[HIGH COURT OF AUSTRALIA.]

AISBETT . . . . . APPELLANT;
PLAINTIFF,

AND

CITY OF CAMBERWELL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 7, 8.

SYDNEY, *Aug.* 21.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Local Government—Drainage of streets—Water directed on to land adjoining plaintiff's—Increased flow from neighbouring land to plaintiff's land—Damage caused by increased flow and impurities brought therewith—Absence of negligence in construction of drain—Local Government Act 1928 (*Vict.*) (*No.* 3720), *secs.* 606-608*.

The plaintiff owned and occupied certain land in the municipality of Camberwell. Through this land there was a natural depression down which surface water flowed from the neighbouring land on the east. Under the provisions of sec. 606 of the *Local Government Act* 1928 the defendant municipality constructed a drain in place of one formerly existing. The new drain, as did the old, discharged water on to the neighbouring land to the east of the plaintiff's.

* Sec. 606 of the *Local Government Act* 1928 (Vict.) provides that: "(1) The council of every municipality may in or through any lands within the municipal district make and open such ditches gutters tunnels drains and water-courses as to such council may seem fit. (2) Such council may make scour cleanse and keep open all ditches creeks gutters tunnels drains or water-courses within or adjoining to the municipal district. (3) Such council for any of the purposes aforesaid may enter upon any lands and shall make compensation to the owners and occupiers of such lands for any damage which they sustain through the exercise of any of the powers conferred by this section." Sec. 608 provides that: "(1) No action shall be brought against any municipality in respect of any works made or constructed without negligence by such municipality under or by virtue of this Division or any corresponding previous enactment or in respect to any damage or injury arising out of the making or constructing of any such works by reason only that the municipality made or constructed the same or caused the same to be made or constructed without exercising any powers created or conferred by this Division or any corresponding previous enactment. (2) Such works shall be deemed to have been made and constructed without negligence if no claim for compensation on account thereof is made within two years from the date of the completion of such works." "This Division" is Division 3, secs. 606-608, entitled "Drains Water-courses &c."

This water flowed down the depression on the plaintiff's land but owing to the increased flow of water carried by the new drain which drains a larger area and to the impurities in the water which the increased flow brought with it damage was caused to the plaintiff's land. There was no evidence that the defendant municipality had been negligent in the design or construction of the new drain, nor was there any evidence that the old drain had caused any damage to the plaintiff.

Held, that the *Local Government Act* 1928 did not authorize defendant municipality to discharge on to the neighbouring land of the plaintiff water which flowed on to the plaintiff's land in greater quantities or in a condition of greater impurity than would naturally flow on to the plaintiff's land, and that the defendant was liable for any damage so caused.

Carslake v. *President, &c., of the Shire of Caulfield*, (1891) 17 V.L.R. 560; 13 A.L.T. 72, and *Hawthorn Corporation* v. *Kannuluik*, (1903) 29 V.L.R. 308; 25 A.L.T. 97; (1906) A.C. 105, considered.

Decision of the Supreme Court of Victoria (*Cussen* A.C.J.): (1933) V.L.R. 207, reversed.

APPEAL from the Supreme Court of Victoria.

William John Aisbett, the plaintiff, appellant, had since 1910 been the owner and occupier of a property known as 367 Toorak Road, Burwood, and situate in the municipal district of Camberwell. The southern boundary of the property abutted on to Toorak Road, to which street there was a frontage of about 500 feet, the property comprising about eight acres. The land to the east of the plaintiff's property was owned by one Hill. This land, which also abutted on Toorak Road, was on a higher level than the plaintiff's. On the plaintiff's property there existed a wooded gully which the plaintiff had planted with trees, shrubs and lawns. Along a small watercourse running in a north-westerly direction at the bottom of this gully there flowed after rain the natural surface water from the catchment area of the gully which included portion of Hill's property and a considerable area of ground south of Toorak Road. Prior to 1931 the water in this watercourse flowed through the plaintiff's property in an unpolluted condition and the plaintiff had, prior to that date constructed a number of fish ponds where he bred for sale large numbers of fish.

Prior to 1910 the defendant had constructed along the bed of the gully where it crossed to Toorak Road, a large wooden underground drain. This drain commenced at or about the southern boundary

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of Toorak Road, passed under Toorak Road and emerged at or about the northern boundary of Toorak Road. The wooden drain was then continued as a much smaller earthenware pipe drain which ran for a short distance into Hill's property and there terminated at a point about seventy yards from the plaintiff's eastern boundary. The southern end of this drain remained choked up with debris. The plaintiff did not complain of any damage caused by this drain. Between 1910 and 1931 the volume of water in the catchment area was concentrated and increased by the construction in the catchment area of buildings, streets, drains and channels. In 1931 the defendant replaced the drain under Toorak Road with a new drain which it carried into Hill's property and in the line of the gully and brought it closer to the plaintiff's eastern boundary than the old drain had been. In 1931 the defendant opened into the new drain two inlets which permitted water and drainage which had formerly flowed down the streets to be discharged into the new drain. After rain the flow of water on to the plaintiff's land was increased and the water so flowing was contaminated with impurities from the streets and the polluted water entered certain of the fish ponds and did damage and injured the plaintiff's lawns.

The plaintiff claimed against the defendant in trespass, or alternatively, a nuisance, or negligence or as a riparian proprietor for pollution of the watercourse, and claimed £3,000 damages and an injunction to restrain the defendant from continuing the injuries complained of.

The defendant alleged that the things done were carried out pursuant to the powers conferred upon it by the *Local Government Act* without negligence and in the *bonâ fide* and reasonable exercise of the discretion given to it by such Act and any damage which the plaintiff sustained was the natural and necessary result of the things which the defendant was permitted to do. The defendant also relied upon sec. 608 of the *Local Government Act* 1928 and sec. 82 of the *Supreme Court Act* 1928.

The action was heard by *Cussen* A.C.J., who held that in the absence of negligence in the carrying out of the work done by the defendant the plaintiff was not entitled either to damages or an

injunction. His Honor, however, assessed the damage which the plaintiff had suffered at £200.

From this decision the plaintiff now appealed to the High Court. The plaintiff accepted the findings of fact and appealed only on questions of law.

