[HIGH COURT OF AUSTRALIA.]

SHIELD . . . . . APPELLANT;
PLAINTIFF,

AND

THE WARDEN, COUNCILLORS AND ELECTORS OF THE MUNICIPALITY OF HUON . . . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1916.

HOBART, *Feb.* 14, 15, 16.

Griffith C.J., Barton and Isaacs JJ.

Local Government—Negligence—Drainage—Exercise of statutory powers—Limitation of action—Action not brought within statutory time—Claim for injunction—Local authorities—Non-feasance—Appeal to High Court—Appealable amount—Local Government Act 1906 (*Tas.*) (6 *Edw.* VII. *No.* 31), *sec.* 231—*Roads Maintenance Act* 1881 (*Tas.*) (45 *Vict. No.* 33), *sec.* 2—*Judiciary Act* 1903—1912 (*No.* 6 *of* 1903—*No.* 31 *of* 1912), *sec.* 35 (1) (*a*) (2).

Sec. 231 (2) of the *Local Government Act* 1906 (Tas.) provides that "No person shall be entitled to recover against a Council or Local Committee any damages in respect of any injury to the person or to property alleged to have been sustained by himself or any other person by reason of the negligence of the Council or Local Committee in respect of any local work vested in or under the control of the Council or Local Committee, unless the following conditions are complied with by him or on his behalf; namely—(1) Notice in writing that injury has been sustained shall be given to the Council or Local Committee within three months, and the action shall be commenced within six months, from the date on which the injury was sustained," &c.

Held, that the section applies to a claim for damages in respect of injuries caused to property by reason of the negligence of a local authority in respect of the maintenance of a road which is under the control and management of the local authority.

In February 1914 the plaintiff brought an action against the defendants, a local authority, alleging, in the first count of his declaration, that the

H. C. OF A. 1916.

SHIELD v. MUNICIPALITY OF HUON.

defendants had negligently kept and continued drains and watercourses on a road, which was under their care and management, to the damage of the plaintiff; in the second count, that the defendants had negligently allowed and permitted the owners of adjoining lands to discharge water on to the road, and had conducted and discharged such water with silt on to the plaintiff's land; and in the third count, that the defendants had improperly constructed and maintained drains on such road and had caused and permitted improper quantities of water to flow on to the plaintiff's land. The plaintiff claimed damages and an injunction. The jury having found that no damages had been sustained by the plaintiff in the years 1913 and 1914 and having awarded to the plaintiff damages amounting to £120 in respect of injury caused to him prior thereto, the Full Court ordered judgment to be entered for the defendants. On appeal to the High Court,

Held, that, as to the claim for damages, sec. 231 of the *Local Government Act* 1906 (Tas.) was an answer.

Held, also, by *Griffith* C.J. and *Barton* J., that, as to the claim for an injunction, inasmuch as according to the evidence the injury to the plaintiff could be obviated by an expenditure of less than £50 on his land, the appeal was incompetent.

Held, by *Isaacs* J., that sec. 2 of the *Roads Maintenance Act* 1881 (Tas.), which requires a local authority to "keep clear and in good order and condition all drains upon" any roads made under the authority of the section, does not impose any duty upon a local authority to construct new works.

Obligations of local authorities in respect of non-feasance discussed.

Decision of the Supreme Court of Tasmania: *Shield* v. *Warden, &c., of the Municipality of Huon*, 11 Tas. L.R., 35, affirmed.

APPEAL from the Supreme Court of Tasmania.

