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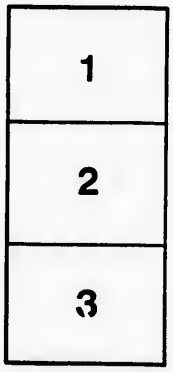

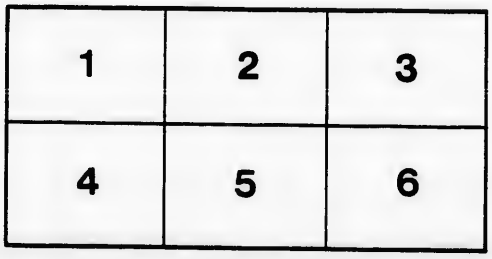

A HANDBOOK

OF PROCEDURE UNDER THE

DITCHES AND WATERCOURSES ACT, 1894,

AND AMENDMENTS THERETO.

BY

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PREFACE.

A SOMEWHAT extended experience in the hearing of appeals before County Judges under "The Ditches and Water-courses Act" has convinced the compiler of this work of the necessity which exists for a convenient handbook under the Act. The different matters of detail under the Act, as well as the appeals, usually have to be worked out in country places where library facilities do not exist, and the object of this work is to present, in convenient form, not only the Act itself, but also references to the different cases which have been decided under it. It is to be clearly

understood that this work does not in any way touch upon matters of procedure under the Drainage Clauses of the Municipal Act, which are now incorporated in "The Drainage Act of 1894." This is quite another subject, involving the consideration of distinct principles, and it is felt that any effort to treat it satisfactorily would be quite beyond the scope of this work.

G. F. H.

OTTAWA, MAY, 1895.

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PART I.

THE DITCHES AND WATERCOURSES ACT, 1894.

TABLE OF CASES CITED.

57 VICTORIA, CHAP. 55, ONT.

An Act respecting Ditches and Watercourses.

[ASSENTED TO 5TH MAY, 1894.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

SHORT TITLE.

1. This Act may be cited as "*The Ditches and Watercourses Act, 1894.*"

CERTAIN ACTS NOT AFFECTED.

2. This Act shall not affect the Acts relating to municipal or government drainage work. (Rev. Stat. c. 220, s. 3).

This Act is intended to apply only to what may be termed "local" drainage schemes; those where the number of original township lots to be affected is not more than seven and where the total expenditure is not to exceed $1,000.00 (see s. 5). More extensive schemes are to be worked out under the drainage clauses of the Municipal

Act, now consolidated in the Drainage Act of 1894 (57 Vic. c. 56). These again are apart from drainage works undertaken by the government.

INTERPRETATION CLAUSE.

3. Where the words following occur in this Act they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:—

Engineer.

"Engineer" shall mean civil engineer, Ontario land surveyor, or such person as any municipality may deem competent and appoint to carry out the provisions of this Act. (See Rev. Stat. c. 220, s. 2 (2).)

Judge.

"Judge" shall mean the senior, junior or acting judge of the county court of the county in which the lands are situated in respect of which the proceedings under this Act are taken.

Owner.

"Owner" (*a*) shall mean and include an owner, the executor or executors of an owner, the guardian of an infant owner, any person entitled to sell and convey the land, an agent under a general power of attorney, or a power of attorney authorizing the appointee to manage and lease the lands and a municipal corporation (*b*) as regards any highways under its jurisdiction.

(*a*) The former Acts did not contain any interpretation of the term "owner," and much difficulty was thereby occasioned. The drainage clauses of the Municipal Act expressly made the

assessment rolls of the municipality the evidence of ownership, but no such provision is found in this Act. In *York* v. *Osgoode*, 24 O. R. 12, the Queen's Bench Divisional Court decided that "owner" in the Act was intended to mean the person appearing by the assessment roll to be the owner, "for it could never have been intended that in a proceeding such as this, under this Act, there should be an inquiry as to the title of the apparent owner of the lands affected by the proposed work, and that a proceeding such as this should be set at naught by the appearance after the whole proceeding was at an end of persons who were not assessed claiming to be persons affected or interested by or in the work awarded to be done." (Per Armour, C. J., at p. 26). This decision was reversed by the Court of Appeal (21 A. R. 168), which held that there was nothing in the Act to show that the word "owner" was intended to have any other than its ordinary legal meaning, and this latter decision has been sustained by the judgment of the Supreme Court (rendered 11th March, 1895, not yet reported).

The result is, therefore, that it is now very necessary to see to it that the owner who (whether by himself or by one of the several representatives

named in this clause) institutes proceedings under this Act has a good legal title to the land with respect to which he makes the declaration required by s. 7. If he has not a good title, he exposes not only himself, but all other parties affected by or interested in the scheme, to the trouble and expense of Superior Court litigation.

(*b*) The municipality, as owner of the highways, is upon exactly the same footing as any individual owner under the Act.

Clear days.

"Clear days" shall mean exclusive of the first and last days of any number of days prescribed. (52 V. c. 49, s. 7).

Ditch.

"Ditch" shall mean and include a drain open or covered wholly or in part and whether in the channel of a natural stream, creek or watercourse or not, and also the work and material necessary for bridges, culverts, catch-basins and guards.

Non-resident.

"Non-resident" shall mean a person who does not reside within the municipality in which his lands, affected by proceedings under this Act, are situate.

Maintenance.

"Maintenance" shall mean and include the preservation of a ditch and keeping it in repair.

Construction.

"Construction" shall mean the original opening or making of a ditch by artificial means.

Written, writing.

"Written," "writing," or terms of like import, shall include words printed, engraved, lithographed or otherwise traced or copied.

APPOINTMENT OF ENGINEER.

4. (1) Every municipal council shall (*a*) name and appoint by by-law (Form A) one person to be the engineer(*b*) to carry out the provisions of this Act, and such engineer shall be and continue an officer of such corporation until his appointment is revoked by by-law and of which he shall have notice, and another engineer appointed in his stead, who shall have authority to commence proceedings under this Act or to continue such work as may have been already undertaken. (See Rev. Stat. c. 220, s. 2).

(*a*) "Shall." This is imperative, and it is submitted that mandamus would lie to compel the council to appoint an engineer: *Dagenais* v. *Trenton*, 24 O. R. at p. 345.

(*b*) See the interpretation clauses of the Act for the extended meaning of the word engineer.

The functions of the engineer are judicial: *Warren* v. *Deslippes*, 33 U. C. Q. B. 59.

Fees of Clerk and Engineer.

(2) The council of every municipality shall, by by-law provide for the payment to the clerk of the municipality of a

fair and reasonable remuneration for services performed by him in carrying out the provisions of this Act, and the council shall also, by by-law, fix the charges to be made by the engineer of the municipality for services performed by him under this Act.

Oath of Engineer.

(3) Every engineer appointed by a municipal council under this section shall (*a*) before entering upon his duties take and subscribe the following oath (or affirmation) and shall file the same with the clerk of the municipality:—

In the matter of *The Ditches and Watercourses Act, 1894.*

I (*name in full*) of the town of , in the county of , engineer (*or* surveyor) make oath and say, (*or* do solemnly declare and affirm), that I will, to the best of my skill, knowledge, judgment and ability, honestly and faithfully, and without fear of, favour to, or prejudice against any owner or owners, perform the duties from time to time assigned to me in connection with any work under *The Ditches and Watercourses Act, 1894*, and make a true and just award thereof.

Sworn (*or* solemnly declared and affirmed) before me at the of in the county of this day of A.D, 189 .

A commissioner, etc. (*or* township clerk, *or* J. P).

(*a*) This provision is new, and it should be strictly observed. Until the engineer has taken the oath or affirmation, he cannot be said to be clothed with the powers provided by the Act.

LIMIT OF WORK.

5. (1) Every ditch to be constructed under this Act shall be continued to a sufficient outlet, (*a*) but shall not pass through or into more than seven original township lots exclusive of any part thereof on or across any road allowance, (*b*) unless the council of any municipality upon the petition of two-thirds of the owners of all the lands to be affected by the ditch shall pass a resolution authorizing the extension thereof through or into any other lots within such municipality, and upon the passing of such resolution the proposed ditch may be extended in pursuance of such resolution, but subject always to the provision of sub-section 2 of this section.

(*a*) "Sufficient outlet." The expression used in the former Act was "proper outlet" (R. S. O. 1887, s. 4, s.-s. 2), and a sub-section was added (s.-s. 3) requiring the written consent of an owner to be obtained before his lands could be overflowed or flooded. The provision as to overflowing or flooding being omitted from the present Act, it follows that a "sufficient" outlet is intended to mean one which will carry away the water without overflowing or flooding.

(*b*) This provision is also new. It is submitted that the engineer can have no jurisdiction beyond the seven lots, and the limit of costs provided by the next sub-section. It will be noticed that the words used are "shall not," and the rule of con-

struction of statutes is that where negative words are used they make the statute imperative. So too where the words are absolute, explicit and peremptory, and show that no discretion is given, and especially so where jurisdiction is conferred. See *Potter's Dwarris*, pp. 228, 229.

Limit of Cost.

(2) Provided nevertheless that no ditch, the whole cost whereof, according to the estimate of the engineer or the agreement of the parties, will exceed $1,000, shall be constructed under the provisions of this Act.

See the notes to the last preceding sub-section.

LANDS LIABLE FOR CONSTRUCTION.

6. (1) The lands, the owners of which may be made liable for the construction of a ditch under this Act, shall be those lying within a distance of seventy-five rods from the sides and point of commencement of the ditch, but the lands through or into which the ditch does not pass, and which lands also adjoin any road allowance traversed by the ditch, shall not be liable except when directly benefited, and then only for the direct benefit.

The limit in the former Act (s. 8, s.-s. 2) was fifty rods instead of seventy-five as at present. Any attempt to assess lands beyond this limit would be in excess of jurisdiction.

Proviso as to Eastern Ontario.

(2) Provided nevertheless that the council of any county lying east of the county of Frontenac may pass a by-law declaring that within said county the lands lying within a distance of one hundred rods from the sides and point of commencement of the ditch may be made liable instead of seventy-five rods, as mentioned in sub-section 1 of this section.

DECLARATION OF OWNERSHIP.

7. Any owner (*a*) other than the municipality shall, before commencing proceedings under this Act, file with the clerk of the municipality in which the parcel of land requiring the ditch is situate, a declaration of ownership thereof (Form B) which may be taken before a justice of the peace, a commissioner for taking affidavits, or the clerk of the municipality (*b*).

(*a*) See notes to s. 3 as to the care necessary to be taken on the question of ownership.

(*b*) The several forms given in the schedule "or forms to the like effect" are sufficient for the purposes of the Act. See s. 40.

By the 58 V. c. 54, s. 1 of the amending Act of 1895, this section is amended as follows:—

JUDGE MAY PERMIT DECLARATION TO BE FILED.

1. Section 7 of *The Ditches and Watercourses Act, 1894*, is amended by adding thereto the following: "Provided nevertheless that in case of omission to file such declaration through inadvertence or mistake at the time aforesaid, the judge may

in case of such ownership at said time permit the same to be filed at any stage of the proceedings upon such terms and conditions as he may impose or direct.

This amendment became law 16th April, 1895. It is not at all likely that the failure to make and file the declaration of ownership would be held to be such an omission as would be fatal to the validity of the award, especially in view of the provisions of s. 23 of the Act. It is well, however, to have some such provision as that of this section, in order that proceedings may not be set at naught by the carelessness or ignorance of a *bona fide* owner. It would be well for the judge, before giving relief under this section, to require some evidence of ownership to be laid before him, and thus avoid possible difficulties in the future.

PROCEEDINGS FOR FRIENDLY MEETING.

8. The owner of any parcel of land who requires the construction of a ditch thereon shall, before filing with the clerk of the municipality the requisition provided for by s. 13 of this Act, serve (*a*) upon the owners or occupants of the other lands to be affected a notice in writing (Form C), signed by him, and naming therein a day and hour and also a place convenient to the site of the ditch at which all the owners are to meet and estimate the cost of the ditch, and agree, if possible, upon the apportionment of the work and supply of material for construction among the several owners according to their

respective interests therein, and settle the proportions in which the ditch shall be maintained, and the notices shall be served not less than twelve clear days (*b*) before the time named therein for meeting. (See Rev. Stat. c. 220, s. 5, *part*).

