THE CORPORATION OF THE TOWNSHIP OF SOMBRA AND PETER MURPHY (PLAINTIFFS).... } APPELLANTS;

AND

THE CORPORATION OF THE TOWNSHIP OF CHATHAM (DEFENDANTS) ..... } RESPONDENTS.

1892

*Mar. 10, 11.

*June 18.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal Corporation—Ontario Municipal Act—R.S.O. [1887] *c.* 184 *s.* 583—*Drainage Works—Non-completion—Mandamus—Maintenance and repair—Notice.*

The township of C., under the provisions of the Ontario Municipal Act (R.S.O. [1887] c. 184) relating thereto, undertook the construction of a drain along the town line between the townships of C. and S. but the work was not fully completed according to the plans and specifications, and owing to its imperfect condition the drain overflowed and flooded the lands of M. adjoining said town line. M. and the township of S. joined in an action against the township in which they alleged that the effect of the work on the said drain was to stop up the outlets to other drains in S. and cause the waters thereof to flow back and flood the roads and lands in the township, and they asked for an injunction to restrain C. from so interfering with the existing drains and a mandamus to compel the completion of the drain undertaken to be constructed by C. as well as damages for the injury to M.'s land and other land in S.

Held, affirming the decision of the Court of Appeal, that M. was entitled to damages, and, reversing such decision, Taschereau J. dissenting and Patterson J. hesitating, that the township of S. was entitled to a mandamus, but the original decree should be varied by striking out the direction that the work should be done at the cost of the township of C., it not being proved that the original assessment was sufficient.

Held, per Ritchie C.J., Strong and Gwynne JJ., that s. 583 of the Municipal Act providing for the issue of the mandamus to compel the making of repairs to preserve and maintain a drain does

*PRESENT:—Sir W. J. Ritchie C.J., and Strong, Taschereau, Gwynne and Patterson JJ.

1892

THE CORPORATION OF THE TOWNSHIP OF SOMBRA v. THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

not apply to this case in which the drain was never fully made and completed, but that the township of S. was entitled to a mandamus under the Ontario Judicature Act (R.S.Q. [1887] c. 44.)

Held, further, that the flooding of lands was not an injury for which the township of S. could maintain an action for damages even though a general nuisance was occasioned. The only pecuniary compensation to which S. was entitled was the cost of repairing and restoring roads washed away.

Held, per Patterson J. that it might be better to leave the decision of the Court of Appeal undisturbed and let the township of S. give notice to repair under sec. 583 of the Municipal Act, and work out its remedy under that section.

APPEAL from a decision of the Court of Appeal for Ontario (1), reversing the judgment of Mr. Justice Robertson at the trial in favor of the township of Sombra, and affirming it in favor of the plaintiff Murphy.

The facts of the case are sufficiently set out in the judgment of Mr. Justice Gwynne.

Meredith Q.C. for the appellants. As to the duty of public bodies in the construction of public works see *White* v. *Gosfield* (2); *Smith* v. *Township of Raleigh* (3).

Pegley Q.C. for the respondent referred to *Galbraith* v. *Howard* (4); *Northwood* v. *Township of Raleigh* (5); *Noble* v. *City of Toronto* (6); *Chrysler* v. *Township of Sarnia* (7): *Dillon* v. *Township of Raleigh* (8).

Sir W. J. RITCHIE C.J., and STRONG J., concurred in the judgment of Mr. Justice Gwynne.

TASCHEREAU J.—I would dismiss this appeal for the reasons given by Mr. Justice Maclennan in the Court of Appeal.

(1) 18 Ont. App. R. 252.
(2) 2 O. R. 287; 10 Ont. App. R. 555.
(3) 3 O.R. 405.
(4) 14 O.R. 46.
(5) 3 O.R. 347.
(6) 46 U.C.Q.B. 519.
(7) 15 O.R. 182.
(8) 13 Ont. App. R. 53.

1892

THE CORPORATION OF THE TOWNSHIP OF SOMBRA v. THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

Gwynne J.

