

IN THE MATTER of the Petition of Right of

JAMES W. BROWN.....SUPPLIANT ;

AND

HIS MAJESTY THE KINGRESPONDENT.

1909
Dec. 30.

HIS MAJESTY THE KING..PLAINTIFF ;

AND

JAMES W. BROWN.....DEFENDANT.

Public work—Damage to lands—Proceedings by petition of right supplemented by expropriation proceedings—Hay lands flooded by construction of Government dam—Damage to Owner's business as cattle rancher and dealer in hay—Basis of valuation.

B., a cattle rancher and hay dealer, had filed a petition of right seeking damages for the flooding of a large portion of his hay lands in the Qu'Appelle valley caused by the construction by the Crown of a dam on the Qu'Appelle river, for the purpose of improving the navigation of Last Mountain Lake. At the trial of the petition counsel for the Crown stated that expropriation proceedings had been instituted by the Crown to expropriate the 1,037 acres of the suppliant's land affected by the dam, together with an additional area of some 240 acres, and it was agreed between the parties that the evidence adduced under the petition of right should be treated as if also adduced in the expropriation proceedings, which practically superseded the petition. The dam was erected in 1906. By his defence in the expropriation proceedings, *B.* claimed \$50,000 for loss of hay during two years before the erection of the dam and since to the time of trial; and a sum of \$131,840 for damages arising from the expropriation and depreciation to remaining lands arising from the severance.

Held, that *B.* was not entitled to damages for the loss of the hay.

2. That in assessing compensation the whole of the property should be considered as comprising 2,080 acres suitable for ranching purposes, and the market value (an element of which was its potential value) together with that of the house and barn thereon, ascertained as of the date of the expropriation, viz. : January, 1906; then by ascertaining the market value of what was left and deducting the same from the value of the part expropriated, the difference would represent *B's* loss.

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THESE cases arose, respectively, upon a Petition of Right for damages arising out of injury to land caused by the construction of a public work, and proceedings, subsequently taken, for the expropriation of the land injured as alleged in the petition of right.

The facts are fully stated in the reasons for judgment.

H. A. Robson, K.C., and *J. F. Frame* for Brown;

J. A. Allan for the Crown.

CASSELS, J., now (December 30th, 1909,) delivered judgment.

In the case of *Brown v. The King* the suppliant filed his petition on the 29th April, 1909. The petition is dated the 4th September, 1908.

The suppliant sets out that he was the owner and in possession of certain lands in 1904, and is still the owner thereof. The lands comprise an area of 2,080 acres.

The suppliant alleges,—

“That the said lands, or the greater portion thereof, are situated in a valley which extends from the foot of the said lake to the Qu’Appelle river, a distance of about four miles, and the natural and only outlet and drainage for the waters of the said lake and the waters in the said valley and on the said lands is by and through a natural water course leading from the said lake to the Qu’Appelle river. The said lands are ordinarily and naturally of great value as hay lands and for the feeding of cattle, and were of great value prior to the construction of the public work hereinafter referred to.”

The suppliant further alleges,—

“That during the latter part of the year 1904, His Majesty the King (represented in that behalf by the Honourable the Minister of Public Works for the Dominion of Canada) through his engineers, servants and workmen, constructed a public work, to wit, a certain dam which was erected or constructed, and has

since been maintained across the said Qu'Appelle river at a point below or down stream from the place where the said river naturally receives the said waters, flowing there through the said natural water course, and the said dam has ever since been maintained and is still maintained as a public work."

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"That by reason of the construction of the said public work, to wit, the said dam, the waters of the said lake and the waters in the said Qu'Appelle river and in the said natural water course, which is the natural outlet of the said lake, have been obstructed, and since the said year 1904 have been prevented from escaping and have continuously been, and still are, retained to a depth of upwards of six feet above the natural level of the said lake and river and water course, thereby wholly submerging the larger portion of the suppliant's said lands, to the extent of at least 1,077 acres thereof, thereby rendering the same wholly unproductive, and also rendering to a large extent useless and unprofitable the remainder of your suppliant's said lands, which were being used by him in connection with the said submerged lands in his business of raising and feeding cattle and raising hay for sale."

The petition came on for trial before me at Regina on the 11th and 12th days of October, 1909.

