THE CORPORATION OF THE TOWNSHIP OF ELLICE (DEFENDANTS) ..... APPELLANTS;

AND

SAMUEL R. HILES (PLAINTIFF).....RESPONDENT.

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*Mar. 13, 14, 15, 16, 17.

*May. 31.

THE CORPORATION OF THE TOWNSHIP OF ELLICE (DEFENDANTS)..... APPELLANTS;

AND

GEORGE CROOKS (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Drainage—Action for damages—Reference—Drainage Trial Act, 54 V. c. 51—Powers of referee—Negligence—Liability of municipality.

Upon reference of an action to a referee under The Drainage Trials Act of Ontario (54 V. c. 51) whether under sec. 11, or sec. 19, the referee has full power to deal with the case as he thinks fit and to make of his own motion, all necessary amendments to enable him to decide according to the very right and justice of the case, and may convert the claim for damages under said sec. 11 into a claim for damages arising under sec. 591 of the Municipal Act.

In a drainage scheme for a single township the work may be carried into a lower adjoining municipality for the purpose of finding an outlet without any petition from the owners of land in such adjoining township to be affected thereby, and such owners may be assessed for benefit. *Stephen* v. *McGillivray* (18 Ont. App. R. 516) ; and *Nissouri* v. *Dorchester* (14 O.R. 294.) distinguished.

One whose lands in the adjoining municipality have been damaged cannot, after the by-law has been appealed against and confirmed and the lands assessed for benefit, contend before the referee to whom his action for such injury has been referred under the

*PRESENT :—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

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Drainage Trials Act that he was not liable to such assessment, the matter having been concluded by the confirmation of the by-law.

The referee has no jurisdiction to adjudicate as to the propriety of the route selected by the engineer and adopted by by-law, the only remedy, if any, being by appeal against the project proposed by the by-law.

A municipality constructing a drain cannot let water loose just inside or anywhere within an adjoining municipality without being liable for injury caused thereby to lands in such adjoining municipality.

Where a scheme for drainage work to be constructed under a valid by-law proves defective and the work has not been skilfully and properly performed, the municipality constructing it are not liable to persons whose lands are damaged in consequence of such defects and improper construction, as *tort feasors*, but are liable under sec. 591 Municipal Act for damage done in construction of the work or consequent thereon.

A tenant of land may recover damage suffered during his occupation from construction of drainage work, his rights resting upon the same foundation as those of a freeholder.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the report of a referee to whom the action was referred under The Drainage Trials Act, 1891.

The facts of the case are fully set out in the judgment of the court delivered by Mr. Justice Gwynne.

Wilson Q.C. and *Smith* Q.C. for the appellants. The referee was wrong in the opinion he expressed, on the authority of *Stephen* v. *McGillivray* (2), and *West Nissouri* v. *Dorchester* (3), that the by-law was invalid for want of a petition from ratepayers in Elma. In those cases the drains were not carried into adjoining townships to find an outlet but for other purposes and so sec. 576 of the Municipal Act did not apply. In the present case that section distinctly authorizes the proceedings. See *Chatham* v. *Dover* (4).

The Court of Revision confirmed the assessment for benefit on plaintiff's lands which precludes him from

(1) 20 Ont. App. R. 225.
(2) 18 Ont. App. R. 516.
(3) 14 O. R. 294.
(4) 12 Can. S. C. R. 321.

obtaining compensation. *Re Pryce and City of Toronto* (1); *James* v. *Ontario & Quebec Railway Co.* (2).

Hiles has been allowed compensation for damage to yearly crops to which he was not entitled. Injury is only to be estimated as on the date of the by-law. *Re Prittie and City of Toronto* (3).

If the work is constructed under a valid by-law there is no liability as for negligence. That is held by our courts and, we submit, by the Privy Council, in *Williams* v. *Township of Raleigh* (4). See also *London, Brighton & South Coast Railway Co.* v. *Truman* (5).

The by-law must be quashed before an action can be brought and notice of action should be given. *Hill* v. *Middagh* (6).

If the work has been lawfully done the only liability of the corporation is to be compelled by *mandamus* to levy an assessment. *Quaintance* v. *Howard* (7); *Smart* v. *Guardians of West Ham Union* (8); *Frend* v. *Dennett* (9).

Plaintiffs have no right of action as it is not given by the statute. *Cowley* v. *Newmarket Local Board* (10); *Municipality of Pictou* v. *Geldert* (11).

Christopher Robinson Q.C. and *Mabee* for the respondents. The Drainage Trials Act deals only with matters of procedure and does not interfere with vested rights or matters of substance. It may therefore be retrospective in its operation. *Mayor, etc., of Montreal* v. *Drummond* (12).

The petition for the by-law was not properly signed which makes it invalid. Judgment of Mr. Justice Henry in *Dover* v. *Chatham* (13).

