1956

*Jan. 30, 31
*Mar. 28

JOHN FREI (*Defendant*) ..... APPELLANT;

AND

HER MAJESTY THE QUEEN (*Plaintiff*) RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Whether proper principle applied.

In 1952, the Crown expropriated certain lands comprising 14·5 acres which the appellant had acquired by bequest in 1942. A large brick house, a barn and a garage had been erected thereon in 1910. The appellant, an experienced gardener, had used the property for raising produce and fruit, and had cleared up and improved it as well as the buildings. Much of the evidence on behalf of the appellant was directed to showing the replacement value of the house and the value of the fruit trees and other improvements on the property rather than estimating the value of the property as a whole. The trial judge found that the fair value of the property to the appellant was $18,250, to which he added ten per cent for compulsory taking and $2,500 for disturbance.

Held (Rand and Cartwright JJ. dissenting): That the appeal should be dismissed.

Per Taschereau, Locke and Abbott JJ.: The trial judge properly applied the principle stated and applied in *Woods Manufacturing Co.* v. *The King* [1951] S.C.R. 504. No material fact was overlooked or misapprehended by him and no ground has been shown for any interference with his judgment.

Per Rand and Cartwright J.J. (dissenting): Applying the rule stated in *Diggon-Hibben Ltd.* v. *The King* [1949] S.C.R. 712 and referred to in *Woods Manufacturing Co.* v. *The King* (*supra*) and which the trial judge does not appear to have followed, it is impossible to say that

*PRESENT: Taschereau, Rand, Locke, Cartwright and Abbott JJ.

a prudent man in the position of the appellant would not have paid a sum substantially larger than that fixed by the trial judge rather than be ejected from his property.

APPEAL from the judgment of the Exchequer Court of Canada, Archibald J., in an expropriation action.

S. Ryan Q.C. for the appellant.

K. E. Eaton and *P. M. Troop* for the respondent.

The judgment of Taschereau, Locke and Abbott JJ. was delivered by:—

LOCKE J.:—This is an appeal from a judgment delivered in the Exchequer Court determining the amount of the compensation to be paid to the appellant for certain lands expropriated for the use of the Crown on February 7, 1952.

The lands taken were 14·5 acres in extent situate within the limits of the Town of Cobourg. The appellant had acquired the property by bequest in the year 1942. In the year 1910 there had been erected on it a large brick house, a barn and a garage by the then owner, a medical doctor.

The appellant is an experienced market gardener and decided to use the property for raising produce and fruit. Between the years 1942 and 1948 he cleared up the property, removing a considerable number of fruit trees which were no longer of value and planting others and preparing the land for the raising of small fruit and garden produce. In addition, he spent some $1,700 for improvements on the house, $600 on the barn and $750 on the garage. He took his first crop off the property in 1948 and, between that time and the date of the expropriation, he actively carried on the business of a market gardener. Of the crops produced, a comparatively small portion was sold by him in Cobourg, much the greater part being sold on the market at Peterborough, some 38 miles distant. The result of these operations for the year 1951, which the appellant described as a good year, was a profit of slightly less than $500 after deducting operating expenses, including an allowance for the time he estimated he had spent in the operations during the year at $1 an hour, and that of his wife who assisted in the work calculated at the same rate.

It was shown that, when the will of the testator by whom the land was bequeathed to the appellant was probated, the

1956

FREI
v.
THE QUEEN

Locke J.

property, which had been valued by the executors at $2,400 for purposes of succession duty, was valued at $4,000 by the succession duty authorities. Lands in the neighbourhood had, however, substantially increased in value since the year 1942, in common with other agricultural lands in the province. Under the provisions of s. 33 of the *Assessment Act* (c. 24, R.S.O. 1950) lands are required, subject to its provisions, to be assessed at their actual value and, in assessing lands having buildings thereon, the value of the buildings shall be the amount by which the value of the land is increased by them. As of the date of the expropriation, this property was assessed by the Town of Cobourg at $3,320, being $800 for the land and the balance for the buildings. The evidence showed, however, that the assessed values in the town had not kept pace with the increase in the value of lands and, while the figures above stated afford some evidence as to values several years ago, it is quite clear that they are very much below the value of this land to the appellant as of the date of the expropriation.

