

BAILY & CO. v. CLARK, SON & MORLAND.

[1899 B. 3333.]

*Water—Artificial Watercourse—Riparian Proprietors—Right to Use of Water
—Nature of Presumed Lost Grant.*

C. A.

1900

BYRNE J.

Nov. 16, 17,
20, 21, 22.

1901

Feb. 4.

C. A.

1902

Feb. 24, 25, 27.

In the case of an artificial watercourse, the origin of which is unknown, the proper inference from the user of the water and from other circumstances may be that the channel was originally constructed upon the condition that all the riparian proprietors should have the same rights (including a right to use the water for manufacturing purposes) as they would have had if the stream had been a natural one.

Sutcliffe v. Booth, (1863) 32 L. J. (Q.B.) 136, followed.

The use of the water by a riparian proprietor for manufacturing purposes must be, as was laid down in *Miner v. Gilmour*, (1858) 12 Moo. P. C. at p. 156, such as not to interfere with the lawful use of the water by the other proprietors, above or below him, or to inflict on them a sensible injury.

The plaintiffs were the owners of a mill, which was situate upon an artificial cut or channel, the water flowing through which was used for working the mill. The water was admitted into the cut from a natural river. The cut was about a mile and a half long, and it rejoined the river at its lower end. The plaintiffs also owned a factory, near to the mill, but a little higher up the stream. For the purposes of the factory the plaintiffs abstracted water from the stream, returning what they abstracted to the stream below the mill.

The defendants owned a factory higher up the stream. For the purposes of the factory they abstracted water from the stream, returning it diminished in quantity by evaporation.

The plaintiffs brought the action to restrain the defendants from abstracting water so as to injure their mill. The plaintiffs claimed a right to the whole of the water in the channel. The artificial stream was known to have existed for some centuries, but there was no evidence as to when or by whom, or on what conditions, it had been originally constructed. The admission of water to the cut had always been under the control of the mill-owner, who had always kept the channel clear and had repaired its banks. The defendants' factory was situate on the site of an old tannery, for the purposes of which water used to be abstracted from the stream, though it was alleged that the defendants had increased the amount abstracted.

There was evidence that there had formerly been a fulling-mill upon the stream above the plaintiffs' mill.

Held, by the Court of Appeal, that the proper inference from the user of the water was that the artificial cut had been originally constructed upon the terms that all the riparian proprietors should have at least the same

C. A.
1902
BAILY & Co.
v.
CLARK, SON &
MORLAND.

rights in regard to the use of the water as they would have had if the stream had been a natural one.

The evidence satisfied the Court of Appeal that the abstraction of water by the defendants had not been such as to cause sensible injury to the plaintiffs' mill, and that, therefore, the defendants ought not to be restrained from abstracting water.

Decision of Byrne J. reversed.

THIS action was brought to restrain the defendants from wrongfully polluting a stream and wrongfully abstracting water from it.

The plaintiffs were the owners of a mill, called Beckery Mill, near Glastonbury, situate upon a cut or channel by which a portion of the water of the river Brue was carried, from a place called Clyce Hole, for a distance of about a mile and a half, at the end of which it rejoined the river. This cut or channel was treated by the parties to the action as being an artificial one, and the Court dealt with it on that footing. The cut was known to have existed for some centuries, but there was no evidence as to when or by whom, or under what conditions, it was originally constructed. It was known that a mill had existed for some centuries on the site of the plaintiffs' mill. The inflow of water from the river at Clyce Hole into the cut was regulated by means of an artificial structure with movable boards, which was, and always had been, under the control of the owner of the mill, who had also always kept the channel clear and clean and had maintained and repaired its banks. The plaintiffs also owned a factory, called Beckery Factory, which was situate on the cut, a little higher up than the mill, where they carried on a skin and rug manufacturing business, for the purpose of which they abstracted water from the cut. The water thus abstracted was, after it had been used in the factory, returned into the cut below the plaintiffs' mill. There was evidence that the plaintiffs abstracted as much as 25,000 gallons of water a day for their factory.

The defendants were the owners of a factory, called Northover Factory, also situate on the cut, about 200 yards higher up than the plaintiffs' factory. The defendants carried on the manufacture of sheepskin and other rugs. For the purpose of

their business they abstracted water from the cut, returning it after it had been used into the cut, but considerably diminished in quantity by evaporation. The plaintiffs alleged that the effluent from the defendants' works seriously polluted the water in the cut, and also that the defendants abstracted water to such an extent as seriously to interfere with the flow of water to the plaintiffs' mill and factory. According to the plaintiffs' evidence, the defendants abstracted as much as 8000 gallons of water a day; according to the defendants' evidence, the amount abstracted was very much less. The plaintiffs claimed, as owners both of the mill and the factory, a right to the whole and unpolluted flow of the water of the stream as it entered the cut, for the use of both the mill and the factory.

The defendants had erected their factory upon the site of an old tannery, which they had purchased in 1870. The tannery had existed for many years, and the water of the stream had been used for the purpose of that business. The plaintiffs alleged that the defendants had greatly increased the amount of the abstraction.

The defendants claimed a right by prescription to divert and consume for manufacturing purposes a part of the water of the stream, and to pollute the stream by discharging refuse into it.

There was evidence that there had in ancient times been a fulling-mill situate on the cut above the plaintiffs' mill.

In Collinson's *History of Somerset* (published in 1791), vol. ii. p. 267, it is stated: "In the terrier of Richard Beere, the last Abbot of Glastonbury but one, we find an account of the state of the town, its government, and other matters, in the time of Henry VIII." This terrier is there quoted, and in it occurs the following passage, p. 268: "There is likewise a new water-mill, situated at Northover, and erected by Abbot Richard, which mill brings in yearly ten pounds. . . . There is another mill called Becary Mill, and a new fulling-mill lately erected by the said Lord Abbot, as also a water-mill in the town, and a wind-mill above it." Richard Beere was abbot (p. 255) from January, 1493, to January, 1524.