(1) 16 O. R. 726.
(2) 15 Ont. App. R. 1.
(3) 19 Ont. App. R. 503.
(4) 21 Can. S.C.R. 103; [1893] A. C. 540.
(5) 11 App. Cas. 45.
(6) 16 Ont. App. R. 356.
(7) 18 O. R. 95.
(8) 10 Ex. 867.
(9) 4 C. B. N. S. 576.
(10) [1892] A. C. 345.
(11) [1893] A. C. 524.
(12) 1 App. Cas. 384.
(13) 12 Can. S. C. R. 321.

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It is not necessary to have the by-law quashed before bringing an action if the defect appears on its face. *Connors* v. *Darling* (1); *Appleton* v. *Lepper* (2); *Cleland* v. *Robinson* (3).

As to the liability of the municipality for negligence see *Williams* v. *Raleigh* (4); *Sombra* v. *Chatham* (5).

Wilson Q.C. in reply. The whole matter should be settled by assessment. *Re County of Essex and Rochester* (6).

As to the petition for a by-law see *In re White and Township of Sandwich East* (7)

GWYNNE J.—These actions are founded almost wholly upon the same grounds, the former for injury to lot no. 21 in the 14th concession of the township of Ellice, of which the plaintiff Hiles is seised in fee, and the latter for injury to lot no. 20 in the same concession of the same township, of which the plaintiff, Crooks, at the time of the injuries complained of, was in possession as tenant. The statement of claim of the plaintiff Hiles, in short substance, is to the effect that: On the 18th May, 1885, the defendant passed a by-law, no. 198, for draining parts of the township of Ellice, under which, and the schedules thereto attached, they assumed to tax not only lands in the township of Ellice, but also lands in the townships of Elma and Logan; that professing to act under the said by-law they constructed a drain commencing in the township of Ellice, thence along the boundaries of the townships of Elma and Ellice, and of Logan and Elma, into Elma to within about 45 rods from the northerly limit of lots 25 and 26 in the 14th concession of Elma; that the defendants, though professing to construct the drain

(1) 23 U. C. Q. B. 541.
(2) 20 U. C. C. P. 138.
(3) 11 U. C. C. P. 416.
(4) [1893] A. C. 540.
(5) 18 Ont. App. R. 252.
(6) 42 U. C. Q. B. 523.
(7) 1 O. R. 530.

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under the drainage clauses of the Municipal Act, did not observe the legal requirements necessary to give them jurisdiction, in that they did not require a petition to be presented to them signed by a majority of the owners of the lands to be taxed, or whose lands would be benefited by the said works; that the defendants did not carry the drain to a proper or any outlet, but brought in the water from Ellice and deposited it on land in Elma, from whence it spread over lots 25, 24, 23 and 22, in the said 14th concession, into plaintiff's land, where it remained to the damage of the plaintiff's lands and crops; that the defendants were guilty of negligence in the construction of the drain in that they provided no proper outlet for the water of the drain, and that they improperly brought large quantities of water from their natural flow into and upon the lands of the plaintiff; that after the said drain was alleged to be completed, and upon the 4th August, 1890, the defendants passed another by-law, no. 265, whereby, after reciting that it was found that the outlet provided by said by-law no. 198 was insufficient, they provided for the construction of a new drain as an outlet from the outlet as provided by by-law 198, across lots 25, 24, 23, 22 and 21 in the said 14th concession of Elma, into a river called the Maitland. That the defendants have assumed to proceed under such last-mentioned by-law and have entered upon plaintiff's land in lot 21, and have taken part of his land for excavating and constructing said drain therein; that said drain, when constructed, will prove a permanent injury to the land of the plaintiff, and will necessitate the construction and maintenance of many small bridges and crossings; that the said last-mentioned by-law is illegal in that the defendants did not comply with the legal formalities necessary to enable them to continue the said

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drain; that no petition was presented for the construction or continuation of the same, and the plaintiff further alleges that by reason of the said by-law, no. 198, being bad for the reasons aforesaid, the by-law no. 265 is of necessity void also; and lastly, that the outlet provided is insufficient and improper in that a much better outlet could have been obtained without injuring the plaintiff's land, and the plaintiff claims $400 damages by the flooding of his land, caused by the work done professedly under by-law no. 198, and $600 damages for injury to his land by the work done professedly under by-law no. 265.

To this statement of claim the defendants set up their defence, which it is unnecessary to set out at length, or further than to say that it insisted upon the sufficiency and validity of both by-laws, which the defendants rely upon as their sufficient defence and justification, to which the plaintiff replied by joining issue.

The plaintiff, Crooks, in his statement of claim based his action precisely upon the same grounds as the plaintiff Hiles had, in respect of the injuries alleged to have been suffered by him for what was done professedly under by-law no. 198.

