ALISTAIR FRASER (*Defendant*) .....APPELLANT;

AND

HER MAJESTY THE QUEEN on the Information of the Deputy Attorney General of Canada (*Plaintiff*) .. RESPONDENT.

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*Feb. 20, 21, 22 Oct. 2

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Land taken as source of rock for causeway—No market for rock apart from building of causeway—Compensation for special adaptability—Expropriation Act, R.S.C. 1927, c. 64.

Certain lands of the defendant, comprising 110.1 acres and having a "bare ground" value of about $50 per acre, were expropriated by the Crown for the purpose of opening up a stone quarry on the said lands to provide rock for the building of a causeway. These lands had no value

*PRESENT: Cartwright, Fauteux, Judson, Ritchie and Hall JJ.

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for any purpose other than that for which they were expropriated and there was no prospect of any other commercial exploitation. The Crown later abandoned all the lands with the exception of 12.8 acres and the abandoned lands revested in the defendant. At the time of the expropriation the contract had been let for the construction of the causeway, under authorization of a prior order in council, and there were specific provisions in the contract relating to the rock on the defendant's lands which indicated that these lands were to be the source of the rock for the construction of the causeway and that it would be supplied free to the contractor. The contractor had the right to use rock from any other source that he might choose provided it was equal to or better than the rock contained in the defendant's lands and met with the approval of the engineer.

An action was brought to determine the compensation to be awarded to the defendant in respect of the expropriation of his lands. The defendant appealed and the Crown moved to vary the judgment of the trial judge.

Held (Judson J. dissenting): The appeal should be allowed and the cross-appeal dismissed.

Per Cartwright, Fauteux, Ritchie and Hall JJ.: The plaintiff's contention that the only potential value of the expropriated lands over and above their "bare ground" value was solely and exclusively related to the scheme of constructing the causeway and should accordingly have been excluded in fixing the value for the purposes of compensation failed. *Cedars Rapids Manufacturing and Power Co. v. Lacoste,* [1914] A.C. 569; *Fraser v. City of Fraserville,* [1917] A.C. 187; *Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands,* [1947] A.C. 565, considered. None of these cases was authority for the proposition that a hitherto undeveloped potentiality of expropriated property is to be entirely disregarded in fixing the value of that property for compensation purposes on the ground that the expropriating authority is the only present market for such potentiality and that it has developed a scheme which involves its use. These cases, however, made it plain that the amount fixed by way of compensation must not reflect in any way the value which the property will have to the acquiring authority after expropriation and as an integral part of the scheme devised by that authority.

The exclusion from the Court's consideration of increase in value consequent on the execution of the undertaking to build a causeway and of any value based on the Crown acting under compulsion as a necessitous purchaser did not mean that the value of the special adaptability to the owner at the date of expropriation was to be disregarded. *Vyricherla Narayana Gajaptiraju (Raja) v. Revenue Divisional Officer, Vizagapatam,* [1939] A.C. 302, followed.

The effective date for valuation of this property was the date of expropriation and the reality of the matter was that the Crown was expropriating tons of rock in the ground rather than acres of land in the rough so that the value of the special adaptability of these lands was to be determined on the basis of the value that a willing vendor might reasonably expect to obtain from a willing but not anxious purchaser for the rock *in situ* at the date of expropriation.

The value of the special adaptability was limited to the 12.8 acres which were retained by the Crown. The value of the 97.3 acres revested in the defendant did not enter into the calculation of the compensation

except to the extent that the defendant was entitled to interest on the value of the whole 110.1 acres from the date of expropriation to the date of revesting.

No amount for compulsory taking was allowed. *Drew v. R.*, [1961] S.C.R. 614, followed.

Per Cartwright and Fauteux JJ.: The statements found in numerous authorities, that the person whose property is taken for the public use shall receive no more than the value of that property to him, did not mean that he is to receive less than the market price where that is ascertainable. *Lake Erie and Northern Railway Co. v. Brantford Golf and Country Club* (1917), 32 D.L.R. 219, referred to. In relation to a case such as the one at bar where what is expropriated is really building material rather than land, the principle underlying the decisions relied on by the plaintiff (other than in *Vézina v. R.*) was that the owner of property taken for the public use shall not receive a price inflated beyond its market value because of the necessities of the scheme for the carrying out of which it is required, not that the owner shall be compelled to take less than the market price which would be paid by any willing purchaser who wanted the material and to whom competitive sources of supply were available. *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam, supra, referred to; Vézina v. R.* (1889), 17 S.C.R. 1, disapproved.

Per Judson J., *dissenting*: Whatever value this property had, other than its value as waste land, it got from the scheme. These lands had no value for their special adaptability for the purpose of quarrying in general, but only for the purpose of quarrying for the needs of the causeway. The scheme and nothing else created the special adaptability and the expropriating authority was not to be charged for the value which it and it alone brought into being. There was only one possible source of value over and above the bare value of the property, and that must be based, not on value to the owner, but on value to the taker. *Vézina v. R., supra; Cunard v. R.* (1910), 43 S.C.R. 88; *Cedars Rapids Manufacturing and Power Co. v. Lacoste, supra; Fraser v. City of Fraserville, supra; Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands, supra,* referred to.

APPEAL and cross-appeal from a judgment of Cameron J. of the Exchequer Court of Canada[1]. Appeal allowed and cross-appeal dismissed, Judson J. dissenting.

J. J. Robinette, Q.C., for the defendant, appellant.

D. S. Maxwell, Q.C., and *P. M. Troop*, for the plaintiff, respondent.

CARTWRIGHT J.:—The facts out of which these proceedings arise are set out in the reasons for judgment of my brother Judson and in those of my brother Ritchie. It is unnecessary to repeat them in detail but I wish to summarize them briefly.

[1] (1960), 23 D.L.R. (2d) 94, 81 C.R.T.C. 53.

