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THE CORPORATION OF THE CITY OF NEW WESTMINSTER (DEFENDANTS) ..... } APPELLANTS;

AND

MANUELLA BRIGHOUSE (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Municipal corporation—Improvement or alteration of street—Lowering grade—Injury to adjacent land—Remedy—Action—Compensation under statutory provisions—By-law—51 V. c. 42 s. 190 (B.C.).

The act incorporating the city of New Westminster, 51 V. c. 42 (B.C.) by s. 190, empowers the council of the city to order by by-law the opening or extending of streets, etc., and for such purposes to acquire and use any land within the city limits, either by private contract or by complying with the formalities prescribed in subsections 3 and 4 of said section, which provide for the appointment of commissioners to fix the price to be paid for such land; subsection 13 provides for the confirmation of the appointment and 15 for the deposit in court of said price by the council which deposit should vest in them the title to said land.

Subsection 17 of section 190 enacts that subsections 3 and 4 shall apply to cases of damage to real or personal estate by reason of any alteration made by order of council in the line or level of any street, and for payment of the compensation therefor without further formality.

The council was authorized by by-law to raise money for improving certain streets but no by-law was passed expressly ordering such improvements. In one of the streets named in said by-law the grade was lowered, in doing which the approach to and from an adjacent lot became very difficult and no retaining wall having been built the soil of said lot caved and sunk thereby weakening the supports of the buildings thereon.

Held, affirming the decision of the court below, Ritchie C.J. and Taschereau J. dissenting, that the owner of said lot could maintain an action for the damage sustained by lowering the grade of the

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

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street and was not obliged to seek redress under the statute; that subsection 17 of section 190 which dispenses with the formalities required by prior subsections only applies to cases where land is injuriously affected by access thereto being interfered with, and where land is taken or used for the purposes of work on the streets the corporation must comply with the formalities prescribed by subsections 3 and 4; that the street having been excavated to a depth which caused a subsidence of adjoining land the latter must be regarded as having been taken and used for the purposes of the excavation, and the council should have acquired it under the statute; not having so acquired it, and having neglected to take steps to prevent the subsidence of the adjacent land, they are liable for the damage thereby caused.

Held further, that the neglect to take such precautions was in itself, however legal the making of the excavation may have been if skilfully executed, such negligence in the manner of executing it as to entitle the owner of the adjacent land to recover damages for the injury sustained.

Held, per Patterson J., that in the absence of the statutory preliminaries a municipality has no greater right than any other owner of adjacent land to disturb the soil of a private person.

APPEAL from a decision of the Supreme Court of British Columbia affirming the judgment at the trial in favour of the plaintiff.

The action in this case was brought to recover damages for injury alleged to have been sustained by the plaintiff in consequence of the street on which her property is situate being excavated, in order to lower the grade, to such a depth that the soil of her lot caved in and fell into the excavation and the supports of the buildings were weakened defendants having neglected to put up a retaining wall or other support. The questions raised on the appeal were whether or not plaintiff was entitled to compensation for such injury, and if she was if she could bring an action to recover it.

The pleadings in the case and the statutes governing it are all set out in the judgment of Mr. Justice Gwynne.

Robinson Q.C. for the appellants argued that under the charter of New Westminster, 51 Vic. ch. 42, plain-

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tiff could not bring an action but must follow the statutory provisions for her remedy if she had any, citing *Adams* v. *City of Toronto* (1); *Coverdale* v. *Charlton* (2); *Pratt* v. *Corporation of Stratford* (3); *Vandecar* v. *Corporation of Oxford* (4); *Ayers* v. *Corporation of Windsor* (5).

Osler Q.C. for the respondent referred to *West* v. *Parkdale* (6) and *North Shore Railway Co.* v. *Pion* (7).

Sir W. J. RITCHIE C.J.—The by-law authorizes the raising of money for improving the street in question. This necessarily involves, in my opinion, authority to expend the money for the purpose for which it was raised. It would be extraordinary if the corporation had authority to raise money for a particular object and had no power to expend it when so raised. And this being so the corporation in improving the street had the unquestionable right to lower and grade it, and if in doing so the land of any proprietors adjoining the street was injuriously affected if they are entitled to claim compensation therefor it can only be under the provisions of the act.

