DISTRICT OF NORTH VANCOUVER (*Defendant*) ..... APPELLANT;

AND

McKENZIE BARGE & MARINE WAYS LTD. (*Plaintiff*) ..... RESPONDENT.

1964
*Oct. 29
1965
Feb. 1

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Municipal corporations—Drainage ditch constructed by municipality—Silt carried by ditch causing damage to plaintiff's property—Action for damages and an injunction—Statutory defence—Municipal Act, R.S.B.C. 1960, c. 255, ss. 527 and 529.

The defendant municipality, in order to drain certain highways, dug a ditch leading into a creek which in turn emptied into Burrard Inlet. The ditch, as originally constructed, caused erosion to adjoining property and in an attempt to remedy that defect the defendant by a fill and extension of the ditch, diverted it to a different arm of the creek. Material eroded by the waters of the ditch was carried along through the creek to build up a delta at its mouth extending some distance into the inlet. Silt from the delta was carried on to the plaintiff's water lot where the plaintiff operated a ship repair yard. The rails of two marine ways extended into the water and the plaintiff operated thereon a cradle on rollers to carry barges and scows above the water level. The plaintiff complained that the silt from the delta was deposited in such quantity as to interfere with the operation of the marine ways and also to decrease the depth of the water alongside the plaintiff's wharf so as to limit access thereto.

The plaintiff brought an action for damages and for an injunction, basing its claim upon both negligence and nuisance. The defendant relied upon the power granted to it by s. 527 of the *Municipal Act,* R.S.B.C 1960, c. 255, and particularly upon the provisions of s. 529 of that statute. The plaintiff was unsuccessful at trial, the judge holding that s. 529 was a bar to the action. The majority of the Court of Appeal, in allowing an appeal, founded liability on the defendant on the basis of its having created a private nuisance in respect of which the provisions of the *Municipal Act* did not provide any defence. The Court refused to grant an injunction and awarded damages to be assessed, such damages to relate only to what had transpired subsequent to January 27, 1961, when the plaintiff first gave notice to the defendant of the damage which it claimed it had sustained as a result of the defendant's actions. The defendant appealed to this Court and the plaintiff cross-appealed against the refusal of the Court of Appeal to grant the injunction and its refusal to award damages in respect of anything which had transpired prior to January 27, 1961.

Held (Spence J. dissenting): The appeal should be allowed and the judgment at trial restored.

Per Abbott, Martland, Judson and Ritchie JJ.: In relation to the powers granted to the defendant by s. 527 of the *Municipal Act,* the principles

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established by such authorities as *Groat v. The City of Edmonton*, [1928] S.C.R. 522, *Manchester Corporation v. Farnworth*, [1930] A.C. 171, and *Geddis v. Proprietors of the Bann Reservoir* (1878), 3 App. Cas. 430, did not entitle the plaintiff to succeed in the present case. Statement of Jenkins L.J. in *Marriage v. East Norfolk Rivers Catchment Board*, [1950] 1 K.B. 284 at 305 and 306, approved and applied. In addition, in the present case there were the provisions contained in s. 529. That section, in terms, deprived any person, sustaining damage as a result of the exercise by a district municipality of the powers conferred upon it by s. 527, of any right to claim damages therefor by way of an action in a Court of law. This did not mean that there could never be a remedy available to a person whose land had been injuriously affected as a result of the construction, or operation, of a ditch made by a municipality under the powers conferred upon it by s. 527. A remedy for injurious affection of land necessarily resulting from the exercise of statutory powers by a district municipality was provided in s. 478(1).

Per Spence J., *dissenting*: Despite the broad words of s. 529 of the *Municipal Act*, that section was meant to apply only to those cases where damages necessarily resulted from the proper construction of a work and it could not bar the well-established action of the plaintiff for damages caused by unnecessary nuisance or by negligence. However, even if s. 529 would protect the municipality from all damage actions arising out of the construction of a work permitted by s. 527 of the *Municipal Act* the actual work here constructed was not so permitted. The defendant had diverted the course of the ditch from its earlier line off on an angle to the top of the bank of a dry gully so that the water rushed out of the mouth of the ditch into the dry gully and then 150 feet down that gully to a branch of the creek. It was a matter of interpretation whether by taking the water to the edge of the gully some 150 feet away from any branch of the creek the defendant was conveying *to* and discharging *in* the watercourse of the creek.

