1928

*Feb. 13, 14.
*June 12.

MALCOLM FORBES GROAT AND WALTER S. GROAT (PLAINTIFFS).. } APPELLANTS;

AND

THE MAYOR, ALDERMEN AND BURGESSES, BEING THE CORPORATION OF THE CITY OF EDMONTON (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Waters and watercourses—Drainage—Upper and lower riparian owners—Rights of drainage by upper owner—Pollution of water—Drainage of streets by municipality through sewer into watercourse.

Plaintiffs claimed an injunction and damages against defendant city for polluting the waters flowing through a ravine which traversed or bounded their land. They recovered judgment at trial in respect of

(1) [1891] 3 Ch. 405.

*PRESENT:—Anglin C.J.C. and Duff, Rinfret, Lamont and Smith JJ.

various acts complained of, but this judgment was modified by the Appellate Division, Alta. (22 Alta. L.R. 457), which held that the city was not liable for alleged pollution caused by certain storm sewers. Against this holding the plaintiffs appealed. The city had constructed a large storm sewer having its outlet in an arm of the ravine above plaintiffs' land. Its purpose was primarily to carry off the surplus water from streets in the vicinity, but (as found on the evidence) through it discharged into the stream in the ravine, not only surface water, but all filth from the streets; also a mass of dirt was allowed to form and accumulate during the winter in the sewer, and in the spring the rush of water washed this into the stream.

Held (reversing judgment of the Appellate Division, Smith J. dissenting), that the operation of the sewer as aforesaid violated plaintiffs' riparian rights; and they were entitled to an injunction (failing abatement of the nuisance within the delay allowed) and to damages.

Per Anglin C.J.C. and Rinfret J.: The common law right of a riparian owner to drain his land into a natural stream affords no defence to an action for polluting the water in the stream; pollution is always unlawful and, in itself, constitutes a nuisance. *Broughton* v. *Township of Grey* (27 Can. S.C.R. 495) and *In re Townships of Oxford and Howard* (18 Ont. A.R. 496) distinguished.

Whatever the consequences, and much as the result may cause inconvenience, the principle must be upheld that, unless Parliament otherwise decrees, "public works must be so executed as not to interfere with private rights of individuals" (*Atty. Gen.* v. *Birmingham*, 4 K. & J. 528, cited).

The Edmonton charter, which conferred the relevant powers on the city, did not authorize interference with the inherent right of a riparian owner to have a stream of water "come to him in its natural state, in flow, quantity and quality" (*Chasemore* v. *Richards*, 7 H.L.C. 349, at p. 382), except when necessary, and then upon payment of adequate compensation.

Statutory powers should not be understood as authorizing the creation of a private nuisance, unless the statute expressly so states.

Per Duff J.: The existence of a nuisance in fact was established; and the city failed to justify its acts as acts done under its charter powers; nor could they be justified as an exercise of the common law rights of a riparian owner.

While the making of streets by macadamizing or paving, etc., is a natural use of the land owned by the city, and it is under no duty to intercept rain water which, having fallen from the clouds, is pursuing its way under the impulsion of gravity or other natural forces towards a watercourse, it is not at common law entitled, in its quality of riparian owner, to collect and discharge the filth of the streets through an artificial channel into a watercourse, where it is to settle and remain until the currents generated by the spring thaws carry the mass of it to the lands of lower riparian owners.

Per Lamont J.: The city had the right to develop its lands in the way cities ordinarily do by constructing and paving streets and lanes, and if, as a result of such user, an increased quantity of street sweepings, horse droppings and other impurities accumulated on its land, and

1928

GROAT v. CITY OF EDMONTON.

these were washed down by the rain through a natural watercourse to the stream, the plaintiffs, as lower riparian owners, had no ground of complaint; but, apart from statutory authority so to do, the city could not by flushing its streets collect these impurities and by means of a storm sewer pour them into a stream the waters of which the plaintiffs had a right to take for domestic or other purposes; under English law an upper riparian owner "must not discharge his filth on his neighbour's land" (principles laid down in *Stollmeyer* v. *Trinidad Lake Petroleum Co. Ltd.*, [1918] A.C. 485; *Ballard* v. *Tomlinson*, 29 Ch. D. 115; *John Young & Co.* v. *Bankier Distillery Co.*, [1893] A.C. 691, applied; *In re Townships of Oxford and Howard*, 18 Ont. A.R. 496, at p. 505; *Gibbons* v. *Lenfestey*, 84 L.J.P.C. 158, at p. 160, distinguished). The city's charter did not limit plaintiffs' right of action, as the city had taken no statutory proceedings to acquire a right to pour the polluted output of its sewer into the stream.

