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*March. 10.
*April 27.

HIS MAJESTY THE KING (RESPONDENT). ..... APPELLANT;

AND

GEORGE MACARTHUR (SUPPLIANT)...RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Public work—Lands injuriously affected—Closing highway—Inconvenient substitute.

The owner of land is not entitled to compensation where, by construction of a public work, he is deprived of a mode of reaching an adjoining district and obliged to use a substituted route which is less convenient.

The fact that the substituted route subjects the owner at times to delay does not give him a claim to be compensated as it arises from the subsequent use of the work and not its construction and is an inconvenience common to the public generally.

The general depreciation of property because of the vicinage of a public work does not give rise to a claim by any particular owner.

Where there is a remedy by indictment mere inconvenience to an individual or loss of trade or business is not the subject of compensation.

Judgment of the Exchequer Court (8 Ex. C. R. 245) reversed.

*PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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APPEAL from a decision of the Exchequer Court of Canada (1) in favour of the suppliant.

In 1897 the government of Canada proceeded to change the route of the Cardinal Canal, between the village of Cardinal and the St. Lawrence, from the south to the north side of the village with the result that both ends of the village were bounded by the new canal and the only bridge was in the centre. The suppliant's property being at one end he claimed damages by reason of depreciation in value and also because he could only get to the adjoining district by means of the drawbridge which was a longer, less convenient and, on account of a railway running over it, a dangerous route. The Exchequer Court awarded him $1,200 as compensation and the Crown appealed.

Chrysler K. C. for the appellant. By the closing of the street, the suppliant suffers in common with all the residents of the village but there is no injury peculiar to himself or his property and it is only for such injury that he can recover. *Attorney General* v. *Conservators of the River Thames* (2); *Lyon* v. *Fishmongers Co.* (3); *Powell* v. *Toronto, H. & B. Railway Co* (4).

The cases in England decided under the Railway Clauses Act 1845 are not in *in pari materiâ* as that Act provides for greater compensation that our Expropriation Act. The Lands Clauses Act more nearly resembles ours and the decisions on the latter are strongly against the suppliant. See *Cowper Essex* v. *Local Board of Acton* (5).

The learned Counsel cited also *Re Birely and Toronto H. & B. Railway Co.* (6); *Town of Toronto Junction* v. *Christie* (7); *East Freemantle Corporation* v. *Annois* (8).

(1) 8 Ex. C. R. 245.
(2) 1 H. & M. 1.
(3) 1 App. Cas. 662.
(4) 25 Ont. App. R. 209.
(5) 14 App. Cas. 153.
(6) 28 O. R. 468.
(7) 25 Can. S. C. R. 551.
(8) [1902] A. C. 213.

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Maclennan K. C. and *Maclennan* for the respondent: The Municipality could not have closed the highway without compensation to the suppliant and consequently the government could not. *In re Publishers' Syndicate; Paton's Case* (1); *Falle* v. *Town of Tilsonburg* (2).

The suppliant would have a right of action irrespective of the statute if the work had been done by a private person and that gives him the some right now. *Caledonian Railway Co.* v. *Walker's Trustees* (3); *Metropolitan Board of Works* v. *McCarthy* (4).

The cut-off of suppliant's land is not too remote to entitle him to compensation. *Caledonian Railway Co.* v. *Walker's Trustees* (3); *Beckett* v. *Midland Railway Co.* (5); *McQuade* v. *The King* (6).

The judgment of the Court was delivered by:—

NESBITT J.—I do not think that there is such an irreconcilability between the more recent authorities as a first perusal of them would suggest. The earlier causes proceeded upon the principle stated by Lord Cranworth in *Ricket* v. *The Directors, &c. of the Metropolitan Railway Co.* (7), at page 198, where he says:

> Both principle and authority seem to me to shew that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundation of buildings on it, obstructing its light, or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the legislature.

