

No. 74.

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William L. Garitee

or

Mayor & City Council
of Baltimore, &
Daniel Constantine.

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B. M. A. & J.
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Opinion by
Avery, J.

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To be reported
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Filed March 30th 1880.

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This is an action on the case brought by the appellant against the appellees to recover damages for an alleged special and particular injury suffered by the appellant from the acts of the appellees in filling up the Patapsco river in front of his, the appellant's, property bounding on said river, and thereby obstructing access to such property by water as formerly used and enjoyed.

There is little or no dispute in regard to the principal facts of the case. It is conceded that the appellant is, and has been since about the year 1868 or 1869, the owner of two several parcels of land fronting on the Patapsco river, a tidal navigable stream, within four miles of Baltimore city;— one parcel in fee and the other a leasehold. It also appears that upon the parcel owned in fee there is a large building, which has occasionally been rented out and used as a place of resort for excursionist and pleasure parties during the summer season; and that upon the leasehold premises there is an extensive

brickyard, and upon both parcels of land there are deposits of valuable brick-clay, and, upon one of them, potter's clay also. It is also shown that there is a wharf, extended out from the leasehold parcel of land, about two hundred feet long, to which boats and vessels of considerable size could come and load and unload, before the obstructions complained of by the appellant.

The deposits, causing the obstructions complained of, were the mud, sediment and other material, dredged from the bottom of the basin, and ~~the~~ⁱⁿ cleaning out Jones' Falls, in the city of Baltimore, and by the agents and employees of the city, transported in scows to the flats opposite to the property of the appellant and there dumped out in water which, previous to that time, was navigable for steam-boats, steam-tugs, scows and other transports. This dumping commenced in 1894 and continued to the time of bringing this suit; and it is conceded that it has materially obstructed the access by water to the property of the appellant.

The manner of making the deposits was to commence as near in to the shore as the tug and scow could be taken, and then recede out towards the channel of the river, as the water became too shallow from the deposits to float the tug and loaded scow; and in this way deposits were made along nearly, if not quite, the entire front of the appellant's property. The evidence tended to show that, by reason of the obstructions thus placed in the previously navigable water in front of his property, the appellant would now have much greater difficulty in sending off his bricks or clay from the premises by boats or scows, than formerly existed; and that the approach to the wharf is much obstructed by these deposits, and that now, a wharf to answer the same purposes as the one in existence did formerly, would have to be extended out from the wharf to eight hundred yards, and at a considerable cost. It was further shown that the appellant remonstrated from time to time against the making these deposits.

At the close of the appellant's case, without requiring the defendants to proceed, the court below instructed the jury that there was no evidence in the cause from which they could find that the plaintiff had sustained injury or damage for which he could recover in this action. And whether this instruction was proper, in view of all the facts contained in the record, this court is now called upon to determine.

In giving this instruction, the court below was required, ^{so} and this court in reviewing that ruling, ^{to assume as established} ~~to assume as established~~ for the purposes of the decision, ~~to assume as established~~ all the facts in favor of the appellant which the jury would have been justified in finding from all the evidence before them.

It is conceded, of course, that the appellant is a riparian owner, and that he has all the rights of such ownership; but it is contended on the part of the appellees that what has been done has been done by competent authority, and though the appellant may have been injured

thereby, it is damnum absque injuria, and therefore no action can be maintained.

Now, in order to treat intelligibly this broad general proposition, it is necessary to ascertain, in the first place, what are the rights of the appellant as riparian owner, and the extent of those rights; and, in the second place, to what extent, if at all, the appellees were authorised to make the deposits in front of the appellant's property, ~~having regard~~ with proper legal regard to his rights as riparian owner.

1. In defining the exact limits of the rights of the riparian proprietor at the common law, on navigable tidal streams, there is to be found a considerable diversity of opinion among courts of high authority, as well as among the writers upon the subject. In this state, however, those rights have been defined by statute, and secured to the proprietor to an extent beyond what the common law allowed, even according to the largest definition ^{of those rights} under that law. This has been effected by the act of 1862, c. 129. By the first

section of that act, the proprietor of land bounding on any of the navigable waters of this State is declared to be entitled to all accretions to said land by the recession of the water, whether formed by natural causes or otherwise, in like manner and to the like extent as such right may be claimed by the proprietor of land bounding on water not navigable. And by the second section, such proprietor is declared to be entitled to the exclusive right of making improvements into the water in front of his land; and that such improvements and accretions shall pass to the successive owners of the land to which they are attached, as incident to their respective estates; saving only that no such improvement shall be so constructed as to interfere with the navigation of the stream.

The third section declares that no patent shall issue by the State ^{for land covered by navigable waters, or} to impair or affect the rights of riparian proprietors as ^{by the act are} ~~then~~ explained and declared; and this Court has held, in the case of Day or Day, 22 Md 530, that no patent could issue for lands below high water mark, because it would interfere with those rights.

