

1901
 Dec. 11.

THE KING, ON THE INFORMATION OF } PLAINTIFF;
 THE ATTORNEY-GENERAL OF CANADA }

AND

CECILIA ELIZA YOUNG AND } DEFENDANTS.
 ROLAND STUART }

*Expropriation—Lessor and lessee—Covenant to build on demised premises—
 Compensation.*

When a lessee is under covenant to build upon the demised premises, and a part of the said premises are expropriated by the Crown for the purposes of a public work, the fact that by the expropriation the lessee is relieved from his covenant, and the further fact that his rent is reduced by reason of the taking of a part of the premises, will be taken into consideration by the court in fixing the amount of compensation to be paid to such lessee.

INFORMATION for the expropriation of certain lands near Victoria, B.C., required for the purposes of a public work of defence.

The facts of the case are stated in the reasons for judgment.

September 27th and 28th, 1901.

The case was heard at Victoria, B.C.

A. P. Luxton and *H. D. Helmcken*, for the defendants, cite *The Queen v. Carrier* (1); *Secretary of State v. Charlesworth* (2).

A. F. R. Martin, for the plaintiff.

THE JUDGE OF THE EXCHEQUER COURT now (December 11th, 1901) delivered judgment.

The questions to be determined have reference to the amount of compensation to be awarded to the defendants, respectively, for the taking, to be used in

(1) 2 Ex. C. R. 36.

(2) [1901] A. C. 373.

connection with the fortifications at Esquimalt, of six and four-tenths acres of land, with buildings and improvements, forming part of section fifteen in Esquimalt District, in the Province of British Columbia. The lands mentioned were taken by the Crown on the 15th day of May, 1899. At that date the defendant, Cecilia Eliza Young, was seized in fee of the said lands, subject, however, to a lease thereof and of other lands to the other defendant, Roland Stuart. The lease embraced something over two hundred acres of land, and these were demised for a term of ten years from July 1st, 1897, for a yearly rental of two hundred and ten dollars, payable quarterly. The lessee was also bound within eighteen months from that date to build a house on the lands taken, such house to cost not less than one thousand dollars. It was also a condition of the lease that in case the lessor should during the term thereby granted sell or otherwise dispose of the premises thereby demised, or any part thereof, to the Crown, the lessee would, upon receiving three months' notice in writing, quit and deliver up possession of the same, or such part thereof as might be desired by the Crown, upon the lessor paying to the lessee the value of any crops which might then be sown, or the value of any ploughing which might be done upon the land sold, and of which possession was required. It appears to be certain that the six and four-tenths acres taken from this property was the most valuable portion of it, and the only portion from which any income to speak of could be derived. Some use was made of the balance in connection with certain ditches and flumes used for the purpose of conveying water to Esquimalt Harbour for the ships there stationed. At times some use could also be made of the residue of the property for pasturage, but the annual value thereof was small. All the witnesses

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who speak of it are agreed that the six and four-tenths acres in question here constituted, for the present, at least, the valuable part of the lands demised. The property as a whole was assessed at ten thousand dollars, but that, so far as I can judge from the evidence, was an excessive valuation for any purpose to which the lands could be put.

For the lands taken the Crown offers to pay to the defendant Cecilia Eliza Young the sum of sixteen hundred dollars; that is at the rate of two hundred and fifty dollars an acre, free from all incumbrances, and including in that sum the amount of any damages to which the tenant Stuart may be entitled. That sum appears to me, however, to be insufficient.

The lease mentioned seems to have been made in the ordinary course of business and without any exceptional circumstances tending to increase the rent obtained. The amount of the rent would seem to show that the land taken, situated as it was with such improvements as were at the time on it, was really worth more than the sum mentioned; and then there is the question of severance to be taken into account. At the same time I do not doubt that it was not worth anything like the six or seven thousand dollars at which some of the witnesses valued it.

I assess the compensation to be paid in this case, including both the interest of the lessor and that of the lessee, with all damages to which they or either of them are entitled, at two thousand seven hundred and fifty dollars.

The defendants consent that the court may apportion the rent payable in respect of the six and four-tenths acres expropriated, and the residue of the lands comprised in the lease, such apportionment to be made as and from the 15th day of May, 1899, the date of the

expropriation. Under the evidence it would, I think, be fair to attribute the sum of one hundred and sixty dollars annually to the lands taken, leaving fifty dollars a year to be paid by the lessee to the lessor, in equal quarterly payments, in respect of such residue. The lessee is by force of the expropriation relieved from his covenant to build on the land expropriated; and his rent being reduced the damages which he will otherwise sustain are not considerable. There is evidence of what, in the opinion of some of the witnesses, could have been made from the cultivation of the lands in question and by building a house thereon; but in making such estimates witnesses are very apt to overlook how much any such return is due to the capital and energy employed, and to lose sight of the fact that there are other lands equally available for cultivation.

On the sum of two thousand seven hundred and fifty dollars interest at six per centum per annum will be allowed from the 15th of May, 1899. Of this sum and interest the defendant Roland Stuart will be paid one hundred dollars and interest from that date, and in addition a sum that will equal the amount of rent, in excess of fifty dollars per annum that has since that date accrued due and been paid by him, with interest on such excess from the dates when the same was paid.

The balance of the amount mentioned and interest will be paid to the defendant Cecilia Eliza Young, upon her undertaking to reduce the rent payable under the lease mentioned to the sum of fifty dollars per annum payable quarterly as before, and upon her giving the Crown a good and sufficient acquittance for such compensation money and damages.

There will be the usual judgment and declaration as to the title to the lands mentioned in the infor-

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mation being vested in the Crown, and the defendants will be allowed their costs.

*Judgment accordingly.*

Solicitors for the plaintiff: *Langley & Martin.*

Solicitors for the defendant Young: *Drake, Jackson & Helmcken.*

Solicitors for the defendant Stuart: *Davie, Pooley & Luxton.*

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