THE TORONTO SUBURBAN RAILWAY COMPANY ..... APPELLANTS;

AND

THOMAS H. EVERSON ..... RESPONDENT.

1916
*Nov. 23, 24.

1917
*Feb. 6.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Expropriation—Railways—Date for valuation of lands—Deposit of plan—Notice—Benefit to lands not taken—Set-off—Excessive compensation—Appeal—6 Edw. VII. c. 30 (Ont.)—3 & 4 Geo. V. c. 36 (Ont.).

Where the expropriation of land is governed by the provisions of the Ontario "Railway Act" of 1906 the date for valuation is that of the notice required by sec. 68(1). The effect is the same under the Act of 1913 if the land has not been acquired by the railway company within one year from the date of filing the plan, etc.

The compensation for the land expropriated should not be diminished by an allowance for benefit by reason of the railway to the lands not taken, the Ontario "Railway Acts" making no provision therefor.

On appeal in a matter of expropriation the award should be treated as the judgment of a subordinate court subject to re-hearing. The amount awarded should not be interfered with unless the appeal court is satisfied that it is clearly wrong, that it does not represent the honest opinion of the arbitrators, or that their basis of valuation was erroneous.

Where the land expropriated is an important and useful part of one holding and is so connected with the remainder that the owner is hampered in the use or disposal thereof by the severance he is entitled to compensation for the consequential injury to the part not taken: *Holditch* v. *Canadian Northern Railway Co.* (50 Can. S.C.R. 265; [1916] 1 A.C. 536) distinguished.

To estimate the compensation for lands expropriated the arbitrators are justified in basing it on a subdivision of the property if its situation and the evidence respecting it shew that the same is probable.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ.

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Held, per Fitzpatrick C.J. and Anglin J. that to prove the value of the lands expropriated evidence of sales between the date of filing the plans and that of the notice to the owner is admissible and also of sales subsequent to the latter date if it is proved that no material change has taken place in the interval.

Brodeur J., dissenting, held that the damages should be reduced; that the arbitrators should have considered only the market value of the lands established by evidence of recent sales in the vicinity.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Ontario affirming the arbitrators' award on an expropriation of respondent's land by the appellant company.

The various questions raised on the appeal are shewn in the above head-note.

R. B. Henderson and *O'Connor* for the appellant. *Holditch* v. *Canadian Northern Railway Co.*(1), shews that compensation should not be allowed for injurious affection.

The benefit to remaining lands should be set off. Nicholls on Eminent Domain, page 330, par. 279.

Tilley K.C. for the respondent referred to *Canadian Northern Railway Co.* v. *Taylor*(2).

THE CHIEF JUSTICE.—I concur in the judgment of Mr. Justice Anglin dismissing this appeal with costs.

DAVIES J.—I assent to the judgment proposed dismissing this appeal, with very great reluctance. That reluctance is occasioned by my belief that the damages awarded are greatly excessive.

If I had been sitting in the first court of appeal, I think I should have voted to set the award aside on the ground that the valuation of the arbitrators was excessive and not justified by the evidence.

But sitting in this final court of appeal, I cannot ignore the fact that the Court of Appeal for Ontario

(1) 50 Can. S.C.R. 265; [1916] 1 A.C. 536.
(2) 15 Can. Ry. Cas. 298.

(2nd Division) has unanimously confirmed that valuation. I have not been able to find that the arbitrators proceeded upon any wrong principle in making up their award.

For some time I wavered considering whether, under the proved facts and the evidence, I should not, even in the face of the approving judgment of the Court of Appeal, allow the appeal on the ground that the valuation was so excessive as almost to shock one.

After reflection and consultation with my colleagues I have decided to assent to the judgment dismissing the appeal.

DUFF J.—The first question is: What is the date with reference to which the value of the land taken and compensation for damages are to be ascertained? The decision upon this question must be the same whether the rights of the parties are ruled by the "Ontario Railway Act" of 1906 or by the "Ontario Railway Act" of 1913.

I think it is the Act of 1906 to which we must look, for the reason that when the Act of 1913 came into force (the 1st July, 1913), the respondent's right to compensation had accrued. This follows from a consideration of certain provisions of the Act of 1906 as amended by an Act of 1908. This last mentioned Act (ch. 44, sec. 5), amending section 68 of the Act of 1906, provides for the service of a notice upon the owner giving a description of the land to be taken, a declaration of readiness to pay a specified sum or rent as compensation giving also the name of the person to be appointed as arbitrator on behalf of the railway company and for the appointment of arbitrators in the case of failure on part of the owner to accept the sum offered and the ascertainment of the proper compensation