The defendants relied upon the sufficiency of that by-law and the legality of the work done thereunder, and they insisted that the damages, if any were suffered by the plaintiff, were the proper subject of arbitration under the Municipal Act, and that no application was ever made for such arbitration; that the plaintiff accepted a lease of the land for injury to which the action is brought after the construction of the drain complained of, and with knowledge of all the risks he ran from the operations complained of, and they insisted that he was therefore estopped from making the claim asserted in the action, and finally

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the defendants claimed the benefit of sec. 338 of ch. 184 R.S.O., 1887.

Upon the 18th October, 1891, upon motion made by the defendants in the action at the suit of Crooks, an order was made by the court in which it was pending that the said action should be and it was thereby referred to the referee appointed under The Drainage Trials Act, 54 Vic. ch. 51. Now this act appears to me to have been passed for the express purpose of removing obstructions to the administration of justice which sometimes occurred where parties, entitled to recover damages for injuries done to their property by drainage works, brought actions at law to recover such damages instead of proceeding under the arbitration clauses of the Municipal Institutions Act, as required by section 591 of the act of 1883, 46 Vic. ch. 18.

The act provides that the Lieut.-Governor of Ontario may appoint a referee for the purposes of the Drainage Acts, who shall be deemed to be an officer of the High Court and among other things (sec. 2, subsec. 4) shall have all the powers of an official referee under the Judicature Act; (subsec. 5) shall also have the powers of arbitrators under the said acts; and shall also have the power of arbitrators under the Municipal Act with respect to compensation for lands taken or injured, and shall likewise have the powers of other arbitrators generally; and (subsec. 6) shall also have as respects proceedings before him the powers of judges of the High Court, including the production of books and papers, the amendment of notices of appeal, and of notices for compensation or damages, and of all other notices and proceedings, the rectification of other errors or omissions, the time and place of hearing, examination and viewing, the assistance of engineers, surveyors or other experts, and as respects all matters whatsoever incident to the trial and decision of matters before him,

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or proper for doing complete justice therein between the parties.

By section 4 the referee is substituted for the arbitrators provided by the Drainage Acts aforesaid.

By section 5 claims, matters and disputes which the said enactments provide for referring to arbitration shall be instituted by serving a notice of appeal, or notice claiming damages or compensation, as the case may be, upon the other parties concerned; the notice shall state the grounds of the appeal or claim, &c., &c.

By sec. 11 any action for damages from the construction or operation of drainage works may at any time after the issue of the writ be referred to the said referee by the court or a judge thereof, and by section 19:

> Where a party brings an action for damages in a case in which, according to the opinion of the court in which the action is brought, or a judge thereof, the proper proceeding is under this act, the court or judge on the application of either party, or otherwise, may order the action to be transferred to the said referee at any stage of the action and on such terms as to costs or otherwise as the court or judge sees fit; and the referee shall thereupon give such directions as to the prosecution of the claim before him as may seem just or convenient, &c., &c.

I cannot doubt that under this act the referee has the fullest powers of amendment which are possessed by the High Court itself, and that upon the reference of an action to him by the court or a judge, whether it be referred under the 11th or the 19th section, he has full power to deal with the case as he thinks fit, and to make, without any application of any of the parties, all such amendments as may seem necessary for the advancement of justice, the prevention and redress of fraud, the determining of the rights and interests of the respective parties, and the real question in controversy between them, and best calculated to secure the giving of judgment according to the very right and justice of the case, and so if necessary to convert

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the claim for damages as stated in the statement of claim, if that should be filed before the transfer or reference of the action to the referee, into a claim for damages under section 591 of the act of 1883, as consequential upon the construction of a work authorized by a by-law duly passed under the authority of the statutes in that behalf, and to cause his adjudication thereon to be entered of record for the plaintiff for his damages, if any awarded him, as damages recovered under that section.

On the 19th of October, 1891, an order was made by the Common Pleas Division of the High Court in the action of *Hiles* v. *The Township of Ellice* whereby it was ordered that that action and all questions arising therein be referred to the referee appointed under the Drainage Trials Act of 1891, pursuant to the provisions of the said act. Accordingly both cases were brought down for trial before the said referee, and evidence of a most exhaustive and much of an irrelevant character appears to have been entered into, for the plaintiffs were allowed to enter into evidence for the purpose of establishing a pretension which they respectively asserted, that it was competent for them to show, either as avoiding the by-law no. 198 altogether, or as establishing negligence making the defendants liable as wrong-doers even if the by-law should be held to be valid, that the route adopted for the drain as constructed was much inferior to another route which if selected the lots 20 and 21 in the 14th concession of Elma would not have suffered damage; this evidence was apparently offered for that sole purpose, but was wholly irrelevant, for assuming the fact to have been established, it could neither have the effect of avoiding the by-law nor of fixing the defendants with liability as for negligence in construction of the work authorized by the by-law. The