There was evidence that the riparian proprietors had been in the habit of using the water of the stream for agricultural

C. A.
1902
BAILY & Co.
v.
CLARK, SON &
MORLAND.

C. A. purposes, such as watering cattle, as well as for domestic
1902 purposes.
BAILY & Co. Prior to 1866 both Beckery Mill and the site of Beckery
v. Factory belonged to J. G. Bishop. In March, 1866, he con-
CLARK, SON &veyed the site of the factory to the plaintiffs. In 1875 Bishop
MORLAND. sold the mill to John Baily, and he in 1897 conveyed it to the
plaintiffs.

In 1877 John Baily commenced an action against the defendants, complaining of the abstraction of water by them from the stream and the pouring of refuse into it. This action never went to trial, but a compromise was effected, which was carried out by a deed executed in October, 1879, by which the agreement was made determinable on a year's notice. The agreement provided that it was not to prejudice existing rights. The agreement was determined in January, 1899, and the present action was commenced shortly afterwards.

The action came on for hearing before Byrne J. on November 16, 1900.

Rowden, K.C., and Ward Coldridge, for the plaintiffs.

Levett, K.C., and R. Cunningham Glen, for the defendants.

Cur. adv. vult.

1901. Feb. 4. BYRNE J., after stating the facts, continued:—It is necessary to keep the plaintiffs' claim as mill-owners distinct from their claim as factory-owners, and I propose first to deal with the case as though they claimed only in respect of the mill-owners' title. Before proceeding to deal with the issues of fact it will be convenient to examine some legal points which arise, and I will first read a passage from the decision of the Privy Council in *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk* (1), which appears authoritatively to state the law applicable to riparian owners as contrasted in the cases of natural and artificial watercourses in general terms. In delivering the judgment of the Court, Sir Montague Smith said (2): "There is no doubt that the right

(1) (1878) 4 App. Cas. 121.

(2) 4 App. Cas. 126.

to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle. In the former case each successive riparian proprietor is, *primâ facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his ownership of it. In the latter, any right to the flow of the water must rest on some grant or arrangement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought, or on some other legal origin." In *Kensit v. Great Eastern Ry. Co.* (1) Cotton L.J., after citing the passage I have just quoted from the judgment of Sir Montague Smith, proceeded (2): "That is to say, in one case it would be what we call by grant or prescription; in the other case it is a natural right from the natural stream flowing through a man's land which gives him the rights incident to the ownership of the land." In the same judgment Cotton L.J. pointed out that it is impossible to say that any natural rights can ever be acquired in an artificial cut, but added (2): "Possibly after a length of time it might be difficult in some cases to say that a cut was not part of the natural stream." It is also, I think, good law that the rights of a riparian owner may be as extensive in respect of the stream in an artificial cut as they can be in respect of a natural stream: see *Sutcliffe v. Booth*. (3) This seems to be a necessary result of the application of the law relating to lost grant. If a lost grant may be inferred from circumstances, I think that if the circumstances lead to such an inference, a lost grant of rights, as good and as extensive as those enjoyed by a riparian owner on a natural stream, may be inferred in favour of an owner on an artificial stream. In like manner, in the case of prescription, to the extent to which prescriptive rights can be acquired, I think that if such rights have been exercised for the period necessary to establish them, they may be as extensive in the case of an artificial stream as in the case of a natural one. In

C. A.

1902

BAILY & Co.

v.

CLARK, SON &
MORLAND.

Byrne J.

(1) (1884) 27 Ch. D. 122.

(2) 27 Ch. D. 134.

(3) 32 L. J. (Q.B.) 136.

C. A. applying the law to the particular case, I do not think that I
 1902 ought to treat the matter as though the cut were a simple
 BAILY & Co. diversion and part of the natural bed of the stream; and I
 v. CLARK, SON & MORLAND. propose to deal with it upon the footing that the cut is artificial,
 and that the right of the plaintiffs to the flow of the water, and
 Byrne J. to its reasonable enjoyment, are those in respect of an artificial
 stream, and must therefore rest upon some grant to be pre-
 sumed, or upon prescription. So, also, the defendants' right
 (if any) to use and foul the water must depend upon grant or
 prescription. In giving the judgment of the Privy Council in
 the case to which I have referred, Sir Montague Smith, after
 referring with approval to passages which he cited from *Wood*
v. Waud (1), *Greatrex v. Hayward* (2), and *Sutcliffe v. Booth* (3),
 proceeded to deal with the facts, and he commenced with the
 inquiry (4): "What then, is the character of the reservoir and
 watercourses now in dispute, and what are the circumstances
 under which they were presumably created, and have been
 actually enjoyed?" I commence with a similar inquiry—
 namely, What is the character of the cut and watercourse in
 question, and what are the circumstances under which they
 were presumably created and have been enjoyed? No direct
 evidence has been adduced to shew the actual date when, or
 the circumstances under which, the artificial cut or watercourse
 was originally made, or when or under which Beckery Mill was
 first built. The watercourse has, undoubtedly, existed for a
 long period, probably for some centuries. Having regard to
 the nature of the cut and to the existence of the mill, as
 well as to the actual user of the mill and watercourse so
 far back as it can be traced, I think it is a right presump-
 tion to make that the cut was originally made with the
 assent of the lower riparian owners on the banks of the river
 Brue, as and for the purposes of Beckery Mill, not necessarily
 the present structure, but a mill on the site of and now repre-
 sented by the mill belonging to the plaintiffs. In other words,
 I think the watercourse is what is commonly called a mill
 stream. It may be that when the cut was made the whole of

(1) (1849) 3 Ex. 748, 777.

