[HIGH COURT OF AUSTRALIA.]

THE METROPOLITAN GAS COMPANY . . APPELLANT;
DEFENDANT,

AND

THE MAYOR, ALDERMEN, COUNCILLORS AND CITIZENS OF THE CITY OF MELBOURNE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 9, 10, 13-15.

SYDNEY, *Nov.* 19.

Isaacs A.C.J., Gavan Duffy and Starke JJ.

Local Government—City of Melbourne—Streets—Construction, maintenance and repair—Gas main in street—Underground drain crossing gas main—Damage to gas main by subsidence of drain—Liability of corporation—Negligence—Nuisance—Trespass—Melbourne Corporation Act 1842 (*N.S.W.*) (6 *Vict. No* 7), *secs.* 80, 82, 83—*Melbourne Corporation Act Amendment Act* 1853 (*Vict.*) (16 *Vict. No.* 38), *sec.* 2—*Metropolitan Gas Company's Act* 1878 (Vict.) (*No.* 586), *secs.* 183, 186, 187, 229, 239.

The Metropolitan Gas Co., pursuant to its powers under the *Metropolitan Gas Company's Act* 1878 (Vict.), before 1883 opened a street in the City of Melbourne and laid down a gas main. In 1883 the Corporation of the City, acting under 6 Vict. No. 7 (N.S.W.) and 16 Vict. No. 38 (Vict.), constructed an underground barrel drain along a street at right angles to the gas main and in such a way that when completed the gas main was built into the drain at their intersection. In 1921, by reason of a subsidence of the drain, the gas main was broken. The Company opened the street and repaired the gas main and the Corporation reinstated the drain and roadway. In an action by which the Corporation sought to recover from the Company the cost of such reinstatement, the Company by counterclaim sought to recover from the Corporation the cost of repairing the gas main.

Held, that the liability of the Corporation for the damage to the gas main depended upon negligence in the exercise of its statutory powers causing unnecessary damage to the Company, that the onus of proving such negligence had not been discharged by the Company, and, therefore, that judgment had properly been given for the Corporation.

Decision of the Supreme Court of Victoria (*Macfarlan* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by the Mayor, Aldermen, Councillors and Citizens of the City of Melbourne against the Metropolitan Gas Co. The plaintiff Corporation by its statement of claim alleged that by a permit in writing dated 19th July 1921 the plaintiff gave the defendant, upon its request, permission to open the roadway at the corner of Flinders Street and Elizabeth Street, a condition of the permit being that the work of reinstating the roadway would be carried out by the plaintiff at the defendant's cost; that the Company opened the roadway at that place, and that the Corporation reinstated it. The Corporation claimed £119 10s. 10d., being the cost of such reinstatement. The defendant by counter-claim alleged that under the *Metropolitan Gas Company's Act* 1878 it was the owner of a gas main lawfully in Flinders Street, that at some time after the construction of such gas main the Corporation constructed a drain in Elizabeth Street across the defendant's gas main in Flinders Street and that by reason of the construction and/or subsidence of the drain the gas main was damaged, and the defendant claimed damages in respect thereof for nuisance or alternatively for trespass. The defendant also alleged alternatively that it had suffered damage to the gas main by reason of the negligence of the Corporation in the construction and/or maintenance and/or non-repair of the drain. The defendant further alternatively claimed to recover £233 9s. 4d. for the damage aforesaid which was carelessly and/or accidentally done by the Corporation. The defendant for this claim relied upon secs. 229 and 239 of the above-mentioned Act. A further alternative claim was made by the defendant that, if it were liable for the amount claimed by the statement of claim, then in addition to the amount of damages above mentioned it was entitled to recover the amount

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for which it was held to be so liable as being damages for the nuisance and/or trespass and/or negligence alleged.

The action was heard by *Macfarlan* J., who gave judgment for the plaintiff for £119 10s. 10d. and dismissed the counterclaim.

From that decision the defendant now appealed to the High Court on the ground (*inter alia*) that judgment ought to have been entered for the Company on the counterclaim.

The other material facts appear in the judgments hereunder.

