[HIGH COURT OF AUSTRALIA.]

WEBSTER . . . . . APPELLANT;
PLAINTIFF,

AND

THE COUNCIL OF THE MUNICIPALITY OF MOSMAN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1925-1926.

SYDNEY, *Nov.* 24, 25, 26, 1925; *May* 3, 1926.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Local Government—Drainage—Construction of drain by municipal council—Watercourse through land—Alteration of watercourse by owner—Increased flow of water caused by council works—No damage done to land—Injunction—Local Government Act 1919 (*N.S.W.*) (*No.* 41 *of* 1919), *sec.* 241*.

Upon the plaintiff's land within a municipality of New South Wales there had been a natural depression along which the surface water from a large area of the municipality passed to the sea. The plaintiff or her predecessors had filled in the land so as to increase the height of the surface of the depression and to confine the water within a defined straight channel of which the filling formed the banks, and the municipal council, purporting to act under sec. 241 of the *Local Government Act* 1919 (N.S.W.), had made a concrete invert along the bottom of this channel. The flow of the water through the channel was increased in volume and velocity owing to the combined acts of the municipal council in making roads, &c., and of the owners of the surrounding land in building, &c.; but the channel was, so long as the filling remained in position, sufficient in size to carry the increased flow; so that no damage was in fact done to the plaintiff's land by it. In a suit by the plaintiff for an injunction to restrain the council from causing water to flow upon the plaintiff's land in larger quantity or in a more concentrated form than naturally would flow upon it,

* Sec. 241 of the *Local Government Act* 1919 (N.S.W.) provides:—"(1) For the purpose of draining or protecting any public road the council may in and through any land of . . . any person make open cleanse and keep open any ditch gutter tunnel drain or watercourse. . . . (3) If the property of the . . . person is damaged by the exercise of this power, the . . . person . . . shall have a claim against the council for the damage so sustained" &c.

H. C. OF A. 1925-1926.

WEBSTER v. MOSMAN MUNICIPAL COUNCIL.

Held, by *Knox* C.J., *Higgins* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting), that in the circumstances the plaintiff was not entitled to an injunction.

Decision of the Supreme Court of New South Wales (*Harvey* C.J. in Eq.) affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in its equitable jurisdiction by Julie Webster, the registered proprietor of certain land within the municipality of Mosman, against the Council of that municipality. By her statement of claim the plaintiff alleged (among other things) that the defendant had wrongfully, negligently and improperly made and constructed certain roads, streets, footpaths, drains, &c., and other works above the plaintiff's land, and in such a manner as to divert water to and concentrate more water upon the plaintiff's land than naturally flowed thereon before the making and construction of such roads, streets, footpaths, drains, &c. (par. 4); and that the defendant broke and entered the plaintiff's land and dug up the soil thereof and wrongfully, negligently and improperly laid and constructed a drain in and upon such land and wrongfully, negligently and improperly continued the same (par 5). The plaintiff claimed (among other things): (1) that the defendant might be restrained from permitting its roads, streets, footpaths, drains, &c., to remain so constructed as to cause to flow on to the plaintiff's land water, sewage and offensive matter which would not otherwise flow thereon, and from permitting or causing such water, sewage and offensive matter to flow on to the plaintiff's land, and (2) that the defendant might be restrained from permitting its roads, streets, footpaths, &c., and other works to remain so constructed as to cause water to flow on the plaintiff's land in a more concentrated form than it would otherwise have done. The defendant, by its defence, alleged (among other things) that a natural watercourse always ran through the plaintiff's land and that, in pursuance of sec. 241 of the *Local Government Act* 1919 (N.S.W.), for the purpose of draining and protecting certain public roads the Council duly made, opened, cleansed and kept open a drain in and along such watercourse, and in doing so committed no damage to the property of the plaintiff. The suit was heard by *Harvey* C.J. in Eq., who dismissed it with costs.

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

The other material facts are stated in the judgments hereunder.

