W. A. GRANDEL, KEN REINE, C. J. APPENHEIMER, CHRIS NEILSON AND F. PONTO (DEFENDANTS) APPELLANTS; *Nov. 11, 12, 13

1952

AND

1953

*April 28

G. W. MASON (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF THE PROVINCE OF SASKATCHEWAN

Nuisance—Negligence—Highway construction near mink farm—Loss of pregnant mink due to noise of construction equipment—Duty to use reasonable care even where nuisance authorized by Statute.

The respondent, on learning extensive construction work was about to be undertaken on a provincial highway contiguous to his mink farm, notified responsible officials of the Highway Department that the whelping season had just begun and the noise from such operations would endanger the lives of the female mink and their offspring. In consequence orders were given by the engineer in charge to leave a sufficient gap in the road by carrying on the work at a distance that would prevent disturbance of the mink. Contrary to orders the appellants operated bull dozers and tractors within the prohibited area and the noise from the equipment resulted in the loss of a number of female mink and their young.

Held: 1. (Taschereau and Lockk JJ. dissenting)—That in an action for damages, the plea that the raising of mink, particularly during the whelping season, was a delicate and sensitive business, did not necessarily conclude the matter. A defendant seeking to avoid liability for a nuisance on the basis that he had pursued but the ordinary and normal course of conduct incident to that locality must establish that he acted with reasonable care, even where statutory authority may have authorized the creation of a nuisance. *L. & N.W. Ry. Co. v. Bradley* 3 Mac. & G. 336 at 341; *Geddis v. Proprietors of Bann Reservoir* 3 App. Cas. 430; *Dufferin Paving & Crushed Stone Ltd. v. Anger* [1940] S.C.R. 174 at 177.

2. That though the respondent's pleadings based the cause of action upon nuisance, it appeared that at the trial the basis of negligence was also considered. It was raised in the Notice of Appeal to the Appeal Court and that Court in its judgment appeared to have founded liability upon negligence. The contention that at this stage respondent's recovery must be restricted to a claim for nuisance, could not be maintained.

3. That a reasonable man in the position of the appellants would have known of the presence of the respondent's mink, forseen the possibility of damage, and taken reasonable care to avoid it. Failure to do so constituted a breach owing by them to the respondent.

Per: Taschereau and Locke JJ., dissenting.—The case should be disposed of upon the only issue raised by the pleadings, which was that of nuisance. The appellants were acting as servants of the Crown and no such action lay against them. Had the appellants been acting as servants of the Municipality rather than of the Crown the action

*PRESENT: Taschereau, Estey, Locke, Cartwright and Fauteux JJ.

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likewise should fail: *Hammerton v. Dysart* [1916] 1 A.C. 57; *Gaunt v. Fynney* L.R. 8 Ch. 8; *Eastern & South African Telegraph Co. v. Cape Town Tramways* [1902] A.C. 381; *Kine v. Jolly* [1905] 1 Ch. 480. As the appellants did not give evidence at the trial as they would presumably have done had the statement of claim contained a count of negligence, the question of their liability on that basis should not be considered.

APPEAL by defendants from a judgment of the Court of Appeal of Saskatchewan (1) allowing an appeal from the judgment of Taylor J. (2) which dismissed plaintiff's action.

F. A. Brewin Q.C. and *R. Scott* for the appellants.

A. W. Embury for the respondent.

TASCHEREAU, J.—(dissenting)—For the reasons given by my brother Locke, I would allow the appeal, dismiss the action with costs here and in the court below.

The judgment of Estey, Cartwright and Fauteux, J.J. was delivered by:—

ESTEY J.:—The respondent (pl.) claims that the appellants (defs.), in operating bulldozers, road graders and other road construction and maintenance equipment upon that portion of Highway No. 35 in the Province of Saskatchewan contiguous to his mink farm, on or about the 9th day of May, 1949, caused the death of valuable mink and their offspring. His action was dismissed at trial, but allowed as against the appellants in the Court of Appeal.

Highway No. 35 is owned and maintained by Her Majesty The Queen in the right of the Province of Saskatchewan. At all times material hereto the Minister of Highways was reconstructing and repairing the road in front of or contiguous to the respondent's farm and the appellants Neilson and Appenheimer were grade foremen and Grandel, Reine and Ponto operators of caterpillar tractors.

The respondent operates a mink farm on the eastern side of Highway No. 35 on lots 1-20, block 59, in the townsite of Qu'Appelle. When, on the 5th day of May, he observed that equipment for reconstruction and repair of the highway was being assembled about 2,000 feet south of his mink farm he realized, because this was the whelping

(1) (1951) 3. W.W.R. (N.S.) 536; [1952] 1 D.L.R. 516.

