

SHAW V. NORTHERN AND NORTHWESTERN RAILWAY CO.

REPORTS.

ONTARIO.

IN THE COURT OF APPEAL.

APPEAL FROM THE COUNTY COURT OF THE
COUNTY OF SIMCOE.

Reported for the CANADA LAW JOURNAL.]

SHAW V. NORTHERN AND NORTHWESTERN
RAILWAY COMPANY.*Action against railway company.—Right to flood
land to obtain water for engines.—Damages.—In-
junction.*

The defendants' road crossed a stream on plaintiff's land which they dammed back to get head enough to work a turbine wheel to pump the water into a tank for supplying their engines. This caused an overflow on plaintiff's land for which he brought this action. The jury having assessed damages, a verdict was entered for the plaintiff. Against this defendants moved, contending, amongst other things, that under the statutes cited they had the right to take the water in the way they did; and that in any case, plaintiff's remedy was by arbitration.

Held, that though defendants might have the right to use the water of the stream, they could not dam it back (and so flood the plaintiff's land), so as to work their turbine wheel, when they could get a sufficient supply by using a pump worked by steam or by hand, the using of which would not overflow plaintiff's land.

Held, also, that plaintiff's remedy was by action, and not arbitration, and that he was entitled to an order for the removal of the dam, and an injunction against its being built.

The facts of the case sufficiently appear in the judgment of the court below by

ARDAGH, Co. J.—This is an action of trespass for flooding the plaintiff's land, and was tried by a jury at the June sittings of this court.

The evidence showed that the plaintiff, in February, 1884, purchased the land in question subject to the right of way previously acquired by the defendants from a prior owner. At the time of the purchase by plaintiff the defendants had constructed and were using their line of railway, trains running regularly over it. They had also, in 1881 or 1882 (some years after the railway was constructed), built a dam on a small stream which ran through plaintiff's lot—that mentioned in the pleadings—for the purpose of gaining a supply of water for

the use of their engines. This dam was partly on plaintiff's land—more than half of it, he said in his evidence (though defendants' engineer said it was all on their road),—and is about four feet high. A year or two ago the defendants raised this dam by laying down a 2-inch plank. The effect of this was to raise the water still higher on plaintiff's lot, and to double the area of overflowed land. This overflowed land lay to the north of the defendants' road, and is nearly an acre in extent. Most of this acre is overflowed, and all of it rendered useless by the water being backed. The plaintiff also complained that the defendants had cut a sort of tail race alongside of the stream on the south side of the railway, 120 feet long and 12 or 14 feet wide, and 3½ or 4 feet deep in some places, for the purpose of carrying off the waste water, and this made it very dangerous for his cattle, as likely to fall in. The object of making the dam was to get enough water to run a turbine wheel, which pumped the water up into a large tank, thus doing away with the necessity of using steam or hand-power for that purpose.

Plaintiff also complained of a small portion of land on the opposite side of the stream having been washed out by this dam breaking away. The area of this is small, but the tail-race and the land between it and the stream (rendered useless) is about one-quarter of an acre.

Previous to action brought the defendants had offered plaintiff \$100 for the land flooded, said by them to be about one-half an acre.

The evidence of the value of the land, and of the damage done by the defendants was sufficient to support the verdict for the plaintiff, which is not complained of on that ground.

For the defence, Mr. Holgate, defendants' chief engineer, was called. He stated when and how this dam came to be constructed by defendants. He said that it was necessary to work a turbine wheel to pump the water, and that no unnecessary damage was done in carrying this out. That a tank was placed at this particular point (Hawkestone Station) on account of the facilities of the water. If this stream had not been there they would have put a tank at Oro Station, about half way between the Allandale and Orillia tanks. He also said that they had tanks in other places where there were no streams.

Mr. Reeve, Q. C., for the defendants, objected to the case going to the jury on the ground that no action would lie against the company, as the act complained of was not a wrongful act, having been done by them under the powers conferred by the statute, so that the plaintiff's remedy was only by arbitration. He also objected on the ground that