The object of this clause is plain. By taking advantage of its provisions the parties may avoid the expense of the making of an award, and may yet obtain the full benefit of the other provisions of the Act. In any event the procedure detailed in this section is the first step after the filing of the declaration of ownership, in the direction of an award.

(*a*) Strict service of the notices and other preliminaries may be waived by the subsequent action of the parties: *Roberts* v. *Holland*, 5 P. R. at 355, provided the jurisdiction be otherwise undoubted: *Moore* v. *Gamgee*, L. R. 25, Q. B. D. 244.

(*b*) "Clear days." See interpretation clause.

PROCEEDINGS IF PARTIES AGREE.

9. (1) If an agreement is arrived at by the owners, as in the next preceding section is provided, it shall be reduced to writing (Form D), and signed by all the owners, and shall within six days after the signing thereof be filed with the clerk of the municipality in which the parcel of land, the owner of which requires the ditch is situate; but, should the lands affected lie in two or more municipalities, the agreement shall

be in as many numbers as there are municipalities, and filed as aforesaid with their respective clerks; and the agreement may be enforced in the like manner as an award of the engineer as hereinafter provided. (See Rev. Stat. c. 220, s. 5, *part*).

This agreement is in effect an award, and in order that there may be no difficulty in its enforcement, great care should be taken to see that it is properly drawn, especially in the description of the ditch. See notes to s. 16.

MUNICIPALITY TO KEEP FORMS.

(2) It shall be the duty of the municipality to keep printed copies of all the forms required by this Act.

These forms may, however, be adapted to suit the emergencies of an especial case. See s. 40.

INFORMALITIES NOT TO INVALIDATE PROCEEDINGS.

10. No proceedings taken or agreement made and entered into under the provisions of sections 8 and 9 of this Act shall in any case for want of strict compliance with such provisions be void or invalidate any subsequent proceedings under this Act, provided the notices required by section 8 of this Act have been duly served; and any such agreement may, with the consent in writing of the parties thereto (which consent shall be filed in the same manner as the agreement), or by order of any court, or of the judge on an appeal under this Act, be amended so as to cause the same to conform to the provisions of this Act.

This is a most salutary provision, as errors are always likely to be made in working out sections 8 and 9. A clear distinction must be borne in mind, however, between preliminaries of a routine nature and those necessary to found jurisdiction: *Re Anderdon and Colchester*, 21 O. R. 476; *Reg.* v. *Malcolm*, 2 O. R. 511; *York* v. *Osgoode*, 24 O. R. 12.

ADJOURNING MEETING TO ADD PARTIES.

11. If at or before the meeting of owners provided for in section 9 of this Act, it shall appear that any notice required by section 8 has not been served, or has not been served in time, or duly served, the owners present at such meeting may adjourn the same to some subsequent day in order to allow the necessary notices to be duly served, and such adjourned meeting shall, if such notices have been given and served as provided by section 8, be a sufficient compliance with the provisions of this Act.

To avoid objections, it is well to notify any parties who may not have attended the meeting of the adjournment.

REEVE TO SIGN FOR MUNICIPALITY.

12. The reeve or other head of the municipal council of any municipality shall have power on behalf of the municipal council thereof to sign the agreement aforesaid, and his signature shall be binding upon the corporation.

The assent of the municipality may be shown by resolutions passed by the council: *York* v. *Osgoode*, 24 O. R. 12.

PROCEEDINGS WHEN NO AGREEMENT.

13. In case an agreement as aforesaid is not arrived at by the owners at the said meeting or within five days thereafter, (*a*) then the owner (*b*) requiring the ditch may file with the clerk of the municipality in which such parcel is situate, a requisition (*c*) (form E), naming therein all the several parcels of land that will be affected by the ditch and the respective owners thereof, and requesting that the engineer appointed by the municipality under this Act be asked to appoint a time and place in the locality of the proposed ditch at which the said engineer will attend to make an examination as hereinafter provided. (See Rev. Stat. c. 220, s. 6, *part*).

(*a*) There should be a delay of five days between the "friendly meeting" under s. 8, and the taking of further proceedings. This is obviously to enable any person who may have refused to agree with a majority to reconsider his position.

(*b*) "Owner," see notes to s. 3.

(*c*) The whole of the subsequent proceedings hinge upon this requisition, and great care should be taken to see that it is properly drawn, as well as that all preliminaries have been properly taken. Up to this point the proceedings are as follows:—

(1) Appointment of engineer, under s. 4, and the taking of his oath of office.

(2) Filing of declaration of ownership, s 7.

(3) Service of notice (form C), s. 8.

(4) Friendly meeting twelve clear days later (s. 8), and adjournment if necessary, s. 11.

(5) Delay of five days, s. 13.

(6) Filing of requisition, s. 13.

NOTICE TO ENGINEER AND HIS NOTICE.

14. The clerk, upon receiving the requisition, shall forthwith enclose a copy thereof in a registered letter (*a*) to the engineer; and on the receipt of the same by the engineer he shall notify the clerk in writing, appointing a time and place at which he will attend in answer to the requisition, which time shall be not less that ten nor more than sixteen clear days from the day on which he received the copy of the requisition; and on the receipt of the notice of appointment from the engineer the clerk shall file the same with the requisition and shall forthwith send by registered letter (*a*) a copy of the notice of appointment to the owner making the requisition, who shall, at least four clear days before the time so appointed, serve upon the other owners named in the requisition a notice (form F), requiring their attendance at the time and place fixed by the engineer, (*b*) and shall, after serving such notice, endorse on one copy thereof the time and manner of service, and leave the same with the endorsements thereon with the engineer (*c*) not later than the day before the time fixed in the notice of appointment. (See Rev. Stat. c. 220, ss. 6, 8, *part*; 52 V. c. 49, ss. 1, 2).

(*a*) The post office certificate of registration should be kept in case of an appeal.

(*b*) The absence of the service of this notice (form F) would form a ground of appeal only, and would not invalidate the award: *York* v. *Osgoode*, 24 O. R. 12.

(*c*) This is evidently for the convenience of the engineer, in order that he may be assured that the parties have been properly notified and that he can proceed with his work. The want of strict observance of this preliminary should not be allowed as a ground of appeal from an award, though it would no doubt excuse the engineer from attendance upon the return of his appointment.

MODE OF SERVING NOTICES.

15. (1) Notices under the provisions of this Act shall be served personally, or by leaving the same at the place of abode of the owner or occupant, with a grown up person residing thereat; and in case of non-residents, then upon the agent of the owner, or by registered letter addressed to the owner at the post office nearest to his last known place of residence, and where that is not known, then he may be served in such manner as the judge may direct. See Rev. Stat. c. 220, s. 19 (1).

Care should be taken to see that the notice is directed to the person who is the owner of the property, within the meaning of the interpretation

clause. This section merely provides for service, either personal or substitutional, but does not relieve the party promoting the scheme from the necessity of finding out the identity of each owner.

Occupant to Notify Owner.

(2) Any occupant not the owner of the land, notified in the manner provided by this Act, shall immediately notify the owner thereof, and shall, if he neglects to do so, be liable for all damages suffered by such owner by reason of such neglect. Rev. Stat. c. 220, s. 7.

The necessity for this provision is clear. It would be manifestly unfair to the owner to make service on his tenant good as against him, without giving him some assurance that the fact of service will be brought to his notice.

EXAMINATION BY ENGINEER.

16. (1) The engineer shall attend (*a*) at the time and place appointed by him in answer to the requisition, and shall examine the locality, (*b*) and if he deem it proper, or if requested by any of the owners, may examine (*c*) the owners and their witnesses present, and take their evidence, and may administer an oath or affirmation to any owner or witness examined by him. If upon examining the locality the engineer is of opinion that the lands of owners upon whom notice has not been served will be affected by the ditch, (*d*) he shall direct that the notice required by section 14 shall be served on such owners by the owner making the requisition, and shall adjourn (*e*) the proceedings to the day named in the notice for continuing the same

for the purpose of allowing such owners to be present and to be heard upon the examination and taking of evidence.

(*a*) A mandamus will not lie against the township to compel the attendance of the engineer: *Dagenais* v. *Trenton*, 24 O. R. 343.

In this case it is intimated in the judgment of Mr. Justice MacMahon (p. 348) that a mandamus might be had against the engineer to compel the performance of his duty, but it is submitted that this is contrary to the *ratio decidendi* of *O'Byrne* v. *Campbell*, 15 O. R. 339, and *Hepburn* v. *Orford*, 19 O. R. 585, and that the only remedy against the engineer is the penalty provided by section 37 of the Act. Section 38 (post) expressly takes away the right to a mandamus if any existed.

(*b*) "*Shall examine the locality.*" This examination should cover the whole of the ground coming within the scope of the requisition, in order that the engineer may fix a course best adapted to the drainage of the whole.

(*c*) In either event, if he deem it proper, *or* if requested so to do, the engineer "may" take evidence. Notwithstanding the permissive word, it would not be wise for an engineer to refuse to take evidence after having been requested to do

so. Such a refusal would amply justify the judge on appeal in sending the award back under section 23.

(*d*) In bringing in further parties as here provided, care must be taken to keep within the limits prescribed by sections 5 and 6.

(*e*) In fixing the time for his adjourned meeting, the engineer must remember that the next sub-section requires him to make his award within thirty days after his first attendance.

THE AWARD.

(2) The engineer may adjourn his examination and the hearing of evidence from time to time, and if he shall find that the ditch is required, he shall, within thirty days after his first attendance, make his award in writing (form G), (*a*) specifying clearly the location, description and course of the ditch, its commencement and termination; (*b*) apportioning the work and the furnishing of material among the lands affected and the owners thereof, according to his estimate of their respective interests in the ditch; (*c*) fixing the time for performance by the respective owners; (*d*) apportioning the maintenance of the ditch among all or any of the owners, so that as far as practicable each owner shall maintain the portion on his own land; and (*e*) stating the amount of his fees and the other charges, and by whom the same shall be paid. (See Rev. Stat. c. 220, s. 8 (1).)

This is beyond doubt the most important section of the Act. Too great stress cannot be laid

upon the importance of appointing thoroughly competent engineers, in view of the extraordinarily wide powers which they possess. The award operates as the grant of an easement on the land through which it passes, binding privies in estate as well as parties; and so long as such award remains unchanged the rights of the parties and the nature of the easement must be governed by it. *Kelly* v. *O'Grady*, 34 U. C. Q. B. 562. It is true that an appeal lies to the County Judge as hereinafter provided (s. 22, *et seq.*), but questions of fact and matters of detail are for the engineer, whose discretion will not be reviewed if exercised reasonably: *Re Roberts and Holland*, 5 P. R. at 353; *Short* v. *Parmer*, 24 U. C. Q. B. 633; *Cameron* v. *Kerr*, 25 U. C. Q. B. 533. The decision of the County Court Judge, too, is final, and not appealable. *York* v. *Osgoode*, 24 O. R. 12, provided that the engineer has had jurisdiction to make the award: *Moore* v. *Gamgee*, L. R. 25 Q. B. D. 244.

(*a*) The preparation of the award, as a matter of detail, shall receive every possible care and attention. The location, description and course of the ditch, its commencement and termination, should be set out with unmistakable clearness. Failure to comply with the requirements of the

statute in this respect will invalidate the award: *Dawson* v. *Murray*, 29 U. C. Q. B. 464; *Murray* v. *Dawson*, 17 U. C. C. P. 588. Points should be clearly fixed from place to place along the course of the ditch, and the directions, distances and dimensions from point to point accurately stated. No room should be left for any possible charge of indefiniteness. Engineers too frequently depend upon the stakes placed by them in their field work, forgetting how readily these are displaced.

(*b*) The apportionment of the work and the furnishing of material, among the lands affected and the owners thereof, is to be in accordance with the engineer's estimate of their respective interests in the ditch. In other words this apportionment should be based on the respective proportions of benefit to be derived. This is a matter to which the engineer should give most careful consideration, as it is one with which, as being matter of discretion, the judge in appeal will not readily interfere (*Re Roberts and Holland*, 5 P. R. at 353), while yet there is no more frequent ground of complaint on appeal.

