Judgment of the Judicial Committee of the Privy Council on the Appeal of the Corporation of Raleigh v. *S. A. Williams and another, from the Supreme Court of Canada; delivered 3rd August* 1893.

Present:

The EARL OF SELBORNE.
LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The Respondents who were Plaintiffs in the action sued the municipality of the Township of Raleigh claiming damages for injury caused by flooding to certain lands in the occupation of the Respondent Sarah Ann Williams and also asking for a mandamus to prevent recurrence of the injury.

The municipality pleaded various defences and among others they took the objection that the Plaintiffs ought to have proceeded by arbitration and not by action.

Without determining this point the learned Judge of First Instance by consent of the parties referred the action and the matters in dispute to Mr. Bell the Judge of the County Court of the County of Kent. Mr. Bell heard evidence at considerable length and viewed the premises on two occasions. He made a careful and elaborate report and determined the action in favour of

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the Plaintiffs. Their Lordships may observe in passing that there is nothing in the terms of reference or in the reference itself to preclude the municipality from relying upon any of the defences which they raised in their pleadings.

Motions were made on the one side to vary and on the other to confirm the Report. On the 4th of September 1890 Mr. Justice Ferguson confirmed the findings of fact of the Referee and gave judgment in favour of the Plaintiffs for $850 the amount found by the Referee and awarded a mandamus which was not however to issue until further order on a subsequent application.

From this Judgment the municipality appealed. On the 30th of June 1891 the Court of Appeal unanimously reversed the decision of Mr. Justice Ferguson and dismissed the action. The Plaintiffs then appealed to the Supreme Court who on the 28th of June 1892 allowed the Appeal with costs and restored the Judgment of Mr. Justice Ferguson except so far as it awarded a mandamus. As regards this part of the relief sought by the action the view of the Supreme Court in which their Lordships concur was that the Plaintiffs were not in a position to claim a mandamus because they had not given the notice prescribed by the Statute under which they were proceeding.

The municipality obtained special leave to appeal to Her Majesty in Council on the ground that the Appeal involved serious questions of public importance depending on the true construction of the Ontario Statutes relating to the powers and duties of municipalities.

These Statutes have from time to time been re-enacted with amendments. The Municipal Institutions Act of 1873, 36 Vict. c. 48, which itself was a Consolidation Act was followed by

the Consolidated Municipal Act 1883, 46 Vict. c. 18. Then came the Municipal Act of 1887 R. S. O. chap. 184 and that again has been superseded by the Consolidated Municipal Act 1892, 55 Vict. c. 42. For the purposes of this judgment it will be convenient and sufficient to refer to the Act in the Revised Statutes.

For the purposes of this appeal their Lordships are of opinion that the findings of fact of the Referee which have been confirmed by the Supreme Court must be accepted as conclusive.

The lands alleged to have been injured are situated in Raleigh near the River Thames in a low lying district known as the Plains.

The injury of which the Plaintiffs complained was alleged to have been occasioned substantially by two causes (1) the neglect of the municipality in breach of their statutory duty to repair a drain known as Government drain No. 1 and (2) the negligent construction by the Corporation of another drain known as the Bell drain.

It appears to their Lordships that these two matters of complaint give rise to distinct considerations and must be dealt with separately.

Government drain No. 1 was the first drainage work in the district now known as the Township of Raleigh. It was constructed by the Government before the municipality of the township was incorporated. It may be described shortly as a straight cut running from the comparatively high ground bordering on Lake Erie which is the southern boundary of Raleigh to the River Thames which is its northern boundary. The Referee found that it was constructed in the years 1870 to 1873 inclusive along the easterly side of the road allowance between lots 12 and 13 in the Township of Raleigh commencing in the rear of the Lake lots and ending in the River Thames

and lying immediately east of lot No. 12 in the fourth concession (in which lot the Plaintiffs' lands are situated) and he found and reported—

"That as a part of the plan or scheme of said drain the earth taken thereout was to be thrown up (and as a matter of fact was thrown up) on the west side of said drain as an embankment in order thereby to prevent the water from said drain and the water flowing into it from the easterly or south-easterly direction from escaping westward on to the lands of said Plaintiffs and others."

