THE CORPORATION OF THE TOWN OF TORONTO JUNCTION............ APPELLANT;

1895
*May 17,18.
*Dec. 9.

AND

DAVID D. CHRISTIE.......................RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Increasing damages without cross appeal—Rule 61, *Supreme Court Rules—Special statute.*

Under the Ontario Judicature Act, R.S.O. [1887], c. 44, ss. 47 and 48 the Court of Appeal has power to increase damages awarded to a respondent without a cross-appeal, and the Supreme Court has the like power under its rule no. 61. Taschereau J. dissenting.

Per Strong C.J.—Though the court will not usually increase such damages without a cross-appeal, yet where the original proceedings were by arbitration under a statute requiring the court, on appeal from the award, to pronounce such judgment as the arbitrators should have given, the statute is sufficient notice to an appellant of what the court may do, and a cross-appeal is not necessary.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming, by an equal division of opinion, the judgment of Mr. Justice Rose (2), on an appeal from the award of arbitrators in an arbitration under the Ontario Municipal Act.

The respondent, Christie, claimed damages from the town corporation for injury to his property by reason of the grade of the street having been raised some six feet, and his claim was submitted to arbitration under the provisions of The Municipal Act. The arbitrators found that the property had been benefited by the change in the grade rather than injured, but considering that he was technically entitled to damages they awarded him $100 and a portion of the costs. On ap-

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

(1) 22 Ont. App. R. 21. (2) 24 O.R. 443.

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peal to a judge from the award the damages were increased to $1,000 with full costs, the learned judge being of opinion that he could deal with the matter at large. On further appeal the judges in the Court of Appeal were equally divided in opinion as to the jurisdiction of the judge to increase the damages, and his judgment stood affirmed. The corporation then appealed to this court.

Aylesworth Q.C. and Going for appellants argued that all that could be done on appeal was to affirm or set aside the award, citing *Lemoine* v. *The City of Montreal* (1) ; *Paradis* v. *The Queen* (2) ; *Morrison* v. *The Mayor of Montreal* (3).

Riddell and Gibson for the respondent referred to *Charland* v. *The Queen* (4) ; *Guay* v. *The Queen* (5).

THE CHIEF JUSTICE.—I have read the judgment prepared by Mr. Justice Gwynne in this case and I agree with it in all respects. I only desire to add that it is not to be considered in any respect as a departure from the rule already laid down by this court in the cases in which it was held that when there was no cross-appeal the court would not increase the damages awarded to the respondent (6).

The court has so held not because it has no jurisdiction in such cases to increase the damages, for the rule relating to cross-appeals leaves the right to interfere in behalf of a respondent entirely in the discretion of the court, but for the reason that it is fair to an appellant that the respondent, if he desires to object to the judgment appealed against, should formulate his

(1) 23 Can. S.C.R. 390.
(2) 1 Ex. C.R. 191.
(3) 3 App. Cas. 148.
(4) 1 Ex. C.R. 298.
(5) 17 Can. S.C.R. 30.
(6) See *City of Montreal* v. *Labelle* 14 Can. S. C. R. 741 ; *Stephens* v. *Chaussé* 15 Can. S. C. R. 379 ; *Bulmer* v. *The Queen* 23 Can. S. C. R. 488.

objection by giving notice in order that the appellant may be apprised of what he is required to answer.

In the present case the appeal to the Court of Appeal of Ontario was under a statute which required the court to pronounce just such judgment as in its opinion the arbitrators ought to have awarded. The statute itself, therefore, was sufficient notice of what the court might be called upon to do, and the same reason applies in this court.

The appeal must be dismissed with costs, subject to the variation directed in Mr. Justice Gwynne's judgment.

TASCHEREAU J.—I would dismiss the appeal which should never have been taken.

