

SHAW V. NORTHERN AND NORTHWESTERN RY. CO.—NOTES OF CANADIAN CASES. [Sup. Ct.]

By section 7 of the Public Railway Act, subsection 6, the company are empowered to construct, maintain and work their road across, along or upon any stream or water-course which it intersects, but the same must be restored by the company to their former state, or to such state as not to impair their usefulness.

Where these statutes affect the common law rights of the plaintiff, I do not care to construe them so as to confer the power to do what the defendants have done, unless I feel myself compelled to do so, and therefore I cannot refuse the order and injunction asked for. At the same time I would suggest that the plaintiff would only be doing what is reasonable, if he would accept what the jury have assessed as his damage, if the present state of things continues—that is, to make over to the defendants the piece of land on the north side of the railway, on payment of the verdict of \$125 and his costs of suit.

Should he refuse to do this, and insist on his strict legal rights, he will be entitled to judgment for \$50 and his full costs of suit in this court, together with an order directing the defendants to remove the obstruction, and restraining them from any repetition of the acts complained of.

To this extent the plaintiff's order *nisi* will be made absolute, and the defendant's order *nisi* will be discharged.

From this judgment the defendants appealed, and assigned the following reasons for appeal:—

The appellants submit that the judgment appealed from should be reversed for the following amongst other reasons:

1. The appellants are not trespassers; they erected the dam in question with the assent of the respondent's grantor for the purpose of obtaining water, which they were entitled to do under their statutory powers, and the respondent purchased the land, knowing that the appellants had constructed the dam thereon.

2. That the respondent's right to compensation, if any, is by arbitration, and not by action.

3. That if the respondent has any right to recover he is only entitled to damages for six months before action.

Consolidated Railway Act, 1879, 42 Vict. chap. 9, section 9, sub-sections 38 and 39; Northern Railway Act, 1875, 38 Vict. chap. 65, sec. 28.

Knapp v. Great Western Railway, 6 U. C. C. P., 187; *Patterson v. Great Western Railway*, 8 C. P., 97; *Clark v. Grand Trunk Railway*, 35 U. C. R., 57; *Cameron v. O. S. & H. R. R.*, 14 U. C. R., 612; *Follis v. Port Hope*, 9 U. C. C. P., 50; *McLean v. Great Western Railway*, 33 U. C. R., 198;

Welland v. Buffalo, etc., Railway Co., 31 U. C. R., 539.

On the 12th July, 1886, the appeal was heard by the Court of Appeal.

Boulton, Q.C., for the appellants.

Stratky, Q.C., for the respondent.

After argument the Court unanimously dismissed the appeal with costs.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.

SUPREME COURT OF CANADA.

DUFFUS V. CREIGHTON.

Sheriff—Action against—Execution of writ of attachment—Abandonment of seizure—Eschoppel.

A writ of attachment against the goods of M. in the possession of S. was placed in the sheriff's hands and goods seized under it. After the seizure the goods, with the consent of the plaintiff's solicitor, were left by the sheriff in charge of S., who undertook that the same should be held intact. The sheriff made a return to the writ that he had seized the goods. The sheriff subsequently sold the goods under execution of the creditors. In an action against the sheriff,

Held, reversing the judgment of the court below, that the act of leaving the goods in the possession of S. was not an abandonment of the plaintiff's solicitor of the seizure and if it was the sheriff was estopped by his return to the writ from raising the question.

Held, also, that the act of plaintiff's solicitor acting as attorney for S. in a suit connected with the same goods was not evidence of an intention to discontinue proceedings under the attachment.

Russell, for the appellants.

Gormully, for the respondent.