Supplement - 1.

29378

In the Privy Council.

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

BETWEEN :

THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY,

APPELLANTS ;

AND

PETER WOOD ET AL., *& qual.*

RESPONDENTS.

JUDGES' REASONS.

Honorable Judge Hall rendering the Judgment of the Court.

The Calvary Congregational Church Society, of this city, acquired, in 1874, the cadastral lot No. 1604, of St. Antoine ward, as a location for their church edifice, with a frontage of 96 feet on Guy street, and extending 160 feet in depth to a public lane parallel to Guy street, leading to Richmond avenue. The cost of the lot, including two brick houses, at the extreme rear, was $10,-625. The title was taken in the name of Mr. Cushing, one of the active members of the church, under the authority of a special resolution of the society, although the deed made was to Mr. Cushing, personally, without disclosure of the trust. A church edifice of brick was shortly afterward erected on the front of the lot, at a cost, including subsequent additions and furniture, of $16,872, making the then total cost of the property $27,497. The two brick houses, at the rear of the lot, were sold in 1877 to John Lawson and John Hannah for $2,450 each, thus reducing the cost of the church property, at its present dimensions, to $22,597. The lots sold to Lawson and Hannah were each 24 feet in width, but instead of giving to their lots a length of 96 feet, representing the full width of the church lot, they were described as being only 86 feet in length and the remaining 10 feet were converted into a private lane, through which access was thus preserved for Messrs. Hannah and Lawson, and the church property, to the original public lane forming the rear boundary of the lot when it was first purchased.

At about the same time Cushing bought as a private speculation part of the adjoining lot toward the south, No. 1605, in the same ward, 80 feet in width by 53 in depth, occupying part of the space between the church lot and Richmond avenue. He sub-divided his purchase into four small lots of 20 feet in width, and to make them more saleable gave to the purchasers of each of them a right of passage over the narrow lane at the rear, out to the public lane leading to Richmond avenue.

In 1879 Cushing made a formal transfer of the church lot to the trustees describing it by its original width of 96 feet on Guy street by a depth of 112 feet; that is, the original depth of 160 feet, less the 48 feet sold to Lawson and Hannah and reserve for the lane (48 feet by 10 feet), the use of which was common to all the properties abutting upon it. No cadastral changes were made to correspond with the subdivisions thus made of lots 1604 and 1605.

On 12th February, 1887, the Atlantic & Northwest Railway Company deposited with the Clerk of the Peace a plan showing their proposed line of entrance into the city, taking off a small corner of the lot sold to Hannah, crossing the ten feet lane in a diagonal direction, as well as some of the small lots at the south of it, into which Cushing had sub-divided cadastral No. 1605.

On 18th March, 1887, Cushing executed a transfer to the church trustees of the right of property in said ten feet lane, for a nominal consideration, declaring that it had been originally acquired for them, and reserving only a right of passage over it to the remaining proprietors of the lot.

On 1st of October, 1883, the railway company gave notice to the church trustees, under the provisions of the Dominion Railway act, of their intention to expropriate a right of passage in a diagonal direction across said lane by an elevated track, leaving a clear space of twelve feet between the surface of the ground and the lowest part of their superstructure, and without occupying any

RECORD.

In the Court of Queen's Bench.

Judges' Reasons.

Reasons of Hon. Judge Hall. —*Continued.*

portion of said lane with supports. They offered, as compensation for this overhead passage over the lane, the sum of $25. The trustees declined the offer. An arbitration was arranged under the terms of the act, Mr. McGibbon, Q. C., representing the Railway company, Mr. J. L. Brodie the trustees, and Mr. C. J. Fleet, being mutually agreed upon as umpire.

The Railway company had previously bought from Hannah the small triangular portion of his lot, which they wished to cross, including his right of passage through the ten feet lane, and had also acquired the four small lots south of it into which part of cadastral No. 1605 had been subdivided, including also such rights as these proprietors had acquired from Cushing, of using the ten feet lane. They contended, therefore, that they had as much right to the surface use of this lane as the church trustees had; that as this surface use was to remain undisturbed, they were really taking no right of property from the trustees, and that $25 therefore were ample compensation for the nominal interference with the lane by means of an overhead crossing. The trustees took the position that the Railway company were actually expropriating real rights belonging to them; that they were entitled consequently to the full indemnity stipulated by the railway act, and that such indemnity included not only the value of the rights in their land, of which they are to be deprived, but compensation for the damage to the remainder of their property, viz.: the church edifice, which, by reason of the train service so near to it, would make the continuance of a church service therein impossible, and thus compel them to buy and build elsewhere and dispose of the Guy street property at a greatly depreciated price, a damage in all, which they estimated at from $20,000 to $25,000.

