

THE QUEEN, ON THE INFORMATION OF
 THE ATTORNEY-GENERAL FOR THE } PLAINTIFF ;
 DOMINION OF CANADA } 1891
 Sep. 17.

AND

WILLIAM MALCOLM.....DEFENDANT.

Injurious affection of property by construction of public work—Obstruction of access—Right to compensation—Waiver.

The defendant was the owner of a dwelling-house and property fronting on a public highway. In the construction of a Government railway, the crown erected a bridge or overhead crossing on a portion of the highway in such a manner as to obstruct access from such highway to defendant's property, which he had theretofore freely enjoyed.

Held, that the defendant was entitled to compensation under *The Government Railways Act* and *The Expropriation Act*. *Beckett v. The Midland Railway Company* (L.R. 3 C.P. 82) referred to.

2. The defendant, and a number of other persons interested in the manner in which the crossing was to be made, met the Chief Engineer of Government railways and talked over the matter with him. The defendant, who does not appear to have taken any active part in the discussion, and the other persons mentioned wished to have a crossing at rail level with gates ; but the Chief Engineer declining to authorize such gates, it was decided that there should be an overhead crossing with a grade of one in twenty. Subsequently the defendant signed a petition to have the grade increased to one in twelve, as the interference with the access to his property would in that way be lessened. The prayer of the petition was not granted.

Held, that by his presence at such meeting the defendant did not waive his right to compensation.

3. The right of way for the line of railway had been previously acquired by the Western Counties Railway Company, and the defendant's predecessor in title had been paid the damages awarded to him. But it was clearly shown that at the time when such damages were assessed there was no intention to construct an overhead bridge, and that they were assessed on the understanding that there was to be a crossing at rail level.

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Held, that the defendant was not, by reason of such payment, precluded from recovering compensation for injuries occasioned by the overhead bridge.

THIS was an information filed by Her Majesty's Attorney-General for the Dominion of Canada under *The Expropriation Act* (1), in a matter of the injurious affection of lands arising from the construction of a bridge or overhead crossing on the Annapolis and Digby Railway at Annapolis, N. S.

By the information it was alleged, *inter alia*, that :—
By the Act of the Parliament of Canada, 52 Victoria, chapter 8, the Minister of Railways and Canals was authorized to build and complete the railway between Annapolis and Digby, N.S., the construction of which had been previously provided for by 50 Victoria c. 25 ; and by the first mentioned Act, the Minister was authorized to take all such proceedings for the building and completing of the said railway as might be necessary under the provisions of *The Government Railways Act* or *The Expropriation Act* or any Acts amending the same.

Subsequently, in pursuance of the said Acts, the railway was duly constructed by Her Majesty the Queen represented in that behalf by the said Minister of Railways and Canals.

The said railway at or near the point where the same enters the town of Annapolis passes over and across a public highway known as St. George Street, and Her Majesty has constructed in the line of the said highway an overhead crossing or bridge of timber trestle-work with approaches having a grade of one foot in twenty and made of solid embankment to a point four feet above the street level.

The defendant claims to be the owner in fee simple of certain lands and premises situate in the neighbor-

(1) 52 Vic. c. 13, s. 25.

hood of the said crossing and described as follows:—
 Bounded on the north by St. George Street aforesaid,
 on the south by the property of George Timothy
 Bohaker, on the east by the line of the said railway,
 and on the west by the Post road to Digby.

The defendant with certain other abutting and
 neighboring proprietors requested that the said crossing
 should be constructed in manner as aforesaid, and as-
 sented to and acquiesced in the details and particulars
 of such construction.

The defendant claims that the construction of the
 railway across the said highway and the construction
 thereupon of the said crossing has injuriously affected
 the lands and premises above described.

Her Majesty the Queen denies that the said lands
 and premises or that any part thereof has or have been
 so injuriously affected.

Under the provisions of chapter 81 of the Acts of the
 Legislature of the Province of Nova Scotia for the year
 1870, entitled "*An Act to incorporate the Western Coun-
 ties Railway Company,*" and under the provisions of c. 70
 of *The Revised Statutes of Nova Scotia*, third series, and
 the Acts in amendment thereof, and under the provi-
 sions of chapter 41 of the Acts of the said Legislature
 passed in the year 1877, entitled "*An Act to appoint Com-
 missioners to re-appraise damages for Railway property
 in the County of Annapolis,*" one Captain John Ling-
 ram, under whom the defendant claims, made a claim
 for and received compensation for damages sustained
 by the lands in question in this action by reason of the
 construction of said railway, and such compensation
 (to wit, the sums of \$40 and \$40) was awarded to the
 said Captain John Lingram, and operates as full satis-
 faction of the claim of the defendant in this action.

Her Majesty the Queen does not admit that the de-

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defendant had or has any estate, right, title or interest in said lands and premises or any part thereof.

Her Majesty The Queen is ready and willing to pay to the defendant, or to any person or persons who may prove to be entitled thereto, such sum, if any, as he or they may respectively prove to be entitled to, in full satisfaction and discharge of all claims of the defendant or any of such persons in respect of damage, or loss, if any, that may have been sustained by the defendant or any of such persons by reason of the construction of the said railway across the said highway, and the construction thereupon of the said crossing or by reason of the said lands and premises being injuriously affected thereby.

Her Majesty The Queen is not aware of any other facts material to the consideration and determination of the questions involved in the matters aforesaid.

