Court File No: CV-22-00088514-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ZEXI LI, HAPPY GOAT COFFEE COMPANY INC,
7983794 CANADA INC. (c.o.b. as UNION: LOCAL 613)
and GEOFFREY DEVANEY

Plaintiffs/Responding Parties

- and -

CHRIS BARBER, BENJAMIN DICHTER, TAMARA LICH, PATRICK KING, JAMES BAUDER, BRIGITTE BELTON, DANIEL BULFORD, DALE ENNS, CHAD EROS, CHRIS GARRAH, MIRANDA GASIOR, JOE JANZEN, JASON LAFACE, TOM MARAZZO, RYAN MIHILEWICZ, SEAN TIESSEN, NICHOLAS ST. LOUIS (a.k.a. @NOBODYCARIBOU), FREEDOM 2022 HUMAN RIGHTS AND FREEDOMS, GIVESENDGO LLC, JACOB WELLS, HAROLD JONKER, JONKER TRUCKING INC., and BRAD HOWLAND

Defendants/Moving Parties

Proceeding under the *Class Proceedings Act, 1992*

PLAINTIFFS' ABBREVIATED BOOK OF AUTHORITIES
(Motion pursuant to s. 137.1 of the *CJA*, returnable December 14-15, 2023)

December 6, 2023

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TAB 1

McKie v. The K.V.P. Company Limited(and four other actions)

Ontario Judgments

Ontario

Mcruer C.J.H.C.

April 15, 1948.

[1948] O.J. No. 471 | [1948] O.R. 398 | [1948] 3 D.L.R. 201

D.R. Walkinshaw, for the plaintiffs.

J.J. Robinette, K.C., J.A. Boles and James Worrall, for the defendants.

MCRUER C.J.H.C.

1 The plaintiffs are all riparian proprietors on the Spanish River in the district of Sudbury, and all operate tourist camps of varying accommodation. The plaintiff James B. Vance, as well as being a riparian proprietor, owns a water lot over which the waters of the river flow and is a commercial fisherman holding a licence from the Province of Ontario. The plaintiff Russell Vance is a son of James B. Vance, and operates a tourist camp on the lands owned by his father. The defendant is the owner and operator of a "kraft" paper mill at the town of Espanola situated 35 miles upstream from the mouth of the river, which empties into the north channel of Lake Huron. The volume of water flowing in the river is considerable. It is said to be 200 yards wide at some places and as much as 80 feet deep. At others it is quite shallow, but it is not argued that at all relevant points the river is not navigable.

2 The plaintiffs' claims are based on the pollution of the water by reason of foreign substances being discharged into the river by the defendant through the effluent from the mill.

3 Prior to the year 1930 the Abitibi Pulp and Paper Company operated a sulphite mill at the site now occupied by the defendant. At that time the mill was closed down and it remained closed until it was reopened by the defendant in May or June 1946 for the purpose of manufacturing kraft paper by the sulphate process.

4 There is no doubt that in the process of manufacture of kraft paper the defendant discharges large quantities of foreign matter into the river upstream from the property owned and occupied by the plaintiffs. The plaintiffs claim damages and ask for an injunction on the grounds that:

(1) Their comfort and the enjoyment of their land is interfered with by reason of foul odours given off from the water.

(2) The water has been rendered unfit for human consumption either in its raw state or after it has been boiled.

(3) The ice taken from the river for domestic use is unfit for the purposes for which it is used.

(4) The water is repulsive to farm animals and milking cows will not drink it in sufficient quantities to maintain normal milk supply.

(5) The water is unfit to bathe in.

(6) The fish in the river are being either killed or driven therefrom.

(7) WWild rice, which has formerly grown in abundance in the waters of the river, forming a feeding ground for wild ducks, has been destroyed. The defendant does not deny that injurious matter is discharged into the river from its mill, but it contends that this is sufficiently diluted by the waters of the river to render it harmless. It is also argued on behalf of the defendant that no right of action lies at the instance of the plaintiffs for interference with the fish in the river.

5 The contentious evidence submitted may be divided into two classes: (1) evidence given by witnesses who testified as to facts relative to conditions in and about the river; and (2) evidence of experts who offered opinions based either on laboratory experiments conducted with samples of water and other substances taken from the river, or on mill operation. I think some of these latter witnesses, called for the defendant, found it difficult to distinguish between the functions of a witness and those of an advocate. While I have given this class of evidence every consideration, I find great wisdom in the following words of Sir G.J. Turner L.J. in Goldsmid v. The Tunbridge Wells Improvement Commissioners (1866), L.R. 1 Ch. 349 at 353:

> "Speaking with all possible respect to the scientific gentlemen who have given their evidence, and as to whom it is but just to say that they have dealt with the case most ably and most impartially, I think that in cases of this nature much more weight is due to the facts which are proved than to conclusions drawn from scientific investigations. The conclusions to be drawn from scientific investigations are, no doubt, in such cases of great value in aid or in explanation and qualification of the facts which are proved, but in my judgment it is upon the facts which are proved, and not upon such conclusions, the Court ought in these cases mainly to rely. I think so the more strongly in this particular case, because it it obvious that the scientific examinations which have been made of the water of this brook must have depended much upon the state of circumstances which existed at the times when those investigations took place. They might well have been affected by the force of the stream at the times of investigation, and probably by the state of the weather, as tending or not tending to the diffusion or dispersion of noxious smells. In my view of this case, therefore, the scientific evidence ought to be considered as secondary only to the evidence as to the facts." Many witnesses were called to testify as to conditions on the river. No useful purpose would be served by dealing with the evidence of each witness in detail. Where evidence conflicts with my findings it may be assumed that I have rejected it as unsatisfactory. The witnesses for the plaintiffs who gave evidence as to these conditions may be divided into two groups, officials who are employed by the Government of Ontario for the conservation of wild life, and those who live on the banks of the river.

6 My findings are that following the closing of the Abitibi plant, and particularly following a flood of about fourteen years ago which washed out the bed of the river, the fish commenced to come back into the river, until in the years just prior to the year 1947 the river had become a good fishing ground, where game fish such as muskellunge, pickerel and bass, together with pike and other fish, were found in abundance. The result was that the area had developed into a desirable resort for fishermen, and the owners of the property on the river had every reason to expect that it would continue to develop if there was no interference with it.

7 After the defendant's plant commenced to operate, the river water began to give off foul odours. These odours not only were prevalent down to the mouth of the river but were detected ten miles out in the channel. One witness said that at his place at the town of Spanish, which is situated at the mouth of the river, the odours were carried in by winds that blew in from the channel. There is no doubt in my mind

that these odours were very repulsive. Some witnesses likened them to the smell of rotten vegetables or rotten cabbage. "Rotten cabbage" was the description used by most witnesses and appears to be characteristic of the smell of the effluent of a kraft mill. There was, however, a substantial difference in the evidence as to the degree and strength of these odours. Samples of the water taken from the river in October and November 1947 were filed by the defendant, from which little or no odour could be detected. I have no hesitation in accepting the evidence of the provincial officers as to the strength of the odour and its repulsive character. Ex. 6 is a sample of matter and water taken from the river two days before it was filed at the trial. The witness Bibby, a provincial constable with no personal interest in this case, swore that the smell from the river was worse than that of the sample filed in court. Nadwell, also a provincial officer, said that in the spring of 1947 he opened a hole in the ice near the mouth of the river and the smell of ex. 6 was mild compared with what came up from the water throught the hole in the ice. I examined ex. 6 at the time the comparison was made and found it very foul. Thomas Taylor, Fish and Wild Life Overseer for the Province of Ontario said that after the defendant started to operate its plant he noticed a strong odour coming from the river. He said it got stronger in 1947 and if a hole was opened in the ice the smell was such as would "nearly knock you down". Sam Nadwell, another provincial officer, gave evidence to the like effect. From the evidence of these officers and the evidence of many witnesses who testified as to the smell given off from the water throughtout the 35 miles of the course of the river below the defendant's plant, I have no hesitation in finding that in the latter part of the year 1946 and more especially in the year 1947 the water of the river gave off a very offensive odour throughout its course from the defendant's plant to the north channel of Lake Huron.

8 There can be no doubt on the evidence that the taste of the water has been materially changed. Many witnesses gave evidence that they were accustomed to use the water for drinking purposes in their homes prior to the operation of the defendant's mill. It would appear that it may have been unwise to use the water untreated, as a chemical analysis shows the presence of colon bacilli for which the defendant is in no way responsible. However, none of those who drank the water appear to have suffered any ill effects. The evidence is that since the operation of the defendant's mill, the water has had a bad taste even when boiled, and that it is unfit for cooking purposes or other common household uses. The witness Edward McKie said that it was disgusting and could not be used for washing on account of the fact that when heated the vapours given off were so offensive that, as he said, "you could not stay in the house".

9 There is no dispute that a large quantity of fibrous material escapes in the effluent from the mill in the manufacturing process. This material consists of wood fibres which have been throught the digesting process of the mill and are in some measure impregnated with the chemicals used in the process. There is some dispute as to the quantity of fibres that escapes but there is no dispute that they are chemically impregnated. The witness Alfred T. Heurter, an engineer of very long and wide experience in the construction of kraft paper mills, was called by the defendant to give evidence as to the design and efficiency of the defendant's mill. He said that in every process there is waste and that all the chemicals cannot be recovered. He said there is a minimum that is non-economical to take off, which passes into the river. His evidence shows that in differenct kraft mills there is a great variation in respect to the fibre loss. His estimate in this mill is that the fibre loss is from 2 to 2.65 per cent., varying every day. Calculated on the basis of an average daily tonnage of the mill of 20,000 tons, there would be approximately 5 tons of chemically impregnated fibre discharged into the river each day.