(1) 5 Ont. L. R. 392 at p. 402.
(2) 23 U. C. C. P. 167.
(3) 7 App. Cas. 260.
(4) L. R. 7 H. L. 243.
(5) L. R. 3 C. P. 82.
(6) 7 Ex. C. R. 318.
(7) L. R. 2 H. L. 175.

This rule was considered too narrow in the case of the *Caledonia Railway Co.* v. *Walker's Trustees* (1), at page 296.

I think that the real test is that suggested by Lord Cairns in *McCarthy's Case* (2):

> The proper test is to consider whether the act done in carrying out the works in question is an act which would have given a right of action if the works had not been authorised by Act of Parliament. I do not pause to consider whether or not, if the question was now to be decided for the first time, it is not a test somewhat narrow. I accept that test as being the test which has been laid down and which has formed the foundation for the decision of so many cases before the present.

Such definition of the right to compensation which was suggested by Mr. Thesiger, in his argument in the case of the *Metropolitan Board of Works* v. *McCarthy* (2), was accepted by the Lord Chancellor (Lord Cairns) and Lord Chelmsford and Lord Hatherley as one which may reconcile the cases which have come before the courts upon this delicate point of law. That definition was as follows:

> The principle to be deduced from a consideration of all the cases is this, that where by the construction of works there is a physical interference with any right, public or private, which an owner is entitled to use in connection with his property, he is entitled to compensation if, by reason of such interference, his own property is injured. The word "physical" is here used in order to distinguish the case from cases of that class where the interference is not of a physical, but rather of a mental, nature, or of an inferential kind, such as those of a road rendered less convenient or agreeable, or a view interfered with, or the profits of a trade, by the creation of a new highway or street, diminished in the old one.

I think a great deal of the confusion has arisen under the cases by seizing upon language which has been used without confining such language to the actual decision in the case, and to the special facts upon which that decision is based, making it neces-

(1) 7 App. Cas. 259.
(2) L. R. 7 H. L. 243.

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sary in nearly all of the cases to draw a sketch of the locality, as described, in order to see just what has been decided. I cannot do better to illustrate this than to refer to *Ricket's Case* (1) which was so carefully analysed by Lord Selborne (Lord Chancellor) in *Walker's Case* (2), at page 281.

Three cases were relied upon by the learned judge in the court below as establishing that an interference with a public right will give rise to a cause of action, and where that is taken, sustain a claim to compensation under the statute. These cases were *Chamberlain* v. *West End of London & Crystal Palace Rway. Co.* (3); *McCarthy's Case* (4), and the *Caledonian Railway Co.* v. *Walker's Trustees* (2).

A critical examination of *Chamberlain's Case* (3) will shew that the road immediately in front of the claimant's property was changed so that the claimants had to go down a set of stairs to reach the deviation road, and it was expressly found that the real estate, as real estate, had been somewhat depreciated in value.

In *McCarthy's Case* (4), the decision, as I understand, went upon the ground that the claimant had two highways, one a metal highway, and the other a water highway, and as put by Lord Hatherley, no one would suggest that if the water highway had lain on one side of his property and the metal highway on the other, and if the water highway had been obstructed *opposite to his premises* he would not have had a cause of action apart from the statute, and it could make no difference that the metal highway and the water highway were immediately contiguous to each other.

In the *Walker's Trustees Case* (2), Lord Watson, at page 303, when speaking of the rule laid down by the Lord Chancellor (Earl Cairns) in the *McCarthy*

(1) L R 2 H. L. 175.
(2) 7 App. Cas. 259.
(3) 2 B. & S. 617.
(4) L. R. 7 H. L. 243.

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Case (1), and adopted by all the law lords in that case, said as follows:

The rule thus formulated does not apply with precision to the law of Scotland, which does not, in cases like the present, recognize that distinction between the remedies by action and indictment upon which the test is founded. But that which satisfies the test, that which gives a right of action in England, has been defined in the case of McCarthy as well as in previous decisions. When an access to private property by a public highway is interfered with, the owner can have no action of damages for any personal inconvenience which he may suffer in common with the rest of the lieges. But should the value of the property, irrespective of any particular uses which may be made of it, *be so dependent upon the existence of that access as to be substantially* diminished by its construction, then I conceive that the owner has, in respect of any works causing such obstruction, a right of action, if these works are unauthorized by Act of Parliament, and a title to compensation under the Railway Acts if they are constructed under statutory powers.