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petition which was the foundation of the by-law could not be produced, having been lost, but the evidence established beyond doubt, that the work petitioned for was simply the drainage of certain lands in the township of Ellice, and that the petition was signed by a majority of the owners of the lands the draining of which was petitioned for. By the surveyor's report, which is recited in and made part of the by-law, it appears that he found it necessary to carry a drain constructed for draining the said lands in Ellice into the township of Elma, and he set out the course which he considered to be best for that purpose, "to a branch of the Maitland river in the 14th concession of Elma," which route, commencing at the said branch of the Maitland river in the said 14th concession, he marked by stakes back to the lands in Ellice proposed to be drained, and being of opinion that certain lands in Elma would be benefited by the construction of such drain he assessed them respectively with amounts which appeared to him to be just and reasonable. No appeal having been taken by the municipality of Elma against his report, plans, assessments or estimates, the council of that municipality passed a by-law for levying from the lands in Elma the amounts so assessed upon them respectively. Thus it appeared that all the proceedings necessary to be taken under sections 570, 576, 578, 579, 580 and 581 of the said act of 1883, which sections have been in force ever since the passing in 1882 of 35 Vic. ch. 26, in order to make the by-law and the work thereby authorized valid were taken and the work was completed as contemplated by the by-law and the surveyor's report; but upon completion it proved that the branch of the Maitland in the 14th concession which the surveyor designed as and made the outlet of the waters brought down thereto by the drain was inadequate for that purpose, and that in

consequence the waters spread over several lots in the 14th concession, and by reason thereof the municipal council of the township of Ellice, upon the 4th day of August, 1890, provisionally passed a by-law numbered 265, whereby, after reciting therein that after the completion of the drain authorized by by-law 198 it was found that the outlet provided by that by-law was insufficient, it was enacted, "pursuant to the provisions of the Municipal Act," *i.e.* section 585 of ch. 184 R. S. O. 1887, which is the same as section 586 of said act of 1883, as amended by section 19 of 47 Vic. ch. 32 (1884), that a new outlet drain from the outlet of the Maitland drain in the creek, that is to say, the outlet of the drain constructed under by-law no. 198, should be constructed to the main Maitland river, crossing several lots, including lot 21 in the 14th concession of Elma, the property of the plaintiff Hiles, according to the report, plans and estimates recited in the by-law. By this by-law lot 21, the land of the plaintiff Hiles, was assessed for benefit in the sum of $38.56. Against this by-law, and the assessment made therein upon the lands in Elma, the municipal council of that township appealed, but the by-law and assessment were confirmed by the arbitrators to whom the appeal was referred under the provisions of the act in that behalf, and thereupon the by-law was finally passed on the 28th September, 1890. Subsequently, and upon the 30th May, 1891, the municipal council of Elma passed a by-law to levy upon the lands so assessed in Elma the amount of such respective assessments. The only question now arising under this by-law is one in the case of *Hiles* v. *Ellice*, and the claim of the plaintiff Hiles therein is solely for the land taken for the drain and for damages occasioned by severance of the land by the drain, and the necessity of erecting and maintaining a bridge or bridges across the drain, &c., &c.

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Upon these actions, so referred to him, the learned referee has adjudicated and determined to the effect that if he was deciding those cases upon the first impression, and not governed by authority, he would consider the above section 576 of the act of 1883, 46 Vic. ch. 18, to apply to cases like those before him, and that therefore the engineer could properly continue as he did the drainage work into Elma, and assess the lands therein which would be benefited by such work under the provisions of the said section, but that he thought he was concluded by the judgments of the courts in *West Nissouri* v. *Dorchester* (1), and *Stephen* v. *McGillivray* (2), and upon what he understood to be the authority of those cases he thought the said by-law, no. 198, to be utterly invalid, as passed without any jurisdiction in the municipal council of Ellice to pass it. But he also adjudged and determined that, assuming the by-law to be valid, the defendants were liable as wrong-doers for negligence, as I understand his report, in not providing a proper outlet for the waters brought down by the drain; and because the work was not properly or skilfully performed, but was for a long time left unfinished at lot 25 in the 15th concession of Elma, with a flood of water passing through it and spreading on adjacent lands, whereby some of the water spread upon the lands of the respective plaintiffs; and because he was of opinion that the drain should never have been constructed upon the route adopted, but should have been taken on a wholly different route to the main river Maitland as it passes through lot no. 18 in the 14th concession of Elma. But he further was of opinion, that even though the above findings should be erroneous, and assuming that all damages arising from the construction of the drain constructed under said by-law no. 198 were only

(1) 14 O. R. 294. (2) 18 Ont. App. R. 516.

recoverable by arbitration under the provisions of the statute, and not by action, he still had power, upon the references made to him under the Drainage Trials Act of 1891, to deal with the cases in that light, and he so adjudicated, and he assessed the damages sustained by the plaintiff Hiles, in consequence of the construction of the drain constructed under by-law no. 198, whether recoverable by proceedings in action or by arbitration under the statute, at the sum of $160, as to the amount of which, assuming the defendants to be liable, there is no complaint, and he assessed the damages sustained from like causes by the plaintiff Crooks at $170, as to which amount neither is there any complaint or objection, assuming the defendants to be liable.