(3) 32 L. J. (Q.B.) 136.

(2) (1853) 8 Ex. 291, 293.

(4) 4 App. Cas. 128.

the land through which it runs was in one ownership, or it may have been in several. I think I ought to infer a legal origin for it, and a legal right to the uninterrupted flow of the water passing along it for the purposes of the mill in the same condition as it enters the cut. It has been argued for the defendants that the only right of user of the water which ought to be presumed (if any) is a right of user for the purpose of turning the mill-wheel; but I do not accept this view. So far back as living memory extends, and probably always, the miller has lived at the mill, and up to a time within living memory the water of the stream has been used for drinking and domestic purposes. Pester, the miller, who has lived there for thirty-seven years, has himself used it for those purposes in the days before the defendants' factory (Northover) was built. I do not doubt that at the present day, and with modern notions, any reasonable miller would refuse to drink the water, even at the intake from the river, where it is, no doubt, fouler than it formerly was, but I am not at all prepared to say that except for the defendants' operations it might not still be used for some domestic purposes. I do not infer any less right to the unpolluted flow of the stream, as it enters at the intake, because the tenement is a mill than I should have done had it been a tenement without the mill. I think that I ought to presume such a right as the mill-owner would have had by grant, not only for the purposes of affording power, but for the purposes of an inhabited dwelling. I hold, therefore, upon the facts proved, and to be properly inferred or presumed, that, subject to any rights in derogation of the mill-owner's rights (if any) which may since have been acquired by prescription or grant by the defendants or their predecessors in title as superior riparian owners upon the cut, the plaintiffs are now entitled to the unimpeded flow of water in the same condition and in the same volume as it enters the cut, as well for the purposes of driving the mill-wheel, as for the purposes of the mill-owner or occupier, for all purposes appropriate to an inhabited tenement. This involves the right to an unpolluted as well as to an uninterrupted flow, save so far as pollution is due to what takes place prior to the intake from

C. A.

1902

BAILY & Co.

v.

CLARK, SON &
MORLAND.

Byrne J.

C. A.
1902
BAILY & Co.
v.
CLARK, SON &
MORLAND.
Byrne J.

the river. Before 1866 the mill and the site of the plaintiffs' factory were in common ownership; but in that year the then owner granted the site of the factory to the plaintiffs' predecessors in title for the purpose of building a factory; and they have since about 1867 abstracted water from the stream, and have also polluted it in carrying on their business; but the pollution does not take place above the mill, as the effluent is discharged below it. The mill-owner, having granted a site for a purpose involving a certain abstraction of water, could not complain of it unless exercised in excess of the requirements of the contemplated works; and no surrender of rights beyond that now involved in the grant ought to be inferred. As between the plaintiffs, in their right as factory owners, and the defendants, as superior riparian owners, the plaintiffs could not have acquired a right to the unpolluted and undiminished flow of the stream except by a grant or prescription; and I do not find that they have proved such a right, inasmuch as they have not enjoyed it for the necessary period. If, however, the plaintiffs are entitled in their right as mill-owners, this will incidentally protect them in their business at the factory. The defendants' predecessors acquired the site of their factory at Northover in the year 1870. There was on the property at that time a tannery, and for the purposes of that business the owners of it had been accustomed to withdraw a certain quantity of water from the cut, and had acquired a prescriptive right so to do. [His Lordship referred to the evidence as to the abstract of water for the tannery, and continued:—]

So far as I can judge, the total abstraction of water for the use of the tannery certainly did not exceed 1000 gallons a week, of which a very large proportion, say three-fourths at least, went back into the stream. Of course I can only make a rough approximate estimate from the evidence, but I should think that the water abstracted and not returned to the stream would not exceed 250 to 300 gallons a week for all purposes, allowing for water lost by being taken up in soaking and washing skins. A certain number of skins were soaked in a crate or cage in the stream and skins were washed in the stream to get rid of the lime after unhairing. The lime-pits

used to be emptied in a somewhat unscientific way, and I have no doubt that the effluent water passing into the stream contained a certain proportion of lime; the greater part of the thick lime was kept out and carted away. I think it probable that there was occasionally some other comparatively slight pollution, but it is quite certain that there was nothing to compare, either in amount of water abstracted from the stream or in volume of effluent, with what the defendants are and have been doing. Shortly after acquiring the Northover Tannery and adjoining property the defendants (who are fell-mongers and rug manufacturers) erected a factory and works for their business. They have from time to time increased and enlarged their buildings and plant. They employ about ten times as many hands as were formerly employed at the tannery. They take out of the stream, at the most favourable estimate, at least 107,000 gallons a week. There is a considerable difference between the plaintiffs' and defendants' figures, which are but estimates after all, as to the quantity of water taken from and returned to the stream after being used for the various processes; but I think it is certain that the amount consumed or lost in the course of the processes is many thousands of gallons a week more than it was in the time of the old tannery. There is also a direct cause of pollution in the soaking of skins in the stream, and there are several hundred more skins a week soaked by the defendants than in the time of the existence of the old tannery. Water is returned to the stream after being mixed with lime, soda, dye, and other matters, and having been used in dyeing the skins and rugs, and after having been subjected to a purifying process by means of settling in tanks and being treated by a method known as the alumina ferric process. The comparative purity of the effluent depends upon the efficiency of the purifying system and on the care with which it is worked; and I have to balance the evidence, professional and other, which I have heard. On the whole I have come to the conclusion that there is at times a very considerable fouling of the stream by the defendants' effluent, far beyond any possible fouling which could have been occasioned by the old tannery. On

