Coram TASCHEREAU, J.

1887
June 16.

TELESPHORE PARADIS.................. APPELLANT;

AND

HER MAJESTY THE QEEEN............ RESPONDENT.

Expropriation of land—Imperial Lands Clauses Consol. Act, and Railways Clauses Consol. Act—"The Government Railways Act, 1881"—Right to compensation under the law of the Province of Quebec—Damage to claimant's business—Interest—Valuation of property on municipal assessment rolls.

On appeal from an award of the Official Arbitrators,

Held:—(1.) In so far as "The Government Railways Act, 1881," re-enacts the provisions of the Lands Clauses Consolidation Act, 8–9 Vic. (Imp.) c. 18, and the Railway Clauses Consolidation Act, 8–9 Vic. (Imp.) c. 20, where the latter statutes have been authoritatively construed by a court of appeal in England such construction should be adopted by the courts in Canada.

Trimble vs. *Hill*, (5 App. Cas. 342) and *City Bank* vs. *Barrow* (5 App. Cas. 664) referred to.

(2). Apart from any legislation of the Dominion parliament, where lands have been expropriated for any purpose, a right to compensation obtains under the law of the Province of Quebec in the same way as under the law of England.

(3). Where lands are injuriously affected but no part thereof expropriated, damages to a man's trade or business, or any damage not arising out of injury to the land itself, are not grounds of compensation; but where land has been taken, compensation should be assessed for all direct and immediate damages arising from the expropriation, as well as from the construction and maintenance of the works.

(*Jubb* vs. *The Hull Dock Co.* (9 Q. B. 443), and *Duke of Buccleuch* vs. *The Metropolitan Board of Works.* (L. R. 5 Ex. 221, and L. R. 5 H. L. 418) referred to.

(4). Under the law of the Province of Quebec, where interest has been allowed on an award by the Official Arbitrators, a claim for loss of profits or rent cannot be entertained by the court on appeal, as such interest must be regarded as representing the profits.

(*Re Fouché—Lepelletier,* Dalloz 84, 3, 69) and *re Pechwerty,* (Dall. 84, 5, 485, No. 42) referred to.

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(5). The valuation of a property appearing upon the municipal assessment rolls does not constitute a test of the actual value upon which compensation should be based, where such valuation is made arbitrarily and without consideration of the trade carried on upon the property, or the profits derivable therefrom.

(6). In an expropriation matter the court should assess damages in the same way a jury would do in an action for forcible eviction. It is not merely the depreciation in the actual market value of the land that a claimant has to be indemnified for, it is the depreciation in such value as it had to him that should be the basis of compensation.

APPEAL from an award of the Official Arbitrators.

Prior to the building of the St. Charles Branch of the Intercolonial Railway, Paradis, the appellant, was the owner of a saw-mill at Lévis which he was operating with considerable profit. This mill was built between a street, or public highway, and the river. Between the highway and the mill there was an area of ground used by Paradis for the purposes of piling lumber and loading carts, which was not fenced off from the road,—carts having free access to it all along the frontage.

In 1883 the Government caused the railway to be laid along the whole front of Paradis' property, expropriating some 2,975 superficial feet from the said piling and loading ground between the highway and the mill.

The Government tendered Paradis the sum of $2,975. in full compensation for the land taken, under the provisions of "The Government Railways Act," 1881. This tender Paradis declined to accept, and put forward a claim amounting to $96,441,67, for the right of way expropriated and damages to his property and business.

This claim was referred to the Official Arbitrators, who made an award in favor of Paradis for $17,542. in full satisfaction of his claim, with interest from the date of the expropriation.

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From this award Paradis appealed to the court.

The appeal was heard before Mr. Justice Taschereau., who ordered evidence to be adduced in addition to that taken before the Official Arbitrators.

Bossé, Q.C. for claimant;

Hogg for the Crown.

TASCHEREAU, J. now (June 16, 1887), delivered judgment.

It is settled law, upon the authority of *Trimble* v. *Hill* (1) in the Privy Council, and *City Bank* v. *Barrow* (2) in the House of Lords, that where a colonial legislature has re-enacted an Imperial statute, and the latter has been authoritatively construed by a court of appeal in England, such construction should be adopted by the courts of the colony.

Now our statute is but a re-enactment of the Imperial statutes on the subject; and, where lands are taken, it is settled law in England that the compensation which the owner, besides the value of what is actually taken, is entitled to recover from the railway company, has to be assessed upon the same basis as it would be if he had been forcibly evicted by the company without their statutory power so to do (*Lloyd on Compensation*) (3), and that the right to compensation always exists, though not exclusively, perhaps, where the action, but for the statute, would have lain. This being so, it is obvious that there may be cases in the province of Quebec, where the right to compensation would lie though it would not in other parts of the Dominion, and *vice versa*, as the right of action may or may not lie in that province in cases where it does or does not in the other provinces. The first

(1) 5 App. Cas. 342. (2) 5 App. Cas. 664.
(3) 5th ed. pp. 66 and 144.

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question to be solved here then is, would the claimant but for the statute have an action? That, of course, in Quebec, would have to be determined by the civil law of the province. In the present case, however, there is no controversy in that respect, for here the case is one where land of the claimant has been taken, and in such a case, either under the French or English law, an action would lie at the suit of the claimant, but for the statute; and the right of the claimant to compensation is not, and could not be denied by the Crown. The amount of that compensation, the principles upon which it has to be assessed, the basis of determination of the particular damages which the claimant is entitled to are the only matters in contestation.

I think it better to first briefly refer to the civil law of the Province of Quebec, and the French cases on the question.

" In cases in which immovable property is required " for the purposes of public utility," says article 1589 of the Civil Code, " the owner may be forced to sell or be " expropriated by the authority of law in the manner " and according to the rules prescribed by special " laws ;" and says article 407, " no one can be com- " pelled to give up his property except for public " utility and in consideration of a just indemnity pre- " viously paid." There is nothing in these articles that is not law in all the Dominion. In fact, by the very statute, under which the award now under consideration was made, it is enacted that, where land has been taken, the expropriated owner has the right to be indemnified for all the damages which have been occasioned by reason of the works authorised by it. In France, as in England, however, though the law is clear on the right to compensation in such cases, there is no uniformity in the decisions, as to the mode of assessing the amount thereof. That the damages, as

in England, must be direct and actual is a well established rule. I need refer on this point but to a very few cases.

L'indemnité d'expropriation ne doit comprendre que le dommage actuel, suite directe de l'expropriation.

Chemin de fer de Clermont v. *Magne* (1).

L'indemnité accordée à l'exproprié doit se mesurer sur la valeur des parcelles expropriées et sur la moins ou plus-value du surplus de la proprieté, (2).

Elle ne peut s'étendre au dommage incertain et éventuel qui ne serait pas la conséquence directe, immédiate et nécessaire de l'expropriation.

Re Maillard (3). See also *Re Commune de Mounier* (4).

So much for the general principles. I will refer to the following cases and quotations from the commentators to demonstrate what application these principles have in practice generally received.

In *re Cordier*, the court of Brussels held that where a factory had been expropriated, the owner could not prove the profits of his trade to fix the value of the property. The commentator on that case (*Dalloz* : *Répertoire de Jurisprudence*) (5) very properly remarks that as to this a distinction must be kept in view. Of course, he says, the profits that the owner made from his factory are not to be considered, inasmuch as they were the result of his personal qualifications, and of his energy and intelligence ; but they should be considered as to the result they bore upon the monetary value of the factory. In the same work, (6) to demonstrate that the idemnity must consist, not only in respect of the value of the part actually expropriated, but also of the amount of the depreciation

(1) Cass. 21 Juillet, 1872 ; S.V. 75, 1, 427.

(2) Cass. 21 Juillet, 1875 ; S.V. 75, 1, 428.

(3) Cass. 5 Mai, 1873 ; S. V. 73, 1, 476.

(4) S. V. 77, 1, 277, and cases ; Dall. 84, 1, 192, and Dall. 85, 1, 80.

(5) Verb. *Expropriation p. c. d'ut. pub.*, 23, No. 572.

(6) Nos. 582, 585.

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in value of the rest of the property caused by the works, the author cites a number of cases. The only one I will refer to is the *Charrin* case, reported at length in the same volume, (1) where it was held that the indemnity must be determined on the double ground of the value of the part expropriated, and of the loss that the owner may suffer as to the part not expropriated, either by its depreciation in value, or by the expense he will be put to in order to render the property co-ordinate with its destination.

