Between

1906
March 29.

THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... PLAINTIFF;

AND

B. H. DODGE AND JOHN H. BOWLES..DEFENDANTS.

Expropriation—Rifle range—Compensation—Witnesses led into error in their valuation—Report of referee—Appeal from—Smaller assessment on appeal.

Where the witnesses, on whose evidence the Referee seemed to rely, were in the opinion of the court led into the error of applying to a large number of acres (in all 623 acres) a value which appeared to represent the value of a portion of the property, but not the whole, the amount of compensation recommended by the Referee was reduced.

2. Where average values are applied to ascertain the value per acre of land taken by the Government, such average values should be applied with great care and moderation.

THIS was an information filed by His Majesty's Attorney-General of the Dominion of Canada to obtain certain lands, alleged to be in the possession of the defendants, for the purposes of a rifle range.

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

May 2nd, 1904.

Ordered, that the case be referred to E. S. Crawley, Esquire, Barrister, of Wolfville, N.S., for enquiry and report.

October, 18th, 1904.

The Referee filed his report herein.

December 13th, 1904.

A motion by the plaintiff by way of appeal from the Referee's report was now heard.

March 14th, 1905

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Statement of Facts.

THE JUDGE OF THE EXCHEQUER COURT referred the case back to the Referee for the following reasons:

This matter comes before the court on appeal by the plaintiff against the report of the learned Referee, by which he finds that the defendant, Brenton H. Dodge, is entitled to be paid by the plaintiff the sum of thirty-eight thousand dollars and interest as compensation for lands taken for military purposes near the Town of Kentville, in the County of Kings and Province of Nova Scotia; and I am asked on the evidence before the court to reduce that amount to a sum of twelve thousand four hundred and sixty dollars and interest or to refer the matter back to the learned Referee for further enquiry and report.

I am not able on the evidence to make any such reduction as that asked for, though I am equally unable to confirm the report and enter judgment for the sum which the learned Referee has found the defendant Dodge entitled to. I think he has not attached sufficient importance to the actual transactions that have within a few years occurred in respect of the lands in question, and that in consequence he has been led to give too little weight to the opinions of the witnesses called for the Crown and to the lower and more moderate estimates of value given by some of the defendant's witnesses. I agree that so far as the defendant, Brenton H. Dodge, made good bargains in the purchase of the different parcels that go to make up the property he and not the Crown is entitled to the benefit thereof; and I also agree that, if the effect of purchasing a number of parcels of land and combining them in one property has been to increase the value of the property as a whole, the defendant and not the Crown is entitled to any advantage arising therefrom. But before coming to the conclusion

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that a considerable number of vendors had within a short time before the expropriation proceedings were taken concurred in sacrificing their properties and in selling them to the defendant, Brenton H. Dodge, for sums greatly less than their real value, I should desire to have more evidence than the record in this case discloses. Neither am I satisfied that in this case the value of the property as a whole was very considerably in excess of the sum of the values of the different properties or lots of which it was made up

The matter will be referred back to the learned Referee for further enquiry and report, as follows:

1. As of the state of the title to the lands on the 5th day of September, 1903. All conveyances in respect of the property made to the defendant Brenton H. Dodge after that date will be excluded from the Referee's consideration.

2. As to the purchases by the defendant Brenton H. Dodge of the several lots and parcels comprising the lands taken, ascertaining and reporting in each case the name or names of the vendors, the date of sale, the price paid, the number of acres sold, the value of improvements, if any, and the conditions under which such sale was in each case made, with a view to determining whether or not the vendors received a fair price, or whether they sold their respective properties for less than a fair price, and if so, the reasons therefor.

3. So far as the enquiry rests upon opinion evidence it will not be opened up or added to. Neither party was entitled without special leave to examine more than five witnesses as to their opinions of the value of the lands taken, and that number has already been greatly exceeded by the defendant Dodge, but it is fair to the learned Referee to add without any objection on the part of the Crown.

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Argument of Counsel.

Upon the further enquiry hereby directed being concluded and the further report being filed, either party may move the court to enter such judgment as upon the whole case may appear to be fair and just, and the costs of the present appeal and application will be reserved to to be disposed of at that time.

February 20th, 1906.

The case came up for argument on a motion by the plaintiff by way of appeal from the further report of the Referee, and a counter motion by the defendants for judgment thereon.

R. T. MacIlreith, for the plaintiff, contended that the Referee had erred in applying a special valuation of certain lots to the whole property. The property was not suitable for orchard purposes as a whole, but only certain parts of it. The sales of similar lots are to be taken as the best evidence of value. *Falconer* v. *The Queen* (1). The land is not worth more than $20 an acre as a whole. The defendant Dodge amended his defence so as to claim $45,000, and as he claims a far greater amount than he can recover on the evidence, he is not entitled to his costs.

