1919
March 11.

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

PLAINTIFF.

AND

ADAM B. CROSBY, MINNIE F. CROSBY, AND CHARLES L. NEWMAN,

DEFENDANTS.

Expropriation—Compensation — Land — Valuation—Future profits—Offers to purchase.

1. An owner of property expropriated is not entitled to claim as an element of its market value at the time of the expropriation a sum representing estimated profits from a business which he asserts might have been done on the property, but which in fact had never been undertaken.

2. Offers to purchase property which are more or less indefinite and not so made as to be binding upon the persons making them are not to be regarded as satisfactory evidence of the value of such property in the opinion of the proposed purchasers.

INFORMATION to determine compensation for the expropriation of land by the Crown.

Tried before the Honourable Mr. Justice Cassels, at Halifax, N.S., September 23, 1918.

T. S. Rogers, K.C., and *T. F. Tobin,* K.C., for plaintiff.

H. McInnes, K.C., and *L. A. Lovett,* K.C., for defendants.

CASSELS, J. (March 11, 1919), delivered judgment.

This case was tried before me in Halifax on the 23rd September, 1918. There was a dispute as to the area of the land expropriated from the defendant. The Crown had tendered for the land as

containing an area of 44,000 square feet, and for the water lot 30,400 square feet. It was agreed at the trial that the parties would get together and ascertain the exact area.

On the 13th January last, a memorandum signed by counsel was filed, which reads as follows: "It "is hereby agreed between the parties that the area "of land expropriated from the defendant by the "Crown for the purpose of the Halifax Ocean Ter- "minals is 49,600 square feet, and that the area of "water also expropriated from the defendant con- "tains 30,400 square feet, a total of 80,000 square feet." This makes an additional area of 5,600 square feet of land, which at the allowance made by Mr. Clarke of twenty-five cents per square foot, would increase his allowance by the sum of $1,400.

The land in question is similar in character to that which formed the subject of litigation in *The King v. Wilson,*[1] decided by me. One difference between the two properties is that the defendants' property is situate nearly a mile further from the centre of the city and towards the south than the Wilson property. Another material difference is the fact that in the Wilson case, a business was being carried on by Mr. Wilson on the property expropriated and an increased allowance was made to him for the loss of his business property. The appraisers in that case allowed him thirty cents per foot for the water lot, to compensate Wilson on account of this loss of an operating business. In the present case no business was carried on by the defendant in the premises in question. I will refer later to the evidence on this point.

[1] (1914), 15 Can. Ex. 283, 22 D.L.R. 585.

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The property in question which has been expropriated is a property bounded on the west by the easterly side of Pleasant Street. It is said to have a frontage on Pleasant Street of 289 feet, and running down into the water to a considerable depth.

Situate on the property in question expropriated were two dwelling houses. The one on the north and nearest the esplanade is what is spoken of as the Ritchie house. The other situate between what is called the galvanized iron shed and the Ritchie dwelling house is what is known as the Neill house.

On the premises there was a considerable amount of crib-work, and also a wharf which was partly in existence at the time of the purchase by the defendant of the properties in question and subsequently extended.

The evidence furnished on the part of the defendants is of a very unsatisfactory character. No witnesses have been called to testify to the values except the evidence of the defendant, Adam B. Crosby.

The defendant Newman is a tenant of what is called the galvanized iron shed. His lease would expire on the 13th October, 1913. The expropriation was on the 13th February, 1913. Under the terms of his lease he was entitled, as compensation, to the sum of $300, and the payment of this sum to the defendant Newman does not seem to be questioned by any of the parties to the action, and I fix his compensation at this amount.

It is important to consider carefully the evidence of the defendant Adam B. Crosby. His method of arriving at the sum of $100,000 claimed by him, is based upon profits which he expected to make were

he to enter upon business in connection with these premises. I need merely refer to the cases of the *Pastrol Finance Association v. The Minister*,[1] *L. E. and Northern R. Co. v. Schooley*,[2] to show that the basis of valuation upon the probable profits of a business to be carried on on these premises in the future is an erroneous basis of arriving at the market value. I have to arrive to the best of my ability at the market value of the premises, to which would be added any loss to the defendant for his loss of business if he were carrying on business and turned out of the occupation of the premises by reason of the expropriation.

