EDWARD McCARTHY (CLAIMANT)...APPELLANT;

AND

THE CITY OF REGINA (DEFENDANT).....RESPONDENT.

1919
*Feb. 24.
*Mar. 3.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Statute — Construction — Municipal corporation—Public work — Land not taken—Injuriously affected—Compensation—"Date at which damages are ascertained"—Sask. R.S. 1909, c. 84, s. 247.

Under section 247 of the "City Act" (Sask. R.S. 1909, ch. 84), when any land, though not taken for some public work, is injuriously affected thereby, a claim for damages must be filed with the city clerk within fifteen days after the publication in a local newspaper of a notice of the completion of the work; and sub-section 3 provides that "the date of publication of such notice shall be the date in respect of which the damages shall be ascertained."

Held, Davies C.J. dissenting, that, in determining the compensation to be awarded under the statute, the court has only to consider the depreciation in value which the claimant's property, as it stood at the date of the publication of the notice, had suffered as a necessary result of the work done by the municipality, and the fact that since the commencement of the work, but before the notice of its completion, the claimant's buildings had been destroyed by fire and rebuilt by him, cannot effect the right of the claimant to recover compensation for depreciation in their value by reason of this work.

Per Davies C.J. dissenting.—Damages to buildings erected by the owner after the "work" has been commenced are not "necessarily incurred by the construction of the work," within the meaning of the statute.

Judgment of the Court of Appeal (42 D.L.R. 792; (1918), 2 W.W.R. 1013), reversed, Davies C.J. dissenting.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), varying the judgment of the Supreme Court *en banc* (2), and further reducing an award given to the claimant.

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

(1) 42 D.L.R. 792; (1918), 2 W.W.R. 1013.

(2) 38 D.L.R. 336; (1918), 1 W.W.R. 94.

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The claimant claims compensation for land and buildings injuriously affected by the construction of a subway by respondent. The work had begun about the 18th September, 1911, and the public notice of the completion of the subway was given on the 17th October, 1914. On the 10th January, 1912, the buildings were destroyed by fire, but rebuilt, partly with insurance moneys recovered, in the summer of 1912. The claimant filed a demand for compensation to the amount of $81,000, and he was awarded $21,334 by the arbitrator. The respondent then appealed to the Supreme Court of Saskatchewan *en banc* where a reduction of $4,050 was made. Subsequently, on a motion by the respondent to amend the minutes of the above judgment, the amount of $6,484 was further deducted from the claimant's award.

E. B. Jonah for the appellant.
G. F. Blair K.C. for the respondent.

THE CHIEF JUSTICE (dissenting)—The damages to be ascertained "for injurious affection" to lands, no part of which has been taken, have to be determined as from or on a particular day, but they are only such as were "necessarily incurred by the construction of the work" and must relate to the conditions existing not alone at the date fixed to ascertain the damages, but those created or caused by or necessarily resulting from the exercise of the city's powers in constructing the work.

The evidence shewed that the buildings, which had been upon the appellant's property at the time the subway was commenced, had been destroyed by fire some three months after such commencement. It was not contended, and could not be successfully contended,

that the construction of the subway had anything to do with the burning of the building directly or indirectly, or that the city was an insurer and liable for plaintiff's loss by fire not caused by the subway. The respondent collected his insurance and built another and larger building in its place while the subway was being constructed. That building, having been commenced and completed months after the commencement of the construction of the subway, cannot in any way be considered as coming within the terms of the statute. I fail to understand how damages can be awarded for a new building erected on the premises of the appellant after the construction of the subway was commenced and during its construction. I think the damages allowed by the arbitrator of 40% for depreciation in the value of this building now in dispute in this appeal was properly disallowed by the Court of Appeal.

Improvements upon the property made after the commencement and during the construction of the subway are, in my opinion, not within the contemplation of the statute. It is the condition of the property when the construction of the subway was commenced that is to be considered when the arbitrator is to ascertain the "damages necessarily incurred by the construction of the work," and not improvements which the owner may put on the land after the work has been commenced.

