THE CANADA SOUTHERN RAILWAY COMPANY (Defendants)..... } APPELLANTS.

AND

GEORGE CLOUSE (Plaintiff)..... RESPONDENT.

1885
May 21.

1886
April 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Farm crossing—Liability of Railway Company to provide—Agreement with agent of company—14 and 15 Vic. cap. 51 sec. 13—Substitution of "at" for "and" in Consolidated Statutes of Canada cap. 66 sec. 13.

The C. S. R. Co. having taken for the purposes of their railway the lands of C., made a verbal agreement with C., through their agent T., for the purchase of such lands, for which they agreed to pay $662, and they also agreed to make five farm crossings across the railway on C.'s farm, three level crossings and two under crossings; that one of such under crossings should be of sufficient height and width to admit of the passage through it, from one part of the farm to the other, of loads of grain and hay, reaping and mowing machines; and that such crossings should be kept and maintained by the company for all time for the use of C., his heirs and assigns. C. wished the agreement to be reduced to writing, and particularly requested the agent to reduce to writing and sign that part of it relative to the farm crossings, but he was assured that the law would compel the company to build and maintain such crossings without an agreement in writing. C. having received advice to the same effect from a lawyer whom he consulted in the matter, the land was sold to the company without a written agreement and the purchase money paid.

The farm crossings agreed upon were furnished and maintained for a number of years until the company determined to fill up the portion of their road on which were the under crossings used by C., who thereupon brought a suit against the company for damages for the injury sustained by such proceeding and for an injunction.

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

1885

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Held, reversing the judgment of the court below, Ritchie C. J. dissenting, that the evidence showed that the plaintiff relied upon the law to secure for him the crossings to which he considered himself entitled, and not upon any contract with the company, and he could not, therefore, compel the company to provide an under crossing through the solid embankment formed by the filling up of the road, the cost of which would be altogether disproportionate to his own estimate of its value and of the value of the farm.

Held also, that the company were bound to provide such farm crossings as might be necessary for the beneficial enjoyment by C. of his farm, the nature, location, and number of said crossings to be determined on a reference to the Master of the court below.

The substitution of the word "at" in sec. 13 of cap. 66 of the Consolidated Statutes of Canada, for the word "and" in sec. 13 of cap. 51 of 14 and 15 Vic. is the mere correction of an error and was made to render more apparent the meaning of the latter section, the construction of which it does not alter nor affect.

Brown v. *The Toronto and Nipissing Ry. Co.*, 26 U. C. C. P. 206 overruled.

APPEAL from a decision of the Court of Appeal for Ontario (1) varying the decree of Mr. Justice Proudfoot in the Chancery Division of the High Court of Justice (2).

The facts of the case are as follows:—

The plaintiff in his statement of claim alleges that in the month of March, 1871, he entered into a verbal agreement with the defendants through their agent, John Avery Tracey, for the sale by the plaintiff to the defendants of $7\frac{21}{100}$ acres of land of the plaintiff's taken by the defendants for the purposes of their railway for which it was then agreed that the defendants should pay the plaintiff $662.00 and should make five farm crossings across the railway on plaintiff's farm; that three of such crossings should be level crossings and the other two under crossings; and that one of such under crossings should be of sufficient height and width to admit of this passage through it from one part of plaintiff's farm to the other, of loads of grain and hay, reaping and mowing machines, and that such crossings

(1) 11 Ont. App. R. 287. (2) 4 O. R. 28.

should be kept and maintained by the defendants for all time for the use of the plaintiff, his heirs and assigns; that at the time when said agreement was entered into the plaintiff was desirous that the same should be reduced to writing and signed by himself and the said Tracey for and on behalf of the defendants, and that he particularly requested said Tracey to reduce to writing and sign that part of the said agreement relating to the farm crossings to be made and maintained by defendants for the use of the plaintiff, but that said Tracey assured the plaintiff that a writing was unnecessary and that the law would compel defendants to build and maintain said crossings although the agreement with reference thereto was not in writing, and the plaintiff believing such representations, and relying thereon, did not further insist upon the said agreement being reduced to writing; that in pursuance of said agreement the plaintiff, by indenture bearing date the 16th day of March, 1871, duly conveyed the said $7\frac{21}{100}$ acres of land to defendants, and the defendants took possession of the same and paid the plaintiff the money consideration agreed upon therefor, and built their railway upon and along said parcel of land and furnished the several level and under crossings so stipulated for and agreed upon between plaintiff and defendants as aforesaid, and have maintained the same for the use of the plaintiff who has used the same without any interruption or hindrance from the time the said railway was built until the 8th of October, 1881, on which day the defendants caused the larger of the said two under crossings to be boarded up so as to render it impossible by, and useless to, the plaintiff, and on several occasions since the defendants have caused the said under crossings to be partly filled up with earth and rubbish, and the plaintiff has been put to great trouble and expense in removing such earth and other obstacles from the said under crossings,