Bowie Wilson (with him *K. A. Ferguson*), for the appellant. Apart from any statutory justification the respondent is liable if it brings upon the appellant's land more water than would naturally come upon it without making provision for taking it through and out of the land (*Carslake* v. *President &c. of the Shire of Caulfield* (1)). The appellant had a right to fill up her land so as to keep the water from coming upon it (see *Gerrard* v. *Crowe* (2); *R.* v. *Pagham Sewers Commissioners* (3)); she also has the right to remove the filling, and the respondent cannot rely on the fact that while the filling remains no damage is done to the land. If the respondent acts under sec. 241 of the *Local Government Act* 1919 it must carry out the work in a workmanlike and proper manner, otherwise it is not protected by the section (see *Roberts* v. *Charing Cross, Euston and Hampstead Railway Co.* (4); *Sims* v. *North Sydney Municipal Council* (5); *Stewart* v. *Enfield Municipal Council* (6); *Kannuluik* v. *Mayor &c. of Hawthorn* (7); *Hawthorn Corporation* v. *Kannuluik* (8); *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (9); *Geddis* v. *Proprietors of Bann Reservoir* (10)).

[ISAACS J. referred to *Coats* v. *Clarence Railway Co.* (11).

[HIGGINS J. referred to *Southwark and Vauxhall Water Co.* v. *Wandsworth District Board of Works* (12).]

It was not a proper manner in which to exercise its power under sec. 241 for the respondent to adopt, as the bank of its drain, the filling which the appellant might at any time remove and in the absence of which the water would flow over her land.

Shand K.C. (with him *Hammond*), for the respondent. On the evidence it is not shown how much of the increased flow of water is due to the acts of the respondent, or that any appreciable addition to the flow has been made by those acts. By the filling up of the

(1) (1891) 17 V.L.R. 560; 13 A.L.T. 72.
(2) (1921) 1 A.C. 395, at p. 397.
(3) (1828) 8 B. & C. 355.
(4) (1903) 87 L.T. 732.
(5) (1912) 1 L.G.R. (N.S.W.) 101.
(6) (1915) 3 L.G.R. (N.S.W.) 26, at pp. 32, 39.
(7) (1903) 29 V.L.R. 308; 25 A.L.T. 97.
(8) (1906) A.C. 105.
(9) (1866) L.R. 1 H.L. 93, at p. 112.
(10) (1878) 3 App. Cas. 430, at p. 455.
(11) (1830) 1 Russ. & My. 181.
(12) (1898) 2 Ch. 603.

H. C. OF A. 1925-1926.

WEBSTER v. MOSMAN MUNICIPAL COUNCIL.

land the watercourse has been narrowed and defined, and the Council was entitled under sec. 241 to make use of it in the condition in which it was for draining other parts of the municipality. All that the respondent did was to make the channel more effective by making a concrete bottom to it. There has been no substantial interference with the appellant's rights, and therefore an injunction should not be granted. [Counsel referred to *Colls* v. *Home and Colonial Stores Ltd.* (1); *Shelfer* v. *City of London Electric Lighting Co.* [*No.* 1] (2); *Salmond on Torts*, 5th ed., p. 219; *Colac Shire* v. *Summerfield* (3).]

Bowie Wilson, in reply.

Cur. adv. vult.

May 3, 1926.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. This appeal should, in our opinion, be dismissed.

The plaintiff is the owner of a parcel of land, adjoining the Balmoral Beach, in the municipality of Mosman in the State of New South Wales. The drainage area, now about one hundred and eleven acres in extent, in which the plaintiff's land is situated, is rugged, precipitous, and rocky, and has its outlet through the plaintiff's land, in which there was a natural depression or watercourse. In addition, the sea also forced itself up this depression into and over the plaintiff's land. The result was the formation upon the land of what is called in the evidence a " lagoon," varying in size and depth according to the state of the tide and the amount of the rainfall in the drainage area. Settlement has progressed in this neighbourhood, roads and water channels have been constructed by the defendant pursuant to the authority conferred upon it by the Local Government Acts, buildings erected, and impervious surfaces in the area increased; all this adds sensibly to the volume and flow of water finding its way to the plaintiff's land, especially in times of heavy rain. This increased burden upon the plaintiff's land was due to the combined acts of the Council and of the surrounding owners, but the evidence leaves it quite uncertain whether the increased drainage was or could