Y

C. A.
1902
BAILY & Co.
v.
CLARK, SON &
MORLAND.
Byrne J.

C. A.
1902
BAILY & Co.
v.
CLARK, SON &
MORLAND.
Byrne J.

the question of loss of water power at the mill, I think that the evidence shews a loss of a substantial and material amount of water, caused by the defendants' operations, which does sometimes interfere with the working of the mill in the summer and autumn. It must of course be borne in mind that the abstraction and return of water is not a constantly equal operation, and it does not give a fair test of result on the working of the mill to treat the matter as though it were. If water is abstracted during working hours, and the effluent returned at night, for instance, at a time when the stream is very low, this may well have a very appreciable result in the working of the mill, which might not be noticeable if the reverse process were adopted. But apart from all theories and calculations, from all figures and descriptions of the excellence and infallibility of the process of purification, I am satisfied upon the evidence of what has been seen, felt, and experienced by the witnesses that there is from time to time a very considerable diminution in the flow of the stream, and a very considerable fouling of the stream, and that caused, not merely by operations similar or analogous to those formerly carried on at the old tannery, but also by operations of an entirely different character, as, for instance, dyeing. I think that a right had been acquired by the owners of the old tannery, as against the mill-owner, to abstract water and foul the stream to a certain extent, and had the same business been carried on that right might still have been claimed by the defendants to the same extent, and possibly even to such greater extent as the ordinary reasonable trade development of the old business required, but they are fellmongers and skin-rug manufacturers, and are making use of the stream for these businesses, not for a tannery. At the same time there are certain processes, at all events, such as soaking and washing skins, which, if I have rightly understood the evidence, are common both to the business of a tannery and to those of fellmongers and rug manufacturers; and, having regard to this fact, I am not prepared to say that the defendants are not still entitled as against the plaintiffs to abstract and use the water of the stream and to pollute it for the same process

or processes and to the same extent as it was used and polluted for the purposes of the old tannery, and I propose to limit the injunction in this respect. The injunction is not to come into operation for at least six months, so as to give the defendants time to rearrange their process as far as possible.

C. A.
1902
BAILY & Co.
v.
CLARK, SON &
MORLAND.

W. C. D.

The defendants appealed. The appeal came on for hearing on February 24, 1902.

C. A.

Levett, K.C., and *R. Cunningham Glen*, for the defendants. A grant should be presumed in favour of the defendants. It does not follow that a riparian owner may not have the same rights in an artificial watercourse as in a natural watercourse, for an artificial watercourse may have been made originally under such circumstances, and may have been so used, as to give all the rights which riparian proprietors would have had in a natural watercourse: *Bullen and Leake's Precedents of Pleading*, 3rd ed. p. 426; *Sutcliffe v. Booth* (1); *Ivimey v. Stocker*. (2) No doubt, in general, the rights in a natural and in an artificial watercourse are distinct, for in the former the riparian owner is entitled to the unimpeded flow of water in its natural course; whereas, in the latter, his right must depend on presumed grant or some other legal origin: *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk*. (3) Here the defendants are entitled to take water from this stream so far as they do not interfere with the plaintiffs' mill: *Wood v. Waud*. (4) There is no evidence that what the defendants have done would have injured the plaintiffs if they had not themselves abstracted water to the extent of 25,000 gallons a days, or 150,000 gallons per week. The plaintiffs are not entitled to have "drinking water" sent down to work their mill. They have no property in the water until it gets down to their land. They have an easement of a certain amount of water from the river Brue through this cut or channel; and so long as that easement is not interfered with, they have no ground of action. The easement which they

(1) 32 L. J. (Q.B.) 136.

(3) 4 App. Cas. 121, 126.

(2) (1866) L. R. 1 Ch. 396, 406.

(4) 3 Ex. 748.

C. A. 1902
BAILY & Co.
I v.
CLARK, SON &
MORLAND.
possess is a right to sufficient water for the working of their mill. The water passes through the defendants' land, and they are entitled to take as much as they require, provided that in so doing they do not stop the plaintiffs' mill. The plaintiffs have no right to every drop of the water, or to say that the water shall come down to them as "drinking water."

Rowden, K.C., and *Ward Coldridge*, for the plaintiffs. It is submitted that the decision of *Byrne J.* was right, and that the cases cited by him support his view. Those cases shew that it is in fact possible to acquire in an artificial stream prescriptive rights, those rights being regulated by the form of the presumed grant. In the present case the presumed grant would have been of the quantity of water flowing down the cut; and that is the plaintiffs' prescriptive right. No doubt there might be some lawful infringement of that prescriptive right, for if the business at the Northover Factory had increased, the plaintiffs' right might have been subject to what might have been required by that increase.

[VAUGHAN WILLIAMS L.J. I cannot reconcile myself to the idea that there ever was a grant to you of the right to take 25,000 gallons a day out of the stream. I do not believe myself that there ever was such a grant. I cannot understand the owner of land consenting to a cut being made through his land upon the terms that you could alone carry on business and enjoin any other person from doing so.]

It is contended that the owner of the plaintiffs' mill would have a perfect right to take the 25,000 gallons subject to the rights of any riparian owner below him. There is no allegation in the pleadings that the defendants' rights have been injured or abridged. The plaintiffs' mill being an ancient one, the presumption is that the water flowed along the cut to the mill without any abstraction. As riparian owner, the owner of the mill could himself abstract the water just as if it were a natural stream, so long as no riparian owner below him was injured. The presumed grant was of the whole of the water which flowed down to this ancient mill. The evidence shews that the plaintiffs have not now enough water, and that the abstraction by the defendants is and will be most serious. It

is not, however, necessary for the plaintiffs to prove actual damage: *Wilts and Berks Canal Navigation Co. v. Swindon Waterworks Co.* (1) As owners of the servient tenement we are being subjected to an increased burden, for the defendants have increased their works, their abstraction of water, and their pollution of the stream. It is contended that the plaintiffs, as lower riparian owners, are entitled to have the water coming down to their mill undiminished in quantity and unimpaired in quality: *Young & Co. v. Bankier Distillery Co.* (2); *McIntyre Brothers v. McGavin* (3); though no doubt that right is subject to ordinary user by the riparian owner above, and also to such further reasonable user by him as may give the riparian owner below him no just cause of complaint: *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (4); *Young & Co. v. Bankier Distillery Co.* (2).