GWYNNE J.—I cannot entertain a doubt that the learned judge Mr. Justice Rose before whom this case came by way of appeal from the award made by the arbitrators herein had authority and jurisdiction under the provisions of the Ontario Municipal Act of 1892, to deal with the case in the manner in which he did. This case, in my opinion, is an apt illustration of the wisdom of the legislature in making awards in matters of this nature, wherein the injured party is deprived of his remedy by action at law, appealable to the courts, for I must say I find it difficult to maintain the award of the majority of the arbitrators upon any principle of law and justice which is reconcilable with the evidence; the judgment of the learned judge upon the appeal is not, in my opinion, open to any objection unless it be that which has been suggested by himself in his judgment, namely, that he does not feel at all satisfied that the amount allowed by him and to which he has increased the amount of the award is sufficient to compensate the plaintiff for the injury

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complained of or to put the houses into the condition in which they were before the execution by the defendants of the work which has caused to them the injury complained of. The property which has been injuriously affected by work performed by the Municipality of the town of Toronto Junction in the exercise of their powers consists of two brick houses having together a frontage of about thirty-six feet erected upon a small town plot of about forty feet in width and one hundred feet in depth. The predecessor of the plaintiff in title purchased in the year 1889 the town plot before it had any building erected upon it. The lot was for the most part situate in low land. It does not appear to have had and indeed could not have had any value except as a building site. Accordingly, immediately upon acquiring it the plaintiff's predecessor in title, in order to make it valuable, resolved to erect upon it two small but substantial brick houses having good cellars, and fitted so as to be heated by a hot air furnace, but before doing so, as the lot abutted upon two streets which would be likely at some time to be raised above the level of the land as it then was, he, as shown by the evidence and found as a fact by the learned judge, communicated with the corporation officials and endeavoured to ascertain the grade to which the streets upon which his lot abutted would be raised, but was unable to obtain any information further than that the streets would probably be raised two feet. He could obtain no levels from the corporation; all that he could obtain was that the corporation engineer surveyed the lot for him, for the purpose no doubt of defining its limits along the street so as to prevent the buildings proposed to be erected encroaching upon the streets. In order to be, as he conceived, upon the safe side he erected the houses along the limits of the streets as so defined so as to allow four feet instead of two for the eleva-

tion to which the grade of the streets could be raised without causing any damage to the houses and so that the first floor of the houses was upwards of six feet above the natural level of the ground as it then was. The houses were finished in the summer or autumn of 1890, and as so finished were supplied with good and sufficient drainage, and the corporation has ever since enjoyed the benefit of the increased taxation to which the property became subjected, as property having dwelling houses erected thereon. Now, some time after the completion of the houses, and while they were occupied by tenants at the rent of about $10 each per month, and in the year 1891, the corporation proceeded to raise the grades of the streets, and while such work was in progress, being advised that a by-law should be passed, the municipal council of the corporation upon 5th of August, 1891, passed a by-law numbered 219, whereby it was enacted

that the plans and profiles of Dundas Street, Weston Road south, Annette Street, Ontario Street and Union Street, as prepared by the town engineer, and deposited in his office, be approved and adopted, and that the said streets be graded in accordance with said plans and profiles under the direction of the town engineer, who is authorized to carry out said work.

The streets upon which the town plot under consideration abutted were the above named Annette and Union Streets. After the passing of this by-law and thereunder those two streets were elevated to the height of upwards of six feet above the natural level as it had been, and so that the crown of those streets was about on a level with the first floor, that is to say, with the ceilings of the cellars of the houses as they had been erected.

Had the streets been elevated to the height of four feet only above their former natural level no damage whatever would have been caused to the houses. It is only for damage consequent upon their having been

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raised two feet still higher that the plaintiff complains. Now the evidence of the gentleman who was mayor of the town in 1891 seems to cast some doubt upon the *bona fides* of the elevation to which the streets were raised, and as to the necessity for such elevation. He says that he used to ask the council why so much earth was being put down on the streets, but never got a satisfactory explanation. He formed the opinion that private parties were getting it done for the benefit of their own lands. A gentleman, he says, who owned property in the neighbourhood seemed to have a pull on the subway earth (that is earth which the corporation in making a subway for a railway had to remove) and he says that he considered that the grade of the streets was raised so high as a good way of getting rid of the subway earth and to benefit the property of that gentleman and of others in the neighbourhood, the plaintiff's property being in point of fact the only property which was damaged thereby. But whether the streets were or were not raised to the height to which they were raised, either unnecessarily or *malâ fide*, for the purpose of benefiting the property of others by damaging that of the plaintiff is immaterial for our present purpose for the Municipal Act ch. 184 R.S.O. sec. 483 expressly enacts that:

> Every council shall make to the owners or occupiers of, or other persons interested in, real property taken or owned by the corporation in the exercise of any of its powers or injuriously affected by the exercise of its powers, due compensation for any damage 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 any, not mutually agreed upon, shall be determined by arbitration under this act.

