

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Isaie Frechette v. La Compagnie Manufacturière de St. Hyacinthe from the Court of Queen's Bench for Lower Canada, in the Province of Quebec; delivered 24th November 1883.*

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Present:

LORD WATSON.  
SIR BARNES PEACOCK.  
SIR ROBERT P. COLLIER.  
SIR RICHARD COUCH.  
SIR ARTHUR HOBHOUSE.

The parties to this suit are owners of contiguous lands on the left bank of the River Yamaska; the Plaintiffs, who are the Respondents, being the owners of the upper lands, and the Defendants, one of whom is the Appellant, of the lower. The complaint is that the Defendants have lately erected a barrier which prevents the water flowing in due course from off the land of the Plaintiffs.

To understand the position of affairs it is convenient to refer to a plan put in by the Defendants. Prior to the year 1878 matters stood as follows;—The whole river was traversed by a dyke marked A, which conducted the water to a mill (No. 4) belonging to the Plaintiffs. After working that mill the water escaped into the natural channel of the river, and was not diverted again by the Plaintiffs until nearly 100 yards below Mill No. 4, where it reached the head of

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another dyke (Dyke No. 1), which was built near and nearly parallel to the left bank, and which caught a portion of the stream and carried it to another mill (Mill No. 1) belonging to the Plaintiffs. The rest of the stream was caught by a dyke (Dyke No. 3), the head of which was in mid-channel opposite Mill No. 4, and which conducted the water to the Defendants' Mill No. 3. The water escaping through the tail race of Mill No. 1 also descended to Mill No. 3, but how it was used there, if used at all, does not clearly appear. Early in the year 1878 the Plaintiffs carried Dyke No. 1 up the river to a point above the head of Dyke No. 3, and there connected it with a reef of shingle which extends to the right bank of the river. By this work the whole stream has been intercepted below Mill No. 4 and conducted to Mill No. 1, except when there is water enough to overflow the reef of shingle, and except so much as may leak through the dyke or through the reef. The Defendant says that water has thus been taken away from the water-course formed by Dyke No. 3; and in the month of June 1878, for the purpose as he alleges of recouping himself, he erected a barrier so as to prevent the escape of water from the tail race of Mill No. 1, and to form a head of water for a new mill which he built just below No. 3. The Plaintiffs have also built a new mill (Mill No. 2) just below No. 1, and have excavated the bed of the river to receive their new wheels.

There has been considerable controversy whether the Defendants' operations have impeded the working of Mill No. 1 or only that of Mill No. 2, but, in their Lordships' opinion, the controversy is not now material. The important fact is that the Defendants' barrier has been found to bay back the water to a maximum depth of 22 inches at Point A, which is the dividing line of the two properties. And the

important question is, whether the Plaintiffs are entitled to have the barrier so lowered that the water shall not be bayed back to any extent at all at Point A.

By the Civil Code of Quebec all rights to flowing water are classed under the head of servitudes; and by Sect. 500 real servitudes are divided into three classes, according as they arise from the natural position of the property, from the law, or from the act of man. Servitudes arising from the law have nothing to do with the present question.

Sect. 501, which deals with servitudes of the first class, is as follows:—"Lands on a lower level are subject towards those on a higher level to receive such waters as flow from the latter naturally and without the agency of man. The proprietor of the lower land cannot raise any dam to prevent this flow. The proprietor of the higher land can do nothing to aggravate the servitude of the lower land."

Sect. 503 applies specially to rivers. It says, "He whose land borders on a running stream may make use of it as it passes for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs, saving the provisions contained in Cap. 51 of the Consolidated Statutes for Lower Canada, or other special enactments." "The same right" their Lordships take to mean the right to make use of the running stream as it passes the bordering land.

Unless then the provisions of the Code are limited by some special enactment, the Plaintiffs have a right to say that the flow of water from their land shall not be impeded, so far as it is a natural flow, and independent of the agency of man. In this case the natural flow of the river has been altered by the agency of man for a long time, but an artificial flow may acquire as ample a right to protection as a natural flow.

The 3rd cap. of the 4th title of the Code treats of servitudes established by the act of

man. Sect. 545 recognizes the right of every proprietor to subject his property to such servitudes as he may think proper consistently with public order. Sects. 549 and 550 are as follows:—

“No servitude can be established without a title; possession even immemorial is insufficient for that purpose.”

“The want of a title creating the servitude can only be supplied by an act of recognition proceeding from the proprietor of the land subject thereto.”

