A. PION, *et al* (PLAINTIFFS)..... APPELLANTS ; 1887

AND

THE NORTH SHORE RAILWAY COMPANY (DEFENDANTS)..... } RESPONDENTS.

*Mar. 3.
*June 20.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Navigable river—Access to by riparian owner—Right of—Railway Company responsible for obstruction—Damages—Remedy by action at law—When allowed—43-44 *Vic.* (*P.Q.*) *ch.* 43 *sec.* 7 *sub-secs.* 3 *and* 5.

Held, reversing the judgment of the court below, Taschereau J. dissenting, that a riparian owner on a navigable river is entitled to damages against a railway company, although no land is taken from him, for the obstruction and interrupted access between his property and the navigable waters of the river, viz., for the injury and diminution in value thereby occasioned to his property.

2. That the railway company in the present case not having complied with the provisions of 43-44 Vic. (P. Q.) ch. 43, sec. 7, sub. secs. 3 and 5 the appellants' remedy by action at law was admissible.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (3) reversing a

*PRESENT.—Sir W. J. Ritchie C. J. and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

(1) 24 L. C. J. 133. (2) M. L. R. 1 Q. B. 346,
(3) 12 Q. L. R. 205,

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judgment of the Superior Court by which the appellant's action was maintained.

The appellants sued the respondents jointly with the Quebec Harbor Commissioners in damages for $50,000. In the Superior Court the respondents were condemned to pay them $5.500.

The material allegations of the declaration and the pleadings and evidence are fully stated in the 12 volume of the Quebec Law Reports, p. 205 and in the judgments hereinafter given. The action was dismissed as far as the Harbor Commissioners were concerned, because appellants could not prove that they had permitted the respondents to do the works complained of.

Langelier Q.C. for appellants.

Are the respondent's legally responsible for the damages is the main point in the case, and the only one on which the judgment of the court of appeal has turned. This involves two questions: 1. Has the riparian proprietor of a navigable river a right of access to such river? 2. If he has, had the respondents legal authority to deprive him of the same? The first of those questions is purely a question of law: the second is a question of law and of fact; it is a question of law to know what authority is required to deprive a proprietor of such supposed right, and it is a question of fact to ascertain whether such authority has been obtained by the respondents.

As to the question of law whether the riparian proprietor has a right of access to a navigable river, I submit that he has, 1st. under the common law of the province of Quebec, 2nd, under a special statute of that province concerning water courses.

According to the old French law which is the common law of Quebec on that point, navigable water courses are in the nature of public highways, they are, according to Pascal's celebrated saying: *des chemins qui marchent*.

Again a party whose property borders such a highway, cannot be deprived of free access, of ingress to it and egress from it, without a special warrant of law. See *Bell* v. *Corporation of Quebec* (1); *Mayor of Montreal* v. *Drummond* (2); *Brown* v. *Gugy* (3); *Renaud* v. *Corporation of Quebec* (4). Consolidated Statutes of Lower Canada, ch. 50;

If, as we contend, the respondents could not, without special authority, deprive the appellants of their right of access to the river, what is the nature of the authority that was required?

The only authority was a statute, not only expressly giving them the power to do what they have done, but further expressly enacting that they could exercise such power without paying any damages. See *Bell* v. *Corporation of Quebec* cited above.

Now, what is the special law invoked by the respondents as their authority for what they have done? 1st. The statute of Quebec, 44-45 Vict. ch. 20 which, they say, gives them power to pass their line where it has been located. 2d. The statute of Quebec, 43-44 Vict., ch. 43 sect. 11, which authorises any railway company whose line is legally located on any beach to use it without indemnity to the crown.

Neither of these statutes gives the respondents the authority which they required.

The evidence shows that the appellants have been deprived by the respondents of the access which they had to the river St-Charles; that they have suffered thereby heavy damages, and if the law of the province of Quebec is as I have contended for, the judgment appealed from should be reversed and the judgment of the superior court restored.

Irvine Q. C. and *Duhamel* Q. C. for respondents contended:—

1st. That they never invaded, nor encroached upon,

(1) 5 App. Cas. 84.
(2) 1 App. Cas. 384.
(3) 2 Moo. P.C. (N.S.) 341.
(4) 8 Q. L. R. 102.

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the appellants' property and therefore, never in any way expropriated them, in the legal sense of the word.

2nd. Any damage sustained by the appellants, in consequence of works lawfully carried out under the authority of a statute can only amount to a *damnum absque injuria.*

3rd. That the Quebec Consolidated Railway Act, 1880, neither contemplates, nor provides for, compensation for damages of this nature.

4th. That at common law (*i. e.* under the Civil Code of Quebec) the appellants have no claim against the respondents, by reason of the facts set forth in their declaration.

5th. That the English decisions relied on by the Superior Court have no bearing on the case inasmuch as they all deal with the interpretation to be given to an Imperial Statute, "The Lands clauses consolidation "Act, 1845," (8-9 Vic. cap. XVIII, sec. 68) which forms no part of our law.

6th. That the only remedy the appellants had was by arbitration, under the statute, and not by action.

7th. That no proof has been made in the cause which would entitle the appellants to indemnity, even under the Imperial Act (8-9 Vic. ch. 18), as construed in the numerous cases determined under it; and they cited and relied on to the following authorities:—

The Quebec Consolidated Railway Act, 1880, sections 5, 7, 9; 22 Vic. ch. 32, secs. 1 and 2; 25 Vict., ch. 46, sec. 1; 36 Vic. ch. 62. secs. 15 and 16; Civil Code, articles 405, 407, 503 and 1589; Code Napoleon, articles 545, 644.

Laurent, *Droit Civil* (1); *The Caledonian Railway Co.* v. *Ogilvy* (2); *Penny* v. *South Eastern R. R. Co.* (3); *Chamberlain* v. *The West end of London & Crystal Palace Railway Co.* (4); *Ricket* v. *The Directors, &c., of*

(1) Vol. 7th p. 310.
(2) 2nd Macq. H. L. Cas. 229.
(3) 7 E. & B. 660.
(4) 2 B. & S. 605.

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the Metropolitan Railway Co. (1); *The Queen* v. *Vaughan and the Metropolitan District Railway Co.* (2); *The Queen* v. *the Metropolitan Board of Works* (3); *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (4); *The Directors, &c., of The Hammersmith and City Railway Co.* v. *Brand* (5); *the Duke of Buccleuch* v. *The Metropolitan Board of Works* (6); *McCarthy* v *The Metropolitan Board of Works* (7); *The Metropolitan Board of Works* v. *McCarthy* (8); Demolombe (9); Pardessus (10); Zachariae (11); Sirey *Rec. des lois et arrêts* (12); Dalloz, *Rec pér* (13); Dalloz, *Rec. pér.* (14); Dalloz, *Rec. pér.* (15); *Brown* v. *Gugy* (16); Sourdat (17); *Governor, &c., British Cast Plate Manufacturers* v. *Meredith, et al.* (18); *Dungey* v. *Mayor, &c., of London* (19); *Ferrar* v. *Commissioners of Sewers in the City of London* (20); *Jones* v. *Stanstead Railway Co.* (21); *The Mayor, &c., of Montreal* v. *Drummond* (22).

