a commodity called "Star fruit" and a commodity being an extract of fruit of no stipulated degree of concentration, and which came to be popularly spoken of as "Star trufruit," or "Star fruit extract," there cannot, consistently with the authorities, be said to be such freedom from danger of deception or confusion as to make registration proper. Taking into consideration the nature of the goods, and the nature of the marks, the words of Lord *Blackburn* in *Johnston* v. *Orr Ewing* (1), quoted by Lord *Watson* in *Somerville* v. *Schembri* (2), may fitly be applied. He said :—"Those are differences which might prevent purchasers from being deceived. I do not think they are such as to prevent its being likely that they would be deceived." Therefore, apart from "fruit juices" the appeal should succeed.

If the matter depended on fruit juices, I also should be disposed to accede to the request of the Attorney-General to postpone this case in order to enable his client to apply under sec. 72 to remove the appellants' trade mark from the register in respect of fruit juices for non-user during three years. I decide nothing definite as to any contention respecting the meaning or effect of that section, and, of course, I suggest nothing as to the result of such application. But I would add a word regarding two of Mr. *Starke's* arguments. One was that sec. 51A, where it applies, is a bar to proceedings under sec. 72; and the other was that, even if the application were successful under sec. 72, it would be of no advantage to the respondents in the present appeal. As to those I would say that the very recent case of *Andrew* v. *Kuehnrich* (3) before the Court of Appeal appears to me to make both of these contentions very difficult to maintain.

Appeal allowed. Respondent to pay costs of appeal and costs of opposition before Registrar. Costs to be taxed in this Court.

Solicitors, for the appellants, *Braham & Pirani.*
Solicitor, for the respondents, *F. B. Waters.*

B. L.

(1) 7 App. Cas., 219, at p. 230. (2) 12 App. Cas., 453, at p. 458.
(3) 30 R.P.C., 677.

[HIGH COURT OF AUSTRALIA.

THE MAYOR &c. OF THE CITY OF ESSENDON . . . . . Defendants, } Appellants

AND

McSWEENEY . . . . . Plaintiff, Respondent.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. of A. 1914.

Melbourne, *Feb.* 23, 24; *March* 2.

Griffith C.J., Barton and Isaacs JJ.

Local Government—Negligence—Construction of drain—Exercise of statutory powers—Severance of drainage area—Insufficiency of drain under new conditions—Obstruction of drain—Liability for overflow.

The E. municipal authority, under their statutory powers, without negligence constructed a drain to carry off the surface drainage from a portion of its municipality. The drain when constructed was, so far as was then known, sufficient to carry off all water which might reasonably be expected to flow into it. The greater part of the drainage area was subsequently severed from the E. municipality and added to the M. municipality, and by reason of the building of houses and construction of streets and drains on the severed part the drain became insufficient to carry off all the water discharged into it, but was at all times ample to carry off all the water coming from that part of the drainage area which remained in the E. municipality.

Held, that after the severance the E. municipality was bound to maintain the drain in efficient condition and clear of obstruction so as to allow, to the extent of its capacity only, the flow through it of water coming from the whole of the drainage area, and, while the drain was so maintained, was not liable for damage occasioned by the overflow of water caused by the drain being insufficient to carry off all the water which flowed into it, but was liable for damage attributable to the drain not being maintained in such condition.

Hawthorn Corporation v. *Kannuluik*, (1906) A.C., 105, distinguished.

Decision of the Supreme Court of Victoria (*Hodges* J.): *McSweeney* v. *Mayor &c. of Essendon*, (1913) V.L.R., 111, on this point, varied.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Ellen Monica McSweeney against the Mayor &c. of the City of Essendon, seeking to recover damages in respect of injury caused to her goods and chattels and premises by the overflow of water from a drain constructed by the defendants. The action was heard before *Hodges* J., when the following facts (*inter alia*) were proved :— In 1873 the defendants constructed within their municipal district an underground drain running under a road and through certain land of which the plaintiff in 1905 became the lessee and occupier, to an outlet beyond the plaintiff's land. Into the drain flowed the drainage from an area of between 50 and 60 acres of the defendants' municipal district. 50 acres of this drainage area was in 1882 severed from the defendants' municipal district and included in that of the Borough of Flemington and Kensington, and in 1905 was severed from the Borough of Flemington and Kensington, and included in the City of Melbourne; and only two acres of the drainage area remained in the defendants' municipal district. Between 1905 and 1912 the drain on several occasions overflowed on to the plaintiff's premises, and certain injury was thereby caused to her. Other facts are stated in the judgments hereunder.