1885

CANADA SOUTHERN RWY. CO. v. CLOUSE.

and rendering them fit for use by the plaintiff, and the plaintiff claimed: 1. Damages for the wrongs complained of. 2 An order restraining the defendants from any repetition of any of the acts complained of. 3. Such further relief as the nature of the case might require.

The defendants, in their statement of defence, admit that Tracey was a purchasing agent of theirs for right of way; but they say that the sum paid to the plaintiff was not merely for the expropriation of his land, but was also for all damages to his property through which the right of way was taken, in so far as it was injuriously affected. They deny that Tracey made any bargain or contract with the plaintiffs for three level and two under-crossings, as alleged in the plaintiff's statement of claim; that if he did he had no authority from the defendants to make the alleged promises, and that the defendants are not bound thereby; and they deny that the plaintiff is entitled to the larger under-crossing, in respect of which the action is brought, or to any under-crossing, or that the defendants are liable to furnish and maintain the same. They also deny that they furnished the under-crossings in the plaintiff's claim mentioned in pursuance of any agreement; that at the places where the two alleged under-crossings are there were depressions in the ground which the defendants bridged over instead of filling up, for economy, intending that these and similar other depressions along the line of their railway should be filled up with earth as soon as they should have the means to do so, and the superstructures over such depressions should require renewal; and that, although they were always ready and willing to allow land owners to use these places as under-crossings, and afforded them facilities for using them as such, it never was the intention of the defendants that the plaintiff, or persons similarly situated, should have the right to

use these crossings permanently, and they averred that they had furnished the plaintiff with good and suitable over-crossings, and they denied that they are legally bound to furnish him with any others; and they finally pleaded the statute of frauds as a bar to the action.

Mr. Justice Proudfoot made a decree in the plaintiff's favour, granting to him a perpetual injunction restraining the defendants from interfering with, hindering or obstructing the plaintiff in his possession, use and enjoyment of the under crossing under the defendants' railway, and lots numbers 10 & 11 in the 8th concession of the Township of Townsend. The defendants appealed to the Court of Appeal for Ontario from this decree and that court varied the decree making it as varied read as a decree granting the plaintiff an injunction restraining the defendants from interfering with, hindering or obstructing the plaintiff in the use and enjoyment of the under crossing under the defendant's railway, &c., until compensation shall have been made, in pursuance of the provisions of the statutes in that behalf, for the additional injury to the plaintiff's farm from any further exercise of the power of the company by which the plaintiff may be deprived of the said under crossing, and with these variations and directions the defendants' appeal was dismissed without costs.

From the decree so varied both parties appeal, the defendants insisting that the plaintiff's action should have been wholly dismissed, and the plaintiff that the original decree as made by Mr. Justice Proudfoot should not have been varied.

Cattanach for appellants.

The respondent having preferred to stand on his statutory rights under the impression that he might get more in that way than by agreement, he could only be entitled to such crossings as the law gave him. The

1885

CANADA SOUTHERN RWY. CO. v. CLOUSE.

learned counsel cited and referred to *Reist* v. *G. T. Ry. Co.* (1); *Burke* v. *G. T. Ry. Co.* (2); *Brown* v. *Toronto & Nipissing Ry.* (3); Hodges on Railways (4).

Admitting there was an agreement, as alleged, specific performance would not be the appropriate remedy.

Citing *Sayers* v. *Collyer* (5); Fry on Specific Performance (6); Pierce on Railways (7); *Raphael* v. *Thomas Valley Ry.* (8); See *Gardner* v. *London C. & D. Ry.* (9). This last case has been followed in Canada in various cases. In *Simpson* v. *Ottawa &c. Ry. Co.* (10); the late Chief Justice of the Court of Appeal when in the Chancery Division, says that the legislature has confided to the company, and not to the courts, the discharge of all functions which have relation to public safety and convenience, &c.

