

HENRY N. PAINT.....CLAIMANT ;

1890

AND

Mar. 24.

HER MAJESTY THE QUEEN.....RESPONDENT.

*Expropriation—Prospective capabilities of property—Value to owner—
Unity of estate—Advantage accruing to paper town from railway.*

In assessing damages in cases of expropriation, regard should be had to the prospective capabilities of the property arising from its situation and character.

2. In awarding compensation for property expropriated, the court should consider the value thereof to the owner and not to the authority expropriating the same.

Stebbing v. The Metropolitan Board of Works (L. R. 6 Q. B. 37) followed.

3. In assessing damages where land has been expropriated, the unity of the estate must be considered, and if, by the severance of one of several lots so situated that the possession and control of each give an enhanced value to them all, the remainder is depreciated in value, such depreciation is a substantive ground for compensation.

4. The advantage resulting to the owner of a paper town from the Crown making it the terminus of a Government railway, and constructing within its limits a station-house and other buildings, is one that should be taken into account by way of set-off under 50-51 Vic. c. 16, sec. 31.

THIS was a claim arising out of an expropriation of land at Port Hawkesbury, N.S., for the purposes of the Cape Breton Railway.

The facts of the case are fully set out in the judgment.

November 21st, 22nd, 23rd, 25th, 26th and 28th, 1889.

Henry, Q. C. for the claimant :

With the exception of a few lots, all the land within the township of Guernsey belonged to the claimant at the time of the expropriation. The unity of possession has been destroyed by the taking, because the whole harbor front of the proposed town is gone, and it is

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robbed of its principal feature in respect of its commercial value. It will no doubt be contended that the railway will be an advantage to the property, and that the court should, under *The Expropriation Act*, set off such advantage against the damage suffered by the claimant because of the expropriation. It has been decided, I think, in this court, that the term "advantage" as employed in the statute must be narrowed and confined to such advantage as is *special* to the claimant's estate and not such as is common to the lands of all the proprietors in the vicinity. Here the other proprietors within the township share whatever advantage accrues to the claimant from the railway, but the disadvantage resulting therefrom is special to the lots held by him. The lots, separated as they now are and cut off from access to the harbor-front, have lost most, if not all, the commercial value they formerly had.

As to the streets that were dedicated to the public prior to the taking, I submit that by such expropriation the claimant's title is revived in them. He holds the fee in them, and is entitled to compensation for the taking.

Maclennan, following for claimant, dealt with the question of claimant's right to damages for the loss arising from the severance of his property in view of its prospective value for shipping and commercial purposes. He cited thereon:—*Mayor etc., of Montreal v. Brown, et al.* (1); *The Queen v. Brown* (2); *Boom Company v. Patterson* (3); *Lyon v. Fishmongers' Company* (4); *Metropolitan Board of Works v. McCarthy* (5); *Duke of Buccleuch v. Metropolitan Board of Works* (6).

Borden for the respondent:

With respect to the streets, the Crown has substi-

(1) 2 App. Cas. 168.

(2) L.R. 2 Q.B. 630.

(3) 98 U.S. Rep. 403.

(4) 1 App. Cas. 662.

(5) L.R. 7 H.L. 243.

(6) L.R. 5 H.L. 418.

tuted a new road for the one expropriated, and, therefore, under the statute, no damage should be allowed on that head except in so far as the substituted way may not be as convenient as the old one. But, undoubtedly, the claimant here is not entitled to compensation in respect of the streets. He has parted with his possession of them and transferred it to the public. He could not apply them to any purpose inconsistent with his dedication of them to the public, and they are, therefore, practically valueless to him. (Cites *Stebbing v. Metropolitan Board of Works* (1))

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Then, with regard to the natural facilities of the place for utilization for commercial purposes, such facilities will lie dormant until the railway builds up the place and makes it a commercial centre. Moreover, it is so situated that no railway can be constructed there without injuring the water-front. This is an inherent natural disadvantage for commercial purposes, which must be considered as well as its natural advantages for such purposes.

Again, it must be held that the advantage accruing from the railway is special to the property of the claimant. With the exception of a few lots, all the land in the proposed town belongs to the claimant, and the benefit to him greatly exceeds the benefit to all the other proprietors put together.

Macdonald followed on the same side.

BURBIDGE, J. now (March 24th, 1890) delivered judgment.

The claimant claims from the respondent \$93,403.60, of which amount the sum of \$73,403.60 is alleged to be the reasonable value of certain lands of the claimant, situate at Point Tupper, in the County of Richmond and Province of Nova Scotia, expropriated for

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the purposes of the Cape Breton Railway, and the sum of \$20,000 to be the reasonable amount of damages to the residue of his lands in the vicinity of and adjoining those expropriated.

