H. B. DODGE (DEFENDANT) ..... APPELLANT; 1906

*Dec. 5, 6.
*Dec. 15.

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Expropriation of land—Payment—Market value—Potential value—Evidence.

D. purchased at different times and in sixteen different parcels 623 acres of land, paying for the whole nearly $7,000, or about $11 per acre. The Crown on expropriating the land offered him $20 per acre, which he refused, claiming $22,000, which on a reference to ascertain the value was increased to $45,000. The referee allowed $38,000, which the Exchequer Court reduced to the sum first claimed.

Held, reversing the judgment of the Exchequer Court (10 Ex. C.R. 208), Girouard J. dissenting, that there was no user of the land nor any special circumstances to make it worth more than the market value, which was established by the price for which it was sold shortly before expropriation.

D. claimed the larger price as potential value of the land for orchard purposes to which he had intended to devote it.

Held, that as he had not proved the land to be fit for such purpose and the evidence tended to disprove it he could not receive compensation on that ground.

By 2 Edw. VII. ch. 9, s. 1, only five expert witnesses can be called by either side on the trial of a case without leave.

Quœre. If more are so called without objection by the opposite party is the testimony of the extra witness valid?

APPEAL from a decision of the Exchequer Court of Canada(1) reducing the sum awarded to defendant by the referee as compensation for land expropriated from $38,00 to $22,649.

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*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 10 Ex. C.R. 208.

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The material facts are stated in the above headnote and fully set out in the judgment of Mr. Justice Idington.

Roscoe K.C. for the appellant.

Newcombe K.C. Dept. Minister of Justice, and *MacIlreith,* for the respondent.

GIROUARD J. (dissenting).—In my opinion, both appeals should be dismissed with costs. As to the main appeal, the record shews that the appellant claimed from the Crown $23,680, and that is about the amount which the Exchequer Court allowed him, namely, $22,649. The appellant contends that he is entitled to the full amount found by the referee. I do not see how he can be. He has only claimed the above $23,680, and he certainly cannot get more. True, the referee allowed him to increase it to $45,000, but the latter had no power to grant such an amendment. He was only authorized to take the evidence and make a report thereon to the Exchequer Court. I would, therefore, dismiss the main appeal, as the appellant has obtained almost everything he asked.

The judgment of the Exchequer Court judge commends itself to my mind, and I would require very clear reasons to induce me to reverse his findings of fact, especially in matters of this description in which he has a long experience.

Taking this view of the appellant's case, it is unnecessary for me to deal with the question of legal evidence, that is, if we can take notice of the testimony of more than five experts, as there was no leave from the court.

Finally, I see no reason why the cross-appeal of

the Crown should be allowed. As remarked by the learned Exchequer Court judge, even some of the witnesses for the Crown support his findings. Because the appellant got these lands at low figures I see no reason why he should not get the amount awarded him by the Exchequer Court.

As to the amount of the tender made by the Crown before taking possession, which the majority of this court declares sufficient, I do not see how it can be considered at all as the Crown has failed to call even one witness to support it.

Both appeals should be dismissed with costs.

DAVIES J.—Concurred in the judgment of Mr. Justice Idington.

IDINGTON J.—Six hundred and twenty-three acres of land in King's County in Nova Scotia having been taken on 13th September, 1903, under and by virtue of 52 Vict. ch. 13, proceedings were taken by the Attorney-General for the Dominion of Canada to have it declared that the same had vested in His Majesty the King and further that the sum of $20 an acre was sufficient and just compensation to the owners for all claim in respect of any damage or loss sustained or to be sustained by reason of such taking possession and expropriation of said lands.

The Exchequer Court referred the matters in question for inquiry and report under section 26 of the "Exchequer Court Act" and the referee reported amongst other things that the appellant as owner was entitled to $38,000 and interest from the said date.

On appeal from such finding Mr. Justice Burbidge cut the amount down to $22,649 and interest.

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The appellant appeals from that, and the respondent cross-appeals.

The preliminary objection of appellant, that Mr. Justice Burbidge could not interfere, seems in face of said section 26 and rule 19 of the general rules of his court, absolutely without any ground to support it.