McCarthy Q.C., and *Robb* for respondent.

The agreement alleged was clearly proved and so far performed as to get over the objection of the Statute of Frauds. The judge at the trial having believed the witnesses for the plaintiff, his finding should not be disturbed. *Grasett* v. *Carter* (11); Berthier Election (12).

The most the Railway Company can obtain is either recission of the whole bargain and a *restitutio in integrum*—or an option to take what we meant to give viz, our strip of land through the middle of our farm, less a perpetual right to an under crossing.

We put the company upon either horn of the dilemma.

The covenants are such as run with the land.

(1) 15 U. C. Q. B. 355.
(2) 6 U. C. C. P. 484.
(3) 26 U. C. C. P. 206.
(4) 6 Ed. 209.
(5) 24 Ch D. 180.
(6) 2 Ed. p. 38.
(7) Pp. 139 & 140.
(8) L. R. 2 Eq. 37.
(9) 2 Ch. App. 201.
(10) 1 Ch. Ch. (Ont.) 126.
(11) 10 Can. S. C. R. 105.
(12) 9 Can. S. C. R. 102.

1885

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Spencer's case (1); *Tulk* v. *Moxhay* (2); *Cooke* v. *Chilcotte* (3).

The plaintiff's case can be subjected to the test of specific performance under the circumstances and the law applicable to the subject, and the plea that the remedy of damages is sufficient under Lord Cairns' Act and R. S. O. c. 40, s. 40 would not be entertained; as in both these cases the acts of part performance have been such as to irretrievably change the condition and circumstances of the parties and to give the defendants full benefit of their contract in specie. That being so the court will go any length to make them perform their part of the agreement in specie.

Per Wigram V. C., in *Price* v. *Corporation of Penzance* (4); *Storer* v. *G. W. Ry. Co.* (5); *Lyttog* v. *G. N. Ry. Co.* (6); *Wilson* v. *Furness Railway* (7); *Green* v. *West Cheshire* (8).

Sir W. J. RITCHIE C. J.—I think it clear that at the time the agreement was entered into the erection of a trestle bridge only was in the contemplation of the company, and the agreement was made in reference to that. If the defendants had intended the agreement to be only temporary that should have been stipulated for; or if they intended to reserve to themselves the right to dispense with the trestle bridge at their own free will and pleasure, and substitute a solid embankment in lieu thereof, that should have been provided for; not having done so, I think plaintiff should have his under crossing. If it is more to the interest of the defendants that there should be a new embankment in lieu of a trestle bridge, they must so construct the embankment as to preserve the plaintiff's subway, or adopt such proceedings as will deprive the plaintiff of

(1) 1 Smith's L. C., 8 ed., pp. 80, 87 and 88.
(2) Ph. 774.
(3) 32 Ch. D. 694.
(4) 4 Ha. 506.
(5) 2 Y. & C. 48.
(6) 2 K. & J. 394.
(7) L. R. 9 Eq. 28.
(8) L. R. 13 Eq. 44.

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Ritchie C.J.

his under crossing and compensate him therefor.

I cannot think that having obtained the plaintiff's land at a reduced price by reason of the agreement that he should have one pass under the bridge it could have been intended by either party that the company were, the next day, at their own will and pleasure, to abandon the trestle bridge and adopt a solid embankment, and so deprive the plaintiff of his pass, he having accepted a reduced price for his land under a clear agreement that he was to have an underground crossing. I think if the defendants find it more to their interest to change the trestle bridge and substitute an embankment, they must so construct the embankment as to give the plaintiff what he, by taking a reduced sum for his land, has paid for it, even though the change and substitution mentioned should thereby involve an increased expenditure.

It is admitted that Tracey was the agent to secure the land for the right of way for the company, and I think, as incidental to that, he was clothed with authority to make agreements with the parties whose lands he was negotiating for with reference to crossings in connection therewith, not only with reference to their location, but also as to their natures. I think the evidence in this case very clearly shows that he did so; that the result of his dealings with the plaintiff was communicated to the officers of the company and acted upon by the company and the plaintiff; that to carry out the agreement, and enable the plaintiff to use and enjoy the privilege agreed on, a change was made in the construction of the trestle bridge by the company, and the plaintiff entered on the enjoyment of the way thus agreed on and arranged by the company, and has used the same, without interruption, for a number of years. I think there was evidence of the agreement and of its ratification by the company, and that the Vice Chancellor was right in holding that there was a

concluded agreement for an under crossing. This crossing would appear to be a necessity for the plaintiff; he has bought it and paid for it by the reduced price of his land, and should not now be deprived of it because the defendants wish to change the trestle bridge to an embankment. If they do so they will be obliged to incur extra expense to furnish the plaintiff with his under crossing. Plaintiff has a right to the enjoyment of his under crossing until it is taken from him by legal means.

