

BETWEEN

THE KING, ON THE INFORMATION OF
 THE ATTORNEY-GENERAL OF CAN-
 ADA.....

PLAINTIFF;

1920
 Sept. 23.

AND

JAMES LACK, MATTHEW T.
 REID, INGLIS N. SPROTT,
 ROBERT S. McCURDY, ROY B.
 McCURDY AND SAMUEL C.
 CROCKETT, THE TRUSTEES OF
 MIDDLETON CHURCH, MIDDLE MUS-
 QUO~~S~~BOBIT, COUNTY OF HALIFAX....

DEFENDANTS.

*Expropriation—Cemetery property—Owner's title—Value to Owner—
 Not commercial property.*

The property expropriated was part of a cemetery consisting of sand and gravel and was absolutely vested in trustees "for cemetery purposes in connection with the congregation and . . . shall be used solely for such cemetery and for no other purpose whatsoever."

Held, that the defendants were entitled to fair compensation to the extent of their loss, which loss is to be tested by what was the value to them at the date of the expropriation. That in view of the restriction upon their use of the property as a cemetery, the property was out of the market for commercial purposes.

That consequently, its value could not be estimated on the basis of its sand and gravel deposits, but as a cemetery only.

INFORMATION exhibited by His Majesty's Attorney-General for the Dominion of Canada for the expropriation of a part of a cemetery property belonging to the defendants for the purposes of the Intercolonial Railway, a public work of Canada.

The case was tried at Halifax on the 21st day of July, 1920.

1920

THE KING
v.LACK *et al.*Reasons for
Judgment.

The facts are stated in the reasons for judgment.

Mr. J. H. MacKinnon counsel for plaintiff.

L. A. Lovette, K.C. and *Jas. A. Sedgewick* counsel for defendant.

AUDETTE J. now (this 23rd September, 1920) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that certain lands, belonging to the defendants, were taken and expropriated by the Crown, under the provisions of The Expropriation Act, for the purposes of the Intercolonial Railway, a public work of Canada, by depositing, on the 21st September, 1917, a plan and description of such land, in the office of the registrar of deeds for the county of Halifax, province of Nova Scotia.

The area taken is 0.674 of an acre,—very nearly three-quarters of an acre,—for which the Crown offers the sum of four hundred dollars.

The defendants, by their plea, claim:—

(a) To be reinstated.

(b) In the alternative for the acquisition of new land, under drainage of same, removing the soil therefrom to the depth of six feet and replacing the same with similar gravel to that expropriated, \$6,000.00.

(c) In the alternative, for 16,000 cubic yards of gravel removed at 25 cents per yard, \$4,000.00.

(d) In the alternative for 88 burial lots, taken at \$10.00 per lot, \$880.00, and for direct and consequential damage to remaining part of cemetery and to cemetery as a whole, \$1,000—\$1,800.00.

This piece of land so expropriated formed part of a Presbyterian cemetery, of about three acres in size, at Middle Musquodoboit, N.S., purchased by the

defendants, under statutory power hereinafter referred to, on the 8th April, 1908, for the sum of \$150, as appears by the deed of sale filed herein as Exhibit "J."

When the officials of a railway take upon themselves the responsibility of interfering with a cemetery, for the sole purpose of getting gravel,—not even for their right of way,—should they not expect this callous step involves the payment of a very adequate compensation for this interference with the field of the dead, when gravel is available elsewhere?

The nature of the soil is gravel and sand, and it is considered as the best material for cemetery purposes.

The population of Middle Musquodoboit, under the last census, is 1,000,—and under witness Bishop's estimate it is composed of about one-third of Methodists, and two-thirds of Presbyterians, although that estimate is criticised by witness Guild, who contends that the population is composed of not even a quarter of the Methodist denomination. Both denominations have a separate cemetery. There are 110 families belonging to the Presbyterian denomination, and we have it stated in evidence that the farming districts in Nova Scotia have not increased in the last thirty or forty years.

The new Presbyterian cemetery was opened in 1912 or 1913,—and there is also the old cemetery which is still open and used by a part of the population,—and the lots in the new cemetery are being sold at \$10 each.