The effect of raising the streets upon which the houses abutted to the height to which they were raised was 1st, to deprive the houses of the drainage which

they had had without providing any substitutionary mode of drainage, and 2nd, to cause all the water falling upon the streets to pour down into the cellars of the houses and to make them as the evidence abundantly shows not only unsaleable but utterly uninhabitable unless and until some effectual mode of repairing the damage done and preventing a recurrence of the nuisance should be adopted. The evidence also shows that while the drainage which the houses formerly had is cut off, and while the corporation have constructed two drains in the adjoining streets, one is not placed low enough to carry off the water from the plaintiffs houses and into the other; although situate low enough the corporation have refused permission to the plaintiff to have access. For the injury thus caused the plaintiff had to pay his tenants for injury to their property $33 and to expend the further sum of $75 in executing some temporary work to prevent in some degree the recurrence of a flood of like character into the cellars of the houses; besides the moneys so expended amounting together to $108, and the loss of tenants ever since by reason of the houses having been rendered untenantable, the plaintiff has been damnified to the extent of the amount necessary to put the houses into as good and tenantable state of repair as that in which they were before the streets were raised to the height which has caused the injury complained of.

Now the nature and extent of the damage done consequential upon the work of the corporation and the cost of making all necessary repairs and of putting the houses into as tenantable a state of repair as they were in before that work was done are matters capable of pretty precise estimate by witnesses who are experts. Several witnesses of this description having large experience in the value of property of this description, have testified that the houses in their present condition

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are wholly untenantable and also unsaleable, unless at the sacrifice of fully 50 per cent of the cost of the houses, that is to the amount of about $2,000, the actual cost of the two houses having been $4,000, and two architects and builders of houses have made precise estimates in items of the amount necessary to be expended in making the houses tenantable and in preventing a recurrence of the damage. Adopting that which is the lowest and therefore most favourable to the corporation, we find that amount to be $1,673.20. Of this sum $155 covers all the items in the estimate which can fairly be attributed to damage arising, assuming any to have arisen, from any other cause than the work for which the corporation are responsible, namely the cutting off the drainage which the houses had and substituting no other in its place, and the flooding of the houses necessarily arising from the grade of the streets having been raised to the level of the ceilings of the cellars, that is to say to a height of two feet above a point at which if the grade had been fixed no damage whatever could have been caused to the plaintiff's property.

These items are:

1. Repairing settlement brick and stone........	$75 00
2. Carpenters' work, rebuilding foundation, sheeting base of porches and steps, fitting doors, trimmings, &c., after raising.........	50 00
3. Repairing plastering, painting and cementing down pipes...............................	30 00
	$155 00

Deducting this sum from the above $1,673.20, leaves the sum of $1,518.20 as the lowest estimate of the cost of putting the premises into that tenantable state of repair in which they were before the corporation executed the works complained of.

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The contention of the corporation was that there had been a settling of part of the walls of the houses, which as was contended caused at least some part of the damage done. Now, although it is true that the evidence showed that when the foundation was being built there did occur a slight settlement at one point, still the evidence showed also that it was observed at the time and that provision was made to rectify it, and that there had been no settlement whatever after the houses were completed. However, *ex majori cautelâ*, and to avoid allowing to the plaintiff anything in respect of damage which the work of the corporation did not cause, I deduct the above sum of $155 as covering all items in the estimate for any damage which can be attributed to any other cause than the work of the corporation.

Now, to the above sum of $1,518.20, it is but just and reasonable that $108 expended in manner above mentioned should be added, thus making $1,626.20, and as the houses which formerly were rented at $10 per month each have been rendered utterly untenantable by the damage consequential on the work of the corporation, it is but reasonable that some allowance for loss of rent should be made. Upon this point it was urged on behalf of the corporation that there has been a general fall in rents, and indeed in the value of al real property in the neighbourhood, and that the houses might have become unoccupied, or if not occupied at very reduced rents even if the streets had never been raised. It was, however, the work of the corporation which made them untenantable, in which condition, by reason of their resisting the claim of the plaintiff, they continued to be for two years up to the date of the award. Under these circumstances the corporation cannot reasonably ask that a greater reduction should be made from the amount the plaintiff

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would have received for rent, but for the work of the corporation, than 50 per cent of the amount formerly received. At this rate there should be added to the above sum of $1,626.20 the further sum of $240 for two years rent at $5 per month per house, making $1,866.20. Now, the arbitrators by their award have found that the premises of the plaintiff have been injuriously affected by the works of the corporation, but to the amount only of "$200" over and above

any benefit and advantage to the said land and premises arising from the grading and levelling of said streets.