Latham K.C. (with him *Ham*), for the appellant. The respondent could have put the drain in such a position that it would not injure the gas main, or the respondent could have compelled the appellant to move its gas main to another place (sec. 191 of the *Metropolitan Gas Company's Act* 1878). Having chosen the particular place and mode of construction, the result of which has been to damage the gas main, the respondent is liable for that damage if negligence in the construction or maintenance or repair of the drain is shown. That is to say, being a statutory body doing something which otherwise would have been unlawful, the respondent must show that the exercise of its power necessarily caused the damage complained of (*Geddis* v. *Proprietors of Bann Reservoir* (1); *Fullarton* v. *North Melbourne Electric Tramway and Lighting Co.* (2); *Hardaker* v. *Idle District Council* (3)). The first duty of the respondent was to take care, and the respondent had also a duty not to do unnecessary harm. Those duties are relevant both to negligence and to nuisance. Sec. 229 of the *Metropolitan Gas Company's Act* makes anyone who damages a gas main by carelessness liable for the damage done. The evidence shows that there was negligence in the original construction of the drain, in that no provision was made for subsidence of the drain, and that there was negligence also in repairing the drain in 1911, when it was found that the gas main had been damaged by the subsidence of the drain.

[STARKE J. referred to *Mayor &c. of Hawthorn* v. *Kannuluik* (4).]

There was here a change of circumstances: what happened in

(1) (1878) 3 App. Cas. 430, at pp. 449, 455.
(2) (1916) 21 C.L.R. 181, at pp. 186, 189.
(3) (1896) 1 Q.B. 335.
(4) (1906) A.C. 105, at p. 108.

1901 and 1911 showed that what originally had been thought to be a proper construction was not such as to prevent future damage to the drain, and the respondent was under a duty to remedy the defect. The burden lay on the respondent to excuse itself, and it has not done so.

[ISAACS A.C.J. referred to *East Fremantle Corporation* v. *Annois* (1); *Borough of Bathurst* v. *Macpherson* (2).]

Owen Dixon K.C. (with him *Leo Cussen*), for the respondent. The Act 6 Vict. No. 7 (N.S.W.), by secs. 80 and 82, authorizes and requires the Council of the Corporation to construct drains which in its discretion it thinks fit and to construct a drain in the place where this drain is in spite of the appellant's gas main being there. The only question is whether the Council constructed the drain without negligence. Having constructed the drain without negligence, as has been found, no further duty having a correlative private right was imposed upon the respondent. There might be a public duty to maintain the drain, but there was no correlative right in the appellant to have it maintained (*Sanitary Commissioners of Gibraltar* v. *Orfila* (3); *Hesketh* v. *Birmingham Corporation* (4); *Phillips* v. *Mayor &c. of Melbourne* (5)).

[ISAACS A.C.J. referred to *Woollahra Council* v. *Moody* (6).]

The *Metropolitan Gas Company's Act* does not diminish the powers of the respondent to any greater extent than to allow the appellant to put its gas pipes in the streets and to keep them there. The respondent has a right to do what it thinks fit with the streets, except that it must not intentionally or negligently injure the gas mains of the respondent (*Auckland Gas Co.* v. *Auckland City Corporation* (7)).

[ISAACS A.C.J. referred to *Papworth* v. *Mayor &c. of Battersea* [*No.* 2] (8); *Great Central Railway Co.* v. *Hewlett* (9).

[STARKE J. referred to *Clerk and Lindsell on Torts*, 7th ed., p. 35.]

(1) (1902) A.C. 213, at p. 217.
(2) (1879) 4 App. Cas. 256, at p. 265.
(3) (1890) 15 App. Cas. 400, at p. 411.
(4) (1924) 1 K.B. 260.
(5) (1875) 1 V.L.R. (L.) 74.
(6) (1913) 16 C.L.R. 353, at p. 361.
(7) (1922) N.Z.L.R. 1041.
(8) (1916) 1 K.B. 583.
(9) (1916) 2 A.C. 511.

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Ham, in reply, referred to *Gas Light and Coke Co.* v. *Vestry of St. Mary Abbott's, Kensington* (1); *Grieve* v. *Mayor &c. of Melbourne* (2); *Unger* v. *Shire of Eltham* (3).

Cur. adv. vult.

Nov. 19.

