THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL..... } PLAINTIFF;

1891
June 22.

AND

WILLIAM F. McCURDY, MARY E. McCURDY AND MABEL G. BELL (AND BY ADDITION) HENRY K. BRINE, TRUSTEE..... } DEFENDANTS.

The Expropriation Act (R.S.C. c. 39)—Assignment of rights in land expropriated previously acquired by lease—Effect of new leases between same parties—Compensation—Assignment of chose in action against the Crown—Evidence.

An agreement by a proprietor to sell land to the Crown for a public work, followed by immediate possession and, within a year, by a deed of surrender, is sufficient under *The Expropriation Act*, s. 6 (R.S.C. c. 39) to vest the title to such land in the Crown, and to defeat a conveyance thereof made subsequent to such agreement and possession, but prior to such surrender.

2. Under section 11 of the said Act the compensation money for any land acquired or taken for a public work stands in the stead of such land, and any claim or incumbrance upon such land is converted into a claim to compensation, and such claim once created continues to exist as something distinct from the land and is not affected by any subsequent transfer or surrender of such land. *Partridge* v. *The Great Western Railway Company*, (8 U. C.C.P. 97), and *Dixon* v. *Baltimore and Potomac Railroad Company*, (1 Mackey, 78), referred to.

3. Where a chose in action was assigned, *inter alia*, for the general benefit of creditors, all the parties interested being before the court and the Crown making no objection, the court gave effect to such assignment.

Quære.—In the absence of acquiescence in such an assignment, are the assignee's rights thereunder capable of enforcement against the Crown?

4. In a case of expropriation the claimant is not obliged to prove by costly tests or experiments the mineral contents of his land. (*Brown* v. *The Commissioner for Railways*, 15 App. Cas. 240, referred to). Where, however, such tests or experiments have not been resorted to, the Court, or jury, must find the facts as best it can from the indications and probabilities disclosed by the evidence.

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Statement of Facts.

THIS was a claim for damages arising out of an expropriation of land at Jamesville, in the County of Victoria, N. S., for the purposes of the Cape Breton Railway.

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

September, 19th, 20th, 22nd and 30th 1890.

Borden, Q.C. and *Chisholm*, for plaintiff;

Fraser, *Drysdale* and *Murray*, for defendants.

BURBIDGE, J. now (June 22nd, 1891) delivered judgment.

The questions to be determined in this case arise out of the acquisition by the Minister of Railways and Canals of certain lands for the Cape Breton Railway. The lands so acquired are situated at Jamesville, in the County of Victoria, and Province of Nova Scotia, and are described in the pleadings as lots numbered 164, 165, 168, and 169. On the 7th July, 1887, such lots formed parts of certain farms owned respectively by Neil Gillis, James Campbell and Hugh Campbell, in and from which the defendant William F. McCurdy had a right, for the residue of a term of which he was assignee, to quarry and ship gypsum. On the day named, Gillis and the two Campbells and their respective wives, by agreement under their several hands and seals, agreed to surrender to Her Majesty all their right, title and interest in and to such portions of such farms as might be required for the right of way, stations, or other railway purposes of the Cape Breton Railway. The price was in one case to be four dollars and fifty cents, and in the others four dollars, per acre. The line of the railway had been located prior to the 7th of July, 1887, and a plan indicating such location and the lands to be taken was shown to the persons named when they entered into the agreements to which I have referred.

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On the 5th of August following, a general plan of such location, corresponding with that shown to Gillis and the Campbells, was filed by the Minister with the Registrar of Deeds for the County of Victoria. The work of taking cross-sections for the railway and setting slope-stakes was commenced on lots 164 and 165 in July, 1887, and completed thereon and on lots 168 and 169 in October following. In September the brush along the line of railway was cleared from all the lots, and the actual construction of the road-bed of the railway was commenced at this point between the 18th and 25th of November of the same year.

On the 12th of November, 1887, James Campbell and Sarah Campbell, his wife, in pursuance of their agreements, surrendered lots 165 and 169 to the Crown, and in like manner, on the 25th of April, 1888, Neil Gillis and wife surrendered lot 164, and Hugh Campbell and wife lot 168.

