1885
*Nov. 17, 18.
1886
*April 9.

THE ONTARIO AND QUEBEC RAILWAY COMPANY ..... APPELLANTS;

AND

C. J. PHILBRICK ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Railway company—Lands taken for railway purposes—Arbitration—Award—Matters considered by arbitrators—Costs.

A railway company, having taken certain lands for the purposes of their railway, made an offer to the owner in payment of the same, which offer was not accepted and the matter was referred to arbitration under the Consolidated Railway Act, 1879. On the day that the arbitrators met the company executed an agreement for a crossing over the said land, in addition to the money payment, and it appeared that the arbitrators took the matter of the crossing into consideration in making their award. The amount of the award was less than the sum offered by the company, and both parties claimed to be entitled to the costs of the arbitration, the company because the award was less than their offer, and the owner because the value of the crossing was included in the sum awarded which would make it greater than the offer.

Held, affirming the judgment of the Court of Appeal, Gwynne J. dissenting, that under the circumstances neither party was entitled to costs.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of Galt J. in the Divisional Court (1), refusing a mandamus to compel the County Court Judge to tax appellants' costs.

The respondent's land having been taken for purposes

*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

(1) 5 O. R. 674.

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of appellants' railway, notice was given with offer of payment as follows:—

NOTICE.

To C. J. Philbrick, M.D., of Toronto.

Take notice that the lands required by and to be taken by the said The Ontario and Quebec Railway Company from you for the purposes of their railway, may be described as follows: All and singular that certain parcel or tract of land and premises being composed of parts of lots Nos 47, 49 and 51, as shown, on lot 17, concession 2, from the bay, township and county of York, and being a strip of land 66 feet wide, lying 33 feet on each side of, and measured at right angles to the centre line located for The Ontario and Quebec Railway Company, which said centre line may be more particularly known and described as follows, that is to say: Commencing at a point on the west limit of lot 47 aforesaid, distant 35 feet 10 inches, measured northerly along said limit, from the south-west angle of the said lot; thence north-easterly along a curve to the left of 2,865 feet radius, 1,021 feet to the intersection of the east limit of lot 51 aforesaid, as shown on the sketch attached hereto, and containing $1\frac{54}{100}$ acres to the same, more or less, and is set out on the plan hereto annexed.

That the powers intended to be exercised by the said The Ontario and Quebec Railway Company with regard to the lands above described are the acquiring of the said lands for the purpose of constructing and thereafter of operating their railway thereon.

That the said The Ontario and Quebec Railway Company are ready and willing and hereby offer to pay the sum of thirty-six hundred and thirty-five dollars as a compensation for the lands above described, and as a compensation for such damages as you may sustain by reason or in consequence of the exercise of the powers above mentioned; and that in event of your not accept-

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ing this offer, His Honor Judge Kingsmill is to be appointed as and will be the arbitrator of the said The Ontario and Quebec Railway Company.

W. H. LOCKHART GORDON,
Solicitor for The Ontario and Quebec Railway Company.

Dated at Toronto, this 23rd day of November, 1883.

The offer of payment contained in the above notice was not accepted, and an arbitration was had, which resulted in a money award $119 less than the sum offered by the company. The respondent, however claimed that he was entitled to a crossing which the company had agreed to make, and that the arbitrators had considered the value of the crossing in making up the award Shortly before the arbitrators met an agreement was drawn up by the company for construction of the crossing, but was not executed; it was claimed, however, that it formed a feature of the evidence before the arbitrators, and was drawn up for that purpose. Under these circumstances the railway company claimed costs which the county court judge refused to allow, and he finally, some time after these proceedings commenced, taxed costs against them. The statute under which the claim for costs is made is sec. 9, sub-sec. 19 of the Consolidated Railway Act. It provides as follows: "If, in any case, when three arbitrators have been "appointed, the sum awarded is not greater than that "offered, the costs of the arbitration shall be borne by "the opposite party, and be deducted from the com- "pensation; but if otherwise they shall be borne by "the company, and, in either case, they may, if not "agreed upon, be taxed by the judge."

