THE CANADIAN PACIFIC RAILWAY COMPANY..... APPELLANT;

1919
*June 2.
*Oct. 20.

AND

ALBERTA ALBIN..... RESPONDENT.

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

Railway—Injurious Affection to land—Loss of business profits—Compensation—"Railway Act," R.S.C. [1906] c. 37, s. 155.

Where land is injuriously affected by construction of railway works, the owner is not entitled to compensation for loss of business profits resulting therefrom. Such compensation can be given only when land is taken.

In the construction of section 155 of the "Railway Act" the English decisions under the "Railway Clauses Consolidation Act" of 1845 to the above effect should be followed. Idington and Brodeur JJ. dissenting.

Judgment of the Appellate Division (45 Ont. L.R. 1; 47 D.L.R. 587), reversed.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Ontario(1), setting aside the award of arbitrators and referring the case back for reconsideration.

The appellant company by constructing a subway on Yonge street, Toronto, so lowered the grade of the street in front of respondent's shop as to practically destroy access thereto. An arbitration was had to fix the compensation for such injury and the award gave appellant, *inter alia*, $4,500 for injury to her business. The Appellate Division held that she was entitled to indemnity for loss of business but that the arbitrators had estimated it on a wrong basis and referred the award back to be dealt with as stated in the judgment.

---

*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 45 Ont. L.R. 1; 47 D.L.R. 587.

1919
CANADIAN PACIFIC RWAY. CO. v. ALBIN.

Geary K.C. and *Colquhoun* for the appellant. Respondent is not entitled to compensation for loss of business when no land is taken. *Metropolitan Board of Works* v. *McCarthy*(1); *Caledonian Railway Co.* v. *Walker's Trustees*(2); *Powell* v. *Toronto, Hamilton and Buffalo Ry. Co.*(3); *Leblanc* v. *The King*(4).

H. J. Scott K.C. for the respondent. The English cases respecting compensation for loss of business are not applicable in Canada owing to the difference between our "Railway Act" and the Acts on which those decisions were founded. See *Parkdale* v. *West*(5), at p. 613. Section 155 of the "Railway Act" obliges the company to make full compensation for injury, which means to place the injured party in as good a position as he was before.

THE CHIEF JUSTICE.—I concur with my brother Anglin.

IDINGTON J. (dissenting).—The question raised by this appeal is confined to whether or not under section 155 of the "Railway Act," which reads as follows,

> 155. The company shall, in the exercise of the powers by this or the special Act granted, do as little damage as possible, and shall make full compensation, in the manner herein and in the special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers,

the compensation recoverable thereunder is limited by the exact market value of the property taken or, in the case of its being injuriously affected, by the exact difference in such market value before and after it has been so injuriously affected by the exercise of the power in question.

(1) L.R. 7 H.L. 243.
(2) 7 App. Cas. 259.
(3) 25 Ont. App. R. 209.
(4) 16 Ex. C.R. 219; 38 D.L.R. 632.
(5) 12 App. Cas. 602.

In view of the uniform approval heretofore of this and other courts to the allowance of ten per cent. generally added by arbitrators to the market value of the property taken, the proposition that the market price is the utmost limit seems a little startling.

Yet such a proposition seems to be the basis of this appeal which has one merit that it is confined to one exceedingly narrow point.

True this case in which the question is raised seems to be one in which the right of property which was invaded was a taking away in two places of the means of access to, and egress from, same to the public highway, and the incidental support an owner is entitled to for his buildings; and thus in one way of looking at the matter may be fairly arguable as a case of injuriously affecting the property.

I incline to agree with the learned arbitrator, as I understand him, that there has been taken from the owner a very substantial part of that which constituted her dominion over or ownership of the property as its owner and that the case is not merely an injurious affection such as might arise from a neighbouring nuisance.

We held in the case of *Canadian Northern Ontario Rly. Co.* v. *Holditch*(1), that where the railway company did not touch or legally injure, by the exercise of its powers, a parcel of land as defined by the plan of its survey, the owner could not recover any compensation on either ground and in this were upheld by the court above(2). How that and numerous other well known cases cited here and below can affect the question to be resolved herein, I fail to see.

It is admitted that the respondent had a very

(1) 50 Can. S.C.R. 265; 20 D.L.R. 557.

(2) [1916] 1 A.C. 536; 27 D.L.R. 14.

1919
CANADIAN PACIFIC RWAY. CO. v. ALBIN.
Idington J.

substantial right to indemnity under the Act and all that is before us, as counsel for appellant frankly admitted, is whether or not a person so damnified as to be entitled to indemnity is confined to the difference between the market value of the property when the works touched it and when completed and is not entitled to have any consideration extended to her by reason of the forcible taking away of her rights in any way, such as in this case the disturbance of her business carried on in the premises in question.