The following written judgments were delivered :—

ISAACS A.C.J. This action was brought by the City of Melbourne Corporation against the Metropolitan Gas Co. for £119 10s. 10d., the cost of reinstating a roadway which had been disturbed for the purpose of repairing a gas main. I shall refer to the parties as the Corporation and the Company respectively. The defence to the claim was really formal, and, as the learned primary Judge says, the claim was, in the end, not disputed and subject to the counterclaim. There was added a counterclaim, really a cross-action, with which this appeal is alone concerned. The Company counterclaims in respect of damage that it alleges has resulted from wrongful conduct of the Corporation in relation to the gas main in question. The damages claimed are (1) the amount of £233 9s. 4d., cost of repairing the main itself, and (2) the amount which may be found to be due for repairing the road, now ascertained to be £119 10s. 10d.

There are some facts not in dispute, and these may be stated :— Many years before the main road was laid down and before 1878 the Corporation, by the authority of its statutes, 6 Vict. No. 7 and 16 Vict. No. 38, had made and it had always continued to maintain Elizabeth Street and Flinders Street, two of the chief thoroughfares of the City. In 1878 the Company was incorporated by special Act of Parliament (41 Vict. No. 586), which amalgamated three previously existing companies and merged their undertakings. The Company at some time prior to 1883, in exercise of its statutory powers, opened the road at the corner of Elizabeth and Flinders Streets, and laid its gas main running east and west along the northern side of Flinders Street and about 3 feet 9 inches below the surface. The main consisted of cast-iron pipes about 24 feet long and fitting one into the other. In 1883 the Corporation constructed a silt pit

(1) (1885) 15 Q.B.D. 1.
(2) (1864) 1 W. W. & à B. (L.) 95.
(3) (1902) 28 V.L.R. 322; 24 A.L.T. 96.

as part of a barrel drain running north and south on the west side of Elizabeth Street. In 1901 it was discovered that the pipe immediately above the silt pit was fractured, and the road was opened by the Company under its statutory authority and the pipe was repaired. The method of repair was, not by inserting a new length of pipe, but by means of what is called a thimble. A thimble for that purpose is a tubular length of cast iron into which short lengths of pipe are inserted and by which they are held together. The Company did not itself reinstate the roadway. It is agreed that, by a general course of conduct and understanding on both sides, the situation was mutually regarded as having been created that (except for liability to penalties) there was "delay or omission" on the Company's part within the meaning of sec. 188 of the Company's Act, and that the Corporation executed the necessary work of reinstatement under the provisions of that section. This applies all through. In 1911 there was again a fracture of the pipe in the silt pit. Once more the Company opened up the roadway, renewed the reparation by thimble, and again the Corporation reinstated the road. In 1921 there was a recurrence of the fracture, and the process of reparation was repeated. For this the Corporation sued for expenses and, on the other hand, the Company complained by counterclaim of the wrongful conduct of the Corporation.

Passing now to contested matters, the wrongfulness alleged, broadly speaking, consists of the improper way in which the Corporation made its drain in 1883 and the reparations in 1901 and 1911, and the improper and needlessly injurious omission to maintain the drain between 1911 and 1921. Technically stated, the Company charges (1) nuisance, (2) trespass, (3) negligence. On the other hand, the Corporation denies all these charges, and asserts its own statutory right to do under its own special Acts what is complained of by the Company. The two first-mentioned grounds of action have been asserted for a purpose, namely, to fix the onus of justification on the Corporation. I am unable to accept either nuisance or trespass as a starting-point. At the threshold of this inquiry I find the matter, even as stated by the Company, to be

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one of conflict of powers under statute and the application of those powers to the facts.

The Company's right is not a common law right which has been prima facie invaded and calls for a statutory defence. It is a statutory right to put down and repair gas mains, thereby interfering with the roads of the City, notwithstanding the then existing statutes of the Corporation. Nor is the Corporation's defence a common law defence. It depends upon the extent of its powers notwithstanding the existing Act incorporating the Company. I proceed, therefore, at once to the enactments.