Gale on Easements (8):

> Subject to the restriction already mentioned, that an encroachment must not be removed with unnecessary violence, there seems nothing to take this class of cases out of the rule before adverted to: "That a party confining himself within the limits of his own property may deal with it as he will." [This view is supported by *Gayford App. Nicholls, Resp.* (1854)(9) in which, the plaint being in part for negligently taking away the support of a modern house, the judge was held to have misdirected the jury in leaving to them the question of negligence. In several modern text books, not including Wms. Saund. (10)

(1) 12 O. R. 243.
(2) 4 Q. B. D. 104.
(3) 16 Ont. App. R. 5.
(4) 3 Ont. App. R. 131.
(5) 14 O. R. 682.
(6) 12 App. Cas. 602.
(7) 14 App. Cas. 612.
(8) 6th ed. p. 390.
(9) 9 Ex. 702.
(10) See vol. 2, 400, n. *(a)* of that invaluable work, 2 Notes to Saund. 802.

it is laid down, without further authority than the cases above distinguished, by the learned editors that an action is maintainable against a landowner for negligence in removing the support afforded by his land to the modern house of his neighbour. This may to some extent be attributable to vagueness in the use of the relative term negligence (1)—of which a definition is given by Alderson B. in *Blyth* v. *Birmingham Waterworks Company* (1856) (2) ; and Willes J., *Vaughan* v. *Taff Vale Rail. Co.* (1860) (3). It should seem that in this class of cases if the mere removal occasions the fall the defendant is not liable, however negligent may have been the manner of the removal—for his act was confined to his own land.] If he dig a pit he is not bound to put a fence round it to keep trespassers from falling into it, [(1 Roll abr. 88 pl. 4), fully supported in *Jordin* v. *Crump* (1841) (4) ; but qualified by *Barnes* v. *Ward* (1850), (5), to the extent that if the pit abuts on a highway and renders the highway dangerous to persons passing along it with ordinary care, then the occupier is bound to fence it. Cf. *Stone* v *Jackson* (1855) (6) ; *Hurst* v. *Taylor* (1885) (7). This is on the ground that such a pit is a public nuisance, interfering with the use of the way. But if the pit or other excavation be not substantially adjacent to the way there is no obligation to fence it, and no action is maintainable against the owner of the land if a person accidentally or otherwise straying off the way falls into the pit ; *Hardcastle v. South Yorkshire Railway &c. Company* (1859) (8) ; *Hounsell* v. *Smyth* (1860) (9).]

Dillon's Municipal Corporations (10) :

990 (783). No common law liability for consequential damages for change of grade. Accordingly, the courts, by numerous decisions in most of the States, have settled the doctrine that municipal corporations, acting under authority conferred by the legislature to make and repair, or to grade, level and improve streets, if they keep within the limits of the street, and do not trespass upon or invade private property, and exercise reasonable care and skill in the performance of the work resolved upon, are not answerable to the adjoining owner, whose lands are not actually taken, trespassed upon or invaded, for consequential damages to his premises, unless there is a provision in the constitution of the State in the charter of the corporation, or in

(1) Per Erle C.J., 29 L. J. C. P. 319 ; Bramwell B., 1 H. & N. 251; 3 H. & N. 318 ; Watson B., 28 L.J. Ex. 250.
(2) 11 Ex. 784.
(3) 5 H. & N. 687, 688.
(4) 8 M. & W. 788.
(5) 9 C. B. 392.
(6) 16 C. B. 199.
(7) 14 Q. B. D. 918.
(8) 4 H. & N. 67.
(9) 7 C. B. N. S. 731. S. C. 29 L. J. C. P. 203.
(10) 4 ed. p. 1218.

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some statute, creating the liability. There is no such implied or common law liability even though in grading and levelling the street, a portion of the adjoining lot, in consequence of the removal of its natural support falls into the highway. And the same principle applies, and the like freedom from implied liability exists, if the street be embanked or raised in reducing it to the grade line, so as to cut off or render difficult the access to the adjacent property. And this is so although the grade of the street has been before established, and the adjoining property owner had erected buildings or made improvements with reference to such grade.

