IN THE EXCHEQUER COURT OF CANADA.

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March 17.

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

PLAINTIFF;

AND

JOSEPH A. BARRETT, GEORGE T. BARRETT AND ERNEST M. BARRETT BY INFORMATION, AND ROBERT NICHOLAS SLATER AND SIR ARTHUR PERCY SHERWOOD, EXECUTORS OF THE ESTATE OF ESTHER SLATER BY ORDER OF THIS EXCHEQUER COURT.

DEFENDANTS.

Expropriation—Valuation of Right of Way—Common Lane—Damage and Depreciation due to severance.

Held: 1. That the *rights* of the owners of the "fee" in a piece of land between two properties, used as a lane way, and over which the neighbor has an absolute right of way, is in effect only a right of way, and no more valuable than the rights of the owner of the right of way, and will be valued as such.

2. (a) That the value to be paid for in expropriation is the value *to the owner* as it existed at the date of taking, and *not* the value *to the taker*.

(b) That the value to the owner consists in all advantages the land possesses, to be determined as at the time of taking.

3. Between the westerly line of the expropriated property, and the buildings on the land adjoining, which buildings and land are also the property of the defendants, there is a strip of land, 10 feet wide, left vacant.

Held, that in as much as, when the property comes into the market, the buildings, now very old, will have to be torn down, (if it is to be used in any practical manner) and the ten feet can be sold with the rest, no damage or depreciation is suffered by reason of the severance of the ten feet and of their being left vacant.

This case has been appealed to the Supreme Court and is still pending.

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Statement.

THIS is an information exhibited by the Attorney-General of Canada for the expropriation of lands in the city of Ottawa, to be used as a site for the Public Building now known as the Hunter Building.

N. G. Larmonth, for plaintiff.

R. G. Code, K.C., for defendants.

The action came on for trial, at Ottawa, before the Honourable Sir Walter Cassels on February 4, 5 and 6, 1919.

On February 7, 1918, notice of expropriating certain properties in the City of Ottawa to become the site of a departmental building (now known as the Hunter Building) was registered in the Registry Office for the Registry Division of the City of Ottawa.

The property expropriated comprised Lots Nos. 11, 12 and 13 on the north side of Albert Street, Lot No. 11 and the westerly half of Lot No. 12 on the south side of Queen Street in the City of Ottawa.

The property in question in this appeal is a portion of Lot No. 11 on the north side of Albert Street, namely, the westerly twenty feet eleven and one-twenty-fourth inches. The easterly nine feet of the defendants' land was subject to a right of way in common to the respective owners of the land held by the defendants and the Loyal Orange Lodge, who were the owners of the remainder of said Lot No. 11. The fee in this nine-foot right of way was vested in the defendants subject to the rights of the Loyal Orange Lodge. On the defendants' land there was situate a house and this house was partly on the land of the defendants in question in this case, and partly on the adjoining Lot No. 10 on the north side of Albert Street, which was also owned by the de-

fendants. The dividing line between Lots Nos. 10 and 11 practically divided the house in question in half, approximately ten feet five inches of the house extending over on to said Lot No. 10. An Information on behalf of His Majesty The King was filed in the Exchequer Court of Canada on October 18, 1918, claiming that the lands of the defendants should be declared vested in His Majesty The King and the amount of compensation to be paid to the defendants declared by the said Exchequer Court of Canada. An application was made at the trial to add as parties the Executors of the Estate of Esther Slater, who held a mortgage on the property owned by the defendants. At a later date, namely, April 17, 1919, an Order was made by His Lordship, Mr. Justice Cassels, directing that Robert N. Slater and Sir A. Percy Sherwood, Executors of the Estate of Esther Slater, deceased, be added as defendants in this action.

The Court allowed the sum of $9,264.85 to wit:—

Full value of house	$2,500.00
Right of way, $100 per foot	900.00
Balance of lot, 11 feet 11 1-24 inches at $400 per foot	4,768.05
Allowance for damage to party wall	280.00
	$8,448.05
10 per cent. on $8,168.05	816.80
	$9,264.85

Plaintiff argued as to right of way that the defendants are the owners of the fee in the nine-foot right of way, being the easterly nine feet of the defendants' land, and the adjoining owners, the Loyal

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Orange Lodge, have an absolute right of way with the defendants over the said easterly nine feet. This virtually makes the said right of way of no more value to the defendants than to the adjoining owners (The Loyal Orange Lodge).