We are not called upon to decide anything in relation to the measure of such damages, or the bearing of any of the elemental facts to demonstrate the cause of such loss or the extent to which they should be considered.

The bare right to any consideration of how injuriously or otherwise the exercise of the power may have affected the owner or her business is denied save as to diminution in market value of the land itself or buildings thereon.

I am and long have been of a different opinion, as evidenced by what I may be pardoned for shewing by quoting from my opinion in the case of *Dodge* v. *The King*(1), at page 155, as follows:—

> The market price of lands taken ought to be the *primâ facie* basis of valuation in awarding compensation for land expropriated. The compensation, for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use, and at all events the value thereof to the using owner, and, the damage done to his business carried on therein, or thereon, by reason of his being turned out of possession.

That opinion was concurred in by the majority of the court.

It is fair to say that the exact question raised herein was not what was in fact under consideration therein

(1) 38 Can. S.C.R. 149.

and hence binds no one but myself; yet it was the result of much consideration of many decisions and other authorities.

The usual ten per cent. allowance I therein referred to is intended to cover contingencies of many kinds. Experience teaches me it has served to prevent injustice in many cases and in most covers incidentally the loss for disturbance of business and possible removal. It is not a rule of law though sometimes it has been sought to be made so for the service of those who actually bought lands they expected to be expropriated and gain thereby. In such like cases it has been discarded by this court when observing that its misapplication had been sought.

The rule now sought by this appeal to be laid down as the meaning of the section 155 in relation to damages for which compensation is to be given certainly never could have been thought to be law or the allowance of such percentage should have been discarded long ago.

In the case of *Lake Erie and Northern Rly Co.* v. *Schooley*(1), the question of business value came up in this court in another way and the several judgments evidence how the question was viewed by the different members of this court. I may say that was for many reasons an unsatisfactory sort of case.

The then Chief Justice aptly put the point by relying upon the decision of the Judicial Committee in the case of *Pastoral Finance Association* v. *The Minister* (2), from which, on page 417, he quoted as follows:—

> The substantial ground on which the majority of the court based their decision was that the appellants were not entitled to anything beyond the market value of the land * * * Their Lordships have no hesitation in deciding that the principle underlying this

(1) 53 Can. S.C.R. 416; 30 D.L.R. 289. (2) [1914] A.C. 1083.

1919

CANADIAN PACIFIC RWAY. CO. v. ALBIN.

Idington J.

decision is erroneous. The appellants were clearly entitled to receive compensation based on the value of the land to them.

This last sentence illustrates what runs through all the cases where the question has fairly come up, and whether put under the name of "special adaptations" or designated by other like phrase, means nothing more nor less than that justice must be done the owner whose land is taken or affected.

In resorting to English authorities decided on the meaning of the "Lands Clauses Consolidation Act," we must ever be on our guard; for, as has been often and well said, the provisions differ so essentially from our provisions in the "Railway Act" and other legislation dealing with compensation to be given parties damnified by the exercise of powers given to expropriate that little value is to be attached to most of these English decisions that are usually and herein cited for determining such questions as raised herein.

The difference is not to the casual reader quite evident. It is when one has to examine the process of reasoning and difference of opinion by which the result was reached in the earlier leading cases, such as *Hammersmith and City Ry. Co.* v. *Brand*(1), and the consequences flowing therefrom in so many cases, that one feels we better observe the express terms of our own legislation which does not give occasion for the application of the same process of reasoning. It is idle to read only two sections, one from each Act, and compare the words when we know, or ought to know, that the said decision did not turn upon the consideration of only a single section in the English Act.

For this opinion I need not rely upon what a consideration of many such cases has impressed upon my mind but am content to submit the following quotation

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

cited to us in argument herein by respondent's counsel from the judgment of the court above in *Parkdale* v. *West*(1), at page 613:—

> There is a marked difference between the provisions of the Dominion Act and those of the "English Land Clauses Consolidation Act," 1845, and decisions upon the English Act * * * afford little assistance. In the Dominion Act the taking of land, and the interference with rights over land, are placed on precisely the same footing.

It is the last sentence of this that was important there and is herein for that was a case wherein deprivation of access as herein was the essential feature invoked.

Its due observance coupled with regard to the rule that it is the value of the land to him from whom it is taken for such purposes as he may have been using it that must be primarily observed.

In the great majority of cases of compensation the mere market value is decisive and in all cases must be had in mind, but it should never be forgotten that there are cases such as this where that rule is only to be taken in its *primâ facie* sense as the basis for whatever else is done in order to do justice.

I am not to be taken as expressing any opinion on the merits of the case or coinciding with what the learned arbitrator accepted as his guide for fixing damages.

I think the appeal should be dismissed with costs.

