ALEXANDER McBRYAN (DEFENDANT)..APPELLANT; 1898

AND *Oct. 26, 27.

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFF)..... } RESPONDENT. 1899 *Feb. 22.

AND

PEARSON SHAW.....THIRD PARTY.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Adjoining lands—Threatened damage to one—Right of owner to guard against without reference to neighbour—Sic utere tuo ut alienum non lædas.

Where the owner of land is threatened with damage by water used for irrigation purposes coming from a higher level he has a right to protect himself against such injury by all lawful means without regard to any damage that may result to land of his neighbour from the measures he adopts.

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

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APPEAL from the decision of the Supreme Court of British Columbia (1), affirming the judgment at the trial by which the plaintiff recovered damages and obtained an injunction restraining defendant from maintaining a dam on his land which flooded that of the plaintiff.

The action for damages and an injunction was brought under the following circumstances. The defendant McBryan is owner of lands bordering on a river. Behind his land is the property of the railway company, and beyond that land owned by Shaw, from which there is a slight depression through the railway property and McBryan's land to the river. Shaw every year brought water from a creek some distance away to irrigate his land, and in order to prevent the flow of such water through a culvert built by the railway company from flooding his property McBryan put a dam immediately below the railway track which sent the water back but not doing any injury to the other properties. In 1895 Shaw used much more water for irrigation than he had previously and the dam not being high enough to hold it back it was raised to the extent necessary to protect McBryan's property, but as a result the quantity of water sent back on the land of the railway company was such as to cause considerable damage, compensation for which, and to prevent a continuance of the same, was the object of the present action.

A judgment for the plaintiff at a former trial was set aside by the Supreme Court of British Columbia and a new trial ordered (2). On the second trial the plaintiff again obtained a verdict, and an injunction was granted restraining defendant from penning back the water from his land so as to injure the plaintiff's property. This judgment having been sustained by the full court the defendant appealed.

(1) 6 B. C. Rep. 136. (2) 5 B. C. Rep. 187.

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Aylesworth Q.C. and *Wilson Q.C.* for the appellant. This case cannot be distinguished from *Ostrom* v. *Sills* (1). Defendant had a right to protect his own property and was not obliged to look after the rights of his neighbour. *Nield* v. *London & North Western Railway Co.* (2); *Collins* v. *Middle Level Commissioners* (3).

S. H. Blake Q.C. for the respondent, cited *Whalley* v. *Lancashire & Yorkshire Railway Co.* (4); *Roberts* v. *Rose* (5); *Wilson* v. *Waddell* (6).

TASCHEREAU J.—I will not dissent, but it is with the greatest hesitation that I concur in allowing the the appeal.

GWYNNE J.—Prior to the year 1883, the owners and occupiers of a farm situate on the South Thompson River at a place called Shushwap in British Columbia of which one Shaw is and since about 1890 has been tenant under one Sullivan, the owner in fee, conducted by artificial works water for irrigation purposes on the farm but provided no means for carrying off any surplus waters so introduced. The defendant in 1883 owned an adjoining lot into which such waters, following the natural declivity of the soil, of necessity flowed by reason of there not having been constructed any mode of carrying off such waters, and instead of bringing an action against the owners and occupiers of the farm by whom the said waters were so introduced for irrigation purposes, to compel them to provide a proper mode for the escape of such waters so that they should not prejudice the defendant's lot, he in that year 1883 erec-

(1) 28 Can. S. C. R. 485.
(2) L. R. 10 Ex. 4.
(3) L. R. 4 C. P. 279.
(4) 13 Q. B. D. 131.
(5) L. R. 1 Ex. 82.
(6) 2 App. Cas. 95.