In a later case (*Dalloz*) (2), it was held :

> L'indemnité doit comprendre, indépendamment de la valeur des immeubles expropriés, la dépréciation des parties conservées et les dommages de toute nature qui sont la conséquence directe et immédiate de l'expropriation.

I may add the case, to the same effect, of *Hanaire et Appay*, cited in *Dalloz*, (3) where the Court of Cassation enumerates as follows the different heads upon which the assessment of the indemnity must be made :

> The value of the property taken, and the expenses of demolition and of reconstruction which will be necessary to render co-ordinate the rest of the property with its ulterior destination, or to re-establish it so as to be profitably used or worked.

In *Herson* : *De l'Expropriation pour cause d'Utilité Publique*, (4) the author also puts, as part of the amount the owner must be paid for, the value of the works rendered necessary on the property left to the owner. *Sabattier* : *Traité de l'Expropriation pour cause d'Utilité Publique* (5), expounds the law in the same sense. So, he says, if the expropriation obliges the owner to demolish and rebuild a mill, he will be entitled to claim the expense of it. I may refer also to *Cadaveine et Théry* : *Traité de l'Expropriation* &c. (6), and *Dufour* : *de l'Expropriation*, &c. (7). In re *Ville de Cherbourg* (8),

(1) P. 652.
(2) 83, 1. 391 (2 *et* 3).
(3) *Rep. de Jurisprudence* v. *Expropriation*, 23, N. 1, p. 641.
(4) P. 184.
(5) P. 325 et seq.
(6) Ss. 307-321.
(7) Ss. 118, 261, 263, 264.
(8) Dall. 84, 1, 344.

the Court of Cassation held that the necessity imposed upon a lace factory, by an expropriation, of purchasing another property for the purpose of its trade, is a fair consideration in the assessment of the indemnity. In another case the same court held that the damage caused to the owner of a property severed by a railway, which consisted in the additional expense occasioned by the works to watch his herds and flocks, gave rise to an indemnity. In three cases of a recent date (1), it is true, the Court of Cassation held that damages which are not the direct result of the expropriation, but would be the result of the construction of the works, cannot give rise to an indemnity for the expropriation. These cases, however, have no application under our statute, which clearly provides for both these grounds of compensation.

Now, as to the English cases: they are far from being harmonious, and this has been the occasion of strong comment from the Bench.

Lord Chancellor Chelmsford, in the case of *Ricket* v. *The Metropolitan Railway Co.*, (2), says:—

It appears to me to be a hopeless task to attempt to reconcile the cases upon the subject.

Lord Westbury, in the same case, after referring to the diversity of judicial opinions on the question, says (3):—

It is a matter of regret that our judicial institutions should admit of these anomalies. It is also painful to observe the number of conflicting decisions on the law of compensation by railway companies. It is impossible to reconcile these decisions by any sound distinctions, and the result is, that, to a great extent, they neutralise each other. Moreover, it is distressing to be told (as we are in the judgment before us) that the Court of Exchequer, in *Senior* v. *Metropolitan Railway Company* (4), and the Court of Common Pleas, in *Cameron* v. *The Charing Cross Railway Company* (5), founded their judgments on the supposed effect of the judgment given by the Court of Exchequer Chamber, so recently as in

(1) Dall. 84, 1, 306.
(2) L. R. 2 H. L. 187.
(3) p. 201.
(4) 2 H. & C. 258.
(5) 16 C. B. (N. S.) 430.

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the year 1863, in the case of *Chamberlain* v. *The London & Crystal Palace Railway Co.* (1), but that both the Common Pleas and the Court of Exchequer did not understand the judgment on which they so relied. It is a striking example of the uncertainty of the law which rests on judicial decisions.

The subsequent case of *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (2) and in the House of Lords (3) shows what diversity of opinions continue to exist on the subject. In a later case (1882), *Caledonian Railway Co.* v. *Walker's Trustees* (4), the Chancellor (Lord Selborne) and Lord O'Hagan thought that the cases in the House of Lords could be reconciled, though not without difficulty. Lord Blackburn did not see that he could reconcile *McCarthy's* case (5) with *Ogilvy's* case (6).

An attentive examination of the cases, however, has led me to the conclusion that this conflict of authority is limited to the case of a claimant whose land has been injuriously affected by the construction of the works, but of which land no part has been expropriated. And keeping in view the distinction between such a claim and the claim of an owner whose land has been expropriated, and also remembering that, as remarked by Lord Selborne, in the *Walker's Trustees'* case (7):— "the reasons which learned Lords [judges] who con- "curred in a particular decision may have assigned for their "opinions, have not the same degree of authority "with the decisions themselves," I feel confident in saying that, where land of the claimant has been taken, it is well settled law that he is entitled to all the direct and immediate damages he suffers from the expropriation and from the construction of the works. I need hardly say that, upon every principle of justice, a contrary law would be most unjust and iniquitous.

(1) 2 B. & S. 605.
(2) L. R. 3 Ex. 306, and L. R. 5 Ex. 221.
(3) L. R. 5 H. L. 418.
(4) 7 App. Cas. 259.
(5) L. R. 7 H. L. 243.
(6) 2 Macq. 229.
(7) 7 App. Cas. 275.

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I will now review the cases where land of the claimant has been expropriated, referring occasionally to the distinction to be made between the two classes of claims.

In *Jubb* v. *The Hull Dock Co.* (1846), (1) the jury had awarded £400 for the premises and £300 as compensation for the damage, loss or injury which the claimant would sustain by reason of his having to give up his business as a brewer, until he could obtain suitable premises in which to carry on his said business.

The company attacked this last part of the award on the ground that it was given for injury to trade and not to the land, but the court (Lord Denman, C.J.) held the award good. The learned judge said (2) :—

In the case of *Rex* v. *The London Dock Co.*, (3) this court held that the tenant of a public house, whose custom had been affected by the cutting off of communication by reason of the works of the company, was not entitled to compensation : but in that case no part of the premises had been taken or touched by the company.

This case is approved in the case of *Ricket* v. *The Metropolitan Railway Company* in the Court of Exchequer Chamber, by Erle, C.J., (4) and by Lord Blackburn in the case of *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (5), in the Exchequer Court. In *Bourne* v. *The Mayor of Liverpool* (1863) (6), the plaintiffs who were brewers, were the owners of a public house, which was let for an unexpired term of seven years, and there was in the lease a covenant by the tenant not to sell on the premises any beer other than that purchased of the plaintiffs. The defendants, under a statute expropriated the premises. The arbitrators awarded, first, £3,900 for the house itself and "£400 for all loss, damage or injury to be sustained by the claimants by reason of the loss of trade there-

(1) 9 Q. B. 443.
(2) Ib. p. 457.
(3) 5 A. & E. 163.
(4) 5 B. & S. 156.
(5) L. R. 5 Ex. 241.
(6) 33 L. J. Q. B. (N.S.) 15.

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after to arise to them from the determination of the aforesaid covenant in the said lease." The defendants objected to this item of £400, but the court (Wightman, Crompton and Blackburn, JJ.) unanimously held it good. Blackburn, J. said :—

> It is not disputed, and it could not be disputed, that in giving compensation for the value of the land, the arbitrator is to give compensation for the value of the land such as it was to the plaintiffs. I can see no reason why the covenant should not be taken into account in estimating the value of the premises to the plaintiffs.

In *Senior* v. *The Metropolitan &c., Ry.* (1863) (1), though no part of the clamiant's land had been taken, the court, on the verdict of the jury that no structural damage to the plaintiff's premises had been sustained by the construction of the defendant's railway, but that the plantiffs had suffered £60 damages for loss in their trade by the obstruction to their premises, during the construction of the defendant's works, gave judgment for the plaintiff on the ground that loss of profits or a decrease in trade are an injury to the premises themselves, and that the evidence of the loss of profits is admissible and a fair item for consideration in assessing the compensation for the damage done to the land or premises. In *Cameron* v. *Charing Cross Ry.* (1864) (2), the claimant, a baker, claimed damages for the loss of trade caused by the access to his premises having been rendered more difficult by the company's works. His claim was allowed on the authority of *Senior* v. *The Metropolitan.* Willis, J. said :—

> It appears to me, that a business which a person carries on upon land is an advantage which he derives from having the land, and his interest consists of a reasonable expectation of getting profits by using such land in carrying on his business there ; and if that expectation was taken from him by the works of the company, I do not see why he should not recover damages for such loss.

