1914

*Feb. 19.
*May 18.

C. W. BURT (PLAINTIFF) ..... APPELLANT;

AND

THE CITY OF SYDNEY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Right of action—Protection of railway crossings—Construction of subway—Order-in-council—Apportionment of cost—Land damages—Injurious affection—"Nova Scotia Railway Act," R.S.N.S. (1900), *ss.* 178 *and* 179.

In the City of Sydney the Dominion Iron and Steel Co. and the Dominion Coal Co. owned railways passing along a public highway and intersected by the tracks of the Cape Breton Electric Railway Co. Under the provisions of secs. 178 and 179 of the "Railway Act" (R.S.N.S. (1900), ch. 99) an order-in-council was passed directing that the highway be carried under the said railway tracks, the Dominion Iron & Steel Co. to execute the work and the cost to be paid in a specific proportion by the City and the three companies and "that all the land damages be paid by the City of Sydney," B. owned land opposite the railway tracks and by the construction of the subway the sidewalk in front thereof was narrowed and altered and access to it changed. Claiming that his property was greatly depreciated in value thereby he brought an action against the City of Sydney for compensation therefor.

Held, that the "land damages" which the city was to pay would include damages for injurious affection such as B. claimed. But

Held, Fitzpatrick C.J. and Idington J. dissenting, that the city was not liable for such damages, B.'s only recourse being against the company which executed the work.

Judgment of the Supreme Court of Nova Scotia (47 N.S. Rep. 480) affirmed, Fitzpatrick C.J. and Idington J. dissenting.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favour of the defendant.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

(1) 47 N.S. Rep. 480.

The facts of the case are sufficiently stated in the above head-note. The only question on the appeal was whether or not the plaintiff had a right of action against the City of Sydney for injurious affection to his property by construction of a subway on a public highway in that city. The trial judge and the Supreme Court of Nova Scotia held that he had none.

Mellish K.C. for the appellant.
Findlay Macdonald for the respondent.

THE CHIEF JUSTICE (dissenting).—I would allow this appeal with costs.

IDINGTON J. (dissenting).—The appellant owns property in Sydney fronting on Victoria Street where a subway has been built which reduces the width of the street and leaves, for the length of the subway, a street of about half the width previously existing and in a manner changes the access to the appellant's property.

He claims that his property has been injuriously affected thereby and that respondent, whose council promoted the creation of this subway by an application to the Governor in Council to direct such work for the public safety as means of crossing two railways, is answerable to him for the damage thus done to his property.

The work was directed by the Governor in Council after hearing respondent and the representatives of the railway companies concerned and the work executed by the Dominion Iron and Steel Co., Limited, according to a plan annexed to the order-in-council.

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The terms of the order-in-council, material for our present consideration, are as follows:—

4. That the Dominion Iron and Steel Company, Limited, shall undertake the construction of the subway at the offer made by the Dominion Iron and Steel Company, Limited, viz., $35,000, and that the City of Sydney shall contribute $5,000; the Cape Breton Electric Company, Limited, and the Dominion Coal Company, Limited, each to contribute one-third of the remainder not to exceed the sum of $10,000, balance of cost of construction to be paid by the Dominion Iron and Steel Company, Limited.

5. That all the land damages be paid by the City of Sydney.

6. That detailed plans and specifications be submitted by the Dominion Iron and Steel Company, Limited, for approval by the Government.

The courts below have held that inasmuch as there was no land taken from the appellant, he has no remedy for anything in the way of his land being injuriously affected.

The order-in-council was founded upon sections 178 and 179 of the "Nova Scotia Railway Act" which are identical in terms with sections 187 and 188 of the "Railway Act of Canada," as consolidated in 1888, save in substituting the Governor in Council for the Railway Committee.

It seems to me that the first question raised is whether or not an action can be founded upon such an order. It is quite correctly stated in the judgment appealed from that the order-in-council cannot enlarge the claim for land damages which must rest upon the statute. But it has been decided in numerous cases that an action may be founded upon orders made under said sections 187 and 188 of the "Railway Act of Canada." The first was the case of the *City of Toronto* v. *The Grand Trunk Railway Co.* (1).

(1) 37 Can. S.C.R. 232.

The action upon the order in that case gave rise to much judicial difference of opinion.

