TORONTO TRANSPORTATION COMMISSION (PLAINTIFF) ..... APPELLANT;

AND

THE CORPORATION OF THE VILLAGE OF SWANSEA (DEFENDANT).... RESPONDENT.

1935
*June 5, 6
*June 24

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Highways—Right of access—Action to compel municipality to permit change in curb to afford owner of adjoining land convenient access to street for purposes of its business—Municipal Act, R.S.O. 1927, c. 233; Local Improvement Act, R.S.O. 1927, c. 235.

At common law an owner of land was entitled to access to an adjoining public highway at any point at which his land actually touched such highway, for any kind of traffic which was necessary for the reasonable enjoyment of his premises and which would not, as he proposed to conduct it, cause a substantial nuisance. A municipal authority, in the absence of an express right to the contrary, was not entitled to deprive him of the full enjoyment of such right. But in Ontario the *Municipal Act*, R.S.O. 1927, c. 233 (ss. 483, 484, 342, 344, and other sections, specifically referred to), and the *Local Improvement Act*, R.S.O. 1927, c. 235 (ss. 2, 20 (2) (*d*), 3 (2), specifically referred to), have created an interference with such common law rights. And where the sidewalks and curbs in question, on streets adjoining land now owned by appellant, had been constructed about 13 years ago under the provisions of the *Local Improvement Act*, it was *held* that appellant had no right to compel the respondent municipality to permit a change in the curb to afford appellant convenient access to the streets for the purpose to which appellant intended to use its land.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario dismissing its appeal from the judgment of McEvoy J. dismissing its action.

The plaintiff corporation owns certain lots in the village of Swansea (the defendant municipality), the land

*PRESENT:—Duff C.J. and Cannon, Crocket, and Davis JJ., and Dysart J. *ad hoc*.

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comprising a parcel roughly 50 feet in width by 150 feet in depth running between Kennedy avenue and Runnymede road in said village. The land was purchased by plaintiff in or about the year 1931. Some years earlier the defendant municipality, in the course of its rights and duties, had constructed sidewalks and roadways, with curbs between, upon the said two streets. The plaintiff desired to use its said land to loop empty buses through, and submitted to defendant municipality proposals for overcoming the barrier to vehicular traffic created by the curbs and requested that the work be carried out either by itself or by defendant, and offered to pay the full cost and expense of the work. The plaintiff alleged that defendant refused to permit the curbs to be altered as suggested or in any other manner to give reasonable vehicular access from the highways to plaintiff's land, and also alleged discrimination by defendant in that defendant had granted vehicular access to every other landowner who applied for it. Plaintiff claimed a declaration that it was entitled to reasonable vehicular access, a mandatory order compelling defendant to take such measures as might be necessary to give plaintiff such access, an injunction restraining defendant from refusing such access, and damages for interference with plaintiff's vehicular access.

In its statement of defence the defendant municipality alleged, *inter alia,* that, at the time of constructing the sidewalks and curbs in question, it dealt with and constructed all approaches applied for in accordance with s. 3 (2) of the *Local Improvement Act,* R.S.O. 1927, c. 235, and that an approach to the said property from Runnymede road was applied for and constructed at that time. The defendant denied that the plaintiff was entitled to any of the remedies claimed, and pleaded the *Local Improvement Act,* R.S.O. 1927, c. 235, and amendments thereto, and the *Municipal Act,* R.S.O. 1927, c. 233, and amendments thereto, and more especially s. 344 of the said *Municipal Act.*

By the judgment now reported the plaintiff's appeal to this Court was dismissed with costs.

I. S. Fairty K.C. for the appellant.

J. J. Addy for the respondent.

The judgment of the court was delivered by

DAVIS, J.—Stripped of several collateral issues developed in evidence and discussed throughout the trial, the real point of the case is the determination of the right asserted by the appellant, an owner of land adjoining a public street within a village in the Province of Ontario, to compel the municipality, respondent, to permit a change in the level of the sidewalk and curb in front of its land in order to afford it convenient access to the public street for the purpose to which it intends to use its land. The point is a narrow and rather difficult one. It seldom arises as a matter of practical importance, for it may be taken as admitted that municipal authorities in Ontario generally afford to owners of land adjoining public streets such changes in the sidewalks and curbs in front of their property as are reasonably necessary to meet the changing conditions and requirements of the particular owner and the use to which he intends to put his property. In this case, however, a strict right is asserted by the appellant (owner) and denied by the respondent (municipality) and the matter falls for careful reasoning and interpretation of the law upon the subject.

There is no difficulty upon the question of the right at common law of an owner of land adjoining a public highway. He is entitled to access to such highway at any point at which his land actually touches such highway for any kind of traffic which is necessary for the reasonable enjoyment of his premises and will not, as he proposes to conduct it, cause a substantial nuisance. Halsbury (Hailsham ed.), Vol. 16, p. 251. This is a right of property that was well settled at the common law. A private owner was always entitled to a full and uninterrupted access from his property that adjoined a public highway to that public highway and a municipal authority, in the absence of express statutory right to the contrary, was not entitled to deprive the private owner of the full enjoyment of this right. When he reaches the public highway and travels upon it, the private owner becomes then one of the public using the highway and subject to all the duties and obligations that rest upon the public generally, but it is his private right to be fully and freely permitted at all points of his private property to have freedom of access to the adjoining public highway. That principle of the

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common law has been fully and completely restated very recently by Lord Atkin in delivering the judgment of the House of Lords in *Marshall* v. *Blackpool Corporation* (1). That leads us to an investigation and consideration of any statutory provisions in Ontario altering the common law in this respect. By the *Municipal Act*, R.S.O. 1927, ch. 233, "highway" means a common and public highway, and includes a street (sec. 1 (*e*)). By sec. 443, unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of the *Municipal Act* or any other Act. And by sec. 444, except where jurisdiction over them is expressly conferred upon another council, the council of every municipality shall have jurisdiction over all highways within the municipality. By sec. 469, every highway shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by the Act.