That case would be a doubtful one now, perhaps,

(1) 32 L. J. Ex. (N. S.) 225. (2) 33 L. J. C. P. (N. S.) 313.

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(no land of the claimant having been taken), since the decision in *Ricket's* case in the House of Lords, (1) if it is taken as holding that compensation is due for loss of trade. But I do not think it bears that interpretation. The plaintiff, it must be remarked, specially alleged damages and injury to his premises ; and his counsel, in the course of the argument, had said that the mere loss of trade was not the ground on which the plaintiff's right was put, but was referred to only for calculating the measure of damages. In that case, the claim was rejected only because the jury had found that there was no injury to the land. There, none of the claimant's land had been taken. And in *McCarthy's* case, (2) ; though none of the claimant's land had been taken, the claim was admitted because the plaintiff's premises had been depreciated in value by the works of the company. In this last case, Lord Chelmsford draws special attention to the difference between the *Ricket* case and the case then under consideration, in view of the fact that McCarthy's land had been injuriously affected, whilst Ricket's had not. And this distinction had been also taken by the judges in the same case in the lower courts (3). In the case *re Stockport, &c. Railway Co.* (4), (a case not only not overruled, notwithstanding the severe criticism it received at the hands of the Master of the Rolls in *The Queen* v. *Essex* (5), but, on the contrary, supported in the House of Lords, in the *Duke of Buccleuch's* case,) the distinction between the case where land has been taken from the claimant, and where land has not been taken but injuriously affected, is also clearly laid down.*

(1) L.R. 2 H.L. 175.
(2) L.R. 7 H.L. 243.
(3) L. R. 7 C. P. 508 ; L. R. 8 C. P. 191.
(4) 33 L. J. Q. B. (N. S.) 251.
(5) L.R. 17 Q.B. Div. 447.

*REPORTER'S NOTE.—Since this judgment was delivered the *Stockport* case has been expressly approved by the House of Lords in the case of *Cowper Essex* v. *The Local Board for Acton*, reported in 14 App. Cas. 153.

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The jury had found an injury to the premises, of which a part had been expropriated for the railway, by reason of the risk of fire to the plaintiff's cotton mill being so much increased by the proximity to the railway as to render it less fit and convenient for the purpose of a cotton mill, and to make the mill not insurable except at a greatly increased premium, and so to render the property of less value to a purchaser. The damage on that head had been assessed at £300.

Mr. Russell, counsel for the defendant, had argued that no compensation was due, and in support of his argument had cited *Penny* v. *The South-Eastern Railway Company* (1), *The Caledonian Railway Company* v. *Ogilvy* (2), and *Broadbent* v. *The Imperial Gas Company* (3), upon which Mr. Manisty, counsel for the claimant, had said :—

There is a clear distinction between the cases cited and this. In the instances referred to no land of the claimant had been taken.

Then Crompton, J., in delivering the judgment of the court, said :—

On the part of the company, it was not denied that the premises were rendered less convenient and fit for the purposes of a cotton-mill, and that the saleable value of the mill was diminished by reason of what had been done by virtue of the provisions of the act. But it was asserted that no action would have lain against any proprietor for damage from fire arising from the proximity of the works or engines carried on and managed without negligence ; and, therefore, that the case fell within the well-established rule, that compensation is only given by such acts of Parliament when what would have been unlawful and actionable but for an act of Parliament, is permitted by the act of Parliament, and compensation therefore allowed in lieu, and by reason of such right of action being taken away. I adhere entirely to this rule as laid down by my brother Willes in *Broadbent* v. *The Imperial Gas Company* (cited *ante*), and in many other cases. But the question here is, whether such rule is at all applicable to cases where part of the land is taken and compensation is given, not only for the value of the part taken, but for the rest of the land being injuriously affected, either by

(1) 26 L.J. Q. B.(N.S.) 225.
(2) 2 Macq. 229.
(3) 26 L. J. (N.S.) Ch. 276 ; 7 H. L. Cas. 600 ; 29 L.J. (N.S.) Ch. 397.

severance or otherwise; and I am of opinion that the distinction pointed out by Mr. Manisty is correct, and that the rule in question does not apply to such cases. Where the damage is occasioned by what is done upon other lands which the company have purchased, and such damage would not have been actionable as against the original proprietor, as in the case of the sinking of a well and causing the abstraction of water by percolation, the company have a right to say, we have done what we had a right to do as proprietors, and do not require the protection of any act of Parliament; we, therefore, have not injured you by virtue of the provisions of the act; no cause of action has been taken away from you by the act. Where, however, the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say, it is by the act of Parliament, and by the act of Parliament only that you have done the acts which have caused the damage; without the act of Parliament, everything you have done, and are about to do, in the making and using the railway, would have been illegal and actionable, and is, therefore, matter for compensation according to the rule in question. I think, therefore, that the distinction between cases where the land is taken and the cases of obstruction of light, rights of way, etc., etc., by acts done on other land is well-founded.

In *Eagle* v. *Charing Cross Railway Co.* (1867) (1), where no land was taken, the award was as follows:—

I find and award that the said company have in and by the execution of their works occasioned a diminution of light to the said messuages and premises in which the said G. C. Eagle claims to be interested as aforesaid, and that the said messuages and premises are consequently rendered less convenient and suitable for the purposes and requirements of the trade or business of a wool-warehouse keeper, carried on therein by Eagle as aforesaid, than they otherwise would have been, and that Eagle has sustained and will sustain damage in his said trade or business by reason of such diminution of light; and I find and assess the amount of the compensation to be paid to Eagle by the company for and in respect of such damage at the sum of £656: and I find and award that, notwithstanding such diminution of light as aforesaid, the saleable value of the interest so claimed by Eagle in the said messuages and premises as aforesaid, is not diminished; and that except the said damage in his said trade or business, Eagle has not sustained and will not sustain any damage in the premises; and that except the compensation to which Eagle is or may be by law entitled in respect of his trade or business as aforesaid, and the

(1) L.R. 2 C.P. at p. 639.

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amount whereof I have hereinbefore found and assessed, he is not entitled to any compensation in the premises.

An action was instituted upon that award, and demurred to upon the ground that it did not appear that compensation was awarded in respect of any injury done to the land of the plaintiff, or to his interest therein. But the court, Bovil, C.J., Keating and Montague Smith, J.J., unanimously dismissed the demurrer, and held that the diminution of light was an injury to the plaintiff's interest in the premises, which entitled him to compensation under the statute; and that it was no answer that, by reason of accidental circumstances, the saleable value of the premises was not diminished.

It was argued by the defendant that loss of trade is not a subject for compensation, and that the finding of the umpire, that the saleable value of the house had not been diminished, was a finding that there was no injury to the premises.

But, said Bovill, C. J. (1):

> The diminution of light is clearly an injury to the premises. * * * The amount of compensation the plaintiff is entitled to for the diminished light to his premises is not to be estimated with reference to what they will sell for. The plaintiff is not bound to sell.

And Montague Smith, J., after stating that the injury must be to the land itself, goes on to say (2):

> I think that is shown upon the face of this award. It finds in effect that the light to the plaintiff's premises has been obstructed, and that, by reason of that obstruction, the premises have been rendered less convenient and suitable for the purposes and requirements of the plaintiff's trade. It seems to me that this is a damage to the plaintiff's interest in the premises immediately flowing from the act of the defendants. If it could be successfully contended that the obstruction of light to the premises is not an injurious affecting of the land, the same argument might equally apply to a case where the flow of water to a mill was obstructed. In either case, the injury is not limited to the trade: it is a permanent injury to the tenant's interest in the land itself. It is impossible that such an argument can be allowed to prevail.

(1) L. R. 2 C. P. p. 648. (2) Ibid. p. 649.

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The learned judge then goes on to distinguish *Ricket's* case, (1) and adds:—

That the saleable value of the premises has not been diminished is not the only, and certainly not a conclusive, test. A man is not to be driven to sell his property. He may choose to continue his business.

In *Knock* v. *The Metropolitan Railway* (2) compensation was given for damages to a stock-in-trade on a property injuriously affected by the construction of certain works, though no land of the claimant had been taken. Bovill, C.J., in the course of his remarks, says (3):—

According to my experience which has extended over a considerable period, no doubt has ever been suggested,—and indeed it has always been one of the most serious heads of compensation,—that where premises are damaged or injuriously affected, by the exercise of the powers vested in the company, the claimant is entitled to compensation for damage done to his stock-in-trade or other property thereon.