Some able judges in the Court of Appeal seem to have hesitated to hold that in a case where the municipality had not applied to the Railway Committee it could be made liable to such an action.

It so happened in that case that municipal authorities had represented that the condition of things needed something to be done for public safety. This enabled some judges to hold the city liable; though doubting much the liability if that element were out of the case.

That case was followed by the special case of *In re Canadian Pacific Railway Co. and County and Township of York*(1), which had to be decided in part at least on the bare question of the right to bring an action upon such an order though the party to be held liable thereunder had taken no part in the proceedings before the Railway Committee.

The court held on the facts one of the municipalities could not be held a person interested, but the other was and that the action would lie.

Then the question came again before the Ontario courts in the case of *City of Toronto* v. *Canadian Pacific Railway Co.*, wherein it was sought to recover from the city the proportionate share of the cost of certain protective measures ordered by the Railway Committee of the Privy Council of Canada.

The learned trial judge in that case followed the foregoing decisions and his judgment was maintained by the Court of Appeal for Ontario.

Thereupon the city appealed to the Judicial Com-

(1) 25 Ont. App. R. 65.

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mittee of the Privy Council. The result is reported in *City of Toronto* v. *Canadian Pacific Railway Co.*(1), from which it appears that by that time former doubts as to the range and efficacy of such an order had disappeared and the only doubt raised was as to the constitutional power to make an order as against a municipality created by a provincial legislature and supposed until the earliest of these cases to be endowed only with such powers as its creator had given it and hence could not be used for any ulterior purpose as a means of taxing those within its limits.

The Judicial Committee overruled the objection and held the order valid and binding upon the city.

I am unable to distinguish in principle the ground proceeded upon in those cases from that invoked herein which is merely another application of the same principle to a slightly different state of facts.

In the last analysis it is simply a question of the jurisdiction of the Governor in Council within the sections relied upon to execute the purposes of the "Railway Act" by such an order as made.

The section neither expressly nor impliedly directs how the purpose is to be executed. Its object is plain. It may be said that there is an implication that the statutory method of expropriation alone can bound the operation of such an order. The language of Lord Macnaghten in *Corporation of Parkdale* v. *West*(2), to which I will presently advert, lends colour to such a proposition. But that was before the decisions I have referred to and legal history outlined therein.

It would, however, I submit, seem quite competent for the Governor in Council either to direct that the

(1) [1908] A.C. 54. (2) 12 App. Cas. 602.

procedure towards making the crossing should be according to the method laid down in the "Railway Act" whereby the arbitration proceedings provided thereby might be invoked and that all usually done before a railway is built, such as filing a plan or scheme, and that satisfaction be made the owner of land taken for damages, or security given therefor, before any proceedings taken; or that the work be done according to plans specified by the order and be paid for as specified and the land damages be determined as the law in such case may have provided and be also paid by any such party as the order should direct. If that party happened to be a municipality it might well be left in the case of a work to be done on or to improve its own streets to its exercising its power of negotiating with those concerned or resorting to its powers of expropriation or taking its chances of an action and directing accordingly.

Now of the four parties concerned in the execution of this work one only was selected to execute it according to the plan proposed and evidently as a contractor doing the work for a fixed price and each of the other three parties who were concerned was to contribute as directed to the cost the sums respectively allotted as its share of the burden.

Respondent in this respect was to pay some of the cost of execution and meet the land damages.

It certainly cannot be said that each of the railway companies was to be expected to file a plan and give notice thereof and have a separate set of arbitration proceedings to determine the amounts to be paid for land damages. And it cannot be said that one merely undertaking on behalf of itself and others the contract

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to execute the work was expected to assume the responsibility for a series of arbitrations with which it was to have no concern.

It was clearly intended that respondent should attend to, and I think the fair inference is that it did attend to, the business of meeting such claims as involved in securing the right of way, but in course of doing so failed to recognize such claim as appellant might have. It widened the street allowance first and thus ameliorated the condition of things sure to result from executing the work. Whether or not that amelioration was sufficient to meet reasonably the rights of appellant in street accommodation is very questionable.

The street is vested in the respondent which took steps to have it so widened. Evidently respondent thus aided in promoting the furtherance of the enterprise and took part in the wrong, if any, now complained of, by co-operating with those executing the work by lowering or altering the grade of its street. It admits as much though not admitting a prior determination to do so.

