THE BOARD OF TRUSTEES OF THE LETHBRIDGE NORTHERN IRRIGATION DISTRICT (DEFENDANT) ..... } APPELLANT;

AND

HENRY FREDERICK MAUNSELL AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

1926
*May 11.
*Oct. 5.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

*Irrigation—Seepage—Flooding of land in vicinity—Liability of irrigation district board—Irrigation Districts Act, Alta. (R.S.A., 1922, c. 114)—Irrigation Act (R.S.C. 1906, c. 61)—Railway Act (D. 1919, c. 68; R.S.C. 1906, c. 37).*

Defendant, a body corporate by virtue of *The Irrigation Districts Act*, Alta. (R.S.A. 1922, c. 114), and administering an irrigation district formed under that Act, applied under *The Irrigation Act* (R.S.C., 1906, c. 61, and amendments) for the water required and for authority to construct the necessary works for utilization thereof, and, having obtained this authority, constructed and maintained a main irrigation canal. At some point of the canal, not discovered, a seepage occurred, and by underground channels the water found its way to and flooded plaintiffs' ranch (which was not contiguous to the canal). Plaintiffs sued for damages.

*Held,* having regard to the provisions of *The Irrigation Act*, and of *The Railway Act* thereby made applicable, the defendant could not justify its flooding of plaintiffs' lands without compensation by claiming to have merely exercised its statutory rights without negligence; by the flooding the defendant had interfered with plaintiffs' rights over their lands, had exercised in respect thereof a veritable easement, which, as well as the right of interference, it could acquire only by following the course prescribed under *The Railway Act*, viz., a notice to treat and expropriation proceedings with the payment of proper compensation; no notice to treat having been given the defendant was in the position of a trespasser; the principle relied on in *Hanley* v. *Toronto, Hamilton & Buffalo Ry. Co.*, (11 Ont. L.R., 91), should be applied, and plaintiffs were entitled to recover damages in an action at law; they were not restricted to having the damages determined by arbitration under *The Railway Act;* it was for defendant to initiate proceedings thereunder. The damages awarded were restricted to

*PRESENT:—Anglin C.J.C. and Idington, Mignault, Newcombe and Rinfret JJ.

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those accrued at the date of the trial, reserving the right to claim subsequent damages if the seepage continued.

Idington J., dissenting, held that, defendant having acted under statutory powers, its duty as water supplier having become imperative, and not being guilty of negligence, it was under no duty to do more than it did, and was not liable to plaintiffs; further grounds against plaintiffs' right to recover were: their failure to pursue the course provided by s. 41 of *The Irrigation Act;* their rejection of defendant's engineer's suggestion of drainage of their land, which would have mitigated the damage; and doubt, on the evidence, whether the water which damaged plaintiffs' land was from the canal.

Judgment of the Appellate Division of the Supreme Court of Alberta (21 Alta. L.R. 449) aff., Idington J. dissenting.

APPEAL and cross-appeal from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which set aside in part the judgment of Tweedie J. (2).

The action was for damages caused by the alleged flooding of plaintiffs' lands by water escaping from the defendant's irrigation canal. The material facts of the case are sufficiently stated in the judgments now reported.

At the trial Tweedie J. awarded the plaintiffs $7,500 damages (2). The Appellate Division set aside this judgment in part, and held the plaintiffs entitled to recover for injury caused up to the time of the trial, with the right to seek further relief for injuries as they occur, and assessed the injury up to the time of the trial at $300, with the option to either party to have a reference at risk of costs of the reference.

Under special leave granted by the Appellate Division, the defendant appealed to the Supreme Court of Canada from so much of the said judgment as declared that the plaintiffs were entitled to recover any sum against the defendant for injury sustained by them; and the plaintiffs cross-appealed, claiming that their damages should be assessed at the trial once and for all at $7,500 with costs, as fixed by the trial judge, and in the alternative that the damages be assessed up to the date of the judgment in this appeal and an injunction granted restraining defendant from committing further damages or injury to plaintiffs' lands.

*W. S. Gray* and *J. J. Frawley* for the appellant.

*R. B. Bennett K.C.* and *J. D. Matheson* for the respondent.

(1) 21 Alta. L.R. 449; [1925] 3 W.W.R. 202.

(2) [1925] 1 W.W.R. 1047.