In the case of *White* v. *The Commissioners of Public Works* (1870) (4), Kelly, C.B., Channel and Cleasby, B.B., gave compensation for loss of profits and the good-will of a business, in a case where land had been taken from the claimant.

In the *City of Glasgow* v. *Hunter Union Railway Co.* (1840) (5) the head-note to the report says:—

Statutory compensation cannot be claimed by reason of the noise or smoke of trains, whether part of the claimant's lands be taken or not.

But that is wrong; for Lord Chelmsford said:—

But the claim in the present case does not arise out of anything done on the land taken, nor in respect of any property of the respondent connected with the land so taken. * * * As no part of the respondent's property has been injured by anything done on his land over which the railway runs, his right to compensation for damage appears to me to be precisely the same as if none of his land had been taken by the company.

Lord Westbury said:—

I concur with the respondent's counsel that where a part only of

(1) 5 B. & S. 149.
(2) L. R. 4 C. P. 131.
(3) Ibid. p. 135.
(4) 22 L. T. (N. S.,) 591.
(5) L. R. 2 H. L., (Sco. App.) 78.

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certain premises is taken, the residue being left to the owner, all the inconvenience sustained by the owner of the residue in consequence of the user made by the railway company of that which is taken is a legitimate subject of consideration when a jury is directed to address itself to valuing the property so taken.

In *Hammersmith* v. *Brand* (1) Lord Colonsay said:—

No land belonging to the plaintiffs, or in which they were interested, was taken or touched by the railway;

and the claim was in that case dismissed on that distinction. I shall cite presently what Lord Chelmsford said of *Hammersmith* v. *Brand*, in the *Duke of Buccleuch's case*. Erle, C. J. delivering the judgment in the Exchequer Chamber, in *Ricket* v. *Metropolitan Ry. Co.* (2) said:—

As to the argument that compensation is in practice allowed for the profits of the trade *where land is taken*, the distinction is obvious, the company claiming to take land by compulsory process expels the owner from his property, and are bound to compensate him for all the loss caused by the expulsion, and the principle of compensation then is the same as in trespass for expulsion. * * * The general conclusion which we draw from this review [of the cases] is that there is no precedent of compensation for an injury to goodwill or for a loss of profit in the business carried on upon the land where no land has been taken; that the compensation for the goodwill of business carried on upon land actually taken is granted expressly on the ground that the occupier is expelled therefrom, and is distinguished thereby from a claim by an occupier from whom nothing has been taken.

In *The Duke of Buccleuch's* case (1871), (3) the great difference that exists between the compensation due to a claimant whose land has been expropriated and the claimant whose land by its proximity to the railway may have been injuriously affected by the construction or usage thereof, but from whom no land at all has been taken, was clearly admitted by the House of Lords. Mr. Justice Hannen, when giving his opinion before the House, said:—

It may well be that there is a hardship in awarding no compensation

(1) L. R. 4 H. L. 171. (2) 5 B. & S. at pp. 163-167.
(3) L. R. 5 H. L. 418.

to a person who sustains loss for the public benefit unless his lands are taken; but there is a manifest difference between the position of a person whose lands are taken and that of one whose lands are not. The former was possessed of something without which the proposed public purpose could not be accomplished; he could have prevented the carrying out of the undertaking if he had not been deprived of this power by Act of Parliament, whereas the person whose lands are not taken had no such power, and could not have hindered the appropriation of lands not his own to any purpose not amounting to a nuisance.

Mr. Baron Martin also clearly recognized this difference between the owner whose land has been expropriated and him whose land has not. Then, in delivering his judgment, Lord Chelmsford said:

In *Hammersmith Railway Company* v. *Brand* (1), it was held that a person whose land had not been taken for the purposes of a railway was not entitled to compensation from the railway company for damage arising from vibration occasioned (without negligence) by the passing of trains after the railway had been brought into use. And in *City of Glasgow Ry.* v. *Hunter* (2) it was held that compensation could not be claimed, by reason of the noise or smoke of trains, by a person no part of whose property had been injured by anything done on the land over which the railway ran. In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use and not by the construction of the railway. But if, in each of these cases, lands had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise, occasioned by passing trains.

In the more recent case of *The Queen* v. *Sheward* (1880) (3), though not the gist of the decision, an award of £6,000, which included a large sum for loss in respect of the claimant's business, was maintained. The three judges, Bramwell, Bagallay and Brett, L. JJ., recognize the distinction between the two kinds of claims. In *Wadham, et al* v. *The North-Eastern Railway Company* (4), though no land had been

(1) L. R. 4 H. L. 171.
(2) L. R. 2 H. L. (Sco. App.) 78.
(3) L. R. 9 Q. B. Div. 741.
(4) L. R. 14 Q.B. Div. 747.

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taken, compensation was awarded. This last case, however, has no application to the present claim.

In the *Queen* v. *Essex* (1) Day, J., said :—

> The great exception, and one which, in my mind, ought to be upheld, is, that where any portion of a man's land is taken he shall have full compensation for the injury that is done to him, although, if his land is not taken * * * he must submit to bear the loss, and can obtain no compensation whatever for it.

Although this case was reversed on appeal (2), the distinction so made was not questioned by the court of appeal.

In *Ford* v. *The Metropolitan Railway Company* (1886) (3), Lord Esher, M.R., says :—

> If a building cannot be used as a business building to the same advantage as it was before, it is an injury to the building as a business building.

The court also held in that case that the contention that damage is not to be compensated because it is merely a temporary one during the construction of the works, is unfounded in law.

In *re Penny and The South-Eastern Railway Company* (1857) (4), where no part of the claimant's land had been taken, it was held that the over-looking of the claimant's premises from the railway was no ground for compensation. In France, the law is similar to the rule laid down in the last mentioned case, and it has been there held :—

> The fact that by the construction of a road the garden of a convent previously secluded is rendered exposed to the view of the public using the road, gives no right to compensation (5).

These two decisions, however, have no application to the present case. I cite them together to show there is no difference under the two systems of jurisprudence in the general principles on the subject.

(1) L. R. 14 Q.B. Div. 753.
(2) L. R. 17 Q.B. Div. 447.
(3) L. R. 17 Q. B. Div. 12.
(4) 7 El. & Bl. 660.
(5) S. V. 80, 2,308.

I close here my review of the cases on the general principles by which courts and arbitrators are to be guided in the determination of the assessment of compensation where land is expropriated. They fully bear out what is said in *Woolf and Middleton on Compensation* (1), in the following passage :—

There is a broad distinction between cases where land is actually taken and cases where land, without being taken, is injuriously affected, as regards the principle guiding the assessment for compensation. When land is actually taken, and mischief is caused by what is done on the land taken, everything is matter for compensation, inasmuch as everything done would, but for the Act (8 Vic., c. 18, s. 68), have been illegal and actionable. * * * In other words, in a case where lands are taken for the execution of works, the principle of compensation is the same as in trespass for expulsion, and in such a case the company are bound to make compensation to the owner for all the loss caused by the expulsion.

The decisions under section 68 of the Imperial *Lands Clauses Consolidation Act* (2), to which I have been referred by Mr. Hogg, have no application in the present case. They relate to claims as to land injuriously affected, but no part of which had been expropriated. It is exclusively to this class of cases that apply the dicta and decisions that a mere personal obstruction or inconvenience, or damages occasioned to a man's trade or business, are not grounds for compensation, but that the damage must be a damage or injury to the land itself, independently of any particular trade the claimant may carry on upon it. See *Lloyd on Compensation* (3).

I now come to the proposition, put forward on the part of the Crown, that the claim must be limited to damages not of a speculative character, and cannot be extended to future damages ; and that the claimant is bound to wait till the damages occur before seeking compensation. I cite on this point the following cases. In delivering the judgment of the court in *Chamberlain*

(1) P. 117. (2) 8 Vic. c. 18, s. 68.
(3) 5th ed. p. 109.

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v. *The West End of London Crystal Palace Railway Co.* (1863) (1), Earle C.J., said :—

A person seeking to obtain compensation under these acts of Parliament must once for all make one claim for all damages which can be reasonably foreseen. * * * The party claiming compensation must bring forward his claim in unity, as far as he can foresee the damages which will arise, estimating them as having as much permanency as the railway.

