74

30 8/24.00

Filed Jany 12, 1880

WILLIAM L. GARITEE, *vs.* THE MAYOR AND CITY COUNCIL OF BALTIMORE; AND DAN'L CONSTANTINE.	IN THE COURT OF APPEALS OF MARYLAND. October Term, 1879. General Docket, No. 64.

APPELLANT'S BRIEF.

I. The Pleadings.

The declaration in this case contains two counts in case, for obstructing a navigable water highway adjoining the plaintiff's close, with allegations of special damage, and one in trespass, (*qu. cb. fr.*) for depositing many offensive substances within the plaintiff's "close covered with water." The first two counts differ from each other only in the special damage charged; the first alleging (Record page 2,) that, by reason of the nuisance, "the close of the plaintiff has been rendered unfit for habitation, and any and all demises and leases thereof prevented;" the second (*Ibid*) that from the same cause, "the plaintiff has been greatly hindered and inconvenienced in his * * * business and occupation of * * * maker and seller of * * * bricks * * * and has lost great gains and profits which he might otherwise have made therein."

The defendants pleaded "not guilty" generally, and issue was joined on that plea, (Record, page 3); upon the pleadings this case seems to be indistinguishable in principle from Harrison vs. Sterett, 4 Har. & McH. 540.

II. The Proof.

This is set out in the record at unusual, and, as the appellant's counsel think, unnecessary length: a summary of it is indispensable to the intelligent adjudication of the cause, unless the unreasonable burden of digesting some fifty printed pages of questions and answers, (Record, pages 3–54,) is to be imposed upon the Court.

The plaintiff proved (Record pages 3–5,) that he had held under claim of title, for several years before the suit, two parcels of ground adjoining the Patapsco river, having bought one in fee and leased the other for a long term of years. That upon the first piece (Record, pages 5, 30, 31,) was a large building used as a resort for Summer excursions and picnic parties, and which, previous to the acts complained of, was rented for, from fifteen to thirty days annually, at the average price of $20 der day. (Record, pages 5, 10, 32.) That upon both the freehold, and leasehold tracts were rich veins of brick and other valuable clays, (Record, pages 5, 17, 33, 34, 35, 44,) which rendered them fairly worth from four hundred to several thousand dollars per acre, if it had water carriage, Record pages 13, 34, 44,) but without water carriage, these mineral resources were valueless, and the land was worth only from $50 to $75 per acre for farming. (Record pages 14, 35, 44.) That previous to the dumping subsequently described, scows could be beached and loaded with brick at any point of the plaintiff's shore, and vessels drawing from seven to ten feet of water, could be freighted at a wharf about two hundred feet long, (Record, pages 7, 13, 33, 48,) while the place was remarkable and notorious for the excellent fishing and crabbing it afforded, (Record, pages, 10, 30, 31, 50); fishing being a chief attraction to pleasure parties. (Record, pages 11, 31.) That the defendant Constantine, as Port Warden of the other defendants, (Record, pages, 21, 24, 39,) and afterwards as contractor, but with the approval and under the directions of the City Harbor Board, (Record, pages 40, 43, 44,) caused a large number of scows towed by tugs, belonging originally to

the city, (Record, pages 20, 23, 39,) and loaded with sedimen and rubbish derived from cleaning out Jones Falls and the Basin, (Record, pages 20, 23, 24,) to dump their contents in front of the plaintiff's land in water previously navigable, as above described, (Record, pages 40, 41, 42); and that other contractors did likewise, (Record, pages 25, 26.) That this dumping commenced in the Summer of 1874, and continued during the open season nine to ten months, (Record, pages 22, 29,) of each year up to the time of trial, notwithstanding repeated remonstrances from the plaintiff, addressed to the defendant Constantine, while Port Warden, the Engineer of the Harbor Board subsequently, the Mayor of the City and the Officers in charge of the dumping. (Record, pages 7, 8, 9.) That the mode of dumping was to begin as near in shore as possible, (Record, pages 21, 24, 42,) and gradually to recede towards the channel, as the water became too shallow for a loaded scow. That in consequence of this filling up of his water front, the plaintiff's property had become inaccessible for vessels of any kind suitable to transport bricks, (Record, pages 7, 32, 36, 45, 50,) unless by the use of a wharf some six hundred to seven hundred feet longer than the one now on the premises, (Record, pages 35, 45, 50,) which would cost from $10 to $12 per lineal foot. (Record, pages 45, 46.) That the plaintiff made at least one contract to sell clay on his leasehold property, (Record, pages, 33, 46, 47,) for a price four or five times the royalty he paid as rent, the buyer to excavate and transport the clay, but the sale could not be consummated, and its profits were lost because the clay, if extracted could not have been shipped at a reasonable cost, (Record pages 47, 48,) such impossibility of shipment arising solely from the effects of the defendant's dumping. (Record, pages 18, 30, 34, 49.) That from the refuse deposited in front of the plaintiff's land arises a very disagreeable odor, (Record, pages 29, 30, 32, 33,) never noticed there previously (*ibid*); the fishing has been wholly destroyed, (Record, pages 11, 30, 31, 50,) and no income has been derived from the hotel and grounds as a pleasure resort since these effects of dumping have