Between the dates of the agreements mentioned and such surrenders the width of lots 168 and 169 had been increased by twenty-five feet as shown on two plans filed with the Registrar of Deeds on the 12th and 29th of October, 1887. The descriptions contained in the surrenders of such lots covered and included this additional area.

On the 7th October, 1887, Neil Gillis and Mary his wife, in consideration of fifty-five dollars, granted to the defendant McCurdy all the gypsum to be found on the Gillis farm, and on the eighth of the same month Hugh Campbell demised to McCurdy for a term of fifty-nine years, with a covenant for renewal at the lessee's option for a further term of fifty-nine years, all the gypsum quarries and gypsum on his farm, the lessee to pay him three cents a ton on all gypsum shipped therefrom. On the 14th of that month

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James Campbell made to McCurdy a like demise in respect of his two farms.

At this date the Crown was without doubt in possession of lots 164, 165, 168 and 169, and McCurdy admits that at the time he knew that there had been a survey for a railway through the properties in question and that the line would pass in their neighborhood, but he adds that he did not know that the proprietors had made any agreements with the Crown.

On the 7th of November, 1887, McCurdy made an assignment of all his estate and effects to one Duncan C. McDougall in trust for the benefit of his creditors, under which, and by virtue of an order made by Mr. Justice Townshend on the 12th of February, 1890, the defendant Henry K. Brine is now the trustee.

On the 10th of April, 1888, McDougall as such trustee in consideration of two hundred dollars conveyed to the defendant Mary Elizabeth McCurdy, the wife of the defendant Wm. F. McCurdy, with other properties, the rights that the latter had acquired in the properties of Gillis and the two Campbells by the grant and leases of October, 1887, before mentioned; and on the 24th September, 1889, McCurdy and wife assigned the same by way of mortgage to the defendant Mabel G. Bell.

On the 18th of January, 1890, the Minister of Railways and Canals caused separate plans and descriptions of lots 164, 165, 168 and 169 to be deposited of record in the office of the Registrar of Deeds for the said County of Victoria. By this proceeding, which under the circumstances of this case was authorized by the tenth section of *The Expropriation Act*, 52 Vic. c. 13, any question that might otherwise have been raised as to the Crown's title to the lands affected thereby was set at rest. It appears tolerably clear, however, that the Crown had previously acquired a

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good title to the lots mentioned. By 49th Vic. c. 14, the Minister of Railways and Canals was authorized by Parliament to construct the Cape Breton Railway as a public work. By *The Expropriation Act* (1), in force in 1887, he had power by himself, his engineers, superintendents, agents, workmen and servants to enter upon and take possession of any land the expropriation of which was in his judgment necessary for the use of such public work (2), and to contract and agree for the purchase of such land (3). By the 5th section of the Act last mentioned it was provided that land taken for the use of Her Majesty should be laid off by metes and bounds, and when no proper deed or conveyance thereof to Her Majesty was made, or if for any other reason the Minister deemed it advisable so to do, a plan and description of such land, signed as therein provided, should be deposited of record in the office of the Registrar of Deeds for the county or registration division in which the land was situate, and such land by such deposit should thereupon become and remain vested in Her Majesty.

By the 6th section of the Act it was enacted that every contract or agreement made by any person before the deposit of the plan and description, and before the setting out and ascertaining of the land required for the public work, should be binding at the price agreed upon for the same land if it was set out and ascertained within one year from the date of the contract or agreement, and although such land had in the meantime become the property of a third person ; and by section 5, sub-section 9, it was provided, in accordance with what was otherwise the law, that no surrender, conveyance, agreement or award under the Act should require registration or enrolment to preserve the rights of Her Majesty.

(1) R. S. C. c. 39. (2) Sec. 3*b*.
(3) Sec. 3*e*.

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By section 11 it was provided, and the same provision is to be found in the amending Act 50–51 Vic. c. 17, that the compensation money for any land acquired or taken by the Minister should stand in the stead of such land, and any claim to or incumbrance upon such land should as respects Her Majesty be converted into a claim to such compensation money, or to a proportionate amount thereof, and should be void as respects such land, which should by the fact of taking possession thereof, or the filing of the plan and description, as the case might be, become and be absolutely vested in Her Majesty—subject always to the determination of the compensation to be paid, and the payment thereof. On the 2nd of May, 1889, *The Expropriation Act*, and the Act in amendment thereof from which I have cited, were repealed, and the Act 52 Vic. c. 13, to which I have already referred, was enacted in lieu thereof.

