[HIGH COURT OF AUSTRALIA.]

THE METROPOLITAN WATER, SEWERAGE AND DRAINAGE BOARD . . . APPLICANT, } APPELLANT;

AND

O. K. ELLIOTT LIMITED AND OTHERS . RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 17, 20, 21; *Dec.* 13.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

*Water—Damage—Statutory compensation—Statutory direction that amount of compensation be determined by Land and Valuation Court—Escape of water from burst water-main constructed some years previously under statutory authority—Damage to neighbouring property—Action framed in tort—Negligence—Nuisance—Action remitted from Supreme Court to Land and Valuation Court—Forum—Correctness of remission—Prohibition—Appropriateness of remedy—Metropolitan Water, Sewerage and Drainage Act* 1924 (*N.S.W.*) (*No.* 50 *of* 1924), *sec.* 32 (4), (5)*—*Land and Valuation Court Act* 1921 (*N.S.W.*) (*No.* 10 *of* 1921), *sec.* 9 (2), (3).*

In an action brought in the Supreme Court of New South Wales against the Metropolitan Water, Sewerage and Drainage Board the plaintiff alleged damage to its property through an invasion of water which had escaped from a burst water-main, situate under a public road, constructed forty years previously by the Board's predecessor and still in use. The declaration was framed in tort

* Sec. 32 of the *Metropolitan Water, Sewerage and Drainage Act* 1924 (N.S.W.) provides :—"(4) In the exercise of any of the powers hereby conferred the board shall inflict as little damage as may be, and in all cases where it can be done shall provide other watering-places, drains, and channels for the use of adjoining lands in place of any taken away or interrupted by it, and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers. (5) The board shall not be liable to make compensation in respect of any damage sustained by reason of the exercise of any of its powers unless a claim in writing shall be made for the compensation within three months after the damage is sustained; and in every

and alleged negligence and nuisance. The Board denied the allegations and pleaded not guilty by statute. Upon the joinder of issues in the Supreme Court the Prothonotary, at the request of the plaintiff and purporting to act under the combined effect of sec. 32 (5) of the *Metropolitan Water, Sewerage and Drainage Act* 1924 (N.S.W.) and sec. 9 (3) of the *Land and Valuation Court Act* 1921 (N.S.W.), remitted the matter to the Land and Valuation Court for determination.

*Held* that the action was based upon alleged unlawful acts of the Board as distinguished from a claim for statutory compensation under sec. 32 (4), (5) of the *Metropolitan Water, Sewerage and Drainage Act* 1924; therefore it was wrongly remitted to the Land and Valuation Court which had no jurisdiction to try it in its present form.

The liability of the Metropolitan Water, Sewerage and Drainage Board to pay compensation in respect to damage sustained by reason of the exercise by the Board of its "maintenance" powers discussed.

*Quære*, whether in the circumstances a writ of prohibition directed to the Land and Valuation Court is the appropriate remedy.

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte Metropolitan Water, Sewerage and Drainage Board*; *Re O. K. Elliott Ltd.* (1934) 34 S.R. (N.S.W.) 322; 51 W.N. (N.S.W.) 96, reversed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by O. K. Elliott Ltd., a company carrying on the business of a furniture manufacturer and dealer, against the Metropolitan Water, Sewerage and Drainage Board, for £1,500 damages. The cause of action, though variously stated in the seven counts of the declaration, was based upon the negligent construction of a water-main; the negligent, unskilful and unreasonable management and maintenance of the water-main whereby it burst and water therefrom flowed into and upon the premises of the plaintiff; and the bringing of water in

case where the board cannot agree with the owner or claimant the amount of compensation shall be ascertained and the case in other respects shall be dealt with under the provisions of the *Land and Valuation Court Act* 1921, as if it were a case in which a claim for compensation by reason of the acquisition of land for public purposes under the *Public Works Act* 1912, had been made."

Sec. 9 of the *Land and Valuation Court Act* 1921 (N.S.W.) provides:—"(2) Notwithstanding anything contained in the *Public Works Act* 1912 . . . in every case where land is taken or acquired . . . and the claim exceeds one hundred pounds . . . any proceeding to determine the amount of compensation payable shall be instituted by action in the Supreme Court. (3) After issue joined or after any interlocutory judgment, the action shall be remitted by the Prothonotary to the Court for determination." By sec. 2 "Court" is defined as meaning the Land and Valuation Court.

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pipes adjacent to the plaintiff's premises and permitting it to escape on to those premises. The plaintiff alleged that the water which thus flowed into and upon its premises damaged the basement of the premises and certain goods and stock-in-trade stored there, large quantities of which were destroyed.

The water-main was constructed in 1890, by an Authority which preceded the present Board, and ever since has been used for the distribution of water.

The Board, in addition to denying the negligence and nuisance alleged, pleaded not guilty by statute, *The Metropolitan Water, Sewerage and Drainage Act* 1924 (N.S.W.), under which Act the Board is constituted. By that Act the Board is charged, amongst other things, with the conservation, preservation and distribution of water for domestic and other purposes, and the operation and maintenance of all works from time to time vested in it; it may construct water-mains, maintain and repair them, and do any act not otherwise unlawful which may be necessary to the proper exercise and performance of its duties. The Board is required to make full compensation to all parties interested for damage sustained by them through the exercise of its powers. Sec. 32 (5) provides that in those cases in which the Board and the claimant cannot agree as to the amount of compensation the amount shall be ascertained and dealt with under the provisions of the *Land and Valuation Court Act* 1921 as if it were a case in which a claim for compensation by reason of the acquisition of land for public purposes under the *Public Works Act* 1912 had been made. Under the *Land and Valuation Court Act* proceedings to determine the amount payable are instituted in the Supreme Court in cases in which the claim exceeds £100, and the parties do not otherwise consent. Sec. 9 (3) of that Act provides that " after issue joined or after any interlocutory judgment, the action shall be remitted by the Prothonotary to the " Land and Valuation Court " for determination."