As to the cross-appeal, the judgment of the Court of Appeal was in error in confining the damages to the period following January 27, 1961, and should be amended to provide that the reference as to damages to which the plaintiff was entitled should cover all damage occurring as a result of the construction complained of. The plaintiff's request for an injunction should not be granted. The cross-appeal was not one for which leave had been obtained, and in the circumstances this Court, under s. 44(1) of the *Supreme Court Act*, had no jurisdiction to grant an appeal against an order made in the exercise of judicial discretion.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], allowing an appeal by the plaintiff from the dismissal of its action at trial. Appeal allowed, Spence J. dissenting.

B. E. Emerson and *B. W. Williams*, for the defendant, appellant.

R. C. Bray and *K. S. Fawcus*, for the plaintiff, respondent.

[1] (1964), 47 W.W.R. 30, 44 D.L.R. (2d) 382.

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The judgment of Abbott, Martland, Judson and Ritchie JJ. was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1], which, by a majority of two to one, allowed the plaintiff's appeal from the dismissal of its action at trial. The case involves the interpretation and application of the relevant sections of the *Municipal Act,* 1957 (B.C.), c. 42, now R.S.B.C. 1960, c. 255.

The facts are concisely stated in the reasons for judgment of Sheppard J. A., who dissented in the Court below, and I am substantially repeating his summary of them.

In March and April of 1958 the appellant, a district municipality, in order to drain the highways, Keith Road and Fairway Drive, dug a ditch leading into Taylor Creek, which, in turn, empties into Burrard Inlet. The waters of the ditch, as originally constructed, caused an erosion endangering adjoining property. Therefore, the appellant, in May of 1961, by a fill and extension of the ditch, directed the ditch in a northwesterly direction to a different arm of Taylor Creek. However, the water carried by the ditch, particularly during freshets, eroded the banks and bed of the ditch, and carried this material along through Taylor Creek to build up a delta at the mouth of Taylor Creek extending 300 to 400 feet into the inlet. There the ebb tides, at times, set up counter-eddies which caused silt from the delta to be carried on to the respondent's water lot situate 150 feet to the east. Occasionally a westerly wind would set up a current carrying silt from the delta on to the respondent's water lot. The respondent, on its land, was operating a ship repair yard which included two wharves, a machine shop and two marine ways. The rails of the marine ways extended into the water and the respondent operated thereon a cradle on rollers to carry barges and scows above the water level. The respondent's complaint is that the silt from this delta was deposited in such quantity as to interfere with the operation of the marine ways and also to decrease the depth of the water alongside the respondent's wharf so as to limit access thereto.

The appellant does not dispute that silt was carried down by the ditch to form the delta, and from the delta on to the respondent's land.

[1] (1964), 47 W.W.R. 30, 44 D.L.R. (2d) 382.

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The respondent's claim against the appellant was based on negligence in failing to take proper care in the design and construction of its ditch and also for the creation of a nuisance. The respondent sought damages and an order to compel the appellant to abate the nuisance.

The appellant, by its defence, relied upon the statutory powers which had been conferred upon it by the *Municipal Act* and in particular relied upon s. 529 of the Act.

The learned trial judge, who dismissed the respondent's action, concluded his reasons with the following findings:

> Here, in my finding the defendant is a "district municipality" (as yet undeveloped) lying at the foot of a mountain range and having frontage of some seven-eight miles on the sea, with some ten major creeks available to it into which to discharge run-off water from its highways. I find that the accretion complained of by plaintiff comes from the discharge of run-off water from Keith Road and Fairway Drive, both of which are highways; and that Taylor Creek is and was the most convenient natural waterway to which defendant could have conveyed such water and discharged it. In its manner of doing so the defendant, in my opinion and finding, fully discharged its obligation to plaintiff. As a district municipality it was and is under no obligation, I think, to construct anything in the nature of a "Highbury Street Tunnel" or other expensive artificial work for the purpose of collecting, conveying and discharging into the most convenient natural waterway, the water run-off from its highways.
>
> For these reasons I hold that the protective provisions of the *Municipal Act* above quoted constitute a bar to the plaintiff's claim, which I accordingly dismiss with costs.

