MARIA E. KEARNEY.........................CLAIMANT;

AND

HER MAJESTY THE QUEEN............DEFENDANT.

1888
Sept. 24.

Expropriation of land for railway purposes—Value of land for building purposes—Damages resulting from want of crossing.

The Crown had expropriated a certain portion of land which the claimant contended was held for sale as building lots. It was established in evidence that such land had not been laid off into lots prior to the expropriation, and that none of it had theretofore been sold for building purposes. There was evidence, however, to show that there was a remote probability that the land would become available for such purposes upon the extension of the limits of an adjoining town.

Held, that while such remote probability added something to the value which the property would otherwise have had, compensation should not be based on any supposed value of the land for building purposes at the time of the expropriation.

2. By the absence of a crossing over the railway, claimant was deprived of access to the shore, and thereby suffered loss in the use and occupation of the property remaining to her.

Held, that claimant was entitled to compensation in respect of the damage resulting from the want of a crossing.

THIS was a claim for damages consequent upon the expropriation of a portion of the claimant Kearney's land for the right of way of the Dartmouth Branch of the Intercolonial Railway.

The property was situated on the shore of the harbor of Halifax (N.S.), near the town of Dartmouth, but not within the limits of that town.

At the hearing it was contended, on behalf of the claimant, that the property was held for sale as building lots at the time of the expropriation. The evidence, however, failed to establish this as a fact; but it appeared that part of the property bordering on the harbor had a certain value at the time of the expropriation

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for bathing purposes, and that other portions of the shore were used by the claimant for various purposes from which profits were derived by her.

The evidence of damage to the property for its present purposes was confined to the matters above stated, and it was proved that:—

(*a*). It was injured as a bathing-house property by the railway overlooking the bathing beach.

(*b*). By reason of the Government not having constructed a crossing, it was not as convenient to obtain from the shore sea manure and drift wood which the sea cast up on the shore, nor to deliver to ballast-boats, as in the past, ballast lying on the other side of the railway.

The case was argued on April 30th and May 1st, 1888, upon the evidence taken by a special commissioner at Halifax.

Wallace for claimant;

Graham, Q.C. for respondent.

BURBIDGE, J. now (September 24th, 1888) delivered judgment.

The claimant is the owner of a property situated near the town of Dartmouth in the Province of Nova Scotia, consisting of some seventy or eighty acres of land. This property is divided into two parts by the Eastern Passage Road, which crosses it at a distance of a mile and a half or two miles from the slip in Dartmouth, where the ferry-steamers from Halifax land passengers. The portion of the property west of the Passage Road is bounded on the south by the Mount Hope Lunatic Asylum property, and on the west by the harbor of Halifax. On this portion are the claimant's residence and garden, the situation of which is indicated by plan Exhibit X, prepared by the witness James W. McKenzie, who states that of this portion of the property five acres are cleared land, and one acre half cleared. He also

states that there are sixteen and three-fourths acres of uncleared land in the place, besides six acres in the adjoining water lot. Possibly, however, as the plan would appear to indicate, he intended to say that there were sixteen and three-fourths acres including the cleared and uncleared land. The claimant, herself, testified that there were 18 or 19 acres between the Passage Road and the harbor.

In 1884, the Government of Canada constructed the Darmouth Branch Railway from the Intercolonial Railway through the town of Dartmouth and across the lands of the claimant, and others, to the Halifax Sugar Refinery, as shown by Exhibit E. The place and manner at and in which this railway was constructed across the claimant's property, are clearly shown by the plan Exhibit A. A tender of $150 for the right of way was made to the claimant, and several attempts appear to have been made to induce her to accept this sum, but she persisted in her refusal,—claiming at one time $200 and at another alleging that her attorney advised her that the damages to her property were a great deal more than $150. The witness who made the tender—Alpin Grant—does not appear to be clear as to whether at this time she claimed $1,000 or $2,000.