GWYNNE J.—In the interval between the years 1874 and 1880 several drains were constructed in the township of Sombra, bringing down large quantities of water collecting in that township into and through the gore of Chatham which lies to the south of Sombra. The lands in the gore of Chatham lay lower than the lands in Sombra and a great part constituted a marsh. Some of the waters brought down by the drains in Sombra were conducted into, and left in, this marsh from which there was no outlet. In 1880 some persons in Chatham who had brought actions against the township of Sombra recovered judgment in those actions for injury to their lands from waters so brought down in some of the drains from Sombra. At this time the gore of Chatham appears to have been interested in having a drain made which should prevent all water coming down from Sombra from flowing at all through or into the gore of Chatham. The township of Sombra had also an interest in procuring a sufficient outlet for the waters which might be brought down by drains already constructed or thereafter to be constructed in Sombra. It seems to have been considered that there would have been a difficulty in getting the inhabitants of Sombra to petition for any drain which would be adequate for the purpose required, and that a petition could readily be obtained in Chatham, the inhabitants of which had a deep interest in preventing the Sombra waters flowing into the gore of Chatham; accordingly, either by agreement between the Reeves of the respective townships, or independently, one William Whitebread and others, inhabitants of the gore of Chatham, in or about the month of September, 1880, petitioned the council of the township of Chatham for a drain to be dug along the northerly side of the road between the gore of Chatham and the township of Sombra to extend from

1892

THE CORPORATION OF THE TOWNSHIP OF SOMBRA v. THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

Gwynne J.

the north branch of the river Sydenham to the channel Ecarté. The council thereupon employed their engineer, a Mr. W. G. McGeorge, to make an examination of the locality and to report to the council thereon under the provisions of the drainage clauses of the Municipal Institutions Act. The petition for this drain would seem to have been presented upon previous consultation with the said township engineer, for he, in his report to the council in pursuance of the reference to him by the council, recommended a drain of certain dimensions in width and depth to be constructed along the precise line of that petitioned for, and in his report he assessed the lands and roads in Sombra to be benefited by the work and to a greater amount than he assessed the lands and roads in Chatham. Upon this report the council of the township of Chatham, on the 6th December, 1880, provisionally passed a by-law under ch. 174 of R. S. O. of 1877, whereby they provisionally adopted the report of their engineer and the assessments made by him upon the lands and roads which, in his opinion, would be benefited by the proposed work, and they appointed a day for the sitting of a Court of Revision for the hearing and trial of all appeals against the assessments made in the engineer's report. The municipality of Sombra, under the provisions of section 540 of said ch. 174, appealed against the assessment so made on the lands in Sombra as too great, and as made on some lands and roads that would not be benefited, and against the assessment in Chatham as omitting some lands therein that would be benefited by the proposed drain, but they did not, in their notice of appeal, allege as a ground of appeal a point much pressed upon the trial of this action, that a portion of the plan of the Whitebread drain which provided for the damming of one of the drains in Sombra, called the Pacific drain, where it

1892

THE CORPORATION OF THE TOWNSHIP OF SOMBRA v. THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

Gwynne J.

crossed the town line and the carrying the waters coming down by it from Sombra through the White-bread drain along the town line to the channel Ecarté instead of conducting the waters to be brought down the latter drain into the Pacific drain and thence through that drain as constructed in the gore of Chatham to its mouth. Had they appealed upon that ground much of the evidence received and relied on in the present action, and irrelevant as so given, would have been relevant. See *Chatham* v. *Dover* (1). Their objections as to the amount of their assessments were entertained and adjudicated upon by the arbitrators, and there having been no appeal against their award under section 380 and 385 of said ch. 174 R. S. O. 1877 their award became conclusive and the by-law was thereupon finally passed on the 14th Oct., 1881, and the said Mr. McGeorge was thereby appointed commissioner to let the contract for constructing the said drain and works connected therewith by public sale to the lowest bidder (not exceeding the estimates made by the engineer in his report adopted by the by-law), and it was by the by-law enacted that it would be the duty of the said commissioner to cause the said drain and works connected therewith to be made and constructed in accordance with his plans and specifications, which were adopted by the by-law, not later than the 31st December, 1881, unless otherwise ordered by the council. This by-law was passed under the provisions of sections 547, 548, 549, and 550 of said ch. 174, R.S.O. 1877. This latter section 550 introduced the application of section 542 of the act which is identical with section 583 of R.S.O. 1887, and which enacted that:

After such deepening or drainage is fully made and completed it shall be the duty of each municipality in the proportion determined

(1) 12 Can. S. C. R. 349 and subsequent pages.

