The objection, therefore, to the magistrate's jurisdiction cannot, in my opinion, be upheld.

(On the merits his Lordship agreed with the JUDGE-PRESIDENT.)

CURLEWIS, J., concurred.

[A. D.]

JOHANNESBURG MUNICIPALITY v. JOLLY.

1915. *September* 8, 10, 27. CURLEWIS and GREGOROWSKI, J.J.

Negligence.—Construction of drains under statutory authority.—Diversion of rain water.—Damages to property.—Liability.

A municipality acting under statutory authority constructed drains and thereby diverted rain water from its natural course. After a heavy fall of rain the water overflowed the drains and caused damage to lower lying property, *Held*, that the municipality was not liable unless the construction of the drains placed a greater burden on such property either as regards the quantity, velocity or direction of the water which in the ordinary cause of nature would have flown over the property.

Appeal from a decision of the magistrate of Johannesburg.

The respondent, plaintiff in the lower Court, sued the appellant, defendant in the Court below, for £53 damages on the ground:—

(1) That she was the owner of stands Nos. 1483, 1485 and 1487 at the corner of First Street and Second Avenue, Bezuidenhout Valley.

(2) That the defendant constructed a road with guttering and kerbing in First Street.

(3) That by reason of the faulty, negligent, inadequate and unskilful construction of this guttering and kerbing, and the diversion of the natural flow of the surplus rain thereby occasioned the plaintiff's garden, well and premises were flooded on the 13th November, 1913, and the damage claimed was thereby caused.

The appellant admitted that respondent's property had been flooded and damaged, that guttering and kerbing had been put in First Street, and that by the construction of First and other adjacent streets and of drains and culverts therein the natural flow of storm water was diverted "in the public interest," and pleaded (1) "that the work was done under statutory powers that it was properly done and was "reasonably adequate to contain the flow of

storm-water along the said street, and that the flooding was not due to the diversion of storm-water aforesaid."

(2) "On the date mentioned a part of the defendant's kerbing on the east side of First Street was, owing to an abnormal storm, broken down causing the water to escape from the gutter, and the said kerbing having been properly and skilfully constructed the defendants are not liable for any damage caused to the plaintiff's property by the water which so escaped," and alternatively.

(3) "On the date mentioned there was an abnormal storm, and the defendants having made reasonable provision in First Street for the conveyance of a normal storm of water along the said street, they were not liable to the plaintiff for damage caused to her property owing to an abnormal flow of storm-water for which they were not bound to make provision.

The magistrate gave judgment for the respondent for the amount claimed, with costs, on the ground that (1) the municipality constructed a surface drainage system for the neighbourhood which had the effect of diverting into First Street the drainage from about three acres at one point and two acres at another point; and (2) Owing partly to miscalculation and partly to an under-estimate of rainfall which might reasonably be expected, although rarely, to occur, the gutter made by the municipality was inadequate to carry off the diverted water, and in consequence it overflowed on to the plaintiff's property and caused the damage complained of.

From this judgment the defendant appealed.

R. Feetham, for the appellant.

M. Nathan (with him *L. Greenberg*), for the respondent.

Cur. adv. vult.

Postea (September 27):—

CURLEWIS, J. (after stating the facts as above): The magistrate, in a very full and able judgment, has stated what his view is of the law as regards the rights and duties of a person who constructs drains and diverts rain-water from its natural course, and has then, after an exhaustive review of the evidence and circumstances of the case, applied the law as understood by him to the facts as found by him.

It will be convenient to deal with the law and facts in the same order as the magistrate has done. With the general statement of the law as laid down by him I in the main concur, based as it is on

the various decisions of South African Courts quoted by him. However, in considering the law in connection with the present case, he expressed himself thus:—"The mere fact that the gutter along the east side of First Street overflowed does not in itself establish that the defendant is liable; because it is common cause that this gutter crossed the flow of water which in its natural line of flow would have gone on across the plaintiff's property, and to the extent to which the guttering did intercept and carry off that water it would obviously be a benefit to the plaintiff's property even if it overflowed. On the other hand, if the gutter would have been sufficient to carry off all the water which in its natural line of flow would have gone over the plaintiff's property, and it overflowed on to plaintiff's property because it was inadequate to carry off also the extra water which the drainage system put down by the municipality had diverted into it, then it appears to me to be no defence to prove that if no guttering had been put in at all the natural flow of water over the plaintiff's property would have caused as much damage. Once it is established that storm-water was diverted into this gutter I do not think the municipality is entitled to say that as much damage would have been done to the plaintiff's property if no guttering at all had been done."

