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*Mar. 18-23.
*April 27.

THE WATER COMMISSIONERS OF THE CITY OF LONDON AND THE CORPORATION OF THE CITY OF LONDON (DEFENDANTS)..... } APPELLANTS;

AND

JOSEPH DANBY SAUNBY (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Water commission—Act of Incorporation—Construction—Appropriation of water.

The Act for construction of waterworks in the City of London empowered the commissioners to enter upon any lands in the city or within fifteen miles thereof and set out the portion required for the works, and to divert and appropriate any river, pond, spring or stream therein.

Held, Sedgewick and Killam JJ. dissenting, that the water to be appropriated was not confined to the area of the lands entered upon but the commissioners could appropriate the water of the River Thames by the erection of a dam and setting aside of a reservoir, and that such water could be used to create power for utilization of other waters and was not necessarily to be distributed in the city for drinking and other municipal purposes.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the plaintiff.

The appellants, the Water Commissioners for the City of London, were incorporated by an Act of the Legislature of Ontario (36 Vict., ch. 102), passed on the 29th day of March, 1873. By the said Act, the Corporation of the City of London was empowered, by and through the agency of the Water Commissioners for the City of London, and their successors, to design,

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

construct, build, purchase, improve, hold, and generally maintain, manage and construct waterworks, and all buildings, matters, machinery and appliances therewith connected or necessary thereto, in the City of London, and parts adjacent, as thereinafter provided.

The said commissioners, and their successors, were declared to be a body corporate, under the name of "The Water Commissioners for the City of London," and to have all the powers necessary to enable them to build the waterworks thereinafter mentioned, and to carry out all and every the other powers conferred upon them by the said Act.

It was, by the said Act, declared to be lawful for the said commissioners, their agents, servants and workmen, from time to time, and at such times after the passing of the said Act as they should see fit, and they were thereby authorized and empowered, to enter into and upon the lands of any person or persons, bodies politic or corporate, in the City of London, or within fifteen miles of the said city, and to survey, set out, and ascertain such parts thereof as they might require for the purposes of the said waterworks; and also to divert and appropriate any river, pond of water, spring or stream of water therein as they should judge suitable and proper, and to contract with the owner or occupier of the said lands and those having a right in the said water, for the purchase thereof, or of any part thereof, or of any privilege that night be required for the purposes of the said Water Commissioners; and in case of any disagreement between the said commissioners and the owners or occupiers of such lands, or any person having an interest in the said water, or the natural flow thereof, or of any such privileges as aforesaid, respecting the amount of purchase or value thereof, or as to the damages such appropriations should cause to them, or otherwise, the same should be decided

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by three arbitrators, to be appointed as thereinafter mentioned, namely, the commissioners should appoint one, the owner or owners should appoint another, and such two arbitrators should within ten days after their appointment, appoint a third arbitrator; but in the event of such two arbitrators not appointing a third arbitrator within the time aforesaid, the judge of the county court of the County of Middlesex should, on application by either party, appoint such third arbitrator; in case any such owner or occupier should be an infant, married woman, or insane, or absent from this province, or should refuse to appoint an arbitrator on his behalf, or in case such land or water privileges might be mortgaged or pledged to any person or persons, the judge of the county court of the County of Middlesex, on application being made to him for that purpose by the commissioners, should nominate and appoint three in different persons as arbitrators; the arbitrators to be appointed, as hereinbefore mentioned, should award, determine, adjudge and order the respective sums of money which the said commissioners should pay to the respective persons entitled to receive the same, and the award of the majority of the said arbitrators in writing should be final; and said arbitrators should be, and they were thereby, required to attend at some convenient place at or in the vicinity of the said city to be appointed by the said commissioners, after eight days' notice given for that purpose by the said commissioners, there and then to arbitrate and award, adjudge and determine such matters and things as should be submitted to their consideration by the parties interested and also the costs attending said reference and award; and each arbitrator should be sworn before some one of Her Majesty's Justices of the Peace in and for the said County of Middlesex, or alderman of the said City, well and truly to assess the