By a writ issued on 25th February 1914 an action was brought in the Supreme Court by Edward Rippon Shield against the Warden, Councillors and Electors of the Municipality of Huon. In the first count of the declaration it was alleged that a certain road adjoining the plaintiff's land was under the care and control of the defendants, and that the drain and watercourses along, through and across the road were made in an improper manner and were kept and continued in that state by the defendants whereby, through the negligence of the defendants, water and silt had been wrongfully discharged and had been caused and permitted to be discharged on to the plaintiff's land whereby the land had been damaged. By the second count it was alleged that the defendants had negligently allowed and permitted the owners and occupiers of land near the plaintiff's

land to discharge water on to the road, and that from the road the defendants had wrongfully conducted and discharged such water on to the plaintiff's land whereby it was damaged. By the third count it was alleged that the defendants so improperly made and constructed the drains along, through and across the road, and kept and continued the same so improperly made and constructed and in an insufficient and improper state, and did also so negligently and improperly manage such drains and permit such large and unreasonable quantities of water to flow into the same, that large quantities of water and silt were deposited upon the land of the plaintiff, which was thereby damaged. The plaintiff claimed damages, and an injunction to restrain the defendants from the continuance and repetition of the injuries complained of and the committal of other injuries of a like kind.

The action was tried before *Dobbie* J. and a jury, who, in answer to questions, found (*inter alia*) that the Council of the Municipality had had control of the road since 1908; that they had maintained the road and the culverts and drains thereon; in answer to the third question, that they had not interfered with those drains and culverts except in the course of ordinary maintenance and repair; in answer to the fourth question, that the road, culverts and drains, with the above exception, were in the same condition as when handed over to the Council by the Government; that the Council during the period of their management permitted water to flow on to the plaintiff's land whether it came from land above the road or not; that the Council had thereby caused injury to the plaintiff's land and put him to expense; that the amount of damages and expense so caused amounted to £20 a year for the six years prior to 1912, but that no damage had been caused during the years 1913 and 1914; that the Council had taken no steps to deal with the flow of water on to and through the road; and, in answer to the twelfth question, asking in what respects the defendants were guilty of negligence, that they were "guilty of some negligence in respect to not dealing with Buxton's drain in some effective manner"—Buxton being the owner of land which was on the opposite side of the road to that on which the plaintiff's land

H. C. OF A. 1916.

SHIELD v. MUNICIPALITY OF HUON.

was, and from which water naturally flowed on to the road. Judgment was thereupon given for the plaintiff for £120, leave being reserved to the defendants to move to enter a nonsuit or a verdict for the defendants.

On motion to the Full Court accordingly, a verdict was ordered to be entered for the defendants: *Shield* v. *Warden, &c., of the Municipality of Huon* (1).

From that decision the plaintiff now appealed to the High Court.

Other material facts are stated in the judgments hereunder.

On the hearing of the appeal, counsel for the respondents objected that the appeal was incompetent as not involving directly or indirectly any claim to property or any civil right of the value of £300.

Lodge and *Flannery*, for the appellant. The plaintiff claims damages for what is a continuing injury to his land caused by the discharge of water upon it. Sec. 231 of the *Local Government Act* 1906, which requires an action for damages in respect of an injury to person or property to be brought within six months of the injury complained of, does not apply to an action of this kind. It only applies to a claim arising out of some accidental injury, and does not apply to a claim for damages arising out of a nuisance. So far as the claim is for an injunction it is not within sec. 231. By sec. 2 of the *Roads Maintenance Act* 1881 a general duty is cast upon a municipality to keep roads and the drains and culverts upon them in good order. Under ordinary circumstances there may be no duty cast upon them to enlarge the drains or culverts, but if circumstances alter in such a way that there is a concentration of water upon the road, then it is their duty to make such a change in the drains and culverts as is necessary. The principles laid down in *Essendon Corporation* v. *McSweeney* (2) do not apply, for here the respondents have full control of the whole matter in question, and can make drains on private property. It is their duty to take reasonable precautions that water concentrated on their road does not injure land adjoining the road: *Geddis* v. *Proprietors of Bann Reservoir* (3). The respondents are liable

(1) 11 Tas. L.R., 35. (2) 17 C.L.R., 524. (3) 3 App. Cas., 430.

apart from negligence, for they are continuously asserting a right to discharge on to the plaintiff's land water which has come on to the road. [Counsel also referred to *Addison on Torts*, 6th ed., p. 274; *Halsbury's Laws of England*, vol. XI., p. 317; *Attorney-General* v. *Copeland* (1); *Crossley & Sons Ltd.* v. *Lightowler* (2); *Roads Act* 1884, sec. 116; *Main Roads Act* 1880, sec. 32; *Cross and Bye Roads Act* 1870, sec. 49.]

