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Present : Branch C.J. and Maartensz A.J.

KATHIRAVALU *et al* v. URBAN DISTRICT COUNCIL,
JAFFNA.

214—D. C. Jaffna, 18,463.

Urban District Council—Acquisition of land—Cutting a drain across plaintiffs' land—Compensation—Enhanced value of land—Ordinance No. 11 of 1920, s. 116.

Where an Urban District Council, in exercise of the powers conferred upon it by section 116 of Ordinance No. 11 of 1920, cut a channel across plaintiffs' land,—

Held, that the plaintiffs were entitled to claim the value of the land taken up by the channel by way of compensation.

The enhanced value accruing to plaintiffs' other land by the cutting of the channel should not be taken into consideration, in assessing the compensation payable to the plaintiffs.

THE plaintiffs sued the Jaffna Urban District Council to recover damages in respect of the action of the Council in cutting a drain across their land. The claim arose from a drain being cut, in exercise of the power vested in the Council by section 116 of the Local Government Ordinance, No. 11 of 1920, in pursuance of a flood outlet scheme to prevent the land in and around Jaffna being flooded during rainy weather. The action was tried on the following issues :—

- (1) Had the Council any right to cut a drain through plaintiffs' lands without having first acquired the necessary land, paying value and damages ?
- (2) Was it necessary for the defendant Council to deepen the water-course ?
- (3) Could not the defendant Council have constructed the channel alongside the public road without causing as much damage to the public ?
- (4) What sum, if any, are the plaintiffs entitled to claim by way of damages ?

The learned District Judge answered the 1st, 2nd, and 3rd issues in favour of the Council, and his findings were not challenged in appeal. The argument in appeal was limited to the question whether plaintiffs were entitled, by way of compensation, to the

value of the land taken up by the drain, and whether the Council was entitled to set off against such value the increase in value of plaintiffs' other land resulting from the cutting of the channel.

Hayley (with *S. Rajaratnam*), for plaintiffs, appellants.

Allan Drieberg, K. C. (with *N. K. Choksy*), for defendant, respondent.

Rajaratnam (in reply).

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March 30, 1926. BRANCH C.J.—

The question that arises for decision in this case is what compensation, if any, is payable to the plaintiffs under section 116 of Ordinance No. 11 of 1920 in respect of the action of the Jaffna Urban District Council in making a drain across the plaintiffs' land.

Section 116 above referred to provides that every District Council may make such drains, sewers, and water-courses as may be judged necessary for the effectual draining of any area within its administrative limits, and, if needful, may carry them through, across, or under any street, and, after due notice, into, through, or under any enclosure or other lands whatever, doing as little damage as may be, and making compensation for any damage done. Under section 225 the District Council may make compensation out of the local funds to all persons sustaining any damage by reason of the exercise of any of the powers vested in the Council. Section 222 names the Court which is to ascertain and determine the amount of the damages payable.

Mr. Hayley for the appellants said that but for *Roderick v. Aston Local Board*¹ he would have taken the point that the Council could not carry a drain "across" the appellants' land, but he cited the case as bearing in other respects on the questions involved.

The case went to trial on the following issues :—

- (1) Had defendant Council any right to cut a drain through plaintiffs' land without having first acquired the necessary land, paying value and damages ?
- (2) Was it necessary for defendant Council to deepen the water-course as shown in preliminary trace as was done by them ?
- (3) If it is held that the tracing and cutting of drainage channel was necessary, could not the defendant Council have constructed the channel alongside the public road without causing as much damage to the plaintiffs ?
- (4) What sum, if any, are the plaintiffs entitled to claim by way of damages ?

The learned District Judge answered issues (1) and (2) in the affirmative. As regards (3) he found that the defendants had exercised a wise discretion in putting the channel where it is at

¹ (1877) 5 Ch. Div. 328.

