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 Oct. 22.

HER MAJESTY THE QUEEN (DE- } APPELLANT ;
 FENDANT)..... }

AND

CHARLES WILLIAM CARRIER } RESPONDENT.
 (CLAIMANT)..... }

Appeal from award of Official Arbitrators—Compensation—Valuation of property—44 Vic. c. 25, s. 16, interpretation of—Advantages derived from a public work—Nature of title.

In assessing compensation to be paid to an owner whose land has been expropriated, the market value of the property should not be exclusively considered. Although the claimant has the right to sell his property, and should, therefore, be indemnified in respect of any loss which, in consequence of the expropriation he might make on such sale, he is not bound to sell, and may reasonably prefer to keep his property for the purposes of his business ; and in that case should be indemnified for any depreciation in its value to him for the purposes for which he has been accustomed, and still desires, to use it.

2. Notwithstanding the generality of the terms of 44 Vic. c. 25, s. 16 (re-enacted by R.S.C., c. 40, s. 15, and 50-51 Vic. c. 16. s. 31), which provides that the Official Arbitrators shall take into consideration the advantages accrued, or likely to accrue, to the claimant, or his estate, as well as the injury or damage occasioned by reason of the public work, such advantages must be limited to those which are special and direct to such estate, and not construed to include the general benefit shared in common with all the neighboring estates.
3. In assessing compensation to be paid to a claimant whose land has been expropriated, the court will look at the nature of his title as one of the criteria of value.

APPEAL and cross-appeal from an award of the Official Arbitrators.

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

January 23rd and 24th, 1888.

Bossé, Q. C. for appellant ;*Hogg* for the respondent.

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BURBIDGE, J., now (October 22nd, 1888) delivered judgment.

In this case there is an appeal by the Crown and a cross-appeal by the respondent (the claimant in the proceedings before the Arbitrators) from an award of \$61,811.86, made on the 13th day of September, 1886, by Messrs. Compton, Simard and Muma (Mr. Cowan dissenting) on a claim for \$193,006.39 for compensation for property expropriated for, and injuriously affected by, the construction, in the summer of 1882, of the St. Charles Branch of the Intercolonial Railway.

The property in question was situated at Lévis, in the Province of Quebec, and consisted of beach and water lots upon which buildings and wharves had been constructed, and which were used by the claimant in carrying on his business.

Referring to the premises occupied by the claimant and the business there carried on, A. H. Larochelle, one of his employees, gives the following evidence :—

Messrs. Carrier, Lainé & Co.'s establishment is very large, is situated in the centre of the business part of Lévis, and in a very advantageous position. I think that apart from the large buildings of the railway companies, this establishment is the most extensive in the Province. All kinds of foundry work and mechanism are done there, in iron, brass and other materials, from the construction of stoves—large and small—to all kinds of machinery ; claimants also make steam power machinery for different kinds of mills, steamboats, and other things in this kind of work.

Their yard before the building of the railway was suited for ship building of different species, which claimants built, and also for the repairing of ships. They also built either for themselves or for others, and also had steamboats to repair their engines, or to replace them by others of their own make.

It was a most prosperous establishment and which, within the last

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few years has always increased, and every year new machines and new ameliorations have been introduced.

There are a great many stoves made in the foundry, but all the mouldings which might be wanted for the making of steam machines, or for other objects, are also fabricated. We also construct steam boilers for stationary machines ; in fact, all that could be done by a large establishment, even the best of machinery for the moulding and finishing of all pieces of iron, brass, or other metals, were done at claimants' establishment.

A part of such beach and water lots the claimant held under two grants made by the Lieutenant-Governor of Quebec, bearing date respectively the 17th of March, 1873, and the 25th of October, 1880 ; and the remaining portion under a lease for twenty years from 1st May, 1881, from one Charles McKenzie who, I assume, derived his title from James McKenzie, who held under two grants from the Crown bearing date the 17th of August, 1857.

This much appears from the evidence given on the hearing before the Arbitrators. From the exemplifications of the grants, which have by direction been filed in the case since the argument on appeal, it appears that such grants contained a number of special provisions.

