

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

bound to restore the whole line in as good a position as it was before, but *held*, that L. had not an absolute title to the easement, the resolution of 1853 and subsequent deed being *ultra vires* the company; and that, therefore, the easement could not be said to lie in grant so as to confer a title by possession by a user for a term shorter than forty years under sec. 35 R. S. O. cap. 108.

Held, further, that a railway company has no power to make grants in derogation of the purposes and objects for which it is incorporated, and which might prevent the performance of its public duties, the easement in question being of that character.

Held, also, that the C. S. R. Co. could not be required in this case to perform any works beyond those proposed in its notice to arbitrate.

[St. Catharines.]

The line of the Erie and Ontario Railway which subsequently became the Erie and Niagara Railway, runs along the top of the bank on the west side of the Niagara River from a point above the Falls down to the town of Clifton, now Niagara Falls.

Mr. Zimmerman under the resolution set out in the judgment and about 1853 constructed a reservoir on the east side of the Railway in Range 10 just above the falls and from thence laid a water main six inches in diameter to Clifton, a distance of about two miles along the E. and O. track.

Subsequently Mr. Lewis purchased the interest of Mr. Zimmerman in the water works and having obtained the deed mentioned in the judgment, constructed a new reservoir on the west side of the track in Range 10 and connected it with the water main and continued in the uninterrupted use and enjoyment of the whole water works system until this time.

The Canada Southern Railway operated the Erie and Niagara Railway and obtained an Act from the Dominion Parliament, 45 Vict. ch. 68, sec. 2, authorizing the construction of a branch from its main line to some point on the Niagara River, and under the authority of this Act, in the summer of 1883 located the branch from its main line at the town of Welland to the town of Niagara Falls near Suspension Bridge, adopting the right of way of the Erie and Niagara Railway in some places, from a point above the falls down to the town of Niagara Falls.

It became necessary to depress the old track very considerably in some places, and to raise it in others to make a uniform grade.

The C. S. R. required a portion of range 10 between the reservoirs for right of way; and for some distance along the track, the pipe line was exposed by the construction of the requisite works.

The cut at range 10 was about twenty-five feet deep and in excavating this, the two pipes, supply and discharge, leading between the reservoirs became exposed and suspended in the air.

On the 16th of September 1883 the C. S. R. served a notice under the Consolidated Railway Act 1879, sec. 9, sub-section 12: (1) describing the land required for railway purposes in range 10 and then proceeded as follows:—(2) "You are also notified that the said company intended to exercise certain powers (and which are hereinafter set out) in regards to certain appurtenances to the said land, comprising the pipe line now existing between the said reservoirs, upon the said range 10, and from thence to the town of Niagara Falls, and used for the purpose of conveying water to the said town, and a right to lay pipes from the said reservoirs along the line of the E. and N. Ry. Co. to the said town, and the portion of the said pipe line, and appurtenance in reference to which such powers are to be exercised, may be more particularly described as follows":—

The different points at which the pipe line would be exposed or become within five feet of the surface was then described and a general clause was added as follows:—

"And those portions of the said pipe, at whatever point the same may become within five feet of the surface of the ground, owing to the construction of its line or the alteration of the Erie and Niagara line, by the C. S. R. Co."

(3) "The powers to be exercised by the said company in regard to the said appurtenance are to relay, depress and lower the said pipes, and to replace them where necessary, with new and similar pipes to a sufficient depth to make them five feet below the surface of the land, as the same will be at the completion of the construction of the line of the C. S. R. Company, or the alteration of the line of the E. and N. Ry. Co. and to suitably connect the said pipes with the remaining portion of the said pipe and to restore the pipe so to be relaid to their former state of usefulness."

The last clause adopted the words of sec. 7, sub-sec. 6, of the Railway Act.

Compensation for the land and damages was also offered.

The proprietor, Mr. Lewis, served a notice refusing the offer, and then proceeded as follows:— "And I further give you notice that I claim that your expropriation in fact destroys my franchise, and under any circumstances will render my property useless as a means of supplying water to my present or future customers; and I further claim that you are not under any circumstances entitled or empowered to enter into my pipe line to elevate or depress the same, or replace the pipes or other fixtures or appurtenances necessary to put the works in repair again; and I further claim that