

BYRON BOWEN OSTROM (PLAINTIFF)
AND ALEXANDER BEATTY (MADE A PARTY APPELLANT BY ORDER OF COURT) } APPELLANTS;

1898

*Mar. 14, 15.

*May 14.

AND

EPHRAIM G. SILLS AND JOHN
SILLS, TRADING AS SILLS BROS., } RESPONDENTS.
(DEFENDANTS)

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Adjoining proprietors of land—Different levels—Injury by surface water—
Watercourse—Easement.*

O. and S. were adjoining proprietors of land in the village of Frankford, Ont., that of O. being situate on a higher level than the other. In 1875 improvements were made to a drain discharging upon the premises of S., and a culvert was made connecting with it. In 1887, S. erected a building on his land and cut off the wall of the culvert which projected over the line of the street, which resulted in the flow of water through it being stopped and backed up on the land of O., who brought an action against S. for the damage caused thereby.

Held, that S. having a right to cut off the part of the culvert which projected over his land was not liable to O. for the damage so caused, the remedy of the latter, if he had any, being against the municipality for not properly maintaining the drain.

PRESENT :—Taschereau, Gwynne, Sedgewick, King and Girouard, JJ.

1898
OSTROM
v.
SILLS.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Chancery Division in favour of the plaintiff.

The facts of the case are thus stated by Mr. Justice Moss in the Court of Appeal.

The locus of this litigation is the unincorporated village of Frankford, situate in the township of Sidney, in the county of Hastings, at the confluence of the River Trent and its tributary Cole Creek. It is not shown when the farm lots on which the village is situate were first laid out in streets and building lots, but in some of the conveyances put in there is a reference to a plan of part of the village made in 1837, by one G. S. Clapp, P.L.S., and to a plan of the village made by one J. D. Evans, P.L.S. The evidence shows this latter plan to have been made in 1870. The plaintiff and defendants are the proprietors of adjoining parcels of land, fronting on the south side of a highway called Mill Street, and extending south to the waters of Cole Creek. The plaintiff's premises have a frontage of 20 feet on Mill Street, and are wholly covered by a building used by him as a chemist's shop and dwelling. At a distance of 68 feet from the N. E. corner of plaintiff's building is Trent Street, a highway running north and south and intersecting Cole Creek, at a distance of 43 feet from the corner of Mill and Trent streets. Immediately to the west of the plaintiff's buildings are the premises of the defendants. They consist of a considerable parcel of land with a frontage of about 166 feet on Mill Street, on which are now erected two buildings, one a storehouse or warehouse, the other a grist mill. When the plaintiff acquired this property, (in the year 1872), the defendant's land was vacant though there had been on the westerly

portion a grist mill which had been burned down. When the defendants purchased there was a covered ditch or drain crossing Mill Street from the north side, and discharging upon the defendant's premises at a place to the east of the site of the old grist mill. It conducted water, which was collected on the north side of Mill Street by means of ditches and drains constructed by the municipality and land owners, across the highway and discharged it upon the premises now owned by the defendants over which it flowed to Cole Creek. The covered drain was constructed of floats or logs placed atop of one another forming a box or pipe about 18 inches wide and 8 or 10 inches in height, covered over by planks on which were put earth and gravel to the level of the highway. It had been placed there probably twenty or more years before. There had been on the ground at this place a shallow depression into which the surface water from the surrounding lands flowed. This depression extended from north of the highway across it and on to the lands now owned by the defendants and the construction of the box drain was the work of the township authorities, done for the purpose of improving the highway by gathering the waters into a convenient conduit and levelling the highway. By these means the waters were concentrated and brought to defendants' lands in increased volume, and discharged with increased force. The land sloped gradually from the south side of Mill Street to Cole Creek, and the water coming through the covered drain cut away the earth and formed a sloping course, along which it was found convenient for persons in vehicles to drive down to Cole Creek, and there ford the stream. In 1875, considerable alterations and improvements were put upon the drain by the township authorities. It was thought to be of insufficient capacity to carry

1898

OSTROM

v.

SILLS.