The Corporation relies on the two Acts above mentioned—(in 1842) 6 Vict. No. 7 and (in 1853) 16 Vict. No. 38. By the first, "for the better protection care and management of the local interests of the inhabitants of the Town of Melbourne and for the improvement thereof" the inhabitants of the town were incorporated as a town. Later, in 1848, by Royal Letters Patent, Melbourne became a city; and in 1849, by Act 13 Vict. No. 14, its title was changed to that of the present respondent. By the Act of 1842 provision was made for a Town Council and various powers of improvement were given to the Corporation. By sec. 80 it was provided: "That from and after the first election as aforesaid of the mayor aldermen and councillors the formation repair and ordering of all public roads lanes streets highways and passages and other public ways and places within the said town shall be wholly under the management and direction of the said council; and the same shall be performed and carried on under the superintendence of the surveyor or surveyors to be by them from time to time appointed as hereinbefore mentioned." This section places under the sole "management and direction" of the Council "the formation repair and ordering of all public roads," and prescribes that no one but the Corporation surveyor shall have the power of controlling the performance of that work. That creates exclusive jurisdiction in the Corporation to interfere with the construction or repair of the public roads, and by "ordering" I understood a comprehensive term indicating all authority and control with reference to the structure of the roads and their maintenance in a condition for public use. Sec. 82 gives to the Council authority, and imposes upon it a discretionary

duty, to improve and maintain the public streets. I do not enter into the details of this section because I refer to it only for the purpose of assisting in the general scheme of supreme control of the public roads of Melbourne that is conferred by that Act on the corporation.

By the Company's Act statutory power is given which *pro tanto* modifies the otherwise exclusive authority of the Council. It is the extent of that modification which, in my opinion, measures the Company's right to place and to maintain its gas mains in the public streets. To assume, first, an absolute right in the Company as if it were a common law right, and then to demand of the Corporation a strict justification or excuse for interference as if its powers were an invasion of an ordinary common law right, is an inverse process, and I reject it. Indeed, sec. 83 of the Corporation's Act of 1842 makes it punishable for any person to break up the streets. The Act 16 Vict. No. 38, sec. 2, is permissive to the Council, but because there is no exclusive provision it is only material, if at all, by authorizing specifically the making of drains and watercourses as part of a scheme including private property. Clearly, then, without special statutory authority the Company would not merely be committing a common law nuisance by breaking up the roadway and putting down the gas main, but it would have brought itself directly within the statutory prohibitions of the Corporation Act 6 Vict. No. 7. The Corporation, in making the silt pit as part of the drainage system of a public street, was exercising statutory discretionary powers and as a public duty, because once the Council thought it " proper and necessary " it was " required " (sec. 82) to do it. For that reason the provision is " imperative " in the sense used by Lord *Watson* for the Privy Council in *Canadian Pacific Railway* v. *Parke* (1). Speaking of a person authorized, Lord *Watson* says " so long as he is not convicted of negligence " he is not liable for damages. This would, in itself, raise a very formidable barrier to the appellant's argument as to onus of proof, even if the injury were in respect of a primary common law right; *a fortiori* when, as here, it is of the nature I have stated. In a case depending on violation of a common law right, *Great Central Railway Co.* v.

(1) (1899) A.C. 535, at p. 547.

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Hewlett (1), Lord *Parker* said: "It is undoubtedly a well-settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by *reasonable precaution* have prevented an injury which *has been occasioned, and was likely to have been occasioned*, by their exercise, damage for negligence may be recovered." Lord *Parker* adds: "To bring this principle into play in the present case the company must be shown to have been exercising a statutory power the exercise of which was likely to occasion and did occasion the collision."

It, therefore, is necessary for the appellant's success that, in the circumstances appearing here, the Company must, in order to establish actionable negligence, show: (1) some reasonable precaution omitted which would have prevented the injury to the pipe; (2) the likelihood of injury being occasioned unless that precaution were taken; (3) that the omission of that precaution occasioned the injury. The first requisite is frequently lost sight of. No conclusion of negligence can be arrived at until, first, the mind conceives affirmatively what should have been done. Lord *Herschell's* words in *Membery* v. *Great Western Railway Co.* (2) may, with advantage, be repeated: "I think that whenever there is a charge of negligence it is of the utmost importance, in order to avoid confusion and the danger of mistake, to remember that negligence implies the allegation of a breach of duty—a duty to take care—and to inquire at once what duty, if any, there was on the part of the persons charged with negligence to take care, and if there was any such duty, what was the extent of it at the time and under the circumstances which existed on the occasion when negligence is alleged to have been committed."