value or damages between the parties to the best of his judgment; and, the Justice of the Peace or alderman before whom the said arbitrators, or any of them, should be sworn, should give either of the parties requiring the same, a certificate to that effect: provided always, that any award under this Act should be subject to be set aside on application to the Court of Queen's Bench or Common Pleas, in the same manner and on the same grounds as in ordinary cases of arbitration. in which case a reference might be again made to arbitration, as thereinbefore provided, and that any sum so awarded should be paid within three calendar months from the date of the award, or determination of any motion to annul the same, and in default of such payment the proprietor might resume possession of his property, and all his right should thereupon revive, and the award of the said arbitrators should be binding on all parties concerned, subject as aforesaid.

The 17th Section of the said Act provides that the Commissioners and their officers shall have the like protection in the exercise of their respective offices and the execution of their duties, as Justices of the Peace now have under the laws of this Province.

The 31st section of the said Act provides that if any action or suit be brought against any person or persons for anything done in pursuance of the said Act, the same shall be brought within six calendar months next after the act committed, or in case there shall be a continuation of damages then within one year after the original cause of such action arising.

The appellants, the Water Commissioners for the City of London, erected a dam across the River Thames at a point about four miles below the City of London, and about four miles below the mill of the respondent. The dam was built to pen back, appropriate and ob-

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struct the flow of the said river for the purpose of carrying out the duties of the Water Commissioners and as a part of their system for supplying water to be used by the inhabitants of the said City, as authorized by "The London Waterworks Act, 1873," and the "The London Waterworks Amendment Act, 1878," passed by the Legislature of Ontario in the 41st year of Her late Majesty's Reign, chapter 27. This dam was completed in the early part of the year 1879, and has ever since been maintained and used by the appelants, the Water Commissioners for the City of London, for the uses and purposes aforesaid.

One Burleigh Hunt, was, by an Act of the said Legislature, authorized to erect and maintain a dam across the said River, at a point about half a mile below the said dam of the appellants, The Water Commissioners for the City of London, and over forty years ago a dam was there erected by him under authority of the said Act, and the same has ever since been maintained by him, and his successors in title

At the time of, and at least six years before, the erec- by the appellants of their said dam, there was erected and placed across the said River, at a distance of about two and three-eighths miles from what is known as 'The Forks," at the junction of the two branches of the River Thames, and a point a short distance up stream from the appelants' said dam, another dam known as "Griffith's dam," which was of a height equal to the said dam erected by the appellants, and the said Griffith's dam was, at the time of the erection of the dam now complained of, acquired by the said appellants.

The respondent alleged that he had been damaged by back water at his mill caused by the damming of the River by the said dam and claimed to recover such damages, and to restrain the appellants, by injunc-

tion, from continuing to dam back such water to his injury.

The Commissioners now appeal from the judgment of the Court of Appeal by which the injunction granted at the trial and the reference as to damages were maintained.

Aylesworth K. C. and *Meredith K C.* for the appellants.

Hellmuth K.C. and *Ivey* for the respondents.

The CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Nesbitt.

SEDGEWICK J. (dissenting).—The above defendant corporation were, by 36 Vict. c. 102, created a body corporate for the purpose of erecting and maintaining waterworks to supply the city with water. Section 5 of the Act is as follows:

5. It shall and may be lawful for the said commissioners, their agents, servants and workmen, from time to time, and at such times hereinafter as they shall see fit, and as they are hereby authorized and empowered, to enter into and upon the lands of any person or persons, bodies politic or corporate, in the City of London, or within fifteen miles of the said city, and to survey, set out and ascertain such parts thereof as they may require for the purposes of the said waterworks; and also to divert and appropriate any river, pond of water, spring or stream of water therein as they shall judge suitable and proper, and to contract with the owner or occupier of the said lands, and those having a right in the said water for the purchase thereof, or of any part thereof, or of any privilege that may be required for the purposes of the said Water Commissioners; and in case of any disagreement between the said commissioners and the owners or occupiers of such lands, or any person having an interest in the said water, or the natural flow thereof, or of any such privilege as aforesaid, respecting the amount of purchase or value thereof, or as to the damages such appropriation shall cause them, or otherwise, the same shall be decided by three arbitrators, etc., etc.