(2) (1951) 3. W.W.R. (N.S.) 169.

season, the possibility of damage. Immediately he interviewed one who to him appeared to be in charge of the equipment and was advised to go to Regina. This he did, where he interviewed Hartwell, Superintendent of Fur Farms in the Department of Natural Resources. As a consequence, on the morning of May 6, 1949, he received from Hartwell a telegram reading:

> CHIEF ENGINEER WILL CONTACT CONSTRUCTION CREW TO COMMENCE CONSTRUCTION FURTHER UP ROAD IF POSSIBLE

The surveyors, at the outset, placed stakes, hereinafter referred to as stations, at each 100 feet, commencing with zero in the centre of Highway No. 1, from which Highway 35 extends northward. The actual work of reconstruction and repair commenced on May 6, at station 20, about 2,000 feet from Highway No. 1. That morning, as a consequence of instructions from his superiors at Regina, Swenson, the engineer in charge, instructed Olson to leave a gap of 1,200 feet between stations 28 and 40 in order "to prevent disturbing the mink" and to particularly inform those in charge of the bulldozers and road graders. When this order was given about noon the crew were working near station 24.

The respondent's mink pens were about 3,350 to 3,400 feet north of the junction of Highways Nos. 1 and 35. Stations 28 and 40 would be respectively 2,800 and 4,000 feet north of that junction. The evidence justifies a conclusion that the gap of 1,200 feet was fixed at or near stations 28 and 40 and, therefore, the mink pens would be about the centre thereof, or 600 feet from each station. That the equipment was moved from some point south of station 28 northward is clear, but the evidence is conflicting as to where the equipment was working on the morning of the 9th when the damage was suffered. The appellants' evidence is to the effect that the work was commenced north of station 40, while that of the respondent and his witnesses indicates that the work was actually being done at the northwest corner of respondent's property.

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The learned trial judge found:

> "I find the fact to be that on the early morning of the 9th, May 1949, the construction work with its accompanying noise, vibration and commotion sufficiently near to the mink, and in entering upon the plaintiff's land to turn the machines, did panic the female mink and caused damage to these female mink and their kittens."

The learned judges of the Appellate Court accepted this finding and stated:

> The finding of the learned trial Judge that construction work was actually carried on on the morning of May 9th close to his property and even on the corner of his property is supported by the evidence and should not be disturbed.

We have, therefore, concurrent findings of fact as to where the noise was created that caused the damage and such findings ought to be disturbed only in exceptional circumstances which are not here present.

The respondent did not object to the noise, except in so far as it caused the death of his mink, nor is it otherwise suggested the noise interfered with the comfort or convenience of the residents of that locality or adversely affected their property. In these circumstances the appellants submit that, though the noise caused the unfortunate loss suffered by the respondent, they are not liable because of the peculiarly delicate and sensitive business of raising mink. That such a business, particularly during the whelping season, may well be styled a delicate and sensitive business is established upon the evidence. The learned trial judge, while dismissing the action upon other grounds, stated:

> Where, therefore, a fur farm with these female mink at times so susceptible to noise is located on a much travelled highway, the owner must in so locating do so at his own peril, and his industry can claim no special privileges as of right, nor object to the noises incidental to the use, repair, reconstruction and maintenance of the highway by the Highway authorities.

The principle underlying the foregoing submission is illustrated by *Eastern and South African Telegraph Co. v. Cape Town Tramways* (1). The appellant (pl.) maintained a submarine cable into Cape Town where the respondents operated a system of electric tramways. Electricity leaked from the rails and affected the working of the appellant's submarine telegraph cable. In dealing with

(1) [1902] A.C. 381.

the common law liability their Lordships of the Judicial Committee pointed out that the apparatus of the telegraph company (appellant) consisted of a delicate instrument at the time the injury complained of was suffered which "to insure its immunity from disturbance is a somewhat serious liability to cast on neighbours."

Their Lordships stated at p. 393:—

> The true comparison is with things used in the ordinary enjoyment of property, and this instrument differs from such things in its peculiar liability to be affected by even minute currents of electricity . . . A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure.

In *Robinson v. Kilvert* (1), the landlord occupied the basement and generated heat to the point that it caused damage to the tenant's brown paper stored on the ground floor of the building. It was held that the excessive heat was not something noxious in itself and did not interfere with the ordinary use and enjoyment of the premises. The tenant's application for an injunction was refused. In the course of his judgment Lopes L. J. stated at p. 97:

> A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade.

The learned author of *Salmond on Torts*, 10th Ed., states at p. 226:

> No action will lie for a nuisance in respect of damage which, even though substantial, is due solely to the fact that the plaintiff is abnormally sensitive to deleterious influences, or uses his land for some purpose which requires exceptional freedom from any such influences . . . Extraordinary and special requirements are not protected by the law of nuisance.

That, however, in the circumstances of this case, does not necessarily conclude the matter. The point at which the work was done and the noise caused which disturbed the mink and caused the damage was, under the concurrent findings, at the northwest corner of respondent's property and, therefore, well within the gap and some 300 or 400 feet closer to the mink than had the work been done, according to instructions, north of the gap. The grade foremen Neilson and Appenheimer and the operators of the machines were not only acting contrary to instructions given to avoid damage to the mink, but were in a place

(1) [1889] 41 Ch. D. 88.