At the trial Mr. Allan, counsel for the Crown, stated that expropriation proceedings had been commenced on behalf of the Crown to expropriate the 1,077 acres (really 1,037) referred to in the suppliant's petition, together with an additional portion of the 2,080 acres.

It was then agreed between counsel for the Crown and counsel for the suppliant that an information on behalf of the Crown should be filed and served, a defence filed, and the information brought to issue. It was also agreed that the evidence adduced in the petition of the suppliant Brown should be treated as if also adduced in

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the information proceedings in the case of *The King v. Brown*; that such further evidence as the parties desired to adduce should be taken before C. H. Bell, Esq., Clerk of the Supreme Court of Saskatchewan, and I agreed to remain over at Winnipeg on my return from the west and hear further evidence and the argument of counsel.

The two cases were argued before me in Winnipeg on the 4th day of November, 1909. Counsel for the suppliant Brown asked leave to amend his petition by striking out paragraph 5 thereof, which reads as follows:—

“ 5. Your suppliant further says that by reason of the construction of the said public work, to wit, the said dam, that his said lands have been injuriously affected as aforesaid, and that by reason thereof he has suffered damage, amounting to the sum of at least \$50,000,” and substituting therefor the following:—

“ Your suppliant further says that by reason of the construction of the said public work, to wit, the said dam, that he has been prevented from carrying on his said business of raising and feeding cattle and raising hay for sale, and has lost all the annual product of the said land and that his loss, up to the time of the institution of this petition, irrespective of permanent injury to the land, amounts to the sum of \$50,000, and your suppliant further says that his said lands so submerged and his lands adjoining the same have been permanently injuriously affected, so that he has suffered further loss amounting to \$131,840 additional.”

Counsel for the Crown consented to this amendment.

As the institution of the expropriation proceedings practically supersedes the petition, and Brown in his answer to the information can set up the same defence, I allow the amendment as asked.

The information filed on the 4th November, 1909, alleges in paragraph 1 as follows:—

"1. The lands hereinafter described were taken under the provisions and authority of section 3 of The Expropriation Act, chapter 143 of the Revised Statutes of Canada, 1906, by his Majesty the King for the purposes of a public work of Canada to wit: a dam at Craven below the junction of the Qu'Appelle river and the outlet of Long Lake or Last Mountain Lake, by depositing of record, under the provisions of section 8 thereof, a plan and description or such lands in the office of the Registrar of Deeds for the Assiniboia Land Registration District in the Province of Saskatchewan, in which Registration Division the said lands are situate whereby the said lands have become and now remain vested in His Majesty the King."

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Then follows a description of the lands, in all comprising 1277.38 acres. The Crown offers \$12,660.28 in full compensation for all the lands expropriated and for all damage and loss of every kind.

In his defence to the information Brown sets up as follows:—

"5. That further as to paragraph 3 thereof he says that he has suffered loss and damage by reason of the construction of the said dam and says that a portion of his loss and damage by reason thereof consists in the total destruction of the hay which, but for the said dam, would have grown on the said lands during the years 1905, 1906, 1907, 1908 and 1909 and which hay would during the said years have aggregated in net value at least \$50,000.00, and he further says that in respect of this particular loss, namely, the loss of said hay for said years he is now proceeding in this Honourable Court against His Majesty the King upon a fiat granted by His Majesty and by a Petition of Right, which proceeding he says was begun long prior to the expropriation proceedings referred to in paragraph 1 of the information, and which

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proceedings he says are still pending and undetermined in this Honourable Court."

"6. That as to paragraph 5 and generally as to the whole of the said information this defendant says that his business is that of a cattle raiser and dealer in hay, and that he has carried on and operated such business since about the year 1889 and up to the year of the construction of the dam which was put in the Qu'Appelle river at or near Craven on or about the year 1905 by His Majesty the King. He further says that he acquired the lands now being expropriated and about eight hundred and three acres more of contiguous upper and hill lands especially for the purposes of the said business and because of their peculiar adaptability for his said purposes. The lands mentioned in the information consist of twelve hundred and seventy-seven and thirty-eight hundredths acres, and the same are meadow lands and are situate in a valley at the foot of the lake known as Last Mountain Lake or Long Lake in the Province of Saskatchewan. There is a natural water course or channel extending from the foot of the said lake to the Qu'Appelle river, which is of such a character and of such levels that in the spring of each year water from the Qu'Appelle river flows north or up stream in the same and irrigates the said meadow lands now expropriated, and in due time recedes and escapes by the said natural water course or channel down into the Qu'Appelle river. The result of this natural irrigation is in each season (except in cases of extreme floods out of the course of nature) to insure the natural growth upon the said meadow of very large crops of superior hay. Up to the time of the erection of the said dam this defendant had yearly cut the said hay and derived great profits from the same both from feeding the same to his cattle and by selling the same to other parties and in exporting the same to town and city markets in Saskatchewan. This defendant has for the pur-