The rights of the parties depend to a large extent upon the proper interpretation that is to be given to

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the powers of expropriation in that section contained The injury complained of was an obstruction to the plaintiff's mill and the overflow of his land by reason of the penning back of the water of the River Thames thereon, such penning back having been occasioned by a dam built by the appellants across the River Thames, some miles below the respondent's property. That there was an obstruction to the respondent's property, and more or less substantial injury occasioned thereby was, upon sufficient evidence, found by the trial judge, which finding was confirmed by the Court of Appeal, and should not now, in my opinion, be disturbed.

The dam referred to was not built for the purpose of obtaining a supply of water for the use of the citizens of London, but only for the purpose of creating a water power with which to drive certain machinery necessary for the distribution of water obtained from springs and streams other than the Thames River in the vicinity of the city. The powers of expropriation set out in section 5 are as follows;—

The commissioners are empowered

to enter into and upon the lands of any person * * * and to survey, set out and ascertain such parts thereof as they may require for the purposes of the said waterworks, and also to divert and appropriate any river, pond of water, spring or stream of water therein as they shall judge suitable and proper, and to contract with the owner or occupier of said lands and those having a right in the said water for the purchase thereof or of any part thereof, or of any privilege that may be required for the purposes of said water commissioners.

The only verbs in this quotation which can possibly refer to the case before us are "enter" and "appropriate," and the contention of the appellants is, and always has been, that although they did not either intentionally or otherwise pen back the waters of the river upon the respondent's land, yet if, as a matter of fact, they had done so, then that was an "appro-

priation" by them under the statute, and that therefore the remedy was not by action but by means of the arbitration provided for in the section. I am strongly of the opinion that this occasional and intermittent injury not intended or contemplated by the commissioners when they erected the dam in question, cannot in any sense be considered as an appropriation of the property injured or of any water privilege which the respondent had. The act of appropriation, it seems to me, must be something done in pursuance of a plan formed by the authority appropriating. There must be a mental process resulting in a determination to do a positive act. There must be an exercise of volition and that volition completed by an act of appropriation. In other words, one cannot appropriate a thing involuntarily. Then the word "appropriate" involves in it the idea of the taking away from one his property or his right in property so that he thereafter ceases to have it, and the person so appropriating succeeds him in the exclusive enjoyment of that particular property or right. Expropriating statutes the world over generally make provision for two things, first, the taking of property, and secondly, the injurious affection of property.

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In the present case this ordinary and necessary principle has been most signally departed from. There is no provision authorising the injurious affection of land, a thing which is absolutely necessary in order to make that injurious affection other than tortious, nor is there any provision authorising compensation to be paid to persons whose lands are not appropriated but only injuriously affected.

Another consideration in this connection appears to me to have great force. The section being considered authorises the commissioners to appropriate any river, spring or stream of water and to contract with the

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owner or occupier for the purchase thereof of any part thereof or any privilege that may be required. The contention has been made that the overflowing of the respondent's land and the obstruction to his mill were an appropriation of what is called a water privilege, and a water privilege was stated at the argument to be land covered by flowing water which was physically suitable for the generation, conservation and distribution of motive power. Now, in what sense have the Commissioners in any way appropriated the respondent's water privilege or any part of his water privilege? Appropriation, as I have suggested, means the taking of dominion over, or the conversion to one's own use of the property of another. Have these Commissioners appropriated to their own use, that is to their exclusive use, and become the sole users and possessors of the respondent's water privilege or any part of it? The very question answers itself. This water privilege has never been appropriated nor taken, it has only been obstructed and interfered with. It was exclusively possessed and used by the respondent. The interference with his privilege was not an assumption of ownership, but simply a trespass. For my part, I do not see how the appellants could do what is complained of here without appropriating to themselves the whole of the water privilege or a definite portion of the area over which the water flows. They cannot make themselves co-users with the owners of any privilege or right which they may think it necessary to acquire.