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present. On the question of compensation he says: "I find that the plaintiffs are not entitled to any damages at present. They are not entitled to the value of the land taken up for the use of the channel. So far as I can see, the value of the land east of the channel has not depreciated. On the contrary, the value of the land on both sides of the channel is steadily going up, both because it has become suitable for dwelling lands and it has been rendered free from floods." He also states: "The flood outlet scheme was a very necessary one. The land in and round Jaffna is flat; and in the rainy weather it is common knowledge that when there is heavy rain for a day or two, as often happens, the lands in and round Jaffna get flooded. The object of the scheme is to prevent these lands being flooded, and the channels are intended to carry away the superfluous water before it can flood the land. The expression 'damages at present' refers to the inconvenience caused the plaintiffs in getting across the channel or drain to a well in the absence of a proper bridge across the drain. I need not consider this aspect of the matter, however, as bridges have now been built and no compensation is now claimed in respect of difficulty of access to the well or for severance generally." In the Court below there were claims for "damages consequent on the land being cut in two" and for "damages resulting from water being drained away from the tanks on which the fields depend for their moisture and for the subsoil of the fields themselves." These claims have been abandoned on appeal. Another point may be shortly disposed of. The learned District Judge held that the correspondence discloses an acquiescence by the plaintiffs in the action of the Council amounting to a gift of the land. I do not think that this finding can be sustained. On appeal the matter thus resolved itself into a claim by the plaintiffs for compensation in a sum representing the market value of the land occupied by the drain. The plaintiffs say that the land taken up by the drain is something under 5 lachams, and that a lacham of land at that place is worth Rs. 1,000. The claim, therefore, is for something a little under Rs. 5,000. The argument on appeal is that the land has for all practical purposes been acquired by the Council, and that the damages should be the same amount as compensation in the case of acquisition, and that no question as to the improvement of the remaining lands can be considered.

The question that remains, therefore, is whether the plaintiffs are entitled to the actual value of the land occupied by the drain irrespective of any question of enhanced value, and if not, how is the amount of compensation for damages, if any, to be arrived at?

It is not necessary for a local authority on a case like the present to purchase the land (see *Roderick v. Aston Local Board* (*supra*), *Thornton v. Nutter*,¹ *Swanston v. Twickenham Local Board*²), but

¹ (1867) 31 J. P. 419.

² (1879) 11 Ch. Div. 838.

in certain cases compensation for the damage sustained by reason of the exercise of the powers conferred by section 116 might be greater than the actual value of the land occupied by a drain, sewer, or water-course. This is apparently not the case here. It was agreed at the appeal that as I would be in Jaffna for the Criminal Sessions I should visit the land, and I did this in company with plaintiffs' counsel and proctor. I was not able to inspect the whole of the drain, but I went over that portion of it lying to the south of the well, access to which is now given by an adequate bridge. The drain is an open one, shallow in most places, and quite dry at the time I saw it, and dry for the greater part of the year. During the dry months the occupiers of land on either side of the drain cross it freely, and it offers no hindrance whatever for much the greater part of its length. Two bridges have been erected by the Council at the only places they appear to be required. In the rainy months the storm water would ordinarily flow practically over the same ground occupied by the drain, but its flow will now be more concentrated. If too there had been no attempt at drainage higher up, it would appear that less storm water would flow over the plaintiffs' land than at present, but in any case a channel would be necessary. It is a little difficult to understand why the plaintiffs object to the present channel, and in the absence of some such system of drainage as that now afforded, it appears to me it might be necessary for the plaintiffs themselves in the interests of public health to drain their land at their own cost. This would be the case even if the Council had done nothing whatever in that area in the matter of drainage on or above the plaintiffs' lands. There can be no doubt, I think, that the surrounding land of the plaintiffs has been increased in market value by the drain in question so far as its value for residential purposes is concerned, and it only requires some further drainage for the paddy field lands to be available for building, to which use they will clearly be put at no distant date. I think, however, that the general enhancement of market value cannot be taken into consideration when determining the amount to be paid the plaintiffs as damage. The damage claimed is, as I have said, the loss of something approaching 5 lachams of land at Rs. 1,000 a lacham. It is somewhat surprising that land in Jaffna, with its comparatively low rental value, should be worth that amount, but there seems to be a keen desire among people in the locality to purchase land for residential purposes, and the evidence of the second plaintiff on the point is as follows:—
 "The value of a lacham is over Rs. 1,000 in that locality. The price of land is going up. The paddy fields there are being converted into dwelling compounds." I am not clear if the learned District Judge has accepted this evidence as to value, and the point can, if necessary, be further considered.