Application was made to Mr. Justice Galt for a *mandamus* to compel the judge to tax the company costs, and also for a writ of prohibition to restrain him from taxing costs against them.

The learned judge held that the agreement or offer

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for the crossing was made by the company before the arbitration, and was included in the sum awarded for damages, and he refused both applications.

The Court of Appeal sustained this judgment, holding, as to the *mandamus*, that as the notice by the company contained no mention of a crossing, and the award did, the latter was not made upon the basis of the matter contained in the notice; and as to the writ of prohibition, that if the costs against the company were taxed the writ was useless, and if the judge had no power to tax the taxation would be futile.

G T. Blackstock for the appellants.

There is only one case in which the land owner is entitled to costs, namely, where the award exceeds the amount offered. The judge had no authority to decide on crossing, nor to send matter back to arbitrators. The company put in agreement with reference to crossing. Respondent went on himself, claiming that the amount offered was not enough. They may have taken crossing into consideration. He was entitled to crossing without any agreement. Act 1884, ch. 11, sec. 9, provides for a crossing in cases of this kind. *Brown* v. *Nipissing* (1) decides that the word "at" should be read "and" and the railway companies were compellable to provide crossings. The meaning of the legislature there is clearly shown by the statute of 1884, sec. 9. If the land owner did not wish to have the subject taken into consideration he should have objected before the arbitrators. It is not competent for the county court judge to do anything but compare the sum given with the sum agreed and tax or not tax accordingly And if you find that the arbitrators did take the crossing into consideration, then I submit that the respondent was entitled to that any way, and it is no part of this case. To say that the company are not entitled to costs, is a decision that the

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crossing is worth $119. The court say this was not an arbitration under the statute at all. But the award purports to be an award under the Railway Act of 1879. We claim under the express provisions of the statute of 1883, ch. 24 sec. 8. The judges of the Court of Appeal proceed upon sec. 9, act of 1884.

In order to make out a title to costs at all, land owner must show the court that the amount awarded is greater than the sum offered. Here there is no pretence that it is greater. But the court says that this, in effect, is not an award under the statute at all. I say the county court judge had nothing to give him jurisdiction except the statute. There was no consent to arbitration outside of the statute. Cites *Wheeldon* v. *Burrows* (1); *Pinnington* v. *Galland* (2); Gale on Easements (3); *Davies* v. *Sear* (4).

All the judges have decided that the land owner was not entitled to his costs but the county court judge taxed them all the same. We showed in Court of Appeal that he did carry out his threat and tax costs against us, and we wish to prevent him paying money to the party.

Dr. McMichael Q.C. and *Shepley* for the respondent.

First as to the right of the land owner to the crossing. He never had any such right. When the statute empowers a company to take land which they never would have had otherwise,, unless specifically provided in the statute, no one has the right to cross that land. The case was discussed in many Great Western cases, and never was any such right set up. By the original statute the company had to make crossings, but this has been amended by substituting the word "at" for "and." *Brown* v. *Nipissing* (4) decides that they had to make the crossings before they could make the gates. The former statute compelled them to make crossings. The altera-

(1) 12 Ch. D. 31.
(2) 9 Ex. 1.
(3) Pp. 134 to 138.
(4) L. R. 7 Eq. 427.
(5) 26 U. C. C P. 206.

tion is only that if they are bound to furnish crossings they shall make them. The agreement is one by which they agree to make crossing. We never accepted it. The court has held that having made it they are bound.

The question here is not so much on the statute as on the reference to arbitration. They have express powers which they intend to exercise. If the effect of that is that they propose to take the land and effect a complete severance of those lands, the damage that would result to respondent would be very great.

When a company indicate to a man that they will take his land from him it is *primâ facie* that they will take it without putting him to any cost. That is the rule in England unless the party is deprived of costs by express provision of a statute. In this case we should not be visited with costs unless we have violated the law. The statute provides a penalty; that is when the award is not greater than the offer. My learned friend puts great stress upon the word "sum" as if it only meant sum of money, but other matters may come in to make up a sum.

Instead of saying we will take the land and simply assume the value of the land and damages, they have said "we will make a crossing."