The learned judge having very properly called attention to the entire disregard by the referee of 2 Edw. VII. ch. 9, amending "The Canada Evidence Act, 1893," the counsel for the Crown object here, that the appellant ought to be now restricted to five expert witnesses in support of his case as the amending Act requires. No objection having been taken at the trial may or may not be a bar to the right to take this objection. In the view I take of appellant's case, I prefer refraining from forming or expressing any opinion in anything arising from the point taken, save that the increased labour caused by disregard of the Act has been very great, and that such a mass of irrelevant evidence as appears in the case would probably not have appeared there if the provision of the Act had been observed.

The land in question is situated near Kentville, the county town of King's County. The town is a place of two thousand inhabitants. Its growth, and prospective growth, in population, as well as that of the county, is not of that rapid character that holding vacant land therein would be a good form of investment.

The land in question had, in some way unexplained, got divided up so that there were sixteen different parcels of it, owned by as many different sets of owners, in February, 1902, when appellant began to buy. He continued doing so until his last acquisition

in August, 1903. The following statement appears in Mr. Justice Burbidge's judgment and none of the facts it shews are questioned:—

Lot.	Acres.	
"A"—The Robinson land (May 5th, 1902)	206	$218.40
"B"—The Sheriff lot (July 21st, 1902)	30	110.00
"C"—Storrs lot (The Lord Bishop, Feb. 13th, 1903)	25	110.00
"D"—Walter Reid lot (Oct. 18th, 1902)	3	200.00
"E"—Carter lot (Oct. 13th, 1902)	1	120.00
"F"—Wilson Youngs (Nov. 24th, 1902)	12	120.00
"G"—Scott or Saml. Chipman (Nov. 27th, 1902)	1	20.00
"H"—Fanning lot (Dec. 30th, 1902)	31	400.00
"I"—The Hamilton lot (Oct. 20th, 1902)	10	20.00
"J"—The Burgess lot (Oct. 17th, 1902)	33	750.00
"K"—The Beckwith lot (Nov. 5th, 1902)	30	400.00
"L"—Norman Robinson lot (Feb. 2nd, 1903)	2	75.00
"M"—Rafuse lot (Feb 1st, 1903, and Aug. 3rd, 1903)	7	315.00
"N"—Driving Park (May 1st, 1903)	26	3,000.00
"O"—Sweet lot (May 2nd, 1903)	204	1,130.00
	623 acres	$6,978.40

This land is in the midst of, or beside, one of the oldest settlements in Canada. There are prosperous farmers near it. And the whole district is of that character, we are told by counsel and it is not denied, that suggests there must have been something that affected either the character or reputation of the land or it could not have been acquired by one man at such prices.

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The two largest parcels, the first and last on above list, were sold at different times by public auction in Kentville. The first was a remnant of an estate in which, at least, half a dozen people were interested, of whom one or two lived not far from it. It had evidently been held for some years, and probably so because unsaleable. They agreed to place it in the hands of an auctioneer and bound themselves to carry out the sale. No complaint is made of want of publicity or of manner of conducting the sale. Appellant's counsel sought to shew that the heirs had at one time not been harmonious. How that affected, or could affect, the price when all had thus agreed, I fail to see.

The last parcel on the list was sold as the result of the foreclosure of a mortgage.

It was, presumably, properly sold, and with due precaution against sacrifice, taken by way of upset price, or reserved bid, as in such cases law and good conscience require. There were several judgment creditors interested. There were bidders besides the mortgagee. But *"nobody really wanted the land."* Lot "C" may have been sold improvidently, and improperly, but I would require something more than the evidence of the man, acting as church warden, in the selling and then trying to lead the court to believe the price got was the result of such improvidence, before I would come to such conclusion.

He lived eight miles from it. I presume he knew the general reputation or character of the tract of land that included it, if he didn't know the precise part he sold, and acted more honestly than seemingly he desires the court to believe.

