

the only inference which I can draw from Mr. Winans' conduct for the last twenty or twenty-five years of his life.

In my opinion the appeal should be dismissed with costs.

Orders of the Court of Appeal and Queen's Bench Division reversed with costs here and below : the respondent to repay to the appellants the amount of the legacy duty paid by them : cause remitted to the King's Bench Division.

Lords' Journals, May 10, 1904.

Solicitors: *E. H. Quicke, for H. Montague Williams, Brighton ; Solicitor of Inland Revenue.*

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WINANS

v.

ATTORNEY-
GENERAL.

[HOUSE OF LORDS.]

McCARTNEY APPELLANT ;

H. L. (L)

AND

LONDONDERRY AND LOUGH SWILLY }
RAILWAY COMPANY, LIMITED . } RESPONDENTS.

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May 10.

Water—Riparian Owner—Railway Company—Abstraction of Water for purposes unconnected with riparian Tenement.

The owner of a tenement adjoining a natural stream has no right to divert the water to a place outside the tenement, and there consume it for purposes unconnected with the tenement.

A natural stream was crossed by a railway line and flowed down to a mill. The railway company claimed the right to insert a pipe into the stream at the crossing (which was the only place where their land adjoined the stream), and to carry the water along their line to a distant tank, and there to consume it in working their locomotive engines along the whole of their railway. If the pipe was used to its full capacity it might not have substantially injured the mill:—

Held, that the railway company were not entitled to carry out their proposal (which was not for purposes connected with the land where it crossed the stream), and that the millowner would be justified in stopping up the proposed pipe.

The decision of the Irish Court of Appeal reversed.

Earl of Sandwich v. Great Northern Ry. Co., (1878) 10 Ch. D. 707, overruled.

For the purposes of their railway the respondents in 1861 and 1862 bought land in Ireland near Derry. The railway

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crossed a stream by a culvert, and for about eight feet on each side of the culvert the respondents' land abutted upon the stream, but in no other place. Lower down the stream flows to and is used for working a corn mill of the appellant. In 1901 the respondents inserted a pipe into the stream at the side of the culvert and diverted water (by carrying the pipe along the strip of railway line) into a tank upon land belonging to the respondents about half a mile from the culvert. This land did not abut upon the stream. From the tank the respondents supplied their locomotive engines with water. The appellant having stopped up the pipe, the respondents brought an action against him claiming a declaration of their right to take the water through the pipe, and an injunction. The action was tried by Holmes L.J. without a jury, who gave judgment for the appellant with costs. The King's Bench Division reversed that judgment with costs, and this decision was affirmed by the Irish Court of Appeal (Lord Ashbourne L.C. and Walker L.J., FitzGibbon L.J. dissenting), who declared that the respondents were entitled to take a reasonable portion of the stream for their engines. Hence this appeal.

Feb. 11, 12. *M. Drummond, K.C.*, and *D. S. Henry, K.C.* (*P. Law Smith* with them)—all of the Irish Bar, for the appellant.

*S. Ronan, K.C.* (Irish Bar), and *S. T. Evans, K.C.* (*John Leech* with them), for the respondents.

*Drummond, K.C.*, in reply.

The House took time for consideration.

May 10. EARL OF HALSBURY L.C. My Lords, in this case the question arises between a millowner and a railway company, the latter claiming the right to take the water of a stream which the millowner uses to supply the power for his mill. The case was originally tried before Holmes L.J., who decided in favour of the millowner; but the issues between the parties have become a little confused from admissions made on both sides, but which do not appear on the pleadings, or, indeed, by any written admission at all.

The railway company brought an action seeking to restrain the millowner from obstructing the railway company's alleged right in what the statement of claim described as a natural stream. The millowner, in his plea, denied that it was a natural stream, and alleged that such as it was, in fact, it was an artificial watercourse. There was ample evidence of this, and the learned judge who tried the cause found as a fact that it was an artificial watercourse made by the defendant and his predecessors in title, and had been used by him for a long time.

For some unexplained reason this finding has been got rid of, I know not how, and the case has been argued upon the hypothesis that the stream is a natural stream, and another concession made, without pleadings or written admission of any kind, that the action of the defendant in obstructing the plaintiffs' works was justified, unless the plaintiffs possess the right they claimed to abstract and use without in any way returning to the stream as much water as they require for the locomotives on their line of railway up to 15,000 gallons.