ANGLIN J.—The grade of the street immediately in front of the respondent's shop having been so lowered in the course of the construction of a subway ordered by the Board of Railway Commissioners as practically to destroy access to the premises, on an arbitration to fix compensation under the "Dominion Railway Act" she was awarded in all $10,866, which the arbitrator,

(1) 12 App. Cas. 602.

1919
CANADIAN PACIFIC RWAY. CO. v. ALBIN.
Anglin J.

in the written reasons delivered with his award, apportioned as follows:—$6,366 for injury to property and $4,500 for injury to business.

On appeal to the Appellate Division the award as to the injury to property was upheld, but the majority of the court being of the opinion that, while the claimant was entitled to compensation for the loss of business occasioned to her by the execution of the work in question in addition to compensation for depreciation in the value of her property, the three year basis on which the arbitrator had fixed the amount of her business loss attributable to injury to the good-will of the property as distinguished from injury "of a personal character" (about two-thirds of the whole net profits) was erroneous, judgment was pronounced so declaring and referring the matter back to the arbitrator to ascertain the entire compensation to which the claimant is entitled, including as a part thereof such compensation for loss of business as he may see fit to allow her having regard to the declaration of the court(1).

From this judgment the contestant appeals on two grounds:—

(1) That the plaintiff is not entitled to compensation for loss of business in addition to full compensation for depreciation in the value of her property occasioned by the lowering of the street level; and

(2) That the compensation allowed for the property itself should be reduced by $192, the arbitrator having in computing it deducted from the gross value of the property before the works were begun, ascertained by him to have been $9,274.00, not the $3,100 realized on the sale of it after the works were completed but only $2,908, the difference of $192 representing the claimant's costs incurred in effecting such sale.

(1) 45 Ont. L.R. 1; 47 D.L.R. 587.

Neither the right of the claimant to compensation for depreciation in the value of her property occasioned by the construction of the works nor the power of the Appellate Court to refer the matter back to the arbitrator instead of itself pronouncing the judgment which should have been given is contested by the appellant. As to the former the claimant's right would seem to be indisputable. There was "a physical interference with a right which the owner was entitled to use in connection with his property" which substantially diminished its value. *Metropolitan Board of Works* v. *McCarthy*(1); *Caledonian Rly. Co.* v. *Walker's Trustees*(2), at page 303; *Wood* v. *Stourbridge Rly. Co.*(3); *Chamberlain* v. *West End of London and Crystal Palace Rly. Co.*(4); *Bowen* v. *Canada Southern Rly. Co.*(5), at pages 8-9, and *Mason* v. *South Norfolk Rly. Co.*(6). As to the latter—the power to refer back—the view which I have taken of the merits of this appeal renders it unnecessary to deal with that aspect of the matter. But see *Canadian Northern Rly. Co.* v. *Holditch*(7).

For the respondent it is contended that the cutting off of immediate access from the property to the highway on which it abuts is tantamount to taking part of the land itself and that compensation should therefore be assessed upon the footing that part of the claimant's lands had been taken. This appears to have been the opinion of the learned arbitrator based on the view that

> all the rights which go to make the land available for use are part of the land itself.

(1) L.R. 7 H.L. 243.
(2) 7 App. Cas. 259.
(3) 16 C.B.N.S. 222.
(4) 2 B. & S. 617.
(5) 14 Ont. App. R. 1.
(6) 19 O.R. 132.
(7) 50 Can. C.R.S. 265; 20 D.L.R. 557; [1916] 1 A.C. 536; 27 D.L.R. 14.

1919
CANADIAN PACIFIC RWAY. CO. v. ALBIN.
Anglin J.

I am clearly of the opinion, however, for the reasons indicated by Mr. Justice Riddell in the Divisional Court and upon such authorities as *Wadham* v. *North Eastern Rly. Co.*(1); *McCarthy's Case*(2); *Walker's Trustees' Case*(3); *Macey* v. *Metropolitan Board of Works*(4), and *Bowen* v. *Canada Southern Rly. Co.*(5), that the arbitrator's view is erroneous and that where no part of the owner's land is taken, but access to it merely is interfered with, however close the interference and however complete the destruction of the access, the case is one not of the taking of land but of injurious affection.

While, as is stated by the learned writers of the article on "Compulsory Purchase of Land and Compensation" in Halsbury Laws of England, vol. VI., at p. 32, no clear principle can be deduced from the English authorities why the measure of compensation should be more liberal in the case of a taking of land than in that of mere injurious affection, the distinction is too well established in England to admit of further discussion there. In the former case loss of good-will and loss of business in so far as they enhance the value of the land to the owner, including all that forms part of it in the eyes of the law, may be taken into consideration in estimating the compensation. The learned authors of Browne & Allen on Compensation (2 ed., p. 101) suggest that

> this is because it is the owner's interest in the land that is to be assessed.