(1) (1904) A.C. 179, at p. 192. (2) (1895) 1 Ch. 287.
(3) (1893) A.C. 187.

be contained within the limits of the depression upon the plaintiff's land. About the year 1923 spoil was spread over the plaintiff's land by her or her predecessors in title, which confined the waters entering her land within a defined straight channel. The spoil formed a bank on the plaintiff's land abutting this channel, some three feet in height, and doubtless the flow of the water operated to deepen the channel, and to form pools of stagnant water which became a menace to the health of the residents in the neighbourhood. About the year 1924 the defendant constructed a concrete invert or drain along the bed of this channel, pursuant to the powers conferred upon it by the *Local Government Act* 1919, sec. 241. The combined effect of these works—the filling and the concrete invert—has been a great advantage to the plaintiff's land. In particular the nuisance from offensive odours has been abated. More water has certainly come down to her land, but it has been confined within the channel formed or authorized by her or her predecessor in title, instead of spreading itself over the land, and its discharge has been greatly accelerated by means of the concrete invert constructed by the defendant. At no time, so far as the evidence goes, has the water gone over the top of the bank, or even approached it. The plaintiff, for her own purpose, substituted the channel as the outlet for the drainage area in place of the old depression or watercourse on her land. And so long as her bank remains in position, the defendant, it seems to us, may treat this channel as the substitute for the natural depression or watercourse and the proper outlet for water collected by the defendant in the drainage area in which the channel is situated.

It is said, however, that the Council cannot throw into this channel water that would not naturally have found its way into the old depression, or at an increased velocity. But sec. 241 enables the Council to make and keep open, in and through the land of any person, a drain, for the purpose of draining any public road. In this case, it made a drain in the form of a concrete invert along the bottom of the channel formed by the plaintiff or her predecessors, and by this means is discharged not only the water naturally flowing on to the plaintiff's land, but also any increased flow brought to it by reason of the combined action of the defendant and the surrounding residents. It is quite impossible, on the evidence, to compare the

H. C. OF A. 1925-1926.

WEBSTER v. MOSMAN MUNICIPAL COUNCIL.

Knox C.J. Starke J.

capacity of the old depression and lagoon and that of the new channel formed on the plaintiff's land. So far as the natural flow of the area is concerned, the new channel is ample to discharge it. And as to the increased flow the Council, in our opinion, made, in the circumstances of the case, reasonable and proper provision for its discharge, and that provision has not, in those circumstances, yet been shown to be unreasonable or inadequate.

The act of the plaintiff or her predecessors in substituting a straight banked channel for the old depression was and is a circumstance which the Council was and is entitled to take into consideration in determining the form and capacity of the drain that it should construct and still use. It may be, as time goes on, that the Council will have to reconsider the provision for drainage in this area. But so far the acts of the Council are not, in our opinion, without lawful authority, and infringe no right of the plaintiff.

ISAACS J. The learned Chief Judge in Equity (*Harvey* J.) has made a most careful and exhaustive examination of the facts, and I accept all the conclusions as to them at which he arrived. He deduced from those conclusions of fact the legal consequence that the appellant's suit should be dismissed. It is as to this legal consequence I find myself unable to agree with the learned primary Judge. Briefly the position is as follows:—The appellant is the owner of a block of land fronting Balmoral Beach, in the respondent's municipality. In its natural state the block of land had a natural watercourse running through it on or near its eastern boundary, and carrying to the sea such waters as naturally fell on a catchment area of 118 acres and found their way to the appellant's land. In the course of the last forty or fifty years, residences and other buildings have been erected within the catchment area, streets have been formed and paved and channelled by the Council of the municipality, and there has been such corporate action as to conduct more water on to the appellant's land and in a more concentrated form than the land would naturally be required to bear. The watercourse on the appellant's land has been altered by her or her predecessor in title, either alone or in conjunction with the owner of the adjoining land. Part of that alteration consists in raising the height of the

