

they assumed the prosecution of the work and dismissed the contractor. The unchallenged finding is that no damage arose to plaintiff from the main dam, which was sanctioned by the statute (62 Vict. ch. 64, sec. 2); that the damage was caused by another and temporary dam, which was not a part of the power works, was not authorized by the statute, was put up for the mere convenience of the contractor, for purposes of navigation and transportation so as to provide more commodious carriage for the material used in the main dam, which was lower down the river. That which is challenged is his finding that defendants have so maintained this temporary dam as to be liable for the damage it caused in 1902. Their contention is, that they did not direct or approve of the erection of this temporary dam, they did not take it over as part of the works, nor did they maintain it in any sense as against plaintiff. On 24th March, 1902, defendants gave notice dismissing Patriarche, the contractor, and thereupon the town took possession of the power works.

The first complaint made (in evidence) was in May or June, 1902, when Mr. Doolittle, a witness, asked Dilworth, another witness, to go with him to the council to see if that body would take away the temporary dam. The precise date is not given, and I take it that as to details the memory of the spokesman, Doolittle, is more accurate than that of his companion. The upshot of the interview was, that the members took the stand which defendants have always maintained: viz., that the temporary dam was not part of the works; it was not authorized nor sanctioned by the town; that the contractor put it up for his own convenience and was answerable for any damage it occasioned, and was alone responsible for its removal. They emphatically declared that they had nothing to do with it, and refused to take it down or to pay damages to the applicant.

The point held of importance by the Judge in this interview was thus stated by Doolittle: "I said to him" (Tudhope, the mayor), "Well, if you do not take out the dam, I will go down with a gang of men and pull it out" . . . and Mr. Tudhope said, if I went down and pulled out the temporary dam, and it caused any damage to the main dam, they would hold me responsible."

The plaintiff was not then present; it is not shewn that Doolittle was then representing him or that what occurred was then communicated to him; and it is not proved that this was really the action of the council which would bind the municipality. But, assuming all these things as made out,