The judgment of the majority of the court (Anglin C.J.C. and Mignault, Newcombe and Rinfret JJ.) was delivered by

MIGNAULT J.—The appellant is a body corporate by virtue of a provincial statute, *The Irrigation Districts Act*, c. 114 of the Revised Statutes of Alberta, 1922. It administers an irrigation district formed under that Act, and as therein provided (s. 35), it applied to the proper authorities under the Dominion Statute, *The Irrigation Act*, c. 61 of the Revised Statutes of Canada, 1906, and amendments, for the water required for the irrigation of the district and for authority to construct the necessary works for the utilization of the water. Having obtained this authority, it constructed and it now maintains a main irrigation canal, or ditch, as it is sometimes called, the head-gates of which are on the Old Man River. Thence the water is carried in the main canal, which is some thirty feet wide at the bottom, and it crosses the river at a distance of about three miles from the head-gates, through a flume. From the flume, the course of the main canal is in a northerly direction, passing at a distance of some 4,000 feet from the respondents' ranch, which is not contiguous to the canal. This ranch occupies some bench lands leading to what is called a cut-bank, where the ground descends by a steep slope to a lower level, on which the respondents' house and buildings are situated. This cut-bank is emphasized as affording shelter to the cattle, and at its foot was a spring that was convenient for furnishing water.

The appellant's canal in the vicinity of the respondents' ranch is constructed through gravel lands, the gravel increasing somewhat in coarseness the further down the excavation goes. When the canal is full, the water is seven feet deep, and it appears to have been anticipated by the builders that there might be some loss of water through seepage on account of the character of the soil.

Water was first turned into the canal in May, 1923. Then a freshet came and caused damage to the works, and the water was withdrawn. It was again let into the canal in the following October. At some point of the canal which has not yet been discovered, a seepage took place, and by underground channels the water found its way to the re-

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spondents' ranch. This flow was first noticed at the spring, the discharge from which greatly increased, and I think it is unquestionable, and both courts have so found, that the respondents' land has been damaged thereby. The learned trial judge granted the respondents $7,500, as damages, assessed, I take it, for all time on the basis of a permanent depreciation of the property. The Appellate Divisional Court considered that no more than $300 should be allowed for damage caused up to the trial, but gave the parties, at their risk, the right to apply for a reference to show, if such be the case, whether the damages up to the trial were greater or less than that amount. Harvey C.J.A. and Hyndman J.A., dissented, and would have dismissed the action on the ground that the board of trustees had merely exercised without negligence its statutory rights, and was not responsible for damage caused thereby.

There is an appeal from the latter judgment by the appellant which relies on the grounds of dissent in the court below to ask for the dismissal of the respondents' action. The respondents also cross-appeal and seek to have the judgment at the trial restored.

*The Irrigation Act* (ss. 28 and following) confers expropriation powers on applicants for a license for water and for power to construct irrigation works such as this appellant, making *The Railway Act* applicable thereto, and subs. (2) of s. 29 states that all the provisions of *The Railway Act* which are applicable shall in like manner apply to fixing the amount of and the payment of compensation for damages to lands arising out of the construction or maintenance of the works of the applicant or out of the exercise of any of the powers granted to him under this Act.

Section 164 of *The Railway Act, 1919,* is a familiar provision, which has often been considered by the Canadian courts and by the Judicial Committee of the Privy Council. It enacts that the company shall, in the exercise of the powers by this or the Special Act granted, do as little damage as possible, and shall make full compensation in the manner herein and in the Special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise of such powers.

In the view I take of this case it will not be necessary to determine whether or not the appellant was guilty of

any negligence in carrying out its statutory duty to supply water for irrigation purposes, as required by the provincial and federal statutes to which I have referred. Even assuming that there was no negligence, it does not follow, in my judgment, that the appellant can justify its flooding of the respondents' lands without compensation, by claiming to have merely exercised its statutory rights without negligence. The respondents' case, in my judgment, calls for the application of other principles. By flooding their lands, the appellant has interfered with the respondents' rights over their lands, and has exercised in respect of these lands what is a veritable easement, and this easement, as well as this right of interference, it could acquire only by following the course prescribed under *The Railway Act*, viz., a notice to treat and expropriation proceedings with the payment of proper compensation.