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by the arbitrators so appointed. Service of this notice is an election by the railway company to take the lands to which it relates subject to the right of abandonment given by sub-section 17. Notwithstanding this provision for abandonment I think the right of the owner upon the service of notice becomes a right which may be put into effect by the appointment of an arbitrator subject, however, to defeasance by the exercise on part of the railway company of the right of abandonment on the conditions prescribed by sub-section 17. He, therefore, has a status not prejudicially affected by repealing or amending legislation in the absence of some express or necessarily implied enactment that such legislation shall so operate: *Main* v. *Stark*(1). It follows that the right of the respondent was a right to be compensated according to the principles laid down by the Act of 1906 and the amendments which had been passed down to the time the notice was given. Section 68 of the Act of 1906 as amended in 1908 evidently contemplates a valuation as of the date of the notice. But if we are governed by the Act of 1913, by section 89 (2) of that Act the date of the "acquisition" of the property is the decisive date when the property is not acquired within one year after the deposit of the plan and book of reference.

The contention advanced on behalf of the appellant railway company that compensation is to be ascertained by reference to the date of the deposit of the plan, profile and book of reference (sec. 89, sub-sec. 2 of 3 & 4 Geo. V., ch. 36) therefore fails, and compensation must be ascertained by reference to a date not earlier than the date of the service of the notice under section 68 of the Act of 1906 amended as above indicated. The arbitrators have decided that it is im-

(1) 15 App. Cas. 384.

material as affecting the amount of compensation to be awarded whether this date be taken to be that of the notice which was the 3rd of March, 1913, or that of the warrant of possession which was the 2nd of April in the same year. There seems to be no reason to doubt the correctness of this and consequently the view of the arbitrators on the first point is one to which I think no exception can be taken.

The next question to be decided is whether certain provisions of the "Ontario Railway Act" (ch. 207, sec. 20, sub-sec. 9, R.S.O., 1897), are applicable which require that the arbitrators in deciding upon the amount of compensation to be awarded are to ascertain the increased value given to the lands not taken by reason of the

passage of the railway through or over the same or by reason of the construction of the railway where the railway is to pass through such lands

and that such increased value is to be set off against the

inconvenience, loss or damage arising from the taking possession or the using of such lands.

The argument is based upon section 44 of the company's special Act, passed in 1901 (1 Edw. VII., ch. 91), and it is in substance that this section 20, subsection 9, of the Ontario "Railway Act" (ch. 207, R.S.O., 1897), is by the provisions of the special Act made an integral part of that Act and that it continues to apply to the company and company's works by force of the special Act itself quite independently of the "Railway Act," R.S.O., 1897, ch. 207, and that consequently it remained unaffected by any amendment of the last mentioned enactment. The conclusive answer to this argument is found in the last sentence of section 44 of the special Act:—

And the expression "this Act" when used herein shall be understood to include the said clauses of the said "Railway Act" and of every Act in amendment thereof so incorporated with this Act.

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The concluding words "so incorporated with this Act" cannot be read as governing the words "every Act and amendment thereof" without depriving these last mentioned words of all office because the "clauses of the 'Railway Act' of Ontario" (meaning indisputably ch. 207, R.S.O., 1897), specified in the earlier sentence of section 44, are the provisions which have been "so incorporated." That expression "clauses of the 'Railway Act' of Ontario" either does or does not include amendments of those clauses. If it is to be read as including them, then *cadit quæstio;* if it does not, then "every Act and amendment thereof" must be taken to add something to the phrase "the said clauses of the said "Railway Act" and if the phrase add anything, there is no reason for putting any limitation upon the meaning of it which would exclude the amendment by which section 20, sub-sec. 9, of the "Railway Act" became non-operative.

The next question is whether under the "Railway Act" of 1906 itself, which does not include any provision corresponding to section 20, sub-sec. 9, of the "Railway Act" (ch. 207, R.S.O., 1897), the arbitrators are bound to allow a set-off as against the compensation that would otherwise be payable in respect of injurious affection.

Mr. Henderson argues that as the owner is entitled only to compensation for loss it is necessarily involved in this, that in estimating the amount of compensation allowance must be made for any increase in value due to the construction of the railway.

"The principles" said Lord Buckmaster delivering the judgment of the Judicial Committee of the Privy Council in *Fraser* v. *The City of Fraserville*(1), on the 25th January, 1917,

(1) 33 Times L.R. 179.

which regulate the fixing the compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *Lucas* v. *Chesterfield Gas and Water Board*(1), *Cedars Rapids Manufacturing Company* v. *Lacoste*(2), and *Sidney* v. *North-Eastern Railway Company*(3), and the substance of them is that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation, with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired.

