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MADRAS RECORD OFFICE

GOVERNMENT OF MADRAS

Revenue DEPARTMENT

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2147

From H. G. RICHARD, Esq., Government Solicitor, to the Secretary to the Board of Revenue,
dated Madras, 30th October 1874, No. 567.

I HAVE the honor to acknowledge the receipt of the Proceedings of the Board of Revenue, dated 3rd October instant, together with its enclosure, requesting the views of the Advocate-General on the existing state of the law with regard to danger to Railways from Irrigation works in private estates.

2. I submitted the matter for the consideration of the Advocate-General, and know forward, herewith, a copy of his opinion.

ENCLOSURE No. 1.

OPINION.

THE law as to the responsibility of the owner of a tank for damage occasioned to surrounding property by the bursting of the tank was discussed and laid down by Judges of the High Court in Madras Railway Company *versus* Zemindar of Carvatinagar, 5 Mad. H. C. R. 139, 6 Mad. H. C. R. 180; and the decision in that case has been affirmed by the Privy Council (Mad. Jurist for October 1874). The general result of these rulings is that the storing of water in tanks is so natural and necessary a proceeding in this country, that a person who does so will not, in the absence of proof of negligence on his part, be held responsible for accidental injuries to his neighbors, arising from such storage. "It appears to me," said Mr. Justice Innes, "that in this country that which the State has taken upon it to maintain, it has impressed with the character of lawfulness; and although the maintenance of it may be in some particular circumstances dangerous to the interests of private persons, it is by the character which the State, acting for the community, has impressed upon it, removed from the class of dangerous and noxious things which a man brings and keeps at his peril whether (as expressed by Blackburn J. in *Fletcher versus Rylands* L. R. 1 Ex. 280) the things so brought be beasts or water or filth or stench," and is properly placed on a footing with the class of dangerous trades and occupations in England, for which there is legislative sanction. In such cases what is authorized to be done, must be done in a careful manner. That is the whole of the obligation. "In other words negligence, causing damage, gives a cause of action, but unless there be negligence, there is no action for damage caused by acts within the scope of the express or necessarily implied authority conferred by the law." The same view of the liability of the owner appears to have been adopted by the Privy Council; their Lordships referring to *Vaughan versus The Taff Railway Company*, 5 H. and N. 679.

2. The question as to what constitutes "negligence" must of course be decided with reference to the facts of each particular case; but it has been defined generally as the doing of something which a reasonable man would not do, or the omitting to do something which a reasonable man would do under the circumstances.

3. Supposing a mishap to have occurred, the owner, to whose negligence it is attributable, would, of course, be liable under Section 283 of the Indian Penal Code.

4. The next question is as to the course to be pursued by Railway Companies in cases where danger from irrigation works is apprehended. The procedure provided in Chapter 39 of the Criminal Procedure Code will, it is probable, be found sufficient in ordinary cases to secure necessary precautions being carried out, and a prosecution might be maintained under the Section of the Penal Code just mentioned for omitting to take order with property in a man's possession or under his charge, and thereby causing danger to a person in a public way, which, I presume, the Courts would deem a Railroad to be. If it is desired to have recourse to a Civil Court, it would no doubt be held good ground for relief that the defendant's tank was in such a condition as to endanger the plaintiff's road, and to involve risk of life to the public at large.—*Goldsmid versus Tunbridge Wells improvement Commissioners*, L. R. 1 Equity 167, and 1 C. A. 350. "The interference of the Court," it was said in that case, "in cases of prospective injury, depends very much on the nature and extent of the apprehended mischief and upon the certainty or uncertainty of its arising or continuing;" no mischief could appear from its nature, extent and the likelihood of its occurrence, to call more imperatively for the interference of the Court than

proceedings were very judicious, and the Board trust that the works have by this been carried out. The Collector is requested to report on this point.

5. The subject has for some time engaged the attention of the Collector of North Arcot, and he has been endeavouring, but without much success, to get the proprietors to repair their tanks. He has in some instances found notices under Chapter 39 of the Criminal Procedure Code effectual; but he expresses doubts whether provisions of that enactment are applicable, unless when the danger is actually imminent or the work so bad as to make it a public nuisance. He points out that it is advisable that there should be summary power of interference before matters come to this point, and considers legislation desirable. As regards advances under the Land Improvement Act, he states that the security would in very many cases be bad, and suggests consideration whether Government should not interfere and advance the money necessary, even if the owners decline to borrow under the Act.

