Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Alexander Gill v. *T. T. B. Westlake, from the High Court of Justice of the Isle of Man (Staff of Government Division); delivered the* 16*th December*, 1909.

Present at the Hearing :

LORD MACNAGHTEN.

LORD ATKINSON.

LORD COLLINS.

[*Delivered by Lord Macnaghten.*]

This is an Appeal from an Order of the Staff of Government Division of the High Court of Justice of the Isle of Man, dismissing, with costs, the Appellant's traverse or appeal from the verdict of a Special Jury of six on the trial of an action in which the Appellant was Plaintiff and the Respondent Defendant.

The action was brought in the Common Law Division of the High Court to recover compensation for injury alleged to have been caused to houses and land by the withdrawal of lateral support.

At the time of the alleged cause of action the Plaintiff and the Defendant were, as they still are, adjoining landowners in Little Switzerland, in the Borough of Douglas. The land in question is on the side of a hill sloping towards

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the sea at an angle of about 18 degrees. The Plaintiff's property is uppermost. It is separated from the Defendant's property by a public road, called Little Switzerland Road. There are two semi-detached houses on it, which were built in the year 1891, and had not at the date of the action acquired the right to support from adjacent land.

In December, 1905, the Defendant began to excavate the ground at the lowest part or seaward end of his land for the purpose of erecting buildings upon it.

The Plaintiff's complaint was that the Defendant's operations had caused his land to slide or move forward, with the result that the walls of his two houses were cracked and the level of the floors disturbed.

It was not disputed that the Plaintiff's houses were injured in consequence of the Defendant's operations; but the Defendant's case at the trial was that he had done no more than drain his own land. The drainage had no doubt withdrawn subterranean water from the land of the Plaintiff, and there was some evidence to show that the injury complained of was caused by subsidence and not by any sliding or forward movement of the ground.

The trial lasted eleven days. The evidence was conflicting. The learned Deemster who tried the case seems to have summed up very fully and very fairly. With the assent of the learned Counsel on both sides, he took as a guide the proposition of law laid down in the case of *Popplewell* v. *Hodkinson* (L. R. 4 Ex. 248), and he told the jury that, if the contention of the Defendant was correct, and if there was no lateral movement, but only a downward movement resulting from abstraction of subterranean water, the verdict on that part of the case must be for the Defendant.

The jury found for the Defendant on the Plaintiff's claim. There was a counter-claim, on which the jury found for the Plaintiff. From that part of the verdict there was no appeal. But the Plaintiff appealed from the finding in favour of the Defendant.

Two points were made by the Plaintiff. In the first place he demanded as a matter of right under the Appellate Jurisdiction Act, 1867, a re-trial of his claim before a jury of twelve on the testimony given in the Court below without re-calling the witnesses or admitting further evidence. He also contended that, if the Court should be against him on the first point, he was entitled to a new trial on the ground that the verdict was against the weight of evidence.

The Court rejected the Appeal. Separate judgments were given on the two points in debate. On the first the Court held that it was enough to say that the claim for a re-trial, as a matter of right, was contrary to established practice, though no case was forthcoming in which the language of the Act had been discussed or reasons given for the interpretation placed upon it.

On the second point the Court held that the verdict could not be disturbed. The credit to be given to the evidence on behalf of the Defendant was for the jury, and, though the Judges in the Court of Appeal might not have come to the same conclusion, it appeared to them that there was sufficient evidence on which six honest men could come to the conclusion that the damage was caused by subsidence due to the abstraction of water.

On the Appeal before this Board the first point was urged with great force and ability by the learned Counsel for the Appellant, who referred to all the Statutes bearing on the

question, and said that, as the principal Act apparently had never been construed in any Court in the Island, it was desirable that their Lordships should determine its true construction.

At the conclusion of the Appellant's argument on the first point their Lordships intimated that they saw no reason to differ from the Court of Appeal. The second point was then opened but not pressed. Mr. Danckwerts said very properly that, as the evidence was undoubtedly conflicting, he could not hope to succeed if their Lordships thought right to apply the rule laid down in such cases by the highest Courts in this country.