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I think that the case should be sent back to the District Judge for further inquiry and adjudication. If the enhancement of market value which has followed the completion of the present works is left out of consideration the plaintiffs will have suffered some damage, namely, some actual pecuniary loss, and compensation for that loss must be assessed.

Excluding questions of compensation for access to the well and for severance generally and for the loss of water by drainage on the one hand, and excluding on the other hand all questions of enhancement in value of the surrounding land, the damage would be the pecuniary loss suffered by the plaintiffs by the exercise by the Council of its statutory powers. It may be difficult to arrive at a fair assessment, but the attempt must be made. It is to be observed that compensation is only claimed in respect of the construction of the drain shown in the plan in its passage through plaintiffs' land. That drain, as I understand the matter, follows the course of an old drain, save at one place, where there has been a necessary deviation, and the damage may, therefore, only be in respect of the widening and deepening of this old drain and of any deviation. This is a question, however, for the learned District Judge. The matter could, it seems to me, be settled expeditiously and at small cost by arbitration, but that is, of course, a matter for the parties. If they desire to make legal history for the benefit of others in a somewhat similar position, there exist all the elements of a protracted and expensive contest. The learned District Judge who tried the action has all the facts before him, and if the parties do not settle the matter themselves, he will in the light of this judgment reconsider the question of damage. If any statement as to facts by me founded on a view of the *locus in quo* or otherwise is wrong, he can correct it and allow the parties to call fresh evidence on that or any other point. The learned District Judge says in his judgment: "It seems that under the English Act, where an exactly similar provision is made, the English Courts have held that no compensation is recoverable for the land taken for the purpose, and that compensation is only recoverable for damage to property, *e.g.*, damage to buildings, plantations, and the like. See the authorities quoted by Mr. Niles from *Halsbury's Laws of England*." The cases referred to in *Lord Halsbury's Laws of England, Vol. VI., p. 163, paragraphs 246, and p. 172, paragraphs 265 and 266*, do not justify the conclusion that in a case like the present no compensation should be given, and I think too that the enhanced value of the surrounding lands has had its effect on the mind of the learned Judge.

The conditions surrounding the present case are so peculiar that no decided case is likely to be of any material assistance, and as regards certain portions of the drain, it may be very difficult to determine, what damage, if any, has been sustained by reason

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of the exercise of the powers of the Council. There are other parts of the drain, however, where the position is a different one. The truth of the matter probably is that if the Council had anticipated difficulty as regards a claim for damages they would have used other means for bringing the lands into a sanitary condition. Now, however, that the Council has done the work itself, considerations involving compensation must prevail.

As regards costs, the plaintiffs have put forward claims in the Court below which cannot be supported, and three of the four issues were properly decided against them. On appeal all but one of the grounds of appeal have been abandoned, and in the one that remains, namely, the claim to be paid, the whole market value of the land occupied by the drain cannot be sustained. On the other hand, the claim of the plaintiffs to be paid something as compensation has been successful. I would order each party to bear its own costs in the Court below, and give the plaintiffs, appellants, half the costs of this appeal. The costs of any further inquiry will be in the discretion of the learned District Judge.

MAARTENSZ A.J.—

The plaintiffs appeal from a judgment of the District Court of Jaffna dismissing their action for compensation for damage caused to the first plaintiff's land by the defendant Council.

The claim to compensation arises from a channel cut through the first plaintiff's land at Vannarponnai, in exercise of the power vested in the Urban District Council, Jaffna, by section 116 of the Local Government Ordinance, No. 11 of 1920, in pursuance of a flood outlet scheme to prevent the lands in and around Jaffna Town, being flooded during rainy weather.

The catchment area is shown in plan D 9. The District Judge says in his judgment :—

“The natural flow of water is from Adiyarakunallakulam and north of it, southwards through the plaintiff's lands into the Vannankulam. From there the water found its way down to the sea on the south through what appears to have been originally paddy fields. These lands on the south have gradually been filled up and converted into dwelling lands and gardens, with the result that unless proper outlets were made the flood water coming from the upper reaches would find no outlet.”