1892

THE CORPORATION OF THE TOWNSHIP OF SOMBRA v. THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

Gwynne J.

by the engineer or arbitrators under the same formalities, as nearly as may be, as provided in the preceding sections, to preserve, maintain and keep in repair the same within its own limits either at the expense of the municipality or parties more immediately interested or at the joint expense of such parties and the municipality as to the council, upon the report of the engineer or surveyor, may seem just.

It is to this and this case only, namely, of a work which it is the duty of two or more municipalities to preserve, maintain and keep in repair, and when any one of such municipalities neglects or refuses to make all necessary repairs within the limits of such defaulting municipality, after notice in writing, requiring such repairs to be made, that subsection 2 of said section 542 applies, which subsection, as amended by 47 Vic. ch. 32, s. 18, now subsection 2 of section 583 of R.S.O. 1887, enacts that:

> Any such municipality neglecting or refusing so to do (that is to make the necessary repairs within its own limits) upon reasonable notice being given by any party interested therein, and who is injuriously affected by such neglect or refusal, may be compellable by mandamus to be issued by any court of competent jurisdiction to make from time to time the necessary repairs to preserve and maintain the same; and shall be liable to pecuniary damages to any person who or whose property is injuriously affected by reason of such neglect or refusal.

This subsection, as I have already observed, is, as it appears to me, expressly limited to the case of one of two or more municipalities whose duty it is to execute all necessary repairs within its own limits neglecting or refusing to make some particular repairs after notice in writing given by any person interested in such repair being made and who becomes injuriously affected by neglect or refusal to make the necessary repairs after such notice. In such a case a mandamus may be obtained in addition to the municipality being liable to an action at the suit of any person who or whose property may be injured by the neglect or refusal of the

municipality to make the necessary repairs after such notice. In such an action the occurrence of damage from such neglect after such notice may be taken as conclusive evidence of negligence, but what in cases where no want of repair is apparent to any person interested and who may become injuriously affected and consequently no notice is given under the section, but the municipality with full knowledge, or means of knowledge, that a drain which they are bound to maintain has been suffered to fall into a state of disrepair omit negligently to make necessary repairs and negligently fail to discharge their duty of maintaining the work in an efficient state of repair and damages result to individuals by reason of such negligence? In my opinion the section in question has no reference to any such case; for such damage sustained by neglect to discharge a statutory duty any person injured has his remedy by action at common law which the section in question does not, as it appears to me, purport to restrict or affect in any manner. However the section has no reference whatever to the present case where the drain authorized to be constructed has never, in point of fact, been fully made and completed.

By the by-law the work designed was declared to be the digging of the drain upon the town line between Sombra and the gore of Chatham, but on the Sombra side of such line, and the raising of the residue of the town line so as to form a permanent embankment which should prevent all water descending from Sombra from flowing into the gore of Chatham, thus damming up all water courses, natural and artificial, flowing from Sombra across the town line between the River Sydenham and the Chenal Ecarté and the giving to the drain a uniform level bottom of the width of nine feet throughout and the width of eleven feet at the surface with side slopes of one to one. Although the

1892

THE CORPORATION OF THE TOWNSHIP OF SOMBRA v. THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

Gwynne J.

by-law appointed Mr. McGeorge, the township's engineer, commissioner for letting the contract for the work and enacted that the work should be completed by the 31st December, 1881, unless otherwise ordered by the council, and although no order of council was ever made ordering otherwise, it appears that the engineer entered into no contract for constructing the work until in or about the month of September, 1882. It appears also that the contractor with whom this contract was entered into shortly afterwards wholly abandoned his contract and that Mr. McGeorge, the engineer of the township of Chatham, without any intervention of or authority from the council, from time to time afterwards let out the work in separate sections to divers persons who either could not, or if they could did not, complete the work let to them respectively at one and the same time. In fact it appeared that without any order in council authorizing such a mode of letting the work and such deviation from the provisions of the by-law the work was still incomplete in the month of January, 1887. On the 15th day of that month Mr. McGeorge addressed to the township council a letter in the following words:—

> Gentlemen: I beg to report to your honourable council that the Whitebread drain is now completed, with the exception that some of the excavated earth taken out late in the season has not been properly spread on the road. This will be done as soon as the frost is out and the earth is sufficiently dry.

