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Nov. 12.

HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA.

PLAINTIFF,

AND

THOMAS NAGLE,

DEFENDANT.

Expropriation—Compensation—Gravel lands—Value.

In an expropriation of gravel lands by the Crown, the basis of compensation is the true or fair market value of the property as a whole; the value to the owner, not the value to the Crown expropriating it is to be considered. The amount awarded may be allowed to go to a mortgagee.

INFORMATION exhibited by His Majesty The King on the information of the Attorney-General of Canada, plaintiff, and one Thomas Nagle, defendant, for the vesting of land expropriated by the Crown.

Tried before the Honourable Mr. Justice Cassels, at St. John, N. B., September 26, 27, 1917.

Hanson, for plaintiff.

H. O. McInerney, for defendant.

CASSELS, J. (November 12, 1917) delivered judgment.

The information asks that certain lands expropriated by the Crown should be declared vested in

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His Majesty The King, and that the compensation for the lands should be ascertained and settled.

The lands in question comprise 59,680 acres. The expropriation plan was registered on the 8th May, 1916. On the 21st April, 1917, the Crown tendered the sum of $1,492 in full compensation for the lands taken and for all damages.

The defendant by his defence claims the sum of $30,000.

When the case came on for trial it appeared that the defendant Nagle was a mortgagee of the lands in question. One Joseph Bennett Hachey was in reality the owner of the lands subject to the said mortgage. By agreement Hachey was added as a defendant to the action, and Mr. McInerney appeared for him as solicitor and counsel, and subsequently a defence was filed for Hachey.

From the evidence of Mr. O'Dwyer it would appear that of the 60 acres expropriated by the Crown, about 32 acres were composed of gravel.

The Crown expropriated the lands in question for the purpose of obtaining gravel for use upon the Intercolonial Railway. At the time of the expropriation the pit had not been opened. It was after the expropriation that the railway opened the pit and took the gravel therefrom.

It appears that the general manager of the railway permitted Hachey to take certain carloads of gravel; and, according to Mr. Hachey, the amount of gravel that he took has to be paid for by him to the railway, and it is not a matter in question before me.

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There is no doubt that the gravel from the lands expropriated is gravel of a fine quality. This is conceded by all parties.

It would also appear that there was considerable gravel upon the balance of the 105 acres not expropriated by the railway, and a claim is put forward upon the part of the defence for injury by the severance of the lands, the defendants claiming that they have no means of working the gravel pit on the land not taken.

The lands in question, comprising 105 acres in lot No. 26, Block No. 36, South Gloucester Junction, were purchased by Hachey at public auction, and the Crown grant to him is dated the 12th February, 1914. The price paid by him for the 105 acres was the sum of $525, or at the rate of five dollars per acre.

The evidence given at the trial is of an unsatisfactory nature. A great mass of it is as to the quantity of gravel contained in the lands expropriated, the various witnesses differing considerably as to quantities. I had grave doubts at the trial as to the admissibility of this class of evidence. As I understand the law, what I have to ascertain is the true or fair market value of the property as a whole. I thought it better to allow the evidence, as it might have some bearing on the intrinsic value if supplemented by evidence of the market value.

In the case of *The King v. Kendall* (1) the learned Judge states "that the property in question must "be assessed at its market value in respect of the "best uses to which it can be put by the owner, "taking into consideration any prospective capa-

(1) 14 Can. Ex. 71 at 81, 8 D.L.R. 900 at 906.

"bilities and any inherent value it may have. One "must discard the idea of arriving at its value by "measuring every yard of sand and gravel on the "bar." The learned Judge cites a decision of the Supreme Court of Massachusetts, namely, the case of *Manning v. Lowell* (1), and also some other cases, and rightly distinguishes the case of *Burton v. The Queen* (2), as this latter case was not an expropriation of lands, but merely the taking of a certain quantity of gravel. The case of *The King v. Kendall* (3) was taken by way of appeal to the Supreme Court of Canada, and the judgment was sustained. The decision in the Supreme Court has not been reported, but I have had the benefit of a perusal of the judgments. The reasons for judgment of Mr. Justice Idington, it seems to me, deals with the question in the way it was dealt with by the learned Judge in the court below. The statement is as follows:

"A mass of evidence was given relative to the "cubic contents of sand and gravel to be found "within the area in question and the market value "of such material. This sort of evidence might well "have some bearing upon the intrinsic value of the "property in question, but unless supplemented by "evidence of the true or fair market value of the "property as a whole must be held of little value "for the reasons given by the learned trial judge. "Of direct evidence of the latter kind little appears "in the case, and I cannot say that the amount ad- "judged is obviously erroneous."

These remarks are very apposite to the case before me.

(1) 173 Mass. 100.
(2) 1 Can. Ex. 87.
(3) 14 Can. Ex. 71, 8 D.L.R. 900.

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A second proposition of law is one of considerable importance in the present case. It is too well settled to need comment, that in dealing with the value of the lands in question, it is the value to the owner that has to be considered and not the value to the Crown expropriating it.

The language in the reasons of the judges in the case of *Sidney v. North Eastern Railway* (1), has strong application to the facts of the present case. Curiously enough, in the *Sidney* case the decision in *Cedars Rapids Power Co. v. Lacoste* (2) was not referred to, although apparently decided before the decision in the *Sidney* case.

