1906

*May 8.

*May 14.

EMMA LEAHY (PLAINTIFF) .....APPELLANT.

AND

THE TOWN OF NORTH SYDNEY (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Watercourses—Riparian rights—Expropriation — Trespass—Torts—Diversion of natural flow — Injurious affection — Damages — Execution of statutory powers — Arbitration — Injunction — Mandamus—Construction of statute—59 *V. c.* 44 (*N.S.*).

A riparian proprietor whose property has been injuriously affected by the unlawful diversion of the natural flow of a watercourse may recover damages therefor and may also obtain relief by injunction restraining the continuation of the tortious acts so committed.

The powers conferred upon the town council of the Town of North Sydney, N.S., by the Nova Scotia statute, 59 Vict. ch. 44, for the purpose of obtaining a water supply give them no rights in respect to the diversion of watercourses except subject to the provisions of the fourth section of the Act, and after arbitration proceedings taken to settle compensation for injurious affection to property resulting from the construction or operation of the waterworks. *Saunby* v. *The Water Commissioners of London* ([1906] A.C. 110) followed.

APPEAL from the judgment of the Supreme Court of Nova Scotia reversing the judgment of Meagher J. and dismissing the plaintiff's action with costs.

The plaintiff brought the action against the Town of North Sydney on account of the injurious affection of her rights as a riparian proprietor and as the owner of privileges in a stream called Smelt Brook which is the only outlet of Pottle's Lake, in the County of Cape Breton, N.S., seeking to recover dam-

*PRESENT:—Sedgewick, Girouard, Davies, Idington and Maclennan JJ.

ages at common law and for an injunction, or, in the alternative, for statutory compensation and a mandamus to compel the town to proceed to expropriate the property affected and have the compensation assessed by appraisers under the provisions of chapter forty-four of the statutes of Nova Scotia for 1896. The plaintiff is the owner of lands on both sides of Smelt Brook a short distance below the lake and has also the right, acquired from riparian owners above her lands, to run a pipe two hundred feet in length up-stream for the purpose of getting a head of water. She built a laundry on her land, erected a dam, ran a pipe up to the dam, installed laundry machinery with a turbine wheel with a flume and raceway and operated the machinery by means of the water-power thus obtained.

By the above mentioned Act the town was authorized and empowered to provide for its inhabitants a good and sufficient supply of water for domestic uses, fire protection and other purposes and to construct the necessary works, lay pipes, build dams and reservoirs, acquire lands and to do all other necessary things in relation thereto. The provisions of the statute affecting the matters in issue are contained in the second, fourth and fifth sections, which are as follows:

"2. For the purpose of obtaining the said supply of water the town council are hereby authorized and empowered to enter upon all lands within the limits of the Town of North Sydney, and upon all lands in the County of Cape Breton outside the limits of the Town of North Sydney, and to enter upon the bed of any river, lake or stream whatsoever in the County of Cape Breton, and to build dams, reservoirs or other works wherever necessary, and to cause the

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water to overflow the land bordering on such river, lake or stream, and to take from such river, lake, stream or springs, such quantity or quantities of water as may be required; and in the construction, building or repairing of any dams or reservoirs, and in the laying down, constructing, repairing or alteration of any main or service pipe or other structure under the provisions of this Act, the mayor, councillors, or any or either of them, and their engineer, superintendent, servants or workmen, shall have full power, and they are hereby authorized, from time to time, as occasion may require, to enter upon any lands or tenements, inhabited or uninhabited, both within the said town or outside of the same, and may remain thereon as long as they may deem requisite for the proper execution of the work, and make all such excavations on the premises as may be expedient, and take up and remove any floors, timbers, planks, walls, fences or erections whatsoever, doing no unnecessary damage to the same, and carefully replacing the same, as far as can be, on the requisite work being performed.

"4. Whenever it shall be necessary for the securing the necessary supply of water, the laying down or placing of any reservoirs, tanks, fountains, pipes, leaders or tubes, or for any purposes whatsoever under this Act, that the town shall be invested with the title or possession of or in any lot or parcels of lands and premises, situated anywhere, either in the town or outside the corporation limits, it shall and may be lawful for the council, in case they cannot agree with the proprietors of such lands, respectively, for the purchase or lease thereof as may be required, to give notice in writing to the party whose lands are intended to be taken, or to his agent, that the said

lands are required for the purposes of the town under this Act, and shall request the party or his agent, whose land it is proposed to take or occupy, to appoint one arbitrator, and the council shall appoint one arbitrator, and a judge of the Supreme Court shall appoint a third arbitrator, and the arbitrators so appointed shall proceed to determine the damages, if any, and award the same to be paid to the owner or occupier, as the case may be, whose award, or the award of any two of them, shall be final and conclusive, provided the town council decide to take such lands; and thereupon the town shall pay and satisfy within six months to those entitled to receive the same, the full amount of such award or valuation, and immediately upon the payment or tender of the sum awarded as aforesaid to the owners, or in case of dispute to such parties as a judge of the Supreme Court shall decide, the town shall be and be deemed the rightful purchasers and owners in fee simple of such lot or parcel of land with the appurtenances, if the said award be for the purchase thereof, or otherwise the tenant thereof for such time as in such award set forth, and in case the proprietor of such lands neglect or refuse to appoint an arbitrator within thirty days after due notice as aforesaid, or in case the proprietor cannot be found, or is absent and has no known agent residing in the province, a judge of the Supreme Court may appoint such arbitrator, who shall be disinterested and not a resident of North Sydney. If the town council have no reason to fear any claims of encumbrances, or if any party to whom compensation is payable cannot be found, or is unknown, or if for any other reason the council may deem it advisable, the council may pay such compensation into the office of the

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prothonotary of the Supreme Court of the County of Cape Breton, a judge of which court shall by order direct it to be deposited in some bank, there to remain until by him directed to be paid out to the party entitled thereto, and shall deliver to the prothonotary aforesaid a copy of the award, and such award or a certified copy thereof under the hand and seal of the prothonotary aforesaid, together with his receipt for the amount awarded, when registered in the registry of deeds office for the County of Cape Breton, shall thereafter be deemed to be the title of the town to the property therein mentioned.

