

HIS MAJESTY THE KING (RE- } APPELLANT ;
 SPONDENT)..... }

1901
 *Nov. 27.

AND

JOSEPH A. LIKELY (SUPPLIANT)...RESPONDENT.
 ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

1902
 *Feb. 20.

Expropriation of land—Damages—Valuation—Evidence.

The Crown expropriated land of L. and had it appraised by valutors who assessed it at \$11,400 which sum was tendered to L. who refused it and brought suit by Petition of Right for a larger sum as compensation. The Exchequer Court awarded him \$17,000. On appeal by the Crown.

Held, Girouard J. dissenting, that the evidence given on the trial of the petition showed that the sum assessed by the valutors was a very generous compensation to L. for the loss of his land and the increase by the judgment appealed from was not justified.

The court, which considering that a less sum than that fixed by the valutors should [not be given in this case expressly stated that the same course would not necessarily be followed in future cases of the kind.

*PRESENT :—Taschereau, Sedgewick, Girouard and Davies JJ.

(Mr. Justice Gwynne was present at the argument but died before judgment was given).

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APPEAL from a judgment of the Exchequer Court of Canada awarding the suppliant \$17,000 for land expropriated by the Crown.

The land expropriated was situate in the City of St. John, N.B., and was taken for wharf accommodation and other purposes in connection with the construction of elevators in the city. It consisted of water lots and other real estate used by the suppliant as a mill site for sawing lumber, a pond for storing logs and other purposes connected with the business of a saw mill.

The Crown had valuers appointed to determine the value of the land which they estimated at \$11,400. This amount the suppliant considered too small and refused to accept it when tendered to him. He proceeded by Petition of Right to claim greater compensation and was successful in obtaining \$17,000 or nearly \$6,000 more than was tendered. The Crown appealed.

McAlpine K.C. for the appellant. In cases tried by a judge without a jury, the Appellate Court may deal with questions of fact as fully as the trial judge. *Phenix Insurance Co. v. McGhee* (1). The loss of profits derivable from the prosecution of a certain business is of a personal character, and cannot be construed as a direct or consequent damage to property. *Lefebvre v. The Queen* (2). See also *Jones v. Hough* (3).

Stockton K.C. for the respondent. The Exchequer Court judge heard the witnesses, saw the manner in which they gave their evidence and was fully informed as to all the circumstances of the case. His judgment is as to a question of value, as if found by a jury, and in that respect must be treated as a finding of fact not to be interfered with on appeal. There is

(1) 18 Can. S. C. R. 61.

(2) 1 Ex. C. R. 121.

(3) 5 Ex. D. 115.

ample evidence to sustain the award. *The Queen v. Murphy* (1). This court should not reverse merely upon a balance of testimony. *The Picton* (2); *Ryan v. Ryan* (3); *Grasett v. Carter* (4); *Jones v. Tuck* (5); *Arpin v. The Queen* (6); *Bickford v. Hawkins* (7); *Solomon v. Bitton* (8); *The Metropolitan Railway Co. v. Wright* (9); *Webster v. Friedeberg* (10); *Gray v. Turnbull* (11); S. S. "*Baku Standard*" v. S. S. "*Angèle*" (12).

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The judgment of the majority of the court was delivered by:

DAVIES J.—In August, 1898, the Minister of Railways and Canals expropriated 28,100 feet of the respondent's land in the City of Saint John, N.B. The parcel expropriated was part of a lot of 80,000 square feet of land used by respondent as a timber pond.

The Minister of Railways appointed three valuers of experience and repute to value the lands expropriated, and they, after inquiring into all the facts necessary to enable them to form a judgment, awarded the owner, the present respondent, \$11,410. The minister accepted this valuation and tendered the respondent the amount. He refused to accept and filed a Petition of Right in the Exchequer Court claiming the valuation to have been "greatly inadequate."

The Court of Exchequer, after hearing many witnesses, awarded the suppliant \$17,000 for the 28,000 square feet taken and for all damages resulting therefrom and interest at six per cent from the 20th of August, 1898, the date of the expropriation.

(1) Cass. Dig. (2 ed.) 314.

(7) 19 Can. S. C. R. 362.

(2) 4 Can. S. C. R. 648.

(8) 8 Q. B. D. 176.

(3) 5 Can. S. C. R. 387.

(9) 11 App. Cas. 152.

(4) 10 Can. S. C. R. 105.

(10) 17 Q. B. D. 736.

(5) 11 Can. S. C. R. 197.

(11) L. R. 2 H. L. Sc. 53.

(6) 14 Can. S. C. R. 736; Cass. (12) [1901] A. C. 549.

Dig. (2 ed.) 21.

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We have not the advantage of knowing on what grounds the learned judge of the Exchequer Court increased the valuator's award, as no written judgment was given by him. This amount awarded by him is at the rate of about 60½ cents per square foot. From the evidence it appears that the suppliant was at one time the owner of the whole lot, embracing 80,000 square feet, as trustee for one Fisher, the beneficial owner. As such trustee after duly advertising the lands he caused them to be sold at public auction in 1894 for \$2,100 being himself the purchaser. No evidence of any special appreciation in the value of these lands between 1894 and 1898 was given but a large mass of testimony was taken by the Exchequer Court with respect to such value. The Crown, having accepted the valuation of the valuator appointed by the Minister of Railways and tendered the amount to the respondent, we do not feel under all the circumstances of this case and the somewhat conflicting evidence, justified in awarding a less sum, though we wish to be distinctly understood as not laying down any rule which would prevent us going into similar valuations and awarding less.

After carefully weighing the evidence and the arguments submitted to us we have reached the conclusion that the amount given by the valuator was exceedingly generous.

The appeal will be allowed with costs and the judgment of the Exchequer Court reduced to the sum of \$11,410, without interest from the time the amount was tendered by the Crown, the suppliant to pay all costs in the Exchequer Court and the costs of this appeal.

GIROUARD J. (dissenting.)—The Crown valuator valued the land expropriated and all damages at \$11,400, which the Crown offered with interest, altogether

\$12,000. The proprietor, not being satisfied with this tender, brought his Petition of Right, and the Exchequer Court judge, after hearing twelve or fifteen witnesses on each side, allowed \$17,000.

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As is usual in similar cases, there is great diversity of opinion. As I read the evidence, I think the weight of it is in favour of the respondent. The learned trial judge saw and heard the witnesses. In *The Queen v. Armour* (1), we decided that in a case where the Crown valuers valued the land and damages at \$6,860, and the Exchequer Court judge increased the amount to \$14,658,

it would be necessary to demonstrate in the clearest possible way, by reference to the evidence in the case, that there was error in his judgment.

A recent decision in the Privy Council in SS. "*Baku Standard*" v. SS. "*Angèle*" (2) is in point. Sir Ford North said:

Their Lordships are of opinion that, considering the evidence, and that the compensation for damage is dealt with separately, full justice would have been done by an award of less than £1,000 for salvage. But this is a question of amount only, and it is not the custom of this committee to vary the decision of a court below on a question of amount, merely because they are of opinion that, if the case had come before them in the first instance, they might have awarded a smaller sum. It has been laid down in "*The De Bay*" (3) (mentioned above) and other cases that they will only do so if the amount awarded appears to them to be grossly in excess of what is right, which is not the case here.

I would dismiss this appeal.

Appeal allowed with costs.

Solicitor for the appellant: *E. H. McAlpine.*

Solicitor for the respondent: *A. A. Stocton.*

(1) 31 Can. S. C. R. 499.

(2) [1901] A. C. 549.

(3) 8 App. Cas. 559.