THE CORPORATION OF THE CITY OF TORONTO..... APPELLANT;

AND

THE J. F. BROWN COMPANY..... RESPONDENT.

1917

*March 7, 8, 9.

*May 2.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Municipal corporation—Exercise of statutory powers—Erection of lavatories—User—Damage to adjoining land—Injurious affection—R.S.O., 1914, c. 192, s. 325—Cons. Mun. Act, 1908, s. 437.

Depreciation in the selling or leasing value of land caused by the construction and maintenance, by the Municipal Corporation in the exercise of its powers, of lavatories on the highway is "injurious affection" within the meaning of section 437 of "The Consolidated Municipal Act" of 1908 (Ont.), and the owner is entitled to compensation, though none of his land is taken and no right or privilege attached thereto interfered with. Davies J. dissenting.

Judgment of the Appellate Division (36 Ont. L.R. 189, 29 affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), affirming by an equal division the award of the Official Arbitrator.

This is an arbitration brought by the respondent to determine what compensation, if any, was payable to it by the appellant by reason of alleged damage to its property at the south-west corner of Queen and Parliament Streets, Toronto. The respondent owns a parcel of land on this corner having a frontage of 104 feet on Queen Street by a depth of 125 feet on Parlia-

*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 36 Ont. L.R. 189.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

ment Street, a street of much less importance than Queen Street. On the easterly 40 feet of the parcel is erected a large three-storey brick store 40 feet by 100 feet wherein tenants of the respondent carry on a weekly payment business in furnishings, clothes, etc. The store's only business entrance is on Queen Street, in the centre of the building, and there are large show windows on Queen Street and for some distance south on Parliament Street.

In the year 1912 the appellant, with a view of providing much-needed lavatory accommodation for the public, constructed a lavatory for men and women at this corner, it being a street car transfer point, and a place of public concourse, and, therefore, a logical situation for such a convenience. The lavatory was constructed underground and about fifty feet apart were stairways leading to the same, with metal hoods over them similar to those over a subway entrance in a large city. These entrances were distant eight feet from the building of the respondent, being midway between the curbing and the street line, which space was completely concreted so as to form an extended sidewalk. Half way between the entrances was a small structure of inconspicuous appearance used as a breather.

The claim of the respondent was mainly based upon the circumstance that a structure used as a lavatory had been placed near its property, causing a diminution in value thereof. In addition, however, some evidence was tendered that bad odours arose from the same. The learned arbitrator, however, found against this contention.

A claim was also made for damage from "seepage" based on a theory that the disturbance of the sub-soil

during the construction of the lavatory caused the cellar walls of the respondent's building to be damp.

The learned arbitrator found that the mere presence of a structure used as a lavatory in the vicinity of the respondent's property was sufficient to depreciate it in value and that the appellant was legally responsible therefor, and awarded the respondent $9,000 in respect of such diminution in value. He found that such damage was confined to the property occupied by the building upon the lands and did not extend south or west thereof.

He also accepted the respondents' theory of "seepage" into the cellar of the building in question and awarded it $1,200 in respect of the same.

The appellant appealed to an Appellate Division of the Supreme Court of Ontario, composed of Chief Justice R. M. Meredith, Mr. Justice Riddell, Mr. Justice Lennox and Mr. Justice Masten, upon the ground that it was not legally liable to pay either amount awarded. The respondent cross-appealed on several questions of fact.

On March 17th, 1916, the Appellate Division delivered judgment unanimously dismissing the cross-appeal, but dividing equally upon the main appeal, Chief Justice Meredith and Mr. Justice Riddell being in favour of allowing the same and setting aside the award and Mr. Justice Lennox and Mr. Justice Masten being opposed in opinion. As to the $1,200 item, Mr. Justice Masten thought it was properly awarded, but Mr. Justice Lennox says (p. 214): "It would better accord with the views I entertain as a matter of technical exactness to reduce the award to $9,000, leaving the company to sue for the $1,200 as damages. Counsel for the City does not ask for this." The appellant

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

submits that the learned judge misunderstood the position as to this item of its counsel in the lower court.

The court being equally divided, the award was confirmed and from this order both parties now appeal to this court.

Hellmuth K.C. and *Fairty* for the appellant. The respondents' claim may be actionable, but is not a matter for arbitration. See *Mudge* v. *Penge Urban Council*(1).

The lavatories do not in themselves constitute a nuisance. *British Canadian Securities Co.* v. *City of Vancouver*(2).

Canadian Northern Ontario Railway Co. v. *Holditch* (3), *Horton* v. *Colwyn Bay*(4); and Cripps on Compensation (5 ed.) 302, were also referred to.

Tilley K.C. and *G. W. Mason* for the respondents cited *Griffith* v. *Clay*(5), *Lingke* v. *Christchurch*(6), and *Pastoral Finance Asso.* v. *The Minister*(7).

DAVIES J. (dissenting)—The respondent in this appeal claimed compensation under the 325th section of "The Municipal Institutions Act," R.S.O. 1914, c. 192, for alleged injuries to his premises, located at the southwest corner of Parliament and Queen Streets, caused by the erection and maintenance of public lavatories for men and women by the Corporation of Toronto under Parliament Street, which runs along the side of his shop fronting on Queen Street. The claim came before the Official Arbitrator, who, after hearing a great deal of evidence, awarded the claimant $10,200 in full satis-

(1) 86 L.J. Ch. 126.
(2) 16 B.C. Rep. 441.
(3) 50 Can. S.C.R. 265; [1916] 1 A.C. 536.
(4) [1908] 1 K.B. 327.
(5) [1912] 2 Ch. 291.
(6) [1912] 3 K.B. 595.
(7) [1914] A.C. 1083.

faction for the injuries complained of. Of this amount the arbitrator allowed $9,000 on account of the lavatories as such, and $1,200 caused by water, or seepage, claimed as having escaped from the lavatories into the cellar of plaintiff's building.

The arbitrator in his written reasons for his award, finds as a fact that

> no land of the claimant was taken

and that

> he did not think it could be contended that *access* is really interfered with.

He seems mainly to base his conclusion as to claimants' right to compensation under the statute upon the fact that a lavatory constructed under the street, and near to claimants' store and premises, "injuriously affected" claimants' premises within the meaning of section 325 of the Act above cited.

There was some evidence that bad odours arose from the lavatories, but the arbitrator found against this, and rested his conclusion upon the depreciation of the value of claimants' shop and premises arising from the use of these lavatories as such.

He says:—

> The outstanding feature of the whole claim is *the user* of the structures, the fact that they are lavatories. This is particularly emphasized by all the claimants' witnesses.

It is clear, therefore, that the damage, exclusive of the seepage, was not caused by the construction of the lavatories but, if at all, by their subsequent use, and it seems equally clear upon the evidence, and the award, that it was this use which influenced the witnesses in estimating the damages and depreciation of the value of the claimants' premises and the arbitrator in awarding the damages. The lavatories being under ground, and not interfering with access to claimants'

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Davies J.

premises, would not as mere structures depreciate the value of those premises, however much they might injure his trade. The arbitrator did not find that the depreciation he awarded damages for arose apart from any injury to claimants' trade.

On appeal from the award to the Second Division of the Supreme Court, that tribunal was equally divided, Chief Justice R. Meredith and Riddell J. holding that as no land of the plaintiff had been expropriated, and no legal right or easement therein interfered with, he had no claim enforceable by arbitration for injurious affection of his lands under the compensation clauses referred to, while Lennox and Masten JJ. were of a contrary opinion and sustained the award.

The Chief Justice and Riddell J. were both of the opinion that as under section 433 of the said "Municipal Institutions Act"

> the soil and freehold of every highway were vested in the Corporation of the Municipality

such corporation had a common law right as owner to construct such lavatories in such places under the streets as they determined were necessary in the public interest, subject of course to the paramount rights of the public over the highway.

Chief Justice Meredith says:—

> Is the injury, if any, made lawful only by the enactment which provides for compensation? My unhesitating answer is:—No. The construction of such conveniences would be lawful and proper under the rights and duties of municipal corporations respecting highways and traffic. The wide character of those rights and duties is not everywhere understood. In this Province not only does the duty to keep all highways in repair devolve upon the municipal corporation; and not only are they made answerable in damages for neglect of such duty; but they have complete jurisdiction over them and even the soil and freehold of them is vested in such corporations and they may sell for their own benefit the timber and minerals in them. They have these rights, subject of course to the paramount purposes of highways, as their duties respecting the repair of them make plain; but it would be idle to say that

as conservators of such public ways their powers are not very extensive; that they may not do largely as they deem best with them as long as there is no curtailment of the right of way over them. No one will deny their right to turn a mud road into a paved street with sidewalks, kerbs and gutters, street lights and other needs and conveniences for traffic; can any one with any more reason deny their right to build in the soil under the highway, closets and urinals, such as the needs of man imperatively demand? Provided, of course, that there is no substantial obstruction of the rights of traffic which there need never be. The need of such conveniences is in a way greater than the need of raised sidewalks. No case has been referred to that conflicts with this view of the rights and duties of municipal corporations under the laws of this Province.

I must say that I am strongly inclined to take the same view of the corporation rights in the streets of which the soil and freehold is vested in them with respect to the construction of lavatories and urinals as expressed by the Chief Justice, and more shortly by Riddell J.

But I prefer to assume that these lavatories were constructed, and are used under the statutory powers of the corporation contained in the "Municipal Institutions Act," and to deal with the award on that assumption.

In the last analysis it seems to me that the question of the claimants' right to recover damages depends upon the true construction of section 325 (1) before referred to. It reads as follows:—

Where the land is expropriated for the purposes of a corporation, or is injuriously affected by the exercise of any of the powers of a corporation or of the council thereof, under the authority of this Act or under the authority of any general or special Act, unless it is otherwise expressly provided by such general or special Act, the corporation shall make due compensation to the owner for the land expropriated or, where it is injuriously affected by the exercise of such powers, for the damages necessarily resulting therefrom, beyond any advantage which the owner may derive from any work, for the purposes of, or in connection with which the land is injuriously affected.