10 Mr. Hunter, the mill manager, said that the estimated average loss for the year 1947 would be about 1.75 per cent., but he produced no reliable data to show the foundation for this estimate. On such an important aspect of the case I find his evidence quite unsatisfactory. Even accepting Mr. Hunter's estimate, the amount of fibre discharged into the river would be 3 1/2 tons per day. This material consists of small wood fibres, varying in length up to one inch, which are carried down the river in suspension.

They lodge in the bed of the river in places where the water runs less swiftly and large masses accumulate which, due to the formation of gases by chemical reaction, eventually rise to the top of the river and float downstream. Many witnesses testified as to seeing these fibrous masses floating in the water in the years 1946 and 1947. Some were said to be three or four feet across and some as large as eight or ten; others less. They had a spongy consistency and when broken up they gave off a very foul odour. At times several would be seen on the river at once. At other times the river would be quite clear of them.

11 On the evening of the 5th December 1947 the witness Russell Vance set a gill net in the river about twenty feet from shore, between Espanola and Wedgewood, downstream from the defendant's mill. The net was taken up on Saturday, the 6th December, and placed in a bucket which was filed as ex. 9 at the trial. When the net was taken up it was covered with a slimy substance which included large quantities of pulp fibre. When I inspected it at the trial it was in a filthy condition. The evidence shows that nets set at the mouth of the river and in the channel also collect a similar substance but not to the same degree. Ex. 44 was a specimen of weeds taken from the river by Dr. Brown and "quick-frozen", and so kept until brought to the trial. These were covered with a black slimy substance similar to that found on the gill net. Ex. 6 is a sample taken from the surface of the river showing the character of the material in the black fibrous masses that float on the river. Ex. 7 is a sample of material taken from the bed of the river between Wedgewood and Espanola. The evidence is that when ice is cut from the river in the winter it is filled with black foreign matter. Some witnesses said they could not use it for domestic purposes and were obliged to draw ice from other sources. One witness said he used it as it was.

12 On all the evidence I find as a fact that the waters of the Spanish River below the defendant's plant have been polluted by the defendant in such a manner as to change their character and substantially affect the use to which the plaintiffs were entitled to put them and to interfere with the enjoyment of the plaintiffs as occupiers of riparian lands.

13 Much evidence was adduced to show that the pollution of the water had so affected the fish in the river that they had been either driven out or killed or prevented from spawning. Many reliable witnesses testified as to seeing considerable and abnormal numbers of dead fish floating on the river when the ice broke up in the spring of 1947. The evidence as to fishing conditions in 1947, as compared with previous years, was conflicting, but I find on the whole evidence that the fishing has substantially declined since the defendant commenced to operate its mill. There is no doubt that some fish were taken from the river in 1947, but it is to be observed that the points were most of these were taken were points where the waters of the river were diluted by unpolluted streams or were near the dam where fresh water of the river coming over the dam mixed with the effluent of the mill.

14 Many witnesses were called to give scientific evidence to disprove the suggestion that the effluent of the mill was the cause of the decline in fishing and to show that no chemicals injurious to fish were discharged into the river in sufficient quantities to be injurious. It was contended on behalf of the plaintiffs that the dissolved oxygen content in the water was reduced to a point where fish could not live in it in a healthy condition. On the other hand, the defendants submitted evidence of experiments conducted under laboratory conditions which indicated that there were no substances present in the water in sufficient quantities to be lethal to fish and that the dissolved oxygen content was at all times sufficient to maintain normal life. It is always to be remembered that these results were procured in experimental conditions. The samples taken were taken in the autumn of 1947, while on the other hand the complaint was that the destruction of the fish took place in the spring or late winter of 1947. The witness Dr. Van Horne, called for the defendant, said that the dissolved oxygen content in the water comes from the air and he could give no information as to the dissolved oxygen content of the water if covered by ice. The

fact remains that very substantial numbers of dead and dying fish were seen in the river in the spring of 1947 and in such quantities as to alarm the property owners on the river. The only explanation offered by anyone as to what killed the fish is what I might term a fanciful theory of Dr. Fry, who suggested that it might have been due to "winter kill". There was no evidence of winter killing in any other place in the district (not even in lakes where it would be more likely to be expected, according to the evidence) except in this portion of the river. There is no doubt that substances (especially methyl mercaptans) are introduced into the river which if present in sufficient quantities would be injurious to fish, and that fibrous substances in large quantities are introduced into the river which would dissolve the oxygen content of the water. Fish lived in a healthy condition before the water was polluted, and since the pollution they died in considerable numbers in the spring of 1947, and in addition there is the fact that they are now found in less numbers than they had been found in previous years.

15 Sitting as a jury on the case, the inference I draw is that the pollution of the river has substantially affected the fishing therein and that the pollution was responsible for killing fish found in the river in the spring of 1947.

16 There is some evidence that the rice beds have disappeared, thus affecting the numbers of duck to be found in the area. This is not an element to be seriously considered in this case, either in fact or in law.

17 Having made these findings, I now consider the authorities dealing with principles that must be applied to the facts in their different aspects.

18 The origin of the common law applicable to this subject goes back to and beyond the Roman law. The proprietor of riparian lands has a right incident to the land, independent of the ownership of the solum of the stream or river, to the flow of water through or by his land in its natural state, and if the stream is polluted or otherwise interfered with, so as to affect this right, by an upper riparian proprietor, the lower riparian proprietor who has suffered damage in law, though not in fact, may maintain an action for an injunction unless the person causing the interference with his right has a prescriptive right to do so.

19 This principle has been discussed in many leading cases and is probably nowhere more clearly developed than in the judgment of Chief Baron Pollock in Wood et al. v. Waud et al. (1849), 3 Ex. 748, 154 E.R. 1047, where the right is defined as "a right to the natural stream flowing through the land, in its natural state, as an incident to the right to the land on which the watercourse flowed, ... and that right continues, except so far as it may have been derogated from by user or by grant to the neighbouring landowners." The injury complained of is an injury to a right, and the defendant, by continuing the practice for 20 years, might establish the right to an easement by prescription: see pp. 772-4.

20 Although the riparian proprietor has rights incident to the rights to the soil, he has no property interest in the water but merely an usufructuary property interest therein. In Blackstone's Commentaries, Book II, p. 14, it is said:

> "... there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had; and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other convenience: such also are the generality of those animals which are said to be ferae naturae, or of a wild and untamable disposition; which any man may seize upon and keep for his own use and pleasure. All these things, so long as they remain in possession, every

> man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards." And at page 18: "... water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary, property therein; wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it."

21 Although water, according to the Roman law, was publici juris, the first occupier or first person who chooses to appropriate a natural stream to a useful purpose has no title against the owner of land below so as to deprive him of the flow of the water in its natural state: per Denman C.J. in Mason v. Hill et al. (1833), 5 B. & Ad. 1 at 24, 110 E.R. 692.

22 For the purpose of getting a clear comprehension of the nature, foundation and extent of the legal right of riparian proprietors it is convenient to quote from some of the many authoritative judgments dealing with the subject.

23 Lord Wensleydale in Chasemore v. Richards (1859), 7 H.L. Cas. 349 at 382, 11 E.R. 140, said: "The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface, ex jure naturae, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbour." See also pp. 382-3.

24 Lord Macnaghten in John Young and Company v. The Bankier Distillery Company et al., [1893] A.C. 691 at 698, said:

> "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. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court." (The italics are mine.)

25 Vice-Chancellor Sir W. Page Wood in The Attorney-General v. The Borough of Birmingham (1858), 4 K. & J. 528 at 540, 70 E.R. 220, said: "He has a clear right to enjoy the river, which before the Defendants' operations flowed unpolluted -- or, at all events, so far unpolluted that fish could live in the stream and cattle would drink of it -- through his grounds, for three miles and upwards, in exactly the same condition in which it flowed formerly, so that cattle may drink of it without injury, and fish, which were accustomed to frequent it, may not be driven elsewhere." The italicized words must be considered in the light of the fact that in this case the plaintiffs were owners of the bed of the stream.

26 In Lyon v. The Fishmongers' Company et al. (1876), 1 App. Cas. 662, Lord Selborne said at p. 682: "But the rights of a riparian proprietor, so far as they relate to any natural stream, exist jure naturae, because his land has, by nature, the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognise and follow the course of nature in every part of the same stream. Water which is more or less salt by reason of the flow of the tides may still be useful for many domestic and other pruposes, though there are no doubt some purposes which fresh water only will serve. The general law as to riparian rights is not stated by any

authorities, that I am aware of, in terms which require this distinction, and, if there is any sound principle on which it ought to be made, the burden of proof seems to me to lie on those who so affirm."

27 And at p. 683: "With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights properly so called, because the word 'riparian' is relative to the bank, and not the bed, of the stream; and the connection, when it exists, of property on the bank with property in the bed of the stream depends, not upon nature, but on grant or presumption of law ... The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by every one having a right of access to it. It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good, jure naturae, as vertical; and not only the word 'riparian,' but the best authorities, such as Miner v. Gilmour, 12 Moo. P.C. 131 [14 E.R. 861, C.R. [3] A.C. 230], and the passage which one of your Lordships has read from Lord Wensleydale's judgment in Chasemore v. Richards, 7 H.L.C. 349 [11 E.R. 140], state the doctrine in terms which point to lateral contact rather than vertical. It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream, but it is in such contact for a great part of every day in the ordianry and regular course of nature, which is an amply sufficient foundation for a natural riparian right."

28 See also Attrill v. Platt (1883), 10 S.C.R. 425, per Strong J. at p. 489.

29 If a riparian proprietor's rights have been violated, it is not necessary for him to prove damage to maintain his action.

30 In Crossley and Sons, Limited v. Lightowler (1867), L.R. 2 Ch. 478 at 483, Lord Chelmsford L.C. said: "From what has been already said, it may be collected that, in my opinion, if the Plaintiffs had proved the pollution of the Hebble opposite to their mills by the Defendants, they would have had good ground for an injunction, although they were not actually using the water for their business."

