

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

MOSS, C.J.O., MACLAREN and MAGEE, J.J.A., also concurred.

*Appeal dismissed.*

MACLAREN, J.A., IN CHAMBERS.

OCTOBER 2ND, 1912.

CAIN v. PEARCE CO.

*Appeal—Court of Appeal—Time for—Delay—Excuse—Refusal to Extend—Vested Right in Judgment.*

Motion by the defendants in the above and four other actions to extend the time for appealing to the Court of Appeal from the order of a Divisional Court, 3 O.W.N. 1321.

D. Inglis Grant, for the defendants.

H. E. Rose, K.C., for the plaintiffs.

MACLAREN, J.A.:—The defendants move in five actions (that were tried together) to extend the time for appealing from a judgment of a Divisional Court rendered on the 23rd May last. No notice of appeal was given within the month allowed by the Rules, and it was only on the 6th September that the first step was taken towards launching the present motion, the excuse being the illness of the defendants' solicitor.

The actions were for damages and an injunction on account of the renewal by the defendants of an old dam; the defence, that an easement had been acquired by prescription. It was held that an easement had been acquired, but that the new dam, although no higher than the old one, retained the water and flooded the plaintiffs' lands for a longer time than the old one. Moderate damages were assessed, of which the defendants do not complain, if the plaintiffs are entitled to any damages. No injunction was granted.

The cases have been much litigated. The trial Judge first found that the defence of prescription was made out in part, and ordered a reference to assess the damages beyond the prescription; a Divisional Court sent the cases back to him; he held a further trial, and assessed the damages, which the Divisional Court has upheld.