W. E. Roscoe, K.C., for the defendants, argued that as the defendant Bowles disclaimed any title in the lands, he was entitled to his costs on the issue of title.

The selling prices of the lots in question are no criterion of the value of lands as a whole. Because the defendant Dodge got the lots cheaply he is not to be deprived of their value in the market at the time of the expropriation.

The court will not disturb the finding of the Referee as to value if there is evidence to support it. There is evidence to support it from the expert witnesses called by the Crown; and the defendants' witnesses entirely

(1) 2 Ex. C. R. 82.

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justify the finding of the Referee. In the case of findings by a Referee they will receive the most favourable construction of which they are capable for the purpose of sustaining the valuation. (*Hill* v. *Grant* (1); *Caswell* v. *Davis* (2): *Grassett* v. *Carter* (3); *Gray* v. *Turnbull* (4); *Village of Granby* v. *Ménard* (5); Schooner *Reliance* v. *Conwell* (6); *In re Pearl Street* (7); *In re John and Cherry Streets* (8); *Burton* v. *the Queen* (9).

The defendant Dodge is entitled to his costs, because he has been awarded a larger sum by the Referee than the amount offered by the Crown as compensation. (*Browne and Allan on Compensation* (10).

Mr. *MacIlreith* replied.

THE JUDGE OF THE EXCHEQUER COURT now (March 29th, 1906) delivered judgment.

In this matter an information has been filed to obtain a declaration that certain lands situated in the County of Kings and Province of Nova Scotia, taken for the purposes of a Camp and Rifle Range, are vested in the Crown, and to ascertain the amount of compensation that should be paid therefor and the persons to whom the same should be paid.

There was some question about the title to the lands taken, but that matter has been disposed of and is of no importance now, except as it affects the question of costs. It will be mentioned again in that connection. The important question has to do with the amount of compensation to which the defendant B. H. Dodge is entitled.

The lands expropriated were situated near the town of Kentville and contained in all six hundred and twenty-

(1) 46 N. Y. at p. 499.
(2) 58 N. Y. at at p. 229.
(3) 10 S. C. R. at p. 125.
(4) L. R. 2 Sc. App 53.
(5) 31 S. C. R. at p. 21.
(6) 31 S. C. R. at p. 657.
(7) 19 Wend. 651.
(8) 19 Wend. at p. 671.
(9) 1 Ex. C. R. at p. 97.
(10) Pp. 101, 102.

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three (623) acres. On these lands there were, when taken, some timber and some buildings. The plan and description, by the filing of which the lands were expropriated, were filed with the Registrar of Deeds of Kings County on the 5th day of September, 1903. The title to all these lands had been acquired by the defendant Dodge either in that year or in the year 1902. The information herein was filed on the 23rd of April, 1904, and the statement in defence on the 2nd day of May following. By the information the Crown offered to pay to the defendants, or to the persons who might prove to be entitled thereto, a sum equivalent to twenty dollars an acre for the lands taken, and for all damages consequent upon such taking for the purposes aforesaid. There was in fact no severance, and consequently no question of damages. The Crown expropriated all the land that the defendant held at this place. The sum tendered, which amounted to $12,460, included however the timber on the land and the buildings. By his statement in defence the defendant Dodge claimed to have had at the date of expropriation a good title to all the lands taken excepting an undivided two-sevenths interest in one parcel thereof, containing thirty-one acres; and in respect of the amount of compensation tendered he alleged that twenty dollars per acre was not a sufficient and just compensation to him for and in respect of the lands so expropriated and for his loss and damage, and he asked that it might be adjudged and declared that he was entitled to the sum or forty dollars per acre, and in all to the sum of $23,680. That amount is obviously computed on the 592 acres that would be left after deducting the 31 acres mentioned. The same rate for the 623 acres would give $24,920.

Issue was joined on the statement of defence on the 5th day of May, 1904, and on the next day a motion was made before the court then sitting at Halifax that the

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matters and questions in issue be referred to E. S. Crawley, Esquire, of the Town of Wolfville, Barrister-at-Law, for enquiry and report under the provisions of section 26 of *The Exchequer Court Act* and the Rules of Court and amendments thereto. The motion was made on behalf of the Crown, and it appearing that the defendants consented thereto, the order was made as asked for.