pose of carrying on his said cattle raising and hay business erected large buildings on his said lands, purchased expensive personal chattels necessary to carry on such a business and permanently established himself thereon in order to prosecute his said interests and to take advantage of the great benefits from his said lands and property. The natural advantages of said lands and their proximity to market, and particularly the said natural irrigation, rendered the same of an unique character and of great and exceptional value and by the aforesaid act of His Majesty the King in building and maintaining said dam and flooding said lands this defendant has wholly lost the benefit of all his said lands, and his said business has by reason thereof been put an end to and his said buildings rendered useless and his said business and property destroyed."

The defendant claims \$50,000 damage for the loss of hay during the years 1905, 1906, 1907, 1908 and 1909, and claims the further sum of \$131,840 for the value of the lands sought to be expropriated and the depreciation of the balance of the 2,080 acres of the land, a part of which, namely, the 1,277.38 acres, have been expropriated.

Before dealing with the evidence in detail, I may state that in my opinion the defendant Brown is not entitled to the damages claimed for loss of hay as above mentioned. If he were so entitled the claim made is an exorbitant one. The first dam was only erected in January of 1906. It did not withstand the spring freshets of the Qu'Appelle river in 1906, and a new dam holding the waters at the same height was constructed a little lower down the river Qu'Appelle in December, 1906. The dam complained of could not possibly have affected the lands in question in 1905, and could hardly have affected them in 1906. In the spring of 1904 there was a freshet exceeding in magnitude the freshet of 1883. All the lands as far as Craven, including the meadow lands in question, were flooded, and remained flooded all through that

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season, and a large portion of the meadow lands, especially Section 5, would not, according to the evidence, have been drained so as to be capable of producing hay during the years 1905 and 1906. *

The object of the dam at Craven was to retain the waters of the Qu'Appelle river and to force them up the outlet which, during low water in the Qu'Appelle river, carried off the waters from Last Mountain Lake until the level of the lake was lowered to a point where the water ceased to flow through the outlet. The intention is to hold back the water so as to improve the navigation of Last Mountain Lake. Brown, the suppliant, complains that the effect of this work is to destroy his meadow lands comprising the 1,037 acres, and that practically the whole value of these 1,037 acres have been lost to him.

The Crown by instituting the expropriation proceedings and expropriating these 1,037 acres, together with the additional land, admits that the defendant Brown is entitled to be paid the value of the lands.

The questions for decision are :

1. Is the suppliant Brown entitled to any damages for the years claimed other than interest on the amount found due ; and
2. The method of arriving at the value and damages ;
3. The amount that should be allowed.

In my opinion the true method of approaching the consideration of the case is as follows :

The Crown in January, 1906, proceeded in the public interest to erect the dam. The necessary effect of such a dam would be to hold back the waters and maintain the level of the lake and injuriously affect the meadow lands of the suppliant and defendant Brown. It is true the first dam was not constructed in such a way as to withstand the freshet, and accordingly the new dam was constructed in December, 1906.

The effect of this dam was to expropriate an easement over the meadow lands (1,037 acres) of flooding. It is clear that such an easement was practically equivalent to a destruction of the lands for hay purposes, the only use to which they could be put. Brown puts his case in this way in his petition. The dam has been maintained ever since, and the information filed. In my view in 1906 when the dam was first constructed the Crown was erecting a public work which necessarily prevented the draining of the meadow lands, and were claiming an easement of flooding the meadow lands, equivalent to taking the fee in the lands. This was followed up by the expropriation proceedings. I do not think the evidence adduced before the special examiner as to conversations with ministers and others about the removal of the dam was admissible. If it were a question of laches it might have some bearing, but not on the question of possession.