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where, as hereinafter described, reasonable men would have foreseen damage would probably result and taken those precautions which, under the circumstances were possible to avoid it. It was their failure to take this reasonable care that created the noise from which the damage resulted.

A defendant who seeks to avoid liability for a nuisance on the basis that he has pursued but the ordinary and normal course of conduct incident to that locality must establish that he acted with reasonable care.

> Those who say that their interference with the comfort of their neighbours is justified because their operations are normal and usual and conducted with proper care and skill are under a specific duty, if they wish to make good that defence, to use that reasonable and proper care and skill. (Sir Wilfrid Greene M.R. in *Andreae v. Selfridge & Co.* (1).)

Even where statutory authority may authorize the creation of a nuisance, parties must, in order to obtain that immunity, act with reasonable care.

> But in order to secure this immunity the powers conferred by the Legislature must be exercised without negligence, or, as it is perhaps better expressed, with judgment and caution (per Lord Truro, *L. & N.W.R. Co. v. Bradley.* (2).) For damage which could not have been avoided by any reasonably practicable care on the part of those who are authorised to exercise the power, there is no right of action. But they must not do needless harm; and if they do, it is a wrong against which the ordinary remedies are available. Pollock on Torts, 15th Ed., p. 94.
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> . . . 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 a 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 this powers. Geddis *v. Proprietors of Bann Reservoir.* (3)

In *Groat v. City of Edmonton* (4), the plaintiffs, riparian owners, recovered damages against the City of Edmonton for pollution of a stream. Duff J. (later C.J.) stated at p. 526;

> The existence of a state of affairs constituting a nuisance in fact, is found, and is, I think, established as resulting from the construction and use of the large sewer extending through the northeast arm; and this was in law a nuisance chargeable to the municipality, unless sufficient justification or excuse has also been established.

(1) [1938] 1 Ch. 1 at 9.
(2) (1851) 3 Mac. & G. 336 at 341.
(3) [1878] 3 App. Cas. 430 at 455.
(4) [1928] S.C.R. 522.

Rinfret J. (later C.J.) with whom Anglin C.J.C. concurred, stated at p. 534:

> The city therefore has inflicted and still inflicts unnecessary injury upon the appellant.

In *Dufferin Paving & Crushed Stone Ltd. v. Anger,* (1) Davis J., with whom Duff C.J. and Hudson J. concurred, stated:

> It may with advantage, however, be pointed out that the authority to use the street was not obligatory but only permissive, and that even where there is a statutory obligation upon a person, that does not entitle him to invade the rights of others unless he can show that in practical feasibility the obligation could be performed in no way save one which involves damage to other persons.

It would seem in principle that a similar rule should apply where, as here, the appellants seek to avoid liability on the basis that, though they created the noise which caused the damage, recovery should be denied because of the delicate and sensitive nature of respondent's business—a business well known throughout the Province. In fact, respondent operated his mink farm under a licence issued by the Provincial Government.

In *Andreae v. Selfridge & Co., (supra)*, Selfridge & Co. appealed from a judgment at trial holding that it had created a nuisance in demolishing and constructing certain buildings. In the Court of Appeal, Sir Wilfrid Greene M.R., with whom Romer L.J. and Scott L.J. agreed, stated at p. 6:

> I am unable to take the view that any of these operations was of such an abnormal character as to justify treating the disturbance created by it, and the whole of the disturbance created by it, as constituting a nuisance. That applies to both the first and the second operations.

The Master of the Rolls, however, went on to hold that Selfridge & Co. was liable for noise caused at unreasonable hours in respect of the first operation and then, as to the second, that it had not satisfied the burden upon it to establish that all reasonable and proper precautions had been taken to reduce the quantity of dust and grit which he described as "insufferable." Lord Green stated at p. 10:

> The use of reasonable care and skill in connection with matters of this kind may take various forms. It may take the form of restricting the hours during which the work is to be done; it may take the form of limiting the amount of a particular type of work which is being done simultaneously within a particular area; it may take the form of using

(1) [1940] S.C.R. 174 at 177.

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proper scientific means of avoiding inconvenience. Whatever form it takes, it has to be done, and those who do not do it must not be surprised if they have to pay the penalty for disregarding their neighbours' rights.

The officials in the Department of Highways, apprized of the possible damage that might result, did what reasonable men, foreseeing the possibility of damage, would have done and instructed the engineer in charge "to commence construction further up road if possible." That such was possible is established by the fact that a gap of 1,200 feet was directed and if proper care had been exercised the equipment would have been moved to the north of that and, as the respondent states, if work had been done a similar distance from his mink pens on the north as on the south damage would not have resulted.

It would, therefore, appear that the appellants were negligent in creating the noise within the gap and in such proximity to the mink and, therefore, cannot avail themselves of the defence based upon the delicate and sensitive nature of respondent's business of raising mink.

