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No. 70

4th Session, 6th Parliament, 24 Victoria, 1861.

BILL.

An Act for the improvement of Water-Courses in Upper Canada.

Received and read, first time, Thursday 4th
April, 1861.

Second reading, Monday, 8th April, 1861.

Honorable Mr. MOWAT.

QUEBEC:

PRINTED BY THOMPSON, HUNTER & CO.
ST. URSULE STRET.

An Act respecting the improvement of Water-courses, in Upper Canada.

WHEREAS to prevent harassing litigation, and encourage the improvement of non-navigable streams, it is expedient to make the provisions hereinafter contained; Therefore Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

Preamble.

I. Every owner of land having therein an estate in fee simple in possession, or any one by his authority, may improve any water-course bordering upon and running along, or passing through or across such land, and may turn the same to account by the construction of mills, manufactories, and machinery of any description,—and may, for any such purpose, erect and maintain, in and about such water course, all the works necessary for efficient working, such as floodgates, canals, embankments, dams, dykes, and the like; but this right is subject to the conditions and regulations hereinafter contained.

Owners of land may turn to account water courses on or adjoining such lands.

CONDITIONS AND REGULATIONS.

II. No such works shall be erected or maintained to the injury of any mill lawfully existing either above or below them on the same stream, unless by agreement or otherwise independently of this Act the same might be so erected and maintained; nor (except in that case) shall any such works be erected or maintained, to the injury of any mill site on the same stream on which a mill or mill dam had theretofore been erected and used, unless the right to maintain a mill or such site had been lost; nor to the injury of any rail-road or public highway, or of the mansion house of any one, or the outhouses, yard, garden, or orchards belonging thereto.

Not to injure other mills, etc.

III. The height to which the water may be raised by a mill dam under the authority of this Act, and the time in every year that the dam may be kept up under the foregoing provisions, shall be subject to restriction by the verdict of a Jury, or the decision of a Court, as hereinafter provided.

Height of dam and how regulated.

IV. This Act does not authorize the diverting of the water from any stream unless the same is again returned to its natural channel.

Water to be returned to natural channel.

V. This Act shall not prevent any person whose property is injuriously affected, or is likely to be injuriously affected, by any such works, from obtaining an injunction to restrain the same, if the Court to which the application is made does not deem it just under all the circumstances of the particular case, to suffer the works to be erected or maintained: Or the Court may require any sum of money to be first paid, or any security to be first given, either for damages past or future, or both, or as the price of the property injured or likely to be injured by the proposed

Injunction may be obtained against any injurious work.

Or Court may assign conditions.

works; or may impose such other terms and conditions, and give such other directions as the justice of the case seems to require.

COMPENSATION.

Compensation for damages occasioned by any work. VI. Any person who sustains damage in consequence of land in which he has some estate or interest, being overflowed or otherwise injured by any such works, shall be entitled to compensation for such damage, and shall also be entitled to elect in regard to compensation for such damage, whether to have an annual compensation therefor, or a gross sum in lieu of all future damages during the continuance of his then estate or interest in the land. 5

Benefit as well as injury to be taken into consideration. VII. Such compensation shall be ascertained by taking into account on the one hand, not only any damage occasioned by the works to the land overflowed, but also to any other land of the party, and likewise on the other hand any benefit occasioned to him by the works in relation to his lands. 10

Limitation of past damages. VIII. But he shall have no compensation for any damage sustained more than three years before the institution of the suit therefor. 15

COMPENSATION HOW ASCERTAINED AND ENFORCED.

Agreement, etc. IX. The amount of compensation may be determined by agreement, or by arbitration or by suit.

Special verdict if action is brought for compensation. X. When a person is entitled to compensation under this Act, and the amount thereof has not been already ascertained by agreement, arbitration or suit, and a suit at law is therefore brought to ascertain and recover the same,—or when a suit is brought for an increase or a diminution of the annual compensation, if already ascertained, subject to such increase or diminution under this Act—either party, by his pleadings, or in such other manner as the Court in which the suit is brought may by general or other rules or orders, direct—may to prevent multiplicity of suits, call for, and shall be entitled to, a verdict embracing the following particulars or any of them: 20 25

What it must show.

Past damages. 1. What sum is due to the plaintiff, in respect of past damages for a period not exceeding three years before the institution of the suit: 30

Yearly sum for future damages. 2. What annual sum (if any) would be a reasonable annual compensation for the damages which may thereafter be occasioned to the plaintiff in respect to his land, by the works, if used as theretofore, or if used in such modified manner as directed by the verdict under the authority of the third section of this Act, and so long as the same are so used: 35

Gross sum for all future damages. 3. What sum in gross would be a reasonable compensation for all the damages which may thereafter be occasioned to the land by the works (if used in a manner conformable to the verdict) for ever, or for such period as the plaintiff's estate in the land continues: 40