But however this may be, there is, I think, another conclusive reason why this section does not cover a case like the present. If it had been part of the scheme of the commissioners at the inception of their undertaking to use the water of the Thames for culinary and other purposes for which water is usually

supplied to cities, then they might have had power under the general words of the section to first appropriate from the riparian proprietors the stream itself. They had power to take water wherever it might be found within a radius of 15 miles from the city, and to distribute that water as provided for in the Act, but it seems to me that they had no power to dam the river Thames for the mere collateral purpose of obtaining motive power that motive power being, without difficulty, obtainable by means of steam. The Legislature, it seems to me, never contemplated the giving of such authority to the appellants. If they require machinery or power for the purpose of conducting their works and distributing water when collected through pipes throughout the city, they must buy that power in the same way as the rest of His Majesty's subjects.

The case of *Simpson* v. *South Staffordshire Waterworks Co.* (1) is interesting in this connection. There the Lord Chancellor (Lord Westbury) held that a waterworks company authorized to take a field or part thereof for the purpose of making a tunnel, were restrained from taking part of the field for the purpose of making a well and erecting pumping machinery thereon.

See also *Bentinck* v. *Norfolk Estuary Co.* (2) and *Galloway* v. *Mayor of London* (3).

A persual of the judgment of the Judicial Committee of the Privy Council in the *North Shore Ry. Co.* v. *Pion* (4) is most helpful in the consideration of the present case. The questions involved there are substantially the same as here. The Act in this case was apparently somewhat modelled after the Railway Act which was in question in that case, and the prin-

(1) 34 L. J. Ch. 380.
(2) 26 L. J. Ch. 404.
(3) L. R. 1 H. L. 34.
(4) 14 App. Cas. 612.

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ciples there asserted by Lord Selborne are to my mind conclusive here and justify the judgments of the courts below. It is true that in that case damages were allowed to be given as for a permanent injury to the plaintiff's land, but the judgment suggests that had the plaintiff, instead of asking for damages based upon the principle, asked for a demolition of the company's works, or an injunction restraining the railway company from interfering with the plaintiff's access and egress to the river, that also would have been a proper remedy.

As to the contention that notice of action was required pursuant to sec. 17 of the appellant's charter, and to ch. 88 sec. 14 of the Revised Statutes of Ontario, it is sufficient to refer to the judgment of the Court of Appeal delivered by Mr. Justice Maclaren upon that point, in which he cites authorities to shew that the statutory notice is not necessary where an injunction is sought, although damages at the same time be claimed.

The judgment below orders the taking of an account of the damages suffered by the respondent for six years before the commencement of the action. It is not at all clear that this judgment is not right but counsel for the respondent at the argument expressed willingness that the account should be taken for those damages suffered within the six calendar months next previous to the action as the action had been brought not so much for the purpose of obtaining compensation for the injuries complained of as to prevent the usurpation of the appellants from ripening into a prescriptive right.

With this variation of the judgment, I think the appeal should be dismissed with costs.

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DAVIES.—I agree substantially with the judgment of my brother Nesbitt. At the close of Mr. Hellmuth's able argument, however, I felt grave doubts whether the statutory powers given to the Water Commissioners were couched in language sufficiently broad to enable them to divert and appropriate the rivers and waters within the prescribed district by damming them up and back and thus to generate power with which to force these and other waters through their mains to and through the City of London. Was the work complained of done for the purpose of carrying out, and as part of, the system of supplying water for the use of the citizens?

I think it was, and that the Water Commissioners were, therefore, acting within their powers. It is not contended that if the waters so penned back were utilized as part of the supply provided for the city, the dam and works of the Commissioners would be beyond their statutory powers. Nor is it, as I understand, contended that they could not use the waters partly to generate power to enable them to supply the city provided the waters so supplied were part of the same waters as those penned back. What was argued was that these waters have been penned back by the dam and flashboards for the sole purpose of generating power to supply other waters than those penned back to the city.