C. A.
1902
BAILLY & Co.
v.
CLARK, SON &
MORLAND.

The facts that for centuries the owner of the plaintiffs' mill has had the sole control of the stream, and has been subject to the obligation of keeping the channel clear and of repairing the banks so as to prevent flooding, lead necessarily to the inference that the stream is the creature of the mill, and that the mill-owner has greater rights in it than any one else. He has, in fact, an exclusive right—a right to every drop of the water which comes down. Even if the plaintiffs have only the rights of riparian proprietors on a natural stream, the defendants are not entitled to cause a sensible diminution of the water, and the evidence shews that they have done this. No doubt the magnitude of the stream is a matter to be taken into consideration: *Earl of Sandwich v. Great Northern Ry. Co.* (5) All other use of water than use for domestic purposes may be called “extraordinary,” and it must be reasonable. In that case an extraordinary user was held to be reasonable. In *Wood v. Waud* (6) an abstraction of water to the amount of 5 per cent. was held to be a sensible injury. The evidence in the present case shews a sensible injury to the plaintiffs; it

(1) (1874) L. R. 9 Ch. 451.

(2) [1893] A. C. 691, 698.

(3) [1893] A. C. 268, 274, 277.

(4) (1875) L. R. 7 H. L. 697,

704.

(5) (1878) 10 Ch. D. 707, 713.

(6) 3 Ex. 748.

C. A. proves that there is not sufficient water for the working of the mill.

1902

BAILY & CO.

v.

CLARK, SON &
MORLAND.

[VAUGHAN WILLIAMS L.J. referred to *Roberts v. Richards* (1), which was compromised on appeal. (2)]

Attorney-General v. Great Eastern Ry. Co. (3) illustrates the distinction between a perfectly natural stream and one which is to any extent artificial. No injury is caused to the defendants by reason of the plaintiffs taking 25,000 gallons of water a day for their factory. The defendants cannot on that ground justify what they are doing.

Levett, K.C., was called upon to reply only on the question of pollution. He urged that the evidence did not shew any injury to the plaintiffs' mill by pollution.

VAUGHAN WILLIAMS L.J. In our view there has been an unjustifiable pollution of the stream by the defendants; and, that being so, the injunction, so far as it relates to pollution, must remain. But we have been told that the defendants have acquired some five acres of land which will enable them so to treat the effluent from their works as to prevent any obnoxious discharge into the stream, and we think it right to suspend the injunction for such further time as may be necessary to enable the defendants to complete this alteration.

With regard to the prescriptive right claimed by the defendants, Byrne J. has affirmed it so far as the tannery is concerned. We do not think that in that respect there should be any alteration in his order—that is, in our opinion, no further prescriptive right has been established by the defendants.

I come then to the main point in the case. The case has been argued on both sides upon the basis that the stream in question is an artificial watercourse, and I propose to deal with it on that footing. But I wish to guard myself by saying that I must not be taken to have decided upon the evidence that this is within the meaning of the authorities an artificial watercourse, for I am not quite certain about that. When there is a stream of this kind, which runs out of a river and

(1) (1881) 50 L. J. (Ch.) 297.

(2) Vide 51 L. J. (Ch.) 944.

(3) (1871) L. R. 6 Ch. 572, 576.

after making a detour returns into the river lower down, it is, I think, plain that the riparian proprietors on the river itself lower down than the point of return and the riparian proprietors on the backwater stand to each other in the relation of lower and upper riparian proprietors, and I should have thought that the obligations of the upper riparian proprietors, and to a certain extent their privileges, would, as between themselves and the proprietors lower down the river, be the same as those of riparian proprietors upon a natural stream, and that independently of any grant or prescription. I have not, however, to decide that point now; I am only suggesting whether this stream might not be treated as a natural stream, at all events for some purposes, and I have mentioned one of the purposes for which I think it might possibly be so treated. And, indeed, I am not sure that it signifies, as regards the conclusion at which I have arrived in the present case, whether this watercourse be regarded as an artificial or as a natural stream. I shall deal with it as an artificial watercourse. If it were a natural watercourse each riparian proprietor would of course have those rights which were so well stated by Lord Kingsdown in *Miner v. Gilmour*. (1) He said: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But, he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury." If, on the other hand, this is an artificial watercourse, any right to the flow of the

C. A.

1902

BAILY & Co.

v.

CLARK, SON &
MORLAND.Vaughan
Williams L.J.

(1) 12 Moo. P. C. 131, 156.

C. A.
1902
BAILY & Co.
v.
CLARK, SON &
MORLAND.
Vaughan
Williams L.J.

water must be based on some grant, whether in the nature of an easement or otherwise. The basis of every right to the flow of the water must be an agreement, expressed or presumed from the user, with the owners of the land through which the stream runs. This being so, it is plain that the circumstances might be such as properly to lead to the inference that the watercourse was originally constructed on the terms that each of the riparian proprietors should have the same rights as the riparian proprietors upon a natural stream would have, and no more.

An authority for that proposition is to be found in *Sutcliffe v. Booth*. (1) As I have already said, it would perhaps be sufficient for the defendants if the rights of the riparian proprietors on this stream were the same as those of riparian proprietors on a natural stream and no more; but it is not necessary to discuss that, for, in my judgment, their rights are somewhat wider; or, to put it in another way, I think it is clear, having regard to the evidence of prior user, that the abstraction of water by the defendants which has taken place has not been a violation of the rights of the plaintiffs as riparian proprietors on this artificial stream. When we look at the evidence, it is plain to my mind that there has been in times past a withdrawal of water from the stream for other than domestic purposes. It is plain that there was a withdrawal of water for the purposes of the old tannery, and, although Byrne J. has allowed the defendants to claim in respect of the tannery the right of abstracting water as a prescriptive right, it seems to me that this right may equally be supported as arising from the conditions under which it must be presumed that the artificial watercourse was originally constructed.

