

Company's wharves at the same rate as charged by the Government at its wharves.

6. After the Government shall have taken possession of said premises under the power above given, or after the expiration of said term, the Company shall have the right to use, during the term of its franchise, so much of the said premises for storage, wharfage and transportation as may be necessary for the purpose of the Company, for which the Government shall charge the Company the same price that is charged by the Government for like privileges; provided, however, that nothing in this section contained shall prevent the Government from allowing the use of said premises by other persons at such times and in such manner as will not interfere with the business of the Company.

7. Notwithstanding the above demise if it should be deemed necessary at any time by the Minister of the Interior, to change the location of said wharf or wharves or of any of the filled in premises for the benefit or improvement of the harbor of Honolulu, the Government shall have the right at its own expense to make such change without paying to the Company any consequential damages for loss of use of said premises, loss of business or otherwise, or any damages other than the kind specified above.

8. The Company shall submit to the Minister of the Interior the plans and specifications of all fillings, walls and other structures proposed to be placed upon said premises and the plan showing the proposed location of the same and the proceeding with the construction of the same shall be subject to the approval by the Minister of the Interior of such plans and location.

9. The Company shall not fill in any land south and (or) west of the fish pond lying south of the Oahu Jail, being the land other than that herein demised, until permission so to do shall have been received from the Minister of the Interior in order that definite plans concerning the final location of walls and the improvement of this portion of the harbor may be arrived at and adopted.

The Company for itself, and its successors and assigns, hereby covenants with the lessor and his successors in office and assigns, that upon the expiration of the said term of the franchise of said Company, or sooner upon the performance by the Government of the conditions upon its part to be kept and performed, the lessee will peaceably quit and deliver up to the said Minister, or his successors in office or assigns, all of the premises hereby demised, and the appurtenances thereon situate and thereto belonging.

In witness whereof the party of the first part has hereto set his hand and caused the seal of the Department of the Interior to be hereunto annexed, and the party of the second part has caused its corporate name and seal to be hereunto placed by John H. Paty, president, and Curtis P. Iaukea, treasurer, the day and year first above written.

(Signed by all the Cabinet Ministers and the president and treasurer of the O. R. & L. Co.)

The status of the parties in this case continued under the lease until September 27th, 1897, when the following notice was sent by plaintiff to defendant:

DEPARTMENT OF INTERIOR,

Honolulu, H. I., Sept. 27, 1897.

B. F. DILLINGHAM, Esq.,  
General Manager, O. R. & L. Co.

Sir:—The Hawaiian Government hereby notifies the Oahu Railway & Land Co., of its intention to take possession at the end of ninety days from this date, of the land lying on the west side of the Honolulu harbor, demised to the Company by the Government on the 15th day of March, 1890, by lease of that date, together with all the improvements on the same, not including the coal hoisting plant.

The Government estimates the value of such improvements at \$16,560, which sum it will tender and pay at the end of such ninety days; or, in lieu thereof such sum as shall be agreed upon; or in default of agreement such sum as shall be named by a board of arbitrators, according to the provisions of said lease.

I have the honor to be, your obedient servant,  
(Sig.) J. A. KING, Minister of the Interior.

On November 9th, 1897, plaintiff received from defendant company, the following communication, being notice of intention to condemn:

"To J. A. King, Minister of the Interior of the Republic of Hawaii, and the Republic of Hawaii, and whom it may concern:

Notice is hereby given that (after the expiration of thirty (30) days from the date hereof) the Oahu Railway & Land Company intends to take, and hereby takes and condemns the portion of land below described from the land owned by the Republic of Hawaii, situated in and adjacent to Honolulu harbor, Island of Oahu, as allowed by law and its charter, for the purpose of constructing, maintaining and operating piers, jetties, stations, sidings, wharves, warehouses and other houses, yards, engines, machinery, signal posts and other apparatus, works and conveniences proper in connection with its railway on the Island of Oahu and the operation thereof.

