Privy Council Appeal No. 18 *of* 1920.

Alexander Gerrard - - - - - - - - *Appellant*

v.

Martin L. Crowe and another - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH NOVEMBER, 1920.

Present at the Hearing:

VISCOUNT CAVE.
LORD MOULTON.
LORD PHILLIMORE.

[*Delivered by* VISCOUNT CAVE.]

This is an appeal from an Order of the Court of Appeal of New Zealand reversing a judgment of the Supreme Court in favour of the appellant, the plaintiff in the action. The question involved in the appeal is whether the respondents are liable to the appellant in damages by reason of their having constructed an embankment to protect their lands from flood.

The facts of the case, as found by Mr. Justice Sim at the trial, are as follows:—

> "The plaintiff is the owner of a farm on the east bank of the Oreti River. The defendants are the owners of certain land on the opposite bank of the river. Part of this land is intersected by a creek known as Hillend Creek, which flows into the Oreti River. Before the year 1913 when the river was in flood and rose above its banks some of the flood waters flowed over the western bank at a point on the defendant Michael Crowe's land about half a mile above the junction of the Hillend Creek with the river. The waters then flowed in a south-westerly direction across the defendants' lands, and ultimately found their way back into the river bed at some point or points further south and below the plaintiff's farm. About the end of the year 1913 the defendants erected an earthen embankment on their land. It is about 90 chains in length and about two feet in height. It begins at a point about half a mile from the western bank of the river, and runs in a southerly direction to a point close to the river bank. The

object of the defendants in erecting this embankment was to prevent the flood waters spreading over their land to the west. And that has been its effect. Its effect also has been to increase the volume of water in the river opposite the plaintiff's land and thus to throw on to that land in times of heavy flood more water than otherwise would have gone there."

The plaintiff accordingly brought this action, alleging that the embankment caused his farm to be flooded to a greater extent than would otherwise have been the case, and claiming damages and a mandatory injunction to compel the defendants to remove their embankment.

The trial judge found as a fact that the plaintiff had failed to prove the existence of any flood channel such as was held to have been obstructed in *Menzies* v. *Breadalbane* (1828, 3 Bli. N.S., 414), and had also failed to prove that there was any ancient and rightful course for the flood waters of the river across the defendants' land so as to bring the case within the law as laid down by Tindal, C.J., in the Exchequer Chamber in *Trafford* v. *The King* (1832, 8 Bingham, 204), and added :—

" It is clear, I think, from the evidence that in times of flood the waters of the river did not flow in any defined course, but simply spread over the country in a south-westerly direction and found their way back to the river at different points to the south of the plaintiff's land."

Notwithstanding these findings, the learned Judge, for a reason to be hereafter noticed, gave judgment for the plaintiff ; but on appeal that judgment was reversed by the Court of Appeal, who, by a majority, gave judgment for the defendants, and thereupon this appeal was brought.

The general rule as to the rights of an owner of land on or near a river to protect himself from floods is well settled. In *Farquharson* v. *Farquharson* (1741, Morison 12,779 ; also referred to in 3 Bli. N.S. at p. 421) the rule was stated as follows :—

" It was found lawful for one to build a fence upon his own ground by the side of a river to prevent damage to his ground by the overflow of the river, though thereby a damage should happen to his neighbour by throwing the whole overflow in time of flood upon his ground ; but it was found not lawful to use any operation in the *alveus*."

In *The King* v. *The Commissioners of Sewers for Pagham* (1828, 8 B. & C., 355) it was held that owners of land exposed to the inroads of the sea have a right to erect such works as are necessary for their own protection, even although they may be prejudicial to others ; and Lord Tenterden expressed himself as follows :—

" But it is contended that this new groyne has caused the sea to flow with greater violence against the land of Mr. Cosens, and make a greater inroad upon it, than possibly it might otherwise have done ; and that, as the Commissioners, acting for the benefit of the level, have occasioned this damage, they must make compensation for it. It may be conceived that such is the effect of the groyne ; but the sea is a common enemy to all proprietors on that part of the coast, and I cannot see that the Commissioners, acting for the common interest of several land-owners, are, as to this question, in a different situation from any individual proprietor. Now,

> is there any authority for saying that any proprietor of land exposed to the inroads of the sea, may not endeavour to protect himself by erecting a groyne or other reasonable defence, although it may render it necessary for the owner of the adjoining land to do the like ? I certainly am not aware of any authority or principle of law which can prevent him from so doing."

To the same effect is *Neild* v. *London and North-Western Railway Company* (1874, L.R., 10 *Exch.*, 4); and in *Whalley* v. *The Lancashire and Yorkshire Railway Company* (1884, 13 Q.B.D., 131, at p. 140). Lindley, L.J., said :—

> " It seems to me established by those cases (*i.e. Menzies* v. *Breadalbane* and *Neild* v. *The London and North-Western Railway Company*) that if an extraordinary flood is seen to be coming upon land, the owner of such land may fence off and protect his land from it and so turn it away, without being responsible for the consequences, although his neighbour may be injured by it."