It is true that, so far, other waters have been distributed to the citizens by means of the power generated at this dam. But these very waters of the Thames may be so distributed any day and by means of the power which the penning back of the Thames by the dam enables the Commissioners to generate.

The appropriation of the waters in advance of the time when they may reasonably be expected to be required would only be an act of prudence.

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I think it would be an altogether too strict a construction to put upon the Act to say that it permits the Commissioners to divert and appropriate streams and rivers and waters within a prescribed area for the maintenance, management and conduct of waterworks in the City of London only and while they use the waters so diverted and appropriated exclusively for distribution in the city or among its inhabitants, but that the whole scheme would become illegal if any part of the waters were utilized in generating power to distribute the waters of the same stream or river or any other stream or river through the city. But the argument against the exercise of the powers must go that far.

I fully agree with what was said, that where compulsory powers are given to a corporation of this kind, they cannot be invoked to cover merely indirect or incidental or collateral purposes. Their use can only be justified when shewn to be substantially and wholly for the purposes and objects for which the Act was expressly and obviously passed. Such powers cannot be invoked to support or defend other or different objects or purposes than those contemplated by the Act.

I think it can fairly and reasonably be said that the Water Commissioners in this case are not abusing their powers in using them as they have done here for the sole purpose of carrying out the object for which they were constituted, namely, the distribution of water in and through the city and in generating the power necessary to enable them to effect that object. The Water Commissioners are not a corporation established for private gain but one constituted for a necessary public purpose, and their charter should receive such reasonable and proper construction as is essential to the carrying out of the plain purposes of the Act.

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Once that difficulty is surmounted, I can have no serious doubts as the extent of the powers conferred on the Commissioners. I need not repeat the words of the fifth section. They seem to me to be broad enough and clear enough not only to enable the Commissioners to purchase or expropriate any lands within the prescribed area "required for the purposes of the waterworks," but also and further so to divert and appropriate any waters being in or upon or flowing through the lands so expropriated or taken as they may judge reasonable and proper. They were not to use these waters simply and only as an owner of lands could use the waters flowing through them. In such case no special legislation would be required. But they were authorised to divert or use them in any way and to any extent they might think reasonable and proper. Of course, proper precautions were taken that in any user by them of waters beyond the user which the law allows a riparian proprietor, they should pay injured parties all consequent damages.

It has been argued that a strict construction must be placed upon the words "divert and appropriate." I know no special reason why this should be done or why the ordinary and reasonable construction necessary to give them their proper and effective meaning in the relation in which they are used should not be given to them. I think the damming back and setting apart of the waters for a particular use and purpose having direct bearing upon the purposes of the corporation is such an appropriation.

As to the argument that there were certain conditions precedent to the exercise of the compulsory powers given by the Act, I am unable to agree with it.

The cases cited of *Jones* v. *The Stanstead, Shefford and Chambly Railroad Company* (1); *The North Shore Rail-*

(1) L. R. 4 P. C. 98.

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way Co. v. *Pion* (1); and *Corporation of Park..ale* v. *West* (2), are controlling authorities as to how these compulsory powers or statutes should be construed. In the two latter cases it was held that, under the statutes there in question, the filing of the plans and the taking of the prescribed means of ascertaining and paying the damages were as much conditions precedent to the exercise of the powers authorising the "injurious affection of lands" as to the taking of lands themselves. But it is perfectly plain from the reasons given for their judgment by the judicial committee, if indeed authority was needed for the proposition, that such conclusion depended entirely upon the language of the statutes before them in those two cases, and that cases may occur where damages may arise from the execution of authorized works, which damages could not be foreseen and, *ex necessitate*, could not be paid before the execution of the works. The probability of such cases occurring seems to me so certain that the legislature may well be taken to have had it in mind when legislating in this case.