The matter came on for hearing and enquiry before the learned Referee at Wolfville on the 13th day of June, 1904, and on a number of days subsequent to that date. Since the amendment of *The Canada Evidence Act, 1893*, made in 1902 by the Act of 2nd Edward VII, chapter 9, it has been the practice in this court in matters of this kind not to permit more that five witnesses to be called on each side to give their opinions as to the value of lands taken by the Crown or the damages suffered by the claimant. The parties are not limited in any way to the number of witnesses that may be called to speak to facts. But in the matter of opinion as experts the number of witnesses on each side is, unless some good reason is shown therefor before the examination commences, limited to the number mentioned in the statute. That practice was not observed in the present case. For the defendant Dodge some twenty witnesses were examined. Of these the learned Referee reports that most of them were shown to have a special qualification for valuing such lands and an intimate knowledge of the tract in question, some of them having made a careful examination of the same for the special purpose of estimating the value. He adds that the estimates made by these witnesses of the value of said lands per acre when fit for ploughing varied from $50.00 to $100.00, and that the cost of clearing was stated to be from $5.00 to $10.00 per acre. The Crown called some seven witnesses of whom three only, I think, expressed opinions as to the value of these lands per acre. One put the value at $20.00 an acre

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and the other two at $25.00 an acre. Of these witnesses the learned Refereee in his first report says that they gave much lower estimates than the defendant's witnesses, but it did not appear that they were qualified to give an opinion as to the value of these lands, their knowledge of them being very slight. In a second report, made under circumstances to which reference will be made, he explains that he did not intend to report that the witnesses for the Crown were not qualified in the sense that they were incompetent, but that they were not shown by the evidence to have sufficient knowledge of the lands in question to enable them to form a fair opinion of value, or at any rate, to form an opinion that could have much weight as against the opinions of the many witnesses for the defence who were shown to have an intimate knowledge of the lands and in several instances to have made personal, extended and careful examinations of the tract and of the soil of which it is composed in many places. Among the witnesses called by the Crown was the defendant Brenton H. Dodge himself, from whose evidence it appeared that he had purchased all the lands expropriated within a period of less than two years before they were taken by the Crown. There were a number of transactions, but the sum of the amounts paid by him did not, as it now appears, exceed $7,000.00. Of these transactions the learned Referee reported that it was true the lands had been purchased by the defendant Dodge for a comparatively small sum, but had been bought in small parcels and at different times, and at the time of the expropriation they comprised a large compact tract bounded on three sides by roads and on the fourth side by a railway, the value of such tract being thereby largely enhanced for purposes of fruit growing and farming; and that the fact that the defendant purchased low and made a shrewd speculation should not prevent his recovering the full value when the

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lands were taken from him. While the matter was before the learned Referee and prior to his first report, an application was made to him on behalf of the defendant Dodge to allow the statement of defence to be amended by substituting for the figures "$23,680.00" where they occur in the third paragraph of the same, the figures "$45,000.00," and also by striking out the words that stood in his way of claiming the whole of the compensation money. This amendment was opposed by the Crown and after argument was allowed.

The learned Referee found that the defendant Dodge was entitled to compensation in the premises in the amount of $38,000.00 with interest at the rate of five per centum per annum from the 5th day of September, 1903, and also to his costs.

The amount was arrived at in the following way:—

196 acres at $60.00 per acre...	$11,760 00
427 acres at $50.00 per acre....	21,350 00
Value of the wood and timber on the land	2,275 00
Value of the buildings, &c.....	2,740 00
Total.....	$38,125 00

The Referee's report having been filed the plaintiff appealed therefrom and asked that the amount be reduced to twelve thousand four hundred and sixty dollars and interest; or that the matter be referred back to the Referee for further enquiry and report. For reasons then given the latter course was adopted. The order was made on the 14th March, 1905, and with reference to the question of compensation the learned Referee was directed with respect to the purchases by the defendant Dodge of the several lots and parcels comprising the lands taken, to ascertain and report in each case the name or names of the vendors, the date of sale, the price paid, the number of acres sold, the value of the improve-

ments, if any, and the conditions under which such sale was made, with a view to determining whether or not the vendors received a fair price, or whether they sold their respective properties for less than a fair price, and if so, the reasons therefor. That enquiry has been concluded, and a second report has been filed. The following is a summary of the particulars of the purchases made by the defendant Dodge of those lands, showing the date or purchase, the number of acres purchased, and the amount paid in each case:—