Some effort was made in the argument to minimise the amount which the railway company claim to have a right to take, and, indeed, the Court of King's Bench in Ireland preface their judgment by a recital, which is apparently intended to limit the user, but it does not do so, nor, as FitzGibbon L.J. pointed out, is it easy to see what operation that recital can have.

The railway company claim a right to place in the stream a pipe, which, if used to the full capacity, would take 15,000 gallons a day, but of which they say their present requirement would be satisfied with a third of that quantity. Notwithstanding the recital, it appears to me the judgment of the Court of Appeal would entitle them to take as much as they wanted up to the extent of 15,000 gallons. The pipe would take 15,000 gallons per day. The railway company claim to keep their pipe such as it is, together with an admission that they may want more than they at present take; and the Court of Appeal have affirmed the judgment of the King's Bench. But Holmes L.J. also decided that, even if the stream

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My Lords, I am of opinion that Holmes L.J. was right. It seems to me that any other decision would be in conflict with the decision of your Lordships' House in the case of the *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (1) In that case Lord Cairns, with the complete assent of Lord Hatherley and Lord Selborne, gave an elaborate exposition of riparian rights, which, though not a new decision, was nevertheless supposed to have settled and almost codified the law upon the subject. Now it is necessary to consider what it is the railway company do, because that is what they claim a right to do. By a pipe placed in the stream at a point where they own some land adjoining the stream they fill a tank with water to be used in the boilers of their locomotive engines. The engines, of course, consume the water in the course of their journeys; the railway itself is forty miles in length, but is connected with other railways over which their engines run for a much greater distance.

My Lords, if the question were the reasonableness in respect of quantity, I should think it a most unreasonable thing that the use of a stream passing through a very small area of riparian land should be made to extend to forty miles of country, or wherever else the exigencies of the railway service might require. Speaking of it simply in respect of quantity, I think it more unreasonable than supplying drinking water to an asylum built on the banks, which has been held to be unlawful.

But, in truth, it is not a question of the quantity at all. I now apply Lord Cairns' words, which I think are literally applicable here: "The use which they" (in this case the railway company) "claim the right to make of it is not for the purpose of their tenements at all, but is a use which virtually amounts to a complete diversion of the stream It is a confiscation of the rights of the lower owner." It is to be observed that Lord Cairns used this language when a water

(1) (1875) L. R. 7 H. L. 705.

company who were riparian proprietors had taken water to supply their customers in a neighbouring town, but in which case it was found, as a fact, that the complaining plaintiffs were not damaged at all.

For another reason the question of damage here has become immaterial. The railway company set up a right to do what they have done. It is not here a question of an injury being so trifling that a Court of Equity will accordingly not interpose by the remedy of an injunction. Here they not only set up a right, but actually ask for a declaration of their right to do what they have done.

My Lords, I have said that the judgment of Lord Cairns had codified the rights of riparian proprietors, and I used that phrase because I do not think there is any novelty in the decision. It certainly has been the law as understood in England for more than half a century. The only part of FitzGibbon L.J.'s judgment (who has admirably dealt with every other part of the case) with which I am unable to concur is that in which he expresses the opinion that Bacon V.-C.'s judgment was right upon the facts proved before him. (1) I cannot agree to that. It may be that the Vice-Chancellor would have been justified in refusing an injunction and leaving the plaintiff to his remedy at law, but unfortunately he uses language which seems to affirm the right of the railway company to carry the water along their line, and justifies this as a riparian use. To this I cannot assent. For the reasons I have given I think this is not a riparian use at all, and, except upon the ground I have suggested, I must say I think the decision was wrong.

I move your Lordships that the appeal should be allowed, that the judgment of Holmes L.J. be restored, and that the respondents do pay to the appellant the costs both here and below.

LORD MACNAGHTEN. My Lords, I prefer the judgment of FitzGibbon L.J., and what now remains of the judgment of Holmes L.J., to the opinion of the learned judges from whom they differ.

(1) *Earl of Sandwich v. Great Northern Ry. Co.*, 10 Ch. D. 707.