In *Croft* v. *The London and North-Western Railway Co.* (1863) (2), Cockburn, C.J , on an action claiming damages accrued since the arbitration, said : —

So far as we can gather from the language of the various enactments relating to the assessment of compensation, the Legislature contemplated that compensation should be settled once for all.

And Crompton J said (3) :—

These injuries must have been in the contemplation of the parties and are foreseen damages; and, as far as such damages are concerned, there is to be one enquiry, and compensation is to be given once for all. * * * When the damage can be ascertained at the time of the enquiry, there can be no further compensation.

In that case a tunnel had been built for the railway under the plaintiff's land. The plaintiff, who, when the tunnel was built, had been awarded compensation under arbitration, complained that since the opening of the railway his house over it was injured by the vibration, and that this was an unforeseen damage at the time of the arbitration for which he had not been paid. But this action was dismissed. In *Whitehouse* v. *Wolverhampton, etc., Railway Company* (4); it was held that compensation was rightly awarded for losses or expenses not then actually sustained or incurred, but which would necessarily be sustained or incurred, and which were capable of being immediately estimated with reasonable certainty.

In *Great Laxey Mining Company* v. *Clague* (1878) (5),

(1) 2 B. & S. 638-39.
(2) 3 B. & S. 453.
(3) Pp. 455-56.
(4) L. R. 5. Ex. 6.
(5) 4 App. Cas. 115.

in the Privy Council, the award was to enable respondent to erect 540 yards of permanent stone fencing (costing £144.15s.) around the reservoir which the company had built on claimant's land under their special act. The Privy Council held that award good, although it was argued against it that it was not for past damages.

In *Todd* v. *The Metropolitan &c., Rail. Co.*, (1871) (1), Bovill, C.J., said:—

The custom has always been to assess the compensation once for all, and not only for the land actually taken, but also for the adjoining property. I do not remember any case in which probable subsequent damage was not claimed for.

In *The Queen* v. *Essex* (2), land had been expropriated for a sewage farm. The claimant declared that his premises near by were injuriously affected by the location of such works in his vicinity. One of the grounds taken by the defendants to resist the claim was that the injury done to the claimant was not occasioned by the construction of their works, but would be occasioned only by the subsequent user of the land. But all the judges, although against the claimant on another ground, were of opinion that there was nothing in this contention, and that the depreciation of the claimant's land was caused by the dedication of the land taken to the erection of the sewage works, and not by the intended subsequent user. The case of *Lee* v. *Milner* (3), cited by Mr. Hogg for the Crown, is distinguished in one of the above cases. Now, before I pass on to the consideration of the statute under which the present claim has been made—*The Government Railways Act*, 1881—I will cite two cases on the principles by which courts must be guided in the interpretation of legislative enactments of this class.

(1) 24 L.T. N.S. 437. (2) L.R., 17 Q.B.D. 447.
(3) 2 M. & W. 824.

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In *East and West India Docks* v. *Gattke*, (1850), (1) the Lord Chancellor said:—

The rules of construction which have been applied to railway acts and other acts of the same nature are, that they are to be liberally expounded in favour of the public, and strictly against the company.

In *The Queen* v. *The Eastern Counties Railway Co.*, (2) Lord Denman said:—

Before we advert to the provisions of this particular act (3), we think it not unfit to premise that, where such large powers are entrusted to a company to carry their works through so great an extent of country, without the consent of the owners and occupiers of land through which they are to pass, it is reasonable and just that any injury to property, which can be shown to arise from the prosecution of those works, should be fairly compensated to the party sustaining it.

Now as to our own statute. By the interpretation clause the word "lands" is given a more extended meaning than it had under the previous statutes, and than it has under the Imperial *Lands Clauses Consolidation Act* of 1845, 8 Vic., c. 18, or under the *Railways Clauses Consolidation Act*, 8 Vic., c. 20. Previous statutes of the Dominion legislature deal with claims in respect of "all real estate, messuages, lands, tenements and hereditaments of any nature,"—*see* 31 Vic. c. 68 (D.); 42 Vic. c. 9 (D.) Under the provisions of *The Government Railways Act*, 1881, sub-sec. 6 of s. 3, the word "lands" shall be taken to include:

All granted or ungranted, wild or cleared, public or private lands, and all real estate, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things for which compensation is to be paid by the Crown, &c.

This extended meaning to the word "land" is given in England by more recent statutes, such as *The Thames Embankment Act*, 25-26 Vic. c. 93. By sec. 5, sub-sec. 15, of our statute of 1881, the Minister of Railways

(1) 3 McN. & G. 163. (2) 2 Q.B. 359.
(3) 6 & 7 W. IV. c. 106.

is authorized to purchase, at such price as may be agreed upon, any land or other property necessary for the construction, maintenance and use of the railway; and also to contract and agree with his vendors on the amount of compensation to be paid for any damage sustained by them by reason of anything done under the authority of the statute. If no agreement can be reached the Minister may tender what he thinks is the reasonable value of the land or property, with a notice that the question will be submitted to the Official Arbitrators; and three days after such tender and notice he is authorized to take possession.

Section 15 enacts that whenever the Minister fails to agree with the owner as to the value to be paid for the land taken or for compensation as aforesaid, the Minister may tender what he thinks the reasonable value of the same, with a notice that if the offer be not accepted, the question will be submitted to the Arbitrators.

Section 16 reads as follows:

> The Arbitrators shall consider the advantage, as well as the disadvantage of any railway, as respects the land or real estate of any person through which the same passes or to which it is contiguous, or as regards any claim for compensation for damages caused thereby; and the arbitrators shall, in assessing the value of any land or property taken for the purpose of any railway, or in estimating and awarding the amount of damages to be paid by the Department to any person, take into consideration the advantages accrued or likely to accrue to such person or his estate, as well as the injury or damages occasioned by reason of such work.

The provision that the Arbitrators are to take into consideration, in the assessment of the compensation, the advantages that may have accrued, or that are likely to accrue, by reason of the railway, to any land, or to any person, is not in the Imperial act; and in *Senior* v. *The Metropolitan &c., Rail. Co.* (1), Bramwell, B. and

(1) 32 L. J. Ex. (N.S.) 225.

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Wilde, B. held that in assessing compensation in these cases, the company are not entitled to set off any benefit accruing to the claimants by the construction of the railway.*

Wilde, B. said (1):

I desire to protest against the idea that in assessing compensation a railway company can claim a set-off by reason of the benefit their works may have done to the neighbourhood. No doubt a railway does improve a neighbourhood, and everybody is entitled to the advantage of that improvement; but if any individual has a portion of his land taken, he is entitled to be paid for it. It is the first time such a question of set-off was ever mooted.

And Bramwell, B. said (2):

Suppose a man has two houses, one injured by the company's works, and the other benefited. Is he to get no compensation for the one injured?

However, our statute is clear; and here, as in France, the plus value resulting from the works has to be taken into consideration. By the operation of the said sec. 16, read in conjunction with section 5, sub-sec. 15, and with sec. 15, it is clear that the owner of land expropriated is entitled to compensation: 1st., for the value of the land taken from him; and 2ndly., for any damage or injury occasioned by reason of the railway, or sustained by him by reason of the expropriation and of the construction and maintenance of such railway. A reference to sections 27 and 30 of the act is unnecessary. They do not apply to the present case.

I will not enter into a detailed comparison between our statute and the Imperial enactments *in pari materia*,—secs. 21, 49, 63, and 68, of the *Lands Clauses Cons. Act*, 8-9 Vic. c. 18, and secs. 6 and 16 of the *Railways Clauses Cons. Act*, 8-9 Vic. c. 20. I may remark however, that under section 21, of 8-9 Vic. c. 18 (Imp.), the owner whose land is taken is to be indemnified " for any damage that may be sustained by him by

(1) 32 L. J. Ex. (N. S.) 230.
(2) Ibid.

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reason of the execution of the works," whilst our statute gives compensation for "any damage sustained by reason of anything done under the Act," being in this more like sec. 6 of 8-9 Vic. c. 20, which gives compensation for "all damage sustained by the owner by reason of the exercise, *as regards such lands*, of the powers by this Act vested in the railway company." The words "as regards such lands" have given rise to some difficulty in England. Fortunately, they are not in our statute.

I now pass to the claim in controversy in the present case, and to the review of the voluminous evidence (1200 MSS. pages) comprising that adduced by the parties before the Arbitrators, and that produced before this court under an order of April last:

Amount of claim	$96,441.75
Land expropriated 2,975 feet	
Amount tendered	2,975
Reference to Arbitrators, August 6, 1883.	
Award, 26th February, 1886.	
Amount of award	17,542
With interest from date of expropriation, August 18th, 1882.	

