

An appeal by the defendant from a judgment of HON. MR. JUSTICE LATCHFORD, 18 O. W. R. 813; 2 O. W. N. 855.

The appeal to Divisional Court was heard by HON. SIR WM. MULOCK, C.J.Ex.D., HON. MR. JUSTICE CLUTE, and HON. MR. JUSTICE RIDDELL.

W. N. Tilley, for the defendants, appellants.

P. White, K.C., for the plaintiff, respondent.

HON. MR. JUSTICE CLUTE:—The plaintiff is the owner of lot 10 in the first concession of Grattan through which flows Constant creek, and has had for a period of years a dam and water power on said creek, where the same crossed his said lot, from which he derives power to operate a chopping mill. The defendants own lot No. 9, in the second concession of Grattan, through which also flows Constant creek, where the same crosses their said lot, and thereby they operate a saw-mill on the said lot. The lands and mill of the defendants are higher up on the creek than the lands and mill of the plaintiff. The plaintiff claims to have the stream flow to and through his lands without obstruction or hindrance and without the same being polluted.

He charges that the defendants at various times during the years 1905 to 1909 inclusive polluted the stream by throwing into the same sawdust and other mill refuse, thereby causing damage to the mill pond and water power, preventing his running his mill and causing damage to his lands; that the matters complained of are contrary to the provisions of R. S. O. 1897, ch. 142; and that the defendants by their dam penned back the waters of the creek and prevented the free and uninterrupted flow thereof to the plaintiff's mill, whereby he was at various times unable to operate the same. The plaintiff claims damages and an injunction restraining the defendants from polluting this stream and penning back the waters thereof, and asks for a declaration of plaintiff's rights to the waters of the said stream.

The defendants deny the plaintiff's right and deny his possession and occupation of the land and of the flow of the said stream as alleged in the statement of claim. The defendants further set up that in the year 1854 the lands now claimed by the plaintiff and owned by the defendants were vested in the Crown and the Crown granted to the defendants' predecessor in title lots 7, 8, and 9 in the second con-