No notice to treat was ever given to the respondents, and the appellant, in flooding their lands, is in the position of a trespasser. To such a case I would apply the principle relied on by my brother Anglin in *Hanley* v. *The Toronto, Hamilton and Buffalo Ry. Co.* (1). To the same effect as the *Hanley Case* (1), and as showing the illegality of an entry on land without notice to treat, I might refer to the decision of the English Court of Appeal in *Cardwell* v. *The Midland Railway Co.* (2), affirming the judgment of Byrne J. at the trial (3). See also the decision of this court in *Leahy* v. *Town of North Sydney* (4), and the judgment of the Judicial Committee in *Saunby* v. *Water Commissioners of London* (5). The general principle governing such cases is stated by Lord Macnaghten in *Parkdale* v. *West* (6).

I am in accord, for the reasons given by Mr. Justice Clarke, with the decision of the Appellate Divisional Court, restricting the damages which should be awarded to the respondents to the damages which had accrued at the date of the trial, reserving the right of the respondents to claim subsequent damages if the seepage continues, and it may in time cease. This is supported by the decision of this court in *Gale* v. *Bureau* (7).

(1) (1905) 11 Ont. L.R. 91.
(2) (1904) 21 T.L.R. 22.
(3) 20 T.L.R. 364.
(4) (1906) 37 Can. S.C.R. 464.
(5) [1906] A.C. 110.
(6) (1887) 12 App. Cas. 602.
(7) (1911) 44 Can. S.C.R. 305.

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I do not think, under the circumstances, that the respondents have no recourse by action at law for their damages but are restricted to having these damages determined by arbitration under *The Railway Act*. It was for the appellant to initiate proceedings under this Act, and then a case would have been established for an arbitration. The appellant should not now be allowed to make this objection.

For these reasons, I would dismiss the appeal and cross-appeal with costs.

IDINGTON J. (dissenting).—The defendant is a body corporate formed under the provisions of *The Irrigation Districts Act* (R.S.A., 1922, c. 114), of which Act section 11 is as follows:—

> 11. The Board of every District formed hereunder shall be a body corporate, and shall have full power to acquire, hold and alienate water rights and all other powers and privileges under *The Irrigation Act* and to take, hold and alienate any property real or personal and shall, subject to the provisions of this Act, have all the powers necessary for the construction, working, maintenance and renewal of irrigation or drainage works necessary for the use and purposes of the district and the inhabitants thereof.

"The Irrigation Act" referred to in the above section is the Dominion Act, being R.S.C., 1906, c. 61.

The appellant filed a memorial with the Commissioner of Irrigation under the provisions of the *Irrigation Act*, asking permission to divert water from the Old Man river.

An authorization to construct the works was granted, but the memorial was amended and a new authorization to construct was issued on November 24, 1920.

The appellant acting upon such authority and the powers given it by the said *Irrigation Districts Act*, proceeded to construct a canal of about forty miles in length designed to distribute water on to the lands of water users within said district containing a hundred thousand acres or more.

The respondents own, outside of same, a ranch of about two thousand acres, the point of which nearest to said canal is some four thousand feet distant therefrom. Said ranch is chiefly on the flat land bordering the Old Man river and about seventy-five feet below the bottom level of said canal.

The said canal was constructed with such great care that the learned trial judge who heard the case out of which

this appeal arises, and all others judicially concerned in the court of appeal below, have held that there was no negligence on the part of those concerned in said construction.

It was finished so far that appellant was given, after due inspection, by duly constituted authority, of said work, a permit by the Minister of the Interior, dated the 15th of May, 1923, to divert from the said Old Man river, a specified quantity of water for use in the works so constructed, and it was turned on accordingly.

An unprecedented flood in the Old Man river about same time did such damage to the head-gates of said canal that no further water was turned on until the following October, 1923.

The suggestion was made by Mr. Houston (an engineer who had much to do with inspecting this work and passing upon the same), in the course of his evidence, if I understand him aright, that said rising may have so disturbed things as to be the cause of the seepage now in question herein.

I pass that meantime to continue the story of these proceedings.

The respondents' ranch suffered what may have arisen therefrom, but the turning on of the water in October into said canal, to serve its uses, and in the following spring again, for same purpose (it having been dry during the winter), were respectively, about three weeks thereafter, followed by a rising in a spring or well on the respondents' ranch, and the plaintiffs, now respondents herein, claim that that soaked into the adjacent ground making part of it boggy.

