

*Judgment of the Lords of the Judicial Committee of the Privy Council on the appeal of The President Councillors and Ratepayers of Colac v. Summerfield, from the Supreme Court of Victoria; delivered 24th March 1893.*

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Present :

LORD WATSON.

LORD HOBHOUSE.

LORD MORRIS.

[*Delivered by Lord Watson.*]

The Appellants are the municipal authority for the shire of Colac, under the provisions of the "Local Government Act, 1874," which is No. 506 of the Public General Statutes of the Colony of Victoria. By section 384, they are authorised, *inter alia*, to make and keep open such ditches, drains, and watercourses as to them may seem fit, in and through any lands adjoining or lying near to any street or road within the municipal district. The same clause expressly provides that they shall "make compensation to the owners and occupiers of any lands for any damage which they may sustain through the exercise of any of the powers conferred by this section."

The Respondent is owner and occupier of a parcel of land in the district of Colac, which abuts upon a road under the charge of the Appellants. His land slopes downwards from the road in the direction of a salt lake; but between it and the lake there is interposed another block of ground belonging to one Armstrong.

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In the year 1871 the Appellants cut a ditch, or open drain, through the eastmost part of the Respondent's land, from the road to his march with Armstrong. Water artificially collected was conveyed by that drain, and discharged upon Armstrong's land until 1881, when, in consequence of complaints made by the Respondent, it was filled up, and a new watercourse constructed along the side of the road. With that arrangement the Respondent had no fault to find; but it was altered in 1886, when the Appellants re-opened the old drain, and at the same time extended it for some distance into Armstrong's block.

This action was brought by the Respondent for recovery of compensation, in respect of (1) damage to his land between 1871 and 1881, and (2) damage sustained and to be sustained by reason of the Appellants' operations in 1886. The first of these claims was withdrawn and need not be further noticed. In his statement of claim the Respondent alleged that the Appellants' drain of 1886 had occasioned serious injury to his land, and also that it was improperly and unskillfully designed and negligently constructed. It is obvious, from the course which the case took at the trial, and in the proceedings which followed upon verdict, that these averments of negligence and want of skill were simply intended to aggravate damages, by showing that the works had not been planned or executed in the best manner for avoiding injury to his land; and that they were not put forward by the Respondent, or understood by the Appellants, as raising any plea to the effect that the latter had exceeded their statutory powers.

The action was tried before Mr. Justice A'Beckett and a jury. The Respondent's evidence was directed to prove that compensation was due, in respect of (1) soil occupied by the drain, (2) damage already sustained from flooding of

his land, and (3) damage yet to be sustained from similar causes. It went to show that water escaped from both sides of the drain, and also that some of the water discharged upon the surface of Armstrong's block found its way to and prejudicially affected a considerable area of low-lying land at the south-west corner of the Respondent's block. According to the Appellants' evidence, the damage, if any, was inappreciable. The Respondent's witnesses assessed compensation on the footing that the injury arising from the drain would be permanent. It was for the Appellants to say whether, in the event of the jury being of opinion that their works were injurious, they would remove them, or take measures to prevent future damage. Their Counsel were referred to in the course of the trial, and refused to give any undertaking of that kind. The jury were therefore entitled to assume, and in all probability they did assume, that any injury to the Respondent's land such as had been already sustained would be continued.

The learned judge submitted two questions to the jury, (1), whether there was negligence by the Appellants in the design and construction of the drain, and, (2), what amount of compensation was due for loss of land occupied by the drain, for damage, if any, sustained in the past, and for damage, if any, by reason of future depreciation in the value of the land. The jury answered the first question in the affirmative; and, in reply to the second, assessed damages at 824*l*. All questions, other than that of damages, were reserved for the decision of the presiding judge.

Parties were subsequently heard upon the effect of these findings before Mr. Justice A'Beckett, who ordered that judgment should be entered for the Respondent for 824*l*. The learned judge held that the finding of the jury

upon the question of negligence, which he submitted to them at the request of the Respondent's Counsel, was immaterial. He was of opinion that "the matter was one on which the Council had properly exercised its discretion, although it had apparently adopted the inferior system"; and accordingly that the finding of the jury with respect to negligence was wrong, but that it did not affect their verdict upon the question of damage.