The agreements of July, 1887, followed as they were immediately by possession and, within the year, by duly executed deeds of surrender, were, it seems to me, sufficient, under *The Expropriation Act*, to vest the title in the Crown. But if that is the true view of the case, McCurdy took no interest in lots 164, 165, 168 and 169 under the grant from Gillis and the leases from the Campbells of October, 1887. The latter proposition may indeed be supported on lower ground. For whatever may have been the date at which Her Majesty acquired a good title to such lots, there is no doubt that She was in possession prior to October, 1887, and that when Gillis and wife made their grant to McCurdy in that month, and the Campbells their leases, Gillis and the Campbells were out of possession, and consequently as Mr. Borden for the Crown contended, not in a position to convey any interest in such lots to the defendant McCurdy.

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This brings me to a second question. For the Crown Mr. Borden argued that by taking the grant and leases of October, 1887, McCurdy surrendered the leases of 1870 (which were outstanding when the agreements between the proprietors and the Crown were made, and the Crown went into possession), or at least that the old leases were merged in the new, and that, therefore, McCurdy was not entitled to any compensation in respect of any interest that he otherwise might have had under the leases of 1870. That, however, does not appear to be the result. By the express terms of the Act, McCurdy's rights in the lands acquired for the railway, were, by the fact of the Minister's taking possession of such land, converted into a claim to compensation, and became void as respects the land itself. The leases of 1870 thereby ceased to be operative in respect of lots 164, 165, 168 and 169, and the right to compensation given in respect thereof by the statute once created continued to exist as something distinct from such leases, and any subsequent assignment or surrender of the latter could not affect the right to compensation so acquired. That, I think, is clear, whether we have regard to the terms of the statute, to principle or to authority (1).

It follows, however, from the same considerations that neither the defendant Mary Elizabeth McCurdy, nor Mabel G. Bell, her assignee, has any interest in the questions before the court, for it is not contended that there are any words in the assignment from McDougall to the former that could operate to transfer to her any claim to compensation arising from the injurious affection of the rights vested in her husband by virtue of the leases of 1870. The right to such com-

(1) *Partridge* v. *The Great Western Railway Company*, 8 U. C. C. P. 78.
mac Railroad Company. 1 Mackey 97 ; *Dixon* v. *Baltimore and Poto-*

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pensation is either in the defendant McCurdy or in the trustee under the deed of assignment made by him for the benefit of his creditors, to which reference has been made. If a claim against the Crown for compensation for land taken or injuriously affected will not, without the concurrence of the Crown, pass to the assignee under such a deed, or if the terms of the deed in question are not sufficient to transfer the claim, McCurdy is still entitled to the compensation money.

The question involved in this enquiry is one which, in the United States, has been definitely determined by legislation and judicial decision. By section 3477 of the Revised Statutes of the United States, re-enacting the provision of earlier statutes, it is provided that all transfers and assignments made of any claim upon the United States shall be absolutely null and void unless executed in the presence of at least two witnesses after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. The mischiefs against which this statute was directed have been said by the highest authority to be two—1st. the danger that the rights of the Government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction; and 2ndly. that by a transfer of such a claim against the Government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the department, the courts or Congress, as desperate cases, when the reward is contingent on success, so often suggest. The terms of the statute, it will be observed, are very wide, but they have been held not to include transfers by operation of law, by will, or by voluntary assignment for the benefit of creditors,—

these not being within the evil for which it was intended to provide a remedy (1).