The majority of the Court of Appeal, in allowing the appeal, founded liability on the appellant on the basis of its having created a private nuisance in respect of which the provisions of the *Municipal Act* did not provide any defence. The Court refused to grant a mandatory injunction for abatement of the nuisance and awarded damages to be assessed, such damages to relate only to what had transpired subsequent to January 27, 1961, when the respondent first gave notice, by letter, to the appellant of the damage which it claimed it had sustained as a result of the appellant's actions.

Sheppard J. A. was of the opinion that, while the statute did not authorize a negligent or unreasonable construction, and the onus was on the appellant to bring itself within the statute, the appellant had obtained the finding of the learned trial judge in its favour on that point and there was no reason to vary it.

The appellant has appealed from the judgment of the Court of Appeal and the respondent has cross-appealed

against the refusal of that Court to grant the mandatory injunction and its refusal to award damages in respect of anything which had transpired prior to January 27, 1961.

If the respondent was entitled to bring an action in Court in respect of the kind of damages which it has sustained, in my opinion the action should fail, on the basis of the findings made by the learned trial judge and for the reasons given by him and by Sheppard J. A. in the Court of Appeal. In this Court, however, the appellant raised, and I believe for the first time, the point that, when s. 529 of the *Municipal Act* is read in conjuction with not only s. 527, but also s. 478(1), it is to be construed as preventing any claim being made, by way of an action in a Court of law, in respect of any damage resulting from the construction, maintenance and operation of the ditch in question. It is contended that any claim to compensation for injury to land, resulting from the exercise by a district municipality of the powers given to it by s. 527, is limited to that remedy which is provided by s. 478(1).

The provisions of the *Municipal Act* which are relevant are as follows:

478. (1) The Council shall make to owners, occupiers, or other persons interested in real property entered upon, taken, expropriated, or used by the municipality in the exercise of any of its powers, or injuriously affected by the exercise of any of its powers, due compensation for any damages (including interest upon the compensation at the rate of six per centum per annum from the time the real property was entered upon, taken, or used) necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; and a claim for compensation, if not mutually agreed upon, shall be decided by three arbitrators to be appointed as hereinafter mentioned, namely: The municipality shall appoint one, the owner or tenant or other person making the claim, or his agent, shall appoint another, and such two arbitrators shall appoint a third arbitrator within ten days after their appointment; but in the event of such two arbitrators not appointing a third arbitrator within the time aforesaid, one of the Judges of the Supreme Court shall, on application of either party by summons in Chambers, of which due notice shall be given to the other party, appoint such third arbitrator.

* * *

527. A district muncipality has the right, and is deemed to have had the right since its incorporation, to collect the water from any highway by means of drains or ditches, and to convey to and discharge the said water in the most convenient natural waterway or watercourse.

528. (1) A district municipality desiring to construct ditches or drains authorized by section 527 may deposit plans and specifications thereof with the Clerk and publish an advertisement once a week for four consecutive weeks in a newspaper published or circulating within the muni-

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cipality giving public notice that the municipality intends to undertake such works, that plans and specifications thereof may be inspected at the office of the Clerk, and that all claims for damages or compensation arising out of or by reason of the construction, maintenance, operation, or user thereof must be filed with the Clerk within one month from the date of the fourth advertisement.

(2) No person has any claim for damages or compensation arising out of or by reason of the construction, maintenance, operation, or user of any such ditches or drains unless he has filed a claim as aforesaid. If the municipality proceeds with the said works or portion thereof, every claim shall be determined according to the provisions of Division (4) of Part XII.

(3) If the construction of such drains or ditches is not commenced within one year from the date when the said advertisement last appeared, the construction shall not be proceeded with unless re-advertised according to subsection (1).

(4) Nothing in this section shall be deemed to restrict the powers of the municipality which it may otherwise exercise under any other provision of this Act.

529. No action arising out of, or by reason of, or in respect of, the construction, maintenance, operation, or user of any drain or ditch authorized by section 527, whether such drain or ditch now is or is hereafter constructed, shall be brought or maintained in any Court against any district municipality.

530. The provisions of sections 527 to 529 shall be in addition to all provisions made by this or any other Act, and in case of any conflict arising the provisions of sections 527 to 529 shall govern.