[ISAACS J. referred to *Attorney-General* v. *Guardians of Poor of Union of Dorking* (3).]

Alec. Thomson (with him *Hodgman*), for the respondents. The decision in *Essendon Corporation* v. *McSweeney* (4) is a complete answer to the action. As to the claim for an injunction the value of the right cannot amount to anything approaching £300.

[Counsel was stopped.]

GRIFFITH C.J. This appeal is brought as of right and without special leave. The action is for damages for negligence of the defendants in connection with the flow of water from their road on to the plaintiff's land. The land is an orchard fronting the Huon River and sloping upwards from it to the road, which runs nearly parallel to the river. On the other side of the road the upward slope continues, the land being occupied as an orchard by one Buxton. In the natural condition of the locality, rain-water falling on Buxton's land would flow downwards across the plaintiff's land to the river. The road is described by the plaintiff as "a side cutting" along the slope. It was made more than thirty years ago by the Government of Tasmania, when culverts and drains were constructed on and across it at suitable places. Afterwards it was placed under the control of the defendants, who have ever since maintained the road, drains and culverts in the same condition as when handed over to them. In consequence of clearing and cultivation, rain-water now flows off more rapidly than when the land was in a state of nature. The substantial complaint is that, in consequence of the manner and place in which Buxton causes his water to flow upon the road, more

(1) (1902) 1 K.B., 690.
(2) L.R. 2 Ch., 478.
(3) 20 Ch. D., 595, at p. 605.
(4) 17 C.L.R., 524.

H. C. OF A. 1916.

SHIELD v. MUNICIPALITY OF HUON.

Griffith C.J.

water passes through one of the culverts than formerly flowed through it, and that by reason of the increased flow the plaintiff has sustained injury for which he seeks to make the defendants responsible. He also claims an injunction. The jury assessed the damages actually caused by the increased flow of water at £20 a year for the six years before 1912, but found that none had been sustained in the years 1913 and 1914. Sec. 231 of the *Local Government Act* 1906 provides that an action against a local authority, such as the defendants are, for damages in respect of any injury to person or property alleged to have been sustained by reason of the negligence of the local authority in respect of local works must be brought within six months from the date of the injury sustained. That section is plainly applicable to the present case, in which no damage was sustained within six months before the action was brought, namely, February 1914. The claim for damages therefore fails. Nothing is left but the claim for an injunction, which is apparently an injunction to restrain the defendants from continuing their inaction in not making new provisions for the increased flow of water through the particular culvert. Objection was taken by the respondents that the appeal is incompetent as not involving directly or indirectly any claim to property or any civil right of the value of £300. It appeared in evidence that all the inconvenience complained of by the plaintiff could be remedied by the expenditure of a trifling sum, certainly less than £50, on the plaintiff's land. The value of the civil right asserted is therefore less than £300, and for this reason the appeal must be dismissed as incompetent.

Under the circumstances it is not necessary or desirable to deal with the substantial question of law, which was sought to be raised, but I think it right to say that the action is wholly misconceived. The complaint is that the defendants have not done anything to remedy the damage caused by Buxton's action. This is a complaint of non-feasance. Whether what Buxton did was an actionable wrong or not, we do not know; but, if it was, the defendants are not responsible for it, and they are not bound to take action against him in respect of it. The law on the subject is well settled. The culvert which is said to be too small