Having not only submitted to, but, actively as its minutes shew, promoted the making of the order and agreed to be governed by it, and actively acted upon the order in question and taken no steps to bring about the usual mode of acquiring lands and satisfying the claims of those damnified which it was by the terms of the order to have satisfied, can it in law say it is entitled to go free?

I have looked at a great many cases of actions founded upon the rights given by virtue of statutes and from the case of *Beckford* v. *Hood*(1), where it

(1) 7 T.R. 620.

was held that by virtue of the "Copyright Act" a man had acquired a right of property in his literary productions for infringement of which he had a right of action, down to the present time there have been a great many successful and unsuccessful attempts made to found actions upon some breach of duty created by a statute having been neglected or the statute intended to protect some one having been wilfully violated. As a result of these decisions I think it seems to be now the settled rule to look at the statute and determine in the language of Lord Cairns in the case of *Atkinson* v. *Newcastle and Gateshead Waterworks Co.*(1), at p. 448, whether or not an action can be said to fall within the purview thereof. He said there, when asked to follow the law as laid down in the case of *Couch* v. *Steel*(2), after doubting the rule therein:—

> I cannot but think that that must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the Act with which the court have to deal is not an Act of public and general policy, but is rather in the nature of a private legislative bargain with the body of undertakers as to the manner in which they will keep up certain public works.

I ask now does it lie within the purview of this statute that an action is intended to be brought or may be brought founded upon the right created thereby?

As to the intention, I grant that for a new road and new enterprises crossing each other there is room to urge that the statutory method of expropriation is to be followed.

But as to the case of improved methods of crossing old roads where no new land is to be expropriated and

(1) 2 Ex. D. 441. (2) 3 E. & B. 402.

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where the proceedings indicated by the statute seem quite inappropriate and next to impossible, if not as I incline to think often absolutely impossible, to make them applicable and workable, is there no remedy by action founded upon the statute and the duties and rights founded upon and flowing therefrom ?

It is this latter phase of what may arise any day on similar statutes that renders this an important case. The sections authorizing the order are evidently intended to apply to two entirely different conditions of things. And so far from the powers given being in any sense limited or bounded by the procedural methods of expropriation, the cases I have cited shew how much further the courts have gone than might be implied from the judgment in *Corporation of Parkdale* v. *West*(1), where, on the facts, the municipality's power to expropriate was impossible of application.

I have come to the conclusion that despite the neglect to adopt the methods provided by the statute, and impossibility of observing same, a case has arisen in which the right of action may be founded upon the statute and what has been ordered and done thereunder, for which respondent must answer.

I also think it may be well rested upon the active co-operation of the respondent with the railway companies in doing that which was wholly illegal; especially if the only methods by which such a work can be executed lawfully are for a railway company to file a plan, etc., as provided for in the case of a new work or extension of an old one to which such methods will apply.

(1) 12 App. Cas. 602.

The latter is not exactly my view, but rather the former. All I mean to say is that if these methods must be observed, then the respondent has wrongfully contributed, by the use made and permission given to use the street owned and controlled by it, to the detriment of the plaintiff in respect of his property.

In such case it would fall within *Corporation of Parkdale* v. *West*(1).

I should prefer to rest upon the ground that the section comprising both that to which the mode of expropriation given by the Act and that to which such methods cannot be applied, the duty created by statute and order thereunder, as between the parties hereto was violated or neglected by respondent and must be answered by it in way of damages.

The charter of respondent by section 248 vests the legal title of the street in it, by section 249 requires it to keep the streets in repair and by section 265 empowers it to see that anything needed for their protection be observed and measures of prevention of any injury thereto may be taken and especially that it be not encumbered in any way by structures of any kind or otherwise. Armed with these powers it neglected each and all of them. It had, moreover, very ample power to close up permanently "in whole or in part any road or street, or portion of a road or street within the town limits" and had comprehensive powers of expropriation and compensation.

Of course, all this and the bearing thereof herein is predicated upon the hypothesis that there is a claim for damages for injuriously affecting appellant's property.

(1) 12 App. Cas. 602.

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The language of Lord Macnaghten in *Corporation of Parkdale* v. *West*(1), is, though in an action against the municipality, clearly intended to demonstrate that there was in fact a case of a claim under the "Railway Act of Canada" as it appeared in the statute which existed before the consolidation of 1888.