After a lengthy *enquête* two of the arbitrators, Messrs. Brodie and Fleet, brought in an award in favor of the church trustees of $16,308, Mr. McGibbon dissenting. The Railway company thereupon appealed to the Superior Court under the provisions of the Railway act, and Mr. Justice Mathieu before whom the appeal was heard, set aside the award and reduced the amount of compensation to be paid, to $1,367, giving as his reasons that the only damages which the Railway act authorized arbitrators to take into consideration were such as resulted from the *construction* of the railway and not from its *use*; and that under this rule he estimated the value of said overhead crossing at 50 cents per foot, amounting to $183.50; the damage resulting from the separation of this right from the similar right over the remainder of the property at a like sum, and the damage resulting from deprivation of light and air at $1,000, making a total of said sum of $1,367. From this judgment the church trustees have appealed. We have, therefore, to adjudicate upon a *quantum* of damage varying in the estimation of the parties from $25 to $25,000, and the determination of the very important and much controverted legal question as to whether or not, in expropriation proceedings, damages from future use are to be allowed, as distinguished from those resulting from and at the time of construction, and as if these problems were not enough for one case, we have a further contention as to whether or not any portion of the appellant's land or real rights has actually been taken or encroached upon. As the decision upon the last named question is of vital importance in the determination of the first

and second I take up the consideration of it at once.

The court is agreed in thinking that the expropriation of an overhead passage gives the right to the enforcement of all the statutory rights which would follow from expropriation of subterranean or surface rights; but even then we have to bear in mind, in this case, that when the deposit of the Railway company's plan was made on the 12th February, 1887 the registered title of the church trustees did not cover the 10 feet lane to which the railway company referred in their notice of expropriation. It was not until a month afterward 12th March, 1887, that Cushing executed the deed of this lane which had been omitted, by inadvertence, he says, when he deeded the church lot proper in 1879. Section 145 of the railway act enacts that the compensation to be paid to proprietors whose lands are expropriated shall be determined as at the date when the right of way map and plans are deposited, and a rigid compliance with this provision might place the church trustees outside the list of those from whom lands were taken, an important distinction in determining their right to compensation and the method of enforcing it. Some members of the court consider that the evidence discloses that the original title taken and held by Cushing to lot 1604 was for and in the interest of the church trustees, sufficiently at least to warrant our treating them for expropriation purposes as the proprietors of the lane in question when the railway company's right of way map and plans were filed. Four of the five members of the court are satisfied, too, that the railway company's expropriation notice covers a small triangular piece of land, outside the limits of the land, and taken from that portion of the church property of which the trustees have been the registered proprietors since 1879. It is probable that the railway officials did not intend to invade this portion of the church property but it is none the less evident that they have done so. The lane reserved by Cushing from the lots sold to Hannah & Lawson was of course only forty-eight feet in length, reserved as it was from the width, 24 feet, of their two lots, and Cushing recognized this when he executed the deed to the church trustees in 1879, giving them all the original depth (160 feet) of this lot, less 48 feet. But when Cushing sold off the lots from 1605, he gave to these purchasers also a right of passage through this lane towards the rear. To this no particular exception could have been taken by the church trustees in regard to those lots which were actually bounded in the rear by the lane, but it appears by the titles produced that, after having sold those of his lots which touched this lane, Cushing kept on giving the same right of passage throught this lane to purchasers of his remaining lots. The Railway company, acquired these lots sold out of cadastral No. 1605, and finding the same references in them all to a right of passage over the lane in the rear naturally concluded that this lane extended as far eastwardly as the lots themselves—eighty feet—and in giving their expropriation notice, mentioned the south boundary of the portion of the lane which they wished to acquire as being fifty feet and four inches in length. Inasmuch as the lane, as we have seen was only forty-eight feet in length, the remaining two feet and four inches encroach to that extent upon that portion of the church property which the trustees acquired in 1879. It is true that the description contained in the notice limits the portion to be taken to the limits of the lane, but the plan filed

RECORD.

