

FEBRUARY 26TH, 1913.

## \*HUNTER v. RICHARDS.

*Water and Watercourses—Saw-mill Owners—Pollution of Stream—Nuisance—Right to Pollute—Implied Grant—Prescription—“Lost Grant”—Evidence—Onus—Estoppel.*

Appeal by the defendants from the order of a Divisional Court, 26 O.L.R. 458, 3 O.W.N. 1432, affirming the judgment of LATCHFORD, J., 26 O.L.R. 458, 2 O.W.N. 855, in favour of the plaintiff, in an action to recover damages for injury done to the plaintiff by the defendants in fouling Constant creek, in the township of Grattan, and obstructing the flow of water to the plaintiff's mill by throwing refuse in the creek, and otherwise injuring the plaintiff

The appeal was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, J.J.A.

W. N. Tilley, for the defendants.

Peter White, K.C., for the plaintiff.

The judgment of the Court was delivered by MEREDITH, J.A. :  
—The judgment pronounced at the trial of this action has been anything but successfully assailed in this Court or in the Divisional Court; it was, as it seems to me, quite right.

It is not open to question that the defendants, through their saw-milling operations, create a nuisance upon the plaintiff's land, and many other lands, as well as in the waters in question, causing very appreciable injury; and a nuisance which becomes more and more objectionable and injurious as the surrounding country becomes more settled, and the lands affected more highly cultivated and more valuable.

The defendants attempt to justify this nuisance and these injuries, in so far as they affect the plaintiff's land, on the ground that they were within their legal rights in all that they have done in the past, as well as in their intention to continue them in the future.

This alleged right is put in three ways: (1) under an implied grant from the plaintiff's predecessors in title; (2) by prescription; and (3) under “a lost grant.” But, in my opinion, they have quite failed to establish in evidence—the onus of

\*To be reported in the Ontario Law Reports.