That no evidence had been submitted on behalf of the defendants to show that the right of way in question had any connection whatever or served any purpose for the benefit of the adjoining Lot No. 10, owned by the defendants. Therefore the right of way can only be considered as being a benefit to the property of the Loyal Orange Lodge, and to the small portion of Lot 11 owned by the defendants.

The compensation due to Barretts for the right of way is the value to Barret as it existed at the date of the expropriation.

As regards the injurious affection to 10 feet 5 inches of land adjoining lands expropriated, no damage can result to the adjoining property owned by the Barretts. The Barretts are the owners of Lot No. 10, which was not expropriated by the Crown, and on Lot 10 stood what were formerly residences with an extension built out to the street line, and the whole place used as an automobile supply place. The Barretts were also the owners of the westerly twenty feet eleven and one-twenty-fourth inches of Lot No. 11 expropriated by the Crown immediately east of Lot No. 10, and as shown by the evidence, there was a house constructed on this portion of Lot 11 some distance back from the street and ten feet five inches of this house extended over on to Lot No. 10. The Crown expropriated Lot No. 11, with the result that the house, which was constructed on a portion of both lots, Nos. 10 and 11, would be

cut in half, and it is admitted that the Crown would have to pay the full value of this house. Lot No. 10 was not expropriated, and the buildings standing entirely upon that lot were not interfered with by the expropriation.

Defendants argued that, as to the lane way this easement and license gives no rights whatever to the owner or owners of the dominant tenement other than a right-of-way over the land for the purposes of access to such dominant tenement, together with such incidental rights as may be reasonably necessary, as entry to make repairs for the due enjoyment of the easement. This easement and license is by the grant restricted, leaving the owner of the servient tenement free to make all other possible uses of the land which, in the exercise thereof, do not interfere with the right of entry to the lands of the dominant tenement by the lane thus provided and it follows that defendants as owners of the fee simple could excavate a subway or cellar under the right-of-way and use the same for their purposes, and this being done, as it could readily be done, so as not to interfere with the free passage of the owners of the dominant tenement over the right-of-way, defendants would be acting within their rights and could not be enjoined.

Likewise, defendants could not be enjoined from building over the right-of-way, so long as the reasonable enjoyment thereof by the owners of the easement was undisturbed. Building contractors in these days of steel construction, it is submitted, would find little difficulty in bridging the 9 feet over the right-of-way and using the space above as a

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portion of any structure erected on the adjoining lands of the defendants.

That weight should also be given the fact, as adduced in evidence, that defendants during all the years while the easement has been in existence paid all carrying charges, taxes, local improvements, etc., and as a consequence in the opinion of the witnesses the value as found should be in the proportion of $100.00 to the Orange Lodge and $300.00 to defendants.

Then as to damages for severance and injurious affection to 10' 5" left vacant by reason of the removal of the buildings. It is argued that the injury, by reason of this narrow strip left vacant, is very serious because it is too narrow to be useful for commercial purposes or any purpose.

That the building adjoining is permanent and suitable to the location for some years at least. The main and rear buildings were built when solidity of foundations and walls were features of construction, thus rendering the premises with the new erection in front extending towards the street line quite suitable for its present purposes as a shop and factory for automobile supplies and repairs thereto.

Five cases were tried together and therefore the reasons for judgment handed down affecting all cases is printed here as follows:

Reasons for Judgment.

CASSELS, J. (March 17, 1919) delivered judgment.

These five cases relating to properties expropriated on Queen Street, Albert Street and O'Connor Street in the City of Ottawa for the site of the new Government buildings erected on the premises, were tried before me on February 4, 1919, and subsequent days.