That was in consequence of the case *Baby* v. *Great Western Ry. Co.* (1). They only offered a sum of money, and thinking over the circumstances afterwards they gave evidence to show how much the damages were diminished by giving the crossing.

What I contend is, that the state of facts contemplated by the statute in which the land owner should be compelled to pay costs has not arisen.

Cites *Fitzharding* v. *Gloucester and Berkeley Canal Co.* (2); *Pearson* v. *Great Northern Ry. Co.* (3); *Gray* v.

(1) 13 U. C. Q. B. 291. (2) L. R. 7 Q. B. 776.
(3) L. R. 7 Q. B. 785 n.

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North Eastern Ry. Co. (1).

If they had included the crossing in their notice we would have been able to consider whether or not we would accept that offer.

Queen v. *Brown* (2).

The question we had to consider was whether the sum offered was sufficient to compensate for what they contemplated doing under their notice.

Cites *Morse, petitioner*, &c. (3); High on Extraordinary Legal Remedies (4).

G. T. Blackstock was heard in reply.

Sir W. J. RITCHIE C.J.—I think there was no proper arbitration under the statute, the arbitrators not having adjudicated upon the offer made by the company, the only basis upon which they had a right to proceed, but on that offer coupled with a crossing, not contemplated in the offer but matter in addition to it, which, obviously, materially affected the estimate of damages the property would sustain, and consequently the amount to be awarded for compensation, it being abundantly clear that such amount without an open crossing would be much greater than would be awarded for a severance with an open crossing.

Under such circumstances I agree with the court below that the company are not entitled to costs. On the other hand, it is quite clear that the land owner is not entitled to costs, inasmuch as he has not brought himself within the terms of the statute entitling him to costs. If the costs have been taxed to him, as alleged, I can only say, in the language of the court below, that it is a perfectly futile proceeding; he can only recover them by action, and it is clear that if he is not entitled to them the mere taxation cannot establish a liability on the company to pay them.

(1) 1 Q. B. D. 696.
(2) L. R. 2 Q. B. 630.
(3) 18 Pick. 443.
(4) 2 ed. p. 30 par. 24.

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FOURNIER J. :—Dans cette cause il s'agit d'une demande de la part de l'Appelante, d'un bref de mandamus pour faire ordonner au juge de comté de taxer les frais faits sur un arbitrage pour expropriation en vertu de la section 9, ss. 19 de l'Acte des Chemins de fer, 1879 ; en même temps que d'une demande d'un bref de prohibition pour faire ordonner au même juge de s'abstenir de taxer les frais faits par l'Intimé sur le même arbitrage.

Une offre de la somme de $3,635.00 comme compensation pour le terrain requis par l'Appelante, ainsi que pour les dommages résultant de l'expropriation et de la mise en opération du chemin de fer fut régulièrement faite à l'Intimé.

Cette offre ayant été refusée, des arbitres furent nommés. Au jour fixé pour leur réunion, le 27 décembre 1883, mais avant de commencer la preuve, le conseil de l'Appelante produisit un acte de déclaration (*deed poll*) par lequel la compagnie s'engageait à donner à l'Intimé un passage sur le chemin de fer dont la construction allait séparer son terrain en deux parties et le laisser sans moyen de communication entre les deux. Le passage ainsi offert n'était pas indiqué dans le plan qui accompagnait les offres. Après une longue enquête, les arbitres en vinrent à la conclusion, que la somme de $3,516 serait une compensation suffisante pour le terrain et les dommages. Ainsi une somme moindre que celle offerte fut accordée. Sans l'offre postérieure d'un passage, la compagnie aurait eu indubitablement droit à ses frais. La règle à ce sujet est établie comme suit par la ss. 19, sec. 9 de l'acte ci-dessus cité :

If in any case when the arbitrators have been appointed, the sum awarded is not greater than that offered, the cost of the arbitration shall be borne by the opposite party, and be deducted from the compensation, but if otherwise they shall be borne by the company, and in either case they may, if not agreed upon, be taxed by the judge.