"5. In the event of any damage being done in the execution of the work the party sustaining such damage shall be entitled to receive such compensation as shall be mutually agreed upon, and in case no such agreement can be made, three appraisers, one to be appointed by the party sustaining such damage, one to be appointed by the town council, and the third to be appointed by the two appraisers already so appointed, shall view the premises and determine the damages, if any, without hearing evidence in the matter, the decision of said appraisers, or any two of them, to be final and binding on the parties, and the amount so assessed to be paid within three months thereafter. In case the party sustaining such damage shall not appoint an appraiser as aforesaid within thirty days from the service upon him of a notice in writing requesting him to appoint such appraiser, the judge of the county court for district number seven may appoint such appraiser."

Under the powers conferred by the Act, the town constructed a system of waterworks obtaining all its supply from Pottle's Lake and the plaintiff complained that, thereby, such large quantities of water

were diverted and abstracted from their natural flow through Smelt Brook past and over her lands that the value of her property was greatly diminished and the effective operation of her water-power injuriously affected.

At the trial Mr. Justice Graham decided in favour of the plaintiff and adjudged that she was entitled to such damages as might be awarded by appraisers to be appointed under the provisions of the fifth section of the Act, and that she was entitled to a mandamus against the town directing the appointment of an appraiser on its behalf and for the proceedings therein provided. By the judgment appealed from this decision was reversed and the plaintiff's action was dismissed with costs, Russell J. dubitante.

Drysdale K.C. (Attorney-General for Nova Scotia), and *Burchell,* for the appellant relied upon the decision in *Roberts* v. *Gwyrfai District Council* (1); *McCartney* v. *Londonderry and Lough Swilly Railway Co.* (2); *The Commissioner of Public Works* v. *Logan* (3); *The Water Commissioners of London* v. *Saunby* (4); *Corporation of Bradford* v. *Pickles* (5), at pages 152, 153, *per* Herschel L.C. and on appeal (6), *per* Watson L.J. at page 596; *Wells* v. *The London etc., Railway Co.* (7), *per* Bramwell J., at page 130; *The Queen* v. *Vestry of St. Luke's* (8), *per* Kelly C.B., at page 153; *The Hammersmith and City Railway Co.* v. *Brand* (9); *City of Glasgow Union Railway Co.* v. *Hunter* (10); *The Great*

(1) [1899] 2 Ch. 608.
(2) [1904] A.C. 301.
(3) [1903] A.C. 355.
(4) 34 Can. S.C.R. 650; [1906] A.C. 110.
(5) [1895] 1 Ch. 145.
(6) [1895] A.C. 587.
(7) 5 Ch. D. 126.
(8) L.R. 7 Q.B. 148.
(9) L.R. 4 H.L. 171.
(10) L.R. 2 H.L. Sc. 78.

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Western Railway Co. v. *Smith*(1), at page 250; *Re Birely*(2), *per* Armour C.J.; *Gareau* v. *Montreal Street Railway Co.*(3); *The Duke of Buccleuch* v. *Metropolitan Board of Works*(4); *Cowper-Essex* v. *Local Board of Acton*(5); *Metropolitan Board of Works* v. *Metropolitan Railway Co.*(6); *Roderick* v. *Aston Local Board*(7), at page 333; *Canadian Pacific Railway Co.* v. *Parke*(8), at page 545; *Love* v. *Bell*(9), *per* Watson L.J. at page 298; *Webb* v. *Manchester and Leeds Railway Co.*(10) *per* Cottenham L.J.; *Scales* v. *Pickering*(11), *per* Best C.J. at page 452; *Scottish Drainage and Improvement Co.* v. *Campbell*(12), *per* Herschel L.C. at page 142; *Clowes* v. *Staffordshire Potteries Waterworks Co.*(13); and *Knowles* v. *The Lancashire and Yorkshire Railway Co.*(14), at page 255.

Newcombe K.C. and *W. F. O'Connor,* for the respondent. The legislature authorized the doing of the acts complained of and, in the absence of negligence, the appellant must either find in the Act some provision for compensation, or be content to be deprived of it in the general public interest. *Canadian Pacific Railway Co.* v. *Roy*(15); *Geddis* v. *Proprietors of Bann Reservoir*(16); *Mersey Docks and Harbour Board Trustees* v. *Gibbs*(17); Coulson & Forbes

(1) 2 Ch. D. 235.
(2) 28 O.R. 468.
(3) 31 Can. S.C.R. 463.
(4) L.R. 5 H.L. 418.
(5) 14 App. Cas. 153.
(6) L.R. 3 C.P. 612; 4 C.P. 192.
(7) 5 Ch. D. 328.
(8) [1899] A.C. 535.
(9) 9 App. Cas. 286.
(10) 4 Myl. & Cr. 116.
(11) 4 Bing. 448.
(12) 14 App. Cas. 139.
(13) 8 Ch. App. 125.
(14) 14 App. Cas. 248.
(15) [1902] A.C. 220.
(16) 3 App. Cas. 430.
(17) L.R. 1 H.L. 93.

on Waters, pp. 112, 270, 271, 273, 290-291; Cripps on Compensation, pp. 10-11, 117, 123, 132, 133; *North London Railway Co.* v. *Metropolitan Board of Works* (1); *Galloway* v. *Mayor of London* (2); *Kennet and Avon Navigation Co.* v. *Witherington* (3), *per* Martin, B.; *Jones* v. *Stanstead, Shefford and Chambly Railroad Co.* (4); Mayer on Compensation (1903), pp. 56, 67; Brown & Allen on Compensation, 384.

