Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of J. Kerr Wilson v. *The Corporation of Delta, from the Court of Appeal of British Columbia (P. C. Appeal No. 69 of 1911); delivered the 13th December 1912.*

PRESENT AT THE HEARING:

LORD MACNAGHTEN.

LORD MERSEY.

LORD MOULTON.

[DELIVERED BY LORD MOULTON.]

This is an Appeal from a judgment of the Court of Appeal of British Columbia dismissing an appeal from the judgment of Hunter, C.J., upon a counter-claim by the Appellant in an action brought against him by the Respondents. The Appellant is a landowner at Delta, New Westminster, in the Province of British Columbia, and the Respondents are the Municipal Corporation of that place.

The counter-claim relates to certain dyking works executed by the Respondents along the south bank of the Fraser River which forms the northern boundary of certain lands of the Appellant. These works run through the lands of the Appellant as well as through neighbouring lands lying upon the same bank, and were constructed for the purpose of keeping back the waters of the Fraser River at times when it is high and thus preventing them from flowing over such lands, and it is admitted that they successfully accomplish this object.

[104.] J. 202. 80.—12/1912. E. & S.

By his counter-claim the Appellant claimed damages against the Respondents on two grounds. In the first place he alleged that the dyke and the works appertaining thereto (more especially a certain ditch running along by the side of the dyke) were constructed illegally and caused damage to his land by overflow. In the second place he alleged that the Defendants after constructing the dyking works under certain specific byelaws, neglected to maintain them and keep them in repair and so caused damage to him. No evidence seems to have been given at the trial to support this latter claim, and no reference was made to it on the hearing of this Appeal, so that it is unnecessary to make further reference to it.

Shortly stated the facts of the case are as follows: Prior to 1895 the Fraser River used to overflow its banks from time to time and flood the neighbouring lands thereby rendering portions of them, including those to which this case refers, incapable of cultivation and practically of no value.

In January 1895 a petition was presented to the Respondents by which they were asked to pass the necessary bye-law to provide for the construction, protection, and maintenance of a dyke along the south bank of the Fraser River from the high land to the Gulf of Georgia in order to prevent these overflows. In consequence of this Petition the Respondents passed a bye-law to authorise the construction of the works in question and to provide the necessary monies. Such bye-law was provisionally adopted on 10th June 1895, and finally passed on 5th October 1895, and on 13th January 1896 the Respondents entered into a contract for the construction of the works. In January 1897 it was discovered that the sum of money so provided would be insufficient to complete the works

and accordingly a further bye law was passed by the Respondents authorising the raising of the requisite further money. This bye-law was provisionally adopted on 10th April 1897, and finally passed on 22nd May 1897. The money authorised by the said bye-laws was raised by debentures of the Respondent Corporation bearing interest at the rate of 5 per cent. per annum. No application has been made at any time to quash either of the said bye-laws or to set aside any of the debentures issued thereunder and interest has been paid upon those debentures regularly to the present time. The works were completed in July 1897.

At the date of the Petition for the original bye-law above referred to, the Appellant was the owner of lands in the area to be protected by the works, known as Lots 83 and 84, and as such owner he signed the Petition for the bye-law. In November 1897, after the works had been completed, he purchased certain other lands known as Lots 128 and 129, which are the lands to which his counter-claim refers. During the years 1898 and 1899 he was a member of the Council of the Respondent Corporation. Shortly after his ceasing so to be a member the Respondents passed a further bye-law authorising the borrowing of a further sum for the purpose of keeping the works in a proper state of repair. Such bye-law was finally passed on 18th September 1900, and debentures were forthwith issued under it. As in the case of the other bye-laws no application has ever been made to quash this last bye-law or set aside the debentures issued under it, and interest has been paid upon those debentures regularly to the present day. The Appellant had from the first full knowledge of all things done by the Respondents as above set forth, and no objection was at any time raised by him to

anything that had so been done until the filing of the counter-claim to which this Appeal relates.

On 13th July 1902 an action was brought by the Respondents against the Appellant for arrears of taxes due from the Appellant as owner of the said lands in respect of the assessment of those lands under the said bye-laws. Beside putting in a defence the Appellant raised a counter-claim for damages and an injunction. The action was tried in the year 1902 before Mr. Justice Martin, who dismissed both the claims, but on appeal the case was sent back for a new trial. Thereupon the Appellant amended his counter-claim and in its present form it was delivered on 31st July 1905. The second hearing of the action took place on 30th October 1905 before Hunter, C.J. who dismissed the claim of the Respondents on the ground that they had adopted the wrong remedy for the non-payment of the taxes. He held that such taxes could only be recovered by enforcing the statutable lien on the lands in respect of them. Against such judgment no appeal has been brought. He also dismissed the counter-claim. The present Appellant appealed against this judgment so far as it related to the counter-claim, and the Court of Appeal by a majority supported the judgment of Hunter, C.J. From this judgment the present Appeal is brought.