Notice is hereby given that (after the expiration of thirty (30) days from the date hereof) the Oahu Railway & Land Company intends to take and appropriate, and hereby takes and appropriates the perpetual right for the Oahu Railway & Land Company, its successors and assigns, to make, and if necessary, to maintain and use a right of way by water for vessels and all other water craft of any draft whatsoever over and upon all

lands and water (the same being owned by the Republic of Hawaii) between the strip or portion of land hereinabove condemned, and containing seventy-nine hundredths (79-100) acre and every portion thereof, and deep water in Honolulu harbor and every part thereof, and the right for said Company, its successors and assigns to sail, haul and otherwise transport vessels and all other water craft of whatsoever draft across and over said right of way and every portion thereof.

The amount of land to be taken outside of said water way amounts to seventy-nine hundredths (79-100) acre, and the Company estimates the value of such land to be \$15,000, which amount will be paid to you at the office of the Company in Honolulu, or at such place as you may be pleased to designate.

The Company estimates the value of the perpetual right of way by water aforesaid to be \$100, which amount will be paid to you at the office of the Company in Honolulu, or at such place as you may be pleased to designate.

Honolulu, November 9th, 1897.

Description of land to be taken as aforesaid, outside of the perpetual right of way by water aforesaid.

Beginning at a point formerly marked by a concrete monument at the southeast corner of L. C. A. 11,225, R. P. 18791; thence S. 71° 39' W. 471 feet along said L. C. A. 11,225; thence S. 31° 30' E. 25 feet; thence S. 64° W. 91 feet; thence S. 56° W. 84 feet; thence S. 35° W. 118 feet; thence S. 11° 50' E. 25 feet; thence N. 36° 15' E. 175 feet; thence N. 70° 17' E. 588 feet; thence N. 18° 21' W. 54 feet to the initial point.

(Signed by president and treasurer O. R. & L. Co.)

Reference to the map accompanying the application for approval of Oct. 29th, shows that some 7.5 acres of navigable water of the harbor was covered in the proposed terminal division, and the letters of the Minister of the Interior of October 30th, recited in an earlier part of this decision, approved the location with the proviso that it should not bind the Government as to the amount and location of the water front to be occupied by the Company. The Company then reduced the area of the navigable water to be included in the terminal division to 1 3-10 acres, which as we understand it was the precise area demised by the lease. A portion only of the same is sought to be taken by condemnation of the Railroad Company being an area of 79-100 of an acre, the front line being considerably landward of the front line of the demised premises; also the perpetual right of way from the proposed condemnation to and over every part of the harbor. It is to be regretted that the original map showing the thus amended terminal division cannot be found with the approval of November 30 endorsed upon it. By agreement of counsel however, a copy made from the original was admitted in evidence. The lease itself recites that "Whereas the Company acting upon the authority conferred upon it by law has located a branch of its railroad from its station and depot in Honolulu to the line of deep water in Honolulu harbor, the same being known as the terminal division of said Company, which location has been approved by the Cabinet," and the description of the harbor line is along the "depth of five feet at mean tide."

It is contended on the part of defendant that the approval of the location was unconditional and therefore the State has given its consent to the railroad to condemn whatever land is included in its limits and counsel say that "the giving and accepting of the lease suspended all proceedings for condemnation, but it did not have the effect of destroying the approval of the location." But the very object of the lease was to prevent the defendant from acquiring the fee of the land and the Government was even unwilling to part with it by lease for any "specific time" and only agreed to lease it to the Company for ten years and thereafter as long as the Company's franchise for a railroad continued, upon the condition that the premises should be surrendered to the Government upon 90 days' notice and tender for value of improvements. It would be inequitable to consider the agreement for the use of the land as separate and distinct from the approval of the location. The two acts were contemporaneous and taken together constitute the status of the respective parties. It is clear to our minds that the approval of the location (of the terminal division) to the line of deep water, including the land sought to be condemned would never have been given by the Government, had not the lease been agreed upon.