These rights, thus secured, are valuable; they are property, according to repeated decisions; and of which the owner cannot be deprived without his consent, or by other competent legal means. *Dungan v. City of Baltimore*, 5 Br. J. 367; *Casey v. Talbot*, 1 Gil. 581; *Balt. & Ches. R. Co. v. Ches.*, 43 Md. 23; *Bueclough v. Met. Board of Works*, 5 Md. 418. And whenever those rights are invaded, or their enjoyment obstructed, the owner is entitled to his remedy for redress, as in other cases of the violation of the rights of property.

2. Such being the rights of the appellant as riparian owner, the next inquiry is, what is the power given by law to the City of Baltimore in regard to the clearing out and the improvement of its harbor, and the deposits of the mud and material removed in making such improvement?

From a very early day in the history of Baltimore there has been special legislation upon this subject. By the act of 1783, C. 24, providing for the appointment of wardens for the port of Baltimore Town, in the tenth section of the act, the wardens were required to have cleared out and scoured the basin and harbor of the town, and to have removed "all obstructions and annoyances in

and upon the said basin, harbour and river, whether from vessels sunk or any other cause. ~~to be removed~~ ^{is still in force and} This provision is now found in the Code of Pub. Local Laws, Art. 4, Sec. 264. And in the act of 1796, C. 68, first chartering the city, among the numerous powers delegated was one, to be found in the ninth section of the act, to provide for the preservation of the navigation of the basin, and Patapsco river within the limits of the city, and within four miles thereof. This provision still remains among the powers of the city, as appears from section 793 of Art. 4 of the Code of Pub. Local Laws; and by the next succeeding section of the same Article of the Code, it is declared that "No person, his servant, &c. shall put or throw into the Patapsco river, or any of the navigable branches thereof, any earth, sand, or dirt, or lay out on the beach or shore of said river below common high water mark, any earth, sand or dirt, unless such earth, sand or dirt be first well secured by stone wall, dovetailed log pens or otherwise, so that no part thereof

may wash into said river or the navigable branches thereof." These provisions manifest the care with which the legislature has guarded this river and harbor against deposits and obstructions of all kinds, not only the main channels thereof, but every part of them. ~~The possibility that~~ the mud and material dredged from the channel, or particular localities, might be deposited in other parts of the river where, by the action of the tides, such material would be washed down the slopes, and made to fill up the channels and obstruct navigation, the work of cleaning out and improving would be of but temporary value. All such deposits are prohibited, under a penalty, in any part of the river or harbor, except it be secured as provided in the statute, so as to prevent its being washed again into the river.

It is contended, however, that all this legislation has been essentially modified by the act of 1872, c. 246. By that act the city of Baltimore was clothed with full

power and authority to widen and deepen the ship channel leading into the Patapsco river, and between the mouth of the river and the city, and to any point within the limits thereof, and to keep such channel in proper condition in respect to width and depth. This act makes no reference whatever to any previous legislation; ~~but~~ ^{and} in order to deduce from it the power claimed by the appellee, it is necessary to maintain not only that the express authority given conferred by implication power to do what is complained of by the appellant, but that this latter act repealed by implication the 794th section of Article 4 of the Public Local Code, heretofore referred to and quoted. Such construction, however, is supported by no authority, and cannot for a moment be maintained. Repeals by mere implication are never favored by the courts; the general presumption being against an intention on the part of the legislature to alter or modify the preexisting law beyond the express terms or immediate scope of the statute relied on as having the effect

of a repeal. If the subsequent act can be made, by any reasonable construction or intendment, to stand with the previous legislation, that construction will always be adopted. This is a canon of construction which is as well established as any principle of the law. *City of Cumberland v. Maguder*, 34 Md. 387; *Milham v. Pritchard*, 4 D. & L. 2; *Sedg. on St.* 123, 125. Here there is no sort of conflict between the later and previous statutes; the later statute simply conferring additional power in affirmative terms, without at all undertaking to regulate or touch upon the subject matter of former ~~legis~~ statutes.

The 794th section of Article 4 of the Public Local Code being ^{therefore} still in force, the appellees were not only without authority for what they did, but their acts were in ^{plain} violation of the terms of the Statute. And that being so, all the authorities agree in holding that the obstructions complained of, placed in a public navigable river, without competent authority, would constitute a public nuisance. The public have a right, at common

law, to navigate over every part of a common navigable river. 3 Kent, Com. 427. They have a right to all the conveniences which the former state of the river afforded, and they cannot be deprived of this benefit by the exercise of any discretionary power on the part of the city, or its officials, or agents, as to the uses to be made of certain parts of the bed of the river, even for the improvement of other parts. This has been expressly ^{so} decided. Rex vs Grosvenor, 2 Stark. 511; Rex vs Ward, 4 Ad. & Ell. 384.

