MORROW v. MERRICK.

Opinion delivered March 26, 1923.

1. APPEAL AND ERROR—CONCLUSIVENESS OF CHANCELLOR'S FINDING.—Where evidence is so conflicting that the preponderance can not be determined, the chancellor's findings will be adopted.
2. WATERS AND WATERCOURSES—DIVERSION OF SURFACE WATER.—A landowner may divert the flow of surface water in good faith for reclamation of his land if injury to adjoining land is not intended; and where his land could not be reclaimed by reasonable care and expense otherwise than by means of ditches and levees, he may construct them, provided that by so doing he does not necessarily obstruct the natural flow of surface water to an adjoining property owner's injury.
3. WATERS AND WATERCOURSES—DIVERSION OF SURFACE WATER—INJUNCTION.—Where a person, by ditch, levee or other means, asserts his right continuously to cast surface waters in a body upon the lands of another to the latter's irreparable and permanent injury, the party causing such injury is guilty of a private nuisance which the injured party may abate by injunction.

Appeal from Conway Chancery Court; *W. E. Atkinson,* Chancellor; affirmed.

J. Allen Eades, for appellant.

Appellant had the right to improve his land by cutting off surface waters from it, and he did nothing more. *American Shovel & Tool Co.* v. *Anderson,* 90 Ark. 235; *McCoy* v. *Plum Bayou Levee Dist.,* 95 Ark. 349; *Little Rock & Fort Smith Ry. Co.* v. *Chapman,* 39 Ark. 476; *Baker* v. *Allen,* 66 Ark. 276.

Edward Gordon, for appellees.

Proof shows appellant wrongfully changed the natural flow of the water and caused it to flow over lands of appellees. *Taylor* v. *Rudy,* 99 Ark. 132; *Holtzman* v. *Boiling Spring Bleaching Co.,* 14 N. J. Equity, 335; *Clay* v. *Middleburg Electric Co.,* 11 L. R. A. (N. S.) 693. See *Wellborn* v. *Davies,* 40 Ark. 83.

WOOD, J. This action was brought by the appellees against the appellant. The appellees alleged in their complaint that they are the owners of certain lands which they described; that these lands are situated at the foot

of Pigeon Roost Mountain and north of Point Remove Creek; that there is a branch or ravine into which the waters along the side of the said mountain drain and which flows on to and across the lands of defendant, adjoining plaintiffs'; that defendant is digging a ditch and building a levee at the foot of said hill on his land for the purpose of diverting and changing the natural flow of water and forcing the same to flow on to the lands of plaintiff, which will overflow about fifty acres of plaintiffs' land, to plaintiffs' irreparable injury and damage. The complaint concludes with a prayer for a mandatory injunction requiring the defendant to remove all levees and other obstructions and to fill up such ditches as he had dug to divert the natural flow of the water.

The appellant, in his answer, denied all the material allegations of the complaint, and alleged that he was digging the ditch complained of on his own land for the purpose of straightening the natural flow to where it has a natural outlet under the public road by a large culvert that was put there by the road construction people, and that said watercourse had been there for years, unknown to the defendant. He alleges that he is cutting away from plaintiffs' land a part of the overflow of water that would naturally come through there during high water, and is thus benefiting plaintiff's land, instead of injuring it.

The cause was heard upon the depositions of the witnesses taken at the instance of the respective parties and the exhibits to these depositions, and the court entered a general finding for the appellees, and entered a decree directing the appellant "to clean out the channel of the branch leading from the road culvert at the foot of the hill north of Point Remove Creek on the Hattieville & St. Vincent Road in Road District No. 4, from where same passes under said culvert, beginning at the east side, to where same empties into Point Remove Creek, and to completely fill up the ditch dug by him, within ten days from the rendition of the decree." The court

further decreed that the appellant be "perpetually enjoined from reopening said ditch or filling said branch, or placing any obstruction in said branch which might cause same to refill, or in any way change or divert the natural flow of the water."

It is the contention of the appellees that the appellant has dug a ditch and built a levee on his own land which has the effect of diverting and changing the natural flow of surface waters through a branch or ravine which runs across and through the lands of the appellant, emptying into Point Remove Creek, and forcing them to flow in a body on to the lands of the appellees, to their great and irreparable injury. On the other hand, the appellant, while admitting that he has dug the ditch and built the levee as alleged, nevertheless contends that the ravine or branch, which the appellees claim he has obstructed, was nothing more nor less than the left-hand prong of a wet-weather branch which had only about a quarter of a mile to gather water in, and that this prong really brings water on to the land of the appellant from the appellees' land, and that it meanders over appellant's rich bottom land, about two acres, and that he dug the ditch and built the levee for the purpose of reclaiming his own land from the effect of the surface waters which were gathered up and brought on to his land through this wet-weather branch or ravine; that appellant's purpose was only to control this surface water, and that the building of the ditch and levee only had the effect of turning the water and causing it to flow in a natural channel that went through the appellee's land and emptied into Point Remove Creek; that the ditch and levee thus constructed did not in any manner injure the appellees' land, but, on the contrary, would have the effect of benefiting the same.