It is admitted that the appellant did not follow the procedures which are described in s. 528, in respect of the construction of the ditch which is involved in this case.

The judgment of the Court of Appeal in favour of the respondent is based upon the proposition that the legal powers granted to the appellant under s. 527 were permissive only, that they could have been exercised by the appellant without the creation of a private nuisance and that s. 529 did not preclude the respondent from bringing action against the appellant. Reliance was placed upon the principles established by such authorities as *Groat v. The City of Edmonton*[1], *Manchester Corporation v. Farnworth*[2], and *Geddis v. Proprietors of the Bann Reservoir*[3].

With respect, I do not agree that, in relation to the powers granted to the appellant by s. 527 of the *Municipal Act,* the principles stated in those cases entitle the respondent to succeed in the present case. In *Marriage v.*

[1] [1928] S.C.R. 522.
[2] [1930] A.C. 171.
[3] (1878), 3 App. Cas. 430.

East Norfolk Rivers Catchment Board[1], Jenkins L.J., at pp. 305 and 306, after citing the principles stated in the *Geddis* and *Farnworth* cases, goes on to say:

> The general principle is thus well settled, but its application in any particular case must depend on the object and terms of the statute conferring the powers in question (including the presence or absence of a clause providing for compensation and the scope of any such clause), the nature of the act giving rise to the injury complained of, and the nature of the resulting injury. I venture to think that the questions which arise in any given case of this kind are substantially these: first, was the act which occasioned the injury complained of authorized by the statute?; secondly, did the statute contemplate that the exercise of the powers conferred would or might cause injury to others?; thirdly, if so, was the injury complained of an injury of a kind contemplated by the statute?; and, fourthly, did the statute provide for compensation in respect of any injury of the kind complained of sustained through the exercise of the powers conferred? If the answers to all these questions are in the affirmative then, I think, it must follow that the party injured is deprived of his right of action and left to his remedy in the form of compensation under the statute.

I am in agreement with this statement and, in my opinion, each of the questions propounded by him would, in the present case, have had to be answered in the affirmative. In addition, in the present case we have the provisions contained in s. 529. That section, in terms, deprived any person, sustaining damage as a result of the exercise by a district municipality of the powers conferred upon it by s. 527, of any right to claim damages therefor by way of an action in a Court of law.

I turn now to consider the relevant provisions of the *Municipal Act* previously cited. Section 527 does not merely give a permission for the construction of a specific work. It defines a statutory right of a district municipality to collect water from any highway, by means of drains or ditches, and to convey and discharge the same into the most convenient natural waterway or watercourse.

Admittedly the appellant did not comply with s. 528 and the respondent contends that ss. 527 to 530 inclusive constitute a complete code with which the appellant must comply if it is to seek whatever protection is afforded to it by s. 529. However, as was properly pointed out in the reasons of the majority in the Court of Appeal, the wording of s. 528 is permissive and I agree with the conclusion reached that failure to advertise, under s. 528, did not deprive the appellant of whatever protection was afforded by s. 529.

[1] [1950] 1 K.B. 284.

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In this connection it should be noted that, had the appellant complied with s. 528, the respondent would have had no right whatever to claim any compensation, unless it had filed a claim within one month from the date of the final advertisement; *i.e.*, before the construction of the ditch had commenced and before the impact of that construction on the respondent's lands could have been foreseen or determined.

If ss. 527 to 530 inclusive are to be regarded as a complete code, for the application of which compliance with s. 528 is essential, then there seems to be no point whatever in the inclusion in this group of sections of s. 529, because then the whole matter would be governed by subs. (2) of s. 528. Section 529 stands separate and apart from that subsection. It is linked specifically, by its terms, to the exercise of powers under s. 527. In my opinion, the appellant's failure to follow the procedures described in s. 528, while it prevented the appellant from obtaining the protection afforded by subs. (2) of s. 528, did not preclude it from relying upon s. 529.

