1928
Oct. 22 & 23.
Nov. 3.

SIMON DUSSAULT .....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Expropriation—Compensation—"Value in use"—Market value

Held, that the productive value of land, or the value of the land to its owner based on the income he is able to derive from its use, is not the measure of compensation, for land expropriated, and is not material, except in so far as it throws light upon the market value. "Value in use" is to be repudiated as a test.

PETITION OF RIGHT by suppliant to have the compensation of his property taken by expropriation, fixed.

The action was tried before the Hon. Mr. Justice Audette at Quebec.

R. Langlais, K.C., and *Mr. Flynn* for suppliant.

Gerard Lacroix for respondent.

AUDETTE J., now (3rd November, 1928), delivered judgment.

This is a Petition of Right whereby it is sought to recover compensation for certain farming land taken and expropriated from the suppliant, by the respondent, for the purposes of a public work, viz: the Canadian National Railways, by depositing, in the Registry Office, on the first October and the 20th November, 1923, a plan and description of the same.

The area expropriated is (0·49) forty-nine hundredths of an acre, or practically half of an acre, from a farm at Les Ecureuils.

The suppliant, by his Petition of Right, claims the sum of $14,303.25.

The Crown, by its Statement in Defence, offers the sum of $725.

This half acre is taken out of a farm of about 60 or 61 acres, which the C.N.R. crosses diagonally, practically from east to west, leaving between 4 and 5 acres to the south and 56 acres to the north.

What seems to have unduly complicated this matter and to have entirely carried away those who approached its consideration is that the officers of the Provincial Experimental Farm started on this farm what is called a *champ d'expérimentation* which usually lasts three or four years, as said by witness Lavoie, that is an experiment with the culture of strawberries or small fruits, on that part of the

farm which was expropriated. As stated by witness Lavoie, the chief of the Agricultural Service, Experimental Farm, the suppliant's land is not specially favourable (pas très favorable) for the cultivation of small fruits, but the farm was selected because it was close to Donnacona where a small market for these products is available.

The suppliant has produced as exhibit No. 4 (upon which unnecessary importance has been placed) the theoretical result prepared by the Experimental Farm, upon information supplied by the suppliant with respect to the cost of operation. These manipulated figures show fairly large revenues from the cultivation of these small fruits; but the accuracy of the expenditure for labour and expenses of this nature is absolutely wanting. The Experimental Farm worked this statement from information supplied by the suppliant who kept no books and said he made this report to the department, to the best of his knowledge, and that he might have made mistakes, and that his return may be varied. All of this is said not because it affects the result of the case; but because the evidence has been tendered with the absolute consideration of the same and that, and that alone, can explain how everything has been so much magnified and exaggerated.

Within the same purview and with the same result in its consideration, is also the other question which seems to have been mentioned by most of the witnesses, and that is that the parcel of land taken was absolutely the only piece of the whole 60 acres which could be used for that kind of culture. The evidence leaves it a controverted question; while some say it is the only place on the farm where such cultivation could be made, others say that part of the farm on the south could be so used and witness Robert, a hard headed farmer of long experience, says he has more practice than the experts, that if he has not the theory he has the practice, and he swears that 50 per cent of the land to the south of the railway is quite suited for that special cultivation of vegetables and strawberries, notwithstanding what is said to the contrary. Witness Constantin, who has experience in the cultivation of strawberries, testified that 2½ acres to the south of the railway would lend itself to the cultivation of strawberries.

On behalf of the suppliant, the following witnesses testified as to the value of the land taken and the damages re-

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sulting from the expropriation, and valued the same as follows, viz:—witness Baillaut at between $6,000 and $6,500; witness Savard at a minimum of $6,000; witness Auger at between $6,000 and $7,000; witness Doré at $6,000, and witness Giguère at between $6,000 and $7,000.

On behalf of the Crown, the following witnesses valued the same as follows, viz:—witness Constantin at between $1,500 and $2,000; witness Marcoux at $681.50; witness Parent at $720 to $725; witness Giroux at $525, and witness Robert at $800.

Another very important and controlling fact proved by the suppliant's witness Doré is that farms at Les Ecureuils are worth $80 to $100 an acre when under cultivation, including dependencies.

The suppliant's farm seems to be a very ordinary one, nothing very special about it; and under the market price prevailing in the parish the farm, as a whole, would be worth (on this basis of $80 to $100 an acre) between $4,880 and $6,100; and yet for not quite half of an acre taken by the railway, the suppliant by his Petition of Right, unreasonably claims the sum of $14,303.25, and his witnesses carried away and proceeding upon a wrong basis, have even testified to a value between $6,000 and $7,000, and their unanimity in the same amount—they being domiciled quite close to the suppliant's farm—is also significant of much; while the evidence of the respondent's witnesses, it must be conceded, is absolutely disinterested.

Now what we are seeking in this case is the fair market value of the land taken and the amount of the damage resulting from the expropriation, taking into consideration any and all uses to which the land is reasonably adaptable. By fair market value is meant the amount of money which a purchaser, willing but not obliged to buy the property, would pay to an owner, willing but not obliged to sell, taking into consideration all uses to which the land was adapted and might in reason be applied. And in this respect, agriculture stands no higher in the eye of the law than manufacture and trade.