Then by sec. 483, the council of every municipality may pass by-laws,

(*a*) for establishing and laying out highways;
(*b*) for widening, altering or diverting any highway or part of a highway;
(*c*) for stopping up any highway or part of a highway and for leasing or selling the soil and freehold of a stopped up highway or part of a highway;
(*d*) for setting apart and laying out such parts as may be deemed expedient of any highway for the purpose of carriage ways, boulevards and sidewalks, and for beautifying the same, and making regulations for their protection;
(*e*) for permitting subways for cattle under and bridges for cattle over any highway;
(*f*) for acquiring land or an interest in land at street intersections for the purpose of rounding corners.

Sec. 484 provides that a by-law shall not be passed for stopping up, altering or diverting any highway if the effect of the by-law will be to deprive any person of the means of ingress or egress to and from his land or place of residence over such highway or part of it unless in addition to making compensation for such person, as provided by this Act, another convenient road or way of access to his land or

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place of residence is provided. Sec. 486 provides for publication of notice of any by-law for the stopping up, altering, widening, diverting, selling or leasing of a highway or for establishing or laying out a highway. Other sections of the *Municipal Act* deal with various phases of matters incidental to the carrying out of the general powers of municipalities in connection with highways but the sections to which I have referred indicate generally the scope and extent of the powers of municipal councils over highways.

The *Local Improvement Act*, R.S.O. 1927, ch. 235, specifically provides by sec. 2 thereof for works of the following character or description which may be undertaken by the council of a municipal corporation as a local improvement, that is to say:

(*a*) Opening, widening, extending, grading, altering the grade of, diverting or improving a street;

(*f*) paving a street;

(*g*) constructing a curbing or a sidewalk in, upon or along a street.

This section does not extend or apply to a work of ordinary repair or maintenance. The procedure for undertaking local improvement works is set out in this statute and provision is made as to how the cost of the work is to be borne. By sec. 20 (2) (*d*) there may be included in the cost of such work "compensation for lands taken for the purposes of the work or injuriously affected by it." By sec. 3 (2) of this Act,

where the work is the construction of a pavement, the council may from time to time during the progress of the work, upon the written request of the owner of the lot to be served, provide for the construction, as part of the pavement, of an approach of such width and character as the council may determine, from the boundary line of the pavement to the street line, so as to form an approach to a particular lot, and the cost of such approach shall be specially assessed upon the particular lot so served.

Reverting to the *Municipal Act*, it is provided by sec. 342 thereof that

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

The amount of the compensation, if not mutually agreed upon, shall be determined by arbitration.

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By sec. 344,

except where the person entitled to the compensation is an infant, a lunatic, or of unsound mind, a claim for compensation for damages resulting from his land being injuriously affected shall be made in writing, with particulars of the claim, within one year after the injury was sustained, or after it became known to such person, and, if not so made, the right to compensation shall be forever barred.

In this case it was proved that the existing sidewalks and curbs were constructed some thirteen or fifteen years ago by the respondent municipality under the provisions of the *Local Improvement Act*. The lands were in exactly the same condition as regards curbs and sidewalks when purchased by the appellant three or four years ago. It is admitted that it is not unlikely that the owner or owners of the land in question when the sidewalks and curbs were constructed were in fact petitioners under the *Local Improvement Act* for the work to be undertaken by the municipality. At any rate, it is plain that if their lands were then injuriously affected by the construction of the work, the then owners were entitled to compensation. It is not disclosed whether any such compensation was sought. But there was authority in the municipality by virtue of the express provisions of the *Municipal Act* and of the *Local Improvement Act,* to which I have referred, to construct the sidewalks and the curbs that are now complained of as preventing the full enjoyment of the property by the present owner in the use to which he intends to put the land. To this extent there is a statutory interference with the common law rights of owners of land adjoining a highway.

We were not referred to any statutory provisions in Ontario, and I know of none, setting up any procedure permitting a change by individual owners in the level of sidewalks or curbs constructed by the municipality under the *Local Improvement Act*. In the *Blackpool Corporation* case (1) the statute set up a procedure for every person desirous of forming a communication for horses or vehicles across any footpath so as to afford access to any premises from a street, to submit to the corporation a plan of the proposed communication, shewing where it will cut the foothpath, and what provision (if any) is made for curbing and for a paved crossing and the dimensions and gradients of the necessary works, and providing that after hav-

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ing obtained the sanction of the corporation such person may execute the works at his own expense under the supervision and to the satisfaction of the corporation and not otherwise.

In view of the statutory provisions in Ontario the appellant is not entitled to the right which it has asserted in this action and its appeal to this Court from the judgment of the Court of Appeal for Ontario which dismissed its appeal to that Court from the judgment at the trial which dismissed its action for a declaration of the right asserted, must be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Irving S. Fairty.*

Solicitor for the respondent: *J. J. Addy.*