In delivering the judgment of the Privy Council in *Pion's Case* (1), the Earl of Selbourne said, at page 626:

> In both cases alike, (that is *Pion's Case* (1), then under consideration, and *West's Case* (2), the damage to the plaintiff's property was a *necessary, patent and obvious consequence of the execution of the work.*

Now, the statute before us does not make any specific act, such as filing of plans or ascertainment and payment of damages or anything else beyond "the survey, setting out and ascertaining of the lands required" a condition precedent to the exercise of the compulsory powers. It was plain that the damages which the exercise of the compulsory powers might cause must, in many cases, while a consequence of the execution of

(1) 14 App. Cas. 612. (2) 12 App. Cas. 602.

the works, be "neither a patent nor an obvious consequence of such execution," and be only capable of being ascertained after the execution of the works. They are such damages as were in the mind of the Judicial Committee when they said in *Pion's Case*, (1) at page 627.

It may well be that the statute gives the right of compensation for damages of a different kind which, at the time when the company had to give its notices and take the other necessary steps to enable it to execute its works, could not be foreseen, a different rule must be applicable, by necessary implication from the provisions, on the one hand, entitling the land owner to compensation, and authorising, on the other hand, the construction of the works.

No one can read the evidence in this case without being satisfied that, if the plaintiff has sustained damages, as the trial judge has found, they were damages which were certainly neither patent nor obvious at the time of the construction of the appellants' works, but which (assuming their existence) happened subsequently to the building of the works in question and as an unforeseen consequence of those works.

The duties of the several parties committing and sustaining the injuries were to take the statutory steps to have the damages assessed. The works constructed by the defendants, being legal works under the statutory powers, cannot be interfered with by injunction.

Nor, on the other hand, do I think that the plaintiff has lost his right to have his damages assessed. The right to maintain the works, on the one hand, and the right to have the damages caused by those works assessed, on the other, co-exist. Such damages are capable of being estimated once for all and should be so estimated and adjudged.

I agree with the finding of the trial judge, confirmed by the judgment of the Court of Appeal, that the defendants have not gained any right by prescription to dam back the waters of the river upon the plaintiff,

(1) 14 App. Cas. 612.

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as claimed by them. To gain such right there must be shown to have been a continuous exercise of the acts relied on through some definite portions of each and every year for a consecutive period of twenty years. I fully agree that no such evidence has been given.

Holding as I do that the appellants' works in the River Thames were constructed under and by virtue of their statutory powers and that any injuries or damages caused to the plaintiff thereby were legalised injuries, the damages for which he had a right to have assessed under the fifth section of the Act, I am clearly of the opinion that neither the seventeeth nor the thirty-first sections of the statute apply. It is quite clear to my mind that the latter section, limiting the time within which an action may be brought against the commissioners for things done by them in pursuance of the Act, can have no relation to proceedings taken by them expropriating lands or water privileges under the fifth section. In this I also agree with the trial judge and the Court of Appeal. But I see no reason whatever why any damages suffered by the plaintiff should not now and once for all be assessed by arbitrators to be appointed under the fifth section of the Act and, if we had the power in this action to grant a mandamus for the appointment of such arbitrators, I would certainly do so. As however, we cannot do this, we must leave the parties to their rights under the section referred to and no doubt proper steps will, at once, be taken to have the damages assessed.

NESBITT J.—This case turns upon the construction which is to be placed upon the Act for the construction of waterworks for the City of London. The first section empowers the Water Commissioners to construct, build, purchase, improve, hold, and generally

maintain, manage and conduct waterworks. The fourth section gives power to employ engineers and others, and to rent or purchase such lands, buildings, waters and privileges as in their opinion may be necessary to enable them to fulfil their duties under this Act. The fifth section authorises the Commissioners to enter into and upon the lands of any person in the City of London, or within fifteen miles of the said city, and to survey, set out and ascertain such parts thereof as they may require for the purposes of the said waterworks, and also to divert and appropriate any river, pond of water, spring or stream of water therein, as they shall judge suitable and proper, and to contract with the owner or occupier of said lands and those having rights in the said water for the purchase thereof, or any part thereof, or of any privilege that may be required for the purposes of the said waterworks. In case of any disagreement between the said Commissioners and the owners or occupiers of said lands, or any person having an interest in the said water or the natural flow thereof, or any such privilege as aforesaid respecting the amount of purchase or value thereof, or as to damages such appropriations shall cause to them or otherwise, the same shall be decided by three arbitrators.

