THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... PLAINTIFF;

1891
Sept. 17.

AND

SARAH BARRY, THOMAS BARRY, WILLIAM J. VEITH, SARAH ANN TAYLOR, WILLIAM O. TAYLOR, JOHN F. VEITH, SUSAN A. VEITH, ANN E. VEITH, HENRY G. WOODS, ELLA VOSE, JESSIE VOSE, GEORGE A. VEITH, JANE LETSON, ROBERT A. LETSON, HENRY W. VEITH AND WILLIAM H. KEATING. DEFENDANTS.

Injurious affection of land—Construction of a railway siding on a sidewalk contiguous to such land—Measure of damages.

Where lands are injuriously affected, no part thereof being taken, the owners are not entitled to compensation under *The Government Railways Act*, 1881, unless the injury (1) is occasioned by an act made lawful by the statutory powers exercised, (2) is such an injury as would have sustained an action but for such statutory powers, and (3) is an injury to lands or some right or interest therein, and not a personal injury or an injury to trade.

2. The construction of a railway siding along the sidewalk contiguous to lands whereby access to such lands is interfered with, and the frontage of the property destroyed for the uses for which it is held (in this case for sale in building lots), is such an injury thereto as will entitle the owner to compensation.

Quære: Whether the rule that compensation in cases of injurious affection only must be confined to such damages as arise from the construction of the authorized works, and must not be extended to those resulting from the user of such works, is applicable to cases arising under *The Government Railways Act*, 1881?

THIS was an information filed by Her Majesty's Attorney-General for the Dominion of Canada in a matter of expropriation of land for the purposes of a siding on the Intercolonial Railway.

On the 30th September, 1881, certain lands belonging to the defendants at Halifax, N.S., were taken by the Gov-

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ernment of Canada for the purposes of the Cotton Factory siding in that city. This siding was located along a public highway called Kempt Road, the frontage of certain property of the defendants, other than that taken for the railway siding, being contiguous thereto. It was claimed by the defendants that by the construction of the siding, access to their property last mentioned was interfered with, and that, inasmuch as the property was held for sale as building lots, it was injuriously affected by the operation of engines and trains over and upon such siding. By the information filed herein, the sum of fifty dollars was declared to be sufficient compensation both for land taken and damages; but the defendants in their answer demanded a sum of six thousand eight hundred and fifty dollars as such compensation. By consent of parties, the case was referred by the court to one of the official referees for enquiry and report as to the value of the land taken and the amount of damages, if any, sustained by the defendants by reason of the construction and operation of the siding. On the 7th of August, 1890, the official referee reported in favor of the defendants for the sum of $2,900.75, being divided as follows: For land taken and damages to lot 5*a*, $79.25; for land taken and damages to lot 7, $126.50; for the injurious affection of lands situate on Kempt Road, $2,695.

The defendants moved for judgment on this report and to increase the amount thereof; and the crown moved against it by way of appeal and asked for a reduction of the compensation money on the ground that the defendants were not entitled to anything in respect of the alleged injurious affection of the property on Kempt Road. The court, being of opinion that the evidence was not altogether clear as to the manner in which the construction of the siding affected the property on Kempt Road,

sent the case back to the official referee for further enquiry and report, 1st, "As to the amount of depre- "ciation in the value of the property in question occa- "sioned by the construction of the siding considered as "a physical obstruction only, and apart from any ques- "tion as to the use to be made of it;" and, 2ndly, "as "to the amount of such depreciation occasioned by "the construction of such siding, having regard to the "use for which it was constructed."

Further evidence having been taken by the official referee, he reported as follows: "As to the amount of "depreciation in the value of the defendants' property "occasioned by the construction of the siding con- "sidered as a physical obstruction only, and apart "from any question as to the use to be made of it, I "estimate this at the sum given in my first report. * * * * "To make myself more clearly understoood, "in estimating the damages sustained by the defen- "dants I have been mainly guided by the evidences "given at the original hearing of the case, at which "hearing all the witnesses admitted that the property "for house-building purposes was destroyed, or rather "that portion of it fronting on the Kempt Road. With "the witnesses I fully concur. In order then to place "the defendants in as good a position as they were "before the construction of the siding, and to enable "them to make sale of their front lots, I consider that "the only feasible thing for them to do is to construct "a new road, beginning at a point about seventy-five "feet from where the railway siding crosses the bend "of the Kempt Road, thence in a southerly direction "to the southern boundary of the property. This "would entail upon the defendants the loss of land "seventy-five feet in width through their property, "and the expense of construction of this road. Allow- "ing for these I arrive at the damage, $2,695."