As to the damages claimed by the plaintiff Hiles in his action, as sustained by him by reason of the drain constructed under the said by-law no. 265, he found and adjudged as follows. He says:

> Apart from any question that might arise in case by-law no. 265 should be held invalid, and assuming these damages were not such as the plaintiff could sue for, but were only such as could be determined by arbitration under sec. 591, &c., of the Municipal Act, but such damages are not referable to me under the Drainage Trials Act, 1891, I think I have authority to deal with the matters upon this reference.
>
> I find the plaintiff's damage to be, upon this branch of the case, $110, made up as follows: $80 for loss of land, $40 for fencing and clearing up and grading banks of the drain, and $30 for one substantial bridge, making in all the sum of $150, and I find the plaintiff's farm is directly benefited by this outlet drain to the extent of $40, over and above the amount assessed against it for construction; taking this $40 from $150 I find the plaintiff's damage upon this branch of the case $110, as above mentioned.

Upon appeal from these judgments and reports of the referee a majority of the Court of Appeal for Ontario has maintained the judgments of the referee in both cases *in omnibus*, and without pronouncing any

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judgment as to the validity or invalidity of the by-laws, or of either of them, has concurred in the judgment of the referee that upon the proceedings taken before him under the Drainage Trials Act of 1891 it was competent for him to award and adjudge damages to the plaintiffs for the injuries sustained by them respectively, whether prior to the passing of that act such damages could have been recovered only by process in arbitration under the act, or by action at law as for tort. From this judgment the present appeal is taken, the defendants still contending that they are not at all liable, but if they are, that it is still a substantial point which they have a right to insist should be determined, namely, whether they are liable as tort feasors, upon the ground of their by-law being *ultra vires*, or whether they are only liable under the provisions of the statute as for damages consequential upon the construction of a work legally authorized to be constructed, for that if their liability be only of the latter character the assessments authorized by by-law no. 198 of Ellice, to enforce recovery of which a by-law was passed by the municipal council of Elma, are still recoverable, whereas if the defendants are liable as tort feasors upon the ground of the invalidity of their by-law, the work constructed thereunder is illegal and the assessments made for payment of the construction of the work are void also, and not only not recoverable in the future, but that those already paid may possibly be recoverable back.

With the first impression of the learned referee, and with the opinion expressed upon that point by Mr. Justice Burton in the Court of Appeal for Ontario, I must say that I entirely concur, namely, that the work contemplated and authorized by the by-law no. 198 was authorized by sec. 576 of the act of 1883, and that the engineer, to give effect to whose report, plans, &c.,

the by-law was passed, had authority to assess as he did the lands in Elma, and that the said by-law and the by-law passed by the municipal council of Elma to enforce the levying of such assessments upon the lands assessed in Elma are perfectly valid and binding in all respects. Neither *Stephen* v. *McGillivray* (1) nor *Nissouri* v. *Dorchester* (2) warrants the conclusion drawn from them by the learned referee. Both of these cases rest in great measure upon the same ground, although that in *Stephen* v. *McGillivray* (1) is more extended than in *Nissouri* v. *Dorchester* (2). In the former the low lands, to drain which the scheme of drainage proposed was designed, extended over several townships situate in three different counties, not as here in Ellice alone to drain which the necessity arose to carry the drain into Elma, and thereby an incidental benefit was conferred upon lands in Elma. Then the drain in *Stephen* v. *McGillivray* (1) was not proposed to be, nor could it have been, carried into McGillivray at all, that township lying higher up than Stephen and ten miles from the proposed drain, which was designed to drain the low lands lying in Stephen and the other adjoining townships in different counties, and the engineer who devised the scheme of drainage which Stephen sought to enfore upon McGillivray, assessed McGillivray as for a benefit which he conceived justified that township being made to contribute towards the expense of the work, because, McGillivray being higher up than Stephen, water descended naturally from it into the low lands in Stephen and the other townships proposed to be drained, for which reason, as he conceived, McGillivray would derive benefit; just as in *Chatham* v. *Dover* (3), the engineer had assessed the township of Dover and lands therein as for benefit in giving it

(1) 18 Ont. App. R. 516. (2) 14 O. R. 294.
(3) 12 Can. S. C. R. 321.