(*c*) It is not sufficient, where the work is to be done by several different parties, to fix one general

time for the completion of the whole work, but each particular party should be given a specified time within which to complete his own portion. See *Murray* v. *Dawson* and *Dawson* v. *Murray*, ante.

(*d*) The maintenance of a ditch may often be of more importance than its original construction, this depending largely upon the nature of the locality and of the soil. The remarks already made upon the question of the apportionment of the original work will apply here with equal force.

(*e*) The amount of the engineer's fees and the other charges must be stated, and the burden of payment equitably distributed, in proportion with the benefit received. The scale of fees of the engineer and of the township clerk are fixed by by-law under s. 4, s.-s. 3.

Covering Ditches.

(3) In any case where a ditch is to be covered, the engineer shall in his award specify the kind of material to be used in the covered portion of such ditch.

See s. 33 as to covered ditches.

CROSSING LAND OF PERSON NOT BENEFITED.

17. Should the engineer be of the opinion that the land of any owner will not be sufficiently affected by the construction

of the ditch to make him liable to perform any part thereof, and that it is necessary or not, as the case may be, to construct the ditch across or into his land, he may, by his award, relieve such owner from performing any part of the work of the ditch and place its construction on the other owners; and any person carrying out the provisions of the award upon the land of the owner so relieved shall not be considered a trespasser while causing no unnecessary damage, and he shall replace any fences opened or removed by him. (See Rev. Stat. c. 220, s. 9 (1).)

This section was originally enacted to meet the difficulties arising in cases such as that of *Riddell* v. *McKay*, 13 U. C. L. J. 92, in which it was held that the former Act applied only where the lands of *each* of the adjoining owners derived actual benefit. With such questions arising, the necessity for this provision is obvious. Without it, assuming *Riddell* v. *McKay* to be good law, a man could not continue his drain across his neighbor's land, unless the neighbor would derive actual benefit, and cases frequently arose where the Act was practically useless by reason of the difficulty of obtaining an outlet.

FILING AWARD, AND NOTICES TO PERSONS AFFECTED.

18. The engineer shall forthwith, (*a*) after making his award as hereinbefore provided, file the same, and any plan, profile or specifications of the ditch, with the clerk of the municipality in which the land requiring the ditch is situate, but should the lands affected lie in two or more municipalities,

the award and any plan, profile or specifications shall be filed by the engineer with the clerk of each municipality, and may be given in evidence in any legal proceedings by certified copy, as are other official documents, (*b*) and the clerk of the municipality, or of each of the municipalities, shall forthwith, upon the filing of the award, notify (*c*) each of the persons affected thereby within the municipality of which he is clerk, by registered letter or personal service, (*d*) of the filing of the same, and the portion of work to be done and material furnished by the person notified as shown by the award, and the clerk shall keep a book in which he shall record the names of the parties to whom he has sent notice, the address to which the same was sent, and the date upon which the same was deposited in the post office or personally served. (See Rev. Stat. c. 220, s. 10.)

(*a*) The time for appealing runs from the date of filing. (Post, s. 22.)

(*b*) See the "Evidence Act," R. S. O. 1887, c. 61, ss. 21-25. By s. 23, it is provided that "in every case in which the original record could be received in evidence, a copy of any official or public document in this province, purporting to be certified under the hand of the proper officer, or person in whose custody such official or public document is placed . . . shall be receivable in evidence without proof . . . of the signature or of the official character of the person or persons appearing to have signed the same, and without further proof thereof."

(*c*) The notice should give the date of the award as well as the date of filing. The award must be actually made in writing within thirty days after the date of the engineer's first appointment, but it is not clear that it must be filed within that time. The party receiving the notice should therefore be informed of both dates.

(*d*) Substitutional service under s. 15, s.-s. (1), will not satisfy the requirements of this section. The service must be either actual personal service, or service by registered letter.

WHERE DITCH CONTINUED INTO ANOTHER MUNICIPALITY.

19. If the lands affected by the ditch are situate in two or more municipalities, the engineer of the municipality in which proceedings were commenced shall have full power and authority to continue the ditch into or through so much of the lands in any other municipality as may be found necessary, but within the limit of length as hereinbefore provided, and all proceedings authorized under the provisions of this Act shall be taken and carried on in the municipality where commenced. (See Rev. Stat. c. 220, s. 26, *part.*)

Under s. 18, should the land affected be in two or more municipalities, the award and any plan, profile or specifications shall be filed by the engineer with the clerk of each municipality. As to the payment and collection of costs, see ss. 20, 27 and 30, post.

WHERE LANDS AND ROADS IN ADJOINING MUNICIPALITIES AFFECTED.

20. In every case where lands or roads in two or more municipalities are affected, the clerk of the municipality in which proceedings were commenced shall forward to the clerk of each of the other municipalities a certified copy of every certificate affecting or relating to lands or roads therein respectively, and the municipal council thereof shall pay the sum for which lands and roads within its limits are liable to the treasurer of the municipality in which proceedings were commenced, and unless the amounts are paid within fourteen days after demand in writing by the parties declared by the certificate liable to pay the same, such council shall have power to take all proceedings for the collection of the sums so certified to be paid, as though all the proceedings had been taken and carried on within its own limits. (See Rev. Stat. c. 220, s. 26, *part*).

See ss. 27 and 30, post, as to the proceedings for collection.

WORK ON RAILWAY LANDS.

21. (1) The council of any municipality may enter into an agreement with any railway company for the construction or enlargement by the railway company of any ditch or culvert on the lands of such railway company, and for the payment of the cost of such work after completion out of the general funds of the municipality, and the council shall have power to assess and levy the amount so paid, exclusive of any part thereof for which the municipality may be liable under the award, in the same manner as taxes are levied upon the lands mentioned in the award, and in the relative proportions of the estimated cost of the work to be done and materials furnished by the respective owners in the construction of such ditch, or as to him may

seem just; and such assessment shall in every case be determined by a supplementary award made by the engineer, and subject to appeal to the judge in the same manner as other awards made under this Act.

(2) No agreement with a railway company shall be entered into by a municipal council under this section which will impose a special liability on the owners without the consent in writing, filed with the clerk of the municipality, of two-thirds of the owners liable for the construction of the ditch in respect to which such work on railway lands is to be undertaken.

(3) The cost of any such work on railway lands shall be exclusive of the sum fixed as the limit of the cost of the work imposed by section 5 of this Act.

It was decided in the case of *Miller* v. *The Grand Trunk Ry. Co.*, 45 U. C. Q. B. 222, that railway companies were not subject to the provisions of "The Ditches and Watercourses Act" as then in force, except as provided by s. 13 of the Act, when they would derive benefit from the work done. The ground work of this decision was that the Act as then framed was expressly confined in its operation to private and individual interests, rights and liabilities, and not to those of a public nature. The scope of the Act being afterwards enlarged, the matter became again open to question, but it has since been made the subject of definite legislation. By 53 Vic. c. 69, known as

"the Railway Clauses of the Ditches and Watercourses Act," it is provided that every railway company owning and operating a railway in the province of Ontario shall for the purposes of this Act be considered an owner of lands within the Act, and full provision is made to carry out the provisions of the Act as applied to railways. This statute is curtailed in its effect, and no doubt litigation as to its validity in all respects has been thereby avoided, by 54 Vic. c. 50, whereby it is declared that the "railway clauses" shall be deemed to apply and to have been intended to apply, to such railways only as are under the legislative jurisdiction of this province with respect to the matters by the Act provided. Although the railway clauses as so curtailed in effect are still in force, being expressly preserved by s. 41 of this Act, the limitation of their effect is so great as to render the provisions of this present section eminently desirable, in order that friendly arrangements may be made with such railways as are not under the legislative jurisdiction of this province with respect to the matters by this Act provided.

The railway clauses are printed as an appendix to this work without any annotation, it being considered that the remarks under the different

corresponding sections of the main Act may readily be applied, *mutatis mutandis*.

APPEAL TO COUNTY JUDGE.

22. (1) Any owner (*a*) dissatisfied with the award of the engineer, and affected thereby, may, within fifteen clear (*b*) days from the filing thereof, appeal therefrom to the judge, and the proceedings on the appeal shall be as hereinafter provided. (See Rev. Stat. c. 220, s. 11, *part.*)

(*a*) "Owner"; see interpretation clause and remarks as to the meaning of the term "owner."

(*b*) "Clear days"; see interpretation clause. If no appeal is lodged within the fifteen clear days the award becomes binding (s. 24).

Notice of Appeal.

(2) The appellants shall serve upon the clerk of the municipality in which proceedings for the ditch were initiated, a notice in writing of his intention to appeal from the award, shortly setting forth therein the grounds of appeal. (See Rev. Stat. c. 220, s. 11 (1).)

This notice should be carefully drawn, and should distinctly set out the grounds of appeal, not only in order that the respondent may have notice of the objections which he must prepare to meet, but also because the judge, being merely *persona designata* under the Act, may well consider himself limited to the grounds of appeal taken.

Fixing Time and Place of Hearing.

(3) The clerk, in the next preceding sub-section mentioned, shall, after the expiration of the time for appeal (*a*) forward by registered letter or deliver a copy of the notice or notices of appeal and a certified copy of the award, and also the plans and specifications (if any) to the judge, who shall forthwith, upon the receipt of the registered letter, or documents aforesaid, notify the clerk of the time he appoints (*b*) for the hearing thereof, and shall fix the place of hearing at the town hall or other place of meeting of the council of the municipality in which proceedings for the ditch were initiated, unless the judge, for the greater convenience of the parties and to save expense, shall fix some other place for the hearing. The judge may if he think proper order such sum of money to be paid by the appellant or appellants to the said clerk as will be a sufficient indemnity against costs of the appeal; and the clerk, upon receiving notice from the judge, shall forthwith notify the engineer whose award is appealed against, and all parties interested, in the manner provided for the service of notices under this Act. (See Rev. Stat. c. 220, s. 11 (2), (3); 51 V. c. 35, s. 2).

(*a*) This simply says, "after the expiration of the time for appeal," not limiting a time within which the act must be done. The object is to wait until all possible appeals have been lodged, in order that the proper convenience of the parties may be consulted in arranging for the hearing. A careful clerk will of course notify the judge promptly after the expiration of the time for appeal.

(*b*) No limit of time is provided, but a time should be chosen which will permit a reasonable length of notice being given to the parties interested. The judge must finally determine the appeal within two months from the date of his receipt from the clerk of the notice of appeal (s-s. 6 of this section).

Inspection by Another Engineer.

(4) Any appellant may have the lands and premises inspected by any other engineer or person who, for such purposes, may enter upon such lands and premises, but shall do no unnecessary damage. (See 53 V. c. 68, s. 1).

This is a recent provision, and a very reasonable one. It would be manifestly unfair that a party making reasonable and proper preparations for giving evidence in support of his appeal should render himself liable as for petty trespass.

Clerk of the Courts.

(5) The clerk of the municipality to whom the notice of appeal is given shall be the clerk of the court, and shall record the proceedings.

This is new. Formerly the clerk of the Division Court fulfilled this duty, but as it is almost invariably necessary to have the clerk of the municipality present at the proof of the preliminaries, the change is a good one.

Hearing and Determination of Appeal.

(6) It shall be the duty of the judge to hear and determine the appeal or appeals within two months after receiving notice thereof from the clerk of the municipality, as hereinbefore provided. (See Rev. Stat. c. 220, s. 11 (5).)

Both the hearing and determination of the appeal must take place within the two months. There is no doubt but that this time may be extended by consent of the parties interested, and it is submitted that the failure of the judge to make his determination within the time would not be taken as a lapse of the appeal, but that a mandamus would lie against the judge, there being no penalty provided by the Act as against him. See the reasoning in *O'Byrne* v. *Campbell*, 15 O. R. 339.

As to the procedure on the hearing of the appeal, see Appendix "B."

POWERS OF JUDGE ON APPEAL.