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ted a solid earth embankment on his own land close to the line between the two lots so as to prevent any of such irrigation waters so introduced into the adjoining lot from flowing on to the defendant's land to his prejudice. That he had a perfect right so to do cannot admit of a doubt. Subsequently, and in 1884 or 1885, the Canadian Pacific Railway Company purchased from the then owner in fee of the said lot adjoining the defendant's lot, for the purposes of their railway, the lowest part of the said lot adjoining the defendant's, and over which the irrigation waters so introduced passed until they reached the obstruction so erected by the defendant, and they built their railway thereon laying their track upon the surface of the land as it then was. Now the purchase of that strip of land by the railway company did not in any the slightest degree prejudice the right of the defendant to maintain the obstruction so as aforesaid erected upon his own land for the purpose aforesaid. The railway company were under no obligation to suffer or permit the waters, to pen back which the defendant had erected said embankment, to continue to flow over the land so purchased by them for their railway track, but they did suffer such waters so to continue to flow and things continued for many years in the same condition, namely, the waters being suffered by the railway company to flow over their land until they reached the said embankment on defendant's land, and that obstruction continued to serve the purpose for which it was erected, namely, to protect defendant's land from injury from such waters.

In or about the year 1892 Sullivan, the owner in fee of the said lot adjoining the land of the defendant except the piece thereof which had been purchased by the railway company for their railway, demised the part of which he was so seized in fee to one Shaw who has since been and still is tenant under such demise.

In 1895 the railway company resolved to fill up the lowest part of the said lot purchased by them at the place where the irrigation waters introduced by Shaw upon the farm leased to him by Sullivan entered upon the piece of land purchased by the railway company, and instead of preventing such irrigation waters entering upon their land as they could easily have done by the embankment they were constructing they constructed and placed a box culvert under the embankment which they constructed through which they caused Shaw's irrigation waters to pass and to discharge themselves as they had previously done over the natural surface on to the defendant's farm where they were stopped by the embankment erected by the defendant in 1883. Immediately after the completion by the railway company of their embankment and their so conducting the Shaw irrigation waters through the box culvert below to the defendant's land, Shaw brought upon his farm a much larger quantity of irrigation water than ever had previously been brought and the consequences were that these waters passing through the box culvert constructed by the railway company for their reception broke down and destroyed the defendant's embankment upon his land and washed away and destroyed a large piece of the soil of his farm. The defendant, instead of bringing an action to recover compensation for the injury so done to him, reconstructed the embankment which had been so destroyed and made it stronger and higher, and Shaw still continued to bring very large quantities of irrigation water on to his farm, which waters the railway company still continued to bring through the box culvert so as to reach the embankment so re-constructed on his land whereby such waters were penned back on to the railway company's track and did some damage to recover compensation for which this action is

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brought, and so instead of the defendant being a plaintiff in an action for the wrong done to him by the destruction of the embankment constructed by him in 1883 and the destruction of a considerable portion of the soil of his farm is defendant in an action for injury sustained by the railway company by their not merely permitting Shaw's irrigation waters to pass over their land so as to reach the defendant's embankment, but by so conducting such waters through a culvert constructed by them for that purpose on their lands. The jury have, very sensibly in my opinion, found that the railway company have thus themselves been the cause of the damage of which they complain.

It has been contended that *Roberts* v. *Rose*, in the Exchequer Chamber, (1), is an authority in support of the railway company's contention in the present case, but a moment's comparison of the facts in that case with those in the present case as stated above and a cursory consideration of the observation of Blackburn J. in that case will show the plain distinction between the two cases. There the plaintiff by parol license granted to him by one Lowe and the defendant, constructed a water course for carrying off water from certain mines of the plaintiff into and through Lowe's land on to and through the defendant's land. The defendant had revoked the license to plaintiff and refused to permit him any longer so to carry off such mine waters and, the plaintiff having refused to discontinue so passing them, entered upon Lowe's land to stop the water course where the plaintiff's mine waters entered the water course on Lowe's land. The plaintiff contended that the defendant had no right to do so, but that he should have stopped up the water course on his own land, the effect of which would have been to pen back

