time he worked it he took the timber from it by its natural waters, the Madawaska, which are the nearest and most convenient; and the only fact which makes the Mississippi more convenient for Caldwell is because he happens to have a mill at Carleton Place on that stream.

[21] This being the condition of affairs, what was to be done? Here was a Statute, which I think I have shown was intended to deprive one man of his rights without compensation, there are no constitutional safeguards, such as they have on the other side of the line, by which an appeal could be made to the Courts of the land. Here was a Statute, retroactive in its operations, which declared that what was law yesterday in the Province of Ontario shall cease to be law tomorrow. The effect of that was to interfere with litigation, and to take from the man his property and his right. And what appeal had he? Why, he had the appeal to the foot of the throne. The only redress that was left to him, as a British subject, was to go with his petition to the representative of the Throne in this country - to His Excellency the Governor General - and point out to him how the matter stood, and ask His Excellency under the circumstances, to disallow the measure. Was that wrong? Is it to be said that, in no case, under no circumstances, can an Act of Parliament, which is within the power of a Local Legislature, be disallowed? No person pretends to assert that doctrine, though I believe the resolution in your hands, Mr. Speaker, does assert it.

Mr. Blake.

[22] Yes; but the hon. Gentleman went a good deal further. What the Legislature said in this case was this: They said that they had the power to declare what the law was. They said that they knew better than others what their intention was, and that they, as the successors of the Legislature that passed that law, could declare what it was. The hon. Gentleman has acknowledged frankly that we were not here, so far as we can interfere with private rights, to do so; but that the Local legislatures, in the much larger measure in which they are invested with authority to deal with private rights, are not restrained by constitutional prohibitions which render it impossible for them to do things which it is impossible for the Legislature of the Dominion to do, but he proposed to apply to the Local Legislatures the same prohibitions in effect.

[23] I will tell you, Sir, what the hon. Gentleman proposed. This is his proposition, Mr. Speaker. He says that under the *Constitution*, things, which it would be impossible for the Local Legislature effectually to deprive the subject of his property except under certain conditions and with certain restrictions, existed which did not exist here. I admit that under the *Constitution* of Canada and the Provinces, the Local Legislatures have the power to deprive the subject of his property under these conditions; but I say that if we import into our *Constitution*, into the *Constitution* of Confederation a restriction upon that power and declare it as a majority in this House propose this night to declare, we will declare it to be the right and duty of the Government wherever that power, which he admits exists, is to be exercised, to nullify its exercise by disallowing such Acts.

[24] The hon. Gentleman says that you find this in the *Constitution*. Why? You do not find it in the *Constitution*. The hon. Gentleman says that this spirit of the *Constitution* shall be violated; that the assent of the *Constitution* shall be broken, and that a new clause shall be inserted in the *Constitution*, giving you not the certainty of a Court on the point, but the discrete determination of a political body trying a case without hearing the other side, as to whether it comes within their competence, what the United States Constitution would forbid, and upon their arguments to decide that the law should be nullified.

[25] No, Sir, I am a friend to the preservation of the rights of property, not, perhaps, after the form of the hon. Gentleman, and many of the hon. Gentleman on the other side, but I believe in the subordination of those rights to the public good. Let me tell the hon. Gentleman what happened under the wholesome influences of that interpretation of the *Constitution* which he, in earlier and happier days received. Let me tell him that the discussion which took place with reference to the Smith will - to the will of Sir Henry Smith - and followed by the discussions which took place with regard to the Goodhue will, proved the importance, morally as well as materially of the possession here belonging, of the power to decide for themselves what should be right and what should be wrong in these cases. The people of Ontario and the Legislature of Ontario found, that there was to be no appeal to some good art of a machine, no appeal to some superior power, but that they had the right as a State, which each of us has as a

man - the right to go wrong - and they determined to go right. A Session did not lapse after the passage of those mischievous measures - after they had become the law of the land, that Legislature at once taking steps on the resolution which I had the honour of introducing, to render practically impossible for the future any such interference as had taken place in the Goodhue and Smith will cases. They proceed to pass a law under which estate bills were to be referred to the Judges. They passed that law, and subsequently the reports of the Judges were made on all estate bills, and the opinion of the Judges was invariably accepted.

[26] The hon. Gentleman says this is an imperfect remedy; he advises that an appeal should be made to the people, and if it is impossible to obtain a satisfactory settlement in a Provincial appeal to the people on account of the other questions which would complicate it there, what does the hon. Gentleman propose by way of remedy? Why, that it should come here to this Government, which is responsible to this Parliament, which Parliament is responsible to this whole Dominion; so that the ultimate recourse of an Ontario subject should be to the general election of the Dominion, complicated with all the issues of the general election itself. Just suppose that the action of the Government had been what it was not; suppose that the hon. Gentleman had said: "We refuse to deal with this measure;" what would have been Mr. McLaren's remedy? His remedy would have been an appeal to the people - first to Parliament, and if Parliament refused to agree with his views, then from Parliament to the people.

Sir John A MacDonald.

[27] Oh!

Mr. Blake.

[28] Well, what other remedy would he have? I know that the hon. Gentleman is aware that the remedy would be wholly inadequate. As to Mr. McLaren getting a remedy by appealing to the whole Dominion on the question whether the Government was right or wrong in disallowing this measure in his private interest, that would be quite hopeless. Therefore, this remedy, if hopeless in the Province is hopeless in the Dominion. I deny that the people of my Province are insensible to or careless about the true principles of legislation. I believe they are thoroughly alive to them, and I am content that my rights of property, humble though they are, and those of my children, shall belong to the Legislature of my country to be disposed of subject to the good sense and right feeling of that Legislature and the good sense and right feeling of the people of that Province.

[29] I do not believe his own friends will echo the shameful statement of the Secretary of State that the Act of the Legislature is an act of robbery to oblige a friend, no more than I impute to the hon. Gentleman opposite, what I might well impute after this statement, that he has disallowed an *Act* of the Local Legislature in order to oblige a friend - no more than I might impute that to him, and with infinitely greater force, because I say that he did it without giving the opposite side an opportunity to be heard. [...]