What, then, are the "reasonable precautions" suggested by the Company which ought to have been adopted by the Corporation so as to prevent injury? Mr. *Latham*, at my request, suggested some corporation "precautions," which I rearrange as follows: (1) it should not have built round the pipe at all, and should have required the Company to change the position of the pipe; (2) if it did build round the pipe it should not have built hard down on

(1) (1916) 2 A.C., at p. 519. (2) (1889) 14 App. Cas. 179, at p. 190.

it, but have left a sufficient space to keep the weight off the pipe; (3) it should not have left 8 feet of the 24 foot pipe unsupported; (4) it should have provided against anticipated subsidence; (5) it should in 1911 have provided for proved subsidence; (6) it should from 1911 to 1921 have exercised its powers of maintenance by periodical examinations, and by keeping a clear space above the pipe or by constructing supports. As to the first, there is no evidence that avoiding the pipe altogether was essential to a reasonable plan. For nearly forty years the suggestion remained unexpressed. As to the second, the evidence on the whole satisfied me that there was a space left in 1911, when the reinstatement took place. As to the third, I am not satisfied that in 1911 a skilful engineer would have considered that in itself as an error. As to the fourth and fifth there is much greater difficulty. It had, in 1911, been shown by experience that some subsidence had taken place. But the amount of subsidence, extending over twenty-eight years, did not lead to any suggestion in 1911 on the part of the Company's engineers that any further precaution was necessary than leaving a space of $1\frac{1}{2}$ or $2\frac{1}{2}$ inches above the pipe. That, in my opinion, was done. Was it so done as to be preserved; that is, was it so constructed as to continue to be a space? The burden of proving the contrary rests on the Company, and I am not satisfied that the arch was not existent up to the time of the accident. It is sufficiently consistent with stability that the breaking in by the workmen destroyed the space and gave the appearance of subsidence. But, even if that were not so, it is common ground that general subsidence was the operating cause of the damage. The space asked for, I am satisfied upon the evidence, was simply to avoid vibration above the pipe. It was to guard against the effect of the road material above the pipe on the assumption that the pipe maintained its own position. It is significant to me that neither in 1911, nor at any time up to 1921, nor even after the dispute became *lis mota*, was there any suggestion that by the omission to build pillars or special supports the Corporation had failed to maintain the space above the pipe. If the subsidence in 1911 was so obviously to be guarded against as is now suggested, it is incomprehensible that no distinct expression of that opinion was made. Retrospective wisdom is proverbially

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easy, but the law does not make that the test. The sixth suggested precaution is watchfulness and provision of new supports. This also is a belated suggestion. There is not sufficient evidence to sustain the onus resting on the Company. If the onus were on the Corporation I should feel considerable difficulty. The renewed subsidences, the attraction of water from various sources, the length of time that had elapsed since 1911 to make inspection advisable, are all factors which make for the Company's case. But, on the other hand, both parties were in a position to know the system adopted in 1911 and both knew of the prior accidents; they were equally aware of the lapse of time, and, had it been so manifest or desirable to periodically examine the condition of the pit and the pipe, there is no reason I can find satisfactory why something was not said by the Company or why the Company did not itself seek to examine the spot. Again, the long absence of the suggestion tells against it.

On the whole, therefore, I am not satisfied that the negligence is proved.

GAVAN DUFFY AND STARKE JJ. This case involves a dispute between the Metropolitan Gas Company and the Corporation of the City of Melbourne. The Gas Company, pursuant to its Acts, laid down, many years ago, a gas main in Flinders Street, Melbourne. There existed, at the time, an open channel drain, running down Elizabeth Street, Melbourne, emptying into a box drain which passed under Flinders Street and the Hobson's Bay Railway, and discharging into the River Yarra. About the years 1883, 1884, the Corporation constructed a barrel drain in place of the open channel in Elizabeth Street, and also, apparently, a silt chamber in Flinders Street, and then continued the barrel drain across Flinders Street and under the railway to the River Yarra. A portion of the gas main passed through the silt chamber after the construction of the latter by the Corporation. In each of the years 1891, 1901, 1911 and 1921, the gas main was fractured, but the fractures do not, so far as the evidence goes, appear to have been at the same point. In 1891 a fracture of the pipe seems to have occurred within the silt chamber, and it was repaired by the insertion of a length of pipe

joined by a collar or "thimble." In 1921 the thimble was split, and the gas main had to be uncovered, repairs effected, and the brickwork of the silt chamber reinstated, at considerable expense. These expenses are the subject of this action.