The words of the Act are "damage *being* done *in* the execution of the work," that is damages done *during* the construction of the works as distinguished from damage arising *by reason of the operation* of the works. The Act does not contemplate, in any event, damage for loss of business or personal loss or inconvenience. *Beckett* v. *Midland Railway Co.* (1867) (5). Similar words in the English Lands Clauses Consolidation Act have been judicially construed as extending only to damage done during *construction,* as distinguished from *operation* of the works. *Hammersmith and City Railway Co.* v. *Brand* (1869) (6), at page 215; *Jones* v. *Stanstead, Shefford and Chambly Railroad Co.* (4), at pp. 117-120; *Caledonian Railway Co.* v. *Walker's Trustees* (7), *per* Shelborne L.J.; *Rex* v. *Pease* (1832) (8); *Vaughan* v. *Taff Vale Railway Co.* (1860) (9); *City of Glasgow Union Railway Co.* v. *Hunter* (1870) (10), *per* Hatherley L.C.; *Hopkins* v. *Great Northern Railway Co.* (1877) (11), *per* Mellish L.J.; *London, Brighton*

(1) Johns 405; 28 L.J. Ch. 909.
(2) L.R. 1 H.L. 34.
(3) 18 Q.B. 531.
(4) L.R. 4 P.C. 98.
(5) L.R. 3 C.P. 82.
(6) L.R. 4 H.L. 171.
(7) 7 App. Cas. 259.
(8) 4 B. & Ad. 30.
(9) 5 H. & N. 679.
(10) L.R. 2 H.L. Sc. 78.
(11) 2 Q.B.D. 224.

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& S. C. Railway Co. v. *Trumanin* 1885(1), *per* Lord Halsbury L.C.; *Attorney-General and Hare* v. *Metropolitan Railway Co.*(2), *per* Lindley L.J.

The Act does not provide for compensation either by action or by appraisement for such damages as are claimed. Section 4 deals with nothing but lands. Section 5, which provides for the case of damages caused by entries upon lands authorized by sec. 2 of the Act in the "execution of the work," but does not look upon the taking of water as the doing of damage, and cannot have been intended to provide compensation for value of impaired riparian rights. A riparian owner cannot convey away his riparian rights. Coulson and Forbes, pp. 118-131-132; *Stockport Waterworks Co.* v. *Potter*(3); *Ormerod* v. *Todmorden Mill Co.*(4).

The declaratory judgment asked for ought not to have been made nor the amendment providing therefor allowed. The court could not grant and superintend consequential relief, and so could not award the declaration. *Barraclough* v. *Brown*(5); *Baxter* v. *London County Council*(6); *Bunnell* v. *Gordon* (7); *Attorney-General* v. *Cameron*(8). The provisions of section 5 oust the jurisdiction of the court. *Crosfield & Sons* v. *Manchester Ship Canal Co.*(9); *Midland Railway Co.* v. *Loseby*(10); *London & Northwestern Railway Co.* v. *Donellan*(11); *Brierly*

(1) 11 App. Cas. 45.
(2) [1894] 1 Q.B. 384.
(3) 3 H. & C. 300.
(4) 11 Q.B.D. 155.
(5) [1897] A.C. 615.
(6) 63 L.T. 767.
(7) 20 O.R. 281.
(8) 26 Ont. App. R. 103.
(9) [1904] 2 Ch. 123.
(10) 68 L.J.Q.B. 326.
(11) 67 L.J.Q.B. 681.

Hill Local Board v. *Pearsall*(1); *Davenport Corporation* v. *Tozer*(2); *Grand Junction Waterworks Co.* v. *Hampton Urban Council*(3); *Pasmore* v. *Oswaldtwistle Urban Council*(4). The section requires a prior attempt at agreement, and in the event of failure to agree, the party sustaining damage must appoint an appraiser. The party sustaining the damage is first named in the Act. In a proper case, he must move first, and if he does not move, the Act provides compulsory process. It is necessary to prove a prior disagreement between the parties and a neglect or refusal to appoint an appraiser before the remedy by mandamus may be invoked. Cripps on Compensation, pp. 68-69, 143-4; *Caledonian Railway Co.* v. *Davidson*(5), *per* Lord Halsbury L.C.

Bodies of water, however large, which are of a temporary character, *i.e.*, dependent on the will or convenience of individuals for their volume or duration, are not the subject of riparian rights. *Briscoe* v. *Drought*(6); *Arkwright* v. *Gell*(7); *Broadbent* v. *Ramsbotham*(8); Coulson & Forbes on Waters, p. 58. Pottle's Lake is not flowing water, and the appellant has no right in the waters thereof. See Coulson & Forbes, p. 289-301; *Proprietors of the Staffordshire, etc., Canal Navigation* v. *Proprietors of the Birmingham Canal Navigation*(9), *per* Cranworth L.J.