Moreover, quite apart from any question of nuisance, it would appear that the appellants are liable on the basis of their own negligence. The maxim *sic utere tuo ut alienum non laedas* is applicable to both nuisance and negligence. Broom's Legal Maxims, 10th Ed., 238, 248, 252. Though the respondent, in his pleadings, bases his cause of action upon nuisance, it would rather appear that it has also been treated on the basis of negligence. The learned trial judge so considered it. It was raised in the notice of appeal to the Court of Appeal and the learned Chief Justice, writing on behalf of the learned judges of that Court, would appear to have founded liability upon the negligent conduct of the appellants. The contention of counsel for the appellants that at this stage the respondent's recovery must be restricted to a claim for nuisance cannot be maintained.

The respondent's mink pens were within approximately 250 feet of the northwest corner of his property. These, as well as two signs reading "Mink, no trespassing," were within the view of persons using or working upon the highway. The respondent had spoken to someone at the equipment on Thursday, the 5th. The instructions relative to

the gap and the moving northward were received and communicated on the 6th. Swenson, the engineer in charge, deposed that when he told Olson, in the presence of Thomson and Boivin, to leave a gap of 1,200 feet, one of them inquired why and he explained "to prevent disturbing the mink" and went on to tell Olson to give the instructions "To whoever was in charge of the machines at the time." Olson corroborates this and states: "Well, my instructions were to tell the construction crew not to build past station 28, that there would be a gap left of twelve hundred feet." It was, as Olson explained, not "an ordinary order, it was something different." Barker and Hanson both admitted they knew of the presence of the mink and the reason for the gap. Neilson deposes that he did not know of the mink farm and, in fact, was not told why the gap of 1,200 feet was made. On the other hand a witness whom the learned trial judge evidently believed deposed that Neilson had told him they "had to move on account of the mink farm." The damage was not suffered until Monday, May 9. In the interval between the 5th and the 9th, as the learned Chief Justice, speaking on behalf of the Court of Appeal, observed, "There is much evidence to the effect that it was common knowledge that the gap was left to protect the plaintiff's mink."

A reasonable man in the position of the grade foremen and the operators of these large machines would have known of the presence of the respondent's mink, foreseen the possibility of damage and taken reasonable care to avoid it. Their failure to do so constituted a breach of duty owing by them to the respondent.

> In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double rôle. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, i.e., to the question of compensation not to culpability, but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e., to the question of culpability not to compensation. Lord Russell of Killowen in *Hay or Bourhill v. Young.* (1)

There is here present evidence of markings and conversations which, in the exercise of reasonable care, would have brought home to the appellants the presence of the

(1) [1943] A.C. 92 at 101.

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mink and the damage that might result from the noise. Those factors essential to liability absent in *Nova Mink Ltd. v. T.C.A.*, (1), are here present.

In *MacGibbon v. Robinson*, (2), the plaintiff operated a mink farm. The trial judge found that the defendant, with knowledge both that this was the whelping season and that during that season noise and disturbance might cause damage, discharged two blasting shots upon land which he was clearing and which did, in fact, cause serious damage to the plaintiff's mink. It was also held that the defendant had been advised by certain government employees that they had discontinued land clearing operations until after the whelping season. It was also found that these shots were unnecessary. In these circumstances the defendant was held liable for the damage caused.

Counsel for the appellant submits that the evidence does not specify which of the defendants caused the damage and, therefore, the action should be dismissed. Neilson and Appenheimer were grade foremen who, upon the morning in question, were directing the operators of the machines. The learned trial judge found the damage was done in the early morning of the 9th. Appenheimer deposed "We both directed where it was necessary" and to a suggestion that they might at times become separated over a space of 1,000 feet and, referring particularly to the morning in question, he said "Well, we would be very close together, just starting up." It was stressed that one witness deposed but two machines were operating at the point in question. Another witness, however, deposed that he saw four or six. In view of this conflict it is significant that neither Neilson nor Appenheimer, the grade foremen, suggests that the usual number were not operating.

These men were all employed in the construction and repair of this highway and, upon the morning in question, in the course of their work created the noise. The learned judges in the Court of Appeal have found them to be joint tortfeasors and they may be, particularly if the provisions of s. 3 of the Contributory Negligence Act (S. of Sask. 1944, c. 23) are applicable. On the other hand, they may be "several concurrent tortfeasors," as that phrase is used

(1) [1951] 2 D.L.R. 241.

(2) (1952) 6 W.W.R. (N.S.) 241.

in Williams—Joint Tortfeasors and Contributory Negligence, p. 5 *et seq.* The point is often one difficult to determine and here, as the case was presented, it is unnecessary to determine under which heading these men must be placed. *Sewell v. B.C. Towing & Transportation Co. Ltd.*, (1) *Sault Ste. Marie Pulp and Paper Co. v. Myers*, (2); *Till v. Town of Oakville* (3), (reversed on other grounds, 33 O.L.R. 120).