1898

OSTROM
v.
SILLS.

away all the water collected on the north side of Mill Street. It was too near the surface and was liable to freeze up in cold weather. The bottom of a ditch running along the north side of Mill Street from the west, which took and conveyed surface waters from lands to the north of the street and west of where the box drain crossed the highway, had become worn to a level below that of the bottom of the box drain. To remedy these defects a wider and deeper excavation was made. A trench more than $2\frac{1}{2}$ feet wide was cut down to the rock. The sides were built up with loose stones to a height of about 20 inches and the top was covered with 2 inch planks, upon which was put earth to the level of the crown of the highway, thus producing a culvert $2\frac{1}{2}$ feet wide by about 20 inches high with its bottom something more than 4 feet beneath the surface of the highway. It connected with the ditch or drain on the north side of Mill Street and extended beyond the south limits of the highway for a distance of 12 or 15 feet into and upon the defendants' premises. The discharge from its mouth was into the same place as the discharge from the box drain and the water from it found its way to Cole Creek in the same direction and along the same course as formerly, but the quantity of the discharge was apparently materially increased and the effect of its action was to cut a much more defined channel from the mouth of the culvert through the defendant's premises to the creek; and if there was a servitude in respect of the former drain it was largely increased by the new culvert. The water formerly brought to and discharged through the box drain and thereafter through this culvert was chiefly surface water collected by means of drains and ditches and conducted to a ditch or drain constructed by the municipality of Sidney along the north side of Mill Street, which at

one time conducted water from west of King Street but for the past fifteen or more years only from a point to the east of the east side of King Street. At one time there was an occasional accession of water from an overflow, in times of freshet, of a pond situate on the corner of Albert and Scott Streets some distance to the north and west of the corner of King and Mill Streets, but this was cut off about the year 1890, by a drain constructed by the municipality. There was also an occasional overflow from a spring situate some distance to the north of Mill Street, nearly on a line with the point where the culvert crosses Mill Street, but about the year 1884 this also was cut off and the water drained to the Trent river. One Chapman who owns a parcel of land on the north side of Mill Street directly opposite the defendants' premises and through whose premises was the natural depression above spoken of, put down a drain from his premises and cellar about the year 1868 and thereby conducted to the drain on the north side of Mill Street, the waters collected by means of his drain. But these and nearly all the other waters that flowed through the culvert were waters cast upon the surface of the ground in the shape of either rain or melted snow, and the quantity consequently varied very considerably, there being sometimes a very considerable volume, while at others, and for the most part, the discharge was comparatively small and intermittent.

This was the state of things when in 1887 the defendants commenced the erection of the building in respect of which the controversy has arisen and which is generally spoken of in the evidence as the storehouse or warehouse. It is a brick structure upon a stone foundation, its eastern wall coming within a few inches of the western wall of the plaintiff's building and extending south to Cole Creek. The south wall

1898
OSTROM
v.
SILLS.
—

1898
OSTROM
v.
SILLS.
—

extends to the west about thirty-four feet. The eastern wall extends northward from the south wall to within about ten feet of the south line of Mill street. It is then turned to the east a distance of about ten feet and is then turned to the north, about ten feet, to the south line of Mill street. The north or front wall extends easterly along or slightly over the street limit to the west wall. There is thus formed at the north-west corner on the building what is spoken of as an "L" about ten feet square. There is left between the warehouse and the grist mill an alleyway about ten feet wide. The culvert comes upon the defendants' premises near the corner formed by the west wall of the "L." In excavating for the foundation of the warehouse the defendants cut away the planks covering the culvert and removed its stone wall for some distance and built the foundation wall across its course from the rock upwards to some distance above the level of the street, but did not move the culvert back to the line of the street and its point of discharge was still upon the defendants' premises. The superstructure was completed in 1888, and then the defendants, in order, as they say, to protect their foundation wall from the waters coming through the culvert and to conduct them to Cole Creek, removed the stone walls of the culvert to the line of the street and made an excavation in a diagonal line from the corner of the "L" fronting on Mill street to the lower corner on the alleyway and placed a barrier of planks across the base of the "L" from the rock to above the level of the street. The space behind this barrier and between it and the foundation wall was filled in with earth and gravel. The space in front was not filled in, but on the contrary the defendants say they caused a cutting to be made from the drain to the alleyway so as to conduct the water coming from the culvert to the

alleyway, and enable it to flow down into the creek. Whether this provision for carrying off the water would have been sufficient if it had continued is not known, for before long the space in front of the barrier began to be filled up with earth, stones, ashes and other debris thrown or collected there without the action or concert of the defendants, so that in less than a year the mouth of the culvert was completely covered and stopped up, and the space became filled almost, if not wholly, to the level of the ground. The effect of this was to entirely stop the flow of water from the culvert. In 1890, upon occasion of heavy rains, water began to come into the plaintiff's cellar through the walls at the north-west corner of his building, more particularly in the west wall, and this continued from time to time up to the time of the commencement of this action on the 6th of September, 1892.

