plained of being purely consequential and too remote to entitle him to compensation as injuriously affecting his land within the statute.

That the Railroad Company have acted under authority of provincial statutes and a by-law, without touching Day's land at all, or causing anything else as back-water, &c.—Regina v. The Eastern Counties Railway Co., 2 R. W. Cases 736, questions Lord Denman's doctrine in Regina v. The Eastern Counties Railway Co., 2 Q. B. 347; The Cast Plate Manufacturers v. Meredith, 4 T. R. 794. He referred to the statute, 14 & 15 Vic., cap. 51, sec. 9, No. 5, sec. 12, sec. 10. Having a by-law, no case for compensation arises—sec. 8, sec. 11 (No. 5-7) No. 19. That they cannot arbitrate, no provision being made for such a case; and there is no right to take possession—Rex v. The Liverpool and Manchester Railway Company, 4 A. & E. 650; Regina v. The London and Southampton R. W. Co., 1 R. W. Cases, 717; Q. B. E. T., 1839—the municipality authorized to act, and must be liable if any one is.

Macdonald, in reply—That the Railroad Company is liable as if the words *injuriously affected* were in the act. The Company must comply with the terms of the by-law. The statute speaks of compensation when the land may suffer damage, or may suffer damage from the exercise of any of the powers &c.

He referred to sec. 11, Nos. 7 & 19, which contain language similar, and speak of injury to land taken, or suffering damage, &c. If the land taken applies to the road in this case the other alternative applies to Day, who is injured seriously. He referred to 14 & 15 Vic., cap. 51, sec. 4, and the subsequent act, and sec. 68. The East and West India Docks Birmingham R. W. Co. v. Gattke, 6 R. W. Cases, 371.—The by-law is incorporated with the statute, and both are to be taken together.

Galt said the Company are answerable to the municipality if the by-law is not complied with—not to Day—Sec. 1, Nos. 5 & 7.

So the question is, whether, if Day's lands are injuriously affected, in fact it forms a case entitling him to compensation under the provisions of the statute cited.—Regina v. The Eastern Counties Railway Company, 2 Q. B. 347, 569, S.C. 2 R.W. cases 736; The South Staffordshire Railway Co. v. North Staffordshire Railway Co., 16 Q. B. 923,—Law Times, 29th May, 1850, p. 106; The Caledonia Railway Company v. Ogilvie, 92 Eng. Rep. 22.

MACAULAY, C. J., delivered the judgment of the court.

The provincial statute 14 & 15 Vic., cap. 51, sec. 4, enacts, that the power given by the special act to construct the railway, and to take lands for that purpose, shall be exercised subject to the provisions and restrictions contained in this act, and compensation shall be made to the owners and occupiers of, and all other parties interested in, any such land so taken or *injuriously affected* by the construction of the said railway, for the value of all damages sustained by reason of such exercise as regards *such lands* of the powers by this or the special act, &c., vest in the Company.

Sec. 11, No. 5—after deposit of maps, and giving notice, &c., application may be made to the owners of lands, or to parties empowered to convey lands, or interested in lands which may suffer damage from the taking of materials or the exercise of any of the powers granted for (qu. to) the railway, &c. See residue of the clause, and also sub-sections Nos. 7 & 19, and the statutes 14 & 15 Vic., cap. 73, and 16 Vic., cap. 37; the special act incorporating the Grand Trunk Railway of Canada, and chaps. 39 & 76. The imperial statute 8 & 9 Vic., cap. 18, sec. 68, enacts that if any party shall be entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken for, or *injuriously affected* by, the execution or the works, &c.

The case of the Caledonia Railway Co. v. Ogilvie (House of Lords Cases, March 30, 1855, 29 Eng. Rep. 22) makes it a test whether the words, *injuriously affected*, entitle the owner of lands to compensation in respect of any act which, if done by the Railway Company without the authority of Parliament, would have entitled him to bring an action against them; and though not a universal test, since the statutes may authorize what would otherwise be actionable, still it is applicable to the case before us. What the Railway Company have done was either legally authorized by the statute and by-law, or it was illegal. If illegal, or as if there had been no statute or by-law, it would be a public nuisance; and thus regarded, the applicant does not make out a case that would entitle him as a private individual to sustain an action because of the peculiar or special inconvenience experienced by him by reason of such nuisance; he was only inconvenienced like any other person, having occasion to pass that way; or, like all other who had houses, and resided in the vicinity of the street. I apprehend he could not maintain an action by reason of the inconvenience he experienced every time he went in or out of his own premises. But if he could, it is said in the above case by the Lord Chancellor it would only be a multiplication of the same damage, not a different damage; and that all attempt at arguing that it was a damage to the estate was mere play upon words. And if it is a public nuisance, it follows that it is not a case for compensation at all events; so to treat it would be impliedly admitting its legality in itself, apart from the applicant's claim.

Then if authorized by law, the case above cited establishes, I think, that the works complained of do not injuriously affect the applicant's land within the meaning of the statute, admitting the right to compensation when lands are injuriously affected by the construction of the railway as distinguished from lands taken, or lands temporarily occupied, or soil or materials removed therefrom in the course of, and for the purpose of the work.

It follows that in either point of view this application cannot be granted.

Mandamus refused.

CHAMBER REPORTS.

(Reported for the Law Journal and Harrison's Common Law Procedure Act, by T. MOORE BENSON, ESQUIRE.)

NIMMO v. FLANIGAN ET AL.

Demurrer to declaration—Averment of non-payment of promissory note.

The statement in a declaration that a promissory note was duly presented and *dishonoured*, is a sufficient averment of non-payment as against the maker, and probably as against the endorser also, but *query*.

[Oct. 31, 1856.]

Declaration—"For that the said defendant Flanigan on the 28th June, 1856, by his promissory note, now overdue, promised to pay to the defendant Strange, or order, £325, at the Bank of Montreal, three months after the date thereof; and the said defendant Strange endorsed the same to the plaintiff, and the said note was duly presented for payment on the day it became due, at said Bank, and was dishonored, whereof the defendants respectively had due notice; and the plaintiff claims £325."

Defendants demurred to the declaration, assigning as cause: that it is not alleged therein that the defendants, or either of them, did not pay the amount of the promissory note declared on, nor is any breach of contract alleged in the declaration.

† *McMichael*, for plaintiff, obtained a summons to show cause why the demurrer should not be set aside as frivolous, and the plaintiff have leave to sign judgment for want of a plea; or why the demurrer of the defendant Flanigan should not be set aside with costs, and the plaintiff have leave to sign judgment against the said defendant Flanigan, for want of a plea, and to

† 3rd November.