

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Mayor and Councillors of East Fremantle v. Annois, from the Supreme Court of Western Australia ; delivered 18th December 1901.

Present at the Hearing :

THE LORD CHANCELLOR.

LORD MACNAGHTEN.

LORD SHAND.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

[*Delivered by Lord Macnaghten.*]

The Appellants are the Council of East Fremantle, a municipality duly incorporated under the provisions of the Municipal Institutions Act 1895 (59 Vict. No. 10). By that Act (Section 109) the council of a municipality is authorised to “make alter level grade . . . repair . . . and otherwise improve all public places streets thoroughfares . . . and other premises within the Municipality.” There is nothing said about compensation in respect of any consequential injury.

In July 1899 before the commencement of the work which has led to the present controversy Sewell Street was a public street within the Municipality. At that time it was little better than a cart track. In places it was almost impassable for vehicles owing to the unevenness of the ground. At its highest point where the Plaintiff has a wooden house which she bought in 1897 for 200*l.* and on which according to her

own account she laid out about 220*l.* more there was a hillock or ridge with a gradient varying from 1 in 6 to 1 in 8. In accordance with the representations of a meeting of ratepayers the Council resolved to improve Sewell Street. They determined to reduce the gradient opposite the Plaintiff's house to 1 in 14½. The work was carried out according to the plans of their surveyor and under his direction. It is in evidence that before the street was improved it was impossible to go with a load of five to seven cwt. up to the Plaintiff's house with a single horse. It is clear that the alteration was not more than was reasonably necessary. The result however so far as the Plaintiff was concerned was that her house was left on the edge of a cutting with a drop of about 6 or 8 feet to the road. This no doubt was a serious inconvenience to her. But it was proved that steps down to the road might be made at a cost of about 15*l.*

In these circumstances the Plaintiff brought her action against the Appellants alleging in her statement of claim that they had "wrongfully" "arbitrarily negligently and oppressively" made an excavation in front of her premises and had thereby deprived her of access to her house. She claimed an injunction or in the alternative 1,000*l.* damages.

The action was tried before the Chief Justice and a common jury. In the course of his summing up his Honour said "It is well established that where a Mayor and Corporation do a public work in the interest of the public if a person suffers unless the Act gives compensation to that private person that private person cannot recover damages at the hands of the jury unless the Mayor and Councillors have gone outside their powers and have acted oppressively arbitrarily and unnecessarily. The question here for you gentlemen is to consider

“ whether the Town Council in this case have
 “ gone outside their bounds or have they acted
 “ arbitrarily or oppressively . . . The one
 “ question for you is, Have the Town Council
 “ acted in such a manner ? ” His Honour con-
 cluded his address to the jury by telling them
 that if they were of opinion that the Council had
 been acting wrongfully arbitrarily unnecessarily
 and oppressively then they might give a verdict
 for the Plaintiff, but that if they were of opinion
 that the Council had been acting in the best
 interests of the public at large, and that the
 Plaintiff though she might have suffered some
 loss had been more than compensated for it by
 the increased value of her property then they
 could not hold the Council liable for damages
 because the Act of Parliament made no provision
 for it.

The jury returned a verdict for the Defendants
 and judgment was given for them with costs.

The Plaintiff then appealed to the Full Court.
 The order of the Full Court was that the verdict
 and judgment be set aside and a new trial had
 on the grounds that :—

“ 1. The learned Judge should have directed
 “ the jury that if the Defendants undertook the
 “ work of cutting down the street complained of
 “ without properly considering or weighing the
 “ injury that must thereby accrue to the
 “ Plaintiff or that if the Defendants carried out
 “ such work without any attempt to lessen or
 “ mitigate the injury to the Plaintiff’s property
 “ the Defendants were acting wrongfully negli-
 “ gently and oppressively.

“ 2. The learned Judge misdirected the Jury
 “ by directing that if the Defendants carried out
 “ the work skilfully and for the benefit of the
 “ public the Plaintiff had no legal cause of
 “ complaint.”