Smith J. dissented, holding that the city had a right to drain the surface water from its streets into the storm sewer and through it to the natural watercourse; that there was no evidence of any pollution from this surface drainage other than what would occur in a state of nature; the only kind of pollution shown was such as would naturally be found in any similar stream draining an area where animals were kept.

The sewer, as originally constructed, had been cut to provide drainage facilities for a certain district, thus creating a diversion of drainage, causing, as plaintiffs complained, a substantial decrease in the quantity of water that would otherwise have gone into the ravine, and thus, by reason of less dilution of the dirt and filth, increasing the dangers of pollution. Dealing with this point, Anglin C.J.C. and Rinfret J. held that the diversion gave plaintiffs no right of action; they had no right to the drainage water collected by the sewer; in complaining against the diversion they were really claiming a right to compel the city to drain into the ravine; diversion of drainage is quite a different thing from diversion of a stream; and, while riparian owners have rights on and to the water flowing in a natural stream, they can claim no right to water in undefined channels or percolating through the earth; and though riparian owners above them may be entitled to drain their lands into the stream, they are not obliged to do so.

As to certain smaller storm sewers discharging into the stream, it was held (sustaining, in this respect, the judgment of the Appellate Division) that, on the evidence as to their operation and the waters discharged thereby, the plaintiffs had no right of action.

Duff and Lamont JJ. pointed out that they had not dealt with the provisions of the *Irrigation Act* (R.S.C., 1906, c. 61), no question thereon having been raised in the argument.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Alberta (1) allowing in part an appeal by the defendant city from part of the judgment of Ives J. in favour of the plaintiffs.

(1) 22 Alta. L.R. 457; [1927] 1 W.W.R. 882.

The plaintiffs claimed damages and an injunction against the defendant for polluting the waters flowing through a ravine, known as " Groat's Ravine," in the City of Edmonton, which ravine, lower down than where the alleged acts causing pollution took place, traversed or bounded the plaintiffs' land.

The plaintiffs' land was south of 102nd Avenue. On 102nd Avenue a bridge, referred to as " Athabasca Bridge," crossed the ravine. It was immediately south of this bridge, and just above the plaintiffs' land, that the smaller storm sewers in question discharged into the ravine. At a short distance north of 102nd Avenue two branches of the ravine, referred to as the " northeast arm " and the " northwest arm " came together. The large storm sewer in question, which was six feet in diameter, had its outlet in the northeast arm.

The action was tried before Ives J., who gave judgment for the plaintiffs in respect of various acts complained of by the plaintiffs as causing pollution of the water.

The formal judgment at trial declared that the pollution complained of in the stream in the ravine was caused by the city, and that the plaintiffs were riparian owners of lands abutting the stream south of 102nd Avenue, and were entitled to relief; that the pollution was a nuisance and was caused: (1) by the city's dump at the junction of the northwest arm of the ravine and 106th Avenue; (2) by the storm sewer and the sanitary sewer situate in the northeast arm of the ravine and discharging into the stream; (3) by the storm sewers discharging into the ravine immediately south of Athabasca Bridge on 102nd Avenue; and ordered that the city be restrained from continuing the nuisances, and that, in the event of the city failing to abate them and keep them abated within a period of two years, the plaintiffs, upon the expiration of two years from the date of the judgment, should be entitled to take out an order restraining the city from continuance thereof. The trial of the issue of damages was reserved for further inquiry, with terms as to costs of the issue depending on the amount established.

The city appealed from part of this judgment, its appeal being practically confined to the matters of the dump at 106th Avenue and of the storm sewer on the northeast arm

1928

GROAT v. CITY OF EDMONTON.

of the ravine, and of the storm sewers discharging into the ravine south of Athabasca Bridge on 102nd Avenue.

The Appellate Division (1) allowed in part the city's appeal. It maintained the judgment below as to the dump at 106th Avenue (though with some doubt, on the evidence, as to its being a cause of pollution), but it allowed the appeal "in respect to the surface drainage through the storm sewers," and, by its formal judgment, amended the judgment at trial by striking out therefrom any declaration: "(*a*) That the pollution caused by or from the storm sewer situate on the northeast arm of the said ravine and discharging into the said stream is or constitutes a nuisance; (*b*) That the pollution caused by or from the storm sewer discharging into the said ravine immediately south of Athabasca Bridge on 102nd Avenue, is or constitutes a nuisance; (*c*) That the surface drainage through any of the storm sewers is or constitutes a nuisance"; and by striking out therefrom "any order that the defendant do abate the use of any of the said storm sewers for drainage purposes, or be restrained from continuing the use of the said storm sewers for such purposes, or that the plaintiffs shall be entitled to take out an order restraining the defendant from the continuance of the use of the said sewers for such drainage purposes."

By the judgment now reported, this Court (Smith J., dissenting) allowed the plaintiffs' appeal, with costs here and in the Appellate Division, and restored the judgment of the trial judge, except as to the smaller storm sewers discharging into the stream south of the bridge on 102nd Avenue.

