

1889
 Nov. 18.

HUGH McLEOD.....CLAIMANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

*Expropriation of land—50-51 Vic. c. 17—Measure of compensation—
 Enhancement of future value of property by railway—Tender by the
 Crown—Bare indemnity—Costs.*

Upon an expropriation of land under the provisions of 50-51 Vic. c. 17, the measure of compensation is the depreciation in the value of the premises assessed not only in reference to the damage occasioned by the construction of the railway, but also in reference to the loss which may probably result from its operation.

2. Where there was evidence that the railway would enhance the value for manufacturing purposes of certain portions of land remaining to claimant upon an expropriation, but it did not appear that there then was, or in the near future would be, any demand for the land for such purposes, the court did not consider this a sufficient ground upon which to reduce the amount of compensation to which the claimant was otherwise entitled.
3. In assessing the value of lands taken or injuriously affected by a public work the owner should be allowed a liberal, not a bare, indemnity.
4. Where the tender was not unreasonable and the claim very extravagant, the claimant was not given costs although the amount of the award exceeded somewhat the amount tendered.

THIS was a claim for compensation upon an expropriation of lands belonging to the claimant at Sydney, N. S., for the purposes of the Cape Breton Railway, and for damages resulting therefrom to other lands of the claimant.

The facts of the case are fully stated in the judgment.

June 3rd, 4th, 5th, 6th, 7th and 12th, 1889.

Gillies for the claimant ;

Graham, Q.C., for the respondent.

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

This is a claim for \$10,000, of which the sum of \$4,800 is demanded for the value of eight lots of land taken by the Crown for the purposes of the Cape Breton Railway, and the sum of \$5,200 for the depreciation in value of the remaining portions of the property, alleged to arise in consequence of such taking for such purposes. The case was heard at Sydney in June last, Mr. Compton, one of the Official Referees of the court, sitting with me as assessor.

No difficulty arises in respect of the principles that should govern the assessment of compensation in this case. The claimant is entitled to a full indemnity for the value of the land taken, and for any damages occasioned by the severance of his property, or arising from its being otherwise injuriously affected by the construction or operation of the railway. The measure of compensation is the depreciation in the value of the premises, assessed not only in reference to the damage occasioned by the construction of the railway, but also in reference to the loss which may probably result from its operation.

The property affected is situated within the limits of the town of Sydney, and consists of a portion of three blocks indicated on the plan (claimant's exhibit No. 2) by the numbers 28, 29 and 30. These three blocks (28, 29 and 30) were purchased by the claimant in 1863 for the sum of \$260, and, with the exception of the lots sold therefrom, have since been occupied by him as one field bounded on the west by Great George Street, on the south by a property now owned by Captain Lorway, on the east by the Creek, and on the north by Townsend Street.

Dolbin Street, Douglas Street, and a street without a name shewn on the plan referred to as running be-

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tween the claimant's property and that of Captain Lorway's, do not appear, at least during the claimant's possession, to have been opened to use by the public. And the same is true of Park Street, shown on the plan of the property (claimant's exhibit No. 1) which was made since the location of the railway.

The whole property, including the streets, contained at the time of the purchase by the claimant about 8½ acres, and has been used principally for pasture and hay land. But, while this was the use made of it prior to and at the time of the expropriation, its chief value consisted in the fact that it was suitable for division into building lots and for sale by lots for building purposes. And it appeared in evidence that some 18 or 20 years ago the claimant caused a plan to be made showing a division of the property into lots, and since then he has from time to time sold a number thereof on Townsend Street and Great George Street to laborers and others who have erected thereon small and inexpensive houses and out-buildings. The area of the lots so sold is slightly in excess of one acre.

The whole property is not, however, equally available for building purposes. Where the railway runs it is low, the level being less than two feet above ordinary high-water mark and the land being overflowed by the spring tides, so that in its present condition, and without draining and filling in, it is not suitable for the erection of buildings thereon except on piles. Now it might happen that the demand for property for building purposes would be active enough to overcome these considerations, and to bring property similar to this into the market for building purposes. But this at present is not the case in Sydney, where, within the portion of the town shown on claimant's exhibit No. 2, from one-half to two-thirds, and, within the limits of the corporation, a greater proportion of the town is still

available for such purposes. It is fair then, I think, to conclude that the portion of the property crossed by the railway, and that adjoining it on both sides, had, at the date of the expropriation, a value exceeding that derived from its use for agricultural purposes ; but that such value was not very considerable in view of the expenditure necessary to the utilization thereof for building purposes, and the remoteness of the chance of there being a demand for it in its then condition for such purposes.

Some of the witnesses were of opinion that the part of the property near the water was suitable for manufacturing purposes, and that for such uses its value would be enhanced by the construction of the railway. That the construction and operation of the railway will increase any value which the property may have for manufacturing purposes cannot be doubted, but there is nothing in the evidence respecting the conditions of business and trade in the town of Sydney to lead one to conclude that there will, in the near future, be any active demand for this property for manufacturing purposes, though it is possible that such may prove to be the case.