The lot "B" was bought at sheriff's public auction sale. The outstanding dower would affect its sale

somewhat as well as the known tendency of sheriff's sale. Lots "D" and "E" had each houses on them, estimated by one of appellant's witnesses at $150 each, and by another at $100 each. Lot "H" had buildings on it worth $450, and lot "M" buildings worth $650, according to the same two witnesses of whom one was accompanied in the inspection on which the estimates are based by the appellant himself.

Lot "H" had also another house worth $100 on it, according to one of these witnesses.

The Beckwith lot was sold because money was needed. The Driving Park had $920 worth of buildings on it.

I think I have thus set forth the facts relative to the chief sales that may have to be borne in mind, in applying these prices, as evidence of what the appellant is entitled to recover herein.

The market price of lands taken ought to be the *primâ facie* basis of valuation in awarding compensation for land expropriated. The compensation, for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use, and at all events the value thereof to the using owner, and the damage done to his business carried on therein, or thereon, by reason of his being turned out of possession.

In this case there is nothing of that sort to be considered. The appellant had never used the land except to take some wood off it. He had expended nothing in improving or in the way of anticipating improvement for future use, special or otherwise.

Hence, *primâ facie,* the ordinary market price when ascertained ought to guide, and almost entirely govern.

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How can it be better ascertained than by means of the prices paid for it so recently, and up to the day before expropriation?

There may be added, as usually is added, a percentage to cover contingencies of many kinds.

Here the market price is clearly ascertained, as to two-thirds of the land, by exposure to sale in the public open market, where its true value is best known. As to the remainder the cost price furnishes a basis for ascertaining that market price. Some consideration may be given to the peculiar circumstances of each sale and purchase.

Bearing in mind all these considerations we have, in the sixteen different purchases made, evidence of the greatest value not only for determining the aggregate value, but also shewing the great variety of values in each parcel of land that goes to form such aggregate value.

This is not the case of a single sale, but of many sales of land in the same tract yet of widely varying values.

What is the net result? We find when the values of buildings fixed by agreement here at $2,740 are deducted from the total purchase money the value of the land is $4,238.40, equal to about $6.80 per acre.

The Crown offers nearly double this and the agreed value of buildings. Or take it as Mr. Justice Burbidge has put it as follows:—

> The value of the timber and buildings on the lands taken is reported by the learned referee to amount to a sum of a little more than $5,000, and the fairness of his valuation has not in that respect been challenged by either party. I accept it as correct, and that leaves only the value of the lands themselves apart from the timber and buildings to be ascertained. Deducting the $5,000 from the amount paid by the defendant for the whole we have a balance of less than $2,000 attributable to the value of the lands alone. That

gives for the 623 acres an average value per acre of a little more than $3. The $20 an acre that the Crown offered to pay included the value of the timber buildings. Excluding the latter the Crown's offer was equivalent to about $12 an acre.

The offer of the Crown involves for the bare land nearly four times the price paid.

In the three ways of looking at the cost price and comparing it with what is offered, we have: 1st, in gross, the profit of $5,485; 2nd, excluding buildings at agreed value, we have nearly double per acreage value; 3rd, excluding buildings and timber per reported value thereof, we have offered four times the per acreage value of the cost price.

The reason for this pressing and presenting of the acreage value is that the potential value per acre when values of buildings and timber are eliminated is the case presented by the appellant.

Surely, anyway we can consider the matter, either one of these alternatives covers, beyond a shadow of doubt, any fair allowances that may be due the appellant as a proprietor, turned out of such possession as he had, or for skill in bargaining, or for enterprise in anticipating the market, or for care and trouble in assembling the parts together or for all combined.

The case thus presented would seem insurmountable.

But the appellant says he is entitled to the potential value of these lands.

There are cases of that kind where, by sudden change of conditions, the prospect of a profit beyond the dreams of avarice may be conceivable, or where the land may be available for a special purpose and no other such land can be found. Neither such exists here.

What the appellant sets up as to the potential

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value in these lands is their adaptation for orchard purposes.

Here, no doubt, land quite as good as this can be got, in quantites suitable for orchard use, for a great deal less than the Crown, for sake of peace, offered for it. Perhaps one might find it troublesome in that old settled district to find so large a block of such bad land, at any price, but I hardly think that grievance is to be considered.