Mais le fait d'avoir ajouté à ses offres en argent, l'offre d'un passage a changé la position des parties ;

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elles ne se trouvent plus dans les conditions d'un arbitrage d'après le statut qui exige que l'on ne puisse procéder qu'après un avis de dix jours contenant, à part de la description du terrain requis, la description des pouvoirs que la compagnie entend exercer sur le terrain

La ss. 15 de sec. 19 décrète que si dans les dix jours après le service de tel avis, le propriétaire n'a pas fait connaître le nom de son arbitre, alors le juge pourra nommer un arpenteur provincial comme seul arbitre pour faire l'évaluation de la compensation; et la ss. 16 dit que si dans le même délai de dix jours, le propriétaire fait connaître le nom de son arbitre, alors les deux arbitres nommés en choisiront un troisième. Dans les deux cas le propriétaire a droit à un délai de dix jours pour considérer s'il acceptera ou refusera l'offre qui lui a été faite. Dans ce cas la compagnie n'ayant point donné avis à l'Intimé de son intention de lui accorder un passage et ne lui ayant fait cette offre qu'au moment du procès, il a été ainsi privé de l'avantage du délai que lui accordait la loi pour considérer s'il devait accepter ou refuser cette nouvelle offre. En introduisant la question du passage offert, l'arbitrage a donc été fait sur une offre différente de celle que les arbitres étaient appelés à décider. L'offre d'un passage paraît, d'après les termes de la sentence arbitrale, avoir été pris en considération par les arbitres qui déclarent que " even with the open crossing," la propriété a été dépréciée d'un tiers par la construction du chemin et l'obstacle qu'il met à son accès. Bien qu'ils n'aient pas déterminé la valeur de ce passage, on ne peut pas dire qu'ils accordent moins que les offres puisque, par leur sentence, ils accordent à l'Intimé un passage qui ne lui avait pas été offert suivant la loi. Les procédés des arbitres n'étant pas en conformité du statut, il s'ensuit que la règle qu'il établit pour la taxe des frais ne peut être appliquée au cas actuel, et qu'il n'y a pas lieu à

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l'émission d'un bref de mandamus pour faire procéder à la taxe des frais.

La demande d'un bref de prohibition est maintenant sans objet, car il paraît par un document au dossier, que le juge, en présence des deux parties intéressées, a procédé à la taxe des frais. Quoi qu'il en soit, cette taxe n'affectant en aucune manière le droit que peuvent avoir les parties de demander ou refuser le paiement des frais de l'arbitrage en question, elles auront à se pourvoir autrement.

En conséquence je suis d'avis que l'appel doit être renvoyé avec dépens.

HENRY J.—I am of the same opinion. The party here applies to have his costs taxed. When these lands were taken for the purposes of the railway company an offer was made of the amount fixed by the party who valued it, which the owner thought insufficient. After that had been done the company gratuitously made a conveyance of a crossing at a particular place over the railway to the part of the respondent's land which had been cut off. The respondent having rejected the offer made to him, in the first place the matter went to arbitration, as I take it, on the submission which preceded the conveyance of the company. The arbitrators, no doubt considering that the respondent was to have the benefit of the crossing mentioned in the conveyance, reduced the amount to be given for damages, and in consequence the amount awarded by the arbitrators was less, by a small sum, than that tendered. Now the question here is as to costs. Where the amount tendered is found to be insufficient, the railway company is liable to pay the costs of the arbitration, otherwise the costs are to be paid by the owner of the land. The latter has not shown this, but from the evidence it would have been otherwise if the conveyance of the

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crossing had not been considered by the arbitrators and the amount of the damages consequently reduced. The award, for that reason, I think, was not a good one, embracing the subject of the crossing conveyed subsequent to the submission.

Under these circumstances, I take it that the award, being contrary to the submission, is invalid. Where parties disagree the law provides a mode of settling the disagreement, but it must be on the terms of the statutory requirements.

Under these circumstances then, the company is not entitled to the costs in question. I do not think it necessary to decide anything in regard to the costs of the other party. I should think, however, that neither party is entitled to costs. In my opinion, therefore, the appeal should be dismissed.

TASCHEREAU J. concurred.

