DIVISIONAL COURT.

JUNE 17TH, 1912.

HUNTER v. RICHARDS.

3 O. W. N. 1432; O. L. R.

Water and Watercourses—Pollution of Stream—Mill owners—Prescriptive Right—Nuisance—R. S. O. (1897), c. 133, s. 35.

An action by a farmer and mill owner on Constant Creek, Renfrew County, for an injunction restraining defendants, mill owners higher up the stream, from throwing into same sawdust, bark, shingles, edgings, roots, cull shingles, and other mill refuse, thereby causing damage to plaintiffs' mill pond and rendering it impossible for him to operate his mill, and for $300 damages in respect thereof. Defendants set up that in 1854 the lands of both plaintiff and defendants had been owned by the Crown and in that year a grant had been made by the Crown of defendants' lands to defendants' predecessors in title for the express purpose of operating a saw-mill, although this purpose did not appear from the grant itself, but from the correspondence leading up thereto and other collateral documents. They also pleaded that they had, by uninterrupted user as of right, obtained a prescriptive right to pollute the stream in the manner complained of. In reply, plaintiff alleged that the user had not been as of right, defendants having paid to plaintiff, in 1896, $100 for damage done his lands, and thereafter, $10 per annum until 1903. He further set up statute R. S. C. 1906, c. 115, s. 19, forbidding the throwing of sawdust into navigable waters.

DIVISIONAL COURT *held*, that the language of the Crown grant being clear and unambiguous evidence, was not receivable to explain nor add to its meaning.

Wyatt v. *Atty.-Gen.*, [1911] A. C. 489, followed.

That to establish a prescriptive right under statute 10 Edw. VII., c. 34, s. 35, twenty years' uninterrupted user as of right immediately prior to the bringing of the action must be proven and the fact that defendants had made payments to plaintiff in respect of damage done by the alleged user, shewed that the user was not as of right.

Gardner v. *Hodgson*, [1903] A. C. 229, followed.

Review of cases as to doctrine of lost grant.

That there could be no implied grant to do an act contrary to an Act of Parliament nor which would constitute a public nuisance. *Mill* v. *Commissioners of New Forest*, 18 C. B. 60, and *Attorney-General* v. *Harrison*, 12 Grant 466, referred to.

That even if a prescriptive right to pollute the stream slightly, prior to 1896, had been established, it did not justify the greatly enlarged user since that date: *Crossley & Sons* v. *Lightowler*, L. R. 2 Ch. 478, followed.

Appeal dismissed with costs, RIDDELL, J., *dissenting*.

Per RIDDELL, J., *dissentiente*, on the principle that a vendor cannot derogate from his grant, the Crown grant gave the right to the grantee to carry on saw-milling in the ordinary way which, at that date, admittedly embraced throwing sawdust into the stream, and gave him an easement over the other lands of the Crown lower down the stream.

Hall v. *Lund*, 1 H. & C. 676, referred to.

A prescriptive right arose and was perfected before any payment by defendants to plaintiff.

Re Cockburn, 27 O. R. 450, approved.

There was no evidence that the stream in question was navigable and, therefore, the statute forbidding the throwing of sawdust into navigable waters did not apply.