Thereafter, on the 30th October, 1924, respondents brought this action, claiming damages arising solely from said seepage, which was tried before Mr. Justice Tweedie, who held that the appellant had not been negligent in the construction of the said canal, or in turning on the water at first, but that when, as the evidence shewed, according to his finding, seepage from the canal had repeatedly shewn it was doing damage, the appellant had been negligent in not remedying the evil, and he entered a judgment for $7,500.

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This evidently was founded upon the pretension of the respondents that the selling value of the land was affected by reason of the existence of said seepage.

On appeal to the Appellate Division of the Supreme Court of Alberta there seems to have been a diversity of view.

The learned Chief Justice, with whom Mr. Justice Hyndman concurred, held that under the principles laid down by Lord Watson in the judgment of the Judicial Committee of the Privy Council, in the case of the *Canadian Pacific Ry. Co.* v. *Parke et al* (1), from which he quotes from page 547 of the report, as follows:—

> The real question, therefore, in this case comes to be, whether these provisions ought to be construed as being in their substance, as well as in their form, permissive merely, and subject to the obligation, which in that case is implied at common law, that the irrigator must use his water supply so as not to do damage to adjacent lands; or, whether they are to be construed as imperative, and therefore as empowering the irrigator, so long as he is not convicted of negligence, to inflict any amount of injury upon his neighbour without incurring responsibility.

and then he points out the legal results and infers as follows:

> He considered that that case was within the first class: for he states in the following page:—
>
> "When the water has been conveyed to his land he is authorized to use it for purposes of irrigation; but it is left to his discretion to determine whether, as circumstances permit, he will use in irrigation the whole, or part, or none of it."
>
> In other words Parke was treated as a water user merely, not as a water supplier which the defendant in this case is under provisions which, as stated, clearly make it imperative that it shall carry the water through its ditch.

He held that it was on the evidence impossible to remove the possibility of any seepage, by any reasonable effort, or in law to stop the work, and quotes Brett M.R., in the case of *Heaven* v. *Pender* (2), where he gives the definition of actionable negligence, as follows:—

> The neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property.

Mr. Justice Hyndman in his concurring judgment cites as appropriate law the following, to be found in the judg-

(1) [1899] A.C. 535.

(2) (1883) 11 Q.B.D. 503, at p. 507.

ment of Lord Hatherly in *Geddis* v. *Proprietors of the Bann Reservoir* (1).

In referring to the case of *Cracknell v. The Mayor and Corporation of Thetford* (2), he says:—

"In that case, which has been followed by several others, it seems to have been laid down that persons having powers to execute certain works, and executing those works in such a manner as to perform that duty in compliance with an Act of Parliament, and being utterly guiltless of any negligence, cannot be liable to an action. If the person injuriously affected cannot find any clause in the Act of Parliament, giving him compensation for the damage which he has received, he cannot obtain compensation for that damage by way of action against the parties who have done no wrong. That is the simple proposition which is laid down in that case, and when it is expressed in those terms it is impossible for anybody to find any fault with it."

The line of thought thus expressed and verified by said quotations is what (with many other authorities, I am about to refer to, and rely upon) convinces me I must agree therewith.

Meantime I may point out that whilst so agreeing with the dissenting judges below, yet that the view the majority of said court took, if damages are to be assessed at all, they can only be damages up to the time of the bringing of the action, and that in such an action as this, if at all maintainable, it can be brought repeatedly and no means exist in the law whereby any such action can be made the ground of assessing damages as if upon the basis of an expropriation.

Moreover the respondents were in duty bound, if any such action is maintainable at all, to have taken such steps as would have mitigated their damages; yet when drainage was suggested to them by a competent engineer acting for appellant, the respondents seemed to scorn it.

It is clear to me as noon-day that drainage of said land, to relieve it of any damage flowing from said water, was the course the respondents should have followed, and especially so when suggested by a competent engineer acting for the appellant.

It would only have cost, according to the evidence of said engineer, about nine hundred to a thousand dollars, or, according to that of another engineer, perhaps up to

(1) (1878) 3 App. Cas. 430, at p. 448.

(2) (1869) L.R. 4 C.P. 629.