991. Same subject. No right to lateral support of soil (1). Where the power is not exceeded there is no implied or common law liability to the adjacent owner for grading the whole width of the street, and so close to his line as to cause his earth or fences or improvements to fall, and the corporation is not bound to furnish supports or build a wall to protect it. The abutting owner has as against a city no right to the lateral support of the soil of the street and can acquire none from prescription or lapse of time.

In addition to which I cannot think that a corporation has not a right, by order, to level and grade a street as incident to their right to put and keep the street which has been duly laid out in a proper state of repair to enable the same to be used as streets and highways usually are. What are they but ordinary and necessary repairs to enable the public to use the streets and highways in the ordinary course of the traffic of the city?

Therefore a by-law was unnecessary, but if necessary then there was, as I have said, a good by-law.

I do not think in levelling this street there was any negligence or carelessness on the part of the Commissioners; they simply acted in the discharge of a public duty in the exercise of a public trust for the public benefit, and inasmuch as they confined the excavation within the lines of the street no action can be sustained against them by any individual who may have sustained a special injury or consequential damage from the act done, the act itself being lawful and

(1) P. 1228.

there being nothing in the mode in which it was carried into execution to make it unlawful. The case of *Boulton* v. *Crowther* (1) establishes this beyond all question.

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The commissioners did no wrong. They could not repair or improve by levelling and grading the street without making the excavation complained of; there is no question but that they acted *bonâ fide* ; they were required to grade and level the streets; in doing so their acts were justifiable. I cannot see that any wrongful act can be alleged against them. The only way the damage complained of could have been avoided, was by leaving a large part of the road unexcavated; this would have frustrated the very object sought to be accomplished, viz., reducing the street to a proper grade. If plaintiff has sustained damages by her property being injuriously affected the law has provided how she may obtain compensation; or if it has not she is without remedy.

It was relied on in the court below that the statute giving compensation was not pleaded. I cannot think there could be any necessity for pleading that plaintiff should not have brought her action inasmuch as she could have obtained compensation under the statute. The plaintiff had a right to bring an action or not. She certainly had no right to bring an action if the law gave a remedy she was bound to pursue and had failed to adopt it, and which precluded the right to bring an action. Surely when on the trial of the case the facts, as proved, developed that she had mistaken her remedy or had no remedy, it would be impossible for the court to give her judgment in an action in which she had misconceived her remedy.

(1) 2 B. & C. 703.

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STRONG J.—I am of opinion that this appeal must be dismissed. First, it is an undeniable fact that no by-law was passed authorizing the interference with her property for which the respondent brought this action. The case is not therefore within the statute authorizing expropriation or encroachment on private property. This is so plain as a legal conclusion that no authority need be cited to sustain it. It is a general proposition of law, that in the case of all statutes authorizing the taking or interfering with private property for public purposes the procedure directed by the statute must be followed with exactitude.

But even if there had been a by-law, and the statute had been followed so far as concerned procedure, I should still have thought the respondent entitled to retain the judgment she has recovered on another and distinct ground.

It is, I take it, an established rule that in all cases where public works are executed under statutory authority to the extent of an infringement on private rights of property the statutory powers must be executed without negligence and in such a way as to do the least possible injury to the private owner. This principle received the approbation of the House of Lords in *Geddis* v. *Bann Reservoir* (1), and is particularly enunciated in the judgment of Lord Blackburn in that case.

In the present case negligence in the execution of the work is distinctly alleged in the statement of claim and is, in my opinion, amply proved. The neglect to build a revetement wall, or to put up some support to the respondent's property after making the escarpment complained of, is conclusive proof of negligence.

(1) 3 App. Cas. 430.

Upon both grounds I am of opinion that the judgment ought to be sustained and this appeal dismissed with costs.

