THE STRAITS OF CANSEAU MARINE RAILWAY COMPANY..... } PLAINTIFFS; 1889 Nov. 18.

AND

HER MAJESTY THE QUEEN..... DEFENDANT.

Expropriation of land for Government railway—Increased risk from fire by operation of railway—Damages.

The plaintiffs were owners of a water-side property upon which they operated two marine railways. A portion of this property was expropriated for the right of way of a Government railway, the track of the latter being situated in such close proximity to the plaintiffs' works that the works, as well as ships in course of repair upon them, would be in danger of taking fire from locomotives when the Government railway was put in operation. In consequence of this increased risk from fire it was shown that plaintiffs would have to pay higher rates of insurance upon their works than they had theretofore paid, and that ships might, for the same reason, be deterred from using the marine railways.

Held:—That the damage resulting from such increased risk from fire was a proper subject for compensation. *Duke of Buccleuch* v. *Metropolitan Board of Works* (L.R. 5 H.L. 418), and *Cowper Essex* v. *The Local Board for Acton* (14 App. Cas. 153) referred to.

2. Where lands are taken and others held therewith injuriously affected, the measure of compensation is the depreciation in value of the premises damaged assessed not only with reference to the injury occasioned by the construction of the authorized works, but also with reference to the loss which may probably result from the nature of the user.

THIS was a claim for compensation arising out of an expropriation of land belonging to plaintiffs at Port Hawkesbury, N.S., for the purposes of the Cape Breton Railway, and for damages suffered by them in respect of their use and occupation of other property.

Ross for the plaintiffs;

Graham, Q.C., for the defendant.

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BURBIDGE, J., now (November 18th, 1889) delivered judgment.

The plaintiffs are the owners of marine railways situated at Port Hawkesbury, or Ship Harbor, in the County of Richmond and Province of Nova Scotia. For the purpose of such railways they acquired, in the year 1863, the fee of a property situated upon the harbor above mentioned, and a grant from the Crown of a water-lot adjoining such property. The water-lot is five hundred feet wide, and extends out into the harbor eight hundred feet; the property referred to, including a road sixty-six feet in width reserved thereout, forms substantially a square, of which each side is five hundred feet in length. Excluding the reserved road, which runs parallel to the shore of the harbor and divides the property into two nearly equal parts, it contains about five acres. For the water-lot the plaintiffs paid (in old currency) fifty dollars, and for the other property five hundred dollars.

Between the years 1863 and 1866 the plaintiffs constructed upon their property two marine railways or slips. The track of the larger of the two was 650 feet in length, and there was operated thereon a cradle 208 feet in length. It was built to accommodate vessels of a tonnage of 1000 tons, but ships of 1200 or 1400 tons could, it appears, be safely placed thereon.

The smaller railway had a shorter track and carried two cradles, each of which was originally intended to accommodate vessels of two hundred tons register. In making some repairs, however, the inshore cradle was shortened as it was longer than was required for the class of vessels using it, so that at present it is 74 feet in length; the length of the outer cradle being 103 feet.

In the year 1885 the larger track was damaged by heavy drift ice, which striking against it, caused a

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twist therein commencing at a distance of 468 feet from the upper end thereof and extending from that point one hundred and twenty feet. Since then the injured portion of the larger track has not been used. The cradle upon this track has also suffered injury from a like cause. In the year 1887 it was struck by floating ice and the outer portion thereof so injured that it was found necessary to cut off 48 feet therefrom, reducing its length to 160 feet, and since then no ship of more than 500 tons register has been taken up on this slip.

The larger railway was constructed for a life of sixteen years, and the smaller for a life of twenty years. The former cost $31,588.32, and the latter $14,747.22. Both have from time to time been repaired, and are still operated.

The larger track, however, requires extensive renewals and repairs, the cost of which was, in 1884, estimated by Mr. Crandall at $10,000, and, in 1885, by Mr. Yorston at a few hundred dollars less than that sum. In giving his evidence in this case, Mr. Crandall said that, apart from its being affected by the Cape Breton Railway, he thought it would now take about $15,000 to put the large railway in a good condition for fifteen years. The making of these repairs has been deferred from year to year, the plaintiffs preferring,—

To continue working the slip as far as practicable, and in the meantime to negotiate with parties for the disposition of the company's property at Port Hawkesbury, subject to the consent of the stockholders.

The weekly returns of the vessels placed on the slips are incomplete, but Mr. Ross, as a part of his argument, favored me with a statement made by the secretary of the company, showing the number of such vessels, and their tonnage, for the years 1873 to 1888, inclusive, with the exception of the year 1884. I have been able from

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the returns in evidence to complete such statement in respect of the year 1884, and in part to verify its correctness in other respects. From this statement, which may, I think, be taken as approximately correct, it appears that, during the sixteen years mentioned, there have been upon the two slips 2289 vessels, representing a total tonnage of 168,378 tons, or in other words an average of 143 vessels per year, in tonnage a fraction less than 74 tons each.