It was contended that because the statute provided that the date of the publication of the notice of the completion of the work or undertaking should be the date in respect of which the damages should be ascertained, that as a consequence buildings erected by the owner after the work was commenced and depreciated in value in consequence of the work should be valued.

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As I have said I cannot accede to that contention. The owner could not, by his own act, after the commencement of the work, increase the damages to which he otherwise would be entitled. Those damages must be confined to those as the statute provides "necessarily incurred by the construction of the work," and I cannot think damages incurred to buildings erected by the owner after the "work" has been commenced are within the statute.

I would dismiss the appeal.

IDINGTON J.—This is an appeal from the judgment of the Court of Appeal for Saskatchewan which deducted from the award of an arbitrator the sum of $6,484. The award was made under provisions enabling the arbitrator to determine the damages suffered by the appellant by reason of the injurious affection of his property by the construction of a subway.

The only right of recovery of damages appellant could have in law was that given by section 247 of respondent city's charter reading as follows:—

> In case any land not taken for any work or undertaking constructed, made or done by the council or commissioners under the authority of this Act is injuriously affected by such work or undertaking the owner or occupier or other persons interested therein shall file with the city clerk within fifteen days after notice has been given in a local newspaper of the completion of the work his claim for damages in respect thereof stating the amount and particulars of such claim.
>
> 2. Such notice shall be given by the city clerk forthwith after the person in charge of the work or undertaking has given his final certificate and shall state the last day on which any claim under this section may be filed.
>
> 3. The date of publication of such notice shall be the date in respect of which the damages shall be ascertained.

The foregoing furnishes the only basis of submission possible and must be held to contain the limitations of the claim made, and authority of the

arbitrator to determine the damages suffered by reason of the construction of the work in question.

It is to be observed that the claim could only arise after the completion of the work as evidenced by the final certificate of him in charge of the work and upon the notice of the city clerk forthwith thereafter.

The date of that publication

shall be the date in respect of which the damages shall be ascertained.

The Court of Appeal, in going beyond that date of 19th October, 1914, I submit with respect, erred by exceeding the powers there given by this statutory submission to the arbitrator.

It was not the condition of things existent two or three years before that time, but simply how much the completed structural changes affected the value of the appellants' property on the 19th October, 1914, by depriving it of the advantages the owner would have enjoyed had the said changes on the street never taken place.

Hence importing into the matters to be considered the destruction of a property by fire in the month of January, 1912, and the insurance money secured in relation thereto, was doing that for which there was no authority.

The above statutory provision seems novel and may be unique, nevertheless it is what those concerned for respondent chose to induce the legislature to provide.

Each expropriating statute generally fixes a time for determining the damages to meet the particular case in respect of which provision is made. The fact that usually the question of what damages any party may suffer by reason of the execution of any public project having to be determined before such execution is entered upon, may have led to the misconception of the court below in regard to what should fall within the operation of the section in question.

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It is to be observed that any statute passed, competent for any parliament or legislature to pass, authorizing the execution of any work, gives no right to those suffering thereby to recover damages in respect thereof unless provision for compensation or damages is provided for. I repeat the only provision made herein seems to be that which I have quoted.

The appeal does not enable us to determine whether or not the point of view taken by the arbitrator and his measure of damages were correct. We can only determine herein whether or not the limits of the submission have been exceeded or not.

The appeal should be allowed and the judgment of the court below, so far as relative to the item of $6,484, amended by restoring said sum to the amount awarded appellant, with costs of this appeal to the appellant.

