IN THE MATTER OF THE PETITION OF RIGHT OF

ANN SYMONDS, FANNIE SYMONDS, LOUISE R. SYMONDS, ELIZABETH S. NEALES, RICHARD JOHN SYMONDS, CHARTERS JAMES SYMONDS, IVY S. KELSEY AND J. ROY CAMPBELL..... SUPPLIANTS; 1903 May 4.

AND

HIS MAJESTY THE KING..... .....RESPONDENT.

Expropriation—Actual value—Compulsory taking—Compensation.

In expropriation cases where the actual value of lands can be closely and accurately determined, a sum equivalent to ten per centum of such actual value should be added thereto for the compulsory taking; but where that cannot be done, and where the price allowed is liberal and generous, nothing should be added for the compulsory taking.

PETITION OF RIGHT for compensation for lands on the harbour front of St. John, N.B., expropriated for the purposes of certain public works of Canada, and for damages arising from the severance of such lands.

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

April 15th and 16th, 1903.

The case was heard at St. John, N.B.

G. C. Coster and *J. Roy Campbell* for the suppliants;

E. H. McAlpine, K. C. for the respondent.

THE JUDGE OF THE EXCHEQUER COURT now (May 4th, 1903) delivered judgment.

The petition in this case is filed to recover compensation for certain lands of the suppliants, and others, situate on the harbour front of the City of Saint John

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in the Province of New Brunswick, which were on the 27th of April, 1899, taken by the Crown for the purposes of certain public works that have been constructed there, and for damages for the severance of such lands held by the suppliants in connection therewith.

On the property in question there was many years ago a wharf known as the Saint Helena wharf, which was carried away in 1868 or 1869 by what is known as the Saxby gale. At that time the wharf was out of repair, and since then and until the present year the property has been unproductive. It has, however, been held by those who controlled it at a figure of about eight thousand dollars; although there has in the meantime been no offer for it, that would establish or sustain any such price.

The property, as a whole, had a frontage on the harbour of Saint John of 304 feet. Its depth at the east end facing the Long Wharf Slip was 26½ feet; its depth at the west end was 94 feet; and the length of the other or inshore side was 308 feet. Of the property, a part on the westerly side of it, 70 feet wide, is by the agreement of the parties hereto, but for the purposes of this case only, to be taken as being subject to an easement in favour of an adjoining property that depreciates the value of the fee in that portion by one half; that is, it is agreed that the property as a whole is to be here dealt with as though the frontage on the harbour were 269 feet, instead of 304 feet; and as though its total area was 15,220 square feet instead of 18,220 square feet.

Of the frontage on the harbour of 269 feet the Crown has taken 64 feet; and of the area of 15,220 square feet 1,920 square feet have been taken.

On the advice of valuators appointed by the Crown the suppliants have been tendered the sum of seven

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hundred and twenty dollars ($720), of which amount the sum of four hundred and eighty dollars ($480) was understood to represent the value of the land taken, and the balance of two hundred and forty dollars ($240) the damages arising from the severance The amounts were arrived at in this way: The valuators came to the conclusion that the land was worth twenty-five cents per square foot, and they added fifty per cent. thereto to cover damages to what was left to the suppliants arising from the severance.

The question to be determined is whether the amount that was tendered is sufficient or not; and if not, what amount should be allowed?

From 1891 to 1898 the property was assessed at a value of $800; since then at $1,600, and no reduction has been made in the assessment because of the expropriation of part of it. In the present year the part of the property that was not taken has been let at a rental and upon terms that would, according to the rule followed by the assessors, give a value to that portion for the purposes of assessment of about $4,000. No one pretends to say that the property doubled in value in the year 1898, or that its value was not diminished by the expropriation of part of it; or that the present assessment judged by an actual transaction occurring in this year is not altogether too low. So that it may be taken that in this case at least the assessment affords no assistance in answering the question that has to be determined.

The valuators chosen by the Crown to value the lands in question and other lands, and to estimate the damages arising from their expropriation are men of standing and character whose opinions are entitled to great consideration. But they were acting for the Crown with a view to advising the responsible minister, and were not in the position of valuators chosen

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by both parties. Indeed in the present case it is not at all clear that they sought for and obtained any information from the suppliants about the value of the lands in question or the damages resulting from severance. They arrived approximately at their conclusions by reference to values that they put on adjacent lands. There is no objection to that if sufficient attention is given to differences of situation and condition. They allowed nothing for the compulsory taking; and they ascertained the damages by adding one half to the estimated value of the land taken. With regard to an allowance, which is now usually put at ten per centum, for the compulsory taking, I am of opinion that it should only be added in cases where the actual value of lands can be closely and accurately determined. Where that cannot be done, and where the price allowed is liberal and generous there is, I think, no occasion to add anything for the compulsory taking. In the present case, for reasons that will appear later, I think the value of twenty-five cents per square foot which the valuators put on the land taken was too low.

Then with regard to damages. I am ready to admit that they may sometimes be fairly enough estimated by adding, as the valuators did in this case, one-half to the value of the land taken, but the principle is wrong, and it it only by chance that in some cases the rule works out correctly and justly.