But it is equally "the owner's interest," that is affected —it is the value of the land to him that is diminished— in the case of injurious affection. Yet in the latter case to entitle the owner to any compensation the injury

(1) 14 Q.B.D. 747; 16 Q.B.D. 227.
(2) L.R. 7 H.L. 243.
(3) 7 App. Cas. 259.
(4) 33 L.J. Ch. 377.
(5) 14 Ont. A.R. 1.

must be such as affects the land—lessens its value—apart from the use to which any particular owner or occupier might put it; and profits of a business carried on on the property can properly be considered only in so far as they indicate not any special or exceptional value to the present proprietor, but the value of the property as a marketable article to be employed for any purpose to which it may legitimately and reasonably be put, including of course such a purpose as that for which the present proprietor makes use of it. *Wadham* v. *North Eastern Rly. Co.*(1). This decision is very much in point because it deals with a case of injurious affection by cutting off access to a public highway. The street in which the house in question was built had been stopped up. See too *Beckett* v. *Midland Rly. Co.*(2), at pages 94-5. The English authorities are collected in Browne and Allen on Compensation (2 ed.) *ubi sup.* and at p. 116; 6 Halsbury Laws of England, No. 36 and Nos. 49 and 53; and Cripps on Compensation (5 ed.), pp. 107-8 and 146. Many of them are reviewed in the opinions delivered in the Divisional Court in the present case. Under English law an award for loss of business profits in a case of injurious affection cannot be maintained.

Counsel for the respondent further contended that under s. 155 of the "Railway Act" (R.S.C. 1906, ch. 37) she is entitled to compensation for all injury occasioned to her by the exercise of powers conferred by that statute, and that owing to the difference between the provisions of the Dominion "Railway Act" and those of the English "Railway Clauses Consolidation Act" of 1845, and the English "Lands Clauses Act" the decisions upon the latter Acts do

(1) 14 Q.B.D. 747, 752; 16 Q.B.D. 227. (2) L.R. 3 C.P. 82.

1919
CANADIAN PACIFIC RWAY. CO. v. ALBIN.
Anglin J.

not govern the construction to be placed upon s. 155 of the Dominion "Railway Act" that under the Canadian Act the taking of land and the injurious affection of land are precisely on the same footing.

Prior to the enactment in 1888, as s. 92 of the "Railway Act" of that year (ch. 29), of the provision now found in the "Railway Act" of 1906 as s. 155, Canadian courts applying the provisions of the "Consolidated Railway Act" of 1879, ch. 9, and the earlier Acts; 31 Vict. ch. 68; C.S.C. ch. 66 and 14 & 15 Vict. ch. 51; had upheld awards of full compensation for all injury occasioned, whether ascribable to the construction of the railway or to its future operation, in cases where an entire parcel of land had been taken, or where part of a parcel had been taken and the injury to the remainder of it was ascribable to the operation of works constructed on the part taken. *Great Western Rly. Co.* v. *Warner*(1); *Atlantic and North West Rly Co.* v. *Wood* (expropriation in February, 1887)(2). But, following English decisions, they had refused to recognize the right of the owner to any compensation where neither his land itself nor a right incidental to its ownership had been physically interfered with so as to lessen the value of the land, *In re Widder and Buffalo and Lake Huron Rly. Co.*(3); *Widder* v. *Buffalo and Lake Huron Rly. Co.*(4); or for injury due to operation as distinguished from construction where none of his land was taken; *In re Devlin and Hamilton and Lake Erie Rly. Co.*(5); or where the works, the operation of which caused the injury, had not been constructed on the portion of his land taken. In *Bowen* v. *Canada Southern Rly. Co.*(6), where the lowering of a street

(1) 19 Gr. 506.
(2) Q.R. 2 Q.B. 335; [1895] A.C. 257.
(3) 20 U.C.Q.B. 638; 23 U.C.Q.B. 208.
(4) 24 U.C.Q.B. 520.
(5) 40 U.C.Q.B. 160.
(6) 14 Ont. App.R. 1.

in front of two town lots affecting access to them and thus depreciating their value was held to be an injurious affection of land entitling the owner to compensation, Osler J.A. at p. 3, speaking of s. 5 and s.s. 5 of s. 11 of the C.S.C. ch. 66 (the "Railway Act" preceding those of 1868 and 1879), says:

> These clauses are substantially similar to those in the "Railway and Lands Clauses Consolidation Act" (Imp.)

Sec. 155 of the Act of 1906 (ch. 37) takes the place of s. 5 of ch. 66 of the C.S.C., and s.s. 5 of s. 11 has its counterpart to-day in s. 191.