What substantially was done was, the Commissioners, having purchased the land on either side of the river, about five miles below the city, erected a dam with stanchions for flashboards, which flashboards were inserted at certain seasons in order to raise the water in the dam.

The plaintiff, who was the owner of the mill privilege, some five miles above the dam, in the river, complains that the placing of the flashboards in position at times injures him in backing water in his raceway.

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The courts have held, and I believe some of my learned brethren are very strongly of the opinion, that what has been done is not within section five of the Waterworks Act; that that Act simply enabled the Commissioners to enter upon any land within the city, or fifteen miles thereof, and to divert or appropriate water within the area of the lands entered upon, which lands must be paid for either by agreement or under arbitration proceedings, and that this is made plain by section six which provides that the lands, privileges and water, which shall be ascertained, set out or appropriated by the Commissioners, for the purposes thereof, as aforesaid, shall thereupon and forever thereafter be vested in the Corporation of the City of London and their successors, and as the mill privilege of the plaintiff was never ascertained, set out or appropriated, that the defendants are simply wrongdoers and trespassers upon his legal right to the natural flow of the water. If this construction of the section is correct I think that the judgment cannot be disturbed for any of the reasons urged. I do not think the Commissioners can be protected under the 17th section of the Act nor do I think that the thirty-first section would limit the damages to the period of six months; and I think that it is a case that, notwithstanding the remedy by injunction may seem a very drastic one, yet the plaintiff would be entitled under the authorities to such remedy, nor do I think the defendants can ask the court to define by its judgment to what point the water may be raised, as they must be at the risk, if they are wrongdoers, in anything they do which may prejudice the plaintiff.

In my view, however, the fifth section does apply I think the word "appropriate" is used in the sense of "setting aside for the purposes of," and the Commissioners, if they are so advised by their engineers,

would be entitled to appropriate the waters of the river by the erection of a dam and the setting aside of a large pond or reservoir for waterworks purposes, and I do not think that the water need necessarily be taken from such pond for the purposes of distribution in the city either for drinking, fire, manufacturing or street purposes, but that as part of the design of a waterworks system the Commissioners would be entitled to say, we deem it the best system to appropriate the waters, in the way I have described, in order to create power for the utilization of other waters, as power is as necessary to a waterworks system as a supply of water or pipes to carry it in, and if the design of the Commissioners involves the notion of an appropriation of the water of the river by setting it aside in the mill-pond or reservoir, and if the necessary result of creating that mill-pond is to back the water, then, any person injured in the natural flow or in any privilege affected by the backing, is damaged by such appropriation and entitled to compel the Commissioners to pay damages under section five for such appropriation so causing damage.

Otherwise I do not think effect can be given to the language of section five which plainly contemplates purchase money for such property acquired and damages caused to other property by such acquisitions and subsequent user.

It is to be observed that the disagreement may arise in reference to the amount *of purchase or value* which is the case where appropriation has taken place, or it may arise as to the amount of damage *such appropriation* shall cause, and I do not think that can be read as only applicable to the actual appropriation which the commissioners may have attempted to set out or ascertain. Such a construction would be a strained one as it must necessarily have

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occurred to the framers of the Act that in case the commissioners went on, say, above the plaintiff's mill privilege, and appropriated the water of the river, which they would be entitled to do, that the only person to be paid would be the person upon whose land the commissioners entered to so divert or appropriate. That diversion or appropriation would be lawful. The person upon whose land they entered would be a person who would be paid but, under the construction of the Act I have referred to, the plaintiff who would be a person entitled to the natural flow and entitled to a mill privilege would have no remedy.

