

tions—namely, that the prisoner was not present—was perhaps a little unfortunate, as likely to suggest that the presence of the prisoner might make them admissible. That is, however, not the test, which is solely and simply whether the state of mind of the declarant was such that he believed he was lying in the presence of imminent death. The other question of evidence raised was the admissibility of the statements of the deceased as to her physical condition, and Mr. Justice Charles carefully excluded anything which did not relate to her then present symptoms; and again it must be pointed out that the result would have been the same if the prisoner had been present, the principle being that statements of this kind stand on the same footing as physical facts like cries of pain."

SUPERIOR COURT.

AYLMER, (Dist. of Ottawa), Dec. 12, 1887.

Before WURTELE, J.

BROWN v. HOLLAND et al.

Water-course running across property—Mill-dam—Damages caused by flooding.

HOLD:—*Where one of the defendants had assisted their father to erect a mill-dam on a water-course running across his property, and the owner of the land above that on which the mill-dam had been built, sued them for the damages resulting from the flooding of his fields:*

1. *That to erect a mill-dam on a water-course which passes across one's land, although it may be hurtful to the owners of the higher lands, is not an illicit act.*
2. *That it is not an offence under Article 1053 of the Civil Code, and that those who assist the owner in the construction of such mill-dam are not responsible for the damages caused by such construction.*
3. *That the right conferred on the owner to utilize a water-course which passes across his land, gives him the right to flood the higher lands, which is in effect an expropriation of the usefulness of the portions of the higher lands so flooded, and that the owner*

who has used this right is bound to pay a just indemnity for the damages caused by such flooding.

PER CURIAM.—The plaintiff alleges that the defendants, being the owners of a land situated below his, had erected a mill-dam on a stream which ran from his land through theirs, and had thereby flooded twenty-six acres of his land, and he claims the damages which he has suffered by the flooding.

The defendants plead that they have never been the owners of the land on which the mill-dam was erected, that it had belonged to their father, and that he had constructed the mill-dam, that he had instituted their mother his universal legatee, that she was in possession of the land and mill-dam in such capacity, and that they were consequently not liable for the damages claimed.

The plaintiff answers that the defendants personally assisted in the construction of the mill-dam, and that they were therefore personally responsible.

The defendants have proved their father's ownership and possession, the construction of the mill-dam by him, and their mother's title and present possession; and the plaintiff, on his part, has proved the damages caused to his land by the erection of the mill-dam, and that one of the defendants had superintended its construction for his father.

At the argument it was contended, on behalf of the plaintiff, that the defendant, who had taken part in the construction of the mill-dam, had committed an offence, and that he was responsible under Article 1053 of the Civil Code for the damages caused by its erection, and moreover, that under Article 1106, his obligation was joint and several, and that he was liable to be charged as a principal.

Was the act of building the mill-dam an offence under Article 1053, which would render all those participating in it responsible for the damages caused by its erection?

It was considered by the Legislature to be in the public interest to encourage the construction of mills and manufactories, and to that end it was enacted by chapter 51 of the C. S. L. C. that every proprietor of land might improve any water-course running along or passing across his land, and construct in such