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On July 9, 1952, when the appellant's lands were expropriated for the use of Her Majesty in the right of Canada it was already known (i) that the causeway was to be built, (ii) that approximately 9,000,000 tons of rock would be required as material to be used in its construction, (iii) that rock admirably suited to this purpose and in excess of the amount required was contained in the appellant's land, (iv) that its location was such that the costs of quarrying and transportation would be less than in the case of any rock in other locations belonging to other persons, and (v) that there were ample other possible sources of supply although because of their location none would be equally economical. The lands of the appellant were not required to form any part of the bed of the causeway or the approaches thereto; the purpose of the expropriation was simply to obtain a suitable supply of rock. Apart from the requirements for the causeway there was no probability of the appellant selling any substantial quantity of his rock in the forseeable future. The value of the expropriated land if all possibility of selling the rock contained in it was disregarded was about $50 per acre. A prudent contractor bidding on a contract the performance of which would require great quantities of rock to be supplied by him would have been willing to offer and pay from 5 cents to 7½ cents per ton for suitable rock *in situ* in a convenient location.

On these facts there are two sharply conflicting views as to what should be paid to the appellant for the 9,000,000 tons of rock taken from what had been his land and used in the building of the causeway. For the appellant it is said that he should get not less than the minimum market price, that is to say, the price which a willing but not necessitous or driven purchaser would pay to a willing seller, for the quantity of rock required. For the respondent it is said that there would have been no market for the rock apart from the building of the causeway and that the appellant is entitled only to the bare value of his land considered as waste land.

We must deal with the realities of the situation. What was compulsorily taken from the appellant was intended to be used not as land but as a source of building material for which there was an ascertainable market price. The statements found in numerous authorities, that the person whose

property is taken for the public use shall receive no more than the value of that property to him, do not mean that he is to receive less than the market price where that is ascertainable. In *Lake Erie and Northern Railway Co. v. Brantford Golf and Country Club*[1], Duff J., as he then was, said:

> It does not follow, of course, that the owner whose land is compulsorily taken is entitled only to compensation measured by the scale of the selling price of the land in the open market. *He is entitled to that in any event* . . .

The words which I have italicized in this passage appear to me to be applicable to the case at bar. Why, it may be asked, should a citizen who happens to own material suitable for use in the building of a public work and in a most convenient location, but of which there are ample available supplies in the hands of other owners, be required to make a gift of his property? I would have thought it plain that the contention of the appellant is the right one were it not for the decision of this Court in *Vézina v. The Queen*[2]. The effect of that judgment, so far as it is relevant to the point before us, is accurately summarized in the first paragraph of the headnote as follows:

> Where land is taken by a railway company for the purpose of using the gravel thereon as ballast, the owner is only entitled to compensation for the land so taken as farm land, where there is no market for the gravel.

I do not find it necessary to enter upon the question, which has sometimes been raised but not, I think, as yet decided, whether strictly speaking this Court is now bound under the principle *stare decisis* by an earlier judgment pronounced by it in a case which was appealable to the Judicial Committee of the Privy Council, for the Court has always been free to reconsider such a judgment if it is found to conflict with a subsequent pronouncement by the Judicial Committee on a point of law. The decision in *Vézina v. The Queen* appears to have been founded on the circumstance that the railway company was the only possible purchaser of the appellant's gravel and, in my opinion, it is inconsistent with the judgment of the Judicial Committee in *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam*[3], which is discussed in the reasons of my brother Ritchie.

[1] (1917), 32 D.L.R. 219 at 229. [2] (1889), 17 S.C.R. 1.
[3] [1939] A.C. 302.

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In relation to a case such as the one before us where what is expropriated is really building material rather than land, the principle underlying the decisions relied on by the respondent (other than that in *Vézina*) appears to me to be that the owner of property taken for the public use shall not receive a price inflated beyond its market value because of the necessities of the scheme for the carrying out of which it is required, not that the owner shall be compelled to take less than the market price which would be paid by any willing purchaser who wanted the material and to whom competitive sources of supply were available.

I have reached the conclusion that the appellant is entitled to be paid the fair market price for the quantity of rock taken from his expropriated land. It may be said with some force that on the evidence this should be not less than 5 cents a ton, but for the reasons given by my brother Ritchie I agree with the figure fixed by him.

For the reasons given by my brother Ritchie and those briefly stated above I would dispose of the appeal and cross-appeal as proposed by my brother Ritchie.

FAUTEUX J.:—For the reasons given by my brothers Cartwright and Ritchie, I would dispose of the appeal and cross-appeal as proposed by my brother Ritchie.

JUDSON J. (*dissenting*):—On July 9, 1952, the Dominion Government expropriated 110.1 acres out of a tract of land comprising 392 acres owned by the appellant. The appellant had inherited this land in 1929. It had been owned by his family, one part since 1897 and the other since 1890.

The purpose of the expropriation was to open up a stone quarry on the lands expropriated to provide rock for the building of a causeway across the Strait of Canso from Auld Cove at Cape Porcupine on the south side of the Strait to Balache Point on the north shore of the Strait in Cape Breton Island.

There is a good description of the property in the reasons for judgment of the learned trial judge contained in the following quotation:

> The lots so owned by the defendant are situated on the south shore of the Strait of Canso which divides Cape Breton from the mainland of Nova Scotia. To the south thereof is the main highway leading from Antigonish to Mulgrave. From that highway, which is about 250 ft. above sea level, the land rises to a height of some 650 ft. above sea level, and

at the north dropped abruptly to the shore of the Strait of Canso. The property consisted almost entirely of solid rock with a very shallow overburden of soil in some places. It was and is totally unsuitable for agriculture and such small trees as grew thereon were of no value. The municipal assessment for tax purposes of the entire 392 acres varied over the years from a low of $100 to a high of $300.

So far as is known, the property was never put to any use whatever and no improvements of any sort were made, the only expenditure thereon being the municipal taxes. No effort was made to sell any portion of the land or any rock therefrom; and no offer to purchase was ever received. Up to the date of the expropriation, no plan had been formulated by the owner for the opening of a quarry or the development of the property in any way.

The reasons of the learned trial judge demonstrate that this land had no value for any purpose other than as a site for the stone quarry needed for the construction of the causeway at the time of the expropriation and that there was no prospect of any other commercial exploitation. We are therefore faced in this appeal with this simple situation: whatever value this property has, other than its value as waste land, it gets from the scheme. It is very difficult to think of an expropriation case where this condition and this condition alone prevails. Usually land has some commercial potential apart from the scheme.

An unusual feature of the case is that when the Government expropriated on July 9, 1952, the contract had been let for the construction of the causeway, under authorization of a prior order in council, and there were specific provisions in the contract relating to the rock on the appellant's land which indicated that this land was to be the source of the rock for the construction of the causeway and that it would be supplied free to the contractor who, of course, had to quarry and transport it. The contract estimated the amount of rock fill needed at 9,000,000 tons, for which the contractor was to be paid 59 cents per ton for all rock placed in the causeway.