(1) L. R. 1 Ex. 82.

the waters and make a pond of Lowe's land. In this state of facts the court held that to have so done would have been a wrong to Lowe, who was an innnocent party inasmuch as he by an arrangement to which the defendant was himself a party had permitted the plaintiff so to discharge his mine waters through his land. For the defendant under such circumstances to have penned back the waters upon Lowe's land as plaintiff insisted he should have done would have been a serious wrong to Lowe, who under the circumstances was reasonably called an innocent party. There is nothing in the present case which can entitle the railway company to that designation upon the authority of anything in *Roberts* v. *Rose* (1), so far as affects the rights and interests of the defendant to maintain on his own ground a construction of the nature of that erected by him in 1883, and restored in 1895, when wrongfully destroyed by waters tortiously brought down over the railway company's land upon and against an embankment lawfully erected and maintained upon his own land for its protection.

The appeal must be allowed with costs, and the action in the court below be ordered to be dismissed with costs.

SEDGEWICK J.—The appellant Alexander McBryan is the owner of lands bounded on the lower side by the Thompson river. At the back of his lands are the track, roadbed and right of way of the Canadian Pacific Railway Company, the respondents, and on the other side of the railway are the lands of one Pearson Shaw. All these lands are, so far as the eye can see, practically level, there being, however, a fall, although almost imperceptible, towards the river. There is, however, a slight depression or valley, commencing

(1) L. R. 1 Ex. 82.

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on Shaw's land extending across the railway track and along McBryan's land to the river. There is no water-course, either natural or artificial, along this depression, but in times of heavy rains or of melting snow surface water runs across the properties to the river. When the railway company built their line they used trestle work to carry the track across this depression, and subsequently they filled up the trestle work with earth, constructing a culvert to provide for the downfall of the water. Shaw, the upper proprietor, had been in the habit of irrigating his land for agricultural purposes, obtaining the water from a creek some distance away. In order to prevent the surface water which necessarily would flow down the depression through the culvert on to McBryan's land from injuring him the latter built a dam on his own land across the depression immediately below the railway track, the effect being that the water which came down was prevented from flooding it, the water being penned back both on to the property of the railway company and of Shaw, but at that time not doing any injury to either property. In the summer of 1895 Shaw brought a much larger quantity of water on his land than he had before done. This water flowed through the culvert and over McBryan's land, the dam there not being sufficient to hold it back. It did great damage to the crops and was tearing away the soil, washing a considerable portion of it into the river, and if it had been allowed to continue irreparable injury would have been sustained by McBryan. The defendant seeing his property injured and his lands washed away immediately proceeded to heighten the dam, doing it at a comparatively small expense, the result being that no further damage was done to his property. It happened, however, that the dam was higher than the roadbed and tracks of the railway.

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The water coming down from Shaw's land flooded the railway track, damaging the company's property to the extent of $125. The company thereupon brought this action, not against Shaw who was the admitted *fons et origo mali*, but against McBryan. The case was tried and judgment was given in favour of the company. Upon appeal to the court *en banc* this judgment was sustained.

It was admitted by the defendant that he might have as easily built a dam on the other side of the railway track as on his own property, and it also appeared that neither the railway company nor McBryan ever gave any license for such a use of their lands. The contention of the plaintiff company is that the defendant had no right to erect the dam in question on his own land; that if he wished to abate the nuisance he was bound to erect the dam in such a way as not to cause damage to the railway property. In other words that it was not only his privilege, which every one admitted, but his duty either to take legal proceedings or to cross over the railway track and erect the dam upon the lands of the upper proprietor, whose action caused the mischief. The defendant on the other hand contends that he was acting within his strict legal rights; that the dam being built, not particularly for the purpose of abating a nuisance, but for the purpose of protecting his own property from destruction, he was justified in doing so even although the effect of it was to damage to some extent his immediate neighbour.

