

IN RE ARBITRATION BETWEEN THE CANADA SOUTHERN RY. CO. AND Z. B. LEWIS.

my entire damages, whatever they may be, must be determined by arbitration and paid me."

The arbitrators appointed were Judge Kingsmill for the company, Mr. Orchard for the proprietor, and Judge Senkler as third arbitrator.

The solicitors for the company and proprietor agreed that the arbitrators should decide as follows:—1st. What work shall be done; 2nd, what the cost of such work should be; 3rd, by whom it shall be done and within what time; 4th, provision as to costs; 5th, and in the event of the arbitrators determining that the company shall do the work, then the company is to be allowed to take possession of the pipe so far as necessary to do the work.

Evidence was taken at length before the arbitrators on behalf of both parties on the 10th, 11th, and 12th Oct., 1883, principally consisting of experts, to show what work was necessary to be done, the cost, etc., the question as to damages being left until the work was completed.

McClive, for the proprietor.—The proposed changes in the E. & N. line will practically render the pipe line useless even if the C. S. R.'s offer is carried out. The track itself when changed, in many places will be over the pipe line, and in other places many feet of earth will be thrown over it. It will make access to the pipes in future nearly impossible owing to passing of trains and necessity for taking up the track. It is necessary, therefore, that the whole pipe line should be moved out from the track.

The proprietor's title is absolute under the Statute of Limitations, having been enjoyed for over twenty years. The resolution and deed of the E. & O. Company were probably *ultra vires*, but this defect has been cured by the statute. The C. S. R. having interfered with this property in part must restore it altogether to its former state, and the proprietor is entitled to have a new pipe line throughout.

Symons, for the company.—The resolution and deed of the E. & O. Company were *ultra vires*, as tending to interfere with franchises granted for a particular purpose. If these instruments were valid they would prevent the carrying out of the objects for which the railway was incorporated, and would besides interfere with its duty of the public.

The Statute of Limitations would not operate before at least forty years, and the proprietor's right is not absolute yet, if it can ever become so.

The company would probably be entitled to treat the proprietor as a trespasser, but this position it has not taken, but offers to restore the pipe that is to be re-laid to its former usefulness. That is the utmost that can be asked.

The evidence clearly shews that the pipes when re-laid as proposed will leave the whole pipe line in a better condition than it was before.

SENKLER, Co. J.—On the 18th October, 1853, a resolution was passed by the Board of Directors of the Erie and Ontario Railroad Company, giving to the late Samuel Zimmerman the privilege of laying the water pipes along the track from the pavilion to Elgin, past the station above the Clifton House for the purpose of conveying water to Elgin.

The Erie and Ontario Railroad ran along the westerly side of the Niagara River, and now is part of the Canada Southern Railroad and belongs to that company. The pavilion lies west of the railroad. Elgin is now the town of Niagara Falls.

Mr. Zimmerman constructed a reservoir near the pavilion, and by means of a water power on the Niagara River forced water through a pipe from the river into the reservoir; the pipe crossed the railroad being sunk under the track. He then, by other pipes along the right of way and beside the track of the railroad, conveyed the water from the reservoir to Elgin.

Nothing of this was done prior to 1853. Mr. Zimmerman died in 1857, and after his death the Bank of Upper Canada purchased the right of Zimmerman to these works at sheriff's sale under execution against Zimmerman's executors, and conveyed the same to Lewis and one Bender, and on or before January 11th, 1860, the executors of Zimmerman, and the Directors of the Erie and Ontario Railroad Company, by deed confirmed the sale so far as they had power to do so, and granted and re-leased to Lewis and Bender the rights and privileges which had been enjoyed by Zimmerman. Lewis has acquired the rights of Bender and is now the sole proprietor.

The privileges have been enjoyed continuously since about 1853.

The Canada Southern Railway Company are now engaged in laying a second track and making other changes in their road, including a deep cutting at the place where the pipe, through which water is forced from the river to the reservoir, crosses the railway by reason of which changes the last mentioned pipe is completely exposed, and its present position is a number of feet higher than the new track will be in the cutting, and the pipe leading from the reservoir to Niagara Falls is in some places exposed entirely, and in other places is almost uncovered and insufficiently protected by the earth left over it. The new track will in places be directly over this line of pipe.

The company, by their notice given under the Consolidated Railway Act 1879, propose to re-lay, depress and lower the said pipes, and to re-place