31 In Pennington v. Brinsop Hall Coal Company (1877), 5 Ch. D. 769 at 772, Fry J. emphasizes the clear distinction to be drawn in these cases between the invasion of a right and damage: "I may observe in passing that the case of a stream affords a very clear illustration of the difference between injury and damage; for the pollution of a clear stream is to a riparian proprietor below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury without damage, which would, however, at once become both injury and damage on the cessation of the other pollutions."

32 From what was said by Mr. Justice Fry it is clear that it is not a defence to this action to show that the waters of the river were in some measure polluted by the municipality of Espanola or others responsible for the presence of colon bacilli therein. Lord Chelmsford L.C. in Crossley and Sons, Limited v. Lightowler, supra, dealing with the defendant's contention that others were polluting the river in question, sets any such contention conclusively at rest. He says:

> "Where there are many existing nuisances, either to the air, or to water, it may be very difficult to trace to its source the injury occasioned by any one of them; but if the Defendants add to the former foul state of the water, and yet are not to be responsible on account of its previous condition, this consequence would follows, that if the Plaintiffs were to make terms with the other polluters of the stream so as to have water free from impurities produced by their works, the Defendants might say, 'we began to foul the stream at a time when, as against you, it was lawful for us to do so, inasmuch as it was unfit for your use, and you cannot now by getting rid of the existing pollutions from other sources, prevent our continuing to do what, at the time when we began, you had no right to object to.'"

33 In view of the fact that in the case at bar the pollution caused by the town of Espanola can be distinguished from the pollution caused by the defendant, no difficulty arises in making application of the cases with which I have just dealt.

34 Some evidence was given on behalf of the defendant to show the importance of its business in the community, and that it carried it on in a proper manner. Neither of these elements is to be taken into consideration in a case of this character, nor are the economic necessities of the defendant relevant to be considered. In The Stockport Waterworks Company v. Potter et al. (1861), 7 H. & N. 159, 158 E.R. 433, Baron Martin discussed whether the jury should have passed on a question as to whether the defendants' business was carried on "in a reasonable and proper manner", and after expressing the view that there was no evidence as to whether it was or was not, said, at pp. 168-9:

> "But, suppose there was, how could it affect the people of Stockport? The defendants carried on their trade primarily for their own profit, and the public are benefited by the carrying on of all trades, for they have an interest in persons using their industry and capital. But what answer is that to an action by persons whose water for drinking is affected by arsenic poured into it by persons carrying on such a trade?"

35 In The City of Manchester v. Farnworth, [1930] A.C. 171 at 203, Lord Blanesburgh makes some observations in dealing with a claim for damage on the ground of the emission of poisonous fumes from a chimney that are aptly applicable to this case:

> "Very readily would I decide, if I felt at liberty so to do, that the loss resulting to the plaintiff from the defendants' operations should without any qualification be borne by the Corporation. That loss is truly just as much part of the cost of generating their electrical energy as is, for example, the cost of the coal whose combustion is the original source of all the mischief. In a question between the plaintiff on the one hand and the Corporation on the other I can discover no sound principle why this loss should not be theirs."

36 In my view, if I were to consider and give effect to an argument based on the defendant's economic position in the community, or its financial interests, I would in effect be giving to it a veritable power of expropriation of the common law rights of the riparian owners, without compensation.

37 In applying the principles of law with which I have been dealing, it is convenient to consider first what rights the plaintiffs have to relief, founded on injury to the fishing. In considering this aspect of the case, the question whether or not the river is a navigable one is of importance. Otherwise, the rights of riparian proprietors are the same on navigable and non-navigable rivers: North Shore Railway Company v. Pion et al. (1889), 14 App. Cas. 612, C.R. [10] A.C. 63, 15 Q.L.R. 228, applied in Re Snow and City of Toronto, 56 O.L.R. 100 at 106, [1924] 4 D.L.R. 1023.

38 The general principle is that rights of fishing are in their nature mere profits of the soil over which the water flows and the title thereto arises from the right to the solum:

> Attorney-General for British Columbia v. Attorney-General for Canada, [1914] A.C. 153 at 167, 15 D.L.R. 308, 5 W.W.R. 878, 26 W.L.R. 347, 13 E.L.R. 536. The fishing in a river is the subject of property, and according to the English law must have an owner and cannot be vested in the public generally: see p. 173.
>
> "... the title to fish follows the title to the solum, unless it has been severed and turned into an incorporeal hereditament of the nature of a profit a prendre in alieno solo": Attorney- General for Canada v. Attorney-General for Quebec, [1921] 1 A.C. 413 at 421, 56 D.L.R. 358.

39 Since 1911 the solum of all navigable rivers in Ontario has been vested in the Crown under the provisions of The Bed of Navigable Waters Act, R.S.O. 1937, c. 44, s. 1a, as re-numbered by 1940, c. 28 s. 3(1), which reads as follows: "Where land bordering on a navigable body of water or stream has been heretofore, or shall hereafter, be granted by the Crown, it shall be presumed, in the absence of an express grant of it, that the bed of such body of water or stream was not intended to pass to the grantee of the land, and the grant shall be construed accordingly, and not in accordance with the rules of the English Common Law."

40 With the exception of the plaintiff James B. Vance, none of the respective plaintiffs has any interest in the bed of the river. They have, however, certain rights to use the river as a highway, but no property right, appendant to the soil, to fish therein.

41 The public right to fish in navigable waters is a matter which has been the subject of discussion antedating Magna Carta, and was dealt with in the 16th chapter. Neill et al. v. The Duke of Devonshire (1882), 8 App. Cas. 135, is of interest in considering its early history. Strong C.J., in In re Provincial Fisheries (1896), 26 S.C.R. 444 at 520, held that in the case of navigable rivers, the beds of which have not been granted but remain in the Crown in the right of the Province, the right of fishing is a public right not restricted to waters within the ebb and flow of the tide. The learned Chief Justice stated that although the public right was so confined by the common law of England, the rule was not to be applied to non-tidal rivers which, in Canada, are de facto navigable. (On the appeal to the Judicial Committee Lord Herschell expressly excluded this aspect of the matter from the decision of the Committee: Attorney-General for Canada v. Attorneys-General for Ontario, Quebec and Nova Scotia, [1898] A.C. 700, C.R. [12] A.C. 48.) There is inconsistency between this statement of the law and the statement of Lord Haldane in Attorney-General for British Columbia v. Attorney-General for Canada, supra, which may have to be determined in an action at some time since both cases were references by the Governor in Council, and neither case is a binding authority in a suit between His Majesty's subjects.

42 I have concluded, however, that, even assuming that the plaintiffs (I am now discussing the rights of those other than the plaintiff James B. Vance), as members of the public, have a right to fish in the river, their rights are no higher than those of any any other members of the public. It may be that they are in a better position to exercise their rights than other members of the public, but the interference with fishing does them no injury not common to others who wish to take fish from the river. The principles applicable here are similar to those applicable to nuisance cases. If the acts or omissions alleged are in derogation of rights which the plaintiffs have in common with all His Majesty's subjects who have occasion to exercise those rights, the plaintiffs have no remedy by an action for damages unless they can establish that they have suffered special and peculiar damage beyond what was suffered by the rest of His Majesty's subjects: Blundy, Clark and Company, Limited v. London and North Eastern Railway Company, [1931] 2 K.B. 334. As was said by Lord Justice Greer in that case, what amounts to special and peculiar damage is a matter of some difficulty, but I have been unable to find any authority, and none has been submitted to me, that would warrant me in holding that loss to the business of the plaintiffs as operators of tourist camps caused by the injury to the fishing would bring the case within the exception and be actionable. The rights of the plaintiff James B. Vance are on a very different footing. As owner of that part of the soil in the bed of the river covered by the grant to him of the water lot, he has property rights distinct from all the other plaintiffs. He is the proprietor of a fishery appendant or appurtenant to the ownership of the soil. He has the right to a free passage for fish in his fishery and he has the right to catch as many fish as by his industry and art he can: Hamilton v. Marquis of Donegal (1795), 3 Ridg, Parl. Rep. 267; Barker v. Faulkner (1898), 79 L.T. 24. But he must not in the exercise of his rights do anything to interfere with the rights of persons above or below him or riparian owners. The defendant,

having, by the pollution of the river, interfered with this plaintiff's property rights, is liable in damages if he has suffered any, and to be restrained from further interference with those rights: Aldred's Case (1610), 9 Co. Rep. 57b, 59a, 77 E.R. 816.

43 The right of action for an injunction is not dependent on proof of actual damage. Where interference is shown to exist, damage is presumed. This aspect of the subject is fully discussed by Lord Wright in Nicholls v. Ely Beet Sugar Factory, Limited, [1936] Ch. 343. In considering the final result in that case it is to be borne in mind that the relief sought was in damages only, there being no claim for an injunction or any suggestion that the injury would recur or that a prescriptive right might accrue.

44 In view of the finding of fact that I have made I have therefore concluded that the plaintiff James B. Vance is entitled to equitable relief based on interference with the fishing.

45 The main ground on which the plaintiffs claim relief is, however, not founded on interference with the fishing but on a violation of their rights as riparian proprietors. On this branch of the case, I find that all plaintiffs have proved a good cause of action and are entitled to succeed on their claims for damages and an injunction.

46 In addition to the right of action based on interference with riparian rights, the plaintiffs claim a right to maintain an action for nuisance. The claim is that the smells from the river, caused by the effluent entering the water from the defendant's mill, are sufficiently offensive to be an actual and substantial interference with the comfort and enjoyment of the plaintiffs' properties measured by ordinary and reasonable standards.

47 The tests to be applied in respect of this claim are expressed with concise clarity in the oft-quoted words of Knight Bruce V.C. in Walter v. Selfe (1851), 4 DeG. & Sm. 315 at 322, 64 E.R. 849: "and both on principle and authority the important point next for decision may properly, I conceive, be thus put: ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?"