In *The Queen* v. *Buffalo and Lake Huron Rly. Co.* (1), at page 211, Draper C.J., delivering the judgment of the Court of Queen's Bench, speaking of the English statute, 8 Vict. ch. 18, and particularly of s. 68, and of the 6th section of the English statute 8 Vict. ch. 20, said:

> We see no solid distinction between the language of these English statutes and that used in our own (C.S.C., ch. 66.)

The applicability of the English decisions establishing the distinctions between the measure of compensation in cases where land is taken and that in cases of mere injurious affection would seem to have been fully recognized. See also *Widder* v. *Buffalo and L. Huron Rly. Co.*(2); *Paradis* v. *The Queen*(3); *The Queen* v. *Barry*(4); *Leblanc* v. *The King*(5), at page 221; *Sisters of Charity* v. *The King*(6) at page 394; *The King* v. *MacArthur*(7).

With the law in this position, s. 92 of the "Railway Act" of 1888, ch. 29, was enacted as a new provision presumably to supply the omission from the Acts of 1868 (ch. 68) and of 1879 (ch. 29) of the express provision for compensation found in s. 5 of the former "Railway

(1) 23 U.C.Q.B. 208.
(2) 29 U.C.Q.B. 154.
(3) 1 Ex. C.R. 191.
(4) 2 Ex. C.R. 333.
(5) 16 Ex. C.R. 219; 38 D.L.R. 632.
(6) 18 Ex. C.R. 385.
(7) 34 Can. S.C. R. 570.

1919
CANADIAN PACIFIC RWAY. CO. v. ALBIN.
Anglin J.

Act", C.S.C. ch. 66, into which it had been carried from 14 & 15 Vict. ch. 51, s. 4; *Bowen* v. *Canada Southern Rly. Co.*(1), at page 9. The right to compensation under the Acts of 1868 and of 1879 both in regard to land taken and land injuriously affected depended upon the general principle of the law that, unless the contrary clearly appears, legislative intention to authorize the taking away of, or injury to, property without payment of compensation will not be presumed and the almost irresistible inference to be drawn from the provision made for its ascertainment. Burton J.A. thought the omission from the Act of 1879 of a provision similar to s. 5 of ch. 66 of the C.S.C. quite immaterial. *Bowen* v. *Canada Southern Rly.*(1), at page 4. Sec. 92 of the Act of 1888 was not meant to create new rights in regard to compensation. At least that was the view taken of it by the courts notwithstanding the patent differences between its terms and those of s. 5 of the C.S.C. ch. 66, and the difference between its collocation in the Canadian "Railway Act" and that of the proviso in the English statute. Section 92 was certainly an adaptation of the proviso of s. 16 of the "Railway Clauses Consolidation Act" of 1845, ch. 20 (Imp.), the language of that proviso being reproduced, with some additions immaterial in the present case. At the date of its introduction there was no provision in the Dominion "Interpretation Act" such as is now found in R.S.C. ch. 1, s. 21, s.s. 4.

The construction of this new section so far as applicable to cases of injurious affection was carefully considered in the Ontario Court of Appeal in *Powell* v. *Toronto Hamilton and Buffalo Rly. Co.*(2), at page 215, Osler J.A. says:—

(1) 14 Ont. App. R. 1. (2) 25 Ont. App. R. 209.

The damage intended by s. 92 is some actual injury or damage to lands occasioned by the exercise of the powers of the railway. It is, in short, damage of the same character as that for which compensation is recoverable under the English Acts where no land is taken * * *. Under the Canadian Act * * * it must be held as under the Imperial Acts that, arising as it does from works authorized by the legislature, it must be such as would apart from the statute have been the subject of an action, and it must also be such as to diminish the value of the property irrespective of any particular use which might be made of it.

Maclennan J.A., at p. 218, refers to the identity of s. 92 with the proviso to s. 16 of the English "Railway Clauses Act," and adds

our law is, therefore, substantially the same as the English law.

Moss J.A. at p. 220, said:—

The damage sustained for which compensation is to be made is damage to land, either from taking materials or on account of its being injuriously affected by the exercise of any of the powers granted to the railway. And it is well settled that the compensation recoverable in respect of lands injuriously affected must be based on injury or damage to the estate or land itself and not on personal inconvenience or discomfort to the owner or occupier.

A similar view had been expressed by Ferguson J. in *In re Toronto, Hamilton and Buffalo Rly. and Kerner*, in 1896(1), at page 20. That learned judge regarded as in point *Ford* v. *Metropolitan Rly. Co.*(2), where Cotton L.J. points out, at p. 25,

that the inconvenience or injury which arises solely from the particular use to which the particular occupier puts the buildings must not be regarded

and that

injuries sustained by them in carrying on their business

cannot be made the subject of compensation.

In *St. Catharines Rly. Co.* v. *Norris*(3), in 1889, Galt C. J., following English authorities, held that injury to trade as distinguished from injury to property did not entitle the owner to compensation for injurious affection.