I think that so far as the 1,037 acres of meadow lands are in question the title to the easement vested in 1906. By *The Expropriation Act*, Cap. 143, R. S. C. 1906, the definition of lands is as follows:—

“(f) ‘land’ includes all granted or ungranted, wild or cleared, public or private lands, and all real property, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things done in pursuance of this Act, for which compensation is to be paid by His Majesty under this Act.”

Section 22 of the same Act reads as follows:—

“22. The compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property; and any claim to or encumbrance upon such land or property shall, as respects His Majesty, be converted into

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a claim to such compensation money or to a proportionate amount thereof, and shall be void as respects any land or property so acquired or taken, which shall, by the fact of the taking possession thereof, or the filing of the plan and description, as the case may be, become and be absolutely vested in His Majesty.”

Also section 47 of *The Exchequer Court Act*, Cap. 140, R.S.C., 1906, has to be considered. It reads as follows:—

“47. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess the value or amount thereof at the time when the land or property was taken, or the injury complained of was occasioned.”

In the Ontario Courts a case of *Ruttan v. Dreifus and Canadian Northern R. W. Co.*, (1) may be looked at as containing a summary of authorities on similar statutes.

I therefore take January, 1906, as the starting point. The difference of dates of expropriation between the 1037 acres of meadow lands and 1,277.38 expropriated, or 240.38 acres, need not in my view be considered. These 240.38 acres were not taken possession of in 1906, and were expropriated in October or November, 1909, but when expropriated, by reason of their depreciation by the withdrawal of the hay lands, their value had so decreased according to the witnesses of Brown that they would be of small value. Viewing the case as I do the whole question of the value of the 1,277.38 acres may be considered together as of January, 1906.

I do not think there is any real dispute between counsel for the Crown, Mr. Allan, and counsel for the suppliant and the defendant Brown as to the manner in which compensation should be awarded. The defendant Brown is entitled to receive full compensation for his loss. The use to which he put the lands and the loss to him

(1) 12 Ont. L.R. 187.

should be considered. See *Bailey v. The Isle of Thanet Ry. Co.*, (1) *Bourne v. Mayor of Liverpool* (2) *Stebbing v. Metropolitan Board of Works*, (3) cases cited by Mr. Frame.

I have had occasion to consider these cases and a great many others in cases decided by me; for instance, *The King v. Condon*, (4) where the property expropriated was an inn, and allowance was made for good-will or loss of business. See also *The King v. Dodge* (5) and cases cited.

I propose to consider the case in the manner claimed by Mr. Frame, namely, treating the whole of the property as a ranch comprising 2,080 acres suitable for ranching purposes. The question is what in January, 1906, was the marketable value of the 2,080 acres as a ranch, together with the barn costing \$5,000 and the house. The potential value at this time must be considered, not however arguing back from matters as they stood at the trial in October, 1909, as claimed by Mr. Frame, but as such potential value was considered to be in 1906. The question is in reality, what was the market value in 1906? The potential value would be an element in increasing the market value. Then the market value of what is left should be ascertained and deducted therefrom, and the difference would be Brown's loss. Viewing the case in this way, the further question arises: Is there any additional sum that should be allowed to the defendant for the present use to him of the ranch and consequent loss? If the marketable value of the property as a ranch is taken as the basis of compensation it is difficult to conclude that any loss of this nature has been proved. No evidence has been adduced, although the attention of counsel was called to the point at the trial, of any loss of profits to the defendant. For all I know he may have been operating the ranch at a loss, trusting to the future to recompense him.

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(1) L. R. 1900, 1 Q. B. D. 722.

(3) L. R. 6 Q. B. 37.

(2) 33 L. J. Q. B. 15.

(4) 12 Ex. C. R.

(5) 38 S. C. R. 149.

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I propose therefore to consider the case from the standpoint I have indicated.

The evidence of the numerous witnesses is mainly opinion evidence. It is not suggested that the witnesses other than the suppliant did not honestly intend to give their views. Their views differ as widely as the offer of the Crown differs from the claim of the defendant.

James W. Brown, the defendant, states that up to 1904 the meadow lands were free from water except in the spring freshets when they were overflowed, but the water went off. He is asked: "What did you do about the 'harvest of those years?'" His answer was: "Well, I 'harvested all I needed.'"

"Q. Was it all capable of being harvested? A. It 'was all capable of being harvested, yes.'"