The execution of this scheme has, as may be expected, taken some years. The scheme was begun by the Local Board of Jaffna, to which the Urban District Council has succeeded.

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In 1919, by letter dated September 20 (D 1), the Chairman of the Local Board, Mr. Constantine, wrote to the second plaintiff regarding a channel through their lands, and by letter D 2, dated November 14, 1921, the second plaintiff agreed to the cutting of the channel, provided the channel south of the hospital road was opened and the channel south of the tank was deepened before the rainy weather set in.

In letters D 4 and D 5, dated October 13 and November 14, 1922, the second plaintiff called attention to the fact that the channel was not cleared. He presumably refers to the channel south of the tank.

The channel complained of was cut on or about July 20, 1923. In June, 1923, the second plaintiff began to prepare the way to a claim for damages. In letter P 2, dated June 22, he contended that the Urban District Council had no power to cut a channel across the land, as under section 116 the Council only had power to make drains below the surface.

The channel across the plaintiff's land had now become necessary.

The District Judge remarks :—

“ From Mr. Berwick's plan D 11 it would seem that in 1915 the water from the tank came down along the channel and lost itself in the plaintiff's fields, and gradually found its way to the Vannankulam. So long as the rain was evenly distributed in the rainy season no harm would result ; on the contrary, as Mr. Tillainather remarked in his evidence, it would be the best thing possible for his fields. But once the flood areas on the north were relieved and the water rapidly filled the tank on the north and ran down the channel, as it must, the condition would be quite different. All the water that originally stood in and around lands on the north would all flow down and submerge the plaintiff's fields and rot their paddy.”

The plaintiffs have not set up a claim for damages on the ground that the channel to the north has increased the flow of flood water on to the first plaintiff's land. It might have been a factor in the present action if the second plaintiff had not agreed to the cutting of the channel across the land in question.

The action was tried on the following issues :—

- (1) Had the defendant Council any right to cut a drain through the plaintiffs' lands without having first acquired the necessary land, paying value and damages ?
- (2) Was it necessary for the defendant Council to deepen the water-course as shown in preliminary trace as was done by them ?

(3) If it be held that the tracing and cutting of a drainage channel was necessary, could not the defendant Council have constructed the channel alongside the public road without causing as much damage to the plaintiffs ?

(4) What sum, if any, are the plaintiffs entitled to claim by way of damages ?

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There is no issue or plea that the first plaintiff acquiesced in the cutting of the channel, and that—to quote the words of the District Judge—“his acquiescence amounts to a gift of the land to the defendant Council for this purpose.”

The learned District Judge answered the 1st, 2nd, and 3rd issues in favour of the Council, and his findings were not challenged in appeal.

As regards damages, the plaintiffs claim (I quote from the judgment) :—

“(1) The value of the land taken up by the channel, which is, roughly, 5 lachams, at Rs. 1,000 a lacham ;

“(2) Damages consequent on the land being cut in two by the channel, rendering the portion on the east (said to be 200 lachams p. c.) inaccessible and uncultivable, and therefore of less value ; and

“(3) Damage resulting from the water being drained away from the tanks on which the fields depend for their moisture, and from the subsoil of the fields themselves.”

The District Judge has found that under head (2) the land east of the channel has not depreciated in value, and that there is no foundation for the suggestion that the channel is responsible for the lands having become less productive ; under head (3) that it has not been proved that the channel is carrying away the moisture of the subsoil.

These findings were not contested in appeal. The argument in appeal was limited to the question whether the plaintiffs were entitled by way of compensation to the value of the land taken up by the channel :—

“The defendant Council admits (I again quote from the judgment of the District Judge) having cut the channel through the plaintiffs' land ; but denies that the plaintiffs have suffered any damage or loss in consequence. It maintains that the channel in question was a necessary one, being part of a scheme for the drainage of the town of Jaffna, and constructed under the advice and supervision of competent Engineers ; and that, far from the plaintiffs suffering damage, these lands which are being rapidly converted into dwelling lands, have been rendered free from floods, and have, therefore, become healthier for residential purposes, and have become more valuable as such.”