This, in my opinion, is the state of the case as it now stands. I do not think it necessary to enter on any discussion as to what the railway company might or might not do if they think it desirable to change from a trestle to an absolutely solid embankment, under the 11th section of the Consolidated Statutes of Canada, ch. 66. As suggested by Mr. Justice Patterson, they have not taken any steps in that direction.

It being abundantly clear that the under crossing was taken into consideration in fixing the amount the plaintiff was to receive and the company to pay, if the company find it desirable to build a close embankment and so make a complete severance of the plaintiff's farm for which they have paid him no compensation they must, by legal means, obtain the right and pay for it before altering the existing state of things.

I think there is no objections to vary the decree as suggested by Mr. Justice Patterson, and that the appeal must be dismissed with costs.

FOURNIER J.—was of opinion that the appeal should be allowed.

HENRY J.—I am of opinion that the agent had authority from the company to make special arrangements to a certain extent, but the ratification of his agreement only carried out the object of the company in making the contract with Clouse. They undertook

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Henry J.

to put up a trestle bridge and they did so. It was no object to them to have the use of an underground passage. They merely authorized the agent to arrange with parties for the damages which they had sustained and I do not think it amounted to the extent of authorizing him to bind the company to give the party a useless crossing and one which the law would not supply, and therefore I am rather of the opinion that Clouse is not entitled to the crossing.

The law provides in such a case for the appointment of arbitrators and I do not think that arbitrators would have power under the act to award an under crossing under these circumstances. I do not think the law would give them any such power.

The condition of these lands have altered since this agreement was made. A crossing for a two hundred acre lot would be very different in the eye of the law from that required for a fifty acre lot. A party has a two hundred acre lot divided into lots of fifty acres each and if he remains owner of the two hundred acre lot the necessity of a crossing for each fifty acres would not be so apparent as it is now when he only has the fifty acres. He should have an agreement for a special crossing.

I concur in the judgment of my brother Gwynne and think the appeal should be allowed.

TASCHEREAU J.—I have come to the same conclusion on the same grounds. I think the plaintiff is not entitled to an under crossing. The appeal should be allowed and the cross appeal dismissed.

GWYNNE J.—In order to arrive at a just conclusion as to what should be done in this case, it is necessary to consider what were the rights of the parties, and what their position towards each other was at the time of the promise being made, if any was made, by Tracey, as the defendant's agent, in respect of the under cross-

ings, the right to the perpetual enjoyment of which the plaintiff claims, what was the extent of Tracey's authority as the defendant's agent? What was the promise which in fact, if any, was made by him, and what was the actual consideration for such promise? It was not disputed, but was rather assumed, that the defendants had filed a map or plan of their proposed railway, with a book of reference, as required by the statute, preliminary to their taking measures to acquire the land required by them for their railway and works by compulsory expropriation under the statute, and that they were in a position therefore to enter into an agreement with him touching the compensation to be paid to him for the land intended to be taken, and for any damage which might be sustained by him from the manner in which they should exercise the powers vested in them In order to proceed by compulsory expropriation it was necessary that they should have served on the plaintiff a notice containing a description of the lands to be taken and of the powers intended to be exercised with regard to the lands, and a declaration of readiness to pay some certain sum as compensation for the land to be taken and for such damages as might be occasioned to the plaintiff by the manner in which they proposed to construct their railway upon the lands so taken. The plaintiff had no power to resist the acquisition by the defendants of so much of the plaintiffs land as they required for the purposes of their railway, provided only that the land required was within the limits authorized by the statute, nor had the plaintiff any right to impose upon the defendants any obligation as a condition upon which alone he would consent to their having the land they required. The plaintiff's sole right at the time the agreement was made with Tracey consisted in the right of determining, by agreement *inter partes* if possible, and if not, of having determined by arbitration under the statute, the amount he should