The appellant's land was the most convenient site for the opening up of a quarry for the supply of rock for the causeway and in addition, as the specifications show, the rock was of a better quality than most of the rock in the immediate neighbourhood in that it was harder and contained less material which would be subject to attrition by weather. It could be quarried in large blocks suitable for protecting the sides of the causeway. The contractor had

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the right to use rock from any other source that he might choose provided it was equal to or better than the igneous rock of Cape Porcupine Hill and met with the approval of the engineer.

I have not the slightest doubt that the appellant's local knowledge, both geological and geographical, and his awareness of the economic necessity of a better crossing from the mainland to Cape Breton Island always enabled him to conclude that if the Government chose to build a causeway he would be near the site and that they would have to come to him for a supply of rock.

There had been much public discussion of the project going back at least to 1943 and probably earlier. In 1943 both the House of Assembly of the Province of Nova Scotia and the Maritime Board of Trade passed a resolution asking the Government of Canada to investigate the practicability of constructing a causeway. In 1944 the Dominion Steel and Coal Company Limited made a report on the project. In 1945 the Dominion Government made a geological map of the Strait. In 1949 a board of engineers appointed by the Dominion Government and the Province of Nova Scotia reported that three projects had been studied and recommended the construction of a low-level bridge. This report is known as the Pratley Report and is the first reference that I can find in the evidence to a low-level bridge. In 1950 the Minister of Transport reconvened the Pratley Commission. It had been decided by this time that the low-level bridge was not a practical solution to the problem. On December 8, 1950, the Province of Nova Scotia expropriated the lands of the appellant. In June of 1951 the Pratley Board reported that in view of the elimination of the bridge project and because of the high cost of improving the ferry, the causeway scheme was the only practical solution. The Board also recommended that the site of the causeway be the same as the site of the proposed low-level bridge, and referred to Porcupine Mountain (the appellant's land) as a source of supply for rock. On October 17, 1951, Cabinet approval was given to the construction of the causeway by the Government of Canada. Consulting engineers were then instructed to prepare plans for the design and supervision of the construction of the causeway. These were completed on March 31, 1952. Tenders were

then invited and on June 18, 1952, the construction contract was signed, under authorization of an order in council of May 16, 1952. On July 9, 1952, the Province of Nova Scotia abandoned its expropriation and fifteen minutes later the Dominion Government expropriated 110.1 acres by filing the necessary plans and description in the registry office. The Crown indicated its willingness to pay $5,505 for the expropriated lands.

Therefore, at the time of the Dominion expropriation, the ownership of the property had been in the appellant for a period of fifteen minutes after an interval of eighteen months, and at this time the Dominion Government's scheme for a causeway was fully formulated. The Dominion filed its information on July 30, 1954, and offered $5,505 for compensation. In his defence, filed on March 21, 1955, the appellant claimed $5,000,000 plus 10 per cent for compulsory taking. On July 2, 1955, the Government amended its information and abandoned all the lands except 12.8 acres. The abandoned lands at that time revested in the defendant. The original offer of the Government of $5,505 remained as before. The defendant then amended his defence to reduce his claim to $1,000,000 plus 10 per cent. The task of the trial judge was therefore to determine the value to the owner of the 110.1 acres expropriated in 1952, taking into account, in accordance with s. 24 (4) of the *Expropriation Act*, the fact of abandonment and revesting in the appellant of a large part of the area.

Cameron J. made an assessment of $40,640. He first determined the market value of the 110.1 acres taken from the appellant on July 9, 1952, without any reference to its special adaptability for use for a quarry site for rock. Taking the evidence as a whole, he concluded that $50 per acre would reasonably represent the full market value of the 110.1 acres exclusive of the value of any special adaptability as a quarry site to be used for the supply of rock for the causeway. He then determined the value of the special potentiality. After reviewing the evidence concerning the history of the causeway and concluding that a willing purchaser, in the circumstances and not acting under compulsion, would, in view of his requirements, pay something in excess of the bare value of the land, and after considering the evidence of two Crown appraisers that the value of the

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potentiality was from $25,000 to $30,000 he reached the conclusion that the value of this potentiality was not in excess of $40,000. He then took into consideration the abandonment and concluded that the value of the 97.3 acres which revested in the appellant was the same as of the date of the expropriation, *i.e.* $50 per acre and, therefore, he deducted the sum of $4,865 leaving a net amount of $40,640. He rejected the appellant's claim for injurious affection for lack of any evidence as to the value of such loss. He also found that there was no advantage or benefit to the appellant arising out of the construction of the causeway that he should take into account under s. 49 of the *Exchequer Court Act*. He awarded the appellant an allowance of 10 per cent for compulsory taking together with interest.

The Crown submits that any increase in the value above the bare market value of $50 per acre as waste land was entirely attributable to the scheme and should be disregarded in assessing compensation. Cameron J. rejected this and held that he must ascertain the value of whatever potentialities there were and determine what would be paid by a willing purchaser to a willing vendor of the land with its potentialities in the same way that he would ascertain it in a case where there are several possible purchasers, and that he could not confine himself to an award based on the value of the land as waste land.

In doing this he followed *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam*[1], which held that this must be done even where the expropriating authority was the only possible purchaser. The judgment in the Indian case was based upon disapproval of the dictum of Fletcher Moulton L.J. in *Re Lucas & Chesterfield Gas & Water Board*[2] and adoption of the contrary opinion of Vaughan Williams L.J. in the same case.

Cameron J. then arrived at a figure of $40,000 for special adaptability. He said that before October 17, 1951, (the date of the order in council) there was always the chance that this land might be needed for a quarry for the causeway, and that before this date a contractor who might expect to tender for the construction contract if ever the causeway scheme were decided upon and tenders called for, might

[1] [1939] A.C. 302.