Sir W. J. RITCHIE C.J. concurred with FOURNIER J.

STRONG J. was of opinion that the appeal should be allowed.

FOURNIER J.—Les appelants avaient en premier lieu établi leur fabrique de mégisserie sur la rue St. Valier, dans la cité de Québec, mais après quelques années, leur industrie ayant pris une extension considérable, ils se virent forcés de chercher un terrain plus étendu et offrant de plus grands avantages pour les opérations

(1) L. R. 2 H. L. 175.
(2) L. R. 4 Q. B. 190.
(3) L. R. 4 Q. B. 358.
(4) L. R. 5 Ex. 221.
(5) L. R. 4 H. L. 171.
(6) L. R. 5 H. L. 418.
(7) L. R. 8 C. P. 191.
(8) L. R. 7 H. L. 243.
(9) Vol. 9 p. 305, No. 540.
(10) Vol. 1 p. 73, nos. 34 & following.
(11) Vol. 2 p. 60, note 14.
(12) 1852-2-478.
(13) 1856-3 61.
(14) 1859-3-35.
(15) 1860-3-2.
(16) 2 Moo. P. C. (N. S.) 341.
(17) Responsabilité, Vol. 1, nos. 426 *et seq.*
(18) 4 T. R. 794.
(19) 38 L. J. (C.P.) 298.
(20) L. R 4 Ex. 227.
(21) L. R. 4 P. C. 98.
(22) 1 App. Cas. 384.

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de leur industrie et de leur commerce. Dans ce but ils firent l'acquisition du terrain qu'ils occupent actuellement sur les bords de la rivière St. Charles dans le quartier St. Roch de Québec, et y érigèrent à grands frais une bâtisse considérable pour y exercer leur industrie. Une des principales raisons qui les engagea à faire le choix de cet endroit était, ainsi qu'ils l'allèguent dans leur action, celle d'utiliser la rivière St. Charles pour laver les peaux et les laines ; pour s'approvisionner d'eau à l'intérieur de la manufacture et pour recevoir le bois, le charbon et les approvisionnements, ainsi que les matières premières nécessaires à leur manufacture et pour écouler les produits de leur manufacture.

En 1883, la compagnie intimée en cette cause construisit pour le passage de son chemin de fer dans la dite rivière St. Charles, en face de la propriété des appelants, un quai d'une hauteur d'environ quinze pieds, fermant complètement aux appelants l'accès à la dite rivière et rendant l'exploitation de leur manufacture plus difficile et plus dispendieuse. En conséquence ils ont demandé par leur action la démolition du quai en question et une condamnation à des dommages et intérêts.

L'intimée a plaidé à cette action par défense au fonds en fait seulement.

Les faits de cette cause soulèvent les questions suivantes : 1° Le quai construit par l'intimée pour le passage de son chemin de fer a-t-il privé les appelants de leur accès à la rivière ? 2° En est-il résulté des dommages et à quel montant ? 3° L'intimée était-elle autorisée à faire cette construction sans payer une indemnité aux appelants pour les dommages qu'elle leur causait ?

Sur le premier point, il est incontestable que la construction du quai a eu l'effet de priver les appelants d'un accès direct de leur propriété à la rivière et *vice*

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versâ. La preuve ne laisse aucun doute à ce sujet. Ce fait étant établi, on ne peut mettre en doute, je crois, que l'intimée s'est rendue coupable de violation du droit appartenant à tout propriétaire riverain de communiquer directement par son fonds avec la rivière qui le borde.

Pour établir ce droit du riverain il n'est pas nécessaire, je crois, de référer à d'autres autorités qu'à celle de la décision du Conseil Privé dans lacause de *Bell* v. *Corporation of Quebec*, (1) où ce droit d'accès du riverain sur la même rivière (St. Charles) a fait le sujet d'un examen approfondi.

Après avoir passé en revue la décision dans la cause du *Maire de Montréal* v. *Drummond* (2), où il s'agissait des droits d'accès et de sortie appartenant au propriétaire d'une maison située sur une rue, le jugement déclare :

These principles appear to be applicable to the position of riparian proprietors upon a navigable river. There may be "droit d'accès et de sortie" belonging to riparian land, which, if interfered with, would at once give the proprietor a right of action, but this right appears to be confined to what it is expressed to be "*accès*," or the power of getting from the water way to and upon the land (and the converse) in a free and uninterrupted manner.

Ce droit d'accès, comme on le voit, est admis sans restriction ; mais leurs Seigneuries étant d'avis que le droit de Bell n'avait pas été violé et que la construction du pont dont il se plaignait ne lui avait causé aucun dommage, rejetèrent sa demande, tout en admettant le droit du riverain.

Dans le cas actuel, les appelants ne se plaignent que de l'obstacle mis à leur droit d'accès et non pas d'obstruction à la navigation. Au contraire de Bell, ils ont fait une preuve claire et positive des dommages résultant de la privation de leur droit d'accès.

Quant au montant des dommages, fixé à $5,000, par l'hon. juge qui a décidé cette cause en première instance, il est amplement justifié par la preuve qui a été faite

(1) 5 App. Cas. P. 98. (2) 1 App. Cas. 384.

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et doit être confirmé, à moins que l'intimée ne fasse voir que par une exemption spéciale en sa faveur, les principes maintenus par le Conseil Privé ne lui sont pas applicables. C'est sa prétention et pour ainsi dire son seul moyen de défense. Au soutien de cette prétention l'intimé invoque les statuts de Québec, 45 Vic., ch. 20 et 43 et 44 Vic., ch. 43, comme l'autorisant à se servir de la grève de la dite rivière pour le passage de son chemin de fer sans payer d'indemnité.

La 17e section de l'acte 45 Vic., ch. 20, a déclaré l'Acte des chemins de fer de Québec de 1880 applicable à la compagnie intimée. Parmi les pouvoirs donnés par ce dernier acte aux compagnies de chemins de fer, à la sec. 7, ss. 3 et 5, on trouve qu'elles sont autorisées avec le consentement du lieutenant-gouverneur en conseil à se servir de

> Telle partie de la grève publique ou du terrain couvert par les eaux de tous lac, rivière, cours d'eau ou canal, ou de leurs lits respectifs qui sera nécessaire pour faire, compléter et exploiter les dits chemins de fer et travaux, sujet toutefois à l'autorité et au contrôle du parlement du Canada en ce qui concerne la navigation et les bâtiments ou navires.

La ss. 5 donne le pouvoir de construire, entretenir et faire fonctionner le chemin de fer, à travers, le long ou sur toute rivière, cours d'eau, canal, grand chemin ou chemin de fer qu'il croisera ou touchera; mais la rivière, cours d'eau, grand chemin, canal ou chemin de fer ainsi croisé ou touché sera remis par la compagnie en son premier état, ou en un état tel que son utilité n'en soit pas amoindrie, etc.

