Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Brown v. *Gugy, from Canada; delivered February* 15, 1864.

Present:

LORD KINGSDOWN.
SIR EDWARD RYAN.
SIR JOHN TAYLOR COLERIDGE.

IT appeared to their Lordships at the hearing of this Appeal that some of the points both of law and of fact so elaborately argued at the Bar, were immaterial to the decision of the only question which is open to them upon the Record. A further examination of the papers has confirmed that opinion.

The Appellant is the owner and occupier of a water-mill on one side of the River Beauport. The Respondent is the owner of the domain of Beauport on the other side of the river.

In the month of October 1852, the Respondent erected a wharf on land which he insists is part of his estate.

The Appellant alleged that this wharf was injurious to him; and on the 29th April, 1852, he commenced an action against the Respondent in the Superior Court of Lower Canada, and on the same day filed his declaration.

After setting forth the Appellant's title to the mill, and stating that he and his predecessors in title had for 100 years used the natural current of the river for working the machinery of the mill, the declaration contained the following allegations; that the Beauport is a navigable river, and has, until the grievance hereinafter complained of, been used

by the Plaintiff and his predecessors in the floating of bateaux and other vessels employed by them in conveying grain, flour, and other effects to and from the said mill; that the Defendant intending to injure the Plaintiff in his business of a miller did, between the 16th day of October preceding, and the date of the issue of the summons (that is, the 29th October), erect lower down the river than the Plaintiff's mill, and in and upon the said River Beauport, a certain wharf which nearly traverses the whole of the said river, and which materially alters the natural course of the river, and narrows the channel of the same so much that it is now impossible for the Plaintiff to float bateaux or other vessels to the mill as he was used to do; and that the Defendant has further, by means of the said wharf, prevented the waters of the river from running down the natural channel, and compressed the channel to so small a breadth that whenever the waters of the river, from the freshets or otherwise, become high, the said waters recede or are thrown back upon the Plaintiff's mill, by reason whereof, and by means of the still water thereby occasioned, the mill cannot be worked, and that in consequence of the illegal and tortious acts of the Defendant in erecting the said wharf, the Plaintiff has been, and still is, prevented from using the waters of the river and working his mill as he otherwise would have done, to his damage of the sum of 300*l.* currency.

The conclusions of the summons are—

1. That the Defendant may be decreed within eight days, or such other time as the Court may appoint, to demolish and remove the wharf, and that in default of his doing so the Plaintiff may be authorized to do so at the Defendant's expense.

2. That the Defendant may be ordered to pay 300*l.* currency for the damage aforesaid, and costs. The whole without prejudice to any further damages that may be sustained by the Plaintiff by reason of the erection of the wharf.

The Defendant in his answer denied generally the allegations of the Plaintiff, and pleaded various special matters both of law and of fact to which it is not necessary to advert.

The cause being at issue, a great deal of evidence was produced on both sides, and in April 1857 the Court referred it to three gentlemen as experts

to make inquiries and report to the Court their opinion on several of the matters in dispute, with directions upon one particular point to receive further evidence.

These gentlemen differed amongst themselves, two concurring in a Report, and the other making a separate Report; and after much expense and delay, finally the cause came on for hearing before the Superior Court—Mr. J. Stewart being the Judge present, when the following Order was pronounced:—

"*February* 1, 1860.

"The Court having examined the proceedings of record, the evidence adduced, and heard the parties by Counsel on the merits; considering that the Plaintiff hath failed to establish in evidence that the Defendant hath erected, or caused to be erected, in and upon the River Beauport, a wharf which crosses the said river in any measure, or which obstructs or diverts the natural course of the same; considering that the River Beauport is alleged and proved to be a navigable river, and that any obstruction to the same would be a public nuisance; and considering that no action by an individual lies for a public nuisance, unless the party bringing such action has received special and particular damage therefrom; considering that the said Plaintiff hath failed to show in evidence that he has received any special or particular damage from the erection of the present wharf,—doth dismiss the present action with costs."