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Holmes L.J., who tried the case at the Derry Assizes without a jury, rested his decision on two grounds. In the first place he came to the conclusion that the stream about which this litigation has arisen was really an artificial water-course, and that McCartney and his predecessors in title had had the control and management of it from a point above the proposed intake of the railway company for a period beyond living memory. In the second place, assuming the stream to be a natural watercourse, he held that the thing which the railway company proposed to do was not within the rights attached to riparian ownership.

For some reason or other, which I do not understand, the first ground of decision was abandoned in the Court of King's Bench and in the Court of Appeal. I regret the course that was taken. The matter seems to me to be worthy of serious consideration, and I cannot altogether accept the view of one of the learned judges in the Court of Appeal, who dealt with the question and disposed of it summarily without argument. However, the point is not open now. The appellant must be held to the concession made on his behalf, and the case must be treated as if McCartney's mill-race were to all intents and purposes a natural stream. Even so, if it had not been for the judgment of the Lord Chancellor and the great preponderance of judicial opinion in Ireland, I confess I should have thought the case very plain and covered by authority.

There are, as it seems to me, three ways in which a person whose lands are intersected or bounded by a running stream may use the water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes, and the wants of his cattle. He may use it also for some other purposes—sometimes called extraordinary or secondary purposes—provided those purposes are connected with or incident to his land, and provided that certain conditions are complied with. Then he may possibly take advantage of his position to use the water for purposes foreign to or unconnected with his riparian tenement. His rights in the first two cases are not quite the same. In the third case he has no right at all.

Now it seems to me that the first question your Lordships

have to consider is, under what category does the proposed user of the railway company fall? Certainly it is not the ordinary or primary use of a flowing stream, nor is it, I think, one of those extraordinary uses connected with or incidental to a riparian tenement which are permissible under certain conditions. In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character.

What the railway company propose to do is to abstract a certain portion of the water of the stream, to carry it along their own property to a tank half a mile off, and then to consume it in working their locomotive engines. They have more than forty miles of railway of their own, and they have running powers over the lines of other companies. They have no intention of restoring to the stream a single drop of the water they mean to abstract, nor is it possible for them, under the circumstances, to do anything of the kind. Is that a user which, though extraordinary, is yet legitimate and permissible? I should say, certainly not. So far as the interests of the lower proprietors are concerned, they mean to efface and blot out, as it were, that portion of the stream which they propose to abstract. They mean to do so for their own gain—to save themselves the expense of paying for the water required for the purposes of their business or gathering it for themselves. And they claim to do this as of right. It seems to me that they might just as well claim to sell the water. And, indeed, Mr. Ronan in his able argument did not shrink from that position. He boldly contended that they would be perfectly justified in selling the water, or doing anything they

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pleased with it, provided the lower proprietor was not practically injured. By way of clenching this argument, Mr. Evans pointed out that the learned judge at the trial expressed no opinion as to the extent to which McCartney's water power would or might be diminished by what the railway company proposed to do. And he succeeded, I think, in shewing that there was no reported case in which the Court had interfered where the injury complained of was so inconsiderable as that which would be likely to occur in the present case. That may be very true, but all the cases to which he referred were cases where the injury complained of was done in the exercise, or assumed exercise, of an authorized and permissible user. That seems to me to make all the difference.

My Lords, I said I thought this case was covered by authority. It seems to me to be entirely covered by the decision of this House in the case of the *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (1) There Lord Cairns (Lord Chancellor) gave a judgment as to the rights of riparian owners so complete and exhaustive that I venture to say no case has since come before the Courts, not excepting the case of *Kensit v. Great Eastern Ry. Co.* (2), which might not have been disposed of by the application of one or two sentences taken from it, and that perhaps without any very great loss to the general stock of legal knowledge. The *Swindon Case* (1) presented two aspects. The navigation company sued as canal proprietors with statutory powers. They sued also as riparian owners in respect of a tenement called Wayte's tenement, on which there had formerly been a mill. The waterworks company, who were upper proprietors, had diverted a portion of the stream for the purposes of their business. His Lordship pointed out that such an appropriation of the water did not come within the range of those authorities which deal with cases of extraordinary user permissible under certain conditions. "Those were cases," said his Lordship, "where the use made of the stream by the upper owner has been for purposes connected with the tenement of the upper owner. But the use which here has been made by the appellants of the water, and the use

(1) L. R. 7 H. L. 697, 704, 712.