3. Taking it then to be clear that the acts complained of constituted a public nuisance, the next question is, has the appellant offered proof tending to show that he has suffered such special and particular damage by reason of this nuisance, beyond that suffered by the public generally, as to enable him to maintain a private civil action therefor? It was upon this question alone that the court below instructed the jury against the right of the appellant to recover.

In the ordinary cases that occur

it is no easy matter to determine when a private action may be maintained for injuries suffered from a public nuisance. The general rule doubtless is, in regard to which there is but little disagreement among the authorities, that no person can maintain a private action for injuries resulting from a common nuisance, unless he can show that he has sustained some special damage therefrom different from that sustained by the public generally. In the case of *Knock or Nachter*, 34 Md. 265, which was an action brought for damages sustained for the alleged obstruction of a highway, and the question in which was raised by a demurrer to the declaration, because the special damage was not sufficiently alleged, this Court stated the general rule to be, as the result of the authorities upon the subject, that to support the action, the damage must be different, not merely in degree, but different in kind from that suffered in common; and hence, though the plaintiff had suffered more inconvenience than others from the obstruction, by reason of his proximity to the highway, that would not entitle him to

maintain the action. In the application of this general rule, however, each case must depend, more or less, upon its own special circumstances. In the case before us, if the jury should find, and we think there was evidence proper to have been submitted to them upon the subject, that the wharf of the appellant, built and used before the obstructions complained of were created, was, by reason of the obstructions placed in front of it, or in the ^{immediate and} direct approaches to it, rendered of little or no value, or that the right to improve out from the shore, under the statute, has been rendered more difficult and of less value; or that, by reason of the obstructions placed in front of the appellant's property, boats bringing visitors or excursionists to his premises, from whom he would derive profit, cannot reach the shore as formerly, and that profit has been or will be lost to him; or that his brickyard, dependent for its value upon the water transportation of the bricks and clay therefrom, has been, by the obstructions complained of, rendered inaccessible by water and thereby diminished in value; then, in either of the cases thus stated,

we think, the appellant will have shown a case of special and particular injury that will entitle him to maintain his action. He can have no claim, of course, simply for the obstruction of navigation, which constitutes the public nuisance; nor can he have claim for any injury sustained in common with the rest of the public. It is only as the dumping or deposits in front of the appellant's property may affect his rights and privileges as riparian owner that he can make claim. By the obstructions in the immediate front of his property, preventing access thereto as formerly, he suffers an injury that no other member of the public can suffer. It is the peculiar and direct relation of the deposits complained of to the property and rights of the appellant that gives rise to the special and particular damage; and no other person than the owner of this particular property can be affected in like manner from these particular deposits. This was the ground upon which the actions were supported in the cases of *Iveson v. Moore*, 1 *Id.* Raym. 486, and *Milke v. Hungerford Market Co.*, 2 *New Cas.* 287.

In the first of the cases just mentioned, the wrong complained of was the prevention of customers from coming to the plaintiff's colliery by obstructing a public highway, per quod the benefits and profits of the colliery were lost, and the coals dug out depreciated in value. The case underwent great consideration, the King's Bench being equally divided upon the question of the right to maintain the action, and Lord Holt being against the plaintiff; but, at the instance of Lord Holt, the case was afterwards heard before all the judges of the Common Pleas and Barons of the Exchequer, at Serjeants Inn; and they were all of opinion that there was such a special and particular damage shown as enabled the plaintiff to maintain the action for the private injury resulting from the public nuisance. That case has never been questioned, but has been followed in all subsequent cases. See case of Chichester vs Lettbridge, Miller, 71, and note thereto.

The case of Milner vs Hungerford Market Co. is also a strong authority. There,

the plaintiff, a bookseller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been diverted from the thoroughfare by the defendants' continuing an unauthorised obstruction across it for an unreasonable time; and it was held that that was a damage sufficiently of a private nature to form the subject of a civil action by the plaintiff. And in that case, in speaking of the distinction between the public and private injury, Chief Justice Tindall said: "The injury to the subjects in general, is, that they cannot walk in the same track as before; and for that cause alone an action on the case would not lie; but the injury to the plaintiff is, the loss of a trade, which but for this obstruction to the general right of way he would have enjoyed; and the law has said from the Year Books downwards, that if a party has sustained any particular injury, beyond that which affects the public at large, an action will lie for redress." It was not therefore for the obstruction of

the highway, or any mere inconvenience thereby to the plaintiff, even greater than that suffered by others, that the action was held to be maintainable, but, within the principle laid down in *Houck vs. Vachter*, 34 Md. 272, it was because the damage suffered was different both in degree and kind from that suffered by the public generally.