In the Court of Queen's Bench.

Judges' Reasons.

Reasons of Hon. Judge Hall. —*Continued.*

plainly shows the encroachment, and the measurement given with so much exactness in the notice as fifty feet and four inches, leaves no doubt in our minds that the railway company's title, secured by these expropriation proceedings, will give to them these two feet and four inches of the church property, notwithstanding that their notice does not describe them as a portion of the church lot, that is, that the correct dimensions given in feet and inches will prevail over the misdescription as to the limits of the lane. This being the case we are obliged to hold that the railway company have sufficiently exercised expropriation powers over land belonging to the church trustees to bring them within the terms of the Railway act in respect to compensation for damages to the remaining lands and property.

As to the estimation of the damage for the lands taken there would be no difficulty. The judgment of Mr. Justice Mathieu allows $1,367, from which the railway company did not appeal. The trustees made a much more serious claim, however, based upon the alleged permanent injury to the church services caused by the noise and vibration and smoke resulting from the use of the railway; an injury so great, it is said, that the edifice will have to be abandoned, another location secured and another building erected. The majority of the arbitrators admitted the validity of this claim. Mr. Justice Mathieu rejected it. The question involved has undergone much consideration from the courts in Great Britain in litigation based upon a Railway act of which our own is almost a copy. The following is believed to be a faithful abstract of the decisions upon this question, from 1856 until the present time, showing such contradictory jurisprudence in its earlier stages that the Lord Chancellor admitted in the *Rickets* case in 1867 that it was a hopeless task to reconcile the decisions which had been rendered up to that time. We have, first.

(1856) *Caledonia Railway Co*, v. *Ogilvie*. House of Lords, Scotch Appeal cases, 2 Macq. 229. Held: That an owner, none of whose land has been taken has no claim for damage caused to his property by inconvenience resulting from a level crossing near his residence.

(1862) *Chamberlain West End of London and Crystal Palace Railway Co.* (Q. B. 2 B. & S. 605) Railway construction, by diverting highway, injuriously effected access to tenement houses belonging to plaintiff, although no portion of his premises was actually taken or even touched by the railway. Held: that plaintiff was entitled to compensation.

(1864) *In re The Stockport, Timperley & Altringham Railway Co.* 33 L. J. Q. B. 251. —A railway company took some land of L. under their act, and proposed to make their railway on it so close to a cotton mill belonging to L. that by reason of the proximity of the railway and the danger of fire from the trains using the line, the building was less suitable for a cotton mill, could only be insured at an increased premiun, and was rendered of less saleable value. Held: That L. was entitled to compensation in respect of the mill being so injuriously affected, and that the rule that compensation should only be given for that which, unless sanctioned by the private statute, would otherwise have been an actionable wrong, had no application to cases where the act complained of was done on claimant's own land, taken from him by the company by force of their statute.

Crampton, J.—" Where the damage is occasioned by what is done upon " other land which the company have purchased, and such damage would not " have been actionable as against the original proprietor, as in the case of sinking " a well and causing the abstraction of water by percolation, the company have " a right to say. 'We have done what we had a right to do as proprietors of " our own land and do not require the protection of any act of Parliament. We " therefore, have not injured you by virtue of the provisions of the act and no " cause of action has been taken away from you by the act.' Where, however " the mischief is caused by what is done on the land expropriated from another, " the party seeking compensation has a right to say, it is by the act of parlia- " ment only that you have done the acts which caused the damage; without " the act of Parliament, everything you have done and are about to do in the " making and using the railway, in so far as I am concerned, would have been " illegal and actionable and is, therefore, matter for compensation according to " the rule in question. I think, therefore, that the distinction between cases " where the land is taken and the cases of obstruction of light, rights of way, " etc., by acts done on other lands, is well founded."

(1865) *Brand & Hammersmith and City Railway Co.*—L. R. 1 Q. B. 130 Action of damages by proprietor—none of whose land had been taken by defendant—for damages caused by operation of line, smoke, vibration, noise, etc.

Miller and Lush, J. J., in rendering judgment for the defendant undoubtedly intended to express an opinion that apart from non-liability by reason of no part of plaintiff's land having been taken, damage resulting from use and operation of railway as distinguished from its construction was not actionable, but the *jugé* limits the effect of the judgment to the case of an owner, none of whose lands has been taken for the purpose of the railway.