We must also, I think, bear in mind what the user of the water by the plaintiffs themselves has been, and I do not understand it is suggested that their user has been unlawful or inconsistent with the original conditions of the creation of this stream. There is also evidence that, in addition to the Beckery Flour Mills, there was at one time a fulling-mill higher up the

(1) 32 L. J. (Q.B.) 136.

stream. Under these circumstances, I come to the conclusion that this watercourse was originally constructed under such conditions that the water might be withdrawn for manufacturing purposes equally by all the riparian proprietors, provided that the abstraction of water was of reasonable amount. It is, of course, always a difficult matter to say what is the measure of what is reasonableness in such a case ; but, speaking for myself, I think you must take into consideration, amongst other things, the size of the stream—that is, the total quantity of water in it, and all the other existing conditions, what other mills and factories there are upon the stream, and also causes of waste and the necessity for the user of the quantity of water which is proved to be used.

The result in my judgment is, that upon the evidence we ought to hold that this watercourse was constructed upon terms giving to all the riparian proprietors equally a right reasonably to withdraw water for manufacturing purposes, and in my opinion there is no proof that the defendants have withdrawn any larger than a reasonable quantity of water. Taking in the strictest way the words of Lord Kingsdown in *Miner v. Gilmour* (1)—“ But, he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury ”—there is, in my opinion, no evidence upon which we can hold that the defendants have, by reason of the water which they have taken out of the stream and which they have returned to the stream less the amount naturally evaporated, done anything to interfere with the lawful use of the water by the other proprietors, or to inflict upon the plaintiffs a sensible injury. The suggested injury was that the defendants had interfered with the working of the plaintiffs’ mill. In my judgment, there is no evidence of that. There is, it is true, some vague evidence that the working of the mill was interfered with by shortness of water. But there is nothing in that evidence inconsistent with that interference having been caused by the withdrawal of, as has been shewn, 25,000 gallons a day by the plaintiffs themselves, of which, be

(1) 12 Moo. P. C. 156.

C. A.

1902

BAILY & Co.

v. $\frac{1}{2}$
CLARK, SON &
MORLAND.

Vaughan *
Williams L.J.

C. A.
1902
BAILY & Co.
v.
CLARK, SON &
MORLAND.
Vaughan
Williams L.J.

it observed, none went back into the stream above the mill, the whole of it being discharged below the mill. Under these circumstances, my view is that the abstraction by the defendants of the quantity of water which they are proved to have abstracted and to a large extent returned to the stream was a reasonable user, but that, whether reasonable or not, it has not been proved to have caused any interference with the plaintiffs' mill, or any sensible injury to the plaintiffs as mill-owners.

Then it is said, that even if the proper inference from the circumstances is that by grants from or arrangements with the various riparian proprietors this watercourse was originally constructed upon conditions which give the riparian proprietors rights either a little wider than or at least equal to those of riparian proprietors on a natural stream, still those rights may be subject to some special right of the plaintiffs as mill-owners. It is suggested that the stream was originally constructed expressly for the use of the owner of the plaintiffs' mill. But to my mind the evidence as to the existence of the fulling-mill disposes of that suggestion. I do not say it is impossible that, either by the original grant or by prescription arising from subsequent user, the plaintiffs might have gained paramount rights—rights larger than those of the other riparian proprietors, so that the rights of the other riparian proprietors would be subject to the paramount right of the mill-owner. But, in my judgment, we ought not to infer such a state of things from the evidence before us. I will not attempt to define what evidence would justify the inference of a grant or prescription giving such a paramount right to the owners of this mill, for I am clearly of opinion that no possible inference from the facts of the present case could give the plaintiffs a right to every drop of the water which passes over the weir. This is what the plaintiffs' counsel have really sought to establish. There is nothing in the facts to lead to the conclusion that the plaintiffs' was the only mill upon the stream, or that the stream was constructed for the benefit of that mill only.

Then it is said we ought to draw that inference because there is never as much water in the stream as the plaintiffs'

mill could take and utilise. Assuming that to be true, I do not think we ought to draw such an inference. I am clearly of opinion that there is nothing to justify the inference that the plaintiffs' predecessor had a grant entitling him to the whole of the water coming over the weir. The history of the user seems to me to negative the notion of such a grant. Then, if that was not the grant, what was the grant which the mill-owner had? It may have been a grant of the right to have the water flowing into this watercourse down to the mill, without any interference except by the exercise of the riparian rights of the proprietors higher up the stream. If that is the plaintiffs' right, there is, in my judgment, as I have already said, nothing in the evidence to justify the conclusion that the defendants have in any way interfered with or caused sensible injury to the rights of the plaintiffs as mill-owners. If there has been any material deficiency of water, it is pretty plain that it is attributable rather to the acts of the plaintiffs themselves than to those of any one else.

Under these circumstances we ought, I think, to vary the order of Byrne J., leaving the injunction against the pollution, and negating any larger prescriptive right than that which is recognised by the order, but discharging the injunction so far as it relates to the abstraction of water.

STIRLING L.J. I am of the same opinion. The question is as to the relative rights of the plaintiffs and the defendants in the user of an artificial watercourse. It is an ancient watercourse, having been in existence for at least 400 years. The plaintiffs are the owners of a flour-mill upon it, and they are also owners of an adjoining factory, which has been only recently erected.

