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 April 2.

DAVID FALCONER, THE YOUNGER, AND  
 CONRAD G. OLAND, ASSIGNEES OF  
 DAVID FALCONER IN TRUST FOR HIS  
 CREDITORS.....

} CLAIMANTS;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

*Expropriation of land—50-51 Vic. c. 17—Value for building purposes—  
 Sales of similarly situated properties—Crossings.*

When lands possess a certain value for building purposes at the time of expropriation, but that value cannot be ascertained from an actual sale of any lot or part thereof, the sales of similar and similarly situated properties constitute the best test of such value.

2. There is no legal liability upon the Crown to give a claimant a crossing over any Government railway, and where the Crown offered by its pleadings to construct a crossing for claimant, the court assessed damages in view of the fact that there was no means of enforcing the performance of such undertaking. (See now 52 Vic. c. 38 s. 3.)
3. Where claimant, for the purpose of effecting a settlement without litigation, had offered to settle his claim for a sum very much below that demanded in his pleadings, the court, while declining to limit the damages to the amount of such offer, relied upon it as a sufficient ground for not adopting the extravagant estimates made by claimants' witnesses.

**THIS** was a claim arising out of an expropriation of lands for the purposes of the Darmouth Branch of the Intercolonial Railway.

January 9th to 16th, 1889.

*Henry, Q.C., Wallace, and Weston* for claimants ;

*Graham, Q.C., and J. A. Sedgewick* for respondent.

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

BURBIDGE, J., now (April 2nd, 1889) delivered judgment.

This is a claim for compensation for lands expropriated for the Dartmouth Branch of the Intercolonial Railway, and for damages to other lands of the claimants occasioned by such expropriation and the construction of the railway.

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The lands in question are situate within the Town of Dartmouth, and are referred to in the statement of claim and in the evidence as Lots 1, 2 and 3.

By notices to the Registrar of this court bearing date the twenty-fifth day of May, 1888, the Minister of Railways and Canals, in accordance with the provisions of *The Expropriation Act*, gave notice of his readiness to pay to the persons entitled to such compensation,—in respect of Lot 1 \$50, of Lot 2 \$50, and of Lot 3 \$100.

The proceedings required by the Act referred to having been taken by the Registrar, the claimants filed in this court a statement of claim in which they allege that by reason of the premises they have suffered damages,—in respect of Lot 1 of \$13,000, of Lot 2 of \$9,000, and of Lot 3 of \$25,000.

By the statement of defence the Attorney-General maintains the sufficiency of the amount of compensation offered by the Minister of Railways and Canals. To this there is a reply, but this question of compensation is the real and, in the end, the only issue to be determined.

In the determination of that question I have had the benefit of the large experience and accurate local knowledge of Mr. Compton, one of the Official Referees of the court, who sat with me as assessor on the hearing of the case.

It will be necessary to refer briefly to each lot and to the manner in which it is affected by the expropriation, but, before doing so, it will be convenient to state a few considerations applicable to the three lots. For twenty or twenty-five years they had been unproduc-

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tive, and in 1884, when part was taken and when the injury complained of was done, they had no value other than their actual value in the market. This value, however, was from their convenient and favorable situation on the harbor of Halifax affected by what I may designate speculative considerations, which, I think, influenced more or less, and to a certain extent properly influenced, the estimates of value given by the witnesses examined before the court. That there is a wide difference between some of such estimates is not, I think, remarkable. Given anything like an active demand for such properties as those in question, I am not prepared to say that their value would not be fairly indicated by the opinions expressed by the witnesses for the claimants. But the fact is that neither in 1884 nor for years before was there, nor has there since been, any such demand. For 30 years the owner had been waiting for the purchaser who never came. Will such demand arise this year or next, or not for 20 years? These are questions which it is impossible to answer, but which are elements entering into, and necessarily rendering uncertain, any conclusion that may be arrived at. In such cases, I know of no rule safer than to ascertain values, as nearly as may be, by comparison with actual sales of similar and similarly situated properties of which the evidence in this case affords a number of instances. Subjected to this test all the estimates made by the witnesses called for the claimants are, I think, excessive ; while those made by the witnesses examined on behalf of the defendant appear to me to approximate the actual value of the several properties in 1884.