By his answer to the information the defendant pleaded, *inter alia*, as follows:—

The defendant denies that he with certain other abutting and neighboring proprietors, or at all, ever requested that the said crossing should be constructed in manner as set out in the information, and defendant denies that he ever in anyway assented to or acquiesced in the details and particulars of such construction.

The defendant says that he is the owner in fee simple of the lands and premises described in the said information, that the same are unencumbered, and that the said lands have a frontage of sixty-seven feet on Saint George Street in the town of Annapolis. The buildings on said lands consist of a valuable dwelling house, barn and outbuildings.

The defendant charges and claims that the said lands and premises are injuriously affected and their value destroyed by the construction of the said crossing for the following, among other reasons :

(a.) The said crossing having an elevation of fifteen feet or thereabouts above the natural level of Saint George Street in front of the said lands, all access thereto with horses and carriages is cut off and destroyed and access by foot is hindered.

(b.) The said Saint George Street was, until the erection of the said crossing, the principal street and business thoroughfare in the town of Annapolis, and the said lands were of great value in that they had a frontage on the said street; but the said crossing has destroyed the said street as a thoroughfare, at least in front of said lands.

(c.) The said lands and premises have been greatly injured by reason of the obstruction of said crossing in front of said lands and the impossibility of access thereto.

(d.) For the reasons aforesaid the said lands and premises are rendered valueless as a residence, or for any use to which otherwise they might reasonably be put.

No sum whatever has been tendered the defendant by or on behalf of Her Majesty as compensation for the damages herein complained of.

The defendant claims that it may be adjudged and decreed that he is entitled to payment by Her Majesty of the sum of \$2,000 damages, and interest thereon, as compensation for the injuries to the said lands and premises by reason of the construction and operation of the said crossing, and his costs of suit.

Such of the facts in evidence as are pertinent to the issues raised are stated in the judgment.

June 2nd, 1891.

Parker and Ruggles for plaintiff;

Ritchie, Q.C. and Robertson for defendant.

BURBIDGE, J. now (September 17th, 1891) delivered judgment.

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It is not denied that the defendant's property is injuriously affected by the construction of the overhead bridge or crossing mentioned in the pleadings, and that if such construction had not been authorized by statute, the defendant would have had a right of action against the persons who constructed such bridge or crossing. The case is not, I think, distinguishable in principle from *Beckett v. Midland Railway Company* (1). This was practically admitted on the argument, but it was said, first, that the defendant acquiesced in the execution of the works complained of, and secondly, that his predecessor in title received compensation which must be taken to have included the damages that the defendant now claims.

As to the first point, it appears that the defendant was one of a number of persons residing at Annapolis, who, being interested in the manner in which the crossing in question was to be made, met the Chief Engineer of Government railways at the Resident Engineer's office and talked over the matter with him. The defendant, who does not appear to have taken an active part in the discussion, and the other persons mentioned wished to have a crossing at rail level with gates. But the Chief Engineer declining to authorize such gates, it was decided that there should be an overhead crossing with a grade of one in twenty. Subsequently, the defendant signed a petition to have the grade increased to one in twelve, as the interference with access to his property would in that way be lessened. The prayer of the petition was not granted. Now, it appears to me that there is nothing in what took place in reference to this matter that could justly be held to have deprived the defendant of any right to compensation that he may have had.

The Minister of Railways was acting under statutory

(1) L.R. 3 C.P. 82.

powers that provided for compensation where lands were taken or injuriously affected. The defendant could not have prevented his exercise of such powers, and had no alternative but to acquiesce. In so far as his presence at the meeting at the Resident Engineer's office may be taken as an approval of the construction of the works that have occasioned the injury, it must, I think, be taken to have been given subject to the provisions of the statute with reference to compensation. I do not think that such acquiescence as would deprive one of a legal right has been established (1).

On the second point, if it had been shown that the plans used by the Western Counties Railway Company disclosed an overhead bridge or crossing at the intersection of the railway with St. George Street, or perhaps if nothing had appeared, I should have been inclined to have adopted Mr. Parker's view, and have concluded that it must be taken that the damages paid to the defendant's predecessor in title included the depreciation of his property resulting from the construction of such bridge or crossing. But from the evidence of Richard Clark, one of the commissioners who assessed such damages, it appears that at the time of such assessment an overhead crossing was not contemplated, and that such damages were assessed on the understanding that the crossing was to be at rail level.

It is clear, therefore, that the injuries now complained of could not have been foreseen, and were not included in the commissioners' award. The case would not have been materially different, it seems to me, if the railway had been built with a crossing at rail level at the point in question, and if subsequently the over-

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(1) *The Conservators of the River Thames v. The Victoria Station and Pimlico Railway Company*, L. R. 4 C. P. 59; *Willmott v. Barber*, 15 Ch. Div. 96; *Bertrand v. The Queen*, 2 Ex. C.R. 285; *Wood v. The Carleton Branch Railway Company*, 1 Pugsley 244.

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head bridge or crossing had been constructed as a new and independent work.

There will be a declaration that the lands and premises mentioned in the information have been injuriously affected by reason of the construction of such overhead bridge or crossing, and that the defendant is entitled to sixteen hundred dollars as compensation, and to his costs.

Judgment for defendant with costs.

Solicitor for plaintiff: *W. F. Parker.*

Solicitor for defendant: *J. J. Ritchie.*