Les termes de ces deux sous-sections ne s'étendent pas évidemment au delà d'une permission donnée aux compagnies de se servir des grèves publiques sans enfreindre les droits de la couronne à cet égard. Il n'y est fait aucune mention des droits incontestables des particuliers sur ces mêmes grèves, et on ne peut pas prétendre que la permission donnée par le gouvernement en ce qui le concerne spécialement peut être

interprétée comme anéantissant les droits des particuliers sur ces mêmes grèves. Le texte de ce statut ne va pas aussi loin que l'intimée le prétend ; il ne fait nullement allusion aux particuliers dont les droits sont restés intacts. De plus cette permission n'est accordée qu'à la condition que l'utilité de ces rivières, cours d'eau, etc., etc., n'en sera pas amoindrie. Cette dernière condition de ne pas diminuer l'utilité des rivières et cours d'eau n'est-elle pas une restriction suffisante pour la protection des droits des particuliers et ne fait-elle pas voir que c'est l'intention de la loi qu'ils ne puissent être violés sans indemnité. Toutefois, je crois que la loi n'avait pas pour but de les atteindre parce qu'il aurait fallu pour cela une déclaration formelle et positive qui n'existe pas.

En supposant même que cette loi affecte les droits des particuliers, il faut remarquer qu'elle n'a pas accordé d'une manière absolue la faculté dont il s'agit. Au contraire elle a mis à son exercice une condition importante qu'il faut préalablement remplir et sans l'accomplissement de laquelle la loi est sans effet. Ainsi il faut avant de se mettre en possession des grèves en obtenir la permission du lieutenant-gouverneur en conseil en vertu de la loi de Québec.

La législation fédérale à cet égard est identique avec celle de la province de Québec. L'acte consolidé des chemins de fer de 1879, 42 Vic., ch. 9, contient la clause suivante, ss. 3 de la section 1re des pouvoirs :

No railway company shall take possession of, use or occupy any land vested in Her Majesty without the consent of the Governor in council, but with such consent any such company may take and appropriate for the use of their railway and works but not alienate so much of the wild lands of the crown lying on the route of the railway as have not been granted for such railway, as also so much of the public beach or of the land covered with the waters of any lake, river, stream or canal, or of their respective beds as is necessary for making and completing and using their said railway and works, subject, however, to the exemptions contained in the next following sub-section.

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Il est évident que la loi exige comme condition préalable de l'exercice de la faculté accordée aux compagnies de chemins de fer, de faire usage des grèves, l'obtention d'une permission spéciale du lieutenant-gouverneur en conseil de la province de Québec et du gouverneur en conseil de la Puissance. Dans la présente cause l'intimée n'ayant ni allégué ni prouvé qu'elle avait obtenu cette permission soit du lieutenant-gouverneur de Québec soit du gouverneur-général en conseil, comment peut-elle se prévaloir du privilège accordé par ces lois sans avoir accompli la condition à laquelle il est accordé? N'est-elle pas dans ce cas clairement coupable d'avoir violé sans justification quelconque les droits des appelants comme propriétaires riverains? La loi étant ainsi, les autorités citées pour établir que l'ouverture de voies nouvelles sur le domaine public ne peut donner aux parties lésées le droit de réclamer des indemnités, n'ont aucune application aux faits de cette cause, puisque les droits du riverain ne peuvent être affectés tant que le gouvernement n'a pas donné de consentement. Dans le cas même où le consentement requis aurait été donné, je ne serais pas prêt à admettre qu'il n'y aurait pas lieu à indemnité parce que la décision du Conseil privé dans la cause de *Bell* v. *La Corporation de Québec* me paraît avoir décidé le contraire. Quoi qu'il en soit, cette question ne peut s'éleverici, car la prétendue autorisation invoquée n'a pas été accordée.

Le fait que les appelants ont pris une action ordinaire au lieu de recourir à l'arbitrage d'après l'acte des chemins de fer, leur est opposé comme une admission qu'ils n'ont aucun recours en vertu des dispositions spéciales de l'acte des chemins de fer. Je crois que l'hon. juge Casault a répondu d'une manière tout à fait concluante à cette objection. Dans ses notes sur cette cause, après avoir passé en revue les principales décisions des cours d'Angleterre au sujet des indemnités

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en cas d'expropriation, il termine par les remarques suivantes :

Les juges en Angleterre, et la chambre des lords, comme tribunal en dernier ressort, ont maintenu, dans les trois causes sus-mentionnées et dans plusieurs autres qui y sont citées, que les termes *injuriously affected*, dans les lois sus-citées, comprenaient tous les cas où, sans l'autorisation accordée par le parlement, les ouvrages faits, eussent donné une action. J'ai déjà, en les rapportant, démontré que ces termes des statuts impériaux ont leurs correspondants dans l'acte des chemins de fer de cette province, et que tout dommage causé à la propriété par les compagnies de chemin de fer, dans l'exercice des pouvoirs que leur confère la loi, doivent être payés par elles. Le statut provincial (N° 13 et suivants de la sect. 9) détermine le mode à suivre pour établir les compensations que les compagnies doivent payer ; mais, dans le cas où elles ne l'ont pas adopté ou suivi, il ne prive pas les propriétaires des recours que leur donne le droit commun (N° 37 même section).

La section de l'acte des chemins de fer réservant aux intéressés le recours aux tribunaux ordinaires me paraît tellement importante que je crois devoir la citer en entier (1) :

Si la compagnie a pris possession d'un terrain ou y fait des travaux ou en a enlevé des matériaux sans que le montant de la compensation ait été convenu ou décidé par arbitrage le propriétaire du terrain ou son représentant pourra procéder lui-même à faire faire l'estimation du terrain ou des matériaux pris, et ce, sans préjudice des autres recours en loi, si la prise de possession a eu lieu sans son consentement.

Il est évident que cette section donnait droit aux appelants d'adopter la procédure qu'ils ont suivie et que leur action est bien portée.

En résumé je suis d'avis en me fondant sur la décision du Conseil privé dans la cause de *Bell* v. *La Corporation de Québec* que les appelants comme propriétaires riverains ont incontestablement droit à une action pour la violation de leur droit d'accès à la rivière St. Charles, bordant leur terrain ; que l'autorisation invoquée par la compagnie n'existe pas, et que sans la preuve de l'autorisation des gouvernements de Québec et de la Puissance, de se servir de la

(1) 43 et 44 Vic. ch. 43 sec. 9 ss. 37.

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grève, les lois à ce sujet n'ont pas d'application et ne peuvent justifier la violation des droits de particuliers; qu'enfin que les dommages sont prouvés et que l'appel devrait être alloué avec dépens.

HENRY J. concurred with FOURNIER J.

TASCHEREAU J.—Under 22 Vic. ch. 32 (1858) as amended by 25 Vic. ch. 46 (1862) that part of the river St-Charles where the tide ebbs and flows, and consequently the locality in question in the present case, is within the limits of the Harbor of Quebec.

Consequently under the authority of *Holman* v. *Green* (1), by which, I presume, we are bound in this court, the ownership of the beach opposite the appellants' property is vested in the federal government.