From this decision the Plaintiff appealed to the Court of Queen's Bench, and that Court by a majority of three Judges to two affirmed the Judgment, and from the decision of these two Courts the present Appeal is brought to Her Majesty in Council.

The only question on which it is our duty to advise Her Majesty is, whether the Judgment dismissing the action ought to be reversed or varied; in other words, whether the Appellant at the hearing below established a case which entitled him, *secundum allegata et probata*, to any relief.

The action is founded on the allegation of damage caused to the Plaintiff by a tortious act of the Defendant. It complains both of injury already

suffered before the commencement of the action, and of continuing injury, and seeks appropriate relief in respect of each complaint—compensation, in money, for the first; and demolition of the wharf, for the second.

The Courts below have found that the Plaintiff has failed to prove any damage whatever sustained by him from the works of the Defendant, either before the commencement of the action or subsequently.

Can we say that either of these findings is erroneous?

As to the first, its propriety was hardly disputed at our Bar, and, indeed, it did not admit of dispute.

As to the second, although there is a great deal of conflicting testimony, and much room for doubt, two Courts have come to a decision in favour of the Defendant. The question is one upon which the Judges in the Colony are more competent to form an opinion than we can be; and it is not the habit of their Lordships, in this Committee, to advise an alteration of a Judgment, unless they can see clearly that, upon some point, there has been a miscarriage in the inferior Courts. This we are unable, in the present case, to discover. The observations of Mr. Justice Meredith show that he has examined the case with the utmost care and impartiality; and the clearness and temper with which he expresses the conclusion at which he has arrived add great weight to his opinion.

It was said, however,—and this is the point relied on by the dissenting Judges,—that it was unnecessary for the Plaintiff in the action to prove actual damage; that the action might be maintained as one of *dénonciation de nouvel œuvre*, and that in such action it is sufficient to prove that the work complained of will, or probably may, be attended with injury to the Plaintiff.

But the action of *dénonciation de nouvel œuvre* is of a different description from the present; is founded upon a different state of circumstances; and seeks different relief. In such an action the Plaintiff claims protection against a work commenced, and still in progress, by which, if completed, he alleges that he will be injured.

If such an action be brought it appears that the Judge may either interdict the further progress of

the work or require security to be given by the Defendant to the Plaintiff against any injury which he may sustain; but when the work is completed this form of action is no longer competent.

This appears to have been the law of Rome. In the Dig., lib. xliii, tit. 15, "De Ripa munienda," after a statement that any protection to the banks of a public river must be made in such a manner as not to hinder navigation, so that any person who apprehends injury from the work may apply to the Prætor for an interdict to restrain it and may obtain security, we find this passage:—"§ 5. Etenim curandum fuit ut eis ante opus factum caveretur. Nam post opus factum persequendi hoc interdicto nulla facultas superest etiam si quid damni postea datum fuerit, sed Lege Aquilia experiendum est."

The law and form of procedure of Rome seem in this respect to have been adopted into the law of France.

In Daviel, "Cours d'Eau," *tit.* "Du Domaine Public," par. 471, it is distinctly laid down that by the old French Law, that is, by the law now prevailing in Lower Canada, the *dénonciation de nouvel œuvre* could only be maintained if instituted before the work was completed, though by an alteration introduced by the French Code, the Law in this respect is now altered and the action may be maintained in respect of a work either "fait ou commencé."

The author says,—

"Je dis nouvel œuvre fait ou commencé. Sous l'ancienne jurisprudence la dénonciation n'était plus recevable du moment que le nouvel œuvre était terminé; c'est ce que cette action avoit de spécial, comme aussi la faculté pour l'auteur du nouvel œuvre de continuer son travail en donnant caution et la restriction du droit du Juge à suspendre les travaux sans pouvoir les faire détruire. Mais sous notre nouveau droit la dénonciation de nouvel œuvre est assimilée aux autres actions possessoires par cela que les lois n'ont pas réproduit les conditions particulières qui la caractérisaient autrefois."

In this case there is no doubt that the work was completed before the action was commenced, and the relief sought is different from that which, according to Daviel, could be granted in an action of *dénonciation de nouvel œuvre*. But even if the present suit could be regarded as an action of

this description, it would be equally met by the objection that the Plaintiff had failed to prove that the work would be injurious to him.