"I think, on the contrary, that in that event the municipality is bound to make adequate provision for the diverted water being carried off without flowing over the plaintiff's property, and that that duty is not discharged by providing a gutter adequate only to carry off the water which flowed into it from the natural drainage area above it, or not adequate to carry off also the diverted water. Shortly, if the natural drainage would fill the gutter, then there would, as regards the diverted area, be in effect no gutter. I have stated this view at some length, because, if it is wrong, I think the defendant is entitled to judgment, as on the evidence it appears to me to be plain that if no guttering at all had been made in the neighbourhood about 25 to 30 cubic feet per second would have flowed on to the plaintiff's property, which is certainly greatly in excess of what flowed on to it on the occasion in question. On the other hand, I think it is established in this case that the overflow on to the plaintiff's property was approximately equal to the amount of water from the diverted area."

I do not think the magistrate has correctly stated our law where he says that it is "No defence to prove that if no guttering had been put in at all the natural flow of water over the plaintiff's pro-

perty would have caused as much damage," and " when once it is established that storm-water was diverted into this gutter I do not think the municipality is entitled to say that as much damage would have been done to the plaintiff's property if no guttering at all had been done." Indeed this seems somewhat inconsistent with what he states almost immediately afterwards, viz.: " The fact that the municipality has made and guttered a street does not in itself make the municipality liable if the gutter overflows, so long as so much water as was taken off by the gutter diminished the amount which would otherwise have flowed over the damaged property."

The municipality has power under the statute to make and construct streets and drains, but is not bound to do so. It is under no obligation to construct drains so as to protect the respondent's property from rain-water which in its natural course would flow over her property.

It is entitled to construct drains and thereby divert water from its natural course, and it will not be liable if thereby no greater burden be placed on the respondent's property either as regards the quantity, velocity, or direction of the water which in the ordinary course of nature would flow over her property; in other words, the municipality will not be liable if by its works the respondent's position has not been made worse than it otherwise would have been had no works at all been constructed by the municipality; if the respondent's position has not thereby been changed for the worse. In *Henley* v. *Port Elizabeth Town Council* (4 E.D.C. 303) the defendants were held not liable for damages for the flooding of the plaintiff's house as the natural rush of water to the house was not greater, but on the contrary, less, after the construction of the road, than it was before such construction. In his judgment DE VILLIERS, C.J., said (p. 304): " It is true that they made a roadway at a higher level than the plaintiff's building, but notwithstanding the evidence given by some engineers on behalf of the plaintiff, I am quite satisfied that the roadway, so far from throwing any additional water on plaintiff's premises, had the effect of carrying off water which would otherwise necessarily have flowed down to them along the slope of the hill," and after having pointed out that the damage was caused by the manner in which the building was erected, he said: " The defendants are not bound to construct such a complete system of drainage that no possible injury can be done by flooding to any building, no matter where it may be erected. The plaintiff erected his building in such a manner and

on such a site that in the course of nature they would necessarily be exposed to flooding. The defendants by their roadway carried off some of the water which would otherwise flow to the plaintiff's land, and if they have not succeeded in carrying off every drop of that water, they cannot on that account be held liable to damages."

The principle that a person who diverts water is liable only for the damage caused by the additional burden thereby placed on another's property was recognised in the case of *Kohne* v. *Harris* (16 S.C. 144) where in dealing with the question of damages DE VILLIERS, C.J., said (page 147): "The plaintiff has sustained considerable damage, but it is not quite clear that all the damage which he has sustained was caused by the defendant's water. It is quite probable that with the rainfall there may have been some other water in what is usually a vlei in winter, but not to the same extent as it was with the defendant's water running there. But in winter a certain portion of plaintiff's land does become a vlei—a smaller portion of the land. Still in consequence of defendant's conduct that vlei was larger this season than it usually was, and I think that upon the whole we may take it that £25 fairly represents the damage which the plaintiff has sustained by reason of the neglectful manner in which defendant has done this work."