The date of the expropriation was the 13th February, 1913. The Crown have tendered the sum of $30,739. The defendant claims the sum of $100,000.

I quote from the evidence of Adam B. Crosby to show that these premises at the time of the expropriation were not being used by Mr. Crosby for the purpose of carrying on a business. He is asked by his own counsel, as follows:

"Q. Will you kindly tell me what your occupation "has been since the year 1908 or 1909? A. Well, "my occupation has been broker, ship and fish "broker, of Halifax, but I must say I have not been "very actively engaged since 1909.

He explains his reasons as follows:

"Q. Why have you not been actively engaged in "it since that time? A. Well, I was elected for "Parliament in 1908, and the sessions were very "long, and I was in Ottawa most of the time in "1909, 1910 and 1911. In 1911 I did not get away "from Parliament until in July.

[1] [1914] A.C. 1083.
[2] 30 D.L.R. 289; 53 Can. S.C.R. 416; 21 Can. Ry. Cas. 334.

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"Q. And since that time, 1911? A. Well, in "1911 I was very sick, in 1910 I was very sick, and "in 1911 I was pretty sick, and after the election I "was sick and was not practically in touch with "things till 1913. I was pretty sick.

Further on in cross-examination he is asked by Mr. Tobin the following questions:

"Q. You never carried on active business there "yourself (referring to the properties in ques- "tion)? A. I never did in particular. In fact, "the taking of that property, following my health "being bad, practically put me out of business.

"Q. And there has never been any active busi- "ness carried on in that neighbourhood? A. I "do not think in late years. They told me that "years ago there used to be a great deal of busi- "ness done there."

Apparently the defendant, Adam B. Crosby, bases his whole claim upon the fact that he would not sell for any price under the sum of $100,000.

It is important to ascertain what was paid for the properties, and I will quote from the evidence of the defendant in order to show this. In cross examination he puts it as follows. There were three properties purchased. The three comprising the properties expropriated and also a property upon the west side of Pleasant Street not expropriated, but which has been rented for about $600 a year. He states that the first of the three properties purchased was the iron shed. It is referred to as an iron shed as it has been partially covered by corrugated iron. "I would say that this purchase was "somewhere about 1904 or 1905." He is asked:

"Q. What did that include? A. That included "the iron shed and this wharf and all south of that.

"Q. It included the iron shed, the wharf, the "water lot and all south? A. Yes.

"Q. And did it include the property on the west "side of Pleasant Street? A. That was all in one purchase."

It should be stated that these properties were purchased at auction. There was apparently a liquidation proceeding. I mention this fact as having been purchased at auction under liquidation proceedings, it may not be a real test of market value, although of course it has a bearing. He is asked:

"Q. What did you pay for that property? A. I paid for that property $4,600."

It had a frontage on Pleasant Street of about 118 feet, roughly speaking. In addition included in this purchase was the property on the west side of Pleasant Street not expropriated, and he puts the frontage on the west side as of about 125 feet.

He is asked:

"Q. That had a large building on it; what was "the depth of the lot on the west? A. Going back?

"Q. Yes? A. I never measured that, but I am sure it is over 200 feet deep.

"Q. It had a very large building on it? A. A large stone building.

"Q. What sort of stone was it? A. I think "the front part was Amherst stone, but the other "was local stone. I am not sure about that, but "it looked to me like Amherst stone. I think the "other was perhaps local stone, and the end was "brick, and evidently put in temporarily."

It must be borne in mind that included in the $4,600 purchase was this property on the west side of Pleasant Street, not in question in this suit.

He states:

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"Q. You got all the cribwork to the east of the "iron sheds? A. Yes."

This comprised the first of the three purchases. It was purchased in 1904 or 1905.