How the arbitrators arrived at this sum we have no means of determining, nor had Mr. Justice Rose save by perusal of the evidence taken on the arbitration. The award, however, in its terms seems to show that some amount, though how much we cannot even guess, for no amount whatever was suggested in the evidence, has been deducted by the arbitrators from the cost of reinstating the premises in a tenantable condition as for some benefit or advantage which it has been assumed has been conferred upon the property which has been injured by the works of the corporation. Assuming any such deduction to have been made I not only concur with Mr. Justice Rose in holding that the award is wholly irreconcilable with the evidence but am of opinion that such a deduction in the present case would be contrary to every principle of justice and is unwarranted by the statute under which the arbitration has taken place. What the statute, namely sec. 483 of the ch. 184 R.S.O., enacts is that the corporation shall pay to all owners of property injuriously affected by work done by the corporation in the exercise of its powers—

due, that is to say full, compensation for any damage necessarily resulting from the exercise of these powers beyond any advantage which the claimant may derive from the contemplated work.

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Now I must say that to me it does not seem to be possible within the limits of common sense to conceive how a small property like that of the plaintiff (the whole value of which consisted in the enjoyment of the two houses as dwelling houses together with the appurtenances thereto belonging), or how the claimant himself could derive any advantage whatever in respect of such property from work the necessary results of which has been proved to be that the houses have been rendered uninhabitable and even unsaleable at any price short of a sacrifice of at least 50 per cent of their cost; and that an outlay of a sum exceeding $1,500 is necessary to reinstate them in as good and tenantable a condition as they had been in. What the statute contemplates and the utmost it authorizes is that the value of any benefit if any there be which the injured property, that is to say which the property in its injured condition, may derive from the work which causes the injury if it can be ascertained and is not wholly speculative may be deducted from the amount which, apart from the value of such benefit, would be required to afford due compensation for the injury.

If, for example, property be injured in such a manner that it is necessary that the injury caused should be repaired before any benefit could accrue, the statute is not open to a construction so at variance with common justice and common sense, as that the prospective speculative estimate of the value of such benefit should be deducted from the amount necessary to repair the injury and to put the property into a condition to receive such benefit. Such benefit could not be said to be derived from the work causing the injury, but from the outlay expended to repair the injury. In the present case there is no suggestion whatever in the evidence that the plaintiff's property, in the condition in which it was when injured, has derived, or could

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derive, any benefit from the work which has caused the injury; all that is suggested is that if the plaintiff's property had been quite different from what it was, that is, if it had been a vacant lot, it would in that case have derived some benefit from the work, the value of which benefit was so wholly speculative and unsubstantial and unreal that no attempt even was made to estimate it; but as to the plaintiff's property in the condition in which it was, being house property, the evidence is that nothing but injury resulted to it from the corporation work, which injury must continue until repaired or until due compensation, as required by the statute, shall be given therefor.

Although there has been no cross-appeal instituted by the plaintiff against the judgment of Mr. Justice Rose, still the Ontario Judicature Act ch. 44 ss. 47 and 48 R.S.O. and the rule of court, no. 16, made under that Act, gave full power to the Court of Appeal for Ontario to increase the amount to which the award had been increased by Mr. Justice Rose, and so likewise has this court like power under its rule no. 61.

In *The Queen* v. *Robertson* (1), although there was no cross-appeal, this court gave judgment in favour of the respondent upon a point in the case which the court below had adjudged against him. This is the precedent which I think should be followed in the present case, in order to prevent what otherwise, as it appears to me, would be a complete failure of justice, and that the plaintiff may have that adequate compensation for the injury done to his property by the work of the corporation which the statute contemplated assuring to him, and to prevent this remedy by arbitration to which he is limited by the statute proving to be illusory. I am of opinion, therefore, that the award should be increased to the above sum of

(1) 6 Can. S.C.R. 52.

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$1,866.20, for which sum, with interest thereon from the 19th of October, 1893, the date of the award, the plaintiff should have judgment, together with his costs, and that this variation being made the appeal should be dismissed with costs.

SEDGEWICK and KING JJ. concurred.

Appeal dismissed with costs, and judgment varied.

Solicitor for the appellants: *Charles C. Going.*

Solicitor for the respondent: *A. Cecil Gibson.*