become apparant. (Record, pages 10, 32.) The record includes the testimony of the defendant Constantine, taken by consent, before the plaintiff closed, (Record page 38); and his official reports for the years 1874 and 1875 as Port Warden, were read in evidence, (Record page 28.) This proof fully established the agency of this defendant, and the responsibility of the City for his acts; indeed these facts were substantially admitted, (Record, page 26,) by the City Counsellor in open Court. In this state of proof, it is submitted that in determining the rightfulness of the Court's instruction, (Record, page 54,) two questions, and only two, are presented to this Court, namely:

A. Can the Mayor and City Council of Baltimore or their officers, agents or contractors lawfully create what would otherwise be a public nuisance, in the navigable waters of the Patapsco river, by depositing in those waters the refuse removed from its harbor? And

B. If the defendants have no such right, has the plaintiff proved special damage to himself from this public nuisance entitling him to recover for it in a suit at law?

These questions seem to the appellant's counsel of great importance, but not of much difficulty.

III. The City's Rights.

A naturally navigable stream of water is a public highway, and any obstruction to its use as such constitutes a nuisance.

Rex vs. Ward, 4 Ad. & El. 384.
Rex vs Grosvenor, 2 Starkie, 511.
Respublica vs. Cauldwell, 1 Dallas (N. S.) 150.
People vs. Vanderbilt, 26 N. Y. 287.
Rose vs. Mill, 4 M. & S. 101.
Beach vs. Schoff, 28 Pa. St. 195.
Blanchard vs. W. U. Tel. Co. 60 N. Y. 510.
Gilman vs. Phila, 3 Wall., 713.

Occupants of land adjoining such a stream have a right to its use analagous to their property in an easement.

Angell on Tidewaters, page 171.
Ball vs. Slack, 2 Whart. (Pa.) 538.
Cartelyon vs. Van Bruntts, 2 Johns. (N. Y.) 357.
Yates vs. Milwaukie, 10 Wall. 497.
Buccleugh vs. Metr. B. of W., 5 H. of. L. C. 418.
Chapman vs. Oshkosh R. R., 33 Wis., 629.
Bowman vs. Watten, 2 McLean, 376.
Clement vs. Barnes, 43 N. H. 607.

This right could not be constitutionally abridged without compensation.

Constitution of Md. Art. 3, Sec. 40.
Pumpelly vs. Green Bay Co. 13 Wall. 166.
Buccleugh vs. Metr. B. of W. *Supra.*
Eaton vs. Green Bay Co., 13 Wall. 166.
Lackland vs. R. R. Co., 31 Mo. 180.
Stetson vs. Faxon, 19 Pick., 147, 158.
Thayer vs. the City of Boston, 19 Pick, 511.
Tate vs. the Ohio & M. R. Co, 7 Ind. 479.
Nevins vs. the City of Peoria, 12 Ill. 502.

The navigability of the Patapsco river is admitted by the pleadings in this cause, (Record, pages 1–3,) besides being clearly established by the proof, and is, moreover, part of the statute law of the State.

Public Local Laws Art. 4 §§ 793–796.

No act therefore allowing the city to deprive this plaintiff of his water front, without compensating him for its loss, would be valid.

Art. 3 Sec. 40 of Constitution, *supra.*

But no such Act has been passed: the City's right under the statute is to *preserve*, *not to obstruct*, the navigable chan-

nel; its duty is to do precisely the opposite of what it has done, and, far from being exempted from liability for an obstruction placed by its agents in the channel, it would be responsible for such a nuisance even if created by other persons.

Mayor & C. C. of Balto. vs. Marriott, 9 Md. 160.
Mayor & C. C. of Balto. vs. Pendleton, et al. 15 Md. 12.
Mayor & C. C. of Balto. vs. Holmes, 39 Md. 243.
Walter vs. Co. Comm'rs of Wicomico Co., 35 Md. 385.
Co. Comm'rs of Balto. Co. vs. Baker, 44 Md. 1.