The present action was commenced in the month of November, 1887, and in the statement of claim filed therein the plaintiffs, the corporation of the township of Sombra and Peter Murphy, whose claims and rights of action respectively, if they have any, are quite independent the one of the other, unite in complaining that in point of fact the drain has never been com-

pleted according to the plan and specifications in the by-law, and in consequence thereof the drain does not answer the purpose for which it was constructed:—

But on the contrary thereof that the effect of it is to collect together and to cast upon the lands of the plaintiff Peter Murphy, and the roads of the plaintiffs, the corporation of the the township of Sombra, large quantities of water from the neighbouring lands, which would not but for the said drain have flowed upon the said land and roads, and the said plaintiffs and the said land and roads have been greatly damnified and injured by reason thereof in each year since the year 1882, and that the said drain was so unskilfully and negligently constructed that the above evils complained of have been greatly aggravated.

And they alleged, further, that the effect of the acts of the defendants with reference to the said drain and works is to prevent certain drains constructed in the township of Sombra from carrying off the waters brought down by them from lands and roads in Sombra and to pen back such waters upon and to flood the said roads and said lands of the plaintiff Murphy, and that the said defendants have refused to complete the said Whitebread drain; and they prayed among other things that the defendants may be ordered to complete the said drain in accordance with the provisions of the by-law, and that they may be ordered to pay to the plaintiffs and to each of them damages for the wrongful acts of the defendants complained of by the plaintiffs. Now it is obvious that as to the damage alleged to be done to the lands of the plaintiff Murphy and to the roads of the plaintiffs, the township of Sombra, the interests and rights of action of the respective plaintiffs are wholly distinct and independent. The lands of the plaintiff Murphy being flooded for a longer or a shorter period might render them unfit for cultivation more or less according to the duration of the flooding, while no injury of a like nature could be done to the corporation by the flooding of their roads. Their

1892

THE CORPORATION OF THE TOWNSHIP OF SOMBRA v. THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

Gwynne J.

roads might thereby become impassable for a longer or shorter period, but that would constitute an injury in the nature of a nuisance to Her Majesty's subjects generally requiring to use the roads, but would give no cause of action to the corporation to recover pecuniary damages by way of compensation for such nuisance or otherwise. The only pecuniary compensation which the corporation in an action of this nature could, as it appears to me, claim would be for the cost of repairing and restoring any of their roads which might be washed away by floods occasioned by the wrongful or negligent conduct of the defendants.

The learned judge who tried the case, after taking a vast amount of evidence, has in effect found the defendants never did complete the drain to the width, depth and bottom level throughout as was provided by the plans and specifications adopted by the by-law, and he adjudged that the defendants should pay the plaintiff Murphy the sum of $150 for his damages in respect of the injuries complained of by him; and without entering into the evidence at large it is sufficient to say that there can, I think, be no doubt that the learned judge was right in his judgment that the defendants never did complete the drain in accordance with the plans and specifications adopted by the by-law, and that the damages sustained by the plaintiff Murphy were occasioned by such default of the defendants and by the negligent, unskilful and wrongful manner which their engineer adopted of letting the work in several sections to different persons, and in not securing the completion of the several sections at one time, and in not taking care that the bottom of the drain should be constructed at one level throughout as required by the by-law. The consequence of this mode of procedure, according to the engineer's own evidence, was that one section having been constructed before others caused,

1892

THE CORPORATION OF THE TOWNSHIP OF SOMBRA v. THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

Gwynne J.