These compensation clauses for land taken and injuriously affected have been present in many statutes

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Davies J.

passed by the Parliament of Great Britain, and very many decisions of the courts have been given as to their true meaning and extent. There is some difference in the language used in the different Acts, but I think after reading all of those referred to in the argument, and the cases cited at bar, and in the judgments below as to their proper construction, I am justified in saying that while there were at first great differences of judicial opinion even in the cases carried to the House of Lords as to what damages could be awarded under the compensatory clauses for "injurious affection" only, where no land was taken and no legal right, or easement appurtenant to the land was interfered with or obstructed, these differences were finally set at rest. It was held as the recognized rule of law applicable to compensation sections such as that now before us that such compensation can only be awarded where some physical interference is caused to the lands of the claimant or to some legal right or attribute attaching to these lands such as access or ancient lights, etc. Where no lands have been taken and no such legal rights or attributes or easement attached to land interfered with, no compensation can be given even though a man's property may be greatly depreciated in value by the exercise of the statutory rights granted to a company or a corporation. If part of an owner's lands have been taken, however, an entirely different result follows and damages are allowed not only for the lands taken, but for the remainder of claimant's lands connected with or belonging to the lands actually taken and for injuries thereto. The taking of any part of claimant's lands opens the door for the right to claim all damages actually sustained by the owner for the lands taken, and also for all his other lands connected with those taken.

It has, for instance, long been settled by the decision of the House of Lords in *Hammersmith* v. *Brand*, 1869 (1), that an owner of land, no part of which has been taken by a railway company and no right connected with which interfered with, cannot recover damages for "vibration" arising from the running of the railway without negligence, no matter what extent such damages may extend to. The headnote reads:—

> The "Lands Clauses Consolidation Act" and the "Railway Clauses Consolidation Act" do not contain any provisions under which a person, whose land has not been taken for the purposes of a railway, can recover statutory compensation from the railway company in respect of damage or annoyance arising from vibration occasioned (without negligence) by the passing of trains, after the railway is brought into use, even though the value of the property has been actually depreciated thereby. (Diss. Lord Cairns.)
>
> The right of action for such damage is taken away.
>
> *Rex v. Pease*(2), and *Vaughan* v. *The Taff Vale Railway Co* (3), approved.

When I speak of damages I do so, however, with the well understood limitation that they must be an injury to lands and not a personal injury or an injury to trade, and also that they must be occasioned by the *construction* of the authorized works and not by their user, and must be of such a character as would have made them actionable, but for the statutory power.

Wherever a legal right has been interfered with by the exercise of statutory powers, all the damages done to the owner as a consequence of that interference is the subject of compensation. Cripps on Compensation, (5th ed.) p. 140, and the cases there cited.

In the present case it appears to me that the finding of the arbitrator, that there has been no physical interference with the claimants' property or with the access to and from their premises, is conclusive.

(1) L.R. 4. H.L. 171. (2) 4 B. & Ad. 30.
(3) 5 H. & N. 679.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Davies J.

It is the use of the structure as a lavatory that causes damage in the opinion of the arbitrator, based upon the evidence given before him, in which I fully concur, and statutory compensation cannot be awarded for damages caused him by the use of works constructed in accordance with statutory powers, and without negligence, unless expressly given by statute.

If the works are not so constructed, then the injured party may have an action for damages caused either by reason of excess beyond the powers, or from bad or improper construction of the works, but has no right of compensation under the compensating clause.

Nothing of the kind is suggested here except with regard to seepage damages with respect to which, if any, (on which I express no opinion) are the subject matter of an action, and not damages under the compensation clause for injurious affection. They are caused, if at all, by the improper or negligent exercise of the statutory powers, and do not necessarily result from their proper exercise.

The expression "injuriously affected by the exercise of the powers" given by the Act now under discussion or of any general or special Act, is copied from the English Acts to which reference has been made. They are technical words to which a legal meaning has been attached by the courts, and when used by the legislature as in this compensation section, should have that meaning given them by our courts.

I need hardly say that if any more extensive meaning was intended to be given to them when used in this "Municipal Institutions Act," one would have found language expressive of that intention. I fail to find any such language.

In the absence of any such words shewing a different meaning, I feel myself compelled to follow the

English authorities, and I may say that I do so without any reluctance, because I share with Chief Justice Meredith the feeling that any such extension or enlargement might, and probably would, have results which would prevent the construction of these necessary public utilities altogether. If the claimants in this case can recover $9,000 or $10,000 damages because a urinal for men and women is placed beneath the surface of the street on which their business premises abuts where no part of their land is taken, and no easement or right in or attached to it is affected, then it follows that every other land owner in the vicinity would have a similar right to damages, greater or lesser than the amount awarded in this case, depending upon the facts of each case with the further result that the exercise of these powers would have to be discontinued because of the excessive cost of their exercise.

It cannot be contended that because the other land owners have not plate glass windows in their buildings fronting on the street, and because their business or trade is not injured by the turning away of the tide of customers, which might flow to them, but for the construction and maintenance of the lavatories, that their claims would be different.

The loss of trade is not a damage which can be allowed under the compensation clause, and it appears to me that is just what has been allowed in this case.

The principle that the use of the lavatory causes depreciation in the value of the adjoining lands is applicable in a more or less degree to all neighbouring land owners, and they certainly would all make claims. As was said in *Ricket* v. *Metropolitan Railway Co.* (1), at page 199, by Lord Cranworth:—

(1) L.R. 2 H.L. 175.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Davies J.

The loss occasioned by the obstruction now under consideration may be greater to the plaintiff than to others, but if it affects more or less all the neighbourhood. He has no ground of complaint differing, save in degree, from that which might be made by all the inhabitants of houses in the part of the town where the works for forming the railway were carried on.

The cases of *Corporation of Parkdale* v. *West*(1), and *North Shore Railway Co.* v. *Pion*(2), were relied upon in the Court of Appeal largely by Mr. Justice Masten. I cannot see what application these cases can have to the one before us. In each of them the owner's right of access to and from their land, to the street in the *Parkdale Case*(1) and to a navigable river in the *Pion Case*(2) was obstructed and interfered with, and "in both cases alike," as the Lord Chancellor said, p. 626 of the report of the *Pion Case*(2):

the damage to the plaintiff's property was a necessary, patent and obvious consequence of the execution of the work.

The actions were held properly brought to recover damages on the ground that the company in the one case, and the corporation in the other, did not take the steps necessary under the respective statutes under which they professed to act to

vest in them the power to exercise the right or do the thing

for which if those steps had been duly taken compensation would have been due to the respondents (owners) under the Act.

But the thing done which in each of these cases made the works of the company and the corporation actionable was the depriving of the owners of their right of access to and from their lands.

Both of the learned judges who decided the case in the Divisional Appeal Court quoted at length from the judgment of the learned judge who decided the

(1) 12 App. Cas. 602. (2) 14 App. Cas. 612.

cases of *Vernon* v. *Vestry of St. James*(1), and *Cowper-Essex* v. *Local Board for Acton*(2), and speak of them as "illuminative" and "instructive" and no doubt they are with respect to facts at all similar to those dealt with in those cases. I fail, however, to find that they afford any assistance to such cases as we have now before us. The Court of Appeal in the *Vernon Case*(1) simply held that as the erection of an urinal was not necessarily a nuisance, the statute authorizing its erection did not empower the Vestry to erect one where it would be a nuisance to the owners of adjoining property and that on the facts of that case the Vestry *had exceeded their powers in placing the urinal where they did* and the court granted the injunction asked for accordingly.

No contention is made here, or could be made, of any excess in the exercise of the powers of the Corporation of Toronto in placing the lavatory and urinal where they did. On the contrary, the claimants' submission in the appeal is based entirely upon the exercise by the Corporation of its legal right under the statute, and the claimed correlative right of the claimants to damages under the 325th section of the Act because their lands were "injuriously affected" by the exercise of the Corporation's statutory powers.

The *Cowper-Essex Case*(2) decided that *part of the plaintiff's land having been taken for sewage works* compensation might be awarded for damage by reason of it injuriously affecting his "other lands" connected with those taken not only by the construction of the sewage works but by their use.

These "other lands" of the plaintiffs were divided from the lands taken by a railway, but the court held

(1) 16 Ch. D. 449. (2) 14 App. Cas. 153.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Davies J.

that notwithstanding the division they were "other lands" within the meaning of the compensation clause of the statute they were considering, the "Lands Clauses Consolidation Act, 1845."

In that *Cowper-Essex Case*(1), the Lord Chancellor Halsbury said, with reference to the different principles of compensation applicable, where part of the owner's land has been taken from cases where no part has been taken, but where it is claimed the lands have nevertheless been "injuriously affected:"

> With reference to the main question I have had less difficulty since I take it that two propositions have now been conclusively established. One is, that land taken under the powers of the "Lands Clauses Act" and applied to any use authorized by the statute, cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation. But a second proposition is, it appears to me, not less conclusively established, and that is that where part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of neighbouring proprietors from whom nothing had been taken for the purpose of the intended works.
>
> It may seem at first sight a little strange that what is injurious affecting in one should not be in the other. But it is possible to explain that apparent contradiction by the consideration that the injurious affecting by the use, as distinguished from the construction, is a particular injury suffered by the proprietor from whom some portion of his land is taken different in kind from that which is suffered by the rest of Her Majesty's subjects.