The lands in question are part of a property that the claimant caused to be laid out as the Town of Guernsey, and of which, in the year 1866, he filed a plan in the registry office at Arichat. Of the 237 lots into which the town was divided, he has sold 71 and mortgaged 149. These mortgages are, for the most part, in the form of deeds absolute upon their face; but it appears that the grantees have undertaken to reconvey to the claimant upon payment of their respective claims. In the seventy-one lots sold, I have included seven lots mortgaged in the manner mentioned to Wm. J. Stairs, and thirteen lots so mortgaged to Thomas F. Jenkins, both of whom have claims before the court in their own names in respect of such lots. The seventeen lots that the claimant still holds in his own name appear, by an admission of counsel filed in the case, to be subject to certain judgments recorded against him in the office of the registrar of deeds at Arichat. But, as neither the mortgagees (with the exceptions mentioned) nor the judgment creditors have appeared and filed their claims, there is no occasion, at least at present, to consider their rights to any portion of the compensation money that may be awarded to the claimant, whom I shall, for the purposes of this case, treat as the owner of one hundred and sixty-six of the said lots, of which five and portions of two others have been expropriated.

With reference to the use of the word "town," I ought, I fancy, at the outset, to guard against being misunderstood, and to state that Guernsey is a town upon paper and in name only. Its streets are not graded and for the most part are not indicated in any

way on the ground, and a large part of the land upon which it is expected that it may one day be built, is at present rough and uncleared. Apart from the marine hospital, the light-house, and the Canseau Marine Railway slip, and the houses and shops of a few of the workmen employed thereon, there were in 1888 very few buildings within the limit of the town.

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The questions to be determined are as follows:—

1. The amount of compensation to which the claimant is entitled for the value of the land expropriated, consisting of :

(a) Lots 1, 5 and 9 in Block "P," North Range, portions of lots 6 and 12 in Block "M," North Range, and the triangular Blocks "O," in the North Range, and "A," in the South Range, containing in the whole 66,473 superficial feet, or the equivalent of about $6\frac{2}{3}$ lots of the size adopted in laying out the town ; and

(b) A narrow strip of slopes lying between Nicholas and Paint streets and high-water mark, containing about 53,700 superficial feet, or $1\frac{2}{10}\frac{5}{10}$ acres.

2. Whether the claimant is entitled to more than nominal damages in respect of the expropriation of some eleven acres of the streets of the town, and of the highway leading therefrom to the Port of Hawkesbury.

3. Whether the claimant is entitled to damages in respect of the injurious affection of the remainder of the lots owned by him, none of which immediately adjoin the railway, and in respect of which there is no actual severance except in the case of lots 6 and 12 in Block "M," North Range, portions whereof were taken for a substituted street.

4. Whether the case falls within the rule prescribed by 50-51 Vic. c. 16, s. 31, that the advantages accruing or likely to accrue to the claimant or his property as

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well as the injury or damage occasioned by the public work was to be considered.

5. The amount of compensation that should be allowed in respect of any excess of disadvantage or damage over such advantages.

With reference to the value of the property expropriated there can be no doubt that regard should be had, as counsel for the claimant contended, to its situation and prospective capabilities (1), and that its adaptability for the purpose of a crossing-place from the Island of Cape Breton to the main-land is a circumstance which the owner has a right to insist upon as an element in estimating such value (2).

The value to be ascertained is, however, that which under such circumstances the property expropriated had in April, 1888, when it was taken for the purposes of the public work mentioned (3).

Applying the principles stated to the facts of the case, I assess the value of the property expropriated, of which in proportion to the area of that immediately adjoining Ship Harbor is considerably the more valuable, at \$6,250.

With reference to the streets, it will be seen from the evidence, that from the head of the harbor to McLean Street, the Minister, in pursuance of the provision of section 3 (*d*) of *The Expropriation Act* then in force, substituted another convenient road in lieu thereof. For the rest the case is governed by the case of *Stebbing v. The Metropolitan Board of Works* (4) in which, at page 42, Cockburn, C.J. says:—

The case, I think, is well illustrated by the instance suggested by my Brother Hannen. Suppose that a right of way exists over land, which prevents it from being built upon, and that a public body has powers conferred by statute to apply that land to some purpose inconsistent

(1) Mayor of Montreal vs. son, 98 U. S. Rep. 403.
 Brown, *et al.* 2 App. cas. at p. 185. (3) 50-51 Vic. c. 16, s. 32.
 (2) Boom Company vs. Patter- (4) L. R. 6 Q. B. 37.

with the right of way, could the owner of the property be admitted to allege that, although he could not apply the land to a profitable purpose, and although he lost nothing by being deprived of it, yet as it would be of some value in the hands of the public body, he was to receive compensation in respect of that value? the answer would be, that as compensation is to be given for the loss which has been sustained, he would be entitled to none because he had suffered no loss.

