MUNICIPAL NEGLIGENCE IN DRAINAGE CASES.

An examination of the law reports of cases arising in Ontario and the western provinces during the last fifty years, reveals the fact that there has been a very considerable amount of litigation as regards the liability of municipal corporations for damage suffered by individuals, consequent on the overflow of water from drainage works constructed by, or under the general control of such municipalities; or for the upkeep of which they were primarily responsible.

The law with regard to one phase of the matter has been settled for the Common Law provinces by the case of *Corporation of Raleigh* v. *Williams*.[1] This was a decision of the Privy Council upon a case which originated in Ontario.

The facts of that case may be summarized as follows: (1) The Township of Raleigh was under a statutory duty to maintain and repair a ditch known as Government Drain No. 1. (2) The township constructed a drain called the Bell drain. (3) The Bell drain was dug under the powers given by a section of the Consolidated Municipal Act of 1883, later re-enacted as Sec. 569, cap. 184 R.S.O. 1887. (4) Briefly the statute gives the municipality power, upon a petition for drainage works, etc., being presented, to procure an engineer to make an examination and prepare plans of the proposed work, and estimates of the cost, etc., and if deemed desirable, to pass a by-law providing for the work to be done. (5) Sec. 483 of said statute provides for compensation to the owners of lands injured by the exercise by the municipality of its statutory powers. (6) The Bell drain had its outlet in the Raleigh Plains drain. (7) The Government Ditch No. 1 was not kept in repair. (8) *The outlet provided for the Bell drain (i.e. Raleigh Plains drain) was not large enough for the quantity of water brought down, the engineer's plans being to that extent defective.* (9) Water overflowed from Ditch No. 1 consequent upon its ill state of repair; and also from Raleigh Plains drain, consequent upon the excess of water discharged into it from the Bell drain. The plaintiffs suffered damage by reason thereof.

Upon action being brought, one defence (the one with which we are at the moment primarily concerned) was that the municipality was acting under a statutory power and was, accordingly, under no legal liability.

[1] [1893] A.C. 540.

In due course the case reached the Supreme Court,[2] which held the township liable, on the ground:

> That it is only when the *act causing the injury* can be justified as the exercise of a statutory power that the party injured must seek his remedy in the mode provided by the statute; if the right infringed is a common law right and not one created by the statute, remedy by action is not taken away.

The Supreme Court further held:

> That the council has a discretion to exercise in regard to the adoption, rejection or modification of the scheme proposed by the engineer or surveyor; and if adopted the council is not relieved from liability for injuries caused by any defect therein, or in the construction of the work, or from the necessity to provide a proper outlet for the drain when made thereunder.

The Privy Council reversed this decision in part. With regard to Government Ditch No. 1, they held that the damage resulted from failure to repair and that the municipality was liable. With that part of the decision this article is not concerned. As to the Bell drain, however, their Lordships held that if a township construct a drain under its statutory powers, and if, "acting in good faith they accept the engineer's plan and carry it out, persons whose property may be injuriously affected by the construction of the drainage work must seek their remedy in the manner prescribed by the statute." It was urged that if the defect was one which a competent engineer ought to have foreseen and guarded against—that is actionable negligence. This argument their Lordships held "wholly untenable."

It might be well to mention here that the last paragraph of the headnote to the report of the Privy Council decision is inaccurate and misleading, as pointed out by the Manitoba Court of Appeal in *Pelletier* v. *Springfield*.[3]

It is the purpose of this article to show that it is very difficult to reconcile this decision with the decisions in certain other leading cases both of the House of Lords and the Privy Council. And further, the writer respectfully submits that the judgment of the Supreme Court was more in accord with the established law at the time, and, hence, should be law to-day, although of course, by reason of the Privy Council decision, it is not.

If we turn to the case of *Geddis* v. *Proprietors of the Bann Reservoir*,[4] decided by the House of Lords in 1878, we find it laid down that:

[2] 21 S.C.R. 103.
[3] 34 M.R. 485.
[4] 3 A.C. 430.

Where the Legislature has authorized certain persons to effect a certain purpose, and has given them the powers necessary to effect it, they may exercise those powers to their full extent without incurring responsibility, but in so doing they must not occasion any needless injury to anyone.