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In none of the cases had the Crown made a tender of any particular sum which they were willing to pay, but the matter was left to the Exchequer Court to arrive at the compensation which should be paid by the Government. I objected to this course of procedure. The Expropriation Act requires the Crown to state in the Information the sums of money which they were willing to pay to the owner whose land was being taken. Subsequently each Information was amended, stating the specific sum which the Crown was willing to pay in respect of the particular property in question.

At the opening of the cases I suggested that as most of the lands were in the same locality, and to a certain extent form part of the one block, that evidence applicable to all the cases should be taken, Counsel for the various parties being at liberty to cross-examine any particular witness, and then any evidence was solely applicable to one case should be taken separately in connection with that case. Counsel did not see their way to adopt my suggestion. However, later on as the evidence developed and the various Counsel thought that the evidence in the first case might assist their clients, they one and all came to my view, and it was eventually agreed that all the evidence taken in regard to any one of the five cases should be held so far as applicable as if given in each of the cases. This has had the result of shortening the trials. I propose to deal with each case separately.

Before, however, passing on each case separately I may say that it is difficult to arrive at a satisfactory conclusion by reason of the fact that since the beginning of the war in August, 1914, there have been

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no sales of land in this particular neighborhood which would form an accurate guide in arriving at a satisfactory conclusion. The experts, however, have given their views, and they are a class of experts upon whose testimony I think reliance can be placed, although there may be a difference of opinion as to their method of arriving at their ideas of value.

Nichols, in his valuable book on *Eminent Domain*, states as follows: Second Ed. Vol. 1, p. 663:

"The productive value of land, or the value of the "land to its owner based on the income he is able to "derive from his use of it is not the measure of "compensation and is not material except so far as "it throws light upon the market value. In other "words, what is sometimes called the value in use "is everywhere repudiated as the test."

In the cases before me, in many instances, the lands are valued at figures which, if the land is to be made available to realize a satisfactory return, the buildings thereon would have no market value, as clearly if the land were to be utilized these buildings would have to be torn down in order to give place to a building suitable to the site. This applies to some of the properties in question. At the same time, to some extent, the rentals received from the buildings are of value as assisting the owners in carrying the properties, such as the payment of taxes, etc. In most of the cases the value will be what might be termed a demolition value. It would be manifestly unfair to allow the owner of the land a price for the land which could only be obtained if the owner contemplated a demolition of the existing buildings and the erection of buildings suitable to the site from which a proper return could be made.

Nichols (on page 694) puts it in this way:

"The cost of removing buildings upon land taken "for the public use is not allowed as an additional "element of damages, but as an effort to reduce the "damages. In the ordinary case the cost of remov- "ing the buildings is almost if not quite equal to the "value of the materials, and the owner is entitled to "recover the full value of the buildings. He is not, "however, entitled to have the buildings valued as "they stand on the land as separate items additional "to the market value of the land, nor on the other "hand, is the condemning party entitled to have the "buildings valued apart from the land, merely as for "purposes of removal. The proper measure is the "market value of the land with the buildings upon "it, and the owner therefore receives nothing for the "buildings unless they increase the market value of "the land. Accordingly, evidence of the structural "value of the buildings is not admissible as an inde- "pendent test of value. When, however, it is shown "that the character of the buildings is well adapted "to the location, the structural cost of the buildings, "after making proper deductions for depreciation "by wear and tear, is a reasonable test of the "amount by which the buildings enhance the market "value of the property. As in other cases of de- "termining market value, not only the character and "condition of the building, but also the uses to which "it might be put, are matters for consideration."

For these propositions, Nichols cites American authorities, and it seems to me that it is common sense. I mention these remarks, as when I come to deal with the particular cases they will be found to be in point.

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Nearly all the witnesses agree that in arriving at the question of value, it must be considered that it may take some considerable time, probably years, before the lands in question could be utilized by the erection of buildings suitable to the location to return revenue, and the parties to these actions must bear in mind that any allowance made to them for the premises expropriated is based upon a cash purchase. It is needless to remark that it is surprising how taxes and loss of interest for a year or two would deduct from the value.