Against this award there is an appeal by the claimant asking that it be increased, and a cross-appeal by the Crown asking that it be reduced.

The claimant's bill of particulars is as follows:

I.—To Right of Way.

1. 2,975 square feet expropriated by the engineers for the railway, at $5.00	$14,875.00
2. 720 square feet additional, also expropriated for the under road and steep exit, at $5.00	3,600.00
3. Loss of time during blasting for the removal of lumber to clear ground required for said railway and for the piling of lumber from one place to another	1,000.00
4. Building of a temporary wharf to pile lumber to give space for ground required for said railway	1,500.00
	$20,975.00

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II.—COSTS AND DISBURSEMENTS.

5. Foundations for saw mills, engine-room and chimney, 70 ft. x 75 ft. x 21 ft.; depth, 110,250 ft. at 10 cts.	$11,025.00
Construction of the planing mill	2,800.00
" " saw mill	3,900.00
" " engine room	950.00
" " chimney	800.00
" " slip	300.00
Putting up and placing machines, boilers, engine, etc., in new mills	3,500.00
Wharves,—building of new wharves to replace the ground expropriated by the Government, and the area of ground necessary for the construction of the new mills. The extension is 100 ft. x 40 ft. x 30 ft.; depth equal to 120,000 ft. at 10 cts.	12,000.00
	$35,275.00

III.—DAMAGES TO BUSINESS AND EXTRA EXPENSES.

6. Loss during the construction of the mills and wharves, 120 days, at $38.75 per day	$ 4,650.00
7. The removal of the buildings eighty feet further to deep water will leave almost no space to boom logs and square timber; consequently the claimant will be compelled to purchase an adjoining lot. With the possession of said lot the capacity to boom will be considerably less than the actual space occupied by the booms. The purchase of said lot will cost at least $4,000, for which the claimant requires an indemnity of	2,000.00
8. The necessity of constructing new wharves to deep water will reduce the space to boom logs and square timber, even with the lot to be purchased as mentioned above, consequently it will necessitate extra labour and extra expenses for steamboats, etc. What was done by two trips by steamboats will now take three trips, a trip of about a week at $10 each, during 30 weeks, representing a capital of	5,000.00
9. Loss of time to men caused by the construction of the road, also to vehicles,—say 40 men at ½ hour each 20 hours, 2 days at $1 to $2 a day or $600 per year. To cover expenses it requires a capital of	10,000.00

10. The steep exit which has been made by order of the engineers of the road will necessitate the complete

removal of the snow during the winter on the under road and steep hill, which has never been done before. The said removal of snow will occupy one man and a vehicle for at least 75 days during winter; 75 days at $1.50 per one man, and vehicle $112.50 capitalised.. 1,875.00

11. The mill was formerly insured against loss by fire for $5,000 only, at least for the last six years. The claimant thought he was sufficiently covered, because the buildings were so much isolated from other properties. The crossing of the railway will increase considerably the damages of a conflagration by sparks, &c. It will become a necessity to keep the buildings fully covered at least for the sum of $20,000 at 6 per cent.,—$1,200 per year, from which deduct 5 per cent. on $4,000 as before, or $200 per year, equal to capital of. 16,666.67

$40,191.67

RECAPITULATION.

1. Right of way...$20,975.00
2. Costs and disbursements......................... 35,275.00
3. Damages to business and extra expenses.... .40,191.67

$96,441.67

This is certainly a most extraordinary statement of claim. Its gross exaggerations are only equalled by its striking illegalities. I will proceed to discuss its details.

As to the 1st item (2,975 square feet), for value of the land actually expropriated, the evidence would not justify me to give more or less than $1 per foot, the amount tendered by the Crown. There was evidence on the part of the Crown that it was not worth more than 25 cents per foot. But this amount of $1 I cannot reduce, as it is the value fixed by the Crown's special agent for the acquiring of this property. I refer to Mr. Demers' evidence taken before this court. Upon the right of way, the value of $1 a foot is fully established.

The 2nd item, 720 feet (at $5 per foot) for the

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road, I must reject. There is no expropriation of these 720 feet, and the claimant must have had a road or used part of his property for a road before the railway. What there is in this item may form an element in ascertaining the amount of depreciation of the property, and that is all.

As to the 3rd item ($1,000 for loss of time during blasting, and for the removal of lumber from the ground expropriated and the re-piling of it at another place), the claim is allowable if proved. But as to the blasting, I do not see any evidence. Atkinson, on the part of the Crown, disproves it, and as to the removing of lumber and re-piling, I cannot find any other reliable evidence than that of Piton, who had charge of clearing the ground for the railway, and who swears that what use Paradis made of it was not worth more than $12. Lortie swears that it was worth $1,000, but he had no personal knowledge of it whatever.

The 4th item ($1,500 for building temporary wharf), is proved at $1,500, but I cannot allow it. The claimant cannot get both the price of the property expropriated, and the amount necessary to replace it by other property.

The 5th item ($35,275 for re-building wharves and mills), I pass over for the present.

The 6th item ($4,650 for loss during re-construction of mill), I could not under any circumstances allow. The Arbitrators rightly, under the law of Province of Quebec, allowed the claimant interest on the amount awarded from the date of the expropriation. Now the claimant cannot get both that interest and the loss of profits. The interest represents the profits. I find two cases precisely in point (1) where it was held that the interest on the indemnity covers the loss of profits

(1) *Re Fouché-Lepelletier* Dall. 84, 3, 69 ; and *re Pechaverty* Dall. 84, 5, 485. No. 42.

and loss of rent during the reconstruction necessitated by the construction of the works.

The 7th item I reject upon the same reason that I gave concerning item 4.

The 8th, 9th, and 10th items are items to be considered in determining the diminution of value of the property by the works, but are not allowable in the shape they are presented.

Item No. 11 ($16,666 for insurance), is also to be considered determining the depreciation of the value of the property, but not allowable as made. It is a preposterous claim. If I gave the claimant $16,666, he would not have to insure at all in the future. He would be getting the amount of his insurance, not only before the fire, but without a fire. He would, moreover, get hereafter the interest on that large sum. Such a claim must have been inserted without reflection.

I now come back to the 5th item ($35,275), for the reconstruction of the mill and the wharves necessary for that purpose.

That this mill cannot remain where and as it is, at a distance of ten feet from the railway fence, which, though not yet made, the railway company has the right to make when they please, is admitted by all the witnesses; the difference on the subject between the claimant's witnesses and the Crown's being that the latter are of opinion that an extension of 36 feet towards the river would be sufficient, leaving the front part of it as it is, at a distance of only ten feet from the railway ground; whilst the former are of opinion that the mill should be entirely taken down and reconstructed at a distance of 70 to 80 feet from where it now stands. Were I to base the amount of the compensation on the cost of either the enlargement or the entire reconstruction of the mill, I would adopt the claimant's witnesses' theory. From the evidence,

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I cannot see that the Crown witnesses' theory of a simple enlargement of 36 feet would give the claimant the same room and advantages he had before the railway. At the same time I would say that he is not entitled to have more ground in the future between his mill and the railway fence—67 feet—than he had before between his mill and the main road. I hesitate, however, to adopt this basis at all in this case, though the authorities might support it, for the reason that, in the shape this item of the claim is made and proved, were I to adopt it I would perhaps make the claimant a richer man than he was before, for if he was to get $35,275, and remain with all his property as it now stands, besides getting the $2,975 for the ground expropriated, in all $38,250, and the property with mill complete, he might be in a better position than he was before, although I must say that upon the evidence, when the railway is fenced in, his mill will not be worth much where it now stands. One way of reaching the amount he is entitled to has been suggested. That is, by ascertaining by the loss of trade alone, the depreciation in value of the property. The loss of trade proved by Paradis himself is from $1,500 to $2,000 a year. This evidence is corroborated by other witnesses, and the Crown witnesses, having no personal knowledge of the claimant's business, were not in a position to contradict it. It is evident, however, that though loss of trade is a fair element of consideration to ascertain the depreciation in value of the property, the claimant cannot get the capital sum representing the amount of his annual loss of trade. Supposing, for instance, that he has lost since the railway $1,500 a year, the Crown is justified to argue that, upon this alone, he is not entitled to claim $25,000. That would be giving him a life insurance, a fire insurance, an accident insurance, and an insurance

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against the fluctuations of trade and the risks that necessarily attach to any business. On the other hand, the claimant can justly argue that when the railway is fenced in, his loss of profits will be more than doubled; and the evidence fully justifies that contention. Under these circumstances, the only fair and legal way of establishing the amount of compensation in the case, it seems to me, is purely and simply by ascertaining the depreciation in value of the property, as regards the claimant, by the construction of the railway, supposing it fenced in, and, taking into consideration the severance of the property, the loss of trade and profits that the claimant would suffer if his mill remained where it is, the increased risk of fire, and the extra expense entailed by having to cross the railway to carry his lumber to or from the main road, as well as the more difficult egress from the lower mill to the main road. I do not lose sight of the loss of profits that the claimant has suffered since the construction of the railway, but I consider that covered by the interest from the date of the expropriation, for the reasons that I gave concerning item No. 6. A few remarks before I review the evidence on the question of depreciation in value.