In constructing the railway no crossing or means of access from the highway to the several lots had been provided, and the absence thereof tended, the claimants alleged, to depreciate the value of their properties.

It appears that in constructing Government railways it is the practice to give to each adjoining proprietor, upon request therefor, one crossing, although there is no legal liability so to do. In the present case this was not done. The properties were not being used for any purpose, and no one asked to have such crossings made. The Crown has, however, by an amendment to the statement of defence, offered to construct such crossings. The faith of the Crown being thereby pledged it cannot be doubted that the necessary crossings will, when they are required, be made ; though the fact that the claimants must rely therefor upon an obligation that is not enforceable, is one which, I think, should not be overlooked in assessing the compensation to be made to them.

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*Lot 1.*—According to the statement of claim this property (lot 1) had a water frontage of 676 feet and extended from Water Street out into the harbor about 300 feet. By the deed from Fairbanks, and others, to Falconer, dated August 10th, 1866, it appears to have had a frontage of some 650 feet with a width from high-water mark out into the harbor of 200 feet at the eastern side thereof and of 250 feet at the western.

At one time, many years ago, there were upon it buildings and wharves. Of these no trace is left. One building was burned, and the others and the wharves have been destroyed and washed away. Of lot 1, there was taken for the purposes of the railway a strip about thirty feet wide along the water front and adjoining Water Street. In March, 1884, David Falconer, the elder, entered into an agreement (Exhibit D) whereby for the sum of fifty dollars to be paid to him, he bound himself to convey to the Crown for the purposes of the said railway a right of way not exceeding fifteen feet in width across this property and adjoining Water Street. At this time he was not the

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owner in fee, but was entitled to a reversion under the trust deed (Exhibit C); but it is, I think, clear that during his life time he was not only consulted by the claimants, his son and son-in-law, but that he acted for them in the negotiations for the sale of portions of these properties to the Crown.

The agreement to which I have referred was not, however, carried into execution, and the respondent has acquired no rights thereunder. It is material only as indicating the view of a person interested and competent to speak as to the effect upon the property of the expropriation of a right of way across it fifteen feet wide for the purposes of a railway. What Mr. Falconer, influenced I assume by the view that the construction of the railway would enhance the value of the remainder of the property, offered to sell for fifty dollars contained about 10,000 square feet. The extent expropriated was 22,050 square feet. For the property so expropriated, and for the depreciation of the remainder of the property by reason of such expropriation and the construction of the railway, I am inclined to think the sum of one thousand dollars would be a fair indemnity.

*Lot 2.*—This property (lot 2) had a harbor frontage of some 470 feet. It extended from Water Street southerly to high-water mark and thence out into the harbor two hundred feet. It had never been used for any purpose, and was the least valuable of the three properties. Along the whole extent of the property the land was bold, and at the northwestern extremity thereof the railway passed through an excavation in a bluff. By reference to the plan Exhibit U it will be seen that of this property there has been acquired and taken for the purposes of the railway 31,500 square feet. Of this 7,800 square feet, indicated on such plan by being colored red and barred, was in May, 1884,

acquired from the claimants by deed of surrender, the consideration being the nominal sum of fifty dollars.

The question to be determined is the amount of compensation that should be paid for the value of the 23,700 square feet additional that have been expropriated, and for any further depreciation in the value of the property occasioned by such expropriation. I assess such compensation at five hundred dollars.

*Lot 3.*—In the expression lot 3 I include only the portion of the property, so designated in the statement of claim, that lies westerly of the line of the railway as originally located. It has a water front of some 420 feet, and extends out into the harbor three hundred feet. Before the construction of the railway, and the surrender to which I shall presently refer, it formed part of a property that extended easterly to what is called the Windmill Road, and contained some seven or eight acres.