as he says, that section to become out of repair and to be choked with silt and earth before others were dug down to their proper level. The engineer's contention was that the drain after its completion became naturally out of repair, but the learned judge has found, and the evidence abundantly supports his finding, that in point of fact the drain never was completed in accordance with the provisions of the by-law. The question, therefore, is not one of non-repair after completion but of non-completion, and section 583 of the chapter 184 of the acts of 1887 has no application in the present case at all. The learned judge has not accorded to the plaintiffs, the corporation of the township of Sombra, any sum by way of compensation for damage done to any of their roads, and indeed no evidence of any damage enabling the corporation to any such sum appears to me to have been adduced; but the learned judge has in and by his decree ordered and adjudged that the defendants should, within one year from the 23rd day of October, 1888, complete the drain to the width and depth and in the manner provided for by the plans and specifications upon which the work was undertaken, such depth being that indicated by the red line in the plan prepared by John H. Jones put in by the plaintiffs at the trial of the action and numbered exhibit 7, and with proper and sufficient outlets at both ends thereof to carry off all the water which enters the same from time to time. The learned judge in his said decree did further declare that the amount provided by the by-law for the completion of the drain, and which came to the hands of the defendants, was sufficient to complete the drain in accordance with the said plans and specifications, and would have completed the same but for the want of skill, negligence and unnecessary delay of the defendants in proceeding with and carrying out the work, and he therefore adjudged

1892

THE CORPORATION OF THE TOWNSHIP OF SOMBRA v. THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

Gwynne J.

and decreed that the cost of the works necessary for the completion of the said drain should be defrayed by the defendants, and that they should not be at liberty to levy or assess the same or any part thereof as a special rate against the lands and roads by the said by-law assessed for the cost of the construction of the said drain. From this judgment the defendants in the action appealed to the Court of Appeal for Ontario. That court ordered and adjudged that such appeal should be allowed as to the relief granted to the plaintiffs, the township of Sombra, and that the action so far as it was the action of the plaintiffs the township of Sombra should be dismissed, and that as regarded the plaintiff Murphy the appeal should be and the same was dismissed with costs to be paid by the defendants the township of Chatham to the said Murphy. The effect of this judgment appears to have been to have left the whole of the decree of Mr. Justice Robertson, as well as to the mandamus as to the damages awarded to Murphy, to stand while the action in so far as the plaintiffs, the township of Sombra, were concerned was dismissed. From this judgment the municipaliy of the township of Sombra have appealed and their appeal is against the judgment of the Court of Appeal for Ontario dismissing the action. They never appealed against the judgment of Mr. Justice Robertson on the ground of his not having awarded them any pecuniary damages. The case was argued before us upon the ground that the judgment of the Court of Appeal for Ontario was erroneous as depriving the township of Sombra of the right to the mandamus awarded by the judgment of Mr. Justice Robertson as if that portion of his judgment had been rendered in their favor alone, for on the present appeal the township of Sombra did not claim any damages. None having been awarded them by the original decree

from which they had never appealed they could not well have claimed any on the present appeal. A difficulty now arises attributable to the fact that the original judgment was single and given in a case wherein the two parties, the plaintiffs in the action, asserted totally distinct and independent claims for damages and a joint claim for mandamus. If on this appeal we should reverse the judgment of the Court of Appeal for Ontario dismissing the action of the plaintiffs the township of Sombra, upon the ground that no question as to their right to pecuniary damages was before us, and that it would be useless to adjudicate upon their right to the mandamus claimed because our judgment could not affect the plaintiff Murphy in whose favor, equally as in favor of plaintiffs the township of Sombra, the mandamus would seem to have been awarded by a literal construction of the original judgment, we should confirm the confusion and difficulty in which the case would seem to be. The better way therefore of getting over the difficulty would seem to me to be to entertain the case as it was argued before us, namely, that that judgment affirmed the original decree in favour of Murphy as to the damages awarded to him, treating the original judgment in his favour as limited to the question of damages, and the award of mandamus in the original decree as a judgment rendered in favour of the township of Sombra. I see no better way at present of getting over the difficulty, and so regarding the case I am of opinion that although the plaintiffs, the township of Sombra, were awarded no pecuniary damages by the original decree against which they have not appealed, they have a substantial interest in maintaining their right to the mandamus awarded by the original decree which entitles them to our judgment upon that question. It has been established by the

1892

THE CORPORATION OF THE TOWNSHIP OF SOMBRA v. THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

Gwynne J.