is of the same size as when it was placed under the defendants' control, and they are not under any legal obligation to enlarge it or to add another in consequence of the altered condition of the neighbouring land for which they are not responsible. In the case of *Essendon Corporation* v. *McSweeney* (1) the Court laid down the principles governing the liability of local authorities in respect of works properly constructed by them in the first instance and afterwards becoming, by reason of altered circumstances, insufficient for their purpose. The same principles are applicable to the case of a local authority upon which the duty of maintenance of works already constructed by their predecessors is imposed for the first time. As the appellants were allowed to argue the point at considerable length in their endeavour to establish the existence of a civil right of appealable value, and as the point is one of general importance to local authorities, I have felt justified in saying these few words on the subject, but I do not feel justified in taking up further public time in discussing a principle so well settled.

In my opinion the appeal should be dismissed.

BARTON J. I concur.

ISAACS J. read the following judgment:—One of the points of law arising in this case renders it necessary to refer to the pleadings. The declaration contains three counts. The first is for negligently keeping and continuing drains and watercourses on a road which was under the defendants' care and management, to the damage of the plaintiff; the second, for negligently allowing and permitting the owners of adjoining lands to discharge water on to the road, and for conducting and discharging such water with silt on to the plaintiff's land; and the third, for improper construction of drains, and negligent management of drains, and causing and permitting improper quantities of water to flow on to the plaintiff's land. The plaintiff claimed damages, originally laid at £500 and afterwards amended to £800. He also claimed an injunction against continuance. The defendants' first plea was not guilty.

(1) 17 C.L.R., 524.

H. C. OF A. 1916.

SHIELD v. MUNICIPALITY OF HUON.

Isaacs J.

The point to which I refer arises on an objection taken by the defendants to the action, and based on sec. 231 of the *Local Government Act* 1906, which provides that "No person shall be entitled to recover against a Council or Local Committee any damages in respect of any injury to the person or to property alleged to have been sustained by himself or any other person by reason of the negligence of the Council or Local Committee in respect of any local work vested in or under the control of the Council or Local Committee unless the following conditions are complied with," &c. The conditions are, shortly, (1) notice in writing within a fixed time; (2) examination of the injured person if required; and (3) examination of the injured property.

Mr. *Lodge* urged that the section applied only to the case of "accidents," that is, something not deliberately persisted in, and also that the present case was, in substance, one of "nuisance" rather than negligence.

As to the first contention, the language of the section draws no such distinction. "Negligence" is the term used, and that expression, as applied to complaints against municipalities in respect of their local work, is at least as frequently directed to persistent omission to alter the condition of the work as to some defect which ordinary care could have prevented, but which is in fact suddenly brought to notice. I see nothing in the context to cut down the natural meaning of the word "negligence"; and the conditions referred to point rather to the full retention of that meaning.

As to the suggested distinction of nuisance, it must be remembered that a nuisance may arise from the mere invasion of an absolute right, and independently of negligence. In that case the section would not apply. But where negligence is the essential cause of action, then, whether the result is a nuisance or not, the section does apply. The conditions admittedly were not complied with. Applying, then, this ruling to the declaration, it will be seen that, except for the charges that the defendants themselves did some act or were privy to some act which apart from negligence constituted a cause of action, sec. 231 bars the action for damages.

Learned counsel for the appellant could not point to any act of the Council itself. As to active interference, the only circumstance suggested was that Buxton said he had the Inspector's permission to dig a drain on the road. But there are several reasons why that should not influence the case. The date was about 1911, perhaps a little before, whereas the damage arose first in 1906; then the Inspector is not shown to have had any authority to consent, and it does not appear that any such consent was brought to the Council's knowledge.

The Warden of the Municipality stated that he had never been asked to consider, and had not considered, any application to deal with water flowing across roads, through culverts, on to and doing injury to another man's land. Lastly, the findings of the jury numbers 3 and 4 negative the suggestion that any new drain can be considered. This circumstance being disposed of, there remains nothing but mere non-feasance, in other words, mere omission to take any steps either by suit or by physical interference to prevent the flow from Buxton's property, that is objected to.