The Prothonotary of the Supreme Court, purporting to act under this sub-section, and at the request of the plaintiff, remitted the action to the Land and Valuation Court. The Board thereupon obtained an order *nisi* from the Supreme Court, calling upon the plaintiff and the Judge and Registrar of the Land and Valuation

Court to show cause why a writ of prohibition should not issue prohibiting further proceedings therein in the Land and Valuation Court.

The Supreme Court, by a majority, discharged the order on the ground that the jurisdiction of the Land and Valuation Court was not limited under sec. 32 (5) of the *Metropolitan Water, Sewerage and Drainage Act* 1924 to the mere assessment of the amount of compensation, but extended to the determination of the question of liability for the alleged damage: *Ex parte Metropolitan Water, Sewerage and Drainage Board*; *Re O. K. Elliott Ltd.* (1).

From that decision the Board now, by special leave, appealed to the High Court.

*Teece* K.C. (with him *Edwards*), for the appellant. The various counts in this action are claims for damages, not compensation, arising from an injury said to have been sustained by reason of the exercise of powers conferred upon the Board by secs. 31 and 32 of the *Metropolitan Water, Sewerage and Drainage Act* 1924. As all the counts are so framed the remarks of *Griffith* C.J. in *Colliery Employés Federation of the Northern District, New South Wales (Industrial Union of Employés)* v. *Brown* (2) do not apply. The jurisdiction of the Land and Valuation Court is, under sub-sec. 5 of sec. 32, limited to the determination of the amount of compensation payable in the particular matters referred to that Court (*Brown and Brown Ltd.* v. *Municipal Council of Sydney* (3)). Compensation is, under sub-sec. 4 of sec. 32, payable by the Board in respect only of present and prospective injury arising from the exercise of its powers, that is, e.g., in this case, the construction of the work concerned (*President, Councillors and Ratepayers of Colac* v. *Summerfield* (4)). Damage arising subsequently to the construction of the work, as here, does not come within sub-sec. 4 and, therefore, does not come within the jurisdiction of the Land and Valuation Court conferred by sub-sec. 5; that damage should be the subject of an action at common law.

(1) (1934) 34 S.R. (N.S.W.) 322; 51 W.N. (N.S.W.) 96.
(2) (1905) 3 C.L.R. 255, at p. 264.
(3) (1925) 4 L.V.R. 27.
(4) (1893) A.C. 187.

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The work was in fact constructed many years before the creation of the present Board. Although by sec. 6 of the Act the liability of its predecessor is preserved to the present Board, any action brought in respect to works constructed by that predecessor is not an action under sec. 32 of the Act. This is not an action for compensation for damage sustained by the respondent company by and in the course of construction of the water-main at the time of construction. It is an ordinary action for tort.

*Weston* K.C. and *Snelling*, for the respondent company. The question for decision is: Which is the correct Court in which claims of this nature may be determined? (See *Ex parte Metropolitan Water, Sewerage and Drainage Board*; *Re Roberts* (1) and *Marks* v. *Metropolitan Water, Sewerage and Drainage Board* (2).) A person injured thereby has an absolute right to compensation in respect to damage arising from a proper use by the Board of its powers. Damage resulting from the exercise of the Board's powers may be of two kinds—that which arises originally and that which arises subsequently. The counts relate not only to the laying of the pipes in the past, but also to the present exercise by the Board of its power to cause water to flow through those pipes. Damages are alleged which arise from a present exercise of the Board's powers. "Damage" in sub-sec. 4 means damage necessarily incurred or damage caused through the negligent exercise by the Board of its powers (*President, Councillors and Ratepayers of Colac* v. *Summerfield* (3)), therefore a claim under either or both headings is referable to the Land and Valuation Court under sub-sec. 5.

The fact that the main was constructed many years ago is immaterial. On this and other points the case is parallel to *President, Councillors and Ratepayers of Colac* v. *Summerfield* (3). The claims made in this action contain the necessary essentials to bring them within the compensation provisions of sec. 32. The counts were framed at common law in tort and nuisance, by reason of the decisions in *Forsyth* v. *Wright* (4) and *Graham* v. *Board of Water Supply and Sewerage* (5). Those decisions remained unaffected

(1) (1932) 33 S.R. (N.S.W.) 142; 50 W.N. (N.S.W.) 75.
(2) (1932) 49 W.N. (N.S.W.) 201.
(3) (1893) A.C. 187.
(4) (1884) 5 L.R. (N.S.W.) 251.
(5) (1891) 12 L.R. (N.S.W.) 287.

until the decision in *Ex parte Metropolitan Water, Sewerage and Drainage Board*; *Re Roberts* (1), which was decided after the commencement of this action. In effect the Board is appealing against that decision. Each of the counts alleges the doing by the Board of an act which the Board has power to do. The allegations of negligence may be regarded as mere surplusage, and the counts treated as a statement of claim that the Board in the exercise of its powers constructed a certain main.

Implied throughout all the counts is a statement that the Board was acting within its powers in passing water through the main.

Negligence does not take the matter out of the exercise of the power, and although action for negligence may be pursued at common law, that does not exclude an injured person from statutory compensation (*President, Councillors and Ratepayers of Colac* v. *Summerfield* (2) ). This should be treated as a claim for compensation, as all matters raised are within the jurisdiction of the Land and Valuation Court. If the pleadings are inapt they may be amended by leave of that Court. As to whether non-feasance amounts to an exercise of power, see *Forsyth* v. *Wright* (3), and *Callinan* v. *Railway Commissioners* (4). The passing of water through a main at a certain pressure, thereby causing the main to burst and damage to result, is within the exercise of the power.