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The third question as to whether or not the claimant is entitled to compensation for any depreciation in value that the construction and proposed operation of the railway may have occasioned to the 160 lots of which he is still possessed, is, I think, settled by the case of *Cowper Essex v. The Local Board for Acton* (1) where it is said that in such cases the unity of the estate must be considered, and in which Lord Watson expresses the opinion that if several pieces of land, owned by the same person, are so near to each other and so situated that the possession and control of each give an enhanced value to all of them, such lands are held together and if one piece is compulsorily taken and converted to uses which depreciate the value of the rest, the owner has a right to compensation.

It is not denied that the property as a whole is benefited by the construction of the railway. On this point the witnesses, speaking generally, agree. But it is said that the advantages accruing therefrom are common, at least, to all the owners of lots in the Town of Guernsey, and therefore ought not to be considered for the purpose of cutting down the damages to which the claimant would otherwise be entitled. It is true, I think, that the enhancement in value resulting from the construction and proposed operation of the railway is common to all the property in the town, but such benefits may, nevertheless, fall within the rule as to special, as contradistinguished from general, advantages (2). Here

(1) 14 App. cas. 153.

(2) *Sutherland on Damages*, vol. 3, p. 454.

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again, I think that the unity of the estate should be regarded. The claimant is the founder of the town. He still owns, or is interested in more than two-thirds of the lots into which he has divided it. The Government makes it the terminus of the Cape Breton Railway, and constructs, within its limits, stations, freight-sheds, round-houses, wharves and all the works usually found at a terminus. That certainly is an advantage, and I think a special advantage to the claimant and to the property. If the Act to which I have referred does not apply to such a case, it would, I think, be difficult to suggest a case to which it would apply.

With reference to the amount of compensation that should be allowed to the claimant in respect of the excess of disadvantage or damage over the advantages, the case is not free from difficulty.

The appropriation of the entire shore along Ship Harbor, and the cutting off of the rest of the town from access to the harbor, are the circumstances that contribute most to the depreciation of the value of the part of the property not expropriated. This circumstance does not, however, affect all such property equally, as part of it is situated at a considerable distance from the harbor, and part on the Straits of Canseau.

It will be seen too that the Crown has, in pursuance of the Act 52 Vic. c. 38, s. 3, undertaken to construct two crossings from the street south of the railway to high-water mark, by which the residents of the town will be able to obtain access to the harbor. This is, of course, a measure of relief, but I agree with Mr. Henry that it falls far short of obviating the disadvantages complained of.

Another circumstance contributing to the depreciation of the value of the property mentioned is the fact that the substituted highway from the head of the



harbor to McLean street, to which I have referred, has at one place a steeper and more difficult grade than had the highway for which it was substituted. This is another element to be considered in assessing damages in the case (1).

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Since the location of the railway at Point Tupper a few lots have changed hands, and at prices in excess of those formerly obtained, and there is other evidence tending to the view that, notwithstanding the serious disadvantages to which I have referred, the advantages accruing from the construction of the railway are such that on the whole the value of property at Point Tupper has not been lessened by such construction, in the manner mentioned. I am not sure, however, that, up to the time of the trial, the effect of the necessary appropriation by the Government of the shore front of Ship Harbor for the purposes of the railway had been fully appreciated, and I am, on the whole, disposed to think it fair to allow the claimant reasonable damages. In doing this, I am fully aware that the near future may show conclusively, what is now a matter of conjecture, that so far from depreciating the value of the claimant's property the railway enhances it, and for that reason I think I should be careful not to allow damages in any way excessive.

As I have stated the claimant owns or is interested in about 160 lots, the average value of which Kenneth Morrison, one of the witnesses called by him, stated to be \$100, giving for the whole a value say of \$16,000. I do not overlook the fact that the credit to be given to Morrison's opinion is greatly weakened by the fact that he estimated the damages to this property, apart from the land taken, at \$30,000; but on the whole I accept his valuation of the lots, though probably somewhat excessive, as a not unreasonable basis upon which

(1) *Caledonian Railway Company v. Walker's Trustees*, 7 App. Cas. 259.

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to calculate the damages to which the claimant is entitled, and which I assess at \$2,000.

In the views that I have expressed as to the amount of compensation that should be awarded for the property expropriated and for such damages, Mr. Compton, who sat with me as assessor, and who had, with me, the advantage of hearing all the witnesses and of viewing and inspecting the premises, concurs.

There will be judgment for the claimant for \$9,223.50 (in which sum is included interest), and a declaration that he is entitled to have constructed the two crossings mentioned. He is also entitled to his costs.

*Judgment for claimant with costs.*

Solicitors for claimant : *George Irvine and Donald Macmaster.*

Solicitor for respondent : *Wallace Graham.*

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