To this may be added a reference to Lord Justice Moulton's observations in *Re Lucas and Chesterfield Gas and Water Board*(1), that the owner receives for the lands he gives up their equivalent, that is, that which they are worth to him in money. The property is therefore not diminished in amount but to that extent is "compulsorily changed in form."

A good deal no doubt may be said in favour of the view that a rigorous application of the principle of compensation thus stated excludes from consideration, in estimating the value of the lands taken on the appropriate date, any elements of value due to the existence of the railway scheme and as regards damages would necessitate the taking into account of any augmentation of value in the lands with respect to which damages are claimed that would flow from the construction or operation of the railway.

I think this is not the correct principle for estimating value or damages under either the Act of 1906 or the Act of 1913. By the Act of 1913 a date is given with reference to which the value of the land taken, or damages as the case may be, must be ascertained and it is not denied that where this value can be ascertained by reference to the price which could be obtained

(1) [1909] 1 K.B. 16. (2) 30 Times L.R. 293; [1914] A.C. 569.
(3) [1914] 3 K.B. 629.

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on a sale to others than the railway company, the claimant is entitled to compensation to the full extent of the value so ascertained.

The Act of 1906, it is true, does not explicitly appoint a time with reference to which the value of the lands taken is to be fixed, but having arrived at the conclusion that the statute sufficiently indicates for that purpose the date of the service of the notice the same result follows.

As to damages, it is clear, I think, that the claimant is entitled to demand as compensation the difference between the value of the property affected on the date with reference to which the damages are to be appraised, as it would be if the railway were not to run through part of it and that which it is in fact worth to the owner in money on that date takin , into consideration the fact that it is to be traversed by the railway.

Mr. Henderson's next point is that compensation has been awarded on the assumption that the block of 27 acres would be subdivided and sold in lots; on that assumption the owner would not, he argues on the authority of *Holditch* v. *Canadian Northern Railway*(1), be entitled to compensation for damages in respect of the whole of the block, but only in respect of those lots which the railway actually crosses. The owner, he contends, cannot claim compensation on two inconsistent assumptions; he cannot have compensation for land taken on the assumption that the property is to be subdivided and sold, and compensation for damages in respect of the part not taken on the assumption that it is to remain as it is.

I think the arbitrators have not proceeded upon inconsistent assumptions, they have, I think, considered

(1) [1916] 1 A.C. 536.

the property as a property capable of subdivision and of producing certain returns for the owner in that state. And as compensation they have allowed the difference between the value of the block as of the appropriate date if it were to remain untouched by the railway and its value on the hypothesis that it is to be traversed by the railway. I think they were right in this. The claimant is entitled to say: "My block of land in its existing condition would now be worth so much in its entirety for the purposes of subdivision without the railway; it is now worth so much less if the railway is to cross it. I claim compensation for the difference."

The final contention of Mr. Henderson is that the amount awarded is demonstrably excessive.

The whole block, of which part (a strip along Dundas Street forty feet wide) was taken, was an area of 27 acres, about ten miles west of the Toronto market, which about three weeks before the notice was served had been bought by Everson for the price of $926 an acre, about $25,000 in the aggregate. The land actually taken had an area of three acres, and for it the arbitrators allowed as compensation a little over $5,000 as well as $3,000 as compensation for injury to the part retained.

The right of appeal from the award of the arbitrators is given by sub-section 15 of section 90 of the Ontario "Railway Act" of 1913 in language not substantially different from that of R.S.C., 1906, ch. 37, sec. 209(1), which language was under consideration in *Atlantic and North West Railway Company* v. *Wood*(1), where Lord Shand delivering judgment for the Judicial Committee stated the effect of the enactment to be the providing for a review of the judgment of the arbitrators as if it were the judgment of a subordinate

(1) [1895] A.C. 257.

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court, it being the duty of the first appellate court to examine the evidence and while not superseding the arbitrators entirely, giving effect to the court's own view if satisfied that the view of the arbitrators is wrong. The fact that the Ontario court of appeal whose duty it was so to review the decision of the arbitrators has unanimously confirmed the award and without comment, is a serious obstacle in the way of the appellants here. In *Johnston* v. *O'Neill*(1) Lord Macnaghten said:—

> The appeal is in reality an appeal from two concurrent findings of fact. In such a case the appellant undertakes a somewhat heavy burden. It lies on him to shew that the order appealed from is clearly wrong. In a Scotch case, *Gray* v. *Turnbull*(2), where there was an appeal from two concurrent findings of fact in a case in which the evidence was taken on commission and neither court saw the witnesses, Lord Westbury, after referring to the practice in courts of equity to allow appeals on matters of fact, makes this observation: "If we open the door to an appeal of this kind, undoubtedly it will be an obligation upon the appellant to prove a case that admits of no doubt whatever." In an English case, *Owners of the P. Caland* v. *Glamorgan Steamship Co.* (3), Lord Watson expressed himself as follows: "In my opinion it is a salutary principle that judges sitting in a court of last resort ought not to disturb concurrent findings of fact by the courts below, unless they can arrive at—I will not say a certain, because in such matters there can be no absolute certainty—but a tolerably clear conviction that these findings are erroneous, and the principle appears to me especially applicable in cases where the conclusion sought to be set aside chiefly rests upon considerations of probability."