Ellis, for the appellant. The whole question in this appeal is whether on the proper construction of the provisions of the *Local Government Act* 1928 the plaintiff is entitled to damages for injury which was caused to him by reason of the water in a pond on his property being contaminated by the direct flow of water from a drain constructed by the respondent. The water in one of the ponds will always remain contaminated. The other ponds on the plaintiff's property are also contaminated by seepage. There may be negligence on the part of the respondent if the drain is placed in a position in which it must do damage, even if there is no negligence in the actual construction of the drain. It is the intention of the legislature that in cases such as this the person damnified should have a remedy (*Local Government Act* 1928, sec. 506). In sec. 506 "land" includes rights over land. Sec. 508 provides that the Council may take land compulsorily for the purposes of the Act. If the Council had exercised its power under sec. 514, sub-secs. (1), (2), it would have had to pay compensation to the owners whose land was taken. Sec. 605 shows that if an underground drain is made, that attracts the provisions for the compulsory taking of land which provide that any person affected would be entitled to compensation. As the Council performed this work without following the provisions of secs. 603-605, the appellant is now reduced to a claim for damages. The present claim is for damages because the Council did not follow the procedure which founds the claim for compensation. The fact that the legislature gives compensation only to owners of land under sec. 606, does not imply that other persons are not to recover damages. Sec. 606 has no reference to this case. Sec. 607 was introduced at the same time that the amendments to sec. 606 were made by the Act No. 1460 of 1896. The powers under sec. 607 have not been used in this case at all. There is a duty on the Council to carry out its work in accordance with the statutory provisions so that persons

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affected thereby may obtain compensation. *Julius* v. *Lord Bishop of Oxford* (1). The legislature has shown an intention in sec. 607 that in any case where concentration of water will arise from carrying out works the provisions of the statute should be followed. The alteration of the words in sec. 606 (1) " in and through " to " in or through " is not important in this case. The important amendment is the amendment of the words in sec. 606, sub-sec. (3) " any lands " to " such lands." Because of the way in which the Council carried this work out there was no avenue of compensation open to the respondent who was left to his action for damages.

In *Carslake* v. *President, &c., of the Shire of Caulfield* (2) the municipality was held liable on the ground that it had further powers which if exercised would have enabled it to carry out the work without causing damage. The relevant words in the section at that time were " in and through." Sec. 608 was then passed. The effect of that legislation is that a municipality is not to be held liable because it made a road and did not proceed to make a drain. Sec. 608 originally provided that when the Council was exercising its power to make a road it would not be liable merely because it did not exercise its power to make drains. Sec. 411 of the *Local Government Act* 1890 was the only special draining power that the Council had at that time. That was one incidental to the road making power. In 1903 the Act was completely recast. It is very hard to say what sec. 608 now means in its present collocation. The act of the municipality in this case constituted a nuisance to the respondent at common law. There is no justification for the Council's action in causing a nuisance where the legislature has inferentially prescribed a means whereby the Council may exercise its power so that a nuisance will not be created.

Metropolitan Asylum District v. *Hill* (3) was a case of a discretionary power which could be exercised only subject to private rights.

He also referred to *Salmond* on *Torts*, 7th ed. (1928), p. 271; *Hawthorn Corporation* v. *Kannuluik* (4); and *East Fremantle Corporation* v. *Annois* (5).

(1) (1880) 5 App. Cas. 214, at pp. 224, 225.

(2) (1891) 17 V.L.R. 560; 13 A.L.T. 72.

(3) (1881) 6 App. Cas. 193, at p. 213.

(4) (1903) 29 V.L.R. 308, at p. 320; 25 A.L.T. 97, at p. 102; (1906) A.C. 105.

(5) (1902) A.C. 213.

Wilbur Ham K.C. and *Read*, for the respondent. There is in sec. 606 an express power to enter upon any land and to make drains there, and there is no obligation on the Council to carry the drains through the land as there was under the Act of 1903. The Council has power to allow water to follow its natural flow in a case such as this. It is possible that if the circumstances were different the Council would have to take further steps to dispose of the flow of water. All the water which flows down this drain would have naturally flowed along this course. The trial Judge does not make any finding as to the condition of the water which was brought on to the plaintiff's land through the drain. No nuisance apart from the concentration of water on to the plaintiff's land has been proved. The power to discharge water from a drain must be implied from powers conferred upon municipalities to construct drains. *Carslake* v. *President, &c., of the Shire of Caulfield* (1) shows that if the legislature gives power to a statutory body such as the Council in this case, then there is a necessary implication to do things requisite to carry out the powers granted. In the present case the Council did not act unreasonably ; it did not bring any water out of the drainage area and bring it on to the land. If the Council acts in that way in constructing a drain it is not acting in any arbitrary manner. Sec. 607 confers a discretion. It is probably an alternative to sec. 606. Under sec. 607 if the Council thinks that any damage is going to be done to any persons, the Council may, in the exercise of its discretion, proceed under that section. This work was not done under sec. 607 on any street or road but was only work done in connection with drainage. Sec. 608 finally concludes the matter in favour of the Council by giving it protection where it does not carry out consequential works. Sec. 608 relates to work done under sec. 606 and 607 and in substance provides that if the Council chooses to proceed under one of these sections and not under the other, the mere fact of proceeding under one and not under both will not give a right of action to the person injured. The mere fact that the Council had proceeded under the wrong section would not render the municipality liable. That position is saved by sec. 608. The municipality cannot

(1) (1891) 17 V.L.R., at p. 592 ; 13 A.L.T., at p. 81.

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act unreasonably as that would be an improper exercise of power under sec. 606, but there has been no unreasonable conduct by the municipality in this case. The history of this legislation shows that the Legislature did not intend to give a remedy to the appellant in such circumstances as have arisen here. *Carslake's Case* (1) states the history of the legislation up to 1874. Since 1874 the main changes were made by the Act of 1903 and since that date there have been two consolidations. Up to 1863 the words were "upon or through." They were then changed to "in and through" and so remained up to 1903, when they were changed to "in or through." The words "any lands" were altered to "such lands" in 1903. Sec. 799 provides in effect a method of arbitration. If the Court finds that the municipality acted under the powers of sec. 606, that would be the end of the argument. But if it has exercised some statutory power other than under sec. 606 and has in fact caused damage, a person in the position of the appellant is not able to recover damages from the municipality (*East Fremantle Corporation* v. *Annois* (2)). On the authority of cases such as *Hammersmith, &c. Railway Co.* v. *Brand* (3) the giving of power to make a drain into land merely without carrying the drain through the land must mean that there is power to discharge liquid on to the land which according to natural laws will find its way on to other land.