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"As to the amount of depreciation occasioned by "the construction of the railway siding, having regard "to the use for which it was constructed, I believe "there would be no depreciation in view of what I "have stated above. By the defendants substituting "a highway or street to take the place of that portion "of Kempt Road running along the front of their pro- "perty and interfered with by the siding, they would "be in a position to realize as much for their lots fac- "ing on such new street as they would were said lots "immediately fronting the Kempt Road *minus* the "railway siding. With an approach other than from "the Kempt Road, occupants of houses would not be "subjected to the same danger or inconvenience as "they might be with the siding in front of them, and "locomotives and cars running over the same."

August 20th and 21st, 1891.

The case then came before the court on motion for judgment by defendants on the official referee's reports.

Sedgewick, for defendants;

Ritchie, for plaintiff.

BURBIDGE, J. now (September 17th, 1891) delivered judgment.

The information in this case is filed by the Attorney-General for a declaration that certain lands therein described, and situate in the city of Halifax, are vested in the crown; and that a sum of fifty dollars tendered to the defendants is a just and sufficient compensation to them for such lands, and for any damages suffered by them, by reason of the expropriation thereof and the construction thereon of a siding from the Intercolonial Railway, known as the Halifax Cotton Factory siding.

The crown's title to the lands, and its right to a

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declaration that they are vested in it, is admitted. With reference to the question of compensation it is not denied that the defendants ought to be paid the two sums of $79.25 and $126.50 for lots 5*a* and 7 mentioned in the first report of the official referee; and it is equally clear, I think, that they are not entitled to any compensation in respect of the item of $500 claimed as the value of a portion of the Kempt Road upon which the siding is constructed, and which under the evidence I find to be a public highway (1).

The main question at issue between the parties is as to whether or not the defendants are entitled to compensation for the injurious affection of a lot of land owned by them and adjoining the Kempt Road.

The Halifax Cotton Factory siding was built in the year 1881, in pursuance of the provisions of *The Government Railways Act*, 1881; and with the leave of the city council of Halifax, subsequently confirmed by an Act of the Legislature of Nova Scotia, it was constructed along a certain public road or street in that city, known as the Kempt Road (2). Opposite the defendants' property, and for a distance, in round numbers, of eleven hundred feet, the track of the siding is laid upon the sidewalk of the street, contiguous to their property. To give access thereto, three crossings have been made, which are sufficient for any use to which the property has hitherto been put. But it appears from the report of the official referee, and from the evidence, that the chief value of the property consisted in its availibility for division into, and sale as, building lots; and that in respect of any such use, its value has been greatly depreciated by the construction of the siding.

(1) *Stebbing* v. *The Metropolitan Board of Works* L. R. 6 Q. B. 37; *Paint* v. *The Queen*, 2 Ex. C. R. 149. As to the crown's title to highways in Nova Scotia, see *Koch* v. *Dauphinee*, James 159.

(2) 44 Vic. c. 25, ss. 5, (7), 49; 47 Vic. (N.S.) c. 30.

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This property, it is to be observed, was not in any way held with lots 5*a* and 7 which were taken for the siding, and no question of unity of possession arises (1). We have seen that the damage results from acts made lawful by the statute, and, so far as that requisite of a well grounded claim is concerned (2), there is nothing in the defendants' way. But they are not entitled to succeed, it is clear, unless the acts complained of would, in the absence of the statutory powers exercised, be actionable, nor unless they cause damage to the property itself. To sustain a claim for compensation under the compensation clauses of the Imperial Lands Clauses Consolidation Act, or other like Acts, there must be a special or peculiar damage to lands, or to some right or interest therein, occasioned by the construction of the authorized works, which, but for the statute might have been the subject of an action, and which diminishes the value of the lands. These two elements must concur. It is not enough that what is complained of would sustain an action on the part of the complainant if the injury or inconvenience is personal to him and does not affect any land of which he is the owner. And, on the other hand, he is not entitled to compensation, although his land may be depreciated in value by the construction of the authorized works, unless what is done under the statute would otherwise have been actionable.

I shall illustrate these propositions by reference, in the first place, to cases in which it has been held that no claim to compensation exists :

In *Rex* v. *The Bristol Dock Company* (3) the owners of a brewery were held not to be entitled to compensation for a loss arising to them in their business from the

(1) *Cowper Essex* v. *Acton*, L. R. 14 App. Cas 153.

(2) *The Imperial Gas Co.* v. *Broadbent*, 7 H. L.C. 600 ; *The Caledonian Railway Co.* v. *Colt*, 3 Macq. H.L. Cas. 833.

(3) 12 East 428.