The wording of s. 529 is not limited to preventing legal action against the appellant, in respect of the construction and operation of its ditch, only in cases where the appellant was not negligent, or could not exercise its powers without creating what, at common law, would have been a private nuisance. If it were to be so limited, the section would have no practical effect whatsoever because, in either of such cases, an action could not succeed against the appellant even if s. 529 were not there at all. In my opinion, this section, coupled with the powers granted to the appellant by s. 527, prevented anyone from making any claim in damages, in a Court of law, against the appellant, in respect of any ditch which it constructed, pursuant to the powers granted to it by s. 527.

This does not mean that there can never be a remedy available to a person whose land has been injuriously affected as a result of the construction, or operation, of a ditch made by a municipality under the powers conferred upon it by s. 527. A remedy for injurious affection of land necessarily resulting from the exercise of statutory powers by a district municipality is provided in s. 478(1). What s. 529 was intended to accomplish, and, in my opinion, does accomplish, is to provide that such an owner is limited in

his remedy to that which is provided in s. 478(1) and that he is precluded from enforcing, by action in a Court of law, any of those remedies which, apart from s. 529, would have been available to him at common law.

In my opinion, s. 529 affords a complete defence to the appellant in these proceedings and, accordingly, this appeal should be allowed and the judgment at trial should be restored. The appellant should be entitled to its costs throughout, including the costs of the cross-appeal.

SPENCE J. (*dissenting*):—This is an appeal from the judgment of the Court of Appeal for British Columbia[1] which, by a majority of two to one, allowed the plaintiff's appeal from the dismissal of his action at trial.

In the spring of 1958 the appellant, which is known in British Columbia as a district municipality, in order to drain the highways, Keith Road and Fairway Drive, dug a ditch leading toward Taylor Creek which in turn empties into Burrard Inlet. That ditch, as originally constructed, caused erosion to certain lots on a plan and in an attempt to remedy that defect the appellant, in the month of May 1961, filled in the course of the ditch and thereby diverted it by a trench in another direction leading, as was described in the evidence, to what was said to be another branch of Taylor Creek. It would appear, in fact, that the gully toward which the ditch, as constructed on this second occasion, led was of soft earth and that the force of the spring freshets coursing down this gully eroded to a very considerable extent the soils in the gully, carried them down the gully into Taylor Creek and out into the waters of Burrard Inlet where, by the force of wind and tide, they were swept against the ways of the respondent company causing the marine railway to be blocked and causing very considerable damage to the respondent. There is no dispute that the silt gathering around the marine railway of the respondent was silt carried down Taylor Creek in the freshets. Under these circumstances, the respondent took this action for damages and for an injunction. The respondent based its action upon both negligence and nuisance.

The appellant in defence relied upon the power granted to it by s. 527 of the *Municipal Act*, R.S.B.C. 1960, c. 255, and particularly upon the provisions of s. 529 of that statute.

[1] (1964), 47 W.W.R. 30, 44 D.L.R. (2d) 382.

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The trial judge held that s. 529 was a bar to the respondent's action and dismissed the action with costs.

The majority of the Court of Appeal allowed the appeal finding that the appellant had created a private nuisance in respect to which the aforesaid provisions of the *Municipal Act* did not provide a defence. The Court of Appeal, however, refused to grant an injunction and limited its damages to those which had occurred after January 27, 1961, when the respondent had first given notice to the appellant of the damage which it claimed it had sustained as a result of the appellant's actions. From that judgment, the appellant appeals to this Court, having been granted leave by the order of the Court dated May 4, 1964. The notice of appeal of the appellant is dated May 11, 1964. The respondent served notice of cross-appeal dated June 19, 1964, in which respondent requested the judgment of the Court of Appeal be varied to permit the damages to be increased and that the injunction requested be granted. No leave was given for such cross-appeal.

Under the circumstances, it becomes necessary to interpret and determine the effect of certain sections of the *Municipal Act,* R.S.B.C. 1960, c. 255, Those sections are as follows:

478. (1) The Council shall make to owners, occupiers, or other persons interested in real property entered upon, taken, expropriated, or used by the municipality in the exercise of any of its powers, or injuriously affected by the exercise of any of its powers, due compensation for any damages (including interest upon the compensation at the rate of six per centum per annum from the time the real property was entered upon, taken, or used) necessarily resulting from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work; and a claim for compensation, if not mutually agreed upon, shall be decided by three arbitrators to be appointed as hereinafter mentioned, namely: The municipality shall appoint one, the owner or tenant or other person making the claim, or his agent, shall appoint another, and such two arbitrators shall appoint a third arbitrator within ten days after their appointment; but in the event of such two arbitrators not appointing a third arbitrator within the time aforesaid, one of the Judges of the Supreme Court shall, on application of either party by summons in Chambers, of which due notice shall be given to the other party, appoint such third arbitrator.