Water may be appropriated before it reaches a stream. *Chasemore* v. *Richards*(10), *per* Chelmsford

(1) 9 App. Cas. 595.
(2) 71 L.J. Ch. 754.
(3) 67 L.J. Ch. 603.
(4) 67 L.J.Q.B. 635.
(5) [1903] A.C. 22.
(6) 11 Ir. C.L. 250.
(7) 5 M. & W. 203.
(8) 11 Exch. 602.
(9) L.R. 1 H.L. 254.
(10) 7 H.L. Cas. 349, at p. 376.

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L.C.; Angell on Watercourses, p. 6; *Holker* v. *Porritt* (1); *Acton* v. *Blundell*(2); *New River Co.* v. *Johnson*(3); *Greatrex* v. *Hayward*(4); *Wood* v. *Waud* (5); *Young* v. *Bankier Distillery Co.*(6); *Ballard* v. *Tomlinson*(7).

The appellant has no right to run a laundry by virtue of her riparian rights, but only by contract, if at all. Her deed entitles her to enough water for a tannery—not a laundry.

We would also refer the court to the decisions in *Bush* v. *Trowbridge Waterworks Co.*(8), *per* James L.J.; *Stone* v. *Mayor of Yeovil*(9); *Clark* v. *The School Board for London*(10); *Green* v. *Chelsea Waterworks Co.*(11); *Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.*(12), at pp. 236-7, and *Duke of Bedford* v. *Dawson* (13).

SEDGEWICK J.—The determination of this appeal depends upon the construction to be given to section two of chapter forty-four of the statutes of Nova Scotia of 1896, and of sections four and five of the same Act.

The majority of the court are of the opinion that while section two gives to the town council of North Sydney the power to divert the stream in question and to take water therefrom, such diversion and taking can only be done subject to the provisions of sec-

(1) L.R. 10 Exch. 59.
(2) 12 M. & W. 324.
(3) 2 E. & E. 435.
(4) 8 Exch. 291.
(5) 3 Exch. 748.
(6) [1893] A.C. 691.
(7) 29 Ch. D. 115.
(8) 10 Ch. App. 459.
(9) 2 C.P.D. 99.
(10) 9 Ch. App. 120.
(11) 70 L.T. 547.
(12) (1899) 2 Ch. 217.
(13) L.R. 20 Eq. 353.

tion four and that no entry or works done upon the lands through which the stream in question flows or any diversion of the waters thereof can be made until after the arbitration proceedings under section four are taken.

Section five, we think, relates only to cases where damage is done the property by the construction, as distinguished from the operation, of the work authorized to be done.

The Town of North Sydney was, therefore, a trespasser when it diverted the plaintiff's waters from their natural course and appropriated such waters for the purposes of the town and, under ordinary circumstances, would be compellable to pay damages for the trespass complained of. Counsel for the plaintiff, however, during the argument in this court expressly waived any claim for damages asking only a perpetual injunction restraining the town from continuing the tortious acts referred to. This she is entitled to upon the same principles that influenced their Lordships of the Privy Council in *Saunby* v. *The Water Commissioners of London*(1), a case which would doubtless have been followed had the judgment been given before the trial of the present action.

The result is that the appeal is allowed and that judgment is to be entered for the plaintiff as herein stated, she being entitled to costs in all the courts below and here.

GIROUARD J.—I concur for the reasons stated by His Lordship Mr. Justice Sedgewick. The appeal should be allowed and judgment should be entered for the appellant with costs in the courts below and in this court.

(1) (1906) A.C. 110.

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DAVIES J.—This appeal depends, in my judgment, entirely upon the construction to be given to the statute as a whole, chapter 44 of 59 Vict. of the statutes of Nova Scotia for 1896. This statute is, as one of the counsel for respondent observed, unique and unlike any other statute to be found in the province and, I might add, in any other province of the Dominion.

I doubt whether much assistance can be gained from any of the array of cases decided under the English Lands Clauses Consolidation or Railway Clauses Consolidation Acts or the many private Acts giving power to expropriate lands to private companies. These statutes are carefully drawn, apt and proper language is used and provisions introduced for the purpose of protecting all interests likely to be affected. The statute before us for construction is inartifically drawn, improper and inapt language is used and no general clause was inserted for the protection of interests likely to be affected or prejudiced by the exercise of the powers granted.

There are, however, several well known rules or canons of construction which may be drawn from the cases decided on these expropriation clauses of private Acts and which may with advantage be borne in mind while endeavouring to determine the full and true meaning of this crude bit of legislation. One of these rules is not to impute unnecessarily to the legislature the intention to confiscate private property and that in the absence of any clear language shewing the existence of such intention, the rights conferred on a private company or corporation compulsorily to take the lands or property of an individual, may well be held to be commensurate and cor-relative with the obligation imposed to pay compensation. I say such will be the general rule applied but of course

if the statute is plain, clear and unambiguous nothing remains for the court but to give effect to it however unfortunate or unjust the Act of confiscation may be. If the language conferring powers of expropriation is, however, ambiguous and doubtful as to their extent and the compensation clauses are limited in their scope and definite in their extent the statute will have a construction put upon it which will avoid confiscation and the ambiguous language of the expropriation clause will be limited to cover such property and interests only as are provided for in the compensation clauses. And this is only another way of stating the proposition that the courts will not impute to the legislature an intention to confiscate private rights and interests.

If the statute is clear and authorizes the promoters to do any particular act or thing and it is done in a proper and reasonable manner even though it should work a special injury to a particular individual or his property, the only remedy he would have would be for compensation under the Act and if no compensation was provided he would be without a remedy.