We find this principle in *Voet* 39, 3, 2, where, after stating that no one may discharge water on to the property of another unless he has a servitude, he says: "*Adeoque perperam agat, si opere manufacto vel etiam plantatis aut positis salicitis efficiat, ut aqua in vicinum praedium influat; aut, cum natura influeret, major jam sit, aut citatior, aut vehementior aut magis compressa, aut corrivata, aut fordibus spurcata, atque ita vicino noceat.*" In section 5 he says: "*Nec denique*" (*i.e.*, the action does not lie), "*si non tam aqua, quam potius ipsius loci natura noceat.*"

From the two English decisions to which we have been referred by Mr. *Feetham*, this would appear to be a principle also of the English law. In *Workman* v. *Great N.R. Coy.* (32 L.J. (N.S.) Q.B. 279) COCKBURN, C.J., said: "If the water had flowed in its natural course it would have caused £72 10s. 0d. damage to plaintiff, and in consequence of the diversion by defendants the plaintiff has not only sustained that amount of damage but £145 10s 0d. more. In estimating the amount of damage resulting from the act of the defendants, we must take into account what would have been the damage which in the ordinary course of nature would have been occasioned by such a flood as must necessarily have occurred.

Taking that to have been ascertained by the arbitrator, I think that ought to be deducted from the total amount of damage." In *West Cumberland Iron and Steel Co.* v. *Kenyon* (11 Ch.D. 782) on an appeal from a decision of FRY, J., the law is put by JAMES, L.J., thus (p. 786): "Now, Mr. Justice FRY seems to have thought that if once a man appropriated water . . . that the moment he had done something by which the water became collected in his hollow, then he became bound to discharge that water in such a way that it would never reach his neighbour's land. I am not aware that there is any principle or any authority for that proposition. I have always understood that everybody has a right in his own land to do anything with regard to the diversion of water, or the storage of water, in any way he chooses, provided that when he ceases dealing with it on his own land, when he has made such use of it as he is minded to make, he is not to allow or cause that water to go upon his neighbour's land so as to affect that neighbour's land in some other way than the way in which it had been affected before. That is the common use of water. But unless his neighbour receives that water in some different way or quantity from what he has done before . . . . provided that when he has finished doing so he does not increase the burden upon his neighbour." And BRETT, L.J., put it in this way (p. 788): "The plaintiffs proved that defendants used their property otherwise than in the natural manner necessary to give them the due enjoyment of their rights of ownership and otherwise than in the regular course of mining; but they have failed to prove that any greater burden was thrown upon their land than it would have had to bear if the defendants had done nothing . . . . Therefore agreeing with Mr. Justice FRY as to what I believe to have been his finding, namely, that no larger quantity of water came to the plaintiffs land, then, if no shaft had been made, I differ from his view that the defendants having once intercepted the water were not at liberty to let it go again."

If I am correct in the view which I take of our law on this subject, it would follow from what I have quoted from the magistrate's judgment that there should have been judgment in favour of defendant, because the magistrate has found that it appears to him "plain that if no guttering at all had been made in the neighbourhood about 25 to 30 cubic feet per second would have flowed on to the plaintiff's property, which is certainly greatly in excess of what flowed on to it on the occasion in question." He found, as a fact,

that the overflow from appellants gutter in First Street immediately above the respondent's property was to the extent of 2·60 or 8·70 cubic feet per second, and that it was this overflow which ran on to respondent's property and caused the damage complained of. So that indeed though the appellant's works were an actual benefit to respondent by reducing the natural flow of water over her ground from, say, 25 cubic feet per second to, say, 8·70 cubic feet per second (taking the figures most favourable to respondent), if the magistrate's view of the law is correct, she would none the less be entitled to claim damages from appellant. Had the magistrate found that the smaller volume of water which overflowed from appellant's gutter came on to respondent's ground with greater velocity than, or in a different direction from what, the larger volume of water would have come on to her ground in the natural course of things, it might be otherwise, because it is quite possible for a smaller body of water flowing in a concentrated form with great velocity, or from a certain direction, to do more damage than would a larger body of water flowing less rapidly and spread over a greater surface. But he does not find this; on the contrary, he apparently came to the conclusion that if respondent had made no streets or drains in the vicinity the respondent would have suffered even greater damage than she actually did on the occasion in question.