original judgment in the case and, in my opinion, upon abundant evidence that the drainage work for constructing which the by-law was passed never was, in point of fact, completed as required by the by-law. The municipality of the township of Sombra were, and it is unnecessary to say that the plaintiff Murphy also was, entitled to an adjudication to that effect, and the township of Sombra, therefore, on this appeal are entitled to have the original judgment restored in so far as it awarded a mandamus or mandatory injunction requiring the municipality of the township of Chatham to complete the drain as orignally designed and in the manner required by the by-law. To that relief they are, in my opinion, entitled, wholly irrespective of section 583 of the Municipal Institutions Act, under the provisions of the Ontario Judicature Act, ch. 44 R. S. O. 1887. The original decree, however, further adjudged that the plaintiffs were entitled to a declaration that the work of completing the drain should be executed at the proper cost and charges of the defendants and not at the cost and charges of those of the ratepayers who had already, by special assessment, contributed funds sufficient to have completed it. This portion of the decree is based upon a declaration contained in the decree that the amount for which those parties were assessed was sufficient to complete the work as directed by the by-law. This declaration or finding of the learned judge who tried the case does not appear to me to have been warranted by the issues or the evidence thereon in the action. On the contrary, the fact that the original contractor for the work who had entered into a contract to complete the work as originally designed within the original estimates as required by the by-law abandoned his contract, and that the engineer could get no other contractor to undertake the work

on like terms, and that the engineer felt himself compelled to proceed with the construction of the work in the imperfect and unauthorized manner in which it was proceeded with, can, I think, be explained only upon the assumption that the original estimate of the cost of the work was insufficient. Now, the only authority that I can see in the act for charging monies necessary to complete a drainage work undertaken under a by-law, and left in an unfinished state, upon the parties originally assessed for the work is under section 573 chapter 184 R. S. O., 1887, namely, in the case of the original assessment proving insufficient for that purpose. I do not think that the defendants should be precluded by a judgment rendered in the present case, as they might be if that portion of the original decree should be left to stand, from showing their right if they can to act under said section 573.

The original decree must also be varied now as to the time within which the defendants were required to do the work, and the defendants should be left unfettered as to any right they may have under the acts relating to drainage works to raise the funds necessary to complete the work. In so far as the mandamus is concerned the decree should simply direct a mandatory injunction to issue requiring the defendants to complete the drain to the width and depth and in the manner provided for by the plan and specifications adopted by the by-law upon which the said work was undertaken, or to provide some substitution therefor under the provisions of the statute in that behalf, reserving leave to the plaintiffs to apply to the court for such other relief as in case of neglect or delay, or otherwise upon the part of the defendants as occasion may require; the decree should be varied by striking out the paragraphs numbered 3 and 5 and being

1892

THE CORPORATION OF THE TOWNSHIP OF SOMBRA v. THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

Patterson J.

so varied the appeal should be allowed with costs and the decree of Mr. Justice Robertson affirmed.

PATTERSON J.—The learned judge who tried this action awarded to the plaintiff Murphy $150 damages, and ordered, on the prayer of the two plaintiffs, the municipality and Murphy, that the defendant municipality should proceed to complete the Whitebread drain.

The Court of Appeal reversed the latter part of the judgment leaving the award of damages undisturbed. The plaintiffs join in appealing to this court and ask to have the order for the completion of the drain restored.

There is room for difference of opinion as to whether the Court of Appeal was so clearly wrong in disallowing the order as to make it proper for us to interfere with the judgment of that court in view of all the circumstances of the case, but it is manifest that if the order of the trial judge is to be restored it must undergo important variations.

My brother Gwynne has, in his careful examination of the case, given reasons for expunging from the order all reference to the manner in which and the persons from whom the money to pay for the work ordered to be done is to be raised, leaving the council quite untrammelled by any direction from the court upon that point. I agree with that conclusion.

Then, considering that the duty to be enforced is only that which arose under the proceedings taken in 1880 and 1881 which resulted in the making of the by-law, we must be careful not to enlarge that duty by the order which we sanction. That would seem to be done, however, by the order of the High Court which after directing the completion of the drain " to the width and depth and in the manner provided for

by the plan and specifications upon which the work was undertaken," adds "and with proper and sufficient outlets at both ends thereof to carry off all the water which enters the same from time to time."

If the plan and specifications or the by-law provide for this well and good.

They speak for themselves and the amplification is unnecessary.

We cannot say and are not called upon judicially to decide that it is possible, having regard to the levels of the lands and rivers, to make outlets sufficient to carry off, by way of those rivers, all the water the drain was originally designed to carry off. Much less can we say so with respect to all the waters that may from time to time enter the drain. This excessive mandate must be corrected.