(2) (1884) 27 Ch. D. 122.



which they claim the right to make of it, is not for the purpose of their tenement at all. My Lords, that is not a user of the stream which could be called a reasonable user by the upper owner; it is a confiscation of the rights of the lower owner; it is an annihilation, so far as he is concerned, of that portion of the stream which is used for those purposes, and that is done, not for the sake of the tenement of the upper owner, but that the upper owner may make gains by alienating the water to other parties who have no connection whatever with any part of the stream." Then his Lordship points out that the navigation company as riparian owners had clearly a right to complain of what was done by the waterworks company, if what was so done by them was insisted upon as a thing which they had a right to do. After the claim of right it was impossible, he said, that the Court could do otherwise than decide the issue which was thus raised between the parties. "It is a matter," he added, "quite immaterial whether as riparian owners of Wayte's tenement any injury has now been sustained or has not been sustained by the respondents. If the appellants are right they would at the end of twenty years by the exercise of this claim of diversion entirely defeat the incident of the property, the riparian right of Wayte's tenement. That is a consequence which the owner of Wayte's tenement has the right to come into the Court of Chancery to get restrained at once by injunction or declaration as the case may be." The other learned Lords, Lord Hatherley and Lord Selborne, entirely agreed. Lord Hatherley observed that enough had been made out to justify the interference of the Court of Equity: "a very slight amount of evidence," he added, "of the actual amount of damage done would be sufficient to justify an injunction, and the declaration of right to be made by the Court is absolutely necessary in consequence of the assertion of right made by the appellants." And so this House altered the order of the Court of Appeal by declaring the rights of the navigation company, as owner of Wayte's mill, to the flow of the stream down to their tenement, "subject to the ordinary and reasonable use of the said stream and waters by the riparian owners higher up upon the said stream"; and then there was added an express declaration, which was not to be found in the order of the Court of

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Appeal, to the effect that the proposed user by the waterworks company was not within such ordinary or reasonable use. As riparian owners the navigation company were not injured in the very least in present enjoyment, but yet it was as riparian owners that they were held entitled to this declaration in their favour negating the pretended rights of their opponents.

My Lords, the question in that case in regard to the rights of the navigation company as owners of Wayte's tenement and the pretended rights of the waterworks company was precisely the same question as that which has arisen in the present case. The railway company claim the right to do that which they propose to do. That was admittedly the question at the trial before Holmes L.J., and therefore it was not incumbent upon McCartney to do more than to shew a very slight case of actual or probable injury. He has shewn a certain amount of injury, not very substantial, I admit, but still I think quite sufficient—sufficient to entitle him to damages at law when a claim of right is set up, and sufficient therefore to entitle him to a declaration in equity. It may well be, if I may refer to a suggestion thrown out by Lord Cairns in the *Swindon Case* (1), that if the railway company had said, "We do not claim a right at all, but what we propose to do is such a trivial matter that it cannot do you any practical injury," the Court might have thought fit not to interfere; but that is not the line which the railway company took. They claimed a right; they admitted that if that issue was found against them their whole case must fail. The question of right was not merely the sole question at the trial. It was really the sole question at issue before the Court of King's Bench and the Court of Appeal. And those Courts have made a declaration of right, but a declaration I think in favour of the wrong party. They have declared in effect that the railway company are entitled to abstract and consume for purposes unconnected with the tenement which gives access to the stream a portion of the waters of the stream which can by no possibility be restored to it. That declaration seems to me to be contrary to principle and precedent.

My Lords, I do not think it necessary to say anything more. But I may venture to remind your Lordships that the law laid

(1) L. R. 7 H. L. 705.

down in this House in the *Swindon Case* (1) was no new doctrine. It is stated clearly and precisely by Parke B. in the Exchequer in *Embrey v. Owen* (2), and by Cresswell J. in delivering the judgment of the Court of Common Pleas in *Sampson v. Hoddinott*. (3)

I have only to add that in my opinion it would be extravagant to suggest that the system of the Londonderry and Lough Swilly Railway Company and the lines of other companies over which they have running powers form one single riparian tenement, or that the railway company, by virtue of contact with this stream at one point, possess throughout their system, and all through the lines of other companies over which they have running powers, rights analogous to those possessed by persons who dwell on the banks of a river in respect of their riverside property. It may be difficult to say how far the rights of the railway company as riparian owners extend, but they can hardly go to such a length as that.