The Gas Company seeks to throw the expense upon the Corporation. And though it was said in argument that the Company's claim was founded upon either trespass or nuisance or negligence, still the liability of the Corporation must depend upon whether, in the exercise of its statutory powers, it has acted negligently, so as to do unnecessary damage to the Company. The Corporation had authority to construct its barrel drain and silt chamber, and its liability, if any, must be founded upon an excess of that authority (*Kannuluik* v. *Mayor &c. of Hawthorn* (1)).

It was argued that the gas main was damaged owing to the negligent design and construction of the drain and silt chamber. Support for the main, it was said, ought not to have been withdrawn, the brickwork should not have been built in contact with the main, and provision should have been made for the possible subsidence of the drain, and also for vibration from the use of the roadway. The learned Judge (*Macfarlan* J.) who tried the action thought that the damage was caused by the subsidence of the drain, but he held that the Corporation had not been guilty of any negligence in its design or construction. It is impossible, on the evidence, to disturb this finding. The drain and silt chamber were built on a solid clay foundation, so far as was known at the time, and "the nature of the soil" according to the finding of the learned trial Judge, "was not such as to lead any reasonable man, taking every care, to believe it necessary to take any precautions against subsidence." And, apparently, the experts of the Company did not even suspect subsidence of the drain and silt chamber until after the damage to the gas main in 1921. This finding also makes it impossible to establish negligence against the Corporation because it did not anticipate or provide for or obviate damage which might be caused by vibration owing to the user by the public of the surface of the roadway. The gas main was sunk some three to four feet below the surface of the roadway, and at the critical point, so far as this case

(1) (1903) 29 V.L.R. 308, at p. 313; (1906) A.C., at p. 108.

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is concerned, it was surrounded by the silt chamber, constructed of brickwork resting upon a solid clay foundation. No damage happened to the main until 1891, and then it is uncertain on the evidence how the damage occurred. But the damage occurring in 1921, which is that sued for, was, according to the finding of the learned Judge, not due to vibration, but to subsidence. This finding is clearly supported by the evidence, and particularly by the evidence called for the Company. It disposes of the Company's case, in so far as that case rests upon an allegation that the damage to its main was due to the negligence of the Corporation in omitting to make proper provision against damage due to vibration from the use of the roadway.

The Company further charged the Corporation with negligence in the upkeep, maintenance and repair of its artificial construction, namely, the barrel drain and silt chamber. We pass by the argument of the learned counsel for the Corporation that it was only liable for negligence in the active execution of its powers and not for mere non-feasance (see *Sanitary Commissioners of Gibraltar* v. *Orfila* (1); *Borough of Bathurst* v. *Macpherson* (2); *Municipal Council of Sydney* v. *Bourke* (3)), for the negligence relied upon has not been established. The gas main was fractured in 1891 and in 1901, but how those fractures occurred is quite uncertain on the evidence, and their consideration throws no light upon the case. In 1911, however, the collar or "thimble" round the gas main was split, and we know now that this was due to subsidence of the drain and silt chamber. But no one suspected—and the learned trial Judge found that there was no ground for any reasonable or prudent person suspecting—subsidence of the drain and silt chamber at that time. The Company itself simply suggested the construction of an annular space round the main. This would relieve it of pressure from any superincumbent weight, or from vibration, but would not safeguard it against the risk of subsidence—if such a risk were appreciated. Now the Corporation's witnesses affirm that this annular space was provided, whilst those called for the Company suggest that it was not. The learned Judge did not resolve this

(1) (1890) 15 App. Cas. 400. (2) (1879) 4 App. Cas. 256.
(3) (1895) A.C. 433.

conflict; much less can we, who have neither heard nor seen the witnesses. Further, it is unnecessary to decide on which side the truth lies, for the damage sued for was due to subsidence and not to vibration.

The critical question is whether the learned Judge was right in finding that no reasonable or prudent person would have suspected or provided for the subsidence of the drain in and after the year 1911. There is ample evidence to sustain that finding; and, applying our own minds independently to the consideration of the evidence, we have not satisfied ourselves that the learned Judge was wrong —in fact, we have reached the conclusion that he was right.

Consequently, the judgment should be affirmed, and this appeal dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Malleson, Stewart, Stawell & Nankivell.*

Solicitors for the respondent, *Lynch, Macdonald & Elliott.*

B. L.