And Lord Watson said (p. 164):—

> In the case of a proprietor from whom nothing has been taken by the promoters, it has been settled by a series of decisions in this House, that, although his lands in the vicinity will necessarily be injured by the use of their works, yet it is not thereby "injuriously affected" within the meaning of the Act of 1845; and that he is not entitled to statutory compensation for injury so occasioned,

and on p. 165 His Lordship goes on to point out the distinction between cases where "land has been taken"

(1) 14 App. Cas. 153.

and those where it has not, but is claimed as having been injuriously affected. He says:—

In *Buccleuch* v. *Metropolitan Board of Works*(1), Lord Chelmsford, in whose judgment Lord Colonsay concurred, said (2), with reference to *Brand's Case*(3), and the subsequent case of *City of Glasgow Union Railway Co.* v. *Hunter*(4): "In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use, and not by the construction of the railway. But if, in each of the cases, lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise, occasioned by passing trains."

After citing other cases he says:—

It appears to me to be the result of these authorities, which are binding upon this House, that a proprietor is entitled to compensation for depreciation of the value of his other lands, in so far as such depreciation is due to the anticipated legal use of works to be constructed upon the land which has been taken from him under compulsory powers.

I am quite unable to see how the judgment in this case appealed from can in any way be sustained by the *Cowper-Essex Case*(5) or by the reasons given therefor by their Lordships. The principle laid down in that case as having been "finally settled" respecting the broad distinction between the compensation which can be awarded for injurious affection in cases where part of an owner's land has been taken and cases where no part has been taken seems to me strongly against the judgment now in appeal.

Metropolitan Board of Works v. *McCarthy*(6), is an authority referred to in many cases not only because of its peculiar facts but because of the adoption by the House of Lords of that test submitted by Mr. Thesiger, as one which would explain and reconcile apparently conflicting cases, viz.:—

(1) L.R. 5 H.L. 418.
(2) L.R. 5 H.L. 458.
(3) L.R. 4 H.L. 171.
(4) L.R. 2 H.L. Sc. 78.
(5) 14 App. Cas. 153.
(6) L.R. 7 H.L. 243.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Davies J.

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.

In that case there was a "special case" submitted to the court in which it was stated:—

That by reason of the dock adjoining the River Thames, and the destruction thereby of the access to, and from the Thames, the plaintiff's premises became and were as premises either to sell or occupy permanently damaged and diminished in value.

Their Lordships held that the plaintiff was entitled to compensation because his right of access to his premises to and from the River Thames had been destroyed, and his lands consequently depreciated in value, but that the damage or injury which is to be the subject of compensation must not be of a personal character, but must be a damage or injury to the land of the claimant considered independently of any particular trade that the claimant may have carried on upon it.

The recent case of *Grand Trunk Pacific Ry. Co.* v. *Fort William Land Co.*(1), determined by the Judicial Committee of the Privy Council on the proper construction of the "Dominion Railway Act, 1906," secs. 47, 15 and 237(3), seems to me to apply the same principles to the construction of our Railway Act as have been applied by the House of Lords to the various English Acts as to lands taken or injuriously affected under statutory powers. That case should go a long way to govern the one before us. In delivering the judgment of their Lordships, Lord Shaw says:—

These respondents are frontagers, that is to say, owners of properties in the streets named, and it is not difficult to understand how they are, and possibly also how the municipality itself is, seriously affected by the location of the railway as proposed and sanctioned.

(1) [1912] A.C. 224.

It appears, however, that many of the properties in question are neither taken or injuriously affected in the sense of the English railway law as interpreted by *The Hammersmith, etc., Ry. Co.* v. *Brand*, 1869 (1), a decision which has been followed in Canada in *Re Devlin and the Hamilton and Lake Erie Ry. Co.* 1876(2). It is in no way surprising to find that the Board, giving a sanction for the construction of a railway through the municipality, should make the condition that the compensation to be paid for that privilege should fully equate with the injury done "to all persons interested"; that is to say, that the compensation should be recoverable in respect not only of the construction of the railway as settled by *Brand's Case*(1), but also for all damage sustained in respect of its "location."

The pith of the judgment, as I understand it, is that the power given by the statute to award damages was in respect of construction only, and not to damages arising from location, and that the power to award compensation is limited to matters specifically referred to in the statute, and could not be extended by the Board of Railway Commissioners as was attempted to be done in their order approving the *location* of the railway conditionally on the company

making full compensation to all parties interested for all damage sustained by reason thereof.

In other words, the Board could not by an order authorizing the location of the road along certain streets in the City of Fort William extend the compensation clauses beyond the matters specifically referred to in the statute, and that the "location" of the road was not one of those matters.

The case of *The King* v. *McArthur*(3), decided by this court in 1904, appears to me applicable in principle to the one now before us. I was one of the judges by whom that case was decided, and I know it received, owing to the apparent conflict between several of the English cases, a great deal of consideration. The

(1) L.R. 4 H.L. 171. (2) 40 U.C. Q.B. 160.
(3) 34 Can. S.C.R. 570.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Davies J.

conclusions there reached unanimously by this court apply with great force to the one now before us.

I have compared carefully the compensation clause 325 of the Act, respecting municipal institutions, with those in the English Acts on which the decisions I have above referred to in the courts were given. I am not able to find any *substantial* differences between this clause (325) and the compensation clauses of the "Lands Clauses Act, 1845," sec. 68; the "Railway Clauses Act, 1845," secs. 6 and 16; the "Waterworks Clauses Act, 1847," secs. 6-12, and the "Public Health Act, 1875," sec. 308. I say substantial differences, because, of course, there are verbal ones, but for all purposes of this appeal I construe the compensation clause of the "Municipal Institutions Act" now before us as having the same meaning and object as the compensation clauses in the various English Acts I have referred to. These decisions in the House of Lords are, of course, binding upon us and with great respect I cannot see the use of quoting from the judgments of the dissenting law lords, however distinguished, as to this meaning and object, as has been done by the learned judges who gave the judgment in the courts below.

These decisions lay down a clear and definite rule with respect to the damages allowable for injurious affection where no land of the claimants or right or interest therein has been taken or obstructed. Being unable to distinguish between the section we are dealing with and those of the English Acts referred to, I feel bound to apply that rule to this case, and doing so, have reached the conclusion that the damages awarded cannot be sustained and that the appeal should be allowed with costs in all the courts, including the arbitrator's, and the claim of the respondents dismissed.

IDINGTON J.—The appellant in 1912 erected two lavatories, urinals and water-closets on Parliament Street, Toronto, in the exercise of the powers conferred by sec. 552, sub-sec. 1, of the "Consolidated Municipal Act," 3 Ed. VII., ch. 18, which is as follows:—

552 (1) The Councils of cities or towns may provide and maintain lavatories, urinals and water-closets, and like conveniences, in situations where they deem such accommodation to be required, either upon the public streets or elsewhere, and may supply the same with water, and may defray the expenses thereof, and of keeping the same in repair and good order.

The respondent then owned a parcel of land on the north-west corner of Queen and Parliament Streets, on which was erected a large building suitable and used for carrying on therein the business of dealing in furniture and house furnishings, and also clothing, millinery and furs.

These urinals and a separate structure called a breather, occupied a considerable part of the side of Parliament Street, next to said building and about only seven feet distant therefrom.

They were separated from each other so that the entire space so occupied was not continuous, but permitted public travel between them.

I assume that no allowance could be made for damage to the business, as such, and it is only the depreciation in the market value of this property of the respondent for which he can claim compensation under sec. 437 of said Act, which is as follows:—

Every Council shall make to the owners or occupiers of, or other persons interested in, real property entered upon, taken or used by the corporation in the exercise of any of its powers or injuriously affected by the exercise of its powers, due compensation for any damages (including cost of fencing when required) necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Idington J.

This section being that in force when proceedings began, must be held to govern what is here in dispute.

And let us clear our minds by realizing that the construction put upon another Act, less simple than this, and very differently worded, in any single section, and conceived in another atmosphere, when modern England had got born again, as it were, and was grappling with new problems, may not fit the situation confronting our legislatures. I submit that we better eliminate from the section all that is superfluous in relation to the facts and claims in question herein and read the section as follows:—

> Every Council shall make to the owners * * * of * * * real property * * * injuriously affected by the exercise of its powers, due compensation for any damages * * * necessarily resulting from the exercise of such powers.

We have long been told by eminent judges and others, that when the language used by the legislature is precise and unambiguous, a court of law at the present day has only to expound the words in their natural and ordinary sense.

There is no ambiguity about this legislative expression.

Nor is there any ambiguity in the language of the power I have quoted above, which enabled the appellant's council

> to provide and maintain lavatories, urinals and water-closets,

etc., on Parliament Street alongside respondent's building.

Nor do I feel that there is the slightest doubt as to the probable conception which the average business man seeking a corner such as the one in question, would have, relative to the market value of such a property, before and after the exercise of power, that provided and maintained such conveniences.

The plain ordinary meaning of the language used seems to me expressly to require that the owner should be compensated according to the conception of such business men relative to such values before and after the execution of the power.

Then comes the difficulty and to my mind the only difficulty in the problem presented to those concerned.

But the solution of that problem is by the statute dealing therewith, expressly relegated to the judgment of an officer with which, unless he clearly has proceeded upon an erroneous apprehension of the principles which should have governed him, we have no right to interfere, or upon the evidence properly adduced his allowance has been so grossly excessive or inadequate as to call for a review thereof.

Excess of damages is not made a ground of this appeal and hence we are relieved from an analysis of the evidence and careful consideration of the results derivable therefrom.

Assuming he proceeded upon the plain unambiguous nature of the language used in the statute, I see no ground for interference.

All that has been urged as to the cases decided in England under the "Lands Clauses Consolidation Act," and the cases resting thereon, so much relied upon, seems to me beside the question.

That Act is so entirely different from the Act upon which we must proceed, that it seems a waste of time to dwell thereon.