With reference to this question of tonnage, there are in evidence no returns for the years 1873, 1875 and 1878 and only partial returns for the years 1879 and 1883, but from such partial returns and the returns for the other years it appears that during the period mentioned there were upon the slips 51 vessels, the tonnage of which, respectively, exceeded 200 tons. Of these, 33 were above 200 tons register and under 300; 12 above 300 and under 400; 2 above 400 and under 500; 1 above 500 and under 600; 2 above 600 and under 700; and 1 above 800 and under 900 tons register. The latter, the *Worcester* of the Boston line of steamships (the register tonnage of which is given in the returns as 865 tons, and the gross tonnage by Mr. Morrison as 1400 tons), is the largest vessel that has ever been upon the plaintiffs' railways.

The total earnings of the two slips or railways have, in the twenty-four years from 1865 to 1888, both inclusive, amounted to $98,317.36, and the total disbursements for working expenses, renewals and repairs, during the same time, to $67,824.22. Dividends were paid in the years 1866, 1870, 1871, 1872, 1873, 1874, 1878, 1879, 1881 and 1883. In the years 1873 and 1874, dividends of eight per centum were so paid, and in the year 1881 one of two per centum. These were respectively the largest and smallest dividends paid. In all there has been so paid to the shareholders in dividends

the sum of $22,462.79, representing an average yearly dividend a small fraction in excess of two per centum on the paid up capital stock of the company, which amounts to $45,000.

In the year 1888, the Minister of Railways and Canals expropriated for the purposes of the Cape Breton Railway a portion of the plaintiffs' property at Port Hawkesbury and of the reserved road before mentioned containing 1.77 acres, and, deeming it advisable so to do, in pursuance of *The Expropriation Act* notified the Registrar of the court of his readiness to pay the sum of $6,000 as compensation for the portion of land so expropriated, and for all damages arising from, or in connection with, the taking of the said land.

The usual notice being published, the plaintiffs filed a statement of claim. The answer of the Crown thereto, and the plaintiffs' reply to such answer, complete the pleadings. There is also a claim in respect of the reserved road mentioned filed by Henry N. Paint, but as the plaintiffs abandoned any claim, in respect to the same and Mr. Paint did not appear on the hearing, the question of the Crown's liability in respect thereof has not been considered in this case. Any rights which Mr. Paint may have are reserved to him.

In the first place, the plaintiffs alleged that they were the owners in fee of the portion of land so expropriated. This the Crown denied, and set up the reservation of the right of way in the deed from Peter Ross and Henry N. Paint to the plaintiffs. In reply the plaintiffs admitted the reservation, but claimed title by possession. On the trial it was admitted that the plaintiffs' title was subject to such reservation. I find, therefore, that the plaintiffs are, subject to such reservation, entitled to compensation for the value of the land expropriated.

The plaintiffs also allege that their property is in-

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juriously affected by such expropriation, and by the construction and proposed operation of the railway, the particulars of which are stated in the fifth paragraph of the statement of claim in clauses lettered from (a) to (m).

It is alleged that all access to the plaintiffs' works from the rear or land side is totally cut off (a). To remedy this the defendant offers to construct a crossing. At the time of the hearing, the Cape Breton Railway was not completed, but Mr. Donkin, the resident engineer in charge of the construction thereof, explains how it was proposed to complete this crossing, which had then been commenced. There will be an order for its construction if it is not already completed. This, I think, will minimize but not provide against all inconvenience arising in this respect from such severance. For the rest damages must be allowed.

It is also alleged that all extensions of the plaintiffs' works on the rear or land side of their property are now rendered impossible (b). In this connection it will be convenient to consider the allegations contained in clauses (g) and (h) of the 5th paragraph of the statement of claim.