Compensation is payable in respect to damage arising from both construction and user (*Hammersmith and City Railway Co.* v. *Brand* (5) ). It is within the function of the Board to supply water: this is well within the meaning of the words " any of its powers " in sub-sec. 5.

[DIXON J. referred to *Markland* v. *Manchester Corporation* (6).]

The decision in that case turned upon the question of negligence, and, further, that decision, and also the decision in *Green* v. *Chelsea Waterworks Co.* (7), was based upon the provisions of an English statute which are much narrower than the provisions of the *Metropolitan Water, Sewerage and Drainage Act* 1924. Compensation is

(1) (1932) 33 S.R. (N.S.W.) 142; 50 W.N. (N.S.W.) 75.
(2) (1893) A.C. 187.
(3) (1884) 5 L.R. (N.S.W.) at pp. 260, 264.
(4) (1901) 1 S.R. (N.S.W.) 89.
(5) (1869) L.R. 4 H.L. 171, at pp. 187, 188.
(6) (1934) 1 K.B. 566, at p. 577.
(7) (1894) 70 L.T. 547; 10 T.L.R. 175, 259.

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payable in respect of injury sustained by reason of the Board carrying out its functions (*Dunn* v. *Birmingham Canal Co.* (1); *Green* v. *Chelsea Waterworks Co.* (2); *Cripp's Law of Compensation*, 6th ed. (1922), p. 460. See also *Midwood & Co.* v. *Manchester Corporation* (3), and *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (4)).

The Court will do its utmost to give effect to the intention of an Act, without straining the words used therein (*Manchester Corporation* v. *Farnworth* (5)). Rule 169A of the *Supreme Court Rules* shows that in the matter of compensation two positions were contemplated, namely, liability and disputed liability, and provision was made accordingly. The language of sec. 9 of the *Land and Valuation Act* indicates that the Legislature intended the Land and Valuation Court to determine all questions which may arise in claims made against the Board.

*Teece* K.C., in reply. The Board is liable to an action at common law for damages arising from negligence in the performance of any work (*Mersey Docks Trustees* v. *Gibbs* (6)). For work negligently done two courses are open to a person by whom injury is sustained; he may proceed either by way of a claim for compensation or by way of an action for damages, but having made his election he is bound by it (*Jones* v. *Stanstead, Shefford and Chambly Railroad Co.* (7)). There is a difference in substance between an action for damages and a claim for compensation. The mere escape of water from a main without more is not sufficient to impose liability upon the Board. *Dunn* v. *Birmingham Canal Co.* (8) is the only authority which supports the contrary proposition, and that by way of *dicta* only. *Fletcher* v. *Birkenhead Corporation* (9) was not an action in tort, but was upon an award, therefore it is distinguishable.

The respondent company has not any proprietary interest in the land where the main is situate (*Swansea Corporation* v. *Harpur* (10)). The respondent company has not an absolute right to compensation.

*Cur. adv. vult.*

(1) (1872) L.R. 8 Q.B. 42, at p. 47.
(2) (1894) 70 L.T. 547; 10 T.L.R. 259.
(3) (1905) 2 K.B. 597.
(4) (1914) 3 K.B. 772.
(5) (1930) A.C. 171.
(6) (1866) L.R. 1 H.L. 93.
(7) (1872) L.R. 4 P.C. 98.
(8) (1872) L.R. 8 Q.B. 42.
(9) (1907) 1 K.B. 205.
(10) (1912) 3 K.B. 493, at pp. 502, 506 *et seq.*

The following written judgments were delivered :—

RICH J. The confusion which has arisen in the administration of sec. 32 (5) of the *Metropolitan Water, Sewerage and Drainage Act* 1924, as applied to the *Land Valuation Court Act* 1921 and the *Public Works Act* 1912, is doubtless a natural result of referential legislation. But in my opinion it has been increased by a failure to insist that the form which the proceedings actually take, and not that into which they might have been thrown, determines whether they should be remitted under sec. 9 (3) of the *Land and Valuation Court Act* 1921, to the Land and Valuation Court for determination. The duty of remitting actions which claim a determination of the amount of compensation is cast on the Prothonotary. It is sufficiently obvious that he is not required to investigate the causes of actions which on the facts are or may be available to the plaintiff. He is concerned only with the claim the plaintiff makes and the character of his actual declaration. If the proceeding is for the determination of compensation, to the Land and Valuation Court it must go. If it is not such a proceeding, in the Supreme Court the action must remain. Whether the proceeding is well or ill-advised, whether under wiser counsels some other relief would have been sought and whether the action is doomed to failure in its existing form are questions all beside the point. If this necessity of regarding the form of proceeding actually adopted had been kept in view, no difficulty could have arisen in the present case. The declaration is framed in tort and does not claim a determination of statutory compensation. Therefore it should not have been remitted, but should have been retained in the Supreme Court, where in due time the question whether on the facts such an action lies would have been decided. If, however, the proceedings had sought statutory compensation, then by demurrer the defendant might have raised the question whether under the provisions of the *Metropolitan Water, Sewerage and Drainage Act* 1924 the facts, assuming them to have been sufficiently and correctly stated in the declaration, raised a claim for compensation. When and if it arose I should give a negative answer to that question. The reasons for such an answer are set out in the judgments prepared by my brothers *Dixon* and *McTiernan*, which I have had an opportunity of reading and I do

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not propose to go again over the same ground. No argument was addressed to us as to the propriety of the remedy sought, namely, prohibition. Probably the order proposed will be found sufficient to give effect to what in the view of this Court are the rights of the parties, and it is, therefore, unnecessary to pursue the question.

In my opinion the appeal should be allowed.