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deterioration of the water of the public river Avon, from which the brewery had been supplied by means of pipes laid under low-water mark, the use of the water having been common to the King's subjects, and not claimed as an easement to the particular tenement. The only remedy for such an injury is by indictment, which in this case was taken away by the Act of Parliament. The Commissioners of the Nene Outfall, in execution of powers conferred upon them by the Act 7-8 Geo. IV. c. 85, acquired for the purposes of navigation certain titheable land, and covered it with water. The tithe-owner claimed compensation but it was held that he was not entitled, as he had a mere right to a portion of the produce of the land when that produce arose and was severed from it, and could not have maintained an action if the Act of Parliament had not been passed (1). The London Dock Company by the construction of its works, which were authorized by the statute 9 Geo. IV. c. 116, occasioned the destruction of the neighborhood of a public house, known as The Wheat Sheaf, by the formation of a basin and a cut on ground before covered by houses, and stopped up several thoroughfares that had previously given a direct passage to, from, and by such houses, whereby the direct and casual custom of the premises was diminished, and their pecuniary value to sell or let as a public house or shop, but not as a private house, was lessened. William Hartree and Ann Lammiman were at the time the surviving trustees under certain indentures of lease and release of the fee simple of this public house, and Ann Lammiman was the occupier and tenant for life thereof and carried on therein the trade of a victualler. Hartree and Lammiman took proceedings to compel the London Dock Company to issue a precept to the sheriff to summon a jury to

(1) *The King* v. *The Commissioners of the Nene Outfall*, 9 B. & C. 875.

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assess compensation to them under the provisions of the statute referred to, but failed, it being held that the statute contemplated compensation only in cases where there was direct injury occasioned by the act of the company to lands, houses or hereditaments, and that the inconvenience arising from public traffic being diverted and the loss of custom in trade thereby occasioned to the owners was too remote and indefinite and would not have given them a right of action if there had been no statutory powers. The inconvenience complained of was common, it was said, in a greater or lesser degree, to every inhabitant in the neighborhood (1). It will be observed, no doubt, that in this case the claimants' premises were diminished in value as a public house by an act done by the company under its statutory powers, which, without the statute, would probably have given them a right of action; but such depreciation appears to have been thought to have been occasioned by the diversion of public travel and traffic, and the consequent loss of custom, and not by reason of any interference with any right of access belonging to the claimants as incident to such premises. The case must be read in the light of later cases, such as *Chamberlain's*, *Beckett's*, *McCarthy's* and that of *Walker's Trustees*, to which I shall have occasion presently to refer, (2) and cannot be relied upon for any larger proposition than this, that the obstruction of a public highway which diverts public travel and traffic and causes loss of custom in trade to the proprietor of premises in the neighborhood of such obstruction, but which does not interfere with any right of access that such proprietor has as incident to such premises, will not support a claim for compensation.

(1) *The King* v. *The London Dock Company*, 5 Ad. & El. 163.

(2) See *post* pp. 349, 350, 351.

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The facts in *Ogilvy's Case* (1) were, that the railway company under the Railways Clauses and Lands Clauses Acts of 1845 took part of the premises on which the plaintiff resided with his family. The line of railway divided the property and crossed at rail-level, and within a few yards of the lodge, a public road that formed the chief access to the residence. By reason of the level crossing Ogilvy was, in going to and from his residence, liable to inconvenience, interruption and delay by the closing of the railway gates, and subjected to the risk of his horses being startled by the passing and noise of engines. For the land taken the jury assessed the damage at £360, and this sum was not in dispute. For the injuries arising from the severance and the level crossing, they allowed him £560 without distinguishing how much was for "severance" and how much for the "level crossing." It was not denied that he was entitled to compensation for the injury to his premises occasioned by the severance, but it was contended that he was not entitled to compensation for the personal inconvenience arising from the level crossing, and that contention the House of Lords (reversing the decision of the Court of Session) upheld. This case has been much discussed. It has been questioned, perhaps qualified, but never over-ruled. It is probable, however, that to-day an owner of an estate would, under later decisions and a like state of facts differently presented, succeed where Ogilvy failed. It cannot, I think, be doubted that the existence of the level crossing of which he complained would have been an inconvenience to any owner of the estate, and would have had the effect of diminishing its value either for occupation or for sale. For such a diminution in value, a portion of the premises having been taken,

(1) *The Caledonian Railway Company* v. *Ogilvy*, 2 Macq. H. L. C. 229.

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he would be entitled to compensation (1). But that is not the state of facts on which the case was decided; and interpreted and limited by subsequent decisions it is an illustration of the principle that where there is no injury to land or any right or interest therein or incident thereto, a personal inconvenience or annoyance to the owner, which, though it may be greater in degree, does not differ in kind from that to which all Her Majesty's subjects are exposed, does not entitle him to compensation, although, but for the statute, he might have had an action for such inconvenience or annoyance. The Court of Common Pleas of Upper Canada followed *Ogilvy's Case* in that of *Day* v. *The Grand Trunk Railway Company* (2), and held that Day was not entitled to compensation. In the latter case the company had, under its statutory powers and with the leave of the municipality of Guelph, constructed its line of railway along the centre of a street in Guelph, in front of a lot of land owned by the plaintiff. The railway occupied, it appears from the report, thirty-four feet of the centre of the street and was elevated from three to six feet above the surface of the street, leaving a space about thirty-two feet wide on each side, and rendering it necessary to use part of the lot in addition to such space to get into the yard of the lot, whereby Day sustained damage. The court treated the case as one of personal inconvenience only, to which Day was exposed in the same way as any other person having occasion to use the street. The interference with the access to the premises does not appear to have been taken into consideration. The case does not, it appears to me, d ffer materially from *Beckett* v. *The Midland Railway Com-*

(1) In *re Stockport, &c., Rail Co.*, L. R. 3 Ex. 306, 5 Ex. 221, 5 H.L. 418; *Cowper Essex* v. *Acton*, 14 App. Cas. 153.