Ellis, in reply, referred to *Metropolitan Asylum District* v. *Hill* (4). *Hammersmith, &c. Railway Co.* v. *Brand* (5) was virtually a case of legislative command. The powers in the present case are purely permissive. Sec. 608 does not say that in no case whatever shall there be an action for negligence. This leaves open an action for damages in certain circumstances though there is no negligence. It is negligent to construct a thing which is going to cause a private individual loss, where the work could have been done in some other way. [He referred to *Salmond* on *Torts*, 7th ed. (1928), at p. 371.]

(1) (1891) 17 V.L.R., at p. 588; 13 A.L.T., at p. 74.
(2) (1902) A.C. at p. 217.
(3) (1868) 4 E. & Ir. App. 171, at pp. 201, 202.
(4) (1881) 6 App. Cas., at p. 201.
(5) (1868) 4 E. & Ir. App. 171.

Wilbur Ham K.C., by leave, referred to *London and Brighton Railway Co.* v. *Truman* (1). The onus is on the appellant to show that the drain could have been constructed so as not to cause damage.

Cur. adv. vult.

Aug. 21.

The following written judgments were delivered :—

RICH J. I have had the advantage of reading the judgment of my brother *Dixon* and agree with it.

STARKE J. The parties to this appeal have not furnished the Court with a transcript of the evidence taken at the trial, and have chosen to argue it upon the facts and findings stated in the judgment of the trial Judge, the learned and lamented *Cussen* J., then the Acting Chief Justice of the Supreme Court of Victoria.

The plaintiff—the appellant here—is the owner and occupier of land near the township of Burwood in the municipality of Camberwell. His property was bounded on the south by Toorak Road and on the east by the land of one Hill. Through Hill's and the plaintiff's property there was a natural watercourse running in a north-westerly direction. Water, I gather from the statement of claim, par. 3, did not flow continually along this watercourse depression or gully, but after rain on the natural surface water from the catchment area found its way into the depression or gully, and an outlet along its course. The plaintiff carried on, upon the land, the business of a poultry breeder, and also that of a breeder of gold and silver fish. Part of the upper portion of the sloping sides of the watercourse in the plaintiff's property was rendered attractive by ferns and trees, and some fish ponds were made on the course of the flow. Prior to 1931 the defendant—the respondent here—or its predecessor had constructed a wooden drain at the south of and across Toorak Road into Hill's property. Any charge in respect of this construction was abandoned at the hearing. In 1931, the defendant, in connection directly with the drainage of a street called Charles Street, running south from Toorak Road, and also with a view to future requirements for the general drainage

(1) (1885) 11 App. Cas. 45, at pp. 64, 65.

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of the locality, constructed a new drain from and in the vicinity of Charles Street across Toorak Road and into Hill's property, the outlet being in the lowest part of the watercourse. The design was such that the natural area served by the old drain was added to, and also the new drain carried off further street drainage owing to the increased settlement in the neighbourhood prior to 1931. The result was that a larger quantity of liquid was discharged on to Hill's property and that this liquid, to a greater extent than formerly, was affected by the fact that it came from streets, rights of way, &c. and thus carried foul and noxious solids in suspension. It followed from the natural slope of the ground that such portion of the liquid as was not retained on Hill's property passed on to the plaintiff's land and at times flooded and fouled his fern gully, injured his ponds, destroyed his fish, and otherwise damaged his property. This drain, the learned Judge found, was sufficient to carry off all water entering it, and was designed and constructed without negligence. In fact, it performed its function only too well so far as the plaintiff was concerned. The injury he suffered was the inevitable consequence of the construction of the drain. But no liquid from other sources than the area covered by the design was turned into the drain by the defendant since its construction.

The learned Judge was of opinion that the acts done by the defendant were authorized by the *Local Government Act* 1928, and that the plaintiff had therefore no cause of action. The learned Judge had in mind, no doubt, the provisions of secs. 534 and 535 of the Act, but he relied mainly upon the provisions of secs. 606 and 608. Some reference to the history of these sections is desirable as an aid to their interpretation. It is unnecessary to go further back than the *Local Government Act* of 1874, for the case of *Carslake* v. *President, &c., of the Shire of Caulfield* (1) states and exhaustively discusses the earlier history and its effect. Under Part XVI. of that Act, entitled "Streets Roads . . . Watercourses etc.," a Division numbered 4 relates to "Making Maintenance and Management of Streets Roads . . . Watercourses etc." And by sec. 376 in that Division it was enacted: "Subject to the provisions of this Act the council of every municipality may within the municipal district or with the

(1) (1891) 17 V.L.R. 560; 13 A.L.T. 72.

consent of the Governor in Council in any part of Victoria from time to time make improve and maintain public highways streets roads bridges and ferries." And by sec. 384 of the same Division it was provided: "The council of every municipality may in and through any lands adjoining or lying near to any street or road within the municipal district make and open such ditches gutters tunnels drains and watercourses as to such council may seem fit, and all ditches creeks gutters tunnels drains or watercourses within or adjoining to the municipal district may make scour cleanse and keep open and for any of the purposes aforesaid may enter upon any lands, and such council shall make compensation to the owners and occupiers of any lands for any damage which they may sustain through the exercise of any of the powers conferred by this section." The *Local Government Acts* were consolidated in 1890 (Act No. 1112), but these sections were not altered. *Carslake's Case* (1), however, fell for decision under the *Local Government Act* of 1874. In 1891 a Full Bench was constituted to hear the case. The facts were that a natural depression or watercourse ran into the plaintiff's land from a certain street. The Council caused this street to be formed and channelled, constructed opposite the plaintiff's land an open channel across the roadway, and put an earthen pipe under the footpath, terminating on the side of the footpath at the point where the depression or watercourse entered the plaintiff's land. But the Council did not enter upon or construct any works within the plaintiff's land. The effect of the works was to concentrate the water previously flowing over the plaintiff's land to the point of overflow of the pipe and to increase the volume of water discharged into the depression or watercourse, thereby, in times of heavy rain or floods, causing injury to the plaintiff's land. The works were executed without negligence either in design or in construction. It was held that the road making power (sec. 376) conferred no authority upon the Council to construct such works unless provision was made for taking the water through or out of the land of the plaintiff. It is too late now to canvass that decision. It has stood for forty years and been frequently followed, and has to some extent been recognized by the Legislature. (See *Collins and Meaden,*

(1) (1891) 17 V.L.R. 560; 13 A.L.T. 72.