ANGLIN J.—When the defendant city constructed the subway which gave rise to the claim for compensation or damages before us on this appeal, it was governed by the "City Act" of Saskatchewan (R.S.S. 1909, ch. 84). No part of the claimant's property having been taken, his claim for injurious affection fell under section 247 of that Act. That section prescribed that such a claim should be filed with the city clerk within fifteen days after publication in a local newspaper of notice of completion of the work, which the municipal council was directed to give. Subsection 3 is in the following terms:—

3. The date of publication of such notice shall be *the date in respect of which* the damages shall be ascertained.

This provision, in my opinion, admits of only one construction. It prescribes that the compensation of the claimant should be the amount of the depreciation in the value of his property, as it stood at the date set, due to the work in question, *i.e.*, he should be awarded

the difference between its value as it then stood with the work constructed and what would have been its value as it then stood had the work not been constructed. The use in sub-section 3 of the words, "the date in respect of which" makes this abundantly clear; and a comparison of the language of that subsection with the corresponding clause at the end of sub-sec. 2 of sec. 246 removes any possible ground for contending that the words "in respect of which" are not more than an equivalent of "at which."

Mr. Blair very properly directed our attention to the language of section 245 restricting the damages to such as necessarily result from the exercise of (the) powers of the city. But I find nothing in these terms which would justify our placing any other construction than that which I have indicated on sub-sec. 3 of sec. 247. Of course the damages to be allowed must be confined to the depreciation in value which the claimant's property as it stood at the date of publication of the notice of completion had suffered as a necessary result of the work done by the municipality in the exercise of its powers. The owner cannot enhance his damages by introducing fanciful considerations.

He is apparently not entitled to compensation for loss sustained during the construction of the work owing to reduction in the rental value of his property, or other inconvenience. That is one of the anomalies of this peculiar legislation. Another is that if the work is not completed there would appear to be no provision for any compensation although serious loss may have been entailed.

But, with great respect, I am unable to appreciate the bearing on the claimant's right to compensation of the fact that pending the construction of the work he recovered some insurance in respect of injury to his

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buildings by fire. Neither is the relative value of his buildings when the work was begun and when it was completed a matter for consideration in determining the compensation to be awarded under the statute.

Although sub-sec. 3 of sec. 247 is probably a unique provision in legislation of this class, it is not at all unjust that the claimant should be compensated on the basis fixed by it. He is entitled to make the most of his land—to build upon it so as to use it to the best advantage. Its possibilities when so utilized must be taken into account in determining its value to him and in estimating the depreciation caused by the work constructed by the municipality. For this purpose a building should be valued not according to its cost—it may be very extravagant for the locality and therefore unprofitable—but upon the basis of its rental value, and depreciation must be measured on the same footing.

I am, with deference, of opinion that the Court of Appeal erred in disallowing $6,484 awarded by the arbitrator for damages in respect of the claimant's building and that this item of the award should be restored. The appellant is entitled to his costs of the appeal to this court and also to his costs of the defendant's motion before the Court of Appeal to vary the minutes of its judgment.

BRODEUR J.—In 1911 the respondent corporation commenced the construction of a subway on Broad Street, in the city of Regina. The appellant was the owner of lands and buildings fronting on that subway but which were not taken and expropriated. However, those lands and buildings were injuriously affected by the construction of that work, since it partially lowered the grade of the street.

In 1912 a fire occurred in the appellant's buildings; and, as they were insured, he recovered the insurance money and he rebuilt them.

The subway was completed in 1914 and, as required by the law, a notice was published in October, 1914, by the city clerk. By the law of Saskatchewan, the liability of the municipal corporation to pay compensation for land injuriously affected is not limited to the cases where some land has been actually taken by the city but it exists in any case where land is injuriously affected by the exercise of the power conferred by the Act. *Vachon* v. *City of Prince Albert* (1).

In the case of land taken a plan has to be filed shewing the land which is to be expropriated and the work which is to be done; and the names of the owners must be filed with the city clerk. Those owners are then notified and the claims for compensation must be filed within fifteen days from the date of the deposit of the plan.

In the case, however, of land not taken but simply injuriously affected, the owner of the land has to file his claim for damages with the city clerk, within fifteen days after notice has been given in a local newspaper of the completion of the work. (Sec. 247, ch. 84, rev. statutes of Saskatchewan, 1909.)

The law also provides that

> the date of publication of such notice shall be the date in respect of which the damages shall be ascertained.

