

## BAGGS V. CITY OF TORONTO.

after raising the grade and block-paving, two culverts or man-holes were put down on the east side of Lippincott Street at the north-east and south-east corners of Lennox Street. The effect of raising the grade on Lippincott Street was to prevent the flow of surface water across the street; and the result was that when freshets or very heavy rains occurred a considerable portion of the surface water, which the culverts at Lennox Street were inadequate to carry off, flowed down the east side of Lippincott Street and through and over the plaintiff's lot, some finding its way into his cellar and filling it up, and more flowing under the plaintiff's house, and then easterly till absorbed at other points. The plaintiff alleges that his building was seriously injured, and about a foot of rubbish and mud deposited in his cellar, which he had to remove at some expense. Other injuries also resulted to his building, which he alleges arose in consequence of this flooding. The worst flood was one occurring on the 3rd and 4th January, 1886, when there was a very heavy downpour for several days, resulting in the flooding of the natural water-courses in the west end of the city, and in overcharging all the sewers in this vicinity. A flood also occurred in 1835 about the time of the construction of the block-paving, and another in March, 1886. The latter was not so serious as the January one, which, according to the evidence, was much the heaviest of the three. The plaintiff also states that the March flood was less injurious to him, because the defendants had put in some additional culverts at Bloor Street, these taking off a quantity of the surface water coming down from the north, and discharging it into sewers on Borden Street and Brunswick Avenue, streets parallel to Lippincott Street and to the east of it. *All the injuries the plaintiff complains of were the result of flooding by surface water, and did not arise from the overflow of the sewer.*

The defendants urge that they are not legally responsible for the damages in question on two grounds: first, they say, We are not bound to protect you from injury from surface water: and second, they say that the plaintiff was flooded by surface water before they graded this street and if, as a fact, it appears that the flooding is any more extensive by reason of their having raised the grade of the street, they contend that they are not responsible, because, in raising the grade in order to block-pave, it was the proper exercise of a legal power by the corporation, and they have not exceeded these powers, nor have they been guilty of any negligence in their mode of exercising them.

On the first point there is no doubt whatever that the defendants are right. The right of drain-

age does not exist *jure naturæ*. The principles applicable to running water which are *publici juris* do not extend to the flow of mere surface water. *McGillivray v. Millin*, 27 U.C.R. 62; *Crewson v. Grand Trunk*, 27 U.C.R. 68; *Murray v. Dawson*, 19 U.C.C.P. 314; *Darby v. Crowland*, 38 U.C.R. 338. *Dillon on Corporations*, second ed., par. 798.

The second point, however, as to whether a corporation, raising a grade of a street and thereby preventing the escape of surface water from one side of the street to the other, and causing damage to an adjacent proprietor, is liable, is perhaps not so free from doubt. The case most in point that I have been able to find is *Darby v. Crowland*, 38 U.C.R. 338. The facts in that case, as stated in the head-note, are as follows: There had for many years been a culvert across a highway adjoining the plaintiff's land, through which the surface water from his land had been accustomed to pass, and the pathmaster had closed it up and made the road-bed solid, by which the flow of surface water from the plaintiff's land was impeded, and the land remained longer wet than it would otherwise have done. The corporation by resolution approved of the pathmaster's action. It was there held that the plaintiff had no cause of action, for there was no right of drainage across the highway for the surface water, and the corporation could not be liable for not exercising their discretionary powers with regard to the drainage of lands.

The numerous cases cited in that judgment show that both in England and the United States it has been distinctly decided, as I have before said, that the right of drainage of surface water does not exist *jure naturæ*, and that long enjoyment of the right would not create an easement. Chief Justice Harrison, after affirming this proposition of law, adds: "The fact that the defendants are a municipal corporation cannot give to the plaintiff any greater rights than he would have against the private individual. It is true that municipal corporations have power, under certain circumstances, to pass by-laws for the drainage of lands; but this, like many other powers conferred on municipal bodies, is a discretionary, not an obligatory, power." In *Dillon on Corporations*, paragraph 798, the law is laid down as follows: "Authority to establish grades of streets, and to graduate them accordingly, involves the right to make changes in the surface of the ground which may injuriously affect the adjacent property owners; but where the power is not exceeded there is no liability unless created by statute, and then only in the mode and to the extent provided for the consequences resulting from its being exercised and properly carried into execution. On the one hand, the