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twelve hundred dollars; and, then, if done, I submit, probably would have added a large portion thereof to the previous value of the ranch, of which the land so treated formed a part. The evidence was not directed further to that consideration.

People acting in such a way, in such remarkable circumstances as in evidence herein, are not entitled to much straining of the law to help them out.

Before considering further that aspect of this case I desire to revert to a further consideration of the law bearing on that aspect of the case presented by the Chief Justice and Mr. Justice Hyndman set forth above.

The case of *Hammersmith and City Railway Company* v. *Brand* (1), long ago decided by the highest authority in England, that any such nuisances as might have arisen from the operation of said railway, in the way of noise, smoke or vibration of the dwellings on the respondent Brand's land, and no matter how seriously the value of his property, adjacent to the said railway, had been impaired thereby, gave him no right to damages unless part of his land had been taken.

That was a decision under the English *Railway Clauses Consolidation Act* of 1845, but followed by this court in the case of the *Canadian Northern Ontario Railway Company* v. *Holditch* (2), in an appeal from an appellate division of the Supreme Court of Ontario. Again on an appeal by Holditch from that decision by this court, to the Judicial Committee of the Privy Council (3), and that appeal was dismissed. The judgment of Lord Sumner, writing on behalf of said court, contains the following passage (cited by appellant's counsel herein) on page 544 of said report:

> The claim for depreciation by the prospective annoyance from noise, smoke and vibration was put thus: Sect. 155 of the Railway Act of Canada requires the company to "make full compensation * * * to all persons interested for all damage by them sustained by reason of the exercise of" the powers granted to them by this or by their special Act, and ss. 191 and 193 use language which draws a distinction between compensation for land taken and for damage suffered from the exercise of any of the powers granted for the railway. It was argued that the interference with convenient access to some of the lots by reason of the line being taken across the streets and the annoyance to be expected from

(1) (1868) L.R., 4 H.L. 171. (2) (1914) 50 Can. S.C.R. 265.
(3) [1916] 1 A.C. 536.

the noise, smoke and vibration of passing trains alike constituted damage suffered from the exercise of the powers granted for the railway.

Their Lordships are unable to adopt this view. The substantive obligation upon the railway company to make compensation is derived from s. 155, and the other two sections are only concerned with the procedure by which this obligation is to be enforced. The language of s. 155 is taken, with modifications to which in this case no importance can be attached, from the proviso to s. 16 of the Railways Clauses Consolidation Act, 1845, and it is well settled by decisions of the highest authority that land so taken "cannot by its mere use, as distinguished from the construction of works upon it, give rise to a claim for compensation." The decisions on this construction of the Railways Clauses Consolidation Act have been applied to the Canadian legislation many years ago.

The important feature of this is that it removes from doubt the distinction attempted therein between that case and the *Hammersmith Case* (1) above cited arising from the facts and wording of the Canadian *Railway Act* when compared with the English Act on which that case turned.

There would seem to have arisen considerable diversity of judicial opinion in the course of that *Holditch Case* (2) through our Canadian courts.

Holditch had subdivided a block of land he owned in Sudbury and filed in the registry office a plan thereof. The railway company expropriated certain of these lots as it was entitled to do, and on a reference to arbitration to determine the compensation he was entitled to, he contended, sometimes successfully, that he was entitled to damages for injury done other lots he owned in said subdivision by reason either of the railway crossing the street leading to such other lots rendering them less accessible—hence less marketable; or of the smoke, noise and vibration incidental to the use of the railway when constructed.

The damage done to Holditch's lands, then in question, I suspect, was much more serious than anything suffered by the respondents herein.

But there, as herein, no part of the lands which Holditch had subdivided, except the lots therein so expropriated, had been expropriated. Hence the basis of the litigation.

I submit that the Canadian railway statute in question therein was the same as that upon which the respondents herein rest their claim for compensation. And in face of said decisions I cannot see how it can be maintained that

(1) (1868) L. R. 4 H.L. 171. (2) (1914) 50 Can. S.C.R. 265.

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there is any foundation for the respondents to rest their claim herein upon.

Their main pretension seems to have been throughout, that the *Railway Act* impliedly gave such rights as they claim because the *Irrigation Act,* R.S.C., 1906, c. 61, s. 29, subs. (2), reads as follows:—

> 2. All the provisions of the Railway Act which are applicable shall in like manner apply to fixing the amount of and the payment of compensation for damages to lands arising out of the construction or maintenance of the works of the applicant or out of the exercise of any of the powers granted to him under this Act.

and, it is claimed, gives such a claim. I submit it clearly does not do so, if we have regard to the relevant facts and the law as declared in the cases cited above.