“Title,” which answers to “titre,” means a written or express grant.

Now as regards the flow of water which existed prior to 1878, and which it may be convenient to call the established flow, it is not now disputed but that the Plaintiffs became and were just before the execution of their new works rightfully possessed (whether by title or by some act of recognition does not clearly appear) of what, according to the Code, is a servitude over the Defendants' property. Their Lordships consider that the Plaintiffs then had, at least as between them and the Defendants, the same right to protection for the established flow as if it were the natural flow. The Defendants might not raise any dam to obstruct the established flow.

The Appellant's Counsel contended strongly at the bar that the working of the Plaintiffs has not been impeded or only impeded to a slight extent, and that the Defendants have been materially injured by the abstraction of water. But their Lordships did not think it necessary to hear the Respondents' Counsel on those points. For the right to resist interference with a natural flow of water, or a flow legally established, is independent of the actual user of the water. Neither would the Plaintiffs' right to have the established flow protected be barred by the mere fact that the Defendants may have been injured by deprivation of water owing to the extension of Dyke No. 1. That might give the Defendants a right to sue for damages, or to remove the

dyke; but it does not follow that they can interfere with the established flow from the Plaintiffs' land.

The Appellant's Counsel also insisted strongly that the action is wrong in form, but their Lordships see no reason to differ from the two Quebec Courts on this point.

The question whether Chapter 51 of the Consolidated Statutes does not confine the Plaintiffs to a single remedy, viz., that of pecuniary damages, is a more substantial one. There is certainly great difficulty in so construing the Code and the statute as to produce a clear and harmonious result for the whole. There is nothing on the face of the statute itself to limit the generality of the powers it appears to confer on riparian owners. It was stated at the bar that there had been a course of decision in Canada which had the effect of placing a limit on the general terms of the statute. But the only case cited, that which is stated in the Respondent's factum filed 11th May 1881, appears only to refer to the mode of ascertaining damages. And the Judges in the Lower Courts do not refer to any course of decision, while they entertain a great diversity of view as to the limits within which the statute is to be construed. The Superior Court appears to think that the statute is no answer to actions founded on common right and on actual injury. Mr. Justice Ramsay, while impugning both the motives and the capacity of its framers, thinks it means nothing more than that if and when damages are sued for they shall be ascertained by referees. The rest of the Court in one passage express an opinion that the statute was not intended to operate against those who had turned running waters to use, and in another, that it was intended to operate only against landowners and not against millowners. It is difficult to find the foundation

for any of these limitations. At the same time, their Lordships find it difficult to suppose that by the saving of the statute contained in Sect. 503, the Code intended to give no remedy whatever beyond pecuniary compensation for any violation of its rules. The question was very ably argued at the bar, but in the result their Lordships do not find it necessary to pronounce any opinion on it.

The substantial difficulty in the way of the Plaintiffs is this: that they are seeking to establish a new and different servitude by the act of man without either grant or recognition; that they have not alleged or proved what was the precise servitude which existed prior to 1878; and that the decree which they have obtained proceeds on the assumption that the existing state of things is the natural state, or at least that there is identity between the state of things before and after the Plaintiffs' operations of 1878. This is the difficulty to which the attention of their Counsel was specially called, and to see how it stands it is necessary to examine the proceedings with some particularity.

In the declaration filed by the Plaintiffs, they set forth their documents of title, and allege that they have had for upwards of 62 years the rights, privileges, and water powers *actually used by them*. They pray for a declaration of those rights, for a declaration that the Defendants have illegally disturbed the enjoyment of them, and for demolition of the Defendants' barrier. It is clear then that, so far, the Plaintiffs make no distinction between the existing flow of water and the established flow.

The Defendants on their part rely on the alterations of 1878. They say in substance that the mischief is caused by the Plaintiffs' own works executed below Mill No. 1 in the preceding spring and summer; that the extension of

Dyke No. 1 has caught all the water and carried it down to Mill No. 1; that by collecting so large a quantity of water into the narrow space on the left bank, the Plaintiffs have themselves to blame if at that point the water is more abundant than they like; and that they have no grant (titre) giving them a right so to use the river.