If a gross sum was ascertained in a previous suit. But if a gross sum for future damages, was ascertained in a former suit under this Act, within ten years before the commencement of the pending suit, the sum so ascertained shall not be open to re-investigation in the new suit, unless the interest which the party to receive the

said sum then had in the land, was less than a fee, and his interest or that of the party representing his interest in the new suit, had diminished by the lapse of time, or had increased by the intermediate acquisition of some further estate in the land, and the sum formerly ascertained requires from such causes to be increased or diminished:

- 5 4. In case the suit is for damages by a mill dam and the declaration or Bill alleges that the dam is raised to an unreasonable height, the verdict shall also state how much (if any) the dam should be lowered: If the dam is to be lowered.
- 10 5. And in case the declaration or bill alleges that the dam ought not to be kept up and closed during the whole year, the verdict shall state whether it shall be left open any part of the year, and (if any) what part. Or to be opened or removed at certain Seasons.
- 15 XI. In case the verdict is moved against, and the Court is of opinion that sufficient ground of objection to the finding is shown in regard to one or some only of the particulars embraced therein, the new trial or reference may be granted as to such particulars only. If a new trial is ordered.
- XII. The judgment entered upon the verdict in regard to all the matters embraced therein shall bind not only the parties to the suit, but also all persons claiming through or under them after the institution of the suit, and shall be enforced by such process as may be necessary. Who shall be bound by the judgment.
- 20 XIII. In case the annual compensation is in arrear for one month, the party to pay shall thenceforward lose all benefit of this Act until all arrears and costs are paid. Non-payment of arrears—effect of.
- 25 XIV. The amount of the annual compensation shall be subject to subsequent increase or decrease by agreement of the parties, or by arbitration, or by a new suit, and the new suit for this purpose may be brought by the party who is for the time being to receive or pay the annual compensation, and shall be subject to the following conditions: Increase or decrease of annual compensation.
- 30 1. Such suit shall not be brought until the expiration of at least a month after the last annual payment of such compensation became due: Conditions.
2. Nor until after one month's notice to the opposite party, of the intention to sue and of the object of the suit:
3. And the party to pay shall not be at liberty to give the notice until he has paid or tendered all arrears.
- 35 XV. As to the alternative in respect to future damages, the party entitled thereto shall have one month after the time when either party is entitled to enter up judgment, within which month to elect whether he will take the sum in gross awarded in that behalf, or the annual compensation awarded by the verdict in the pending suit: and in case he elects to take the gross sum, he shall enter up judgment therefor forthwith, and shall before or after entering up judgment but within the one month, give written notice of his election to the opposite party, or his attorney or agent in the suit; but without leave of the Court granted on special grounds, execution shall not issue for such sum until the expiration of six months after service of the notice. Provision as to the alternative as regards future damages.
- 40 If gross sum is taken.
- 45

Non-payment to forfeit the benefit of Act.

XVI. In such case, from the time execution is issued for such gross sum until the amount thereof with interest and costs of suit is paid, or secured to the plaintiff's satisfaction, the defendant shall lose all benefit of this Act.

If the Plaintiff does not elect within a month:—execution for annual sum.

XVII. In case the plaintiff does not elect within the month, he shall be deemed to have elected to accept the annual compensation; and judgment shall be entered accordingly, and execution may from time to time issue by leave of the Court for the annual sum, if default is made in paying the same.

Or Plaintiff may sue in Division Court, if the amount is within its jurisdiction.

XVIII. Or if the amount unpaid in respect thereof at any time does not exceed the amount for which the Division Court has jurisdiction to entertain suits in other cases, the plaintiff, (if he chooses) may sue in the Division Court for what is due to him instead of applying to the Superior Court for an execution on his judgment; and if he so sues, an exemplification or a certified copy of the judgment Roll shall entitle him to recover the same amount as he would be entitled to an execution for in the Superior Court.

If annual compensation has been settled without suit.

XIX. Where the annual compensation has been ascertained by agreement or arbitration, instead of the judgment of a Court, and the amount unpaid in respect thereof does not exceed the amount for which the Division Court has jurisdiction in other cases, any suit therefor shall be brought in the Division Court.

Judgment against annual compensation no bar to future damages.

XX. If in a suit in one of the Superior Courts, under this Act, the Court decides that the plaintiff is not entitled to any annual compensation, the judgment shall not be a bar to damages arising after the verdict.

By whom costs under this Act shall be paid.

XXI. As to costs, the party prevailing in any suit under this Act, shall be entitled to his costs, whatever may be the amount found in his favour, in regard to any of the matters in litigation: But in case a suit embraces a demand for past damages, then if a tender of amends was made, before suit, or if money is paid into Court for the same purpose, after suit, such tender or payment shall have the same effect in regard to the costs of so much of the suit as relates to past damages, as a tender or payment into Court has in other cases in which the same is by law allowed.

Certain offers in writing to have the effect of a tender.