(7) The judge on appeal may set aside, alter or affirm the award and correct any errors therein; (*a*) he may examine parties and witnesses on oath, and may inspect the premises (*b*) and may require the engineer to accompany him; and should the award be affirmed or altered, the costs of appeal shall be in his discretion, but if set aside he shall have power to provide for the payment of the costs in the award mentioned, and also the costs of appeal, and may order the payment thereof by the parties to the award, or any of them,

as to him may seem just, and may fix the amount of such costs. (*c*)

(*a*) The powers of the judge on appeal are very wide indeed, but it is against the policy of the courts to exercise them to the full extent of their latitude. Thus questions of fact and matters of detail should be left largely, if not altogether, to the discretion of the engineer, and if it appear that this discretion has been reasonably exercised the judge on appeal will hesitate before interfering: *Re Roberts and Holland*, 5 P. R. at 353; *Short* v. *Parmer*, 24 U. C. Q. B. 633; *Cameron* v. *Kerr*, 25 U. C. Q. B. 533.

(*b*) "May inspect the premises." Without this express provision it is doubtful if the judge could inspect the *locus in quo*: *Reg.* v. *Petrie*, 20 O. R. 217. Knowledge of the locus by the judge must facilitate the taking of evidence.

(*c*) The decision of the county judge is final and not appealable, provided always that the engineer has the necessary jurisdiction to make the award: *York* v. *Osgoode*, 24 O. R. 12.

The question of costs is altogether in the discretion of the judge. The costs include only those of the engineer, the clerk and the judge himself,

no provision being made for costs of solicitor or counsel. Being *persona designata* under the Act, the judge has no power to order payment of costs other than as provided by the Act: *Re Young*, 14 P. R. 303, following *Cobb* v. *Mid Wales R. W. Co.*, L. R. 1 Q. B. 342.

The result in the ordinary case is, that even though successful in opposing an appeal, the respondents are put to a considerable amount of expense which they cannot recover from the unsuccessful appellant. Frequently, too, this burden is distributed unequally among the respondents, some of whom may refuse to take up the defence of the appeal. This is a distinct hardship, which calls for legislative redress. The award being the act of an official appointed by the municipality, the municipality should be obliged to assume the burden of its defence, provision being made for a rateable levy upon all parties affected or interested of any amounts properly disbursed in connection with such defence.

DEPRIVING ENGINEER OF FEES WHEN GUILTY OF MISCONDUCT.

(8) In case the judge on an appeal finds that the engineer has through partiality or from some other improper motive, knowingly and wilfully favoured unduly any one or more of the parties to the proceedings, he may direct that the engineer

be deprived of all fees in respect to the award or of such part thereof as the judge may deem proper. But such order shall not deprive any party to the proceedings of any remedy he may otherwise have against the engineer.

This clause must speak for itself. It is to be hoped that its application will be rare.

FEES OF THE JUDGE.

(9) The judge shall be entitled to charge for holding court for the trial of appeals under this Act, and for the inspection of the premises the sum of five dollars a day, which charge shall be considered part of the costs of appeal under the provisions of the next preceding sub-section.

Under the next sub-section the payment of these and the other costs of the appeal is to be enforced in the same manner as the payment of the costs of the award.

ENFORCEMENT OF AWARD AS AMENDED.

(10) The award as so altered or affirmed shall be certified by the clerk together with the costs ordered, and by whom to be paid, and shall be enforced in the same manner as the award of the engineer, and the time for the performance of its requirements shall be computed from the date of such judgment in appeal; (*a*) and the clerk shall immediately after the hearing, send by registered letter, to the clerk of any other municipality in which lands affected by the ditch are situate, a certified copy of the changes made in the award by the judge, which copy shall be filed with the award, and each clerk shall forthwith by registered letter notify every owner within his

municipality, of any change made by the judge in the portion of work and material assigned to such owner. (See Rev. Stat. c. 220, s. 11 (6).)

(*a*) This is not very clear. It might be contended that under this provision the time for performance fixed by the award must necessarily be extended by so much time as may have been taken up by the appeal proceedings. To prevent any such contention, it is distinctly advisable for the judge to make a definite order as to the time of completion.

AWARD NOT TO BE SET ASIDE FOR WANT OF FORM ONLY.

23. No award made by an engineer under this Act shall be set aside by the judge for want of form only or on account of want of strict compliance with the provisions of this Act, and the judge shall have power to amend the award or other proceedings, and may in any case refer back the award to the engineer with such directions as may be necessary to carry out the provisions of this Act.

This is a very sensible provision. The Act is intended to be worked out largely by unskilled persons, who may naturally be expected to commit errors. Care must be taken, however, to distinguish between such irregularities as may come under this section, and the omission of some act necessary to found jurisdiction: *York* v. *Osgoode*,

24 O. R. 12; *Re Anderdon and Colchester*, 21 O. R. 476; *Reg.* v. *Malcolm*, 2 O. R. 511. The spirit of this section is the same as that of section 10.

WHEN AWARD BINDING, NOTWITHSTANDING DEFECTS.

24. Every award made under the provisions of this Act shall after the lapse of the time hereinbefore limited for appeal to the judge, and after the determination of appeals, if any, by him, where the award is affirmed, be valid and binding to all intents and purposes notwithstanding any defect in form or substance either in the award or in any of the proceedings relating to the works to be done thereunder taken under the provisions of this Act.

This again must assume the award to be made by an engineer having jurisdiction to make the award: *York* v. *Osgoode*, 24 O. R. 12. The award may be reconsidered after a lapse of two years, if for an open drain; or of one year, if for a covered drain. (See s. 36.)

By s. 2 of the amending Act of 1895 (see after s. 36), it is further provided, for eastern Ontario only, that in the event of a ditch proving insufficient to carry away the water coming into it, an overflow resulting such as to cause actual damage, the agreement or award may be reconsidered after six months, so far as may be necessary to remedy the defect to which the owerflow is due.

POWERS OF JUDGE AS TO EVIDENCE.

25. In all appeals under this Act from the engineer's award the judge shall possess all such powers for compelling the attendance of, and for the examination on oath, of all parties and other persons as belong to or might be exercised by him in the division court or in the county court. (See Rev. Stat. c. 220, s. 12.)

Subpœnas for ordinary witnesses may be issued, without any order of the judge, by the clerk of the municipality under the next section. If the attendance of registrars of deeds, or of certain other officials is required, an order for the issue of the subpœna must be obtained from the judge.

ISSUE OF SUBPŒNAS.

26. (1) Upon any appeal to a judge under this Act, the clerk of the municipality shall have the like powers as the clerk of a division court as to the issuing of subpœnas to witnesses upon the application of any party to the proceedings, or upon an order of the judge for the attendance of any person as a witness before him.

See the note to the last preceding section.

WITNESS FEES.

(2) The fees to be allowed to witnesses upon an appeal under this Act shall be upon the scale of fees allowed to witnesses in any action in the division court.

The tariff of fees to witnesses is as follows:—

Attendance *per diem*, to witnesses residing within three miles of the place where the court is held, if within the county...	$0 75
And if without the county	1 00
Attendance *per diem* if residence over three miles distant, and within county	1 00
Attendance *per diem* if residence over three miles distant, and without county	1 25

The travelling expenses of witnesses, over three miles, shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed twenty cents per mile, one way.

The fees of the engineer are fixed by by-law under the Act. Surveyors, engineers and certain other professional witnesses are entitled to specific fees by statute.

MUNICIPALITIES TO PAY COSTS AND COLLECT SAME FROM PERSONS LIABLE.

27. The municipality or each of the municipalities shall within ten days after the expiration of the time for appeal or after appeal, (*a*) as the case may be, pay to the engineer and judge and all other persons entitled to the same, their charges and fees or the portion thereof awarded or adjudged to be paid by the owners therein, and shall, if the same be not forthwith repaid by the persons awarded or adjudged to pay the same,

cause the amount, with seven per cent, added thereto, to be placed upon the collector's roll as a charge against the lands of the person so in default, and the same shall thereupon become a charge upon such lands, and shall be collected in the same manner as municipal taxes. (*b*) (See Rev. Stat. c. 220, s. 14.)

(*a*) "After appeal," that is after the judge's determination of the appeal.

(*b*) As to the mode of collecting municipal taxes see "the Consolidated Assessment Act, 1892." (55 Vic. c. 48.)

LETTING WORK ON NON-COMPLIANCE WITH THE AWARD.

28. (1) The engineer at the expiration of the time limited by the award for the completion of the ditch, shall inspect the same if required in writing so to do by any of the owners interested (*a*) and if he finds the ditch or any part thereof not completed in accordance with the award, he may let (*b*) the work and supply of material to the lowest bidder giving security in favour of the municipality by which he was appointed, and approved by the engineer for the due performance thereof within a limited time, but no such letting shall take place:—

(*a*) Until notice in writing of the intended letting has been posted up, in at least three conspicuous places in the neighbourhood of the place at which the work is to be done, for four clear days. (*c*)

(*b*) And until after four days from the sending of the notice by registered letter, to the last-known address of such persons interested in the said award as do not reside in said municipality or municipalities, as the case may be.

(*a*) It was held in *O'Byrne* v. *Campbell*, 15 O. R. 339, that an action would lie against the engineer for breach of his duty to make this inspection. By section 38 of the present Act, however, this right of action is taken away, and the only penalty incurred by the engineer is that provided by s. 37.

(*b*) This section provides the only remedy at the disposal of a party complaining of the non-completion of the award. See s. 38 of the Act which affirms the law as laid down in *Murray* v. *Dawson*, 17 U. C. C. P. 588 and *Hepburn* v. *Orford*, 19 O. R. 585. See further notes under s. 38.

(*c*) The mere publication of the engineer's notice does not afford ground for an action of trespass where the award is invalid. *York* v. *Osgoode*, 24 O. R. 12.

Extension of time for performance.

(2) If, however, the engineer is satisfied of the good faith of the person failing in the performance of the award, and there is good reason (*a*) for the non-performance thereof, he may, in his discretion, and upon payment of his fees and charges, extend the time for performance. (See Rev. Stat. c. 220, s. 15.)

(*a*) It would appear that good faith and good

reason must co-exist in order to justify the engineer in extending the time.

Liability of owner in default who does work after proceedings to let commenced.

(3) Any owner in default, supplying the material and doing the work after proceedings are begun to let the same, shall be liable for the fees and expenses occasioned by his default, and the same shall form a charge on his land, and if not paid by him on notice, the council shall pay the same on the certificate of the engineer, and shall cause the amount with seven per cent. added thereto to be placed on the collector's roll against the lands of the person in default, to be collected in the same manner as municipal taxes.

Before this section was enacted, a party in default could do the work after the posting of the notice of letting and prior to its return day, in which case there would be no work to let, and no fund for the payment of the costs occasioned by the default.

Power to re-let.

(4) The engineer may let the work and supply of material or any part thereof, by the award directed, a second time or oftener, if it becomes necessary in order to secure its performance and completion. (52 V. c. 49, s. 3.)

This provision is useful where the party buying in the work fails to perform it.

CERTIFICATE OF ENGINEER ON COMPLETION OF WORK LET.

29. The engineer shall, within ten days after receipt of notice in writing of the supplying of material and completion of the work let, as in the next preceding section mentioned, inspect the same, (*a*) and shall if he find the material furnished and the work completed, certify the same in writing. (Form H) (*b*) stating the name of the contractor, the amount payable to him, the fees and charges which the engineer is entitled to for his services rendered necessary by reason of the non-performance, and by whom the same are to be paid. (See Rev. Stat. c. 220, s. 16.)

(*a*) An engineer failing to make this inspection becomes liable to the penalty mentioned in section 37, but incurs no further liability.

(*b*) The production of this certificate is a condition precedent to recovery by the contractor of the amount payable to him, (see Hudson on Building Contracts (Ed. of 1891) pp. 262, *et seq.*) unless it be shown that the certificate has been fraudulently and collusively witheld (Hudson, p. 298, *et seq.*).

PAYMENT OF AMOUNTS CERTIFIED.

30. The council shall, at their meeting next after the filing of the certificate or certificates as in the next preceding section mentioned, pay the sums therein set forth to the persons therein named, (*a*) and unless the owners within the municipality, upon notice, pay the sums for which they are

thereby made liable, the council shall have power to cause the amount each owner is liable for, together with seven per cent. added thereto, to be placed upon the collector's roll, and the same shall thereupon become a charge against his lands, and shall be collected in the same manner as municipal taxes. (*b*) (See Rev. Stat. c. 220, s. 18.)