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Local Government Law and Practice (1933), 2nd ed., pp. 658-670). But it may be interesting to compare it with those under the English *Highway Act* of 1835; they are collected in *Pratt and Mackenzie, Law of Highways* (1923), 17th ed., pp. 254, 255. Had the legislation remained unaltered, the decision would have afforded considerable assistance to the appellant in the present case. A distinction in fact no doubt exists: the Council in the present case has not discharged water directly on to the appellant's land, but, relying doubtless on road making and drainage powers, has constructed its drain across the roadway into the land of an adjoining owner (Hill), and there discharged the water, whence it flows down to and upon the appellant's land. That distinction would not have availed the Council under the 1874 Act, for its only power under that Act was to make drains in and through any lands adjoining or lying near to any street. The Council, as I understand *Carslake's Case* (1), had no power to discharge water directly or indirectly upon the lands of any owner or occupier without making provision for carrying it through such lands. But this brings me to the alterations made by the Legislature in the relevant provisions of the *Local Government Acts*.

In 1891, by Act No. 1243, the words "adjoining or lying near to any street or road" in sec. 411 of the Consolidated Act of 1890 (sec. 384 of the 1874 Act) were repealed. In 1896, by Act No. 1460, sec. 5, municipalities were relieved from certain actions: "No action shall be brought against any municipality in respect of any works made or constructed by such municipality under or by virtue of Division 4 of Part XVI. of the *Local Government Act* 1890 or any corresponding previous enactment" (Part XVI. (4) of the Act of 1874) "or in respect to any damage or injury arising out of the making or constructing of any such works by reason only that the municipality made or constructed the same or caused the same to be made or constructed without exercising any powers created or conferred by section four hundred and eleven of the said Act or any previous corresponding enactment," (sec. 384 of the Act of 1874) "provided that such works were made and constructed *bonâ fide* and before the first day of January One thousand eight

(1) (1891) 17 V.L.R. 560; 13 A.L.T. 72.

hundred and ninety-one and were so made and constructed without negligence."

The sidenote to this provision indicates that it was made in consequence of the decision in *Carslake's Case* (1), but its effect depends upon its true construction. In 1903 the Act numbered 1893 consolidated and amended the laws relating to local government. Part XVIII., "Streets Roads etc.," Division 6, "Making Maintenance and Management of Streets Roads etc.," sec. 489 set out the old power to make improve and maintain public highways, streets, roads, etc., contained in sec. 376 of the Act of 1874, and in sec. 401 of the Act of 1890. Part XX. of the Act of 1903, "Sewers, Drains, Water-courses, etc.," Division 3 "Drains, Water-courses, etc.," secs. 557-559, made some important alterations in the drain-making power. Sec. 557 provided :—"(1) The council of every municipality may in or through any lands within the municipal district make and open such ditches gutters tunnels drains and water-courses as to such council may seem fit. (2) Such council may make scour cleanse and keep open all ditches creeks gutters tunnels drains or water-courses within or adjoining to the municipal district. (3) Such council for any of the purposes aforesaid may enter upon any lands and shall make compensation to the owners and occupiers of such lands for any damage which they may sustain through the exercise of any of the powers conferred by this section."

The important alterations here are the substitution of the words "in or through" in sub-sec. (1) for the words "in and through" in the earlier Acts, and the substitution of the words "such lands" in sub-sec. (3) for the words "any lands" in the former legislation. Sec. 559 provided :—"(1) No action shall be brought against any municipality in respect of any works made or constructed without negligence by such municipality under or by virtue of this Division or any previous corresponding enactment or in respect to any damage or injury arising out of the making or constructing of any such works by reason only that the municipality made or constructed the same or caused the same to be made or constructed without exercising any powers created or conferred by this Division or any previous enactment. (2) Such works shall be deemed to have been made

(1) (1891) 17 V.L.R. 560; 13 A.L.T. 72.

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and constructed without negligence if no claim for compensation on account thereof is made within two years from the date of the completion of such works."

The provision in sub-sec. (2) was new. In the Act No. 1460 the words " under or by virtue of Division 4 of Part XVI. of the *Local Government Act* 1890 " referred as well to the power to make and improve roads (sec. 401 of the 1890 Act, sec. 376 of the 1874 Act), as to the power to make drains and watercourses (sec. 411 of the 1890 Act, sec. 384 of the 1874 Act), whereas the words " under or by virtue of this Division " in the 1903 Act only refer to the drain-making power (Part XX., Division 3, secs. 557 *et seq.*), for the road-making power is, in that Act, found in Part XVIII., Division 6, sec. 489. The Act of 1903 in sec. 558 also provides a new and useful method of procedure in cases where municipalities propose to execute works which will concentrate and divert drainage. It is, I think, an alternative power, but was not used in the present case.

In 1915 the laws relating to local government were again consolidated by the Act numbered 2686. The 1903 Act was not altered in any matter relevant to this case. (See secs. 489, 557, 558, 559.) Once more in 1928 these laws were consolidated by the Act numbered 3720; Parts XVIII. and XX. of the Act of 1915 were renumbered Parts XIX. and XXI. respectively, but the Act of 1903 was not altered in any matter relevant to this case. (See secs. 535, 606, 607, 608). It is unnecessary to set out the provisions of these sections, for they are in the same words as secs. 489, 557, 558, and 559 of the Act of 1903, which are above set out or sufficiently referred to. The question raised on this appeal is whether the alterations in the powers and authorities of municipalities now appearing in the 1928 Act justify the Council in discharging drainage and storm water across the Toorak Road, on to Hill's land, and thence on to the land of the appellant.

The roads within the municipality must be drained; drainage and storm water cannot be left to stand on the roads. Municipalities have power to make improve and maintain streets and roads within their districts. Such a power, as *Hood* J. observed in *Carslake's Case* (1), necessarily includes " the sufficient drainage, without which

(1) (1891) 17 V.L.R., at p. 593; 13 A.L.T., at p. 82.

no proper street or road could exist." The water which gets on to the roads must be got away, and that can only be done by making drains and channels for carrying it off. But wherever drainage takes place, the result is to conduct the water to a point of discharge more quickly than before and to concentrate it at that point. Where then can municipalities lawfully discharge the water collected by their drainage works ?