* * *

527. A district municipality has the right, and is deemed to have had the right since its incorporation, to collect the water from any highway by means of drains or ditches, and to convey to and discharge the said water in the most convenient natural waterway or watercourse.

528. (1) A district municipality desiring to construct ditches or drains authorized by section 527 may deposit plans and specifications thereof with the Clerk and publish an advertisement once a week for four consecutive weeks in a newspaper published or circulating within the municipality giving public notice that the municipality intends to undertake such works, that plans and specfications thereof may be inspected at the office of the Clerk, and that all claims for damages or compensation arising out of or by reason of the construction, maintenance, operation, or user thereof must be filed with the Clerk within one month from the date of the fourth advertisement.

(2) No person has any claim for damages or compensation arising out of or by reason of the construction, maintenance, operation, or user of any such ditches or drains unless he has filed a claim as aforesaid. If the municipality proceeds with the said works or portion thereof, every claim shall be determined according to the provisions of Division (4) of Part XII.

(3) If the construction of such drains or ditches is not commenced within one year from the date when the said advertisement last appeared, the construction shall not be proceeded with unless readvertised according to subsection (1).

(4) Nothing in this section shall be deemed to restrict the powers of the municipality which it may otherwise exercise under any other provision of this Act.

529. No action arising out of or by reason of, or in respect of, the construction, maintenance, operation, or user of any drain or ditch authorized by section 527, whether such drain or ditch now is or is hereafter constructed, shall be brought or maintained in any Court against any district municipality.

530. The provisions of sections 527 to 529 shall be in addition to all provisions made by this or any other Act, and in case of any conflict arising the provisions of section 527 to 529 shall govern.

It is the contention of the appellant that it was given power to construct the ditch by s. 527 of the *Municipal Act* and that all actions against it are barred by the provisions of s. 529. It is agreed that the appellant municipality did not deposit a plan with the Clerk and insert the adverisements required by s. 528 of the *Municipal Act*. The appellant further submits that the respondent was not deprived of its remedy as it could always have proceeded to arbitration under the provisions of s. 478 of the *Municipal Act*. It is the respondent's submission that s. 529 of the *Municipal Act* does not bar actions which are based upon either negligence or unnecessary nuisance caused in the construction of a work.

The appellant cites in support of this proposition, *inter alia, Groat v. The City of Edmonton*[1]; *Manchester Corporation v. Farnworth*[2], at p. 88; *Guelph Worsted Spinning*

[1] [1928] S.C.R. 522.

[2] [1930] 99 L.J.K.B. 83.

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Co. v. City of Guelph[1], at p. 82; and *Fraser v. Vancouver*[2], at pp. 730 and 735. Those authorities are examples of the well-established principle which may be gathered from a short statement by Duff J. at p. 527 of *Groat v. The City of Edmonton*:

> That the municipality possesses authority under its charter to construct sewers and drains for carrying away water from its streets is beyond question. But it is only in respect of the authorized works and the necessary results of such works that the municipality is entitled to the protection of the statute; and that protection is not available where the nature of the specific work alleged to be authorized under the statute is not made to appear. In this case, no by-law or other instrument evidencing authority or defining the work alleged to be authorized was adduced; and there is no finding, either by the trial judge or by the Appellate Division, that the nuisance complained of was authorized, or was the necessary result of works authorized pursuant to the charter.

Middleton J. in the *Guelph Worsted* case at pp. 80 and 81 quotes from Lord Blackburn in the *Metropolitan Asylum District Managers v. Hill* et al.[3], at p. 203:

> Where the Legislature directs that a thing shall at all events be done, the doing of which, if not authorized by the Legislature, would entitle any one to an action, the right of action is taken away... The Legislature has often interfered with the right of private persons, but in modern times it has generally given compensation to those injured; and if no compensation is given it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others.