The decision in *Brand* v. *Hammersmith*(1), needed the consideration of four clauses of the "Lands Clauses Consolidation Act," together with two of the "Railway

(1) L.R. 4 H.L. 171.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Idington J.

Act," to be expressly linked up with it, and the frame of the former Act, in order to be able to arrive at it.

And the substance of the whole matter turned upon the supposed necessity of shewing that some part of the owner's land had been taken in order to permit of injurious affection being considered at all, despite the weighty opinions to the contrary effect of Lord Cairns and three of the four judges to whom the question had been submitted.

That mode of thought dominated many later cases even under other statutes, when the condition precedent thus established as necessary to relief under that particular statute existed no longer as a barrier. Thus, indirectly, it seems to have come about that in later times some imagined the word "injuriously" must be held to import something technical as *injuria* as a condition precedent to the allowance of damages for injurious affection.

Later than the *Hammersmith Case*(1), Lord Blackburn, the dissenting judge of the four to whom the question had been submitted in that case, saw his way in the case of *Buccleuch* v. *Metropolitan Board of Works*(2), 1870, at page 244, to hold that

> a part of the premises being taken it let in the claimant to have damages assessed for everything.

We have no such condition imposed in the Act now in question, and I see no reason why we should engraft upon the ordinary meaning of the words used something that is not there, and can only be imported there by giving to the word "injuriously" a highly technical meaning which Lord Blackburn, and others, including Lord Cairns in the case lastly cited, did not find.

(1) L.R. 4 H.L. 171. (2) L.R. 5 Ex. 221.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Idington J.

Nor did Lord Selborne in the case of *Brierley Hill Local Board* v. *Pearsall* (1), which turned upon sec. 308 of the "Public Health Act, 1875," where the expression used is "damages" seem to imagine it was necessary to prove a right of action for the wrong done but treats the language in its plain ordinary sense.

Nor did we, or any one else concerned in the recent case of *Vancouver West* v. *Ramsay*(2), imagine that it was necessary to enable a plaintiff suing on an award for damages caused to his property by narrowing the street to shew that independently of the provision for compensation he would have had a right of action.

Why should we? It is answered some other Acts having used the word "injuriously" cases decided thereon should be followed.

But the case of *Horton* v. *Colwyn Bay* (3), so much relied upon in argument of counsel for appellant, turned upon a section of the "Public Health Act," which did not use the word "injuriously" at all.

That brings us back to the proposition that legal damages are implied in such legislation, though I think the case is distinguishable on other grounds upon which I need not enlarge.

It is exceedingly difficult to reconcile all the numerous cases bearing more or less upon the question. I doubt if everything decided in England upon merely analogous statutes and cases binds us.

We, of course, receive such decisions with the greatest respect, but when it comes to a question of the construction of one of our own statutes, neither identical in language nor even fitted to the like conditions, we must give our statute the meaning probably attached to it by the legislature enacting it.

(1) 9 App. Cas. 595. (2) 53 Can. S.C.R. 459.
(3) [1908] 1 K.B. 327.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Idington J.

But even if we are bound to apply the word "injuriously" in the technical sense that there has been something done for, or in respect of, which an action would lie, I see no difficulty in this case.

Let us assume for a moment that without legal authority, the appellant had, or to put it more broadly, some one else had, presumed to erect and maintain such structures, either for such uses or not, on such a street in such close proximity to the respondent's premises as appears in the case presented, I have no manner of doubt the respondent would have had a right of action as one suffering beyond the general public by reason thereof, and could have successfully maintained a claim for injunction or damages.

Everything in such a case must depend upon the surrounding circumstances, and the use, or possible use a proprietor may be making, or desire to make, of his premises.

For example, a farmer might not be able to maintain such an action arising from the erection of such a structure on a country road alongside his farm, so long as his entrance, or probable entrance, to his premises was not obstructed or otherwise interfered with.

But here the proprietor not only for the present uses he is putting his property to, but the evident possible use he might find it advantageous to put his property to by making entrance thereto from Parliament Street, does suffer loss and injury beyond the rest of the public.

In short, as one of the appellant's own witnesses puts it, he is deprived of the value inherent in a corner lot.

There are some reasons why, apart from the technical reasons which rest upon the right to bring an action for the nuisance, the adoption of such a test

may be of value in guiding an arbitrator who has to solve the problem of diminution of value.

If the proprietor suffers no such damage as would entitle him to bring an action, then, roughly speaking, the probability may be that he suffers no damages, or at least such as he should trouble any one about. And again there are conceivable cases where the institution of some establishment might tend to lessen the value of property in a whole town or district thereof, and for practical purposes a proprietor might be suffering no more than the rest of the public and hence any assessment of damages would be but taking it out of one pocket to put it into another by reason of his having to pay in his rates a share of what each similarly situate might be awarded.

Hence, in either way we look at the construction of the statute, I think the appellant fails.

A question is raised as to an item of $1,200 of damages caused by the erection being only matter of the negligent exercise of the power and hence possibly not within the reference.

I cannot, however, see the clear evidence of negligence, nor does it seem to me the case was fought out on that line before the arbitrator. It was separated from the total merely upon the point being taken accidentally in argument.

As to the cross-appeal, I think the damages allowed ample compensation even if the whole of the respondent's property is to be considered instead of merely one shop at the corner as possibly a correct view to take, and therefore the cross-appeal should also be dismissed.

I think the appeal should be dismissed with costs.

DUFF J.—The authority for the construction of lavatories under which the appellant municipality

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

acted is that given by sec. 552, sub-sec. 1, of the "Consolidated Municipal Act, 1903," and the compensation clause applicable is sec. 437 of that Act. Some doubt was expressed on the argument on this point, the suggestion being that the rights of the parties were perhaps governed by the provisions of the "Consolidated Municipal Act of 1913." But it seems to be undisputed that before that Act came in force, on the first day of July, 1913, the lavatories had been provided. It appears to be a case in which sec. 14, sub-sec. *c.*, ch. 1, R. S. O. 1914, of the "Interpretation Act" applies; and that the change in the law, if there was any, could not affect any "right, obligation or liability acquired, accrued, accruing or incurred" under the Act of 1903.

Compensation for "damages" caused by the exercise of the powers of the municipality is provided for by sec. 437 as follows:—

> Every Council shall make to the owners or occupiers of, or other persons interested in, real property entered upon, taken or used, by the corporation in the exercise of any of its powers, or injuriously affected by the exercise of its powers, due compensation for any damages (including cost of fencing when required) necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under this Act.

It is conceded that the necessary result of the construction and maintenance of the lavatories is to diminish the value for selling and letting of the respondent company's property. An essential condition, however, of the company's right to recover compensation under the enactment above quoted is that its property is "injuriously affected" by this "exercise of the powers" of the municipality; and, on behalf of the municipality, it is contended that the property has

not been "injuriously affected" within the meaning of this section.

The phrase "injuriously affected" was a subject of much controversy, but more than 50 years ago it was settled that as used in sec. 6 of the "Railway Clauses Consolidation Act" (1845) and in sec. 68 of the "Lands Clauses Consolidation Act" (1845) the phrase imports something which if done without the authority of the legislature, would have given rise to a cause of action. *Ricket* v. *The Directors of the Metropolitan Ry. Co.*(1), *The Metropolitan Board of Works* v. *McCarthy*(2), *Caledonian Ry. Co.* v. *Walker's Trustees*(3). It has, moreover, been settled that since a condition of the right to compensation is that the claimant's property has been "injuriously affected," it is incumbent upon him to establish that the injury he complains of was an injury to his estate and not a mere obstruction or inconvenience to him personally or to his trade; *Ricket* v. *Metropolitan Railway Co.*(1); and further that the damage complained of must be in respect of the property itself (in its existing state or otherwise) and not in respect of some particular use to which it may from time to time be put: *Beckett* v. *Midland Rly. Co.*(4), at pages 94 and 95.

It is undeniable and admitted in fact that the learned arbitrator in assessing the compensation has limited his attention to depreciation in value of the building and depreciation in value of the land.

The appellant municipality's contentions are, first, that the compensation clause above quoted gives a right to compensation only for damages caused by the construction as distinguished from the maintenance of the conveniences in use, that is to say, the damages

(1) L.R. 2 H.L. 175.
(2) L.R. 7 H.L. 243.
(3) 7 App. Cas. 259.
(4) L.R. 3 C.P. 82.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

occasioned by the structural form of the works without reference to the use to which they are put, or to the concomitants of them as public lavatories; secondly, that the first condition of the claimant's right is unfulfilled, namely, that the injury suffered by him should be one for which an action could be maintained in the absence of statutory authority for what the municipality has done; and thirdly, if such an action could have been maintained, another condition, namely, that the damage complained of should have been the necessary result of the exercise of the lawful statutory powers of the municipality, is absent because the section under which the municipality professed to act (sec. 552, s.s. 1) does not authorize the creation of a nuisance.

It should first be noted that section 437 provides for the payment of compensation in respect of harm done through the exercise of a great variety of powers; and that its language, when read without reference to judicial decision in relation to other statutes or to practice under other statutes and without preconception originating in familiarity with some such course of decision or practice, does not justify any restriction upon the scope of the remedy given; there being nothing here which even remotely suggests that for the purpose of determining what is due compensation to the sufferer from the exercise of a municipal power to "provide and maintain lavatories," a lavatory provided under that power to be maintained under that power is to be regarded only as a physical construction interrupting the continuity of the surface of a public street. "To provide and maintain public lavatories" involves the provision of conveniences which the public are invited and expected to use and the "damages" resulting therefrom are, if the words are to be given their natural and ordinary meaning, damages arising

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

from the execution of the powers to "provide and maintain."