IV. The Plaintiff's Damage.

Any substantial injury caused by a public nuisance which the plaintiff's occupation or the situation of his person or property makes *peculiar* to him, differing not merely in *degree* but in *kind* from that caused by it to other members of the community not so circumstanced, entitles him to sue the person guilty of creating the nuisance.

Houck vs. Wachter, 34 Md. p. 265.
Brown vs. Watrous, 47 Md. 161.
Winterbottom vs. Lord Derby, L. R. 2 Exch. 316.
Carpenter vs. Mann, 17 Wis. 155.
Blanc vs. Klumpke, 27 Cal. 156.
Cook vs. Corporation of Balto., 6. L. R. Eq. Cas. 177.
Wood on Nuisance, Chap. *XVIII*, §§ 618 to 676.

Here the plaintiff showed:

A. Loss of custom to his hotel as a pleasure resort: which was sufficient of itself.

Morley vs. Pragnall, Cro. Car. 510.
Rose vs. Groves, 12 L. T., N. S. 251.
Wesson vs. Washburn Iron Co., 13 Allen (Mass.) 95.

B. Depreciation in value of his land; this also would be enough.

Stetson vs. Faxon, 19 Pick. (Mass.) 147.
Francis vs. Schoellkoppf, 53 N. Y., 162.
Attorney General vs. Earl of Lonsdale, L. R, 7 Eq; Cas., 390.
Lansing vs. Smith, 4 Wend. (N. Y.) 10.
Frink et al, vs. Lawrence, 20 Conn. 117.

C. Loss of a lucrative sale, a very strong instance of special damage.

Iveson vs. Moore, Ld. Raym. 486.
Rose vs. Miles, M. & S. 101.
Hughes vs. Heiser, 1 Binn. (Pa.) 463.
Greasley vs. Codling, 2 Bing. 263.
Powers vs. Irish, 23 Mich. 429.

D. Discomfort from foul odors to occupants of his premises, and injury to their habitability.

Soltan vs. De Held, 9 Eng. L. & Eq. 102.
Ross vs. Butler, 4 C. E. Green, (N. J.) 294.
Weir vs. Kirk, 73 Pa. St. 284.
Crooke vs. Forbes, L. R., 5 Eq. 166.
Ottawa G. L Co. vs. Thompson, 39 Ill. 598.

Upon *four* distinct grounds, therefore, the appellant is entitled to recover for the *special* damage, *peculiar* to himself and differing in *kind* as well as *degree*, from that suffered in common with all other members of the community, caused him by this public nuisance.

V. Were these Obstructions properly a Public Nuisance, as regards the Appellant?

Argumenti gratia this case has been hitherto assumed to be a private suit brought to recover for a public nuisance, it is, however, submitted, that speaking accurately, these obstructions were at once a *public* and a *private* nuisance; public, in so far as they interfered with navigation and injured fishing; private, as regarded the damage they did to the owners of adjoining property.

Wood on Nuisances, sec. 641-653.
Hamilton vs. Whitridge, 11 Md. 128.
Del. & Md. R. R. Co. vs. Stump, 8 G. & J. 479.
Harrison vs. Sterrett, *supra.*
Spencer vs. L. & B. R. W. Co, 8 Sim. 193.
Sampson vs. Smith, Ibid, 272.
Frink vs. Lawrence, 20 Conn. 118.
Corning et al, vs. Lowerre, 6 Johns Ch. 439.

VI. The Plaintiff's First Exception.

Should a new trial be awarded in this case, it will be material for this Court to pass upon the admissibility of the evidence to the exclusion of which below the appellant's first exception was taken. (Record, p. 47.) This is stated rather obscurely in the Record, but was in substance proof that the witness, D. Preston Parr, who had already testified to his abandonment of one contract to purchase clay from the plaintiff on terms very advantageous to the latter, solely because these obstructions prevented his shipping it at a reasonable cost, afterwards made large purchases of similar clay from other persons which he could and would preferably have obtained from the plaintiff upon the terms of the abortive transaction above described, had not the latter's land been thus rendered artificially inaccessible.

It is submitted that the profits of these sales were as really lost to the appellant, because of the appellee's wrongful acts, as if the parties had gone through the vain form of making contracts which both then knew those acts had rendered impossible to perform. There was nothing vague or doubtful about the injury; it was so many dollars and cents out of the appellant's pocket, because, and because *only* of the appellee's dumping.