Judgment was not directed against Barker and Hanson in the Court of Appeal and they are not before this Court. The learned trial judge did not accept the evidence of those who deposed that the work was done north of the gap and it, therefore, follows that the work on the morning in question was done within the gap and at a point near the northeast quarter of the respondent's property. The appellants before this Court all participated in that work and in the creation of the noise.

The appeal should be dismissed with costs.

LOCKE J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal of Saskatchewan (4) which allowed the appeal of the present appellant from a judgment of Taylor J. (5) by which the action was dismissed. In view of the nature of the claim advanced in the pleadings and the manner in which the action has been dealt with in the judgment appealed from, it is necessary to examine closely the evidence adduced at the trial.

The respondent, in the spring of 1949, established what is described as a fur farm on the outskirts of the Town of Qu'Appelle and there carried on the occupation of raising mink. Prior to this time, he had engaged in operations of this nature on a farm near Grenfell, Sask. At Qu'Appelle he acquired a property described as Block 59, comprising an area 500 feet in length and 300 feet in width, the western boundary of which fronted upon Provincial Highway No. 35. On this property, he constructed pens and other buildings required for carrying on his operations. To this site he brought some 49 female mink and 12 males which were maintained there within an enclosure. According to

(1) [1883] 9 Can. S.C.R. 527.
(2) (1902) 33 Can. S.C.R. 23.
(3) (1914) 31 O.L.R. 405.
(4) (1951) 3 W.W.R. (N.S.) 536; [1952] 1 D.L.R. 516.
(5) (1951) 3 W.W.R. (N.S.) 169.

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a rough sketch of the premises put in by the respondent at the trial, the nearest of these pens was distant approximately 250 feet from the easterly limit of the highway which ran due north and south.

It was established in evidence that at the time female mink are about to whelp, and for some two weeks thereafter, they are extremely sensitive to unusual noises and, when disturbed by such a cause, are liable to kill their young and frequently themselves suffer death. The time of the year when this condition is present is apparently during the last days of April and the early days of May.

Highway No. 35 is a provincial highway, a term defined by s-s. 2 of s. 8 of *The Highways and Transportation Act*, 1949, as being a public highway designated as such by the Lieutenant-Governor in Council. Public highway is defined by s-s. 9 of s. 2 of the Act as meaning a road allowance or a road, street or lane vested in His Majesty or set aside for such purpose under the provisions of *The Northwest Territories Act* or any Act of Saskatchewan and includes any bridge, culvert, drain or other public improvement erected upon or in connection with such public highway. It was admitted on behalf of the defendants for the purpose of the trial that Highway No. 35 was a provincial highway and:— "as such is the responsibility of the Government of Saskatchewan for maintenance and repairs." It was further admitted that the appellants were between the 5th and the 10th days of May, 1949, engaged as members of a work crew doing maintenance and repair work on the said highway in the area adjoining, but not contiguous to, the lands of the respondent.

On May 5, 1949, the respondent saw the work crew, of which the appellants were members, on Highway 35 to the south of his property. They had with them a caterpillar tractor for use in connection with the work and, believing that the noise made by such machines on the road maintenance work might cause damage to the mink, he spoke to a member of the crew and told him about the danger. He could not identify the person to whom he had spoken. He then went and spoke to some other unidentified persons who referred him to the Department of Highways at Regina. He, thereupon, went to Regina and spoke to a

Mr. Hartwell, who was the Supervisor of Game in the Department of Natural Resources. It was admitted on behalf of the appellants that Hartwell brought to the notice of the Department of Highways that Mason was concerned about the effect of the highway operations on the mink, and on May 6th Hartwell wired the respondent from Regina, saying that the Chief Engineer would instruct the crew to commence construction further up the road, if possible.

On May 6th, the crew commenced operations on the highway to the south of the respondent's property. According to Orville Swenson, a graduate engineer employed by the Department of Highways, he was the resident engineer in charge of the work to be performed upon Highway No. 35 and directed the work of the survey gang who were establishing the lines for the proposed work and driving stakes for the guidance of those who were to do the work, which involved widening the right-of-way by some 17 feet, starting at a point a mile north of Qu'Appelle. Stations were established at every 100 feet and stakes driven. Gordon Olson was the construction foreman in charge of the work. On the morning of May 6th, a construction engineer of the Department gave instructions that no work was to be carried on upon the highway for a distance of 1,000 feet opposite the respondent's property, the centre of the gap to be in line with the mink pens. Swenson instructed Olson as to this, who, in turn, communicated the order to the appellant Neilson, who was sub-foreman on the work. E. W. Boivin was the foreman in charge of the construction work and, working under him, in addition to Neilson, was the appellant Appenheimer. Boivin received the same instructions as to the gap to be left opposite the respondent's place directly from Swenson.

