HON. MR. JUSTICE CLUTE says *(Continued)*

(3) The damage or loss must be an injury to lands.

(4) The damage or loss must be occasioned by the construction of the authorized works and not by their user; Cripps on Compensation, 5th ed., p. 136, and see in re Collins and Water Commissioners of Ottawa (1878), 42 U.C.R. 378, 385.

It was held in Hull v. Bergeron (1913), 9 D.L.R. 28 (Que.), that where a statute provides for indemnity to be fixed by arbitration, that does not deprive the injured person of his common law resource, if he has any, and he may therefore sue for damages without any reference to arbitration, and reference was made to what was said by Patterson, J., in Williams v. Raleigh (1892), 21 S.C.R. 103, 131, but apparently it is overlooked that that learned Judge went on to say that, "if the act that injures you can be justified as the exercise of a statutory power, you are driven to seek for compensation in the mode provided by the statute; if, as it sometimes happens, no such provision is made, you are without remedy." Here in subsection (2) of section 225 the word "shall" is used, but subsection (1) gives the right to compensation where property is injuriously affected.

I am of opinion that where, as here, the major part, if not all, of the damage arose from the negligence in the operation of the plant, and it seems impossible to define any particular portion of the injury to the lawful exercise of the powers given, the plaintiff is not precluded on the facts in this case from recovering full compensation in the action which he is compelled to bring in order to seek an adequate remedy.

The fourth heading as quoted above from Cripps "that the damage of loss must be occasioned by the construction of the authorized works and not by their user," may not have full application to the present case under the Municipal Act, but if it has, the damage here was occasioned by the user of the plant and might under that heading not be protected by the statute.

For authorities bearing upon this case see Meredith's Municipal Manual, 24, 25, 353.

As to the weight of evidence in a case of this kind, see Great Central Railway v. Doncaster, Rural District Council, 15 Local Government Reports, 1917, Part 1, page 813. This was a case of sewage refuse. A large number of witnesses for the plaintiff stated that the smells were dangerous to health. An equal number of witnesses for the local authorities swore that the smells were not serious and not detrimental to the public health, and that they had greatly diminished or ceased altogether since the tip had been covered by a layer of earth. Held, that where, as in Bainbridge v. Chertsey Urban District Council, 13 L.G.R. 835, a strong weight of reliable, positive evidence is produced by the plaintiff, such evidence cannot be set aside by reason of mere negative testimony on the part of the defendants. Here the plaintiff's evidence was to my mind overwhelming against the evidence offered by the defence.

In the present case the defence under the statute fails, in my opinion, because (1) the requirements of the statute in regard to by-law and sanction by the Board of Health were not complied with; (2) the damages suffered by the plaintiff were caused by the defendants through their negligence; (3) that while the evidence is conclusive that the plaintiff suffered damages, it is impossible to say if any portion of such damages necessarily resulted from the exercise of such powers.

The appeal should be dismissed with costs.