It is to be noticed that only a small portion of the land of the State under deep navigable water was demised to the Company, or is included in the "location." But the Company seeks to condemn the perpetual right of way for its water craft from the land sought to be condemned to and over all the harbor of Honolulu. Does this mean an exclusive right of way, or a priority in the use of the right of way over the waters of the harbor? This, as we have seen above, is not subject to condemnation and it is doubtful if the State as a trustee for the public could consent to part with it.

The evidence seems to us to show that the Government declined to let any part of the land under navigable water of the harbor to go out of its control, and that the defendant Company agreed with this policy. The Government has never given its consent to anything that would deprive itself of this right.

It is evident from the correspondence and the final agreement in the lease of March 15th, 1890, that the Government was willing to assist the defendant Company with wharfage facilities so far as possible without compromising its paramount right to navigable water. Very likely also it had not then an appropriation or funds to do the wharf building itself and was not then

ready with any plan for harbor improvement, but when the Government was ready to increase wharf room and otherwise improve the harbor it gave the notice required in the lease for the surrender of the demised premises.

The citations made that a covenant by lessor for quiet enjoyment is not broken by its assertion of the right of condemnation do not apply here for the lessor here does not seek to condemn. Other citations notably *Kip v. N. H. R. R.* 67 N. Y. 227, which hold that the covenant by lessee to return the land at the end of the term is no bar to condemnation proceedings is not in point here, considering the public nature of the property in question. All the cases cited are proceedings by a party having the right to eminent domain under which to condemn private property. *De Campe v. Hibernia R. R. Co.* 47 N. J. L. 43; *Tait's Exec. v. Central Asylum* 102 Mass. 19.

Argument is made that the defendant has the right to build "wharves" by force of its charter which specially allows the defendant to do this. But this must mean the defendant has the right to build wharves (if this means wharves over deep harbor water) upon land to which they may have become entitled by grant or consent of the State. The enumeration of "wharves" among other authorized structures, is not sufficient of itself to constitute a concession by the State of the right of the defendant to condemn the property upon which the wharves may be built.

It is also contended by defendant that the defendant, as a riparian proprietor, it owning land bounded by the navigable water of the harbor, has the right of access to the navigable part and to build wharves in furtherance of this right. The main case is *Yates v. Milwaukee*, 10 Wall, 497.

Without expressing any view on this matter, we say that the case before us does not raise this issue, which is the right of the plaintiff to enjoin defendant's condemnation proceedings and defendant would not seek to condemn that which it has a right to use.

Having found that the defendant has no right of condemnation of the property in question, we hold that a perpetual injunction should be issued in accordance with the views herein expressed.

Decree accordingly.

A. S. Hartwell and Attorney-General Smith for plaintiff.  
F. M. Hatch, and Kinney, Ballou & McClanahan for defendant.

CONCURRING OPINION OF JUDGE PERRY.

Assuming that our statute or statutes purport to grant to the Oahu Railway & Land Company the right to condemn property whether belonging to the Government or to others, the exercise of such right by the Company is nevertheless confined by statute to such property as lies within the lines of its road as approved by the Cabinet. I concur in the conclusion reached in the foregoing opinion that the Cabinet has not unconditionally approved the location of the respondent's road or its wharves over the land which is the subject of these proceedings so as to empower the respondent to condemn and take the said land for its own use and, therefore, in the conclusion that the respondent has no right of condemnation of the property in question and that a perpetual injunction should be issued against the respondent, as in the above decision set forth; but think that the adoption of this view by the Court renders it unnecessary to express an opinion on the question of whether or how far the legislature can deprive the State (by grant to private individuals or companies) of its ownership of the submerged lands under the navigable waters of the harbor of Honolulu, or on the question of the superiority or otherwise of the Government's use or proposed use of the property in controversy.

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