(2) 5 U.C.C.P. 420.

33 L. J. Q. B. 251; *Buccleuch* v. *The Metropolitan Board of Works*,

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pany (1), in which it was held that the plaintiff was entitled to recover. Interference with the privacy of lands by reason of their being overlooked by persons on the railway will not, it is clear, sustain a claim to compensation, although the value of such lands is thereby diminished. There is in such a case, no damage to any right which but for the statute would be actionable (2). The case of *Herring* v. *The Metropolitan Board of Works* (3) illustrates the proposition that the injury which gives a right to compensation must diminish the value of the claimant's lands (4), although it should be added that that is not the principle upon which all the members of the court rested their opinions. In that case the respondents under statutory authority erected a hoarding in Northumberland Street, London, for the purpose of enabling them to reconstruct a sewer running under that street. The hoarding occupied the whole width of the street between the kerb stones on each side, and the upper end of it stood five or six inches higher up the street than the lower side of the appellant's gateway, that is, it overlapped the entrance to his premises five or six inches. It stood three feet six inches from the nearest part of his premises, the access to which was thereby rendered less convenient than it had been before. The obstruction, it was maintained, interfered with the carrying on of the appellant's business, and thereby occasioned him loss, but his premises were not damaged or diminished in value. Held, that he was not entitled to compensation. *Ricket's Case* (5) was also a case in which the plaintiff's business was injured by the obstruction, during the construction

(1) L. R. 3 C. P. 82.

(2) *Penny* v. *The South Eastern Railway Company*, 7 El. & B. 660.

(3) 19 C. B. N. S. 510.

(4) *Ibid.* See opinion of Montague Smith, J., p. 526.

(5) *Ricket* v. *The Metropolitan Railway Company*, L. R. 2 H. L. 175.

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of the defendant's works, of certain public thoroughfares near the plaintiff's premises. This obstruction was continued for twenty months. The question for determination was "Whether the loss of customers by "the plaintiff in his trade," under such circumstances, "was such damage as to entitle him to recover from the "company?" The Court of Queen's Bench consisting of four judges (1) answered the question in the affirmative. Their decision was reversed in the Exchequer Chamber by four judges (2) against two (3) and the latter judgment was affirmed by the House of Lords (4). By *Ricket's Case, Senior v. The Metropolitan Railway Company* (5), in which a tailor recovered compensation for loss of business resulting from the obstruction of public streets adjacent to his premises, and *Cameron* v. *The Charing Cross Railway Company* (6), involving under similar circumstances a like question of the loss of trade suffered by the plaintiff, a baker, were over-ruled. *The Queen* v. *Vaughan and the Metropolitan District Railway* (7) affords another illustration of the proposition that the acts complained of must be actionable, and that loss of profits in business occasioned by the authorized destruction of the neighborhood is not a proper subject for compensation. The claimant in that case was tenant from year to year of a public house, for which the company gave him notice to treat. The proceedings thus commenced for the acquisition of his interest were delayed for some two or three years, and in the meantime he continued to carry on his business. In the end he claimed not only the value of his interest in

(1) Cockburn, C.J. and Blackburn, Mellor and Shee, JJ.

(2) Erle, C.J., Pollock, C.B. and Channell and Pigott, BB.

(3) Keating and Byles, JJ., 5 B. & S. 155, 157, 169.

(4) Lord Chelmsford, L.C. and Lord Cranworth, Lord Westbury dissenting. L. R. 2 H. L. 175.

(5) 2 H. & C. 258.

(6) 16 C. B. N. S. 430.

(7) L. R. 4 Q. B. 190.