Simmons vs. Brown, 5 R I. 299.
Hamner vs. Knowles, 6 H. & N. 454–459.
Fult vs. Wycoff, 25 Ind. 321.
Gillett vs. Western R. R. Co., 8 Allen, (Mass.) 560.
Howes vs. Ashfield, 99 Mass. 540.
Albert vs. The Bleecker St. R. R. Co., 2 Daly (N. Y. C. P.) 389.

GEORGE HAWKINS WILLIAMS,
CHARLES J. BONAPARTE,
Counsel for Appellant.

Qu 74.
218
#1680
Filed Jan 16 1880

WILLIAM L. GARITEE,

vs.

THE MAYOR AND CITY COUNCIL OF BALTIMORE, AND DAN'L CONSTANTINE.

IN THE

COURT OF APPEALS

OF MARYLAND.

OCTOBER TERM, 1879.

GENERAL DOCKET, No. 64.

BRIEF OF APPELLEES.

The declaration says that plaintiff held land in Baltimore Co., "bounded by and abutting upon *a certain navigable stream* known as the Patapsco River," * * * "which said stream of water has been for time immemorial *a public highway, open to all citizens of the State,*" * * * * and the plaintiff "was and is of right entitled to the free and unhindered use and enjoyment of the said stream of water, *for the purpose of obtaining access* to his close, and further, to have the said stream kept *pure and unpolluted* and free from all matters and substances, whereby the value and utility of the said close might be diminished or impaired." Yet that the defendants deposited mud and other substances "*within and upon the bed of the stream, and over against and adjoining*" the plaintiff's land—and says his access is injured.

A second count says that being possessed of said land, the plaintiff "made use thereof, for the purpose of *extracting clay* from the soil, and *converting the same into bricks,* which bricks he afterwards sent to the city of Baltimore and divers other

places." And that by reason of the defendants depositing matters "within the navigable stream aforesaid," "it has become impossible for the plaintiff *to ship bricks* from any but a very small portion of the water front of his said close upon the stream aforesaid."

A third count says that "great numbers of *fish, crabs and other* useful and valuable *animals* belonging to the said plaintiff *have been killed* thereby, and others driven away.

The Evidence shews that the city of Baltimore and the defendant Constantine, acting as its agent and under its authority, did deposit mud in the bed of the stream opposite a part of the plaintiff's land, so that where deposits were made the water is not so deep as it was, and that thereby he has been deprived in some part of access to the whole front of his land bordering on the river, in the same manner as he had it before; that is to say, the water at the part where the deposits have been made is not deep enough now for scows to be brought up to the land, as they were before. While this evidence is clear, yet it also appears from the plaintiff's own testimony that his wharf has not been touched, (p. 15,) and that since the dumping there the tide has got higher, although the witness says he *does not understand the theory of it.*

EXCEPTION TO EVIDENCE.

There was *an exception* to the admissibility of evidence, which would become unnecessary to consider, if the Court's instruction be correct; and it will therefore be considered at the end of this Brief.

INSTRUCTION.

The Court (under its rule) instructed the Jury:

"That there is no evidence in the cause from which they can find that the plaintiff has sustained injury or damage for which he is entitled to recover in this action."

POINTS OF ARGUMENT.

1. A Riparian owner has no such right to land under a navigable stream, as to prevent the State, or its agent, from filling up the stream in any manner which does not injure the general right of navigation; and if a riparian owner is damaged by such filling up, it is *damnum absque injuria*.

2. The Riparian owner's rights, under act of 1862, ch. 129, are not to be construed as in contravention of the State's right to fill up; the State intending only to preclude itself from granting the land to another by patent, as it had a right to do before that act; but not to preclude itself as to such owner from the exercise of any rights theretofore existing in it.

Day vs. Day, 22 Md. 530.
Pollard vs. Hagan, 3 How. 212.

3. The State has deputed to the municipality of Baltimore its right, or assigned to it the duty, as a subordinate branch of the government, and an agent for it, of keeping the harbor of Baltimore, and the channel approaching it, in proper order, and if the public is not injured, no private owner can complain of the exercise of this right.

4. If the plaintiff is not injured in a manner different in kind from the rest of the public, he has no right to complain, even if the city were proceeding unlawfully.

The injury to navigation is the same to all. The clay on his land being no more special to him than clay on the land of others, or than crops.

If what the city has done be a *nuisance*, the remedy is not by a civil action.

Houck vs. Wachter, 34 Md. 265.
Act of 1872, ch. 58.
1870, ch. 44.
1860, p. 310, sec. 794, Public Local Law.

5. The State itself having prescribed the mode for redressing any injury of the kind complained of by plaintiff, no other mode can be used.