[2] [1909] 1 K.B. 16 at 31.

have risked an outlay of between $25,000 and $30,000 on the property and he had some evidence before him to this effect. He next held that after the date of the order in council any increase in the value of the special adaptability of the land to a causeway scheme resulted from the definite adoption of the scheme and was to be disregarded. On this point, in my respectful opinion, he was clearly right. He correctly instructed himself that he had to ascertain value to the owner, including any special adaptability as of the date of expropriation, but he also held, correctly, in my opinion, that there could be no increase in value between the date of the order in council and the date of expropriation. If Cameron J. was entitled to consider and value a special adaptability of this kind immediately before the date of the order in council, I would accept his valuation. To me he made the maximum possible award in favour of this claimant and the question is whether the claimant was entitled even to the $40,000.

Any increase in value over $50 per acre was entirely the result of the scheme no matter what date one chooses to look at the problem. The $40,000 that the trial judge awarded was just as clearly in this classification as the $1,000,000 which the appellant claimed in his defence. These lands had no value for their special adaptability for the purpose of quarrying in general, but only for the purpose of quarrying for the needs of the causeway. The scheme and nothing else created the special adaptability in this case and I do not think that the expropriating authority is to be charged for the value which it and it alone brought into being.

The appellant's case to me depends upon the unacceptable principle that there is a value to him for which he should be compensated because of the needs and purpose of the expropriating authority. These needs and the purpose are unique. No one else had these needs and no one else could have used the rock for that purpose. The Crown was expropriating some 12 acres of land for the purpose of opening up a quarry. It is the purpose and the use of the rock that creates value. Yet the appellant is claiming compensation as though the power of expropriation had not been exercised and he had been left to deal with a private undertaker upon whom he could have imposed his own

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terms, within the limits of competition. There is only one possible source of value in this case over and above the $50 per acre, and that must be based, not on value to the owner, but on value to the taker.

A similar problem came up in this Court as early as 1889 in the case of *Vézina v. The Queen*[1]. In that case the land was taken for railway purposes and for a gravel pit in connection with the construction of the railway. Patterson J. said:

> The learned judge has allowed $807.70 for the land taken, being $100.00 per arpent. This valuation is not complained of so far as the five arpents taken for the track are concerned, and it is not asserted that the three arpents taken for the gravel pit were, as farm lands, of any greater value. But the claimant insists that it shall be valued with reference to the gravel, some 45,000 cubic yards, taken from it, as if he had sold the gravel at so much a yard. The learned judge considered that those three arpents were, to the owner, simply three arpents of his farm, not rendered any more valuable to him by the existence of a bed of gravel under the soil, as there was no market for gravel, and it became of value to the Government only because the railway required it for ballast.

In *Cunard v. The King*[2], Duff J. said:

> One principle by which the courts have always governed themselves in estimating the compensation to be awarded for property taken under compulsory powers is this: you are to apply yourself to the consideration of the circumstances as if the scheme under which the compulsory powers are exercised had no existence. The proper application of that principle to chapter 143, R.S.C., seems to me to be this—you are to estimate the value as if the property were not required for the public purpose to which the Minister, who is taking the proceedings, intends to devote it. The circumstance that it is so required is not to enter into the computation of value as either enhancing or diminishing it.

This was written in a dissenting judgment, but I am not aware that the principle so stated is open to any question.

Cedars Rapids Manufacturing and Power Co. v. Lacoste[3] and *Fraser v. City of Fraserville*[4] are illustrations of this principle. Both were cases of expropriation for the purpose of power development. The expropriated owner happened to be in a favourable situation on the site of the development and without the power of expropriation he was in a position to hold up the scheme and name his own price. In both cases the arbitrator awarded compensation based upon value to the taker and not to the owner. In each case it was held to be wrong to assess compensation on the basis that

[1] (1889), 17 S.C.R. 1.
[2] (1910), 43 S.C.R. 88 at 99.
[3] [1914] A.C. 569.
[4] [1917] A.C. 187.

the expropriated owner had made a proportionate contribution to the development of the power. This is merely one aspect, as was pointed out in the *Fraser* case, of value to the buyer and not value to the owner. In reviewing the *Cedars Rapids* case, which had recently been before the Privy Council, Lord Buckmaster said:

> The principles which regulate the fixing of compensation of lands compulsorily acquired have been the subject of many decisions, and among the most recent are those of *In re Lucas and Chesterfield Gas and Water Board, Cedars Rapids Manufacturing & Power Co. v. Lacoste,* and *Sidney v. North Eastern Ry. Co.* The principles of those cases are carefully and correctly considered in the judgments the subject of appeal, and the substance of them is this: that the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired, the question of what is the scheme being a question of fact for the arbitrator in each case. It is this that the Courts have found that the arbitrator has failed to do, and it follows that his award cannot be supported.

I cannot see that there is any question of these principles or that they are affected in any way by any possible misapprehension of the supposed unanimity of opinion between Vaughan Williams L.J. and Fletcher Moulton L.J. in *Lucas and Chesterfield.*

It is not a question here of a possibility of the Dominion Government acquiring powers of expropriation. It always had these powers and it was the only authority that could exercise them. In this situation it does not create the market and then have to pay for the value so created.

The task then is to test how an award of $40,000 plus $50 per acre fits in with the concept of value to the owner as developed in this Court through *Irving Oil Co. Ltd. v. The King*[1], *Diggon-Hibben Ltd. v. The King*[2], and finally in *Woods Manufacturing Co. Ltd. v. The King*[3]. What would the claimant, as a prudent man at the moment of expropriation, (he then being deemed as without title, but all else remaining the same) pay for the property rather than be ejected from it. Any readiness to pay anything above the value as waste land can only come from the fact that a causeway is to be built.

In my opinion, *Pointe Gourde Quarrying and Transport Co., Ltd. v. Sub-Intendent of Crown Lands*[4], is directly in

[1] [1946] S.C.R. 551, 4 D.L.R. 625. [2] [1949] S.C.R. 712, 4 D.L.R. 785.
[3] [1951] S.C.R. 504, 2 D.L.R. 465. [4] [1947] A.C. 565.