The opinion of the Full Court consisting of
 Stone and Hensman J.J. was delivered by

Hensman J. After stating the facts and citing the case of the *Plate Glass Company v. Meredith* decided in 1792 by Kenyon C.J. and Buller and Grose J.J. and the case of *Boulton v. Crowthor* before Abbott C.J. and Bayley Holroyd and Littledale J.J. in 1824 his Honour expressed the opinion of the Court that “the doctrine of those earlier cases had been modified by principles which had been affirmed by the highest Courts of Appeal.” In support of that view reference was made to two cases in the House of Lords—*Geddis v. Proprietors of Bann Reservoir* in 1878 and *Metropolitan Asylum District v. Hill* in 1881 and to an observation of James L.J. in *Vernon v. Vestry of St. James* in the Court of Appeal in 1880. His Honour added that in Victoria in *King v. The Mayor of Kew* the Supreme Court had applied the general principle of those later cases to facts almost precisely similar to those then before the Court. The Court, he said, had some doubt whether they ought not to follow the Supreme Court of Victoria and hold that the Plaintiff was entitled to judgment; they thought that there certainly ought to be a new trial.

4 Term Rep. 799.

2 B. & C. 703.

3 A. C. 430.

6 A. C. 582.

16 Ch. Div. 449.

Their Lordships are of opinion that the order of the Full Court cannot be maintained. They think that the charge of the learned Chief Justice was if anything too favourable to the Plaintiff. Topics were introduced which might have confused the issue. For example it was not for the jury to consider whether the Plaintiff had been compensated for the loss and inconvenience she might have suffered by the increased value of her property. In their Lordships' opinion there was no case to go to the jury and the jury ought to have been directed to return a verdict for the Defendants.

The law has been settled for the last 100 years. If persons in the position of the Appellants acting in the execution of a public trust and for

the public benefit do an act which they are authorised by law to do and do it in a proper manner though the act so done works a special injury to a particular individual the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute. That was distinctly laid down by Lord Kenyon and Buller J. and their view was approved by Abbott C.J. and the Court of King's Bench. At the same time Abbott C.J. observed that if in doing the act authorised the trustees acted arbitrarily, carelessly or oppressively the law in his opinion had provided a remedy. Those words "arbitrarily carelessly or oppressively" were taken from the judgment of Gibbs C.J. in *Sutton v. Clarke* decided in 1815. As applied to the circumstances of a particular case they probably create no difficulty. When they are used generally and at large it is not perhaps very easy to form a conception of their precise scope and exact meaning. In simpler language Turner L.J. observed in a somewhat similar case that "such powers are at all times "to be exercised *bonâ fide* and with judgment "and discretion." And in a recent case where persons acting in the execution of a public trust were sued in respect of an injury likely to result from their act the present Master of the Rolls then Collins L.J. observed that "the only "obligation on the Defendants was to use "reasonable care to do no unnecessary damage "to the Plaintiffs."

6 Taunt. 34,

2 D. J. & S. 613.

1898 2 Ch. 613.

In a word the only question is has the power been exceeded? Abuse is only one form of excess.

Their Lordships are of opinion that the principles laid down by Lord Kenyon and Abbott C.J. have not been in the slightest degree modified by the more recent cases referred to by Hensman J. They were all cases where upon

the true construction of the particular statute under consideration the Court held that there was no intention of authorising interference with private rights.

In *Geddis v. Proprietors of Bann Reservoir* the Defendants had flooded the lands of the Plaintiffs and had done so as the Court held without any statutory authority.

In *The Metropolitan Asylum District v. Hill* the remarks of Lord Watson must be taken in connection with the circumstances of the case with which his Lordship was then dealing. As his Lordship observes "what was the intention of the Legislature in any particular Act is a question in the construction of the Act." There it was held as Lord Selborne pointed out that there was no statutory right to commit a nuisance and that no use of any land which must necessarily be a nuisance at common law was authorised. As Lord Blackburn observed in a later case quoting Bowen L.J. there was not to be found in the Act under consideration in *Metropolitan Asylum District v. Hill* "any element of compulsion or any indication of an intention to interfere with private rights."

In *Vernon v. Vestry of St. James* in the very sentence quoted by Hensman J., James L.J. went on to say that he was of opinion that there was no legislation in the case authorising the Vestry to interfere with private rights. In an earlier part of his judgment the Lord Justice had observed "there are no words here that authorise the Vestry to commit a nuisance."

The learned counsel for the Appellants was unable to refer their Lordships to a report of the Victorian case of *King v. The Mayor of Kew*. If the effect of the judgment is correctly stated by Hensman J. their Lordships are compelled to express their dissent from it.

Truman v. L. & S. C. Railway, 11 A.C.
31.

Their Lordships therefore will humbly advise His Majesty that the order of the Full Court ought to be discharged with costs and the judgment of the Chief Justice restored.

The Respondent must pay the costs of the Appeal.
