Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Corporation of the City of Adelaide v. *Charles White from the Supreme Court of South Australia; delivered March 4th*, 1886.

Present:

THE LORD CHANCELLOR.
LORD BLACKBURN.
LORD MONKSWELL.
LORD HOBHOUSE.
SIR RICHARD COUCH.

THE Plaintiff in this case is a cattle grazier who occupied certain numbered plots of land which he bought of the Government. The plot material to inquire into is No. 194. He complains of the Defendants, the Corporation of the City of Adelaide, on the ground that they erected a dam whereby they at times flooded his land to his damage, and whereby at times they cut off the water from his land, whereby he also suffered damage.

With respect to the first head of complaint the jury have found that he sustained no damage, and that is out of the question.

The question remains whether he has reason to complain as a riparian proprietor of the flow of the water to his land being improperly intercepted. He states his case in this way: that he was entitled to the natural flow of a stream called the River Torrens to and through the said land, No. 194. Then he describes what the Defendants did in the way of erecting dams and so on, and he sets out the damage which he has sustained by the interruption of the flow of water, such as the necessity of digging pits, of

A 21258. 100.—3/86. Wt. 2708. E. & S.

depasturing his cattle on other lands, and so forth, and he prays for damages and an injunction.

The Defendants deny all his allegations, and plead their right to make the dam complained of under certain statutes. They also plead to the whole of the Plaintiff's claim not guilty by statute.

It may be as well at once to dispose of this last plea. It was argued on the part of the Appellant that the learned Judge ought to have directed the jury that the action was not maintainable because it was not brought within three months of the trespasses complained of, and because notice of action had not been given in pursuance of a Colonial statute. But inasmuch as that point does not seem to have been urged in the Court below, it appears to their Lordships too late for the Appellant to be allowed to take it now.

It is unnecessary to go at length into the evidence, but the outline of the case may be thus stated:—The Plaintiff contends that he has been entitled for a long time, ever since the year 1839 at all events, to the flow of a portion of what is called the River Torrens into his land. He admits that in 1839 and for a number of years afterwards the larger channel of the Torrens, at a point beyond his land where it bifurcates, flowed to the northward, that larger channel being described by some of the witnesses as being about twice the size of the channel which flowed to the southward. But he says that he has been and is entitled to so much of the water of the Torrens as flowed into his lot No. 194 through the southern channel. It appears that in 1867 he, or his predecessor, put up certain planks at or near the bifurcation of the river, whereby the flow of water was almost stopped towards the north. But their Lordships

have nothing to do with that, inasmuch as the question before them relates to the state of things before it was done.

It appears to their Lordships, as it did to the Court below, that the evidence very strongly preponderates in favour of the contention of the Plaintiff that a portion of the water of the Torrens flowed into his land in a definite channel which was defined by a survey map made in the year 1837. There is a conflict of evidence as to the constant or intermittent nature of the flow, but their Lordships are of opinion that whether the intermissions be as described by one set of witnesses or the other, the evidence preponderates that he was entitled as a riparian proprietor to the flow of some portion of the stream of the Torrens.

Unfortunately their Lordships have not any authentic record before them of the summing up of the learned Judge, and they can only deal with what appears in this record. It is said :—" His Honour sums up and puts to the jury whether the Torrens in its natural course did flow into section 194"—that is into the Plaintiff's land. The answer is this :—" The jury find that the River Torrens naturally flowed through section 433" —that is another plot of land—" north of Plain-" tiff's land. Their verdict therefore is in favour " of the Defendant."

It appears to their Lordships, as it did to the Court below, that this is an unsatisfactory finding. It is not clear on the face of this finding whether the jury only meant to say that the great bulk of the River Torrens,—what may in a sense be called the River Torrens,—flowed to the north, and that no portion of it flowed to the Plaintiff's land; or whether they in fact had their attention drawn to the question whether any portion of it did or did not flow to the Plaintiff's land.

Their Lordships think that the Chief Justice put the case very clearly in these observations. He says:—"The finding of the jury seems to "have been founded upon some misconception "of the question which they had to try. There "is no doubt that (as they found) the River "Torrens naturally followed through section "433. On that point there was no controversy. "The question was, whether the river also "flowed into section 194; and their minds do not "seem to have been applied to that question, if "their finding is to be read literally. If their "finding means that the Torrens did not flow "into section 194, the evidence is altogether the "other way." Their Lordships concur in that view of the Chief Justice, and the Court, including the learned Judge who tried the case, having been of opinion that the verdict was unsatisfactory, and having directed a new trial, their Lordships are unable to say that the Court was wrong.

Under these circumstances their Lordships will humbly advise Her Majesty that the Judgement appealed against be affirmed and the appeal be dismissed with costs.