Now under that act as it then stood it was much more difficult to found any claim for the injuriously affecting land than under the later Act from which the "Railway Act of Nova Scotia" seems to have been almost entirely taken.

The judgment of Lord Macnaghten, therefore, seems to put beyond doubt that in such a case as this the man whose lands are to be injuriously affected by executing a work which it is duly competent for the Governor in Council to direct, is not confined to the terms of the single section by virtue of which the Governor in Council acts, but that the whole Act must be looked at and read in a way that will execute its probable purpose.

In the "Nova Scotia Railway Act" there are sections 88 and 138 respectively identical with sections 92 and 144 in the "Canada Railway Act of 1888," which I repeat were more effectively framed to protect the owner of land injuriously affected than is to be found in the earlier acts which were before the court in *Corporation of Parkdale* v. *West*(1).

In that case the railway companies concerned and the municipality had all agreed and signed a memorandum of agreement which provided for the municipality undertaking the work. It alone was sued and unsuccessfully sought to justify under the order of the Railway Committee.

(1) 12 App. Cas. 602.

In many leading features that case and this are alike, but as respondent here did not, as defendant there, actually execute the work, that case does not by any means entirely cover this, but as to the measure of damages it seems in point so far as the judgment needed to go. There are many features in the facts of that case which render it of very doubtful help herein. For the work in question there was not wholly within Parkdale, but stretched into another municipality over which it had no control. There had been local legislation enabling the two municipalities to deal with the matter, but that was ignored in what was done. Yet as to the question of the measure of damages it seems a safe guide.

I have no doubt on the facts there the damages were very much more obvious than here and presented a case much more adaptable to fit the procedural features of the "Railway Act" relative to expropriation to the facts than can be done by what is presented in this case.

All that I have set forth above as within the powers of respondent if it had chosen to exercise them were, upon its peculiar facts automatically, as it were, eliminated from consideration in that case.

The law of Ontario also rendered it impossible for a municipality to destroy the property of landowners fronting upon a street without making compensation.

The charter of respondent gave it more invasive power in this regard than existed in the Village of Parkdale under the "Municipal Act of Ontario," and so far as lowering the grade of the street may be involved the damages recoverable may have to be in that regard measured by a less stringent rule than might have been applicable to Parkdale.

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This, however, is a minor point, not going to the gist of the action.

What I am concerned with is to demonstrate if I can that the Governor in Council acted within the power given and that it became the duty of each party falling within the scope of the order made, to do that which in law it could properly and lawfully do to carry out the order made and that if the respondent had exercised its numerous powers, it could have protected the street until those entitled to compensation had been satisfied or secured and that those entitled by virtue of their property being likely to be injuriously affected were of that class, and that unless and until either by the exercise of its own powers or the exercise by some one of the other parties concerned of a power lying within the power given it, the order of the Governor in Council remained inoperative save in so far as the implied duty thereunder cast upon the respondent to satisfy the claims for "land damages."

It overlooked this and thereby in effect disobeyed the order by which the Governor in Council had directed in that regard as above quoted.

Hence in my view this action must rest upon the statute and the possible duties that the directing power thereunder may impose.

I may repeat that in the alternative there seems a clear case of the respondent having not only neglected to preserve the street, but also joined in an attempt to destroy it unless protected by the authority of the order of the Governor in Council.

The respondent is clearly liable either for its failure to observe the terms of the order-in-council or for this violation of the terms of its charter imposing the duty to maintain the street.

It is to be observed that the authority of the Governor in Council is by the amendment of 1898, now forming section 8 of the "Railway Act of Nova Scotia," sub-secs. (*h*) and (*i*), more direct and specific than that given the Railway Committee in the "Railway Act of Canada."

The sub-section (*h*) empowers the Governor in Council to direct relative to the construction of railways upon, along or across highways, and sub-section (*i*) empowers as to the compensation to be made to any person or company in respect of any work or measure directed to be made or taken, or the cost thereof, or the proportion of such cost to be borne by any person or company.

In the "Interpretation Act" applicable to this in the Revised Statutes of Nova Scotia, of which the "Railway Act" is one, a person is so defined as to include any body corporate, which the respondent is.