TASCHEREAU J.—I also dissent with His Lordship and for the reasons by him given, from the judgment about to be entered. I would allow this appeal. A by-law was not necessary as, in my opinion, was amply demonstrated by Mr. Justice McCreight in the court below. Then, if one was necessary, that of the 17th June, 1889, covers the case, and the plaintiff's only remedy was by arbitration under the compensation clauses of the act of 1888. If necessary the defendants should be allowed to amend their defence under sections 63 and 64 of the Supreme Court Act.

GWYNNE J.—The plaintiff in her statement of claim complains that the defendants have wrongfully excavated and lowered Agnes street in the city of New Westminster to the depth of 15 feet or thereabouts in front of a lot of land of the plaintiff whereon she had a house erected, and that thereby they have withdrawn the support of her said lot and that the soil of her said lot has in consequence sunk, given way and caved into the said street, and her house thereon is weakened and cracked and has settled and is liable to further settlement; and she complains that the defendants excavated and lowered the said street as alleged negligently, carelessly and unskilfully in not leaving sufficient support to the said lot from the soil of the said street and in not erecting a retaining wall or other fixture to prevent the soil of the said lot from caving or falling into the said street; and that they lowered the said street as alleged without any by-law being passed by the council of the said city authorizing the same and without any legal authority, and she claimed damages for such alleged injuries.

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The defendants in their statement of defence allege that they are a municipal corporation incorporated by and subject to the provisions of an act of the Legislative Assembly of the province of British Columbia passed in the 51st year of Her Majesty's reign and known as "The New Westminster Act 1888," and they say that acting in pursuance of the powers and in performance of the duties conferred and cast upon them by the said act, for the purpose of repairing, levelling and grading the said street, they cut down the same in some places and raised the same in other places, one of the places where the same was so cut down being opposite the land of the plaintiff which are the alleged wrongful acts of the defendants in the plaintiff's statement of claim mentioned, and they deny that the plaintiff's land was entitled to the support of the land of the street or that the execution of the said works have deprived the plaintiff of any support to which she was entitled as owner of the said lands. And they further deny that the said work was executed in a negligent, careless or unskilful way as alleged in the plaintiff's statement of claim, and they deny that the work was executed without the passing of a by-law or without legal authority. The above contains the whole substance of the complaint and defence to which it is necessary to advert.

At the trial it appeared that Agnes street had been excavated along the front of the plaintiff's lot to a depth varying from 8⅔ feet to ten and one-third, 10⅓, feet, and that the natural consequence of such excavation, though made within the limits of the street, was to withdraw support from the plaintiff's lot to such an extent that a large portion thereof was carried away and sunk, and caved into the excavation made in the street whereby the foundation of the plaintiff's house settled and became injured. No by-law

authorizing to be done the work which was done was ever passed by the municipal council of the city. A by-law was passed intituled "A by-law to raise by loan the sum of $85,000 for street and park improvements," by which it was enacted that it should be lawful for the mayor of the city to raise by way of loan, from any person or persons, bodies or body corporate, who might be willing to advance the same upon the credit of the debentures thereinafter mentioned, a sum of money not exceeding $85,000, and that the proceeds of the debentures issued and sold under the authority of the by-law should be applied to improvments on Queen's Park and the streets thereinafter mentioned, and as nearly in the proportion in the by-law also mentioned as might to the council seem expedient, that is to say, "Queen's Park $15,000, Columbia street $1,000, Agnes street $2,500," and divers other streets, divers other sums appropriated to each :—

Provided that out of the said sum of $15,000 set apart for the improvement of Queen's Park there should be paid into the city treasury to the credit of the general account the sum of $3,000, being the sum already expended out of the general revenue for park improvements; provided, also, that if the requirements of any of the streets above mentioned should be found to be less or greater than the sum apportioned to the said street, the said sum may be increased or diminished, as in the circumstances may seem to the council expedient, and the surplus, if any, remaining out of the appropriations above set out after said streets have been completed may be applied to other works of permanent improvement not specified herein at the discretion of the council.

The contention on behalf of the defendants was, 1st. That for the work which was done on Agnes street no by-law was necessary; 2nd. That if a by-law was necessary the above by-law for raising $85,000 was sufficient; 3rd. That the work as done was authorized by the powers vested in the council by the act incorporating the city, being the provincial statute 51 Vic.