Owing to the damage from ice to the cradle upon the large track it was proposed to lengthen the track on the land side some fifty-five or sixty feet so as to make it possible to draw the cradle, when placed in winter quarters, that much farther out of water. For this purpose Mr. Crandall, who constructed the works, and who is an expert in such matters, thought at first that it would be necessary to excavate a portion of the bank now occupied by the railway ; but, upon measuring the distance from the head of the large track to the edge of the railway embankment, he found that he could get the required number of feet without excavating if the engine-house and machinery were

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placed on the side of the track. As to that, it would in any event have been necessary to remove the engine-house and machinery; and, in his opinion, even at an increased expenditure, it would be better to have the new engine-house and machinery placed at the side than at the end of the track. As to the difference in cost Mr. Crandall thought the construction of the engine-house and machinery on the side of the track would cost some $2,500 more than at the end of the track, while the excavation at the end would involve an expenditure of $1000 more than at the side, giving an increased cost for the side location of $1,500. Mr. Crandall estimated that the excavation at the end of the track would cost about $1,500. Mr. Donkin, however, places the cost of such excavation at $3,000. He is acquainted with the nature of the soil, and made his estimate from measurements. If he is right in this, and I think in such a matter he is the safer guide, even in the matter of cost the side location has the advantage over the end location. Another course suggested to give the extra fifty-five or sixty feet of track out of the water, was in renewing the track to raise it 3 feet. But this would increase the danger from ice, and necessitate the construction of breakwaters as a protection therefrom. It was clear from the evidence that such a means was not necessary to secure safe winter quarters for the large cradle.

The smaller track is, however, more directly affected. The railway embankment covers a few feet of the land end thereof, and, by reason of the proximity of the railway, the plaintiffs will be deprived of the use of some thirty or thirty-five feet of that portion of the smaller track that is out of water. It is clear that there is no way to remedy this evil and to secure an equal number of feet of track out of water, if they are necessary to the convenient and profitable use of the slip, except

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by raising this track two feet or two and one-half feet. That would cost about $3,850, and would not be a very considerable matter if it did not happen that the track so raised would be more exposed than it is now to the heavy drift ice and would need to be protected by breakwaters, the cost and expense of maintaining which would amount to a large sum—estimated by Mr. Crandall at $7,000. There is, however, evidence that would justify the conclusion that, notwithstanding the interference of the railway with the smaller track, it is still capable of being worked to the full capacity required of it without any raising of the tracks. This would, I think, clearly be the case if the jib-booms of vessels using the slip were rigged in when two of the larger size were upon it at the same time, except perhaps in the event of the company having occasion to place a vessel on each cradle when in winter quarters. But I agree with Mr. Ross that the necessity of adopting any such expedient has a tendency to interfere with, or render less profitable, the business of the marine railway, and therefore depreciates the value of the property.

There is no evidence that up to the date of the hearing of the case the railway had prevented the plaintiffs using at the same time the two cradles on the smaller track for any business that had offered, and I assume that they will not incur the large expenditure which I have mentioned unless the business of the railway actually calls for it. In this connection I should mention that between the retaining wall of the railway and the northerly line of that portion of the land expropriated which is immediately in the rear of the plaintiffs' works, is a strip of land a few feet wide for which the Crown has no use and which it offers to reconvey to the plaintiffs. There will, in pursuance of such offer, be an order for such reconveyance.

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With reference to the allegations contained in clauses (b), (g) and (h) of the 5th paragraph of the statement of claim, I am of opinion that in any view of the matter, and whatever expedients may be adopted, the interference with the plaintiffs' property and the profitable use of it is substantial, and the depreciation in its value resulting therefrom very considerable.

It is also alleged (c) that the land of the plaintiffs in rear of the portion expropriated is rendered totally valueless to the plaintiffs, the severance preventing the plaintiffs from utilizing the same in connection with their business. To this the defendant answers, as the fact is, that the plaintiffs' land in rear of the portion expropriated was, previous to the expropriation, severed from the plaintiffs' works by the reserved road before mentioned. There is no proof of any special damage to this portion of the plaintiffs' property, and I think it is not injuriously affected except as a portion of the property as a whole.

It is also alleged (d) that, by reason of the excavations for the railway, the water supply for the plaintiffs' steam boilers, which is obtained from a well in the rear of the machine-shop, has been diminished in quantity and made full of sediment, working great injury to the plaintiffs' boilers; and (j) that it will be necessary to sink new wells. These allegations are denied by the defendant, and are not sustained by the evidence.

It is also alleged (e) that the severance of the plaintiffs' property will prevent the plaintiffs from collecting surface water in the spring, as was their custom, to be used in clearing the ice from under the cradles and upon the track. The defendant offers to lay a pipe under the railway track to conduct such surface water from the plaintiffs' lands to their works, which will, I think, obviate the difficulty. There will be an order for the laying of such pipe.

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The allegations as to the injury that will probably be occasioned to the chimney built on plaintiffs' property by the running and shunting of trains (f) are denied, and are not supported by any evidence.