This being so, there is no statute either federal or provincial applicable to this case, under which an Order in Council could issue for the purpose of authorising this company to construct their railway on that beach, for the Quebec Railway Act of 1880, clearly does not and could not authorize a railway company to take possession of the property of the Dominion, and the Dominion Railway Act of 1879 does not and could not apply to a provincial railway, of which character the North Shore Company was when they took possession of the beach in question (39 Vic. ch. 2), and up to the 23rd May, 1883 (46 Vic. ch. 24 D.), neither could the Quebec act of 1882 (45 Vic. ch. 20) authorize the company to take possession of this beach. It is obvious that the Quebec Legislature could not dispose of the property of the Dominion.

The question of an order in council, either federal or provincial does not therefore arise.

It, moreover, was not open to the appellants under the terms of their declaration, and, even if open in the Superior Court, is not open to them on this appeal

(1) 6 Can. S. C. R. 707.

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from the terms of the formal judgment of the Court of Queen's Bench, which declares that the appellants have not in that court contested the company's right to have their railway on the beach in question.

In the view I take of the case, however, this is quite immaterial. The appellants must fail, whether the company is a trespasser on this beach or not, if they do not show a title, or a right to use it—for the purposes of their trade. They have no *locus standi* to complain of an encroachment of the company on their neighbour's property, if the company by their works have not deprived them of any of their rights. So that the only question to be determined is: What are the appellants' rights to that beach for the purposes of their trade, whether the company is lawfully in possession of it or not? This question has, in this case, to be determined upon the civil law of the Province of Quebec.

The appellants base their action on a right of servitude which, as they allege, the law gives them on the beach opposite their property. They claim that they have a special, and necessarily an exclusive, right as riparian owner to use that beach for the purposes of their trade.

The Quebec Court of Appeal has decided that they have no such right, and in that decision I unhesitatingly concur.

It is by sufferance only that the appellants have been using that beach for the purposes of their trade up to the time of the building of this railway. They had no more rights there than the public had. If when they established their factory they had obtained from the crown a grant of that beach lot, they would not have been exposed, without full compensation, to the damage they now suffer. But they now claim without a title the same rights they would have had with

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a title. According to their contention it would be perfectly unnecessary for a riparian owner to obtain a grant of the beach lot opposite his property. Their position as riparian owners, they claim, gives them on that beach all the rights a patent from the crown would. This contention is, in my opinion, utterly unfounded.

The riparian owners on navigable rivers have no special rights either on the beach or on the rivers. Laurent (1). The wharf that the appellants had built in front of their property, below the high water mark, without a grant or license from the crown, was an encroachment on the public domain, which the crown could have put a stop to at any time.

Les propriétaires riverains des cours d'eau dépendant du domaine public ne peuvent y excercer aucune enterprise.

says Demolombe (2). The riparian owner, in the Province of Quebec, has no exclusive right to the grant by the crown of the beach lots opposite his property. This was determined long ago in *Reg.* v. *Baird* (3), and never has been doubted since, that I am aware of. I draw particular attention to the remarks in that case of Meredith C. J. than whom no higher authority on the law of the Province of Quebec can be quoted.

The crown could therefore have conceded this beach lot opposite the appellants' property to any third party who would have been at liberty to erect on it a wharf, or a dock, or an elevator or any building whatever, and the appellants would have had no claim for compensation for their severance from the river.

In the United States, where from the case of *Stevens* v. *Paterson and Newark RR. Co.* (4), I gather that the law is precisely the same as in the Province of Quebec on the subject, this doctrine was, in that case, directly applied. The facts of that case were exactly as they are here, that is to say, a railway company had built

(1) Vol. 7 No. 254 et. seq.
(2) Vol. XI. No. 124.
(3) 4 L. C. R. 325.
(4) 3 Am. R. 269.

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its road along the bank of a navigable river, below high water mark, thus cutting off the riparian owners from the benefits incident to their property from its contiguity to the water. The question was whether they were entitled to compensation. The court held that they were not; that the titles of owners of lands bordering on tide waters ends at high water mark, that below the ordinary high water mark, the title to the soil is in the state; and that the riparian owner has no rights beyond high water mark, as against the state or its grantees. The Chief Justice, in his remarks, said:

Indeed I think it is safe to say that no English lawyer, speaking either from the bench or from the bar, has ever asserted that the owner of the land along the shore of navigable water has any particular right, by reason of such property, to the use of the water or of the shore.

Such is the law of the Province of Quebec. It is precisely what was also declared to be the law of England by the Court of Appeal in Chancery in *Lyon* v. *Fishmonger's Co.* (1), where the court held that they had been unable to find any authority for holding that a riparian proprietor where the tide flows and re-flows has any rights or natural easements vested in him similar to those which have been held in numerous cases to belong to a riparian proprietor on the banks of a natural stream above the flow of the tide

This holding, it is true, was reversed in the House of Lords (2); but this merely shows the difference between the law of England and the law of the Province of Quebec on this subject, a difference which the Privy Council in *Bell* v. *The Corporation of Quebec* (3); in reviewing that case of *Lyon* v. *Fishmonger's Co.* seemed to recognize.

The Ontario case of *The Queen* v. *The Buffalo and Lake Huron Railway Co* (4) is no authority; it is not

(1) 10 Ch. App. 679.
(2) 1 App. Cas. 662.
(3) 5 App. Cas. 84.
(4) 23 U. C. Q. B. 208.

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law here. A judgment of the highest tribunal of France in 1865, in *re Joanne Rousseray* (1) on a case in point leaves no doubt on the subject.—There the claimant had bought for the special purpose of having the use of the river (a navigable one) a lot bordering on that river. The State constructed on the river immediately opposite the claimant's riparian lot public works, by which the claimant was deprived of all access to the river from his lot. He therefore claimed damages. The court of first instance dismissed his claim, and on appeal to the *conseil d'état*, this judgment was confirmed. "Considering, says the judgment dismissing the appeal, that by the construction of public works on navigable rivers, the State owes an indemnity but to those of whom a right of ownership has been affected by the works: Considering that the works in question have not affected any inherent right of the claimant as riparian owner, &c." The doctrine that a riparian owner on a navigable river has not an inherent right of access to the river could not receive a more decisive sanction. In that case it is true the claimant had still access to the river, not from his lot, but some way down the river. But in the present case also, the plaintiffs have still complete access to the river.

They have not been deprived of their *droit d'accès et de sortie* referred to in *Montreal* v. *Drummond* (2), and in *Bell* v. *Corporation of Quebec* above cited.

They still have access to the river. Besides the tunnel which the company has opened in the embankment of their road for their special use, there is a public highway running alongside their property leading to the river, and through this, they have, with the public, all that the public have, that is to say, all that they can claim as of right. All the damage they suffer from

(1) S. V 65, 2, 246. (2) 1 App. Cas. 384.

the construction of the road, is that the access to the river is rendered thereby for them longer or more difficult. Now, the cases under the French law are clear, that, under these circumstances, the appellants have no *locus standi*.