James A. Ross K.C. for the appellants.

O. M. Biggar K.C. for the respondent.

ANGLIN C.J.C. concurred with Rinfret J.

DUFF J.—I concur in the judgment for these reasons.

The existence of a state of affairs constituting a nuisance in fact, is found, and is, I think, established as resulting from the construction and use of the large sewer extending through the northeast arm; and this was in law a nuisance chargeable to the municipality, unless sufficient justification or excuse has also been established.

(1) 22 Alta. L.R. 457; [1927] 1 W.W.R. 882.

Mr. Biggar's argument founded on the statute, fails, because justification under the statute was not proved at the trial. Indeed there was no attempt to prove it. That the municipality possesses authority under its charter to construct sewers and drains for carrying away water from its streets is beyond question. But it is only in respect of the authorized works and the necessary results of such works that the municipality is entitled to the protection of the statute; and that protection is not available where the nature of the specific work alleged to be authorized under the statute is not made to appear. In this case, no by-law or other instrument evidencing authority or defining the work alleged to be authorized was adduced; and there is no finding, either by the trial judge or by the Appellate Division, that the nuisance complained of was authorized, or was the necessary result of works authorized pursuant to the charter.

I agree that the making of streets by macadamizing or paving or otherwise, is a natural use of the land owned by the municipality; and, moreover, that the municipality is under no duty to intercept rain water which, having fallen from the clouds, is pursuing its way under the impulsion of gravity or other natural forces towards a water course. But the municipality is not at common law entitled, in its quality of riparian owner, to collect and discharge the filth of the streets through an artificial channel into a water course, where it is to settle and remain until the currents generated by the spring thaws carry the mass of it to the lands of lower riparian proprietors. I can perceive no warrant for this under the common law. I refrain from discussing the provisions of the *Irrigation Act*, R.S.C., 1906, c. 61, because these were not mentioned in the argument.

The appeal, as I view it, turns exclusively upon points of fact. A nuisance in fact has been found, and is, I think, proved. The municipality has not exonerated itself from responsibility by justifying its acts as acts done under the powers conferred upon it by its charter; nor can they be justified as an exercise of the common law rights of a riparian proprietor.

RINFRET J.—This appeal involves a consideration of the rights of riparian owners in a natural water-course.

1928

GROAT v. CITY OF EDMONTON.

Rinfret J.

The appellants hold, in the western portion of the city of Edmonton, a block of land bordering on the north bank of the Saskatchewan river. A deep ravine, known as Groat's Ravine, which extends northward from the river, traverses their property or bounds it to the west. It is formed of two branches: one coming from the northwest, and, as would appear from the plan, starting approximately at 109th Avenue; the other coming from the northeast, at the corner of 105th Avenue and 123rd Street. The two branches are joined at a comparatively short distance north of 102nd Avenue (also referred to in the case as Athabaska Avenue) in the Groat Ravine Park which belongs to the City of Edmonton. The ravine then proceeds under a bridge at 102nd Avenue and, shortly below, meets the appellants' land, along which it extends until it eventually reaches the river.

It forms a natural drainage basin for a large district and, prior to the settlement, the appellants and their predecessors had found there a continual flow of water, "pure and healthy," according to the evidence, which was used for drinking purposes, or at least offered a sufficient supply for stock purposes.

The appellants complained that the City of Edmonton caused or permitted the northwest branch of the ravine, at 106th Avenue, to be used "as a nuisance dumping ground for very large mounds of garbage and general city refuse" and that the water passing through it was adulterated and rendered noxious by the fault of the city; that the city had also erected on the northeast branch, in the neighbourhood of 126th Street and 103rd Avenue, a pumping station designed to raise a sewage system outflow into another sewer at a higher level, but because this pump either failed to function or became overtaxed, or because stuff was actually taken out by the city employees and deposited at the side of the station, sewage matter accumulated on the bank of, or in the channel of, the ravine and was carried to the main stream, much to the appellants' injury.

Then the city constructed a storm sewer, six feet in diameter, having its outlet in the northeast arm, at a short distance below the pumping station. Its purpose was primarily to carry off the surface waters from streets in the

vicinity. The appellants, however, alleged that all street dirt and filth were washed into this sewer. Later, the pumping station was connected with it in order that any outflow of sewage from the station might be thrown into the sewer and through it discharged into the ravine. To this the appellants strongly objected, on the ground that the effect was to pollute the water in the stream.

Still another complaint was as follows:

Between the outlet of the six foot storm sewer and the bridge at 102nd Avenue, the stream was left open; but, under the bridge and at the bottom of the ravine, a pipe was placed in order to confine the waters and protect the abutments of the bridge. This pipe extended into the appellants' property, and so, it was contended, constituted a trespass upon the appellants' land, while it increased the velocity of the water in the stream and undermined the banks, which had slipped into the ravine.

