

its mouth, opposite the town of Goderich. The plaintiffs acquired the lands for the purpose of taking sand and gravel therefrom for use in building and in paving streets; and they complained that the defendants, in the building of the Guelph and Goderich line of railway across the river, at a point on the eastern line of the plaintiffs' property, through and across the river, constructed an embankment, narrowing the stream, and throwing the waters of the river with great force against the bank on the plaintiffs' lands; that, in consequence of such diversion, the waters of the river have been year by year washing out into Lake Huron large quantities of sand and gravel from the plaintiffs' lands, to their serious loss and damage.

The defendants alleged that their embankment and bridge were constructed and maintained under their Acts of incorporation and under the Railway Act of Canada; and they denied that the embankment had the effect alleged by the plaintiffs.

The action was tried without a jury at Goderich.

J. H. Rodd, for the plaintiffs.

Angus MacMurchy, K.C., C. Garrow, and J. D. Spence, for the defendants.

CLUTE, J., set out the facts in a written opinion. He said that the defendants contended that the building of the Government breakwater, shutting off the river from the harbour, had caused all the change in the river, and had thrown the channel from the south bank to the north bank along the plaintiffs' property, and that this change was complete before the railway embankment was built. The plaintiffs asserted that the damage to their property was caused at times of high water and freshets, and that the conditions must be considered as they existed at such times.

The learned Judge found that the breakwater caused a great change in the flow of the water, throwing more to the north channel and tending to make that the main channel.

It was suggested that, even although the embankment had caused the injuries complained of, the defendants were not liable, as what they had done was authorised by statute and by order of the Dominion Board of Railway Commissioners. Reference to secs. 151 to 156 of the Railway Act, R.S.C. 1906 ch. 37.

In the learned Judge's opinion, the obstruction in this case amounted to a continuing nuisance; and the plaintiffs were peculiarly injured thereby, in a way different from that which affected the general public, by reason of the erosion and destruction of the gravel-bank.