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the premises, to which he was admittedly entitled, but the depreciation in value of such interest, the custom of the public house having in the interval been greatly reduced by the pulling down of neighboring houses taken under the company's statutory powers. Held, that he was not entitled to compensation for such depreciation, it being clear that no action would lie by a person whose business is injured by reason of some one having acquired and pulled down the neighboring houses. In the case of *Reg.* v. *The Metropolitan Board of Works* (1), it appeared that the occupier of premises near the Thames had been used to draw water from the river, and to bring barges to a draw-dock there, as public rights and not as rights attaching to the premises. The works of the embankment, then in course of construction by the defendants, caused an obstruction by which access to the river at the place at which such rights had been exercised was practically cut off, and it was suggested that the deprivation would continue until the embankment works were completed. There was no direct evidence as to whether the obstruction would be permanent or not. Held, not to be a case for compensation. The case of *The Metropolitan Board of Works* v. *The Metropolitan Railway Company* (2) turned upon the point that the plaintiffs had acquired no right to lateral support for the sewer that was injured by the construction of the defendants' railway, and affords another example of the application of the rule that where the act complained of is not actionable there is no right to compensation. *Brand's Case* (3) illustrates chiefly a different principle, but it will be convenient briefly to notice it here. In that case Cumberland House, the property of the respondent's wife, was not diminished in value by the construction

(1) L. R. 4 Q. B. 358.
(2) L.R. 4 C.P. 192.
(3) *The Hammersmith and City Railway Company* v. *Brand.* L.R. 4 H.L. 171.

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of the appellants' railway, but it was injuriously affected by the operation of the railway, such injury arising from vibration caused by the passing of trains over the railway. Now it will be observed that the premises were depreciated in value by an act of the company, which, but for the statute, would have been actionable. The Court of Queen's Bench (1) on a special case held that the claim to compensation was not sustainable (2). This decision was reversed in the Exchequer Chamber by Bramwell, B., Keating and Montague Smith, JJ. (Channell, B. dissenting) (3). In the House of Lords (4), of the judges summoned, Willes, J., Keating, J., Pigott, B., Lush, J. (the latter of whom on further consideration had changed his opinion) and Bramwell, B. thought the respondent was entitled to compensation, and Blackburn, J. that he was not, and the latter view prevailed, being supported by Lord Chelmsford and Lord Colonsay (Lord Cairns dissenting). It was agreed that the owner's right of action had been taken away, the operation of the railway having been legalized, and it was determined that the statute, in the case under consideration, made no provision for compensation. The principle is that a railway company is not bound to make compensation for damages necessarily caused by the use of its works for the purposes authorized by the legislature. It is necessary, in the discussion of this case, to bear in mind that no part of the owner's property nor any right or interest therein, was taken or acquired, for in that respect it is distinguishable from such cases as *Buccleuch* v. *The Metropolitan Board of Works* (5). At first sight, *The City of Glasgow Union Railway Company* v. *Hunter* (6) would appear to sustain the view that even

(1) Mellor and Lush, JJ.
(2) L. R. 1 Q. B. 130.
(3) L. R. 2 Q. B. 223
(4) L. R. 4 H. L. 171.
(5) L. R. 5 H. L. 418.
(6) L. R. 2 Sc. Ap. 78.

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where a part of the claimant's land is taken he cannot recover compensation for the depreciation in the value of that which is left resulting from the inconvenience occasioned by the noise and smoke of trains. That appears to have been Lord Hatherly's opinion, but Lord Chelmsford distinctly rests his opinion on the facts that the claim did not arise out of anything done on the land taken, nor in respect of any property of the respondent held therewith, but from the construction of a railway bridge over the land of another person, and that no part of the respondent's property had been injured by anything done on his land over which the railway ran; and Lord Westbury expresses the opinion that when part only of premises is taken, the residue being left to the owner, all the inconvenience sustained by the owner of the residue, in consequence of the user made by the railway company of that which is taken, is a legitimate subject of consideration in determining what is the damage resulting from the severance of the property. In *Devlin's Case* (1), the facts were that the railway was brought into Hamilton, by consent of the municipality along Cherry Street, a narrow street only thirty feet wide, on which the claimant had a brick cottage and a double frame house, and she complained of the great injury done to her by the railway and its user,—that passing trains caused the house to vibrate and the plaster to fall off the walls. Held, following *Brand's Case* (2), not to be a case for compensation. So, too, it has been decided that the owner of a ferry is not entitled to compensation for loss of traffic occasioned by the construction of a railway bridge (3). The diversion of the traffic under the circumstances of

(1) *In re Devlin and the Hamilton and Lake Erie Railway Company*, 40 U.C.Q.B. 160.

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

(3) *Hopkins* v. *The Great Northern Railway Company*, 2 Q.B.D. 224, over-ruling *Reg.* v. *The Cambrian Railway Company*, L.R. 6, Q. B. 422; *Jones* v. *The Stanstead, Shefford and Chambly Rail. Co.*, 16 L. C. J. 157, L. R. 4 P. C. 98.