There is no question that the plaintiffs and their predecessors in title have been entitled during that period to the user of the watercourse for the purposes of their flour-mill; and, so far as appears, the mill-owner has had from time immemorial the control of the flow of the water. He has been able, therefore, so to deal with the water as to avail himself of it at such times as he pleased, and in such manner as was beneficial for the working of the mill. He had also, it seems, cast upon him the

C. A.
1902
BAILY & Co.
v.
CLARK, SON &
MORLAND.
—
Vaughan
Williams L.J.
—

C. A. obligation of cleaning the watercourse and repairing its banks.
1902 In that state of things it cannot be doubted that the plaintiffs
BAILY & Co. are entitled to the benefit of the flow of the stream and to a
v. reasonable use of the water, at all events for the purposes of
CLARK, SON & their mill, returning the water after that use to the natural
MORLAND. stream, the river Brue. But the plaintiffs are not content
Stirling L.J. with that; they assert that they are entitled to the exclusive
use for the purposes of the mill of the whole flow of water
along this artificial watercourse.

In dealing with this claim we have to inquire, first, on what principle are rights of this kind to be ascertained. The principle has been laid down in various cases, of which I may mention *Wood v. Waud* (1), *Sutcliffe v. Booth* (2), and *Rameshur Pershad Narain Singh v. Koonj Behari Pattuk*. (3) It appears, I think, from those authorities that you must take into account, first, the character of the watercourse, whether it is temporary or permanent; secondly, the circumstances under which it was presumably created; and, thirdly, the mode in which it has been in fact used and enjoyed. This watercourse is obviously of a permanent character, and there is no question that rights and easements may be acquired in it. As to the circumstances under which it was created we know nothing. It has existed for hundreds of years, but we do not know who at the time of its construction were the owners of the properties which now belong to the plaintiffs and the defendants respectively, or indeed anything about the ownership at that time of any part of the land along the watercourse.

The plaintiffs' mode of using the watercourse for the purposes of their mill has been already stated, and their right was put as high as this: it is said that they are entitled to the use of every pailful of water in the stream, the nature of which it is said is such that every pailful is of importance to the owner of the mill. What has been done by the other owners of property abutting on this watercourse? First of all, the owners of the adjoining properties have, it is stated, used the water for the purpose of watering their cattle, and for the

(1) 3 Ex. 748.

(2) 32 L. J. (Q.B.) 136.

(3) 4 App. Cas. 121.

other ordinary purposes for which riparian owners would use a natural stream. Secondly, the defendants, or rather their predecessors in title, were owners of a tannery, on the site of which the defendants' factory now stands, and they used the water for the purposes of their tannery business. Thirdly, the plaintiffs' predecessors in title sold their land, with rights of water, for the erection of a manufactory, and the plaintiffs before they became owners of the mill used and they still use the water for the purposes of their manufactory, and do not now use it exclusively for the purposes of their mill. If the plaintiffs are entitled, as they claim, to the exclusive use of every pailful of water for the purpose of their mill, they are not entitled to use a single pailful for any other purpose. What ought the conclusion to be with regard to these acts of the riparian owners? It seems to me that they ought to be taken *primâ facie* to have been done in the exercise of a legal right rather than as having been done without any legal title. It ought therefore, I think, to be inferred that the owners of the lands abutting on this watercourse reserved to themselves at the time when the watercourse was constructed the right to a reasonable use of the water as it passed their lands, and that the plaintiffs are in like manner entitled to a similar right—a right to the use of the water for all reasonable purposes, and not merely for the purposes of their mill. In substance, over and above the special use of the water for the purposes of the mill, both the plaintiffs and the other adjoining owners are entitled to those rights to which the owners of lands adjoining a natural stream would be entitled *inter se*.

If this then be the nature of the plaintiffs' title, have their rights been infringed? Byrne J. came to the conclusion upon the evidence that they had. He said: "I think that the evidence shews a loss of a substantial and material amount of water, caused by the defendants' operations, which does sometimes interfere with the working of the mill in summer and autumn. It must, of course, be borne in mind that the abstraction and return of water is not a constantly equal operation, and it does not give a fair test of result on the working of the mill to treat the matter as though it were. If

C. A.
1902
BAILY & Co.
v.
CLARK, SON &
MORLAND.
Stirling L.J.

C. A. water is abstracted during working hours, and the effluent
1902 returned at night, for instance, at a time when the stream is
BAILY & Co. very low, this may well have a very appreciable result in the
v. working of the mill, which might not be noticeable if the
CLARK, SON & reverse process were adopted." I have listened with attention
MORLAND. to all those passages in the evidence which were relied upon
Stirling L.J. by the learned counsel for the plaintiffs, and I am unable to
arrive at the same conclusion as did Byrne J. The defendants'
right to use the water is limited by this, that they must not so
use it as to cause sensible injury to the plaintiffs. Therefore
the plaintiffs, coming here to complain of the defendants' user,
must prove sensible injury. Two classes of evidence have
been adduced, as in all cases of nuisance. There is, first,
what has been termed direct evidence of injury; and, secondly,
the evidence of experts and other persons who have not worked
the mill, but have paid visits to it and drawn conclusions from
what they have seen there. In my opinion, the first class is
that which we must regard, at any rate to begin with. I do
not say that expert evidence is to be excluded; it is most
valuable and useful, if once you arrive at the conclusion that
the direct evidence establishes the existence of an injury to
the plaintiffs' rights, for the purpose of tracing the origin of
the injury to the defendants' operations. But, if the direct
evidence of injury is unsatisfactory, it requires, to say the
least, very strong expert evidence to prove a case for an
injunction. The case then becomes one of a *quia timet* action
to prevent apprehended injury, and there must be very strong
evidence to induce the Court to interfere.