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point. There an owner was expropriated in Trinidad by the Crown for the purpose of enabling the United States to construct a naval base. On part of the land expropriated there was an operating quarry. The owner was compensated on proper grounds for the quarry as an operating quarry. In addition to this the Court awarded the sum of $15,000 because this quarry was particularly useful to the United States for the construction of its naval base. On this aspect of the award the Privy Council said at p. 572:

> It follows from this that the question as submitted to the Full Court should have been answered in the negative. But it does not follow that this part of the award can stand. It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition. As it was put by Eve J. in *South Eastern Ry. Co. v. London County Council*: 'Increase in value consequent on the execution of the undertaking for or in connexion with which the purchase is made must be disregarded.' This rule was recognized by the Full Court and, indeed, appears to be the basis of its main conclusion, for in the course of his judgment Blackall C.J., after a reference to Lord Buckmaster's statement of the principle in *Fraser v. Fraserville,* proceeds: 'In the present case, although a value as a quarry had admittedly been created prior to the acquisition, that value was increased by the fact that a base was being established in the vicinity for which a large quantity of stone in a readily accessible situation was required. In other words, the value was enhanced by the scheme of the party acquiring the land, and that is not a factor for which additional compensation may properly be awarded.'

My judgment therefore is that this claimant is entitled to nothing beyond $50 per acre plus interest. The appeal should be dismissed with costs. I would allow the cross-appeal with costs to the extent of eliminating the $40,000 award and the 10 per cent compulsory taking. The result is that the appellant is entitled to an award of $640 for 12.8 acres at $50 per acre plus interest. The appellant should pay the costs of the trial.

The judgment of Ritchie and Hall JJ. was delivered by

RITCHIE J.:—The appellant has appealed and the Crown has moved to vary a judgment of Cameron J. of the Exchequer Court of Canada[1] fixing the amount of compensation to be awarded to the appellant in respect of the expropriation of certain of his lands being a part of Porcupine Mountain, so called, at Cape Porcupine in the County of Guysborough, Nova Scotia, which lands were, at the time of the expropriation, known to be the source

[1] (1960), 23 D.L.R. (2d) 94, 81 C.R.T.C. 53.

from which an estimated 9,000,000 tons of rock was to be obtained for use by the Crown in the construction of a causeway between Cape Breton Island and the mainland of Nova Scotia.

Ways and means of joining Cape Breton Island to the mainland had been widely discussed for many years before the Nova Scotia Legislature passed its resolution of April 12, 1943, in the following terms:

> BE IT THEREFORE RESOLVED that the Government of Canada be asked by this Legislature to investigate the railroad ferry at the Strait of Canso with a view to the construction of a causeway, thereby eliminating this bottleneck in traffic which has been the greatest drawback to industrial production in Cape Breton Island.

Porcupine Mountain, at least 110.1 acres of which were owned by the appellant, abuts on the south shore of the Strait of Canso and it appears to have been recognized at an early date as a convenient source of suitable supply of rock if a causeway were to be adopted as a means of crossing the Strait so that the subject of the above resolution was not unrelated to the future value of the appellant's lands.

Between 1943 and 1950, the crossing of the Strait of Canso was made the subject of study and report by the Dominion Steel and Coal Company, the Maritime Board of Trade, the Dominion Government and others, and the alternative solutions of a causeway, a low-level bridge, and a tunnel were all considered. The Strait of Canso Board of Engineers had at first reported to the Dominion Government in favour of a low-level bridge but on September 28, 1950, the then Minister of Transport wrote to all the former members of that Board advising them that the engineers of the Canadian National Railways and of the Province of Nova Scotia "were of the opinion that a low-level bridge was not practicable" and the Board was accordingly reconvened to review its earlier findings and "to recommend the best method of improving the present rail and highway transportation facilities across the Strait . . .". On December 8, 1950, after the Board had been reconvened, but before its final report was issued, the Province of Nova Scotia acting under the authority of the *Expropriation Act*, R.S.N.S. 1954, c. 91, expropriated certain lands near the Strait including 110.1 acres of the appellant's lands on

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Porcupine Mountain which were subsequently expropriated by the Dominion Government, and in the following June the Board reported that the causeway scheme was the only practical solution to the problem and that recent borings had confirmed the long held view that Porcupine Mountain contained a suitable supply of rock for its construction.

On October 17, 1951, formal Cabinet approval was given to the construction of the causeway and on June 8 of the following year the Crown entered into a contract with Northern Construction Company and J. W. Stewart for the performance of the necessary work which contract contained a provision that

> if the quarry is located south of Auld Cove between Highway No. 4 and the Strait of Canso, the Department will also provide the quarry site without cost to the contractor. If he chooses any other quarry site it shall be provided at his own expense.

The quarry site which was to be provided without cost is on the appellant's lands and the total amount of rock fill required was estimated at 9,000,000 tons. The specifications also provide that the contractor was to be paid 59 cents a ton for all rock placed in the causeway. This was presumably compensation for quarrying, transporting and placing the rock.

At the time when this contract was entered into title to the land formerly owned by the appellant at Porcupine Mountain was vested in the Province of Nova Scotia pursuant to the expropriation proceedings taken on December 8, 1950, but on July 9, 1952, for reasons which are not explained in the evidence, the Province filed a notice of abandonment which had the effect of revesting title in the appellant so that he was the owner when, 15 minutes after the notice had been filed by the Province, a plan and description of 110.1 acres of this land, signed by the Deputy Minister of Transport, was filed by the respondent thus causing it to be expropriated for the use of Her Majesty the Queen in the right of Canada in accordance with s. 9 of the *Expropriation Act*, R.S.C. 1927, c. 64.

The present proceedings were commenced on August 3, 1954, by the Deputy Attorney General of Canada filing an information seeking to have the compensation to be paid for the 110.1 acres expropriated as aforesaid determined by

the Exchequer Court in accordance with s. 27 of the *Expropriation Act*. The Crown offered the appellant the sum of $5,505 in full satisfaction of all claims, and by way of defence the appellant claimed the sum of $5,500,000.

On May 9, 1955, all the lands of the appellant so taken, with the exception of 12.8 acres, were declared to be abandoned by Her Majesty under s. 24 of the *Expropriation Act* and thereby revested in the appellant, but when the Crown amended its information on June 2, 1955, to conform to this abandonment it is somewhat significant to observe that the same compensation ($5,505) was offered in respect of the remaining 12.8 acres as had originally been offered for the 110.1 acres.

In amending the information on June 2, 1955, and again on June 20, 1956, the Crown gave an undertaking pursuant to s. 31 of the *Expropriation Act* to grant to the appellant an easement for the purpose of a right of way from the public highway to the 97.3 acres which had been abandoned to the appellant and thus to enable the appellant to use the 12.8 acres expropriated except the portions thereof occupied by loose rock already quarried on behalf of Her Majesty, in order to remove rock from the lands abandoned to the appellant and to operate a rock crushing plant. On June 7, 1955, and again on September 9, 1957, the statement of defence was amended and the appellant pleaded that he was willing to accept the sum of $1,100,000 by way of compensation for expropriation of the smaller area.