(*a*) See note (*b*) to the last preceding section.

(*b*) See note (*b*) to section 27.

ROCK-CUTTING OR BLASTING.

31. (1) If it appear to the engineer that rock-cutting or blasting is required, the engineer may (*a*) cause the work of cutting or blasting and removing the rock to be done by letting the same out to public competition by tender or otherwise, instead of requiring each owner benefited to do his share of the work; and the engineer shall, by his award, determine the fractional part of the whole cost which shall be paid by each of the owners benefited, and, upon completion of the rock-cutting or blasting and removal, shall certify to the clerk of the municipality by which he was appointed, the total cost thereof including his fees and charges; and the said clerk and the clerk of any other municipality affected shall notify all the owners liable to contribute under the award within their respective municipalities, of the said total cost and the part to be paid by him, and unless forthwith paid, the same, with seven per cent. added thereto, shall be placed on the collector's roll of the municipality in which his lands are situate, and the same shall thereupon become a charge against the land of the owners so liable, and shall be collected in the same manner as municipal taxes. (See Rev. Stat. c. 220, s. 9 (1).)

(*a*) This is a matter of discretion with the engineer. The total cost of a work under this Act being limited to $1,000, it is obvious that a work involving any considerable amount of rock-cutting or blasting would be better undertaken under the Drainage Act. (57 V. c. 56.)

PAYMENT OF CONTRACTOR AND ENGINEER.

(2) It shall be the duty of the municipality in which proceedings for the work were commenced, through the treasurer thereof, to pay the contractor for the rock-cutting or blasting and removal as soon as done to the satisfaction and upon the certificates of the engineer, and also to pay the fees and charges of the engineer in connection therewith. (See Rev. Stat. c. 220, s. 13).

As to the necessity of the production of a certificate before payment, see the notes to s. 29.

OWNERS DESIRING TO USE DITCH AFTER CONSTRUCTION.

32. In case any owner during or after the construction of a ditch desires to avail himself of such ditch for the purpose of draining other lands than those contemplated by the original proceedings, he may avail himself of the provisions of this Act, as if he were an owner requiring the construction of a ditch; but no owner shall make use of a ditch after construction, unless under an agreement or award, pursuant to the provisions of this Act. (See Rev. Stat. c. 220, s. 25.)

Under this section a ditch already constructed under the provisions of the Act may be used as

an outlet for a new ditch to be so constructed, and if necessary may be deepened and widened for that purpose. In this event the lands crossed by the portions requiring to be deepened and widened must be included in the new scheme, and must be included in the number of seven original township lots to which the scheme is limited by s. 5.

DEEPENING, WIDENING OR COVERING EXISTING DITCHES.

33. This Act shall apply to the deepening, widening or covering of any ditch already or hereafter constructed, and the proceedings to be taken for procuring such deepening, widening or covering, shall be the same as the proceedings to be taken for the construction of a ditch under the provisions of this Act, but in no case shall a ditch be covered, unless when covered it will provide capacity for all the surface and other water from lands and roads draining naturally towards and into it as well as for the water from all the lands made liable for the construction thereof. (See Rev. Stat. c. 220, s. 28.)

By s. 36 an award for the construction of a covered drain may be reconsidered after the expiration of one year, and one for the construction of an open drain after the expiration of two years.

MAINTENANCE OF DITCHES.

34. The maintenance of any ditch, whether covered or open, constructed, or of any creek or watercourse that has been deepened or widened, under the provisions of *The Ditches and Watercourses Act*, being chapter 199 of the Revised Statutes of

Ontario 1877; *The Ditches and Watercourses Act, 1883*, being chapter 27 of the Acts passed in the 46th year of Her Majesty's reign; or *The Ditches and Watercourses Act*, being chapter 220 of the Revised Statutes of Ontario, 1887, or constructed deepened, widened or covered under this Act, shall be performed by the respective owners, in such proportion as is provided in the original or any subsequent award; and the manner of enforcing the same, shall be as hereinafter provided. (See 52 V. c. 49, s. 6.)

ENFORCING MAINTENANCE.

35. (1) If any owner whose duty it is to maintain any portion of a ditch, shall neglect to maintain the same in the manner provided by the award, any of the owners parties to the award whose lands are affected by the ditch, may, in writing, notify the owner (*a*) making default, to have his portion put in repair within thirty days from the receipt of such notice; and if the repairs are not made and completed within thirty days, the owner giving the notice, may notify the engineer, in writing, to inspect the portion complained of. (*b*)

(*a*) As to the mode of service of notices see s. 15. Care must be taken to see that the notice is addressed to the actual owner of the land, within the meaning of the interpretation clause.

(*b*) The making of the inspection cannot be enforced other than as provided in s. 37.

Inspection and consequent expenses.

(2) The inspection by the engineer and the proceedings for doing and completing the repairs required and enforcing pay-

ment of costs, fees and charges shall be as hereinbefore provided in case of non-completion of the construction of a ditch; (*a*) but should the engineer find no cause of complaint he shall certify the same with the amount of his fees and charges to the owner who complained and also to the clerk of the municipality, and the owner who made complaint, shall pay the fees and charges of the engineer, and if not forthwith paid by him, the same shall be charged and collected in the same manner as is provided for by this Act, in the case of other certificates of the engineer.

(*a*) See ss. 28, 29 and 30 and notes.

Re-constructing ditches not made under any statute.

(3) Any owner interested in or affected by any ditch heretofore or hereafter constructed, which has not been constructed under any of the Acts mentioned in section 34 of this Act, nor under this Act, nor under any Act relating to the construction of drainage work by local assessment, may take proceedings for the deepening, widening, extending, covering or repair of such ditch in the same manner as for the construction of a ditch under this Act; provided always that the extent of the work and costs thereof and assessment therefor shall not exceed the limitations imposed by sections 5 and 6 of this Act. (*a*)

(*a*) Section 5 limits the cost of the whole work to within $1000, and its extent to within seven original township lots (exclusive of road allowance), and s. 6 provides that only those whose lands lie within seventy-five rods from the sides and point of commencement of the ditch may be

made liable for its construction. See too the note to s. 32.

RECONSIDERATION OF AWARD.

36. Any owner party to the award whose lands are affected by a ditch, whether constructed under this Act or any other Act respecting ditches and watercourses, may, at any time after the expiration of two years from the completion of the construction thereof, or in case of a covered drain at any time after the expiration of one year, take proceedings for the reconsideration of the agreement or award under which it was constructed, and in every such case he shall take the same proceedings, and in the same form and manner, as are hereinbefore provided in the case of the construction of a ditch.

This section is new, and very necessary. The award operates as an easement (*Kelly* v. *O'Grady*, 34 U. C. Q. B. 562), and as the practical working of a ditch does not always come up to the expectations of the engineer, it would be a very serious matter if there were no provision for reconsideration.

The amending Act of 1895 (58 Vic. c. 54) further provides as follows:—

PROVISO AS TO EASTERN ONTARIO.

2. Section 36 of *The Ditches and Watercourses Act, 1894*, is amended by adding at the end thereof the following proviso:—

"Provided that should any ditch, after its construction, prove insufficient for the purposes for which it was constructed so as to cause an overflow of water upon any lands along the said ditch and has caused damage to the same, any owner party to the award may at any time after the expiration of six months from the completion of the ditch take proceedings as aforesaid for the reconsideration of the agreement or award under which such ditch was constructed for the purpose of remedying the defect in that particular respect. This proviso shall apply only to that portion of the province lying east of the county of Frontenac."

This amendment is undoubtedly a step in the right direction, and it is difficult to see why it should not be made to apply to the whole province. It applies only to cases where actual damage has been caused by overflowing, and then only for the purpose of remedying the defect in the award in that particular respect. This amendment became law on 16th April, 1895, but as the Act of which it is part is read with and as part of the main Act, it is retro-active in effect.

PENALTY FOR ENGINEER FAILING TO INSPECT.

37. Any engineer who wilfully neglects to make any inspection provided for by this Act for thirty days after he has received written notice to inspect, shall be liable to a fine of not less than $5 or more than $10, to be recovered with costs on complaint made before a Justice of the Peace having jurisdiction in the matter, and in default of payment the same

shall be recoverable by distress, and every such fine shall be paid over to the treasurer of the municipality in which the offence arose. (See Rev. Stat. c. 220, s. 17.)

This would seem to be the only penalty to which breach of duty on the part of the engineer will render him liable, especially in view of the next following section. It was held in *O'Byrne* v. *Campbell*, 15 O. R. 339, before the passing of section 38, that an action for damages would lie against the engineer for breach of the imperative duty to inspect, but it was pointed out that it would be practically impossible to prove any damage as proximately caused by this breach. In *Hepburn* v. *Orford*, 19 O. R. 585, following *Murray* v. *Dawson*, 17 U. C. C. P. 588, it was held that an action for damages sustained by non-completion of an award would not lie at the suit of one party to an award against the other parties, the only remedy for non-completion being that provided by the Act itself. Section 38 of the present Act was no doubt intended to set all such questions finally at rest, and although it is unfortunately not very clear as to the existence or non-existence of any remedy against the engineer beyond the penalty mentioned in this section, it will probably be held to have the intended effect.

ACTIONS FOR MANDAMUS, ETC., NOT TO LIE.

38. No action, suit or other proceeding shall lie or be had or taken for a mandamus or other order to enforce or compel the performance of an award or completion of a ditch made under this Act, but the same shall be enforced in the manner provided for by this Act. (See 52 V. c. 49, s. 4.)

See the notes to the last preceding section.

This section is no doubt intended to enact the law as laid down in such cases as *Berkeley* v. *Elderkin*, 1 E. & B. 805; *Vestry of St. Pancras* v. *Batterbury*, 2 C. B. N. S. c. 477; *G. N. S. Fishing Co.* v. *Edgehill*, L. R. 11 Q. B. D. 225; *Regina* v. *County Court Judge of Essex*, L. R. 18 Q. B. D. 704 and the cases in our own courts mentioned in the notes to the last preceding section

CERTAIN ACTS REPEALED.

39. This Act is substituted for *The Ditches and Watercourses Act* as amended by the Act passed in the 51st year of Her Majesty's reign chaptered 35, by *The Ditches and Watercourses Amendment Act, 1889*, and the Act passed in the 53rd year of Her Majesty's reign chaptered 68, and all Acts and parts of Acts inconsistent with this Act are hereby repealed.

USE OF FORMS.

40. In carrying into effect the provisions of this Act, the forms set forth in the schedule hereto may be used, and the same or forms to the like effect shall be deemed sufficient for the purposes mentioned in the said schedule.

RAILWAY CLAUSES NOT AFFECTED.

41. Nothing in this Act contained shall repeal, alter or affect the Act passed in the 53rd year of Her Majesty's reign, chaptered 69, intituled *An Act to amend the Ditches and Watercourses Act as applied to Railways*, and the Act in amendment thereof passed in the 54th year of Her Majesty's reign and chaptered 50.

The "Railway Clauses" are given in an appendix to this work.

FORMER WORKS AND PENDING MATTERS NOT AFFECTED.

42. Nothing in this Act contained shall be taken or deemed to affect the validity of anything heretofore done or any liability incurred, nor the disposal of the costs in any action or other proceeding now pending under any former Act relating to ditches and watercourses.

FORMS.

FORM "A."

(*Section 4.*)

BY-LAW FOR APPOINTMENT OF ENGINEER.

A by-law for the appointment of an engineer under *The Ditches and Watercourses Act, 1894.*

Finally passed 189

The municipal council of the of in the county of enacts as follows:

1. Pursuant to the provisions of section 4 of *The Ditches and Watercourses Act, 1894,* (*name of person*) of the town (*or* township of in the county of is hereby appointed as the engineer for this municipality to carry out the provisions of the said Act.

2. The said engineer shall be paid the following fees for services rendered under the said Act (*or as the case may be*).

3. This by-law shall take effect from and after the final passing thereof.

Reeve.

Clerk.

New. {Seal.}

FORM "B."

(*Section 7.*)

DECLARATION OF OWNERSHIP.