I am of opinion that the judgments of the Court of Appeal and the Court of King's Bench ought to be reversed, and the judgment of Holmes L.J. restored, and that the respondents ought to pay the costs both here and below. But, in order to prevent any dispute in future, I think it would be well to preface the order by a declaration of opinion that the railway company are not entitled to use the stream in question for the purpose of supplying their locomotive engines with water.

LORD LINDLEY. My Lords, it is not now disputed that the stream from which the railway company desire to take water is, or at all events must be regarded as, a natural and not an artificial stream, nor is it disputed that the railway company are the proprietors of the strip of land on which their line is constructed where it crosses the stream. For a short distance, therefore, the railway company are the proprietors of a few feet of land next the stream. They put down a three-inch pipe by which they intended to draw water from the stream in order to fill a tank some distance off, from which they could supply their locomotive engines with water. This pipe was on their

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(1) L. R. 7 H. L. 705.

(2) (1851) 6 Ex. 367.

(3) (1857) 1 C. B. (N.S.) 590.

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own land, and the defendant had no right to interfere with it unless he was entitled to do so in order to protect his own water rights as a riparian proprietor lower down the stream, where he had a water-mill. In order, however, to protect those rights he took up the pipe, and it was admitted at the trial that he was justified in what he did if the railway company were not entitled to use the water in the manner proposed. Holmes L.J., who tried the case, held that the defendant was justified in what he did. The Divisional Court took a different view and reversed his decision, and the Court of Appeal affirmed the decision of the Divisional Court, FitzGibbon L.J., however, dissenting.

It was proved at the trial that the defendant's mill was an old mill and required a flow of 7000 gallons of water per minute to work it. To work for one hour, therefore, 420,000 gallons would be required. The total quantity of water reaching the mill in dry weather was about 627,000 gallons per day, and of this quantity 500,000 gallons only came down the stream as far as the mouth of the railway company's pipe. The remaining 127,000 gallons entered the stream lower down. On the other hand, it was proved that the pipe would carry off 15,000 gallons a day if allowed to run unchecked. The railway company gave evidence that they did not want more than 5000 gallons a day, and that they only had ten locomotives a day to fill. But their witnesses admitted that more would probably be wanted shortly. The practical result of the evidence was that in dry weather the defendant wanted all the water he could get, and that if the railway company drew off only 5000 gallons a day his mill would be stopped for less than a minute a day; and that if they drew off 15,000 gallons a day it would be stopped for less than three minutes a day. Holmes L.J. did not apparently decide the case upon the ground that the defendant would sustain serious damage, but on the wider ground that the railway company had no right to take water from the stream for the purpose of supplying their locomotives with water. The Divisional Court and the Court of Appeal were of opinion that the railway company were entitled to take water for their locomotives, provided they did not seriously interfere with the working of the defendant's

mill; and they considered that the interference would be too slight to amount to an infringement of his rights.

The water which the railway company contend they are entitled to take is wanted for use over the whole line, including the little strip of land which immediately adjoins the stream and is crossed by it. But the whole line cannot be regarded as riparian property; and the quantity of water required for use on the short strip which immediately adjoins the stream is too small to be of any consequence to either party. The right to take that much is not worth discussing, and may be conceded; but the concession will not decide the important question which your Lordships have to determine.

My Lords, although the damage suffered, or likely to be suffered, by the millowner is small, yet it is plain that, if the railway company are not entitled to retain and use their pipe as intended, but are nevertheless allowed to do so without interruption for twenty years, they will be infringing the millowner's rights all that time, and will, at the end of the twenty years, gain a prescriptive right to continue such use for ever. Such an invasion of his rights the millowner is entitled to prevent. This has been long well settled. In the note to *Mellor v. Spateman* (1) it is said: "Wherever any act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right without proof of any specific injury." This principle has been repeatedly recognised and acted upon in cases involving water rights, e.g., *Sampson v. Hoddinott* (2) and *Harrop v. Hirst*. (3) The principle must be borne in mind when reliance is placed on judicial decisions in cases in which it was unnecessary to allude to it. The principle was conceded and recognised in *Kensit v. Great Eastern Ry. Co.* (4), which was decided on the ground that what was there complained of was not in excess of the defendants' rights and never could grow into a prescriptive right, inasmuch as all the water taken from the stream was returned to it undiminished in quantity and undeteriorated in quality. This was the ratio decidendi of that case.