The order-in-council is not perhaps as clearly expressed as it might have been, but it certainly implies that the duty of compensation relative to land damages was imposed upon respondent.

Then section 14 provides that any decision or order made by the Governor in Council under said "Railway Act" may be made an order of the Supreme Court and be enforced in like manner as any rule or order of such court.

All these provisions coupled with the line of cases I have cited upon the right to bring an action to enforce an order of the Railway Committee under the "Railway Act of Canada" decided since the decision in *Corporation of Parkdale* v. *West*(1), somewhat differ-

(1) 12 App. Cas. 602.

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entiate the point of view to be taken here from that held in that case as to what may be the scope of authority implied in an order-in-council under the "Nova Scotia Railway Act."

It was suggested in argument by appellant's counsel that at least a declaration might be made by us which is not necessary or desired if the appeal can be maintained.

If we cannot maintain the appeal, I think we have no right to make any declaration, as this is not a suit for any such purpose even if such a suit is maintainable in a Nova Scotia court.

And, again, it has been suggested that the company constructing the subway are the wrongdoers and should have been parties defendant.

That company was a mere contractor to do the work and get certain compensation and there is no right by or through it to reach the respondent.

If that company and all the other companies concerned had been made parties along with the respondent, they might have answered that it was the duty of respondent alone to bear the burden of compensation for land damages.

If the respondent is liable at all, it can be held liable herein without such circumlocution which could lead nowhere.

In conclusion I may remark that the damages may be insignificant if heed is given to the powers of the city to close part of the street. The measure of damages should be reached by due consideration being given to the possibilities of what might have happened had the city exercised all its powers and the consequent damages in way of compensation in such case.

I think the appeal must be allowed with costs.

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DUFF J.—The controversy in this appeal turns upon the construction of certain sections of the "Nova Scotia Railway Act," sections 178 and 179, chapter 99, R.S. of N.S., and of a certain order-in-council made under the authority of these sections. A brief statement of the material facts will be necessary to shew the exact nature of the points in question.

The appellant is the owner of certain lands in the territorial limits in the City of Sydney, the respondent municipality. Railways of the Dominion Coal Company and the Dominion Iron & Steel Company cross a street within the municipality, known as the Victoria Road. The Cape Breton Electric Co. has a tramway in this road which, following its surface, formerly crossed these railway tracks by a level crossing. The crossing being dangerous, the Governor in Council on April 29th, 1911, made an order in the following terms:—

The Commissioner of Public Works and Mines in a report dated the 18th day of April, 1911, states that the Dominion Coal Company, Limited, and the Dominion Iron and Steel Company, Limited, have constructed and in operation certain railways in the County of Cape Breton to which chapter 99, Revised Statutes of Nova Scotia, 1900, is applicable.

That such railways so in operation pass over and across a highway within the limits of the City of Sydney in the County of Cape Breton, at a point known as the McQuarrie's Crossing;

That it has been represented to the Governor in Council that it is necessary and expedient for the public safety that such highway be protected;

That careful inquiry has been made in respect thereto, and in respect to the best means of affording such protection and as to the apportionment of the costs thereof, and all parties interested have been heard in respect thereto;

That it is necessary and expedient for the public safety and for removing and diminishing the danger arising from the position of the said railways and crossing that the said highway be carried under the said railways.

The Commissioner recommends that the necessary subway be ordered constructed in general accordance with the plans and

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specification submitted by the Dominion Iron & Steel Company, Limited, and referred to on the report of F. W. W. Doane, civil engineer, dated 14th September, 1910, and annexed to the Commissioner's report, but, however, with the following modifications and subject to such approval of the Governor in Council as to the further details thereon.

1. Modification of the sidewalk subway arch under the Dominion Coal Company railway to a span with girders, and reinforced concrete roof.

2. Leaving the south approach, including sidewalk grade, to the approval of the city engineer of the City of Sydney.

The Commissioner further recommends that, except as modified above, the report of the said F. W. W. Doane be adopted, and that the recommendation contained therein be carried into effect.

The Commissioner further recommends:—

1. That permanent pavement be not required to be laid in the said subway.

2. It shall be the duty of the Dominion Iron & Steel Co., Limited, and the Dominion Coal Company, Limited, to keep the street reasonably open for traffic during the construction of said subway.