And he found and reported---

"That it was the duty of said Defendants to keep said drain properly cleaned out and free from obstructions and to keep said embankment in a fit and proper condition."

And then after finding and reporting that after the completion of the said drain the Defendants had constructed a number of other drains leading into it and thereby brought down immense quantities of water far beyond its capacity to carry off the Referee found and reported—

"That said drain No. 1 has been allowed and permitted to become and has become and now is through the sixth fifth and that part of the fourth concession lying south of the Grand Trunk Railway badly filled up with earth and silt and badly overgrown with grass and willows and that its capacity has thereby become much diminished and impaired and is not and has not for the past five years been one half of what it was when first completed and that as the result of this condition and overflow of water on to and over Plaintiffs' said lands the damage and injury thereto has been much increased."

The Referee also found and reported—

"That the Defendants have not kept the embankment on the westerly side of said No. 1 drain up to its original height nor have they kept it up to the height that it was after the earth thrown up as aforesaid had become firm and settled and when breaks have been made in the said embankment by the water overflowing as aforesaid the Defendants have permitted these breaks to remain for a long time wholly unrepaired and when repaired they were repaired in an inefficient and inadequate manner and still left lower than the road bed on the north-west or south east of said breaks thereby enabling or permitting water to escape on to and to flow over the Plaintiffs' said land and damage and injure the crops thereon that would otherwise have been carried down No. 1 drain to the River Thames.

The Municipal Act in express terms imposes upon every municipality the duty of preserving

maintaining and keeping in repair drainage works within its own limits and that whether the drainage work is a work constructed by the Municipality or a work constructed by the Government before the municipality was incorporated (Sections 583, 586, 587, 589). Sub-section 3 of Section 583 declares that the deepening extending or widening of a drain in order to enable it to carry off the water it was originally designed to carry off is to be deemed to be a work of preservation maintenance or keeping in repair within the meaning of the Section. Section 583 seems to apply when the drainage work is carried into or benefits lands in two or more municipalities. Section 586 seems to apply where the work and the lands benefited are within the limits of one and the same municipality as is the case in the present instance.

It was not disputed and their Lordships see no reason to doubt having regard to the purview of the Legislature of Ontario in the Municipal Act and the language there employed that an action for damages against the municipality lies at the suit of any person who can show that he has sustained injury from the non-performance of this statutory duty. But it was argued that Sub-section 2 of Section 583 makes a notice in writing a condition precedent to the bringing of an action either for a mandamus or for damages. It was said that the present case falls under Section 583. Their Lordships think that it falls under Section 586. But even so it may be contended that Sub-section 2 of Section 583 must be treated as applying also to Section 586. Their Lordships are disposed to think that this view is probably correct though singularly enough Section 586 repeats Sub-section 3 of Section 583 and does not repeat sub-Section 2.

Sub-section 2 of Section 583 is in these terms:—

"Any such municipality neglecting or refusing so to do upon reasonable notice in writing being given by any person interested therein and who is injuriously affected by such neglect or refusal may be compellable by mandamus to be issued by any Court of competent jurisdiction to make from time to time the necessary repairs to preserve and maintain the same and shall be liable for pecuniary damage to any person who or whose property is affected by reason of such neglect or refusal."

It seems to their Lordships most reasonable that no action should be brought for a mandamus to compel a municipality to execute repairs until after notice in writing has been given to them. But it would be very unreasonable to enact that a municipality is bound to repair all drainage works within its limits and at the same time to say that a municipality is not to be liable for any breach of that statutory duty however gross the breach may be unless previous notice in writing is given. Damage by floods for the most part is sudden and unexpected. A man's property may be entirely ruined before it is possible for him to give any notice to the municipality, and yet if the contention of the Appellants is correct he would be left without remedy; for there is no provision for arbitration in the statute relating to such a case. There are two arbitration clauses in the Municipal Act providing for compensation to lands injuriously affected (Section 483 and Section 591). But Section 483 only applies to damages "necessarily resulting" from the exercise of the municipality's statutory powers. And Section 591 applies to damages alleged to have been done "in the construction of drainage "works or consequent thereon."