(1) 28 O.R. 14. (2) 17 Q.B.D. 12.
(3) 17 O.R. 667.

1919
CANADIAN PACIFIC RWAY. CO. v. ALBIN.
Anglin J.

With these decisions before it Parliament re-enacted s. 92 of the statute of 1888 in the "Consolidated Railway Act" of 1903, as s. 120 (ch. 58) and again re-enacted it in the revision of 1906 as s. 155 (ch. 37) in *ipsissimis verbis*. Although s.s. 4 of s. 12 of the "Interpretation Act" (R.S.C. ch. 1, in force since 1890 (53 Vict., ch. 7, s. 1), declares that

> Parliament shall not be re-enacting any Act or enactment or by revising, consolidating or amending the same be deemed to have adopted the construction which has, by judicial decision or otherwise, been placed upon the language used in such Act, or upon similar language.

We

> cannot assume that the Dominion Legislature when they re-enacted the clause verbatim (in 1903 and again in 1906) were in ignorance of the judicial interpretation which it had received. It must on the contrary be assumed that they understood that (s. 92 of the Act of 1888) must have been acted upon in the light of that interpretation.

Casgrain v. *Atlantic and North West Ry. Co.*(1), at page 300.

It is unreasonable to suppose that if Parliament were not satisfied that its intention had been thereby given effect to it would have re-enacted the section in the same terms. As already pointed out, when the proviso to the English s. 16 was first introduced into Canada we had no such interpretation provision as is now found in s.s. 4 of s. 21 of ch. 1 of the R.S.C. 1906. *Arnold* v. *Dominion Trust Co.*(2), at pages 448-9. Under these circumstances, although not bound by the dicta of the eminent Ontario judges to which I have referred, even if I entertained doubts as to the meaning of s. 155 in the present Act, I

> would have declined to disturb the construction of its language which had been (so often) judicially affirmed.

Casgrain v. *Atlantic and North West Rly. Co.*(1); *City Bank* v. *Barrow*(3), at pages 673, 679.

(1) [1895] A.C. 282. (2) 56 Can. S.C.R. 433; 41 D.L.R. 107.
(3) 5 App. Cas. 664

In *Canadian Pacific Rly. Co.* v. *Gordon*(1), the applicability of English decisions in regard to the right of compensation in cases of injurious affection under the Dominion "Railway Act" was again recognized by Clute J., who delivered the principal judgment in the Appellate Division in the case now at bar.

The decision of the Privy Council in *Holditch* v. *Canadian Northern Rly. Co.*(2), certainly overrules the view expressed by Armour C. J. in *In re Birely and Toronto, Hamilton and Buffalo Rly. Co.*(3), (already "scotched" in *Powell* v. *Toronto Hamilton and Buffalo Rly. Co.*(4), that the introduction of s. 92 into the Dominion "Railway Act" of 1888 had effected such a material change in the scope of the provisions for compensation in that Act that in cases where no land had been taken compensation might thereafter be recovered for injuries due to the operation of the railway. Their Lordships there point out (p. 544) that that section (now s. 155) is taken from s. 16 of the English "Railway Clauses Consolidation Act," 1845, and they approve the application of the English decisions to determine its purview in the Canadian statute. Their earlier decision in *Grand Trunk Pacific Rly. Co.* v. *Fort William Land Investment Co.*(5), points in the same direction.

Notwithstanding the passage from Lord Macnaghten's judgment in *Parkdale* v. *West*(6), at page 616, in which he says—of course *obiter*—

> their Lordships were asked by the appellants to express an opinion as to the measure of damages in case the appeal should be dismissed. It appears to their Lordships that, as the injury committed is complete and of a permanent character, the respondents are entitled to compensation to the full extent of the injury inflicted,

(1) 8 Can. Rly. Cas. 53.
(2) [1916] 1 A.C. 536; 27 D.L.R. 14.
(3) 28 O.R. 468.
(4) 25 Ont. App. R. 209.
(5) [1912] A.C. 224.
(6) 12 App. Cas. 602.

1919

CANADIAN PACIFIC RWAY. CO. v. ALBIN.

Anglin J.

to which I allude merely to make it clear that it has not been overlooked, the utmost use that can be made of evidence of loss of business ascribable to the exercise of powers conferred by the "Railway Act" in cases of injurious affection is indicated in my opinion in the following passage from the judgment of Lopes L. J. in *Howard* v. *Metropolitan Board of Works*,(1) quoted by Clute J.:—

> The plaintiff's house was injuriously affected by the execution of the works and the jury awarded compensation, not for the loss to trade, which would not, *per se*, be a legitimate head of damage, but for the deterioration in the value of the house as measured by the loss of trade.