It is said that they may take advantage of the contour of the locality and discharge the water into depressions or watercourses following the natural flow of the water, and that the Act itself expressly authorizes them to make and open drains in or through any lands within the municipal district, making compensation to the owners and occupiers of such lands for any damage. There is a presumption however " that a public body . . . is not authorized to create a nuisance or otherwise to affect private rights unless compensation is provided," but the presumption " must yield where the language of the statute is sufficiently clear to authorize the nuisance without compensation " (*Price's Patent Candle Co.* v. *London County Council* (1)). Municipalities must, no doubt, take advantage of the contour of the locality for drainage purposes, but there is nothing in the *Local Government Act* other than the provisions contained in sec. 606 and sec. 607 which authorizes them to cast drainage water upon the lands of others or to create a nuisance by means of the discharge of such water upon those lands. Had the municipality of Camberwell entered made and opened any drain or watercourse in or through the lands of the appellant, compensation would have been payable to him under the Act. It admittedly did not do so, for the drain that it made and opened on lands adjoining the Toorak Road terminated in Hill's land, lying to the east of that belonging to the appellant. So far as Hill is concerned, it appears that the municipality can justify its acts, assuming that no nuisance has been created and that compensation has been paid to him. But water discharged by the municipality on to Hill's land must inevitably flow onwards to the appellant's land ; for it is in the line of flow according to the contour of the locality. The municipality as surely discharged and cast this water

(1) (1908) 2 Ch. 526, at pp. 543, 544.

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upon the appellant's land as it did upon Hill's land. No justification can be found in sec. 606 for this act. The municipality did not use the powers contained in sec. 606 so far as the appellant is concerned, nor the powers contained in sec. 607, and must fall back on its road making power, which does not authorize any such act (*Carslake's Case* (1)).

All that remains for consideration is the effect of sec. 608. The suggestion is that the non-exercise of the drain making power under sec. 606 as to the appellant's land relieves the municipality from liability. But the liability of the municipality in this case is not based upon any works constructed under or by virtue of Division 3 of Part XXI., secs. 606 and 607, or upon the fact only that the municipality made or constructed the same without exercising any powers created or conferred by the Division, but upon the want of authority in the road making power (Part XIX., Div. 6, sec. 535), upon which it must rely, to discharge water and create a nuisance upon the appellant's land. Difficulties, both of an engineering and of an economic character, surround municipalities in draining streets and roads in Victoria, but some of those difficulties might, I think, be avoided if the municipalities acted upon the provisions in sec. 607 relating to the executing of works upon streets or roads concentrating or diverting drainage.

This appeal must, I think, be allowed, and the damages contingently assessed by the Acting Chief Justice awarded to the appellant and an injunction granted.

DIXON J. The appellant, who is the plaintiff in the action, owns and occupies a parcel of land about eight acres in area situated within the municipal district of Camberwell. The land is upon a slope and surface rain water from the higher levels flowed through it in a definite course formed by the natural contour of the land. A depression, which runs from the upper ground of his adjoining neighbour through the appellant's land, forms a natural drain for the collection and discharge of surface water. It is not a watercourse in the proper sense because it does not usually carry water. Its flow appears to be confined to comparatively short periods during

(1) (1891) 17 V.L.R. 560; 13 A.L.T. 72.

and after the fall of heavy or continued rain. A continual or interrupted supply of water is not necessary to form a watercourse where there is a defined bed, but the flow of water must not be occasional. It must be sufficiently regular, frequent, or usual to afford a predominant or at least a recognized characteristic (*Stollmeyer* v. *Trinidad Lake Petroleum Co.* (1); *Lyons* v. *Winter* (2)).

The appellant's land and his neighbour's higher land front a street into which another opens at right angles. Before 1931, some of the surface water collecting in and upon these streets was conducted by a box drain into his neighbour's land and there discharged into the natural depression in which it flowed through his land. In 1931 the respondent corporation caused the channelling and draining of the streets at this point to be re-designed. A new drain from the streets was constructed discharging into the natural depression, or storm-water course, at a point in the neighbouring lands. It discharged water caught on a much wider area of roadway. It, therefore, took into the depression a larger quantity of water. At times of rain the increased volume of water so discharged flows into and through the appellant's land. It is charged with some impurities from the street and, both because of these and because of the volume of the water discharged upon his premises, the appellant has suffered damage which has been assessed at £200 by *Cussen* A.C.J., who tried the action. The learned Judge held, however, that the municipality had acted in the exercise of a statutory power which afforded it complete protection and that it was not liable. He accordingly decided that the damages which he so assessed were not recoverable by the appellant and he refused the injunction which, in the absence of a statutory justification, he would have granted. This decision was founded upon secs. 606, 607, and 608 of the *Local Government Act* 1928. Sec. 606 is as follows:—"606. (1) The council of every municipality may in or through any lands within the municipal district make and open such ditches gutters tunnels drains and water-courses as to such council may seem fit.

"(2) Such council may make scour cleanse and keep open all ditches creeks gutters tunnels drains or water-courses within or adjoining to the municipal district.

(1) (1918) A.C. 485, at pp. 490, 491.
(2) (1899) 25 V.L.R. 464; 21 A.L.T. 237.

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"(3) Such council for any of the purposes aforesaid may enter upon any lands and shall make compensation to the owners and occupiers of such lands for any damage which they sustain through the exercise of any of the powers conferred by this section."

In making the drain to its point of discharge into the natural storm-water channel "in" the adjoining land, the municipality depended for its power upon this section. It does not appear whether the owner of that land received compensation for any damage sustained through the construction of the drain. But, in any case, it confers no right to compensation upon owners in the situation of the appellant. For upon the express terms of sub-sec. (3), payment of compensation is confined to the owners and occupiers of lands entered for the purpose of making and maintaining drains, watercourses, and the like in or through such lands. No compensation is given to the owner or occupier of premises receiving excessive quantities of water sent from a place in his neighbour's land of higher level by its discharge there from a municipal drain constructed under sub-sec. (1). If the authority given by the provision extends to emptying a conduit where water will be poured upon neighbouring lands, it operates to authorize the infliction, without compensation, of serious loss upon the owner of the lower lands, although the drain cannot be constructed in the higher land to the point of discharge except upon payment of compensation to the owner and occupier of such land for any damage which he sustains through the exercise of any of the powers conferred by the section.

The foundation of the enactment now appearing as sec. 606 is sec. 67 of the English *Highway Act* 1835, the material expressions in which give to a surveyor of the highways a "power to make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses, and also to make and lay such trunks, tunnels, plats, or bridges, as he shall deem necessary, in and through any lands or grounds adjoining or lying near to any highway, upon paying the owner or occupier of such lands . . . for the damages which he shall sustain." In reference to this provision, *Stirling* J. in *Croysdale* v. *Sunbury-on-Thames Urban Council* (1), said that, however widely it be construed, it only authorizes the making and keeping open of

(1) (1898) 2 Ch. 515, at p. 520.

ditches and drains in and through lands adjoining a highway and does not authorize the discharge of the contents of any ditch or drain on such lands; that, unless the thing into which it escaped, in that case a pond, could be treated as part of the drainage system under the control of the authority, the provisions do not not empower the discharge of surface water into it. In *Thomas* v. *Gower Rural Council* (1), a Divisional Court consisting of *Swift* and *Acton* JJ., adopting the same interpretation of the provision, held that it did not authorize the diversion of spring and surface water into a culvert discharging into lands adjoining the highway.