In Canada the practice of the Crown is, so far as I know, against the recognition of the assignment by one person to another of a claim against it. By the third rule of the rules prescribed by the Treasury Board (February 1st, 1870), under sanction of His Excellency-in-Council, it is provided in reference to the mode of acquittal of warrants for the payment of money that no power of attorney which partakes of the character of an assignment of the moneys to another party, or purports to be irrevocable or in any respect qualified, will be received by the Government for the payment of money. At the same time the practice has always been, I think, to give effect to transfers by operation of law, or by will, of claims against the Crown, and, although I do not recall any case in point, I have no doubt that the same course would be followed in respect of a voluntary assignment for the general benefit of creditors. It is, I think, free from objection and eminently fair and just that effect should be given to such assignments, but that perhaps is not conclusive. In *Flarty* v. *Odlum* (2), Buller, J., while concurring with the other members of the court that, on grounds of public policy, the half-pay of an officer is not saleable and cannot be assigned, expresses the view that salary accrued due might be assigned; and in the *Queen* v. *Smith et al.* (3), Mr. Justice Strong says, that had it appeared from the proof in that case that there had been an equitable assignment to the suppliants of the payments to arise from the performance of the work by the original contractors, the former would

(1) *United States* v. *Gillis*, 95 U. S. 407; *Spofford* v. *Kirk*, 97 U. S. 484; *Erwin* v. *United States*, 97 U.S. 392; *Goodman* v. *Niblack*, 102 U. S. 556; *Stanford* v. *Lockwood*, 31 Hun. 291.

(2) 3 T. R. 681.

(3) 10 Can. S. C. R. 66.

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have been undoubtedly entitled to recover in respect of work actually performed by the latter; for such an equitable assignment would have been entirely free from objection, either upon the general law, or upon any provision contained in the contract, and the record would have been properly framed for relief upon such a state of facts. In the case of *The Queen* v. *Dunn* (1), the suppliant's case rested upon a transfer to him of moneys alleged to be due from the Crown to one Tibbitts, but the petition in that case (2) contained an allegation that the transfer had been communicated to the Government and accepted by them.

There are, in several of the Provinces, statutes authorizing the assignment of certain choses in action, but I do not see that they are of much assistance in the determination of this case; for even if the terms of any such statute were in any case large enough to include such a claim as that in question, the Crown, not being named therein, would not be bound by the statute.

As between the parties to such equitable assignments they are undoubtedly good, and if in any such case the money so assigned were paid to the assignor, his assignee would have an action against him for the same; and when, as in the present case, the assignment is for the general benefit of creditors and all the parties are before the court, and the Crown makes no objection, I see no reason for refusing to give effect to such assignment.

Referring then for a moment to the trust deed, it will be seen, I think, that by its terms the claim to compensation in question passed to the trustee. After assigning a number of properties by description, and, among others, the rights to quarry gypsum acquired from Gillis and the Campbells in October, 1887, McCurdy

(1) 11 Can. S. C. R. 385. (2) P. 392.

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assigned to McDougall, in trust, all his real and personal estate, book-debts, accounts, credits, mortgages, judgments, bonds, bills, notes and securities for money, goods, chattels, choses in action, assets and effects, and all his right, title and interest, trust, possession, property, claim and demand whatsoever, at law or in equity, in the same. There can, I think, be no doubt that the claim to compensation for the injurious affection of the rights which, in July, 1887, McCurdy had in the lots in question, formed at the date of his assignment to McDougall a part of his estate and effects, and passed to the latter as trustee. The amount of such compensation to which the defendant Brine, McDougall's successor in the trusts, is entitled, is the only question remaining to be determined.

The Gillis farm contained two hundred acres, and of this there was acquired for railway purposes four acres and nine-tenths of an acre, described as lot 164, as stated. Lot 165 containing two acres and six one-hundredths of an acre was severed from a larger lot of twenty acres in the possession of James Campbell, while the farm on which the latter resided, and from which lot 169 containing three acres and one-hundredth of an acre was taken, contained something less than one hundred acres. Hugh Campell's farm contained between eighty and one hundred acres. From this farm was taken lot 168 which contained three and twenty-four one-hundredths of an acre. In these four farms McCurdy had in July, 1887, the right for the residue of a term of 39 years from April, 1870, to quarry and ship gypsum, paying to the proprietors three cents a ton on every ton shipped. That right had in the first instance been granted by the predecessors in title of such proprietors to one Norman McMillan, together with other rights and interests necessary to its bene-