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Hopkins' Case (1) would not, it was held, have been actionable if the bridge had been erected without the authority of the Act of Parliament, and, besides, such diversion was not occasioned by the construction of the railway bridge, but by its user. This case is of course very different from that of *Reg.* v. *The Great Northern Railway Company* (2), where the obstruction of access to an ancient ferry, appurtenant to the land injuriously affected by such obstruction, was held to give the owner of the land a right to compensation. In *Fleming* v. *The Newport Railway Company* (3) the facts were, to state them very briefly, that the railway company took none of the appellant's land but the line of railway cut off access to a way shewn on a plan by which his predecessor in title had purchased, and thereby diminished the value of such land. The way in question had not been opened, and the seller or superior was under no obligation to open it. Held, not a case for compensation. The appellant would have had no right of action if the statute under which such access was destroyed had not been passed.

If, on the other hand, the access from lands or premises to a public highway or navigable water on which they immediately abut is destroyed or rendered less convenient, and the value of such lands or premises is thereby depreciated, the owner is entitled to compensation, for without the statute he would have had a right of action incident to his ownership of such lands or premises (4).

(1) 2 Q. B. D. 224.

(2) 14 Q. B. 25.

(3) 8 App. Cas. 265.

(4) *Reg.* v. *The Eastern Counties Railway Company*, 2 Q. B. 347 ; *The East and West India Dock Company* v. *Gattke*, 3 M. & G. 155 ; *Moore* v. *The Great Southern and Western Railway Company*, 10 Ir. L. R. 46; *Reg.* v. *The Buffalo and Lake Huron Railway Company*, 23 U. C. Q. B. 208 ; *Buccleuch* v. *The Metropolitan Board of Works*, L. R. 5 H. L. 418 ; *Yeomans* v. *The Corporation of the County of Wellington*, 43 U. C. Q. B. 522, and 4 Ont. Ap. 301 ; *Bowen* v. *The Canada Southern Railway Company*, 14 Ont. App. 1 ; *Parkdale* v. *West* 12 App. Cas 602; *Pion* v. *The North Shore Railway Company*, 14 Can. S.C.R. 677, 14 App. Cas. 612.

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So, too, for a like reason, he is entitled to compensation where the subjacent or adjacent support to which as owner of buildings he is entitled is interfered with (1); or an easement or similar right is destroyed or interfered with (2), as, for instance, access to a ferry appurtenant to the owner's land (3); or the obstruction of a private road (4), or of ancient lights (5); or the diminishing of the flow of water to which the riparian owner has a right (6). The owner is also entitled to compensation where, by the obstruction of a public highway or navigable water, the right of access incident to the ownership of lands or premises is interfered with or made less convenient, and in consequence the value of such lands or premises is diminished, although they do not immediately abut upon the public highway or navigable water where the obstruction in question is made. In *Chamberlain's Case* (7), certain houses of the plaintiff, four of which fronted on a highway and eight others on a new road running at right angles to such highway, were rendered less convenient of access and less suitable for occupation, and were depreciated in value, by the defendants' works which crossed and obstructed such highway, and it was held that he was entitled to compensation for such depreciation. Chief Justice Erle distinguishes this case from *Ogilvy's* by stating that Ogilvy was claiming compensation for

(1) See *The Metropolitan Board of Works* v. *The Metropolitan Railway Company*, L.R. 4 C.P. 192, in which the plaintiff failed because the right did not exist.

(2) *Buccleuch* v. *The Metropolitan Board of Works*, L.R. 5 H.L. 418.

(3) *Reg.* v. *The Great Northern Railway Company*, 14 Q.B. 25.

(4) *Glover* v. *The North Staffordshire Railway Company*, 16 Q.B. 912.

(5) *Eagle* v. *The Charing Cross Railway Company*, L.R. 2 C.P. 638; *Clark* v. *The School Board for London*, L.R. 9 Ch. 120; *Duke of Bedford* v. *Dawson*, 20 L.R. Eq. 353.

(6) *Bush* v. *Trowbridge Water Works Company*, L.R. 19 Eq. 291; *Stone* v. *The Mayor of Yeovil*, 2 C.P.D. 99.

(7) *Chamberlain* v. *The West End of London and Crystal Palace Railway Company*, 2 B. & S. 605, 617.

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a personal inconvenience or annoyance and not for injury to his property. *Chamberlain's Case* is approved in *McCarthy's Case* and in that of *Walker's Trustees*. In *Beckett's Case* (1), which was held to be one for compensation, it appeared that the railway company had erected an embankment on a portion of the highway opposite to the plaintiff's house, thereby narrowing the road from fifty to thirty-three feet, impeding the access of light and air and the approach to the house, and diminishing its value. The facts in *McCarthy's Case* (2) were that McCarthy resided and carried on business as a carman and contractor for supplying builders with lime, bricks and other building materials, and as a dealer in sand and ballast, near a dock known as the Whitefriar's Dock, which was a draw-dock leading into the River Thames. This dock was a free and open public dock, and was largely used by the plaintiff in the way of his business. But he had no right or easement in the dock other than as one of the public, nor was there appurtenant, or otherwise belonging to his premises any other right or privilege in or to the dock. The plaintiff's premises were only twenty feet distant from the head of the dock, which was three hundred and fifty-two feet long, and thirty feet wide at its head and forty-six feet wide at its outlet into the Thames. By reason of their proximity to the dock, and the access thereby given to and from the Thames, the premises were more valuable to sell or occupy with reference to the uses to which any owner might put them. In the execution of the works authorized by the *Thames Embankment Acts*, a solid embankment was carried along the fore-shore of the Thames, thus permanently stopping up and destroying Whitefriar's Dock. By reason thereof access through the dock to