In other words, if in the *Raleigh* case (*supra*), the mere digging of the Bell drain, no matter how well planned, had caused damage to individuals, those persons would be either without remedy, or at least would have only such remedy as the statute gave. Lord Blackburn in his judgment makes the following remarks at p. 455:

For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the Legislature has authorized, if it be done negligently. And I think that if by reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence," not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases are in conflict with that view of the law.

Can it be denied that the Township of Raleigh could have procured a competent engineer who would have designed a ditch with a sufficient outlet, or at least reported unfavourably on the proposed scheme.

In 1881 the House of Lords was again called upon to consider this point, in the case of *Metropolitan Asylum District* v. *Hill*.[5] We find Lord Blackburn again enunciating the principle "that 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 anyone to an action, the right of action is taken away." It is apparent that the loss of the individual's right to an action only occurs when the damage is consequent on the *mere exercise* of the statutory right. If the Bell drain had been of perfect design and sufficient in outlet it might, by its mere existence, have seriously damaged a farm, e.g., by cutting it in two. For that result no action would lie and only that compensation given by the statute could be recovered. But if the damage result not from the *mere exercise* of the right, but from exercising it in a negligent fashion, the ordinary right of action should not be lost in any case, particularly if the statute be not imperative but permissive.

Lord Watson said, at p. 212:

On the other hand, I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case

[5] 6 A.C. 193.

where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature, lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good these two propositions—in the first place, that such are the imperative orders of the Legislature. and in the second place, that they cannot possibly obey those orders without infringing private rights. If the order of the Legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to shew that the Legislature has directed it to be done. Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose.

In the case of *Raleigh* v. *Williams* (*supra*), the municipal authority could not make good the two propositions above mentioned. The section of the statute under which the drain was built reads:

> . . . the council *may* procure an engineer or provincial land surveyor to make an examination . . . and *may* procure plans and estimates . . . and if the council is of opinion that the proposed work . . . would be desirable, the council *may* pass by-laws.

These are not "imperative orders of the Legislature." If they were imperative, can it be argued that the municipality could not possibly obey them without infringing private rights.—at least in so far as the infringement consists in flooding adjoining lands? Their Lordships themselves admit that the municipalities are not "helpless instruments in the hands of the engineers they employ. They cannot indeed modify the engineer's plan themselves. That is no part of their business. But they may return the plan for amendment if they think it is not desirable in the shape submitted to them."

I confess that I cannot reconcile this part of the Privy Council judgment with the rest of it. The municipal councillors presumably have no technical knowledge. What then is to make them think the plan not desirable and in need of amendment? However the words quoted appear to support the present contention that the municipality could have exercised the powers given to it without invading private rights; although my suggestion, is that this could,

and should have been done, not by themselves reviewing the engineer's plan, but by employing a competent engineer in the first place. If they failed to do so, they should shoulder any resulting loss. Their right of recourse against such an incompetent servant is another matter.

When the *Raleigh* v. *Williams* case (*supra*) was before the Supreme Court of Canada, judgments were delivered by Gwynne and Patterson, JJ. Gwynne, J., refers with approval to the passage above quoted from the judgment of Lord Watson in *Metropolitan Asylum* v. *Hill* (*supra*). He has the following to say himself at p. 116:

> There is no compulsion whatever imposed upon the council to adopt the plan as proposed by their engineer or surveyor. The person so employed is their servant. He may be an ignorant and unskilled person, and if he be, or whether he be or not, the council cannot shirk the responsibility cast upon them of exercising their own judgment in determining whether they shall or shall not adopt the plan as suggested by their servant. If they do adopt it is their own work for all the consequences attending which they must be responsible, except in so far as they are protected by the statute authorizing them to use their discretion in the matter . . They must distinctly exercise their judgment as to adopting or refusing to adopt the scheme suggested, and if they do adopt it it becomes their work and scheme and not their servant's.

It is submitted that this is sound law. To those who would say, "why then does the Legislature direct an engineer to be employed, if the municipality is still to be liable," the reply is made that the legislature obviously would not authorize the municipalities to dig drains without any technical or professional advice; but this is not to say that having taken such advice they are thereby relieved from all ordinary consequences of their acts.

Gwynne, J. then proceeds to discuss the intention of the Legislature in enacting the drainage clauses to which I have referred. He concludes that the "rational and natural inference is that the intention of the Legislature was that the water . . . should be conducted . . . into some lake . . . which the waters . . . could reach without any injury being done to the lands of anyone." He further concludes that if a municipality professing to act under the statute overloads a natural or artificial watercourse, so that it cannot retain the waters which escape and flood neighbouring lands then, he says: "I cannot doubt that such conduct would constitute a private nuisance not at all warranted by the statute, and would be an actionable wrong which could not be justified under the statute."