The following is an extract from one of the grants of 17th August, 1857, to James McKenzie : --

We do hereby grant unto the said James McKenzie, his heirs and assigns forever, full power and liberty to use, occupy and enjoy the said lot or piece of land in any manner that he or they may think fit by erecting a wharf or wharves, store or stores, or other buildings thereon, and to apply the produce or profits thence arising to his or their own use and benefit, paying unto us, our heirs and successors the respective sums aforesaid, provided always, and these our Letters-Patent are granted upon the express condition that our said grantee, his heirs and assigns, do and shall within three years from the date of these presents, erect and build, or cause to be erected and built on the said lot or piece of land hereinbefore granted, an open wharf for the greater convenience and accommodation of ships and vessels resorting to and lying in our port of Quebec, and for the more safe and easy loading and unloading of goods, wares and merchandise, at the said

wharf in and upon and from and out of any such ship or vessel ; provided, also, that every such wharf shall be of a depth extending from low-water mark to high-water mark, and not less than seventy feet in length or frontage, and shall be constructed of proper materials, in workmanlike manner, and be so loaded as to be capable of resisting any pressure to which any such wharf may be exposed, and shall be faced all round with substantial timber of proper quality, so as to prevent the loading from escaping into the river, and shall be kept in a complete state of repair ; and every such wharf shall be subject to the inspection and approval, and its sufficiency shall be established by the certificate of the Commissioner of Public Works for our said Province, or of any person or persons appointed for that purpose by the Governor, Lieutenant-Governor, or person administering the government of our said Province ; provided always that our said grantee, his heirs and assigns, do and shall at all times, after the construction and erection of any such wharf or wharves on the said lot or piece of ground, permit all and every person or persons whomsoever to use such wharf or wharves for the purposes of moorage and wharfage, and to moor and fasten ships or vessels thereto, and to lade and unlade any goods, wares and merchandise, at any such wharf or wharves, and also to use any crane or cranes erected thereon, upon payment of a reasonable rate as and for moorage, wharfage and cranage, to be assessed and allowed to the proprietor or wharfinger of such wharf or wharves, by and under the authority and in the manner hereinafter mentioned ; and shall leave an open space at one of the ends of every such wharf for a landing place for boats and small crafts on the said beach lot hereby granted ; and we do hereby for us, our heirs and successors, grant to the said James McKenzie, his heirs and assigns, that it shall and may be lawful for him or them to demand, have and receive to and for his or their own use and behoof from any person or persons whom the same shall or may concern, such reasonable rate and rates as and for moorage for all ships or vessels which shall be moored or fastened to such wharf or wharves, as and for wharfage for all goods, wares and merchandise shipped off, laden or unladen at such wharf or wharves, and as and for the use of any crane or cranes to be erected on any such wharf or wharves, as shall from time to time be assessed or allowed by the Governor, Lieutenant-Governor or person administering the Government of our said Province ; and provided always that our said grantee, his heirs and assigns, do and shall, within three months of the day of obtaining the said certificate, cause to be published in *The Canada Gazette* during four consecutive weeks the tariff of rates so assessed or allowed as aforesaid ; provided further, and these our Letters-Patent are granted upon the further express condition, that if our said grantee, his heirs and assigns, do not nor shall, within the aforesaid

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term of three years from the date of these presents, erect and build an open wharf of the dimensions and in the manner hereinbefore mentioned, or shall not publish the tariff of rates in the manner and within the time hereinbefore described and specified, then, and in every such case, he, our said grantee, his heirs and assigns, shall, from and after the expiration of the said period of three years, and until such wharf shall be built of the dimensions and in the manner aforesaid, and the said certificate shall be so as aforesaid by him or them obtained, and until such publication shall be made, pay unto our said Commissioner of Crown Lands over and above the hereinbefore first mentioned sum, an annual rent of fifteen pounds nine shillings and seven pence, currency aforesaid; and, provided further, that if our said grantee, his heirs and assigns, neglect or refuse to keep every such wharf in a complete and proper state of repair to the satisfaction of our Commissioner of Public Works for our said Province, then, and in every such case, this, our present grant, and everything herein contained, shall cease and become absolutely void, and the said lot or piece of ground hereby granted shall revert to us, our heirs and successors, and become the absolute property of us or them in the same manner as if these presents had never been made, anything herein contained to the contrary in any wise notwithstanding; provided always, that if our said grantee, his heirs and assigns, shall require and shall actually occupy the said lot hereby granted for the purpose of a timber cove or for the purpose of building ships thereon, then, in either such case, he or they shall not be bound to conform to the conditions and provisions hereinbefore mentioned in so far as they relate to the erection of the said wharf; provided always, and these our Letters-Patent are granted upon the express condition, that our said grantee, his heirs and assigns, do and shall renounce, quit and give up all and every claim against, and shall hold harmless, all and every the *censitaires* holding lands in the immediate rear of the beach lot hereby granted, for or by reason of any sale or transfer of property by them, or any of them, heretofore made to our said grantee, or of right of property in the said beach lot or any part thereof; and further, that in case the said beach lot shall at any time hereafter be laid out for building lots, a sufficient number of cross-streets shall be left open so as to afford easy communication between the public high-road in the rear of the said beach lot and low-water mark in front thereof, and that such streets shall be made in the manner and of the dimensions that shall be prescribed by municipal regulations then lawfully established; and also, that our said grantee, his heirs and assigns, whenever thereunto required by competent public authority, shall deliver up the ground necessary for completing a width of thirty-six feet, French measure, on the whole length of the said beach lot as reserved for a public