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ch. 42, the 116th subsection of section 142 of which act was specially relied upon, and that there was no negligence committed in the performance of the work and that therefore, 4th. No action lay; 5th. That the plaintiff was either entitled to no redress at all or could seek redress only under some provision in the statute for that purpose, but it was not set up by way of defence upon the record that the plaintiff had any remedy given to her by the statute which she was restricted to instead of proceeding by action.

The learned judge before whom the case was tried without a jury rendered a verdict in favour of the plaintiff for $681; that verdict was sustained by the Supreme Court of British Columbia from the judgment of which court this appeal is taken, and the grounds urged before us in support of the appeal were those above stated.

By the 204th and 205th sections of the above act of the legislature of British Columbia, 51 Vic. ch. 42, incorporating the city of New Westminster, it is enacted that every public street, road, square, lane, bridge or other highway in the city shall be vested in the city, and that every such public street, road, square, lane, bridge and highway shall be kept in repair by the corporation.

By the 142nd section it is enacted that the council may from time to time alter and repeal by-laws for, among other things (1):

> Opening, making, preserving, improving, repairing, widening, altering, stopping up and putting down drains, sewers, water-courses, roads, streets, squares, alleys, lanes and other public communications within the jurisdiction of the council, &c., and for entering upon, breaking up, taking or using any land in any way necessary or convenient for said purpose.

By section 190 it is enacted that:

(1) Subsec. 116.

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The council of the city shall have full power and authority to order by by-law the opening or extending of streets, lanes, public places, squares and highways, or the construction of a public wharf or wharves, &c., and to order at the same time that such improvements should be made out of the city funds, or that the cost thereof shall be assessed in the whole or in part upon the pieces or parcels of land belonging to the parties interested in or benefitted by said improvements, and to purchase, acquire, take and enter into any land whatsoever within the limits of the said city, either by private contract between the council of the said city and the corporation or other persons interested, or by complying with all the formalities hereinafter prescribed for opening streets, &c., or for continuing or improving the same, &c., &c.

The formalities which are then prescribed for acquiring any land required by the corporation for the purpose of said improvements, and by compliance with which alone the corporation can acquire or take any land the property of any person, are set forth in the 3rd and 4th subsections of section 190 as conditions precedent necessary to be fulfilled before the corporation can take or interfere with any such land, and are as follows :—

The council shall cause to be served upon the owner of the property required for the purpose of any such improvement a notice, either personally or by a notice addressed through the post office to the person last assessed as proprietor at his actual or last known domicile, and shall also give public notice by three insertions in at least one newspaper published in said city and in the *British Columbia Gazette*, that they would on a day and hour mentioned in such notices (not less than one week distant) present to the Supreme Court of British Columbia or to a judge thereof in chambers, or to a county court judge, a petition calling upon the said court or judge to nominate three competent and disinterested persons to act as commissioners to fix and determine the price to be allowed for each and every piece of ground or property which may be required by

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the corporation for said improvements, and which shall be designated in the said notices by a general description and by reference to a map or plan in the office of the solicitor of the corporation, and one week at least shall elapse from the date of the last insertion of the said notice in the said papers to the day appointed for presentation of the said petition and a copy of the said notice shall be posted near or in the neighbourhood of the property to be expropriated. Then by subsec. 4 it is enacted that the court or judge to whom such petition should be presented shall appoint three commissioners as aforesaid, and shall fix the day on which the said commissioners shall begin their operations and also the day on which they shall make their report, &c. Provision is then made for the course to be pursued by the commissioners in making their appraisement and their report thereon, and then by subsection 14 it is enacted that—

On the day fixed in and by the order appointing the commissioners the council of the city shall submit to the court or to any of the said judges the report containing the appraisement of the said commissioners for the purpose of being confirmed to all intents and purposes, and the said court or any of the said judges may thereupon, after hearing any or all of the parties interested therein who may appear, pronounce the confirmation of the said report, which shall be final as regards all parties interested and not open to any appeal.