land at the edges of the watercourse, whereby the additional water, and the extra amount of it in a given time, brought down by reason of the respondent's municipal improvements in the upper portions of the catchment area, is at present prevented from spreading at large over the appellant's land. If the additional filling so placed as a preventive against flooding the land generally were removed, the adjacent land would at times be flooded with the additional water. All that the municipality has done with respect to the drain has been the construction of a concrete invert within it, which has in some way improved it, but, as *Harvey* J. has found, "has not in any way assisted in the discharge of the water"—and that is an important point. In times of heavy rain the water flows some feet above the bottom of the invert and is kept in its course simply by the protective side-filling. That side-filling, as the learned Judge says, *the appellant has an undeniable right to remove.* If, however, she did remove it, other parts of the land would at times be flooded with water unnaturally brought there. The extent, says the learned Judge, to which the Council is responsible for the increased flow it is almost impossible to determine. But it is beyond question that the Council has been an active and constant participator in causing the increased flow by conducting the water to her land. I am not prepared to say that any of the other participants have been guilty of any actionable conduct in bringing more water on the land. Building is an ordinary and anticipated use of the land. The only questions of law, in my opinion, are: (1) Has the respondent municipality been guilty of what is called "negligence" in not utilizing the powers it possesses of avoiding the effect of draining the excess and concentrated water of the catchment area so as to swamp the appellant's land—that is, really, has it been guilty of doing an unauthorized act? and, if it has, then (2) has damage been thereby caused to her land? The only relevant power of mitigation is contained in sec. 241 of the *Local Government Act* 1919. Unless the concrete invert is to be taken as the exercise of that power, there has been none. That invert is admittedly and obviously insufficient to carry off the increased and more concentrated water brought down, and may be for present purposes disregarded. If the invert were regarded as intended to receive the additional water,

H. C. OF A. 1925-1926.

WEBSTER v. MOSMAN MUNICIPAL COUNCIL.

Isaacs J.

its construction, and its maintenance for that purpose, would be demonstrably negligent because manifestly insufficient. But it was not so intended, and there never has been any exercise of statutory powers with a view to discharge, *contra nolentem* and for ever, the excess waters and the super-concentrated waters coming from the higher levels. The learned Judge, however, assumes that the Council, by simply running the water on to the land through the existing drain, can take advantage of the protective filling as if it had been constructed by itself, and that so long as the appellant chooses to allow the filling to remain she must put up with the extra water, there being so far no damage caused to the land. With great respect there is a confusion of thought. No doubt the presence of the filling prevents actual pecuniary damage to the adjacent land, and so long as that protection stands, so long will it be impossible for the appellant personally to sustain pecuniary damage and therefore to claim pecuniary damages as reparation. But "damage" to property, whether at common law or within the meaning of sec. 241, is not confined to pecuniary damage actually sustained by the owner and which may be the subject of "damages" to be recovered by way of compensation. "Damage" to property may consist in the mere deprivation of a right to use it or some fragment of dominion which is interfered with. This is as old as *Ashby* v. *White* (1). An excellent modern example is found in *Trent-Stoughton* v. *Barbados Water Supply Co.* (2). There it was held by the Judicial Committee that "damage or loss" meant, not necessarily the monetary loss or even deprivation of actual user, but that the owner "was deprived of the *power* of using the property which was his." In the present case, once it is found, as it has been found, (1) that the Council has no right to have the filling maintained where it is, so that it is under no liability to pay statutory damage, and (2) that consequently the appellant has an undeniable right to remove the filling, and (3) that if she does her land is liable to be flooded by the excess water brought down by the Council, then the Council's liability follows. It follows because, in the first place, it has used its corporate powers of bringing the water to the appellant's land, and then, without exercising the power of sec. 241

(1) (1703) 2 Ld. Raym. 938.