As was said by Lord Macnaghten in delivering the judgment of the Privy Council in *East Freemantle Corporation* v. *Annois*(1), at page 217.

> The law has been settled for the last hundred years. If persons in the position of appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do and do it in a proper manner though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute.

It was upon that principle the judgment of the

(1) [1902] A.C. 213.

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court below proceeded in dismissing this action, namely, that the works built and executed by the town council were within and not beyond those expressly authorized by the statute and were properly and reasonably done, and that the statute not having provided compensation the plaintiff was without a remedy. I agree with them that the statute does not provide compensation for such a case as the plaintiff's. I differ from them as to the works not being beyond or in excess of the statutory authority, and on this ground would allow the appeal and grant a new trial for the assessment of damages. The case of *Geddis* v. *Proprietors of Bann Reservoir*(1), is very instructive upon the question, as is also the judgment of Farwell J. in the case of *Roberts* v. *Charing Cross E. & H. Railway Company*(2). In his judgment amongst other statements pertinent to the case before us he says:—

> There may be questions of construction which are affected to some extent by the consideration whether compensation is or is not given by the Act, but the same principle applies to all. If the Act of Parliament has authorized the particular thing to be done then you cannot sue a man or a company for doing what is a lawful act. In my opinion this principle applies whether the powers are given to public authorities acting for the public benefit or to railway companies or others acting for their own profit.

The statute here in question was one intituled "An Act to provide for supplying the Town of North Sydney with water." The first section conferred upon the town in general terms the power so to provide either by contract or by itself constructing the works and doing all things necessary to be done to carry out the object. The second section for the pur-

(1) 3 App. Cas. 430. (2) 87 L.T. 732.

pose of obtaining the necessary supply of water generally empowered the council

> to enter upon all lands in the County of Cape Breton and to enter upon the bed of any river, lake or stream in the county, and to build dams and reservoirs where necessary, and to cause the water to overflow the land bordering on such river, lake or stream, and to take from such river, lake or stream such quantities of water as may be required.

The fourth section enacted that

> *whenever it shall be necessary* for the securing the necessary supply of water * * * or for any purposes whatsoever under this Act *that the town should be invested with the title or possession of or in any lots or parcels of land situated anywhere*

it should be lawful for the council in case it could not agree with the owners for the lease or purchase of the lands to take the same compulsorily. The section then goes on to specify the procedure to be adopted in the compulsory purchase and the mode or method of assessing the damages and declares that

> *immediately upon the payment or tender of the sum awarded* * * * the town shall be and be deemed the rightful purchaser and owners in fee simple of such land with the appurtenances if the award be for the purchase thereof or otherwise the tenant thereof for such time as in such award set forth.

The section then goes on to provide for the payment into court of the money awarded in case the party to whom the compensation is payable cannot be found.

Now many difficulties, some of them perhaps insuperable, might be met in the attempt to apply such crude and ill drafted legislation to the purchase of many titles or interests.

The Nova Scotia Interpretation Act might, no

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doubt, help in some cases, because it says that the word "lands" shall, wherever used, include

> lands, tenements, hereditaments and all rights thereto and interests therein.

But putting a reasonable and fair construction upon these two sections I conclude that section two was intended generally to confer and did confer upon the town council the "authority and power" in addition to its municipal functions to enter upon lands, build reservoirs and dams upon them, dam up and back the water, overflow the lands bordering on rivers, lakes or streams, and to take from them such water as might be required. Such general power was no doubt given but the mode of its exercise, the procedure to be adopted in changing the power into a *right,* the limitations and obligations imposed upon the exercise of the right were, so far as they were set out and defined at all, set out in the fourth section from which I have quoted above.

Only such rights are given as could be gained by the exercise of the powers granted as prescribed by this fourth section. No other or greater are provided for. If under that section, in the exercise of the powers conferred, the town council amicably purchased the lands of an owner in fee it was authorized by the second section to do so and on the necessary documents being signed became the owner in fee itself. If the estate or interest so amicably purchased was other or less than the fee of course only the lesser estate passed. If the compulsory powers were resorted to under the section then the estate or interest of the person notified might be expropriated *but no more nor other estate than he possessed* no matter what it might be. And as the section does not provide

for the "injurious affection" by the town council of any lands, and it was not essential to the exercise of any of the powers conferred upon them that they should injuriously affect any other lands than those they took under their compulsory powers, the result follows that if they did so injuriously affect other lands, such for instance as those of the plaintiff by taking away or abstracting from her the natural flow of water which the trial judge and the appeal court held she had a right to flow over her land, they did so wrongfully and to the extent they did so are trespassers.

No one could successfully contend that either the amicable or compulsory purchase of certain property from third persons could in itself give the right contended for by the defendant here to destroy the right of the plaintiff which defendant did not purchase or treat for to the natural flow of water across and over her property.

Suppose the case I put during the argument. The bed of a lake is owned by ten or twelve several owners in ten or twelve several equal or nearly equal parts. Could it be seriously argued that the purchase, amicable or compulsory, of that particular owner's part of the bed of such lake nearest its outflow gave the town council the right to enter upon that portion and drain off all the water from the other parts of the lake and that without treating with the owners of such other parts and without compensation? Such a proposition need only be stated in order to refute it. No express power or right to divert the natural course or run of any stream is given by the Act.