The appellants' situation is not improved where the first tribunal has had the advantage of a view and where the controversy relates entirely to the value of land, a subject in most instances full of uncertainty. There is a crowd of recent cases in which this principle had been accepted; *Montgomerie & Co.* v. *Wallace-James*(4); *Greville* v. *Parker*(5); *The Glasgow*(6), are examples.

(1) [1911] A.C. 552, at p. 578.
(2) L.R. 2 H.L. Sc. 53.
(3) [1893] A.C. 207.
(4) [1904] A.C. 73.
(5) [1910] A.C. 335.
(6) 112 L.T. 703.

Except in regard to the points already discussed and disposed of Mr. Henderson does not argue that the award itself gives evidence of the arbitrators having misdirected themselves; his contention is that the evidence supplied by actual sales of property in the vicinity and of the price paid for this very block only three weeks before the service of the notice, conclusively demonstrates—if the price paid on actual sales is to be accepted as the true test—that the actual selling value of the property taken was much less than the arbitrators found it to be; and that the arbitrators erred in principle by largely disregarding the proper inferences from the facts proved in relation to actual sales and in giving predominant weight to the opinions of real estate experts which could not be supported by reference to actual transactions.

I do not think that there are sufficient grounds for inferring that the arbitrators failed to appreciate the distinction between evidence of this class and evidence of value supplied by actual sales of the very property to be valued within a short space of time before or after the appointed time with reference to which the valuation was to be made. The area taken by the railway was about one-ninth of the total area of the block, and taking the price paid by Everson as a guide, $25,000, and treating all the property as of equal value, the value of the property taken would be about $2,600, while the compensation awarded for this property was $5,300; but this seeming disparity must be considered in light of the fact that in proportion to its size this area was by far the most valuable part of the property. And, moreover, I am not convinced that the arbitrators were wrong in thinking as they evidently did think,

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that Everson's vendor had not appreciated the advantages to be gained by subdividing the property.

I think the appeal should be dismissed with costs.

ANGLIN J.—The majority award on an arbitration under the Ontario "Railway Act" allowed to the landowner as compensation for land taken and injury to his remaining property $8,365. The Appellate Division, after reservation of judgment, but without assigning reasons, unamimously dismissed an appeal by the railway company. From that dismissal the company now appeals on these grounds:—

(*a*) The lands should have been valued as of the date of filing the plan, profile and book of reference—22nd February, 1912—and not as of the date of the notice served on the owner under sec. 68(1) of the "Railway Act 1906"—3rd March, 1913.

(*b*) Enhancement of value of the owner's property not taken, due to the advent of the railway, should have been deducted from the damages awarded.

(*c*) Evidence of sales subsequent to the filing of the plan and even to the order for possession was wrongly received.

(*d*) The compensation allowed was grossly excessive; the value of the lands was fixed arbitrarily, or by compromise or average, and was not based on market value; the lands should have been valued as farm lands on an acreage basis and not as building lots on a frontage basis.

(*e*) If valued as business lots compensation should not have been allowed in respect of lots of which no part was actually taken, there having been as to them no severance entitling the owner to compensation; and nothing should have been allowed for loss of, or interference with, access.

(*a*) Whether the "Railway Act of 1906" (6 Edw. VII., ch. 30), or the "Railway Act of 1913" (3 & 4 Geo. V., ch. 36), should govern, the valuation was properly made as of the date at which the notice to the owner was given. The order for possession followed this notice within one month and there was no material change in the interval. More than a year having elapsed between the filing of the plan and the actual acquisition of the land, if the Act of 1913 governs, under section 89(2) compensation must be ascertained as of the date of such acquisition. If the Act of 1906 applies, although notice of the deposit of the plan is by section 67 declared to be general notice to all persons owning lands shewn thereon of the lands required for the railway, until the notice to the owner prescribed by section 68 is given, the land to be taken is not fixed, since the company may desist, or may deviate within the limit of one mile from the line as located on the filed plan (sec. 59, sub-sec. 13). Moreover, this notice must be accompanied by a declaration of the company's readiness to pay a sum certain as compensation for the land or damages, which a disinterested Ontario land surveyor must certify to be fair. No other date being mentioned, the compensation here referred to is presumably based upon valuation as of the date of the notice and certificate. There is no provision in the Ontario "Railway Act" of 1906, such as is found in the Dominion "Railway Act" (R.S.C. ch. 37, sec. 192(2); 8 & 9 Edw. VII. ch. 32, sec. 2), and in the Ontario "Railway Act" of 1913 (sec. 89 (2)), making the date of deposit of the plan, profile and book of reference the date with reference to which compensation shall be ascertained if the lands are actually acquired within one year thereafter. Under these circumstances I think the notice to the