Finally, the appellants said the city had laid two pipes, immediately below the 102nd Avenue bridge, respectively on the east and west banks of the ravine, to conduct the street drainage into the latter. They complained that the result was also to foul and pollute the water in the stream.

The appellants accordingly asked for an injunction and an inquiry as to damages.

At the trial, they were successful in all their contentions. Ives J. thought

> the evidence clearly proves that the natural stream found in what is called Groat's Ravine * * * is grossly polluted, and the conclusion is irresistable that such pollution is caused, first, by the dump on 106th Avenue, which crosses the northwest branch of the stream; secondly, by the storm sewer and the sanitary sewer (*sic*) situate in the northeast branch of the stream and discharging into it; and thirdly, by the storm sewer discharging into the stream immediately south of the bridge (on) 102nd Avenue.

He declared that the dump and sewers "in their operation cause a nuisance." He therefore granted the injunction, to become effective after two years, during which the city was ordered to abate the nuisance. The issue of damages was reserved for inquiry before himself, with the proviso that the costs thereof would be borne by the appellants, unless they succeeded in establishing damages in a sum greater than $100.

As will be noticed, there was no adjudication upon two points: 1. The complaint about the supposed injury to the

1928

GROAT v. CITY OF EDMONTON.

Rinfret J.

banks of the water-course. 2. The alleged trespass upon the appellants' land by laying thereon, for a distance of thirty to thirty-five feet, the large pipe intended to confine the water of the stream under the bridge and protect the abutments thereof.

The absence of findings on these points is consistent with the assumption that they were not pressed before the trial judge. At all events, the appellants accepted his judgment. The city alone appealed therefrom to the Appellate Division of the Supreme Court of Alberta. Neither of those points was again raised before us; indeed, the city conceded the appellants' right in respect to "the construction and maintenance of pipes on (their) property south of 102nd Avenue."

In the Appellate Division, the city admitted that in so far as the judgment declared it a nuisance to permit "the house sewage to escape from the (pumping station) into the ravine it was unobjectionable," and submitted "to the order requiring it to be abated." Moreover, the city was unsuccessful in its attack upon the order concerning the dump at 106th Avenue.

The appeal was allowed, however, with regard to "the surface drainage through the storm sewers," and the judgment was amended by

striking out therefrom any declaration:

(*a*) That the pollution caused by or from the storm sewer situate on the northeast arm of the said ravine and discharging into the said stream is or constitutes a nuisance;

(*b*) That the pollution caused by or from the storm sewer discharging into the said ravine immediately south of Athabasca Bridge on 102nd Avenue, is or constitutes a nuisance.

(*c*) That the surface drainage through any of the storm sewers is or constitutes a nuisance.

And the said Judgment is further amended by striking out therefrom any order that the Defendant do abate the use of any of the said storm sewers for drainage purposes, or be restrained from continuing the use of the said storm sewers for such purposes, or that the Plaintiffs shall be entitled to take out an order restraining the Defendant from the continuance of the use of the said sewers for such drainage purposes.

Another modification was introduced allowing the appellants to elect to take judgment for $100 damages in lieu of the inquiry; but they have since given notice of their refusal to accept this sum and we need not further concern ourselves about it.

The City of Edmonton is willing to abide by the decision of the Appellate Division, but the plaintiffs now ask us to restore the original judgment, and, in addition, would like us to consider a further question which it will now be convenient to examine.

The six-foot storm sewer, as originally constructed, took care of the storm water drainage from the district west of 121st Street. It extended on its southerly course from 121st Avenue down to the northeast arm of Groat's Ravine. In 1924 and 1925, it was cut at 114th Avenue to provide drainage facilities for the town of Calder. The appellants argued that the natural flow of the stream had been thereby interfered with and a substantial proportion of the water subtracted from the ravine. It was said that the decrease in the quantity of water caused the dirt and filth carried by it to be less diluted and therefore the diversion at 114th Avenue correspondingly increased the dangers of pollution.

In our opinion, this argument cannot be entertained. No doubt a riparian owner may not divert the water of a natural stream to the injury of the lower riparian owners. He may, while the water flows through his land, put it to any lawful use for reasonable purposes, but he must return it to its regular course in the stream beyond the property. Diversion of drainage, however, is quite a different thing from the diversion of a stream. While riparian owners have rights on and to the water flowing in a natural stream, they can claim no right to water in undefined channels or percolating through the earth. Owners, though they may be entitled to drain their lands in a water-course, are evidently not under any obligation to do so. The appellants, when they complain against the diversion of the storm sewer at 114th street, are really claiming a right to compel the city to drain into Groat's Ravine. It may be granted that the object of the six-foot storm sewer is to collect the drainage water from the area already described; yet, the appellants hold no absolute right to such water, and no action lies for its diversion.