XXII. In case one object of the suit is to determine what annual sum, if any, should be paid for future compensation, or for an increase or a decrease of the annual compensation ascertained by a former agreement or judicial determination, then, if a written offer is shown to have been made before suit, of an annual compensation, or of an increased or diminished annual compensation, and if (to enable the other party to exercise the option given to him by this Act) the said offer was accompanied by a written offer of a gross sum for future damages, where a gross sum therefor had not been ascertained by a proceeding under this Act within ten years previously, such offers shall have, as nearly as may be, the same effect in regard to so much of the costs of the suit as relates to the determination of the said particulars, as a tender has in cases in relation to which a tender is by law pleadable.

If any such offer is accepted.

XXIII. In case either offer is accepted, either party may require the other to execute a joint agreement under seal, embodying the effect thereof.

XXIV. In case of a suit being hereafter brought in the Court of Chancery for an Injunction, or for any other equitable relief, between (on the one hand) any of the parties interested in a Mill, Manufactory (or works connected therewith), and (on the other hand) any of those interested in land overflowed or otherwise injured by the works,—and if the plaintiff in such suit establishes his right to the relief in equity which he seeks, the Court may, as incidental to such relief, and to prevent unnecessary litigation and costs, proceed to give the parties or either of them, such other relief as they would be entitled to in a suit under any of the preceding sections of this Act, conforming therein as nearly as may be to the provisions of this Act.

Power of the Court of Chancery to grant other relief, in case of application for an injunction.

PURCHASES FOR MILL PURPOSES.

XXV. In case any owner of land on which at any time there is a water mill, or on which he purposes building a water mill, desires for the purpose of working the mill to erect or maintain a dam across the stream on or abutting on land which is not his, he shall be entitled (subject to the approbation of a court as hereinafter mentioned,) to purchase the land he needs for the purpose, at a fair valuation, subject to the conditions hereinafter provided:

Cases in which the owner of land on one side of a stream may take land on the other to abut a mill dam.

Provided (1) that the land required does not exceed one acre besides what is the bed of the stream;

Extent of land.

And provided (2) that the stream is not navigable;

Stream not to be navigable.

And provided (3) that the proposed dam would not occasion the overflow or injury of,—and that the land to be taken does not comprise—the mansion house of any one, or the outhouses, yard, garden, or orchards belonging thereto, or any railroad or public highway;

Dam not to overflow any house, garden etc.

And provided (4) that the proposed dam would not injure any mill lawfully existing either above or below it on the same stream, or any mill site on the same stream on which a mill or mill dam had theretofore been erected and used, unless the right to maintain a mill on such site had been lost, or unless the owners of such existing mill or of such mill site consent to the proposed purchase;

Not to injure any other mill.

And provided (5) that the health of the neighbors would not be injured by the stagnation of the water or otherwise;

Nor affect health of neighbors.

And provided (6) that the Court to which the application to purchase under this Act is made, deems the application to be on the whole reasonable.

Court must deem application reasonable.

XXVI. In case any owner of land on which there is a water mill, or on which he is about to build a water mill, desires for the purposes of the mill to cut or enlarge a canal through land above or below, he shall be entitled to purchase the land necessary for this object, subject to the like conditions.

Same condition for cutting any canal etc.

XXVII. In any case provided for by either of the two next preceding sections, any of the Superior Courts of law or equity shall have jurisdiction, on the application of the proposed purchaser and notice to all parties concerned, to ascertain by proper proceedings whether the case falls within the said preceding sections; and, if satisfied that it does, the Court may grant or refuse the claim to purchase as under all the

What courts shall have jurisdiction. Powers of court.

circumstances may seem right; and if the Court grants the claim, the grant may be upon such terms and subject to such conditions as the Court considers just.

Conditions on which only possession may be taken.

XXVIII. But the purchaser shall not take possession of the land until he has paid or tendered the amount at which the land has been valued, and complied with all other terms and conditions which the Court may require him to perform before taking possession; and he shall not be entitled to retain the land unless the proposed mill is commenced within a year and is in good condition for use within three years from the time the claim to purchase is allowed by the Court; and the Court shall have power to enforce compliance with any terms and conditions the Court may impose, in like manner, as nearly as may be, as like obligations could be enforced by the Court in any case. 5 01

MISCELLANEOUS PROVISIONS.

Plaintiff in certain cases not entitled to verdict for nominal damages.

XXXI. In case of an action at law being brought against the owner or occupant of a mill for an alleged infringement of the plaintiff's legal rights, in respect to the water of a non-navigable stream used for the purposes of the mill, if it appears that by the acts complained of the Plaintiff did not sustain any actual loss or damage whatever, he shall not be entitled to a verdict for nominal damages, as heretofore, but the verdict shall be for the defendant. 15 20

Certain sections of Common Law Procedure Act to apply.

XXXI. The 333rd, 334th, 338th, 339th and 340th sections of the Common Law procedure Act shall be deemed incorporated with this Act as if the provisions therein contained had been repeated in this Act, and expressly made to apply thereto, so far as relates to proceedings at common law, but it shall not be necessary to lay before Parliament the rules made by the Judges for the purposes of this Act. 25

Act limited to U. C.

XXXII. This Act shall apply to Upper Canada only.