Section 164 of *The Railway Act, 1919,* also put forward, is identically the same as section 155 of the *Railway Act* as it stood when Lord Sumner wrote the judgment in the *Holditch Case* (1), containing the above quotation therefrom, and the sections 191 and 193 to which he refers have been only so slightly modified in *The Railway Act, 1919,* as not to interfere with his said reasons above quoted.

But it is the *Railway Act,* R.S.C., 1906, c. 37, which I submit must be referred to, as I cannot find that the *Irrigation Act* which appeared in the same revision and by sections 28 and 29 *et seq.,* thereof, under the caption *Expropriation,* which tries to apply the *Railway Act* to solving such questions, has not been, since said revision, changed in this regard. And hence Lord Sumner's judgment, as quoted, proceeds on the express language in question herein.

I desire to refer to the case of *The London, Brighton, and South Coast Ry. Co.* v. *Truman et al* (2), which turned upon the Railway Act which provided for railways carrying cattle and purchasing lands wherein to provide conveniences for loading them and keeping in store until loaded, but failed to provide any compensation for those suffering damages by reason of such a nuisance. It was held therein that the respondents therein who had complained, had no alternative but to submit thereto without any compensation therefor.

(1) [1916] 1 A.C. 536. (2) (1885) 11 App. Cas. 45.

Lord Selborne in giving judgment (1), says at p. 57:—

Here there can be no question that the legislature has authorized acts to be done for the necessary and ordinary purposes of the railway traffic (e.g., such as those complained of in *Rex v. Pease* (2) ), which would be nuisances at common law, but which being so authorized are not actionable.

Lord Blackburn in his judgment, at page 60, says:—

I do not think there can be any doubt that if on the true construction of a statute it appears to be the intention of the legislature that powers should be exercised, the proper exercise of which may occasion a nuisance to the owners of neighbouring land, and that this should be free from liability to an action for damages, or an injunction to prevent the continued proper exercise of these powers, effect must be given to the intention of the legislature.

Again in the case of *Mayor and Councillors of East Fremantle* v. *Annois* (3), where

The appellant municipality, in the exercise of authority conferred by the Western Australian Municipal Institutions Act (59 Vict., No. 10), s. 109 and at the request of the ratepayers, in order to improve a street reduced the gradient opposite the respondent's house so that it was left on the edge of a cutting with a drop of about six or eight feet to the road:—

*Held,* that the respondent was without remedy, since none had been given by statute, and the appellants had not exceeded the powers conferred.

Therein Lord Macnaghten, at page 217, says as follows:—

The law has been settled for the last hundred 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 authorized 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.

The case of the *Canadian Pacific Railway Company* v. *Roy* (4), in some respects presents a case more like unto this than any other for undoubtedly upon the facts presented, the fire originated from a locomotive of the railway company, passing the land in question, and destroyed more property than in question herein.

It ultimately turned upon the question of negligence and the question of negligence was negatived, and hence Roy had no remedy.

(1) (1885) 11 App. Cas. 45.
(2) (1832) 4 B. & Ad. 30.
(3) [1902] A.C. 213.
(4) [1902] A.C. 220.

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The Lord Chancellor, at page 229 of the Report, spoke as follows:—

> If the immunity claimed for the appellants were simply claimed upon the ground that they were a corporation without reference to what they are authorized to do in that capacity, the argument would be well founded; but the fallacy of the suggestion lies in supposing that that immunity is claimed because they are a corporation. If it were so, there would be no difference between the law of England and the law as so expounded in the province of Quebec; but the ground upon which the immunity of a railway company for injury caused by the normal use of their line is based is that the legislature, which is supreme, has authorized the particular thing so done in the place and by the means contemplated by the legislature, and that cannot constitute an actionable wrong in England any more than it can constitute a fault by the Quebec Code.