The remaining question on the appeal is solely whether the amendments made to the judgment by the Appellate Division "in respect to the surface drainage through the storm sewers" were justified under the circumstances.

1928

GROAT v. CITY OF EDMONTON.

Rinfret J.

We have the holding of the trial judge that the natural stream across the appellants' lands was grossly polluted, and that such pollution was caused by the dump, the six-foot storm sewer, the "sanitary sewer" (which meant, no doubt, the connection through which the overflow of the pumping station was directed into the storm sewer), and the storm sewers discharging into the ravine immediately south of the 102nd Avenue bridge. Subject to what will be said with regard to the latter, there was no reversal of these findings by the Appellate Division. Its judgment proceeds on the assumption that these facts were established and then states, as a proposition of law, that the respondent as riparian owner had the right to act as it did. As authority for this proposition, the Court relied on a decision of this Court in *Broughton* v. *Township of Grey* (1), where Gwynne J., dealing with an alleged liability under an Ontario Drainage Act, referred to a judgment of the Ontario Court of Appeal in *In re Townships of Oxford and Howard et al* (2), and expressed his concurrence with "the reasons given by the learned judges who pronounced it." One of those judges, in the course of his remarks (p. 505), happened to have said that

> while the landowners exercise their rights [to drain into a natural watercourse] reasonably, whether they do so individually or collectively, they are not concerned with the effects produced lower down the stream.

In the above case, however, there was no suggestion of pollution; nor was there in the *Broughton Case* (1). Pollution does not appear to have been discussed by any of the judges, and the remarks just quoted were not addressed to a situation such as is held to exist here.

The right of a riparian proprietor to drain his land into a natural stream is an undoubted common law right, but it may not be exercised to the injury and damage of the riparian proprietor below, and it can afford no defence to an action for polluting the water in the stream. Pollution is always unlawful and, in itself, constitutes a nuisance.

In cities and towns, drains and sewers are a necessity. Generally they are built under statutory powers. They may also be said to be constructed in the exercise of the collective rights which, in that respect, the local ratepayers have at common law and which are represented by the

(1) (1897) 27 Can. S.C.R. 495. (2) (1891) 18 Ont. A.R. 496.

municipality. But these rights are necessarily restricted by correlative obligations. Although held by the municipalities for the benefit of all the inhabitants, they must not—except upon the basis of due compensation—be exercised by them to the prejudice of an individual ratepayer. So far as statutory powers are concerned, they should not be understood as authorizing the creation of a private nuisance—unless indeed the statute expressly so states.

We have been referred to the sections of the Edmonton Charter whereby the relevant powers were conferred on the city by the Legislature of Alberta. As they include the power to interfere with the property of the citizen, they are to be construed favourably to the latter's rights.

In our opinion, they do not authorize interference with the inherent right of a riparian owner to have a stream of water "come to him in its natural state, in flow, quantity and quality" (*Chasemore* v. *Richards* (1)), except when necessary and then upon payment of adequate compensation.

Through the 6 foot storm sewer and into this natural stream (which up to that time afforded "pure and healthy" water used for drinking and stock purposes), the city discharges not only surface water, but all the street washings and filth, the horse droppings, the sweepings "and anything else that happened to be there." This is not ordinary street drainage, but street sewage. In addition to that, a mass of dirt was allowed to form and to accumulate during the winter in that large storm sewer back of the pumping station. In the spring, the rush of water coming down washed this filthy stuff into the stream.

We think a distinction ought to be made between this condition and mere natural drainage through pipes arranged to take care of rain-water or melted snow. This difference indeed was at the basis of the decision in *Durrant* v. *Branksome Urban District Council* (2) to which reference was made by counsel for the respondent, in the course of his very able argument.

For that reason, we agree with the Appellate Division in respect to the small pipes by the Athabaska Avenue bridge. We do not think the evidence shows anything more than

(1) (1859) 7 H.L.C. 349, at p. 382. (2) [1897] 2 Ch. 291.

1928

GROAT v. CITY OF EDMONTON.

Rinfret J

that "they simply confine, control and conduct to the channel the waters which reach the top of the bank in a natural way and which but for the pipes would make their way down the bank, no doubt in many cases to its injury."

In the case of the six foot storm sewer, however, there is ample evidence to justify the holding of the trial judge. The city engineer admitted that it would be possible to prevent the pollution. The city therefore has inflicted and still inflicts unnecessary injury upon the appellant.

While the courts will naturally be slow to grant an injunction against a public body carrying out an important public work, they cannot lose sight of the fact that in this case there is an existing nuisance caused by the respondent. The appellants' established riparian rights have been and still are violated. They are entitled to an order forbidding the fouling of the water and abating the nuisance, as well as preventing the recurrence of the wrong and protecting them against the acquisition of prescriptive rights.