(2) (1893) A.C. 502.

to lawfully acquire the right of taking the water through on the terms of statutory compensation, it insists on doing so by force. The doctrine of *Geddis* v. *Proprietors of Bann Reservoir* (1) is here in point (and see *Dell* v. *Chesham Urban Council* (2)). The Council thus acting, " damage " is, as stated, established, and the case is complete. The appellant is not, in my opinion, compelled to endure without complaint, or, alternatively, first to take away the filling and run the risk of being flooded, and then to claim reparation for the pecuniary damage actually sustained and also an injunction against repetition of injury. She is entitled to rely on her right of ownership and on her admitted *right* to remove the filling at will without being subject to further actual damage.

The contrary view is based on the supposition that her retention of the protective filling is voluntary. Even on that supposition I am unable to see how that confers any right on others to cast new burdens on her property. But the foundation itself is unsound. In this respect law and metaphysics do not speak in identical terms. There are many cases in which it has been pointed out that the adoption of one of two alternative courses, though in one sense the act of the will, is not voluntary in the sense required by the law. I need mention only two. One is the case of *The Elizabeth* (3), where Sir *William Scott*, speaking of the acceptance of a discharge by a seaman abroad notwithstanding his claim for more wages, said :— " It is a mere abuse of language to call that a voluntary act. It is a preference of evils, of which a man is compelled to take one." The other is the proposition laid down by the Privy Council, speaking by Lord *Moulton* in *Seth Kanhaya Lal* v. *National Bank of India Ltd.* (4), in the following terms :—" By English law it is not open to the wrongdoer to prescribe by which of two lawful alternatives the injured man puts a stop to the wrong under which he is suffering. His choice of any one alternative does not make it as between him and the wrongdoer a voluntary act or estop him from claiming that it was done under coercion." The answer given to the plaintiff in the present case is virtually the wrongdoer's dictation to her which course of self-protection she must adopt, and under the notion

(1) (1878) 3 App. Cas., at p. 456.
(2) (1921) 3 K.B. 427.
(3) (1819) 2 Dods. 403, at p. 406.
(4) (1913) L.R. 40 Ind. App. 56, at p. 63.

H. C. OF A. 1925-1926.

WEBSTER v. MOSMAN MUNICIPAL COUNCIL.

Isaacs J.

that the retention of the filling now—however it originated—is voluntary in the necessary sense. In my opinion that answer is wrong and the Council has not justified its act in sending down the water complained of, as supported either at common law or by statute; and, in law, the appellant's land has been injured. She is therefore entitled to relief from a continuing injury.

The appeal ought, in my opinion, to be allowed, and an injunction granted with costs.

HIGGINS J. If we accept the findings of fact as stated by the learned Judge of first instance, I am of opinion that the dismissal of the suit was right. An injunction ought not to be granted.

To state the position briefly:—The water of this catchment area, some 118 acres, naturally finds its way towards the sea along the low ground in which the plaintiff's land is situated, and that land is at the lowest point. As the settlement of the district increases, the surface water comes down on the plaintiff's land in a more concentrated form than in a state of nature, owing to the formation and metalling of the streets, the alteration of the course of the creek, the acceleration of the water from roofs and hard surfaces, the disappearance of the natural growth. When the plaintiff purchased her land in 1923 there had been a drain constructed by a predecessor in title; and a filling of rubble and earth had been placed on one side of the drain. The municipal council, acting as in pursuance of sec. 241, has placed in the bottom of the drain a concrete invert over which the water runs. The charge as to sewage and offensive matter, street sweepings or horse manure has, in the opinion of the Judge, broken down. No doubt, seaweed comes from the sea sometimes and rots; but the concrete invert does not aid, it rather mitigates, this nuisance. Owing to the drain with the invert the water does not cover so much of the plaintiff's land as it otherwise would cover; but it may be assumed that, but for the filling of rubble and earth, there would be considerably more water spreading over that land when rain is heavy or tides high.