Apply that to this case, where a canal duly authorized by those having an absolute right to do so, and upon the material which it required, and was duly presented in compliance therewith, and the canal was constructed accordingly without negligence, and the water turned on after due inspection thereof, and permission given, and no negligence to be found up to that time, how can negligence be imputed by reason of such a very remarkable discovery as that alleged to have been made herein? I fail to see any ground therefor. There is no ground for the appellant refusing to carry on by reason thereof. The cost of protecting the respondent now is quite prohibitive according to the evidence. It is a corporation created for municipal purposes only, in a country that needs the supply of water for irrigation.

The duty has become imperative by virtue of the legislation of its creator, and that must be observed. And thus what is complained of falls within the definition of Lord Watson in disposing of the *Parke Case* (1) above referred to. And all the authorities recognize that when that has transpired, there is no ground for relief in the case of unexpected developments which the legislature must have decided not to recognize.

There is another feature of the legislation, bearing upon the questions arising herein, I may advert to.

It was decided by this court in the case of *Canadian Pacific Railway Company* v. *Albin* (2), that even where the property was in a sense damaged by improvements the

(1) [1899] A.C. 535. (2) (1919) 59 Can. S.C.R. 151.

railway needed, and the injury done to it as a place of business was such that it had to be abandoned, the arbitrator allowed $6,366 for injury to the property, and the injury being such as to destroy the business, he allowed $4,500 therefor, and this court, reversing that and the court below, held that the latter loss could not be compensated for. I dissented, but that binds me now. How can I hold respondents entitled in a much less meritorious case.

Especially so when there is nothing expressly provided by the legislature, for any compensation for any damages for anything arising after the continued operation of the work has become imperative.

The nature of the appellant's incorporation is, in a legal sense, the same as if it had been declared part of the municipal system of the province of Alberta, for the promotion of the interests of that province, and the duties cast upon appellant are purely of that nature and in no way for financial gain to appellant directly or indirectly.

A distinction has been often made, between such a body and other corporate bodies created solely with a view to financial gain, when it comes to determining whether or not the legislature had definitely decided that under such like relevant circumstances, there could not be any claim for damages, although, in similar circumstances, a private corporation solely for gain, might be held liable.

In the one case the legislature can hardly have intended to declare that a tort, which was done under the direction of certain public officers, specified in the legislation, and in strict compliance therewith, without any negligence.

In the converse case of a private corporation which I thus point out, a different construction might be put.

The appellant's counsel properly drew our attention to the fact that it is subject to the control of the Irrigation Council constituted under *The Irrigation Districts Act,* section 34, of which the relevant parts are as follows:—

34. (1) There shall be an irrigation council of three members, or any less number, whose duty it shall be to advise every board upon the conduct of the affairs of its district and who may forbid any act or course of conduct proposed to be done or entered upon by a board.

(2) The member or members constituting the council shall be appointed by the Lieutenant Governor in Council.

(3) No money received by any board upon debenture issue shall be expended at any time without the prior approval of the council.

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(4) The council shall be entitled at all times to require from any board all such information as it may be in its power to give, with respect to anything done or proposed to be done by it.

* * * *

(8) No construction of any work shall be directed or begun and no contract for the construction of any work, entered into by any board, shall be of any effect whatsoever until the same shall have received the assent of the council.

And he cites in that connection the *Corporation of Raleigh* v. *Williams and Another* (1), and quotes from the judgment of Lord Macnaghton at page 550 of said case as follows:

> It was argued on behalf of the respondents that if a drainage work constructed under a by-law duly passed turns out in the result not to answer its purpose by reason of the insufficiency of the outlet, or by reason of some other defect which a competent engineer ought to have foreseen and guarded against, or if the result of a drainage work is to damage a person's land by throwing water upon it which would not otherwise have come there—that is actionable negligence on the part of the municipality. This argument in their Lordships' opinion is wholly untenable. On the other hand their Lordships do not agree with the argument of the appellants that municipalities are helpless instruments in the hands of the engineers they employ. They cannot indeed modify the engineer's plan themselves. That is no part of their business. But they may return the plan for amendment if they think that it is not desirable in the shape submitted to them. If, however, acting in good faith, they accept the engineer's plan and carry it out, persons whose property may be injuriously affected by the construction of the drainage work must seek their remedy in the manner prescribed by the statute.

I accept that from such an eminent judge and great lawyer as an absolutely accurate statement of the law and, I may add thereto that it is quite clear when there is no express and definite provision of such a remedy that none exists, and the legislature never intended there should be any.