6. The evidence rejected was clearly inadmissible, because uncertain or conjectural profits cannot be used as the measure of damages.

ON THE FIRST POINT.

It is to be distinctly noticed that the acts complained of were not committed on the plaintiff's land, but only the land covered with water; that is, on the land below low water mark. The declaration and the evidence shew this.

Independently of the Act of 1862, ch. 129, the State had a right to all the land under navigable waters.

Day vs. Day, 22 Md. 530.

Martin vs. Waddell, 16 Peters, 367.

This last case arose on ejectment for some mud flats; and by a divided Court it was held that they belonged to the State. The right of fishery was the principal point in dispute.

In Smith vs. Maryland, 18 Howard, 71, the question was whether the State could enact a law to prevent the destruction of oysters in the waters of this State; and it was held that the soil below low water mark belongs to the State.

Browne vs. Kennedy, 5 H. & J. 195, was ejectment for Todd's Range, bordering on Jones' Falls, and although the Court were divided as to the right in the land now dry, where Jones' Falls did run, arising from the terms of the grant, all the Judges agreed that the property in the soil under the water of a navigable stream is the State's.

Pollard vs. Hagan, 3 Howard, 212, (affirming Martin vs. Waddell,) decided that the United States could not, after the formation of the State of Alabama, grant land lying in the Mobile River, which had formerly been covered by water at common high tide; but that to Alabama belong the navigable waters, and soils under them.

The question of the rights of the State to the soil under the water must not be confounded with the right to wharf out.

In some States it has been held that the State may grant the land, between high and low water mark, out to private persons.

This doctrine has been severely criticised, and many cases are collected on the subject in Providence Steam Engine Co. vs. Providence Steamship Co., in Supreme Court of Rhode Island, July, 1879—reported in the Central Law Journal of St. Louis, Missouri, Vol. 9, No. 21, for 21st November, 1879.

And in Balto. & Ohio R. R. Co. vs. Chase, 43 Md. 23—the right to wharf out is recognized.

This right is not denied in this case; but it is denied that the State has not the power to fill up flats, and so to determine within what bounds a navigable stream shall run.

It is not taking away any right of the riparian owner, nor in any way impairing it, but rather promoting it and facilitating its exercise.

On what ground can the right to erect bridges over navigable streams be supported, unless the State has a paramount right to regulate or modify the right of navigation, so however as not to injure the public?

Dew vs. Jersey Co., 15 Howard, 426.
Rundle vs. Delaware Canal, &c., 14 Howard, 80.
Barney vs. Keokuk, 94 U. S., 324.
Atlee vs. Packet Co., 21 Wallace, 390.
Weber vs. Harbor Com., 18 do. 57.
Miss. & Mo. R. R. vs. Ward, 2 Black, 485.
Transportation Co. vs. Chicago, 99 U. S. 635.

ON THE THIRD POINT.

The Code, Art. 30, Crimes and Punishments, sub-title Rivers, sec. 170, is amended by 1870, ch. 44, and again by 1872, ch. 58, approved March 1st, 1872, which is a substitute for both, which prohibits any ballast, &c. from being cast out in any river below high water mark.

The Act of 1872, ch. 246, approved April 1st, 1872, grants power to the City to keep the ship channel, between the mouth of the Patapsco River and the City "*in proper condition in respect to width and depth.*"

If these Acts conflict, then ch. 246, being the later, must prevail.

Straus vs. Heiss, 38 Md. 292.

If both stand well together, then they must be construed in *pari materia*, and to each must be given its due force; in other words, the control given to the city is consistent with the prohibition upon others.

The Code of Public Local Laws, Art. 4, City of Baltimore, sub-title Navigation, sec. 794—may be construed in the same manner.

It is to be particularly noted, that this section in the laws defining the rights of the city, is not a prohibition on the city itself, but on others—the language—"*no person, his servant or slave,*" cannot, in the connection which it stands, be intended to prohibit the city.

If such were the proper construction, then 1872, ch. 246, controls it.

This section 794 being under head *City of Baltimore*, applies only to that part of the River Patapsco which lies *within its limits;* and hence does not apply to this case, for the land lies in Baltimore county, as the declaration avers, and the evidence shews.

On the Sixth Point.

If the acts complained of are punishable under this sec. 794 and 795, or under 1872, ch. 58, then the State itself has prescribed the mode of procedure, and limited the penalty; so that this action against the city will not lie.

JAMES L. McLANE,
City Counsellor.
EDW. OTIS HINKLEY,
For Appellees.