Lot "A"—The Robinson land (May 5th, 1902)....	208	acres	$218 40
" "B"—The Sheriff lot (July 21st, 1902)	30	"	110 00
" "C"—Storrs lot (The Lord Bishop) (Feb. 13th, '03)	25	"	100 00
" "D"—Walter Reid lot (Oct. 18th, 1902).....	3	"	200 00
" "E"—Carter lot, (Oct. 13th, 1902).....	1	"	120 00
" "F"—Wilson Youngs (Nov. 24th, 1902).....	12	"	120 00
" "G"—Scott or Saml. Chipman (Nov. 7th, 1902)	1	"	20 00
" "H"—Fanning lot (Dec. 30th. 1902).....	31	"	400 00
" "I"—The Hamilton lot (Oct. 20th, 1902).....	10	"	20 00
" "J"—The Burgess lot (Oct. 17th, 1902).....	33	"	750 00
" "K"—The Beckwith lot (Nov. 5th, 1902.....	30	"	400 00
" "L"—The Norman Robinson lot (Feb. 2nd, '03)	2	"	75 00
" "M"—The Rafuse lot (Feb. 1st, '03 & Aug. 3rd, '03)	7	"	315 00
" "N"—The Driving Park (May 1st, 1903).....	26	"	3,000 00
" "O"—The Sweet lot (May 2nd, 1903).....	204	"	1,130 00
	623	acres	$6,978 40

The defendant Dodge had not at the date of the expropriation made any improvements on the land. The learned Referee finds that in a number of instances the owners, at the time they sold to Dodge, were unaware of the real quality and value of the lands, and that this may be said of lots "A", "C", "L" and "O". With regard to the matter in general his report contains the following findings.—

"I find generally that a large part of these lands were "so situated that they were inaccessible and for that "reason were of small value until they had been pur- "chased and blocked together by defendant Dodge

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"so as to give the whole tract frontage on roads and "railway. This feature applies particularly, I think to "lots "B", "C", "E", "M" and "O", containing in "all about 267 acres. It is worthy of note too that some "of these lands, the Robinson lands, lot "A," 208 acres, "had no water and was therefore practically valueless "for farming purposes until blocked with other well "watered lands. I find also that at the time of the "purchase by Dodge the boundaries of a number of these "lots were in dispute, in some case admittedly unknown, "and in at least one case, the Storrs lot, the location of "the lot was unknown to the owners. These I think "were conditions that would render such lots practically "unsaleable to the ordinary purchaser, but which were "wiped out when the whole was purchased by Dodge, "thus forming a compact tract with well defined bounds "and accessible on all sides. I also gather from the "evidence that a portion of these lands had, prior to and "up to the time of purchase by Dodge, been used as a "trotting park or race track and as a place for the train-"ing of horses, and the existence of this place for such "purposes I find was a condition that to some extent "depreciated the value of the adjoining lands until the "objectionable conditions were removed by purchase of "the whole by Dodge."

And he adds that after a careful review of the evidence taken before him, and basing his opinion upon the evidence only, he is unable to come to any conclusions different from those contained in his former report.

Now in general I agree with the observations that I have quoted from the report, and I think it would be an injustice to the defendant Dodge to limit the amount of the compensation to be made to him to the sum that he paid for the lands. He, and not the Crown, is entitled to any advantages that accrue from the good bargains that he made and from the increased values that have

been given to the lands by bringing them all under one owner. But when one has said that, he ought not in my opinion to dismiss all further consideration of these transactions. They furnish after all the best and safest criterion by which to test the opinion evidence. There was at the time no general advance in the value of neighbouring lands. The value that these lands had in the defendant's hands over that which they had in the hands of the vendors arose wholly from the considerations that have been mentioned.

The value of the timber and buildings on the lands taken is reported by the learned referee to amount to a sum of a little more than $5,000, and the fairness of his valuation has not in that respect been challenged by either party. I accept it as correct, and that leaves only the value of the lands themselves apart from the timber and buildings to be ascertained. Deducting the $5,000 from the amount paid by the defendant for the whole we have a balance of less than $2,000 attributable to the value of the lands alone. That gives for the 623 acres an average value per acre of a little more than $3. The $20 an acre that the Crown offered to pay included the value of the timber and buildings. Excluding the latter the Crown's offer was equivalent to about $12 an acre. In general I understand the witnesses that expressed opinions as to the values of the land to have given estimates therefor per acre, without the timber or buildings. The three witnesses for the Crown put that value, as has been seen, at $20 to $25 an acre. The considerable n mber of witnesses called for the defendant placed thereon an average value per acre of $50 and upwards. I agree, as I have intimated, that the $3 per acre which would represent the cost to the defendant of these lands would not under the circumstances of this case constitute with the value of the timber and buildings a fair and just compensation in the premises. Any assess-

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ment of the compensation on that basis would exclude from consideration matters to which the Referee has very properly attached a good deal of weight. But it is argued that if the price paid is not to be taken as a measure of the compensation to be allowed it is not more unreasonable or difficult to adopt the opinions of the many who made the higher estimates of value, than that of the few who took more moderate views of the question. It seems to me, however, to be much more improbable that the lands taken were really worth from seventeen to twenty times what was paid for them than that their real value was seven or eight times the amount so paid, and especially in a case where as here the lands were situated in a part of the country that has been long and well settled. There is a much greater probability in this case that the defendant's witnesses in giving a very high average value per acre for the lands taken have fallen into some error or mistake than that the Crown's witnesses have in the more moderate estimates given by them.

