

In the circumstances shewn, the plaintiff had acquired no prescriptive right at common law: *Burrowes v. Cairns* (1846), 2 U.C.R. 288; *Grand Hotel Co. v. Cross* (1879), 44 U.C.R. 153.

The plaintiff could not substantiate a claim under the prescription provisions of the Limitations Act, R.S.O. 1914 ch. 75, because the easement had not been actually enjoyed by him since 1898. *Lancaster v. Eve* (1859), 5 C.B.N.S. 717, considered and distinguished.

The plaintiff's case must therefore rest upon a lost grant.

The first inquiry was, whether the plaintiff had in 1898 acquired a prescriptive right by way of lost grant. Reference to *Philipps v. Halliday*, [1891] A.C. 228, and other cases. There was from 1845 until 1898 an open enjoyment of the easement by the plaintiff and his predecessors as of right unexplained, and consequently the presumption of a lost grant arose without further evidence, unless the contention of the defendants that the easement could not have had a legal origin was entitled to prevail.

There is not now and never was power either in the municipal corporation or the Crown to grant to the plaintiff or his predecessors the right to carry water for power purposes across a highway by means of an artificial raceway: *Regina v. Hunt* (1865), 16 U.C.C.P. 145; *Attorney-General v. Harrison* (1866), 12 Gr. 466. But no evidence was adduced to shew when Pine street became a highway, and it was entirely consistent with all the evidence that the plaintiff's predecessors originally owned the lands now known as Pine street, and that the street was dedicated by them as a highway, reserving this easement. Every presumption should be made in favour of the legal origin of the plaintiff's enjoyment of this right.

It was contended that the plaintiff's property, not having been used for milling purposes since 1898, had become valueless for such use, and that the easement had also ceased; citing *Burrows v. Lang*, [1901] 2 Ch. 502, 507; *Baily & Co. v. Clark Son & Morland*, [1902] 1 Ch. 649, 668. But here the watercourse was of a permanent, not a temporary, character. The source of supply, the Humber river, is permanent, and the raceway was shewn to have been used for three different mills; the cessation of use of the whole three does not carry with it the result of a cessation of the easement. The site is still valuable as a mill privilege, and possesses practical commercial value at the present time. Therefore, prescriptive rights may be acquired in it and may be retained notwithstanding the fact that the plaintiff is not at the present