In the matter of *The Ditches and Watercourses Act, 1894*, and of a ditch in the township (*or as the case may be*) of in the county of

I of the of in the county of do solemnly declare and affirm that I am the owner within the meaning of *The Ditches and Watercourses Act, 1894*, of lot (*or the sub-division of the lot, naming it*) number in the concession of the township of , being (*describe the nature of ownership*).

Solemnly declared and affirmed before me at the of in the county of A.D. 189 ,

. *New.*

a Commissioner.
(J. P. or clerk.)

FORM "C."

(*Section 8.*)

NOTICE TO OWNERS OF LANDS AFFECTED BY PROPOSED DITCH.

To

Township of , (*date*) 189 .

Sir,

I am within the meaning of *The Ditches and Watercourses Act, 1894*, the owner of lot (*or the sub-division, as in the declaration*) number in the concession of , and

as such owner I require a ditch to be constructed (*or if for reconsideration of agreement or award to deepen, widen or otherwise improve the ditch, state the object*) for the draining of my said land under the said Act. The following other lands will be affected: (*here set out the other parcels of land, lot, concession, and township and the name of the owner in each case; also each road and the municipality controlling it.*)

I hereby request that you, as owner of the said (*state his land*), will attend at (*state place of meeting*), on , the day of , 189 , at the hour of o'clock in the noon, with the object of agreeing, if possible, on the respective portions of the work and materials to be done and furnished by the several owners interested and the several portions of the ditch to be maintained by them.

Yours, etc.,

(*Name of owner.*)

(*See* Rev. Stat. c. 220, Form B.)

FORM "D."

(*Section 9.*)

AGREEMENT BY OWNERS.

Township of (*date*) 189

Whereas it is found necessary that a ditch should be constructed (*or* deepened, *or* widened, *or otherwise improved*) under the provisions of *The Ditches and Watercourses Act, 1894*, for the draining of the following lands (and roads if any); (*here describe each parcel and give name of owner as in the notice, including the applicant's own land, lot, concession and township, and also roads and by whom controlled.*)

Therefore we the owners within the meaning of the said Act of the said lands (*nd if roads proceed* and the reeve of the said municipality on behalf of the council thereof) do agree each with the other as follows: That a ditch be constructed (*or as the case may be*) and we do hereby estimate the cost thereof at the sum of $, and the ditch shall be of the following description: (*here give point of commencement, course and termination, its depth, bottom and top width and other particulars as agreed upon, also any bridges, culverts or catch basins, etc., required.*) I owner of (*describe his lands*) agree to (*here give portion of work to be done, or material to be supplied*) and to complete the performance thereof on or before the day of , A.D. 189 . I, owner of, etc. (*as above, to the end of the ditch*).

That the ditch when constructed shall be maintained as follows: I owner of (*describe his lands*) agree to maintain the portion of ditch from (*fix the point of commencement*) to (*fix the point of termination of his portion*), I owner of (*describe his lands*) agree to maintain, etc., (*as above, to the end of the ditch*).

Signed in presence of } (*Signed by the parties here.*)

(*See* Rev. Stat., c. 220, Form A.)

FORM "E."

(*Section 13.*)

REQUISITION FOR EXAMINATION BY ENGINEER.

Township of (*date*) 189

To (*name of clerk*).
Clerk of
(*P. O. address*).

SIR,—I am, within the meaning of *The Ditches and Water-*

courses Act, 1894, the owner of lot (*or sub-division as in the declaration*), number , in the concession of and as such I require to construct (*deepen, widen or otherwise improve as needed,*) a ditch under the provisions of the said Act, for the draining of my said land, and the following lands and roads will be affected: (*here describe each parcel to be affected as in the notice for the meeting to agree and state the name of the owner thereof*), and the said owners having met and failed to agree in regard to the same, I request that the engineer appointed by the municipality for the purposes of the said Act, be asked to appoint a time and place in the locality of the proposed ditch, at which he will attend and examine the premises, hear any evidence of the parties and their witnesses, and make his award under the provisions of the said Act.

(*Signed by the party or parties.*)

(*See* Rev. Stat. c. 220, Form C.)

FORM "F."

(*Section 14.*)

NOTICE OF APPOINTMENT FOR EXAMINATION BY ENGINEER.

Township of (*date*) 189

To (*Name of owner*).

(*P. O. address*).

SIR,—You are hereby notified that the engineer appointed by the municipality for the purposes of *The Ditches and Watercourses Act, 1894*, has, in answer to my requisition, fixed the hour of o'clock in the noon of day, the ay of , to attend at (*name the place appointed*) and to examine the premises and site of the ditch required by me

to be constructed under the provisions of the said Act (*or as the case may be*) and you, as the owner of lands affected, are required to attend, with any witnesses that you may desire to have heard, at the said time and place.

Yours, etc.,

(*Signature of Applicant.*)

(*See* Rev. Stat. c. 220, Form D.)

FORM "G."

(*Section 16.*)

AWARD OF ENGINEER.

I, the engineer appointed by the municipality of the of in the county of under the provisions of *The Ditches and Watercourses Act, 1894* having been required so to do by the requisition of owner of lot number in the concession of the township of (*describe as in requisition*), filed with the clerk of said municipality and representing that he requires certain work to be done under the provisions of the said Act for the draining of the said land, and that the following other land (*and roads*) would be affected:—(*here set out the other parcels of lands or roads affected as in the requisition*), did attend at the time and place named in my notice in answer to said requisition, and having examined the locality (and the parties and their witnesses) (*if such be the case*) find that the ditch (*or the deepening or widening of a ditch*) is required. The location, description and course of the ditch, and its point of commencement and termination are as follows:—

(*Here describe the ditch as to all above particulars.*)

The said work will affect the following lands:—(*here set forth the other lands and their respective owners.*) I do therefore award and apportion the work and the furnishing of material among the lands affected and the owners thereof according to my estimate of their respective interests in the said work as follows:—

(*Name of owner and description of his land*) shall make and complete (*here fix the point of commencement and ending of his portion*) and shall furnish the material (*state what material*) all of which, according to my estimate, will amount in value to $, and I fix the time for the performance of such work, and providing such material on the day of A.D. 189 , at furthest.

2. (*Name of owner and description of his land and so on as above to the end.*)

I do further award and apportion the maintenance of the ditch as follows:—

1. (*Name of owner and description of his land*) shall maintain (*here fix the point and commencement and ending of his portion.*)

2. (*Name of owner, etc., as above.*)

My fees and the other charges attendant upon and for making this award are (*here give fees and other charges, including clerk's fees in detail*) amounting in all to $, which shall be borne and paid as follows:—(*state by whom and by what lands respectively.*)

Dated this day of A.D. 189

Witness, } (*Signature of Engineer.*)

(*See* Rev. Stat. c. 220, Form E.)

FORM "H."

(*Section 29.*)

CERTIFICATE OF ENGINEER.

To

Clerk of the of

I hereby certify that has furnished the material and completed the work (*as the case may be*) which under my award made in accordance with the provisions of *The Ditches and Watercourses Act, 1894*, and dated the day of , A.D. 189 , one owner of lot number (*describe his land giving township or otherwise*) was adjudged to perform, and having failed in the performance of the same it was subsequently let by me to the said for the sum of $, and as he has now completed the performance thereof he is entitled to be paid the said amount.

I further certify that my fees and charges for my services rendered necessary by reason of such failure to perform are (*give items*) $, and said amount payable to the said contractor and the said fees and charges are chargeable on (*describe property to be charged therewith*) under the provisions of *The Ditches and Watercourses Act, 1894*, unless forthwith paid.

Dated this day of A.D. 189 .

(*Signature of Engineer.*)
Engineer for

(*See* Rev. Stat. c. 220, Form F.)

APPENDIX "A."

The Railway Clauses of the Ditches and Watercourses Act.

In the case of *Miller* v. *G. T. Ry. Co., 45 U. C. Q. B. 222*, it was held that a Railway Company was not subject to the provisions of The Ditches and Watercourses Act. The Act set out hereunder was passed with a view to placing Railway Companies in the same position as other owners of lands. To avoid constitutional difficulties, however, an Act was passed during the session of 1891 (54 Vic. ch. 50) declaring and enacting that this Act (53 Vic. ch. 69) shall be deemed to apply, and to have been intended to apply to such railways only as are under the legislative control of this Province with respect to the matters by the said Act provided. Railways which are not under the legislative control of the Province in respect of these matters, can only be made subject to the provisions of the Ditches and Watercourses Act with their own consent, as provided by section 21 of the Act. The following Act must now, therefore, be read subject to the limitations stated.

ONTARIO STATUTES OF 1890.

53 VIC. CHAPTER 69.

An Act to amend The Ditches and Watercourses Act as applied to Railways.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

RAILWAY COMPANIES TO BE DEEMED OWNERS.

1. Every railway company owning or operating a railway in the Province of Ontario shall for the purposes of this Act be considered an owner of lands under the provisions of *The Ditches and Watercourses Act.*

SERVICE OF NOTICES.

2. All notices which require to be served upon any such railway company under the provisions of this Act, shall be served upon the manager; and any duties that such manager performs, or causes to be performed by any engineer, assistant engineer, or any person acting under his instructions, shall be deemed to be performed by the railway company.

DITCHES ON RAILWAY LANDS.

3. (1) Every existing ditch, drain, creek, or watercourse, situate on the property of any such railway company, and running along or under the railway, may be deepened, widened or extended, and any existing bridge or culvert in the road-bed of such railway may also be deepened or widened, or a new

bridge or culvert may be constructed, when it is found and reported upon by the engineer of the municipality, or agreed and reported upon as hereinafter provided, that such ditch, drain, creek or watercourse, or the widening, deepening or construction of any such bridge or culvert is necessary as an outlet for any creek or watercourse, or any ditch or drain that has been or may be constructed under the provisions of the said Act or of any previous Act, and that such can be done without detriment to the safety of the railway.

(2) The ditch or drain which may be constructed through the lands of the railway may be either covered or open as the said engineer may report.

(3) The aforementioned work shall be done in such a manner as not to injure the bridges, culverts, or road-beds of the railway or in any way to interfere with the traffic thereof.

(4) In any case when any such ditch or drain will require to be carried through any cutting of the railway, the consent of the railway company shall be first obtained.

PLANS AND REPORT.

4. The said engineer when he reports that any ditch, drain, creek or watercourse, running along or under any railway, is required to be used for the purposes aforesaid, and also, that any bridge or culvert is required to be enlarged by the deepening or widening of the same, or that a new bridge or culvert is required, shall file with such report a plan or profile of such drain, creek or watercourse, and also a plan or profile of the enlargement of any bridge or culvert, but only to shew the extent, depth and width of the required enlargement of such bridge or culvert, or of any new bridge or culvert (as the case may be) together with a statement of the estimated cost of the work to be done upon the lands of the railway, including

the cost of any excavation required to be made in enlarging or constructing any bridge or culvert; and such report shall be filed with the clerk of the municipality within the time specified in section 10 of the said Act.

PROCEEDINGS AFTER REPORT.

5. (1) When so found and reported, the clerk of the municipality shall within six days after the filing of the report, send to the manager of the railway company, by registered letter a copy of so much of the report as relates to the work upon the lands of the railway company, together with a copy of the plan or profile of said work with a statement of the estimated cost of such work as made by the said engineer.

(2) The manager of the railway or some one acting in his behalf, shall within fifteen days after receiving such report forward to the clerk of the municipality, by registered letter, a notice stating whether he approves or disapproves of said report; if he approves of said report his letter of approval shall be filed in the clerk's office with the report of the engineer, and said report shall be binding upon all parties concerned, and who are liable for the performance of the work, or the cost of the same, upon the lands of the railway company, and shall not be subject to appeal except as hereinafter provided.

(3) If the manager of the railway company objects to the said report in whole or in part, he shall in such notice state his objections, and shall also fix a day not later than twenty nor earlier than fifteen days from the mailing of such notice, upon which the engineer of the railway, or some one acting on his behalf, shall meet the engineer of the municipality at the place where the work is proposed to be done for the purpose of arriving at an amicable agreement as to the work objected to by the manager of the railway or the cost thereof.

(4) The clerk of the municipality shall within four days after receiving such notice, notify the engineer of the municipality, if the manager of the railway has approved of his report, and if he has not approved of his report, he shall notify said engineer to attend at the place of the proposed work upon the day fixed by the manager of the railway.