In this case all the evidence shows is that the suppliant, in common with all others, is cut off from one access to Prescott, by what is known as the old highway, but all other methods of access or egress to or from the village remain the same, and the Government, under the Expropriation Act, section 3, subsec. f., substituted another road in lieu thereof, so that the suppliant still has access to Prescott, although by not so convenient a road. This is an inconvenience which he suffers in common with all the other persons desiring to use that portion of the highway which is cut off. I do not think that any case can be found which, under the English law, would hold that for such an obstruction the plaintiff could himself maintain an action. I think the remedy being by indictment, it is absolutely clear, from all the authorities, that mere inconvenience of a person, or loss of trade or business, is not the subject of compensation.

It was urged that because the substituted road was constructed with a swing bridge, which, owing to the

(1) L. R. 7 H. L. 243.

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traffic in the canal, sometimes caused delay, that this gave rise to a claim, but I think that is answered by the circumstances, first, that this arises from the subsequent use of the canal, not from its construction, and secondly, that it is an inconvenience which the suppliant may suffer more often than others, yet it is an inconvenience common to the whole public.

The evidence makes it quite plain that the reason the witnesses said that the property was depreciated in value is because it is less convenient as it is a somewhat longer road, and parties are held by the opening of the bridge, and also because railway tracks are upon the bridge, which of course is not an item which can be considered in this case.

I do not find that any of the English authorities extend the rule to cover cases where there may be said to be a general depreciation of property because of the vicinage of a public work. And *Walker's Trustees Case* (1), which goes further than any case upon the subject, is, as I have pointed out, put upon the special grounds of the dependence of the property upon the existence of the access, so that the cutting of it off diminished its value irrespectively of any use to which it might be put. To extend the rule, which has been widely laid down in cases where damage is occasioned to a person by any public works which have been constructed by an Act of Parliament for the purposes of public improvement, so as to embrace cases where the person injured is being injured as one of the public, and not to confine it, as it has been confined, to persons whose land has been injuriously affected, as land itself would be in this country, would be to unduly hamper the prosecution of public works and the consequent development of the country.

It was never intended that where the execution of works, authorized by Acts of Parliament, sentimentally affected values in the neighbourhood, all such property

(1) 7 App. Cas. 259.

owners could have a claim for damages. In most of our large cities values are continually changing by reason of necessary public improvements made, and if, although no lands are taken, everybody owning lands in the locality could, by reason of the changed character of the neighbourhood or interference with certain convenient highways, claim compensation by reason of a supposed falling of the previous market value of property in the neighbourhood, it would render practically impossible the obtaining of such improvements. I think the property in this case is not so dependent upon the existence of the access which was so cut off as to constitute an injurious affection within the authority of the statute. I do not think that there is substantially much difference between the various Expropriation Acts which were referred to. The real question is whether or not the claimant could have maintained a cause of action at common law for damages occasioned by the obstruction. I see no real distinction between the effect which the closing up of the nine mile road south of the canal, and the opening up of the new road across the swing bridge, had upon the value of the suppliant's land, and its effect upon all the lands in the village of Cardinal, between the two canals and the point just mentioned. The suppliant's land suffered no special damage distinguishable from that which all these special lands suffered. *Mayor of Montreal* v *Drummond* (1); *Bell* v. *Corporation of Quebec* (2); *North Shore Railway Co.* v. *Pion* (3).

I would allow the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Chrysler & Bethune.*

Solicitors for the respondent: *Maclennan, Cline & Maclennan.*

(1) 1 App. Cas. 384 at p. 406. (2) 5 App. Cas. 84.
(3) 14 App. Cas. 612 at p. 624.