It is this feature of the case that has caused me considerable difficulty, and in which, I must confess, I have not been able to come to a decision without some hesitation, because there is much to be said for Mr. *Nathan's* contention that the magistrate has erred on this point of fact, and that if that be so, his decision should nevertheless be upheld.

Dealing now with the magistrate's finding of facts. I see no reason to question the magistrate's finding on the following facts: (1) That the municipality by the construction of the streets and drains in that locality diverted down First Street into the gutter adjoining respondent's property water which in its natural line of flow would not have crossed respondent's property, and that the water diverted by the upper dish drain was to the extent of about 3 acres of ground, and by the lower dish drain to the extent of about 2 acres.

This latter diversion does not appear to have been of much importance in so far as it concerns the damage which respondent sustained, because the magistrate found that the damage was caused

not by an overflow at the south dish drain, which diverted the water from the two acres, but by the overflow below the north dish drain and immediately above respondent's property. (2) That the rainfall on the occasion in question was such as might reasonably have been expected, although rarely to occur. (3) That the kerbing of the east gutter in First Street was not badly constructed and that the breaking of the gutter was caused by the overflow washing away the earth behind it and that the overflow did not result from the breaking of the gutter. (4) That the flooding of respondent's property was due not to water coming from the stands situate to the north of the property and east of the east gutter in First Street, but to the overflow from the gutter at or below its junction with the north dish drain and above the northern boundary of stand 1483 and that this overflow was due to the gutter being inadequate to carry off the volume of water on the occasion in question. And I do not think it necessary to resort to such a close calculation of figures, as the magistrate has done, in order to support this conclusion. The principal washaway was from the north-west corner of stand 1483 along the boundary, and it then spread over the garden. This appears clear from the evidence. The sluit washed out in that stand was from 18 inches to 2 feet deep. Along the northern boundary of stand 1483 respondent had erected a corrugated iron fence from 1 foot to 18 inches high and had a trench made to the north of the iron fence to protect her ground from water that might come over the vacant stand adjoining her stand 1483 on the north. According to the evidence the water on the 13th November came partly over and partly under this iron fence. The slope of the ground north of respondent's property is from north-west to south-east, so that water falling on the stands north of respondent's property and east of the gutter would tend to run in a south-easterly direction and would be only an insignificant quantity at the north-west corner of respondent's property and wholly insufficient not only to fill the trench on the north of stand 1483 and to run over the iron fence of 12 or 18 inches. It could not possibly have had the force to do the damage in the upper part of stand 1483 testified to. And not only did the water come over this fence in the northern boundary, but it also came in at the north-west corner, and just below the north gate in the west boundary.

On the other hand, we have the fact that the east gutter in First Street collected and diverted water which would otherwise have

flowed east of respondent's property by way of Bezuidenhout Avenue or in the natural slope of the country, that the north dish drain also collected and diverted into the east gutter water which would have flowed west of respondent's property, that there was thus a mass of water concentrated at the junction of the dish drain and the east gutter, and that the water overflowed the side walk on the east of First Street to such an extent that it washed away a portion of the side walk and kerbing. [His lordship dealt with a portion of the evidence and continued]:

I, therefore, have no hesitation in agreeing with the finding of the magistrate that the washaway was caused not by water from the stands to the north of respondent's property and east of the gutter in First Street, but by water which overflowed from the gutter in First Street and ran across the sidewalk and the south-western portion of stand 1484 and on to respondent's ground. The probabilities are all in favour of that view.

Dealing now with the finding of the magistrate that if no guttering at all had been made in the neighbourhood a body of water would have flowed on to respondent's property on this occasion far in excess of what actually did overflow from appellant's drains, 25 to 30 cubic feet per second as he finds; this has perplexed me not a little, because I find some difficulty in following the magistrate here, a difficulty which is not lessened by the fact that the magistrate is so positive on this point or by the unsatisfactory manner in which the evidence has been recorded in this case. The magistrate says: "It is common cause that this gutter (*i.e.*, along the east side of First Street) crossed the flow of water which in its natural line of flow would have gone on across the plaintiff's property, and to the extent to which the guttering did intercept and carry off that water it would obviously be a benefit to the plaintiff's property even if it overflowed," and as regards the greater excess of water which would have flowed over respondent's ground he says that from the evidence this appears to him to be "plain."