48 They are also laid down by Lord Lindley in Rapier v. London Tramways Company, [1893] 2 Ch. 588 at 600: "The question is whether the Defendants do or do not create in the conduct of their business such a smell as diminishes the reasonable enjoyment and comfort of the Plaintiff's house. The fact that somebody with a sensitive nose smells some ammonia and does not like it will not prove a nuisance; it is a question of degree. You can only appeal to the common sense of ordinary people. The test is whether the smell is so bad and continues as to seriously interfere with comfort and enjoyment. No one says it is so bad as to interfere with health."

49 The evidence of reliable witnesses is convincing that the smell from the river has rendered much less desirable that which was an attractive resort for tourists, and if the nuisance is permitted to continue it will in greater measure interfere with the plaintiffs' business as well as their personal enjoyment of their properties.

50 It is argued on behalf of the defendant, but I think with little confidence, that even if the nuisance exists, it is a public nuisance committed on Crown property (i.e., the bed of the river) and consequently the plaintiffs have no cause of action. I know of no authority that would justify me in holding that it is the law of Ontario that one can deposit material injurious to the health or the comfort of one's neighbours on

a highway vested in the Crown, either with permission or without it, and that the Courts would be helpless to give relief to the injured party by restraining the original wrongdoer.

51 For some purpose that was not developed very clearly at the trial, the defendant introduced in evidence an agreement between Kalamazoo Vegetable Parchment Company (the defendant's predecessor in title) and the Crown in the right of the Province of Ontario, which contains the following clause:

> "19. No refuse, sawdust, chemicals or matter of any other kind, beyond that reasonably necessary for the operation of the Company herein, which shall be or may be injurious to game and fish life shall be placed or deposited in any river, stream or other waters."

52 It was faintly suggested in argument that this agreement amounted to a permit to deposit noxious material in the river if it was "reasonably necessary for the operation of the company". I do not think that the document can be so construed, but even if it could a bilateral agreement to which the plaintiffs are not parties can be of no avail to assist the defendant in these actions as an answer to the plaintiffs' claim. The plaintiffs' rights may be taken from them by legislation, but not by agreement between the Crown in the right of the Province and the defendant. I therefore find that the plaintiffs have proved an actionable nuisance and are entitled to relief on that footing as well as the one heretofore discussed.

53 It remains to be considered what form the relief to which the plaintiffs are entitled should take. On the argument counsel for the defendant expressly stated that in case I should find the plaintiffs entitled to relief he did not contend that damages should be given in lieu of an injunction. He argued, however, that if an injunction should be granted its operation ought to be deferred for a reasonable period to give the defendant an opportunity to adopt some alternative method of disposing of the effluent from the mill. This I shall deal with later.

54 The principles on which the Courts act in granting an injunction in cases of this sort are fully discussed in Shelfer v. City of London Electric Lighting Company; Meux's Brewery Company v. The Same, [1895] 1 Ch. 287. Lord Lindley at p. 314 quotes from the judgment of Lord Kingsdown in Imperial Gas Light and Coke Company v. Broadbent (1859), 7 H.L. Cas. 600, 11 E.R. 239, as follows:

> "The rule I take to be clearly this: if a plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation."

55 And Lord Justice Smith says at p. 322:

> "Many Judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance ...
>
> "In such cases, the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction."

56 The witness Heurter gave evidence that some kraft mills he had visited disposed of their effluent through settling basins. Before the defendant's plant started to operate, the plaintiff Dr. Downe interviewed the manager, Mr. Hunter, and suggested to him that the effluent be disposed of by being piped to a sand flats nearby. To this Mr. Hunter replied: "It is a matter of economics." The course of

action that followed shows an indifference towards the rights of others which a Court should not hesitate to control by measures appropriate in the circumstances.

57 An injunction will go restraining the defendant from depositing foreign substances or matter in the Spanish River which alter the character or quality of the water flowing over the lands of the plaintiff James B. Vance, and washing the lands owned or occupied by the other plaintiffs.

58 The assessment of damages already incurred is a most difficult matter. Much of the evidence given in respect thereof deals with matters that are of such a speculative character that I cannot reasonably consider them, and much of it was in respect of injury to the fishing, which is not a relevant element except in the case of James B. Vance, whose claim I will discuss in more detail in due course. With the exception of the plaintiffs James B. Vance and Russell Vance, none of the plaintiffs produced books of account to substantiate their claims for loss of business. After most careful consideration of all the arguments advanced by counsel, I exclude the claim of all plaintiffs for injury to the fishing and take into account only the interference with the plaintiffs in the enjoyment of their respective property rights and the effect on their businesses caused by the pollution of the river and the nuisance for which the defendant is responsible. I assess the damages as follows:

Ted McKie . . . . . $450 Earl McKie . . . . . 1,250 Jack Gifford . . . . . 300 Russell Vance . . . . . 2,100 Dr. Downe 1,000

59 James B. Vance is in a different position from the other plaintiffs. As I have stated he is a commercial fisherman holding a licence from the Province of Ontario and owner of a water lot on the river. It was not argued that a licence to take fish from the river gave this plaintiff a particular right of action for damages for injury to the fishing that would not be vested in the other plaintiffs holding no such licence. No claim having been put forward on this footing, I do not deal with it. As owner of that part of the solum of the river vested in him he has a right to restrain the defendant from interfering with the fishing in the waters passing over his property. There is, however, no proof that he carried on his business as a commercial fisherman on this part of the river or that he actually suffered damage by reason of any interference with the fishing at this point. It therefore follows that the only damages that I can award must be based on the interference with his riparian rights and for the nuisance for which the defendant is responsible. After considering all aspects of this plaintiff's claim I assess his damages at $500.

60 The operation of the injunction will be suspended for six months in order to give the defendant an opportunity to provide other means of disposal of its noxious effluent. This concession, however, is on condition that the defendant compensate the plaintiffs for damages suffered from the date of the trial of the action to the date when the injunction becomes effective. In so providing I am following the formal order in The City of Manchester v. Farnworth, supra. There will be a reference to an official referee to ascertain these damages. If the parties cannot agree on the referee, counsel may speak to me. As this reference is necessitated by an indulgence granted to the defendant, the costs of the reference will be paid by the defendant. The plaintiffs will have their costs of the action on the Supreme Court scale throughout.

61 Judgment accordingly.

62 Solicitors for the plaintiffs: Roebuck, Bagwell, McFarlane & Walkinshaw, Toronto.

Solicitors for the defendant: Boles and Worrall, Toronto.

TAB 2

O'Neil v. Harper

Ontario Judgments

Ontario Supreme Court - Appellate Division

Mulock C.J.Ex., Clute, Riddell, Sutherland and Leitch JJ.

May 13, 1913

[1913] O.J. No. 91 | 28 O.L.R. 635 at 640 | 13 D.L.R. 649

Case Summary

Highway — Travelled Road — Dedication — Acceptance — Evidence — Municipal-By-Laws — Presumption of Intention to Dedicate — Obstruction — Action for Injunction — Right of Action — Special and Peculiar Damage.

Land dedicated to the public for the purpose of passage becomes a highway when accepted for such purpose by the public; but whether, in any particular case, there has been a dedication am] acceptance, is a question of fact. A dedication must be made with intention to dedicate; such an intention is a matter to he inferred by the jury in the light of the surrounding circumstances. Acceptance may be inferred from public user, and requires no formal act of adoption. Open and unobstructed user by the public for a substantial time is, as a rule, the evidence from which a jury are asked to infer both dedication and acceptance.

Consideration of the authorities upon dedication and acceptance.

The defendant sought to obstruct a road crossing his land, which had been travelled before the grant from the Crown in 1846, and openly used as a public road at least down to 1898. Portions of the road were closed by municipal by-laws, but not the portion obstructed by the defendant. The lands in the neighbourhood of the road were low; and, until a system of drainage was introduced, about 1882, the greater portion was submerged at certain seasons of the year. After the drainage system was established, the allowances for roads on the concession-lines and side-lines were made passable and came into use, and there was less travel upon the old road. The mail had been carried over the mad for many years:

Held, that there was evidence upon which a jury might and ought to find as the trial Judge did find, a dedication and acceptance of the road as a public highway; and that the subsequent opening of the concession-lines and side-lines, and the gradual diversion of traffic to these better roads did not have the effect of destroying the character of the road in question; the common law rule, "once a highway, always a highway," applies, until by legal means its character is destroyed.

In the case of a district only partly settled, where roads are used across private property until the authorised public roads are opened, even long user does not always raise a presumption of intention to dedicate; but here it was not to be supposed that the owners of the lots across which the road was carried had in mind a possible future policy of the Legislature as to drainage, and intended to authorise a temporary use only; the presumption was the other way.

Held also upon the evidence, in this reversing the finding of the trial Judge, that, owing to the peculiar

location of the plaintiff's land and [28 OLR Page636] the buildings thereon, and the drainage canal and the railway crossing it, and the fact that the new roads could not have been opened without the land first being drained, the plaintiff had suffered that peculiar and special damage from the defendant's obstruction of The mad which entitled him (the plaintiff) to bring an action for a declaration and an injunction.

Consideration of the authorities upon this question.

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1 ACTION for a declaration: (1) that a road which crosses the south half of lot 7 in the 2nd concession of the gore of Chatham is a public highway; (2) for an order compelling the defendant to remove all obstructions placed by him upon that highway; (3) for an injunction restraining the defendant from further obstructing that highway; and (4) for damages for an alleged assault committed by the defendant upon the plaintiff in attempting to prevent the plaintiff from travelling upon that highway.

2 The action was tried before BRITTON, J., without a jury, at Chatham.

February 18. BRITTON J.

3 The plaintiff owns that part of lot 8 in the 2nd concession of the gore of Chatham lying north of Running creek. The defendant owns the south half of lot 7 in the same concession.