Now, so far as regards the claim for trespass (par. 5 of the statement of claim) the Council justifies its action under sec. 241 of the *Local Government Act* 1919:—"For the purpose of draining or protecting

any public road the council may in and through any land of . . . any person make open cleanse and keep open any ditch gutter tunnel drain or watercourse. . . . If the property of the . . . person is damaged by the exercise of this power, the . . . person . . . shall have a claim against the council for the damage so sustained." It is not contended by Mr. *Bowie Wilson*, for the plaintiff, that what the Council has done does not come under the words "make open cleanse and keep open any ditch," &c.; but he points us to the fact, generally admitted by the engineers, that a covered culvert drain would be better. This fact, it is urged, supports the allegation in par. 5 that the Council "wrongfully negligently and improperly constructed the drain"; but, whatever may be regarded as the best kind of drain, the concrete invert as now existing is not the cause of the extra water due to concentration, and it does not cause water to lie on the plaintiff's land which would not lie on it but for the concrete invert, nor does it put more land out of use than if the concrete invert did not exist. Owing to the bed of the watercourse being only very slightly above mean high-water mark, it would not be practicable to deepen the bed of the drain.

I do not regard sec. 241 as justifying more than the trespass alleged of breaking and entering the plaintiff's land and digging the soil and constructing or keeping open the drain. The section confers no right on the Council to send on the plaintiff's land more water than that to which it was subject by nature. The right to make a drain is clear under sec. 241; to throw more water on the land than it naturally would bear is not a right conferred by that section; and this latter right is challenged by par. 4 of the statement of claim. This paragraph alleged that the Council wrongfully, negligently and improperly made and constructed certain roads, drains, &c., above the plaintiff's land and in such a manner as to divert water to and concentrate more water upon it than naturally flowed thereon. I understand the Judge to find that more water comes over the land in the existing drain than would come naturally. But the question is, does this fact justify the Court in granting an injunction? The plaintiff suffers no damage from the extra water at present, and will not suffer damage unless and until she remove the filling of rubble and earth which at present holds the water

H. C. OF A. 1925-1926.

WEBSTER v. MOSMAN MUNICIPAL COUNCIL.

Higgins J.

within the drain. It is quite true that the plaintiff is free to remove that rubble and earth at any time ; but there is not even an allegation that she wants to remove it. There is no actionable nuisance until the plaintiff actually suffers an injury ; there is no cause of action until the nuisance actually begins (*Sturges* v. *Bridgman* (1) ; and see *Salmond on Torts*, 5th ed., p. 223). The law of nuisance is similar in this respect to the law of support (*Backhouse* v. *Bonomi* (2)). This seems to me to be the true answer to the question which I have asked during the argument as to the right of a defendant, charged with sending more water on to a plaintiff's land than came naturally, to defend his conduct on the ground that so long as the plaintiff keeps the obstruction (rubble and earth) to the flow of water, an obstruction which she is free to retain or to remove as she will, no harm is done. Nor is this such a case as would justify an injunction *quia timet*, if such a case were raised by the pleadings. Indeed, the damage could only occur if there were extraordinary downpours of rain or extraordinary tides, or both. It was laid down clearly by *Knight Bruce* and *Turner* L.JJ. that the occurrences of nuisances, if temporary and occasional only, are not grounds for the interference of the Courts by injunction except in extreme cases (*Swaine* v. *Great Northern Railway Co.* (3)).

The only matter as to which counsel for the appellant plaintiff impugns the findings of fact at the trial is the finding that the defendant has not permitted sewage or offensive matter to pass along the drain ; but I do not see any grounds for differing from that finding.

I think that the injunction should be refused.

RICH J. I have had the opportunity of reading the judgment of my brother *Isaacs*, and concur in it.

Appeal dismissed with costs.

Solicitors for the appellant, *Windeyer, Fawl & Osborne.*

Solicitor for the respondent, *Evan Macdonald.*

B. L.

(1) (1879) 11 Ch. D. 852. (2) (1861) 9 H.L.C. 503.
(3) (1864) 4 DeG. J. & S. 211.