Then a somewhat long experience in these matters has taught me that averages have to be made with great good judgment and moderation. In the present case I have not the least doubt that there were parts of the land in question that were worth fifty or sixty dollars an acre, but that it was all worth the one sum or the other per acre seems to be altogether improbable in view of the actual transactions. Again, it is I think to be conceded that a claimant in such a case as this, has no great difficulty in getting numbers of respectable witnesses to come forward and make very liberal and sometimes exaggerated estimates of the value of lands that the Crown has taken, or of the damages that the claimant has suffered. On the other hand I find that men in general do not come forward very willingly for the Crown to give evidence, the effect of which is to cut down a

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claimant's compensation to what they think is a close or illiberal figure. The Crown has to be fairly liberal in its offers and tenders, or it will fail to support them by evidence when the case comes down for trial. The present case illustrates that fact. Apart from the evidence of the actual transactions in these lands the evidence of the Crown does not support the reasonableness of the offer made by it.

Then again, where there is a large number of acres to deal with there is a danger in applying averages, that does not exist in the same degree where only a few acres are taken by the Crown. In the latter case the error into which one falls by adding without reason or justification ten, twenty or even thirty dollars an acre to the value of the land taken is not a considerable matter, but where one is dealing as here, with more than six hundred acres the question becomes a serious one. In such a case one needs to be sure of his averages and to apply them with moderation and in reason.

Mr. Roscoe, for the defendant Dodge, contended that under the rules applicable to such a case as this there are a number of reasons why the Referee's report should be confirmed and judgment entered in accordance therewith. I agree with him that there are such reasons and that they are entitled to serious consideration. But taking the case as a whole, I am unable to adopt that course. It seems to me that a mistake has been made and that the amount allowed is largely in excess of the true value of the lands and premises taken. I am not able to come to the conclusion that in their then state any large number of acres thereof were worth fifty or sixty dollars an acre; and it seems to me most improbable that if all the land in question had really been of that value the defendant would have been able a short time before the expropriation, to have bought it with the timber and buildings thereon for less

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than seven thousand dollars. The error which, in my view, underlies the opinion evidence given by the defendant's witnesses is that a price of fifty or sixty dollars an acre, which would have been reasonable enough no doubt for some parts of the land, was applicable to the whole. I think that the actual transactions proved show that that was not so. The learned referee felt himself bound to give effect to what in his opinion was the weight of evidence. There is of course a great disparity in the number of witnesses called on the one side and on the other; but after all it is only a matter of opinion and mere numbers are not conclusive. And the defendant was in this respect allowed to avail himself of greater latitude than he was entitled to.

It seems to me that if in addition to the value of the timber and buildings the defendant is allowed an average value of twenty-five dollars per acre for the lands taken, the allowance will at least be fair; and that it will be liberal if a further allowance of ten per centum is added in respect of the compulsory taking. In that way I make up the amount of compensation to be paid to the defendant B. H. Dodge as follows:

623 acres of land taken at $25 an acre, without the timber or buildings	$15,575 00
Value of the wood and timber thereon...	2,275 00
Value of the buildings, &c., thereon.....	2,740 00
	$20,590 00
Add ten per centum thereon for compulsory taking	2,059 00
Total	$22,649 00

On that sum the defendant Dodge will be allowed interest at the rate of five per centum per annum from the 5th day of September, 1903, and he will have his costs, except the costs of the appeals from the referee's reports, which will be taxed and allowed to the plaintiff.

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There was at one time a question of title, and it was claimed by the Crown that the defendant John H. Bowles had an interest in part of the lands in question. Bowles himself, by his statement in defence disclaimed any such interest, and issue was joined thereon. It is now conceded that at the date of the expropriation he had no such interest, and he will be allowed his costs of that issue.

There will also be a declaration that the lands and real property described in the information are vested in His Majesty the King.

Judgment accordingly.

Solicitor for the plaintiff: *R. J. MacIlreith.*

Solicitor for the defendant Dodge: *W. E. Roscoe.*

Solicitor for the defendant Bowles: *H. H. Wickwire.*