It has been suggested that this would necessitate very large expenditures and require considerable time. In fact, the judgment of the trial judge rather gave credit to that contention and, for that reason, prescribed that the order restraining the operation of the sewers should be taken out only at the expiration "of two years, provided such nuisance is not abated in the meantime."

Although it is no part of the court's duty to inquire how the respondent can best abate the nuisance, we entertain little doubt that within the delay thus granted the city respondent, either through the instrumentality of the Board of Public Health or through the exercise of its powers of expropriation, may avoid the removal of the sewer and the modification of its system. The city may acquire an easement through the appellant's land or the right to discharge upon it the stream water injured in quality. But, whatever the consequences, and much as the result may cause inconvenience, the principle must be upheld that, unless Parliament otherwise decrees, "public works must be so executed as not to interfere with private rights of individuals" (*Atty. Gen.* v. *Birmingham* (1)).

The appeal should be allowed and the judgment of the trial judge restored (with costs here and in the Court of

(1) (1858) 4 K. & J. 528.

Appeal), except in respect of "the storm sewers discharging into the ravine immediately south of Athabaska Bridge on 102nd Avenue."

But although, after the judgment of the Appellate Division, the respondent elected to refuse the sum of $100 as damages, we see no harm in preserving his right of electing to take judgment for that sum or to take an inquiry as stated in the judgment of the Court of Appeal, with the modification that the delay of two weeks within which to make such election will run only from the day of the present judgment.

LAMONT J.—This action was brought to restrain the defendant city from trespassing upon and committing a nuisance on the plaintiffs' property and from polluting the water of a natural stream on which both plaintiffs and defendants were riparian owners. The learned trial judge found as follows:—

> I think the evidence clearly proves that the natural stream found in what is called Groat's Ravine, in this city, is grossly polluted, and the conclusion is irresistible that such pollution is caused, first, by the dump on 106th Avenue, which crosses the northwest branch of the stream; secondly, by the storm sewer and the sanitary sewer situate on the northeast branch of the stream, and discharging into it; and thirdly, by the storm sewer discharging into the stream immediately south of the bridge crossing 102nd Avenue.
>
> * * * *
>
> The owners are entitled to an order for the abatement of this nuisance, and that it be kept abated.

From that part of the judgment which declared that the dump on 106th Avenue, the storm sewer on the northeast arm of the ravine, and the storm sewer discharging into the stream at 102nd Avenue, were sources from which the stream was polluted, the city appealed to the Alberta Appellate Division. That court affirmed the judgment of the trial judge as to the dump, but reversed it as to the storm sewers. From the judgment of the Appellate Division the plaintiffs appeal to this court.

Dealing first with the dump on 106th Avenue, I am of opinion that the judgment below was right. There was evidence which, in my opinion, justified the conclusion of the trial judge that it was one of the sources of the pollution of the stream. This leaves only the storm sewers to consider.

1928

GROAT v. CITY OF EDMONTON.

Lamont J.

As to the small storm sewer discharging into the stream south of the bridge crossing 102nd Avenue, there was evidence that a sample of water taken from the stream at a point opposite the out-flow of that sewer was polluted. That is practically all the evidence pointing to the pollution of the stream from this storm sewer.

As the place from which this sample was taken was south of the dump on 106th Avenue, it seems to me difficult to say that the pollution disclosed by this sample came from the storm sewer rather than the dump. I therefore agree with the Appellate Division in thinking that evidence of pollution from the small storm sewer sufficient to justify the issue of an injunction, has not been produced.

As to the large six foot sewer the city engineer says

> At the mouth of the six foot outflow there is a septic sludge which, in my opinion, is street washing, that would be animal organic matter but not human organic matter.

The engineer also testified that in August or September in each year the city placed a screen or door in the sewer a short distance from the outflow. The primary object of the screen was to prevent currents of cold air going up the sewer. It had the effect, however, of impeding the flow of the water in the sewer, with the result that the solids settled to the bottom and formed a mass of putrefaction extending up the sewer for 170 feet, and having, at the screen, a depth of one and a half feet. In the spring when the screen was removed this mass of putrid solids was swept into the stream near the plaintiffs' land and so polluted the water that the plaintiffs' animals refused to drink it.

It was contended that this pollution could be accounted for by the overflow of the pump at the sanitary sewage station. The evidence, however, is that the overflow from the pump entered the storm sewer at a point only fifty feet back from the screen, while the sludge extends back 170 feet. As the flow from the pump entrance was towards the mouth of the sewer, the sludge above that entrance could not have come from the pump. The samples of water taken at the mouth of this sewer, on being analysed, were found to be grossly polluted. I am, therefore, of opinion that there was sufficient evidence to justify the finding of the trial judge that the large six foot storm sewer was a source of pollution.