highway, by and in virtue of an ordinance of the Superior Council of Quebec (*Conseil Supérieur de Québec*) passed on the thirteenth day of May, in the year of Our Lord one thousand six hundred and sixty-five, intituled : *Ordonnance au sujet des clôtures sur le bord du Fleuve St. Laurent* ; provided always, nevertheless, and we do hereby reserve unto us, our heirs and successors, full power and authority to erect and build one or more battery or batteries, or any other works of military defence, upon the said lot or piece of ground hereby granted, or any part thereof, when our or their service may require the same ; provided further, and we do also hereby expressly reserve unto us, our heirs and successors, full power and authority, upon giving twelve months' previous notice to our said grantee, his heirs or assigns, to resume, for the purpose of public improvement, the possession of the said lot or piece of ground hereby granted, or any part thereof, upon payment or tender of payment to him or them of a reasonable sum as indemnity for the ameliorations and improvements which may or shall have been made on the said lot or piece of ground, or on such part thereof as may be so required for public improvements, and upon reimbursement to our said grantee, his heirs or assigns, of such sum as shall have been by him or them paid to our Commissioner of Crown Lands for such lot or piece of ground, or such part thereof so required for public improvements and in default of the acceptance by our said grantee, his heirs or assigns, of such sum, so as aforesaid tendered, the amount of indemnity, whether before or after the resumption of possession by us, our heirs or successors, shall be ascertained by two *experts*, one of whom shall be nominated and appointed by our Governor of our said Province for the time being, and the other by our said grantee, his heirs or assigns, or in the event of a difference of opinion arising between the said *experts*, by either of them the said *experts*, and a *tiers-expert* or umpire chosen by them ; and provided further, and these our Letters-Patent are granted upon the further express condition that nothing in our said grant contained shall, or shall be construed, to interfere in any way or diminish any right, privileges, easements, or servitudes granted to any railroad company by any statute whatsoever of the Legislature of our said Province, and further that our said grantee, his heirs and assigns, do and shall in every respect conform and submit to the provisions and requirements of all and every such statutes.

The other grants, though not in the same terms, are similar to this, and all contain the reservations of power to construct works for military defence on the property, and to resume possession thereof for the purposes of public improvement on giving twelve months'

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notice, and paying a reasonable sum as indemnity for the ameliorations and improvements made thereon.

No question was raised before the Arbitrators as to the right of the Lieutenant-Governor of Quebec to make grants of the beach and water lots in question, although the same are within the harbor of Quebec (1); nor was the point pressed on the argument of the appeal. The explanation is probably to be found in an order-in-council, a copy of which has since been filed in this case, passed on the 13th of April, 1870, by which the Governor-in-Council concurred in an opinion of the Minister of Justice, that, subject to any laws passed by the Dominion Parliament respecting navigation, the beach lots on the River St. Lawrence, and other rivers of the Province of Quebec, if ungranted, belonged, like other Crown lands, to the Province of Quebec.

For the present, therefore, I take it that the grants from the Province of Quebec to the claimant are recognized by the respondent and are, for the purposes of this case, to be treated as having been properly made.

The claimant seeks compensation not only in respect of his freehold, and of his leasehold interest in the McKenzie property, but also in respect of the interest of the heirs McKenzie, in the latter. In support of this he has filed an agreement dated the 27th day of July, 1883, made between Charles McKenzie and himself, whereby he covenanted, notwithstanding the expropriation, to pay the full rent of \$1500. reserved in the lease before referred to, and McKenzie assigned to him the sum or amount which the Arbitrators might award as indemnity for damages to the McKenzie property.

The following is the statement of claim made in respect of both properties :—

(1) 22 Vic. (P.C.) c. 32 s. 1; 36 Vic. c. 62; *Holman v. Green* 6 Can. S.C.R. 707 (1881).

