

SHAW V. NORTHERN AND NORTHWESTERN RAILWAY CO.

caused' by the dam breaking was made during plaintiff's ownership.

Of course, the plaintiff would have had his action at common law for the injury done by the defendants, were it not for the protection afforded them by the Railway Act cited. The powers given by these statutes are very ample, but they must not be construed to give more than they actually do, and I think the wording of them should be strictly followed, so as not to take away plaintiff's common law right. They would no doubt have the right to use the water of this stream under the limitations given in their special Act, but, if they could use it without damaging the plaintiff, that is no reason why they should overflow his land so as to save themselves expense; without any dam at all they could have pumped up the water into the tank either by hand or steam, as they do and have to do at other places. It is not necessary for the maintenance of the railway that they should construct a turbine wheel to pump up the water and to flood the plaintiff's land. If they can erect the dam they can also raise it high enough for a ten foot wheel, and so do all the flooding they like.

The general Act speaks of their purchasing the water required by them. Must this involve the erection of a mill pond where the water can be obtained in some other way, though it may be at greater expense to them?

In *Pendegast v. Grand Trunk Railway Co.*, 25 U. C. R. 193, the defendants had set fire to some refuse on their railway (which they had a right to do), and it broke out in some way unknown and spread to the plaintiff's land adjoining, and it was held that he could not be deprived of his common law right to an action for the damage done.

In *Cameron v. Grand Trunk Railway Co.*, 14 U. C. R. 612, it was held that the injury complained of should have been the subject of arbitration, inasmuch as the embankment, the cause of the injury, was erected during the construction of the railway, and there was no complaint in the declaration of "want of care or skill in the manner of performing the work," but that as it was a continuing injury the plaintiff would not be limited to the six months.

In *Wallace v. Grand Trunk Railway Co.* (supra.) there was no natural outflow for the water causing the plaintiff injury through the ravine spoken of, and nothing was done but the making of the road. There was no allegation of improper construction. In such a case arbitration was held to be the proper course.

In *Knapp v. Great Western Railway Co.*, 6 U. C. C. P. page 187, the injury complained of was done at the time of the construction of the railway and

as a necessary consequence thereof, and, it was said, compensation must therefore be assumed to have been made and paid to the plaintiff. But plaintiff did not complain of the construction of the road, but of a consequential injury arising from time to time. The court assumed that compensation had been agreed upon and paid. Two years had elapsed between the construction of the road and the injury complained of. While the damage claimed for was the result of the original construction of the road, the nature of the injury must have been then perfectly apparent, and the claim must be assumed to have been advanced, because the acts which formed the foundation of the claim were then completely done. DRAPER, C.J., says:—"I think that when a damage is the direct consequence of an act authorized by the statute on compensation being made, and a subsequent claim for that damage as a continuing damage is set up, in a form which must be taken to admit that a compensation for the act itself had been made, such subsequent claim is barred. In this case the damages are attributed to the construction of the railway upon and immediately adjacent to the plaintiff's land, and therefore might have been considered and their value estimated and determined when defendants made compensation for the rights they acquired from the plaintiff."

This case goes to show that the court will only go the length of assuming compensation to have been made where it is a fair presumption, arising from the work causing the injury having been done at the construction of the road, or else as being a natural consequence of its construction.

In *McGillivray v. Grand Trunk Railway Co.*, 25 U. C. R. 69, an embankment was constructed by the defendants without a proper culvert, so causing the injury complained of. It was held that an action would lie, but the plaintiff was limited to the damages arising during the six months preceding the action.

In *L'Espérance v. Great Western Railway Co.*, 14 U. C. R. 173, the action was held not maintainable, as the injury done was attributable to the mere construction of the railway, which should have been taken into consideration at the time of the contract or at the reference, if the parties had disagreed.

In *Patterson v. Great Western Railway Co.*, 8 U. C. C. P. 89, the injury complained of was for diverting water, which used to flow on to plaintiff's land. It was held that the injury was permanent at once, and therefore the action should have been brought within six months.

All these last mentioned cases are alluded to in that of *Vanhorn v. Grand Trunk Railway Co.*, 18