4 The plaintiff alleges that Running creek commences in the 3rd concession of the gore of Chatham, flows southerly and easterly through the said gore of Chatham, and along the north side of the town of Wallaceburg to the river Sydenham.

5 The evidence established, and I find as a fact, that, from the early settlement of the township of Chatham down to a comparatively recent date, a travelled road ran from Nelson street in Wallaceburg--or a point near Nelson street --westerly and along the southern bank of Running creek, crossing lots 11, 10, and a part of 9 in the said 2nd concession of the gore of Chatham; then the road crossed the said creek to the north side thereof, and proceeded westerly and southerly across the remainder of lot 9, and diagonally across lots 8 and 7, to the line between the 1st and 2nd concessions, and on to the river St. Clair. [28 OLR Page637]

6 It was well established that for many years this road was the only direct and travelled road--and called a highway--between Wallaceburg and Baby's Point and Port Lambton.

7 The part of lot 7 now owned by the defendant was crossed by this road. The obstructions placed by the defendant are on the line of this road.

8 There is no evidence of any word of the owner of any part of the land where this road passes to shew an intention to dedicate the road to the public.

9 As to the dedication, this case is governed by Mytton v. Duck (1866), 26 U.C.R. 61. In that case Draper, C.J., decided that, as against the grantee of the Crown and those claiming under him, the public user for thirty years, without objection or interference on their part, would furnish conclusive evidence of dedication.

10 This road was used as a public highway long before the grant by the Crown to the Canada Company of lands over which the road was travelled.

11 Dedication cannot by mere user be presumed against the Crown, but the Crown granted these, with other lands, to the Canada Company in 1846.

12 This road was openly used as a public road at least down to 1896, and thus, according to the case cited, dedication has been conclusively established.

13 The evidence did not establish that statute labour had been continuously done upon this road, or that any public money had been expended upon it.

14 It is a fact that the Town of Chatham assumed, by by-law, to close a portion of it; and the Town of Wallaceburg, by by-law, assumed to close a short part at the eastern end.

15 It is difficult to connect the Wallaceburg by-law with this road, as the by-law described it as "the original allowance for road." However, of the intention of the municipality to close a part of the road in question, there is no doubt.

16 These by-laws do not either assist the plaintiff or prejudice him in his contention.

17 As to the part of the road in which the plaintiff is particularly interested, no action has been taken in any way by, the [28 OLR Page638] township, and, so far as appears, no person, other than the defendant, has interfered with the plaintiff or those desiring to use the road.

18 The case of Dunlop v. Township of York (1869), 16 Gr. 216, does not conflict with Mytton v. Duck, 26 U.C.R. 61.

19 What is stated in Dunlop v. Township of York must be accepted as sound reasoning, viz., that in a new part of the country, or over an area of low land where persons would naturally look for the high places over which to travel, user of a road is not to be too readily accepted as evidence of an intention on the part of an owner to dedicate.

20 In this case, the great length of the time of the user and the comparatively slight deviations strengthen very much the argument in favour of the highway contended for here.

21 Frank v. Township of Harwich (1889), 18 O.R. 344, is in favour of the plaintiff's contention.

22 Intention to dedicate may be presumed: see Lord Halsbury's Laws of England, vol. 16, p. 33.

23 The Canada Company, grantors of the land of the defendant, had other lands in the vicinity.

24 The inference is warranted that they knew of this road, and of its user by the public, if not before, very soon after, the grant to them.

25 If the plaintiff is entitled to maintain this action at all, he is entitled to a declaration that the travelled road across lot 7 is a public highway.

26 The defendant pleads that the plaintiff cannot maintain this action without either the Attorney-General or the Municipal Corporation of the Township of Chatham and North Gore being a party thereto. The plaintiff simply joins issue upon this statement.

27 The question is, upon the evidence in this case, as laid down in Drake v. Sault Ste. Marie Pulp and Paper Co. (1898), 25 A.R. 251, at p. 256: "Can the plaintiff be said to have suffered damage peculiar to himself beyond that suffered by the rest of the public who were also entitled to use the road for any purpose?" [28 OLR Page639]

28 I am met at once with the absence of evidence that the plaintiff has suffered damage peculiar to himself beyond that suffered by the rest of the public who were entitled to use the road.

29 The plaintiff's evidence was almost wholly directed to the question of highway or no highway, and he omitted to prove, if he could prove, either the particular damage to himself by the defendant's obstruction, or to prove an assault.

30 The defendant in his pleading denies the assault, and in his evidence does not admit it. He admits preventing the plaintiff, on a Sunday, from going through a gateway upon the alleged road. The defendant said that the plaintiff crossed this part of the alleged highway only twice in eighteen months. The plaintiff was not called to deny or explain this evidence of the defendant.

31 Even if the plaintiff, in erecting the gate on the highway, has created a public nuisance, I am unable to find that the plaintiff suffered particular injury, so as to bring the case within Fritz v. Hobson (1880), 14 Ch. D. 542.

32 The objections that the municipality was not a party to the action, and that no particular private injury to the plaintiff had been proved, were made upon the argument.

33 The plaintiff did not ask for any postponement to endeavour to get the (municipality to intervene, or to supplement the evidence as to assault or private injury.

34 As the great mass of evidence was given upon the point on which the plaintiff was right, I think justice will be done if the action is dismissed without costs.

35 The judgment should be without prejudice to any other action by the plaintiff or at his instance, if such action be properly constituted, as to further obstructions, if any, by the defendant against the plaintiff upon the highway in question.

36 Before closing, I venture to say that a right of way across the defendant's land seems to me to be of so little inconvenience to him that, with very little mutual concession, all matters in difference as to this road could be and should be settled without further litigation.

37 Judgment as above.

38 The plaintiff appealed from the judgment of BRITTON, J. [28 OLR Page640]

39 April 16 and 17. The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

40 J. S. Fraser, K.C., for the plaintiff, argued that the learned trial Judge was right in finding as a fact that there had been a dedication of the highway, as claimed by the plaintiff, but that he erred in holding that the plaintiff had not produced such evidence of damage peculiar to himself as would entitle him to bring

the action. He referred to Mytton v. Duck, 26 U.C.R. 61; Watson v. City of Toronto Gas-light anti Water Co. (1846), 4 U.C.R. 158; Drake v. Sault Ste. Marie Pulp and Paper Co., 25 A.R. 251; Town of Sarnia v. Great Westerly R.W. Co. (1861), 21 U.C.R. 59, 62.

41 M. Wilson, K.C., for the defendant, cited Clerk & Lindsell's Law of Torts, 6th ed., pp. 395, 396; Winterbottom v. Lord Derby (1867), L.R. 2 Ex. 316; Hamilton v. Covert (1865), 16 C.P. 205, 209; Consolidated Municipal Act, 1903, secs. 599, 601. The finding of fact by the learned trial Judge as to dedication was based upon a misconception of the Mytton case, and on this branch of the case he did not exercise his own independent judgment. The finding as to absence of particular damage was justified by the evidence and the cases, and should be affirmed. Reference was made to Rae v. Trim (1880), 27 Gr. 374, 379; Biggar's Municipal Manual, notes at p. 810; Belford v. Haynes (1849), 7 U.C.R. 464, 469; Township of St. Vincent v. Greenfield (1887), 15 A.R. 567, 570, affirming S.C. (1886), 12 O.R. 297, 309; Regina v. Ouellette (1865), 15 C.P. 260; Regina v. Plunkett (1862), 21 U.C.R. 536, a case shewing that, even if there is a dedication for a temporary purpose, the owner has a right to close the road when the proper allowance is opened: Dunlop v. Township of York, 16 Gr. 216, 222.

42 Fraser, in reply, referred to Cook v. Mayor and Corporation of Bath (1868), L.R. 6 Eq. 177, 180; Angell's Law of Highways, 3rd ed., secs. 154, 155; Halsbury's Laws of England, vol. 16, pp. 33, 34.

May 13. CLUTE J.

43 The plaintiff is the owner of that part of lot 8 in the 2nd concession of the gore of Chatham, in the county of Kent, lying north of Running creek. The defendant is the lessee from the Canada Company of the south half of [28 OLR Page641] lot 7 in the said 2nd concession, and adjoining in part the plaintiff's land to the west.

44 The plaintiff charges that the defendant obstructed the highway at a point where it crosses the line between lots 7 and 8, and claims special damage and an injunction. The defendant denies that there is such a highway, and further denies that the plaintiff has suffered peculiar damage.

45 The trial Judge found that there was a public highway by dedication, as claimed by the plaintiff, but that he had not suffered peculiar damage, and dismissed the plaintiff's action, but without costs.

46 After a careful perusal of the evidence, I do not think that there is much doubt as to the main facts. The lands in the neighbourhood of the alleged road are very low; and, until a system of drainage was introduced, about 1882, the greater portion was submerged at certain seasons of the year and unfit for cultivation, except a very restricted area thereof. The higher lands were found to be along the creek, and from the earliest recollection of the oldest inhabitants, there was a road, or trail, from Wallaceburg westerly to the St. Clair river. This trail followed the southerly bank of Running creek until it reached a point near the dividing line between lots 8 and 9. It then crossed the creek by a bridge, and followed the northerly bank of the creek in a south-westerly direction across lot 8 and the south-east corner of lot 7, crossing the road allowance between concessions 1 and 2, about 18 chains west of the dividing line between lots 7 and 8, crossing the concession line and following the northerly bank of the creek in a south-westerly and westerly direction to the St. Clair river.