It is contended that the language of section 437 closely resembles the language of section 68 of the "Lands Clauses Consolidation Act" and of sections 6 and 16 of the "Railway Clauses Consolidation Act," and that a long series of decisions in the English courts by which the rule has been developed that the right of compensation given by these sections and like enactments has been held to be limited to loss arising from the construction as distinct from the the subsequent user of the works, has been applied in this country to Canadian enactments which differ from those enactments as much as section 437 does, and that in view of this course of decision something more explicit than anything to be found in section 437 is required to shew that the legislature intended "damages" for "injurious affection" to be awarded under that section on any other principle.

In examining this argument, the first point to consider is; are the decisions of the English courts under the two Acts specifically mentioned decisions which ought to govern the construction of the statute we have to construe? Sections 6 and 16 of the "Railway Clauses Consolidation Act" were authoritatively interpreted and applied in *Hammersmith* v. *Brand*(1), and it was there held that the proviso of the last mentioned section requiring "satisfaction" to be made to all

> parties interested * * * for all damage by them sustained by reason of the exercise of such powers

must be read with reference to the initial words of the section, which were held to shew that all the powers specifically conferred by that section were to be exer-

(1) L.R. 4 H.L. 171.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

cised exclusively for the "purpose of constructing the railway" (see judgment of Lord Chelmsford at page 205); and that the proviso must be limited to "damage sustained" through the exercise of the powers conferred by that section; and consequently that the proviso had no relation to "damage" sustained by reason of the exercise of the authority given by the 86th section of the Act to "use and employ locomotive engines" upon the railway. As regards the somewhat similar words used in the 6th section, it was held that the generality of the terms must be restricted by reference to the "heading" of a group of clauses in which that section, as well as the 16th section occurs, and this "heading" was considered to manifest that the legislature was dealing with the subject, in that group of sections, of the construction of the railway alone.

In *Brand's Case*(1) their Lordships rejected the view pressed by Lord Cairns, that when compensation is to be awarded for damage caused by the construction of a railway, regard must be had to the character of the thing authorized as it was contemplated by the legislation, not a physical thing made once for all, but a railway in operation. Similar reasoning led to the same result in the interpretation of section 68 of the "Lands Clauses Consolidation Act," by which compensation in respect of "injurious affection" is to be given where lands are "injuriously affected" by the "execution of the work."

This reasoning, which proceeds upon the particular words of these enactments, and upon a very strict view of the words "construction" and "execution" as applied to works of the description authorized, has obviously no kind of relevancy in itself to the question of the effect of the broad language of section 437.

(1) L.R. 4 H.L. 171.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

So much for the decisions on these specific sections. There are authorities upon the effect of sections 49 and 63 of the "Lands Clauses Consolidation Act," however, that may usefully be referred to as emphasizing the inutility of the decisions on the sections first mentioned as precedents in questions involving interpretation of statutes couched in such general terms as those of section 437. Sections 49 and 63 of the "Lands Clauses Act," deal with the case of "severance" and in that case the owner is to be paid not only the value of that part of his land which has been taken, but he is also to receive compensation for damage sustained by him by "severance" or by "otherwise injuriously affecting such other lands by reason of the exercise of the powers of this or the special Act."

> Damage * * * by otherwise injuriously affecting such other lands by reason of the exercise of the powers of this or the special Act

are words not in themselves distinguishable in effect from those employed in section 437, so far at least as affects the question now before us; and the law is very clearly settled that in cases governed by sections 49 and 63 compensation is assessable in respect of damage caused by subsequent user. *Duke of Buccleuch* v. *Metropolitan*(1). The effect of section 63 is fully discussed in the judgment of Montague Smith J. speaking for Willes and Brett JJ. as well as himself (2), at page 252 *et seq.*, and by the law Lords in *Essex v. Local Board for Acton*(3), at pages 162, 165, 166 and 167. There are some observations of Lord Macnaghten at pages 177 and 178, illustrating the view their Lordships held of the effect of the general language of sections 49 and 63:—

(1) L.R. 5 H.L. 418. (2) L.R. 5 Ex. 221.
(3) 14 App. Cas. 153.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

Where land is required for public purposes, the injury, if any, to the owner's adjoining property depends mainly on the character of the undertaking. There are various purposes for which local boards may be authorized to take land. They may take land for pleasure grounds. They may take land for sewage purposes. But before putting in force any of the powers of the "Lands Clauses Consolidation Act," a local board is bound to publish the nature of the proposed undertaking, to define the lands required, and to collect, as far as possible, the views of all persons interested in those lands. Then comes a public inquiry, to be followed in due course by a provisional order, and an Act confirming it. These elaborate provisions, designed apparently for the protection of private, as well as public interests, would be something of a mockery if a person from whom land is taken is to be told, when he asks for compensation, that at that stage of the proceedings it is all one whether his land be required for a public garden or for a sewage farm.

It was said that the objection to a sewage farm comes from an unfounded apprehension of possible mischief. Does that matter? Call it what you will: ignorance or prejudice or fancy; the loss to the owner who may want to sell is not the less real. In such a case apprehension of mischief is damage of itself. And the depreciation in value must be the measure of compensation if the owner is to be compensated fairly.

The promoters of an undertaking can only take lands for the purpose authorized by their Act. When the lands are taken, the promoters can only use them for that purpose. It is the purpose of the undertaking and that alone, which justifies its existence, and directs and controls the exercise of its powers. And yet it is said that on a question of disputed compensation the arbitrators or the jury, as the case may be, are to shut their eyes to the purpose of the undertaking, and to make believe that the intended works are some innocent and meaningless folly.

The decisions upon sections 49 and 63 of the "Lands Clauses Act" negative conclusively the theory that some general principle of construction has been established applicable to compensation statutes by which the effect of general words such as those of section 437 (not distinguishable, as I have said, from those of sections 49 and 63) can, in the absence of some qualifying context, be restricted in the way suggested.

This is aptly illustrated by an authority referred to on the argument, *Fletcher* v. *Birkenhead*(1). The controversy there related to the right to compensation

(1) [1906] 1 K.B. 605.

under certain clauses of the "Waterworks Clauses Act, 1847, "compensation being demanded for what was conceded for the purposes of the decision to be maintenance or user as distinguished from construction of the works. The defence relied upon *Brand's Case*(1), and I quote the observation of Bray J. at page 611:—

> It seems to me quite sufficient to say that the sections are not similar, and that it is wholly misleading to try and construe one Act by another Act, and on the ground that the differences between the two are small. The safest course is to construe the Act by its own language.

In the Court of Appeal(2), the provisions of the "Waterworks Clauses Act" were compared and contrasted elaborately with those of the "Railway Clauses Consolidation Act" by the Master of the Rolls, who pointed out what has already been indicated above as touching the grounds of that decision. The Lords Justices (Cozens-Hardy and Farwell L.JJ.) emphasized the distinction between a railway as conceived by the majority of their Lordships in *Brand's Case*(1)

> a causeway or embankment with rails laid upon it, and nothing more, a thing which was made once for all,

and the subject matter of the Act they had to construe works which are described as waterworks

> consisting of a well and pumping station by which water is obtained, a reservoir in which it is stored, and pipes by which it is carried to and from that reservoir;

and Farwell L.J. says at page 217:—

> It must be remembered that the case of *Hammersmith & City Ry. Co.* v. *Brand*(1), determined no question of principle. It dealt merely with the construction of a particular Act, and not with the Act with which we are dealing. Moreover, the Act upon which that decision turned dealt with a subject-matter so different from that with which the Act now in question deals, that it is obvious that the construction of one statute can be little or no guide to the construction of the other.

It is quite true that the "Waterworks Clauses Act" in express words gives a right to compensation for

(1) L.R. 4 H.L. 171. (2) [1907] 1 K.B. 205.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

damages arising from "construction and maintenance"; but the observations of their Lordships afford strong confirmation of the conclusion above indicated that no such general principle as that contended for is established by the English decisions on the two Acts referred to.

A brief reference to the decisions under section 308 of the "Public Health Act" is perhaps not out of place. The enactment provides that

> where any person sustains any damage by reason of the exercise of any of the powers of this Act * * * full compensation shall be made to such person by the local authority exercising such powers.

It was long ago settled that the right given by this section is available only where the act giving rise to the damage in respect of which compensation is claimed would be actionable in the absence of statutory authority. *Lingke* v. *Christchurch*(1). But subject to that it has been broadly held, to quote the language of Lord Esher in *Re Bater and Birkenhead*(2), at page 79, that

> the words * * * must include any pecuniary loss which a man suffers when he is not himself in default.

Hobbs v. *Winchester*(3), *Walshaw* v. *Brighouse*(4), *In re Davies and Rhondda Urban Council*(5); and accordingly compensation has been held to be awardable under them for damages suffered by reason of user as distinguished from the construction of the sewage works. *Durrant* v. *Banksome*(6), at pages 298, 300, 304 and 305; *Uttley* v. *Local Board of Health of Todmorden*(7), at page 23. *Horton* v. *Colwyn Bay*(8), which was pressed upon us by the appellant municipality is also a decision under section 308

(1) [1912] 3 K.B. 595.
(2) [1893] 2 Q.B. 77.
(3) [1910] 2 K.B. 471.
(4) [1899] 2 K.B. 286.
(5) 80 L.T. 696.
(6) [1897] 2 Ch. 291.
(7) 44 L.J.C.P. 19.
(8) [1908] 1 K.B. 327.

of the "Public Health Act," and it is sufficiently evident when the case is understood, that it has very little relevancy to any question before us. The defendants there acting under the "Public Health Act," had constructed a sewer, pumping station and sewage reservoir, forming one scheme of sewerage. The sewers were in part constructed on the property of the claimant; the pumping station and the reservoir on the property of other persons. The present value of part of the claimant's lands was depreciated by reason of the contemplated user of these works for sewage purposes and in respect of this depreciation he claimed compensation.

The decisive consideration rested upon the fact stated at page 342 in the judgment of Buckley L.J. that the erection and user of the pumping station and reservoir would be no actionable wrong as against the claimant; of this there seems to have been no dispute and *primâ facie*, therefore, section 308 of the "Public Health Act" had no application.