STARKE J. The respondent O. K. Elliott Ltd. brought an action in the Supreme Court of New South Wales against the appellant the Metropolitan Water, Sewerage and Drainage Board, for damages. The cause of action, though stated variously in seven counts of the declaration, was based upon the negligent construction of a water-main, the negligent, unskilful and unreasonable management and maintenance of the water-main, whereby it burst, and water flowed into and over the respondent's premises, to the respondent's damage, and the bringing of water in pipes adjacent to the respondent's premises and permitting it to escape on to such premises, to the respondent's damage. The appellant pleaded, with other pleas, not guilty by statute 1924, No. 50, *The Metropolitan Water, Sewerage and Drainage Act* 1924. Under this Act, the Metropolitan Water, Sewerage and Drainage Board is constituted. The functions of the Board are stated in sec. 30: it is charged, amongst other things, with the conservation, preservation and distribution of water for domestic and other purposes, and the operation and maintenance of all works from time to time vested in it; it may construct water mains, maintain and repair them, and do any act not otherwise unlawful which may be necessary to the proper exercise and performance of its duties (secs. 31 and 32). By sec. 32 (4), (5), it is provided:—"(4) In the exercise of any of the powers hereby conferred the board shall inflict as little damage as may be . . . and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers. (5) The board shall not be liable to make compensation in respect of any damage sustained by reason of the exercise of any of its powers unless a claim in writing shall be made for compensation within three months after the damage is sustained; and in every case

where the board cannot agree with the owner or claimant the amount of compensation shall be ascertained and the case in other respects shall be dealt with under the provisions of the *Land and Valuation Court Act* 1921, as if it were a case in which a claim for compensation by reason of the acquisition of land for public purposes under the *Public Works Act* 1912, had been made."

Under the *Land and Valuation Court Act*, No. 10 of 1921, proceedings to determine the amount of compensation payable are instituted in the Supreme Court in cases in which the claim exceeds £100 and the parties do not otherwise consent. "After issue joined or after any interlocutory judgment, the action shall be remitted by the Prothonotary to the court"—that is, the Land and Valuation Court —"for determination." (See sec. 9 (2), (3).) The Prothonotary of the Supreme Court, purporting to act on this section and at the request of the respondent, remitted the action brought by the respondent against the appellant to the Land and Valuation Court. The appellant thereupon obtained an order *nisi* from the Supreme Court, calling upon the respondent and the Judge and Registrar of the Land and Valuation Court to show cause why a writ of prohibition should not issue prohibiting further proceedings in the Land and Valuation Court. The Supreme Court discharged this order, and an appeal is now brought to this Court on the part of the Metropolitan Water, Sewerage and Drainage Board.

It has long been settled that if public authorities or persons do acts which they are authorized by statute to do, and do them in a proper manner, then, though the acts so done work special injury to a particular individual, the individual injured cannot maintain an action at law. He is without remedy unless compensation is provided by the Act, and his only remedy is that given by the statute, namely, compensation (*East Fremantle Corporation* v. *Annois* (1)). The compensation is for losses sustained in consequence of what the authorities or persons may lawfully do under the powers conferred upon them (*Caledonian Railway Co.* v. *Colt* (2)). But it is equally well settled that if the injury or loss is caused by an act which, notwithstanding the statute containing or incorporating a compensation clause, is not made lawful, the remedy by

(1) (1902) A.C. 213.

(2) (1860) 3 L.T. 252.

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action is not taken away and is open to the person injured. Statutory powers must be exercised " with reasonable regard to the rights of other people," and if an act is done in excess of the statutory power, or carelessly or negligently, then the person injured can put in force the ordinary legal remedy by action in the Courts of law (*Caledonian Railway Co.* v. *Colt* (1); *The Mersey Docks Trustees* v. *Gibbs* (2); *Brine* v. *Great Western Railway Co.* (3); *Clothier* v. *Webster* (4); *Coe* v. *Wise* (5); *Roberts* v. *Charing Cross, Euston and Hampstead Railway Co.* (6); *Howard-Flanders* v. *Maldon Corporation* (7)).

The declaration in the case now before us is framed on the basis that the acts and omissions of the Board are not made lawful by its Act, but were in excess or in abuse of its powers, or were carelessly and negligently done or omitted. Consequently, the remedy is by action at law for damages, and not for compensation under the Act. In *President, Councillors and Ratepayers of Colac* v. *Summerfield* (8) the case " was conducted upon the footing that what the appellants had done was done in the exercise of the powers conferred upon them by sec. 384 " of the *Local Government Act* 1874 of Victoria. " So long as they act within their statutory powers, negligence is, in any question of compensation, immaterial, and cannot affect the extent of their liability, which is for all damage resulting from the construction or maintenance of their works " (9). The decision is therefore in accordance with the principle already referred to. In *Fletcher* v. *Birkenhead Corporation* (10), compensation had been assessed under the *Waterworks Clauses Act* 1847 for injurious affection of the plaintiff's house by the exercise by the defendants of powers conferred upon them by the *Birkenhead Corporation (Gas and Water) Act* 1881, which incorporated the provisions of the *Waterworks Clauses Act* 1847. The point of the decision is that the provisions of the Act gave compensation for " damage occasioned otherwise than by mere works of construction." " The Act contemplates not merely that structures capable of holding and conducting water should be made,

(1) (1860) 3 L.T. 252.
(2) (1866) L.R. 1 H.L., at p. 112.
(3) (1862) 2 B. & S. 402; 121 E.R. 1123.
(4) (1862) 31 L.J.C.P. 316; 142 E.R. 1353.
(5) (1866) L.R. 1 Q.B. 711.
(6) (1903) 87 L.T. 732.
(7) (1926) 135 L.T. 6.
(8) (1893) A.C. 187.
(9) (1893) A.C., at p. 191.
(10) (1906) 1 K.B. 605; (1907) 1 K.B. 205.