There is a complaint against the township of Sombra, pleaded by way of counter claim, for sending into the Whitebread drain by means of new drains in that township more water than the drain was originally intended to receive. I do not think there was any finding at the trial respecting the facts on which the complaint was founded, but we have in evidence a formal protest by the council of Chatham by resolution passed in May, 1887, on the subject, and there is also a report made by Mr. McGeorge, the engineer, in November, 1887, to the council of Chatham, stating that excessive quantities of water were being sent down from the higher township by numerous drains.

The order as it was made at the trial requires a sufficient outlet for all these waters and is in that respect entirely unwarranted.

For my own part I should prefer to leave the judgment of the Court of Appeal undisturbed, and to allow the appellants to work out their object by a regular

1892

THE CORPORATION OF THE TOWNSHIP OF SOMBRA v. THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

Patterson J.

notice to repair and proceedings upon it under section 583, or by any other machinery available under the statute. It may be true, and I assume in deference to the opinions of my learned brothers that it is true, that the drain was never completed in full accordance with the original design. That the evidence is capable of being differently understood has been shown in the court below, particularly by Mr. Justice Maclennan. But the council of Chatham having adopted, in January, 1887, the report of Mr. McGeorge, who certified that the work was complete, could not allege the non-completion of the work in bar of the application of section 583. "Repair," under that section, includes deepening or widening in order to fit a drain to do the work it was originally intended to do.

It is now more than eleven years since the work was initiated. The action was not commenced until nearly six years after the date first fixed for the completion of the work. If the work had been promptly completed it would, in the natural course of things, have required repair by this time, and all the more so if the additional waters from Sombra helped to injure the embankment and to silt up the waterway. To put the drain now into the state it should have been in ten or eleven years ago will combine repairing with construction. The order now in question is not a mandamus such as, in cases under section 583, becomes, under proper conditions, claimable as of right.

It is one that is more in the discretion of the court to grant or refuse in view of all the circumstances, and I cannot say that, under all the circumstances, the decision of the court ought to have been different.

The order as originally made, freeing the appellants from liability to special assessment, was obviously better worth insisting upon than when shorn of that feature and with the question of the assessment left at

large. I am not sure that the appellants will be better off with the order in the shape it is now to take than if left to work out their object under such provisions of the statute as may apply to the case, nor am I entirely free from doubt as to the propriety of bringing an action like the present, or quite prepared to hold, what the judgment seems to involve, that a council can be compelled to carry out, without alterations, the plans and specifications on which a drainage work may be launched. My doubt as to the propriety of proceeding by action is partly suggested by subsection 16 of section 569, which declares that the provisions of that section shall be deemed to extend to the re-execution or completion of any works which have been executed or have been partly or insufficiently executed under any provision of any act of the Legislature of Ontario (as this case was) or of the Parliament of the Province of Canada.

But while I should prefer to do as the Court of Appeal decided to do, and leave the appellants to such remedies as the act affords them, I am not so clear about those remedies as to feel warranted in formally dissenting from the judgment of the court.

The proceedings referred to in subsection 16 of section 569 would apparently be proceedings at the instance of the Chatham people, not those of Sombra, and so would the action, if any, taken under section 573 to raise more money for the completion of the drain. The amendment of section 583 by 52 Vic. ch. 36 s. 35 does not aid the appellants or give them any better remedy under that section, while, curiously enough, the duty of Chatham to maintain and repair the drain, which depends on section 583, does not seem beyond dispute. The drain is not in either of the municipalities but on the road between them. The right to make a ditch in that position is given, and

1892

THE CORPORATION OF THE TOWNSHIP OF SOMBRA v. THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

Patterson J.

the liability to pay for it is provided for, by section 596. Then, by section 597, the chain of sections from 569 to 632 apply, as far as applicable, to it; but the duty of any municipality, under section 583, to maintain is confined to works within its own limits.

I agree without any hesitation in the variations of the original order proposed by his lordship the Chief Justice, and I also concur, though with hesitation, in allowing the appeal.

The cross appeal against the damages awarded to Murphy should, I think, be dismissed.

Appeal allowed with costs.

Solicitors for appellants: *Gurd & Kittermaster.*

Solicitor for respondent: *Charles E. Pegley.*