I refer to the cases of *Re Daube* (1); *Re Darnis* (2); *Re Crispon* (3); *Re Hubie* (4).

In *Re Daube* the court held that works which cause inconveniences to a property do not give a claim for indemnity to the owner.

Re Darnis and *Re Hubie* are in the same sense as the decision of the Privy Council in *Drummond* v. *Montreal*.

In *Re Crispon*, the railway had been built between a quarry where the claimant got his limestone and his lime-kiln. The claimant claimed damages from the fact that by the railway works the road from his quarry to his lime-kiln was lengthened, and because he would have to cross the railway to communicate from one to the other. Damages refused.

I also refer to the case of *Ville de Paris* (5).

And Sourdat (6) says :—

Maintenant, quand y aura-t-il dommage indirect, insusceptible de servir de base à une demande en indemnité ?

C'est, d'abord, dit-il, quand il n'y aura d'atteinte portée qu'à de pures facultés ouvertes à tous d'une manière générale, à la différence des droits proprement dits que la loi établit, reconnait et garantit. Les premières ne sont garanties positivement à personne, tel est l'usage des voies publiques; tant qu'elles subsistent, chacun a le droit d'en jouir, d'en tirer tout l'avantage que cet usage, conforme aux lois et aux règlements, peut procurer. Leur abandon, leur suppression ne peut donner lieu à des réclamations fondées.

The appellants have referred us to that class of cases, as *Brown* v. *Gugy* and *Bell* v. *The Corporation of Quebec* where it has been held that an action lies for a public nuisance at the instance of any private individual who has suffered special damages thereby. Not mere

(1) S. V. 49 2 383.
(2) Dall. 56, 3, 61.
(3) Dall. 59, 3, 35.
(4) Dall. 60, 3, 2.
(5) S. V. 75, 2, 342.
(6) Vol. 1 No. 437

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damages, but special damages. But these cases have clearly no application here.

We have also been referred to the class of cases in the Province of Quebec, where the rights of riparian proprietors on a navigable, but non-tidal, river have been discussed. These also are obviously quite distinguishable. On such rivers there are no beach lots belonging to the crown.

The cases also on non-navigable rivers, such as *Miner* v. *Gilmour* (1), are also distinguishable. On these rivers, the riparian owner is proprietor of the bed of the river *ad filum aquæ*, subject to the restrictions imposed by the law on the use of these waters. *Boswell* v. *Denis* (2).

I am of opinion that the judgment of the Quebec Court of Appeal by which it was held that the appellants have no right of action should be affirmed.

But, even if the appellants would have had their action at common law they cannot succeed, because under the statute their right to a compensation and of action has been taken away, 1st, because the only damages they claim are damages to their track and business, for which, under the statute, they are not entitled to compensation, and 2nd, because, even if they had a right to compensation, their only recourse under the statute is by arbitration and not by action.

On the first of these propositions, I cite Lord Blackburn in *Caledonian Ry. Co.* v. *Walker's trustees*, (3).

It is not open for discussion that no action can be maintained for anything which is done under the authority of the legislature, though the act is one which, if unauthorized by the legislature, would be injurious and actionable. The remedy of the party who suffers the loss is confined to recovering such compensation as the legislature has thought fit to give him. * * *

And it must now be considered settled that on the construction of these acts compensation is confined to damage arising from that

(1) 12 Moo. P. C. 131. (2) 10 L. C. R. 294.
(3) 7. App. Cas. 293.

which would, if done without authority from the legislature, have given rise to a cause of action. * * *

And it must, I think, also be now considered as settled that the construction of these statutes is confined to giving compensation for an injury to land or an interest in land; that it is not enough to show that an action would have lain for what was done if unauthorized, but it must also be shown that it would have lain in respect of an injury to the land or an interest in land.

Now, that by their action the damages claimed by the appellants here are merely those to their trade and business is clear. Their declaration, after alleging their title to their property, and that they purchased it because of its advantageous situation for the purposes of their trade, the price paid being one thousand dollars as appears by the deed of sale fyled with their declaration, goes on to say that they have built thereon at a cost of $30,000 a large factory for the purposes of their trade, and that the railway company have since illegally built their road between their property and the river, so as to render their access to the river impossible. They then allege that in consequence of the said railway works:—

Les demandeurs ont été mis dans l'impossibilité d'avoir accès de leur dite propriété à la dite rivière; que la navigation sur celle-ci, vis-à-vis de la dite propriété a été obstruée et rendue impossible; que l'exploitation de la manufacture des demandeurs a été rendue beaucoup plus difficile et beaucoup plus dispendieuse, et que tant pour les causes susdites que pour d'autres causes connexes et en résultant les demandeurs ont souffert et continueront de souffrir des dommages et que les dommages déjà soufferts sont au montant de cinquante mille piastres, laquelle somme les défendeurs refusent de payer aux demandeurs bien que dûment requis de ce faire, les défendeurs refusant aussi de faire disparaitre le dit quai et la dite obstruction dans la dite rivière St-Charles.

And they pray for $50,000 damages.

Not a word that their property has been injuriously affected, that it has decreased in value, in consequence of the works. Nothing but personal damage, damages for personal inconvenience and to their business, which as they allege, up to the date of their declaration,

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amounted to $50,000, but which they will continue to suffer in the future. The sum claimed alone, coupled with these allegations, leaves no doubt as to the nature of their claim. For the proposition that for such damages no right to a compensation lies, and that the subject of compensation, where no part of the claimant's land has been taken, must not be of a personal character but must be damage or injury to the land itself, considered independently of any particular trade, I refer to the following additional cases: *Caledonian Railway Co.* v. *Ogilvy* (1); *Reg.* v. *Metropolitan* (2); *Hammersmith Railway Co.* v. *Brand* (3): *City of Glasgow Union Railway* v. *Hunter* (4); *Ricket* v. *The Metropolitan* (5); *Metropolitan Board of Works* v. *McCarthy* (6).

In *Reg.* v. *The Metropolitan Board of Works* (7) compensation was refused, though the execution of the works prevented access to the river for the purpose of drawing water; and in *Rex* v. *Bristol Dock Co.* (8), though the river was dammed back by the execution of the works, and the water was thereby made less pure, brewers who had been in the habit of using the water were refused compensation.

I refer also to *Rex* v. *London Dock Company* (9) and *Benjamin* v. *Storr* (10).

In France, also, the same principle prevails—*In re Le Balle* (11), held, that the damages caused to the claimant in the course of his business do not entitle him to an indemnity. To entitle him to an indemnity, the works must injure his property directly and materially.

The case of the *Duke of Buccleuch* v. *The Metropolitan*

(1) 2 Macq. H. L. Cas. 229.
(2) L. R. 4 Q. B. 358.
(3) L. R. 4 H. L. 171.
(4) L. R. 2 Sc. App. 78.
(5) L. R. 2 H. L. 175.
(6) L. R. 7 H. L. 243.
(7) L. R. 4 Q. B. 358.
(8) 12 East 428.
(9) 5. A. & E. 163.
(10) L. R. 9 C. P. 400.
(11) S. V. 54, 2. 558.