If this statement be accepted it is difficult to understand why, if the value of the hay crop be as claimed, a shrewd business man should allow the greater part of the crop to be wasted.

He makes no claim for damage in 1904, attributing the flooding to the great freshet.

Referring to the dam he is asked:—

"Q. Now what, if anything, was done in the way of 'retaining these waters in the fall of 1904? A. Well, 'this dam was constructed at Craven.

"Q. What year was it put in? A. As near as I can 'tell it would be built in December, 1904.

"Q. Now, since 1904, since that dam was put in, at 'what level has the water been standing on your lands 'as regards uniformity? A. They have been in the fall 'of 1904, and probably a little higher, because the water 'has been standing on section 21."

The meadow land of section 21, it may be remarked, is the southerly part and further away from Last Mountain Lake than the meadow lands on sections 5, 32 and 28. These meadow lands on section 21 are considerably

higher than the meadow lands of section 5 adjoining the lake. Brown states in his subsequent evidence that he disposed of part of his cattle in 1904. That he reduced his stock about one-half and that he had about 100 head left.

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Brown is unable to place any value on the lands. Being asked, he answered :—"The value of the lands—well I don't know, I never offered it for sale."

He is asked :—

"Q. Now after this flood came on and the dam was constructed, what, if any thing, did you do with respect to the stock you had? A. I disposed of the most of it.

"Q. How many head of stock were you running at the time the dam was put in? A. I had about 350 head that year.

"Q. And had you been running it at that? A. Yes, I had run as high as 450 head."

On cross-examination he is asked :—

"Q. Well now, will you tell me how you figure up your damage at \$50,000? A. Well, the season of 1904 I don't claim any damages due to flood; in 1905 I claim that the lands on 21, 28 and 32 would have uncovered so that I would have cut hay.

"Q. And what do you estimate as your damage for 1905? A. Well take the number of acres at 2½ tons per acre."

And he places the profit at \$6 to \$6.50 a ton.

His claim for 1906 is for the same lands and about half of section 5.

As I have stated before, the dam was not erected until January 1906, and was not effective until 1907. I quote thus fully from the suppliant's evidence to show how exaggerated his claim is. That part of his evidence which refers to the season of 1905 is also important as it shows the lands were flooded in 1905 although there was no dam; and it tends to confirm what is stated by one or

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two of the Crown's witnesses, that judging from the length of time it took for the waters to recede after the great flood of 1883 it would have taken a considerable period for the flood waters of 1904 to have receded even had the dam not been erected.

Edwin Carss, a rancher, states that in 1905 the meadow lands were flooded pretty much as they are now.

William Henry Mulligan cannot place any value on these lands.

John Albert Graham only refers to the value of the hay, and generally as to the manner of running a ranch.

Hugh Armour, a butcher, residing in Regina, places the value of the hillside lands, the meadow lands being withdrawn, at about \$2 to \$3 an acre. With the meadow lands he would value these hillside lands to a rancher at from \$8 to \$10 an acre. In his re-examination he places the meadow lands at \$100 an acre from a rancher's point of view.

George W. Brown, brother of the suppliant, and a barrister-at-law practising at Regina was heard. This witness, the suppliant and two other brothers were partners farming, and acquired the lands in question originally for the farm, each having a fourth interest. The partnership was dissolved, the suppliant retaining the ranch in question. On the dissolution this witness took as his share "farm lands down on the plain and other considerations".

Considering the difficulty in arriving at the value of the property in question for the reasons given by some of the witnesses, it might have been of use had the lands taken by this witness been described and their value given. Being "plain lands" the value could have been arrived at by reference to other lands of a similar character.

He values the meadow land, 1,037 acres, at \$100 per acre. He values the side hill lands with the meadow at

about \$10 an acre; without the meadow at from \$2 to \$3 an acre. The barn, he states cost \$5,000.

Francis N. Darke, another witness, lives in Regina and is the owner of a ranch in the Qu'Appelle valley. He estimates the market value of the meadow lands at from \$50 to \$60 an acre. The side hill lands in conjunction with the meadow lands and the balance of the ranch at from \$10 to \$12 an acre; and with the meadow lands withdrawn at from \$2.50 to \$3 an acre.

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This witness is asked :

“ Q. What would you say is the value of that 2,080 acres as it stands there, taking the whole thing, buildings, meadow and everything, to a man going into that business?