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ficial enjoyment. McMillan quarried and shipped from the Campbell properties about half a cargo of gypsum, which he sent to Montreal for the purpose of ascertaining its value. Beyond this he made no attempt to open or develop the quarries at Jamesville. By assignments dated, respectively, the 27th of October, 1870, and the 25th of September, 1873, in consideration of the sum of four thousand five hundred dollars, he assigned his right to quarry gypsum under the leases which I have mentioned, and in some eight other properties therein described, to Duncan McDonald, of Montreal, who was, McMillan thinks, acting for the parties to whom the latter was shipping plaster. Speaking of these other properties, McMillan says that they were leases of the right to quarry plaster on farms, some of which contained one hundred or two hundred acres and some less, he could not tell the exact area. McDonald does not appear to have made any use of the rights of which he so became assignee; and in April, 1886, they were sold at Sheriff's sale, and the defendant McCurdy became the purchaser thereof for the sum of one hundred dollars. So far as the Gillis lease is concerned, we have seen that fifty-five dollars was the value which, in 1887, Gillis put upon his right to be paid three cents a ton on all the gypsum to be shipped from his farm during the residue of the term mentioned in the lease, and on all the gypsum that might remain after the determination thereof. It will also be observed by reference to the assignment from the trustee of McCurdy's estate of the 10th of April, 1888, to McCurdy's wife, that the consideration expressed therein is only two hundred dollars, and that the transfer includes not only all the rights to quarry plaster and interests in the Jamesville and other properties that I have mentioned, but also rights in other properties as well.

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It is beyond question that there exist in the farms mentioned large deposits of gypsum, a fact which, from the outcrop to be seen at the shore of the Bras d'Or Lake and elsewhere, must have been well known for many years. These quarries have, however, never been developed and no borings or tunnellings have ever been made. The excavations for the road-bed of the railway have, perhaps, disclosed more accurately than anything else the quantity and quality of the deposits of gypsum there situated.

The case of *Brown* v. *The Commissioner for Railways* (1), on which Mr. Fraser relied, shows that there is no rule of law imposing upon a claimant in a case such as this, in order to sustain a verdict, the burden of proving by costly experiments the mineral contents of his land. But where such tests and experiments have not been resorted to, the jury must, I take it, find the facts as best they can from the indications and probabilities disclosed by the evidence. In the case before me, there is, I think, satisfactory evidence not only that there are in the properties mentioned large deposits of gypsum, but that a considerable proportion thereof is soft gypsum which has a commercial value; but what proportion is soft and what hard, it is impossible with the materials before the court to determine with even approximate accuracy. The defendant McCurdy estimated the quantity of soft gypsum actually expropriated at 186,318 tons; but after all this was only an estimate, and I cannot say that it rested on any satisfactory basis.

Apart from its use as a fertilizer, soft plaster has an additional value if it is of a quality suitable for the manufacture of plaster of Paris. From the weight of evidence in this case, I am inclined to the conclusion that the soft gypsum in question is valuable only for

(1) 15 App. Cas. 240.

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agricultural purposes. That it has any other value, has not, I think, been established. With reference to what was said of the quantity of clay and earth overlaying the deposit, it appears to me that they were not shown to be sufficient to interfere with a fairly profitable working of the quarries, if all other conditions were favorable.

For such soft gypsum as that to be found at Jamesville, the price, free on board at the quarries, appears to have been ninety cents a ton, and the cost of quarrying and loading from fifty to sixty or seventy cents per ton. That, as one of the witnesses, Mr. DeWolfe, who is himself engaged in the business in the County of Richmond, said, would pay handsomely if they could ship enough. For himself he had never been able to find a market in which he could compete with the Windsor plaster.

Mr. McCurdy says that so long as they had to depend on sailing vessels, by which the business had theretofore been carried on, it was precarious. He was hopeful of better things if shipments were made by steamships which he stated were at the time of the trial carrying freight from Cape Breton to Montreal. I did not, however, understand him to mean that gypsum at that time formed part of such freight. The fact is that the available supply of gypsum greatly exceeds the demand, and the competition is correspondingly keen. For which reason gypsum properties, or, as one of the witnesses called them, "plaster chances," have never, I take it, commanded any considerable price in the market. I have referred to the small consideration paid in the actual cases and transactions of which there is evidence before the court, and I assume that if the defendants had known of other sales which would have disclosed higher market values they would have tendered evidence of such transactions. There