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Board of Works (1) is distinguishable on various grounds, besides the difference between the English law and the French law on the subject. First, the case was determined on special clauses of Imperial acts of a much wider import than the corresponding ones in the Quebec railway act of 1880, or not to be found at all in the latter. The meaning of the word "land" itself, in the Thames Embankment Act under which the claim was there made is of a much wider import than that of the same word in the Quebec Act.

Secondly, in that case, a part of the claimant's property had been expropriated, whilst here not an inch of the appellants' property has been taken or touched by the company. And the cases show what an important difference this constitutes.

Thirdly, the damages awarded to the claimant were for damages to his property, not for personal damages, or damages to any road.

Fourthly.—The damages awarded for a severance of the claimant's property from the river had arisen from the construction of works necessary, exclusively I might perhaps say, under an Imperial Statute relating to works on water fronts, and providing for compensation for damages resulting to the riparian owner from severance from the water.

Upon these authorities the appellants are not, in my opinion, entitled to compensation for the damages they claim in the present action.

I now pass to my second proposition on this part of the case, that is, even if the appellants were entitled to compensation, their action does not lie, and their only remedy was by arbitration under the statute.

That this railway has been built under the statute is unquestionable. And it has been built under the statute as well for the 30 or 40 feet opposite the ap-

(1) L. R. 5 H. L. 418.

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pellant's property, as for the rest of the 170 miles between Quebec and Montreal, even if for that part of beach it had not *ab initio* the express consent of its owner the crown.

As long as its owner allows the company to have and maintain their road there, the appellants cannot question their title. As regards any one else but the crown, the company is lawfully in possession, and for that reason, no doubt, the Superior Court, though awarding some compensation to the appellants, dismissed that part of their conclusion by which they asked for the removal of the railroad from the premises.

Now, that the only remedy under the statute is by arbitration admits of no doubt. In all the cases I have cited, this proposition is incessantly repeated. I refer also to Lloyd on Compensation, (1); also to two cases in the Privy Council from the Province of Quebec directly in point, *Jones* v. *Stanstead* (2) and *Drummond* v. *Montreal* (3), cases which clearly are binding upon this court, though, as would appear by Mr. Justice Ramsay's remarks in this case, not considered by the Court of Appeal, to be binding upon them.

To resume, I say that in my opinion:—

1st. The appellants had no right to compensation at common law;

2nd. That, even if they had such right at common law, they are not, under the statute, entitled to any compensation for the damage to their trade and business as claimed;

3rd. That, even if they were entitled to such compensation, their action must fail, as their only recourse was by arbitration under the statute.

GWYNNE J.—I am of opinion that the appellants

(1) P. 109 et seq. (2) L. R. 4 P. C. 98.
(3) 1 App. Cas. 384.

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under the provisions of the railway act, in virtue of which alone the respondents could legally have constructed the work in question, are entitled to recover in some form of proceeding for such damage as their property situate on the banks of the river St-Charles can be shewn to have suffered, by reason of free access between the appellants' property and the navigable waters of the river being obstructed by the work in question.

The point has been so decided in the courts of the late province of Upper Canada at Toronto, in 1864, in *Regina ex rel. Widder* v. *the Buffalo and Lake Huron Railway Co* (1) and the principle upon which the appellants' claim for compensation rests appears to me to have been affirmed, incidentally only it is true, by the judgment of the Privy Council, in *Bell* v. *The Corporation of Quebec* (2); although, in that case, the court held that in point of fact the plaintiff's right had not been violated.

It has been contended that the plaintiffs' declaration in the present case is not framed as a claim for such damage but only for damage done to the plaintiffs trade and that it was only for damages for injury to plaintiffs' trade that judgment was given by the learned judge of the superior court by whom the case was tried. I have been unable to see the foundation upon which this contention is based for the plaintiffs in their declaration expressly allege :—

Que dans le cours du printemps ou de l'été dernier les défendeurs, les Commissaires du Hâvre de Quebec, ont illégalement permis au défendeurs la Compagnie de chemin de fer du Nord d'obstruer la dite rivière St. Charles, vis-à-vis la dite propriété des demandeurs de manière à leur en rendre l'accès impossible.

Que la dite Compagnie de chemin de fer du Nord profitant de la permission a construit dans la dite rivière du côté des demandeurs un quai haut d'environ quinze pieds qui ferme complètement aux demandeurs l'accès de la dite rivière.

(1) 23 U. C. Q. B. 208. (2) 5 App. Cas. 98.

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Que par suite de la dite permission ainsi accordée par les Commissaires du Hâvre de Québec, et de l'usage qui en a été fait comme susdit par la Compagnie du chemin du Nord, les demandeurs ont été mis dans l'impossibilité d'avoir accès de leur dite propriété à la dite rivière; que la navigation sur celle-ci vis-à-vis de la dite propriété a été obstruée et rendue impossible.

Then the learned judge of the Superior Court in pronouncing judgment uses language which, as it appears to me, very clearly shows that it is for damage to the plaintiffs' property by reason of such access being obstructed and not for injury to the plaintiffs' trade that he has given judgment in their favor. He says:

Considérant que la dite défenderesse n'a pris pour son chemin aucune partie du terrain des demandeurs ni aucuns matériaux sur icelui, mais que pour construire son dit chemin de fer elle a érigé sur la grève de la rivière St. Charles qui borne la propriété des demandeurs au nord, et qui à cet endroit est navigable un quai et un terrassement qui ôtent à la dite propriété des demandeurs l'accès à la dite rivière et leur enlèvent une des voies de communication qu'ils avaient auparavant.

Considérant que la privation de cette voie fait subir à la propriété des dits demandeurs une détérioration et une diminution de valeur permanentes et pour lesquelles ils ont droit à une indemnité qui d'après la preuve paraît se monter à cinq mille cinq cents piastres, condamne la dite défenderesse à payer aux dits demandeurs la dite somme.

Whether the sum awarded be or not open to the imputation of being excessive it is, I think, clear from the above language that it was for the obstruction of free and uninterrupted access between the property and the navigable waters of the river, and injury and diminution in value thereby occasioned to the property that the damages were awarded and not for injury to plaintiffs' trade, and the learned judge's notes which accompany his judgment are expanded largely to the same effect.

The defendants in the Superior Court appear to have placed their defence at the trial in argument, though not upon the record, upon the contention that the land upon which the structure complained of has been

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erected was the property of the commissioners of the Harbor of Quebec and that the defendants constructed their railway on such property by the authority of the said commissioners, although they seem to have failed in establishing the latter proposition. The learned judge in his notes accompanying his formal judgment says upon this point :—

La défenderesse a invoqué les statuts constituant la commission du Hâvre comme donnant à cette corporation le terrain sur lequel la voie est construite, et enlevant, par là aux demandeurs le droit de se plaindre d'ouvrages que la commission d'après leurs allégations aurait autorisés. La Commission du Hâvre n'exerce qu'à titre de *fidéi-commis*, les pouvoirs que lui a délégués le Parlement relativement aux grèves du St. Laurent et des rivières navigables comprises dans ses attributions ; elle ne peut pas plus y autoriser tacitement des constructions que ne le pourrait, sans un statut le gouvernement lui-même. De plus elle ne peut sur le lit ou les rives des rivières sous son contrôle, rien permettre qui nuise à la navigation, à moins que celle-ci n'y trouve plus qu'une compensation et que les travaux autorisés n'aient pour objet de l'aider et de la faciliter, ce qui est loin d'être le but du terrassement que la défenderesse a construit sur la rive entre le lit de la rivière et la propriété des demandeurs.