“ A. You mean the market value, the value it would be likely to sell at?

“ Q. I mean a fair value not a forced sale—a sacrifice value at all, mind you—a fair value and an honest transaction? A. Well, I think that property would be very reasonable at from \$35 to \$40 an acre; for the whole property, that is the land.

“ Q. For the whole 2,080 acres? A. Yes, that would not include the buildings”.

He adds for the buildings \$8,000. His value for the lands across the valley he puts at about \$2 to \$3 an acre. For the balance of the farm comprising the farm lands—side hill lands including the buildings—\$6, \$10 or \$12 an acre. The witness in giving his evidence as to value is referring to present values (October, 1909).

Henry C. Lawson, another witness, lives in Regina, and for a number of years owned a ranch in the Qu'Appelle valley. His ranch was situate down the Qu'Appelle river fourteen or fifteen miles from the suppliant Brown's lands and below the dam in question. He values the 2,080 acres, the whole thing as a going concern, at about \$40 an acre, without the dam. His value for the farm lands,

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280 acres, with the meadow lands withdrawn, is \$12 to \$14 an acre; and the side hills at \$3 to \$4 an acre.

Then he would add \$2,000 for the buildings.

His valuation of the 2,080 acres at \$40 an acre would equal.....\$ 83,200 00

Less 280 acres of farm lands at

\$14 an acre..... \$3,920 00

Buildings..... 2,000 00

523 acres of side hill lands at

\$4 an acre..... 2,092 00

\$8,012 00 8,012 00

Leaving as damages..... \$75,188 00

This witness, on cross-examination, describes the ranch he owned. He sold it in July 1909. His ranch comprised 800 acres. Of this from 350 to 400 acres were meadow lands; 250 acres of hill side lands; and the balance rough bottom lands, etc. He sold his ranch for \$20 an acre. He had been asking \$25 an acre prior to the dam. In placing the value of the 2,080 acres at \$40 an acre he says it is only a guess and the value is as of the present time (October 1909). During the last five years there would probably be a general rise in values of twenty per cent, he states. Comparing his ranch with that of the suppliant Brown, he is asked:

“Q. How does the Brown property compare with yours and other properties east on the Qu’Appelle river?”

“A. Well, the Brown property it is more dead level, the meadow there, and the meadow land, that is, their meadow land, is first class; down our way there is good and bad in meadow land, and it varies, it isn’t on such a dead level and it is at the outlet of the lake.

“Q. Would you say that per acre your land in Qu’Appelle was worth as much as the Brown’s? A. The best of ours is as good as his, but there is probably more

“good land up his way than there is down ours, ours is
“more broken.

“Q. So that per acre his is worth more than yours,
“because of uniformity? A. Yes, it is”.

The witnesses for the Crown gave their evidence as to
value.

Zéphirin Malhiot, an engineer in the Public Works
Department was called by the Crown. He proves (what
is corroborated by other evidence) the fact beyond reason-
able dispute that the first dam was erected in January,
1906. According to his evidence the dam had no effect
so far as flooding of the meadow lands is concerned. It
is hard to understand why if the Public Works Depart-
ment did no injury to the suppliant's lands they should
commence proceedings to expropriate 1,277 acres. At
one part of his evidence he states the difference in
level between the dam and the bridge at the trail on
section 5; the lake is a foot higher than the top of the
dam. He corrected himself and answered: “Yes than
the waste wear”. He proceeds to argue that water must
run down hill. He places the top of the dam at 1,586
(referring to sea level). The level of the lake he places
at 1,587, 10 namely, a foot higher than the level of the
top of the dam. I am inclined to think he was leading
me to understand the dam had no effect in retaining the
waters, referring to the height of the dam without the
second “stoplog”.

On his plan filed as exhibit No. 1, which is supposed
to give the levels, I find that the height of the level of
the top of the second stoplog is given as 1,588 feet.
However this may be, the Crown by expropriating the
lands seems to view the matter in a different light. I
pass over the evidence of this witness, but with the remark
that the report referred to of Coutlee cannot be received
as proof of the facts therein stated.