I interpret the statute, reading it as a whole, to invest the town council with the power it did not other-

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wise possess of buying either amicably or compulsorily lands outside of the town, laying pipes, building dams and reservoirs on the lands bought, overflowing the banks of lakes and streams upon lands which they might buy, and taking from all these lakes and streams not only all such surplus or additional water which by their dams or works they might dam back and retain, but also all the water which the owners or persons from whom they bought might have of right taken or abstracted before any dams were built with the correlative obligation of compensation to each owner. I refuse to extend the right or power of the town council to take away or injuriously affect the valuable right of other parties without compensation. Such an extension would mean confiscation not expropriation, and would require much clearer language to justify it than is found in the statute.

I agree with the court below in its reasoning and conclusion that neither the fourth nor the fifth sections provides for compensation to the plaintiff in this case because neither her lands nor any right or interest in them have been taken by the respondent and the sections do not provide for damages caused by injuriously affecting lands. *Bush* v. *Trowbridge Waterworks Co.*, 1875, (1). I do not think the damage done a necessary incident of the powers conferred or that any authority under the statute existed to justify the injury caused the plaintiff. So far as the defendant has taken away the plaintiff's right to the natural flow of water over her lands it is a trespasser.

The case is one where damages will be a complete

(1) 10 Ch. App. 459.

satisfaction for the injury and wrong. These damages can be assessed by the court once for all with or without the assistance of a jury as the practice of the province provides, and I think therefore the appeal should be allowed and the case remitted to the court below for the assessment of such damages as the plaintiff has sustained.

IDINGTON J.—The plaintiff who is appellant here was a riparian proprietress in a stream known as "Smelt Brook" and entitled, as such, and also by virtue of a grant to her of an easement, to use the waters of the said stream for divers purposes.

The respondent's town council were by the Nova Scotia Statute (1896) 59 Vict. ch. 44, sec. 1, empowered to provide for the town a supply of water.

Increased powers were given by later legislation to extend this supply to other places.

Section two of the first mentioned Act was as follows:—

> For the purpose of obtaining the said supply of water the town council are hereby authorized and empowered *to enter upon all lands* within the limits of the Town of North Sydney, and upon all lands in the County of Cape Breton outside the limits of the Town of North Sydney, and to enter *upon the bed* of any river, lake, or stream, whatsoever in the County of Cape Breton, and to build dams, reservoirs or other works wherever necessary, and to cause the water to overflow the land bordering on such river, lake or stream, and to take from such river, lake, stream or springs, such quantity or quantities of water as may be required; and in the construction, building or repairing of any dams or reservoirs, and in the laying down, constructing, repairing or alteration of any main or service pipe or other structure under the provisions of this Act, the mayor, councillors or any or either of them, and their engineer, superintendent, servants or workmen, shall have full power, and they are hereby authorized, from time to time, as occasion may require, to *enter upon any lands or tenements*, inhabited or uninhabited, both within the said town or outside of the same, and may remain thereon as long as they may deem requisite for the proper execution of the

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work and make all such excavations on the premises as may be expedient, and take up and remove any floors, timbers, planks, walls, fences or erections whatsoever, doing no unnecessary damage to the same, and carefully replacing the same, as far as can be, on the requisite work being performed.

Section four of the same Act provides that:

> Whenever it shall be necessary for the securing the necessary supply of water, the laying down or placing of any reservoirs, tanks, fountains, pipes, leaders or tubes, or for any purposes whatsoever under this Act, that the town shall be invested with the title or possession of or in any lots or parcels of lands and premises, situated anywhere, either in the town or outside the corporation limits, it shall and may be lawful for the council in case they cannot agree with the proprietors of such lands respectively for the purchase or lease thereof as may be required, to give notice in writing to the party *whose lands are intended to be taken*, or to his agent, that the *said lands are required for the purposes of the town under this Act*, and shall request the party or his agent, whose land it is proposed to take or occupy, to appoint one arbitrator, and a judge of the Supreme Court, etc.

and following this at length provides details of an appropriate arbitration to fix an amount for compensation and gives the council the option of deciding to take such lands or not, and if accepting, that *then* the town

> shall be and be deemed the rightful purchaser and owner in fee simple of such lot or parcel of land with the appurtenances, if the said award be for the purchase thereof or otherwise the tenant thereof for such time as in such award set forth, etc.

The respondent pursuant to the powers thus conferred constructed the contemplated works, tapped the lake which fed the stream in question, and drew therefrom such quantities of water as to impair the supply plaintiff by virtue of the rights above mentioned was entitled to enjoy at about a mile below this lake.

The questions thus raised are, whether or not, respondent was entitled to do as it has done and if so

entitled must it compensate plaintiff? And if it must compensate can it so act as to invade appellant's rights, until it shall have made compensation, or at least taken such steps as to bind it to acquire and to compensate?

The learned trial judge found for plaintiff and awarded a mandamus requiring defendant to appoint an appraiser and proceed under section five of the said Act which provides that:

> In the event of any damage being done in the execution of the work the party sustaining such damage shall be entitled to receive such compensation as shall be mutually agreed upon, and in case no such agreement can be made, three appraisers, one to be appointed by the party sustaining such damage, one to be appointed by the town council, and the third to be appointed by the two appraisers already so appointed, shall view the premises and determine the damages, if any, without hearing evidence in the matter, the decision of said appraisers, or any two of them, to be final and binding on the parties, and the amount so assessed to be paid within three months thereafter. In case the party sustaining such damage shall not appoint an appraiser as aforesaid within thirty days from the service upon him of a notice in writing requesting him to appoint such appraiser, the judge of the county court for district number seven may appoint such appraiser.

He thought section four was not applicable.

The court *en banc* reversed this judgment and dismissed the action.

At first blush the suggestion that the claim of plaintiff may fall within section five is rather taking. But can what is now complained of be matter of "damage being done in *the execution of the "work?"*

The damages suffered do not arise from "the execution of the work" if we take that as the equivalent of the *construction* of the work and all incidental thereto.