Then by subsection 15, it is enacted that:

The council of the said city shall, within one month after the confirmation of the report of the commissioners, make in the hands of the registrar or clerk of the court a deposit of the price or compensation and damages settled and determined in and by said report, and the act of such deposit shall constitute a legal title in the city to the property in the said piece of land, &c., &c., and the said council shall be vested with said piece of land, &c., &c., and may of right, without any further formality, enter into possession of and use the same for any of the purposes authorised by the act.

Then by subsection 17 it is enacted that all the provisions of the said 3rd and 4th subsections shall apply and be extended:

To all cases in which it shall become necessary to ascertain the amount of compensation to be paid by the said council to any proprietor of real or personal estate, or his representative, for any damage he or they may have sustained by reason of any alteration made by order of the council in the line or level of any street, &c., &c., and the amount of such compensation it is directed shall be paid at once by the council to the party having a right to the same without further formality.

Then follows a provision, that:

Any person who shall erect any building whatever upon or contiguous to any established or contemplated street, &c., &c., without having previously obtained from the City Engineer or Surveyor the level and line of such street, &c., shall forfeit his or her claim for damages or compensation by reason of any injury caused to the property or building when such level or line shall be settled and determined by the council.

With respect to this provision it is only necessary to observe that it has no application to the present case for the plaintiff's house was erected prior to the passing of the act.

Now, while by subsection 116 of section 142 the corporation is empowered to make by-laws for opening, making, improving, repairing, widening and altering streets, &c., &c., and for taking and using any land in any way necessary or convenient for any such purpose; and although it may be that any improvement or alteration made wholly within the limits of the street can be lawfully performed without a by-law; yet it cannot, I think, be doubted that if any such improvement or alteration should require the taking, using or encroaching upon any adjacent land belonging to any person other than the corporation as necessary or convenient for the making the proposed improvement or alteration, the right to take, use or encroach upon such land for such purpose could only be acquired under a by-law and by compliance with the provisions of section 190 and the subsections thereof; while if the improvement or alteration can

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be and is made within the limits of the street improved or altered without the taking, using or appropriating any adjacent land for the purpose, and without encroaching upon or affecting such land otherwise than by injuring the access thereto by alteration in the level of the street the corporation may make the alteration subject to having compensation awarded under the provisions of subsection 17 of the section 190.

Subsections 1 to 15 of section 190 plainly, as it seems to me, apply to any land adjacent to the line of a street, the level of which is altered, that is necessary to be appropriated, taken or used in the making or maintaining the altered level, while subsection 17 applies to the cases of land not so taken or used but which, although not so taken or used, is injuriously affected by the alteration of the level. The contention on the part of the appellants was that what they caused to be done in the alteration of the level of Agnes street they were authorized to do without a by-law, and that if the plaintiff was entitled to any remedy or compensation she was entitled to it only under subsection 17 of section 190. If the injury sustained by the plaintiff was only that her lot was injuriously affected by the access thereto having been injured by a work completely executed by the corporation within the limits of the street, as would have been the case if the corporation by the erection of a sufficient retaining wall had prevented the subsidence of a portion of her land into the excavation, she might have been barred of her right of action, and remitted to her remedy under section 190 subsection 17, but under the circumstances of the present case I do not think that the plaintiff is driven to that subsection for the redress to which she is entitled.

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We must take it as established beyond controversy that the subsidence of that portion of the plaintiff's land which has sunk and caved into the excavation made in the street was the natural and inevitable consequence of the excavation having been made to the depth it was made, unless such subsidence should have been prevented by the erection of a sufficient retaining wall. The consequence being natural and inevitable, unless so prevented, must have been and should have been foreseen by the corporation and its officers, and it was therefore incumbent on the corporation either to have acquired before making the excavation the right to take and use so much of the plaintiff's land as must, by reason of the depth of the excavation, fall into the excavation when made, or to have prevented the subsidence by the erection of a sufficient retaining wall, in which latter event the plaintiff could have claimed compensation, limited, however, to the damage sustained by her land being injuriously affected in the access thereto; when then the corporation made an excavation in the street, although made within the limits thereof but to such a depth as of necessity to have caused the total subsidence of a large portion of the plaintiff's land into the excavation, they must, in my opinion, be regarded as having taken and used the land of the plaintiff so sunk into the excavation as having been necessary to the making of the excavation as made, just as much as if the level of the street, instead of having been lowered, had been raised to such as height that the base of the embankment necessarily covered a portion of the plaintiff's land. In either case the land of the plaintiff so appropriated, taken or used for the purpose of the alteration must be regarded as so much land taken from the plaintiff for the necessary purposes of the alteration in