The Appellants thereupon gave notice of motion for a new trial, upon eight specific grounds. Six of these relate exclusively to directions which the presiding Judge was said to have failed to give, and to directions which he ought to have given to the jury, with reference to the principles upon which they should estimate damage. It is unnecessary to notice them in detail, because not one of them was relied on in the argument addressed to this Board. The remaining grounds upon which the motion was based were, (1) that the findings of the jury were against evidence, and the weight of evidence, and (2) that damages were excessive. No exception was taken to the presiding judge having submitted to the jury the question of damage by future depreciation.

The case then came before the Full Court, who refused the Appellants' motion, but varied the terms of the judgment entered for the Respondent, for the purpose of making it clear that the sum decreed included compensation for prospective as well as past damage.

In this appeal, their Lordships were asked to recall the judgments of both Courts below, and to remit the cause for new trial, mainly upon two grounds, neither of which is to be found in the Appellants' notice of motion, or is referred to in the opinions of the learned Judges. Shortly stated, the first of these was that the Respondent could not recover statutory

compensation, because the jury's finding of negligence conclusively showed that the works which occasioned damage to his property were not constructed and maintained, in the exercise of the powers conferred upon the Appellants by Section 384 of the Local Government Act. The second ground was that the Respondent could not recover prospective damages by way of compensation, but must raise a new action at law, from time to time, for the recovery of such damage as it accrues.

It would be sufficient for the disposal of this appeal to say that the pleas upon which it was maintained travel beyond the record, and ought not to be entertained by this tribunal. But, parties having been heard upon them, their Lordships do not hesitate to state that, in their opinion, these pleas, even if competently raised, could not avail the Appellants.

As to the first of them, their Lordships think it is very plain that, by his averments of negligence, the Respondent did not intend to charge, and was not understood to charge the Appellants with excess of their statutory powers; and that the jury, by their verdict, only meant to affirm that the Appellants, if they had seen fit to do so, might have so planned and executed their works as to occasion less injury to the Respondent's land. In the Courts below, the case, from first to last, was conducted upon the footing that what the Appellants had done was done in the exercise of the powers conferred upon them by Section 384. So long as they act within their statutory powers, negligence is, in any question of compensation, immaterial, and cannot affect the extent of their liability, which is for all damage resulting from the construction or maintenance of their works.

The second plea, to the effect that the Respondent cannot sue for compensation in respect

of future damage, was supported in argument by a reference to *Geddis v. Proprietors of the Bann Reservoir* (3 L.R. Ap. Ca. 430), and other well-known English authorities. The principle of these decisions is simple and intelligible ; but it rests upon the construction of statutory enactments, which bear no analogy whatever to the provisions of Section 384 of the Victorian statute, upon which the claim of the Respondent is based. He is entitled to recover compensation, not only for past but for future damage, if Section 384, according to its true construction, so provides. Their Lordships have no hesitation in holding, with the learned Judges in the Courts below, that it does so provide. The language of the clause appears to them to indicate plainly the intention of the Legislature that, when a ditch or drain has been made in virtue of its powers, an owner or occupier injuriously affected shall be entitled to have compensation for damage to his land assessed once for all, and shall not be compelled to raise an action yearly, or it may be weekly, for damage subsequently accruing.

Some argument was addressed to their Lordships in support of the motion for a new trial in respect of damages being excessive. Upon such a question their Lordships would, in any circumstances hesitate to disturb the unanimous decision of the Full Court. In this case, although the award of damages is a liberal one, their Lordships are of opinion that it is mainly due to the conduct of the Appellants themselves ; and, that in view of the position which they chose to assume at the trial, its amount is not unreasonable.

Their Lordships will humbly advise Her Majesty that the judgment of the Full Court ought to be affirmed and this appeal dismissed. The Appellants must pay to the Respondent his costs of this appeal.

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