Mais supposant même que la commission du Hâvre eût eu le pouvoir de permettre à la défenderesse de mettre sur la rive de la rivière St Charles à laquelle touche la propriété des demandeurs, le terrassement pour y passer sa voie ferrée elle ne l'aurait pu toutefois qu'à la condition que les autorités provinciales eussent elle-mêmes autorisé cette construction ; or ces dernières n'ont pas donné d'autre autorisation que celle que comporte " l'acte refondu des chemins de fer de Québec, 1880," qui à la section et aux sous-sections suscitées, met à l'exercice des droits qu'il confère la condition d'indemniser les propriétaires des terrains qui en souffriraient des détériorations ou des dommages. La sec. 9 No. 11, n'oblige pas seulement les compagnies à payer les terrains des particuliers et les matériaux que la loi les autorise de s'approprier, mais aussi les dommages causés à d'autres terrains par l'exercise de quelqu'un des pouvoir conférés aux chemins de fer. La défenderesse n'a ni invoqué ni établi le consentement du Lieutenant Gouverneur en Conseil requis par le statut pour l'occupation par elle d'une partie du rivage pour ses terrassements ; mais là n'est pas la question principale èn cette cause. Car, si les demandeurs avaient un droit spécial d'accès à la rivière, ce consentement ne leur ôterait pas celui d'obtenir une indemnité ; et si la construction de la jetée que la défenderesse a érigée entre la propriété des demandeurs et la rivière ne les a privé

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de l'exercise d'aucun droit appartenant à leur propriété ils sont sans motifs de plaintes et sans recours en indemnité.

La propriété des demandeurs bornait à la rivière qui y donnait une voie naturelle de communication. Ils y avaient par conséquent un droit d'accès, une espèce de servitude analogue à celle de tout propriétaire riverain sur la voie publique. C'était-là, pour les propriétaires un droit spécial, particulier et distinct de celui qu'ont tous les citoyens dans les rivières navigables. En les en privant par ses constructions, la défenderesse a diminué la valeur de la propriété des demandeurs. Elle leur doit, par conséquent, compensation pour la détérioration qu'elle a ainsi fait subir à leur terrain.

The learned judge having thus with great clearness pointed out that the statute gave to the defendants no authority to erect the structure complained of, unless upon the consent of the Lieutenant Governor in Council first obtained, which consent, as he says, was never invoked or established, and that the structure was therefore erected without any authority, I cannot I confess understand how the first *considérant* in the formal judgment came to be inserted, namely:—

Considérant que la loi permettait à la compagnie du chemin de fer du Nord un des défendeurs en cette cause, de construire sa voie ferrée sur la grève de la rivière Saint Charles dans la cité de Québec.

If this be not a mis-print in the printed case brought before us, it is clearly shown by the notes of the learned judge that the law authorised no such thing; and it is, moreover, to be observed that nothing in the rest of the adjudication in the case is predicated upon anything stated in this *considérant* as it is in the printed case.

The circumstances of the present case and of *Regina ex rel. Widder* v. *The Buffalo & Lake Huron Railway Co.* and the acts upon which the question in both cases turned, and the reasoning of the learned judges in both cases are very similar.

Draper C.J. delivering the judgment of the Court of Queen's Bench in that case referring to the Railway Clauses Consolidation Act of Canada, which subjected railway companies to the obligation of giving com-

pensation to owners of land taken, or injuriously affected by the construction of the railway, says :—

By the 9th section of that act, sub-sec. 3, any railway company with the consent of the Governor in Council may, among other things, take and appropriate for the use of their railway and works so much of the public beach, or of the land covered with the waters of any lake, river, stream or canal, or of their respective beds, as is necessary for making, completing, and raising their said railway and works.

By the 37 section of the defendant's act of incorporation they are authorized to purchase and the Canada Company are authorised to sell to them the harbour of Goderich and so much of the islands on the river Maitland and the shore adjoining that river as may be agreed between them.

In 1835 the Crown leased to the Canada Company for a term of 21 years a space along the shore of Lake Huron extending north and south a distance of a mile and five hundred yards more or less out into deep water, and along the water's edge of the lake to the river Maitland and up that river on one side nearly two miles to a certain point, and then across the river and thence down on the other side, saving and excepting to the Crown the free use of the land and premises and of any wharf, &c., that might be erected thereon, and on condition that the lessees within five years build a wharf and pier and remove a certain portion of the bar at the entrance of the river and lake there for the free navigation of vessels of seventy tons burthen.

The statute of Upper Canada, 7 W. 4 c. 50 authorised the Canada company to improve the harbor of Goderich and to levy tolls, with a proviso for the purchase thereof by the province upon certain conditions. After a purchase made by the defendants under the 37th sec. of their act of incorporation it was by the same section made lawful for them to straighten and improve the river Maitland and deepen cleanse and improve and alter the navigation thereof, &c., &c , and to construct basins, docks, piers, wharfs, warehouses, &c., &c., and also appropriate the mud and shore of the river Maitland, and the bed and soil thereof, and to do all such other acts as they might deem necessary or proper for improving Goderich Harbor and the navigation of the river, and the bed and shores thereof and the land adjacent thereto.

On the 14th of June, 1859, the Canada Company assigned to the defendants their rights, powers and privileges under their lease.

The statute 23 Vic. ch. 2. sec. 35 is also to be noted : "Whereas doubts have been entertained as to the power vested in the Crown to dispose of and grant water lots in the harbors, rivers and other navigable waters in Upper Canada and it is desirable to set at rest

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any question which might arise in reference thereto, it is declared and enacted that it has been heretofore and that it shall be hereafter lawful for the Governor in Council to authorize sales or appropriations of such water lots under such conditions as it has been or may be deemed necessary to impose."

It appears to us that we shonld treat the powers given by the legislature and the rights thereunder for the purposes of the railway, as distinct from the powers granted for the purpose of the navigation of the river Maitland and the use of the Goderich harbor, and that an act done which expressly comes within the former class of powers leaves the rights of third parties as to compensation just where they were before the latter powers were conferred or acquired. The two sets of powers are for distinct purposes and it is abundantly clear to us that the powers to improve the navigation of the river do not and were not intended to enable the possessor of them to cover the bed of the river with railway works, or to interfere with or prevent free access to the river and harbour for the purposes of navigation. The case of the *Queen* v. *Betts* (1) though not similar in many respects tends in others to confirm the opinion that the powers conferred for the improvement of the navigation are to be exercised for that purpose solely and not as auxiliary to and extending those conferred on the defendants by their charter as a Railway Company. Adopting this conclusion it will be obvious that the defendants cannot uphold their refusal to submit to arbitration the prosecutor's claim for compensation for the injuriously affecting his land by the construction of the railway on the ground of the rights they have derived from the Canada Company.