From the earliest days, as long as the House of Keys exercised both judicial and legislative functions, it was the Court of Appeal from all verdicts of juries except during the period between 1777 and 1793, during which an Appeal lay to the Governor in all matters other than those affecting land.

In 1793 the Appellate Jurisdiction of the House of Keys was restored in actions of all kinds. The procedure as to entering traverses or appeals for hearing by the House of Keys and the practice in regard to giving security for the amount of the verdict and costs was afterwards regulated by an Act promulgated in 1847 and an amending Act promulgated in 1850.

On the traverse or appeal being duly entered, the case came before the House of Keys upon the signed depositions of witnesses taken at the trial.

In 1866 the House of Keys ceased to exercise judicial functions. By an Act passed in that year it was enacted that the Appellate Jurisdiction of the House of Keys in all matters triable by jury in the Court of Common Law and in all other matters of Appeal or traverse to the House of Keys should cease and determine.

From the passing of that Act until the Appellate Jurisdiction Act, 1867, there seems to have been no provision for appeals.

By Section 2 of the Act of 1867 provision was made that any person aggrieved by a verdict might, within the time theretofore limited by law for entering traverses, enter a traverse in the Rolls Office, and it was enacted that all provisions contained in the Act of 1847 and the Act of 1850 with respect to traverses or appeals to the House of Keys should be read as applicable to traverses to be entered under the Act of 1867, whether such traverses should be from verdicts in the Court of Common Law or not, and that no traverse should lie otherwise than under the Act from a verdict in any Court which theretofore could have been traversed to the House of Keys.

Section 3 of the Act of 1867, so far as material, is in the following words :—

> 3. Every traverse entered under the provisions of this Act shall be heard by the Court on the petition of either party in the cause or suit, and on the hearing thereof the Court may [except as to the admission or rejection of evidence] review the proceedings at the trial, and determine all matters of law which may have arisen thereat, including any determination or ruling of the Judge who presided at the trial, and the directions given to, or the questions submitted by the Judge for the consideration of the jury; and such determination of the Court shall, subject to the right of appeal as hereinafter mentioned [that is, to His Majesty in Council] be final and conclusive; and should any question of fact, or any question as to amount of damages then remain between the parties, the Court shall, upon the application of the traverser, order a new trial, and such new trial shall be had upon the evidence adduced at the former trial without recalling the witnesses; or may order judgment to be entered for either party as the case may be.

Then follows a provision as to costs and a provision for summoning a jury of twelve and a

direction that nothing therein contained should empower the Court without a new trial or consent of parties to alter a verdict as to the amount of damages or as to the finding of the jury on matters of fact only.

On behalf of the Appellant it was argued that, upon hearing the traverse, the Court could only decide upon questions of law arising at the trial, and that, should any fact or any question as to the amount of damages be in dispute, the Court was bound to order a new trial, to be had upon the evidence adduced on the former trial without recalling the witnesses before a jury of twelve.

Their Lordships are unable to accept this view. They are of opinion that the old law with respect to traverses from verdicts of common law juries was abolished by the Act of 1866, and that the Act of 1867 provided a new mode of procedure, preserving only by re-enactment the old procedure up to the point of entering the traverse, but no further. They are of opinion that, according to the proper construction of Section 3, the Court is entitled to review the proceedings at the trial, both with respect to questions of law and questions of fact except as to the admission or rejection of evidence, and to determine all questions of law, and that, as to questions of fact or questions of damages, subject to the limitations in the first proviso of Section 3, a judicial discretion was given to the Court either to order a new trial or to order judgment to be entered for either party.

No question of law was open to the Appellant on his appeal to the Court of Appeal, as he had not complied with the provisions of Section 5 of the Act of 1867, which forbids the consideration of any questions as to any determination, ruling,

or direction of the Judge at the trial in matter of law, unless the points or questions objected or excepted to be stated in the form of a case in writing agreed to or settled by the Judge and filed at least three days before the hearing of the traverse.

In the result their Lordships are of opinion that the decision of the Court of Appeal on both points was perfectly right and that this Appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The Appellant must pay the costs of the Appeal.

LONDON: Printed for His Majesty's Stationery Office,
By LOVE & MALCOMSON, LTD., Dane Street, High Holborn, W.C.
1909.