In May, 1884, the claimants, in consideration of the sum of \$280, surrendered to the Crown for the purposes of the Dartmouth Branch Railway a portion of this larger property, containing .635 acres, as indicated by the barred lines on plan Exhibit U. This was not the actual value of the property surrendered, but was one which the claimants were willing to accept to secure the construction of the railway. Subsequently, the location of the railway was changed, and the portion indicated on the plan referred to (Exhibit U.) by being colored red was expropriated. That part which on this plan is indicated both by being colored red and barred is common to both locations of the railway, and was acquired by the deed of surrender referred to.

It appears that the Crown has been and is willing, for the sum paid to the claimants therefor, to grant to them that part of the property acquired by such deed of surrender that is not covered by the present location.

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On the hearing of the case I expressed the opinion, and I have seen no reason to change it, that no question arises now as to the effect of the expropriation and the construction of the railway upon the property east of the original location thereof. That was settled by the parties themselves when they severed their property, and surrendered the right of way mentioned. The question to be determined, as it was in the case of lot 2, is the compensation that should be made for the additional land expropriated and for damages caused by such expropriation to that part of the property which lies westerly of the original location, and to which, as I have said, I refer as lot 3.

The question is not free from difficulty. It is clear, of course, that if an equal area were recovered from the sea the property would be equally valuable; but the expense of such recovery would vary greatly according to the character of the works undertaken therefor. There is, I suppose, no question that some extension harbor-wards, in addition to what was already on the property, would under any circumstances have been necessary to any large use thereof. Several of the witnesses thought that, assuming that the portion covered by the original location was in the possession of the claimants, the present location would be better for them than the original. Others were of the contrary opinion.

The difference of opinion is, I think, natural and easily accounted for. For some businesses and purposes it is desirable to have the railway between permanent buildings and the wharves, for others it is not desirable; and while one, looking to some special use of the property, would prefer the present location, another, influenced by other considerations, would prefer the former location. Anything, however, that lessens the number of possible purchasers depreciates, I think, in

some degree the value of a property. The claimants are entitled to such a sum of money as represents the difference in the values of the property before and after the expropriation. That may sometimes be best estimated by ascertaining, as near as may be, the cost of taking such steps and executing such works as would make the property as valuable as it was previously. One of the steps which in this case it is open to the claimants to take, is to re-purchase from the Crown the portion sold to it in 1884. They are not, I think, bound to do this. Neither do I think the Crown can, in mitigation of damages, force a grant upon them. The fact, however, that the Crown has offered to sell and that it was and is open for the claimants to buy, is a consideration which, I think, ought not to be disregarded.

Beyond making this purchase, prudent men probably would not take any step until they knew to what use the property was to be put. On the whole I think the sum of two thousand five hundred dollars will, in respect of lot 3, represent a liberal indemnity.

In these valuations I am happy to say I have Mr. Compton's concurrence.

In coming to the conclusions stated I have not lost sight of the fact that Mr. Falconer was willing to settle the claims under consideration for, according to Alpin Grant's evidence, the sum of \$2,000, and for \$2,500 according to that of the claimant David Falconer the younger. On the one hand I have not thought myself bound to limit my assessment by what, for the purposes of effecting a settlement, Mr. Falconer was willing to accept; while, on the other hand, I take it that his offer fully justifies me in not following the speculative estimates made by the claimants' witnesses and allowing the large amounts claimed.

The judgment of the court is, that the amount of compensation offered by the Minister of Railways and

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Canals was not sufficient, and that for such compensation the claimants are entitled, in respect of the three lots, to be paid the sum of four thousand dollars with interest from May 25th, 1888, to this date, in accordance with the 15th section of *The Expropriation Act*.

They are also entitled to costs.

The properties referred to remain vested in the Crown, and the claims of all parties are barred according to the statute (1).

*Judgment for claimants, with costs.*

Solicitor for claimants : *B. A. Weston.*

Solicitor for respondent : *W. Graham.*