[His Lordship referred to the direct evidence of injury, and continued :—]

This direct evidence is far from satisfying me that any
sensible injury to the plaintiffs' mill is caused by the defend-
ants' works. If there is any injury, it is to my mind probably
caused by the diversion of a large portion of the stream to the
plaintiffs' other works. In the expert evidence there is, as
usual, great conflict. The defendants' witnesses admit, I
think, an abstraction of 1500 gallons of water a day which the
defendants do not return into the stream. The plaintiffs'
witnesses put the abstraction much higher, and I will assume

that they are right in saying that 8000 gallons a day are taken by the defendants—that is, about one-third of what is taken by the plaintiffs for their works. The minimum flow of the stream is 3,000,000 gallons a day, so that the defendants take about one-fourth per cent. of the stream. That abstraction is not, as it seems to me, sufficient to establish a case entitling the plaintiffs to an injunction in a quia timet action. Byrne J. in his judgment suggests that something may be due to the irregularity with which the water is abstracted and sent down. I am not prepared to say that to take a large quantity of water out of the river at one time and to send it down at another time might not be such an interference with the regular flow of the stream as to cause sensible injury to the plaintiffs, but I have not been able to find any evidence of it in the present case. It is a mere suggestion of the experts, who say that they found a large quantity of water is pounded up, and that this may cause injury to the flow. In my opinion, it is not proved that the defendants have caused any sensible injury to the plaintiffs such as to call for the interference of the Court.

One other matter I desire to mention. It was said by the plaintiffs' counsel that a right is claimed, and that it was not necessary for them to prove any damage. I agree that if they were asserting a title to do a particular thing it would not be necessary for them to prove damage. The defendants by their defence assert specific rights by prescription, but these have not been insisted upon at the bar. The defendants also claim a right to use the stream reasonably, and assert that their acts have been consistent with the reasonable user of the stream. I think when we are varying the judgment of Byrne J. our order should negative any right on the part of the defendants by prescription or otherwise beyond this, that the defendants are entitled to use the water in this watercourse in a reasonable way, not causing any sensible injury to the plaintiffs.

COZENS-HARDY L.J. I entirely agree, and it is only out of respect for the learned judge from whom we are differing that I think it right to add a few words. I feel some doubt whether

C. A.
1902
BAILY & Co.
v.
CLARK, SON &
MORLAND.
Stirling L.J.

C. A. this stream ought not to be regarded as a natural one, having
 1902 regard to its length, to the great and unknown antiquity of its
 BAILY & Co. construction, and to all the other circumstances. But I am
 v. content to treat it as an artificial watercourse. That being so,
 CLARK, SON & MORLAND, it becomes necessary to consider and ascertain, so far as we
 Cozens-Hardy can, what mutual rights have been created in the watercourse,
 L.J. or, in other words, what are the terms of the lost grant which
 from the nature of the case must be presumed to have existed.

The plaintiffs contend that we ought to presume a grant to them of all the water coming over the intake and going thence down to the mill, and that no one else along the course of the stream—considerably more than a mile—has a right to take a pailful of water out of it. That is the construction which I think Byrne J. has adopted. I cannot follow it. It seems to me absolutely inconsistent with all the evidence we have, and with all we know about the origin and user of this artificial cut for many years. On the other hand, the defendants raised a contention which I am equally unable to accept. It was strenuously and ably argued by Mr. Levett that the implied grant to the plaintiffs did not extend to the whole of the water in the artificial channel, but only to so much as was necessary to work the mill. I am quite unable to follow that. It seems to me that the subject-matter of the grant must be all the water which comes into the artificial cut from the intake, and the only difficulty is to ascertain who were the grantees and what were the mutual rights conferred upon the adjacent riparian owners and occupiers.

Now, we know something—not very much, but that something is very interesting—about this watercourse and Beckery Mill. In a matter of this kind we are, of course, entitled to refer to a county history. [His Lordship read the passage above quoted from Collinson's History of Somerset, and continued :—]

From that, I think, it is apparent that this artificial watercourse was used more than 400 years ago, and was probably constructed many hundred years before that. It was certainly used more than 400 years ago, not merely for the purpose of the Beckery Mill—that is, the plaintiffs' mill—but also for the purpose of a fulling-mill on its banks, thus affording a clear

proof of the user of the water of this cut for manufacturing purposes. That is sufficient to negative the foundation of the plaintiffs' argument, namely, that the sole grantee—the only person entitled to the benefit of the lost grant—was the mill-owner. In my judgment the true inference from all the facts is, that the rights of the riparian owners and occupiers must be taken to be the same as they would have been had this been a natural watercourse. I think the evidence shews that the riparian owners and occupiers are entitled to a reasonable use of the water, whether for domestic or for manufacturing purposes. That being so, I entirely agree with my learned brethren that, although there is evidence which would have justified the finding of the learned judge, if we had adopted his view as to the nature of the lost grant, namely, if it had been a grant of all the water in the stream, still I think there is no evidence of the slightest weight to shew that there has been anything more than a reasonable use of the water by the defendants as against the mill-owner and the riparian owner lower down. I am not forgetting the pollution of the water: to that extent the user was not reasonable. What I mean is, that no more than a reasonable quantity of water has been abstracted by the defendants for manufacturing purposes.

For these reasons I think the judgment of the Court below cannot stand, and I entirely adopt the views which have been expressed by my learned brethren.

[The injunction as to pollution was suspended for six months to enable the defendants to complete some alterations which they had commenced for the purpose of preventing pollution of the water.

At the suggestion of the Court the defendants' counsel consented that those words in the order, which allowed them to continue polluting the water to the same extent as it had been polluted by the old tannery, should be omitted.]

Solicitors: *Crowders, Vizard & Oldham, for W. Nixon, Glastonbury; James, Mellor & Co., for Hobbs & Brutton, Portsmouth.*

W. L. C.

C. A.
1902
BAILY & Co.
v.
CLARK, SON &
MORLAND.
Cozens-Hardy
L.J.