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

receive by way of compensation for the land taken from him and for such damage, if any, as the construction of the defendants railway through his farm might occasion to him over and above the mere value of the land taken. This latter value might possibly be easily agreed upon, but the amount of compensation to be paid for the damage, if any, which might be occasioned to the plaintiff by the manner in which the defendants proposed to construct their railway through his farm might not be so easy of adjustment. In order to enable a land owner to make a fair estimate of the damage thus occasioned to him it is but reasonable that the Railway Company should show him in what manner, and with what description of work, it is proposed that the railway should be carried through his land, namely, whether on the level throughout, or partly on the level and partly on an embankment, or in a deep cutting; and what mode of crossing is proposed to be supplied to enable the land owner to have access to his land on both sides, namely, whether by farm crossings on the level or by under or over crossings, or in one place by one kind, and in another by one of the other kind; unless information upon these particulars should be afforded, the land owner could not, although willing to come to terms with the company, nor, in case he should prefer submitting his case to arbitration under the statute, could arbitrators, form an accurate judgment as to the amount of compensation the land owner should receive for the damage which might be occasioned to him by the railway. The plaintiff here could not have imposed upon the defendants the obligation that they should give him at the place indicated here a permanent under crossing as a condition of their acquiring the land required for roadway through his farm. If the defendants thought that they could not conveniently, or consistently with a proper regard to their own interests, in view, for example, of the great expense

of such a work, grant him such an under crossing, but that they could give him a surface crossing, or surface crossings, which, although not as convenient as the undercrossing he desires to have might be, still would afford some degree of convenience, all, if anything, that the plaintiff could claim would be reasonable compensation in money for the damage, if any, which might be occasioned to him by the difference in the convenience afforded to him by the surface crossings and in that which the under crossing, if granted, would afford to him. The defendants admit that Tracey was their agent for acquiring right of way. He had their authority to agree with the plaintiff upon the price to be paid for the land taken and also upon the amount to be paid by way of compensation for such damage as might be occasioned by the manner in which it was intended that the railway should be constructed through his farm. For this purpose it was necessary that he should be in a position to show in what manner the work was intended to be constructed. The defendants had put Tracey in such a position as their agent to deal with the plaintiff as to the amount of compensation to be paid to him that although he had not, and I think it clear that he had not, any authority vested in him to bind the defendants to give to the plaintiff a permanent under crossing, as claimed by him, still it was necessary that the defendants' agent should be in a position to show the nature of the works contemplated by the defendants to enable the plaintiff intelligently to estimate the amount of damage done to him for which he might be entitled to receive compensation, and to enable him to determine whether he should himself conclude an agreement with the defendants, or should, in preference, have recourse to the measures provided by law for obtaining satisfaction in the absence of agreement. As to surface crossings there does not appear to have been

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

any difficulty; one has been given on each fifty acres, into which the plaintiff has divided his lot of two hundred acres, one of which divisions of fifty acres, and only one, he retains as his own, having apportioned the others among his children. A depression in a portion of the fifty acres retained by the plaintiff, which the railway would have to cross, indicated that an embankment would have to be constructed at some time; the expense of constructing an under crossing through which might be so great that the defendants might reasonably be expected to be unwilling to give such a crossing. The plaintiff, I think, seems to have entertained some such idea, for when asked by Tracey what he wanted for right of way, he replied, as appears by his own evidence, "that the farm was so cut up "that he did not see how he could have anything "handy." The evidence shows that the defendants' intention was to cross this depression in the land at first by trestle work with a bridge on it across a little stream which ran there through the lot, as a temporary expedient, such trestle work to be replaced at some subsequent time when the defendants should be better able to afford the expense, by a solid embankment, with a culvert in it sufficiently large for the waters of the little stream to pass through it. That a trestle work was the mode designed to be adopted in the first instance Tracey knew, as probably also did the plaintiff. Boughner, who is the witness to the agreement subsequently signed by the plaintiff, says that he was present when the plaintiff and Tracey were negotiating about the price to be paid to the plaintiff, and that Tracey suggested that there would be a good chance for an under crossing on the banks of the creek. Tracey himself, while he swears that he had no authority to agree, and that he never did agree with the plaintiff that he should have a permanent under crossing, admits that he did say