The defendants were duly incorporated under the name of trustees of Middleton Presbyterian Church of Middle Musquodoboit, by an Act of the Nova Scotia Legislature, in 1896 (Ch. 116, 59 Vict.), and by an Act of the same Legislature, in 1908 (8 Ed.

1920

THE KING
v.LACK *et al.*Reasons for
Judgment.

1920
THE KING
v.
LACK *et al.*
Reasons for
Judgment.

VII, ch. 198), the trustees were authorized and empowered to purchase the three acres in question herein for cemetery purposes. By section 2, thereof, these lands were "absolutely vested in the said trustees and their successors in office forever, in trust nevertheless for cemetery purposes in connection with the said congregation, and the said lands and every part thereof shall be used solely for such cemetery and for no other purpose whatsoever."

It appears from the evidence of John B. Archibald that 0.30 of an acre, of this new three-acre cemetery, was on the 1st April, 1915, sold by the trustees to the Crown for the sum of \$100. This piece of land is said to have been so sold to give access to the Bruce property, and it is contended that it was taken from the flat below, where the land is wet and low and valueless for cemetery purposes, although, as appears by the several plans filed at trial, that part was also divided in burial lots.

The first sale decreased the area of the cemetery and the present expropriation has also had the further effect of decreasing its size; but, does it really remain so small as to be useless, as not answering the requirements of the community for a long time to come, when used conjointly with the old cemetery in existence for over 100 years, and of a much smaller size? I am unable to answer this question in the affirmative.

However, be that as it may, the defendants are entitled to a fair compensation to the extent of their loss, and that loss is to be tested by what was the value at the date of the expropriation of such piece or parcel of land to them, with the statutory title above mentioned.

The value of the land to the taker, the party expropriating, is no test or criterion for arriving at the compensation. The nature of the trustee's title takes the property out of the market for commercial purposes and it has no value as such.

1920
THE KING
v.
LACK *et al.*
Reasons for
Judgment.

The defendants own the property solely for cemetery purposes, and it could not be used for any other purpose.

The consideration of the value of the gravel and sand,—the nature of the soil, is no test, as is well established by a long catena of cases. It is, I repeat, the value to them for cemetery purposes that must be considered (1).

I am unable to find, as stated in the evidence, that 88 lots were taken by the present expropriation,—I cannot find that quantity on the plans filed.

It was conceded on the argument at bar that reinstatement was impossible under the circumstances.

The whole of the cemetery is subdivided on plans, but such subdivision is not all plotted on the ground. To collect \$10 a lot upon the land expropriated, the trustees would have to expend a certain amount of money.

Taking all the circumstances of the case into consideration, I will allow for the land taken, which, after proper allowance being made for roads, clearing, grubbing, seeding, etc., would sell at \$10 a lot,—a sale spread perhaps over a number of years,—the

(1) See *Stebbing v. Metropolitan Board of Works*, (1870) L.R. 6 Q.B. 37; *Manmatha North Miller v. Secretary of State for India*, (1897) L.R. 24 Indian App. P.C. 177; *Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co.* (1901) A.C. 373; *Browne & Allan—Law of Compensation*, 97, 153; *Cripps on Compensation*, 102, 103; *Hudson on Compensation*, 301, 302, 1192; *Nichols on Eminent Domain*, 212.

1920
THE KING
v.
LACK *et al.*
Reasons for
Judgment.

lump sum of \$600.00 and for the expenditure in the correction and alteration of roads, occasioned by the expropriation, together with the unsightly appearance of the land on the expropriated side, the total sum of \$150.00, making in all the sum of \$750.00.

There will be judgment, as follows, to wit:

1st. The lands expropriated herein are hereby declared vested in the Crown from the date of the expropriation.

2nd. The compensation for the land so taken, and for all damages resulting from the said expropriation is hereby fixed at the sum of \$750, with interest thereon from the 21st September, 1917, to the date hereof.

3rd. The defendants are entitled to recover from the plaintiff the said sum of \$750 with interest as above mentioned, in full satisfaction for the land taken, and for all damages resulting from the expropriation, upon their giving to the Crown a good and sufficient title free from all mortgages or encumbrances whatsoever upon the said property.

4th. The defendants are also entitled to the costs of the action.

Judgment accordingly.

Solicitor for plaintiff: *R. H. Murray.*

Solicitor for defendant: *Jas. A. Sedgewick*
