

DAVID WEIR (PLAINTIFF).....APPELLANT,

1889

AND

*Jan. 18, 19.

*Mar. 18.

PIERRE CLAUDE (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR
LOWER CANADA (APPEAL SIDE).*Pollution of running stream—Long established Industry—Nuisance—
Injunction.*

W. acquired a lot adjoining a small stream at Côte-des-Neiges, Montreal, and finding the water polluted from certain noxious substances thrown into the stream brought an action in damages against C. the owner of a tannery situated 15 *arpents* higher up the stream, and asked for an injunction. At the trial it was proved that C. and his predecessors had from time immemorial carried on the business of tanning leather there, using the water for tanning purposes, to the knowledge of all the inhabitants without complaint on their part; that it was the principal industry of the village; that the stream was partly used as a drain by the other proprietors of the land adjoining the stream and manure and filth were thrown in, but that every precaution was taken by C. to prevent any solid matter from falling into the creek. W. only acquired the property since C. had been using the stream for the purpose of his tannery, and there was no evidence that the property had depreciated in value by the use C. made of the stream.

Held—Affirming the judgment of the court below, that W., under the circumstances proved in this case, was not entitled to an injunction to restrain C. from using the stream as he did.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (Appeal side) (1) which reversed the judgment of the Superior Court granting an injunction (2).

*PRESENT :—Sir W. J. Ritchie, C.J. and Strong, Fournier, Taschereau and Gwynne JJ.

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The appellant, who was plaintiff in the Superior Court alleged in his declaration :—

That he owned a house and property at the village of Côte-des-Neiges, where he passed the summer months. This property was traversed by a small stream known as the Ruisseau de la Côte-des-Neiges, a verbalized municipal water course. The plaintiff's *auteurs* had used this stream for culinary and domestic purposes. The defendant owned a large tannery, built upon this stream, about a quarter of a mile above the plaintiff's house. For five years past, the defendant and his employees had made an illegal use of this stream, to the damage of plaintiff. The defendant in the course of his tanning and dyeing operations, threw into the stream at frequent intervals, various poisonous and noxious matters, used by him in his business. The water in which hides had been washed was also constantly emptied into the stream. The defendant also dammed the stream at intervals, so as to obtain a greater quantity of water in which to empty his vats of offensive matter. The effect of this abuse of the stream by defendant was to deprive plaintiff of his lawful use of the water, to render the water, in fact, unfit for any use whatever ; to seriously depreciate the value of plaintiff's property ; and to endanger his health and that of his family, one of his children having already had typhoid fever in consequence of the state of the water.

By his conclusions, the plaintiff asked for \$2,000 damages, and for a restraining order compelling defendant to carry on his tanning operations in such a way as not to render the neighborhood unhealthy, and not to interfere with the plaintiff's lawful use of the stream.

The defendant pleaded that he and his predecessors had from time immemorial carried on business of tan-

ning in Côte-des-Neiges with the consent of the inhabitants of Côte-des-Neiges, that the tanneries supplied a large part of the population with their livelihood, and that the inhabitants had consented to the inconveniences resulting from the tanneries, in view of the advantages resulting therefrom. He also pleaded that the stream was more polluted by others than by himself.

To this plea the plaintiff demurred, on the ground that it alleged the acquisition of a servitude, without invoking any title. The plaintiff also answered generally.

The issues were closed by defendant's replications. The demurrer was argued before Mr. Justice Taschereau, but was reserved for the final hearing. The final judgment condemned the defendant to pay \$500 damages, and granted a restraining order in the terms of the declaration.

The defendant appealed from this decision, and the Court of Queen's Bench reversed the judgment and dismissed the plaintiff's action.

The evidence is reviewed at length in the judgments of the courts below (1).

Laflour and Rielle appeared on behalf of the appellant and *Laflamme* Q. C. and *David* appeared on behalf of the respondent.

In addition to the points relied on and authorities cited in the courts below and which are reported at length (2), the learned counsel for the appellant cited *Championnière, Propriété des eaux courantes* (3); *Larombière Obligations* (4); *Blair v. Deakin* (5); *Thorpe v. Brumfitt* (6); *Ball v. Ray* (7); and Kerr on

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- (1) M. L. B. 4 Q. B. 197. (3) P. 757.
(2) See M. L. R. 2 S. C. 329, M. L. R. 4 Q. B. 197, 31 L. C. Jur. 39 and 32 L. C. Jur. 213. (4) Vol. 5, p. 693, s. 12.
(5) 57 L. T. N. S. 522.
(6) L. R. 8 Ch. App. 650.
(7) L. R. 8 Ch. 467.

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 — Injunctions (1); and the learned counsel for the respondent referred to Campbell Law of Negligence (2), *Brown v. Gugy* (3), *McGibbon v. Bedard* (4) and Laurent (5).

TASCHEREAU, J.—We are of opinion that this appeal should be dismissed with costs entirely adopting the reasoning of Chief Justice Dorion in the court below.

Appeal dismissed with costs.

Solicitors for appellant : *Lasleur & Rielle*.

Solicitors for respondent : *David, Demers & Gervais*.

(1) 2 Ed. p. 208.

(2) P. 15.

(3) 14 L. C. R. p. 216.

(4) 30 L. C. Jur. 282.

(5) 6 Vol. p. 194.