(5) If the engineer of the railway company and the engineer of the municipality agree upon any portion or the whole of said work which may have been objected to by the manager of the railway, then such report shall be amended as may be agreed upon and shall be in duplicate and signed by both engineers, one copy to be retained by the engineer of the railway, and one to be filed with the clerk of the municipality within ten days after arriving at such agreement; and said report shall be binding upon all parties concerned as set forth in sub-section 2 of this section.

(6) If the engineer of the railway company and the engineer of the municipality fail to agree upon the matters in dispute, as mentioned in sub-section 3 of this section, then in such case said matters of dispute shall be referred to the decision of an engineer to be appointed by the Commissioner of Public Works of the Province of Ontario, whose report and decision shall be final and binding upon all parties interested, and not subject to appeal as far as the work upon the lands of the railway is affected, except as hereinafter provided.

(7) When said disagreement takes place the engineer of the municipality or of the railway company shall within four days thereafter, by registered letter, request the said Commissioner to appoint an engineer as provided for in the previous sub-section, and shall in such letter give the name and post-

office address of the railway engineer, and also his own post-office address, and state the locality where the proposed work is to be done.

(8) The Commissioner of Public Works shall within six days after receiving said request appoint a competent engineer to settle the matters in dispute; the engineer so appointed shall within six days after his appointment, notify by registered letter, the engineer of the railway company, and also the engineer of the municipality of the day on which he will attend at the place of the proposed work, which day shall not be earlier than ten, nor later than twenty days from the date of such notification, and said engineers shall attend at the time and place named in such notice, and shall give all necessary information to the engineer appointed by the Commissioner of Public Works, and said engineer shall carefully enquire and examine into all the objections made, and differences of opinion existing between the engineer of the railway company and the engineer of the municipality in reference to said proposed work upon the lands of the railway company and the cost thereof.

(9) The said engineer shall within ten days after such meeting, make out a report in duplicate, one to be sent by registered letter to the engineer of the railway company, and one copy to be sent by registered letter to the engineer of the municipality which copy shall be filed with the clerk of the municipality, and such report shall be final and binding as set forth in sub-section 6 of this section.

(10) The engineer of the municipality in making his award (which shall be made when a final agreement has been concluded as set forth in the next sub-section) shall in respect of the work to be performed upon the lands of the railway

company, apportion such work and the estimated costs of the same upon the several owners interested in the construction of such work in proportion to the benefit to be derived.

(11) The engineer of the municipality shall within 30 days from the date of approval by the manager of the railway, as provided in sub-section 2 of this section, or in the event of the refusal of such approval, then from the date of the agreement if made by the engineers as provided for in sub-section 5 of this section, or in the event of the engineers failing to agree, then from the date of the report as made by the engineer as provided for in sub-section 6 of this section, make his award and file the same with the clerk of the municipality, and said award shall embrace the lands of the owners, which may be liable for the construction of any such ditch or drain, or the widening or deepening of any creek or watercourse, or for the enlarging or construction of any bridge or culvert.

(12) Any interested owner may appeal against the award of said engineer in the same manner and form as is provided in *The Ditches and Watercourses Act*, and the amendments thereto, but such appeal shall as in respect to the work upon the lands of the railway company, be confined to his right of being made liable for any portion of such work, and the proportion or cost of the same, but such appeal shall not affect the railway company.

NOTICE TO COMPANY.

6. (1) The clerk of the municipality shall within four days after expiration of the time for appeal if no appeal has been made, or if an appeal has been made, within four days after the final decision upon such appeal, send to the manager of the railway company by registered letter, a notice stating

the place and day upon which the work will be commenced and proceeded with, which day shall not be sooner than twenty, nor later than thirty days from the day of notice, and in such letter of notice he shall ask the manager of the railway which of the following modes of doing the work he will select on behalf of the railway company :

(*a*) First, the railway company to do the work by their own employees for such amount as may have been finally agreed upon and made part of the report and award ; or

(*b*) Second, that the work may be performed by the party or parties who are liable for the cost of performance of said work, and done under the supervision of the railway engineer, or some one acting in his behalf, and subject to the provisions of section 3.

(2) The manager of the railway, or some one acting in his behalf, shall within ten days after receiving the said notice, notify the clerk of the municipality, by registered letter, which of the said modes of doing the work he will select on behalf of the railway company, and if he selects to do the work under the provisions of clause (*b*) of the preceding sub-section, upon the receipt of such notice the clerk of the municipality shall forthwith notify the parties who are liable to perform the work, of the day that has been fixed for the commencement of the said work, by the manager of the railway.

(3) If the work is completed under the provisions of clauses (*a*) or (*b*) of sub-section (1) of this section, then, in either of such cases, the engineer of the railway company shall send to the clerk of the municipality, by registered letter, a

certificate, certifying that the work has been completed in accordance with the copy of the plans and profile as may have been finally agreed upon and furnished to the railway company.

(4) When the work is completed under the provisions of clause (*a*) of sub-section (1) of this section, the council of the municipality shall at their first meeting, after the clerk has received the certificate mentioned in the preceding sub-section, order the payment of the cost of the work and the same shall be paid by the municipality in accordance with the provisions of section 13 of said *Ditches and Watercourses Act* to the railway or to the party authorized by the railway company to receive the same, and if not forthwith paid by the party or parties who are liable for the same under the provisions of the award, it shall be entered upon the collector's roll as provided in sections 14 and 18 of *The Ditches and Watercourses Act.*

ENLARGING BRIDGES AND CULVERTS.

7. In any case where the engineer of the municipality reports that an existing bridge or culvert in the road-bed of any railway has to be enlarged by the deepening or widening of the same, or that a new bridge or culvert is required, and that the same has been agreed to and reported either as provided in sub-section 2 of section 5, or as in sub-section 5 of said section 5, or as provided in sub-section 6 of section 5 of this Act, then all such deepening or widening or construction shall be performed by the railway company and by their employees and at the cost of the municipality in the first instance, said cost to be collected from, and paid for by the owners who will be liable for the same, as provided for in the said sections 14 and 18 of *The Ditches and Watercourses Act.*

COMPANY NOT LIABLE FOR COST.

8. The railway company shall not be liable for the cost of any work performed upon the lands, or under the road-beds of any railway, under the provisions of this Act.

DOING WORK WHEN COMPANY REFUSES.

9. If any railway company neglects or refuses to proceed with the work within the time specified in the report for the completion of the same, then in such case the party or parties who are liable for the payment of the costs of the work under the provisions of the report or award, as may have finally been decided upon, may proceed with and complete said work upon the lands of the railway company, except the enlarging of a bridge or culvert and the excavation in connection therewith.

COMPANY LIABLE FOR NEGLECT.

10. If the railway company neglect or refuse to enlarge or construct a bridge or culvert within the time specified in the award or report for the completion of the same, then in such case the railway company shall be held liable for all damages sustained by the party or parties, embraced in the report or award, on account of the non-enlargement of such bridge or culvert; and such damages shall accrue from the date mentioned in the report for the completion of the work.

HOW ACT READ AND CITED.

11. This Act may be read and cited as *The Railway Clauses of the Ditches and Watercourses Act* and shall be read as part of said Act.

APPENDIX "B."

Procedure on Hearing of an Appeal Before the County Judge.

In view of the many technical matters of which proof must be given upon the hearing of an appeal before the County Judge, a short summary of procedure upon such hearing should be of practical assistance. The sections of the Act which especially apply to appeals are sections 22, 23, 25 and 26.

Upon the hearing of an appeal by the County Judge the appellant must commence the proceedings by proving his appeal. In order to do this he must prove that the following steps have been taken:—

1. That he has been served with notice of the filing of an award, or that an award has been made and filed affecting his lands, under the provisions of section 18.

2. That he is the "owner," within the meaning of the interpretation clauses of the Act, of land affected by the award.

3. That within fifteen clear days from the filing of the award he did serve upon the Clerk of the municipality in which the proceedings for the ditch were initiated, a notice in writing of his intention to appeal from the award, particularly setting forth therein the grounds of the appeal. Section 22, s.-s. 1 and 2.

4. That the Clerk after the expiration of the fifteen days forwarded by registered letter or delivered to the Judge, a copy of the notice or notices of appeal and a certified copy of the award with the plans and specifications. Paragraph 22, s.-s. 3.

5. That the Judge thereafter notified the Clerk of the time appointed for the hearing of the appeal as provided by section 22, s.-s. 3.

6. If security ordered by the appointment that such security was duly given.

7. That the Clerk had notified the Engineer and all parties interested of the hearing of the appeal. Section 22, s.-s. 3.

These steps having been properly proved the appellant is properly before the Court, and may then proceed to attack the award. It has been

the experience of the writer that some Judges require the respondent, at this stage of the proceedings, to prove that a valid award has been made, but it is confidently submitted that this procedure is based upon a misconception of the rights of the parties. The award being made is an official act, which must be presumed to have been rightly done until the contrary is shewn, and it is, therefore, clear that the appellant, having proved his status, must proceed to shew that there is some weakness, either in the award itself or in the jurisdiction of the Engineer by whom it was made.

A question may arise, in the event of it appearing that the Engineer has acted without proper jurisdiction, as to whether the Judge, who being *persona designata* derives his jurisdiction through that of the Engineer, has any authority to set aside the award. It is submitted, however, that the great balance of convenience is in favour of the Judge exercising such authority. By his doing so the parties are placed in the proper position without the necessity of Superior Court litigation.

It is almost impossible within the narrow compass of a work such as this to indicate the numerous objections to the merits of an award which may

possibly be taken, but the adviser of the appellant is referred to the notes under the different sections of the Act, especially to those under sections 16 and 22.

The appellant should confine himself to the grounds of appeal of which he has given notice, as the Judge may well consider himself to be limited to these grounds, both as a matter of common justice and as a matter of strict law, he being *persona designata* under the Act and his jurisdiction being based upon the service of the notice of appeal, without which he could have no jurisdiction to try the appeal.

In the event of it proving necessary for the respondent to shew that all the different steps in the direction of the making of the award have been properly taken a concise summary of these different steps may be of advantage. The steps are :—

1. The by-law of the municipality appointing the Engineer. Section 4, s.-s. 1.

2. The taking and filing of the Engineer's oath. Section 4, s.-s. 3.

3. The taking and filing of the declaration of ownership under section 7.

4. Service of notice of a friendly meeting and the holding of such meeting twelve clear days thereafter under section 8.

5. The affirmative fact that no agreement was arrived at by the owners present at the friendly meeting, and that no adjournment was had as provided for by section 11, or if such adjourned meeting was held that no agreement was arrived at at such meeting.

6. That the requisition was filed as provided by section 13, and that the person filing such requisition was an "owner" within the meaning of the interpretation clause of the Act.

7. That the Clerk on receiving the requisition forthwith enclosed a copy of it by registered letter to the Engineer. Section 14.

8. That on receipt of such copy by the Engineer he notified the Clerk in writing appointing a time and place for his attendance in answer to the requisition, not less than ten days or more than sixteen clear days from the date on which he received the copy of the requisition. Section 14.

9. That the Clerk filed the Engineer's notice of appointment and sent a copy of it by registered letter to the owner making the requisition. Section 14.

10. That at least four clear days before the date of appointment the owner served the other owners named in the requisition with the notice of the appointment. Section 14.

11. That the owner also endorsed on one copy of the notice the time and manner of service on the other owners, and left such copy so endorsed with the Engineer not later than the day before the date of the appointment. Section 14.

12. That the Engineer attended at the time and place appointed by him as aforesaid, and examined the locality and took the other proceedings required by section 16.

13. The making and filing of the award and the notices to the persons affected required by section 18.

APPENDIX "C."

DIGEST OF ONTARIO REPORTED CASES UNDER THE DITCHES AND WATERCOURSES ACT.