Dealing with the arbitration clauses he had this to say, at p. 121:

> To injuries arising from such a cause the arbitration clauses of the statute have, in my opinion, no application; they apply only to injuries

consequential upon the mere constructions of drains authorized by the statute and not to injuries which, as in the present case, as already shown, arise from acts in themselves unlawful which constitute a private nuisance, and which the statute has not only not directed but has not authorized to be committed.

Patterson, J. agreed in the result with Gwynne, J.; but he based his judgment on reasons so different that they amount to a negation of the principle which the words of Gwynne, J. support. He says in effect that the municipality was negligent and is not relieved by the statute from the consequences of that negligence. The negligence however, in his judgment, consisted in not obtaining from the engineer an opinion on the *effect* of digging the Bell drain, as well as a plan for the mere digging of it. He says that the township of Raleigh merely said to the engineer "prepare plans for a drain, to drain a certain area into the Raleigh Plains drain"—that and no more. They did not, he says, ask for an opinion on the sufficiency of Raleigh Plains drain as an outlet. No such engineering opinion was given. A proper drainage scheme should have contained such a report. Therein he says, lay the negligence. If an engineering opinion had been obtained as to the sufficiency of the outlet, and such opinion proved erroneous, he infers that the municipal authorities would have been exonerated. The council in his opinion had a discretion to exercise, in considering if the report covered the whole ground. They should have asked and obtained a scheme for building a specified drain.

This judgment is not, it is true, helpful to the argument herein made, inasmuch as it really reiterates the dictum that if the statute be strictly followed by the selection of an engineer, no matter how incompetent, no liability to the municipality can ensue. It is submitted however that it is most unlikely that an engineer of skill and common sense would blithely prepare plans for and proceed with the construction of a drain, without knowing or caring whether the outlet was sufficient. So extraordinary would such a course be, that surely the municipality would assume, and rightly so, that when they asked their engineer to plan and build the Bell drain, he would consider the matter of the outlet, and report to the council if he found the proposed outlet insufficient. If this be so, and there was no municipal negligence here, it follows that Patterson, J. should either have decided for the municipality in view of the balance of his judgment, or decided for Williams for the reasons given by Gwynne, J.

In the case of *Ellice* v. *Hiles*,[6] decided subsequent to the Privy Council decision in *Raleigh* v. *Williams* (*supra*), Gwynne, J. re-

[6] 23 S.C.R. 429.

views his judgment in the former case, and would seem to endeavour to make it appear that there is no conflict in that case between his judgment and that of Patterson, J., and that in effect his views were not dissimilar to those of the Privy Council. He states however, that the question to which his observations were directed are found on page 116 of the report of the *Releigh* case (*supra*). If we turn there we find him using the words "The person so employed (the engineer) is their servant." . . . If they do adopt it, it is their own work for all the consequences attending which they must be responsible." The distinction which he endeavours to make, in the *Ellice* case (*supra*) is not clear. The words in the *Raleigh* case (*supra*) are clear and explicit; and it is respectfully suggested they are much to be preferred as a statement of law, to the explanation put forth in the later case.

We might just note here, that section 569 of the Ontario Municipal Act did not in any event, specifically authorize the municipal authorities to have the engineer report upon and submit plans as to the *sufficiency of outlet* of the proposed work. They are authorized to "procure an engineer . . . to make an examination . . . and may procure plans . . . to be made of the work." It is hardly conceivable that in "the work" the Legislature would not include the plan of disposal of the waters brought down. Why then should the municipality specifically call for a plan as to this feature. They follow the statute—that is all. But in doing so, it is now argued, they must do without negligence, what the legislature has by this permissive legislation authorized to be done. They must carry out the work without derogating from the common law rights of individuals, since it is quite possible, within the ambit of their statutory powers, for them to do so.