The parties litigant introduced testimony to sustain these respective contentions. The testimony is exceedingly voluminous, and it could serve no useful purpose to set forth and discuss in detail the testimony of the wit-

nesses. After a careful reading of the record we have reached the conclusion that this is one of those cases where it is utterly impossible for this court to determine where the preponderance lies. In *Leach* v. *Smith,* 130 Ark 465-470, we said: "When chancery causes reach this court on appeal they are taken up for trial *de novo* on the record made up in the lower court, that is, on the same record, but the law and the facts are examined the same as if there had been no decision at *nisi prius.* In determining the issues of fact by this court in chancery causes, no weight is given to the findings of fact by the trial court, unless the evidence is so conflicting as to leave the minds of this court in doubt as to where the preponderance lies. Where the evidence is evenly poised, or so nearly so that we are unable to determine in whose favor the preponderance lies, then the findings of fact by the chancellor are persuasive. But the issues of fact, as well as law, are tried by this court anew."

We have carefully reviewed the evidence in this record, and it is so conflicting, and, to our minds, so evenly poised that we are unable to say which of the litigants is entitled to the preponderance. We are not convinced that the findings of the trial court are clearly against the weight of the evidence, and therefore must adopt the findings of the chancellor as our own. To be sure, if the appellant had done nothing more than merely divert the flow of surface waters, and was doing so in good faith for reclamation of his own land, and with no purpose of injuring the adjoining lands of the appellees, and if the appellant could not have reclaimed his own land, by reasonable care and expense, otherwise than in digging the ditch and building the levee complained of, then he would have had the right to do so, provided that, by so doing, he did not unnecessarily obstruct the natural flow of the surface water in such manner as to injure the land of the appellees. *Little Rock & Fort Smith Ry. Co.* v. *Chapman,* 39 Ark. 463; *Baker* v. *Allen,* 66 Ark. 271; *Ames Shovel & Tool Co.* v. *Anderson,* 90 Ark. 235;

McCoy v. *Board of Directors of Plum Bayou Levee Dist.*, 95 Ark. 345-349.

The converse of the doctrine above stated is equally true. If the trial court found that the appellant was dealing with the surface water, it must also have found that he unnecessarily diverted its natural flow by digging the ditch and building the levee mentioned, and that by so doing he did the appellees an irreparable injury. We cannot say that such finding of the trial court would be clearly against the preponderance of the evidence, for there was testimony to justify the court in finding that the appellant, instead of handling the surface waters as he was attempting to do, could, at much less expense, and with greater benefit to himself, and without any injury to the appellees, have cleaned out the channel of the branch which he had obstructed and allowed the water to flow through the same and in its natural course and outlet into Point Remove Creek. Furthermore, the court was justified in finding from the evidence that the appellant had gathered up the waters, which, through various small drains or tributaries, made their way into what counsel for appellant called the "left-hand prong of this surface water branch," and by digging the ditch and building the levee had cast these waters in a body into the prong, depression, swale, or slough, that ran into and upon the land of the appellees, where there was no sufficient natural outlet for them, and thereby had caused appellees' land to overflow, and which overflows, in times of high water, would result in practically destroying several acres of valuable land.

The facts, as the court might have found them, bring this phase of the case well within the doctrine of *St. Louis, I. M. Ry Co.* v. *Magness*, 93 Ark. 46-53, where we said: "Even if these waters had been nothing more than surface waters, appellant could not gather them into its ditch and cast them in a body upon the lands of appellees. This was practically the effect of appellant's ditch. For the evidence shows that when the waters of

Thomas Creek were by this means added to the waters that usually passed through other lower natural and artificial drains, these drains were insufficient to carry them off, so they passed on over and overwhelmed appellees' lands."

Where a person, by a ditch or levee, or other means, asserts his right to continuously cast the surface waters in a body upon the lands of another, to the irreparable and permanent injury of the latter, the party causing such injury is guilty of a private nuisance. The party injured may, if he so elects, resort to a court of chancery for a mandatory injunction to abate such nuisance and to have the offending party forever enjoined thereafter from causing and maintaining such nuisance. *Wellborn* v. *Davis,* 40 Ark. 83; *Taylor* v. *Rudy,* 99 Ark. 128; High on Injunctions, secs. 794 *et seq.;* Farnham on Water Courses, 582a.

We find no reversible error in the record, and the decree is therefore affirmed.