This judgment, even in this limited sense, was reversed upon coming before full Bench, in 1867, L. R. 2 Q. B. 223, three judges, Bramwell, Keating and Montague Smith, holding, against one, Channel, B., dissenting, that the plaintiff was entitled to injury to her property resulting from the operation of the railway, although no portion of her land had been taken.

This last judgment was again reversed upon coming before the House of Lords, in appeal, by Lords Chelmsford and Colonsay, against the opinion of the chancellor Lord Cairns, and the original judgment restored, which declared the railway company not liable for such damage. L. R. 4 H. L. 171.

(1867) *Beckett* v. *Midland Railway Co.*, 3 C. P. 83. Where highway in front of plaintiff's house had been narrowed by construction of railway embankment from 50 feet in width to 33, decreasing the light, etc. Held: That plaintiff was entitled to compensation. Case distinguished from *Caledonian Railway Co.* v. *Ogilvie* where owner's inconvenience was common to the whole community.

(1867) *Ricket* v. *Directors Metropolitan Railway Co.* L. R. 2 H. L. 175.—Ricket, keeper of a public house, claimed damages for temporary obstruction to one of the streets leading to his premises. Defendants' construction works did not actually touch Ricket's premises, but undoubtedly, caused a temporary injury to his business. The jury found for plaintiff £100 damages. Four

RECORD.

In the Court of Queen's Bench.

Judges' Reasons.

Reasons of Hon. Judge Hall.
—*Continued.*

judges of Court of Queen's Bench confirmed the award. On appeal to Exchequer chamber, four judges out of six reversed the decision and set aside the award. In the House of Lords the Lord Chancellor admitted that it was a hopeless task to attempt to reconcile the contradictory decisions which had previously been rendered on the question at issue in this case and it only remained for each judge to express his individual opinion. His own was in favor of there being no liability on behalf of the railway company, In this opinion Lord Cramworth concurred, while Lord Westbury dissented. By this division, therefore, the award was set aside.

(1870) *City of Glasgow Union Railway Co.* v. *Hunter*, 2 Scotch appeals, 78,
Held: That statutory compensation cannot be claimed by reason of the noise or smoke of trains, whether part of plaintiff's land be taken or not. In this case, although some land belonging to plaintiff was taken by the railway, it was separated from that to which the injury was caused by smoke, vibration, etc.

The Lord Chancellor (Lord Hatherly) after stating the pleadings and the question raised proceeded as follows;—

I take the result of the decisions in *Ricket's* case and in *Brand's* case to be this. In the first place, no claim of statutory compensation can be made in respect of a damage for which the claimant would not have had an action supposing the Railway act had never been passed. That is one point that has been settled. The second point was settled by this house in *Brand's* case, and it was this; that the damage must be damage done in the execution of the works, and not damage done afterwards when the railway is completed, and in the exercise of the powers vested in the company by the general acts, the Railway clauses acts and their special act.

There is no ground for supposing that the Legislature intended to give compensation for any further or other injury than that occasioned by the operation of the Railway Clauses act, and the works authorized by the special act; or that they intended in any way to extend the remedy to the exercise of the powers of the act after the works had been executed. There is no reason a *priori* to suppose that any such intention could be anticipated in an act which simply deals with the proprietary rights of the landowner and the mode of ascertaining his rights. I think we are bound to read those words "the exercise of the powers of the act," exactly as they were read in *Brand's* case, as meaning that no further compensation was intended to be given than for that damage which might be occasioned by the execution of the works.

That being so, we find that in the damages awarded by the jury to Mr. Hunter there is included injury by noise of trains and smoke. Now the noise of trains and smoke would clearly fall within the principale of Brand's case, and the parties would not be entitled to any assessment in respect thereof.

"Lord Colonsay: "I feel that there is considerable difficulty upon some of "the points involved in this case. In the case of *Brand*, I certainly did rest "my judgment somewhat, and not a little, upon the circumstance that I did "not think that the claimant in that case, was entitled to the position of a "person claiming under the Land Clauses act, because that act has "reference only to parties who claim a right of property in or, an interest in

" property taken. If you look through all the clauses of the act, you will find, " I think, that Mrs. Brand was not in that predicament."

(1872) *Jones & Stanstead, Shefford & Chambly Railroad Co.* L. R., 4 P. C., 117.—Jones having statutory exclusive rights to construct toll bridge across Richelieu river, brought an action " en dénonciation de nouvel œuvre" against a Railway company which had constructed and was operating a railway bridge over the same river, for passenger service.