I am of opinion that the contention of the defendant is the correct one, and that the company, instead of proceeding against him, should have proceeded against the upper proprietor. It is, I think, a universal principle that a man may do what he likes with his own, provided that in so doing he does not interfere with

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some legal right of his neighbour. In the present case, as I have stated, there was no natural watercourse, there was not even an artificial watercourse, and in so far as the defendant's lands were damaged it was a pure act of trespass on the part of Shaw from which the defendant had a clear right to protect himself by all lawful means irrespective of any consequences which might happen to other parties. To prevent the defendant under the circumstances, when he saw his lands being flooded and his property washed away, from interposing a barrier at the boundary of his property and sending the water back the way it came, would, I think, be most unreasonable. To compel him to cross over and perhaps trespass upon the railway lands in order that he might erect a similar barricade on Shaw's land would be even more so. And I cannot see why, when he did nothing more than protect himself by the fair and reasonable methods he used, the company can compel him to pay the damages they sustained, particularly when they had ample means of redress from the originator of the mischief, and could as easily have protected themselves from injury as the defendant had done. It seems to me, with great deference, that any other contention is manifestly erroneous. Let me put a few illustrations demonstrating, as I conceive, that error.

I have a sheep ranch on the foot-hills of the Rockies. I descry in the distance a horde of mountain wolves evidently intending to attack my herds. Their course of attack is apparent. I summon my servants and we erect a barricade sufficiently strong to hurl them back. In consequence of their repulse they attack my neighbour's herd some distance off. Am I to be responsible for the damage the wolves have done my neighbour? Or, I see a prairie fire approaching me from the distance. It means inevitable destruction to my pro-

perty unless I can devise a method of arresting its progress. On the margin of my property I plough up a strip of prairie. The flames reaching this strip are unable to surmount it. The wind or other causes as often happens sends the fire in other directions and my neighbour's fields and buildings are burned. Am I responsible for that damage? Or, I surround my young orchard with a thick evergreen hedge to protect it from the northern blast. The cold winds thus turned from their accustomed course strike against the fruit trees of my neighbour, so that they wither and die. Am I responsible for the loss? Or take a case which continuously happens in every northern village and town on this continent. My second door neighbour allows snow to accumulate in his back garden. In the spring it melts, overflows my next door neighbour's garden and is on the point of attacking the foundation of my house and threatening my cellar I raise my cellar wall and as a consequence the garden of my immediate neighbour is overwhelmed by the flooding water. Am I responsible for that, and must I, as the contention is, in order to protect my cellar cross over my neighbour's property to the property of his neighbour and erect a wall of masonry there? That, I say, would be absurd.

In all these cases, instead of putting up protective works on my own estate I might with equal inconvenience to myself and equal benefit as well, have put them up on or beyond the limits of my neighbor's land. Does the obligation of neighbourhood impose that duty upon me. And if so, and I fulfil it, will not my neighbour's neighbour have a similar claim for the damage I have done him? And how far afield must I go? These illustrations contain their own refutation, otherwise it might be an actionable wrong to plant a hedge or erect a party wall or fence, or even build one's house upon a water-proof foundation. They are

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common enemies, the wolf, the fire, the wind, the flood, and every one must of necessity have a right to defend himself within his own domain against them.

The English authorities, so far as they go, are, in my view, in favour of the appellant's contention. They well known case of *Chasemore* v. *Richards* (1), has definitely settled the question so far as percolating water is concerned, deciding that you may without incurring liability so work your own land by mining or otherwise as to do material damage to your neighbour by diverting water from his wells and depriving him absolutely of their use; and the cases would seem to show that there is no distinction between underground percolating water and surface water, no natural watercourse being concerned. Mr. Goddard in his work on Easements, fourth edition, page 85 (5 ed. p. 88) says:

> The case of flood water is different from that of flowing streams, and the principles of law relating to the latter do not relate to floods; but it may be mentioned in passing that every landowner has a right at common law to protect his land from damage from floods, and for that purpose to erect dams or other defences to divert the flood-water from its natural course.