As the provision stood in the Victorian legislation before the consolidation and recension of 1903, which is reproduced in the *Local Government Act* 1928, a right to compensation for injury sustained through the exercise of the powers was given to the owners and occupiers of any lands and not merely to the owners and occupiers of lands in and through which the drain was taken, but, otherwise, the differences between it and the English section were not material to the present question (sec. 384 of the *Local Government Act* 1874 and sec. 411 of that of 1890). Notwithstanding the wider provision for compensation, the Victorian Supreme Court adopted a similar interpretation of the section. In *Kannuluik's Case* (2), *Holroyd* J. said: "Shortly it has been decided to mean that the Council may enter upon any land adjoining or lying near to any highway for the purpose of making and maintaining drains through such land to carry water, clean or foul, from a place from which they may lawfully take it to another place to which they may lawfully bring it."

The same construction was given to the analogous provision of the New South Wales *Local Government Act* 1919 (sec. 241) by *Higgins* J. in *Webster* v. *Mosman Municipal Council* (3). He said: —"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

(1) (1922) 2 K.B. 76.
(2) (1903) 29 V.L.R., at p. 319; 25 A.L.T., at p. 102.
(3) (1926) 37 C.L.R. 557, at p. 567.

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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." The provision as it was remodelled in 1903 into the form in which it now stands in sec. 606 of the Act of 1928 authorizes the municipality to make the drain, not in and through, but in *or* through lands. Further, the lands need not adjoin or lie near a highway. The difference in meaning between the two phrases appears to me to be of small importance in considering whether the enactment authorizes the discharge of the contents of the drain into lands of a lower level. The alternative " in or through " clearly contemplates the possibility of the drain terminating in the land into which it is taken as well as the possibility of it going through it. On the other hand, the conjunctive " in and through " is susceptible of a construction requiring that the drain shall be always taken through the land adjoining or lying near the highway. But while the conjunctive " and " makes it more difficult to interpret the provision as authorizing a final discharge of the drainage upon private premises, yet the alternative " or " in the expression " in or through lands " carries with it no possible justification for the conclusion that the contents of the drain need not be carried to a lawful discharge but may be poured anywhere. Reading sec. 606 without the aid of authority and without regard to the vicissitudes which its text has undergone, I should have found nothing in its language to support an interpretation authorizing the municipality to pour drainage upon private premises. I should have construed the section as conferring a power, upon paying compensation, to make and maintain drains in private lands or through private lands, but as neither expressing nor implying any power in reference to the final discharge of the contents of the drain from the drainage system of the municipality. It appears to me to assume that some lawful outfall will exist or be provided. But the real difficulty of the case arises from the course of decisions in Victoria upon earlier enactments and the changes made in the legislation.

The *Municipal Institutions Act* 1863 (No. 184) contained in sec. 272 a transcript almost of sec. 67 of the English *Highway Act* 1835. But the *Road Districts and Shires Act* (1863) (No. 176), although passed at the same time, expressed the authority of the District

Boards somewhat differently. Sec. 237 provided that it should be "lawful for the board to cut make and maintain drains or watercourses upon or through any lands lying contiguous to any road making reasonable compensation to the owners and occupiers of such lands for any damage they may sustain thereby." Upon this statute and a subsequent statute (No. 358) containing the same provision decisions were given to the effect that the power to construct roads carried with it authority to turn water from the road on to adjoining lands (*Hepburn* v. *Mayor, &c. of Hawthorn* (1); *President, &c., of the Shire of Ballarat* v. *Beaton* (2); *Cameron* v. *President, &c., of the Shire of Mount Rouse* (3)). In the first two of these cases the question appears to have been considered to be whether the existence of the power to make drains upon private lands, paying compensation, called upon the road authority to divert the water by such a drain and thus enabled the private land owner to obtain compensation. In *Beaton's Case* (4) *Stawell* C.J. said:—"The . . . section applies to cases in which it was necessary not merely to form the road, but also to cut drains on contiguous land to make the road drier and more efficient. If the Council, in the exercise of a sound discretion consider it unnecessary to make those drains we cannot compel them to make them to suit the purposes of the plaintiff, and afford him compensation for so doing. The power is only given over those lands contiguous to the road, but, if the plaintiff's contention be right, it may be in many instances necessary to carry the drain through other lands which are not contiguous, and the person on whose land not contiguous to the road, the water was ultimately brought would have no remedy." In *Cameron's Case* the complaint was that the municipality made a drain from a road upon and through part of the plaintiff's land and improperly omitted to extend and construct it so as to convey or lead the water to a proper outlet and thus discharged quantities of the water on the plaintiff's land. *Stawell* C.J. said (5) the words of the statute were plain. "If it is necessary to construct the drain, and if the drain is brought upon, that is a certain distance into, the land, it is a sufficient compliance

(1) (1866) 3 W.W. & a'B. (L.) 61.
(2) (1872) 3 V.R. (L.) 163.
(3) (1872) 3 V.R. (L.) 207; 3 A.J.R. 106.
(4) (1872) 3 V.R. (L.), at pp. 166, 167.
(5) (1872) 3 V.R. (L.), at pp. 208, 209.

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with the Act. It may be necessary to cut the drain only a very few yards, but it would be straining the enactment to compel the Board to extend it in every case through each man's land. We think the words 'Upon and through' in the . . . section decide the question." *Barry* J. added:—"The word 'compensation' is not limited to the cutting of the drain alone, but extends to consequential damage arising from flooding of water running through the drain when constructed."

It will be noticed that although the decision in *Cameron's Case* (1) is consistent with the view that the owner of lower land receiving the discharge of water from a drain with an outlet on adjoining higher lands, inasmuch as no compensation was payable to him, might still complain, yet the observations of *Stawell* C.J. in *Beaton's Case* (2) are to the contrary.