In determining the amount of compensation to be paid to the appellant under these circumstances the learned trial judge based his award on the "bare ground" or "agricultural" value of the land being $50 per acre and he found that the 12.8 acres retained by the Crown had an additional value by reason of its special adaptability as a source of rock which he fixed at $40,000; after deducting the value of the 97.3 acres which had been abandoned by the Crown he thus found the 12.8 acres to have a value of $40,640 to which he added 10 per cent for compulsory taking. He also awarded interest at the rate of 5 per cent per annum on the value which he had found for the lands originally taken ($49,569) from the date of expropriation to the date of abandonment, and on the amount of $44,704 from the date of the abandonment of the 97.3 acres to the date of his judgment. From this

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award the appellant appeals on the ground that the learned trial judge failed to give sufficient weight to the value of the special adaptability of the lands for causeway construction, that he erred in failing to award any compensation for the increase in the value of the lands between the date when the causeway project was approved by the Cabinet (October 17, 1951) and the date of expropriation, and finally that he erred in holding that the lands had no value for special adaptability as a rock quarry for purposes other than the causeway.

The respondent seeks to have the judgment varied so as to exclude any award for special adaptability or in the alternative so as to reduce such an award from $40,000 to $30,000 and, in any event, to set aside the award of 10 per cent for compulsory taking.

The respondent's counsel contends that the only potential value of the expropriated lands over and above their "bare ground" value was "solely and exclusively related to the scheme of constructing the causeway" and should accordingly have been excluded in fixing the value for the purposes of compensation. The leading authorities cited in support of this contention are: *Cedars Rapids Manufacturing and Power Co. v. Lacoste*[1]; *Fraser v. City of Fraserville*[2], and *Pointe Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendent of Crown Lands*[3]. None of these cases is, in my opinion, authority for the proposition that a hitherto undeveloped potentiality of expropriated property is to be entirely disregarded in fixing the value of that property for compensation purposes on the ground that the expropriating authority is the only present market for such potentiality and that it has developed a scheme which involves its use. These cases do, however, make it plain that the amount fixed by way of compensation must not reflect in any way the value which the property will have to the acquiring authority after expropriation and as an integral part of the scheme devised by that authority.

In the *Cedars Rapids* case, *supra*, Lord Dunedin stated the matter thus, at p. 576:

> Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability . . .

[1] [1914] A.C. 569.

[2] [1917] A.C. 187.

[3] [1947] A.C. 565.

is really rather an unfortunate expression) the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

It seems plain that the element of value which Lord Dunedin excluded in fixing compensation was the value as "a proportional part of the assumed value of the whole undertaking . . .". If there were any doubt about this, it is made plain at p. 577, where it is said:

> Their Lordships have sought in vain in this testimony for any evidence directed to the true question as they have expressed it above. All the testimony is based on the fallacy that the value to the owner is a proportional part of the value of the realized undertaking as it exists in the hands of the undertaker. There are other fallacies as well, but that is the leading one, and is sufficient utterly to vitiate their testimony.

In *Fraser v. City of Fraserville, supra,* the original arbitrator had taken into consideration the value which the lands would have after expropriation as a part of the hydro-electric system to be operated by the City of Fraserville, and Lord Buckmaster observed, at p. 193:

> . . . in truth the value which Mr. St. Laurent (the arbitrator) fixed was the value of the property to the person who was buying and not to the person who was selling and it was not this value that he was appointed to determine.

In the *Pointe Gourde* case, *supra,* which is particularly relied upon by the respondent, the British Crown authorities expropriated the appellant's lands in Trinidad which were required by the United States of America in connection with the establishment of a naval base. The situation was that the appellants owned and operated a stone quarry situate on the expropriated lands which had a special suitability and adaptability for the purpose of producing and marketing quarry products and as such had a market value as quarry land prior to the acquisition. The original award of compensation made due allowance for the value of the quarry as a going concern and for the special adaptability of the land as a quarry but the item in dispute was a special award of $15,000 which related

> not to the special suitability or adaptability of the land for the purpose of quarrying which existed before the acquisition, but to the special

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adaptability (to follow the language of the tribunal) which the quarry land possessed after acquisition in that its proximity to the naval base under construction made it specially suited to the needs of the United States.

It is to be noted that the "special suitability" for which the additional $15,000 award was made could not arise until after the acquisition of the land by the British Crown and after the lands had been leased to the United States Government for the purpose of building the base and that it only came into being because of the "special needs of the United States".

In giving his reasons for disallowing this item, Lord Macdermott further indicated what he meant by "an increase in value which is entirely due to the scheme . . ." when he said, at p. 572:

> It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition. As it was put by Eve J. in *South-eastern Railway Co. v. London County Council* [1915] 2 Ch. 252 at 258: "increase in value consequent on the execution of the undertaking for or in connection with which the purchase is made must be disregarded".

Earlier in his judgment, Lord Macdermott had characterized "the use of the quarry stone in the construction of the naval base" which is the subject of the disputed item as being "at most . . . but a circumstance which added to the value to the United States of the use of the land as a quarry".

The exclusion from the Court's consideration of "increase in value consequent on the execution of the undertaking" to build a causeway and of any value based on the Crown acting under compulsion as a necessitous purchaser, does not mean that the value of the special adaptability to the owner at the date of expropriation is to be disregarded.

In this regard, like the learned trial judge, I adopt the reasoning of Lord Romer in the case of *Vyricherla Narayana Gajapatiraju (Raja) v. Revenue Divisional Officer, Vizagapatam*[1] (hereinafter referred to as the "Indian" case) where he makes the following comment on the judgment of Rowlatt J. in *Sidney v. North Eastern Ry. Co.*[2] Lord Romer there said, at pp. 322-323:

> If and so far as this means that the value to be ascertained is the price that would be paid by a willing purchaser to a willing vendor,

[1] [1939] A.C. 302. [2] [1914] 3 K.B. 629.

and not the price that would be paid by a "driven" purchaser, to an unwilling vendor, their Lordships agree. But so far as it means that the possibility of the promoter as a willing purchaser, being willing to pay more than other competitors, or in cases where he is the only purchaser of the potentiality, more than the value of the land without the potentiality is to be disregarded, their Lordships venture respectfully to differ from the learned judge.