The declaration was against the defendant as owner of a lot adjoining the plaintiff's land, alleging the existence of a large quantity of surplus water upon both lots, and that both parties disputed as to their respective rights and liabilities under the Fence-Viewer's Act (C. S. U. C. c. 57). The declaration then went on to recite the award of the Fence-Viewers verbatim, which directed two ditches to be made by the parties, one by each, and concluded thus, "said ditch to be made before the 1st October, 1865." Plaintiff then averred performance of the award on his part, and a neglect and refusal to perform it on the defendant's part, and claimed damages for such neglect and refusal Held, on demurrer, that the declaration was not bad as failing to disclose a case which gave the Fence-Viewers jurisdiction, which it sufficiently did, but that it was bad as setting out an award which did not fix the time each party should have within

which to perform his share of the ditching, or direct where such ditching should be made; and also, for not shewing that a demand in writing had been made on the defendant to perform the award, the non-compliance with which would have entitled the plaintiff under the Act to have completed the ditch and sued for the price fixed, instead of bringing an action for damages, which could not be maintained. The eleven sub-sections of section 16 of the above Act (C. S. U. C. c. 57), refer to ditches and watercourses as well as to fences. *Murray* v. *Dawson, 17 C. P. 588.*

The plaintiff and defendant, occupying adjoining lots, having disputed as to the drainage of surface water, referred the question to fence-viewers, who awarded the defendant should open a ditch from the line between himself and plaintiff, through the plaintiff's farm, of sufficient depth to carry off the water then in the ditch opened by the defendant, about twenty rods in length, and that the plaintiff should make and keep open this same portion of ditch, commencing at the line fence and of sufficient length, width and fall, to carry off the water; to be two and a half feet deep at the line fence; said ditch to be made before the 1st of

October, 1865: Held, following the last case, that the award was bad, for not sufficiently defining the point of commencement and course and position of the ditch. *Dawson* v. *Murray, 29 Q. B. 464.*

Semble, that the award was not bad, as decided in Murray v. Dawson, 17 C. P. 588, for omitting to specify the time within which each party was to perform his share of the work, for that the time mentioned applied to both. *Ib.*

To an action for trespass on the plaintiff's land, defendant pleaded justifying under the award, alleging that the plaintiff paid half the expenses of the award as thereby directed, and that defendant, in pursuance of it, having first duly notified the plaintiff, entered on the plaintiff's land and opened the ditch there as directed by the award, doing no unnecessary damage: Held, that the plea was bad, as setting up a right which the award, being invalid, could not give; but that the facts might be found to support a plea of leave and license. *Ib.*

Held, that the evidence stated in this case failed to establish a natural water course, and that the plaintiff's only remedy for obstructing it was

under C. S. U. C. c 57. *Murray* v. *Dawson, 19 C. P. 314.*

In trespass defendant justified cutting the ditch complained of under an award of fenceviewers, etc. The jury found for defendant on this issue, and on the general issue that there was no damage: Held, that as a right was involved, the plaintiff was entitled to a verdict on the general issue for nominal damages. The Township Clerk produced a copy, which he swore was a true copy of the fenceviewers' award, the original being in his custody. Held, that such copy was admissible in evidence under C. S. U. C. c. 32, s. 6, these awards being made by a statutable public officer acting in a judicial capacity, and which might affect a large portion of the public, and even municipalities. Semble, per A. Wilson, J., that if the copy had been one delivered by the fenceviewers under the statute, it might have been received without proving it to be a true copy. *Warren* v. *Deslippes, 33 Q. B. 59.*

The question whether a joint interest exists is to be determined entirely by the fenceviewers, and their discretion cannot be reviewed if fairly and

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reasonably exercised. Semble, the absence of a demand under s. 15 may be waived by the subsequent conduct of the parties. *In re Roberts and Holland, 5 P. R. 288; C. L. Chamb. A. Wilson.*

An award of fenceviewers directing a drain to be constructed on one man's land for the benefit of another, operates as the grant of an easement on the land through which it passes, binding privies in estate as well as parties; and so long as such award remains unchanged the rights of the parties and the nature of the easement must be governed by it. An action therefore will lie against the owner of the land through which the drain passes for obstructing it to the injury of the person for whose benefit it is required. Semble, that such person may enter upon the land and clear out the drain to the extent to which he is bound to maintain it under the award. *Kelly* v. *O'Grady, 34 Q. B. 562.*

Held, that the defendants, a railway company, were not subject to the provisions of "The Ditches and Watercourses Act," R. S. O. (1877) c. 199. *Miller* v. *Grand Trunk R. W. Co., 45 Q. B. 222, Q. B. D.*

After the time fixed by an award under the Ditches and Watercourses Act, 1883, for the completion of certain drainage work by neighbouring landowners, the plaintiff, who was one of the parties interested in the award, in writing, required the defendant, as township engineer, to inspect the work, with the object of having it completed according to the award; but, as the plaintiff alleged, the defendant neglected to inspect the work or cause it to be completed according to the award, and thereby the provisions of the award were not carried out, and the plaintiff in consequence suffered damage by reason of water remaining on his land, etc. Held, that the provisions of section 13 of the above Act as to the inspection by the Engineer are imperative, and an action would lie for breach of his duty; but even if the evidence had shewn such a breach, the damages claimed were not proximate, necessary, or natural results thereof. The other provisions of section 13 are merely permissive, and no action would lie for their non-performance; nor, were it otherwise, could it be held that the damages claimed were the proximate result of such non-performance. Those who, by the terms of the award, ought to have done the work, were the persons proximately

responsible for the damages. *O'Byrne* v. *Campbell, 15 O. R. 339, Q.B.D.*

Where an award has been made under the "Ditches and Watercourses Act, 1883," the only remedy for the non-completion of the work in accordance with the award is that provided by section 13 of the Act. Murray v. Dawson, 17 C. P. 588, followed; and O'Byrne v. Campbell, 15 O. R. 339, distinguished. No other or greater costs were allowed to the defendants than if they had successfully demurred instead of defending and going down to trial. *Hepburn* v. *Township of Orford, 19 O. R. 585, Q.B.D.*

That cannot be called a defined channel or watercourse which has no visible banks or margins within which the water can be confined; and an occupant or owner of land has no right to drain into his neighbor's land the surface water from his own land not flowing in a defined channel.

The rule of the civil law that the lower of two adjoining estates owes a servitude to the upper to receive all the natural drainage has not been adopted in this province. *McGillivray* v. *Millin, 27 U.C. R. 62; Crewson* v. *Grand Trunk R. W.*

Co., ib. 68; *Darby* v. *Crowland, 38 U. C. R. 338*; *and Beer* v. *Stroud, 19 O. R. 10, considered. Williams* v. *Richards, 20 O. R. 651.*

An owner of land, desiring to construct a drain on his own land and to continue it through that of an adjoining owner, served him with the notice provided by the Ditches and Watercourses Act, R. S. O. ch. 220, sec. 5, as amended by 52 Vic. ch. 49, sec. 2, (O.) to settle the proportions to be constructed by each, and, on their failing to agree, served the Clerk of the municipality with the notice provided for by such Act requiring the Engineer to appoint a day to attend and make his award. The Clerk immediately forwarded the notice to the Engineer, who was absent, and who declined to attend:

Held, that a mandamus would not lie against the municipal corporation to compel their engineer to act in the premises. *Dagenais* v. *The Corporation of the Town of Trenton, 24 O. R. 343.*

1. Where the Engineer of a municipal corporation purports to make an award under the Ditches and Watercourses Act with respect to the making of a drain, the affirmance of such award by the

County Court Judge does not preclude the High Court from entertaining the objection that the Engineer had no jurisdiction to make the award; nor is such an objection one for the determination of the County Court Judge alone. *Murray* v. *Dawson, 17 C. P. 588 distinguished.*

2. In the absence of a resolution of the municipal council such as is provided for by sec. 6 (*b*) of the Ditches and Watercourses Act, R. S. O. ch. 220, the question whether the Engineer had jurisdiction to make an award depends upon whether, before filing the requisition, the owner filing it has obtained the assent in writing of a majority of the owners affected or interested, as provided by sec. 6 (*a*); if he has obtained such assent, the Engineer is immediately upon such filing clothed with jurisdiction; and the absence of the notice (Form D.) required by section 6, would not deprive him of such jurisdiction, but would form only a ground of appeal against his award.

3. The assent of the municipal corporation as one of the landowners interested may be shewn by resolutions passed by the council directing the Engineer to proceed with the work.

4. The term "owner," as used in the Act, means

the assessed owner; and a tenant at will may be an owner affected or interested within the meaning of the Act.

5. The decision of the County Court Judge as to matters over which the Engineer has jurisdiction cannot be reviewed by this Court; and whether the plaintiffs were benefited by the proposed work was a matter to be determined by the Engineer and the subject of appeal to the County Court Judge.

6. The mere publication by the Engineer, within a year after the affirmance of an award, of a notice that he would let the work to be done upon the land of one of the persons affected by the award, and that such letting would take place after the expiry of a year from such affirmance, does not afford any ground for an action of trespass. *York et al.* v. *Township of Osgoode et al., 24 O. R. 12.*

The word "owner," as used in the Ditches and Watercourses Act, R. S. O. c. 220, means the actual owner and not the assessed owner; and a tenant at will of land affected, assessed as owner, is not an owner affected or interested within the meaning of the Act.

Judgment of the Queen's Bench Division, 24 O. R. 12, reversed. *York et al.* v. *Township of Osgoode et al., 21 A. R. 168.*

Affirmed in Supreme Court March 11th, 1895.

The Act respecting Ditches and Watercourses (38 Vic. c. 26) is only applicable where the lands of *each* of the adjoining owners is benefited by the work.

Where, therefore, fenceviewers awarded that R. should pay for and maintain a portion of a drain and watercourse, which was only of benefit in draining Mc.K.'s land, the award was set aside. *Riddell* v. *McKay, 13 C. L. J. 92.*

(But see sec. 17 of the present Act.)

It is the duty of the fenceviewers to look carefully at the property, and to satisfy themselves that there is a sufficient outlet, and if no such outlet can be obtained they should not interfere (*a*).

(*a*) (See sec. 5 of the present Act.)

The award when registered operates as a "lien and charge" upon the lands, and the greatest caution should therefore be exercised in such an important proceeding.

Everything should be set out accurately in the award.

If uncertain it must be set aside.

On the facts set out in this case :—

Held, that the fenceviewers had no jurisdiction to make the award. Re *Bell & Codling, 18 C.L.J. 15.*

The award of an Engineer directing the construction and maintenance of a ditch, thedischarge from which would injuriously affect the interests of others, was set aside, because the parties so affected were not notified of the proceedings. Re *Hilborn and Pickering, 23 C.L.J. 194.*

(And see new sec. 5 of the present Act.)

An Engineer, under the Ditches and Watercourses Act, is entitled to his fees, when the by-law appointing him is silent as to his rights, in case his award is set aside.

Parol evidence, inconsistent with the by-law of the corporation, of an agreement between members thereof and the Engineer that no fees were to be charged by him in case of his award being set aside, is not admissible.

The Act applies to all municipalities, but *Semble* its powers should not be put in force unless clearly applicable, or if to do so would be oppressive or inequitable, or if the benefits ensuing are not of proportion to the cost of the work. *Smith* v. *Cannington, 24 C.L.J. 498.*

The failure of an agreement is a condition precedent to taking action under the Act. (*a*)

It is the duty of the Clerk and Engineer to examine and satisfy themselves before acting that the requirements of the Act have been strictly complied with. (*a*)

The Engineer is not obliged to adopt the route or course of the drain asked for, but can deviate therefrom or lay out a different or alternative route, and may notify such persons as may be interested in or affected by such new route, and the persons so added will be covered by the award as if originally notified. (*b*)

An award founded upon proceedings wholly irregular cannot be amended. *Re Furness & Gilchrist, 25 C.L.J. 64.*

(*a*) (See new secs. 8 and 10 of the present Act.)
(*b*) (See new sec. 16 of the present Act.)

Unless there is a preponderating benefit to the land through which it is necessary to construct or maintain a ditch, for the benefit of the superior owner, the inferior owner should not be required to construct or maintain it, where it is shewn that any corresponding benefit to his land is counterbalanced by the inconvenience or nature of its location. *Re Healey & Macdonald, 26 C.L.J. 600.*

(See new sec. 17 of the present Act.)

The provision of the Act as to fees to witnesses being that these fees shall be the same as those allowed in the Division Court:

Held, that the costs of a map or survey cannot be taxed as disbursements against an unsuccessful respondent. *Re Curtin & Taylor, 26 C. L. J. 600.*

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