He is asked:

"Q. When did you buy the next property? A. The "next property I bought was the Ritchie property.

"Q. That was immediately south of the esplan- "ade. A. In fact I was bargaining for those two "properties.

"Q. Tell me the next one you bought? A. I think "I bought the Ritchie property about 1906 or 1907.

"Q. That had a house on it? A. Yes.

"Q. What is the frontage of that lot on Pleasant "Street—about 60 feet is it not? A. I think so.

"Q. From whom did you buy that? A. From the "Ritchie estate. Mr. Langford was the man sold it "to me.

"Q. How much did you pay for that? A. $2,400, "I think; it might be $2,450, but between $2,400 and "$2,500."

This completed the Ritchie purchase.

With respect to the third purchase he is asked:

"Q. When did you buy the next lot? A. The "next one, I bargained for it some time along in "1907 or 1906. I bought that from Mr. McInnes.

"Q. That property had a frontage of 82 feet on "Pleasant Street? A. Possibly. . . .

"Q. 82 by 300 is the exact measurement shown "by your deed; is that right? A. Oh, well, that "would be right.

"Q. What did you pay for that? A. $3,000, I think."

These three sums of $4,600, $2,400, and $3,000 are the exact amounts paid for the three properties

and included, as I have stated, is the property on the west side, with a large stone building.

He further states:

"Q. You have told us what rental you got out of "the building on the west side of the street before "the expropriation, the old distillery itself? A. I "got $600 a year."

Mr. Lovett, for the defendant, objected to evidence being given in regard to the property on the west side of Pleasant Street as it was not the property expropriated. I allowed the evidence subject to objection, but I am of opinion that it was rightly received for several reasons. One being that this property was included in the purchase of part of the expropriated property for which $4,600 was paid, and it is necessary to get some idea of how much of this $4,600 was paid for that portion of the property lying to the west.

He is asked:

"Q. How do you arrive at the value of $100,000? "A. For my own business, in connection with my "own business I value that property. I said here "a moment ago that no man could buy it from me "for less than $100,000, because I felt that would "be the very least. I do not mean to say it is not "worth more than that, but I mean to say I could "make it a very valuable property to myself in my "own business. It would be worth $8,000 to $10,000 "to me in my own business."

This is only of course conjecture, as in point of fact he never carried on business on the property in question.

Mr. Crosby, in addition to his illness, was unfortunate in the loss of his financial man, Mr. Mason, who died in the year 1909. He is asked:

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"Q. I suppose you kept books of the property "showing what the property cost and what it "earned? A. I may say that after 1909 my finan- "cial man, Mr. Mason, died, and I must confess "that after that time I had a very hard time. I "had been looking for a man, but I had not really "a bookkeeper that kept my affairs, and I would "have been in much better position to come here "if I had had one, because my books in 1909 went "bad, and I had to pick up men off the street, you "might say, to come in and do my business.

"Q. You have no record of what the property "cost, or what its earnings were, or what you spent "on it? A. I can give you a good idea."

Referring to the Ritchie house, he states as follows:

"Q. Have you any documents in regard to it? "A. You see I moved away from my office some "three years ago, and it never occurred to me of "this coming up, but I can give you a good idea of "what it cost, and the man that built the L., for "instance, that I put on the Ritchie building, that "was built by Brookfield, and he can tell you what "it cost, and other works and repairs on the Neill "building and repairs on the shed."

Referring to the repairs on the shed, he says: "Nobody could tell that because I did it piece work, "according as I—"

According as I had money, he intends to say.

Mr. Crosby has not called Mr. Brookfield nor has he called anyone in support of his evidence of market value.

He is asked:

"Q. Who built the wharf? A. Mosher; you can "get him any time.

"Q. What did you pay for the wharf? A. I "think the addition I put on cost between $700 and "$800—not $800 I do not think.

"Q. That is what you paid Mosher? A. Yes. "The cribwork was done differently."

Mr. Mosher was not called as a witness by the defendant Crosby. Mr. Craig states the cribwork was done differently.