It is also alleged ((i) (k) and (c)) that the operation of the railway in such close proximity to the plaintiffs' property injuriously affects the same, for the reasons that it will be necessary to incur expense in taking additional precautions against fire; that the rates of insurance upon their property and upon vessels using the slips will be increased, and the owners of vessels will be deterred from using the slips for the repair of the same. The defendant denies that the passing and use of engines and trains on the said land, as they will pass and be used, will increase the risk from fire either to plaintiffs' works or to ships, and sets up, by way of demurrer, the defence that such matters are not, in law, proper subjects for compensation. As to that, I think, the law is to the contrary. I have always understood the rule to be that where lands are taken and others held therewith are injuriously affected, the measure of compensation is the depreciation in value of the premises damaged, assessed not only with reference to the damage occasioned by the construction of the authorized works, but also with reference to the loss which may probably result from the nature of the user. That is the rule laid down by Mr. Cripps in his treatise on the *Principles of the Law of Compensation* (1) upon the authority of *re Stockport, &c., Railway Co'y* (2) and *Buccleuch* v. *Metropolitan Board of Works* (3), and it is affirmed in a late case in the House of Lords,—*Cowper Essex* v. *The Local Board for the District of Acton* (4).

On the question of fact I find that an increase risk from fire will be occasioned to the plaintiffs' property,

(1) Pp. 124, 125.
(2) 33 L. J. Q. B. 251.
(3) L. R. 5 H. L. 418.
(4) 14 App. Cas. 153.

and to vessels using the same, by the operation of the Cape Breton Railway.

The plaintiffs also allege (m) that the alterations that it will be necessary to make in their works by reason of the construction of the railway will occupy considerable time, and that a loss of profits during the time so occupied will result. This allegation is not, I think, sustained by the evidence except in respect of the raising of the tracks of the smaller railway, if that should be found necessary, to which reference has already been made.

Before considering the question of the amount of compensation that should be assessed in favor of the plaintiffs, it will, I think, be convenient to come to some conclusion as to the value of the property as a whole at the date of the expropriation. The property had been acquired and the works constructed by the plaintiffs at a total cost of about $48,000, and with any reasonable deduction for depreciation could not, I think, under ordinary circumstances, have exceeded in value, in the year 1888, the sum of $30,000. In view of the damages that had been done to the company's railways by ice, and the evidence in respect to their condition, and the business which they had done or was likely to be done upon them, I am satisfied that, for the purposes of assessing the compensation in this case, it would be fair to fix such value at twenty-five thousand dollars. In that estimate Mr. Compton, who acted as assessor, entirely concurs. It exceeds by $10,000 the sum which Mr. Crandall says he would have given for the property if it had not been affected by the railway.

The plaintiffs claim $65,000 damages. The defendant tenders $6,000 as a full compensation, and, in addition to other matters of defence that I have mentioned, sets up that the plaintiffs' property is benefited by the construction of the railway. In support of that view Mr.

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Graham relied, in part, upon an expression of opinion occurring in the report of the directors of the plaintiff company for the year 1887, in which they state that:—

> During last season contracts were made for a pier to be constructed at Point Tupper for railway purposes which will be completed coming season, the tracks as laid out pass through the company's property which is contiguous to the proposed terminus, and when completed must enhance the value of the same materially.

It does not appear, however, whether in the view of the directors this enhancement in value would be occasioned by any special advantages resulting to the property from the construction of the railway, or from considerations affecting in common all the property in the neighborhood. There is, however, some evidence that the railway is likely to be of special benefit to the property in question by facilitating the transmission thereto of the timber needed for the plaintiffs' works, and for the repairs of vessels resorting thereto.

Mr. McKeen, the Government valuator on whose valuation the tender of $6,000 was made, says that Mr. Ross, the President, and Mr. Twining, the Secretary, of the company, at the time he attempted to arrange with them, demanded $10,000, and that Mr. Twining said they would accept that amount. With reference to this, Mr. Twining states that what Mr. Ross and he told Mr. McKeen was that if the latter would put his valuation of damages at $10,000 they would recommend the company to accept that amount, but, he adds, that this took place before the construction of the railway, and that he did not know at the time that it was so near the smaller track.

On the whole, I am, after a careful examination of the evidence and arguments of counsel, and from an inspection of the premises, inclined to the opinion that the sum of $10,000 would constitute a liberal indemnity to the plaintiffs for all damages that have been, or

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are likely to be, occasioned to their property by the expropriation of the portion thereof referred to, and by the construction and operation of the Cape Breton Railway. In this view Mr. Compton also concurs. To that sum should be added $753.34 for interest from 16th August, 1888. There will be judgment for the plaintiffs for $10,753.34, and costs to be taxed.

In addition there will be an order for the construction of the works to which I have referred, and for the reconveyance to the plaintiffs of the strip of land mentioned.

Judgment for plaintiffs with costs.

Solicitors for plaintiffs : *Ross, Sedgewick & Mackay.*

Solicitor for defendant : *W. Graham.*