the plaintiff was not entitled to any compensation for what was done by the defendants before the plaintiff became the owner of the land, as it must be presumed that what was done was done with his (plaintiff's vendor's) consent, and that in any case plaintiff could only recover damages for the six months prior to the bringing of the action.

Mr. Strathy, Q.C., for the plaintiff, asked for an injunction against the defendants (that having been prayed for in the statement of claim) to prevent them continuing the flooding, and for an order compelling them to remove the dam.

The jury were directed to assess damages:

1st. For the two and a half years the plaintiff has been in possession as owner, for which they found $50.

2nd. For the six months before the action was brought. For this they found $20.

3rd. The total damage to the plaintiff in case the defendants did not remove the dam. For this they allowed $125, and for this latter sum the verdict was entered.

The defendants now move absolute an order *nisi* to set aside this verdict, and to enter one for the defendants or a non-suit.

The plaintiff also took out an order *nisi* to enter a verdict for the $50, with an injunction and order as prayed for in plaintiff's claim, and both motions were argued together.

Mr. Boulton, Q.C., for defendants:—

When the dam was built the plaintiff was not the owner, nor till two years afterwards. Also that there was no dissent by the other owner, and that the plaintiff bought with the dam on the place, and so has no right now to complain.

The defendants, in erecting this dam, were acting within their powers, and so cannot be treated as trespassers, arbitration under the statute being the proper course in such a case.

Even if this action is maintainable, plaintiff ought not to recover for more damages than have accrued during the six months before the commencement of the action.

He referred to the Consolidated Railway Act, 42 Vict. chap. 9, sec. 9, ss. 38 and 39, and also to the Northern Railway Company Act, 1875, 38 Vict. chap. 65, sec. 28.

By the last mentioned Act this company are empowered to make use for the purposes of its railway of the water of any stream or water-course over or near which its railway passes, doing, however, no unnecessary damage thereto and not impairing the usefulness of such stream or water-course.

Mr. Strathy, in reply, contended that any powers the defendant undertakes to exercise must be only such as the statute confers on them; that the statute cited gave them power to use water, and not to flood land, and therefore, the injury complained of is not one which should be the subject of arbitration. That the plaintiff took this land subject to the right of way only (as he swore at the trial) and that only a right of way was reserved in his deed. He also argued that the words "injury sustained by reason of the railway," in section 27 of the Act (where the six months' limitation is spoken of) refer to what was done under the authority of and in pursuance of the Act (see the closing words of the 1st section), and therefore cannot be held to refer to a case of this sort, where the injury was not so done.

The questions to be considered are, it seems to me, these:—1st. Has plaintiff any right of action at all? 2nd. Was the construction of this dam something which the defendant had the right to do under either of the Acts cited? If not (3rd), is the plaintiff to be restricted to damages for the injury complained of for the six months preceding the action being brought? 4th. Is this a proper case for the order and injunction asked for?

I must say I do not see why the plaintiff has not a right of action, apart, of course, from the question of arbitration, which will be considered presently. It is true that the dam in question was erected before the plaintiff bought the land, but he says he bought subject only to the defendants' right of way, and that that was the only thing reserved in the deed from his grantor. This dam had been erected long after the defendants had bought this right of way, and there is neither evidence nor inference that there had ever been any compensation to plaintiff's grantor on account of it. Could his grantor have maintained an action for it? If so, why not he? In the case of *Wallace* v. *Grand Trunk Railway*, 16 U. C. R. 551, the plaintiff's grantor had been paid by the defendant, not only for the land, but for all damage done, and it was said that as his grantor could not have maintained an action for it, so the plaintiff (his vendee) could not.

If then this injury was done by the erection of the dam without the consent of the plaintiff's grantor (for in the absence of some evidence to the contrary this might fairly be assumed, and also that it was done without his knowledge) why should not the defendants pay this plaintiff for it? But apart from that, it was in evidence that the area overflowed before the plaintiff bought, was doubled by the addition (small though it was) made to the height of the dam by the defendants, after the plaintiff bought the land, and that the wash-out