So, we see that there are different provisions in the case of lands taken and of lands injuriously affected. In the first case the owner is obliged to make his claim within fifteen days of the deposit of the plan; and in the case of land simply injuriously affected, the claim has to be filed within fifteen days after the notice of completion has been given.

(1) 9 Sask. L.R. 80.

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McCarthy filed his claim in due time after the notice of completion was given. In the judgment *a quo* McCarthy was denied the right to claim any compensation in respect of his building because the property had been built on after the commencement of the subway. I am unable to agree with that proposition. The law states specifically that the date of publication of the notice of completion shall be the date at which the damages shall be ascertained. Then, we have to find out what buildings were on the property when the work was completed, and the extent to which those buildings are injuriously affected. We have nothing to do as to whether those buildings were of recent date or not.

Of course, if something had been done by the owner so as to unduly increase the burden of the city as regards the compensation to be paid, the situation might be different (*Mercer* v. *Liverpool, St. Helens & Lancashire Railway* (1)). But there is no suggestion in this case of any such fraudulent action on the part of the land owner.

In those circumstances, I am of opinion that the appeal should be allowed and that the appellant should be entitled to recover the sum of $6,484 for damages as to his building with costs of this court and of the motion to amend the judgment in the court below.

MIGNAULT J.—The only question which arises here is as to the construction and effect of certain provisions of the statute governing the respondent previous to 1915.

The appellant claimed compensation for land and buildings injuriously affected by the construction of Broad Street subway, being an extension north of

(1) 73 L.J. K.B. 960.

Broad Street across the right-of-way of the Canadian Pacific Railway to Dewdney Street, in the city of Regina. No part of the appellant's land or buildings was taken, but he claimed that they were injuriously affected by the construction of the subway and demanded the sum of $81,000 for his damages. Public notice of the completion of the subway was given on the 17th October, 1914, the work of construction of which had begun about the 18th September, 1911.

On the 10th January, 1912, the appellant's building on lots 24, 25 and 26 was destroyed by a fire which also damaged his building on lots 27 and 28. The building on the two latter lots was repaired or rebuilt in the spring and summer of 1912, and was in the same condition as repaired or rebuilt on the date the damages were assessed, namely, the 14th October, 1914. The appellant filed his claim for damages on the 22nd October, 1914.

The arbitrator awarded to the appellant $21,334. The respondent then appealed to the Supreme Court of Saskatchewan *en banc*, where, as appears by the judgment of Mr. Justice Newlands of the 27th November, 1917, a reduction of $4,050 was made in the amount awarded to McCarthy. Subsequently, on the 15th July, 1918, on a motion of the respondent to amend the minutes of judgment, the amount of $6,484 was further deducted from Mr. McCarthy's award for the reasons stated by Mr. Justice Newlands as follows:—

> In this matter, Mr. Blair, for the city, called the attention of the court to the fact that the learned arbitrator in assessing the damages to the McCarthy property had included in his award the building upon the property, and had allowed 40 per cent. depreciation for damage to the same by the subway; that the evidence shewed that the building which had been upon this property at the time the subway was commenced had been destroyed by fire some three months after the commencement of that work; that McCarthy had collected the insurance and had rebuilt.

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This matter was not dealt with in our previous judgment through an oversight.

As the building which is now upon the property was built after the commencement of the subway, it cannot be said to be injured by that work, so McCarthy would not be entitled to any damages on that account. Neither can the rebuilding be considered as a repair of an existing building, as urged by Mr. Jonah, because after the fire it could not be used for any purpose, and was not such a building as could be damaged by the building of the subway.

The building was damaged by fire, for which McCarthy was paid by the insurance company, not by the subway.

There should, therefore, be deducted from the award to McCarthy the sum of $6,484, the amount allowed for damage to the building.

Mr. McCarthy now appeals from the judgment thus reducing his award by $6,484.

I am, with deference, of the opinion that this reduction should not have been made.