The compensation must rest, not on what such a block may be worth to the Crown for the peculiar purpose involved in its acquisition, but upon the loss the owner suffers by the Crown taking it.

Has he furnished evidence in support of his contention of such strength as to overthrow the case presented by the facts I have dealt with?

He has presented a mass of evidence all of which I have read with care to see on what it rests. I have not confined my reading to the skillfully arranged excerpts set forth in the factum, but have read everything, to see how such a remarkable case was built up and whether or not by reason.

If opinions, regardless of knowledge, or means of knowledge, and plainly without knowledge, of a witness must be accepted as fact, then I confess this appellant ought to succeed and the referee's finding be restored.

I will not stop to characterize each witness or dwell upon his fitness or right to express such opinion as he has expressed. It would be a waste of time.

The land in question had been, until acquired by the Crown, almost all waste lands, from part of which there had been, many years ago, taken some valuable timber. All but a small part of the original timber

of substantial value had thus been removed. In its place there had sprung up, in some places, a second growth of timber, likely in time to become valuable, and even in 1903, of some value worth considering. In other parts of this that was originally timbered land there had grown up scrubby bushes of inferior wood, of no value, but rather the reverse as an obstacle to improving the land.

About two hundred acres of the land was thus overgrown by this wood growth of all kinds. Perhaps more, but this is as far as I can find from direct statements in the evidence. Then a number of small holdings (including a 26 acre driving park), together amounting to a little over two hundred acres, were probably cleared land. On one of those holdings are some acres of bog—and outside of those was another bog. What the remaining two hundred acres consisted of I am at a loss to know. I find on the plan a goodly sized millpond within the areas, but nothing to indicate how many acres it covers.

No single attempt at description, of a definite character, regarding the external appearance, and condition, of this land in question appears in the evidence as one might expect to find in a case of this kind.

The same remark holds true of the soil itself of which so very much was said.

One witness describes the whole as a gravel loam ridge. Another tells about holes he dug, and he calls what he found sandy loam. Some places he found 10%, other places 20% of loam and all that was not loam was sand. I count thirteen holes he speaks of, but exactly where is impossible to say with certainty from his evidence. Trying to follow on the plan his

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steps, the utmost I can make of it is that these tests are worthless, as a guide to the character of anything but a fractional part of the whole land.

Another dug other holes, but how many or where he fails to tell so as to be of any value in the way of giving information.

Some others looked in some of these holes, and put their hands in and found loam or sand or both.

It is from such loose statements that we are left to conjecture the real nature of the soil on each and all of the many parts of this tract of land nearly a mile square in extent. Some of the witnesses brought to inspect and give such evidence lived eighteen or twenty miles away. They had no special qualification for such work. Why were they brought?

We are told two hundred acres had no water on it. How the rest was watered we are left uninformed as to, except that from one place the water ran one way, and then another stream ran another way, and that there were some springs some places.

The plan filed helps slightly, but shews no trace of a stream in a place where one witness speaks of one two feet deep. Which is right?

I have tried to trace the wanderings of those who try to tell of digging to discover the nature of the soil. The witness who did more than any other of this sort of exploration I venture to say did not cover but a very small part of the land. Others seem to have got to the same places or thereabouts. No sensible man who had the slightest conception of what such an inquiry involves, to be of any value, would invest in a 623 acre orchard on the strength of such explorations. They proceeded without system and, consequently, leave us without that means of testing their proceed-

ings or evidence that we ought to have had if value is to be given to the results.

As for the jaunty fellows who could discard all past history of these lands without trying to know why the land had lain so long waste yet see through the woods, the water, the bog, the bushes, the heather or grasses that covered the soil and form opinions, the less said the better.

There is not a single witness who has professed to have examined this 623 acres of land in such a way as to suggest that he had anything like a proper conception of the problem he had undertaken to solve.

It is common knowledge that land within the space of a very few acres may so vary in its essential qualities as to be eminently fitted in one part to produce a particular crop or grow a particular kind of tree or fruit and in all its other parts utterly unfit therefor.

So much more does that apply to the extensive tract of land now in question.