For these reasons, their Lordships have come to the conclusion that, even where the only possible purchaser of the land's potentiality is the authority that has obtained the compulsory powers, the arbitrator in awarding compensation must ascertain to the best of his ability the price that would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in the case where there are several possible purchasers and that he is no more confined to awarding the land's "poramboke" value in the former case than he is in the latter.

Although recognizing that an allowance must be made for the value of the special adaptability of the property in question as a source of rock for the causeway, the learned trial judge felt himself bound to assess the value in relation to the market which would have ruled if the lands had been put up for sale immediately before October 17, 1951, when Cabinet approval was given to the scheme, and in so doing he was governed by his interpretation of the following quotation from Cripps on Compulsory Acquisition of Land, 10th ed., at p. 4040, where it is said:

> The value must be tested in relation to the market which would have ruled had the land been exposed for sale before the purchaser had secured any powers or acquired the other subject which made the undertaking a realized possibility.
>
> This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded.

In apparent reliance on this authority, the learned trial judge went on to hold:

> In Canada, of course, the powers of the Crown to expropriate property for public works are statutory and ordinarily no special Act is required. It seems to me, however, that when Cabinet approval was given to the construction of the causeway on October 17, 1951, the undertaking of the construction thereof became a realized possibility and ceased to be a mere potentiality. The value of the lands expropriated, together with the special adaptability "must be tested in relation to the market value which would have ruled had the land been exposed to sale prior to that date". The subsequent preparation of the plan, the call for tenders, and the letting of the contract were merely steps in carrying out the scheme to which the Crown was already committed, and of themselves could not, in the circumstances, be considered as adding to the potential value to the special adaptability.

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With the greatest respect, I am unable to treat the giving of Cabinet approval to the construction of the causeway as being equivalent to the exercise of powers of expropriation over the appellant's lands. In the case of an expropriation by the Crown in the right of Canada no question arises of securing special powers and in the present case there was no occasion to acquire the other land upon which the public work was to be constructed as the Strait of Canso was the property of the federal government. For these reasons in applying the language used by Cripps on Compulsory Acquisition of Land to the present circumstances it should, in my opinion, be read as meaning that:

> The value must be tested in relation to the market which would have ruled had the land been exposed for sale before the powers of expropriation had been exercised.

This same view was expressed by Roach J.A. in *Agnew v. Minister of Highways*[1], with reference to the statutory power of expropriation conferred upon the Minister of Highways of Ontario.

By giving Cabinet approval to the plan to construct a causeway the Crown made it known that there was a probable rather than a possible market for the appellant's rock at the price which a willing purchaser would pay to a willing vendor, but taking this factor into consideration in fixing the value of the land is by no means the same thing as determining the value on the basis that the use of the appellant's rock as a part of the undertaking for the construction of the causeway had become a realized possibility.

The significance of the phrase "realized possibility" as employed in the authorities is illustrated by the following excerpt from the reasons for judgment of Lord Romer in the *Indian* case, *supra*, at p. 313:

> No one can suppose in the case of land which is *certain*, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that in ascertaining its value the possibility of its being used for building purposes will have to be taken into account. It is equally plain, however, that the land must not be valued as though it had already been built upon, a proposition that . . .

[1] [1961] O.R. 234 at 239, 27 D.L.R. (2d) 82.

is sometimes expressed by saying that it is the possibilities of the land and not its realized possibilities that must be taken into consideration.

When the property in question was taken from the appellant by the Province of Nova Scotia in 1950, the potential market for the rock which it contained was still a matter of speculation as no decision had been finally made about the causeway but when the lands were reacquired by the appellant on July 9, 1952, the years of speculation, study and planning concerning the building of this causeway had already culminated in the letting of a contract for its construction which contemplated the use of an estimated 9,000,000 tons of rock from these lands, and the potential market for this commodity had thus become a reality before the lands were reacquired by the appellant. It was these lands, with this potentiality, which were expropriated by the Dominion Government, and it is their value at the time of that expropriation which is required to be assessed for the purposes of compensation. In this regard, s. 46 of the *Exchequer Court Act*, R.S.C. 1952, c. 98, provides that:

> 46. The Court, in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property, shall estimate or assess *the value or amount thereof at the time when the land or property was taken,* or the injury complained of was occasioned.

The Crown called two expert witnesses who gave their respective opinions as to the value of the land based on the merest possibility of a market existing for the rock which it contained. The nature of the question which they were both asked is reflected in the answer of Mr. Scrivener when he stated the advice which he would have given to a contractor as to what should be paid for the property. He said:

> Then if we put it on the basis that it is just a possibility but the thing has not crystallized very much, what the contractor would be doing in such a case would be investing a little money in the hope of this event coming to pass. It is a speculative investment; I would not suggest in such a case that he invest more than, perhaps, twenty-five, might be thirty thousand dollars on such a speculation, because there are many links between that and his profit from it.

In answer to the same question, Mr. Piette said:

> Yes, my answer to that would be twenty-five thousand dollars based on the fact that it took about 12.8 acres and that the maximum value that I would give to such a land would be $2,000 per acre.

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Although the action of the government authorities in making available to the contractor 9,000,000 tons of the appellant's rock before taking any steps to acquire his property does not mean that the land is to be valued for the purpose of compensating the owner as if it were being sold to a necessitous purchaser or as if the rock which it contained were already a part of the causeway, it nevertheless does mean that before the date of expropriation the Crown had disclosed itself in the role of "a willing purchaser" and this is the circumstance which appears to me to take the matter out of the field of speculation and to make it altogether unrealistic to value the land as if the market for the rock which it contains "is just a possibility but the thing has not crystallized very much."

The learned trial judge concluded that the value of the special adaptability was somewhat in excess of the values placed thereon by Scrivener and Piette because those witnesses were not fully aware of, and had therefore not taken into consideration, all the facts which indicated as of October 17, 1951 "that the causeway might be built at the place finally chosen". There is, however, nothing in the judgment appealed from to indicate that the learned trial judge departed from the acreage basis on which the Crown witnesses had valued the special adaptability.