For the purposes of the present Appeal it will suffice to say that the works in question consist mainly of a dyke reaching along the south bank of the Fraser River. This dyke has of necessity a ditch running along it on the side away from the river so as to conduct away the water which otherwise would have drained into the river from the protected lands at such times as the river might be at a sufficiently low level to receive such drainage. There are, however, two so-called sloughs in this portion of the Fraser River. The upper

slough known as the Crescent Slough is a kind of bye-pass which leaves the river and returns to it and thus encloses an island of considerable size known as Crescent Island. The second slough known as the Chilukthan Slough is in reality a small arm of the river flowing into the Gulf of Georgia by an independent opening. Both these waterways were admittedly of great utility to the lands through which they flowed as well as to the lands lying adjoining thereto for the purpose of watering cattle. In order to preserve these waterways without interfering with the protective action of the dyke openings were made through the dyke at the junctions of the sloughs with the river, and these openings were protected by floodgates, which could be opened at times when the river was at such a level that this could be done without injury to the adjacent lands. To make the protection complete it then became necessary to insert in the ditch at its intersection with the sloughs apparatus known as ditch boxes, so that the ditch might be protected from the inflow of river water during such periods as the floodgates were opened. In addition to these special arrangements at the points where the works crossed the sloughs certain dams and floodgates were constructed in the works at points where the dyke passed across the lands of two owners who had themselves previously established protective works. Their Lordships are satisfied that all these variations in the general plan of the works were incidental to carrying out the authorised works, and were fully within the powers of the Respondent Corporation in the performance of their duties under the bye-laws. It is the duty of the public body entrusted with the construction of such works to avoid causing unnecessary inconvenience to members of the public affected by the works, and where local adjustments and variations of the general plan

can be made without affecting its suitability for its intended purpose or its *de facto* compliance with the description of the works authorised, it is right to make them if they diminish the interference with the convenience of individuals and so lessen the amount of compensation to which they would become entitled. In each particular case the propriety of such special variations will be a matter dependent on the facts of that case, but in the present case the evidence both as to the works themselves and the conduct of the parties satisfies their Lordships that there is no ground for doubting that whatever was done was fully justified by the surrounding circumstances.

The main argument for the Appellant in the argument before their Lordships was directed to show that the bye-law was invalid because of certain irregularities in the procedure for obtaining it.

Their Lordships have no doubt that the matters urged upon them in this behalf are immaterial. In view of the disastrous consequencies which would ensue if the validity of a bye-law of this type could be challenged long after action had been taken upon it, the Legislature of British Columbia has in the Municipal Act 1892 enacted that all objections to such bye-laws must be made promptly and within a very short period of its being passed. In this connection, Sections 146, 146*a*, 278 and 279, may be instanced, all of which apply to the present case and secure the bye-laws in question from all attack.

Section 146, which may be taken as an example, reads as follows : —

Section 146.—"When debentures have been issued "under a Statute or under a bye-law and the interest on "such debentures and the principal of such thereof (if any) "as shall have fallen due has been paid for the period of "one year or more by the Municipality, the Statute and

" the bye-law and the debentures issued thereunder or such " thereof as may yet be unpaid, shall be valid and binding " on the Corporation and shall not be quashed or set aside " on any ground whatever.

It was suggested on behalf of the Appellant, that the effect of this section was limited to the validation of the debentures issued. Their Lordships can see no ground for this contention. The section provides plainly that under circumstances which are admittedly to be found in the present case, "the statute and the " bye-law . . . shall be valid . . . and " shall not be quashed on any ground whatever."

For these reasons it is wholly unnecessary to enquire whether the contentions of the Appellant as to the existence of irregularities in the procedure for obtaining the bye-laws are well founded or not.

The remainder of the argument on behalf of the Appellant was based on the contention that the works were not justified by the bye-laws. As has already been stated, their Lordships are of opinion that this contention is not justified in fact. But their Lordships are also of opinion that the claim, so far as it is based on this ground, is barred by the provisions as to limitations of action contained in the Municipal Clauses Act, 1897, Sections 243 and 244. It is not necessary to decide under which of these two sections the suggested right of action would come, because the acts complained of were all done before August 1897 and the counter-claim was not put in until August 1902. The longest period allowed by Sections 243 and 244 is one year after the cause of action has arisen, and this period had therefore elapsed long before the action was brought. As will be seen by the counter-claim, the Appellant claimed an injunction to prevent the Respondents from maintaining.

and working the apparatus complained of, and that cause of action, if it ever existed, must have first arisen in July 1897. There is no suggestion here that the Respondents have acted otherwise than *bonâ fide* and with the greatest openness, and it is clear that everything relevant to such a ground of action was fully known to the Appellant from the first. Without in any way deciding whether or not the Appellant might have any rights in this or any other form of action had such not been the case, their Lordships have no doubt that under such circumstances cases like the present are precisely the cases to which these provisions for limitation of actions in the case of municipal corporations are intended to refer, and that the Plaintiff's cause of action based on alleged deviations by the Respondents from the works contemplated by the bye-laws is barred by these provisions.

The above considerations suffice to decide this Appeal. . . . But in addition thereto there is in their Lordships' minds grave doubt whether the Appellant has proved that he has suffered any damage in fact or in law. It is admitted that his land has been greatly benefited by the works, and when analysed his sole complaint is that if the Respondents in working the ditch constantly kept the level of the water in it sufficiently low, he would have facilities of drainage of his lands which he does not now possess. Their Lordships see no obligation on the Respondents so to work the ditch. Had they thought it proper there was nothing to prevent their establishing weirs in the ditch which would have maintained such level in each section of the ditch as they thought proper, and in fact the effect of the ditch boxes and dams is of this nature. It would seem, therefore, that no legal right possessed by the Appellant has been

infringed by the actions of the Respondents, and although their Lordships do not feel called upon to decide the question, they think it proper to put on record that they are not satisfied that any damage has been proved. Their Lordships will, therefore, humbly advise His Majesty that this Appeal be dismissed and that the Appellant be ordered to pay the costs.

In the Privy Council.

J. KERR WILSON

v.

THE CORPORATION OF DELTA.

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