Surely, that the ditch was dug in both cases in a negligent fashion is established by the evidence of Douglas A. Welsh for the defendant who admitted that he did not examine the particular area from the point of view of the erosion factor of the soil at all and that he was not concerned with erosion. The nuisance is, of course, self-evident.

The submission of the appellant is that s. 529 of the *Municipal Act* requires those cases to be distinguished as in none of the aforesaid cases was there any counterpart of the present s. 529 of the *Municipal Act*.

I have examined those authorities and others and I have found that in no case where this proposition was enunciated was there a bar of action similar to that contained in s. 529. It is, therefore, necessary to examine the said s. 529 and determine whether it was meant to apply to the circumstances present in this case.

[1] (1914), 18 D.L.R. 73. [2] [1942] 3 D.L.R. 728.
[3] (1881), 6 App. Cas. 193.

It is the contention of the respondent that ss. 527 to 530 of the *Municipal Act* composed a code, the sections are inter-related and that the appellant cannot rely upon s. 529 of the statute unless the appellant has complied with the requirements of s. 528, which, of course, the appellant had not complied with in the present case. Despite the fact that s. 528 is, by its terms, permissive, there would seem to be considerable weight to the contention of the respondent. In the statute, the heading above s. 527 is "Subdivision (*c*)—Special Provision for District Municipalities", and that subdivision covers the sections from 527 to 530 inclusive. I am, however, impressed by the fact that under s. 528(2) no person had any claim for damages or compensation arising out of the construction or maintenance or operation or user of a ditch unless he had filed a claim as permitted by subs. (1), *i.e.*, within one month from the date of the fourth advertisement, while the very damage with which this action is concerned could not have been discovered within that limited time and therefore no claim could be enforced by arbitration under s. 528 even if the advertisements had been properly inserted. The appellants answer by pointing out the provisions of s. 478 and submit that the arbitration under that section was always available to the respondent. A reference to s. 478 of the *Municipal Act* shows that it requires compensation to be made for injurious affection by the exercise of the corporation's powers for damages *necessarily resulting* from the exercise of such powers beyond any advantage which the claimant may derive from the contemplated work. It is here the contention of the respondent and it would seem to be confirmed by the evidence that the damage did not *necessarily* result from the construction of the ditch but only resulted from the improper construction of the ditch and that therefore the respondents would not have had a right to claim compensation under s. 478 of the *Municipal Act*.

I am, therefore, of the opinion that despite the broad words of s. 529 of the *Municipal Act*, it was meant to apply only to those cases where damages necessarily resulted from the proper construction of a work and it cannot bar the well-established action of the respondent for damages caused by unnecessary nuisance or by negligence. It matters not under which head the cause of action be put.

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I, therefore, wish to adopt the words of Whittaker J. A. in his judgment of the Court of Appeal for British Columbia when he said:

> In my opinion sections 527 to 529 inclusive may be read together. Section 529 is a bar to any action for damage inevitably resulting from the carrying out of the authorized work. The Legislature did not, I think, intend to relieve the Municipality from liability for negligence or for the unjustifiable creation of a nuisance. That result could only be achieved by the use of explicit language, or by necessary implication.

I have up until this point considered the appeal upon the basis that the work performed by the appellant corporation was work authorized by s. 527 of the *Municipal Act*. That section gave the district municipality the right "to collect the water from any highway by means of drains or ditches and to convey it to and discharge the said water in the most convenient natural waterway or watercourse". The evidence established that what the appellant corporation did was to divert the course of the ditch from its earlier line off on an angle to the top of the bank of a dry gully so that the water rushed out of the mouth of this ditch into the dry gully and then 150 feet down that gully to a branch of the Taylor Creek. It is the contention of the respondent that that was not conveying the water *to* and discharging the said water *in* the most convenient natural waterway or watercourse but was only conveying the water to a point where by the action of gravity it would eventually flow into the Taylor Creek. The appellant submits that the respondent is here met with concurrent findings of fact by the trial judge and the Court of Appeal. I am of the opinion, on examining the record, that this cannot be substantiated.

Sullivan J., at trial, said:

> I find that the accretion complained of by plaintiff comes from the discharge of run-off water from Keith Road and Fairway Drive, both of which are highways; and that Taylor Creek is and was the most convenient natural waterway to which defendant could have conveyed such water and discharged it. In its manner of doing so the defendant, in my opinion and finding, fully discharged its obligation to plaintiff.