In support of this, *Trafford* v. *The King* (2), and *Nield* v. *London & North-Western Railway Co.* (3), are cited. The author in a foot note proceeds to remark:

> From these decisions it does not appear clear whether the landowner who defends himself against floods, incurs liability to another person, if by his act the flood-water is thrown upon the other's land and does injury there. In *Trafford* v. *Rex* (2), Tindal C. J. said the exercise of the right was subject to the restriction that the person exercising it did not thereby occasion injury to the lands or property of other persons; but in the case of *Nield* v. *The London & North Western Railway Co.* (3), it was held that as the water was not brought into the canal by the defendants they were not liable for damage caused to a neighbour owing to their act of defence. The latter principle appears the more reasonable of the two, for the natural result of preventing water coming on

(1) 7 H. L. Cas. 349. (2) 8 Bing. 204.
(3) L. R. 10 Ex. 4.

one man's land is to force it to flow on to the land of another, where it is sure to be more or less prejudicial. How then can it be said that there is a right to defend one's own land by forcing the water on to another person's ground, and yet that it is wrong to cause the injury which must necessarily follow?

In this case a flood had occurred in a canal from the bursting of the banks of an adjoining river and the canal company placed a barricade across the canal above their premises and thereby flooded the plaintiff's premises. It was held the company was not liable.

The flood (says Bramwell B. at p. 7) is a common enemy against which every man has a right to defend himself. And it would be most mischievous if the law were otherwise for a man must then stand by and see his property destroyed out of fear lest some neighbour might say "you have caused me an injury." The law allows what I may term a kind of reasonable selfishness in such matters; it says "Let every one look out for himself and protect his own interest," and he who puts up a barricade against a flood is entitled to say to his neighbour who complains of it: Why did not you do the same? I think what is said in *Menzies* v. *Earl of Breadalbane* (1), is an authority for this and the rule so laid down is quite consistent with what one would understand to be the natural rule. Where, indeed, there is a natural outlet for natural water no one has a right for his own purpose to diminish it, and if he does so he is, with some qualification, perhaps, liable to any one who has been injured by this act, no matter where the water which does the mischief came into the water course. I say with some qualification because it may be that even in the case of a natural water course the riparian owner is entitled to protect himself against extraordinary floods by keeping off extraordinary water.

In this country the question indirectly came up before the Court of Queen's Bench, Upper Canada, in the case of *L'Esperance* v. *The Great Western Railway Co.* (2), in the year 1856. In this case the railway company had purchased certain lands from the plaintiff and had built their railway upon them. It happened that there was an artificial underground drain which the company blocked up, the consequence being that the plaintiff's lands were flooded. It was held

(1) 3 Bligh N. S. 414. (2) 14 U. C. Q. B. 173.

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that the company not being under a burden in regard to the drain, the plaintiff not having reserved a right of drainage in the conveyance, the action could not be maintained, the railway company having the right to deal with their land as they pleased. I do not cite this case with a view of expressing an opinion whether, under existing railway law and legislation, that decision would be now followed, but for the purpose of quoting what Mr. Justice Burns says in his judgment at page 178.

> The present case presents (he says) so far as disclosed by the declaration and what was proposed to be proved, the case of a party using his own land for his own purposes, in a way which prevents the use of an artificial work formerly constructed on that land, which no legal right to maintain is shewn on the one side, and no obligation arising either from contract or duty to be observed, having regard to the laws of nature to permit longer to exist on the other side. The passage in Domat, section 1581, seems to me to apply precisely to this case: "He who in making a new work upon his own estate uses his right, without trespassing either against any law, custom, title or possession which may subject him to any service towards his neighbours, is not answerable for the damage which they may chance to sustain thereby, unless it be that he made that change merely with a view to hurt others, without any advantage to himself. For in this case it would be a pure act of malice, which equity would not allow of. But if the work were useful to him—as, if he made in his estate any lawful repairs, to secure it against the overflowing of a torrent or river, and his neighbours' grounds were thereby the more exposed to the flood or suffered from thence any other inconvenience, he could not be made answerable for it.