Hodges J. found that the drain when constructed was in fact insufficient to carry off the water from the drainage area, but that there was no negligence in its design or construction; that as new roads were constructed and new buildings were erected it became more and more insufficient; and that in March 1910 the outlet of the drain was partially obstructed by refuse, but that, notwithstanding the obstruction, the drain was then sufficient to carry off the water from that portion of the drainage area which remained in the defendants' district. He held that the defendants were liable in respect of the water coming from the whole of the drainage area, and gave judgment for the plaintiff for £100 damages and costs: *McSweeney* v. *Mayor &c. of Essendon* (1).

(1) (1913) V.L.R., 111.

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From this decision the defendants now, by special leave, appealed to the High Court.

Starke (with him *Dethridge*), for the appellants. The case of *Hawthorn Corporation* v. *Kannuluik* (1) is not an authority for the proposition that the appellants as they constructed the drain are liable in respect of any water that is brought into the drain; but only for the proposition that the appellants are liable in respect of water which they themselves bring, or which is brought by their permission, into the drain. All the water which the appellants are responsible for is that which comes from the portion of the drainage area which is still within their municipal area, and it is found that the drain is ample to carry that off. The respondent's remedy in respect of the water which comes from that portion of the drainage area which is now in the City of Melbourne is against that corporation, which had a right to use the drain as it found it, but had no right to increase the quantity of water thrown into it. It is found as a fact that the drain was constructed without negligence, and the fact that it was insufficient to carry off the water which more recent observations show ought to have been expected to flow into it from the drainage area does not alter the extent of the liability of the appellants. There is no evidence that the conditions which existed when the drain was made were altered until the City of Melbourne altered them. The drain having been constructed without negligence, all that could render the appellants liable in respect of it would be a wrongful user by them of it, and none has been shown. The evidence shows that the drain was reasonably sufficient at the time it was constructed.

Hassett (with him *H. I. Cohen*), for the respondent. Assuming that the drain was, according to the then state of knowledge, constructed without negligence, when the drain turned out to be insufficient it was the appellants' duty to rectify what they had done, and not having done so, they are liable: *Geddis* v. *Proprietors of Bann Reservoir* (2); *Metropolitan Asylum District*

(1) (1906) A.C., 105.

(2) 3 App. Cas., 430.

v. *Hill* (1); *Beven on Negligence*, 3rd ed., p. 316; *Canadian Pacific Railway Co.* v. *Parke* (2).

[ISAACS J. referred to *Raleigh Corporation* v. *Williams* (3).]

It is found that the appellants allowed the outlet of the drain to become stuffed up with refuse to such an extent as materially to interfere with the outflow of water. On that ground alone the judgment should stand.

Starke, in reply. As to the obstruction, the judgment did not go on that ground. Damages are given in respect of a period beyond that during which the obstruction existed, and *Hodges* J. did not apply his mind to the quantum of damage occasioned by the drain being obstructed, or to the length of time during which it existed. The drain even when obstructed was sufficient to carry off the water from the appellants' territory. The duty of the appellants, when the drain was found to be insufficient, was not to provide a new drain or a new drainage scheme, but to use the drain which existed with due care and diligence: *Stretton's Derby Brewery Co.* v. *Mayor of Derby* (4); *Attorney-General* v. *Dorking Union* (5); *Baron* v. *Portslade Urban Council* (6); *Beven on Negligence*, 3rd ed., p. 312.

[GRIFFITH C.J. referred to *Workman* v. *Great Northern Railway Co.* (7).]

Cur. adv. vult.

March 2.

GRIFFITH C.J. read the following judgment:—In this action, brought by the respondent against the appellants, the municipal authority of the City of Essendon, a suburb of Melbourne, the plaintiff claimed damages for injuries caused by flooding lands in her occupation. The accumulation of water occurred in consequence of the failure of a drain which had been constructed by the appellants in the year 1873 to carry off the water which came to its inlet from an area of 50 or 60 acres lying to the north and east, all of which at that time formed part of their municipal

(1) 6 App. Cas., 193.
(2) (1899) A.C., 535, at p. 545.
(3) (1893) A.C., 540.
(4) (1894) 1 Ch., 431.
(5) 20 Ch. D., 595.
(6) (1900) 2 Q.B., 588.
(7) 32 L.J.Q.B., 279.

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district. In the year 1882 the greater part of this area was severed from the appellants' district and added to that of the City of Melbourne, all that remained in their district being a strip of land forming the western half of a street, the middle line of which forms the boundary between the two districts, and a small piece of 2 or 3 acres lying to the west of that street.

The injuries of which the plaintiff complained were alleged to have been occasioned by (1) the want of reasonable care in the original construction of the drain, in that it was not large enough to carry off the water which fell upon the area drained by it; (2) default on the part of the defendants in cleaning and maintaining the drain; (3) default on their part in not increasing the capacity of the drain so as to make it large enough to carry off the water flowing into it from time to time.

The case was tried by *Hodges* J. without a jury.