But the greatest mistake, which in the view that I take of this case, the valuators made was to ascertain the value of the land taken by reference to superficial area alone, and without reference to the frontage on the harbour. Mr. Grant, the chairman of the valuators, very frankly admitted that in ascertaining the value of a property such as that in question here, the area alone is not a fair criterion; and that frontage is the

more important consideration, if the depth is sufficient to make the property available for wharf purposes; and he adds that the valuators looked at it in that way. But I cannot see that they gave any effect to any consideration of that kind. Of course a property might be so narrow that the frontage itself would be lessened greatly in value. But in the present case it appears that even at its narrowest point the width is sufficient to make the frontage available for wharf purposes. The property as a whole (taking it as it has been agreed that it should be taken for the purposes of this case) had one foot of frontage for every 56 square feet of area; the portion that is left to the suppliants has one foot of frontage to every 65 square feet of area; while the portion that was taken has one foot of frontage for every 30 square feet of area. Obviously if one gives, as I think he ought to give, some weight to the element of value derived from frontage the portion taken had relatively a greater value per square foot than the property as a whole, or the portion of it that is left. Then with regard to the valuators, it is, I think, fair to say that their opinion is not, because they were employed by the Crown as valuators, entitled to any greater weight than would otherwise attach to it, if they had had an opportunity or occasion to form a judgment on the matter. The value of their testimony given in this court under oath depends upon their character, good judgment, and the opportunity they had for forming an opinion in the matter. And the evidence that they gave and the opinions that they expressed have to be considered and weighed in connection with the opinion of the witnesses also given under the sanction of an oath, and whose characters, judgment and opinions may equally be entitled to the consideration of the court.

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Of that class of witnesses the suppliants have called three, all of whom are men of high character, good judgment and great business experience. That they should differ so widely from the valuators whom I have mentioned and from each other only goes to show how unsatisfactory the best opinion evidence may be in cases such as the present. Of these witnesses, Mr. John E. Moore put the value, in 1889, of the land taken at $1,000 ; and he did not think there were any damages resulting from severance. In that view he stands alone. All the other witnesses on both sides that spoke of the matter agreed that there were damages occasioned by the severance; and there can, I think, be no doubt, that there were such damages. Mr. James S. Gregory put the compensation, including damages at $3,000, and Mr. W. H. Thorne at $4,000 at the least. The two estimates last given are based on an estimated value of the property in the year 1899 of $8,000 ; and although that was the price at which it had been held, it exceeded, I think, its fair value in the year mentioned. At the same time I do not fail to see how Mr. Gregory and Mr. Thorne, looking at the property from the standpoint of those who were financially strong enough to hold it for their price, might reasonably entertain the view that they held. It appears, however, that Mr. Coster, acting for the suppliants, made an offer to let the Crown take the whole property at the price of 37½ cents per square foot, which he understood the valuators had fixed as the value of that taken. That would give a value for the whole (limited as stated for the purposes of this case) of an amount between $5,500 and $6,000. On the whole I am inclined to think the smaller sum of $5,500 very fairly represented the value of this property in 1899 ; and that what was left to the suppliants had a value of about $4,000 ; the difference

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between these two sums giving for this case the fair measure of compensation for lands taken and for damages, viz. about $1,500.

Apart from the opinion evidence proof was made, as has been stated, of a transaction occurring in the present year with respect to the portion of the property remaining to the suppliants that would show its present value to be about $4,000. It also appears that since 1899 there has at Saint John been some advance in the value of property such as this is. It further appears that the property as a whole with 269 feet frontage would have brought a higher rent, and have been more valuable relatively than the portion which was the subject of the lease mentioned. That is, that the portion of the property left to the suppliants in 1899 was diminished in value by the severance that took place; but that it has more or less recovered its original value by the general advance in values arising from the increased business of the port and the works which the Crown has constructed. But there is nothing by which those two elements of value acting as they do in opposite directions may be measured; and it seems to me that the only course to adopt is to eliminate both as being approximately equal, though that probably is to the disadvantage of the suppliants. Disregarding then the two elements mentioned and taking the present lease as giving a value in 1899 for the portion not taken of $4,000, and applying that to the frontage and to the areas respectively, we get approximately a value per square foot of 30 cents; and per foot of frontage of $19.50. If we take area as a criterion we would get a value for the 1,920 square feet taken of $576.00. If we take frontage as the criterion we would find the value of the portion taken to be $1,248. But it would not, it seems to me, be fair to take either area or frontage alone, and the true value is to be found

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somewhere between these two amounts. If equal importance is attached to each of the two considerations, that is, if one-half of the sum of the amounts mentioned is taken, we get as the value of the land expropriated a sum of $912, and if to that we add ten per cent. for the compulsory taking we get approximately the amount at which Mr. Moore fixed the value in 1899, namely, $1,000. To that amount I would add a sum of $500 for damages for severance. That gives the same result as was arrived at by taking the value of the property, as a whole, in 1899, to be $5,500, and the value of what was left after the expropriation to be $4,000.

There will be judgment for the suppliants for one thousand five hundred dollars, with interest at six per centum per annum from the 27th day of April, 1899, and with costs.

It appears that all the parties having an interest in the compensation money to be paid in this case have not been joined as suppliants, and it was agreed that it should be a condition of the judgment that the amount thereof should only be payable to the suppliants upon giving to the Crown a sufficient release from any persons other than the suppliants having, at the date of the expropriation, any interest in or claim to the lands mentioned.

Judgment accordingly.

Solicitors for suppliant: *G. C. Coster and J. Roy Campbell.*

Solicitor for respondent: *E. H. McAlpine.*