but that the operations should embrace the filling of the reservoir with water, without which the works could not really be said to be waterworks at all" (1). As a matter of construction, the *Metropolitan Water, Sewerage and Drainage Act* also, I think, gives compensation for damage occasioned otherwise than by mere works of construction. But that is not inconsistent with the principle mentioned. The case of *Graham* v. *Board of Water Supply and Sewerage* (2) is in accord with that principle, and was, in my opinion, rightly decided. The decision in *Ex parte Metropolitan Water, Sewerage and Drainage Board*; *Re Roberts* (3), cannot, in my opinion, be supported. The case of *President, Councillors and Ratepayers of Colac* v. *Summerfield* (4), upon which the Supreme Court of New South Wales relies in *Roberts' Case* (3), is not authority for the proposition that a careless and negligent exercise of a statutory power is a lawful exercise of that power. *Farwell* J. thus stated the law in *Roberts* v. *Charing Cross, Euston and Hampstead Railway Co.* (5): "If the Legislature has given powers and those powers are being used for the purpose of carrying out the work authorized, and it is admitted that the mode in which they are being used is unreasonable, that is an abuse of the power so given, and is therefore *ultra vires*." And for such excess the ordinary legal remedy by action subsists unless that right be explicitly taken away.

Some reference was made during the argument to cases in which notice is required before action is brought against public authorities. But the Acts in question usually prescribe that notice be given in respect of acts done in pursuance of or under the authority of the Act, or in the execution or intended execution of the Act (Cf. *Selmes* v. *Judge* (6)). These cases have no relevance to that now before us.

The final conclusion is that the Prothonotary had no right or authority, in my opinion, to remit this action to the Land and Valuation Court for determination, his act in purporting to remit it is null and void, and the action remains in the Supreme Court, where it rightly belongs, for trial. The parties have raised no objection to

(1) (1907) 1 K.B., at p. 210.
(2) (1891) 12 L.R. (N.S.W.) 287.
(3) (1932) 33 S.R. (N.S.W.) 142; 50 W.N. (N.S.W.) 75.
(4) (1893) A.C. 187.
(5) (1903) 87 L.T., at p. 734.
(6) (1871) L.R. 6 Q.B. 724.

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the procedure by way of order *nisi* for a writ of prohibition to the Land and Valuation Court, but I have some doubt whether it was an appropriate remedy in the circumstances and on the facts appearing in the transcript. It will suffice, I think, if the appeal be allowed, the order of the Full Court and the order *nisi* for prohibition set aside, and liberty given to either party to apply to the Supreme Court to restore the action to its list of causes for trial.

DIXON J. This is an appeal by special leave from a decision of the Supreme Court of New South Wales discharging a rule *nisi* for a writ of prohibition sought against the Judge of the Land and Valuation Court prohibiting his further proceeding in the determination of the issues arising in an action brought in the Supreme Court by the respondent in this appeal against the appellant Board.

The issues had been remitted in purported pursuance of sub-sec. 3 of sec. 9 of the *Land and Valuation Court Act* 1921 by the Prothonotary to the Land and Valuation Court for determination.

It appears from the declaration and some admissions, which supply the place of particulars thereunder, that the grievance of the respondent, the plaintiff in the action, was that its place of business was invaded and its stock-in-trade damaged by water which escaped from a water-main in the street which had been laid down some forty years ago by the defendant Board, the Water Supply Authority.

The declaration, which was framed in tort, alleges negligence and nuisance.

In cases in which the Board is liable under statute to make compensation in respect of damages sustained by reason of the exercise of any of its powers, it is provided by sec. 32 (5) of the *Metropolitan Water, Sewerage and Drainage Act* 1924 that, where the Board cannot agree with the claimant, the amount of compensation shall be ascertained and dealt with under the provisions of the *Land and Valuation Court Act* 1921, as if it were a case in which a claim for compensation by reason of the acquisition of land for public purposes under the *Public Works Act* 1912 had been made. The *Public Works Act* 1912, by sec. 104 (1), directs that, if there is no agreement as to amount of compensation within the prescribed time, the claimant may institute proceedings in the Supreme Court

against the Minister empowered to carry out any authorized work as nominal defendant. In certain cases arbitration is prescribed as an alternative. But sub-sec. 2 of sec. 9 of the *Land and Valuation Court Act* 1921 provides that, notwithstanding anything contained in the *Public Works Act* 1912, there shall be no arbitration, and any proceedings to determine the amount of compensation payable shall be instituted by action in the Supreme Court. Sub-sec. 3 provides that, after issue joined, or after interlocutory judgment, the action shall be remitted by the Prothonotary to the Land and Valuation Court for determination.

The scheme, which results from these provisions of three statutes, is that, where statutory compensation is sought against the Board in respect of damages sustained by reason of the exercise of any of its powers and the parties are unable to agree upon the amount, the claimant may proceed for the determination of the amount in the Supreme Court in the form of an action for compensation. When the action has reached the appropriate stage, it becomes the duty of the Prothonotary to remit it to the Land and Valuation Court for determination. Sec. 9 (1) of the *Land and Valuation Court Act* 1921, in combination with sec. 32 (5) of the *Metropolitan Water, Sewerage and Drainage Act* 1924, gives that Court jurisdiction to hear and determine the claim without a jury. In such a scheme, the jurisdiction of the Land and Valuation Court and the duty of the Prothonotary to remit the cause to that Court depend upon the nature of the claim made in the action. If the claim is for statutory compensation, the action must be remitted to and heard in that Court. But, if the claim is not for statutory compensation, the action must proceed in the Supreme Court. If a claim is made for damages in an action of tort, it must go to trial in the Supreme Court, unless, by an amendment of the pleadings, it loses that character and becomes an action for statutory compensation. The fact that, if the plaintiff were better advised, he would have sued for statutory compensation is nothing to the point. It is no part of the Prothonotary's duty to consider for what the plaintiff might have sued; whether he remits the action or not depends upon the cause of action the plaintiff has declared upon and the relief he has

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sought. This the Prothonotary can ascertain from a mere inspection of the proceedings.