It appeared in evidence that on several occasions in the years 1905, 1906, 1907, 1908 and 1909 the drain failed to carry off the water flowing to it, by reason of which the plaintiff's premises were injuriously affected. It also appeared that in 1873, when the drain was originally constructed, and up to 1882, the date of severance, the drainage area was substantially in a state of nature, but that since that time it has become more populous, several streets and water channels having been constructed by the municipal authority of Melbourne, and that in consequence of the altered conditions of the surface the water flowed off it much faster than at first, so that the drain, whether it was or was not originally sufficient, is no longer able to carry off all the water flowing into it.

In support of the third ground of claim the plaintiff maintained that under these circumstances the defendants were bound to enlarge or reconstruct the drain so as to make its capacity sufficient to carry off all the water now or hereafter flowing to it. The defendants denied that they had been guilty of negligence in the original construction or of any default in maintenance, and contended, further, that they were not liable for any loss occasioned by the increase of the flow of water to the drain caused by the building and street-making operations within the adjacent Melbourne municipal district.

There was evidence to show that, according to present ideas, based upon a more accurate knowledge of the rainfall in that part of Victoria and the rapidity of its discharge upon a sloping surface, the capacity of the drain was in fact originally insufficient to carry off all the rain falling upon the area which it served, but that according to the best opinion and advice procurable in 1873 it was reasonably sufficient for the purpose, having regard to the then present conditions and reasonable expectations of the future.

The learned Judge found that the original capacity was in fact insufficient, but that the defendants were not guilty of any negligence in its design or construction.

As to the insufficiency he appears to have relied in part upon complaints supposed to have been made in 1875. But on more careful examination of the evidence it appears that the supposed complaints related to damage done to the drainage works themselves by a heavy fall of rain, which was immediately repaired by the appellants. There was no evidence of any further accumulation of water by reason either of insufficiency of the drain or of damage to it until the year 1905, a period of 30 years. This is, however, in my judgment, immaterial in view of the finding as to negligence. But the learned Judge thought that the case was concluded against the appellants by the decision of the Judicial Committee in *Hawthorn Corporation* v. *Kannuluik* (1), which, as I understand his judgment, he took to mean that it is not a defence to a municipal authority to show that works constructed by them were sufficient at the time of construction, if at any subsequent time they prove, by reason of altered circumstances, to be insufficient. He thought, therefore, that the defendants were liable as for pouring the water from the Melbourne area upon the plaintiff's land. But upon a careful consideration of *Kannuluik's Case* (1), and in particular of the judgment of *Holroyd* J. (2), with which the Board agreed, it appears that in that case the additional flow of water which occasioned the damage complained of was caused by the defendants themselves, or others for whose acts they were responsible, who had, after the

(1) (1906) A.C., 105.

(2) 29 V.L.R., 308, at pp. 317 *et seq*; 25 A.L.T., 97, at pp. 101 *et seq*.

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construction of a drain originally sufficient, constructed other drains discharging into it, which so increased the flow of water that it was no longer sufficient.

The judgment under appeal is not, therefore, supported by this decision. No other authority has been cited in support of the argument that when a work authorized by Statute is carried out by a public body without negligence either in design or execution, it can become actionable as against the constructors by reason of subsequent events over which they have no control.

Such a contention is, indeed, negatived both by principle and authority. When a public body undertakes in the exercise of statutory powers to construct a work of public utility, it is bound to use reasonable care both as to design and execution, and if from want of such care injury is caused to an individual he can maintain an action for damages. But in the absence of such negligence the construction of the work is a lawful act, which cannot afterwards become unlawful as against the constructors except by reason of their own subsequent unlawful acts or omissions. They are not liable for mere inaction, or, as it is called, non-feasance, unless the legislature has imposed upon them the duty of action. The remedy, if any, in such a case is to be found in the Statute which authorized the work. If none is to be found there, the persons injuriously affected have no cause of action, whatever other means may be open to them of obtaining redress: *Hammersmith and City Railway Co.* v. *Brand* (1); *Raleigh Corporation* v. *Williams* (2).

If, therefore, there were no more in the case, the appellants would be entitled to judgment. But the learned Judge also found that in 1910 the outlet of the drain was very seriously obstructed by a compacted mass of material, which, according to the evidence, diminished the capacity of the outlet by about one-half. He did not make any express finding as to the existence of this obstruction at the times when the floodings complained of occurred. But upon the evidence there was reason to believe that the accumulation of the mass had been going on for some years, and it appeared that the defendants' officers had since 1905, when a complaint was first made on the subject, given

(1) L.R. 4 H.L., 171.