"Q. Who did that? A. Reid and Archibald.

"Q. What did you pay them? A. Something like "$500, and the truckage and that, that was done, "and the filling, that was another thing.

"Q. Who did that? A. Different ones.

"Q. Have you any record of that? A. We had a record.

"Q. Have you looked for it? A. Yes, I did, and "I found my books—you know when I moved my "books up I was not there."

The result is that the books were not forthcoming.

"Q. Take the Ritchie house. What did you pay "for the addition to that? A. $1,000 paid to Brook-"field for the L, and then we put in plumbing and "changed the plumbing.

"Q. What did that cost? A. I think it cost some-"thing like two or three hundred dollars. That is "the Ritchie property.

"Q. Did you spend any more money on the "Ritchie house, $2,000, and $200 plumbing? A. I "do not remember whether there was any shingling "done there or not."

This $2,000 is a mistake. It should be $1,000. If the $1,000 for the L, and the $200 for the plumbing are added to the sum paid for the Ritchie house it would make the total purchase price with the improvements the sum of $3,600.

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In regard to the money spent upon the iron shed, he states that he put a whole iron roof on it new. But he cannot tell what it cost. He says that Harris would probably remember, "but I am not sure "whether we had the whole property recovered with "iron on the top or not. I don't know."

"Q. Can you tell me what you spent or can you "not? A. No, I would not tell you definitely.

"Q. Do you think you spent $500? A. I am sure "I spent over $2,000."

Now, the total amounts of the expenditures made according to Mr. Crosby's evidence, including purchase price and improvements, amount to the sum of $14,400 inclusive of the property on the west side.

In regard to the statements as to the proposals for purchase made by different people, to my mind they are too vague and too indefinite to form the basis of any value in arriving at the market value of the property.

Nichols, in his book entitled "*The Law of Eminent Domain,*" 2nd ed., vol. 2, s. 454, p. 1195, states as follows:

"An offer to purchase the land at a certain price, "made by the party which subsequently took it by "eminent domain, is inadmissable to show market "value. It does not presuppose a willing seller "and a willing buyer, but is based upon the price "which a corporation, intending to take the land at "all events, is willing to pay to avoid the expense "of litigation and the chance of an excessive verdict "from an unsympathetic jury. An offer made by "a private party encounters none of these objec- "tions, and, in determining value outside of judi- "cial proceedings, the fact that an owner had re-

"ceived and rejected an offer of a certain sum would "doubtless be looked upon as material. Nevertheless, it is felt by some courts that evidence or "offers should not be received. It is, at most, a "species of indirect evidence of the person making "such offer as to the value of the land. He may "have so slight a knowledge on the subject as to "render his opinion of no value. Oral and not "binding offers are so easily made and refused in "a mere passing conversation, and under circumstances involving no responsibility on either side, "as to cast no light upon the question of value, and "they are unsatisfactory, easy of fabrication and "even dangerous. While all these objections might "not apply in every case it is thought best, by most "courts, to reject evidence of offers altogether."

After the best consideration that I can give to the case, I am of opinion that the tender by the Crown of $30,739 with the addition of $1,400 for the extra 5,600 feet of land and 10 per cent. added for the forcible taking, is very adequate and fair compensation for the property expropriated.

I think the evidence of Mr. Clarke and the others shows that they intended to deal liberally with the defendant. The Crown adheres to the tender, and I think that the defendant should be thoroughly satisfied with the amount allowed.

There will be judgment for the defendant, Adam B. Crosby, for the amount of $35,352.90, and also for $300 in favour of defendant Newman, with interest on both amounts from the date of the expropriation.

I think the defendants are entitled to the costs of the action.

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The question between Mr. and Mrs. Crosby as to what her rights will be in regard to dower, if not settled between the parties, will have to be referred, but I imagine that there will be no trouble in the defendants arriving at an agreement as to this.

Judgment accordingly.

Solicitor for plaintiff: *T. F. Tobin.*

Solicitors for defendants: *McInnes, Mellish & Co.*