I do not find it so clear from the evidence that, before the construction of appellant's roads and drains, the rain water would in its natural course have flowed over the respondent's ground to the extent stated by the magistrate. Moreover it does not appear so clearly that in the natural condition the water would not have spread over a larger area, or that it would come on the respondent's ground in such a concentrated mass, and have done such damage, as it did on this occasion. [His lordship further discussed the evidence.]

The magistrate, in dealing with the natural flow of the water in this locality, says, in his judgment: "The slope of the neighbourhood is N.W. to S.E., but there is slight depression of the ground from a kloof in the koppies to the north, running south, broadening out as it goes south, which, when the ground was in its natural state threw a greater amount of water across the plaintiff's stands than if the ground were an even slope from N.W. to S.E." And again: "The water from the kloof and from ground both to the N.E. and N.W. of stands came down First Street. To some extent this water broke at the corner of Bezuidenhout Avenue, but some of it supplemented by water coming from the N.W. and joining behind that point continued down First Street in a natural sluit. This sluit occasionally overflowed so that the overflow following the natural line of flow came across the plaintiff's stands."

It is not easy to follow the evidence as recorded when one has not personally heard the witnesses and is not acquainted with the locality, and the magistrate has commented on the evidence as to the area of diverted "foreign" water and has come to the conclusion that the area must be taken as three acres, this being the amount of "foreign" water diverted by the gutter along the east side of First Street, water which otherwise would have flowed to the north-east or north west of respondent's property. The magistrate finds it as established that the overflow on to respondent's property was approximately equal to the amount of water from the diverted area. [His lordship again dealt with the evidence.]

I find it difficult in this conflict of evidence to say what actually was the position before the respondent constructed any work in the locality. It is possible that respondent's witnesses may be correct that a furrow ran right down the west side of First Street, and that this represents the "foreign" diverted water which has been diverted by appellant into First Street and which the magistrate found was to the extent of three acres area, and that of the balance of seventeen acres drainage seven acres ran along Bezuidenhout Avenue. But if so, then at least seven acres of drainage must have flowed down First Street and crossed it diagonally to the S.W. across stand 1484 and respondent's ground. I was at first inclined to the view that the magistrate erred in holding that a quantity of water far in excess of what actually flowed over respondent's ground on the 13th November, 1913, would have flowed over her ground in the natural course of things had appellant constructed no works in the vicinity, but after a very careful perusal and consideration of

all the evidence in this case, I am not prepared to say that there is not sufficient evidence to justify his finding.

Under these circumstances I have reluctantly come to the conclusion that we would not be justified in reversing the magistrate's finding on this question of fact, I say reluctantly because if we reversed his finding on this fact the judgment in her favour would stand, in part if not entirely, and because I feel that the appellant in adopting the policy of concentrating so much drainage on the east side of First Street in order to have the expense of the culvert lower down, introduced a new agency which could easily become a source of danger to respondent's property and cause her greater injury than she would have suffered had the natural flow of storm water not been interfered with, though it may be difficult of proof.

The appeal must, therefore, be allowed with costs and the judgment of the lower Court altered into one in favour of defendant with costs.

GREGOROWSKI, J., concurred.

Appellant's Attorneys: *Lance & Hoyle;* Respondent's Attorneys: *Gregorowski, Scheuerman and Knox-Davies.*

[J. M. M.]

REX v. SHAMOSEWITZ AND SCHATZ.

1915. *August* 23, *September* 28. DE VILLIERS, J.P., WESSELS and MASON, JJ.

Criminal law.—Procedure.—Indictment against partners.—Insolvency Law.—Inconsistent allegations.—Sec. 120, *Criminal Procedure Code.—Sections* 146 (*a*) *and* (*b*) *and* 147 *of Law* 13 *of* 1895.—"*Insolvent.*"—*Books of insolvent kept by bookkeeper.—Admissibility against insolvent.*

Where an accused person was charged with contravening section 147 (*a*) and (*b*) of Law 13 of 1895 it is unnecessary to set out in the indictment the manner in which the fraudulent dealing was carried out.

An indictment is good which charges an accused person with contravening section 146 (*a*) of Law 13 of 1895 in that he "alienated, embezzled, concealed or removed" property belonging to the insolvent estate over the value of £10 with intent to prejudice his creditors, and also with contravening section 146