In the consolidating *Local Government Act* 1874 (No. 506) the power was included in a form closer to sec. 67 of the English *Highway Act* 1835. But the authority was to take the drain "in and through any lands adjoining or lying near to any street or road" (sec. 384 of Act No. 506), and compensation was payable to the owner of "any lands" for damage arising from the exercise of the power. In *Brett* v. *Slater* (3) the Supreme Court held that the municipality had no authority under this power "to take water across a road, and, without any attempt to make a side drain, discharge that water on to a man's land and leave it there." Referring to the alternative form of the provision in the earlier legislation, *Higinbotham* C.J. said that he was not prepared to say what would be the effect of that section if it were then in force, whether it would justify the Council in taking water upon a man's land without taking it through the land. Next, in *Carslake* v. *President, &c., of the Shire of Caulfield* (4), *a'Beckett*, *Hodges* and *Molesworth* JJ., *Higinbotham* C.J. and *Hood* J. dissenting, held that neither the general road making power nor the provision under discussion enabled a municipality to make a drain to the edge of a road, up to, but not into, the adjoining lands, so as to pour surface water thereon. The power to make a drain in

(1) (1872) 3 V.R. (L.) 207; 3 A.J.R. 106.

(2) (1872) 3 V.R. (L.), at pp. 166, 167.

(3) (1888) 14 V.L.R. 77, at p. 82; 9 A.L.T. 188, at p. 189.

(4) (1891) 17 V.L.R. 560; 13 A.L.T. 72.

and through adjoining lands had clearly not been exercised in this case, because the drain was confined to the road, and the real controversy was whether the general road making powers carried with them the incidental power of discharging water from the road upon neighbouring land. One reason relied upon by the majority for denying such an incidental power was the existence of the power, subject to compensation, to make drains on private lands near roads. In his dissenting judgment, *Hood* J. regarded this power as directed rather to a system of drainage than to road-making merely. Throughout the course of these decisions, a marked tendency appears to treat the question whether water can be discharged from a road on to adjoining land as amounting to the question whether the municipality is bound to exercise the power to make a drain through the land and so expose itself to a claim for compensation from the land owners.

In 1896, five years after *Carslake's Case* (1), a protective section based upon this view of the matter was included in Act No. 1460, an Act dealing with entirely different subjects. At that date the road-making power was contained in Division 4 of Part XVI. of the *Local Government Act* 1890. That Division included also the power to make drains; sec. 411. Sec. 5 of Act No. 1460 was as follows:—"5. No action shall be brought against any municipality in respect of any works made or constructed by such municipality under or by virtue of Division 4 of Part XVI. of the *Local Government Act* 1890 or any corresponding previous enactment or in respect to any damage or injury arising out of the making or constructing of any such works by reason only that the municipality made or constructed the same or caused the same to be made or constructed without exercising any powers created or conferred by section four hundred and eleven of the said Act or any previous corresponding enactment, provided that such works were made and constructed *bonâ fide* and before the first day of January One thousand eight hundred and ninety-one and were so made and constructed without negligence."

I think this provision operated to bar a land owner's remedy where road making, done before the specified date *bonâ fide* and without other negligence, had resulted in a discharge of water upon his land which would have been avoided if the power to make drains

(1) (1891) 17 V.L.R. 560; 13 A.L.T. 72.

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had been exercised. But I do not see how it could afford any answer to a complaint that, owing to the construction of a drain in the exercise or purported exercise of that power, water was poured on to private land instead of into a place of lawful discharge.

In the consolidation of the Local Government law of 1903 this section gave rise to what is now sec. 608 of the *Local Government Act* 1928. It is of general application and is not limited to works already made. It protects a municipality against actions brought by reason only that the municipality without negligence made or constructed the works without exercising any powers created or conferred by the Division or any corresponding previous enactment. In a second sub-section, the section provides that the works shall be deemed to have been constructed without negligence if no claim for compensation on account of them is made within two years of completion. The provision is difficult to construe and there is some ground for the view that it does not apply except when the exercise of the power would have exposed the municipality to a liability to compensate the plaintiff. However this may be, I think that the section cannot bar a cause of action arising from the fact that in the exercise or attempted exercise of the power to construct a drain upon private land water has been conducted to an unauthorized discharge. An action for such a cause is not brought by reason that the municipality constructed works without exercising a power. It is certainly not brought only for that reason. But, no doubt, this section ought not to be considered alone. The changes in what is now sec. 606 were made at the same time and sec. 607 was also introduced. In the opinion of *Cussen* A.C.J. in these changes the Legislature in 1903 showed a definite inclination to the view that municipalities, often with limited revenue, should not be hampered by the possibility of large claims for damages or compensation from proceeding by gradual steps for the drainage of the district. But most of the significance attached to changes in the provisions standing as sec. 606 appears to me to arise from the Victorian decisions I have set out. Although the dicta of *Stawell* C.J. in *Beaton's Case* (1) do support a construction of a power to make a drain " in or through lands " which would extend it to the discharge

(1) (1872) 3 V.R. (L.) 163.

of water on those and on other lands and a tendency giving general support for this view is disclosed by *Cameron's Case* (1), it must be remembered that in *Brett* v. *Slater* (2) *Higinbotham* C.J. treated the question as doubtful and that the views of the majority in *Carslake's Case* (3) proceeded upon grounds opposed to it. On the whole I do not think that the Legislature can be taken to have adopted a form of expression which was understood to have these consequences. The limitation of the right to compensation to the owners of the lands entered appears to me to be against the view that the power gave authority to pour water, through the lands entered, on the adjoining lands. The language of sec. 608, however obscure, is certainly very restricted. Sec. 607 confers a new power, but it is confined to works on a roadway which will concentrate or divert drainage and, after doing so, will discharge it or permit it to flow through any land. In these conditions the Council may proceed to exercise the powers which the section sets out in detail. But it must pay compensation if claimed in time. I do not think the introduction in the legislation of this power affects the construction of sec. 606. Nor do I think it can be said that the action is brought by reason of the failure to exercise it. Conceivably such an argument might be advanced if the roadmaking power contained in secs. 534 and 535 were included in Division 3 of Part XXI., which it is not, and if the injury arose from the exercise of that power, which it does only in a very indirect, not to say incorrect, sense.

My conclusion is that the provisions of the *Local Government Act* 1928 do not authorize the discharge on to the appellant's land from the outlet on his neighbour's land of the respondent's drain of water in greater quantities or in a condition of greater impurity than would naturally be received.

I think the appeal should be allowed. An injunction should be granted operating as from a future date sufficiently remote to enable an alteration of the drain. The amount of damages awarded to the appellant by the judgment below should be increased by £200. The respondent should pay the costs of this appeal and of the action.

(1) (1872) 3 V.R. (L.) 207; 3 A.J.R. 106.
(2) (1888) 14 V.L.R. 77; 9 A.L.T. 188.
(3) (1891) 17 V.L.R. 560; 13 A.L.T. 72.