On May 7th, the crew carried on the work of construction to the south of the respondent's property and it appears to be common ground that no ill result followed from their operations on that day. May 8th was a Sunday and no work was done but operations were continued on Monday, May 9th, and it was upon this date that the damage was caused. There is a conflict between the evidence of the respondent and of two witnesses called by him and of the

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witnesses for the appellant, as to the exact area in which work was done on that day. According to the respondent, the crew discontinued work on the 7th, 600 feet south of the southern limit of his property and, having removed their equipment, they recommenced their operations on the road allowance at the northwest corner of his land "right up from my mink pens", on Monday. On the same day the respondent says that the crew excavated a small portion of a borrow pit which was thereafter greatly extended so that, according to the respondent, it was ultimately some 210 feet in length and encroached approximately 25 feet along the western boundary of his property. That part excavated, however, on May 9th was only a small portion at the northwest corner of his property. The respondent, however, contends that in digging this part of the pit on May 9th the crew trespassed upon his property. According to Donald Leslie, a labourer who was a member of the crew and who was called by the respondent, there were two machines engaged in moving earth opposite the northwest corner of the property in question. He said that the tracks of the caterpillar tractors and the buckets and the cables which moved them made a lot of noise. The respondent did not attempt to describe the noise made by the operation of the machinery but it resulted, he said, in the mink becoming very excited, apparently through fright. In addition to saying that a small portion of the borrow pit was excavated on his land on May 9th, he said that during part of the time the operators of the machinery turned it around on his property, but the evidence as to this is extremely vague. The necessity for doing so when the highway was available for this purpose does not appear. After working at the location mentioned for a period which the respondent described as "a matter of a few hours", they moved to the north, away from his property.

A further witness called by the respondent, Alex Haughian, who was engaged by the Department of Highways for cutting brush on the road allowance, said that Neilson had told him on May 7th that the work they were doing was causing trouble with the respondent's mink and that they were to work to the north. It will be noted, however, that the respondent himself said that there was no trouble with the animals at that time. On May 9th,

Haughian said that he was working near the northwest corner of the respondent's property and that the machines moving the earth were working to the south of him and that there were from 4 to 6 of them and that Neilson was directing the work.

As opposed to this evidence, Boivin, the foreman who said that there were 5 caterpillar tractors in operation on the work between the 5th and the 10th of May and that two of the operators were the appellants Grandel and Reine, said that a gap of over 1,200 feet had been left, on instructions, opposite the respondent's land and that no work was done along this part of the road, or on the borrow pit, between the 7th and the 19th of May and that no work was done at any time within 600 feet of the mink pens. Olson said that the centre of the gap was very close to opposite the mink pens. Swenson, the resident engineer, was at the scene on the morning of May 9th and said that the crew were then working about 400 feet to the north of the north end of the gap and that no work was done in the gap up to the time he left the work on May 19th. L. O. Thompson, the resident engineer employed by the Government at Qu'Appelle, said that no work was done in the gap between the 6th and the 19th of May and that the borrow pit was not commenced until May 19th. Barker and Hanson, both of whom were named as defendants in the action and were engaged in operating tractors on the work on the day in question, say that no work was done in the gap on that day, the operations being carried on to the north of it. The appellant Appenheimer said that he had not ordered any of the machines to operate in the gap after May 6th and that none of the drivers had done any work on that section of road between May 6th and 19th.

Taylor J. by whom the case was tried, after saying that this was a Government project and that there was no evidence that any of the defendants did anything other than in pursuance of the orders given to them, which they were employed and paid to perform, said:—

> It may be, and I strongly suspect, there was negligence in the supervision of the work and carrying it out by the head foreman and the resident engineer, but they are not parties to the action.

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I find the fact to be that on the early morning of May 9, 1949, the construction work with its accompanying noise, vibration and commotion sufficiently near to the mink, and in entering upon the plaintiff's land to turn the machines, did panic the female mink and caused damage to these female mink and their kittens.

and further, after saying that, in his opinion, none of the defendants were liable, the learned Judge said:—

As stated, I am satisfied that an error was made in proceeding with the project at the place in question on the 9th May. The resident engineer and head foreman had gone off the job over the weekend, and instructions to pass that place and work elsewhere may have been given to the engineer and were disregarded.

This, I think, must be taken as a finding of fact that work was carried on by the construction crew at or near the northwest corner of the respondent's property and that some of the machines had entered on the property to turn around. The action was framed in nuisance but the learned trial judge appeared to be of the opinion that it might properly be treated as including a claim for damages for negligence and as the defendant workmen owed no duty to the plaintiff, whether statutory or otherwise, in his opinion, he considered the action failed. For this reason, he found it unnecessary to examine the evidence to ascertain which, if any, of the defendants were actually engaged in the particular work that caused the damage. Taylor J. further considered that the operator of a fur farm locating close to a much travelled highway must be deemed to have done so at his own peril and to be without any right to object to the consequences of noises incidental to the use, repair, reconstruction and maintenance of the highway. This, I think, was directed to the claim for nuisance.