(2) (1893) A.C., 540, at p. 550.

instructions to clear out the drain periodically. There was, therefore, evidence fit for the consideration of a jury to show that the floodings complained of were occasioned in part, if not altogether, by this obstruction. If the case had been tried with a jury who had been directed to the effect of the learned Judge's judgment, there must have been a new trial. To grant a new trial in the present case, where the damages awarded were only £100, would be oppressive. On the other hand, it is undesirable for this Court, or, indeed, any Court of appeal, to exercise the functions of a Court of first instance in determining facts which have not been found by the Court appealed from. The parties have, however, agreed that if the Court is of opinion that upon the evidence the injuries to the plaintiff were caused in part by the obstruction I have described, but that the defendants were not liable for damage which would have accrued if there had been no such obstruction, judgment shall be given upon that footing without a new trial.

In my opinion the damage was, in fact, on some at least of the occasions of flooding, largely increased by such obstruction.

It was contended for the appellants that they were not liable for any loss occasioned by the increased, or, indeed, any, flow of water from the Melbourne district, or bound to keep the drain clear so as to allow of its discharge. In my judgment they were bound to maintain the drain as originally constructed in efficient condition and clear of obstructions so as to allow, to the extent of its capacity, the flow of such water as they knew was actually likely under existing circumstances to flow into it, no matter whence it came. But I think that they are not liable for any damage which would have occurred if the drain had not been obstructed. The parties have agreed that this damage shall be taken at £50, which must be deducted from the £100, leaving a sum of £50 for which the appellants are liable.

BARTON J. I concur.

ISAACS J. read the following judgment:—But for the question of negligent maintenance, I should be of opinion that judgment ought to be entered for the appellants.

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The original construction of the drain, which was made in 1873 under Act No. 359 (1869) was found by the learned primary Judge to have been free from negligence. So that no liability can arise from that source.

When the evidence is carefully examined, there is none to support the finding of actual insufficiency to meet the requirements of 1873, or even of 1882. One of the minutes of the Essendon Council discloses damage by a flood, apparently an extraordinary occurrence, and at all events not shown to be an event which should reasonably have been anticipated. Another of those minutes refers to damage done, not to the respondent's property, but to the drain itself, and arising from the same cause—the flood. But it was upon those minutes alone that the learned primary Judge founded his conclusion of actual insufficiency, and there is no other evidence to support it. On the other hand, there is great negative force in the fact that for over 30 years no instance appears of any interrupted or unsatisfactory working of the drain. That finding, therefore, cannot be supported. Even if it could, it would not be sufficient to impose the full extent of liability declared in the judgment appealed from. For that judgment is based upon the supposition that even if the drain were ample to carry off all the water which would flow down according to its working capacity as existing in 1882, when the severance took place, yet the Essendon Council is responsible for all additions to that water overtaxing the drain's capacity, not contributed by itself or with its consent, but caused by new works or altered conditions in the adjoining municipality. The position cannot be sustained.

The question is: What burden or obligation remained upon Essendon in respect of this drain after the severance had taken place? The Order in Council severing the Flemington and Kensington Ward from the defendant municipality gave no directions as to the matter.

The necessary implication is that the municipality of Essendon rested under these obligations: (1) to receive from the new municipality water along the drain up to its constructional capacity at the date of severance, and (2) to exercise care in maintaining and cleansing the Essendon portion of the drain so as to preserve that capacity.

But it was not under the obligation of receiving from the neighbouring municipality any further drainage. As to such further drainage beyond the 1882 capacity of the drain in a proper state of maintenance, Essendon was in the same position as if there had been no drain at all.

The learned Judge thought *Kannuluik's Case* (1) laid down the principle that the mere fact of not preventing a neighbouring municipality from sending down excess drainage rendered the recipient municipality liable for consequent injury in its territory. But in that case Hawthorn either itself constructed the works conveying water into the main drain from the adjoining municipalities, or consented to their construction.

The Privy Council was careful to say (2), as the basis of their judgment: "A number of subsidiary channels have since been made by the municipal authorities of Hawthorn, or with their permission, for the purpose of running off the storm-water and sewage into the main drain. The result is that the water and sewage from the upper parts of Hawthorn and from the parts of Kew and Boroondara which drain through Hawthorn are concentrated and poured into the main drain with great violence."

But here there was no such action and no such permission on the part of Essendon. We have not now to determine whether Melbourne would be liable for the excessive outpour, but while holding Essendon not responsible for the unpermitted act of another, I by no means assert that the private individual injured would be without remedy.

The Essendon Council could not have physically stopped the surplus flow; an action might conceivably have been brought to restrain it, but, for the reasons stated by *Jessel* M.R. in *Attorney-General* v. *Dorking Union* (3), the omission to bring such an action does not constitute an actionable wrong, nor does it in my opinion necessarily amount to a permission, in the necessary sense of authority, to do the objectionable act.

It is submission rather than permission. And the submission may have arisen from the fact that the municipal property is not injured—private persons being left to their remedy, if any,

(1) (1906) A.C., 105.
(2) (1906) A.C., 105, at p. 108.
(3) 20 Ch. D., 595, at p. 605.