The general rule as to municipal non-feasance was dealt with by this Court in *McSweeney's Case* (1). It was sought to distinguish that case from the present by the fact that Buxton's land, from which the water comes, is within the municipality, whereas in the case cited the objectionable flow was from a neighbouring municipality. But the power and the right to interfere, either by physical act or by suit, is the same in both cases, and the distinction fails. Notwithstanding that decision, which, if applicable, is fatal to the appellant's case, it was earnestly pressed upon us that by reason only of not taking some active steps to prevent the water sent by Buxton from flowing over the road, the Municipality were, in law, causing or permitting, in the necessary sense, that water to pass to the plaintiff's land. No authority could be found to support so drastic a proposition. To the *Dorking Union Case* (2), which I quoted in *McSweeney's Case* (1), I would add another, very much in point, *Saxby* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (3). There

(1) 17 C.L.R., 524.

(2) 20 Ch. D., 595.

(3) L.R. 4 C.P., 198.

H. C. OF A. 1916.

SHIELD v. MUNICIPALITY OF HUON.

Isaacs J.

may or may not be found, according to the facts of a particular case, a permission to do the acts complained of, so as to establish a privity or participation on the part of the intermediate owner. No such case is made here. It is true that the jury have given one answer which, if it stood unqualified, would in my opinion entitle the plaintiff to judgment. The sixth question is: "Has the Council during the period of its management permitted water to flow on to the plaintiff's land whether coming from lands above the road or not?" The answer was: "Yes." But we have not the learned Judge's charge before us, and so, in the first place, reading that with the twelfth question and answer, and by the light of the evidence and the argument addressed to us, I take the word "permitted" there to mean mere passivity. Further, the motion to the Supreme Court of Tasmania was upon leave reserved to enter a nonsuit or a verdict for defendants, and, as already pointed out, there is no evidence to support a finding of permission in the sense necessary to constitute privity or participation in the wrong.

The appellant's ultimate reliance was placed on the effect of sec. 2 of the *Roads Maintenance Act* 1881 (45 Vic. No. 33). It was contended that the final requirement to "keep clear and in good order and condition all drains upon any such road" required the defendant Municipality, to the extent of their means, to make sufficient drains to carry off whatever water found its way from any source, lawful or unlawful, to the road.

I cannot read the section in that way. The section contemplates construction of works by the Minister, and then maintenance of those works by the Trustees (and now by the Municipality) in good order and condition. But the enactment is sharply opposed to any original construction of new works by the Trustees.

The appeal, therefore, in my opinion, entirely fails.

As to the competency of the appeal, I prefer to leave this open, yet, in view of the uncontradicted affidavit as to value and the case made as to the increased quantity of water which is sent upon the appellant's land, I am at present disposed to think it comes within the words of sec. 35 of the *Judiciary Act*. The

effect, in relation to the grant of an injunction, of the comparative cost and inconvenience of drains on the plaintiff's property to avert actual damage is another matter.

Appeal dismissed with costs.

Solicitors for the appellant, *Simmons, Wolfhagen, Simmons & Walch.*

Solicitors for the respondents, *Ewing, Hodgman & Seager.*

B. L.

[HIGH COURT OF AUSTRALIA.]

MAY . . . . . APPELLANT;

AND

HIGGINS . . . . . RESPONDENT.

Patent—Application—Combination—Improvement of integer of old combination—Want of novelty.

The improvement of one of the integers in an old combination which does not make the combination substantially a new thing does not entitle the inventor of the improvement to a patent for the combination with the improved integer incorporated in it although he may be entitled to a patent for the improved integer.

APPEAL from the Commissioner of Patents.

Matthew John Higgins applied for a patent for an "improved starting device for distance handicap races." The device was applicable to horse-races in which the handicapping is by distance, and its general principle was to have an elastic cord (called in the specification a "tensional barrier") stretched across the racecourse at each of the points where the horses were to start. Each of the