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owner, given by the company as directed by section 68 of the Act of 1906, under which it professed to proceed, should be regarded as the equivalent of the notice to treat under the English "Lands Clauses Consolidation Act" of 1845. The compensation was properly ascertained as of the date when it was given.

(*b*) Sec. 53 of the Ontario "Railway Act of 1906" (sec. 59 of the Act of 1913; compare sec. 16 of the English "Railway Clauses Act" of 1845; the "Lands Clauses Consolidation Act" of 1845 has been held to imply the same right of compensation: *The Queen* v. *Vestry of St. Luke's*(1); *Ricket* v. *Metropolitan Rly. Co.*(2)), requires railway companies to

> make full compensation * * * to all parties interested for all damage by them sustained by reason of the exercise of (the companies') powers.

Neither in that Act nor in the Act of 1913 is there any provision, such as is found in the Ontario Municipal Act, directing that the compensation to be allowed shall be confined to damages

> beyond any advantage which the owner may derive from the work,

(R.S.O., 1914, ch. 192, sec. 325(1)), or such as is found in the Dominion "Railway Act" (R.S.C., 1906, ch. 37, sec. 198), that arbitrators in fixing compensation shall take into consideration and shall set off against the inconvenience, loss or damage occasioned the increased value, beyond that common to all lands in the locality, that will be given to any lands of the opposite party (*i.e.*, in a case such as this, of the owner) through or over which the railway will pass by reason of the passage of the railway through or over the same, or of the construction of the railway. In the absence

(1) L.R. 6 Q.B. 572, at p. 576; (2) L.R. 2 H.L. 175, at p. 187. 7 Q.B. 148, at p. 152.

of any such provision the authorities under the English "Lands Clauses Consolidation Act" seem to establish that no deduction from or set-off against the full satisfaction * * * for all damage ("Railway Clauses Consolidation Act," sec. 16), which the company is required to pay, may be allowed for any benefit or advantage to the owner's lands—whether common or peculiar—due to the advent of the railway: *Eagle* v. *Charing Cross Railway Co.*(1); *Senior* v. *Metropolitan Railway Co.* (2).

By a former Railway Act of Ontario (R.S.O., 1897, ch. 207) express provision was made in sub-section 9 of section 20 for the set-off of increased value similar to that in the earlier Dominion "Railway Acts" of 1879 and 1888, upon which *In re Ontario and Quebec Railway Company and Taylor*(3), and *James* v. *Ontario and Quebec Railway Co.*(4), were decided. In the Ontario "Railway Act" of 1906, which repeals chapter 207 of the R.S.O., 1897, section 68 replaces section 20 of the Revised Statute, which it amends by omitting sub-section 9 and in lieu thereof inserting, as sub-section 8 (sub-sec. 9 of sec. 90 in the Act of 1913), a clause directing the arbitrators, besides awarding the value of the lands taken, to state the total amount payable for damages. It would therefore seem that, instead of limiting the set-off to benefit peculiar to the owner's lands as distinguished from that common to all lands in the locality, as the Dominion Parliament had done by the "Railway Act" of 1903, section 161, the Ontario Legislature deliberately eliminated consideration by the arbitrators of any benefits or advantages to owners and did away with any deduc-

(1) L.R. 2 C.P. 638.
(2) 2 H. & C. 258.
(3) 6 O.R. 338, 348.
(4) 12 O.R. 624, at p. 630; 15 Ont. App. R. 1.

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tion or set-off on that account in favour of the railway companies.

There appears to be no distinction between section 53 of the Ontario "Railway Act" of 1906 and the proviso to section 16 of the English "Railway Clauses Act" of 1845. The appellants, therefore, cannot escape the application of the decisions in *Eagle's* and *Senior's* cases. But for the line of decisions to which those cases belong, and the peculiar course of the Ontario legislation, to which I have adverted, I should have required to consider very carefully what I conceive may have been the view of the late Mr. Justice Street, that compensation to a landowner, part of whose property has been taken, for the damage he sustains from the execution of a work authorized in the public interest, implies recouping him for his net loss thereby occasioned after credit has been given for such benefit as will accrue from the work to his remaining property: *Re Pryce and City of Toronto*(1); *Re Richardson and City of Toronto*(2). But it may be that in these cases the learned judge was merely expressing his view of the effect of the Ontario "Municipal Act," which provides for deduction of the value of any advantage to be derived by the landowner from the work.