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Leslie Hoskins, another witness on behalf of the Crown, lives at Craven. He has been familiar with the lands in question for a great number of years. His evidence shows that it would be unreasonable to take the whole area of the meadow lands and assume that each acre produces so many tons per acre. It has to be averaged. For instance, when the southern portion of the meadow lands is yielding a good hay crop the northern lands, section 5 particularly, yield nothing. The southern portion requires water, and when the freshets are sufficient to supply the requisite irrigation, the lands on section 5 are drowned lands. He explains that it took twelve years to drain these lands after the flood of 1883. He also testifies to the fact that the first dam constructed in January, 1906, was not effective. He further states that the meadow lands in 1906 were still flooded from the freshet of 1904. He places the value, taking into account the uncertainty of the hay crops, etc., at \$20 an acre. The buildings on the lands this witness values at \$2,200.

John W. Silverthorn, another witness called by the Crown, lives at Lumsden, not far from Brown's. He places the value of the meadow lands at about \$20 an acre. He places the value of the 280 acres of farm lands at about from \$20 to \$25 an acre. He places the value of the hillside lands at about \$10 an acre. This witness points out that these hillside lands are good pasture land—grazing land. This view is corroborated by the fact that while Brown was running the ranch cattle during the summer never grazed over the meadow lands. Their pasture was from the hillside lands and neighbouring lands not owned by Brown.

William Pearson, another witness called by the Crown, lives in Winnipeg, and is the President and Manager of the William Pearson Co., Ltd. It is argued that his evidence should be received with considerable caution, as he is interested in maintaining the lake level. I fail to

see how this fact should bias him as the expropriation is an accomplished fact. This witness is a man of large experience. He gives his evidence, as far as I can judge, not having seen him, fairly. He values the meadow lands on section 5, taking into account the fluctuating and uncertain returns, at about \$7 an acre. He values the meadow lands on section 32 at \$16 an acre; the meadow lands on section 28 at \$16 an acre; the meadow lands on section 21 at from \$13 to \$14 an acre; and the southeast quarter of section 22 at \$13 an acre. He also states that the value of these lands without the dam would, in 1906, be a great deal less. He places the value of the hillside lands, apart from the meadow, at about \$10 an acre. In conjunction with the meadow lands he would place an additional \$3 an acre on these hillside lands. Referring to the top lands, 230 acres, he considers their value to be \$25 per acre without the buildings. He values the house, the meadow lands withdrawn, at \$1,500. The barn which cost \$5,000 he would value to a purchaser at \$1,668.

Charles O. Benjafield, another witness heard on behalf of the Crown, is familiar with the property in question. He estimates the natural increase in the class of land in question between 1906 and time of trial at from \$5 to \$8 an acre. He places the value of the top lands (280 acres) without the buildings, at about \$22 an acre; and the value of the hillside lands at \$10 to \$12 an acre for grazing purposes. His view is that the top lands—the farm lands—would not be depreciated by the withdrawal of the meadow lands. The grazing land would be depreciated one half.

Charles Benjafield, another witness for the Crown, has been familiar with the property for years. He places no value on section 5 for hay purposes. The hillside lands he values at \$8 an acre. Adding the hillside lands to the top lands and selling them together, he would add

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\$2 an acre, or \$10 per acre. The top lands (280 acres) without the buildings, he values at from \$25 to \$30 an acre. In 1906 he would place the value of the top lands at \$20 an acre, the hillside lands at \$7 per acre.

On this evidence I have the difficult task presented to me of arriving at the amount Brown should be allowed.

I am of opinion that the claim put forward, when viewed as of January, 1906, is exaggerated.

I would place the value of the ranch as a whole (2,080 acres) exclusive of buildings, at \$25 an acre. This would amount to \$52,000. I would add to this \$8,000 for the barn and house and sheds. This would make the total value \$60,000, and I think this amount would be full compensation. From this \$60,000 I would deduct 280

acres of farm lands at \$20 an acre..	\$ 5,600 00
Value of buildings to a purchaser...	3,000 00
Value of hillside lands left, 523 acres	
at \$8 an acre.....	4,184 00

\$ 12,784 00

If this \$12,784 be deducted from \$60,000, it would leave the suppliant Brown, the defendant in the case of *The King v. Brown*, entitled to \$47,216, together with interest from the date of the expropriation, and this sum I think fully compensates him.

The suppliant is entitled to the costs of his petition and of the expropriation proceedings.

Judgment accordingly.

Solicitors for Suppliant: *McKenzie, Brown, Thom & Frame*;

Solicitor for Crown: *J. A. Allan.*