

THE
ONTARIO WEEKLY REPORTER

VOL. 24

TORONTO, MAY 29, 1913.

NO. 12

HON. MR. JUSTICE HODGINS.

MAY 14TH, 1913.

CARDWELL v. BRECKENBRIDGE.

4 O. W. N. 1295.

Waters and Watercourses—Dam—Easement to Pen Back Water—Flooding of Servient Tenements—Evidence—Necessity of Literally Continuous Adverse User—Extent of Right Acquired—Alleged Raising of Dam—Prolongation of Period of Flooding—Improved Methods of Water Conservation—Damages—Injunction—Costs.

HODGINS, J.A., *held*, that an easement to pen back the water of a stream and to cause flooding to riparian owners can be acquired by user of the stream in this manner continuously or at regularly recurring intervals for a period of 20 years, but that the extent of the right acquired must be measured strictly by the extent of the user.

Review of authorities.

That therefore an easement by mill-owners to pen back and utilize the spring freshets and such summer rains as would be extensive enough to warrant user, did not justify the storing and conservation of such water as was collected to greatly prolong the period of user beyond the termination of the spring freshets, and so extend the period of flooding of the servient tenements.

Action by four plaintiffs for damages for flooding lands and for an injunction, tried at Peterborough non-jury sittings, December 18th, 19th, 20th, and 21st, 1912, and January 20th, 21st, 1913.

The defendant resisted the claim, setting up that by prescription he had obtained the right to flood the lands of the several plaintiffs.

G. H. Watson, K.C., and L. M. Hayes, K.C., for plaintiffs.

I. F. Hellmuth, K.C., and F. D. Kerr, for defendant.

HON. MR. JUSTICE HODGINS:—The defendant's mill dam is built across the river Ouse just north of the travelled road between lots 10 and 11 in the second concession of Asphodel; and the saw mill and grist mill lie between it and