An ingenious attempt to get over the difficulty by appealing to some rather sweeping observations made in *In re London, Tilbury, etc. Railway Co. and Gowers Walk Schools*(1), and applying them to the fact that the system was a system in part constructed on the claimant's land failed; it would serve no useful purpose to follow the discussion on this last mentioned point.

We have now to consider the decisions upon the Canadian statutes. First, there is a series of authorities in the Ontario courts on the "Dominion Railway Act" in which it was held that the effect of the compensation clauses of that Act as touching the point now in question was the same as that attributed to

(1) 24 Q.B.D. 326.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

secs. 6 and 16 of the "Railway Clauses Consolidation Act" in *Brand's Case*(1) and these decisions of the Ontario Courts were assumed in the *Fort William Case* (2), to have settled the law under the "Dominion Railway Act." In *Holditch* v. *Canadian Northern Ry. Co.*(3), the Judicial Committee of the Privy Council, as I read the judgment, held (see p. 554) that no importance can be attached to any difference in language between section 155 of the "Dominion Railway Act" and the proviso to section 16 of the "Railway Clauses Consolidation Act" of 1845, and their Lordships' language seems to imply that they approve of the view that the construction of section 155 as regards the point now in question is governed by the decision in *Brand's Case*(1).

Now it is too clear for dispute that if section 155 of the "Dominion Railway Act" was to be construed apart from its context, it could be given no narrower effect than the language of section 437 of the "Municipal Act." On the other hand, section 155 is found in a group of sections, which, like the group of sections in which section 16 of the "Railway Consolidation Clauses Act" occurs, has the heading "construction" and (although sub-section (*f*) of section 151 in that same group of sections deals with the manner of operation as regards motive power and otherwise) it is, I think, a proper conclusion from the whole tenor of their Lordships' remarks at page 554 in the *Holditch Case*(3) that the foundation of their Lordships' view was that the language of section 155 when read with the context in which that section is found, sufficiently evidences an intention to adopt the law of *Brand's Case*(1).

(1) L.R. 4 H.L. 171. (2) [1912] A.C. 224.
(3) [1916] A.C. 536.

The other Canadian decisions to which I shall refer concern the effect of section 47 of the "Exchequer Court Act" and of provisions of the Dominion Government Railways Act of 1881.

The King v. *McArthur*(1), a decision of this court at first sight is a formidable obstacle for the respondent company.

The court was there governed by the provisions of the Dominion statutes, the "Expropriation Act," and section 47 of the "Exchequer Court Act." There is in these enactments no explicit statement of any specific rule or principle upon which compensation is to be awarded, although some right to compensation (when property is taken or injured) is necessarily implied.

The court in the case just mentioned appears to have assumed, without argument on the point, that the rules developed by the English courts in compensation cases under the "Railway Clauses Act" and the "Lands Clauses Act," were proper guides for the interpretation of the "Exchequer Court Act" and the "Expropriation Act." The decision can therefore have no weight as an authority on the construction of section 437. If the court had been dealing with section 437 of the "Municipal Act" another question might have arisen; although in view of the course of this court in its decisions upon article 1054 C.C., see *Vandry* v. *Quebec Light, Heat and Power Co.*(2), of Lord Blackburn's observations in *Brand's Case*(3), and of the decision of the Privy Council in *The Queen* v. *Hughes*(4), I should not have felt myself constrained to do violence to the language of the statute by a decision in which the point in question had passed *sub silentio*. The

(1) 34 Can. S.C.R. 570.
(2) 53 Can. S.C.R. 72.
(3) L.R. 4 H.L. 171.
(4) L.R. 1 P.C. 81.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

statute in question in that case was, however, another statute, and as the decision cannot be said to establish any principle, we are not bound to give effect to everything which may appear to be a logical consequence of it. *Ex parte Blaiberg*(1), at page 258; *Spencer* v. *Metropolitan* (2), at page 157; *Admiralty Commissioners* v. *S.S. America* (3), at pages 42 and 43.

In *Paradis* v. *The Queen*(4) Taschereau J. observed at page 193 that " our statute," meaning the Government Railways Act of 1881, was but a re-enactment of the "Imperial Statutes" on the subject of compensation and it followed, of course, that the decisions on the English statutes were considered to be authoritative. The particular clauses of the "Government Railways Act," to which Taschereau J. referred, have since disappeared from the statute, but I am afraid I am unable to agree with the assumption that they were a mere reproduction of the "Imperial Statutes."

On the whole my conclusion is that there is nothing in the decisions of this court on the Dominion statutes, which constrains us to give section 437 an effect not justified by the words themselves which the legislature has selected for the expression of its intention.

The point being settled that the right of compensation given by section 437 extends to cases where property is "injuriously affected" by the exercise of powers of maintenance and user of works as distinct from the power to construct works, in the narrower sense of those words, the next question to be considered is whether the first of the conditions above mentioned has been satisfied, namely, that the depreciation in value of the respondent's property which admittedly has taken place is the result of acts

(1) 23 Ch.D. 254.
(2) 22 Ch.D. 142.
(3) [1917] A.C. 38.
(4) 1 Ex. C.R. 191.

which in the absence of statutory authority would have been wrongful and actionable.

I shall not repeat the reasons given by Mr. Justice Masten in which I concur for thinking that the openings and the railings about them constitute illegal and indictable obstructions to the public right of passage in the highway. The general principle that an illegal and indictable act is wrongful as against an individual and actionable at his suit if it has occasioned to him some particular loss more than that sustained by the rest of the public, has been applied frequently in compensation cases: *Metropolitan Board of Works* v. *McCarthy* (1), at pages 263 and 266; *Chamberlain* v. *West End of London*(2); and especially in the exposition of Mr. Justice Willes in *Beckett* v. *The Midland Railway Co.*(3), beginning at page 97. There is a distinction, however, between this case as regards the relation between the obstruction and the loss suffered by the respondent company, and all the other compensation cases in which, as far as I have seen, the principle has been held to be operative. As I view the facts there is no warrant for holding that any loss has fallen upon the respondent company through any direct effect upon the value of its property of these obstructions as obstructions, because, in other words, of any interference with the public right of passage occasioned by them; and it may be added that the learned arbitrator has in substance found, I think, and I should find without hesitation that there is no invasion of the respondent company's right of access, the private right that is to say incidental to its ownership.

The depreciation in value for which compensation is awarded is occasioned by the fact that the presence

(1) L.R. 7 H.L. 243. (2) 2 B. & S. 636.
(3) L.R. 3 C.P. 82.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

of such conveniences makes the property less desirable from the point of view of possible purchasers and lessees, and therefore diminishes its selling and letting value. Does the circumstance that the loss is not due to the obstructions as such affect the application of the principle? If an illegal act causes damage to an individual, which is particular damage, that is to say, which affects him particularly over and above any harm it may cause to the public generally, and that damage is the natural and probable consequence of the act, reparation for such damage is, I think, recoverable, and I do not see why the law breaker should escape this consequence because of the fact that the injurious results (the natural and probable results) of his concrete illegal act are not connected by any causal relation with the particular circumstances giving the act its specific illegal character. The point has been dealt with in *Campbell* v. *Paddington*(1), in which it was held that an erection in a highway, unlawful as an obstruction to the public right of passage which also interfered with the view from the plaintiff's windows and thus deprived her of the opportunity of letting some rooms for the purpose of viewing a procession, was actionable at her suit although she was not specially affected by the obstruction as an obstruction to the right of passage. See also *Griffith* v. *Clay*(2).

But the question arises, is it sufficient that the depreciation should have been the result of something which would have been an actionable public nuisance, but for the statutory authority? That it should be actionable is a condition, but is it sufficient? Lord Cairns' words in *McCarthy's Case*(3), at page 252, have frequently been quoted:—

(1) [1911] 1 K.B. 869. (2) [1912] 2 Ch. 291.
(3) L.R. 7 H.L. 243.

In the observations I am about to make to your Lordships, I propose entirely to accept the test which has been applied both in this House and elsewhere, as to the proper meaning of those words as giving a right to compensation, namely, that 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 work had not been authorized by Act of Parliament.

Lord Hatherly's language is to the same effect at page 260 and in *McCarthy's Case*(1), the decision of the Exchequer Chamber in *Chamberlain's Case*(2), at page 605, and the decision of the Court of Common Pleas in *Beckett* v. *Midland Railway Co.*(3), at page 82, are explicitly approved in which it was held that depreciation in value caused by an obstruction giving a right of action by reason of such depreciation would afford a sufficient ground for compensation. Certain earlier cases, notably *Caledonian Railway Co.* v. *Ogilvy*,(4) in which a claim for damages occasioned by a railway crossing at highway level was disallowed, are explained on the ground that no depreciation of value or other injurious effects upon the claimant's property was shewn.

A difficulty, however, may seem to arise from the language of the Lord Chancellor (Lord Cairns) and of Lord Chelmsford in *McCarthy's Case*(1), and the application made of that language by this court in *The King* v. *McArthur*(5). Lord Cairns appears to have accepted, although it may be doubted whether he intended to lay it down finally as a "definition," the test proposed in the form of a "definition" by Mr. Thesiger in argument. Lord Cairns formulates that test at page 253 in these words:—

Mr. Thesiger stated that the test which he would submit as one which he thought would explain and reconcile the various cases upon this subject, was this, that where by the construction of works there is

(1) L.R. 7 H.L. 243.
(2) 2 B. & S. 636.
(3) L.R. 3 C.P. 82.
(4) 2 Macq. 229.
(5) 34 Can. S.C.R. 570.

1917
THE CITY OF TORONTO v. J. F. BROWN CO.
Duff J.

physical interference with any right, public or private, which the owners or occupiers of property are by right entitled to make use of, in connection with such property, and which right gives an additional value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value.