3. That the expenses of a watchman from the first day of January, 1911, be paid by the parties interested, *i.e.*, the Dominion Coal Company, Limited, the Dominion Iron & Steel Company, Limited, the City of Sydney and the Cape Breton Electric Company, Limited, in equal shares until the traffic across the rails be diverted into the subway.

4. That the Dominion Iron & Steel Company, Limited, shall undertake the construction of the subway at the offer made by the Dominion Iron & Steel Company, Limited, viz.; $35,000, and that the City of Sydney shall contribute $5,000; the Cape Breton Electric Company, Limited, and the Dominion Coal Company, Limited, each to contribute one-third of the remainder, not to exceed the sum of $10,000, balance of cost of construction to be paid by the Dominion Iron and Steel Company, Limited.

5. That all the land damages be paid by the City of Sydney.

6. That detailed plans and specifications be submitted by the Dominion Iron & Steel Company, Limited, for approval by the Government.

7. That the stairway be roofed over and all parties interested pay an equal portion of the cost.

Pursuant to the order, the projected subway was constructed on Victoria Road underneath the railway tracks. The appellant's premises are situate on Victoria Road and the subway passes in front of them.

The result of the works was that the roadway of Victoria Road was lowered throughout the width of the subway and the sidewalk opposite the appellant's premises was altered and narrowed. The appellant in his action advances a claim for compensation in respect of the injurious affection of his premises by the construction of these works. In his statement of claim he based his claim to relief upon an allegation that "the parties interested in the order-in-council had constructed the subway in question in the years 1911 and 1912 and that in doing so they altered and lowered the grade of the street, changed the width of the street and the sidewalk opposite his property, thereby impeding access to that property from the street and bringing about a diminution in value and furthermore, that under the provisions of the order-in-council the respondent municipality was under an obligation to pay to the appellant compensation for his loss." In the alternative, the appellant charged that the respondent municipality had wrongfully altered the grade of the street, prejudicially affecting his property in respect of the access thereto from Victoria Road and diminishing the value of it. The answer of the respondent municipality was twofold. In substance it was alleged that the works in question were constructed (under authority of the order-in-council passed pursuant to certain provisions of the "Nova Scotia Railway Act") by the Dominion Iron & Steel Company, Limited, and that the municipality was not in any way responsible to the appellant for the acts of that corporation; that the clause of the order-in-council directing the City of Sydney to pay "land damages" did not give the appellant any direct recourse against the municipality and that the statement of claim disclosed no cause of action.

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The parties agreed that the question of the liability of the respondent municipality to plaintiff should first be determined on the pleadings and on certain admissions which are as follows:—

It is admitted in pursuance of the said order-in-council the Dominion Iron and Steel Company proceeded to make such subway in the years 1911 and 1912, before this action was brought.

It is admitted that said subway was built as shewn on plan M/a and had the effect on the street as shewn on the said plan.

It is admitted that the sidewalk in front of the plaintiff's property was altered and narrowed.

It is admitted that the access to the plaintiff's property has been changed by the building of the said subway.

It is agreed that the question of legal liability of the city on the admissions made at the trial and appearing on the pleadings be first decided, and in the event of the city being held liable that the damages be assessed at a later date.

The action came on for trial before Mr. Justice Ritchie, who held that the provision of the order-in-council respecting "land damages" was *ultra vires* and that the other grounds of liability put forward by the appellant were met by the fact that the subway was constructed by the Steel Company pursuant to the order-in-council under authority of statute.

In the full court the appellant's appeal was dismissed in part as appears in the judgment of Mr. Justice Meagher on the same ground as that taken by Mr. Justice Ritchie as well as on the further ground that the provision in the order-in-council assessing the "land damages" against the city must be read as only a provision apportioning the cost of the works amongst the parties interested and not as giving any right against the city to third parties.