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an outlet, as he termed it, such benefit and outlet consisting only in enlarging the capacity of a natural water course in Dover, by which the lands there assessed were already sufficiently drained, so as to enable it to carry off the extra waters brought down into it by the drain proposed to be constructed in Chatham. In *Nissouri* v. *Dorchester* (1), the low lands to drain which the drainage scheme there was designed, lay in both of the above-named townships, instead of, as in *Stephen* v. *McGillivray* (2), in three townships in different counties, but the principle upon that point is the same, and is that sec. 576 only applies where the lands proposed to be drained lie in one township only, and that for the drainage of these lands the scheme designed requires that the drain should be carried into a lower township, which work incidentally benefits the lands in such other township. If it does not so benefit such other township the lands in that township cannot be assessed for, or charged with, any portion of the cost of the work, but if it does they can to the extent, but only to the extent, of the benefit so conferred, and the time and place for contesting the question as to benefit or no benefit is before arbitrators, as provided by sec. 582 of the act of 1883. This, as it appears to me, is the effect of the judgment of this court in *Chatham* v. *Dover* (3).

Then, as to the finding of the learned referee that the work done under the by-law 198 was not properly or skilfully performed; that it never should have been constructed upon the route upon which it was constructed, as provided in the by-law; that it was not continued to a proper outlet; that it was left for a long time unfinished at lot 25 in the 15th concession of Elma, with a flood of water passing through it and spreading upon adjacent lands, by which means the

(1) 14 O.R. 294. (2) 18 Ont. App. R. 516.
(3) 12 Can. S. C. R. 321.

water was turned loose upon lands in Elma, and some came upon the lands of the respective plaintiffs.

By these findings of the learned referee, and the manner in which he subsequently deals with them in his report, I understand him to mean that these circumstances either constitute negligence in the construction of the drain, for which the defendants would be liable in an action at common law, as wrong doers, even if the by-law no. 198 be valid, or at any rate they would be liable, under sec. 591, as for damage "done to the property of the plaintiffs in the construction of the drainage works, or consequent thereon." So understanding the learned referee I concur with him, but think that the proper conclusion to be drawn is that the liability of the defendants is under sec. 591, and not as tort feasors at common law.

The fact that an outlet as designed by an engineer for a drainage work and reported by him to a council, and adopted by the council, should prove to be insufficient constituted negligence in the municipality in the construction of the work when adopted by by-law has never, so far as I am aware, received countenance in the courts in this country, if indeed the contention has ever been seriously raised. No case, so far as I am aware, has arisen wherein it appeared that any engineer or surveyor prepared for the adoption of a municipal council a scheme of drainage work which did not propose an outlet which at least seemed to be sufficient to carry off the waters from the lands proposed to be drained. It has never, I think, been considered by any engineer that the drainage clauses of the Municipal Institutions Act, at any time, authorized the construction of a drainage work which, while taking off water collected on the low lands of A. B. C. and D. provided no outlet whatever for such waters, but proposed to deposit them, or "turn them loose," to

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use the expression of the learned referee, upon the lands of other persons, as E. F. G. &c., &c. If Mr. Cheeseman ever entertained that opinion he certainly did not act upon it in the report and plans made by him upon which by-law no. 198 was passed, for in them he plainly designated a stream called by him a branch of the Maitland river in the 14th concession of Elma as the outlet, and as a sufficient one, for carrying off the waters to be brought into it by his proposed drain. In the judgment of the learned Chief Justice of Ontario, pronouncing the judgment of the majority of the Court of Appeal for Ontario in the present case, I entirely concur, and I have always held the opinion that one township cannot discharge the waters collected within its area, either just inside of, or anywhere in, another township, there to be let loose, without being liable for damages to the parties thereby injured. But in such case the liability would, in my opinion, arise as for an act done without any jurisdiction whatever, utterly *ultra vires*, and not merely as for negligence in the mode of performing an act legal in itself. I cannot see therefore that section 27 of 49 Vic. ch. 37 (1886), which added some words to the text of section 576 of the Municipal Act of 1883, conferred any power or imposed any duty upon an engineer designing and laying down a scheme for a drainage work which had not already been conferred and imposed by the said section 576, as it had always been, or did anything more than make perfectly plain to the most humble capacity of the lay mind, what to the professional mind was sufficiently plain by section 576 as it previously stood in the act of 1883, and in the statutes of which that act was but a repetition and consolidation. The object appears to me to have simply been to remove any doubt there might be in the minds of any person of the humblest capacity engaged in the administration of the

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act. Then as to the water suffered to overflow the adjacent lands during the construction of the work, it is to be observed that the work was let by the corporation to an independent contractor, and if any part of the injury done arose from his negligence in the execution of the work authorized by the by-law the corporation cannot in respect of such injury be held liable as tort feasors. I see no intention in the learned referee to distinguish between any overflow during the construction from that which occurred after the completion of the work. All injuries caused from overflowing lands by the waters brought down by the drain are placed upon the same footing and all, as it appears to me, fall under section 591 of the act as damage done "in the construction of the work and consequent thereon."