The result of the evidence in the present case is that, outside of the Intercolonial Railway, there is no market for the gravel from the pit in question except to a very trifling extent.

Albert E. Trites, a witness examined by the plaintiff, is probably the one best qualified as a witness. He gave his evidence in a satisfactory manner. He is a railway contractor to a large extent, and has been such for over 40 years. He is asked:

"Q. As such have you had considerable experi-
"ence with gravel and gravel pits?—A. Yes.

"Q. You know gravel pretty well as a result of
"that long experience?—A. I think so."

He then goes on to explain how he was called upon in the Crown Lands office in Fredericton, to report on certain lots. He then proceeds to give evidence in regard to the gravel pit in question, that is lot No. 26. He states, what is uncontradicted, that the gravel is all of a good quality. As I have mentioned before, the pit was opened by the rail-

(1) [1914] 3 K.B. 629. (2) [1914] A.C. 569, 16 D.L.R. 168.

way, after the expropriation. He places a value of $300 per acre upon the portion of the land expropriated which contains gravel. On his cross-examination he points out that in placing this valuation upon the pit, he is placing a value on it to the railway and not to the owner. I quote some portions of his evidence:

"Q. Upon what did you base your value of $250 "per acre of ballast ground down there, on 27, "and $300 on 26; how did you arrive at that "figure, how did you make that up?

"A. My idea was that if anybody wanted it, it "would be worth that much money.

"Q. To the person taking it?—A. To the person "taking it.

"If the railway wants it you thought it would "be worth that much to the railway?

"A. That was my idea.

* * * *

"Q. In other words, your value of $300 an acre "is based on what you think it is worth to the "railway?

"A. That is my idea.

"Q. If the railway was not a purchaser, Mr. "Trites, if there was no Intercolonial Railway to "sell it to—eliminate that for the time being— "what would you say would be the market value "of that gravel land altogether, leaving out of "consideration the railway?—A. I could not say. "The demand would be very light for large quan- "tities.

"Q. The demand would be almost negligible, "would it not, as far as you are aware; can you

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"suggest any market for that ballast outside of "the railway?

"A. Nothing further than what is used for pri- "vate use and the roads.

"Q. That would be very small, would it not?

"A. It would not amount to any big quantities, "for the time being.

"Q. I agree with that, that the railway is the "market for this ballast?

"A. The railway is the big market.

"Q. And practically the sole market?

"A. Largely the sole market.

"Q. And it appears to have been the only mar- "ket up to this year from what we have heard to- "day?—A. Yes.

"Q. You know of no market outside of what has "been said to-day?—A. No.

"Q. You would not say there was a market to "haul that gravel to Moncton?

"A. The distance would be against it.

"Q. They get gravel a good deal nearer?

"A. They get it nearer.

"Q. This is about 120 miles from Moncton?

"A. I think so. It is a long haul.

"Q. So that your figure of $300 and $250 per "acre respectively was based on a value to the "railway?

"A. Certainly.

* * * *

"Q. So you based it on Hachey's value to the "Intercolonial Railway?—A. Certainly.

And further on he says:

"Q. You knew no other market in 1916 for this "property except the Intercolonial Railway?

"A. No extended market.

"HIS LORDSHIP: No practical market?

"A. No practical market.

"*Mr. Hanson*: No commercial market?

"A. No commercial market on a large scale."

He says further:

"I think the demand for the gravel, outside of "the railway, would be for small quantities."

Had there been other railways competitors with the Intercolonial Railway the case might be different, but it is beyond question there was no other competitor. I think it is also evident there was no market for the gravel at Moncton. The expense of the haul would be too great to make it a commercial venture, and as the evidence shows there are other quarries within a short distance from Moncton containing all the gravel that could be required. For instance, the Anagance pit, etc. Mr. O'Dwyer in his evidence gives details of the various pits.

Now we have, as I have stated, the fact that the whole 105 acres were purchased by Hachey in the fall of 1913 for the sum of five dollars an acre, viz., for $525. At the time of the expropriation the lands were in the state in which they were at the time of the purchase. There had been no attempt to develop them.

A letter was produced purporting to be signed by one White and Robertson, containing an alleged offer of $200 an acre. I do not think that this offer was intended as a genuine offer. Hachey himself does not seem to treat the matter as if it was *bona fide*. He is asked the question:

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"Q. Was that a *bona fide* offer?—A. It came in-
"directly to me. It did not come to me person-
"ally."

* * * *

"Q. As a matter of fact, did you regard this as
"a serious offer?—A. No, I don't know as I did."

I think that if the defendant intended to seriously rely upon such an offer they should have called these two gentlemen. I have but little doubt that when Hachey purchased the lot in question he contemplated that he would be able to sell it to the railway, and had that in view when purchasing.

On the best consideration I can give to the case and having regard to the law that governs, as I understand it, the offer of the Crown of $1,492 is more than ample to compensate Mr. Hachey for the loss of the 60 acres and any damage on the severance.

I think the tender of the Crown is ample, and that the amount tendered, together with interest up to the date of the tender from the time of expropriation, is sufficient to cover all claims the defendant can reasonably have, including any allowance for compulsory taking, and I think the Crown are entitled to their costs of the action, to be paid by the defendants.

The amount allowed should go to the mortgagee.

Judgment accordingly.

Solicitors for plaintiff: *Slipp & Hanson.*

Solicitor for defendant: *H. O. McInerney.*