Mr. Hogg, for the Crown, argued that, upon Marceau's evidence, the claimant's business has not decreased since the construction of the railway. Now, admitting this to be so, it does not follow that his profits have not decreased.

The claimant, whom I saw in the box and thought to be a very respectable witness, swears that they have decreased. He is the only one who really knows anything about it. Then, if the business has not decreased, or even if the profits had not, it must be borne in mind that, up to this, the railway has not been fenced in, and that the claimant has been suffered to use,

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as much as practicable, the ground belonging to the railway. When the fences are put up, it is proved by all the witnesses that no long-timber sawing—which is a profitable, if not the most profitable, part of the claimant's business—will be possible, and that the other branches of his business will be greatly interfered with.

The Crown has examined and cross-examined many witnesses to prove that the timber trade of Quebec is a thing of the past; that there is no more ship-building in its harbour; that Bennett's mill, Ritchie's mill, Benson's mill, Charland's mill, and others have shut down; that Drum's cabinet factory is in financial difficulties. But for what purpose all this evidence is, I fail to see. It is conclusively proved that the claimant's mill, partly because all the larger mills have closed, but more especially because of its situation in the business centre of Lévis, is in a flourishing condition. Though there is no more, or very little, building of large ocean ships, there is in a port like Quebec, every year, a certain number of ships that come to it requiring repairs. Then there is the building, every year, of a few steam-boats, market-boats, tug-boats, ferry-boats, schooners and yachts. All this feeds the claimant's long-timber business; and his trade in smaller timber and deals is carried on with the people of the locality for house-building, etc., etc.,—a trade which the situation of his mill gives him almost command of. As an instance of the advantage of its location, I notice that from the sale alone of the refuse, slabs and saw-dust, which to other mills are a source of expense to carry away, he receives from $1,000 to $1,200 a year.

I now come to the evidence bearing more directly on the depreciation in value of the property by the construction of the railway. What was the value of

this property before the railway, and what is its value since the railway? have to be first ascertained.

By the Municipalities' valuation roll, the property was valued, in

1882	at	$10,000
1883	"	10,000
1884	"	15,000
1885	"	15,000

To this evidence, however, I attach no importance: first, because it gives the actual supposed value of the premises, without consideration of the trade carried thereon, and its profits; secondly, Mr. Demers, the Government's agent, proves, what is of public notoriety in the province, that property in Lévis, as elsewhere in the province, is not rated at its real value on the municipal rolls. The increase on the roll from 1882 to 1885 has likewise no significance, as property on these rolls is increased or decreased in value with the requirements of the municipal treasury. It is a way supposed to be less obnoxious to the ratepayers of increasing taxation. Neither do I attach any importance to the sale of this property, with right of redemption, for $25,000 by the claimant to Davie. It was merely done to secure the payment to Davie of the sum of $25,000 that the claimant owed him. This is satisfactorily proved. I may as well remark just here that the advantage to the property resulting from the building of the railway amounts, from the weight of the evidence, to very little, if anything. The claimant's trade is a local trade. He is not a shipper by rail to any extent, and cannot get his logs, or unmanufactured lumber, by rail. It would be a ruinous business for him to do so. Then, before the construction of the present works, he had, as well as now, this railway at his disposal, the station being within one mile of his mill.

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I now turn to the oral evidence before the Arbitrators on the question of value of the property before the railway. I summarize it as follows:

Claimant's witnesses:

James Tibbitts	$80,000
2nd Deposit	50,000
Hubert Paradis	60,000
C. Baillargé	63,000

Claimant himself says it cost him $40,000. It must be remarked, however, that he bought this property long ago, and in different lots which have increased in value, not only with the general increase of all property in the locality, but also and mainly, perhaps, from the fact of being put together to form one lot and one property.

Respondent's witnesses:

Simon Peters, and witnesses to his report	$22,000
Augustin Matthieu	20,000
John Wilson	16,000
Theoph. Boulanger (without foundations)	10,000

I must say that I cannot adopt the low estimate put upon this property by the Crown's witnesses. They clearly speak of the actual market value, not of the value of it as it stands to the claimant. And then, is it likely that Davie, a neighbour, a man who knows the property as well as the claimant himself, would have lent $25,000 on it if it had not more value than the Crown witnesses give to it? There are for the Crown two reports, or statements, filed in this case. (Exhibits 3 and 4.) The first, signed by Berlinguet, Peters, Ritchie, Richard Walsh, V. C. Coté, Archer, Staveley and Maurice Walsh. The second, by Matthieu, Gingras, Lachance, Lavoie, Lemelin and Samson. All of these persons have been brought forward as witnesses

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for the Crown. The witness Berlinguet drew up the first report. He acted as the Government whip in the matter; marshalled the witnesses, and got their signatures to the report. Each of them swore that the report is true; but each of the eight knows personally but one-eighth of the facts it contains. For the other seven-eighths, he swears to it because he believes what the other seven said of it. The same remark applies to report number two. Now that kind of evidence carries no weight, however respectable each and every one of the witnesses may be. Each of them swears to what he believes to be the truth; but he believes it because the others have given it as a true report. Then, these witnesses are all brought forward for a particular purpose, and with a preconceived plan. Their common function is to undervalue the property. They are biased. Now the most respectable men, when brought to the witness box under such circumstances, not only are liable to, but will almost surely, form a wrong or exaggerated opinion; and I must say, without intending to convey anything disparaging to the character of these witnesses, that I do not attach much weight to their testimony. Their depositions bear intrinsic evidence of the unreliable nature of their statements. I find a striking example of it, for instance, in the deposition of Simon Peters, a man of undoubted respectability and unimpeachable character, who, alone of all the witnesses in the case, swears that the claimant's property has not been injured by the railway. The depositions of the other witnesses, in this report, are also full of flagrant contradictions, not due to bad faith or improper motives, but to the wild and erratic manner they swear to matters of opinion. To the same causes are due the exaggerations and contradictions of many of the claimant's witnesses,—Hubert Paradis, Lortie and H. G. Marceau, particularly. As to Tibbits,

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Rosa, Rattray, Lavoie, Seraphin Marceau, Dion, Baillargé and Duclos, I do not feel justified to call them biassed witnesses, but they certainly do not at all seem to know on what basis their opinion as to value or amount due to the claimant is to be formed. I am surprised, for instance, to see a man like Baillargé swear that the claimant is entitled to $3,333 for being deprived of the use of the public road to pile his lumber or saw his long-timber, or say that the claimant is entitled to an indemnity of $63,000. Lortie goes further: He swears that the claimant is entitled to $96,441.75. And what for? Why, purely and simply, because that is the amount of the claim which he (Lortie) has prepared upon the claimant's data. To the testimony of all the witnesses examined before me, however, I attach great weight, as well from their well known respectability as from their demeanour in the box. The fact that Davie has an interest in the result of the case does not detract from the weight I attach to his evidence. I consider his evidence unimpeachable, under whatever circumstances given. To the testimony of the claimant himself I attach full credence, and the impression he made upon me, when he gave his deposition in court, I cannot but take into consideration when weighing the evidence he gave before the Arbitrators. I ordered these witnesses out of court, and they gave their evidence out of the presence of each other.

Now what is, upon the evidence, the diminution of value caused by the expropriation and the construction of this railway? On the part of the claimant, Hubert Paradis proves 50 per cent. James Tibbits, supposing this property worth $50,000 before railway, puts it at $20,000 now. G. T. Davie says the property would be ruined, if the mill were to remain where it is. C. Baillargé puts depreciation at 33 per cent.; Narcisse Rosa at 75 per cent. David Rattray, N. Lavoie, N.G. Marceau,

Calixte Dion, Pierre Duclos, prove large depreciation; and when the railway is fenced, they say the mill cannot properly be worked where it now stands.