that there was a chance for the plaintiff to pass under the bridge, and that he also said that the law gave all necessary crossings and that plaintiff would get all necessary crossings. He admits also that he entered in his private memorandum book the words: "Settled "with Clouse he can have one pass under bridge," which he says he so entered because, knowing of the trestle work intended to be constructed, he knew there was a chance for a pass under the bridge; and he swears that he had nothing to do with the crossing business except upon three or four occasions for which he received special instructions from Mr. Courtwright, who appears to have been a contractor for building the road. He never received any instructions from the board of directors nor from any one but Mr. Courtwright. In the view which I take, nothing turns upon any contradiction there may be in the evidence of the witnesses or any of them. In the actual facts which occurred, there does not appear to be much substantial difference, it was in the view which each took of what did take place that the difference exists. Tracey's view of the question of crossings appears to have been that this was a subject with which he, as agent merely for acquiring right of way, had nothing to do; that the law would give the plaintiff all necessary crossings; and I can well understand that in pointing out that by reason of the trestle work which was intended to be put up the plaintiff might get, or have an opportunity to get, the under crossing he wanted to have, he never contemplated by this suggestion, or by anything he said or by the memorandum entered in his book, that he should be understood as making, or as having made, any contract on behalf of the defendants that the plaintiff should have such a crossing or that he was imposing any obligation upon the defendants to give it. In the view which I take, the case may be determined upon what appears to me to be the true construction of the

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

result of the evidence as given by the plaintiff himself. In his letter of the 18th July, 1882, to the chief engineer of the defendants company, he says that his original demand was $1,000 for right of way and damages. I take this sum to be more accurate than the sum of $1,200, which the plaintiff on his examination in chief in the cause states to be the amount he first demanded when, as he says, his farm was so cut up that he did not see how he could have anything handy. It was then, according to plaintiff's evidence, that Tracey suggested that plaintiff could have this under crossing. Plaintiff says that he suggested that he should have some writing to that effect, but that Tracey said there was no need of it, that the law provided that people should have such crossings as were necessary to cross their farms and that Mr. Boughner lived handy and would see that plaintiff should get it all right; before finally closing with Tracey, the plaintiff consulted his lawyer, a Mr. Duncombe, who also told him that it was not necessary to have an agreement about crossings in writing, and that he would get them all right, that the law would give the crossings, that the statute provided for it.

That the plaintiff consulted Mr. Duncombe with a view to govern his conduct in negotiating with Tracey for the land taken there can be no doubt upon the plaintiff's own evidence; and Mr. Duncombe advised him that there was no necessity for any writing as to crossings, for that the law would give them. This appears to have been the general opinion. Tracey admits that he was of that opinion also, and that he so expressed himself. So advised, the plaintiff finally entered into an agreement with Tracey bearing date the 23rd of January, 1871, which was signed by the plaintiff whereby he agreed to convey to the defendants, by a proper deed with bar of dower, so much of lots 10 & 11 in the 8th concession of the Township of Towns-

end, in the County of Norfolk as is taken by the company for its line of railway containing $7\frac{21}{100}$ acres for the sum of $650.00 to be paid within thirty days from the date of the said agreement, being for price of land $540.75 and for price of damages $109.25, and the plaintiff thereby granted leave to the defendants to take possession at once for the purpose of prosecuting the work of grading.

Now, the true inference to be drawn from the above is that the plaintiff being advised by his counsel that there was no necessity for any writing relating to crossings, and that the law sufficiently made provision for them, deducted from the amount which he originally asked, upon the assumption that he was not to have the particular under crossing in question, the sum of $350.00 intending to rest upon his legal rights to secure him the crossings he required. The plaintiff very probably considered that what Tracey had said constituted a sufficient location for an under crossing, or he may have thought, under the legal opinion he had taken, that he had the right to locate his farm crossings, but it is clear, I think, that he relied upon the law to secure them to him and not upon any contract made with the defendants through Tracey as their agent, and he concluded his bargain for right of way and damages, which was reduced to writing and signed by him as a transaction wholly independent of all consideration of farm crossings and his rights thereto whatever they might be under the statute; and upon the 16th March following, he executed a deed whereby, in consideration of $662 then paid to him, he granted and confirmed to the defendants, their successors and assigns forever, the lands taken for their railway. Under these circumstances the plaintiff cannot, in my opinion, be now heard to say that he executed this deed upon condition of his having a permanent under crossing at the place in question or elsewhere; or even that a verbal agree-