Later applications of the rule are to be found in *Greywensteyn* v. *Hattingh* (L.R. 1911, A.C., 355) and *Maxey Drainage Board* v. *Great Northern Railway Company* (1912, 106 L.T., 429).

It was argued on behalf of the appellants that the right of a landowner to protect himself against floods is conditioned by the maxim *sic utere tuo ut alienum non lædas*, and cannot be exercised if as a consequence of his operations more water flows on to his neighbour's land and thereby damage is caused ; and reliance was placed on *Menzies* v. *Breadalbane* (1828, 3 Bli., N.S., 414) and *Trafford* v. *The King* (1831, 1 B. & A., 874, 8 Bing., 204), and on a dictum of Lord Chelmsford in *Bickett* v. *Morris* (1866, L.R., 1 Sc., 47, at p. 56).

To import such a condition would be directly contrary to the rule as stated in the authorities above cited and would indeed render those authorities meaningless : for it would surely have been unnecessary to invoke the authority of the Courts in order to establish the proposition that a man may erect an embankment on his own land if no damage ensues to others. But in fact the authorities cited are, in their Lordships' opinion, insufficient to support the proposition contended for. In *Menzies* v. *Breadalbane* there was a regular flood channel which, although dry when the river was low, became filled with water at times of flood : and it is plain that such a channel forms part of the *alveus* of the river and cannot be obstructed. In *Trafford* v. *The King*, Lord Tenterden, C.J., no doubt said that " it had long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another," and appears to have expressed the view that no sound distinction can be drawn between the ordinary course of water flowing in a bounded channel at all usual seasons and the extraordinary course which its superabundant quality has been accustomed to take at particular seasons. But on the case being removed into the Exchequer Chamber on error the above judgment was reversed and a *venire de novo* awarded, partly on the ground that it did not appear by the verdict that the course which

the flood water had taken was the " ancient and rightful course " which it ought to take nor whether it had been so carried for such a period of years over the lands of different persons, as to constitute a right of watercourse in time of flood in the direction described by the special verdict. The case is not further reported ; and in view of the decision in the Exchequer Chamber it cannot be relied upon as a safe authority for the contention put forward. *Bickett* v. *Morris* was a case of injury to the *alveus* ; and the sentence quoted from Lord Chelmsford's judgment does not appear to have been necessary for the decision of the case.* Possibly the *dicta* relied upon mean no more than this, that a landowner in protecting his land from the common enemy must use reasonable care and skill and must not do more than is reasonably necessary for that purpose ; but, however that may be, they cannot be held to derogate from the express decisions above referred to. In their Lordships' opinion, therefore, this contention fails.

A further point, founded on the decision of the trial judge, was taken on behalf of the appellant. It was said that the effect of the respondents' embankment, which was not erected on the bank of the river Oreti, but stood back a little distance on the respondents' property and left some fourteen acres of land unprotected, was to throw the flood water on to those fourteen acres, and accordingly that the respondents were liable for the damage caused by its escape : and in support of this contention *Hurdman* v. *The North-Eastern Railway Company* (1878, L.R., 3 C.P.D., 168) and *Whalley* v. *The Lancashire and Yorkshire Railway Company* (1884, L.R., 13 Q.B.D., 131) were cited.

It would be strange if a land-owner, not being liable for protecting the whole of his land against floods by raising the bank of a river, became liable by reason of the fact that he had set his embankment further back and so had left a portion of his land unprotected ; and it does not appear to their Lordships that this is the law. In *Hurdman* v. *The North-Eastern Railway Company* the defendant had erected on his property a mound of earth, which caught the rain naturally and ordinarily falling on his own land and discharged it on to the land of his neighbour. In *Whalley* v. *The Lancashire and Yorkshire Railway Company* the defendants had allowed a pool of water to accumulate on their property, and had subsequently taken active steps to discharge it on to the plaintiff's property. In the present case the defendants neither accumulate water on their own land nor discharge it by active steps on to the plaintiff's land. It is the river—the " common enemy "—which first floods the fourteen acres and then carries away the flood ; and the injury to the plaintiff is not increased, but is probably diminished, by the fact that the fourteen acres are left open and unembanked. There is, in fact, neither *injuria* nor *damnum* proved under this head. This contention, therefore, also fails.

For the above reasons their Lordships are of opinion that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

---

* See on this case *Orr-Ewing* v. *Colquhoun*, 1877, L.R., 2 A.C., at pages 845, 853.

In the Privy Council.

ALEXANDER GERRARD

v.

MARTIN L. CROWE AND ANOTHER.

DELIVERED BY VISCOUNT CAVE.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.

1920.