47 In 1879, a bridge was built over Running creek, where it crosses the road allowance between concessions 1 and 2, south of lot 7, and work was done in improving this road allowance. About this time, the drainage system was inaugurated, and some 5,000 acres in this vicinity reclaimed. The result was, that allowances for roads on the concession-lines and side-lines were now in a condition to be made

passable, and work was done upon them, and, as this work proceeded, the new roads came more and more into use. [28 OLR Page642]

48 In 1880, or shortly after, the road allowance between concessions 1 and 2 was made passable, and the old road across lots 8 and 7 was less used, although it continued to be used, more or less, without any gates, fences, or other obstructions across it, until 1896. In that year, one Summers purchased the farm owned by the plaintiff (lot 8) from one Stewart, and erected two gates, one between lots 8 and 9, on his easterly line, and another between lots 7 and 8, on his westerly line, and, as he says, "I put in the two gates for my own convenience, to allow people to travel through, never to stop the traffic."

49 After 1896, it would appear, from the evidence, that there continued more or less travel upon the old road, persons desiring to use the same opening and closing the gates. Public traffic would appear to have grown less and less as the concession roads and side-lines were put in proper repair.

50 The evidence clearly establishes, and indeed it does not seem to be disputed, that from the earliest settlements in that vicinity, prior to 1850 and probably even before 1845, the road in question formed part of the only and regular thoroughfare from Wallaceburg west to the St. Clair river.

51 The finding of the trial Judge in this respect is as follows: "The evidence established, and I find as a fact, that, from the early settlement of the township of Chatham down to a comparatively recent date, a travelled road ran from Nelson street in Wallaceburg--or a point near Nelson street --westerly and along the southern bank of Running creek, crossing lots 11, 10, and a part of 9 in the said 2nd concession of the gore of Chatham; then the road crossed the said creek to the north side thereof, and proceeded westerly and southerly across the remainder of lot 9, and diagonally across lots 8 and 7, to the line between the 1st and 2nd concessions, and on to the river St. Clair. It was well established that for many years this road was the only direct and travelled road--and called a highway--between Wallaceburg and Baby's Point and Port Lambton. This part of lot 7 now owned by the defendant was crossed by this road."

52 This finding is well supported by the evidence. It would appear that the defendant's buildings have encroached upon a part of the travelled portion of the old road, and his fence has [28 OLR Page643] enclosed a further portion, and persons requiring to use the road passed the south of the fence and buildings.

53 For many years, the pumping house, erected in connection with the drainage operations between lots 8 and 9, was reached by the old road, and wood and other fuel taken in that way. The Canada Company received a patent of lot 7, with other lands, in 1846, and the trial Judge finds that this road was used as a public highway long before the grant by the Crown to the Canada Company.

54 The Township of Chatham passed a by-law to close a portion of this road, and the Town of Wallaceburg passed a by-law purporting to close another part at the eastern end of the road, though the latter by-law speaks of "the original allowance for road," which seems inapplicable to the road in question.

55 With reference to the Canada Company, the trial Judge finds that "the inference is warranted that they knew of this, road, and of its user by the public, if not before, very soon after, the grant to them;" and concludes, as to this branch of the case, that, "if the plaintiff is entitled to maintain this action at all, he is entitled to a declaration that the travelled road across lot 7 is a public highway."

56 Land dedicated to the public for the purpose of passage becomes a highway when accepted for such

purpose by the public: Regina v. Petrie (1885), 4 E. & B. 737; but whether, in any particular case, there has been a dedication and acceptance, is a question of fact and not of law.

57 "It is not correct to say that the early user establishes an inchoate right capable of being subsequently matured ... The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coëval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses:" Turner v. Walsh. (1881), 6 App. Cas. 636, 642.

58 "Dedication necessarily presupposes an intention to dedicate:" Halsbury's Laws of England, vol. 16, p. 33. [28 OLR Page644]

59 "A dedication must be made with intention to dedicate. The mere acting so as to lead persons into the supposition that the way is dedicated does not amount to a dedication, if there be an agreement which explains the transaction:" per Lord Denman, C.J., in Barraclough v. Johnson (1838), 8 A. & E. 99, 103, quoted with approval in Simpson v. Attorney-General, [1904] A.C. 476, 493, 494.

60 In giving the quotation in the last-mentioned case, curiously enough, the words, "if there be an agreement which explains the transaction," are not quoted, although the judgment proceeded upon such an agreement, which made it plain in that case that there was only a license to use.

61 As a rule, such intention is a matter to be inferred by the jury in the light of the surrounding circumstances: Rex v. Wright (1832), 3 B. & Ad. 681. Acceptance may be inferred from public user, and requires no formal act of adoption, even where the road becomes ipso facto repairable at the public expense: Rex v. Inhabitants of Leake (1833), 5 B. & Ad. 469; Roberts v. Hunt (1850), 15 Q.B. 17. Open and unobstructed user by the public for a substantial time is, as a rule, the evidence from which a jury are asked to infer both dedication and acceptance: Halsbury's Laws of England, vol. 16, sec. 43, p. 34. An intention to dedicate can only be inferred against a person who is absolute owner in fee simple and sui juris: ib., sec. 44.

62 In Regina v. Inhabitants of East Mark (1848), 11 Q.B. 877, at p. 882, Lord Denman, C.J., said: "If a road has been used by the public between forty and fifty years without objection, am I not to use it, unless I knew who has been the owner of it? The Crown certainly may dedicate a road to the public, and be bound by long acquiescence in public user. I think the public are not bound to inquire whether this or that owner would be more likely to know his rights and to assert them; and that we have gone quite wrong in entering upon such inquiries. Enjoyment for a great length of time ought to be sufficient evidence of dedication, unless the state of the property has been such as to make dedication impossible." [28 OLR Page645]

63 In Turner v. Walsh, 6 App. Cas. 636, supra, it was held that dedication from the Crown or private owner, as the case may be, may and ought to be presumed from long-continued user of a way by the public, whether the land belongs to the Crown or to a private owner, in the absence of anything to rebut the presumption; and the same presumption should be made in the case of Crown lands in the Colony of New South Wales (and, therefore, in Ontario), although the nature of the user and the weight to be given to it may vary in each particular case. In the Turner case, the land was purchased from the Crown in 1879, under an Act passed in 1861. It appeared that for forty years before the commencement of the action there had been a road over and across the piece of land granted to the plaintiff which had been used by the public with carriages and on foot, and was the main road between two places. The snail

coaches travelled the road, and teamsters conveying the produce of the country used it; and, in fact, it had been used by the public for all purposes, during this period, without interruption. The Privy Council held that upon such evidence the Judge would be right, unless there was some positive restriction on the power of the Crown, in directing the jury that they might presume a dedication of the road by the Crown to the public. The presumption of dedication may be made where the land belongs to the Crown or to a private owner, as the case may be, and, in the absence of anything to rebut the presumption, may and indeed ought to be presumed. (See, however, Rae v. Trim, 27 Gr. 374, where Blake, V.-C., held that a party in possession of Crown lands, before patent issued, could not dedicate any portion of the same.)

64 "If property is under lease, of course there can be no dedication by the lessee, to bind the freehold:" per Patteson, J., in Regina v. Inhabitants of East Mark, 11 Q.B. at p. 883; for, during the lease, the freeholder could not interfere with persons permitted by the tenant to cross the land: Baxter v. Taylor (1832), 4 B. & Ad. 72. If the land has been in the occupation of a series of tenants, the assent of the freeholder may properly be presumed, for at each change of tenancy the landlord might have interfered: Rex v. Barr (1814), 4 Camp. 16; [28 OLR Page646] Halsbury's Laws of England, vol. 16, sec. 47. "Even when the land has been in lease during the whole period of user proved, still earlier user and a dedication at some time prior to the commencement of the lease may be presumed, if the evidence is not inconsistent with it:" ib. "On the determination of a tenancy the freeholder must assert his right to stop any public user without delay, for if it be allowed to continue he may be taken to have acquiesced in it:" Rugby Charity Trustees v. Merryweather (1790), 11 East 375, n.

65 Applying the principles laid down in these cases to the present case, I am of opinion that there was evidence upon which a jury might and ought to find, as the trial Judge did find, a dedication of the road in question. This view is strengthened by the fact that the Municipalities of the Townships of Chatham and Wallaceburg considered it necessary to take proceedings to close portions of this road by by-laws. These were public acts, and stew how the question was regarded by the public, acting through their official representatives.

66 That this would be admissible as evidence of reputation would appear from the Barraclough case, supra, where it was held that action taken at a public meeting was evidence of reputation upon an issue as to whether or not certain land was a common highway. The fact that the mail was carried over this road for many years is also cogent evidence.

67 What also weighs with me, in the disposition of this case, is the nature of the land through which the road passed. The question should be considered as it existed down to the time when action was taken to drain the lands. The policy of the Legislature was first evidenced by the Drainage Act; and dedication, if it took place at all, was long prior thereto. The case differs, I think, from that of a partially settled country, where roads are used across private property until the authorised public roads are opened; for, in that case, even long user does not always raise a presumption of intention to dedicate on the part of the owner of the lot.

68 Every one knows that, as soon as the roads on the side-lines and between the concessions are opened the ways of convenience across the lots may be abandoned. [28 OLR Page647]

69 But here, from the condition of the lands, the case is different. The presumption is, I think, the other way. It can scarcely be supposed that the owners of the lots had in mind a possible future policy of the Legislature, and only intended to permit the road being used for a temporary purpose.

70 Upon the facts of this case, I agree with the trial Judge that the road in question became a public highway by dedication.

71 This being so, the subsequent opening of the concession-lines and side-lines, and the gradual diversion of the traffic to these better roads, did not, in my opinion, have the effect of destroying the character of the road in question. The common law rule, "once a highway, always a highway," applies, until by legal means its character is destroyed, although the long-continued existence of an obstruction may tend to shew that there never was a highway. See Halsbury's Laws of England, vol. 16, sec. 103.