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(1) 1 Wm. Saund. 346 a.

(2) 1 C. B. (N.S.) 590.

(3) (1868) L. R. 4 Ex. 43.

(4) 23 Ch. D. 566; 27 Ch. D. 122.

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The question for your Lordships' decision is, therefore, reduced to this, namely: Will the use of this pipe by the railway company infringe the millowner's rights? Or, in other words, are the railway company entitled to use this pipe for the purposes for which they have put it down? Two cases only have arisen in which the right of a railway company to take water from a stream for its locomotive engines has called for judicial decision. One is *Attorney-General v. Great Eastern Ry. Co.* (1), in which Lord Romilly expressed his opinion that a railway company having a line adjoining a stream had no right to take water from it for supplying their locomotives. The other is *Earl of Sandwich v. Great Northern Ry. Co.* (2), in which Bacon V.-C. decided that they had. In the first of these cases, which was affirmed by Lord Hatherley (3) the abstraction of the water seriously impeded the navigation of the stream, and Lord Hatherley decided the case on that ground. In *Lord Sandwich's Case* (2) no substantial damage was proved, and the Vice-Chancellor considered that the railway company was entitled to take what water they wanted, so long as they did not inflict any substantial damage on other riparian owners. He held, in short, that the railway company were not exceeding their own rights and were not infringing the rights of the plaintiff. This decision is in favour of the railway company in the present case. I cannot, however, think it right in point of law. It is, in my opinion, impossible to reconcile it with the principles laid down and acted on by this House in *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (4) In that case a water company had bought a mill by a stream, and took water from it to supply a neighbouring town. They were held not entitled to do this, although the plaintiffs, who were lower riparian owners, were not in fact damaged by the defendants' operations. Lord Cairns there stated the law as to the water rights of riparian owners, and it is unnecessary to do more than to refer to his judgment.

The railway company in this case became riparian owners

(1) (1870) 18 W. R. 1187; 23 L. T.

(N.S.) 344.

(2) 10 Ch. D. 707.

(3) (1871) L. R. 6 Ch. 572.

(4) L. R. 7 H. L. 697; L. R. 9 Ch. 451.

simply by buying a small strip of land crossed by the stream. They thereby acquired the water rights, whatever they were, of the owner of the land so bought, but they acquired no greater rights than he could give them in respect of that land. These rights did not include the right to take water from the stream for consumption off the land, the possession of which conferred his rights. He could not lawfully take water from the stream in any appreciable quantity and sell it for use miles away, or, indeed, use it himself at a distance from his riparian tenement without returning it to the stream. Such a user can only be justified by a grant from lower riparian owners or by prescription. This I take to be now settled by *Stockport Waterworks Co. v. Potter* (1), by the decisions of the Court of Appeal and of your Lordships' House in the *Swindon Case* (2), and by *Ormerod v. Todmorden Mill Co.* (3)

The intended use of the water in this case by the railway company was reasonable enough from their point of view, but such use would have been in excess of their rights, and an infringement of the rights of the defendant.

I am of opinion, therefore, that the appeal should be allowed. and that the judgment of Holmes L.J. should be restored, and that the railway company should pay the costs here and below.

Orders of the Irish Court of Appeal and King's Bench Division reversed and judgment of Holmes L.J. restored with costs here and below: declaration that the respondents are not entitled to use the water of the stream for the purpose of supplying their locomotive engines with water: cause remitted to the Irish King's Bench Division.

Lords' Journals, May 10, 1904.

Solicitors: *Greene & Underhill, for Hugh C. O'Doherty, Dublin; William Webb & Co., for James E. O'Doherty, Dublin.*

(1) (1864) 3 H. & C. 300. (2) L. R. 7 H. L. 697; L. R. 9 Ch. 451.

(3) (1883) 11 Q. B. D. 155.

H. L. (I.)

1904

McCARTNEY

v.

LONDON-
DERBY AND
LOUGH
SWILLY
RAILWAY.

Lord Lindley.