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

ment that he should have it constituted part of the consideration for his executing the deed granting the land for the railway—the two things constitute quite distinct transactions and were understood so to be—the one relating to the land required for the railway which was complete for the consideration stated in the agreement, and the other relating to crossings of the railway on the plaintiff's farm, as to which the plaintiff relied upon the law to secure them to him wholly apart from, and independently of, the agreement for the land. The plaintiff's case cannot either, in my opinion, be rested upon the allegation that the plaintiff was prevented by any fraud of the defendants, acting through their agent, from having an agreement verbally complete reduced to writing and signed, nor upon the contention that a verbal agreement was entered into which should be enforced against the defendants upon the ground that the plaintiff, upon the faith of the defendants performing their part, had faithfully performed his part of the same agreement. The plaintiff's legal and equitable right, if he has any, as to this under crossing cannot under the circumstances appearing in evidence be rested upon contract, but must be determined upon view of the statute law in virtue of which alone the defendants acquired the right of interfering in any manner with the plaintiff's property. What those rights are involves the necessity of reviewing the decision of the Court of Common Pleas for Ontario in *Brown* v. *Toronto and Nipissing Ry. Co.* (1); I was a party to that judgment, but I must confess that on further consideration I do not think it can be supported. I do not think that the substitution of the word "at" in section 13 of chapter 66 of the Consolidated Statutes of Canada, for the word "and," which was the word used in section 13 of ch. 51 of 14 and 15 Vic., makes any difference in the

(1) 26 U. C. C. P. 206.

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

construction of the section. In view of the identity of the language of the statute of the State of New York, of 1850, ch. 140, sec. 44, there cannot, I think, be a doubt that sec. 13 of our statute, 14 and 15 Vic. ch. 51, was taken from the statute of the State of New York. So, in like manner, I think that our amended section 18, as consolidated in chapter 66 of the Consolidated Statutes, was taken from the statutes of the State of New York of 1854, ch. 282, sec. 8, substituting the word "at" for "and." In the courts of the State of New York this amendment has not been considered to make any difference in the construction, and that it should not is, I think, the right conclusion. The amendment, indeed, appears to me to have been made to make the section more perfect than it originally was, and to express what was intended but was omitted in the section as it was. The word "and" being, by inadvertence as I think, used instead of "at," the section failed to express where the "openings, gates or bars in "the fences" were to be. The section ran thus :—

Fences shall be erected and maintained on each side of the railway of the height and strength of an ordinary division fence, with openings or gates or bars therein, and farm crossings for the use of the proprietors of the lands adjoining the railway.

Now it will be observed that this sentence fails to express where the "openings or gates or bars" were to be; they were to be in the fences, but in what part is not said, and yet it cannot be doubted that they were intended to be "at the farm crossings of the road for "the use of the proprietors of the lands adjoining the "railway." The substitution of "at" in the Consolidated Statutes for "and" precisely expresses this intention. The statute so amended is, in my opinion, to be construed as regarding "farm crossings" to be a necessary convenience for the use of the proprietors of the lands adjoining the railway when one part of a man's property is separated from the residue by the railway and to which necessary convenience such proprietor is

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

entitled as of right, unless it shall appear that he has released and abandoned his right upon receiving compensation from the railway company in consideration of their depriving him of such necessary convenience. A railway may be so run across a man's property as to separate only a small angle from the rest of his farm; in such a case a farm crossing might not be necessary; but when a substantial part of a farm is separated by a railway from another substantial part, or a man's house is separated from his barn or stables or the like, then farm crossings constitute such a necessary requisite to the beneficial enjoyment of his property by the owner that no man can be deprived of them otherwise than by an instrument to that effect voluntarily executed by him or upon receipt of compensation adjudged to him by process of law, and the ordinary courts of the country are the courts wherein all differences between parties as to the nature, location and number of the crossings they are entitled to have, and all other matters incidentally arising are to be adjudicated upon and determined. These courts having jurisdiction to compel the construction of all such crossings as can be reasonably required have jurisdiction over every matter incidentally arising, and can, therefore, award pecuniary compensation also, if it should appear to be more reasonable that the land owner should be supplied with a less convenient crossing, with pecuniary compensation for difference in convenience, than that the railway company should be compelled specifically to give a more convenient crossing, as, for example, an under crossing, which, although it would afford the utmost amount of convenience, could be constructed only at a cost altogether disproportionate to the value of the farm upon which it was desired to be constructed, or disproportionate to the convenience which, when constructed, it would afford. The interests of both parties must in all cases be equitably con-