The phrase is of ambiguous import. The subject matter provided for was clearly, to the mind of the

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draftsman, something entirely different from an implication of the acquisition of a title to lands or easements such as one would expect to be desirable and be provided for, to put an end to complaints such as now in question.

It is not, however, necessary here to determine more than that the appellant should not be confined to rights such as might rest upon that clause alone.

The respondent sets up the rather startling answer to appellant's claim that nothing was done to infringe upon her rights during the construction of the works, and that what has been done was the direct result of using, without negligence, the works after construction, and that the use was authorized by law, and hence no claim for damages. It is an extension of the principles upon which the well-known case of *Hammersmith and City Ry. Co.* v. *Brand*(1), rests, that seems to mean this; that if a municipality or company is authorized to carry on a business, not only is it protected against liability for damages arising from the necessary and unavoidable incidents of such a business, which, but for such necessity and unavoidability, so authorized, so legalized, would give rise to actions for damages; but also entitles such municipality or company to appropriate for the purpose of carrying on such business its neighbour's goods.

Such would seem to be the logical result of the maintenance of the respondent's position here.

Such results are not within any case or line of cases.

Nothing in this Act imposes upon the municipality here the duty or the necessity of taking from this Smelt Brook or Pottle's Lake anything.

(1) L.R. 4 H.L. 171.

If it does take therefrom that which would or may destroy another's property it must abide by the ordinary results of so doing unless it can shew express authority, for doing so without compensation, or that it has imposed by law upon it an imperative legal duty that presents no alternative possibility of discharging, unless by the taking or destroying.

The facts do not warrant any such conclusion as necessary. See *Canadian Pacific Railway Co.* v. *Parke*(1).

We are then driven to see if the statute has given the right of expropriation of the appellant's easement or riparian rights, or if the acts complained of are wholly unauthorized.

The answer to this inquiry must depend upon the meaning of the words "lands and premises" in section four of the Act.

The provisions of section two clearly contemplate the taking not only of lands but of waters.

They do not perhaps express clearly and definitely all that was intended to have been covered but they do beyond a possibility of doubt indicate the intention on the part of the legislature of authorizing the expropriation of the rivers and lakes needed by the municipality for the purpose in hand.

Where have they executed this intention if not in section four?

Is it conceivable that it was intended to compensate for lands but not to do so for water?

Is it possible that anybody could have intended whilst giving a method of paying for and taking land as such that it was intended to confiscate any and all rights in water and the valuable uses it might have been serving?

(1) [1899] A.C. 535.

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The answers to these questions must be in the negative, and the interpretation of the word "lands" given in the Revised Statutes of Nova Scotia then in force is as follows:—

"The expressions 'land,' 'lands,' 'real estate,' or 'real property,' include respectively lands, tenements, hereditaments and all rights thereto, and interest therein."

Are the words "interest therein" in this definition read into the word "lands" in the second and fourth sections by virtue of this statutory interpretation, as we must read them, sufficient to cover the appellant's rights?

Such words do not appear in "the Lands Clauses Consolidation Act, 1845," or "the Waterworks Clauses Consolidation Act, 1847," upon which the greater part of the numerous cases cited to us are founded.

The interpretation of the word "lands" in one of these statutes reads it so as to include "messuages, lands, tenements and hereditaments of any tenure," and in the other the same with the word "heritages" inserted before word "tenure." Questions as to easement have been dealt with under the provisions in these statutes for the "injuriously affecting," and thus obvious difficulty avoided. Hence the cases under those acts are for our present purpose almost wholly useless.

The case of *The Great Western Railway Co.* v. *Swindon & Cheltenham Railway Co.*, 1884,(1) is suggestive, if not instructive, in regard to this phase of the easement being a thing capable of expropriation within such legislation.

The case of *Clark* v. *The School Board for London* (2), which turned upon 33 & 34 Vict. ch. 75, sec. 19,

(1) 9 App. Cas. 787.

(2) 9 Ch. App. 120.

where the words used were "and any right over land," resembles somewhat in the question raised what we have here.

The "Lands Clauses Consolidation Act" having been incorporated with this special act "The Elementary Education Act" so complicates the legal questions raised as to prevent us from having the benefit of a decision upon the exact point. The opinion of the eminent judges who dealt with the meaning to be attached to the words "any right over land" are, however, instructive. They suggest that such words might comprehend any easement. If so the words "and all rights thereto and interest therein" may also be well understood as covering such rights and easements as the appellant's case rests upon.

They are inapt words, if we are to view the real estate interests in question here from a legal scientific point of view. They are, however, in ordinary language, very comprehensive. And when we have regard to the many peculiarities of the wording of the Act we are considering, we must make due allowances and try to extract from it a meaning that will give effect to the purpose so clearly in hand without being too fastidious in the way of attaching to each word or phrase used its exact legal value, as if the document had been penned by a lawyer having regard to such things.

We find in every sentence of these clauses stumbling blocks unless we take the course that seems thus required of us to interpret this act. We may thus, without violating any canon of construction, best subserve the interests of justice and the true interests of all parties, by holding section four as applicable.

It would seem, therefore, that we can thus find the

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easement and riparian rights of the appellant as covered by the words "lands and premises" and as a consequence the subject of expropriation.

What then must we find the rights of these parties to be herein? The respondent had the right to expropriate this easement and these riparian rights, but did not proceed to do so. It gave no notice such as the Act contemplates it should do.