In replying to these defences the Plaintiffs do not fall back on their right to the natural or the established flow of the water. As regards their works below Mill No. 1, they say that the Defendants' allegations are false in fact. And as to all their recent operations, they say that their only object has been to preserve the water and conduct it from one of their mills to another, *as they have always done.*

At the wish of both parties experts were appointed by the Court to report upon instructions given to them by the Court. They were to state,—

1. The condition of the localities and of the erections described in the writings of the parties, both before and after the said erections.
2. The works of the Defendants.
3. The nature of those works, and whether they are calculated to injure the working of the water power used by the Plaintiffs before they were completed.
4. What should be done so that each party may use the water without injury to the other.
5. What amount of damages, if any, should be paid by the Defendants to the Plaintiffs.

These instructions are not pointed to the effect of the Plaintiffs' operations, but rather indicate that the only question is whether the flow existing at the time of the Defendant's operations has been impeded.

In answer to the first and second questions the experts show the construction of the old and new mills to the effect herein-before stated, but they say nothing about the extension of Dyke No. 1, nor do they show what was the former flow of the water, or the bed of the river, or in any other respect what was the state of the localities prior to the execution of the recent works of the Plaintiffs. In answer to the third question they find that the Defendants' new barrier bays back the water to the depth of about two feet at the boundary line, Point A. In answer to the fourth question they find that the Defendants ought to lower their barrier by 22 inches, so as not to bay back the water at all over Point A. And they award 100 dollars for damage.

The parties then went into evidence, and the cause came on for hearing before Mr. Justice Sicotte, Judge of the Superior Court. That learned Judge gave the Plaintiffs a decree in precise accordance with the opinion of the experts. The decree is founded on recitals showing that the Plaintiffs have been in possession of a real right for a year and a day, using the upper waters and letting them escape over the land of the Defendants. Then it states that the barrier raised by the Defendants has obstructed the waters in *their natural course such as it was formerly*.

It is clear then that the Superior Court paid no attention to the alteration effected by the Plaintiffs' works in 1878. The recital of possession for a year and a day is true of the prior state of things, but is not true of the existing state of things. Nor is the present course of the water its natural course, nor such as it was formerly.

On appeal to the Queen's Bench, there was a difference of opinion among the Judges. Mr. Justice Ramsay states very clearly the point of the defence which is now under discussion. He



says, "The Defendants answer that they have not stopped the natural flow of the water, but that the Plaintiff has, by increasing his own works above, directed the waters of the river out of their natural course, and so created an artificial accumulation of water which can only escape through the tail race." He thinks this would be a good defence if it were not for the acquiescence or recognition of the Defendants. But there is no evidence of such acquiescence in the Plaintiffs' works of 1878. The evidence referred to by Mr. Justice Ramsay consists of two acts. First, the construction by the Defendants of Dyke No. 3, which was long prior to the extension of Dyke No. 1. Secondly, the construction of the works now complained of. But in the first place, though it is true that by their new works the Defendants sought to take advantage of the new flow of water, they did so because their former flow was partially cut off. And in the second place an act can hardly be treated as acquiescence in favour of a person who has ever since been contending against it, and striving to destroy it. It is at the utmost acquiescence on condition of enjoying the thing acquiesced in, and if that condition is taken away, so is the acquiescence.

Having thus disposed of the defence founded on the extension of Dyke No. 1, Mr. Justice Ramsay addresses himself to the question of damage. He thinks that there is no sufficient evidence of damage, and would either dismiss the action or remit it for further report by experts.

The opinion of the rest of the Court was delivered by Mr. Justice Tessier. That learned Judge states the Defendant's plea that the Plaintiffs themselves have caused the mischief complained of, but he thinks it completely answered by the report of the experts in answer to the 3rd question. Now that question and

answer relate only to the existing flow of water, and have absolutely no bearing on the prior question whether the Plaintiffs are entitled to have that flow protected. Mr. Justice Tessier then quotes Art. 501 of the Code, and says that the Company have not added anything to the volume of the water by the hand of man, because they have not introduced any foreign water into the Yamaska. On these grounds the Court decides for the Plaintiffs, and dismisses the appeal.