Pierce, in his work on Railroads, says at page 211:—

> The general rule of damages, which covers the part taken and the remaining land, is, that the owner is entitled to the difference between the market value of the whole lot or tract before the taking and the market value of what remains to him after such taking.

This method of adjusting the compensation gives the railway company credit for benefit or advantage derived by the owner. See too *Bauman* v. *Ross*(3), at page 574.

(1) 16 O.R. 726.

(2) 17 O.R. 491, at p. 493.

(3) 167 U.S.R. 548.

Mr. Henderson argued that because section 20 of ch. 207, R.S.O., 1897, was expressly incorporated in the appellant company's private Act (1 Edw. VII., ch. 91), sub-section 9 of that section, notwithstanding its repeal, remains in force as to it. But the incorporating section (No. 44), though awkwardly phrased, seems to make it reasonably certain that it was the purpose of the legislature that amendments from time to time made to such provisions of the general "Railway Act" as were incorporated in the appellant company's special Act should be automatically embodied therein. It therefore seems unnecessary in this case to reconsider the effect of the provision of the "Interpretation Act" (now found in ch. 1 of the R.S.O., 1914, as section 16 (*b*)) dealt with in *Kilgour* v. *London Street Railway Co.*, in which the decision of the Appellate Division(1), which also supports the respondent's contention, was affirmed in this court upon an even division of opinion.

(*c*) Evidence of sales between the date of deposit of the plan and that of the giving of notice to the owner was properly received. To whatever objection the evidence of sales subsequent to the latter date may be open, any such evidence admitted would appear not to have affected the result. Evidence of *bonâ fide* sales within a short time after an expropriation accompanied by proof that there had been no material change in value in the interval, would seem to me relevant and admissible.

(*d*) While I incline to the view that the compensation awarded is excessive and that sufficient weight was possibly not given by the arbitrators to the sale of the property in question at a price equivalent to

(1) 30 Ont. L.R. 603.

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$926 an acre made by Wood to Everson only three weeks before the notice to the owner was served, the record undoubtedly contains a substantial body of evidence which supports the view that the value of the property was properly estimated on a basis of subdivision and that at the date of the expropriation there was a market for it as building lots at prices at least as great as those on which the arbitrators proceeded. The reasons for the award given by the majority of the arbitrators shew that they made what they deemed the real value of the property to the owner at the date of expropriation the basis of their valuation. They "tried to look at the matter in the way that would produce the least damage." The amount awarded, while considerably larger than the railway company's estimate of the proper compensation, was very much less than the owner's claim and the estimates of his witnesses. It is true that the precise values on which the arbitrators base their award are not to be found in the testimony of any witness on either side. But it must not be forgotten that they had the advantage of a view of the property. They were not bound to adopt the estimate or opinion of any witness or set of witnesses as to value: *Calgary and Edmonton Railway Co.* v. *MacKinnon*(1). That they did not do so by no means warrants the conclusion that the result at which they arrived was reached by compromise or by averaging the values deposed to by witnesses on either side. Not disregarding the evidence, but giving effect to such of it as they deemed credible and trustworthy, and taking into account the facts disclosed by their view of the property and their knowledge of surrounding conditions, it was the arbitrators' duty to form and

(1) 43 Can. S.C.R. 379.

to express their own opinions as to value and damages and there is nothing to shew that duty was not conscientiously discharged.

The right of appeal is conferred by sub-section 15 of section 90 of the Ontario "Railway Act" of 1913 (R.S.O., 1914, ch. 185, sec. 90, sub-sec. 15) in terms similar to those of the Dominion "Railway Act" (R.S.C., 1906, ch. 37, sec. 209 (1) The court is directed to

> decide any question of fact upon the evidence taken before the arbitrators as in a case of original jurisdiction.

The effect of this provision has been determined by their Lordships of the Judicial Committee to be that the appellate court

> should review the judgment of the arbitrators as they would that of a subordinate court, in a case of original jurisdiction, where review is provided for.