The correctness of this finding was not questioned by the Appellate Division. The reversal by that court of the trial judge's finding that the storm sewers were creating a nuisance on the plaintiffs' property was based upon what it conceived to be the right of the city to use the natural water course of Groat's Ravine for draining any part of its natural drainage area, and to do so by the aid of the construction of works useful for that purpose, and that if, in so doing, without more, the water was polluted, the consequences must be borne by the owner affected. As authority for this proposition the judgment of Maclennan J.A. in *In re Townships of Orford and Howard et al* (1), was cited, where, at page 505, the learned judge said:—

> I think that by the common law it is the right of every landowner to drain his land into any natural water-course accessible to him. Indeed, it is the principal function and purpose which a water-course serves, to carry off to great lakes or to the sea, the surplus precipitation from the atmosphere, whether rainfall or melted snow, beyond what is required to support vegetation, and to supply the needs of mankind; and I think that while the landowners exercise their rights reasonably, whether they do so individually or collectively, they are not concerned with the effects produced lower down the stream.

The principle there enunciated was expressed by Lord Dunedin in giving the judgment of the Privy Council in *Gibbons* v. *Lenfestey et al* (2), in the following words:

> Where two contiguous fields, one of which stands upon higher ground than the other, belong to different proprietors, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water which falls from the superior. If the water, which would otherwise fall from the higher grounds insensibly, without hurting the inferior tenement, should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is, without the positive constitution of any servitude, bound to receive that body of water on his property.

It will be observed that neither of these cases deals with the pollution of a stream the water of which a lower riparian owner is entitled to appropriate to himself. Has an upper riparian owner a right to drain on to the land of a lower owner water which has become polluted by impurities on the land of the upper owner? In *Ballard* v. *Tomlinson* (3), Lord Lindley said:

> The right to foul water is not the same as the right to get it; and in my opinion does not depend on the same principles.

* * * *

(1) (1891) 18 Ont. A.R. 496.

(2) (1915) 84 L.J.P.C. 158, at p. 160.

(3) (1885) 29 Ch. D. 115, at p. 126.

1928

GROAT v. CITY OF EDMONTON.

Lamont J.

Prima facie no man has a right to use his own land in such a way as to be a nuisance to his neighbour, and whether the nuisance is effected by sending filth on to his neighbour's land, or by putting poisonous matter on his own land and allowing it to escape on his neighbour's land, or whether the nuisance is effected by poisoning the air which his neighbour breathes, or the water which he drinks, appears to me wholly immaterial. If a man chooses to put filth on his own land he must take care not to let it escape on to his neighbour's land.

Then on page 127, after referring to *Womersley* v. *Church* (1); *Hodgkinson* v. *Ennor* (2), and *Whaley* v. *Laing* (3), he said:

These decisions shew that *prima facie* one man has no right to foul water which another has a right to get.

In *John Young & Co.* v. *Bankier Distillery Co.* (4), Lord Macnaghten laid down the law in these words:

Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality.

In that case the appellants, without any prescriptive right so to do, pumped from their mines and poured into the stream from which the respondents obtained their water for distilling purposes, a quantity of water which without being pumped up would never have reached the stream, and which so hardened the water of the stream that it was rendered unfit for the respondents' purposes. It was held that the appellants had no right to do this, on the ground that a lower riparian owner was under no obligation to receive foreign water brought to the surface of the upper owner's property by artificial means. In his judgment Lord Shand, at page 701, after pointing out that the appellants had a right to work their mines, said:

If in doing so in the ordinary course of working they should happen to tap springs or a water waste from which the water by gravitation rose to the surface and flowed down to a lower proprietor's land, this must be submitted to; but the mine owner is not entitled by pumping to increase this servitude or burden on one unwilling to submit to it by pumping up water which might never rise to the surface, or which might only do so more gradually and slowly and in much smaller volume.

The obligation of a lower riparian owner to receive surface water saturated with impurities from the land of an upper owner, was discussed by the Privy Council in *Stollmeyer* v. *Trinidad Lake Petroleum Co., Ltd.* (5). In that

(1) (1867) 17 L.T. (N.S.) 190.

(2) (1863) 32 L.J. (Q.B.) 231.

(3) (1857) 2 H. & N. 476; (1858) 3 H. & N. 675.

(4) [1893] A.C. 691, at p. 698.