At present, however, I do not attach enough weight to these considerations to feel justified, by reason thereof, in lessening the amount of compensation to which otherwise I think the claimant entitled.

In such a case as this it is difficult, I think, to come to any satisfactory conclusion with reference to the amount at which the value of the land taken, and the depreciation in the value of the property remaining to the claimant, should be assessed, without forming some opinion as to the value of the property as a whole. In a return made by the claimant for the purposes of the assessment of rates and taxes in the town of Sydney for the year 1887, he returned the

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property in question as consisting of four or five acres, in pasture, and of the value of \$500. With it he made return of another property at \$800. These values, however, it appears were not accepted by the assessors, who rated the two properties at \$1,800 instead of \$1,300; and, in accordance with the rule adopted by them that year to value property for the purposes of assessment at one-fourth the cash value, assessed the claimant on real estate of the value of \$450. I do not, however, think it would be fair or just to conclude that the \$500 at which the claimant valued this property, or the somewhat higher sum at which the assessors valued it, represents the true value thereof. If the suggestion made that the claimant, in making the return, valued the property at one-fourth or one-fifth of its true value were accepted, the conclusion would be more consistent with the other evidence in the case.

From a comparison of the property in question with other properties (such as the Biscoe property and the Bown property) similarly situated, suitable for the same purposes and valuable for like considerations, the fair values of which have been determined by actual sales taking place under ordinary and usual conditions, I have no difficulty in coming to the conclusion, in which Mr. Compton concurs, that the value of the portion of blocks 28, 29 and 30, then owned by the claimant, and which with the streets contained about seven acres, did not, at the date of the expropriation, exceed two thousand eight hundred dollars.

Of this property there was taken for the use of the railway about three-fifths of an acre ( $\frac{57}{100}$ ). The railway crosses it obliquely, thereby increasing the damages occasioned by the severance; and undoubtedly the value that the adjoining property derived from the chance that it might have been in demand for building purposes is to some extent lessened. With reference to the prices obtained for the lots sold by the claimant,

there is, except in the case of Mr. McCodrum, no evidence entirely satisfactory. The claimant appears to have included in the sums which he states he received, the interest paid by the purchasers from time to time. McCodrum, in 1872 or 1873, purchased two lots 44 by 80 feet for \$80 a lot. They are situated immediately west of where the railway crosses the south line of Townsend Street, and are in level three or four feet higher than the level of the property where the railway crosses it. McCodrum's cellar is four feet in depth, and the high water backs into his drains. Some of the property on Townsend Street has changed hands within a few years, and the prices obtained do not indicate any considerable advance in values since the time when McCodrum purchased his two lots. In 1888 two lots, 40 x 100, opposite to McCodrum's on Townsend Street and similarly situated, were sold by the witness Burns for \$75 per lot.

Assuming a demand, for building purposes, for the property crossed by the railway and that immediately adjoining it, I do not think that lot for lot it would be worth as much, or would command as high a price, as the McCodrum or Burns lots, for the reason already mentioned that it could not be conveniently utilized for such purposes without incurring the expense of filling it in.

The amount tendered by the Crown as compensation for land taken and for damages was four hundred dollars, and there is ample evidence to sustain the sufficiency of the tender. This evidence is to me much more satisfactory, and having seen, as I have, the property, I should accept it with much more confidence than the evidence by which the claimant sought to sustain the claim for damages, greatly exceeding in amount the value of his whole property.

I am not wholly satisfied, however, that either the committee, who, at the instance of the persons inter-

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ested in the extension of the railway from the Shipyard to Barrack Point, made an appraisement of such damages, or the Government valuator, or the witnesses who have been called for the Crown and who have estimated the damages, have given sufficient weight to the fact that the claimant's property has been taken against his will by a compulsory process, and that he should not have a bare indemnity but a liberal indemnity.

Mr. Compton is inclined to think the sum tendered sufficient, because the portion of the property remaining to the claimant is likely to be available for manufacturing purposes, owing to the nearness of the railway ; but believing the time when manufactories will be established in the town of Sydney to be somewhat remote, he agrees with me in assessing the compensation to be paid to the claimant in this case at six hundred dollars. To that sum will be added \$63 for interest from February 18th, 1888.

There will also be an order, in accordance with the undertaking of the Crown given on the trial, for the construction of level crossings on Park Street and on the street between the claimant's property and that of Captain Lorway's, whenever they are opened for use to the public.

With reference to costs I entertain the view that where, as in this case, the tender is not unreasonable and the claim very extravagant, I should not allow costs to the claimant, although to make certain that the compensation is not merely an indemnity, but a liberal indemnity, something more than the sum tendered is ultimately awarded.

The judgment will therefore be entered up for \$663, without costs.

Judgment for claimant without costs.

Solicitor for claimant : *J. A. Gillies.*

Solicitor for respondent : *Wallace Graham.*