Finally, as to the route selected by the engineer and adopted by the by-law no. 198 not having been the one which, in the opinion of the learned referee, should have been adopted, that is a matter which was not within the jurisdiction of the learned referee to adjudicate upon. That was a point which should have been raised, if at all, as I think, by an appeal against the project as proposed by the by-law 198, and cannot be raised after the passing by the Municipal Council of Elma of a by-law for the purpose of levying the amounts of the assessments upon the lands in Elma to pay their share of the cost of the particular work as defined in the report and plans of the engineer as adopted by the by-law no. 198. In so far, therefore, as concerns the amounts adjudged by the learned referee to the respective plaintiffs for damages done to their lands during construction, and subsequently to the completion of the work, I am of opinion that judgment should be entered for those respective sums, namely, $160 in the case of Hiles, and $170 in the case of Crooks, as for

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damages sustained by them "in the construction of the drain authorized by the by-law no. 198 and consequent thereon;" and that the record of the judgment should express the recovery as being for such damages.

I entirely concur in the judgment of the Court of Appeal that Crooks, as a tenant, is as much entitled to recover damages for injury done to him during his occupation as a freeholder would be for like damage. His claim is not at all based upon section 393 of the act of 1883; his right to recover is established upon section 591, which does not qualify his right of redress for any damage done to the land to his injury during his occupation, but affects only the mode in which such redress should be obtained when, and so often as, the injury occurs. His right to recover rests precisely upon the same foundation as does the right of Hiles, in respect of the like damage done to him.

As to the amount awarded to Hiles in respect of damage done to his land under by-law no. 265, that by-law, as already pointed out, was passed under, and derives its authority from, sec. 585 of ch. 184 R. S. O. 1887, which is identical with sec. 586 of the act of 1883, after the passing of the act 47 Vic. ch. 32, sec. 19, and not under 49 Vic. ch. 37, sec. 27. Sec. 576 of the act of 1883, equally after the passing of sec. 27 of ch. 37 of 49 Vic. as before, related solely to an original by-law passed in adoption of the report of an engineer for constructing a drainage work upon a petition presented under the statute, by owners of lands in a higher township, in effecting which purpose the engineer found it to be necessary to carry his drain into a lower township; it had no relation to a by-law passed for the purpose of making a new outlet, or improving one already adopted for a drain already constructed under the authority of he act which was the purpose and object of the by-law 265, and which was authorized solely by sec. 586

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of the act of 1883, as amended by 47 Vic., ch. 32 sec. 19, and without any petition being presented therefor. What the learned referee has done in respect of this matter, was to increase the amount imposed upon the plaintiff Hiles, by the by-law 265, for benefit, and then to deduct such increased amount from what the learned referee has estimated to be the damage done to him by the drain, making the amount of such damages to be in excess, not only of such increase in assessment for benefit but of that amount added to the assessment for benefit made by the by-law. The statute which confers jurisdiction upon the learned referee gives him no authority to reopen matters which had already been closed by the provisions of the law as it existed prior to the passing of the Drainage Trials Act; and this matter was, as I think, concluded by the judgment on the appeal taken by the municipality of Elma to the by-law 265, and the assessment on lands on Elma made thereby and by the by-law passed by Elma to levy upon the landholders in Elma those assessments so confirmed by the arbitrators on such appeal. While the case was pending in appeal was, as it appears to me, the time when Hiles should have insisted that he was not assessable for benefit, as I think he was not if the damage done to his property exceeded all benefit conferred upon it by the proposed drain. Hiles cannot, I think, under the circumstances, now claim under sec. 393 as for land taken or injuriously affected by the corporation in the exercise of its powers. In respect, therefore, of this part of the learned referee's judgment I think the appeal of the defendants in Hiles's case must be allowed with so much of the costs in the courts below and upon the reference as relates to such portion of the plaintiff's claim, and that as to the residue, that as the defendants succeed in their appeal partially, viz., as regards the maintenance of

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the validity of the by-laws and the variation in the judgment, that it should, in both of the cases, be entered for the plaintiffs respectively as for "damage done in the construction of the drain as authorized by the by-law no. 198 and consequent thereon." I think there should be no costs of this appeal on either side.

I may be excused if I add a few lines for the purpose of correcting an erroneous impression as to my judgment in *Williams* v. *Raleigh* (1) which appears to be entertained by my learned brother Mr. Justice Burton, of the Court of Appeal for Ontario.

That learned judge, in his judgment in the present case (2), says:

> Mr. Justice Gwynne proceeded upon the ground that as the statute was not obligatory, but permissive, the corporation were liable if the effect of the work was to cause injury to any one, the engineer being their servant. While I disagree entirely from that view it is sufficient at present to say it was not the judgment of the court.