In the case last mentioned there happened to be a definite remedy applicable in the municipal law governing the drainage there involved.

The parties, plaintiff therein concerned, had sought the same sort of relief as the respondents had tried on herein, but were told by the court above that they had erred in doing so and must begin *de novo*.

There is another aspect of the law relevant herein, and that is the provision of the *Irrigation Act*, R.S.C., 1906, c. 61, s. 41, as follows:

(1) [1893] A.C. 540.

41. Should any person residing on or owning land in the neighbourhood of any works, either completed or in course of construction, apply to the Minister in writing for an inspection of such works, the Minister may order an inspection thereof.

2. The Minister may require the person so applying to make a deposit of such sum of money as the Minister thinks necessary to pay the expenses of an inspection, and in case the application appears to him not to have been justified, may cause the whole or part of the expenses to be paid out of such deposit.

3. In case the application appears to the Minister to have been justified, he may order the applicant for a licence or the licensee to pay the whole or any part of the expenses of the inspection, and such payment may be enforced as a debt due to the Crown.

4. Upon any inspection under the provisions of this section the Minister may order such applicant or licensee to make any addition or alteration which he considers necessary for their security to or in any works of the applicant or licensee, and if the applicant or licensee fails to obey to that effect, reciting all the facts and, in the province of Saskatchewan or Alberta, the judge of the Supreme Court of the Northwest Territories for the judicial district in which such works lie pending the abolition of that court by the legislature of the province, and thereafter any judge of such superior court as in respect of civil jurisdiction is established by the legislature of the province in lieu thereof, and, in the Northwest Territories, a stipendiary magistrate having jurisdiction in the district or place where such works lie, upon the production of such certificate, shall hear and determine the matter in a summary manner and shall order the applicant or licensee to proceed with all despatch to take such measures as the judge or magistrate considers necessary in the premises; and the refusal or neglect to obey any order made by a judge or magistrate under this section may be treated and punished as contempt of court, and such other proceedings may be had and taken thereon as in the case of non-compliance with any other mandatory order of the said court or a judge thereof.

5. This section shall not apply to cases where the Minister waives the filing of plans.

The last subsection has no application for there was no such waiver, but the rest of the said section may well have.

The respondents never pursued that course and I submit that is another good reason in law why they ought not to succeed herein.

I am, as result of reading the evidence relevant to the question of negligence on the part of the appellant, most decidedly of the opinion that there was no negligence on their part of which the respondents can complain.

Had the ground underneath the said canal been composed, as respondents' declaration sets forth, entirely of gravel or loose stones, there would have been no trouble for the water would have sunk pretty straightly down

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through same for at least seventy-five feet, and never have travelled the four-fifths of a mile sideways to reach the respondents' ranch.

If the seepage in question came from the canal it clearly was by reason of its meeting an expansion of rock or other material impervious to water.

I must repeat the doubts I above expressed as to the water from the canal being that which got into the well or spring on the respondents' ranch, but will not labour that question. No one can tell absolutely for the engineers testify that under any ordinary circumstances it would take much longer than three weeks to travel the four-fifths of a mile sideways.

I fail to see any analogy, in fact or in the relevant law, between this case and either the case of the *Corporation of Parkdale* v. *West* (1), or *North Shore Railway Company* v. *Pion et al* (2).

The injury done to those respectively complaining in each of said cases seems to me to have been so flagrant that I cannot understand how those respectively responsible proceeded as they did by ignoring the law and failing to take the steps required of each respectively, by the several particular statutes in question in each of said cases.

In this case, now in hand, appellant was confronted with nothing it could have invoked to justify an appeal to any authority to expropriate or pass upon its property in any way save as in the way it did, by watching and so puddling with material parts possibly porous. And that is abundant reason for the dismissal of this action.

I am, for the many reasons assigned by me in the entire foregoing, clearly of the opinion that the respondents never had any cause of action in law against the appellant, and that the appeal by it herein should be allowed and the action of the respondents dismissed with costs throughout, and that the respondents' cross-appeal herein should be dismissed with costs.

*Appeal and cross-appeal dismissed with costs.*

Solicitors for the appellant: *Shepherd, Dunlop and Rice.*

Solicitor for the respondents: *Joseph D. Matheson.*

(1) (1887) 12 App. Cas. 602. (2) (1889) 14 App. Cas. 612.