The present respondent's appeal to the Court of Appeal was allowed, the unanimous judgment of the Court being given by the Chief Justice of Saskatchewan. In the reasons for his judgment the learned Chief Justice said in part:—

The finding of the learned trial Judge that construction work was actually carried on on the morning of May 9 close to his property and even on the corner of his property is supported by the evidence and should not be disturbed.

Without mentioning the fact that the action was framed in nuisance, he said further that a public employee must be subject to the common law relating to negligence, to the

same extent as any other individual, and is personally responsible if he fails to take that reasonable care to avoid injury to anyone to whom he owes a duty in the circumstances and, after commenting on the fact that while the appellants Grandel, Reine and Ponto had filed defences but had not given evidence at the trial (a fact which is considered to be significant), expressed the view that the evidence warranted a conclusion that a prima facie case was made against these three operators of the machinery, there being evidence that the workmen of the crew knew of the mink and knew that the gap was being left to protect them, and accordingly:—

> owed a duty to the plaintiff to take care not to operate within the limits of the gap—there was a forseeable risk—and in my opinion they are liable for the damages caused by carrying on the operations within the gap and so close to the plaintiff's premises and the mink pens.

He was further of the opinion that the appellants Neilson and Appenheimer, together with the three machine operators, were joint tortfeasors, and jointly and severally liable for the entire damage suffered by the plaintiff.

I am unable to construe the allegations made by the Statement of Claim in this action, other than as a claim for damages for nuisance. The pleading contains no allegations of negligence. Had this been the cause of action, particulars of the negligence relied upon must have been pleaded or furnished on the defendant's demand. Such particulars would presumably have differed in respect of the claim against the defendants such as Neilson and Appenheimer who, as sub-foremen, were in a position of authority on the work and Grandel, Reine and Ponto, who merely operated the road building equipment, under their direction. I am, with respect, unable to attach importance to the fact that Grandel, Reine and Ponto did not give evidence at the trial. The only claim pleaded against them was that, as operators of the machinery, they were parties to the commission of a nuisance. The nuisance, if such there was, was committed on the instructions and on behalf of the Crown. It was presumably by reason of the plaintiff being advised that an action for damages for nuisance would not lie against the Crown in the right of the Province that the plaintiff decided to proceed against

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the servants of the Crown, rather than initiating proceedings by a Petition of Right under the provisions of c. 73, R.S.S. 1940. If these three defendants were advised (as I would assume they were) that a claim founded in nuisance did not, in these circumstances, lie against them, their failure to give evidence at the trial appears to me to be without significance.

The nature of the acts alleged to constitute a nuisance was causing "offensive and pestilential noises to be created on and about the plaintiff's lands and premises." If it be assumed, for the purpose of argument, that an action for damages for nuisance would lie against the Crown in respect of road making operations carried on by it upon Crown property in the manner in which such operations are customarily conducted, as it might against a municipal corporation, the question to be determined at the outset is whether the respondent has any such right of action in the circumstances disclosed by the evidence. Assuming this and since the claim is in nuisance, any right of the respondent against the servants of the Crown cannot be any higher than they would be against their employer if it was liable to an action for such a tort.

Much evidence was adduced on behalf of the respondent as to the particular sensitivity of female mink to disturbance from unusual noise or other causes shortly before whelping and for some two weeks thereafter. According to the respondent, the mink were not, even at this period, affected by the ordinary noise of traffic and the other noises to which they are accustomed. Thus, he said, they were not affected by the noise from the operation of his own farm machinery. A. K. McNeill, who had had some nine years' experience with raising mink in Saskatchewan, said that, from approximately the 1st of May until the 1st of June, noise caused by an aeroplane and even strange human voices would disturb them and might cause damage. Noise from highway traffic to which they have become accustomed was not, in his experience, likely to cause any disturbance. Walter Lefurgey, an experienced mink rancher and the President of the Saskatchewan Provincial Fur Breeders' Association called by the plaintiff, said that the

mink at such time did not appear to mind noises they were used to but, if there was any very great noise, they were liable to kill their young. He considered the month of May to be the danger period.

There is no suggestion in the present matter that such noise as was caused by the road making machinery at the time in question was more than that usually attendant upon like operations, or that it would have caused any inconvenience or discomfort to the owners or occupants of the adjoining property other than the respondent. The respondent's case, therefore, is that by carrying on his operations in a location, chosen by himself, closely adjoining a public highway, he has imposed upon the owners or occupants of adjoining property a liability that would otherwise not exist.

The differences between cases of nuisance and cases of negligence must never be lost sight of (*Latham v. Johnson,* (1)). Negligence is not necessarily an element of nuisance. The principle underlying the action for damages for nuisance is the same as the maxim *sic utere tuo ut alienum non laedas.* As pointed out by Lord Parker in *Hammerton v. Dysart,* (2), nuisance involves damage but damage alone is not sufficient to give rise to a right of action. There must be some right in the person damaged to immunity from the damage complained of. The nature and extent of that right is the matter to be determined.