It seems to their Lordships that the reference to damages in Sub-section 2 of Section 583 was probably inserted in order to preserve the right of the applicant to damages during the currency

of the notice and the construction of the required repairs and to negative the possible contention that his remedy against the municipality would be exhausted by obtaining a mandamus.

However this may be their Lordships do not think that the language of Sub-section 2 of Section 583 is so clear as to take away the right to bring an action for damages without notice—a right to which a person injured as the Plaintiffs in this case have been injured would *primâ facie* be entitled. So far therefore as relates to the damage occasioned by the overflow which might have been prevented if Government drain No. 1 and its embankment had been preserved maintained and kept in repair their Lordships are of opinion that the Plaintiffs are entitled to maintain the action, and they do not think that this right is prejudiced or affected by the fact that the municipality have poured into Government drain No. 1 excessive quantities of water by means of other drains constructed under by-laws duly passed. It may be and perhaps it ought to be inferred from the Referee's report that there was at times some overflow from the latter cause which even if the drain and embankment had been preserved maintained and kept in repair would not have been prevented. But this in their Lordships' opinion can make no difference as to the duty of the Corporation to keep the drain in such a state as to carry off in relief of the Plaintiffs' land all the water which it was capable of carrying off as originally constructed, nor as to the Plaintiffs' remedy by action for the damage which (as the report expressly finds) was caused by the non-performance of that duty. It is not necessary to determine the question whether the municipality under the circumstances are bound to deepen or widen

Government drain No. 1 in accordance with Sub-section 3 of Section 583.

The case as to the Bell drain stands on a very different footing.

The finding of the Referee as regards the Bell drain is in these words :—

" I do further find and report that by the construction of the Bell drain by the Defendants in the year 1884 and particularly by the construction of an embankment on the westerly side thereof (and I find the construction of the said embankment to have been a part of the plan of said Bell drain) a large body of water was brought down to the drain known as the Raleigh Plains drain that would not otherwise have come there and that the Raleigh Plains drain was thereby overcharged with water and that in time of high water every year for the past five years (except the year 1888) and in some of these years several times in the year the water thus brought down has flowed on to and over the Plaintiffs' land or by raising the general level of the water has caused other waters to flow on to or over the Plaintiffs' said land that would not otherwise have gone there and the Plaintiffs' said land and crops have thereby been injured and damaged every year for the past five years (except the year 1888)."

It appears that the Bell drain was constructed under a by-law duly passed. It was therefore constructed under the statutory powers of the municipality and not the less so because it has in the result injuriously affected the lands of the Plaintiffs. The statute itself clearly contemplates that a drainage work which benefits certain lands may injuriously affect others. For any damage "necessarily resulting" from the exercise of the statutory powers of the municipality (Section 483) and for any damages done to the Plaintiffs' property "in the construction "of drainage works or consequent thereon" (Section 591) the Plaintiffs must seek their remedy by arbitration. So far the action is incompetent.

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.

Their Lordships regret that they are unable to affirm the judgment of the Supreme Court in all respects because they cannot help seeing that the Plaintiffs have been seriously injured by the construction of the Bell drain as well as by the breach of the statutory duty imposed upon the municipality. As far as the evidence goes there is no reason to suppose that the municipality would have been able to cut down the damages if the Respondents had proceeded by arbitration. There is nothing whatever to suggest that the lands of the Plaintiffs have been benefited in the slightest degree by the Bell drain. And although their Lordships are of opinion that the Appellants have not waived their right to insist upon arbitration as regards

the Bell drain they think that the Appellants ought to have insisted upon the question as to the competency of the action being determined before the matters in dispute were referred to the County Court Judge.

In the result their Lordships will humbly advise Her Majesty that the order of the Supreme Court ought to be discharged except as to costs (with which their Lordships do not propose to interfere), and that the order of the Court of Appeal and the judgment of Mr. Justice Ferguson ought also to be discharged, and that it should be referred back to the County Court Judge to determine the amount of damages occasioned by the overflow from Government drain No. 1 and that the action as regards the Bell drain ought to be dismissed without prejudice to to any claim on the part of the Respondents to have the amount of the damages to their property occasioned by the construction of the Bell drain and consequent thereon determined by arbitration and that the further consideration of the action should be reserved.

There will be no costs of this appeal.