It follows that, in the present case, the action ought not to have been remitted to the Land and Valuation Court which has no jurisdiction to try it in its present form.

The question does not arise in the present case whether, when an action for compensation is brought and the Board disputes its liability under the statute to pay compensation, the issue whether it is liable or not shall be decided in the Supreme Court or in the Land and Valuation Court, but it would appear that upon demurrer it may be determined in the Supreme Court.

In discharging the rule nisi for prohibition, *Stephen* J. and *Markell* A.J., who formed a majority of the Court, adopted the view that the Land and Valuation Court had complete jurisdiction to determine the liability of the Board, and that, although the action was framed in tort, its substance should be considered and its form might be amended in that Court. They saw nothing in the allegations in the declaration to show that the Board had acted outside its powers and that the works, from which the damage arose, were not authorized by statute.

*Halse Rogers* J. was of opinion that the Land and Valuation Court had no jurisdiction to do more than assess the amount of compensation where liability was conceded.

In my opinion, it is difficult to disregard the form of the proceedings, because it is the form which determines the forum in which they are to be disposed of. But special leave to appeal was granted in the present case because of the difficulty which has arisen in this and other cases in the administration of these statutory provisions. It may, therefore, be desirable to assume that the pleadings may be amended so as to claim statutory compensation, and, upon this assumption, to decide whether the statute imposes upon the Board a liability to make compensation for the damage complained of. The question depends upon sec. 32 of the *Metropolitan Water, Sewerage and Drainage Act* 1924. That section is contained in Part IV. which is headed " Functions and Powers of Board " and in Division 2 which is headed " Construction." Sec. 31, the first section of the Division, sets out under three paragraphs the works

the Board may construct. Sec. 32 (1) enacts that, for the purposes and subject to the provisions of the Act, the Board may exercise a number of powers set out in eight paragraphs. The second, third and fifth of them are as follows:—"(*b*) enter upon, take and hold such land as it may from time to time deem necessary for the construction, maintenance, repair, or improvement of any works; (*c*) from time to time sink such wells or shafts and make, maintain, alter, or discontinue such reservoirs, waterworks, cisterns, tanks, aqueducts, drains, cuts, sluices, pipes, culverts, engines, and other works, and erect such buildings upon the lands, streams, and watercourses authorized to be taken as it shall think proper; . . . (*e*) enter upon any Crown or private land, public road, or street, and may erect any ventilating shaft or lay or place therein any water or sewerage main, pipe, or drain, or repair, alter, cut off or remove the same."

It will be noticed that pipes may not only be made but "maintained." Sub-sec. 4 provides: "In the exercise of any of the powers hereby conferred, the board shall inflict as little damage as may be . . . and shall make full compensation to all parties interested for all damage sustained by them in the exercise of such powers." Par. (*b*) and sub-sec. 4 are founded upon the third paragraph of sec. 12 of the English *Waterworks Clauses Act* 1847.

Sec. 12, in conferring the powers it contains, expressly refers to them as relating to works for constructing the waterworks. Nevertheless it has been held that they extend to maintenance as well as construction. In *Graigola Merthyr Co.* v. *Swansea Corporation* (1), *Tomlin* J., as he then was, said:—"This section goes further than the corresponding provision in the *Railways Clauses Act* 1845, as it provides for cases of injurious affection by reason of the maintenance as well as by reason of the construction of the works." For this statement he cites *Fletcher* v. *Birkenhead Corporation* (2). In my opinion, sec. 32 of the New South Wales Act should, in spite of the heading of the Division, receive a similar interpretation. But it does not follow that the Board incurs an absolute statutory liability to make compensation to the occupiers of premises adjoining streets

(1) (1928) Ch. 31, at p. 36.
(2) (1906) 1 K.B. 605; (1907) 1 K.B. 205.

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for damage sustained by their goods or premises by reason of outbursts of water from the Board's water-mains in the roadway.

Upon the similar, but not identical, provisions of the English Act, no such absolute liability has been imposed, but persons complaining of such injury have been put to an action of negligence to recover damages (*Snook* v. *The Grand Junction Waterworks Co.* (1); *Green* v. *Chelsea Waterworks Co.* (2); *Markland* v. *Manchester Corporation* (3); *Cox Brothers (Australia) Ltd.* v. *Commissioner of Waterworks* (4)). *Fletcher Moulton* L.J., in *Swansea Corporation* v. *Harpur* (5), describes these as "cases which relate to damage done to a road without negligence, but in consequence of the presence of the pipes there, as, for instance, the case of *Green* v. *Chelsea Waterworks Co.* (2) where a pipe burst and did damage to a private individual. The Courts have established that in such cases where there is no negligence the water company is not liable. It has obtained from the Legislature those privileges, and if it properly exercises its rights it is not liable for damages unless it has been guilty of some neglect or default."

In my opinion the same result follows from the provisions of the Board's Act. The Board is required to inflict as little damage as may be, and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers. When these words are related to the power of maintenance, they mean, I think, to confer a right to compensation upon a party who has some specific interest in land which is affected by an operation of maintenance. The word "inflict" points to some active operation, and the word "interested" to some proprietary right. An outburst of water in the street results, not from some active work of maintenance, but from the failure of the pipe to withstand the pressure of the water with which it is charged. It is charged with water in the exercise of the Board's power, and duty, to maintain a supply of water. This power is conferred by Division 4 of Part IV., not by Division 2 which contains sec. 32, and sec. 32 has no apparent relation to it. Clear expressions are needed before statutes, giving

(1) (1886) 2 T.L.R. 308.
(2) (1894) 70 L.T. 547.
(3) (1934) 1 K.B. 566.
(4) (1933) 50 C.L.R. 108.
(5) (1912) 3 K.B. 493, at pp. 503, 504.

a general right of compensation in respect of public works and undertakings, are construed to impose an absolute liability upon an Authority for every accidental loss which may be suffered in the course of its daily conduct. The language of Lord *Tomlin* already cited (1), appears to me exactly to describe the effect of the provision. "It provides for cases of injurious affection by reason of the maintenance as well as by reason of the construction of the works."