It is as to the necessity for payment of compensation before interference with the right that cases of injurious affection are held by Lord Macnaghten to stand under the Canadian Act on precisely the same footing as cases of actual taking, in that respect differing from the like cases under English Lands Clauses Consolidation Act of 1846. *Parkdale* v. *West*(2).

In *Parkdale* v. *West*(3), the corporation was held liable as a wrongdoer not protected from the consequences of its tort by any statutory provision, and it was on that basis that Lord Macnaghten thought the municipality liable "to the full extent" and that damages were assessed against it.

I am, for these reasons, of the opinion that the construction of s. 155 of the Canadian "Railway Act" of 1906 is governed by the English decisions on the purview of the proviso of s. 16 of the "Railway Clauses Consolidation Act" of 1845, and that the respondent is not entitled to compensation for loss of business occasioned by the execution of the works in question. The award should therefore be reduced by $4,500.

(1) 4 Times L.R. 591. (2) 12 App. Cas. 602, at page 613.
(3) 15 O.R. 319.

The respondent has been allowed the full benefit of evidence of loss of business in so far as it affected the value of her property as "a marketable article." The $9,724 found by the arbitrator to have been its value before the works were begun, represented a valuation on the same basis as the £1,550 allowed in *Wadham's Case*(1), *i.e.*, it included any special value which the premises had as a stand for the particular class of business carried on by the respondent.

There should also be a further reduction of $192 as claimed by the appellant from the $6,366 allowed for injury to the land for the reasons indicated by Riddell and Kelly JJ. in the court below. The award will therefore stand for the sum of $6,174—and costs.

The appellant is entitled to its costs in this court and in the Appellate Division.

BRODEUR J. (dissenting).—This is an appeal from the Appellate Division of the Supreme Court of Ontario which referred back to the arbitrator an award concerning lands for which the respondent claims compensation.

The appellant company for the purpose of building a subway in the City of Toronto on Yonge street had lowered the level opposite the respondent's property and practically left it without access to the street.

The arbitrator to whom the question of compensation was referred awarded $6,366 for the bare depreciation of the land and $4,500 for loss of business based on an estimate of profits for three years.

The Appellate Division held that the respondent was entitled to compensation for the loss of business but that the amount had been arrived at by an erroneous principle and the case was referred back to the

(1) 16 Q.B.D. 227.

1919
CANADIAN PACIFIC RWAY. CO. v. ALBIN.
Brodeur J.

arbitrator to ascertain the compensation which the respondent was entitled to in that regard.

There is no dispute as to the depreciation of the property itself. The only question then is whether some compensation should be given for the loss of trade, or the diminution of the claimant's good-will in her business, consequent on the destruction of the access to the premises in which the business was carried on. Section 155 of the "Railway Act" is the law under which the claim of the respondent to compensation is made. It reads as follows:—

> The company shall in the exercise of the powers by this or the special Act granted, do as little damage as possible, and shall make full compensation in the manner herein and in the special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.

There is no doubt that the respondent is an interested person, since the access to the street which she had before is virtually destroyed. Nobody disputes that she is entitled to damages. If some land had been taken, there is no doubt under the authority of the English cases that the measure of damages would be the difference between what the premises as a running concern would be worth to the expropriated party and the value of the land afterwards, and would include compensation for loss of business.

But a distinction is made in England as to the measure of damages in the case of lands taken and in the case of lands injuriously affected. When in the case of lands taken full compensation including loss of business is given, in the case of lands injuriously affected the compensation does not include personal inconvenience.

1856, *Caledonian Railway Co.* v. *Ogilvy*(1); 1864, *In re Stockport Timperley and Altringham Rly. Co.*(2);

(1) 2 Macq. 229.
(2) 33 L.J.Q.B. 251.

1862, *Chamberlain* v. *West End of London and Crystal Palace London Railway Co.*(1); 1865, *Brand* v. *Hammersmith and City Rly. Co.*(2); 1867, *Beckett* v. *Midland Rly. Co.*(3); 1867, *Ricket* v. *Metropolitan Rly. Co.*(4); 1871, *Duke of Buccleuch* v. *Metropolitan Board of Works* (5).

These decisions in England are somewhat conflicting and not very satisfactory. The Lord Chancellor in *Ricket's Case*(4), stated that it was a hopeless task to attempt to reconcile the contradictory decisions which have been rendered on the questions at issue.

But should those decisions be invoked here under our Canadian legislation?

I do not hesitate to say no, because our own legislation differs from the English statutes and I rely in that respect on the views expressed by Lord Macnaghten in *Parkdale* v. *West*(6), where he said at page 613.

> There is a marked difference between the provisions of the Dominion Act and those of the English "Lands Clauses Consolidation Act," 1845, and that decisions upon the English Act, such as *Hutton* v. *London and South Western Railway Co.*(7), which was referred to in the argument, afford little or no assistance in the present case. In the Dominion Act the taking of land, and the interference with rights over land, are placed precisely on the same footing.