GWYNNE J.—I am of opinion that, upon the facts appearing in this case, the appellants were entitled to their costs under the peremptory provision of the statute in that behalf, and that the rule *nisi* for a *mandamus* to the county judge of the county of York, commanding him to tax those costs, should have been made absolute, and that therefore this appeal should be allowed with costs and a rule absolute for the *mandamus* be ordered to be issued from the court below.

The appellants, having been unable to agree with the respondent upon the amount of compensation to be paid to him for certain land of the respondent required for the road-bed of the appellants' railway, served upon the respondent a notice, as required by the Consolidated Railway Act, in the following terms:—[See p. 289.]

This notice was accompanied with the certificate of a sworn surveyor for the Province of Ontario to the effect that the lands mentioned in the notice, as intended to

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be taken by the railway company, were required for the Ontario and Quebec railway; that he knows the said lands so required and the amount of damage likely to arise from the exercise by the railway company of the powers mentioned in the notice; and that the sum of thirty-six hundred and thirty-five dollars offered by the said the Ontario and Quebec Railway Company in the notice mentioned was, in his opinion, a fair compensation for the lands in the notice described and for the damages that may be sustained by reason, or in consequence, of the exercise of the powers in the notice mentioned. A sketch of the manner in which the railway was intended to pass through the land, along the whole front thereof, but not showing where the appellants contemplated that the respondents should have a crossing, was annexed to the notice. This notice and certificate conformed with the requirements of the statute in that behalf, and accordingly the respondent appointed his arbitrator who, with the company's arbitrator, appointed a third arbitrator to act with them under the provisions of the statute for the purpose of ascertaining and determining, by the award of any two of them, the amount of said compensation to be paid to the respondent by the said railway company, and evidence was duly entered into for that purpose. It is unnecessary to refer to the fact that Judge McDougall, junior judge of the county court of the County of York, was subsequently appointed and substituted as third arbitrator in the place of the person first appointed to that position, for such substitution took place by agreement between the parties for that purpose made. Two of the three arbitrators made their award in writing signed by them and annexed the same to the notice of arbitration, above set out, served upon the respondent, and they did, by such their award, adjudge and award that the said Ontario and Quebec

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Railway Company do pay the sum of three thousand five hundred and sixteen dollars as compensation for the lands thereinafter described; and after giving a description of the land precisely as it is decribed in the notice of arbitration annexed to the award, the award declared that the arbitrators so making the award, awarded:

The said above mentioned sum as compensation for such damages as the said C. J. Philbrick may sustain by reason or in consequence of the exercise of the powers of the said railway company with regard to said lands as set forth in their notice herein.

And they thereby further certified, in accordance with a provision to this effect in the statute, that in deciding on such compensation they had taken into consideration the increased value that would be given to the lands or grounds of the said C. J. Philbrick, through or over which the said railway will pass, by reason of the passage of said railway through or over the same, or by reason of the construction of the said railway, and that they had set off the increased value that would attach to the said lands or grounds against the inconvenience, loss or damage that might be suffered or sustained by reason of the said company taking possession of, or using, the said lands; and by a memorandum at the foot of their award they declare that the above amount of $3,516.00 was made up as follows, namely:

For area of land taken $1\frac{54}{100}$ acres.....	$ 924 00
For depreciation of balance of property by reason of construction of road through property, interfering with access, &c., even with open crossing.....	2,592 00
In all.....	$3,516 00

The amount so awarded is less than the sum which had been tendered by the company to the respondent by the sum of $119.00.

Now by the Consolidated Railway Act it is enacted that:

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If by any award of arbitrators made under this act the sum awarded exceeds the sum offered by the company, the costs of the arbitration shall be borne by the company, but if otherwise they shall be borne by the opposite party, and be deducted from the compensation, and in either case the amount of such costs if not agreed upon may be taxed by the judge.