I have come to the conclusion there is no answer to the last mentioned point taken in the judgment of Mr. Justice Meagher. Sections 178 and 179 of the "Nova Scotia Railway Act" are as follows:—

Sec. 178. Whenever any portion of a railway is constructed or authorized or proposed to be constructed, upon or along or across any street or other public highway at rail level or otherwise, the company, before constructing or using the same, or in the case of railways already constructed, within such time as the Governor in Council directs, shall submit a plan and profile of such portion of railway for the approval of the Governor in Council; and the Governor in Council, if it appears to it expedient or necessary for the public safety, may, from time to time authorize or require the company to which such railway belongs, within such time as the Governor in Council directs, to protect such street or highway by a watchman or by a watchman and gates or other protection — or to carry such street or highway, either over or under the said railway by means of a bridge or arch, instead of crossing the same at rail level, — or to divert such street or highway, either temporarily or permanently — or to execute such other works and take such other measures as under the circumstances of the case appear to the Governor in Council best adapted for removing or diminishing the danger arising from the then position of the railway, and all the provisions of law at any such time applicable to the taking of land by such company, and to its valuation and conveyance to the company, and to the compensation therefor, shall apply to the case of any land required for the proper carrying out of the requirements of the Governor in Council under this section.

Sec. 179. The Governor in Council may make such orders and give such directions respecting such works and the executing thereof, and the apportionment of the cost thereof and of any such measures of protection between the said company and any person interested therein, as appear to the Governor in Council just and reasonable.

I am unable to agree with the view (assuming the works in question to have affected the appellant's access to his property from Victoria Road in such a way as to entitle him to claim a compensation from the railway company constructing the works, for injurious affection of his property under sec. 138 *et seq.*) that such compensation may not properly be the subject of apportionment as part of the cost of the works authorized under sec. 179, and I think the phrase "land damages" is wide enough to embrace, and was intended to embrace, compensation of the nature of that claimed by the appellant in this action. On the other hand (assuming the works were lawfully

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constructed under secs. 178 and 179) the plaintiff on well settled principles would have to look to some statutory provision or some contract for his right of compensation for injuries suffered by him in consequence of an undertaking carried into effect under the sanction of statute. I agree with the full court in thinking that section 179 does not invest the Governor in Council with authority to do more than apportion among the parties interested the cost of the undertaking and that such authority does not extend to the giving a right of action to persons entitled to compensation against anybody who is not exercising the powers conferred by the "Railway Act."

In this particular instance it was the Dominion Iron & Steel Company which was exercising its powers as a railway company under authority of section 178 and by the last paragraph of that section that company in exercising those powers was subject to all the provisions of the law relating to taking of land by a railway company. On it rested the obligation created by the "Railway Act" to compensate persons whose lands should be injured by the construction of the works. I think section 179 does not authorize the Governor in Council to extend this obligation to others and I think the order-in-council does not profess to do so. Assuming then the works to have been lawfully constructed, the position would be this: The appellant's right to recover compensation, if any, is against the steel company, and it is to have compensation determined in the manner provided for by the Act. But there is no right under the Act against the municipality.

The truth appears to be, however, that if the claim now put forward by the appellant is a well-

grounded claim the work never was lawfully constructed. The provisions of the "Railway Act of 1879" which were in question in *Corporation of Parkdale* v. *West*(1), were almost identical with the provisions of the "Nova Scotia Railway Act" relating to the construction of works which trespass upon or injuriously affect the lands of private persons, and it was there held by the Privy Council that before constructing a work having such effect, it was the duty of the railway company to take the necessary proceedings to ascertain and to pay the compensation provided for in the Act. That was not done in this case, and while it may be that the plaintiff would in consequence have a right of action for damages against the railway company, there is nothing in this record whatever to justify a finding that the city was in any way implicated in the wrongful acts of the railway company, in other words, there is nothing to shew that the municipality was a party to proceeding with the work without taking the necessary steps under the "Railway Act." One may suspect that the municipality, being the party chiefly interested, was in reality responsible for the taking of this course, but there is no admission to that effect, and there are no facts which would justify such an inference. I am not satisfied that the appellant could not after the completion of the structure, have taken proceedings to compel the railway to concur in the necessary steps for determining and to pay compensation when determined. That, however, was not done and I am unable to see on what ground his claim against the municipality can be sustained. It was not suggested on behalf of the appellant that the railway com-

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pany should be added as party-defendant and one must suppose that there is some good reason why proceedings were not taken against the railway company.

With a good deal of regret I find myself forced to the conclusion that the appeal must be dismissed on the short ground that the municipality is not shewn to have done any wrongful act; and as regards compensation, it is responsible only under the order-in-council and the provisions of the order-in-council are limited to giving to the railway company a right to claim contribution in respect to the cost of the work. There is no *vinculum juris* between the appellant and the municipality and no tort for which the municipality is responsible.