The sections of ch. 84, R.S.S. 1909, which governed, at all the dates in question in this case, the compensation payable for land taken by the respondent, or for land injuriously affected by the construction of public works by it, are the following:—

Section 245.—The said council or commissioners shall make to the owners or occupiers of or other persons interested in any land taken by the city in the exercise of any of the powers conferred by this Act due compensation therefor and pay damages for any land or interest therein injuriously affected by the exercise of such powers the amount of such damages being such as necessarily result from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; and any claim for such compensation or damages if not mutually agreed upon shall be determined by arbitration under this Act.

Section 246.—Before taking any land the council or commissioners shall deposit with the city clerk plans and specifications shewing the land to be taken or used and the work to be done thereon and the names of the owners or occupiers thereof according to the last revised assessment roll.

2. The city clerk shall thereupon notify such owners and occupiers of the deposit of the said plans and specifications and of the date of such deposit, and that all claims for compensation for the land so to be taken and the amount and particulars thereof must be filed with him within fifteen days from the date of the deposit of the said plans and specifications which date shall be that with reference to which the amount of the compensation for such lands shall be ascertained.

3. If any claimant under this section has not filed his claim within the period hereinbefore limited it may be barred and extinguished on an application to a judge upon such terms as to notice, costs and otherwise as the judge may direct.

247. In case any land not taken for any work or undertaking constructed, made or done by the council or commissioners under the authority of this Act is injuriously affected by such work or undertaking the owner or occupier or other persons interested therein shall file with the city clerk within fifteen days after notice has been given in a local newspaper of the completion of the work his claim for damages in respect thereof stating the amount and particulars of such claim.

2. Such notice shall be given by the city clerk forthwith after the person in charge of the work or undertaking has given his final certificate and shall state the last day on which any claim under this section may be filed.

3. The date of publication of such notice shall be the date in respect of which the damages shall be ascertained.

4. Any claim under this section not made within the period hereinbefore limited shall be forever barred and extinguished.

A clear distinction is here made between compensation for lands taken by the city and compensation for lands not taken but injuriously affected by a public work constructed by it.

In the case of lands taken, plans and specifications of the lands and work are deposited with the city clerk before taking the lands, and thereupon the city clerk notifies the owners of the lands to be taken, and the date of the deposit of the plans and specifications is that with reference to which the amount of the compensation for such lands shall be ascertained.

In the case of lands not taken but injuriously affected, the owner notifies the city clerk of his claim for damages within fifteen days after notice has been given in a local newspaper "*of the completion of the work,*" and the date of publication of such notice *shall be the date in respect of which the damages shall be ascertained.*

Since the date of the notice of the completion of the work is the date in respect of which the damages to lands not taken but injuriously affected shall be ascertained, it is entirely immaterial whether during the

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construction of the work the buildings of the appellant were destroyed by fire and rebuilt by him. It is also immaterial whether or not the appellant received insurance money on account of the destruction of the building. I cannot, with respect, agree with Mr. Justice Newlands when he says that as the building which is now on the property was built after the commencement of the subway, it cannot be said to be injured by that work. The roadway was narrowed from 100 feet to about 33 feet, and any building erected on such a roadway would be damaged by the work. In other words, it would generally be worth less than if the roadway had not been narrowed. It is true that McCarthy received the amount of his insurance, but apparently he employed it to rebuild, and there is nothing in the statute preventing him from so doing. There is no suggestion of fraud on his part or of any attempt to injure the city. What he did was to replace at his own cost a building which was on the property when the work began.

Moreover, as I have stated, the statute is clear and the only date to be considered for the purpose of determining the compensation to which the appellant is entitled is that when the notice of completion of the work was published.

I would, therefore, allow the appeal with costs as stated by my brother Anglin, and fix the compensation to be paid to the appellant at the sum of $17,284, being the amount allowed by the court below before the reduction was made.

Appeal allowed with costs.

Solicitors for the appellant: *Cross, Jonah, Hugg & Forbes.*

Solicitor for the respondent: *G. F. Blair.*