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EVATT J. In this case I agree with the judgment of my brother *Dixon*.

McTIERNAN J. I am of the same opinion. The drain with respect to which the appellant confined his case was made to discharge directly into a gully at a place within the property of the appellant's adjoining neighbour. The consequence was that more water than formerly also more noxious matter which was borne by the water, debouched into the gully. Sec. 606 of the *Local Government Act* 1928 of Victoria empowers the Council to make drains and other specified conduits in or through any land and for that purpose to enter upon the land. The section provides that the owner and occupier of such land must be compensated by the Council for any damage sustained through the exercise of this power. The gully into which the drain discharged continued through the appellant's land which was at a lower level than that of his neighbour. Hence more water, and more refuse borne by the water flowed into the appellant's land than it was formerly accustomed to receive. The provision in sec. 606 for the payment of compensation extends only to the owner and occupier of land in or through which the conduit was made. Thus the appellant's neighbour was entitled by the Act to compensation but the appellant was not so entitled. It was found at the trial that the drain was constructed without negligence. The appellant's submission is that sec. 606 did not empower the Council to make a drain with an outlet in his neighbour's land from which more water and refuse discharged than the volume which formerly flowed on to the appellant's land. The Council contends that the construction of the drain in the manner described was a due exercise of its powers under the section and consequently there is no lawful ground for the appellant's grievance. The Council further contends that if sec. 606 does not extend to authorize what it had done, the appellant is nevertheless prohibited by sec. 608 from maintaining the action.

The principle for determining whether private rights have been lawfully impaired in the execution of a power given by statute is stated by *Fry* J. in *Corporation of Yarmouth* v. *Simmons* (1) in these

(1) (1878) 10 Ch. D. 518, at p. 527.

terms: "when the legislature clearly and distinctly authorize the doing of a thing which is physically inconsistent with the continuance of an existing right, the right is gone, because the thing cannot be done without abrogating the right." The making and opening of a drain in or through land is not physically inconsistent with the continuance of the right of the owner and occupier of adjoining property not to be injured in his possession and enjoyment of such property by having more water cast upon such land by the drain than usually flows into the land. The object of a drain or other conduit which the Council is empowered to make is to carry off and get rid of water—superfluous water I apprehend—and not merely to carry water from one place to another after the fashion of a channel in an irrigation system. *Stirling* J. in *Croysdale* v. *Sunbury-on-Thames Urban Council* (1) referring to secs. 67 and 68 of the *Highway Act* 1835 said with respect to the former section: "That section, however widely it be construed, only authorizes the making and keeping open of ditches and drains in and through lands adjoining a highway, and does not authorize the discharge of the contents of any ditch or drain on such lands." Continuing, he said, "Unless, then, the pond can be treated as part of the drainage system under the control of the authorities, these sections do not empower the defendants to discharge the surface water into the plaintiff's pond." But whatever the nature of the outfall to which a conduit authorized by sec. 606 should lead, the section, in my opinion, did not authorize the construction of the drain in the present case with an outlet so placed in the adjoining property that more water and refuse flowed into the appellant's land than would naturally flow there. Compare *Attorney-General* v. *Council of Borough of Birmingham* (2). If the legislature has empowered the Council to solve the drainage question in one locality by making drains which discharge over the land of other ratepayers, the provision of compensation may be some solace to an owner or occupier of land "in or through" which a drain has been made. But as for the adjoining owners or occupiers for whom the Act does not expressly provide any compensation although the drain discharges the superfluous waters upon their lands, all that may be said is "*Occupet extremum scabies.*" In these words *Farwell* L.J.

(1) (1898) 2 Ch., at p. 520. (2) (1858) 4 K. & J. 528; 70 E.R. 220.

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described the plight to which the defendant's argument in *Price's Patent Candle Co.* v. *London County Council* (1), would have reduced the plaintiff in that case. The absence of any provision in the Act for the payment for compensation to the owner or occupier in the situation of the appellant is against the Council's contention in the present case. In the course of his judgment in the case which has just been mentioned *Cozens-Hardy* M.R. said (2) :—" Certain general principles have been laid down for our guidance in cases of this nature. In the first place, there is a presumption that a public body, whether a trading body or not, is not authorized to create a nuisance or otherwise to affect private rights unless compensation is provided. In the second place, this presumption must yield where the language of the statute is sufficiently clear to authorize the nuisance without compensation." In the present case the appellant is, in my opinion, entitled to the benefit of this presumption.

The remaining question is whether the appellant is prohibited by sec. 608 from maintaining the action. The presence of this section in Part XXI. of the Act is, in view of its history, somewhat remarkable. The cause of action at which the section would appear to be directed looks like that mentioned by Lord *Blackburn* in *Geddis* v. *Proprietors of Bann Reservoir* (3). But whether that precisely is the cause of action dealt with by sec. 608, it is unnecessary to decide, for it is clear, I think, that the present action is not brought by reason only that the municipality made or constructed the drain without exercising any powers created or conferred by Division 3 or any previous corresponding enactment. Sec. 608 is not, in my opinion, a bar to the appellant's action.

The appellant is entitled, in my opinion, to an award of damages in the sum of £200 in addition to the sum awarded him at the trial, and also to an injunction from a future date. As to the suspension of the injunction, see *Attorney-General* v. *Colney Hatch Lunatic Asylum* (4).

Appeal allowed with costs. Order of the Supreme Court of Victoria varied as follows :—The amount of damages to

(1) (1908) 2 Ch., at p. 538.
(2) (1908) 2 Ch., at pp. 543, 544.
(3) (1878) 3 App. Cas. 430, at pp. 455, 456.
(4) (1868) L.R. 4 Ch. 146, at p. 161.

plaintiff, viz., £50 *to be increased by the sum of* £200, *viz.*, *to the sum of* £250. *Include in the order an injunction restraining the defendant its servants and agents from continuing to discharge water from the drain in the pleadings mentioned on to the plaintiff's land. Substitute for the order as to costs an order that the plaintiff recover the costs of the action including the costs of pleadings interrogatories discovery and shorthand notes. Stay such injunction for six months from this date. Let the defendant be at liberty to apply to the Supreme Court to extend the period of such stay to enable it, with due diligence, to comply with the injunction and let such period be extended for such time and upon such terms as the Supreme Court may think right. Remit the cause to the Supreme Court.*

Solicitors for the appellant, *Cleverdon & Hayes.*

Solicitors for the respondent, *Percy J. Russell & Kennedy.*

H. D. W.