ANGLIN J.—This appeal presents three questions for determination:—

1. Are land damages part of the costs of the "works and the execution thereof" within section 179 of the "Nova Scotia Railway Act," Revised Statutes of Nova Scotia, ch. 99?

2. Are the sections of that Act which provide for payment of such damages in respect of lands not taken, but injuriously affected, made applicable to works ordered under section 178?

3. Is the City of Sydney directly liable to the plaintiff for whatever damages he has sustained?

Having regard to the obvious connection between section 178 and section 179 and to the provisions of the former, I have no doubt that land damages are included in the costs of works dealt with in the latter.

The decision of the Judicial Committee in *Corporation of Parkdale* v. *West*(1), at pp. 611-12, with a re-

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ference to section 138 of the "Railway Act," gives a conclusive answer in the affirmative to the second question.

The third question presents a little more difficulty. The order of the Governor in Council was authorized by sections 178 and 179, as well as by section 8(*i*) of the "Railway Act." By that order, granted on the application of the defendant municipality, and without which, because of interference with the railways, the works could not have been undertaken, while the railway companies were directed to construct them, the City of Sydney was required to pay "all the land damages" occasioned by them. These terms were accepted by the city and upon them the work was undertaken.

If the work was begun and prosecuted without application, or notice to treat to the plaintiff (secs. 138-141) (and that would appear to have been the fact in view of the contention of the defendant, made throughout this litigation, that there is no liability for damages sustained by the owner of land not taken, but only injuriously affected) their construction and the alteration in the level of the highway were as to him a trespass; and for that those who committed it, the railway companies, and not the present defendant, are liable, just as they would be, if they had entered upon and taken the plaintiff's land. *Corporation of Parkdale* v. *West*(1); *Inverness Railway and Coal Co.* v. *McIsaac*(2); *Hanley* v. *Toronto, Hamilton and Buffalo Railway Co.*(3).

(1) 12 App. Cas. 602. (2) 37 Can. S.C.R. 134.
(3) 11 Ont. L.R. 91.

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If, on the other hand, proceedings were duly taken, under sec. 138 *et seq.* of the "Railway Act," it is probable that only damages ascertained in accordance with those provisions are recoverable. But, however that may be, it would seem that the land damages, like other items of the cost, are payable in the first instance by the companies exercising the powers conferred by sec. 138 *et seq.*, with a right as to the land damages of indemnification against, or recoupment by, the City of Sydney under the terms of the order-in-council. That order made under sections 8(*i*), 178, and 179 of the "Railway Act," contemplated that the powers conferred by that Act should be made use of as the machinery by which the right to acquire, or to cause injury to, land should be exercised. Unless that procedure is followed it may be that there is no obligation upon the defendant municipality under the order-in-council. But in any case, I think the primary and the only direct responsibility to the plaintiff is that of the railway companies, either as trespassers, or as liable to pay compensation under the "Railway Act." Whatever may be the liability of the City of Sydney, if any, it is in my opinion not to the plaintiff, but to the railway companies by way of indemnity or contribution.

On this ground alone I would dismiss the appeal.

BRODEUR J.—The proceedings do not disclose any *lien de droit* between the appellant and the respondent.

The appellant claims that his property has been injuriously affected by the construction of a subway. It might be true; but who is the wrongdoer ? That is the railway company and not the respondent muni-

cipality; and the action then should have been brought against the company.

But the appellant says that he is entitled to proceed against the City of Sydney because, under the order-in-council which ordered the construction of the subway, that city was condemned to pay "land damages."

I have no doubt that the Lieutenant-Governor in Council could authorize or require the railway company to construct the subway. But the taking of any land required for the carrying out of the requirements of the order-in-council or any compensation for lands injuriously affected, should be determined under the ordinary provisions of the law. (Ch. 99, R.S.N.S., sec. 178.)

Arbitration proceedings should have taken place. Damages would have been assessed and then the City of Sydney could perhaps be held liable for those damages and compensation.

But until this is done, can the city be condemned to pay anything to a riparian owner of the subway? I don't see how in the circumstances of this case an action by a property owner should lie against the municipality.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *R. M. Langille.*
Solicitor for the respondent: *Findlay Macdonald.*