(1) *Beckett* v. *The Midland Railway Company*, L. R. 3 C. P. 82 ; (2) *The Metropolitan Board of Works* v. *McCarthy*, L. R. 7 H. L. 243.

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and from the Thames was destroyed, and the plaintiff's premises, either to sell or occupy with reference to the uses to which any owner or occupier might put them in their then state and condition, were permanently damaged and diminished in value. Held, to be a case for compensation; the test submitted by Mr. Thesiger, of counsel for the claimant, being generally accepted, that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which right gives an additional market 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 property, is lessened in value. *McCarthy's Case* (1) was followed in *The Caledonian Railway Company* v. *Walker's Trustees* (2) in which the facts were, to state them perhaps too briefly, that the respondents were possessed of a spinning mill ninety yards from an important main thoroughfare in Glasgow, having parallel means of access on the level from two sides of the mill to such thoroughfare. The railway company under their Special Act cut off entirely one access substituting therefor a deviated road over a bridge with steep gradients; and the other access they diverted and made less convenient. But none of the operations were carried on *ex adverso* the premises. Held, that the owners were entitled to compensation. In the case of *McPherson* v. *The Queen* (3), decided in this court in the same year but a few weeks earlier than the decision of the House of Lords in the case of *Walker's Trustees*, Mr. Justice Fournier held the suppliant was entitled to

(1) L.R. 7 H.L. 243. (2) 7 App. Cas. 259.
(3) 1 Ex. C. R. 53.

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compensation where his premises had been diminished in value by an authorized interference with his access thereto by a public street, the grade of which was raised several feet. There were other grounds on which the judgment in that case was rested, but I mention this only to add that in the case of *Paint* v. *The Queen* (1), in which the Supreme Court dismissed the cross-appeal of the crown as well as the appeal, I took into consideration as one element of damage the inconvenience arising from the steeper grades existing on a highway substituted for one theretofore used. But in *Paint's Case* part of his lands was taken, and it was not a case of injurious affection only, and the rules as to the measure of damages are not under the decisions the same in the two cases. It will be observed, however, that it was not decided in *Walker's Case* that a mere change of gradient in a highway would give a right to compensation (2). *Re Wadham and the North Eastern Railway Company* (3) is an authority, primarily, for the proposition that the measure of damages for the injurious affection of property is the depreciation in its value as a marketable article to be employed for any purpose to which it may legitimately and reasonably be put, but it also illustrates the principle that premises are injuriously affected within the meaning of the *Lands Clauses Consolidation Act*, 1845, where the street upon which they are situated is stopped up by the works of the company.

But while an obstruction of access by a public road or navigable water to private property need not, to sustain a claim to compensation, be opposite to such property, it must be proximate and not remote (4). In *McCarthy's Case* (5) the point at which access to the

(1) 2 Ex. C. R. 157.
(2) 7 App. Cas. 260, 274.
(3) 14 Q. B. D. 747.
(4) Per Lord Selborne, L. C. in *The Caledonian Railway Company* v. *Walker's Trustees*, 7 App. Cas. 285, and Lord Blackburn at p. 299.
(5) L.R. 7 H.L. 243.

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river Thames was obstructed, was distant three hundred and seventy-two feet from the premises affected, and in *Walker's Trustees* (1) the interference took place at a point distant two hundred and seventy feet from the mill.

There are of course a large number of cases, which have not arisen under statutes making provision for compensation for lands taken or injuriously affected by railways or other works, that illustrate the principles by which the right to compensation under such statutes is determined. I shall refer to a few of such cases only. The obstruction of a common highway, by which customers are prevented from going to a colliery, whereby the benefit of the colliery is lost and the coal dug up depreciated in value is such a special damage as will enable the owner to maintain an action for a public nuisance (2); and for a like reason the owner of houses who, through an obstruction of a highway, loses his tenants and the profits of his houses, may have his action (3). Lord Chelmsford in *Ricket* v. *Metropolitan Railway Company* (4) questions the decision in *Baker's Case*, but in *Beckett* v. *The Midland Railway Company* (5), decided later in the same year, Willes, J., commenting upon the observations of Lord Chelmsford, expresses the opinion that it is well decided. In *Greasley* v. *Codling* (6) it was decided that one who was delayed four hours by an obstruction in a highway, and thereby prevented from performing the same journey as many times in a day as if the obstruction had not existed, might maintain an action against the obstructor. But in a later case it was decided that in order to maintain an action for obstructing a public way

(1) 7 App. Cas. 259.