6. From the Advocate-General's opinion, there seems to be ample remedy, civil and criminal, after the event, since the omission to provide proper escape for surface water would probably be held to be such negligence as would make a man responsible, but the only mode of interference when danger is only apprehended is action by the Magistrate under the chapter of the Criminal Procedure Code, which has been put in operation by the Collector of North Arcot, and a Civil proceeding for an injunction. Mr. Cunningham, however, also suggests express legislation.

7. So far as the railway is concerned, the Board think that the danger shown by their reports, is not sufficiently great to warrant exceptional legislation, but this, if called for at all, is required more for the protection of Government works and irrigation which are endangered by the insecure condition of private tanks discharging into them. Government have recently issued instructions for dealing with such cases.

G. O., dated 25th June 1874, No. 1,721, para. 4. and the effect of these orders should be awaited. Further, it is difficult to say what form the new legislation should take. It would probably make action dependent upon the recorded opinion of the Collector and District Engineer, and would involve expenditure which they might incur recoverable as arrears of revenue. But it is likely that the legislature would authorize action upon the mere opinion of interested officers, and it would probably be required that this opinion should be fortified by the concurrence of a jury (as in the case of Magistrates under the Criminal Procedure Code) or of a Civil Court. In this case, acting otherwise than on sudden emergency, or of a Civil Court. In this case, the procedure would be scarcely more expeditious than a suit for injunction, which is now open to Government to file; and if it were in any case necessary to incur immediate outlay to avoid danger, such could probably be recovered through a Civil Court under the existing law.

8. The Board submit, therefore, that express legislation is not immediately advisable or necessary.

(A true Extract.)

(Signed) H. E. STOKES,
Acting Secretary.

No. 482.

ORDER THEREON, 21st September 1875, No. 2,724.

CIVIL WORKS, No. 32-C.

THESE papers contain the result of a reference made to Collectors of Districts traversed by railway lines, in G.

No. 535, of 28th February 1872, to obtain the repair by their proprietors of all private tanks above the railway lines, the state of which was defective. A reminder on the subject was conveyed in G. O., No. 2,511, of 4th September 1874.

2. It is observed that no returns have been made by the Collectors of South Arcot, Madura, and Tinnevely, through which the South Indian extension runs; these will now be called for by the Board of Revenue. The Collector of Cuddapah should not rely only on the District Engineer to bring to his notice the existence of private tanks above the railway line; the agency at his own disposal should be competent to inform him on the subject. The Collectors of North Arcot and Salem appear to have taken such action as was required by the number and condition of the private tanks affecting railway lines in their districts. The Government are distinctly of opinion that the absence of calingulabs constitutes "negligence," as defined by the law; and direct that the owners of tanks in such condition be formally warned of the liability which they incur.

3. The subject is one on which constant attention should be bestowed by Collectors and District Engineers, not only on account of the safety of railways, but also, as pointed out by the Revenue Board, with reference to the security of Government Irrigation Works, which latter are, it is presumed, being systematically inspected, reported on, and repaired under the orders of the Chief Engineer for Irrigation. His Excellency the Governor in Council agrees with the Revenue Board in thinking that exceptional legislation is not called for. Chapter 39 of the Criminal Procedure Code is considered by the Advocate General as applicable in certain cases, and has apparently been resorted to with effect by the Magistrate of North Arcot; and if the instructions of G. O., No. 1,047, of 15th April 1875, are properly carried out, there should be no difficulty in affixing such liability as will enable the Railway authorities to sue for damages in future with success.

(True Extract.)

Major-General, R.E.,
Secretary to Government.

To the District Engineer, Cuddapah.
" " Bellary.
" " Presidency.
" " Chingleput.
" " North Arcot.
" " South Arcot.
" " Salem.
" " Bangalore.
" " Tanjore.
" " Trichinopoly.
" " Coimbatore.
" " Madura.
" " Tinnevely.
" Chief Engineer for Irrigation.
" Consulting Engineer for Railways.
" Board of Revenue.
" Revenue Department.

Exd. S. T. Austin.

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Govt. of Madras

PUBLIC WORKS.

THE DISTRICT ENGINEER,

CUDDAPAH.

&c. &c. &c.

Dated September 21st.

Received

Recd.

60th 7th

Encl.

G. O., 21st September 1875, No. 2,724.

SEPTEMBER.

Nos 481-482

Tanks belonging to private proprietors and commanding Railway lines in the Madras Presidency.—Passing orders on Proceedings of the Board of Revenue reviewing and submitting to Government with remarks the reports of Collectors of Districts traversed by Railway on the state of the law regarding proper maintenance and on the general condition of —

N: 2147

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12 Oct 75

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