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are other considerations which, to me, appear to confirm the view to which I have given expression. Part of the deposits in the Campbell properties formed a cliff at the shore of the Bras D'Or Lake, and for that reason offered exceptional facilities for opening, quarrying and shipping, yet they had never been worked. In making the leases in 1870, and again in 1887, the proprietors of the lands in which these deposits occur did not bind the lessees to work or develop them, but left them free at their option to allow the properties to lie idle, in the case of the 1870 leases for 39 years, and of those of October, 1887, for 118 years. Of course there is this to be said on the other side that if the business should at any time become profitable it would be in the interest of the lessee to ship as much gypsum as possible; and if it were never profitable no harm would be done. But that, I take it, is only another way of saying that these rights to quarry gypsum had not at the time acquired any considerable market value. At the same time it is clear that in assessing the damages I should not exclude from consideration the prospective capabilities of these properties. In *Brown* v. *The Commissioner for Railways* (1), Lord Macnaghten, delivering the judgment of their lordships, says it must be borne in mind that it does not follow because a seam of coal is not presently workable at a profit that no compenstation is to be given for it, if it is likely to prove profitable in the future. So far as the Gillis property is concerned the facilities for quarrying have not been greatly interfered with by the construction of the railway. The injury in respect thereof arises principally from the expropriation of the gypsum lying within the limits of the right of way. In the other cases, however, the shore front of the properties have been taken, and here it was that quarries could have been most advantageously opened and worked. That is not now

(1) 15 App. Cas. 240.

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possible, and the gypsum cannot be shipped by water without the construction of a tramway through a gulch under a railway bridge and across the railway property to the properties to the north thereof. Not only does the lessee lose the right to quarry the gypsum under the right of way, but his facilities for exercising his rights in the remainder of the properties are rendered less valuable. Undoubtedly the injury in relation to the value of the rights affected is serious and substantial. But it does not appear to me that the value of such rights, from whatever standpoint they are regarded and making all fair allowances for the possibilities of the future, represented in 1887 a very considerable sum of money.

By their statement in defence the defendants claim the sum of $74,774 as compensation for injuries sustained. But it is only fair to add that Mr. Fraser in the course of his argument said that when the statement in defence was drawn he was not in possession of McKenzie's measurements, and that if he had been the claim would have been presented in a different form. What he did contend for was that the compensation should be determined by allowing a fair royalty on the estimated number of tons of soft plaster in the portions of the farm expropriated, and by adding thereto a sum for the injurious affection of the right to quarry in other parts of the farms mentioned. The application of such a rule presents, however, some difficulties at least in the case now under consideration. For instance, to take the difference between the cost of quarrying and loading a ton of gypsum and the price thereof, free on board, as the measure of royalty to be allowed, would be to overlook the facts that for such a business capital and skill are necessary, and that in the prosecution of such enterprises man incidents arise to reduce or dissipate apparent profits. The rate per ton agreed upon by the proprietors and

lessees by the leases of 1870 and 1887 would, I think, afford a better basis for fixing the royalty if that were deemed the better mode of proceeding to assess the compensation. But even the three cents per ton so bargained for would have to be reduced in view of the facts that the lessees were not bound to quarry, and that in any case the payments to the proprietor would not be made in one sum, but would be paid from year to year as operations proceeded. In such a case it would be necessary to form some conclusion as to the number of years it would take to develop the quarries and exhaust the deposits, and the probable output each year, and then to ascertain a sum that would be the equivalent of such a royalty paid from year to year on the amount of gypsum so gotten out. For such a calculation the case does not, I think, present data in every way satisfactory. On the other hand the actual transactions affecting the properties in question afford, I think, a better way of determining the value of the rights that the defendant McCurdy, in July, 1887, had therein. There is nothing in the case to lead me to doubt that the sum of one thousand five hundred dollars would be a large estimate of the value of such rights as a whole, and that half that amount would constitute a liberal compensation for the damages which he sustained by reason of the expropriation complained of and the construction and operation of the railway.

There will be a declaration that the lands and premises mentioned in the information are vested in Her Majesty, and that the defendant Henry K. Brine, as trustee, is entitled to be paid the sum of seven hundred and fifty dollars with interest from the 7th of July, 1887.

The question of costs is reserved

Judgment accordingly.

Solicitor for plaintiff: *W. F. Parker.*

Solicitors for defendants: *Fraser & Jennison.*