1898
 OSTROM
 v.
 SILLS.
 —

The Divisional Court held that the plaintiff was entitled to damages and reversed the judgment of the trial judge who dismissed the action. The Court of Appeal reversed the judgment of the Divisional Court and restored that of Falconbridge J., at the trial. The plaintiff then appealed to this court.

After the appeal was lodged in the Supreme Court, it having been made to appear that the plaintiff had become insolvent an order of a judge in chambers added his assignee, Alexander Beatty, to the cause as an appellant.

C. J. Holman and *Porter* for the appellants. The plaintiff having suffered damages through the act of the defendant in obstructing the watercourse he is entitled to recover though not a reparian proprietor. *Hurdman v. North Eastern Railway Co.* (1); *Whalley*

1898
 ~~~~~  
 OSTROM  
 v.  
 SILLS.  
 —

v. *Lancashire and Yorkshire Railway Company* (1);  
*Conniff v. The City and County of San Francisco* (2).

A dedication of the watercourse to the public may be inferred. *Mann v. Brodie* (3); *Harrison v. Harrison* (4); *Turner v. Walsh* (5).

The judgment may be reversed on the facts even against the concurrent findings of two courts. *North British and Mercantile Insurance Co. v. Tourville* (6); and see *Ryan v. Ryan* (7).

*Clute Q.C.* and *Williams* for the respondents. The principles applicable to public waters do not extend to the flow of mere surface water. *Rawstron v. Taylor* (8); *McGillivray v. Millin* (9); *Murray v. Dawson* (10).

This case is not within the rule laid down in *Rylands v. Fletcher* (11).

The evidence will not support the contention that there was a dedication. See *Glover v. Coleman* (12).

The judgment of the court was delivered by :

GWYNNE J.—Mr. Justice Moss has in his able judgment so fully stated the facts of the case that it is unnecessary to repeat them.

It is sufficient to say that whatever may have been the condition fifty or sixty years ago of the premises where the culvert in question across Mill Street in the village of Frankford is situate, that is to say, whether there was then anything which could be called a natural watercourse, it is unnecessary to inquire, for it is clear upon the evidence that for nearly twenty years before the defendants in 1888 completed their building which is complained of, and perhaps ever since the

(1) 13 Q. B. D. 131.

(2) 67 Cal. 45.

(3) 10 App. Cas. 378.

(4) 4 Russ. & Geld. 338.

(5) 6 App. Cas. 636.

(6) 25 Can. S. C. R. 177.

(7) 5 Can. S. C. R. 387.

(8) 11 Ex. 369.

(9) 27 U. C. Q. B. 62.

(10) 19 U. C. C. P. 314.

(11) L. R. 3 H. L. 330.

(12) L. R. 10 C. P. 108.



village municipality came into existence the only waters passing through the culvert in question were the waters brought down from a drain constructed by Mr. Chapman upon his lot on the north side of Mill street about thirty feet distant from the mouth of the culvert and the rain and melting snow fallen on the street and land in the vicinity of a ditch along the north side of Mill street from Chapman's drain to the culvert. These waters were discharged through the culvert on the defendants' land, and what the defendants have done which is complained of is that in 1888 they completed the erection of a building of stone and brick on their own land on the south side of Mill street, the north wall of which is distant ten feet from the southern limit of the street, and they have cut off the walls of the culvert which projected over the line of the street whereby the waters passing through the culvert soak partly through the street and partly through the ten feet of defendants' land between their building and the street, and so possibly have done some damage to the plaintiff. But the defendants in so erecting their building and cutting off that part of the culvert which projected over their land, have only exercised their right, and if the plaintiff has been damnified thereby, his remedy is not against the defendants, but rather against the municipality who maintain the drain in an insufficient condition.

The appeal must be dismissed with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *E. Guss Porter.*

Solicitors for the respondent: *Clute & Williams.*

1898  
 Ostrom  
 v.  
 Sills.  
 Gwynne J.