(5) [1918] A.C. 485.

case the appellant and respondents were riparian owners, the appellant being the lower. The business of the respondents was boring for and pumping oil. In carrying on their operations, which were performed properly and without negligence, some oil would escape from the pipes and spill on the surface so that during the rainy season the surface water which made its way in the ordinary course of drainage into the river Vessigny, came to be water polluted with oil. The appellant brought an action to restrain the respondents from polluting the water. The Privy Council held that he was entitled to succeed, as the pollution from oil was greater than in an ordinary region an upper riparian proprietor was entitled to inflict upon a lower one, except by prescription. Their Lordships, while recognizing the right of an upper owner to make any natural user of his land that he wished, held that such right was subject to the limitation that he must not use it in such a way as to be a nuisance to his neighbour. Two passages from their Lordships' judgment are instructive. The first, at page 496, reads:

> If, again, the pollution, such as it is, arises simply because the rain water falls on an oily surface and, running over it until it reaches the defined channel or watercourse, collects there and flows away as oily water, the appellants would again fail. The respondents are not bound to abstain from a normal use of their own ground merely in order that it may remain as clean a catchment area for the rainfall as it was in its virgin state.

The other, at page 497, is as follows:—

> It would not be an application of English law to Trinidad, but an abandonment of it, to hold that an invasion of the appellants' rights must go without remedy, unless it is accompanied by present and substantial damage. Still less can it be called an application of the maxim *sic utere tuo* to Trinidad to say that while in England a landed proprietor must not discharge his own filth on to his neighbour's land at all he may do so in Trinidad, if only he is careful about it and does it for his own benefit.

Applying the principles laid down in the above decisions to the case before us, it would appear to follow that the city has a right to develop its lands in the way cities ordinarily do by constructing and paving streets and lanes thereon, and that if, as a result of such user, an increased quantity of street sweepings, horse droppings, and other impurities accumulates on its land, and these are washed down by the rain through a natural water-course to the stream, the plaintiffs, as lower riparian owners, have no

1928

GROAT v. CITY OF EDMONTON.

Lamont J.

ground of complaint. But, apart from statutory authority so to do, the city cannot by flushing its streets collect these impurities and by means of a storm sewer pour them into a stream the waters of which the plaintiffs have a right to take for domestic or other purposes. Under English law an upper riparian owner "must not discharge his filth on his neighbour's land."

Counsel for the city quoted section 433 of the City Charter, which gives the Corporation power to construct, manage and conduct a system of storm sewers or sanitary sewers, or both, and section 463, which provides for compensating "persons interested in the land, waters, rights or privileges entered upon, taken or used by the Corporation, or injuriously affected by the exercise of such powers," and he contended that the plaintiffs' remedy was compensation under this section.

As the city has taken no steps by the payment of compensation or by other statutory procedure to acquire a right to pour the polluted output of its storm sewer into the stream, the statute places no limitation on the plaintiffs' right of action.

As no question has been raised, either in the pleadings or on the argument before us, as to the effect, if any, of the provisions of the *Irrigation Act* (Dom.) on the rights of riparian owners, I have not considered that question.

I would, therefore, allow the appeal and restore the judgment of the trial judge, except as to the storm sewer discharging into the stream immediately south of Athabasca Bridge on 102nd Avenue. As practically no attention was paid at the trial to this storm sewer the plaintiffs, in my opinion, are entitled to their costs throughout.

SMITH J. (dissenting).—I have carefully read all the evidence in this case, and am completely in accord with the judgment of the Appellate Division, for the reasons there stated.

The City of Edmonton, in my opinion, has a perfect right to drain the surface water from its streets into the storm sewer referred to in the pleadings and, through it, to the natural water course.

There is absolutely no evidence of any pollution from this surface drainage other than what would occur in a

state of nature. It is the surface drainage of an area that forms rivulets such as that in question here, and the natural result of such surface drainage, whether in a city or in a country place, is the kind of pollution complained of in reference to the surface waters from the streets of Edmonton.

Putting aside the pollution from the dump and the pump-house well, for which a remedy is given in the judgment appealed from, the only pollution proved is that caused by the mixture of soil, such as mould, clay, sand, grit and animal droppings carried into the stream by the flow of surface waters. This kind of pollution, it is admitted by plaintiff's own expert witness, will naturally be found in any similar stream draining an area where animals are kept within that area.

The evidence discloses that the plaintiff himself had on his own premises a dozen cattle and some forty horses having access to this stream. In addition to this, several sleughs and an area extending for several miles were drained by this rivulet. Coli baccilli found in the waters of this rivulet are just what would be found in any similar rivulet running through an area where animals were pastured, as is admitted by Dr. Shaw, the plaintiffs' expert. Some of this coli baccilli, no doubt, would be contributed from the surface drainage of the City of Edmonton streets and other lands in the city, but not, I think, in greater proportion than by plaintiff's own land, with its barnyard, piles of manure and toilet on the bank, and his large stock of cattle and horses that had access to the rivulet.

The appeal, in my opinion, should be dismissed with costs.

Appeal allowed in part, with costs.

Solicitors for the appellants: *Lavell & Ross.*

Solicitor for the respondent: *J. C. F. Bown.*