Damage from the escape of water from a bursting main is not, in my opinion, injurious affection to land from the exercise of a power of maintenance.

For these reasons I think that the action was properly framed in tort and not as one seeking statutory compensation, and that it must be tried in the Supreme Court.

A writ of prohibition seems a curious remedy in a case where the Prothonotary of the Supreme Court has remitted mistakenly an action for trial before the Land and Valuation Court, but the propriety of this remedy has not been discussed before us. It probably is sufficient to discharge the order appealed from and remit the cause to the Supreme Court. If this course is taken, and the parties find it necessary to obtain a rule absolute from the Supreme Court, the rule *nisi* can be moulded to give what is considered appropriate relief. I should have thought that a rule to the Registrar of the Land and Valuation Court to return the record or issues would suffice.

EVATT J. In this case I concur in the judgment of my brother *McTiernan*.

MCTIERNAN J. The appellant, which is constituted under the *Metropolitan Water, Sewerage and Drainage Act* 1924, is charged with the duty of conserving and distributing water for domestic and other uses (sec. 36 (1) (*a*) ). Statutory compensation is payable under sec. 32 (4), which is in Division 2 of Part IV., for damage sustained in certain cases through the exercise by the appellant of "any of the powers hereby conferred." Sec. 32 (5) provides that the amount of such compensation should be determined in the following

(1) (1928) Ch. at p. 36.

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manner: "In every case where the board cannot agree with the owner or claimant the amount of compensation shall be ascertained and the case in other respects shall be dealt with under the provisions of the *Land and Valuation Court Act* 1921, as if it were a case in which a claim for compensation by reason of the acquisition of land for public purposes under the *Public Works Act* 1912, had been made." The provisions of the statutes, which are hereby made applicable, require the claimant for compensation to commence an action by writ of summons in the Supreme Court, and after issue joined or any interlocutory judgment in such action, the Prothonotary is directed by sec. 9 (3) of the *Land and Valuation Court Act* to remit the case to the Land and Valuation Court for determination.

The respondent brought an action in the Supreme Court for damages alleged to have been done to its premises, and stock-in-trade by water flowing out of one of the appellant's water-mains which had burst. Issue having been joined the Prothonotary, at the request of the respondent, remitted the action to the Land and Valuation Court.

We have to decide whether the remission was rightly made under sec. 32 (5). The question whether an action is of the description which this provision directs to be remitted turns upon the nature of the cause of action contained in the pleadings which, under the procedure of the Supreme Court, are closed when issue is joined. The pleadings show that the respondent sued for damages for alleged unlawful acts, negligence and nuisance. In my opinion the jurisdiction conferred by sec. 32 (5) upon the Land and Valuation Court does not extend to cases where the cause of action sued upon is an alleged unlawful act of the Board as distinguished from a claim for statutory compensation for damage inflicted by the Board in the exercise of its statutory authority (*Jones* v. *Stanstead, Shefford and Chambly Railroad Co.* (1); *Swansea Corporation* v. *Harpur* (2)).

The appeal has, however, been argued on the assumption that the nature of the actual claim made might be disregarded, and notwithstanding the cause of action alleged, the matter might be treated as

(1) (1872) L.R. 4 P.C. 98, at p. 115.
(2) (1912) 3 K.B., at p. 507; (1913) A.C. 597.

if the action was brought in respect of damage alleged to have been sustained by the respondent in the exercise of such statutory authority. Upon this assumption the question arises whether the manner in which the alleged injuries to the respondent's premises and stock-in-trade were sustained, entitles it to statutory compensation. The liability of the appellant to pay statutory compensation is, as already stated, defined by sec. 32 (4), which is in these terms: "In the exercise of any of the powers hereby conferred the board shall inflict as little damage as may be, and in all cases where it can be done shall provide other watering-places, drains and channels for the use of adjoining lands in place of any taken away or interrupted by it, and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers."

The respondent contends that it sustained the damage, for which the compensation is claimed, through the exercise by the appellant of its power to maintain a supply of water in its mains, and that this power is conferred by sec. 32 (1), particularly placita (*b*), (*c*), (*e*) and (*h*). These provisions occur in Division 2 of Part IV., which is headed "Construction." It may be conceded that they extend beyond mere matters of construction (Cf. *Fletcher* v. *Birkenhead Corporation* (1); *Harpur* v. *Swansea Corporation* (2)). The heading is a narrow and inadequate description of the powers and permissions contained in the above-mentioned Division. It is apparently derived from sec. 31, which gives the appellant power to construct *inter alia* reservoirs and distributory works, including mains for water supply purposes. This and the next section are in Division 2, and are concerned with the construction and maintenance of works. Secs. 31 and 32 (1) are special provisions conferring powers and permissions ancillary to the appellant's function as a water supply authority. Their object is to empower the appellant to construct and maintain *inter alia* its mains and distributory works for supplying water to the users. The words maintenance and maintain as used in sec. 32 (1) (*b*) and sec. 32 (1) (*c*) respectively relate to the maintenance of the works, not to the maintenance of the supply of water in the works. The object of these provisions is not to

(1) (1913) A.C. 597.

(2) (1907) 1 K.B., at p. 216.