Now, although this court was divided in *Williams* v. *Raleigh* (1) upon the construction and application of sec. 583 of ch. 184 R.S.O., and being so divided no judgment was given thereon, I am not aware that there was any substantial difference of opinion in the court upon the main point upon which the judgment of the court proceeded, namely, that the corporation by reason of their wilful neglect to keep in an efficient state of repair the drain called the Raleigh plains drain, which they had made to serve as an outlet to carry off the water brought down into it by the "Bell drain," and by the "drain no. 1," they were liable for the damage done to the plaintiff in an action at law, and that the plaintiff was not driven to seek redress by process of arbitration under the statute. The observations in my judgment which are alluded to by my learned brother were made in answer to an argument

(1) 21 Can. S.C.R. 105. (2) 20 Ont. App. R. 239.

addressed to us, which appeared to me to receive countenance from some passages in the judgment of the Court of Appeal for Ontario when reversing the judgment of Mr. Justice Ferguson, namely:

That when a surveyor has devised a scheme of drainage work it is for the corporation simply to construct it as designed, without incurring any responsibility in so doing.

The question to which my observations were so addressed is with preciseness stated at page 116 of the report, and after arguing the point raised by such question, and referring to the clauses of the statute, I wound up at page 118 in these words:—

The object of the clauses is to enable lands to be drained for the purpose of cultivation, and to provide means for paying the expense of so doing, and of preserving them (that is the drainage works) when constructed in an efficient state of repair to perform the purpose for which they are designed; there is nothing whatever in any of those clauses to justify the inference that the legislature contemplated or countenanced the idea that water taken from the lands of one person should be so conducted as to be deposited upon the lands of another person.

And I concluded that if they adopted a project having such an object in view they would be responsible for the consequences of such a work, for that as the statute gave them no jurisdiction to pass such a by-law they could not appeal to the statute for protection.

I am not aware that my late Brother Patterson, or any of my learned brothers, differed from me in this view, and it is a matter of gratification to find a passage in the judgment of the majority of the Court of Appeal in the present case, delivered by the learned Chief Justice of Ontario, concurring in it, where he says: "I am unable to accept the argument that one township can collect the water from a large area and discharge it just inside the line of another township where it is let loose, without being liable for damage to those injured."

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By adding after the words "just inside" as above used the words "or anywhere within," this is the precise conclusion to which my observations led, and I then, at page 117 *et seq.*, proceeded to show that the judgment in favour of the plaintiff needed no such foundation, for that it had a much firmer foundation to rest upon, namely, that the Raleigh Plains drain into which the waters both of the drain no. 1 and of the Bell drain were conducted, were by the wilful neglect and default of the defendants permitted to fall into such a state of disrepair and inefficiency as to be quite incapable of carrying off the waters so conducted into them and to have thereby in fact lost two-thirds of their original capacity; and so that however perfect the Raleigh Plains drain may have been to carry off the waters of the Bell drain when the latter was originally constructed the defendants, by their wilful neglect to perform the duty imposed upon them by statute to keep the Raleigh Plains drain, which they had made the outlet of the Bell drain and other drains, in an efficient condition to do the work imposed upon it, were liable in an action at law, and that damage done to the plaintiff's land by the overflowing of the Raleigh Plains drain could not, under the circumstances, be fairly said to be "damage done in the construction of the Bell drain or consequent thereon" so as to drive the plaintiff to seek redress by arbitration under the statute. Their Lordships of the Privy Council, however, have thought otherwise, and have thereby, should the plaintiff feel disposed to incur the expense of the inquiry directed, imposed upon the court of first instance a difficult if not impossible task, namely, where a natural or artificial water course is made the channel of outlet for several streams of water brought down into it from various different sources, and where such channel of outlet, by reason of

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the neglect of the defendants to fulfil the obligation imposed upon them by statute of keeping it in an efficient condition of repair to carry off the waters so conducted into it, becomes quite inadequate for the purpose and has thereby lost two-thirds of its original capacity, from which cause it overflows its banks and causes much damage to neighbouring lands, to determine how much of the damage so done is attributable to the waters brought down into such channel of outlet from one only of such sources, as distinguished from the damage attributable to the waters brought down from the other sources. Without venturing to call in question the soundness of this judgment, it cannot but appear to the lay mind to be marvellously strange that a party should fail to obtain redress for an admitted injury, upon the ground that he had not pursued the proper course to obtain such redress, although of four of the courts of this country before which the question came three of them, including the learned trial judge who had the peculiar advantage of viewing the premises and observing the precise cause of the damage done, were of opinion that the course pursued was the right one. It is matter, however, of congratulation that in the future the effect of the Drainage Trials Act of 1891 will be to prevent parties suffering damage from drainage works being prejudiced by any such conflict of opinion in the courts as to the proper mode in which redress should be sought for the injuries inflicted. If it has not that effect I cannot see what is its *raison d'être*, and I cannot entertain a doubt that such is the object of the act.

Appeal in Hiles's Case allowed in part without costs and dismissed without costs in Crooks's Case but judgment varied.

Solicitors for appellants: *Idington & Palmer.*

Solicitors for respondents: *Mabee & Gearing.*