Sheppard J.A., giving the minority judgment in the Court of Appeal, said:

> In March and April of 1958 the defendant, a District Municipality, in order to drain the highways, Keith Road and Fairway Drive, dug a ditch leading into Taylor Creek which in turn empties into Burrard Inlet.

Whittaker J.A., giving judgment for the majority in the Court of Appeal for British Columbia, said:

> It is conceded that Taylor Creek is the most convenient natural waterway or watercourse in which to discharge the water from this particular drainage area. The appellant contended that respondent, by bringing the ditch to the edge of the gully rather than to the creek bed, did not discharge the water into the Taylor Creek "waterway or watercourse". I think the learned trial judge was right in refusing to give effect to this contention.

I am of the opinion that in so far as those findings were findings that Taylor Creek was the most convenient watercourse they are findings of fact. I have no quarrel with such findings nor did the respondent in its argument in this Court. In so far as the findings are that the appellant conveyed *to* and discharged the water *into* Taylor Creek they are surely subject to the evidence which is only to the effect I have outlined above and it is a matter of interpretation whether by taking the water to the edge of the gully some 150 feet away from any branch of Taylor Creek it is conveying *to* and discharging *in* the watercourse of Taylor Creek. I am not ready to so interpret the statute and I am of the conclusion that even if s. 529 would protect the municipality from all damage actions arising out of the construction of a work permitted by s. 527 of the *Municipal Act* the actual work here constructed was not so permitted. For these reasons, I would dismiss the appeal of the appellant municipal corporation.

I now turn to the cross-appeal and, firstly, deal with the cross-appeal as to the limitation of the plaintiff's right to damages to those which occurred in the period after January 27, 1961.

Whittaker J.A., in coming to the conclusion that the respondent's damages should be so limited quoted a passage from Salmond on Torts, 13th ed., at p. 200, and remarked that the words "as when it is caused by a secret and unobservable operation of nature" did not exist in the said passage in the 5th edition which had been approved by Lord Maugham and Lord Wright in *Sedleigh-Denfield v.*

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O'Callaghan et al.[1] That such a statement should not be taken to exclude the liability of the actual creator of the nuisance for any damage which occurred after the commencement of the nuisance is, in my opinion, confirmed by reference to the same learned author who, in the 13th edition at p. 204, states:

> He who by himself or by his servants by a positive act of misfeasance (as opposed to a mere nonfeasance, such as an omission to repair) creates a nuisance is always liable for it, and for any continuance of it, whether he be the owner, the occupier or a stranger, and notwithstanding the fact that it exists on land which is not in his occupation, and that he has therefore no power to put an end to it.

I am of the opinion that the learned justice in appeal was in error in confining the damages to the period following January 27, 1961, and I would amend the judgment of the Court of Appeal to provide that the reference as to damages to which the respondent is entitled should cover all damage occurring as a result of the construction complained of.

As to the respondent's cross-appeal in which it requests that the injunction prayed for in the original action should be granted, as was observed in the course of the argument, the provisions of s. 44(1) of the *Supreme Court Act* provide:

> No appeal lies to the Supreme Court from a judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceedings in equity originating elsewhere than in the Province of Quebec and except in *mandamus* proceedings.

It is provided in subs. (2) that subs. (1) should not apply to an appeal under s. 41. The appeal in this case by the appellant municipality was an appeal under s. 41, *i.e.*, with leave to appeal. The cross-appeal, however, was not one for which any leave had been obtained, the respondent as cross-appellant merely relying on its right under R. 100. Under such circumstances, I am of the opinion that this Court has no jurisdiction to grant an appeal against an order made in the exercise of judicial discretion and I would not provide that the injunction should issue.

In the result, the appeal of the appellant municipality is dismissed, the cross-appeal of the respondent is allowed

[1] [1940] A.C. 880.

only as to the aforesaid variation in the reference as to damages. The respondent is entitled to its costs throughout.

Appeal allowed and judgment at trial restored with costs throughout to the appellant, Spence J. dissenting.

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Solicitors for the plaintiff, respondent: Clark, Wilson, White, Clark and Maguire, Vancouver.