No arrangement with her having been arrived at, she subsequently instituted an action in the Supreme Court of Nova Scotia against Oaks and Paw (the contractors for the construction of the Branch Railway) for trespasses alleged to have been committed upon the property in question. The defendants justified the acts complained of by alleging entry, under directions of the Government of Canada, for the purpose of constructing the Branch Railway. On the trial before the Chief Justice of the court it appeared that the order-in-council authorizing the construction of the said Branch was not passed until the 12th of December, 1884, while

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the entry complained of had been made during the month of July previous. The Chief Justice, being of opinion that the entry was unlawful, directed judgment to be entered for the plaintiff for $100. On appeal to the Supreme Court of Nova Scotia, this judgment was set aside on the ground that no notice of action had been given to the defendants in accordance with the provisions of *The Government Railways Act*, 1881. Notice of appeal to the Supreme Court of Canada was then given.

By arrangement between the Crown and the claimant, and without prejudice to the appeal to the Supreme Court of Canada in *Kearney* v. *Oakes et al.*, the Minister of Railways and Canals has referred the claim to the Exchequer Court,—it being agreed that such claim should be heard on the evidence taken in the case last mentioned, and on such further evidence as should be taken in accordance with the consent now upon file in this court.

The only question arising on the reference is as to the amount of compensation that should be awarded to the claimant for the land taken from her for the Dartmouth Branch Railway, and for damages in respect of her property being injuriously affected by the construction of such railway.

Now I think it will be convenient to consider and dispose of several matters which do not, so far as I understand the case, affect this question of compensation.

In the first place, it was not contended that the property east of the Passage Road is affected in any way.

In the second place, it was suggested by a number of the witnesses examined both on the part of the claimant and of the Crown that the claimant's property (and in using that term hereinafter I wish to be understood as referring only to the portion west of the Pas-

sage Road) might in the future be available for commercial or manufacturing purposes, such as the erection thereon of factories, or, along the harbor front, of wharves and docks. The witnesses, however, differed in opinion as to whether or not any value which the property had in 1884, arising from this consideration, would be increased or diminished by the construction of the railway. I have no hesitation, looking at all the evidence on this point and the situation of the property, in accepting as correct the views of those witnesses who were of opinion that, having reference to any such use as this of the property, the railroad increased, or, at least, did not depreciate, its value.

What I think I may fairly designate as the principal case presented by the claimant, was directed to showing the value of her property as consisting of a number of small building lots; and for this purpose a plan (Exhibit B) was put in evidence. This plan was, I infer, made by the witness William A. Hendry, a Deputy Land Surveyor, for, on cross-examination, he states that, so far as he knew, these building lots were never laid off before he did it, and that he did it three or four weeks before his examination (December 28th, 1887). He also admits that, with the exception of the Eastern Passage Road, there are no roads on the property as represented on the plan. This witness had previously in his direct examination stated that this plan (Exhibit B) did not represent the best way of laying out the lots since the railway was built, and that had he to lay it out again he would do it differently. One hesitates to believe that this witness, until the truth was brought out in cross-examination, deliberately attempted to convey the impression that the division of the property into building lots had been made prior to the construction of the railway, and was at that time a well settled and established fact, though it

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is difficult to see what other inference he could wish or expect those who heard or read his evidence to draw.

The claimant, in her direct-examination before Mr. McDonald, says that for years she had intended to have the property divided into building lots, and, in her cross-examination, that before the construction of the railway she had never had a plan laying the property off into lots, and that she had never sold a lot. Now I think that any one who reads the evidence in this case carefully must be forced to the conclusion, that, up to the time when such evidence was given, there had never been any demand for any portion of the property for building purposes, and that the probability of its being made available for any such purpose was very remote indeed. That very remote probability added, it is true, something to the value which the property would otherwise have had, but it is perfectly clear, I think, that it would be absurd to think of assessing the compensation to be paid to the claimant on the basis that in 1884 this property consisted of building lots, having at that time a market value as such.

Mr. Graham, in his argument for the Crown, observed that the view thus presented was fabricated out of the slightest evidence; and I must admit that I am not prepared to say that his observation was unwarranted.