The amount awarded having been less than the sum offered by the company they claimed to be peremptorily entitled to their costs under this clause, and the judge of the county court having refused to tax them, alleging as his reason that, in his opinion, the respondent, and not the appellants, was entitled to the costs of the arbitration, the appellants applied to the Divisional Court of Common Pleas for a *rule nisi* for a *mandamus* addressed to the judge of the county court of the county of York, commanding him to tax to the appellants their costs, and for a prohibition forbidding him to tax any costs to the respondent. Upon argument this *rule nisi* was discharged with costs, and the rule discharging such *rule nisi* has been upheld by the Court of Appeal for Ontario. These judgments proceeded upon the assumption that what the company, by the terms of their notice served on the respondent, offered him $3,635 for was the right of constructing their railway upon the slip of $1\frac{54}{100}$ acres along the whole front of the respondent's land, consisting of 15 acres, in such a manner as to cut off all possible access for the respondent to his land, consisting of 12 acres, lying to the north of the railway which separated such part from the only highway by which the respondent could have any access thereto, without giving to the respondent, or allowing him to have, any means of access whatever across the railway, and so in effect to render wholly valueless all the respondent's land not taken by the company for the road-bed of their railway; and upon the further assumption that the law enabled the company thus, at their arbitrary will and pleasure,

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so to injure the defendant's property not taken, and that upon an arbitration had under the statute upon a notice framed in the terms of the notice in this case the arbitrators would have been bound to estimate the amount of compensation to be paid to the respondent upon the basis that by the terms of their notice and offer of compensation the appellants claimed to have, and had, the right of utterly excluding the respondent from all access from the highway in front of his land across the railway to the 12 acres lying to the north thereof; and that the appellants having, immediately before the opening of the arbitration, left with the arbitrators, for the benefit of the respondent, an obligation duly executed under their seal whereby they bound themselves, their successors and assigns, to make and maintain, at their own costs and charges, an ordinary roadway crossing, with cattle guards on each side thereof, over the railway upon the division between lot 45 and said lot No. 47, which said roadway crossing should be of the width of 66 feet; 33 feet of such roadway being upon lot 45 and 33 feet being on lot 47, this was a wholly new offer from that contained in the notice and was made too late; and that the effect of the appellants lodging such obligation with the arbitrators was to make the award made thereafter to be an award not within the statute so far as the question of costs was concerned, and that to entitle the appellants to costs the arbitration must be one proceeding strictly upon the footing of the terms of the notice, which it was held that the award in this case was not; for that the arbitrators must have attached some value, although how much did not appear, to the railway crossing which the appellants had bound themselves to make and maintain. If this contention be well founded it must rest wholly upon the ground that (as an incontrovertible proposition of law) the terms in which the notice is framed require the con-

struction which has been put upon it, for the evidence, I think, establishes beyond all question that the appellants never entertained the idea of excluding, or thought that by appropriating for the road bed of their railway a strip of $1\frac{54}{100}$ acres extending along the whole front of the respondents land, they had any right to exclude, the respondent from all access across the railway from the highway in front, to that portion of the respondents land on the other side of the railway which was not taken or required by the company for the purposes of their railway. The evidence shows that the invariable practice of the company has been to make crossings in all cases of severance. The gentleman who valued the land and damages for the company, with a view to negotiating with the respondent for the amount of compensation to be paid to him, if possible without going to arbitration, says that he had several interviews with a Mr. Wickson, acting as attorney for the respondent, and with a Mr. Turner, engineer and surveyor, deputed by the respondent to negotiate with him as the company's valuator for a settlement, and that in all these conversations it was agreed by the witness, upon behalf of the company, and was perfectly understood that the respondent was to have a crossing or crossings; that it was known to all interested that a proper crossing would be provided; and he says that it was not supposed to be necessary that it should be mentioned in a notice of arbitration that such was to be provided. Another gentleman, one of the firm of the appellant's solicitors, says that he endeavored to effect a settlement without an arbitration with a Mr. Hoskin, acting as the respondent's solicitor, and that in his negotiations for that purpose he informed Mr. Hoskin that the company would provide a proper crossing, or proper crossings, and that, in fact, if the respondent wished it they would provide three crossings for him, one on each of his lots

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which consisted of five acres each. That the respondent was aware of these offers would appear from the fact that he himself gave evidence that before the arbitration he spoke with this gentleman with reference to crossings, and that he asked him to put into writing what the company would do with reference to crossings; and the gentleman who acted as valuator for the company said that when it was found that no settlement could be made by agreement with the respondent he advised the preparation of the obligation which was subsequently executed under the company's seal to prevent any misunderstanding about the matter, locating the crossing where it is located by that obligation as the place where it would be most beneficial to the respondent.