Held; Inasmuch as Railway Company was also exercising a statutory right, Plaintiff, even assuming that he was entitled to compensation, had no right of action in form adopted, as Railway Company could not be held to be a wrongdoer.

(1872) *Duke of Buccleugh* v. *Metropolitan Board of Works.* 5, L. R. H. L., 118.—Held: Though compensation may not be granted to a person, annoyed by the smoke and vibration occasioned by trains, passing along a railway constructed, under the authority of an act of Parliament, where no part of his land has been taken, compensation may be given for deterioration in the value of his property occasioned in a similar manner, where a part of his land has been taken for the construction of a work authorized by an act.

" Justice Hannen—" If the act of Parliament had not been passed, the " Plaintiff would have had it in his power, by refusing to part with his rights " to prevent the land, now being made into a road from being so converted. " It seems but just that if his power to prevent mischief being done to him is " taken away by law, he should receive compensation, according to the mea- " sure of the injury inflicted upon him. The Legislature has recognized this " right of property, and the power growing out of it as a fact, but has guarded " against its abuse by compelling its possessor to avail himself of it only as a " means of obtaining a fair compensation for real damage.

(1874) *Metropolitan Board of Works* v. *McCarthy,* Law Rep. 7, H. L., 243. Case submitted in connection with construction of Thames embankment was: " That by reason of the destruction of the dock, and the destruction thereby " of the access to and from the Thames, the Plaintiff's premises became and " were, either for sale or occupation, in their then condition permanently " damaged and diminished in value," although none of his land was taken.

Held: That the Plaintiff was, on these facts, entitled to compensation.

(1882). *Caledonian Railway Co.* v. *Walker's trustees,* 7 Law Rep., H. L., 259. Access to manufacturing premises injuriously affected by railway although no land taken. Held: That owner was entitled to compensation. *Metropolitan Board of Works* v. *McCarthy, Chamberlain* v. *West End of London Railway Co.,* 2 B. & S., 617, and *Beckett* v. *Midland Railway Co.,* Law Rep. 3 C. P., 82, cited and approved. *Caledonian Railway Co.* v. *Ogilvy,* 2 Macq., 228, explained and distinguished.

(1889). *Essex* v. *Local Board for Acton,* 14, Law Rep., H. L. 153. Under statutory powers incorporating the Lands Clauses Consolidation act, 1845, the local board of Acton gave notice to Essex, that a part of his land would be required for sewage works. At the Enquête it was proved that the maintenance of sewage works, even if conducted, so as not to create an objectionable nuisance, would depreciate the market value of the Appellants other lands

RECORD.

In the Court of Queen's Bench.

Judges' Reasons.

Reasons of Hon. Judge Hall. —*Continued.*

for building purposes. The jury gave a verdict of £8,737, for the value of the land taken and £4,000, for damages sustained, or to be sustained, by the owner's remaining land. The Queen's Bench maintained the award; the Court of Appeals, reversed the decision and set aside the award, but on appeal to the House of Lords, the last decision was reversed and the award restored. It is true that in the Lands Clauses Consolidation act, under which, this proceeding took place, there is a provision (section 63) of a somewhat more comprehensive character in reference to such damages than is to be found in " the English Railway act, in these words: " In estimating such compensation, " regard shall be had not only to the value of the land to be taken, but also " to the damage, if any, to be sustained by the owner by the severing of the " lands taken from his other lands, or otherwise injuriously affecting such other " lands by the exercise of the powers of this act," but in the reported decisions under it, the judges do not appear to make any distinction between it and the English Railway act. In rendering judgment in the *Essex* case, Lord Watson, quoted with approval Lord Chelmsford's remarks in the case of *Buccleugh* v. *Metropolitan Board of Works*, in reference to the cases of " *Hammersmith and City Railway Co.* v. *Brand* and *City of Glasgow* " *Union Railway Co.* v. *Hunter*. " In neither of these cases was any " land taken by the Railway Company connected with the lands which were " alleged to have been so injured, and the claim for compensation was for " damage caused by the use, and not by the construction of the railway. But " if, in each of those cases, lands of the parties had been taken for the railway, " I do not see why a claim for compensation in respect of injury to adjoining " premises might not have been successfully made on account of their probable " depreciation by reason of vibration, or smoke, or noise occasioned by passing " trains." And Lord Watson, summed up the consideration of the previous " decisions, pro and con, as follows:—It appears to me, to be the result of " these authorities which are binding upon this House, that a proprietor is " entitled to compensation for depreciation of the value of his other lands, in " so far as such depreciation is due to the anticipated legal use of works to be " constructed upon the land which has been taken from him under compulsory " powers," a doctrine which he says is merely the adoption of that previously laid down by Mr. Justice Crampton, *in re The Stockport, Timperley & Altringham Railway Co.*, already cited. All the other Lords, Lord Chancellor Halsbury and Lords Bramwell, Fitzgerald and Macnaghten, not only concurred in the *Essex* case, but referred to, and accepted the principle laid down in the *Stockport* case, decided under the terms of the Railway act.