It was then said that, however the law might be, if the bank on the face of which this wharf is built were the private property of the Defendant, a distinction is to be made, because the bank is, in truth, part of the bed of the river, and a portion of the public domain, and that a work erected upon it is a public nuisance of which any person interested has a right to complain.

That the bank in question is a part of the bed of the river, and a portion of the public domain, is not in terms alleged by the pleadings. The averment was said at the Bar to be contained inferentially in the statement that the wharf erected by the Defendant nearly traverses the whole of the river, which it would not do unless the bank formed part of the river. If the fact were essential to our decision in this case, we should feel great difficulty in holding that the Plaintiff had either sufficiently put it in issue by his declaration or established it by evidence.

But it is not in our opinion necessary to decide this question. The law of Lower Canada, as we collect it from the authorities, seems to stand thus:—

An officer suing on behalf of the public has a right at his own instance, or on the application of any person interested, to call for the demolition of any work erected without license on the public domain, and he is no more required to prove that the erection has occasioned actual damage to the public than a private person who complains of a wrongful invasion of his property is obliged to prove that it has occasioned actual damage to him. But although such officer may, if he think proper, take proceedings to abate the nuisance, he is not obliged, nor is it in all cases his duty, to interfere. A case of this kind is put by Proudhon, in a passage cited by Mr. J. Aylwin. He says, "It may be that in the case of a dyke erected in the bed of a navigable river the dyke may do no injury to the actual state of the navigation, as being built in an arm of the river where navigation is not practised, and which nevertheless does not on that account cease to be a part of the public domain."

This supposed case has much resemblance to the present. The particular portion of the river where the channel is said to have been contracted does not appear to have been actually in use by the public for the purposes of navigation.

If the public officer refuse to interfere, an individual who suffers injury is not prejudiced; he has still his *action privée*, by which he may recover damages for injury already sustained, and the abatement of the cause of such injury for the future. The public and private action are said to be not only independent of each other, but essentially distinct in their object. The fact that the place where the work is erected is public property is of course very important in both cases, in regard to the right of the Defendant to do what he has done, but it does not according to the law, as we can collect it from the authorities, supersede the necessity of the Plaintiff in a private action proving that he has sustained injury by the work special to himself, and beyond that which is common to the public at large, and this, as we have already stated, the Plaintiff in this case has failed to do.

Upon the whole, we must humbly advise Her Majesty to affirm the Judgment, and the costs must follow the decision.

We cannot part with this case without noticing two subjects which have attracted our attention in the course of the discussion, though they do not bear directly on the decision.

The first is the manner in which the case has been conducted in the Court below, and the enormous expense and delay which have attended the proceedings. Much of these evils is no doubt to be attributed to the parties, who seem to have been more anxious to indulge their feelings of hostility towards each other than to arrive at a cheap and speedy determination of their rights. But much must also be attributed to the unfortunate course adopted by the Court in directing the reference to experts—a step which appears to us to have been unnecessary and to have led to no satisfactory result, but rather interposed difficulties in the way of the decision, and to have occasioned crimination and recrimination amongst persons acting as officers of the Court, little creditable to the administration of justice.

The other subject to which we think it fit to advert is this: Two of the Judges have sent home long and very elaborate arguments, supported by a citation of numerous authorities, against the decision of the majority of the Court.

It was asserted by the Respondent, without any contradiction on the part of the Appellant, that these arguments were not delivered by the dissenting Judges at the hearing of the cause, but were first made known to the parties by being printed as part of the Record before us. If the statement thus made be accurate, we must say, with all respect for those learned persons, that the course so pursued by them appears to us open to great objection. We think that their reasons for dissenting from their colleagues should have been stated publicly at the hearing below, and should not have been reserved to influence the decision in the Court of Appeal.

We have thought it due to the general interests of the suitors in the Colony to make these remarks, in order to prevent what has been done from growing into a practice, though it may not have produced any mischief in this particular case.