Lord Chelmsford restates the "test" in slightly different language at page 256. Now there is a fallacy in applying this "test" where the claim is for damages caused by maintenance and user as distinguished from construction simply. In *McCarthy's Case*(1) their Lordships were applying the 68th section of the "Lands Clauses Consolidation Act," which comes into operation only where property is injuriously affected by the "execution of the works." And in view of the decision of the House in *Brand's Case*(2), all their observations were, of course, directed to a discussion of the point raised by a claim for the injurious affecting of property as the result of the physical construction. It is too obvious for argument that a claim for compensation for damages caused by vibration, in the working of a railway for example, is not within the purview of the language quoted. This being the proper construction of the language, it may no doubt have been rightly applied by this court in *McArthur's Case*(3), on the assumption upon which that decision proceeded, namely, that the statute under which compensation was claimed, had no application to the injurious consequences of user as distinguished from construction.

It is proper at this stage to notice an argument of Mr. Tilley, which was to the following effect. Assuming section 437 to have no application to cases in which no property is taken, and no property is injuriously

(1) L.R. 7 H.L. 243. (2) L.R. 4 H.L. 171.
(3) 34 Can. S.C.R. 570.

affected by construction, the depreciation in value ought, nevertheless, in part, on the evidence to be attributed to the existence of the obstruction to the right of passage occasioned by the openings in the surface of the highway independently of their connection with the conveniences; and that the compensation clause having once "attached," even though no land was taken, compensation must be assessed for the whole of the resulting damage arising from use as well as from construction.

I have already said that in my view the premises fail on the facts; but assuming the premises the conclusion is, I think, to say the very least, extremely doubtful. Section 437 gives compensation for

any damage necessarily resulting from the exercise of such powers,

"such powers" being those in the exercise of which land has been "entered upon, taken or used," or by the exercise of which land has been "injuriously affected. If "injuriously affected by the exercise of any of its powers" contemplates powers of construction only, then it must follow that where compensation is claimed for injuriously affecting lands it must be shewn that this results from construction. That seems necessarily involved in the acceptance of the interpretation of the statute put forward on behalf of the respondent. That interpretation given, there is no foothold for a claim in respect of damages occasioned by user.

Mr. Tilley's contention, moreover, is founded on certain English decisions, which, when closely examined, are seen to be *non ad rem*. I have already mentioned that in the *Cowper-Essex Case*(1), their Lordships had to apply sections 49 and 63 of the "Lands Clauses Consolidation Act." The language of those clauses is discussed above and the effect of them noted in their application to

(1) 14 App. Cas. 153.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

circumstances such as those their Lordships had before them in the *Cowper-Essex Case*(1), where part of a landowner's property is severed from the rest. Their Lordships followed the decision in the *Duke of Buccleuch's Case*(2) where the majority of the law Lords proceeded on the ground that land had been taken. The right of access to the river, moreover, along the whole of the river front, was invaded and access destroyed, and I should not be disposed to think that this was distinguishable from the taking of land, the right of access being not an easement, but one of the rights *jure naturæ* incidental to ownership. *Lyon* v. *Fishmonger's Co.*(3); *Kensit* v. *Great Eastern Ry. Co.*(4); *North Shore Ry. Co.* v. *Pion*(5), at page 621. See Lord Cairn's judgment in the *Duke of Buccleuch's Case*(2), at page 462. *In re Tilbury*(6), at page 326, is a case which seemed at first sight to support the contention, and the language used by the Lords Justices is very broad. At page 333, for example, Lopes L.J., says:—

> That principle I understand to be, that when the compensation clauses of the statute attach, the party who is injuriously affected is to be entitled to recover full compensation for all damage in respect of the determination in value of his property.

When, however, one considers what their Lordships had to decide, and what their Lordships did decide, one sees that they were only dealing with the case in which property is injuriously affected by construction. The ground of the claim was that certain buildings constructed by the railway company injuriously affected the claimant's property in the obstruction of certain ancient lights, and that this obstruction, which, but for the statutory powers of the railway company, would

(1) 14 App. Cas. 153.
(2) L.R. 5 H.L. 418.
(3) 1 App. Cas. 662.
(4) 27 Ch. D. 122.
(5) 14 App. Cas. 612.
(6) 24 Q.B.D. 326.

have been unlawful and actionable, at the same time had the effect of interrupting the access of light to windows in respect of which the claimant had acquired no easement of light. Their Lordships applied and construed section 16 of the "Railway Clauses Consolidation Act, 1845," in relation to these facts. I have already pointed out that under the decision in *Brand's Case*(1) the proviso to that section requiring the promoters

> to make full satisfaction * * * for all damage * * * sustained by reason of the exercise of such powers

applies only where the damage is sustained in consequence of construction as distinguished from user, and this is the section which their Lordships applied. The damage for which compensation was claimed was in its entirety attributable to construction.

There is, I think, no decision under the "Railway Clauses Act," or under the "Lands Clauses Act" in which it is held, or in which it is laid down that where land is not taken compensation can be recovered for damages arising from the injurious affecting of it by subsequent user as distinguished from construction; that no doubt is because there is nothing in the provisions of those Acts to give support to such a claim. There is one circumstance, moreover, which tells very powerfully against any such view. In *Brand's Case*(1) a claim was made, and allowed for damages for interrupting the access of light and air, and if the contention I am considering were sound, that would have afforded a basis for a claim to compensation for damage caused by vibration, which was disallowed. The point was not discussed by the law Lords, and not referred to in argument, but attention had been called to it in the judgment

(1) L.R. 4 H.L. 171.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

of Montague Smith J.(1), and though perhaps as Lord Blackburn afterwards observed, the decision of the law Lords cannot be regarded as concluding the point, it is at least clear that Sir Roundell Palmer who appeared unsuccessfully for the respondent (and probably Lord Cairns, who thought the respondent ought to succeed), regarded the point as of no consequence.

I now come to the last point upon which Mr. Hellmuth, I think, chiefly relies, and that is that on the hypothesis upon which the respondent's case rests, the action of the municipality in providing and maintaining the conveniences exceeded any authority conferred by the "Municipal Act," and that consequently no right to compensation arises. I concur with the view advanced by Mr. Hellmuth, that if the municipal by-law was beyond the powers of the council no right to compensation under the statute would arise; but I have not sufficiently considered the provisions of the "Municipal Act" in relation to the procedure in compensation cases to enable me to form an opinion whether such an objection (postulating as this does an abuse of the powers of the council) could properly be taken as this objection was taken for the first time after the evidence had all been heard.

I am satisfied that there is nothing before us to justify the conclusion that the council exceeded their powers. Mr. Hellmuth's point is that the appellant municipality could not validly exercise its authority in relation to the providing of public lavatories in such a way as to create a nuisance prejudicially affecting private property.

Now there is a sense in which that proposition is perfectly sound. The municipality must exercise this

(1) L.R. 2 Q.B. 223.

power in a proper manner, that is to say, it must not by acts of collateral negligence by improper construction, for example, create a nuisance, and for a nuisance occasioned by such negligence, the municipality is undoubtedly responsible in an action for damages and that is the proper remedy. But the respondent company does not claim compensation for anything of the kind. It claims compensation for damages arising from the existence of these conveniences, and from concomitants of them which are inevitable, and from the harmful consequences necessarily resulting from the lavatories being where they are placed. It is argued that the municipality can have no authority under the statute to place such a convenience in such a situation as to produce such injurious consequences to a private individual. I think that proposition is not well founded. The authorities relied upon are *Vernon* v. St. *James*(1), *Metropolitan Asylum Dist.* v. *Hill*(2). These cases have been fully dealt with in a judgment of Lord Macnaghten, speaking for the Judicial Committee in *East Fremantle* v. *Annois*(3), which enunciates clearly and succinctly the principle upon which such questions must be decided, namely, by ascertaining the answer to the question: What is the proper construction of the statute from which the power is derived? I limit myself to quoting the most directly relevant passages:—

> The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute * * *
>
> In a word the only question is, has the power been exceeded? Abuse is only one form of excess.

(1) 16 Ch.D. 449. (2) 6 App. Cas. 193.
(3) [1902] A.C. 213.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

Their Lordships are of opinion that the principles laid down by Lord Kenyon and Abbott C.J. have not been in the slightest degree modified by the more recent cases referred to by Hensman J. They were all cases where, upon the true construction of the particular statute under consideration, the Court held that there was no intention of authorizing interference with private rights * * *

In *Metropolitan Asylum District* v. *Hill*(1), the remarks of Lord Watson must be taken in connection with the circumstances of the case with which his Lordship was then dealing. As his Lordship observes: "What was the intention of the Legislature in any particular Act is a question in the construction of the Act?" There it was held, as Lord Selborne pointed out, that there was no statutory right to commit a nuisance, and that no use of any land which must necessarily be a nuisance at common law was authorized. As Lord Blackburn observed in a later case, *Truman* v. *London, Brighton and South Coast Rly. Co.*(2), quoting Bowen L.J., there was not to be found in the Act under consideration in *Metropolitan Asylum District* v. *Hill*(1) "any element of compulsion, or any indication of an intention to interfere with private rights."

In *Vernon* v. *Vestry of St. James*(3), in the very sentence quoted by Hensman J., James L.J. went on to say that he was of opinion that there was no legislation in the case authorizing the vestry to interfere with private rights. In an earlier part of his judgment, the Lord Justice had observed, "there are no words here that authorize the vestry to commit a nuisance."

The question is then—Has the legislature endowed the council with authority to select a site for such conveniences, subject to the obligation to pay compensation where private rights of property are injuriously affected? Municipal councils invested with very large powers must be presumed to act not only with due regard to the public interest, but with due consideration for individual rights and interests in such matters. But the question is: Is a discretion committed to the council which enables it to select a site where private property will inevitably be damaged when it deems the public interest so to require?