We find that subject once more dealt with by the Privy Council in the case of *C.P.R.* v. *Parke*.[7] In this case an owner was authorized by statute to bring water on his lands to irrigate the same. He did so in such quantities that the surplus water, carrying with it mud and silt escaped lower down, and inflicted continual damage upon the railway line of the plaintiffs. Drake, J. in the court below had laid it down as law that "the permission to use implies a legal right of use which will bar an action for damages when the use has been non-negligent." Lord Watson on appeal said that this proposition was too broadly stated. He proceeds:

> Wherever according to the sound construction of a statute, the Legislature has authorized a proprietor to make a particular use of his land, and

[7] [1899] A.C. 535.

the authority given is in the strict sense of the law permissive merely, and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law rights of others.

Lord Watson then goes on to quote with approval the words of Lord Blackburn in *Metropolitan Asylum* v. *Hill* (*supra*), at which case we have already looked. Lord Blackburn there said, at p. 208:

It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to shew that by express words, or by necessary implication, such an intention appears.

Raleigh v. *Williams* (*supra*) decided that in digging the Bell drain the municipality had not been negligent merely because the engineer's plan was defective, and there being no negligence they were not liable in damages. *C.P.R.* v. *Parke* (*supra*) would appear, not merely to negative this previous decision, but to do something more. It adopts the law as laid down in *Metropolitan Asylum* v. *Hill* (*supra*) and holds that *even if there is no negligence,* in carrying out a permissive statute, the common law rights of others must not be infringed.

However *C.P.R.* v. *Parke* (*supra*) does not deal with a case of a municipality constructing drainage works under a permissive statute authorizing employment of an engineer, therefore although the reasoning is equally applicable *Raleigh* v. *Williams* (*supra*) remains still the governing decision in cases of this kind.

In decisions of more recent date in western Canada at least, the courts have appeared to strain away from the consequences of a literal application of *Raleigh* v. *Williams* (*supra*). Where possible at all, that decision has been "distinguished." We find that in *Pelletier* v. *Springfield* (*supra*), the municipality was held liable for damage arising from works constructed under section 634 of the Municipal Act. Dennistoun, J. A., says at p. 498, that *Raleigh* v. *Williams* (*supra*), does not apply, for:

In that case the municipality could be guilty of no negligence when it adopted and carried out the plan of the engineer, for by the statute governing the case they were authorized to do so. The negligence of the engineer, if any, could not be attributed to the municipality, for he was not their servant or agent, and they were in no way responsible for the defects in the plan of the work which he had prepared.

Section 569 of the Ontario Act of that time is similar in all relative ways to section 499 of the Manitoba Municipal Act, hence we must assume from the above quoted words, that *Raleigh* v. *Williams* (*supra*), would apply to works done under that section. Section 499 authorized the council to procure an engineer to prepare plans in the

one case. Section 634 authorizes the municipality to construct under the supervision of an engineer certain works. It is difficult to see the essential difference between procuring an engineer to prepare plans and proceed with the work, and constructing a work under the supervision of an engineer.

Trueman, J.A., holds that negligence is really foreign to the purview of sec. 634—then why not foreign to the purview of sec. 499 also?

Inasmuch as the municipality was held liable for the damage caused, the result of the decision in *Pelletier* v. *Springfield* (*supra*) is in accord with the views here expressed, although the reasons for judgment are very different. *Raleigh* v. *Williams* (*supra*) seems to have caused some embarrassment to the court.

In an earlier case *Kenny* v. *St. Clements*,[8] judgment was given against the municipality, but it does not appear from the report that *Raleigh* v. *Williams* (*supra*) was considered.

It was suggested by Mr. Justice Dennistoun in *Pelletier* v. *Springfield* (*supra*) that the Legislature should amend section 634 to make the meaning clear. It is a pity that has not been done. Furthermore in view of his statement that *Kenny* v. *St. Clements* (*supra*) may be taken to have settled the law for Manitoba, it would be well if the Legislature would enact the necessary legislation to remove the doubts that now exist; for unless it can clearly be distinguished, *Raleigh* v. *Williams* (*supra*) must of course be taken to remain the governing decision.

The purpose of this article is to urge that the law should be that laid down so clearly by Lord Watson in *Metropolitan Asylum* v. *Hill* (*supra*); that those who set up a statutory provision as their excuse for infringing the rights of others must make good Lord Watson's two propositions; and finally that the fact that a municipality when constructing drainage works, is authorized to, and does employ an engineer, should in no way relieve that municipality from the resulting damage, if the engineer's plans were defective. The engineer should be regarded as their servant, and they should be fully responsible for all he does while so acting.

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[8] 24 M.R. 51.