

ST. LOUIS SAN-FRANCISCO RAILWAY COMPANY *v.* MANNING.

Opinion delivered April 7, 1930.

1. EVIDENCE—OPINION AS TO DAMAGE.—Opinion testimony respecting the amount of damage to land by overflow waters was competent where the witnesses stated their means and opportunity for knowing the value of the lands.

2. WATERS AND WATER COURSES—LIABILITY FOR CAUSING DAMAGE BY OVERFLOW.—A railroad was liable for damages to another's land caused by cutting through a natural embankment and causing a more harmful overflow than before.
2. WATERS AND WATER COURSES—DIVERSION OF SURFACE WATER—LIABILITY.—Although Crawford & Moses' Dig., § 8480, required a railroad to get rid of the surface water on its right-of-way, this did not relieve the railroad from liability for damage caused by cutting a natural embankment and causing damage to plaintiff's land.
4. APPEAL AND ERROR—VERDICT ON CONFLICTING TESTIMONY.—A verdict on conflicting testimony will not be disturbed on appeal.

Appeal from Lawrence Circuit Court, Western District; *S. M. Bone*, Judge; affirmed.

STATEMENT BY THE COURT.

Mrs. Lillian Manning, appellee, the owner of a farm along the bank of Spring River in Lawrence County, lying between the river and appellant company's right-of-way, brought this suit for damages to her lands alleged to have been caused by appellant's negligently cutting a ditch through a natural embankment protecting her land from overflow on the west side, and allowing the overflow waters of Spring River to run through and over it with a swift current destroying 7 or 8 acres of the land.

The railroad runs east and west at this place, Spring River being south of the railroad track and south of the Manning land flowing in a southeasterly direction, and for some distance north of the railroad a natural ravine collects the water from the hills and carries it under the railroad track into Spring River. In doing some work on track extension and construction of a passing track near Ravenden Springs, the appellant procured dirt from the land of Tom Lawrence, lying west of the Manning tract, with which it widened its dump on which to build the passing track extension. This extension crosses the ravine, and it is claimed by the plaintiff that in constructing the extension the railway company cut a bank of the ravine, which allowed the overflow water from Spring River when it is high to go through and overflow her lands. The Manning lands are from 5 to 20 feet lower

than the railroad track. In 1915 an unprecedented overflow in the river occurred and submerged the railroad tracks and the lands of appellee. In 1927 and 1928 there were excessive overflows in the river, claimed to be unprecedented by appellant company, which also covered the railroad tracks and the lands of appellee.

Appellant denied that it was negligent in any manner in the construction of its passing track, and that it diverted any water from its natural channel, or did any act that injured appellee or damaged her property, and alleged that the overflows causing the damage were caused by the extremely high waters of 1927 and 1928.

The complaint alleged that in the summer of 1926 the railway company carelessly and needlessly excavated along the south side of its right-of-way adjacent to her lands a ditch extending across and through a natural embankment in such a way as to divert the overflow water from Spring River across her lands causing the land to wash and ruining about 7 acres thereof, for which damages were prayed.

The testimony tended to show that the ravine which collected the waters from the hills above the railroad tracks ran along the west boundary of appellee's land, separating it from the Tom Lawrence land, which was lower than appellee's tract although upstream from it. The river touched the Manning land only at the southwest corner and turned back south and southwesterly along another tract of land owned by Luther Ball, separating the Manning tract from the river. The Lawrence field is 7.8 feet lower than the Manning land. The ravine carrying the waters under the railroad track was 10 or 12 feet deep, and the bank or natural embankment ran from the river to the railroad, and continued around past the lower corner of the Manning land, the river bank being higher there also. Before 1926 this natural barrier joined up completely to the railroad dump or embankment. Before the railroad made the improvement and cut the ditch, the overflow water from the river came

out on the lower land of Tom Lawrence on down to the ravine, and, striking the embankment, ran back into the river. Since the improvement was made and the cut or ditch put through the natural barrier, the water comes between the track and the land in question and runs down over the crops. The opening through the barrier was about 20 feet wide and the ditch about 3½ feet deep.

One witness said: "The overflow water at this bank always turned down into the river, but now it comes through the opening and down the track and over the land. Four or five feet of water in overflow comes through there now, when before it would have to be high enough to get over this bank here 8 to 10 feet high." The land had not washed materially before the cut was made.

Others testified that but for the cutting of the embankment appellee's land would not have been overflowed in 1927 and 1928, because the water could not have got over the bank. The embankment which they cut running along the west end was higher than the railroad tracks.

Objection was made and exceptions saved to the giving and refusing of certain instructions, and also of errors committed in the introduction of testimony. This appeal comes from a judgment rendered against appellant company.

*E. T. Miller, E. L. Westbrooke, Jr., and E. L. Westbrooke, for appellant.*

*J. H. Townsend, for appellee.*

KIRBY, J., (after stating the facts). Appellant insists that the court erred in allowing the introduction of testimony of witnesses stating their opinion of the amount of damage to the lands. These witnesses, however, stated their means and opportunity for knowing the value of the lands, and then their opinion of the value, and it was competent for them to do so. *St. L. I. M. & S. R. Co. v. Ayers*, 67 Ark. 31, 55 S. W. 159; *Railway Co. v. Morris*, 35 Ark. 622; *Standard Oil Co. v. Goodwin*, 174 Ark. 603, 299 S. W. 2.

The hypothetical question asked the witnesses was virtually the same as that approved in *St. Louis I. M. & S. Railway Co. v. Magness*, 93 Ark. 46, 123 S. W. 786, and the witnesses answering the question qualified themselves to do so by showing their familiarity with the lands and condition surrounding them before and after the waters of the river were diverted by the cut through the natural barrier allowing them to flow through and over appellee's land.

Appellant insists that it not only had the right to get rid of the surface water on its right-of-way, but was required to do so by statute (§ 8480, C. & M. Digest); that it caused no obstruction of any water course or diversion of any waters from a natural channel, and was not liable for any damages alleged to have been caused by waters flowing across appellee's lands. Although it is true appellant cut through the high bank of the ravine on its own right-of-way, which protected appellee's land on the west, and did not divert the water from any natural channel, nor change or disturb the natural flow of water in Spring River, the testimony tends to show that, before the cutting of the natural barrier protecting the west boundary of appellee's lands from the overflow waters of Spring River, her lands were not subject to overflows that were injurious because of the waters washing or cutting through, the overflows before being only back-water without current—still or dead water, and that her lands were not subject to overflow at all except during the extremely high water. Appellant's testimony on the other hand tended to show that the opening or cut through the natural barrier or embankment on the west of appellee's land could not have had effect to cause any damage to these lands in the years complained of, because it is undisputed that the water during these overflows was higher than the natural embankment and would have flooded in any event the lands north and south of it, the overflow water being high enough to cover the track of appellant which was 5 or 6 feet higher than any part of

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the lands between it and the river. The jury found, however, that the lands of appellee would not have been injured by the current from the overflow but for the opening made in the bank or barrier on the west, and could have found that, because of it, they were now subject to be inundated by overflow from the river across the lower lands upstream at a stage of water from 5 to 6 feet lower than could have reached them before the opening was made. If appellant had diverted the waters of a stream or obstructed and collected surface water and turned it in injurious quantities through appellee's lands, he would have been liable to the payment of the resulting damages, and we can see no difference in principle between this case where its cutting or opening the natural barrier had the effect to release the waters in a swift current overflowing and injuring the lands below, and, the jury having found, under proper instructions and upon conflicting testimony that the lands were damaged thereby, its verdict will not be disturbed, and the judgment is accordingly affirmed.

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