Atlantic and North West Railway Co. v. *Wood*(1), at page 263. Demonstrable error in principle should not be exacted as a condition of interference: *James Bay Railway Co.* v. *Armstrong*(2), at page 631. The appellate court is bound to examine the evidence, not entirely superseding the arbitrators, but correcting any erroneous view of it which it is apparent they have taken. Due regard is to be paid to their findings, and the provision of sub-section 16 of section 90 of the Act of 1913, that

> Upon the appeal the practice and proceedings shall be as nearly as may be the same as upon an appeal from an award under the "Arbitration Act"

is not to be lost sight of. A similar provision of the Dominion "Railway Act" is noticed by Lord Shand in *Atlantic and North West Railway Co.* v. *Wood*(1), at page

(1) [1895] A.C. 257. (2) [1909] A.C. 624.

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263. I shall deal with the award in the manner laid down by these high authorities as I understand them.

While by no means satisfied that if disposing of the matter as a judge of first instance, or if at liberty here

> to entirely disregard the judgment of the arbitrators and the reasoning in support of it

and

> to consider the evidence as if it had been adduced before the court itself,

I should not have allowed a substantially smaller amount for compensation, treating the award as the judgment of a subordinate court subject to re-hearing as outlined in *Coghlan* v. *Cumberland*(1) or as an award appealable under section 17 of the "Arbitration Act" (R.S.O., 1914, ch. 65), and, in either case, affirmed by an intermediate appellate court, *Montgomerie & Co.* v. *Wallace-James*(2), at pages 78, 82; *Greville* v. *Parker*(3), at page 339; *The Glasgow*(4), at pages 707, 709-10, I am not prepared to hold it so unreasonable or so clearly wrong that we would be justified, without having had the advantage of seeing the witnesses or of a view, in setting it aside or in substituting for it an allowance based upon our own estimate of the proper compensation, which might, as Lord Shand put it in *Atlantic and North-West Railway Co.* v. *Wood*(5),

> be liable to criticism equal to that to which the award was open.

I am, therefore, somewhat reluctantly obliged to decline to interfere on the ground that the compensation awarded is excessive. Upon the evidence I cannot say that the amount awarded clearly exceeds the

(1) [1898] 1 Ch. 704.
(2) [1904] A.C. 73.
(3) [1910] A.C. 335.
(4) 112 L.T. 703.
(5) [1895] A.C. 257.

actual loss of the landowner based on the real worth of the property to him, ascertained by taking into account its market value (*Dodge* v. *The King*(1)), any restrictions to which its user and enjoyment in his hands were subject, all its potentialities estimated at their present value (*The King* v. *Trudel*(2)), and the use made of it by him (market price alone not being a conclusive test): *South Eastern Railway Co.* v. *London County Council*(3), at page 258, or that the arbitrators reached their conclusion by process of compromise or average, or that it does not truly represent their honest opinion as to damages, or that their basis of valuation was erroneous.

(*e*) In support of this ground of appeal Mr. Henderson cited the very recent Privy Council decision in *Holditch* v. *Canadian Northern Railway Co.*(4), affirming the decision of this court(5). Their Lordships' disposition of that case would appear to have depended entirely upon their appreciation of its facts as expressed in this passage of Lord Sumner's judgment, at page 543:—

> In the present case the appellant's relation to the property had been definitely fixed before any notice to take land was served at all. He had parcelled out the entirety of his estate and stereotyped the scheme, parted with numerous plots in all parts of it without retaining any hold over the use to be made of them, and converted what had been one large holding into a large number of small and separate holdings with no common connection except that he owned them all. There was one owner of many holdings, but there was no one holding, nor did his unity of ownership conduce to the advantage or protection of them all as one holding.

The facts in the present case differ *toto coelo* from those stated by Lord Sumner. The owner here had parted with none of his "large holding." The subdivision of

(1) 38 Can. S.C.R. 149.
(2) 49 Can. S.C.R. 501.
(3) [1915] 2 Ch. 252.
(4) [1916] 1 A.C. 536.
(5) 50 Can. S.C.R. 265.

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it into building lots is merely a scheme to which he may resort for its profitable exploitation. The land taken was part and parcel of one entire estate held by one owner and of especial value to the whole as its most important and useful frontage—it was, again to quote Lord Sumner,

> so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance.

The appellants' railway is not to be constructed upon a public highway, as was the case in *Grand Trunk Pacific Railway Co.* v. *Fort William Land Investment Co.* (1), referred to by Mr. Henderson. It will occupy a private right of way acquired from the respondent. This will lie between his remaining property and Dundas Street to which, in lieu of the immediate access formerly enjoyed, access can hereafter be had from his remaining land only across the railway tracks of the appellants. Part of his land having been taken he is entitled to compensation for all consequential injuries affecting the remaining land to be occasioned by the exercise of the statutory powers, whether in the construction of the railway or in its subsequent operation: *Cowper-Essex* v. *Local Board for Acton*(2).