sulted. It would be quite unjust to compel a railway company to construct an under crossing through an embankment, the cost of constructing which would be quite disproportionate to the value of the land separated or in excess of fair compensation for the injury the farmer might sustain from his not having such particular crossing, if a reasonably convenient crossing throgh it may be less convenient can be given elsewhere. The court, no doubt, has the power, in a proper case, to compel by its decree a railway company to construct an under crossing, instead of rendering satisfaction in damages to the farmer for his not having such a crossing, and this power and jurisdiction is founded not upon any contract, but is an inherent power in the court, arising of necessity to enable it to do justice between the parties. Whether the court shall or not exercise this jurisdiction is quite discretionary with it in view of the circumstances of each particular case. The defendants, by giving to the plaintiff for the period of eleven years' permission to cross the railway under the trestle work which was but a temporary construction, have not, I think, become absolutely bound to give to the plaintiff an under crossing through a permanent embankment substituted now for the trestle work; the question, however, of what would be reasonably sufficient crossings is still open to the court which is bound to weigh in an equal scale the interests of both parties. The learned judge who tried this case has expressed the opinion that from the nature of the ground the undercrossing claimed is of such importance to the plaintiff that adequate compensation cannot be given to him in damages. I must say that I fail to see the evidence upon which this opinion is founded, and I cannot well see how it can be supported in the presence of the evidence of the plaintiff himself, who seems to have valued the want of it at $350.00, the amount

1886

CANADA SOUTHERN RWY. CO. v. CLOUSE.

Gwynne J.

by which he reduced his claim, which was for $1,000 00 when he was under the impression that he could not have this under crossing, to $650.00 when he understood that he could have it, thus, in effect, signifying his own estimate of the injury the want of the under crossing would do to him to be $350 00. Now, the evidence shows that the cost to the defendants of the crossing under the permanent embankment proposed to be constructed would be from $2,500.00 to $3,000.00, a sum of money so disproportionate to the plaintiff's own estimate of the amount he should have received on the supposition that he was not to have it (and I cannot but think also to the value of this little farm of the plaintiff's, consisting only of 50 acres) that I do not think a case is made which justifies the decree which was made in the court of first instance. The defendants, it is admitted, have already supplied one surface crossing upon this little farm; if another, or more, is or are reasonably necessary for the convenient enjoyment of his farm by the plaintiff he is entitled to them, and he is entitled to have that question enquired into and determined by the court in this action, which is so framed that the court can award whatever relief the plaintiff may be entitled to and the nature of the case may require. The court is by the suit in possession of the whole case, and in the suit the rights of the parties must be conclusively determined, instead of remitting the case to the arbitrators to award compensation, the course which is directed by the decree as varied by the Court of Appeal for Ontario.

The opinion which I have above expressed is founded upon, and is supported by, decisions of the Court of Appeals for the state of New York, in cases upon statutes similarly worded and which (concurring as I do in their soundness) I do not hesitate to adopt. The cases I refer to are *Wademan* v. *Albany and Susquehanna Ry. Co.* (1); *Clarke* v. *Rochester, Lockport & N.*

(1) 51 N. Y. 570.

F. Ry. Co. (1); *Smith* v. *N. Y. & Oswego Ry. Co.* (2); *Jones* v. *Sleighman* (3).

The result at which I have arrived is that the decree of the court of first instance should be varied as follows:

Declare that the plaintiff is entitled to have constructed and maintained for him by the defendants all farm crossings reasonably required, as necessary for the beneficial enjoyment of the lands separated by the defendants railway as it passes through his farm of 50 acres in the pleadings mentioned. Refer it to the master to enquire and report whether the one surface crossing already supplied by the defendants is reasonably sufficient for the enjoyment of his farm by the plaintiff, and if not in his opinion so reasonably sufficient then and in that case he is to enquire and report how many crossings, and where situate the defendants are willing to supply, or it would be reasonable to require that they should supply.

Dissolve the interlocutory injunction reserve all further consideration with costs.

Allow the appeal of the defendants the railway company and dismiss the cross-appeal of the plaintiff with costs.

Appeal allowed and cross appeal dismissed with costs.

Solicitors for Appellants: *Kingsmill, Cattenach & Symons.*

Solicitors for Respondents: *Tisdale & Robb.*

(1) 18 Barb. 350. (2) 63 N. Y. 61.
(3) 81 N. Y. 194.