

Mun. Case.]

RE THOMSON V. MCQUAY.

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that they bear out his contention. *Murray v. Dawson* (1st case) simply decided that an award under the Fence Viewers' Act (C. S. U. C. ch. 57) cannot be sued upon, but must be enforced in the manner pointed out by the Act. The second case of the same name was an action brought against the defendant for wrongfully obstructing the plaintiff's drain, and would be applicable to this case only if McQuay had been the plaintiff, and Thomson the defendant. It was there held that the penning back of the natural surface flow of water is not actionable, and that the plaintiff's remedy was under the Fence Viewers' Act. That Act was only applicable where it is the "joint interest of owners to construct a ditch." Now, in this case Thomson's contention is that he has no interest whatever in the drainage of McQuay's land, and yet he invokes the aid of these proceedings to compel him to carry off the water so as not to injure his land.

I do not think the Act has superseded his Common Law remedies.

The Corporation of Pickering could stop up or obstruct the culvert in question, and so I take it could Thomson himself; and McQuay could have no remedy, as "the right of drainage does not exist *jure naturæ*": *Darby v. Crowland*, 38 U.C.R. 343; *Crewson v. The Grand Trunk Ry.*, 27 U.C.R. 68. If his complaint is, as it appears to be, that McQuay, by means of this ditch, carried to and projected on the applicants land more surface water than otherwise it would have received, he has his remedy at law in an action for damages or for an injunction, or both: *Perdue v. Chinguacousy*, 25 U.C.R. 61; *Rowe v. Rochester*, 22 C.P. 319, and 29 U.C.R. 590; *Stonehouse v. Enniskillen*, 32 U.C.R. 562.

In *McGillivray v. McMillin* the defendant was the inferior owner, and the action was for obstructing a drain, just the reverse of the present case. I do not see how any of the cases cited by Mr. Billings apply.

*Smith v. Kendrick*, 7 C. B. 575, decides that it is the duty of the owner working on the lower level to guard against the water flowing upon him by banking or otherwise.

An examination of the form B. given in the schedule will throw some light upon the scope and meaning of the Act. It reads: "I require to construct a ditch or drain through said (my)

lot and find it necessary to continue same through your lands." Nothing can be more different from the requisition served in this case.

Thomson, in his evidence, asserts that his land does not require drainage, and that a drain will be an injury to him rather than a benefit, and yet he asks McQuay to construct a drain across his land (Thomson's), the costs to be borne by McQuay. I think this is turning the Act, so to speak, upside down, and that he has mistaken his *forum*. He is bound to receive McQuay's natural surface water, being the inferior owner. If McQuay has collected in one place more than such natural surface water, and discharged it upon Thomson's land he has a right either to erect an obstruction to divert such overflow, or he can bring an action for damages or for an injunction. If he desires to invoke the aid of this Act, I think his only course would be to build a drain across his own land, and call upon the township engineer to ascertain whether McQuay was benefited by its construction, and if so, in what proportion he should contribute towards its cost.

As the effect of my judgment is that the matter in question does not come within the provision of the "Ditches and Water-courses Act" my finding is practically that the township engineer had no jurisdiction to entertain the matter.

I have had some hesitation as to whether I should set aside the award *in toto*, but as I do not disagree with its findings, have concluded to confirm it. The engineer has omitted to provide for the costs of the Division Court clerk and of the respondent's witnesses. I therefore amend the award by directing "that the costs of the engineer, according to the tariff provided by by-law, and of the Division Court clerk and bailiff, and of the respondent and his witnesses be taxed on the Division Court scale by the clerk of the 2nd Division Court and paid by the appellant to the respondent forthwith after taxation."

In the event of non-payment the respondent can collect these costs under the machinery provided by the Act, or sue for them in the ordinary way, as he may be advised. I express no opinion as to which is the proper course.

The recent case of *Northwood v. The Corporation of Raleigh*, 3 O.R. 347, I think confirms the views that I have taken of the law