Many other cases might be referred to in support and as illustrative of the general principle stated; but, in addition to the authorities already referred to it will not be necessary to do more than refer to the case of *Rose vs. Geover*, 5 M. & S. 613, decided by the English Common Pleas in 1843.

In that case the question as to what special damage will sustain an action of the class of the one now under consideration was fully considered.

Here the declaration alleged that the plaintiff
 was possessed of a public house abutting upon
 a navigable river, and that the defendant
 wrongfully and maliciously placed upon
 the river, and kept there for a considerable
 time, certain timbers, so as to drift
 opposite to the plaintiff's house, whereby the
 access to the house was obstructed, and diverse
 persons who would otherwise have come
 to the house and taken refreshments there,
 were prevented from so doing. The judge
 who tried the case below having left it
 to the jury to say whether the access to the plaintiff's
 house had been obstructed in fact, and the
 jury having found for the plaintiff, there was
 a motion in arrest of judgment, and also
 a motion for a new trial upon the ground
 of misdirection. The rule upon both motions
 was refused. The case was fully argued and
 considered in two aspects: first, as presenting
 simply the case of a private nuisance, and
 secondly, as a case of public nuisance,
 attended with special and particular damage
 to the plaintiff. And upon review of the

authorities, all the judges were of opinion that the declaration disclosed a case of special and particular damage to the plaintiff, and held that, in either aspect in which the case was presented, the action was maintainable. And in support of the action, treating the case as founded upon a public nuisance doing special injury to the plaintiff, they cite and rely upon the leading case of *Joerson v. Moore*, 1 *Do. Raym.* 486; *Milker v. Hungerford Market Co.*, 2 *New Cas.*, 287, and *Rose v. Miles*, 4 *M. & S.* 101. The same principle is fully recognized in the recent cases in equity, of *Cook v. Corporation of Bath*, L. R. 6 *Eq. Cas.* 177, and *Att. Genl. v. Earl of Lansdale*, L. R. 7 *Eq. Cas.* 390.

The appellees contend, however, that though they ~~exercised their~~ may not have been authorized to do what is complained of, and what has been done by them constitutes a nuisance that specially affects the appellant, the remedy therefor is not by civil action, but must be for the penalties prescribed by the Code of Pub. L. d. art. 4, sec. 795, and the act of 1852, c. 58. But to this

position the answer is exceedingly plain. In the first place, the statutes referred to do not profess, in prescribing the penalties for their violation, to exclude all other remedies. Moreover, it was not the purpose of those statutes to provide for the redress of private injuries; and though the acts complained of may have rendered the parties committing them liable to the infliction of the penalties prescribed, as for a public wrong, the common law remedy by civil action for the damage sustained by an individual is in no manner affected. Upon this subject, see the case of *Benwick vs Morris*, 3 Hill, 621, and *S. C. in error*, 7 Hill, 575.

x In the next place, as to the act of 1872, c. 58, that has no application to this case, or to the acts complained of as the source of the grievance. That act contains a general prohibition against throwing overboard, in the waters of the Chesapeake Bay, above Sandy Point, or in Herring Bay, or in any river, creek or harbor, in this State, below high water mark, any ballast, ashes, filth, earth, soil, or oyster-shells, under

penalties prescribed; with a proviso, that nothing therein contained shall be construed to apply to the improvement of harbors. As we have already seen, the city of Baltimore is charged with the duty of providing for the preservation of the navigation of the basin, and the river Patapsco within the limits of the city, and within four miles thereof. This, for all purposes of improvement of navigation, must be regarded as the extent and limit of the harbor. The acts complained of were done, though improperly and illegally done, in execution of a plan for the improvement of the harbor; and being done for the relief and improvement of the harbor, they were exempt from the operation of the act of 1872, c. 58, and the penalties therein prescribed.

With these views of the case, we think, upon the testimony disclosed, ^{it} ~~therefore~~ should have been submitted to the jury for their consideration; and therefore there was error in the instruction given by the Court below.

Having thus disposed of the principal questions presented in the case, it only remains

to say a few words in regard to the question of evidence presented by the first exception taken by the appellant. That exception was to the refusal of the Court to allow the introduction of evidence as to profits that might have been made by the sale of clay by the appellant from his land. It was proposed to ask the witness, Dan, whether he would, if the obstructions to transportation by water had not existed, have purchased clay from the appellant, and what profits thereon would have accrued to the latter. This was disallowed by the Court, and we think properly so. It was altogether too contingent and speculative to be considered by the jury. We know of no case that has sanctioned the admission of such evidence as the foundation for estimating damages.

Concurring with the Court ^{below} in its ruling in the first exception, but differing with it as to the ruling set out in the second, we must reverse the judgment appealed from, and award a new trial.

Judge reversed &
new trial awarded.

Decided 30th March 1880