THE CHAUDIÈRE MACHINE AND FOUNDRY COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

THE CANADA ATLANTIC RAILWAY COMPANY (DEFENDANTS).. RESPONDENTS

1902

*Nov. 17.

*Dec. 9.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Nuisance—Trespass—Continuing damage.

In 1888 the Canada Atlantic Railway Company ran their line through Britannia Terrace, a street in Ottawa, in connection with which they built an embankment and raised the level of the street. In 1895 the plaintiffs became owners of land on said street on which they have since carried on their foundry business. In 1900 they brought an action against the Canada Atlantic Railway Company alleging that the embankment was built and level raised unlawfully and without authority and claiming damages for the flooding of their premises and obstruction to their ingress and egress in consequence of such work.

Held, that the trespass and nuisance (if any) complained of were committed in 1888, and the then owner of the property might have taken an action in which the damages would have been assessed once for all. His right of action being barred by lapse of time when the plaintiff's action was taken the same could not be maintained.

*PRESENT :—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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CHAUDIÈRE MACHINE & FOUNDRY CO. v. CANADA ATLANTIC RWAY. CO.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment for the defendants at the trial.

The facts of the case are sufficiently stated in the above head-note and in the judgment of the court on this appeal.

Aylesworth K.C. and *McVeity* for the appellants. The Railway Company had no authority to alter the grade of the street and being wrongdoers our action will lie. *Corporation of Parkdale* v. *West* (1); *North Shore Railway Co.* v. *Pion* (2); *Darley Main Colliery Co.* v. *Mitchell* (3): *Backhouse* v. *Bonomi* (4);

The damages are continuing. *The Joseph Schlitz Brewing Co.* v. *Compton* (5); *Uline* v *New York Central and Hudson River Railroad Co.* (6).

Shepley K.C. and *J. Christie* for the respondents, cited as to continuing damages, *Backhouse* v. *Bonomi* (4).

The judgment of the court was delivered by:

The CHIEF JUSTICE—In 1900 the appellants, as owners of a lot of land on Britannia Terrace, in Ottawa, brought this action claiming damages from the respondents upon the ground that in 1888,

the defendants without any authority or justification in that behalf unlawfully and negligently constructed an embankment of rough stone and other material about ten feet high and sixty feet wide in and along the said Britannia Terrace street and in front and in the vicinity of the plaintiffs' said land fronting thereon for the purpose of building thereon a branch of their railway.

In or about the time aforesaid the defendants, without any authority and unlawfully and wrongfully and negligently raised the grade or level of the said street in front of the plaintiffs' said land to the great injury of the plaintiffs.

(1) 12 App. Cas. 602.
(2) 14 App. Cas. 612.
(3) 11 App. Crs. 127.
(4) 9 H. L. Cas. 503.
(5) 142 Ill. 511.
(6) 101 N. Y. 98.

The said defendants have since wrongfully and without any authority placed and constructed in and upon the said embankment and in and along the said Britannia Terrace street in front and in the vicinity of the plaintiffs' said lot a line of railway and other constructions and erections for the purposes of use for a branch railway as aforesaid.

Since the time aforesaid the defendants have wrongfully and without any authority kept, maintained and continued and still keep, maintain and continue the said embankment and line of railway on the said street.

The said embankment and railway have greatly injured and made difficult the said ingress as aforesaid to and from the lands and buildings thereon, from and to the said Britannia Terrace street, and the value of the said lands and buildings by reason thereof has been greatly and *permanently* injured and lessened.

The said embankment and railway placed thereon have been so negligently constructed, kept, maintained and continued that the surface water and rain falling thereon flows in and upon and accumulates on the plaintiffs' said land and renders the same and the buildings thereon unfit for use as a foundry and useless for the purposes of the plaintiff's said business.

The plaintiffs were and still are entitled to have and enjoy a right of egress from the said lands and the buildings thereon to the said Britannia Terrace street and back again from the said street for themselves, thier servants and workman on foot and with horses, carriages and cattle at all times of the year.

By reason of the construction, maintenance and continuance of the said embankment and line of railway as aforesaid the plaintiffs' said lands and their foundry erected thereon as aforesaid have been from time to time flooded and their castings, moulds, machinery, plant and other chattel property thereon have been destroyed and injured.

On or about the times herein before mentioned the defendants wrongfully trespassed upon the lands of the plaintiffs hereinbefore described and they have continued and still continue wrongfully to commit such trespassing upon the plaintiffs' said land although frequently requested by the plaintiffs to desist therefrom and the plaintiffs have thereby suffered serious loss and damage.

The appellants' action was dismissed at the trial (Street J.) and the Court of Appeal affirmed that dismissal. They now appeal from this last aforesaid judgment.

I would dismiss their appeal upon the simple ground, without dissenting from the reasoning adopted by the

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court *a quo*, that, upon their own allegations, the right to complain of what they call the trespass or nuisance by the respondents arose when that nuisance or trespass was committed, that is to say, over ten years before their action was instituted. The fact that they became the owners of this lot only in 1895 does not affect the case one way or the other. If they have an action against the respondents every spring after the melting of the snow, or after each rain storm during the summer, as they would contend, the party who owned the lot in 1888 would have the same right had he retained the ownership of it. Now that cannot be so. He had then a right of action for the waters shed upon the lot and the impaired access to the street, and the depreciation in value of his property in consequence thereof, and upon such an action the damages caused by the respondents' embankment would have been assessed once for all. *The Corporation of Parkdale* v. *West* (1); *North Shore Railway Co.* v. *Pion* (2); *Arthur* v. *Grand Trunk Railway Co.* (3).

His right of action would therefore now be barred, or was barred when the present action was instituted, by the lapse of six years. And the appellants cannot recover damages upon that very same cause of action. The proposition that every conveyance of the title would revive a right of action arising out of the same tort for the additional damages suffered by the new owner is untenable. If an action had been taken by the then owner, when the respondents built this embankment, for the damages to this property, a judgment in his favour in that action would be a bar to any subsequent action for subsequent damages either

(1) 12 App. Cas. 602. (2) 14 App. Cas. 612.
(3) 22 Ont. App. R 89.

at his instance or at the instance of the subsequent owners of the property. *Goodrich* v. *Yale* (1).

The cases of *Backhouse* v. *Bonomi* (2), and of *Darley Main Colliery Co.* v. *Mitchell* (3), relied upon by the appellants, are clearly distinguishable. In these two cases, the acts which had caused the damages were, when done, lawful, so that clearly no action for damages could be thought of till the damages accrued. Here the appellants' claim rests upon their allegation that the works done by the respondents at the outset constituted a nuisance and a trespass on their lot.

Appeal dismissed with costs.

Solicitors for the appellants: *McVeity & Culbert.*

Solicitors for the respondents: *Christie & Greene.*

(1) 8 Allen (Mass.) 454.
(2) 9 H. L. Cas. 503.
(3) 14 Q. B. D. 125; 11 App. Cas. 127.