(2) *Iveson* v. *Moore*, 1 Ld. Raymond 486.

(3) *Baker* v. *Moore*. 1 Ld. Raymond 491.

(4) L.R. 2 H.L. 188.

(5) L.R. 3 C.P. 100-101.

(6) 2 Bing. 263.

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the plaintiff must suffer some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way; and where, in an action for obstructing a public way, the plaintiff proved no damage peculiar to himself beyond being delayed on several occasions in passing along it, and being obliged, in common with every one else who attempted to use it, either to pursue his journey by a less direct road or else to remove the obstruction, it was held that he was not entitled to maintain his action (1). The facts in the case of *Wilkes* v. *The Hungerford Market Company* (2) were that the plaintiff, a book-seller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been diverted from the thoroughfare by defendants continuing an authorized obstruction across it for an unreasonable time, and it was held that this was a damage sufficiently of a private nature to form the subject of an action; but the authority of the case is questioned by Chief Justice Erle in *Ricket's Case* (3), and by Lord Chelmsford, L.C. in the same case in the House of Lords (4), and in *Beckett's Case* (5) Willes, J. expresses the opinion that it was over-ruled by *Ricket's Case*.

The right of navigating a tidal river is common to the subjects of the realm, but it may be connected with a right to the exclusive access to particular land on the bank of a river, and the latter is a private right incident to the enjoyment of the land,—the invasion of which may form the ground for an action for damages. The right of the riparian owner to the use of the stream does not depend upon the ownership of the soil of the stream (6).

(1) *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316, 1867; *Baird* v. *Wilson*, 22 U. C. C. P. 491, 1872.
(2) 2 Bing. N. C. 281.
(3) 5 B. & S. 161.
(4) L. R. 2 H. L. 188.
(5) L. R. 3 C. P. 85-100.
(6) *Lyon* v. *The Fishmongers' Company*, 1 App. Cas. 662.

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Now, with reference to the case under consideration, it has been seen that the defendants are the owners of lands situate on Kempt Road, in the City of Halifax, which they hold for sale as building lots. The value of such lands to be used for that purpose depends largely, no doubt, upon the frontage on the street mentioned. By the construction of the railway siding in question upon the sidewalk contiguous to such lands, access thereto and such frontage have been interfered with. It is clear, I think, that the owners have suffered damages not only greater in extent but different in kind from those to which others of Her Majesty's subjects having occasion to use the Kempt Road are exposed. Their right of access to the property has been interfered with, and for such an interference they might, but for the statute, have maintained an action; and the official referee has found, and I think rightly, that by reason of such interference the property has been lessened in value. Under these circumstances, I entertain no doubt that the defendants are entitled to compensation.

With reference to the amount of compensation, it is established by the decisions under the Lands Clauses Consolidation Acts, though possibly there is still ground for some discussion, that in cases of injurious affection only, the owner is not entitled to compensation for injury arising from the operation of the authorized works, but only for loss arising from their construction. In the present case, however, the official referee has found that the lands have been diminished in value by reason of the construction of the work; and he has assessed compensation at an amount which, in his opinion, will be sufficient to enable the owners of the property to obtain convenient access thereto. That having been done, he thinks no further depreciation will arise by reason of the

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operation of the railway siding. This finding renders it unnecessary, therefore, to consider whether *The Government Railways Act*, 1881, under which the siding was constructed, is wider in terms than the Imperial Lands Clauses Consolidation Acts, or makes provision for compensation in a case of injurious affection where no title to compensation would arise under such Acts (1). The official referee in his first report found that 35 lots, 33 feet wide, are injuriously affected by the construction of the siding, and in his second report he intimates that further evidence taken shows that 36 lots are so affected; but it is clear, I think, and counsel for defendants admits, that the number of lots so affected is 33. Making allowance for this obvious error and adding interest to date upon what I understand to be the principal sums at which compensation was assessed by the official referee, I find that the defendants are entitled to compensation as follows :— In respect of lot 5*a* to $79.90, in respect of lot 7 to $127.84, and in respect of the injurious affection of the property upon Kempt Road to $2,636.70. There will be a declaration that the title to the lands expropriated is vested in the crown as claimed in the information. The question of the respective interests of the defendants in the compensation money has not been considered, and leave is reserved for any person interested to apply for further directions. The defendants are entitled to their costs.

Judgment for defendants with costs.

Solicitor for plaintiff: *W. F. Parker.*

Solicitors for defendants: *Ross, Sedgewick & Mackay*

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(1) 44 Vic. c. 25, s. 3, sub-sec. 6; s. 5, sub-sec. 15; ss. 15, 27, 30.