"An Act of Parliament," said Bowen L.J., in *Truman*

(1) 6 App. Cas. 193. (2) 11 App. Cas. 45, at page 64.
(3) 16 Ch.D. 449.

v. *London, Brighton and South Coast Rly. Co.*(1), at page 108,

> may authorize a nuisance, and if it does so, then the nuisance which it authorizes may be lawfully committed. But the authority given by the Act may be an authority which falls short of authorizing a nuisance.
>
> It may be an authority to do certain works provided that they can be done without causing a nuisance, and whether the authority falls within that category is again a question of construction. Again the authority given by Parliament may be to carry out the works without a nuisance, if they can be so carried out, but in the last resort to authorize a nuisance if it is necessary for the construction of the works.

Nobody would deny that the municipality has authority to expropriate land for the purpose of establishing lavatories; therefore the scheme of the Act is certainly not to require the municipality, in the exercise of this power, to refrain from interfering with private rights; it contemplates, on the contrary, interference with private rights, subject, of course, to paying compensation. But in my judgment, to accept the view advanced by the municipality would nullify the utility of this power.

I will not elaborate the point; my conclusion is that where private rights are affected the compensation clause attaches. This is not to say that the municipal council may act in a wholly fantastic manner passing, for example, a by-law which

> reasonable persons, acting in good faith, could not sanction.

Slattery v. *Naylor*(2). For such conduct the law affords ample remedy.

For these reasons I have come to the conclusion that the conditions of the claimant's right to compensation under the compensation clause of the "Municipal Act" construed by the light of the relevant judicial decisions, are fulfilled, and that the main appeal should therefore be dismissed.

(1) 29 Ch.D. 89.

(2) 13 App. Cas. 446.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Duff J.

As to the cross-appeal, it involves questions of fact only, and upon these questions the arbitrator's findings have been affirmed by the Appellate Division, and ought not therefore to be disturbed in this court unless it is quite clear that they are founded upon some specific mistake. That has not been shewn.

ANGLIN J.—The facts are so fully set out, and the authorities so thoroughly discussed in the judgment of my brothers, Davies and Duff, which I have had the advantage of reading, and in those of the learned judges of the Appellate Division(1), that it seems quite unnecessary to do more than state the conclusions I have reached, and to indicate the grounds on which they are based.

The crucial questions appear to me to be these:—

1 Is the construction and maintenance of a public lavatory, which would otherwise be within the authorization of section 552 (1) of the "Municipal Act, 1903," or section 406(8) of the "Municipal Act, 1913," (identical provisions) excluded therefrom because it entails conditions which, if not so authorized, would amount to a nuisance?

2. Are the lands of the respondent company "injuriously affected" by the exercise of the powers conferred on the appellant municipality within the meaning of section 437 of the "Municipal Act, 1903," or section 325 of the Municipal Act, 1913 ? " I regard both these provisions as substantially the same, but I agree with my brother Duff that the Act of 1903 governs, the works having been constructed before the 1st of July, 1913.

3. Do the powers, for damages occasioned by the exercise of which compensation is thereby provided,

(1) 36 Ont. L.R. 189.

include the maintenance, in the sense of carrying on or conducting public lavatories, or are they confined to the original providing (*i.e.*, the construction) of them and subsequent maintenance merely in the sense of repairs or betterments?

(1) I entertain no doubt whatever that the fact that the existence of a public lavatory causes conditions which would at common law amount to a nuisance, if those conditions are a necessary concomitant of its erection and maintenance, whether it is constructed on expropriated lands or on the city streets, does not exclude it from the authorization of the statute. In specifically authorizing the construction and maintenance of public lavatories, and providing for compensation for resultant injury the legislature contemplated that such conditions, productive of damage to adjacent private properties, might ensue. The city is entrusted with a discretion as to the location of such lavatories, and its judgment, honestly exercised, is not subject to curial control or review. The causing of damage which is not a necessary result of the exercise of the statutory power—which due care in its exercise would avoid—is not within the statutory authority. It is an excess or abuse of the power; and damage so caused is not a subject for compensation, but for action. But the construction and maintenance of a lavatory, with all proper precautions to avoid unnecessary injury is authorized by the statute, even though it should entail conditions which would, if not so authorized, amount to an indictable or actionable nuisance. The statute substitutes money compensation for some of the benefits and advantages of and incidental to ownership of property, in so far as it is "injuriously affected" by the exercise of the corporate powers.

(2) The construction of the words "injuriously

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Anglin J.

affected" as applied to lands in compensation Acts, is too well established to admit of controversy. It imports an affection of the lands themselves (apart from any particular use to which they may be put or any personal inconvenience suffered by the owner) entailing appreciable damage. It also implies an *injuria* known to the law, *i.e.*, the doing of an act which, if not authorized by the statute, would be actionable—that the loss sustained must not be *damnum absque injuria*. Once an actionable injury is established, however, all the damage sustained in consequence of the exercise of the statutory power is to be compensated for. Thus, if the *injuria* consists in the blocking of lights to the enjoyment of which the land-owner has a legal right, prescriptive or contractual, he is entitled to compensation for interference with other existing lights to the enjoyment of which he has not a legal title. The *Tilbury Case*(1); *Horton* v. *Colwyn Bay*(2) at page 341; *Griffiths* v. *Clay*(3).

Moreover, if the act done be illegal (as Mr. Justice Masten has, to me at least, satisfactorily demonstrated the erection of the lavatory in question, but for the statutory authorization, would have been, because of the partial obstruction of the highway involved) damages which are its natural and probable consequences, may be recovered, although no actual damage can be shewn attributable to the feature of the act which renders it illegal, or, but for the statutory authorization, would have made it so. *Campbell* v. *Paddington*(4), cited by my brother Duff, illustrates this phase of the law. I agree that the affirmance of the judgment in appeal involves the acceptance of the principle of the *Paddington Case*(4).

(1) 24 Q.B.D. 326.
(2) [1908] 1 K.B. 327.
(3) [1912] 2 Ch. 291.
(4) [1911] 1 K.B. 869.

1917

OF THE CITY OF TORONTO v. J. F. BROWN CO.

Anglin J.

(3) I have no doubt that the word "maintain" in section 552(1) of the Act of 1903, is used in the sense of "carry on" and that the power conferred was not merely to erect lavatories, and keep them in repair, but to conduct and operate them as municipal enterprises, *Fletcher* v. *Birkenhead* (1), at pages 610-11;(2), at pages 213, 216-17, 218, seems to me to be very much in point.

In dealing with section 437 of the "Municipal Act, 1903," we are not embarrassed by the restrictive effect of a heading of a fasciculus of sections such as led to the decisions in *Brand's Case*(3) and the series of English cases following it. The language of section 437 is obviously wide enough to cover compensation for injury due to user as well as to erection, once it is established that carrying on or conducting the lavatory is an exercise of the statutory power conferred by the word "maintain," as I have no doubt that it is. My brother Duff has clearly pointed out the distinction between the construction placed by the English courts on section 68 of the "Lands Clauses Consolidation Act" and sections 6 and 16 of the "Railway Clauses Consolidation Act," and that given to sections 49 and 63 of the former Act, and the grounds on which that distinction rests. I agree in his conclusion that the construction of section 552(1) and section 437 of the "Ontario Municipal Act, 1903," is governed by the decisions on sections 49 and 63 of the "Lands Clauses Consolidation Act." There is nothing in the "Municipal Act" which requires a more restricted application of section 437 than its language *ex facie* calls for.

(1) [1906] 1 K.B. 605. (2) [1907] 1 K.B. 205.

(3) L.R. 4 H.L. 171.

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Anglin J.

Compensation for damages due to user having been expressly provided for by the statute, and injurious affection, resulting from an act illegal but for statutory authorization, having been shewn, nothing more, in my opinion, is required to establish the claimant's right to recover.

I have not overlooked the argument made on behalf of the appellant, based on the fact that title to the land occupied by the highway is now vested in the city under the "Municipal Act, 1913." When the lavatory was built, however, and the respondent's right to compensation accrued, the title was in the Crown, and the appellant cannot invoke the Act of 1913, which is not made retrospective. But, although the title to the soil under Parliament Street is now vested in the City, having regard to the trust upon which it is held, it cannot, in my opinion, be lawfully used without statutory authority as a site for a lavatory. The lavatory was not erected, and is not maintained, under any such pretended common law right of proprietorship, but in the exercise of the powers conferred by the statute; and for injury to land sustained as the result of the exercise of those powers, the legislature has given the right to compensation.

I am, for these reasons, of the opinion that the award as to the item of $9,000, no complaint having been made as to the quantum, should be sustained.

As to the item of $1,200 allowed for damage due to seepage, I find no evidence in the record of any negligence in the planning or construction of the works, such as would be an abuse of the statutory powers or without the protection they afford. It may be that by additional works (Mr. Justice Riddell suggests a coat of waterproof cement on the walls of the claimant's shop) the seepage complained of could have been

1917

THE CITY OF TORONTO v. J. F. BROWN CO.

Anglin J.

prevented. But the municipality's failure to undertake such additional works did not render it liable to an action for damages. The injury caused by the seepage seems to have "necessarily resulted" from the exercise of the statutory powers of the municipal corporation within the meaning of section 437. On this branch of the case I agree with the views expressed by Mr. Justice Masten.

No case was made for increasing the amount of the award as claimed by the cross-appeal. Indeed any error in the assessment of compensation would seem to me to be clearly in favour of the claimant. A more moderate award might have been accepted without appeal. The allowance of excessive compensation in cases such as this is calculated to discourage the undertaking of important public improvements.

BRODEUR J.—I concur in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitor of the appellant: *William Johnston.*

Solicitors for the respondents: *Macdonald, Shepley, Donald & Mason.*