Evidence of experienced land valuators was given both on behalf of the appellant and of the Crown. Much of the evidence tendered on behalf of the appellant unfortunately was directed to showing the replacement value of the house which, while no doubt suitable at the time of construction for the use of a medical doctor, was much larger than was required upon the property when used as a market garden, and the value of the fruit trees and other improvements on the property rather than estimating the value of the property as a whole. Two of the witnesses called by the appellant expressed their opinion as to the amount which might have been obtained for the property on the market as of the date of the expropriation. The witness Lister, an experienced land valuator, was of the opinion that $25,000 could have been obtained, and the witness Parnell $27,000. The witness J. R. Cooper, called by the Crown and who is a real estate broker in Cobourg, considered that, prior to the announcement of the establishment of the Ordnance Depot for which the property was taken by the Crown, the property could have been sold for $12,000 on the market and, after the announcement had been made, for $15,000. The witness W. H. Bosley, a valuator of very long experience, was of the opinion that between $15,000 and $16,000

could have been obtained on the market. Market value is a factor to be considered in determining the value of the land to the owner, though it is not, of course, decisive.

The trial judge, the late Mr. Justice Archibald, in a carefully considered judgment, found that the fair value of the property to the owner as of the date of the expropriation was $18,250, to which he added ten per cent for compulsory taking and an allowance for disturbance of $2,500, making the total compensation $22,575. The learned judge, in arriving at his conclusion, properly applied, in my opinion, the principle stated and applied in the judgment of this Court in *Woods Manufacturing Co. Ltd.* v. *The King* (1). I have examined the evidence with care and I do not find that the learned judge has either overlooked or misapprehended any material fact and I think no ground has been shown for any interference with his judgment (*Vézina* v. *The Queen* (2); *The King* v. *Elgin Realty Company* (3)).

I would dismiss this appeal with costs.

The dissenting judgment of Rand and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the late Mr. Justice Archibald pronounced on the 21st of May, 1953, fixing the compensation to which the appellant is entitled for his lands at $22,575 together with interest from May 1, 1953, the date on which he gave up possession. The lands were expropriated on the 7th of February, 1952 and it is as of that date that the compensation was fixed.

The facts, as found by the learned trial judge or established by uncontradicted evidence, may be summarized as follows. The land expropriated is on the east side of D'Arcy street in the town of Cobourg approximately one half mile north of the main public highway from Cobourg to Toronto, and comprises 14·5 acres on which are located a large house, a barn and a garage. The appellant is a native of Switzerland. At the date of the trial, in March 1953, he was 44 years old. He is married and has two children. Before coming to Canada he had been engaged in market gardening and, after coming to this country, spent some time farming in western Canada. In 1935 he

(1) [1951] S.C.R. 504.
(2) (1889) 17 Can. S.C.R. 1 at 16.
(3) [1943] S.C.R. 51.

1956

FREI
v.
THE QUEEN

Cartwright J.

came to Cobourg and resided at the expropriated property, then owned by Miss Jones who devised it to him in 1942. He served with the Armed Forces of Canada from 1943 to 1946. On his discharge from the army he returned to Cobourg and engaged in the business of a market gardener on the property. At that time there were on the property a large number of fruit trees of which all but 60 had outlived their usefulness. With the exception of these 60 trees he cut down all the fruit trees and cleared up the land, taking out the roots and prepared the land for cultivation of a variety of vegetables, berries, small fruits and other crops. He also planted a number of young fruit trees.

At the date of expropriation the appellant had repaired the barn and garage, making them suitable for his business as a market gardener and had improved the condition of the soil. The witnesses are unanimous in saying that the appellant is a good market gardener and in the short time he was on the property, he had brought it to a high state of cultivation. The land is particularly well suited for market gardening purposes. It is level, the soil is rich and easily worked and is free from weeds and pests and is not subject to erosion. Prior to the date of expropriation, the highest and best use to which the property could be put was that of a market garden. The appellant is an industrious and capable man and worked the land carefully and to excellent advantage.

The house on the expropriated property is large, of solid brick construction, with ten rooms, high quality trim, well maintained and in good repair, but the learned trial judge was of opinion that "it is not at all suitable for a man operating a small market gardening business." The house was built in 1910. At the date of the trial it still had a remaining useful life of about 60 years. Its reconstruction cost was estimated at about $27,000.

It is clear from all the evidence that the appellant planned to continue to reside on the property and work it as a market garden and that it was yielding him and his family a modest but comfortable living.

It appears from his reasons for judgment that the learned trial judge, after careful consideration of the evidence of all the witnesses, arrived at the opinion that the market

value of the land and buildings at the date of expropriation was $18,250. To this he added an allowance of 10% for compulsory taking, $1,825, and an allowance of $2,500 for disturbance.