It would have required skill and knowledge of a very high order to have established after days and weeks of investigation the proposition that this entire tract of land was, as witnesses have assumed, save as to the bogs useful and likely to prove profitable for growing an immense orchard upon. Some of these lands were sixty feet above other parts. Hence, no doubt, one man talks of gravel loam and others of sandy loam.

No prudent man without the possession or use of such skill and knowledge and careful investigation would ever dream of investing $38,000 of his own money in such an enterprise as presented here, as a possibility, upon this imperfect investigation.

Money of the Crown is just as sacred as private

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property. I regret to think as I infer from Mr. Justice Burbidge's remarks that such is not thought generally to be the case.

Values it must be observed depend on the estimation of the ordinary man. The extraordinary man who makes great discoveries in such worthless spaces of ground has to wait until he has persuaded his fellow men of the reality of his discovery before he can enrich himself thereby, even when the needs of the public have required of and from him a deprivation of both property and the dream.

Until the dream becomes a concrete reality that men can grasp it is worthless for purposes of such a valuation.

This appellant, as a discoverer of wealth in the waste places, seems to have at first been modest enough to claim only $23,680 in his statement of defence.

It had to be amended to meet his growing knowledge, which reached that state when he placed it on oath at "$45,000 or more."

Much of the land in King's County has by reason of climatic conditions been found adapted to the growing of fruit and especially apples, and many of the farmers have turned their attention that way. As a result some men have made some orchards so highly productive as to render their orchard lands thus improved and developed very valuable.

Wherever any specialty in farming has become successful in a locality, there is, no doubt, a tendency to turn more land to use in that special direction and thus the values of undeveloped land may rise or shew a tendency to rise. The process is necessarily in the case of orchards a slow one. It has been going on in King's County possibly for generations and with each

new success gathering strength. But there is no evidence here that the land has there suddenly risen in value. I infer quite the contrary. There is no evidence that the available land for such a purpose has become scarce or that this particular land is of the quality that has rendered King's County orchards so noted. Indeed, quite the reverse. Only a fraction of each farm is as a rule so used. It is said to have been, in recent years, observed that even the inferior lands, such as this undoubtedly is, being sand for a depth of at least two feet according to tests of appellant's men who have given evidence (with only ten to twenty per cent. of loam) have been found capable, in some instances, by development and use of fertilizers of being made productive of fruit. How far this process of enhancing the worth of such inferior land and its consequent rise in price has gone, the evidence, from its diffusive character, has not instructed us much.

I am unable, therefore, to find that the movement upon which so much stress was laid has been such as to warrant much weight being given to inferences therefrom regarding the potential value of this land in question.

I think the appeal should be dismissed with costs, the cross-appeal allowed with costs, and that no costs of the proceedings, the reference, the appeals therefrom or otherwise, should be given either party in the court below.

I think the judgment should be as prayed and the price offered in the prayer of the petition of the Attorney-General be declared as prayed with interest on the amount thus arrived at from the 13th September, 1903.

MACLENNAN J. concurred.

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DUFF J.—The respondent undertook to establish as a fact that the land in question was in situation and in the character of the soil itself suitable to be utilized for fruit growing in a highly profitable degree; and that it was owing to ignorance of its character on the part of its owners that it had recently been sold to him at prices much below its real value. The learned judge of the Exchequer Court has taken the view that this case is substantially made out, and, although (the learned judge not having in this case had an opportunity to observe the demeanour of the witnesses) we are not in a position less advantageous than his, as regards the appreciation of the evidence, we would not, even in such circumstances, disturb such a finding, except upon coming to a clear opinion that it cannot be supported. There is, however, an appeal to this court on questions of fact as well as on questions of law, and having come to such an opinion it is our duty to give effect to it.

For the reasons given by my brother Idington, I agree that the learned judge's finding ought to be reversed and the amount of compensation reduced to the sum offered by the Government valuator.

Appeal dismissed with costs.
Cross-appeal allowed with costs.

Solicitor for the appellant: *W. E. Roscoe.*
Solicitor for the respondent: *R. L. MacIlreith.*