The commissioners could answer him, "what we have done is a lawful act. There is no provision in the Act for injurious affection of property and we are not liable to you." This would seem a most curious result and one most unlikely to be contemplated by the framers of the Act. Of course it is settled law that the legislature could give the right of appropriation without payment of compensation either for taking or injurious affection, but where a construction can possibly be placed upon an Act to avoid such consequence it should be done.

It seems plain to me that in the illustration I have given the plaintiff could immediately have compelled, by mandamus, an arbitration, as being a person interested in the natural flow of the water, or in a privilege, and as being damnified by the appropriation of the water of the river made by the commissioners. If it is true that the appropriation could lawfully take place above the plaintiff, how can any different construction be supposed because the appropriation took place below, the necessary consequence of which is the damming back of the water on the plaintiff and the interference therefore with the natural flow and the partial destruction of his privilege. In such case it seems to me

reasonably clear that he was a person entitled to compel arbitration and that his remedy was under the Act.

A clear distinction must be drawn between a case like the present where, if my construction is correct, the act which is complained of was itself lawful, but the result of the act not obviously causing damage, and a case where certain conditions precedent are necessary upon the part of the person authorized before entry can be made upon the land of the person complaining, that is cases where it is obvious land must be taken or injury done.

This is a case where, it is true, there has been an appropriation of the plaintiff's mill privilege, an appropriation of his rights to the natural flow of the water, but that appropriation has taken place as a necessary result of a lawful appropriation further down the stream and is more in the nature of an injurious affection than of an actual appropriation by the commissioners, but in whichever way it is viewed it seems to be within the Act.

If a railway company is authorized to construct a railway and to enter upon lands, first filing plans, etc., then, as shewn by such cases as *West* v. *The Village of Parkdale*, (1) and *Pion* v. *North Shore Railway Co.* (2) such filing of plans, etc., is a necessary condition precedent, and otherwise the act is unlawful and plaintiff can claim demolition of the works, or may have his damages assessed once for all as for permanent works, and so in this case if what has been done were treated as an original appropriation of the right of the plaintiff to the natural flow of the river, there would be great force in the argument that there had been non-compliance with the conditions precedent under the Act, namely, the entry upon the land and the surveying, setting out and ascertaining the parts required for the purposes of the waterworks, and that as such had not

(1) 12 App. Cas. 602.

(2) 14 App. Cas. 612.

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been done the plaintiff could at any time within the period of the Statute of Limitations treat the works so appropriating his privilege or right to the natural flow of the water as a trespass and require its demolition.

As I have pointed out this, however, while in a sense an appropriation, is rather a necessary result flowing from a lawful appropriation further down the river, and the plaintiff is a person damaged by such appropriation and a person who did not seek the remedy under the Act.

KILLAM J. (dissenting).—In my opinion this appeal should be dismissed. It appears to me that the statutes did not authorise the commissioners to do what they have done. They were empowered to divert and appropriate rivers and streams. Leaving entirely aside the question of the right of the commissioners to use their special statutory powers for the purpose of procuring the power to operate their works, as distinguished from the acquisition of the water to be supplied, it seems to me that they were not authorised to pen up, or keep or store, the water acquired for any purpose in such a manner as to injure others. They were further given power to acquire, either by purchase under contract or by compulsory method, lands or water privileges. They have not acquired or sought or attempted to acquire the plaintiff's lands or water privileges. They have merely committed occasional acts causing him injury, and they threaten and intend, unless prohited by judicial authority, to continue the commission of such acts

Upon the remaining points I agree with the conclusions of the Court of Appeal.

Appeal allowed with costs. *

Solicitor for the appellants: *Thomas G. Meredith.*

Solicitors for the respondent: *Hellmuth & Ivey.*

* Leave to appeal to Privy Council has been granted. (July, 1904.)