It is true, indeed, that the Plaintiffs have not increased the whole volume of the Yamaska, but they may have accumulated the waters of that river into a small space, and so have increased their depth at the point where they complain of it, and have augmented the servitude they desire to enforce. This is the very thing which the Court of Queen's Bench appear to think would be material if only it had been done by introducing fresh water into the Yamaska, instead of being done by a readjustment of the waters of the Yamaska itself. That it must have been done to some extent seems evident from the plan, and the Respondents' Counsel so admitted. It results also from the evidence given by Bertrand and by Delisle, showing how the water which used to flow to the right of Dyke No. 1 now flows to the left. The Plaintiffs have left the point untouched by evidence. Whether the difference is much or little has not been ascertained.. By Sect. 501 of the Code, the proprietor of the higher land can do nothing to aggravate the servitude of the lower land. The Plaintiffs have certainly accumulated the volume of the water, and have probably increased its depth in the narrow channel up to the dividing line. To that extent they are aggravating the servitude of the lower land, and to that extent at least they have no right to demand, as they do demand, a free course for the water sent down by them. That the matter is

left in this uncertainty is the fault of the Plaintiffs who are bound to allege and prove a case entitling them to relief. They come into Court insisting on their right to keep unobstructed the flow of water which they say has existed as it now is for more than 60 years. The issue is distinctly raised that the existing flow is not the ancient one; but they continue to insist that it is, and refuse to shape their case so as to try the question whether or no they are really entitled to some relief on the ground that the established flow had been interfered with, and to get that amount of relief. It is unsatisfactory to dispose of a case on such grounds, but their Lordships cannot see by what right the Defendants are to be compelled to keep their dam so low that the whole volume of water, as accumulated and increased by the Plaintiffs, shall run away unobstructed.

It is not easy to find decisions precisely applicable to such peculiar circumstances; but their Lordships have not been referred to and are not aware of any case in which the Plaintiff has obtained relief in respect of any servitude except that to which he has clearly alleged and proved his right.

In *Saunders v. Newman*, 1 B. and A. 258, the Plaintiff had acquired a prescriptive right to an artificial flow of water. All he had done within recent times was to alter the construction of the wheel turned by the water. It was held that the Defendant, a lower proprietor, had no right to obstruct the ancient flow; but it seems clear from the observations of the Judges that the decision would have been otherwise if the Plaintiff's operations had substantially altered the flow of the water. Abbott, J., says, "When a mill  
" has been erected upon a stream for a long  
" period of time, it gives to the owner a right  
" that the water shall continue to flow to and

“ from the mill in the manner in which it has  
 “ been accustomed to flow during all that time.  
 “ The owner is not bound to use the water in the  
 “ same precise manner, or to apply it to the same  
 “ mill. If he was, that would stop all improve-  
 “ ments in machinery. If indeed the alterations  
 “ made from time to time prejudice the right of  
 “ the lower mill, the case would be different ;  
 “ but here the alteration is by no means injurious,  
 “ for the old wheel drew more water than the  
 “ new one.”

Tapling *v.* Jones, 11 H. L., 290, was cited as an authority for the Plaintiffs; but so far as it bears upon the point under discussion it favours the argument for the Defendants. For the Plaintiff in Tapling *v.* Jones succeeded in getting protection for nothing but his ancient light; those very rays of light to which he had acquired an indefeasible right. Lord Westbury says:—“ In the  
 “ present case an ancient window in the Plaintiff’s  
 “ house has been preserved, and remained un-  
 “ altered during all the alterations of the holding.  
 “ . . . . The Appellants wall, so far as it ob-  
 “ structed the access of light to the Respondent’s  
 “ ancient unaltered window, was an illegal  
 “ obstruction.” And Lord Chelmsford, in answering the argument that the alteration of windows had changed the character of the right so as to destroy it, says, “ But it is not easy to  
 “ comprehend how this effect can be produced  
 “ by acts wholly unconnected with an ancient  
 “ window which the owner has carefully retained  
 “ in its original state.”

It may be inferred from these judgments that, if the Plaintiff in Tapling *v.* Jones had so mixed up his old lights with his new ones that they could not be distinguished, he would have failed. It is true that in that case the protection given to the ancient light carried with it incidentally protection to the new lights. But the only

reason why it did so was that the new lights could not be obstructed without obstruction to the ancient light. New lights are no encroachment, nor did the Plaintiff's decree aggravate the Defendant's servitude, for he was only prevented from building so as to obstruct the ancient lights. In the case of an augmented flow of water the servitude of the lower proprietor is aggravated.

The result is that the Plaintiffs have insisted on an enjoyment to which they have shown no legal title, and have not proved or even alleged any case for relief in respect of that enjoyment to which they may have had a title. Their Lordships have anxiously considered whether it is possible usefully to remit the case to be tried on the true issues. They are however convinced that an attempt to do so will not save time or money, and that the litigation must follow the strict course. They will humbly advise Her Majesty to reverse the decrees below, and to dismiss the action with costs. The costs of this appeal will follow the result.

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