The land is looked upon as so much land, entirely apart from the personality of its owner and care must be taken to distinguish between income from the property and income from the business conducted upon the property. It might be that two rival farmers held adjacent farms, of

the same nature of soil and buildings, similar in all respects, upon which they cultivated. One of them, by reason of his shrewdness, foresight and good fortune might be deriving a large return and would doubtless be unwilling to sell for a sum considerably in excess of its market value—while the owner of the adjacent farm may find himself losing money and hardly making a living on it, and he would be pleased to dispose of it at a sacrifice. Yet if the two farms were taken by eminent domain or expropriation, the measure of damages would be the same in each case. Nicol, On Eminent Domain, p. 662.

Where one of these farms, say of 100 acres each, of a value of $10,000 was entirely exploited as a potato field, yielding 300 bushels an acre, selling at $2 a bushel, returning $600 to the acre, the whole farm giving a gross return at that rate of $60,000,—while upon the other equally valuable farm, in so far as the soil is concerned and otherwise, the usual mixed farming were conducted with the result of a bare living for the farmer and his family, the market value of these two farms would be the same. The industry, ability and enterprise of the respective farmers will explain the difference.

The land is looked upon as so much land of a certain quality, entirely apart from the personality of the owner and the manner in which he exploits it.

The productive value of the 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 " value in use " is everywhere repudiated as the test. Idem 663.

If the owner of a property uses it himself for commercial purposes, the amount of his profits from the business conducted upon the property depends so much upon the capital employed and the fortune, skill and good management with which the business is conducted, that it furnishes no test of the value of the property. It is accordingly well settled that evidence of the profits of a business conducted upon land taken for public use is not admissible in proceedings for determination of the compensation; but evidence of the character and amount of the business conducted upon the land may, however, be admitted as tending to show one of

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the uses for which the land is available. And when, as in the present case, the land is used for a specific and temporary agricultural purpose and experiment these considerations obtain to a lesser degree.

The amount claimed for this half acre of a most ordinary farm is so grossly exaggerated and magnified that it becomes a direct challenge to reason and common sense; the suppliant in so claiming obviously places himself in the rank of (*les plaideurs téméraires*) those who are adamant to the just criticism that is evoked by reckless statements as to values of property in which they are interested, but who must bear the consequence. Such an intransigent claimant places the expropriating party in the impossibility of ever transacting with him and coming to terms as to the compensation. This manner of magnifying everything must be avoided and discouraged. The number of plants claimed could not reasonably be placed upon the land taken. Although claim is made for gooseberries, the suppliant in the witness box says there were none on the land taken. The claim is beyond reason.

Assuming that the land in question, as in the rest of the Parish, be worth $80 to $100 an acre, it must, however, be conceded that, when a small portion of land is carved out of a farm for expropriation, the land in such cases is worth much more. To meet that view to its full limit I will for the purpose of fixing the compensation, put a value upon the same at $500, and therefore allow for the 0·49 (forty-nine hundredths) of an acre the round figures of $250. Then there remains the question of the severance and the damage resulting therefrom, i.e., the gates, the crossing of a double track to establish and maintain communication between his 56 acres on the north and the 4 or 5 acres to the south;—and to meet a full compensation for the same I will allow the value of these 4 or 5 acres to the south, i.e., 4½ acres at $90 an acre, equal to $405. With this allowance the suppliant will recover the value of that land and yet hold it for all purposes, remaining thus fully compensated with a sum of $655. The damages resulting from a severance must obviously vary with each farm, depending upon the areas formed by the severance.

The suppliant, after the Crown had taken this 0·49 of an acre remains with two strips of that land under the cultivation of strawberries, one to the north and one to the

south of the railway. Each strip being of $\frac{1}{8}$ of an acre, making in all $\frac{1}{4}$ of an acre. I can see no reason why he should not, as contended at trial, if he sees fit, continue this cultivation with the quarter of an acre, much more so when it is abundantly proved that some part of the south would lend itself to a similar kind of culture.

The suppliant has set up a most exaggerated and magnified claim, a claim beyond common sense. He has been supported to an amount of about half by unfortunate witnesses who obviously, misled by this small plot of berries, proceeded upon a wrong basis to ascertain the value of the land and the damages. The Court cannot give support to any such contention and claim.

This evidence adduced by the suppliant upon a wrong basis disappears and he remains without evidence in support of his claim, and the only apposite evidence extant on the record is that offered by the respondent.

Were I to allow in this case even somewhat over and above this amount of $655 or the amount of $725 offered by the statement in defence or somewhat more, I would feel compelled to follow the decision in the case of *McLeod* v. *The Queen* (1), where it was held that where the tender is not unreasonable and the claim very extravagant, the claimant will not be given costs although the amount of the award exceeded somewhat the amount tendered. While no cost will be allowed the suppliant, there will be no cost in favour of the Crown, taking into consideration that this is a case of expropriation where the land was forcibly taken from the suppliant.

Therefore there will be judgment as follows, namely:—

1. The land expropriated herein is declared vested in the Crown as of the 1st October, 1923.

2. The compensation for the land taken and for all damages whatsoever resulting from the expropriation is hereby fixed at the sum of $725, the amount offered by the statement in defence.

3. The suppliant, upon giving to the Crown a good and satisfactory title, free from all hypothecs, charges and incumbrances whatsoever, is entitled to recover against the Crown the said sum of $725 and without interest. (See sec. 31 of The Expropriation Act.)

4. There will be no costs to either party.

Judgment accordingly.

(1) (1889) 2 Ex. C.R. 106.