Now does the notice indicate any intention of the appellants to exclude (assuming them to have the right to exclude) the respondent from all access between the highway and his lands north of the railway, which are severed from the highway by the railway? It certainly does not in express terms, nor can it, in my opinion, be said to do so by implication. The notice expressly says that the sum of $3,615 is offered as compensation for the land described therein as taken, being $1\frac{54}{100}$ acres for the road-bed of the railway, and as compensation for such damages as the respondent might sustain by reason or in consequence of the appellants constructing, and thereafter operating, their railway thereon. If, then, the notice served by the appellants for arbitration with the respondent is susceptible of the construction which has been put upon it, it must be because the law imperatively requires such a construction, notwithstanding that the appellants never intended to exclude, and never supposed they had a right to exclude, the respondent from all access from the highway, across the railway to his land not taken by the company, and in my

judgment the law does not require, or indeed admit of, any such construction. Doubtless in an arbitration of this nature it is a matter of great importance that the parties should before the arbitration, or at least during its continuance, come to an understanding as to the number and the sites and the nature of the crossings to be given by the company to a land owner whose lands are severed by the railway, whether the severance be of one part of his land from other parts or from a highway; for the compensation to be given to the land owner for the inconvenience which the severance may occasion to him may be increased or diminished accordingly as the number and the sites and the nature of the crossings to be given may afford more or less convenience. Thus in the case before us it appears upon the evidence of the respondent's own engineer and surveyor that a crossing at any other place than at the west limit of lot 47 (precisely where the appellants have by their obligation under seal located it), would be utterly useless, and that having it even at this westerly limit of lot No. 47, a road which must needs be made on the respondent's land to reach the table land which rises upwards of 50 feet at a very short distance from the railway will cost $200 more starting from the crossing on the railway than it would cost if made from the highway in front of the land before the railway was located. This was evidence proper to be considered by the arbitrators in determining whether the offer made by the appellants and mentioned in their notice of arbitration was sufficient compensation, but it is one thing to say that in estimating damages sustained by a land owner by reason of severance of his land it is proper that the arbitrators should be shown where and what number and what nature of crossings the railway company propose to give, assuming them to be bound to give all reasonable crossings in the absence of a

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special agreement with the land owner dispensing therewith, and quite a different thing to say that this information must be inserted in the notice of arbitration under the statute, and in default thereof that the notice must be construed as indicating the intention of the company that the land owner shall have no crossings and as an offer of compensation to be paid to him upon the basis that he shall not have any right whatever to cross the railway to or from his land. An award made on such a basis could not, in my opinion, be sustained. In a case like the present a land owner cannot, in my opinion, be deprived of his right to cross the railway somewhere unless by an express agreement voluntarily executed by him divesting himself of such right which for the reasons given by me in *Clouse* v. *The Southern Ry. Co.*, (1) I conceive to be a right vested in him by law as of necessity, of which he is not divested by the Consolidated Railway Act or by any other Act. Now the arbitrators by their award have declared that the sum of $3,516 by them awarded is given as compensation for the land taken by the company and for such damages as the said C. J. Philbrick may sustain by reason, or in consequence of, the exercise of the powers of the said railway company with regard to the said lands as set forth in their notice, which is annexed to the award; in other words, as it appears to me, that for what the company had offered the respondent, $3,635, the arbitrators award $3,516. The recital in the award of the company's execution of the obligation as to the crossing makes no difference in this respect, in my opinion. It is, therefore, in my opinion, quite a mistake to say that the execution by the company of that obligation after the service of the notice of arbitration and its deposit with the arbitrators constituted the arbitration which was had thereafter to be one not

(1) Cassell's Dig. 443.

within the statute, so as to entitle the appellants to their costs under the provisions of the statute in that behalf.

Appeal dismissed with costs.

Solicitors for appellants: *Wells, Gordon & Sampson.*

Solicitors for respondents: *McMichael, Hoskin & Ogden.*