BRODEUR J.—This is an appeal from the judgment of the Second Appellate Division dismissing an appeal by the appellant railway company from an award in favour of the respondent, Everson, for $8,365.00.

The lands owned by Everson consisted of 27 acres in the Township of Etobicoke and the part expropriated represents about 1¼ acres. The front of those lands is situate on the main road called Dundas Street.

The expropriation took place under the provisions

(1) [1912] A.C. 224.

(2) 14 App. Cas. 153.

of the Ontario "Railway Act" and the first question which presents itself is whether the property should be valued as of the date of the filing of the plan or of the date of the notice of expropriation or order for possession.

The Ontario "Railway Act" of 1906 (6 Edw. VII. ch. 30), contains no express provision as to which compensation is to be fixed. It differs in that respect from the provisions of the Dominion "Railway Act."

Section 59 deals with the plans and surveys of the railway, and section 67 declares that the deposit of the book of reference and the notice of such deposit shall be deemed a general notice to all persons whose property may be expropriated.

It is declared also (sec. 59) that deviations of not more than one mile from the line assigned on the plan might be made.

The effect of these provisions is that when the plan is certified by the board and deposited, the parties are notified of the proposed route and are entitled to appear and object. So far no question of compensation is dealt with. As a question of fact, the plan might, when deposited affect one part of a piece of land; but in virtue of the power which the company possesses it might locate its lines a mile further and then the property which was first marked on the plan would not be taken at all.

It seems to me clear that the object of the deposit of the plan is to give notice to the parties who might object if they find it advisable to do so.

By section 68 as amended in 1908 it is provided that a notice might be served upon the owner, giving him a description of the land to be taken, the offer of a certain sum of money and the name of the arbitrator of the company and will be accompanied by the certi-

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ficate of the land surveyor to the effect that the land shewn on the map is required for the railway or is within the limits of deviation allowed by the Act. Within ten days of the service of the notice the owner must appoint his arbitrator.

According to these different provisions of the Act and in view of the fact that the deposit of the plan might not specifically contain the land not expropriated, it seems to me that the date at which the amount of compensation should be ascertained would not be the date at which the plan has been deposited; but the date at which the notice has been given to the owner. That was the decision reached by the arbitrators and in which I concur: (*Saskatchewan Land and Homestead Co.* v. *Calgary and Edmonton Railway Co.*(1)).

In 1913, after the notice of expropriation had been served but before the arbitrators began to proceed, an amendment was made to the Ontario "Railway Act" by which it was provided that the date of the deposit shall be the date with reference to which compensation should be ascertained.

I don't think that this new provision of the law would have a retroactive effect with regard to the facts of this case. As I have said the effect of expropriation should be from the date at which compensation is ascertained.

Besides, the company had taken possession of the land before this new law came into force.

Everson, the respondent, acquired the property on the 10th February, 1913, about a month before the service of the notice of expropriation took place. He purchased the 27 acres of land for the sum of $25,000, or about $926 an acre. His witnesses, however,

(1) 51 Can. S.C.R. 1.

valued it at $103,000, instead of $25,000, the purchase price, and claimed that by the taking of 1¼ acres Everson suffers damage for $35,000, or $10,000 more than he paid for the whole property.

The arbitrators, however, would not accept entirely the evidence of those witnesses but awarded the very large sum of $8,365.

The property is 3¼ miles from the western limits of the City of Toronto and it is pretty evident that it will be many years before this property can be converted into town lots.

The law requires that the market price of the land expropriated should constitute the basis of valuation in awarding compensation. That market price can be determined by the sales of property in the neighbourhood. We have in this case properties similarly situated which, in the same year 1913, were sold at prices varying from $413 an acre to $645 an acre. Some other farms were even sold at a smaller price. But none of them reached the sum of $926, which the respondent Everson paid on the 10th February, 1913.

I consider then that Everson paid a very high price. A month later, on the 3rd of March, the notice of expropriation was given and on the 2nd of April, 1913, an order of possession was granted. Would not that sale of a month or two months previous constitute the best basis for determining the market value of that property? I would not hesitate one moment to answer affirmatively to that question.

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 the expropriation. (*Dodge* v. *The King*(1)).

(1) 38 Can. S.C.R. 149.

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I am, therefore, of opinion that the sum of $926 an acre should have been awarded to the respondent. That would entitle him to get $1,157.50 for the 1¼ acres expropriated. Besides, I would grant him $3,000, the sum found by the arbitrators, for damages caused to the rest of the property.

The appeal should be allowed with costs of this court and the court below and the award reduced to $4,157.50.

Appeal dismissed with costs.

Solicitors for the appellants: *Royce, Henderson & Boyd.*

Solicitors for the respondent: *Millar, Ferguson & Hunter.*