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empower the appellant to keep a supply of water in the mains. The provisions of the Act which are concerned with the supply of water are sec. 30, which is in Division 1 of Part IV., and sec. 47 and a number of following sections, which are in Division IV. of Part IV. Sec. 32 (4), which is in Division 2 of Part IV., creates a right to statutory compensation for damage sustained in the exercise of the powers "hereby conferred." In my opinion this does not extend beyond damage sustained through the exercise of the powers conferred by Division 2 of Part IV. The Act contains no provision imposing liability upon the appellant to pay compensation for damage inflicted in exercising its power to send water through the mains. The question, whether the appellant is liable to pay damage, in respect of the respondent's alleged grievances, must, therefore, be determined in an action founded on alleged negligence or some other alleged tortious act, as distinct from an action to enforce a liability to pay statutory compensation for an act done in exercise of the appellant's statutory authority (*Snook* v. *The Grand Junction Waterworks Co.* (1); *Green* v. *Chelsea Waterworks Co.* (2); *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.* (3), per Lord *Sumner*; *Burniston* v. *Corporation of Bangor* (4); *Cox Brothers (Australia) Ltd.* v. *Commissioner of Waterworks* (5)).

The provisions of the statute made applicable by sec. 32 (5) relate to compensation for compulsory acquisition, but sec. 32 (4), which confers the right to statutory compensation, does not in terms relate to compulsory acquisition. But it should be observed that sec. 85 of the *Public Works Act* 1912 provides that the amount of compensation payable by reason of the exercise of various powers for carrying out the purposes of the Act should be determined in the same manner as the amount of compensation payable by reason of the compulsory acquisition of land. The powers conferred by the *Public Works Act* in relation to which sec. 85 was enacted are analogous to the appellant's powers under sec. 32 (1) of the *Metropolitan Water, Sewerage and Drainage Act*. The effect, therefore, of sec. 32 (5) is to assimilate the procedure for determining the amount of statutory compensation payable by the appellant, to the procedure prescribed

(1) (1886) 2 T.L.R. 308.
(2) (1894) 70 L.T. 547; 10 T.L.R. 175, 259.
(3) (1914) 3 K.B. 772, at p. 781,
(4) (1932) N. Ir. 178.
(5) (1933) 50 C.L.R. 108.

by the *Public Works Act* for determining the amount of compensation payable under that Act for damage done in analogous circumstances. The procedure in both cases is that prescribed by the *Public Works Act* for dealing with an action for statutory compensation payable by reason of the compulsory acquisition of land. The appellant's power to acquire land compulsorily is specially conferred by Division 1 of Part VI. of the *Metropolitan Water, Sewerage and Drainage Act*.

It may be observed that if upon its true construction sec. 32 (4) applies to damage done by the appellant in exercising its powers to keep its mains charged with water, the respondent would not be entitled to compensation unless it were established first, that the damage alleged was sustained in or through the exercise of that power by the appellant, and, secondly, that the respondent was within the designated class "all parties interested." The conclusion at which I have arrived as to the operation of sec. 32 (4) renders the decision of these questions unnecessary. But it may be noted that in *Swansea Corporation* v. *Harpur* (1), *Buckley* L.J. made some observations which are pertinent to the first question; and with respect to the question whether the respondent is a "party interested," the Legislature has not expressly said that the interest which is necessary to support a claim for statutory compensation is an interest in land or hereditaments which have been injuriously affected. (Cf. sec. 96 of *Public Works Act* 1912). But it would seem that the words of the section in their natural meaning limit its operation to cases of injurious affection to an interest in property, and that it does not extend to injuries which are merely personal. As to what is "injurious affection" within the meaning of sec. 68 of the *Land Clauses Consolidation Act* 1845 (8 & 9 Vict. c. 18), see *Metropolitan Board of Works* v. *McCarthy* (2).

Sec. 9 (3) of the *Land and Valuation Court Act* 1921, which is made applicable by sec. 32 (5) of the *Metropolitan Water, Sewerage and Drainage Act* 1924 requires that "after issue joined or after any interlocutory judgment" in an action commenced in the Supreme Court in which a claim is made for statutory compensation payable by reason of the compulsory acquisition of land, the action shall be

(1) (1912) 3 K.B., at p. 507.
(2) (1874) L.R. 7 H.L. 243, *per* Lord *O'Hagan*, at p. 267.

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remitted by the Prothonotary of the Supreme Court to the Land and Valuation Court for determination. After joinder of issue in an action in the Supreme Court, which is commenced by a declaration, the pleadings are closed. Where parties have joined issue they are in dispute on matters of fact essential to the case either of the plaintiff or the defendant. The description, interlocutory judgment, is appropriate as referring to a judgment signed in an action for unliquidated damages before the amount of damages is assessed. Having regard to the language of sec. 9 (3) of the *Land and Valuation Court Act* it would appear that by sec. 32 (6) the Land and Valuation Court is given jurisdiction to determine not only an action in which the pleadings put facts in issue upon which the right to receive statutory compensation depends, but also an action in which the only question to be decided by the Supreme Court, if the action had remained there, would have been the amount of statutory compensation which should be paid to the claimant. But if before joinder of issue either party should demur in lieu of, or in addition to pleading, the language of sec. 32 (5) of the *Metropolitan Water, Sewerage and Drainage Act*, or of sec. 9 of the *Land and Valuation Court Act* does not, in my opinion, sufficiently exhibit any intention to oust the jurisdiction of the Supreme Court to hear and determine the demurrer.

The question whether prohibition would not go to the Land and Valuation Court was not argued, and I express no opinion on that question. The remission of the action to the Land and Valuation Court was, in my opinion, wrong.

The appeal should be allowed.

*Appeal allowed. Order of the Supreme Court discharged. Cause remitted to the Supreme Court. Appellant to pay the respondent's costs pursuant to its undertaking.*

Solicitor for the appellant, *R. W. Hooke.*

Solicitors for the respondent, *A. S. Gourlay & Co.*

J. B.