London, Tilbury & Southend Railway Co. v. *Trustees of the Gowers Walk schools*, 24 L. R. Q. B., in appeal, 326 (December, 1889). Claimants were owners of certain buildings, with ancient lights, which the Railway company interferred with by the erection of a warehouse, acting under the exercise of their statutory rights.

Held—Affirming judgment of the Q. B. division that the claimants were entitled to compensation.

Lindley J.—" In consequence of what the Railway Company, have done, " the Respondent's land has been damaged to an amount estimated by the

" arbitrator at £1,450. On what principle are the Railway Company, not to " pay for that diminution in value? Their case falls within the Railway act, " and the consequence is that full compensation must be made, which full com- " pensation is the difference between the value of the land as it was and as it " is. Is there any authority to the contrary.? I think not, but that what " authority there is supports this conclusion.

Lopes, J., concurred, and based his decision upon the principle followed in the *Buccleugh* and *Essex* cases.

Upon consideration of these cases it must be held, we think, that whatever conflict of opinion and decision there may have formerly been, it is now the settled jurisprudence of the English courts, that in cases where a portion of the proprietor's land has actually been taken for railway purposes, so as to compel or authorize the adoption of the statutory provisions for determination of the amount of compensation, the jury are authorized to take into consideration an estimation of damage or depreciation resulting from the use of the railway, as distinguished from its construction.

The principles laid down, by both the old and modern French authors are in the same sense, but in France they have no general railway act corresponding with ours, and their method of determining compensation before the "Conseils de Préfecture" differs so much from our own that no precise authorites can be cited from that jurisprudence.

We have then to consider whether or not the principle now recognized by the English courts, in the interpretation of their own Railway act, is applicable here under the Dominion Railway act of 1888.

Under the English act (8 Vic., C. 20) the only sections referring to compensation for land damages are the 6th and 16th.

"The Company shall make to the owners, etc., interested in any lands taken or used for the purpose of the railway or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used and for all damage sustained by such owners etc, by reason of the exercise as regards such lands of the powers of this or the special act" and "subject to the provisions and restrictions in this and special act,and any act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway, orthe accommodation works connected therewith, hereinafter mentioned to execute any of the following works;

"They may construct in upon, across, under or over any lands, streets etc,, tunnels, enbankments, etc.

" They may alter the course of rivers not navigable, etc.

" They may make drains, etc.

" They may erect houses, warehouses, offices, etc., as they think proper.

" They may from time to time alter, repair, or discontinue, the beforementioned works.

" They may do all other acts necessary for making maintaining, altering, or repairing and using the railway.

" Provided always that in the exercise of the powers by this or the special act granted, the Company shall do as little damage as can be, and shall make full satisfaction, in manner herein, and in the special act, and any act incorpor-

RECORD.

In the Court of Queen's Bench.

Judges' Reasons.

Reasons of Hon. Judge Hall. —*Continued.*

ated therewith, provided, to all parties interested for all damages by them sustained by reason of the exercise of such powers."