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the level made by the corporation. The right to take or use any part of the plaintiff's land as in any way necessary or convenient for the purpose of making or maintaining the alteration contemplated to be made in the street could only be acquired under a by-law, and by compliance on the part of the corporation with the provisions of subsections 3, 4, 14 and 15 of section 190 as conditions precedent. No such right ever was acquired, but the corporation, in making the excavation which they have made in their own land to such a depth and in such a manner as of necessity to cause a large portion of the plaintiff's land to sink into the excavation so made, have, as a necessary attendant upon the making the alteration made in the street, taken and used, and deprived the plaintiff of, so much of her land as has so necessarily sunk into the street, and in so doing they have wrongfully taken and deprived the plaintiff of so much of her land. As to the case of *Pratt* v. *Corporation of Stratford* (1) and other cases of a like nature in the Ontario courts upon which the learned counsel for the appellants relied as justifying what they have done in the present case, it is only necessary to say that in the view which I have taken they do not apply. In those cases the complaint was not, as here, of the plaintiff having been deprived of a portion of her land in the doing the work done by the corporation, but that the work done merely injuriously affected the access to the plaintiff's land, none of which was in any way taken or used in the performance of the work, and of none of which was the plaintiff in any of those cases deprived by the manner in which the work was executed.

But the plaintiff is, in my opinion, entitled to maintain this action also upon the principle that the non-prevention of the subsidence of the

(1) 16 Ont. App. R. 5.

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plaintiff's land into the excavation made by the corporation in the street, however legal the making of the excavation may have been if skilfully executed, constituted such negligence in the manner in which the work was executed as to entitle the plaintiff to recover in this action. It is clear upon the evidence that the injury to the plaintiff's land which is complained of could have been prevented by the erection of a retaining wall. It was, therefore, incumbent upon the corporation to have erected such a wall as a necessary precaution to prevent the sinking of the plaintiff's land into the excavation made by the corporation for their own purposes in the street, and thereby to have reduced the plaintiff's claim to compensation under subsection 17 of section 190 by reason of the alteration in the level of the street injuriously affecting the access to the plaintiff's land. The appeal, in my opinion, must be dismissed with costs.

PATTERSON J.—I am of opinion that this appeal should be dismissed for the reasons given by my brother Gwynne. I have had an opportunity of reading the judgment which he has now delivered. I shall not attempt to go over the matters which he has so fully discussed, but I shall merely refer to some additional authority on one point. The excavation and lowering of the street in front of and up to the line of the plaintiff's land was, as has been shown, an act within the powers of the council. It would have been competent for the council, if it were desired or were necessary to break in upon the plaintiff's land to do so, taking the preliminary steps and adjusting the compensation under the statute. What was intended was not to touch the corpus of the plaintiff's property but to confine the works to the limits of the

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street. In doing that, however, the support which the plaintiff's land received from the adjacent soil of the street was removed, causing a fall of the soil and injuriously affecting the supports of the plaintiff's house. It is not shown or alleged that the house, which was a recent structure, contributed by its weight to the falling in of the soil, or that the soil would not have fallen to the same extent if the house had not been there.

Now, in the absence of the statutory preliminaries, I do not understand that the municipality, as owner of the street, has any greater right to disturb the plaintiff's soil than any other owner of adjacent land would have. An ajdacent owner may, as I understand the law, excavate and remove his land up to his neighbour's line, but if in so doing he removes the natural support to which his neighbour is entitled he must replace it by artificial support. In this case the required support would have been a retaining wall.

In Goddard on Easements (1), I find that the law thus stated:

> Every person has a right *ex jure naturæ* that his land shall not be disturbed by the removal of the support naturally rendered by the subjacent and adjacent soil.