In view of that decision in the *Parkdale Case*(6), I say that we should not refer to decisions rendered under English statutes, but we should find whether the provisions of s. 155 might cover the loss of trade in cases where lands have been simply injuriously affected.

Section 155 enacts that compensation should be made for all damage caused. There is no distinction

(1) 2 B. & S. 605.
(2) L.R. 1 Q.B. 130.
(3) L.R. 3 C. P. 82.
(4) L.R. 2 H.L. 175.
(5) L.R. 5 H.L. 418.
(6) 12 App. Cas. 602.
(7) 7 Hare 259.

1919
CANADIAN PACIFIC RWAY. CO. v. ALBIN.
Brodeur J.

in this section in case of lands taken and in case of lands injuriously affected. We have to revert to the ordinary rule governing torts and find whether the damage is the necessary result of the injury done.

When the clause of the statute applies, the party is entitled to recover full compensation for all damage in respect of the diminution in value of his property *Buccleuch's Case*(1).

The loss to an owner includes not only the actual value of the lands but all damage directly consequent on the taking thereof under statutory powers. The arbitrators called upon to fix the compensation should take into consideration the probable diminution in the value of the claimant's good-will in his trade.

See decisions quoted by Cripps, 4th ed., pp. 98 and 99; *In re Davies and James Bay Rly. Co.*(2); *Caledonian Railway Co.* v. *Walker's Trustees*(3), at p. 276.

I am unable to find that the court below was in error in stating that the respondent was entitled to compensation for loss of business.

The appeal should be dismissed with costs.

MIGNAULT J.—I have had the advantage of reading the very full and carefully considered reasons for judgment of my brother Anglin, and with some hesitation, caused by the very wide language of s. 155 of the "Railway Act" (R.S.C. 1906, ch. 37), I have finally come to the conclusion that my brother Anglin is right in his construction of this section. Section 155, if I may use the term, is a condition of the grant of extensive powers to a railway company. It is taken almost verbatim from the proviso of s. 16 of the English statute, the "Railway Clauses Consolidation

(1) L.R. 5 H.L. 462. (2) 28 Ont. L.R. 544; 13 D.L.R. 912.
(3) 7 App. Cas. 259.

Act," 1845, and if it is to receive the same construction as the English courts have given to the latter section, damages for loss of business carried on on lands not taken but merely injuriously affected by the construction of the railway cannot be granted. There appears to be no escape from the conclusion that the wide language of s. 155 must receive some limitation, and this has been done with respect to damages caused by the operation of the railway as distinguished from its construction, *Holditch* v. *Canadian Northern Ontario Railway Co.*(1), which would be damages caused by the exercise of the powers of the company. And if s. 155 be construed as s. 16 of the "Railway Clauses Consolidation Act," 1845, has been construed, damage for loss of business in respect of land not taken but injuriously affected cannot be awarded. This does not mean that I can appreciate the reason for the distinction which has been made between cases where land is taken and cases where land is not taken but merely injuriously affected, but this distinction is now clearly and authoritatively established, and, as I have said, no damages are granted for loss of business where lands are not taken but only injuriously affected. There is no doubt much force in the contention of the respondent that the construction of s. 16 of the English statute has been influenced by other provisions of the Imperial statutes, but looking at our own "Railway Act" and its enactments—perhaps rules of procedure—governing the taking and using of lands and compensation and damages (ss. 172 to 214 inclusive, and more especially ss. 191 and 193), it seems to me that these sections can be compared to the other provisions of the English statutes referred to by Mr. Justice Clute as having influenced the construction of s. 16.

(1) [1916] 1 A.C. 536; 27 D.L.R. 14.

1919

CANADIAN PACIFIC RWAY. CO. v. ALBIN.

Mignault J.

So we have a construction authoritatively placed on the proviso of s. 16 which has been copied into the Canadian Act, and after due consideration I feel that this construction should be adopted here.

I would, therefore, allow the appeal with costs here and in the Appellate Division, and restrict the compensation to the sum of $6,366.00 awarded by the learned arbitrator for damage caused to the respondent's property, deducting however the sum of $192.00, expenses of the auction sale effected by the respondent after the construction of the appellant's works. The learned arbitrator valued the respondent's property as it stood before the construction of the works and deducted from this gross value the net proceeds of the auction sale. It is obvious that if the respondent had sold her property at the higher valuation before it was injuriously affected, she would have incurred the necessary expenses of the sale, so that it seems to me a fallacy to compare the gross value before the construction of the works to the real value, less expenses of sale, after the property had become depreciated. The deduction of this sum of $192 reduces the compensation to $6,174, and costs.

Appeal allowed with costs.

Solicitor for the appellants: *William Johnston.*
Solicitor for the respondent: *William Laidlaw.*