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On the question "whether the plaintiffs are entitled to recover the value of the land so taken," the learned District Judge, after referring to section 116, says :—

"It seems that under the English Act, where an exactly similar provision is made, the English Courts have held that no compensation is recoverable for the land taken for the purpose, and that compensation is only recoverable for damages to property, *e.g.*, damage to buildings, plantations, and the like (see the authorities quoted by Mr. Niles from *Halsbury's Laws of England*). It seems to me that our Ordinance also intended to make a similar provision in Ceylon for purposes of public health."

The appellant contends that this proposition cannot be supported, and that he is entitled to the value of the land taken up by the channel by way of compensation, and that the defendant Council is not entitled to set off the enhancement in value, if any, of other land belonging to the plaintiff owing to the cutting of the channel.

Respondent's counsel was unable to refer us to any authorities for the statement that no compensation is recoverable for the land taken. The dismissal of the plaintiffs' action on that ground cannot be supported, and the case must go back for the assessment of damages.

The main question argued in appeal was whether the Council was entitled to set off against the value of the land taken the increase in value of the remainder of plaintiffs' land resulting from the cutting of the channel.

Section 116, under which compensation is claimed, enacts as follows :—

"Every District Council may, from time to time, cause to be made, altered, or extended such main or other drains, sewers, and water-courses as may be judged necessary for the effectual draining of any area within its administrative limits, and, if needful, may carry them through, across, or under any street, or any place laid out as or intended for a street, and (after reasonable notice in writing in that behalf) into, through, or under any enclosed or other lands whatsoever, doing as little damage as may be, and making full compensation for any damage done."

Neither this section nor any other section gives any indication as to how the question should be answered.

The powers vested in the Urban District Council are very similar to the powers vested by section 16 of the Public Health

Act, 38 and 39 Victoria, chapter 55, and section 308 of this Act provides :—

“That where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matters as to which he is not himself in default, full compensation shall be made by such local authority exercising such powers.”

Neither appellants' counsel nor respondent's was able to cite any authority directly deciding the question under consideration, nor have I been able to find any.

The Act has been in force about fifty years, and I cannot but be surprised that there should be no authorities if the principle contended for by respondent's counsel was one which could be set up under the Act.

The absence of authority, in my opinion, indicates that the plea of betterment has no place in a claim for compensation under section 308 of the Act.

I agree with Mr. Driberg's argument that the power exercised by the Council would, but for the provisions of section 116, be a tort, and that the measure of damages is the actual pecuniary loss sustained by the plaintiffs. I am not prepared to accede to the other branch of his argument, that to arrive at the actual pecuniary loss the increase in value of other land belonging to the first plaintiff must be taken into consideration.

I am of opinion that the claim to compensation must be governed by the principles applicable to an action in tort, except that by reason of section 116 the plaintiffs are not entitled to claim vindictive damages or insist on a removal of the channel.

If the plaintiffs had sued the defendant Council in an ordinary action for trespass and damages, the Council, under the Roman-Dutch law, if a *bona fide* possessor, might have set up a counter claim for compensation for improvements, and claimed the cost of the improvement or the difference between the value of the land before and after the improvement was effected, whichever is less, *Pereira on Compensation*, p. 48. The Council cannot possibly be deemed a *bona fide* possessor.

Even if the Council is a *mala fide* possessor, it could claim compensation for useful improvements if the owner stood by and allowed the improvements to proceed without any notice of his own claim. *Pereira*, p. 62. Otherwise he can only take away such improvements as can be removed without detriment to the property. *Ibid.* 44.

The English Common law would appear to draw no distinction between a *mala fide* and a *bona fide* possessor as regards the right to compensation for improvements. Both are equally disentitled.

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But when the owner of property stands by and allows the improvements to proceed, equity interferes and gives the necessary relief, *Pereira, p. 34 ; Mayne on Damages, p. 527.*

Claims to compensation for improvements arise both in English law and in the Roman-Dutch law in actions for the recovery of possession and mesne profits. Even if they were applicable in an action for damages for injury to the land, it cannot be said that the plaintiffs stood by and allowed the Council to incur the expenditure, for by letter P 2, dated June 22, 1923, the second plaintiff objected to a channel being cut on the surface of the land.