The author then shows that the right to subjacent support has been decided to be similar to the right to adjacent support, and adds:

> The natural right to support, then, being established by-law it is necessary to understand what is the exact nature of this right—that is, to what land owners are really by law entitled. The right to support is not a right to a particular means of support—as, for instance, if support has always been received from subjacent coal, that the coal, or a certain portion sufficient to sustain the superincumbent weight of the soil, shall never be removed; but it is a right that the ordinary enjoyment of land shall not be interrupted, so that, until the enjoy-

(1) 1st ed. p. 34. See 4th ed. p. 55.

ment of the surface land is disturbed, the owner has no right to complain of the removal of the minerals. It is, therefore, perfectly justifiable for a mine owner to excavate the whole of the minerals and substitute artificial props to support the surface land in lieu of the natural means of support which he has removed. * * * * It is commonly said that the natural right to support continues only while land remains in its natural condition unburdened with houses ; this is not correct, for the natural right remains though houses are built ; but the owner of land cannot suddenly increase his right, or impose a new or additional burden on the servient tenement, by erecting buildings, and the servient owner is therefore not responsible if the land sinks when he excavates if the sinking is produced by the increased weight the dominant owner has imposed on the surface. That the natural right remains is clear from the decisions in the cases of *Brown* v. *Robins* (1) and *Stroyan* v. *Knowles* (2), in which it was held that an action would lie for the removal of the support necessary for the adjoining land in its natural condition, notwithstanding houses had been recently erected on the surface, provided the weight of the houses did not produce the sinking of the land—that is, providing the land would have sunk in the same manner had no houses been erected.

The case of *The Corporation of Birmingham* v. *Allen* (3) was decided after the publication of the first edition of Mr. Goddard's treatise from which I have quoted those passages, which are not materially altered in the later editions. The judgments in that case contain an instructive discussion of the question of support in the peculiar aspect in which it there arose. I shall read a short passage from the judgment of Jessell M. R.

As I understand, the law was settled by the House of Lords, confirming the decision of the Court of Exchequer Chamber in the case of *Backhouse* v. *Bonomi* (4), that every landowner in the kingdom has a right to the support of his land in its natural state. It is not an easement, it is a right of property. That being so, if the plaintiff's land had been in its natural state no doubt the defendants must not do anything to let that land slip, or go down or subside. If they were doing an act which it could be proved to me by satisfactory expert evidence would necessarily have that effect I have no doubt this court would interfere by injunction on the ground upon which it always interferes, namely, to prevent irreparable damage when the damage is only threatened.

(1) 4 H. & N. 186.
(2) 6 H. & N. 454.
(3) 6 Ch. D. 284.
(4) 9 H. L. Cas. 503.

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In *Siddons* v. *Short* (1) we have an instance of the granting of an injunction to restrain mining operations which would cause neighbouring land to sink although buildings had been recently erected there on the ground that the operations would have caused the land to sink even if the buildings had not been placed upon it.

I have no doubt of the power of the corporation to improve the street by altering its level, or in any other way, without first passing a by-law on the subject. On this topic I refer to my remarks in the recent case of *Bernardin* v. *North Dufferin* (2). I may add that when the necessity for a by-law is insisted on, as it has been in argument in this case, on the notion that while pending before the council persons interested would know from its terms what was proposed to be done and might oppose its passing, an assumption is made which nothing in the statute warrants. The provision that by-laws may be passed on certain subjects requires no particular form, no details, and in this case would, as I think, be satisfied, if a by-law were required, by the one that was passed appropriating money for the improvement of Agnes street. My judgment proceeds not upon any question of the authority of the corporation to make the improvements in the street, but upon the unauthorized injury to the plaintiff's property which I think was a wrong for which an action lies, and not an injurious affecting of the property by a lawful act the remedy for which would be by proceedings for compensation.

Appeal dismissed with costs.

Solicitors for appellants : *Carbould, McColl, Wilson & Campbell.*

Solicitors for respondent : *Armstrong, Eckstein & Gaynor.*

(1) 2 C. P. D. 572.

(2) 19 Can. S.C.R. 581.