

I. F. Hellmuth, K.C., and C. H. Ivey, London, for plaintiff.

The judgment of the Court (MOSS, C.J.O., MACLENNAN, GARROW, and MACLAREN, JJ.A.), was delivered by

MACLAREN, J.A.—This action was brought by the proprietor of a mill on the river Thames, in the city of London, against the water commissioners of that city, for damage caused to his water power by defendants' dam at Springbank, some four miles lower down the river, and for an injunction. Defendants were incorporated by the Ontario statute 36 Vict. ch. 102, for the purpose of supplying water to the inhabitants of London, and in 1879 built the dam in question, and also acquired another mill privilege between that and plaintiff's for the purpose of furnishing power to pump to the city the water for its use, which was obtained from another source.

Defendants denied the injury to plaintiff and claimed that they were authorized to do what they had done by the Act of 1873; that a month's written notice of the action should have been given; that the action was barred by the lapse of more than a year under sec. 31 of the above Act; that plaintiff by laches, acquiescence, and delay had disentitled himself to relief; and that defendants, by themselves and their predecessors in title, had acquired a prescriptive right to dam up the stream as they had done.

The action was by consent referred to Messrs. Wisner and Kennedy, two hydraulic engineers, to examine and report whether the water was prevented from flowing from plaintiff's tail-race and lands by defendants' dam and flashboards, and if so to what extent. After they had made their report the case came on for trial before Falconbridge, C.J., without a jury. . . . Upon the report and evidence he held that plaintiff was entitled to an injunction, and ordered a reference to determine what damages he had suffered during the six years preceding the institution of the action.

By sec. 5 of the Act of 1873 the commissioners were authorized to enter upon any lands in the city of London or within fifteen miles of the city and to survey, set out, and ascertain such parts thereof as they might require for the purposes of the water works; and also to divert and appropriate any river, pond, spring, or stream of water therein, and to contract with the owner or occupier of such lands for the purchase thereof or of any part thereof, or of any privilege that might be required for the purposes of the commissioners, and in case of disagreement the matter was to be determined by arbitration.