In the Canadian Railway act, the corresponding provisions are to be found embodied in section 92, where after enumeration of all the Company's powers for the construction and maintenance of its line and the transport thereon of persons and goods, it is enacted, "The Company shall, in the exercise of these "powers, do as little damage as possible and shall make full compensation in "the manner herein provided to all parties interested, for all damage by them "sustained by reason of the exercise of these powers." Section 144 provides for making applications to those "interested in lands which may suffer damage "from the taking of materials or the exercise of any of the powers granted for "the railway," and in case of disagreement, provision is made by section 146 for serving a notice upon such parties containing a declaration of readiness to pay some certain sum "as compensation for such lands or for such damages" accompanied by a certificate (section 147,) of a sworn surveyor stating his estimate of the "amount of damage likely to arise from the exercise of such powers." Then follow (sections 149-152) provisions for the appointment of arbitrators, who shall proceed to ascertain such compensation, and in doing so they are instructed by section 153 to "take into considera-"tion the increased value that will be given to any lands, through or over which "the railway will pass by reason of the passage of the railway through or over "the same, or by reason of the construction of the railway and shall set off the "increased value that will attach to the said lands against the inconveniencies, "loss or damage that might be suffered or sustained by reason of the Company "taking possession of or using the said lands as aforesaid."

A careful comparison of these acts will certainly show no intended diminution or curtailment of the liability of the railway company toward the land owner, under the Canadian act as compared with the English one, and in my opinion that liability is, if anything, enlarged under the clause of our act, which says that for all damage caused by the company in the exercise of the powers conferred upon them, they shall make full compensation, and the provision that it shall be made "in the manner herein provided," which Mr. Justice Mathieu interprets as restrictive, is, in my opinion, stipulated in the interest of the land owner, to enable him to secure his compensation by the expeditious and practical remedy of an arbitration in which he is directly represented, rather than by the exercise of the usual common law, recourse to the courts. That this view of the spirit of our act is shared by the judges of final resort, under our procedure, will be evident from the dictum of Lord Macnachten in the Parkdale case (12 Law Reports, H. L. 602):—"The Railway act of Canada places on the same "footing in so far as expropriation proceedings are concerned, the taking of land "and interference of rights over land. In the opinion of the Court the act in-"cludes provisions for compensation in respect of land injuriously affected "though not actually taken. It appears to their Lordships that as the injury "committed is complete and of a permanent character, the respondents are "entitled to the full extent of the injury inflicted." And in a Canadian case, *North-Shore Railway Co.*, v. *Pion*, 14 Law Rep.,H. L. 612, decided in the House of Lords since the decision in the case of *Essex* v. *Local Board of Acton*, it

was held that "under the Quebec Railway Consolidation act, 1880, (which is "the same as the Dominion Act,) no authority is given to a railway company to "exercise its powers in such a manner as to inflict substantial damage upon "land not taken, without compensation."

I think I have established, therefore, that whatever may be the liability of a railway company for damages to an adjacent proprietor, none of whose land has been taken, there can be no doubt that both under the English and Canadian act the company is responsible, where lands and real rights are or have been actually expropriated, to compensate the proprietor not only for the land actually taken but for the direct damage to his remaining land, resulting either from construction and severance, or from the use of the railway line and the operation of its traffic service. This is but the adoption of the general principle that no one can use his own property or rights to the detriment of his neighbour, even if the exercise of such right be under the authority of an Act of Parliament.

Applying that principle and the jurisprudence I have quoted, to the facts of the present case, we must conclude that the arbitrators were justified in taking into consideration the injurious effect upon the present occupation of Appellant's premises, resulting from the noise and vibration caused by the train service in such close proximity to their church. That it is a direct and tangible and appreciable damage, in the sense of the act, will be apparent from considering the result if the Appellants were the tenants only, and not the proprietors of the church in question. Would they be content to pay the same rental for the use of a church edifice thus situated as for one as free from disturbance as Calvary church was before the construction of the railway? Clearly not; and if its rental availability and value are diminished, certainly its use by its own proprietors has suffered a corresponding depreciation, for which it is possible to establish a pecuniary estimation and enforcement. Is that estimate which the present arbitrators have made, judicious and suitable? In the face of the evidence adduced, it cannot be said to be unreasonable nor manifestly incorrect, and we do not feel warranted, therefore, by substituting our discretion for theirs, to adopt an estimate of damage which might be open to equal criticism, and even less defensible according to the evidence by which both they and we are bound. The result is that the judgment of the Superior Court is reversed with costs, as well in that court as in appeal, and the majority award of the arbitrators is maintained.

ROBT. N. HALL,
J.Q.B.

In the Privy Council.

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

BETWEEN :

THE ATLANTIC AND NORTH-WEST RAILWAY COMPANY,

APPELLANTS ;

AND

PETER WOOD ET AL., *ès-qual.*,

RESPONDENTS

JUDGES' REASONS.