STATEMENT of claim of C. W. Carrier, on account of property expropriated by the Government for the St. Charles Branch of the Intercolonial Railway :—

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1. 14,341.46 superficial feet of land expropriated for railway, at \$2.00.....	\$28,682 92
2. 52,505.60 cubic feet of wharf, (built of wood, iron, stones) expropriated at 10 cents.....	5,250 56
3. 17,556.75 cubic feet wharf (filled up with earth and stones) expropriated at 10 cents.....	1,755 67
4. One cistern 14' 9" x 10' x 12' with automatic valve, partly covered by railway and to be rebuilt on other side of track.....	500 00
5. To removing crane from old wharf unto new wharf....	600 00
6. One wharf and crossing to be constructed outside of track to replace ship-yard destroyed by building railway in front of it, 826,673 cubic yards at \$2.70.....	22,319 00
7. One wharf to be built alongside of track to replace frontage destroyed by railway, and two cross wharves between said wharf and ry. track, 8,387 3-10 cubic yards at \$2.70.....	22,647 00
8. To filling up space between above mentioned wharf and ry. track, 6,579 yards at 60 cents.....	3,947 00
9. One new boiler shop, 4,948 superficial feet to be built on wharf outside of track to replace old boiler shop, part of which was destroyed, and remainder not being large enough for the purpose.....	4,778 57
10. To new engine, boiler, and shafting to be fitted up in new boiler shop to drive machinery.....	1,500 00
11. To yearly consumption of coal at \$1.00 per diem, and engineer stoker at \$1.00 per diem, as also oil and waste at \$15.00 per year, or \$615.00 per year capitalized at 6 per cent.....	10,250 00
12. To new forge to be built on new wharf to replace forge for marine work and ship-yard purposes.....	1,505 00
13. To a nightwatchman in ship-yard, boiler shop, &c, 365 nights at \$1.00 per night capitalized at 6 per cent.	6,083 34
14. Damage done to property owing to railway being built across deep water wharf and the space to ground vessels for loading and unloading, and steamboats for fitting in engines and boilers, so shortened as to be now useless for the purpose.....	8,333 33
15. To timber pond destroyed by railway, it being also the only way to communicate on the beach with vehicles, 5,940 superficial feet, at \$1.00.....	5,940 00

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	17. To 4 years deprived of use of ship-yard, and loss of profits made yearly on boat building.	10,000 00
	18. To loss of time by men in boiler shop owing to said shop being partly destroyed and having to run to and from the forge and other end of premises, and to work outside, 4 years at \$900.00.....	3,600 00
	19. To daily loss of time of workmen disturbed by trains and passengers, average 200 men, 6 minutes each, 1,200 minutes=20 hours=2 days, at average \$1.25 = \$2.50 for 300 days, \$750.00 capitalized at 6 per cent.....	12,500 00
	20. To extra cost of crossing machinery, vehicles, &c., over railway track to communicate on wharf outside and loss of time for men and horses, owing to trains being stopped in front of property on arrival and departure of trains, and due also to constant shunting.....	12,000 00
	21. To increase of insurance premiums since the railway has been built on \$40,000, at 1½ per cent. \$450, capitalized at 6 per cent.....	7,500 00
	22. To general depreciation of property resulting from the fact that it is separated into two different parts and cannot be managed as one single property.....	20,000 00
	23. To fees paid to surveyors and engineers to establish damage, as also for making plan of property.....	314 06
		\$193,006 39

A claim similar to this was considered by Mr. Justice Taschereau in the case, in this court, of *Paradis v. The Queen* (1). To the instructive judgment rendered in that case, I wish to refer, as giving, with great fulness of detail and clearness, the principles upon which compensation should be assessed.

Now, if in the present case it were possible to come to a conclusion as to the value to the claimant for any available purpose of the properties in question, taken as a whole, immediately preceding the expropriation, and the value of the same thereafter, the depreciation

(1) 1 Ex. C. R. 191.

being occasioned by such expropriation and not otherwise, the difference of the two sums would represent the amount of the indemnity to which the claimant is entitled. In making such an estimate the market value should of course be considered, but not exclusively. For although the claimant has the right to sell his property, and should, therefore, be indemnified in respect of any loss which in consequence of the expropriation he might make on such sale, he is not bound to sell, and may reasonably prefer to keep his property for the purposes of his business, and in that case should be indemnified for any depreciation in its value to him for the purposes for which he has been accustomed, and still desires, to use it. In a case such as this, the evidence respecting the value of the property actually expropriated is, as a rule, much more certain and definite than that with respect to the depreciation of the remainder of the property from which it is severed, and therefore it is often convenient to assess such value and depreciation separately,—the sum of the two representing the total depreciation.

