

3. That the plaintiff was not entitled to have the stream or water-course flow by and away from the said tannery and land as alleged.

These three pleas were to the first count of the declaration, and similar pleas were pleaded to the second count.

The plaintiff issued issue on all the pleas.

The cause was taken down to trial at the Fall Assizes of 1868, at Peterborough, before Hagarty, J.

There was evidence offered on the part of the plaintiff, to shew that in the month of March, 1868, ice had lodged against a bridge constructed by defendants along a street in the town of Peterborough, over a stream that passed through premises occupied by the plaintiff: that the lodging of the ice there in the spring of the year formed an ice dam, or jam, as it is called, and this penned back the water on the plaintiff's premises, flooded his tan vats, and injured him to the extent of about \$418, as shewn by his evidence.

A witness for the plaintiff said, in relation to the water being penned back, there was not the slightest doubt but that this was caused by the bridge: that the defendants took up the floor of the bridge and broke up the ice, and the damage ceased at once. This witness did not think obstructions by one Doherty, lower down the stream, backed the water to the injury of the tannery.

For the defence it was shewn that a bridge had been erected across the stream at the place complained of for more than thirty years: that one Doherty owned premises further down the stream than the bridge: that the corner of one of his buildings was erected in the stream, and that he had a wheel also that was in the stream: that parties having mills on the stream above the plaintiff's premises, in the spring of the year, when the water rose, cut away the ice and sent it down the stream: that it lodged at Doherty's, and formed a jam, and the stream filled with ice up to the defendants' bridge, and then the ice which came down from above lodged about the bridge: that as soon as the jam was cleared below, from Doherty's up to the ice at the bridge, all passed away: that the floor of the bridge was taken up to aid in removing the ice dam or jam, and after that was done all passed away: that had it not been for the obstruction at Doherty's, there would have been no injury: that defendants' bridge did not cause the jam at all, and if it had not been there the jam at Doherty's would have caused the injury. One of the defendants' witnesses said he considered if the bridge was removed, the artificial work in the stream below it would have caused the damage. He also thought the bridge would cause this obstruction, even if the artificial work below was not there.

At the end of the case, defendants' counsel objected that defendants were not liable on the evidence: that the bridge was erected in the ordinary course of their duty, and that the obstruction in the flow of the stream was caused by sending the blocks of ice down the stream by parties above, and not by the ordinary action of the ice.

The learned judge stated that the case turned on the plea of not guilty: there was damage done, and he left it to the jury to say by whom,

by the defendants' bridge, or by the ice jam at Doherty's, irrespective of the bridge.

On this direction the jury found for the plaintiff, damages \$100. The plaintiff's counsel took the same objections to the charge of the learned judge that he took at the close of the case.

In Michaelmas Term, *C. S. Patterson* obtained a rule *nisi* to set aside the verdict, as being contrary to law and evidence and the weight of evidence, in this, that it was shewn that the obstruction which injured the plaintiff was not caused by the defendants' bridge, but by a stoppage of the stream at a place lower down the stream than the bridge; and because it was not shewn that the bridge caused any obstruction, or that it was calculated to cause any obstruction in the natural flow of the stream; and because the obstruction was shewn to have been caused by ice which did not come down in the natural flow of the stream, or by reason of the natural thaw, but was sent down the stream by persons who broke it up from the mill-ponds; and because it was not shewn that the defendants had constructed their bridge in a negligent or improper manner, or had done any act beyond what they were required by law to do; and for misdirection of the learned Chief Justice, in ruling that the declaration would be supported by evidence of an obstruction caused by the lodgment against the bridge of bodies of ice sent down the stream, notwithstanding that the bridge would not obstruct the stream in its natural flow.

The rule was enlarged until this term, when *J. H. Cameron, Q. C.*, shewed cause. The simple question on not guilty was, whether the defendants, by the construction of the bridge, penned back the water on the plaintiff's premises, so as to cause him damage. That damage was done by penning back the water is not denied. There is evidence that it was caused by the bridge, and the jury, who had a view of the place, were competent to judge whether the plaintiff's contention, that the injury was caused by the defendants' bridge, was correct or not. If they thought it had arisen from other causes, they would have found for defendant.

The action is not brought for negligently constructing the bridge, but simply for penning back the water on the plaintiff. If the water was thrown back by the bridge, and the defendants wished to justify the erection of the bridge as in discharge of their duty, they should have so pleaded; but the general issue merely denies the fact of the flooding, and there was evidence to go to the jury that it was caused by the bridge. *Harrold v. The Corporation of Simcoe*, 18 U. C. Q. B. 9.

C. S. Patterson, contra. The weight of evidence is clearly with the defendants. They were by law bound to build the bridge; they were guilty of no negligence in what they did, and cannot properly be held responsible for the injury sustained by the plaintiff. Besides, the learned judge should have told the jury that the act of the parties above caused the jam by sending down the ice improperly, and that they should find for the defendants on not guilty. At all events he should have told them that defendants would not be liable if their bridge would not have obstructed the ice in its usual and natural condition, and if the jam was caused by the ice above being sent down in too large quan-