72 The question remains, did the plaintiff suffer such damage, peculiar to himself, as entitles him to bring this action? In the view of the trial Judge, he did not. He points out that the evidence was almost wholly directed to the question of highway or no highway, and the plaintiff "omitted to prove, if he could prove, either the particular damage to himself by the defendant's obstruction, or to prove an assault" so as to bring the case within Drake v. Sault Ste. Marie Pulp and Paper Co., 25 A.R. at p. 256, and Fritz v. Hobson, 14 Ch. D. 542.

73 One of the instances of acts which may, be found to be nuisances at common law is that of erecting a fence or building across, or so as to encroach upon, the highway: Halsbury's Laws of England, vol. 16, sec. 266; see cases cited, note (n), p. 153. The remedy is by indictment or an action at the suit of the Attorney-General for an injunction to restrain the commission of the nuisance or for a mandatory injunction directing its abatement, and in such an action no actual injury need be proved: "but a member of the public can only maintain an action for damages or an injunction in respect of such nuisance, if he has sustained therefrom some substantial injury beyond that suffered by the rest of the public, such injury being direct and not merely consequential:" ib., sec. 269; and in such cases the Attorney-General [28 OLR Page648] is not a necessary party: Wallasey Local Board v. Gracey (1887), 36 Ch. D. 593; Tottenham Urban District Council v. Williamson & Sons, [1896] 2 Q.B. 353 (C.A.)

74 In Cook v. Mayor and Corporation of Bath, L.R. 6 Eq. 177, Malins, V.-C., at p. 180, says: "In Spencer v. London and Birmingham R.W. Co. (1836), 8 Sim. 193, a very similar case to the present, Vice-Chancellor Shadwell laid down the rule to be, that where there was a public nuisance by obstructing a highway which caused a particular private injury, a bill would lie for the private injury, and granted an injunction; and on the appeal Lord Cottenham did not dissent from this view."

75 It is important to consider the peculiar circumstances of this case in deciding the question as to whether or not the plaintiff sustained a substantial injury beyond that suffered by the rest of the public.

76 The owners and occupants of the plaintiff's land were: Stuart, 1875 to 1896; Somers, 1896 to 1897; Howard, 1897 to 1910; O'Neil, the plaintiff, 1910 to the present time.

77 It will be seen that Stuart's occupation covered a period before, during, and after the drainage system was introduced. Charles Stuart bought the farm, afterwards acquired by the plaintiff, in 1875, from one MacDonald. His son, Archibald Stuart, states that the father, himself, and brother Alexander, lived upon what is now known as the plaintiff's farm, from the time they bought it in 1875 until it was sold to Somers in 1896, and that, at the time they bought and occupied it, the road in question was the only road open. He further says that, at the time his father moved down there, "there was a big travel. All the travel through here was along that road. The mail was carried along that road, and there was a stage on that road. There was two stages on that road."

78 The railway was constructed across lot 8, running in a diagonal direction from the north-west to the south-east, north of Running creek. The father owned the whole of lot 8; and, after his death, the son Alexander deeded the part of lot 8 south of Running creek to Archibald Stuart, who deeded his interest in that part of lot 8 north of the creek to Alexander Stuart. [28 OLR Page649]

79 The result of the examination of the evidence leads me to the conclusion that prior to about 1879, or a little later, when the drainage of the land permitted the roads to be built, there was no outlet, no way of getting to a public highway from the land north of the creek, except by the road in question.

80 It is not a case of an obstruction to a highway simply, which might affect the public in general in the same way, but the case of an owner of land being cut off from the highway altogether, at the period referred to. The damage, if any, was peculiar to the owner of the land as such, and not simply as one of the public.

81 The drainage works, when completed, formed a channel, impassable except by bridge, through the north-easterly part of lot 8, and along the south side of the road allowance between concessions 2 and 3, so that by the time conditions had changed so as to make it possible to open that concession-line upon which lot 8 abutted on the north, it was cut off by the drain some 40 feet wide. A bridge was put over this drain in 1896 to reach the northeasterly part of lot 8. At that time, no provision was made to erect any' bridge over the drain by common rate imposed upon those benefited by the drain. The bridge built by the plaintiff's predecessor in title, Somers, in 1896, was not, and is not, sufficient to permit a threshing machine to pass over it, so that, if the owner of lot 8 north of Running creek desired to reach a highway, even after the 3rd concession-road was opened, he could not do so, except by a considerable expenditure of money, and cannot bring in a threshing-machine now without a further expenditure.

82 The result was, that, prior to the drainage system, the 3rd concession was an impassable swamp, and afterwards it could not be reached except by a bridge. The evidence shews that the plaintiff's farm, by the obstruction, was peculiarly affected, and depreciated in value.

83 The defendant by his pleadings denies that the road in question was a highway. The evidence shews that the defendant maintained a fence across it and prevented the plaintiff from passing along the highway by such obstruction and by his refusal to permit him to go through. He says, "I stopped him going [28 OLR Page650] through with a buggy," and that the threshing-machine had gone through prior thereto from time to time.

84 It would appear that, until the occasion in question, the plaintiff and others passed through, usually closing the gate. From the evidence, I thinly it established that the plaintiff was prevented by the defendant from passing along the road across lot 7 by the fence forming an obstruction between lots 7 and 8.

85 In Fritz v. Hobson, 14 Ch. D. 542, the question here involved is considered. Many cases are cited in the notes to secs. 269 and 270 of vol. 16, Halsbury's Laws of England, as shewing what is sufficient damage to support an action of this kind. An individual may bring an action who suffers injury to his person or chattels, e.g., if he or his horse fall into a ditch dug across the road, or if he collides with some obstruction therein; also whose property is rendered difficult of access, e.g., by the narrowing, diversion, or other alteration of the highway by which it is approached: Spencer v. London and Birmingham R.W. Co., 8 Sim. 193; Cook v. Mayor and Corporation of Bath, L.R. 6 Eq. 177; or otherwise prejudicially affected in value: Baker v. Moore (1697), cited in Iveson v. Moore (1699), 1 Ld. Raym. 486, 491.

86 Fry, J., in Fritz v. Hobson, 14 Ch. D. at p. 555, referring to this case, said: "The case of Iveson v. Moore is one of great authority. It is reported in numerous books. It has found its way into the various digests of the law, and was cited with approval in Ricket v. Metropolitan R.W. Co. (1865), 5 B. & S. 156, by the Court of Exchequer Chamber ... Now, as cited in Comyn's Digest, 5th ed., vol. i, p. 278, that case resulted in this, 'If A. has a colliery, and B. stops up a highway near it, whereby nothing can pass to his colliery, an action on the case lies; for he ought to be remedied in particular, though it was a highway for all.' And accordingly, in Benjamin v. Starr (1874), L.R. 9 C.P. 400, Lord Justice Brett considered that if by reason of the access to his premises being obstructed for an unreasonable time, and in an unreasonable manner, the plaintiff's customers were prevented from coming to his coffee-shop, and he suffered a material diminution of trade, that might be a particular, a direct, and a substantial damage.'" [28 OLR Page651]

87 In the Ricket case (1867), in the House of Lords, L.R. 2 H.L. 175, at p. 188, Baker v. Moore and Wilkes v. Hingerford Market Co. (1835), 2 Bing. N.C. 281, are doubted. This reference by the House of Lords to Baker v. Moore is very fully considered in Beckett v. Midland R.W. Co. (1867), L.R. 3 C.P. 82. After referring to the effect of what was said in the House of Lords, Willes, J. (p. 100), says: "Speaking with profound deference to the remarks of that noble and learned Lord, I think I may well doubt that Baker v. Moore must necessarily share the fate of Wilkes v. Hungerford Market Co., because in the latter case there was that which existed in the case under judgment, viz., a claim for compensation in respect of loss of goodwill; whereas, in Baker v. Moore, the claim was in respect of actual damage by deprivation of the only use to which the plaintiff could put his houses--a loss, therefore, directly affecting the ownership of the houses, and a loss moreover of a character which has in other cases besides that of Baker v. Moore, as well before as since, been held sufficient to constitute special damage, so as to sustain an action in which it is necessary to aver and to prove such special and particular damage." After further discussing the question, he continues (pp. 102-3): "Speaking, therefore, of the case of Baker v. Moore, I would say with the greatest deference that it deserves to be well considered before it is treated as overruled by the dictum I have referred to in Ricket's case."

88 "Substantial pecuniary loss occasioned to an individual by the fact that be or his servants cannot carry on his business, or can only do so by a circuitous or more costly journey, may be sufficient:" Halsbury's Laws of England, vol. 16, sec. 270.

89 Among the numerous cases cited for this proposition, I may refer to the following.

90 In Rex v. Deusnap (1812), 16 East 194, Lord Ellenborough, C.J., says: "I did not expect that it would have been disputed at this day, that though a nuisance may be public, yet that there may be a special grievance arising out of the common cause of injury which presses more upon particular individuals than upon others not so immediately within the influence of it. In the case of stopping a common highway which may affect all the subjects, [28 OLR Page652] yet if a particular person sustains a special injury from it, he has an action."

91 In Rose v. Miles (1815), 4 M. & S. 100, it was held, where the defendant had some barges moored on a navigable creek, and had thereby obstructed a public navigable creek and prevented the plaintiff from navigating his barges, whereby he was obliged to convey his goods at a greater distance over land, that this was special damage, for which an action upon the case would lie.

92 In Boyd v. Great Northern R.W. Co., [1895] 2 I.R. 555, it was held that where the plaintiff, a medical

doctor, was held an unreasonable time by the gate-keeper at a level crossing on a railway, he was entitled to damages against the company.

93 In Re Taylor and Village of Belle River (1910), 1 O.W.N. 609, 15 O.W.R. 733, the defendant closed a portion of a public highway leading to the plaintiff's hotel. The hotel did not abut or front on the highway closed. Held, "that its proximity to such highway enhanced its value and the closing of such highway depreciated its value," and that the plaintiff was entitled to recover. Reference is made in this case to Metropolitan Board of Works v. McCarthy (1874), L.R. 7 H.L. 243, quoting Lord Penzance, at p. 263, as saying: "The question then is, whether when a highway is obstructed, the owners of those lands which are situated in a sufficient degree of proximity to it to be depreciated in value by the loss of that access along the highway which they previously enjoyed, suffer especial damage 'more than' and 'beyond' the rest of the public. It surely cannot be doubted but that they do."