On the part of the Crown, the witnesses put the depreciation of the property at the following figures:

Simon Peters	25	per cent.
V. T. Côté	25	"
A. Matthieu	25	"
Joseph Archer	25	"
John Wilson	15 to 25	"
Berlinguet	15	"

As a rule, I notice, these last named witnesses do not take into consideration the fact that the railway authorities can fence in their ground when they please; and they have also spoken of the actual value of the premises, not of what the depreciation is, to the claimant himself in his business.

Now, the result of these figures would be as follows:—

Crown admits by factum that the claimant is damaged to the extent of $10,693, to which I add the difference between the amount allowed therein for land taken, and the amount I allow, viz., $2,232= $12,925.

Supposing the property worth $50,000.

15 per cent.	$ 7,500 × 2,975	$10,475
25 "	12,500 × 2,975	15,475
30 "	15,000 × 2,975	17,945
33 "	16,666 × 2,975	19,641
50 "	25,000 × 2,975	27,975
James Tibbit's		30,000
75 per cent.	37,500 × 2,975	40,475

I cannot lose sight of the fact, apart from these figures, that the profits, as appears by the evidence and as conceded by the Crown in the factum, were at least from $7,000 to $8,000 per annum, and that if

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the mill remains where it is the claimant will suffer a clear loss, when the railway is fenced in, of at least $3,000 a year. The witnesses Davie, Rattray, Lavoie. N. G. Marceau, S. Marceau, Dion and Duclos, all agree that when the fences are put up, the property will be worth very little to the claimant. Yet, I cannot give to the claimant $50,000,—a capital that would represent his actual profits. I cannot insure him for the future.

I have great difficulty in coming to a conclusion I cannot make this man richer than he was, yet the Crown not only must not ruin him by this expropriation, but must not make him lose a farthing by it. He has been forcibly ejected from his property, and is entitled to full indemnity for all loss and injury he suffers thereby.

It is not merely the depreciation in the actual market value of the property that he must be indemnified for. A man is not to be driven to sell his property,—as was said by Bovill, C.J., in *Eagle* v. *Charing Cross*, cited *ante* (1). It is the depreciation in the value of the land such as it was to the claimant that I must be governed by, as held in *Bourne* v. *The Mayor of Liverpool*, *Senior* v. *Metropolitan*, and *Cameron* v. *Charing Cross*, cited *ante* (2); and, as said by one of the witnesses (Rattray), it would not be fair to base the value of the claimant's land on the value of lands in the vicinity. Moreover, it is not merely the land that I have to take into consideration. The claimant is entitled to all the damages he suffers from the expropriation and from the construction of the railway, and I have to assess these damages as a jury would do in an action for forcible eviction. *Ricket* v. *The Metropolitan Railway Co.*; *Jubb* v. *Hull Dock Co.*, cited *ante* (3).

(1) P. 204. (2) Pp. 199, 200.
(3) P. 199

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I allow $25,000 damages, with interest from the date of expropriation.

*Appeal allowed with costs.**

Attorney for appellant; *J. G. Bossé.*

Attorney for respondent: *O'Connor & Hogg*,

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*On appeal to the Supreme Court of Canada by the Crown, so much of the judgment of Taschereau, J. as dealt with the amount of compensation to be paid to the appellant in the court below and increased the same above the amount awarded by the Official Arbitrators, was reversed, andthe award of the said Arbitrators restored.

PRESENT: Sir W.J. Ritchie, C.J., Strong, Henry, Fournier and Gwynne, JJ.

1889

Jan. 15.

The following judgment was delivered by

SIR W. J. RITCHIE, C.J.—Two questions are raised in this case—one as to the value of the property and the other as the damage to be given.

Charles Baillargé, a witness called by the plaintiff, Paradis, and afterwards examined again by the judge says:—

(Questions posées par l'honorable juge Taschereau.)

Q. Vous êtes le même témoin qui a déjà été entendu devant les arbitres?

R. Oui.

Q. Je voudrais savoir de vous quelle a été la dépréciation de valeur de cette propriété par la construction du chemin de fer? Est-ce que cela a diminué de la moitié, d'un tiers ou d'un quart? En prenant en considération que le chemin de fer serait cloturé des deux cotés—le chemin de fer prend vingt cinq pieds—en supposant qu'il serait cloturé des deux cotés, quelle est la dépréciation de valeur?

Je crois avoir déjà dit dans mon témoignage que c'était un tiers de dépréciation du terrain. Je suis de la même opinion encore aujourd'hui. Il y a déjà un an de cela, je ne me rappelle pas exactement, mais toujours, c'est à peu près cela, un tiers.

Les procureurs du réclamant et de l'intimé déclarent ne pas avoir de questions à poser au témoin.

With respect to this witness respondent's factum thus speaks:—"Under these circumstances we submit the testimony of such a man as Mr. Baillargé should preponderate. Having no interest in the matter, barely knowing the respondent, his impartiality is above suspicion. For over twenty years he has had for the city of Quebec superintendence of all its works, buildings, wharves, of expropriations made for city purposes, and of purchases of materials of all kinds."

So far as I can judge this would seem to be a fair and reasonable percentage of the loss and damage

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which this property has suffered by reason of the construction of the railway. Mr. Baillargé is the Engineer of the city of Quebec and would seem from his experience as a valuator of property to be as well, if not better, qualified to give an opinion than the other witnesses called by the respondent. The claimant himself by his own witness Lortie, who made up the claim, has fixed the value of the property at forty thousand dollars. One-third of this amount would be $13,333.33. If to this is added land taken, and if Mr. Baillargé's evidence is adopted, viz: 50 cts. a foot, 2,975 feet at 50 cents would amount to $1,487.50; and if $1.00 a foot is allowed, viz. $2,975 and added to the damages $13,333.33 the amount, viz., $16,308.33 would still be less than the award, viz., $17,542.

Taking into consideration the speculative character of the value of the property, taking into consideration the different estimates which have been put upon this property, and taking into consideration the language of Chief Justice Hagarty in the case *re Macklem and The Niagara Falls Park* (1), where the award of certain commissioners was under consideration, and the question of whether the amount allowed by the commissioners was sufficient or not, which is as follows:—

"The estimate finally arrived at must necessarily involve many speculative considerations; unfortunately any estimate which this court can make must be at least as speculative, and without the great advantages possessed by those whose deliberate conclusions we are now asked to question.

"We are to hear this appeal on any question of law or fact.

"On this branch of the case we cannot see any departure from the rules of the law. We are left then to say is there any error or miscarriage of fact?

"To warrant an interference we must be satisfied beyond reasonable doubt that there has been this error, that an award of value necessarily largely speculative, is either too much or too little.

"If we refer it back to the referees it must be on the ground that it is too high or too low. I cannot possibly see my way to naming any sum, on my own opinion of the evidence, which would be a more just and reasonable compensation than that awarded. If I ventured to do so I would have the very unpleasant idea in my mind that I was interfering; to the prejudice of justice, with the opinion of those who had far better opportunities of ascertaining the truth than I enjoy. I am unable, therefore, to see my way to interfere."

Again, Mr. Justice Patterson in *Re Bush* (2):—

"An appeal lies, it is true, on questions of fact as well as on questions of law. But when the fact for decision is a matter so peculiarly depending upon estimates and opinions of values as it is in this case, and when the award represents the conclusion of the persons who have had means of forming an estimate of the reliance that ought to be placed on the testimony adduced, which we do not possess, as well as of exercising their own judgment, which they have a perfect right to

(1) 14 O. A. R. p. 28

(2) 14 O.A.R., p. 81.

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do, bringing to the task whatever knowledge they may have of the locality and the properties, and their general acquaintance with the subject, as to which we are not expected to deal as experts and are not likely to be better informed than they, or more capable of forming a correct judgment; it is obvious that we cannot interfere unless we find that some wrong principle has been acted on, or something overlooked which ought to have been considered;"—taking, then, into consideration the several matters to which I have referred, under the circumstances shown in this case it would require the strongest possible evidence to satisfy me that the award of the Arbitrators should be interfered with by the court.

The other judges present on the hearing of the appeal (with the exception of Henry, J., who had died in the interim) concurred.