In *Gaunt v. Fynney* (3), where the action was to restrain a nuisance, by noise, Lord Selborne L.C. said that a nuisance by noise was emphatically a question of degree and that (p. 12):—

> If my neighbour builds a house against a party-wall, next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery or his music-room, it does not follow (even if I am nervously sensitive or in infirm health) that I can bring an action or obtain an injunction. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable.

In *Cook v. Forbes* (4), a manufacturer of fabrics which were sensitive to injury by sulphuretted hydrogen claimed damages for nuisance against the defendant, a manufacturer whose operations resulted in large quantities of that

(1) [1913] 1 K.B. 398 at 413.
(2) [1916] 1 A.C. 57 at 84.
(3) (1872) L.R. 8, Ch. 8 at 12.
(4) (1867) L.R. 5 Eq. 166.

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gas being discharged into the air. Page-Wood V.C. held that it was not an answer to the claim that the product manufactured was of great delicacy and thus liable to injury from a substance which would not otherwise cause damage. In that case, however, as pointed out by Lindley L.J. in *Robinson v. Kilvert* (1), the gas poured into the air from the defendant's works was in itself of an offensive and noxious character, and this was to be distinguished from doing something not in itself noxious which makes the neighbouring property no worse for any of the ordinary purposes of trade.

In *Eastern and South African Telegraph Company v. Cape Town Tramways* (2), dealing with the liability of the Tramway Company for damages caused to the submarine cable of the appellants by the escape of electricity stored by the respondents for the due working of their tramway system, Lord Robertson said in part (p. 393):—

> Now, having regard to the assumptions of the appellant's argument, it seems necessary to point out that the appellants, as licensees to lay their cable in the sea and as owners of the premises in Cape Town where the signals are received, cannot claim higher privileges than other owners of land, and cannot create for themselves, by reason of the peculiarity of their trade apparatus, a higher right to limit the operations of their neighbours than belongs to ordinary owners of land who do not trade with telegraphic cables. If the apparatus of such concerns requires special protection against the operation of their neighbours, that must be found in legislation; the remedy at present invoked is an appeal to a common law principle which applies to much more usual and less special conditions. A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure.

In *Kine v. Jolly* (3), Vaughan Williams L.J. said in part (p. 489):—

> I think we must bear in mind that in these cases, which are conveniently grouped together as cases in which the proper form of action is an action of nuisance, citizens are not to be allowed to enforce rights which limit the user by others of property, unless the facts relied upon as constituting a nuisance are such as interfere with the ordinary rights which according to the ordinary notions of mankind they are entitled to exercise in relation to one another and in relation to their property.

(1) (1889) 41 Ch. D. 88 at 96. (2) [1902] A.C. 381.
(3) [1905] 1 Ch. 480.

The authorities upon this aspect of the law of nuisance appear to me to be accurately summarized in Pearce and Meston on the Law of Nuisance at pages 39, 50 and 51. In my opinion, a person establishing an industry of any nature upon a public highway such as the Provincial Highway in question here, or upon highways the ownership of which is vested in municipalities, upon which, of necessity, maintenance and construction work must be done from time to time in the ordinary course of events, has no right in law to complain of the noise attendant upon the performance of such work on the ground that it is a nuisance and, accordingly, the claim advanced in the present matter must fail.

I do not interpret the Statement of Claim as advancing a claim in trespass. If there was, indeed, some entry upon the respondent's property near the northwest corner, this appears to have been justified under the provisions of s-s. (*d*) of s. 30 of *the Highways and Transportation Act, 1949*. The evidence as to any entry upon the respondent's land for the purpose of turning around is very slight and there is nothing to suggest that any damage flowed from this, as distinct from that resulting from the noise of the operations upon the right-of-way.

There is no suggestion in the evidence that the road making machinery was operated in a negligent manner so that it made more noise than that which ordinarily resulted from its operation. The negligence suggested is that of having operated in that area at the time in question, contrary to their instructions. In these circumstances, and as I think it to be the case that the activities carried on at the time in question were not an infringement by the Crown (and would not have been an infringement on the part of a Municipality) of any right of the respondent, I have difficulty in understanding upon what footing the servants of the Crown might be held liable for performing or directing the performance of the work. I am satisfied that if the plaintiff's claim had been framed in negligence further evidence would have been tendered on behalf of the appellants. As no such case was made against them, I decline to speculate as to the particulars of the negligence which might have been asserted against the appellants, or

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the nature of the defence which would have been raised by them against such a claim, or the evidence that would have been given to support it. I think this case should be disposed of upon the issues raised in the pleadings.

I would allow this appeal with costs in this Court and in the Court of Appeal.

Appeal dismissed with costs.

Solicitor for the appellants: *W. G. Currie.*

Solicitor for the respondent: *A. W. Embury.*