On the claimant's property there was, in 1884, a bathing establishment, which had been erected by a company several years before. It is clear, I think, that the place itself afforded exceptional facilities for bathing, and the company had expended some $1,500 in erecting buildings and other improvements. The only drawback mentioned by any of the witnesses was the drain from the Asylum grounds, to which Dr. Weeks referred. The company held a lease from the claimant, paying her a rental of $50 a year. After the season of 1884, the enterprise was abandoned. The claimant

contends that this was caused by the construction, in that year, of the railway, which it is alleged destroyed the privacy of the place. The evidence of Arthur E. Harrington, who had been secretary and vice-president of the bathing company, and who was called by the claimant, disposes of this contention. He says that excepting one year, in which they spent their profits in improvements, the enterprise did not pay. He attributed this to the steamboat which they had, which used to break down, compelling them to use row boats in going from Halifax to the bathing-house. In 1883, they sub-let to one Rudolph, who agreed to pay eight per cent. on the company's outlay, but who never paid anything.

The claimant also alleged that the railway prevented her from again leasing the bathing premises, which subsequently fell into her hands. She says that she had several applications, but that the applicants refused to take the premises when they saw the embankments of the railway. On cross-examination, however, she admitted that Rudolph was the only applicant she could remember, and that he made no offer. He, as I understand the evidence, is the person in whose hands the enterprise failed to pay before the construction of the railway. I am satisfied that no case has been made out to justify me in allowing the claimant any special damages on this branch of her case.

Apart from the general question of the depreciation of the claimant's property by the severance of the part expropriated, she contends, and I think justly, that she has suffered loss by reason of the absence of a railway crossing. This, I think, she was entitled to, and without it she has no convenient access to the shore.

It has prevented her, as she alleges, from selling ballast and sea-manure, and from gathering drift-wood, as had previously been her custom to do, and from which,

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in some years at least, she derived a profit, according to her own estimate, of about one hundred and twenty-five dollars. For such damage, I shall allow her five hundred dollars ($500).

Now in respect to the value of the right of way and the damage caused by the severance, it is not possible to reconcile the evidence, and I shall not attempt to do so. It is clear, I think, that at one time in 1884, the claimant was willing to accept two hundred dollars for the right of way, and looking at the evidence of Lewis P. Fairbanks and James W. Turner, or at the assessment roll, or the amount paid to other proprietors (whose lands were also affected by the construction of the railway), this sum would appear to constitute a sufficient indemnity. I am inclined to think that it did not inadequately represent the market value of the land expropriated—apart from any question of severance.

On the other hand, the proprietors who surrendered their lands freely, or for small sums, were anxious to have the road constructed, and those who exacted any may not have exacted a full indemnity. Then, too, I do not think the claimant, when she offered to accept two hundred dollars, knew where, or understood how, the railway would cross her property ; and it is clear that there was no agreement which prevents her now demanding a full indemnity. I think, if I allow her compensation at the rate of $1,200 per acre, at which rate she sold 3⅓ acres to the authorities of the Lunatic Asylum, I will allow her a sum sufficient to indemnify her fully for the land taken, and for all damages to the property other than the special damages arising from the want of a crossing. It was suggested on the argument, though it is not in evidence, that in paying her $4,000 for 3⅓ acres of the land, the Asylum authorities desired to put an end to certain litigation then existing between them and the claimant.

There is besides this, however, evidence of the sale to them of four acres of cultivated land by Thomas Mott, for $4,400. I would not, however, feel justified in assessing the compensation to be paid in this case at so large a sum were it not that, apart from every other consideration which, in 1884, made this property valuable, I was satisfied that its proximity to Dartmouth and Halifax, its beautiful and convenient situation on the harbor of Halifax, and the probabilities, more or less remote, of its being at some time saleable for one or more villa residences, or for manufacturing or commercial purposes, or even at some distant time as building lots, gave it at that date a value which it would otherwise not have had.

I assess the compensation to be made to the claimant in this case, on giving the Crown a good and sufficient discharge, at two thousand and twelve dollars ($2,012);—on fifteen hundred and twelve dollars, parcel of which, I allow interest from the 13th August, 1884, the date on which the first plan and description were filed in the office of the Registrar of Deeds for Halifax County.

I also allow the claimant her costs in this court; and I reserve leave to either party to apply for further directions.*

Judgment for claimant, with costs.

Solicitor for claimant: *T. J. Wallace*;

Solicitor for respondent: *W. Graham.*

*On appeal to the Supreme Court of Canada by the claimant, the amount of compensation awarded by the Exchequer Court was increased on the ground that it did not appear that such compensation was assessed in view of the *future* damage that may result from the want of a crossing.