While the learned trial judge referred to the recent decisions of this Court dealing with the principles applicable to a case of this sort it does not appear to me that he has followed the rule stated by Rand J. in *Diggon-Hibben Limited* v. *The King* (1), as to which Rinfret C.J. giving the unanimous judgment of the Court in *Woods Manufacturing Company Limited* v. *The King* (2), said at page 508:—

> The proper manner of the application of the principle so clearly stated cannot, in our opinion, be more accurately stated than in the judgment of Rand J. in the last-mentioned case at p. 715:
>
> " . . . the owner at the moment of expropriation is to be deemed as without title, but all else remaining the same, and the question is what would he, as a prudent man, at that moment, pay for the property rather than be ejected from it."

In applying the principle so stated to the facts of the present case it must be borne in mind that the appellant was anxious to continue to make a living for himself and his family as a market gardener, the occupation that he had followed for some years and in which he was highly skilled, and that he wished to continue to live in the vicinity of Cobourg. It cannot be said that these desires were not those of a prudent man. The test to be applied then is, what would the appellant in these circumstances reasonably pay for the property rather than be ejected from it.

It seems to me that the answer to this question is that he would pay such amount as he would have to pay to obtain a comparable property in the same locality and in addition thereto such amount as would cover the loss which he would inevitably suffer during the period necessary to bring the new property into a state of productivity equal to that of the old.

Between the date of the expropriation and the date of the trial the appellant purchased the Johnson property on Ontario Street at the price of $25,000. On the uncontradicted evidence he did this after a search which took up some months during which he was not able to find any other suitable property in the locality.

(1) [1949] S.C.R. 712. (2) [1951] S.C.R. 504.

1956

FREI
v.
THE QUEEN

Cartwright J.

The evidence establishes that the new property is not as suitable for the appellant's purposes as was his former property. The house is older and smaller and had, at one time, settled and sagged badly although the effects of this had, at some unstated time prior to the purchase, been remedied by inserting a steel beam and some additional posts. The house on the new property has six rooms, two bathrooms and an air-conditioning unit. The barn and garage are not so convenient for the appellant's purposes as were those on the old property. The only advantage, for the purposes of the appellant, which the new property was suggested to have over the old is that the roadway on Ontario Street is better surfaced than the one on D'Arcy Street. The area of the new property is 11 acres, 2 of which are not suitable for planting.

There is no evidence to suggest that the appellant could have obtained a suitable property in the vicinity of Cobourg for less money and all the witnesses who were asked about the matter made it clear that in their opinion the old property was more suitable for the appellant's purposes than the new. On the uncontradicted evidence it would require a period of 3 years to bring the new property into a state of productivity comparable to that of the old.

With these circumstances in mind it is, I think, impossible to say that a prudent man in the position of the appellant would not have paid a sum substantially larger than that fixed by the learned trial judge rather than be ejected from his old property.

In my view the learned trial judge erred in the following respects: (i) in accepting and acting upon the evidence that the house on the old land was "a misfit"; this would have been right enough if all that had to be considered was the market value in the sense of what the appellant could hope to realize if he offered the property for sale; but I do not think it can properly be said that the house was a misfit for the purposes of the appellant who wished to continue to live on the property with his family; (ii) in directing his mind mainly, if not exclusively, to ascertaining the market value of the property and failing to apply the principle stated in the passage quoted above from the *Woods Manufacturing Company case;* (iii) in failing to appreciate the extent of the loss by disturbance; in this connection it

should be mentioned that his reasons would indicate that the learned trial judge was under some misunderstanding when he says "counsel for the defendant estimates the loss in dollars suffered by the defendant due to disturbance at $1,920;" it is conceded that no such estimate was made by counsel in the course of the trial or in argument.

That the figure reached by the learned trial judge is inadequate seems to me to be demonstrated by the following considerations. As a result of the expropriation the appellant has been forced to move from a property in excellent condition to another smaller in size and less suitable for a market garden for which he has had to pay $25,000. There is no evidence that he has acted imprudently or without adequate search in acquiring the new property or that he could have made any better bargain. It will require three years to bring the new property into a state of productivity comparable to that of the old; and yet the total award to the appellant is $2,425 less than the bare purchase price of the new property. Such a result cannot in my opinion be reconciled with the evidence of Rand J. in *Diggon-Hibben Limited* v. *The King* (*supra*) at page 715:—

> A compensation statute should not be approached with the attitude that Parliament intended an individual to be victimized in loss because of the accident that his land rather than his neighbour's should be required for public purposes; . . .

After a careful consideration of all the evidence it is my view that the appeal should be allowed and for the amount awarded by the learned trial judge there should be substituted the sum of $30,000 with interest from the first of May, 1953. The appellant should have the costs of the appeal.

Appeal dismissed with costs.

Solicitor for the appellant: *Stuart Ryan.*

Solicitor for the respondent: *F. P. Varcoe.*