And upon the authority of *Chamberlain* v. *The West London & Crystal Palace Railway Co.* (2), and an Irish case of *The Queen ex rel. Cowan* v. *Rynd* (3), the court granted a peremptory *mandamus* commanding the defendants to take the necessary proceedings to enable an arbitration to be entered into, under the Railway Act, to indemnify the applicant for the injury done to his property although no land was taken from him.

This case was decided in 1864; since then the cases of *Beckett* v. *Midland Railway Co.* (4) and *Metropolitan Board of Works* v. *McCarthy* (5) have been decided. Upon the authority of these cases it was decided in

(1) 16 Q. B. 1022.
(2) 2 B. & S. 605.
(3) 9 L. T. N. S. 27.
(4) L. R. 3 C. P. 82.
(5) L. R. 7. H. L. 243.

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Yeomans v. *The County of Wellington* (1) that a county council in Ontario could not under a statute containing a similar clause of indemnity in respect of land injuriously affected raise one of their own roads, so as to obstruct the access between land adjoining the road and the road without rendering compensation to the owner of the land, and since the judgment of the House of Lords in the *Caledonian Railway Co.* v. *Walker's Trustees* (2), in which all the previous cases have been reviewed, it cannot, I think, admit of a doubt that the obstruction of access between a public highway and adjoining land, whether such highway be on dry land or on navigable waters, is an infringement of a right attached to land for which an action lies at the suit of the owner of the land access with which is so obstructed unless the obstruction can be justified, and that if the justification be that the work causing the obstruction was done under the authority of a statute containing a clause of indemnity similar to that in the statute now under consideration, although the owner of the land is thereby deprived of his remedy by action at common law, he is entitled to compensation to be ascertained by arbitration under the statute.

Now between *Regina* v. *The Buffalo & Lake Huron Railway Co.* and the present case, the only difference is in the form of the proceeding. In that case the work complained of as injuriously affecting Mr. Wider's land was treated by him as having been done by the defendants under the authority of the acts authorizing the construction of their railway, and upon that assumption he applied to the court for and obtained a mandamus *nisi*, calling upon the railway to initiate the proceedings necessary under the statute to have compensation awarded to him by an arbitration entered

(1) 43 U.C.Q.B. 522; 4 Ont. App. 301. (2) 7 App. Cas. 259.

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into in accordance with the provisions of the statute, and it was upon the return to that mandamus that the question arose. The defendants did not in that return raise any question as to the propriety of the mode of procedure adopted by Mr. Widder—they did not contend that his remedy, if any he had, was by action and not by arbitration; that is to say, they did not set up that they were not acting under their statutory powers at all in the construction of the work complained of, but they insisted that they had power under their act to erect the construction without giving any indemnity to the applicant, because the work was not constructed upon any land of the applicant, but upon land of which, as the defendants contended, they were themselves possessed by title derived from the crown; namely, the bed of the river Maitland in the navigable waters of the harbour of Goderich.

In the present case, on the contrary, the substance of the plaintiffs' claim in their action is that the defendants have illegally constructed a work on the navigable waters of the river St. Charles in front of the property which cuts off all access between their property and the navigable waters of the river. If this allegation be true the cases conclusively decide that the charge involves an infringement of a right of privilege incident to land which is an actionable wrong. The defendants if the work complained of was erected by them in point of fact could not exempt themselves from liability to the plaintiffs for such damages as they could establish upon a declaration containing such a cause of action otherwise than by a special plea of justification shewing the construction of the work not to have been illegal, and under the circumstances appearing in the case such a plea to constitute a good defence must have stated all the facts necessary to shew that under the provisions of the statute under consideration the

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defendants had authority to erect the structure which they have erected in the bed of the river St. Charles. In case such a plea should be sustained in evidence the effect would be to defeat the present action it is true, but to give to the plaintiffs a remedy by arbitration which could have been enforced as in *Regina* v. *the Buffalo and Lake Huron Railway Company* by mandamus. But the defendants have pleaded no such plea—they have contented themselves with pleading simply the general issue—they offer no defence, but a simple denial of the facts alleged in the declaration which in the evidence were not disputed, the defendants' defence on the trial being simply that the land on which the work was erected by the defendants not being the land of the plaintiffs, no actionable injury had been done to them. The Court of Appeal in the Province of Quebec have adopted this view and on appeal from the judgment of that court the defendants' contention before us was that if the plaintiffs are entitled to any compensation upon the facts as alleged and proved such compensation cannot be recovered in an action like the present, but can be recovered only by proceedings in arbitration under the statute, a defence not set up by plea upon the record, and which, if it had been, the defendants failed to establish, as has been pointed out in the notes of the learned judge of the Superior Court and which has never been questioned by the defendants, even if without a plea it could have been, namely that they never either invoked or established the consent in Council of the Lieutenant Governor to their building their railway on the bed of the river St-Charles, without which consent first obtained they could not invoke the statute as a protection or justification for their conduct; the defendants were therefore placed in the position of being mere wrong doers, having no

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justification for doing the act causing the injury to the plaintiffs of which they have complained, and which act not having been justified as, and shewn to be, legal is actionable. I cannot see upon what principle the defendants should now be heard to insist that the plaintiffs' remedy is not by action but by arbitration. It was the duty of the defendants if they relied upon their statutory powers as authorising the construction of the work complained of to have initiated the proceedings for an arbitration. Not having justified under the statute they were liable as wrong doers and subject to an action for damages, and they cannot now be permitted to deprive the plaintiffs of the benefit of proceedings which the defendants' own neglect to bring themselves within the protection of their statute has occasioned, and at this late stage to appeal to their liability in arbitration as relieving them from liability in this action while they have not taken, or so far as appears do not propose to take, any proceedings to bring about such arbitration. The courts below have never had presented to them any issue upon the point now urged that proceedings by arbitration and not by action constitute the plaintiffs' sole remedy. The judgment appealed from proceeds upon no such question. The Court of Appeals have decided that as the defendants have not constructed the work complained of on the plaintiffs' land but on the bed of a navigable river the plaintiffs are not injured and have no ground of complaint any more than all other Her Majesty's subjects—and that therefore their action should be dismissed. This judgment being erroneous the appeal should be allowed with costs and, as no complaint has been made that the amount allowed to the plaintiffs by the judgment of the superior court is excessive (assuming the amount to have been assessed upon sound principles) as it appears to have been, that

the judgment should be restored.

Appeal allowed with costs. (1).

Solicitors for appellants: *Montambault, Langelier & Langelier.*

Solicitors for respondents: *Bossé & Languedoc.*

(1) Leave to appeal to the Judicial Committee of the Privy Council has been granted in this case.