It had the right to retreat, if it had done so and found the burthen after arbitration greater than anticipated and practicable for it to bear.

These considerations seem to put the case entirely out of the class of cases where possession may be taken, the right be fully asserted, once and for ever, and the question of damages be remitted to a tribunal to fix compensation later on, upon the basis that all that had been done was lawfully and rightfully done.

The case seems rather to fall within the case of *Saunby* v. *The Water Commissioners of London*(1), where it was held the proceedings to arbitrate must precede the taking possession.

The result is that the appellant is entitled, as in that case, to an injunction restraining the respondent from further infringing upon the rights of the appellant in the premises until, as was provided there, such steps have been taken as will ensure a proper settlement between the parties pursuant to the provisions of the Act for fixing first the rights to be exercised and then the compensation to be paid therefor, and the assurance be given that respondent will abide by these findings.

All we need to determine is that injunction go

(1) [1906] A.C. 110.

and be continued until the court below has found these matters fully and finally determined or so adjusted to the satisfaction of the court below as may be done with least possible inconvenience to any one concerned.

The appeal will therefore be allowed with costs in all the courts below and here.

MACLENNAN J.—The plaintiff is the owner of a parcel of land through which a watercourse, the natural outlet of a lake of considerable area, flows. The defendant obtained, by provincial statute, 59 Vict. ch. 44, sec. 2, authority to take from the lake and stream such quantity or quantities of water as might be required by them for domestic, fire or other purposes. This the defendant has done, and has thereby diverted from the watercourse a very large proportion of the water which would otherwise flow over the plaintiff's land.

By another statute, 3 Edw. VII. ch. 87, the defendant has obtained authority to take a further large quantity of water from the same lake and stream to supply the Town of Sydney Mines, and the Nova Scotia Steel and Coal Company.

In this action the trial judge found that the plaintiff had suffered injury by the diversion of water from the stream and gave judgment for a mandamus to the defendant to appoint appraisers of the plaintiff's damages under the provisions of section five of the original Act.

That judgment was reversed on appeal, and the action was dismissed, and from that reversal the plaintiff appeals to this court.

It is impossible not to be very strongly impressed

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by the judgment of Meagher J. and the reasoning by which he has supported it. But, after very careful consideration, I am of opinion that it ought not to be allowed to stand and that the plaintiff's appeal should be allowed.

I think the plaintiff has a remedy under either section four or five, but preferably under section four.

The nature of the plaintiff's right as a riparian proprietor in the flow of the water of this watercourse over her land is stated in Coulson & Forbes on Waters (2 ed.), p. 112, as follows:—

The right * * * is not what is called an easement, because it is inseparably connected with and inherent in the property in the land; it is parcel of the inheritance and passes with it.

That statement is abundantly borne out by numerous authorities.

I will take an extreme case. Suppose that a private person wished to take the whole outflow of the water of the lake, to divert it altogether, so that the old course over the plaintiff's, and other lands, should become dry. How could he obtain the right to do so? Plainly he must obtain a grant from all the proprietors down the stream. He must get a parcel of his inheritance from each of these proprietors, obtaining from each a freehold, or less right, according to the nature and extent of his title.

Now the defendant could not do anything of that kind, that is the diversion of streams, for want of corporate power, and so it obtained that from the legislature. But it also obtained power to do it compulsorily. It is authorized to take such quantity or quantities of water as may be required from

any river, lake or stream. It can take all if required. Another power which has been given to it is that of laying down pipes upon any lands, doing no unnecessary damage, evidently without being obliged to buy or take the lands itself or more than the right to lay the pipes therein.

Now, having regard to these two powers, let us consider section four of the Act. It is as follows:—

> Whenever it shall be necessary for the securing the necessary supply of water, the laying down or placing of any * * * pipes, * * * or tubes, or for any purposes whatsoever under this Act, that the town shall be invested with the title or possession of or in any lots or parcels of land and premises, situated anywhere, either in the town or outside the corporation limits, it shall be lawful for the council in case they cannot agree with the proprietors of such lands respectively for the purchase or lease thereof, as may be required,

then follows provision for arbitration to ascertain the damages, upon payment or tender of which the defendant is to be deemed the rightful purchaser in fee simple or lessee, as the case may be, of such lot or parcel of land with the appurtenances.

This section is not very happily or clearly expressed, but, having regard to the subject of it, I think it means to say that whenever, for the purpose of securing a supply of water, or laying down pipes, it is necessary to obtain title to or possession of land, then there must be either agreement or arbitration with the owner.

It is evident that in order to obtain the water of this stream to the extent to which they have taken it it was necessary that the defendant should have obtained a *title* from the plaintiff, that is a title to the interest in her land which they required, namely, to stop either wholly or in part the flow of water over

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it. So, likewise, in order to lay down pipes in any land it is not necessary to take the land itself, or the whole title, but only a part of the freehold, that is just the actual space which the pipes necessarily occupy, with a right of entry for repairs. Section four provides for both these cases, the taking of water and the laying down of pipes, and I think it is plain that the *title* of *lots* or *parcels* of land mentioned in the section must include and mean the title of any limited interest in lots or parcels as well as the absolute interest.

The defendant having taken, as I think, an interest in the plaintiff's land without taking the steps prescribed by section four ought, I think, to be restrained by injunction from continuing the wrong and there should be a reference as to damages, if desired. The defendant should have a reasonable time to take the steps prescribed by the statute, until which the issue of the injunction should be suspended.

Appeal allowed with costs.

Solicitor for the appellant: *Charles J. Burchell.*

Solicitor for the respondent: *John N. Armstrong.*