94 With great deference to the trial Judge, and notwithstanding that the plaintiff's evidence was chiefly directed to the question of dedication, and not to the peculiar loss suffered by him, yet, owing to the peculiar location of this lot and of the buildings thereon, and the drainage canal and the railway crossing it, and the fact that the evidence on both sides, in the main, agrees that the roads could not have been opened without the lands first being drained, I think it fairly clear, from the evidence, that the plaintiff did suffer that peculiar and special damage which entitled him to bring this action. [28 OLR Page653]

95 I would allow the appeal, setting aside the judgment for the defendant, and directing judgment to be entered for the plaintiff, and granting an injunction restraining the defendant from continuing any obstruction to the highway across lot 7.

96 The plaintiff is entitled to costs here and billow.

97 MULOCK, C.J., SUTHERLAND and LEITCH, JJ., concurred.

98 RIDDELL, J., with some hesitation, also concurred.

99 Appeal allowed.
J. S. Fraser, K.C., for the plaintiff.

M. Wilson, K.C., for the defendant.

J. S. Fraser, K.C., for the plaintiff.

M. Wilson, K.C., for the defendant.

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TAB 3

Rainy River Navigation Co. v. Watrous Island Boom Co.

Ontario Judgments

Ontario Supreme Court - Appellate Division

Second Divisional Court

Mulock C.J. Ex., Riddell, Sutherland and Leitch JJ.

June 15, 1914.

[1914] O.J. No. 420 | 6 O.W.N. 537 | 26 O.W.R. 456

(16 paras.)

Case Summary

Water and Watercourses — Obstruction of Navigation — Invasion of Right — Damages, when More Than Nominal.

On appeal from judgment of BRITTON J., 24 O.W.R. 905; 4 O.W.N. 1593, dismissing action for damages in connection with steamer carrying passengers, mails, and goods on a navigable river, through erection of obstruction by defendants,

SUP. CT. ONT. (2nd App. Div.) set aside judgment and gave $500 damages, holding that: (1) The fact that plaintiff had not shewn what pecuniary damages were sustained was no answer to claim, as where there is invasion of right, the law infers damages.

Asby v. White, 2 Ld. Raym. 938; Embrey v. Owen (1851), 6 Ex. 353, followed.

(2) Where evidence shewed "that the wrongful conduct of defendants had been deliberate, persistent, and high-handed, and productive of substantial inconvenience and delay to the plaintiffs," the damages should be more than nominal.

Bell v. Midland Rw. Co. (1861), 10 C. B. N. S. 287.

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1 Appeal from a judgment of HON. MR. JUSTICE BRITTON dismissing the plaintiff's action with costs, 24 O.W.R. 905.

2 The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK C.J. Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

3 I.F. Hellmuth, K.C., and Bartlett, for the plaintiffs, appellants.

4 A.W. Anglin, K.C., and Glyn Osler, for the defendants.

MULOCK C.J. EX.

5 This case was tried along with that of the Rainy River Navigation Co. v. Ontario & Minnesota Power

Co., and evidence common to both actions may be found in the evidence, and, in my judgment, in that case, and it is sufficient to refer here to only such portions of the evidence as are material to the question here under consideration.

6 The Rainy River from Fort Frances to its mouth is an international stream, and lies along the boundary line between Canada and the United States. The citizens of each country are entitled to free, uninterrupted navigation throughout the whole length of the river. On the 18th June, 1911, the steamer "Aguinda" owned by the plaintiff company left for the village of Rainy river, proceeding upstream towards Fort Frances. On reaching a point called Hannoford Bar, further progress was stopped by a boom stretching completely across the river from one shore to the other. The defendant's men were in charge of the boom, and when asked by the captain to permit the "Aguinda" to pass through, they declined. Thereupon the captain proceeded down the river to the company's office, some three miles away, and learned that the foreman, who apparently was in charge of the men, had gone upstream. After further search he was found, and finally consented to open the boom and allow the vessel to pass through.

7 The detention caused by this obstruction extended for a period of about three and one-half hours. On the 20th of June, when coming down stream, the vessel was again delayed by the boom for about one-half an hour. On the 23rd of June she was again obstructed by the boom for a period of from one-half to three-quarters of an hour. On the 25th of June there was a similar delay.

8 The defendants had erected some stone piers in the river in connection with the boom, whereby they could make different openings in the boom to permit vessels to pass through and on one of these occasions the opening was so close to a sandbar that the vessel was obliged to go out of the channel, coming in contact with the sandbar, whereby her rudder post was injured and she was probably in danger of grounding. On reaching Fort Frances the same evening, the captain reported the occurrence to Mr. Sutherland, one of the defendants' officers, and informed him that the vessel would remain at Fort Frances until the centre pier which had occasioned the trouble was removed. It was a log pier filled with rock and sunken just at the side of the channel.

9 Speaking of the occasion of the 18th of June, Captain Black says, on cross-examination:

> "Q. Who did you see? A. A stranger who claimed to be the foreman. He said he had orders to allow no boats through and there were men with him.
>
> Q. And when you spoke to him you got him to go down the river? A. No, I consulted with the manager and he said 'Better go down and get the foreman' who was over him again - Mr. Vealey, We passed him on the way down in a blue canoe and didn't know it.
>
> Q. Mr. Graham is the manager you speak of? A. Yes.
>
> Q. And when you found Mr. Vealey, he came up and had the boom opened? A. When we got back he opened the boom for us.
>
> Q. How far did you say you went back when you were stopped on the 18th June? How far was it from the boom? A. In the neighborhood of three miles.
>
> Q. Would you be surprised to learn it was two miles? A. I would.
>
> Q. When you saw Mr. Vealey, he made no question at all about your getting through the boom? A. He talked to the manager.
>
> Q. To Mr. Graham? A. Yes.
>
> Q. You don't know whether he made any objection or not? A. It was some little time after they got talking before any decision was arrived at anyway.

> Q. And on all subsequent occasions as soon as your boat put in an appearance the boom was opened? A. The system they had of opening that boom; it was so slow they couldn't help themselves.
>
> Q. They opened it as quickly as they could? A. If we got there they did. ...
>
> Q. When you came to Fort Frances you told Mr. Sutherland you would not run any more until this boom was changed in the river, down at the boom? A. I asked to have the deep water channel open. ...
>
> Q. But this was not in the deep water channel? A. 15 ft. on the upper side. Everything was boom, timber and chains. ...
>
> Q. When you complained to Mr. Sutherland you complained entirely about this boom? A. Yes.
>
> Q. And you told Mr. Horne that? A. About the boom putting us out of the channel."

10 It is clear from the evidence that the defendants unlawfully interfered with the plaintiff's rights in the river. It was, however, contended that the plaintiffs not having shown what pecuniary loss they had sustained were not entitled to recover. But such a contention is no answer to the plaintiff's claim. Where there is invasion of a right the law infers damage; Ashby v. White, 2 Ld. Raym. 938, as said by Parke, B., in Embrey v. Owen (1851), 6 Ex. 353; "Actual perceptible damage is not indispensable as the foundation of an action. It is sufficient to shew the violation of a right, in which case the law will presume damage."

11 The river is a public highway and the citizens of both countries are entitled to free use thereof. The defendants had no right to erect and maintain therein piers and booms and thereby exclude the plaintiffs from the enjoyments of their rights of navigation. The difficulty, risk, trouble and delay caused to the plaintiffs on several occasions establish not a mere accidental but a high-handed intentional interference by the defendants with the plaintiffs' rights.

12 For the reasons which appear in my judgment in the Rainy River Navigation Co. v. Ontario and Minnesota Power Co., ante, I am of opinion that the plaintiffs are entitled to maintain this action for damages, and that the amount thereof should not be limited to nominal damages. If the case had been tried with a jury it would have been proper for them, although the plaintiffs were unable to shew the extent of their damage, to award more than nominal damages if they found on the evidence that the wrongful conduct of the defendants had been deliberate, persistent and high-handed, and productive of substantial inconvenience and delay to the plaintiffs; Bell v. Midland Rw. Co. (1861), 10 C. B. N. S. 287.

13 It is impossible to believe that the defendants could have considered themselves entitled to take exclusive possession of a portion of a great international river to prevent or seriously obstruct its navigation by the plaintiffs' steamer when engaged in carrying passengers, mails and goods, and to dislocate and injure their business with impunity.

14 All these circumstances are proper elements for consideration in assessing the plaintiffs' damages and it is no answer to say that the difficulty in determining the amount with precision disentitles the plaintiffs to substantial damages. On this point the reasoning adopted in Chaplin v. Hicks, L. R., [1911] 2 K. B. D. 791, which was an action for breach of contract is equally applicable where the action is in tort.

15 With respect I think the plaintiffs were entitled to substantial damages for the wrongs inflicted upon them by the defendants and that the learned trial Judge should have awarded to the plaintiffs damages to the extent of at least $500 with costs and therefore the judgment appealed from should be set aside and judgment entered for the plaintiffs for that sum, with costs of the action, and of this appeal.

16 RIDDELL, SUTHERLAND and LEITCH JJ. agreed.

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Court File No. CV-22-00088514-00CP

ZEXI LI et al.	**- and -**	**CHRIS BARBER et al.**
Plaintiffs (Responding Parties)		Defendants (Moving Parties)

ONTARIO
SUPERIOR COURT OF JUSTICE

PLAINTIFFS' ABBREVIATED BOOK OF AUTHORITIES
(Motion pursuant to s.137.1 of the *CJA*,
returnable December 14-15, 2023)

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