

out any kind of intimation to anybody of intention to leave Montreal, also leaving Benallack diminished in fortune to satisfy all the claims against the partnership, was enough to raise the worst suspicions in Benallack's mind. By his plea he says he verily believed that Chapman would never return and had left with intent to defraud.

We think Benallack was warranted in saying all he did, even if advising Bolduc to seize as Bolduc did. Bolduc swears that he did not seize because of what the defendant said, but because of what Mrs. Chapman had said. There is much to show that Bolduc was really moved by defendant; nevertheless we do not see that plaintiff is entitled to judgment. Judgment confirmed; one *motif* struck out.

L. H. Davidson, for Plaintiff.

Cruickshank & Cruickshank, for Defendant.

COURT OF REVIEW.

MONTREAL, April 29, 1881.

MACKAY, RAINVILLE, BUCHANAN, JJ.

[From C. C., Ottawa.]

MCGILLIVRAY V. McLAREN et al.

Water power—Dam.—C.S.L.C., Cap 51.

The defendant inscribed in Review of a judgment of the Superior Court, District of Ottawa, Bourgeois, J., 16th Dec., 1879.

The action was instituted for the recovery of \$3,000 damages, alleged to have been suffered by the plaintiff by reason of the damming up of a creek, tributary of the North River, traversing plaintiff's property, during the years 1871-1873.

The plaintiff alleged that for the purpose of driving the sawlogs to defendant's mill on the River Nation through the branches thereof, he, defendant, had erected a dam on the west branch of the creek above plaintiff's farm, and one dam at a lake in lot No. 17, five miles above said farm and another dam about $3\frac{1}{2}$ miles above the latter dam; also another below the plaintiff's farm in the 5th Range of the township of Lochabar; that the construction of these dams caused the water to overflow the flats on plaintiff's property, depriving him of the use of 90 acres for farming purposes. The

plaintiff alleged specially that the creek in question where it falls through his farm, is not a navigable or even a floatable stream, and that the water and the bed of the stream belong to him as his property.

The defendants pleaded denying the allegations of the plaintiff's action, and specially averring that they were proprietors of expensive saw mill on the Nation River, and that to supply the mill with saw-logs it became necessary to erect dams on the creek, economically to float saw-logs, and to clear the channel to allow the descent of the logs to the Nation River. That by law plaintiff could not recover damages until they were established and ascertained under cap. 51, C.S.L.C.; that the plaintiff never called upon defendant to ascertain the damages according to the provisions of the Act. There was a second plea alleging that the creek is a floatable stream.

The Court below condemned the defendants to pay \$80 damages, holding that the provisions of the statute referred to could not be invoked by defendants as regards their works.

The defendant submitted that the application of the Statute entitled them to a reversal of the judgment: the plaintiff had no right of action without previously having the damages ascertained according to the Statute. The construction of dams for the floating of timber is a work within the Statute, which enables every proprietor of land to construct dams to enable him to carry his lumber to market.

MACKAY, J. We have nothing before us but a law point, viz: Could plaintiff sue when he did and as he did? Was he bound to go to an *expertise* to substantiate his damages, as per cap. 51 Cons. Stat. L. Ca.: "Act respecting the improvement of water courses." The judge *à quo* has held negatively. He is supported by the Quebec decision of Chief Justice Meredith, confirmed in Review. See vols. 3 and 5, Queb. Law Rep. We confirm. The defendants suffer very little by the judgment *à quo*—too little; but plaintiff has not inscribed. Cap. 51, Cons. Stat. of L. Ca. cannot be worked. The plaintiff notwithstanding it could resort to the Superior Court.

Judgment confirmed.

M. McLeod, and Robertson & Fleet for plaintiff.

R. & L. Laflamme for defendants.