Two of the properties in question, namely, in the Burns case and the Sutherland case, are properties situate on Queen Street in the City of Ottawa. They are between O'Connor and Bank Street, and on the south side of Queen Street. I will deal first with the case of *The King v. Burns.*

The special reasons given in this case follow:—

CASSELS J. (April 26, 1919) delivered judgment.

Judgment rendered April 26, 1919. Reasons for judgment to be attached to the reasons for judgment in the *King v. Burns et al.*

I held over the reasons for judgment in this case by reason of the fact that the property in question was mortgaged with other properties to Robert Nicholas Slater, and Sir Arthur Percy Sherwood, executors of the estate of Esther Slater. I thought the mortgagees should be parties defendant to these proceedings in respect to their mortgage interest.

Since the trial the mortgagees have agreed to be added as parties defendant and to be bound by all the proceedings in the action, including the evidence taken, to the same extent as if they had been origin-

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ally parties, and an order was made (a consent being filed on April 22 instant) adding them as parties.

No tender was made by the Crown, but at the trial they amended their petition by offering the sum of $8,600.

The land expropriated is property lying immediately west of the land expropriated from the Loyal Orange Lodge, whose property was expropriated. Altogether Barretts own the fee in eleven feet and eleven and one-twenty-fourth inches. In addition to that, they have the right to the lane on the east side of the property and on the west side of the Loyal Orange Lodge. While technically the fee in this lane is in the Barretts, it is held in trust for the property owned by the Loyal Orange Lodge. The Barretts and the Loyal Orange Lodge have equal rights in this lane.

I allowed to the Loyal Orange Lodge $100 for the nine feet. I think that $400 a foot for the eleven and eleven one-twenty-fourth inches would be full compensation for the value of the land expropriated. I think that if another $100 a foot for the nine feet is also allowed the Barretts, it would be full compensation for the value of their interest in this land.

In my opinion, the nine feet dedicated as a lane, having regard to the fact that it could not be built upon either by the owners of the property expropriated or by the owners of the property vested in the Loyal Orange Lodge, is not worth at the time of the expropriation more than $200 a foot, and if the Barretts get one-half and the Loyal Orange Lodge the other half, they are receiving full compensation.

On the property expropriated from the Barretts there is a very old house in a very bad state of re-

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pair. It would have to be torn down were the property to be utilized in order to bring in a return on the property to be utilized in order to bring in a return on the value of the land. While in one sense it should be valued on a demolition basis, nevertheless, rent was being received which helped to carry the property. A feature in conection with this house is the fact that it extends further westwardly on land not expropriated by the present proceedings. It is conceded by the Crown that by reason of the tearing down of a considerable portion of this house the balance is absolutely valueless and should be paid for. I think if the Barretts are allowed the sum mentioned by Fitzgerald of $2,500, they receive everything they could reasonably expect to receive.

Another question arises but not of very much moment. It is said that the removal of this house leaves exposed what would be a party wall between the house and the building owned by Barrett on the west. There seems to be a consensus of opinion among Counsel that a reasonable allowance should be made for protecting this wall. I think the sum of $280, mentioned by Christie, is not unreasonable.

It is conceded that between the westerly line of the expropriated property and the buildings adjoining, there will be a strip of land left vacant somewhere in the neighbourhood of 10 feet, and a claim was made for the depreciation of this ten feet. The property immediately adjoining is owned by the Barretts and when it comes into the market the buildings on that property will have to be torn down if it is to be used in any practical manner. I do not

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think any sum should be allowed in respect of this piece of land.

In all there will be allowed the sum of $4,768.05 for the eleven feet and eleven and one-twenty-fourth inches; and additional sum of $900 for the interest of the Barretts in the lane in question; and the further sum of $2,500, the value of the house. These sums amount to the sum of $8,168.05—and to this amount ten per cent. should be added. The further sum of $280 should be added as mentioned above for the party wall.

On this amount of $9,264.85, interest should run from the date of the expropriation.

The defendants are entitled to the costs of this proceeding.

Judgment accordingly.

Solicitor for plaintiff: *N. G. Larmonth.*

Solicitors for defendants: *Code & Burritt.*