This passage from Domat, (Strahan's translation, Cushing's ed. Liv. ii. tit. viii, sec. iii, no. 9 of the French edition) must now in those provinces of Canada, where the English common law prevails, be modified so far as it refers to malice, having in view the late decision of the House of Lords in *Allan* v. *Flood* (1). But it shows clearly that the civil law on this subject is in accord with my view of what English law is.

(1) [1898] A. C. 1.

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The recent case in this court of *Ostrom* v. *Sills* (1) is, I think, applicable to the present case and must conclusively lead us to the allowance of this appeal. In that case we simply confirmed the judgment of Mr. Justice Moss in the Court of Appeal. In that judgment the following passage occurs:

> I think that the defendants are entitled to judgment because in doing what is complained of they are protecting themselves against the acts of other parties by means of something put up on their own land as a barrier, and not as a medium for conducting the waters from their premises to, and casting them upon, the plaintiff's premises.

In that case water, not a natural stream, was allowed by the municipality to overflow defendants' land on the lower side of a highway. The defendants erected a building cutting off the water from flowing over them, and thereby necessarily diverted it so that it flowed upon and injured the lands of a neighbour; it was held there was no action. The object to be gained by the foundation wall in *Ostrom* v. *Sills* (1), and by the dam in the present case was the same; in the former to protect the foundation wall and cellar from the waters coming through the street drain, and in the latter to protect the farm from being washed into the river.

The plaintiff's counsel in support of his contention, supported it mainly from the maxim *sic utere*, etc., as illustrated in the cases of *Rylands* v. *Fletcher* (2); *Roberts* v. *Rose* (3); and *Whalley* v. *Lancashire & Yorkshire Railway Co.* (4). *Rylands* v. *Fletcher* (2), has no application to this case as between the plaintiff and the defendant. Its only application is as to the right of the railway company to proceed against Shaw. So far from the defendant here bringing upon his ground material which if let

(1) 24 Ont. App. R. 526; 28 Can. S. C. R. 485.
(2) L. R. 3 H. L. 330.
(3) L. R. 1 Ex. 82.
(4) 13 Q. B. D. 131.

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loose might do damage to his neighbour, he did not bring or collect it there at all; his sole object in building the dam was to prevent the invasion upon his land of noxious material gathered from the lands of another. The facts in *Roberts* v. *Rose* (1), were different from those here. And Lord Blackburn in making his observations relied on at page 89, was referring not to what a man might do upon his own land for the purpose of protecting it from attack by water or otherwise, but was referring only to how one might upon the lands of another abate a nuisance. Besides in so far as it aids the plaintiffs it must be deemed to be modified by Lord Bramwell's subsequent decision in the *Nield Case* (2) above referred to. The facts were different to those in the *Whalley Case* (3). Had the defendant here after he had erected his dam and penned back the accumulating waters suddenly demolished it allowing the waters to pour down inundating lands on the other side of his property, that would give rise to a state of facts and possibly to a state of law not applicable here.

For a full discussion of the American law see Angell on Watercourses, sec. 108 *a*, *et seq.*

On the whole I am of opinion that the appeal should be allowed with costs both here and below, and that the action should be dismissed with costs.

KING and GIROUARD JJ. concurred.

Appeal allowed with costs

Solicitor for the appellant: *J. H. Senkler.*

Solicitor for the respondent: *Fred. J. Fulton.*

Solicitor for the third party: *Wm. H. Whittaker.*

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(1) L. R. 1 Ex. 82.
(2) L. R. 10 Ex. 4.
(3) 13 Q. B. D. 131.