By 44 Vic. c. 25 s. 16 it was provided that in assessing the value of property or damages in a case of this kind, the Arbitrators should take into consideration the advantages accrued or likely to accrue to the claimant or his estate, as well as the injury or damage occasioned by reason of the public work (see also R. S. C. c. 40, s. 15 and 50-51 Vic. c. 16, s. 31). The language of this provision is apparently large enough to include not only the special and direct benefit arising from the position of a property on the line of railway, but also the general benefit not arising therefrom but from the facilities and advantages caused by the railway which affect all the estates in the neighborhood equally, and which are shared in common with such estates. I apprehend, however, that the narrower is the true

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construction of the provision, and that the advantages accrued, or likely to accrue, should be limited to those which are special and direct (1), and in a case like the one under consideration to such as arise from increased conveniences for carrying on business, because of the opportunity of connecting the property with the railway by tracks and sidings. In this way, no doubt, and by the facilities afforded for receiving and shipping goods, a manufactory, such as the one in question, could be greatly benefited.

Applying these general remarks to the claim under consideration it is clear, I think, that, for the most part, the claim could not be entertained in the form in which it is presented.

With the exception, however, of items 16 and 17, which will be represented by interest on the amount allowed, and item 23, which is a matter of cost rather than compensation, the other items present elements of value or depreciation which, if established by the evidence, should be considered and disposed of in making the assessment of compensation. For example, items 1, 2 and 3 are to be considered in fixing the value of the property expropriated; items 14 and 15, in deciding as to whether or not there is a depreciation of the value of the property because, by reason of the expropriation, it has become impossible to put it to some use to which the claimant could formerly have put it; items 4, 5, 6, 7, 8, 9, 10 and 12 in considering how far the premises were, by the expropriation, rendered unfit for the claimant's business, and therefore depreciated in value to him, and whether the works constructed or proposed by him for the purpose of putting it in a state to continue that business were or are reasonably necessary; and items 11, 13, 18, 19, 20, 21 and 22 in deciding as to whether or not there is any

(1) *Sutherland on Damages* Vol. 3, 452-3-4.

depreciation in the value of the property to the claimant, because, even after he has done what he can to counteract any inconvenience occasioned by the construction of the railway, he is still compelled to conduct his business at a greater expense than formerly.

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In other words, items 1, 2 and 3 will be disposed of when the value of the property expropriated has been fixed, while the amount allowed for the depreciation in value of the property not expropriated (which, as before stated, must be assessed in view of the special advantages which such property derives from the construction of the railway) will include the other items mentioned.

Now I do not wish to be understood as expressing any opinion as to whether or not the claimant has, in respect of the value of the property taken, or of any of the elements of depreciation, made out his case; and especially do I wish to guard against being thought to approve of the calculations and extensions presented in reference to such items of the claim as 11, 13, 14, 15, 18, 19, 20 and 22. It was to items similar to these, I apprehend, that Mr. Justice Taschereau referred in the case of *Paradis v. The Queen*, (1) when he expressed the opinion that the statement of claim in that case was most extraordinary, "its gross exaggerations being only equalled by its striking illegalities."

In the view I take of this case it is not necessary for me at present to express any opinion as to the amount of compensation that should be awarded. That is peculiarly a matter for the consideration of the Arbitrators, and did I think that the case had been properly presented to them I would not be inclined to interfere with their finding. But it appears to me that neither the value of the property expropriated, nor its depreciation can be satisfactorily assessed without knowing

(1) 1 Ex. C. R. 217.

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what the claimant's title is, and whether or not it is free from, or burdened by, conditions.

I have no doubt that every witness who put a value upon this property, or of any part of it, and that the Arbitrators in making their award, did so on the assumption that the claimant had a good title to the premises, free from any burdensome condition. It is impossible for it to be otherwise, as they did not have before them the grants to which I have referred, but only extracts therefrom showing the descriptions of the several lots.

I think that the assessment has not proceeded on a correct principle, and therefore I set aside the award and remit the whole matter to the said Arbitrators, Messrs. Cowan, Compton, Simard, and Muma, now Official Referees of this court, for their re-consideration and re-determination and for report to the court, for which purpose they have leave to hear further evidence and the parties as they shall see fit.

Such report should show:—

- (1) The date of the expropriation, from which date interest should be allowed.
- (2) The assessment of compensation, and the manner in which this amount is arrived at.
- (3) Whether the Official Referees have ascertained definitely the claimant's interest in the premises, and whether the same is free from any incumbrance or charge, and whether the compensation is awarded in reference to his interest only, or in respect of the entire estate, and for indemnity to every person, who, at the time of the expropriation, may have had any interest therein.

Case remitted to Official Referees for re-consideration; costs reserved.

Solicitor for Respondent: *J. G. Bossé.*

Solicitors for Appellant: *O'Connor & Hogg.*