On the other hand, with the greatest respect for Mr. Justice Cameron's opinion, I adopt the view that the effective date for valuation of this property is the date of the expropriation and that the reality of the matter is that the Crown was expropriating tons of rock in the ground rather than acres of land in the rough so that the value of the special adaptability of these lands is to be determined for the purpose of fixing compensation for their expropriation on the basis of the value that a willing vendor might reasonably expect to obtain from a willing but not anxious purchaser for the rock *in situ* at the date of expropriation. In this latter regard, I am much influenced by the evidence of John D. Stirling, a disinterested contractor of high repute and wide experience whose company (E.G.M. Cape & Company) estimated the value of the rock with a view to includ-

ing this item in its tender for the contract to construct the causeway. This witness gave the following evidence:

> In estimating the value of the rock we were not at all certain as to whether we were going to have to pay a royalty to the Dominion Government Department of Transport or not. Based on a good deal of past experience, and not knowing who the owner was, we said: "Well, we may have to pay ten cents a ton for this if he is a hard man to deal with; if not we may get it for five cents a ton, which is what we had previously paid for rock in various places. We came to the conclusion that we should include the sum of seven and a half cents in our estimate per ton. After that we thought we had better clear up this vague clause in the specification, called the engineers and they told us that there was no charge to be made—no royalty to be paid, and therefore we did not include it.

The same witness was then asked:

> Q. What would you say a fair price for that granite would be per ton?
>
> A. I would have offered five cents.
>
> Q. Would that be on the high or on the low side?
>
> A. That would be on the low side. I naturally would not offer any more than I was prepared to pay.
>
> * * *
>
> Q. Between a willing purchaser and a willing vendor, what would you expect to get that granite for?
>
> A. We hoped we would not have to pay more than seven and a half cents, but I hoped we would get it for five. That was our thinking at the time.
>
> Q. Somewhere between seven and a half and five cents?
>
> A. Yes.
>
> Q. If you had tendered on the basis of paying for the rock how much would you have added to your tender?
>
> A. We would have added seven and a half.

If the special adaptability of the lands is to be measured in terms of the value of the rock *in situ* the quantity involved must, in my opinion, be treated as being the amount of the requirement estimated by the Crown before expropriation, *i.e.*, 9,000,000 tons. This constituted an immediate market for a substantial amount of the appellant's rock, and the unprecedented opportunity to dispose of such a quantity of his supply at one time must, in my view, be treated as a circumstance which would induce a prudent man to willingly accept less than he might expect to receive if he was required to sell the commodity piecemeal but, with all respect, it does not, in my opinion, mean that such a man should be required to accept less than one-tenth of the amount which an experienced contractor would have

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been prepared to pay if he had had to include the rock in his tender for the contract, and this appears to me to be the effect of the value fixed by the learned trial judge.

While the evidence of Mr. Stirling is not conclusive as to the value of the rock to the owner, I think it must nevertheless be accepted as establishing that in offering to provide "the quarry site without cost to the contractor" the respondent was offering free of charge a source for its estimated requirement of 9,000,000 tons of rock for which a most reliable and experienced contractor would otherwise have been prepared to pay at least $450,000.

Having regard to all the matters hereinbefore mentioned and taking into account the fact that the value fixed by a contractor as part of a tender may be a very different thing from the value to the owner before expropriation, I have nevertheless reached the conclusion that the appellant would, under the circumstances, have been justified in expecting to obtain a price for his property from a willing purchaser based upon its proven adaptability as a source of the estimated amount of rock required for the causeway being measured in terms of that rock *in situ* having a value to the owner of four cents a ton at the time of expropriation. I accordingly fix the amount of compensation to which the appellant is entitled in respect of the special adaptability of the expropriated lands as a source of rock at $360,000.

I agree with the learned trial judge that in applying the provisions of s. 24(4) of the *Expropriation Act* the 97.3 acres which were abandoned by the Crown and revested in the appellant in 1955 should be treated as having the same "bare ground" value which it had at the date of expropriation, *i.e.* $50 per acre, and that the value of the special adaptability of the property is to be limited to the 12.8 acres which were retained by the Crown and which also had a "bare ground" value of $50 per acre, *i.e.* $640. Section 24(4) of the Act reads as follows:

> The fact of such abandonment or revesting shall be taken into account, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to any person claiming compensation for the land taken.

In a case such as this where the value of the land revested is equal to its value at the time of the initial taking, the owner is in the position of having received in property "the

equivalent in value to him of the property taken as of the date . . . of the filing of the plan", to adopt the words used by Duff J., as he then was, in *Gibb v. The King*[1] which were applied by Abbott J. in *Standish Hall Inc. v. The Queen*[2].

It accordingly appears to me that the value of the 97.3 acres revested in the appellant does not enter into the calculation of compensation in this case except to the extent that the appellant is entitled to interest on the value of the whole 110.1 acres, *i.e.* $5,505, from the date of expropriation to the date of revesting.

Having regard to the decision of this Court in *Drew v. The Queen*[3], I would not allow any amount for compulsory taking.

I agree with the learned trial judge that the appellant's claims for injurious affection and loss of right of access to the shore of the Strait of Canso should be disallowed and, like him, I am unable to see any merit in the Crown's contention that the construction of the causeway at a point convenient to the lands retained by the appellant has increased the value of his lands so as to give rise to a set-off in favour of the Crown under the provisions of s. 49 of the *Exchequer Court Act*.

In the result, I would allow this appeal, dismiss the main cross-appeal, and vary the judgment of the learned trial judge by fixing the amount to which the appellant is entitled for the expropriation of his property and for all damages resulting therefrom at the sum of $360,640 together with interest at the rate of 5 per cent per annum on the sum of $365,505 from the date of the expropriation (July 9, 1952) to the date of abandonment (May 9, 1955), and on the sum of $360,640 from May 9, 1955, to the date hereof.

The appellant should have his costs of this appeal and of the cross-appeal.

Appeal allowed and cross-appeal dismissed with costs, JUDSON J. *dissenting.*

Solicitor for the plaintiff, respondent: E. A. Driedger, Deputy Attorney General of Canada, Ottawa.

Solicitor for the defendant, appellant: Donald McInnes, Halifax.

[1] (1915), 52 S.C.R. 402 at 430. [2] [1963] S.C.R. 64 at 71 and 72.
[3] [1961] S.C.R. 614, 29 D.L.R. (2d) 114.