In an ordinary action the defendant Council would not be entitled to set up a claim for compensation.

There are, as I have stated, no decisions under the Public Health Act regarding "betterment." But there are two cases under the Land Clauses Consolidation Act with reference to 63 of the Act, in which claims in the nature of betterment were rejected.

This section provides that :—

" In estimating the purchase money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith."

The cases are (1) *Senior v. The Metropolitan Railway Company*¹ and (2) the case of *Eagle v. The Charing Cross Railway Company*.²

In the earlier case Bramwell B. said at page 229 :—

" But I understand it is now suggested, on the part of the company, that although the obstruction may have caused a temporary loss to the plaintiff, it may still turn out that ultimately there will be a benefit to the premises. I much doubt whether the company is entitled to a set-off of that description. Suppose the case of a tenant from year to year, or for a term of years, whose term happened to be co-extensive with the obstruction, is he to get no compensation for the loss sustained by him during his term? Or take it in another way. Suppose a man has two houses, one injured by the company's works, and the other benefited. Is he to get no compensation for the one injured? It appears to me that the principle of set-off contended for is unsound."

¹ (1863) 32 L.J. Q. B. 225.

² (1863) 36 L. J. Common Pleas 297.

In the later case the umpire found the plaintiff had suffered damage from the diminution of light to the house resulting from works erected by the Railway Company, but that the saleable value of his interest in the house was not diminished. It was contended that this means that there is no damage to the message or premises.

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Bovill C.J. said at page 303 with regard to that contention :—

“ It cannot be said to my mind, consistently with justice, that a man’s damage is to be ascertained with reference to what he could sell his property for. He may say, I do not desire to part with it. The whole finding seems to me to have reference to a totally different matter, and this point was probably raised at the request of the company, to obtain a decision upon the question whether saleable value was the test of compensation or not. In many cases, with regard to old properties, where the value depends on the site, I can quite understand that you might damage the houses, as then erected, and yet the property would sell for the same amount whether the obstruction existed or not. I think that is not the test.”

Montague Smith J. at page 306 said that the saleable value may be a test in ascertaining the true amount of damage, but that it is not the only, and certainly not a conclusive, test. He added : “ A man is not to be driven to sell his property before he can ascertain whether he is entitled to compensation or not.”

The rulings in these cases confirm my opinion that such a claim could not be made under section 116 of Ordinance No. 11 of 1920.

Mr. Driberg in his argument referred us to the provision of section 26 (6) of the Land Acquisition Ordinance of 1876, which enacts that the judge or assessor shall not take into consideration in determining the amount of compensation to be awarded any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put, and asked us to draw from the absence of such a provision regarding compensation for damages under section 116 the inference that the Legislature intended that the enhanced value of the land should be set off against any damage to it.

I find it impossible to hold inferentially that the Legislature intended to set off against a claim of damages for injury to a land the increase in value of the remainder of the land or other land belonging to the person injured resulting from that injury. Such a claim as I have pointed out could not have been set up in an ordinary action, and if the Legislature intended to depart from the ordinary rules I would expect it to say so in express terms.

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I am of opinion that the defendant Council is not entitled to set off the increased value, if any, of the remainder of the plaintiff's land resulting from the cutting of the channel.

As regards the amount of damages, Mayne lays down that "where there has been a total deprivation of land the damages of course are such as will indemnify the plaintiff for the loss of his property." *Mayne on Damages, p. 520.*

The learned District Judge has not assessed the damages, and I set aside the decree and remit the case to the District Court for the purpose of further inquiry and adjudication on the issue of damages. This does not appear to be a case in which compensation is payable on an acquisition. A right to some compensation has been established, and what that compensation should be must be left to the District Judge.

The plaintiffs should have the half costs of appeal. I would order each party to pay his own costs in the District Court. The costs of the further inquiry will be in the discretion of the District Judge.

Decree set aside.

Case remitted.

