[Before the Hon. ARCHIBALD McLEAN, Ex-Chief Justice, President;* the Hon. W. H. DRAPER, C. B., Chief Justice of Upper Canada; the Hon. P. M. VANKOUGHNET, Chancellor; the Hon. W. B. RICHARDS, Chief Justice of the Court of Common Pleas; the Hon. Vice-Chancellor ESTEN; the Hon. Mr. Justice HAGARTY; and the Hon. Mr. Justice ADAM WILSON.]

(ON APPEAL FROM THE COURT OF COMMON PLEAS)

SAMUEL DICKSON, APPELLANT, AND JOHN H. AUSTIN, RESPONDENT.

Lessee of mill—Riparian proprietor—Pleading.

The lessee of a mill, situate near to a river and driven by water drawn in a channel from it, sued for damages sustained by him by reason of the obstruction of the flow of the stream, caused by the defendant throwing slabs and other waste stuff into the stream, and thereby obstructing the flow of water into the channel aforesaid. The lessor of the plaintiff was the owner of the land adjoining the stream, and also of the land surrounding the pond used for the working of the mill.

Held, affirming the judgment of the court below, that the lessee had a right to maintain such action; and that the declaration stating the plaintiff to be possessed of land and premises *near to* the river, and as such entitled to the use of the stream for the working of his mill, was sufficient.

This was an appeal from a judgment of the Court of Common Pleas, refusing a nonsuit in a cause pending in that court, wherein the respondent was plaintiff and the appellant was defendant. The case is reported in the eleventh volume of the Reports of that court, where the pleadings and evidence are so fully set forth as to render any statement of them here unnecessary.

From that judgment the defendant in the action appealed, on the following among other grounds:

1. That it was not proven at the trial that the plaintiff was possessed of lands and premises adjacent and near to the river Otonabee, which gave him the right to have and enjoy the benefit of the waters of that river for the purpose of working his mills being upon the said lands and premises.

2. That it was not proven at the trial that the plaintiff was possessed of lands and premises adjacent and near to the river Otonabee, which entitled him to the use and flow of the stream, for the benefit and enjoyment of the said lands with the appurtenances.

3. That the title which the plaintiff proved he had under the lease from Robert D. Rogers to the plaintiff and Jacob Vanalstine, and under the memorandum of agreement made between the plaintiff and Vanalstine, was not such a title as entitled the plaintiff to a verdict on the issues raised by the defendant in his second and third pleas; and the right of the plaintiff under such lease and agreement being but a limited right, and for a limited period, and being but a lease only, it was necessary for him, if he claimed to recover in respect thereof, to set the same forth, and how conferred, and he had no right to avail himself of the title and right of said Rogers as a riparian proprietor, to entitle him to recover under the allegations in the declaration and the issues raised thereon.

4. That the evidence at the trial was such as entitled the appellant to have had his rule *nisi* to enter a nonsuit made absolute.

The plaintiff contended that the judgment was correct, and ought to be affirmed for the reasons following:

1. Because the respondent, by virtue of the lease from Robert D. Rogers to him and one Jacob Vanalstine, and the assignment from Vanalstine to the respondent, became entitled to all the rights and privileges of the said Robert D. Rogers as a riparian proprietor in the use and enjoyment of the waters of the river Otonabee, for the purpose of working the mills demised to the respondent.

2. Because, by virtue of the possessory right acquired under the said lease from the said Rogers, the respondent became entitled to the enjoyment of the waters aforesaid; and it is in respect of such possessory right that the allegations of the declaration in that behalf are to be understood.

3. Because, whenever a possessory right is prejudiced or affected, it is unnecessary, so far at least as a wrong-doer is concerned, to set forth the manner in which the same is derived with any particularity, and any general allegation and proof of possession is sufficient to sustain the action.

4. Because the duration or limitation of the defendant's right of possession is only an element in the computation of damages, and cannot affect his right of action.

5. Because, during the existence of the lease to the respondent, the said Robert D. Rogers could not have maintained any action against the now appellant, save in respect of his reversionary interest, and the right, therefore, to sue for the intervening injury to the possession must be in his lessee, the now respondent.

6 Because the injury complained of is in violation of the provisions of the Consolidated Statutes of Upper Canada, chapter 47 (page 454), section 284.

Read, Q. C., for the appellant, referred to *Austin* v. *Snider*, 21 U. C. Q. B. 290. It is shown that Rogers, when erecting his mill, constructed the dam in such a manner that the slabs were prevented from floating down the stream, which they would have certainly done if left to the natural influence of the water.

The mill of the respondent is built at such a distance from the river, that it cannot be said that this is a reasonable use of the water. *Shears* v. *Wood*, 7 J. B. Moore, 345; *Moore* v. *The Earl of Plymouth*, 3 B. & Ad. 66; and *Bird* v. *Randall*, 3 Burr. 1345, show that a party having once received compensation for a wrong complained of, is precluded from seeking damages at the hands of another.

In this case, Austin must be looked upon as the author of his own mischief, as by the improper mode of constructing the pond and raceway adopted by him, the slabs and refuse are drawn into them.

He also contended that Austin, under the averments in his declaration, was bound to show that he was a riparian proprietor, which he failed to do, the fact being that land intervenes between him and the bank of the stream. *Fentiman* v. *Smith*, 4 East, 107.

Austin, in his declaration, alleges his right to the use of the water to be by virtue of his possession. The fact, as proved, is, that he claims by virtue of the grant. Claiming under a lease, he ought to have set it out, and not asserted a claim as proprietor. The right to the water in this case is personal, not appurtenant to the mill. An assignment of the mill would not carry as appurtenant a right to the water. In *Northam* v. *Harley*, 1 Ell. & B. 665, cited in the court below, the right was appurtenant, which is sufficient for the explanation of that case. In such a case, where all claim under the same deed, it is sufficient to allege title by possession as against such parties. *Embrey* v. *Owen*, 6 Exch. 353

A. Crooks, Q. C., for the respondent.

If the argument of the other side be acquiesced in, it would show that Rogers never had any right to construct the pond and raceway; but the law would appear to be different as enunciated by Lord Kingsdown in *Miner* v. *Gilmour*, 12 Moo. P. C. 131. Rogers, if in possession of and working this mill, could certainly have maintained this action, and so also can his lessee. Addison on Torts, pp. 10, 63 & 64; *Eddingfield* v. *Onslow*, 3 Lev. 209.

Here Austin stands in the place of Rogers, and can declare in the same form, *Tucker* v. *Paren*, 7 U. C. C. P. 269; *Laing* v. *Whaley*, 3 Hurl. & Nor. 675.

Even admitting that a natural right exists of throwing slabs, &c., into a stream, so as to injure a party making a reasonable use of the water, which will scarcely be contended for, the Legislature has excluded all considerations of that sort by prohibiting the very act which is here complained of.

Counsel also relied on the cases cited in the court below, and Con. Stat. U. C. cap. 48, secs. 3 & 13.

The judgment of the court was delivered by

ESTEN, V. C.—The evidence has not been given to us in this case; but the facts appear to be, that one Rogers owned the land forming the pond and around it, and through which the raceway was constructed, and on both sides of the river at this place, and the land and mills in question, and demised such land and mills, with the right of using a certain quantity of water, to the plaintiff and one Vanalstine, for the term of ten years; and that Vanalstine transferred all his interest in the lease to the plaintiff, that at this time a dam and pond and raceway existed, which conducted the water of the river to these and other mills, which dam, pond and raceway had existed for more than eight years; and that the owners of mills higher up the river, and amongst them the defendant, had been for many years in the habit of throwing slabs and

* Was absent when judgment was pronounced.