Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Saunby v. *The Water Commissioners of the City of London and The Corporation of the City of London* (*Ontario*), *from the Supreme Court of Canada; delivered the 9th November* 1905.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD JAMES OF HEREFORD.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

The Appellant is the owner and occupier of lands adjoining the river Thames in the Province of Ontario, and of a water mill operated by water from that river. He complains in this action that the Respondents by the erection of a dam with flash boards across the river Thames at a point some miles below the Appellant's mill have penned back the water in the river, with the result that in certain seasons of the year his lands are flooded, and the water power of his mill is interfered with. There is no serious dispute that the Appellant has in fact been injured by the Respondents' works, and if this were all his right of action would be clear. But the Respondents the Water Commissioners, who are incorporated by a Provincial Act, 36 Vict. c. 102 (Ontario), for supplying the City of London with pure water, contend at their Lordships' Bar that they are authorised by their Act to execute the works complained of, and the

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Appellant's remedy (if any) is to proceed by arbitration for damages under the provisions of the Act.

The action was commenced on the 19th August 1897 in the High Court of Ontario. Both the Respondents were made Defendants, but the Water Commissioners are the party really interested, and will alone be referred to as the Respondents. The Appellant's claim was for damages, and an injunction against the continuance of the wrongful acts complained of, and a mandatory order directing the Defendants to remove the dam and flash boards. After the case was opened a reference was by consent made by the Court to two engineers agreed upon by the parties to report upon the facts of the case, and to ascertain and report the extent of the damage (if any) the Appellant suffered by reason of the said dam and flash boards. The referees made a detailed report dated the 19th October 1901. In the result they found that the Appellant had suffered material injury both to his riparian rights and his rights as a mill-owner. They also found that the amount of damages to the mill would vary between $440 and $240 per annum, according to the view which should be taken as to certain questions not material for the present purpose.

By the Decree of the Chief Justice of the King's Bench Division dated the 28th August 1902 judgment was ordered to be entered for the Appellant with a reference as to damages confined to six years before the commencement of the action, and an injunction was granted to restrain the Respondents from penning and forcing back the water in the river Thames so as to damage or injure the Appellant in any of his riparian rights as owner of the lands mentioned, or so as to prevent the water flowing away from the mill of the Appellant as such water

otherwise would but for such penning and forcing back.

An Appeal by the Respondents from this Decree was dismissed by an unanimous judgment of the learned Judges of the Court of Appeal.

The Respondents then appealed to the Supreme Court of Canada, and that Court by a majority of three to two reversed the previous Judgments, and by an Order of the Court dated the 27th April 1904 the action was ordered to be dismissed with costs. The present Appeal is from the last-mentioned Order.

The majority of the learned Judges thought it was within the powers of the Respondents given to them by their Act to appropriate the water in the river by the formation of their dam on paying damages for such appropriation, and the proper remedy of the Appellant was to apply for a mandamus in order to have the amount of such damages determined by arbitration in accordance with the 5th Section of the Act. The minority, on the other hand, thought that the Respondents had not taken the proper preliminary steps for the purpose of appropriating the Appellant's land and water rights, and that the arbitration clauses of the Act were therefore inapplicable, and the Appellant was entitled to an injunction to restrain what they held to be an unauthorised trespass.

The difference between the learned Judges, therefore, really depends on the proper construction of the 5th Section of the Respondents' Act. By that section the Commissioners are authorised to enter into the lands of any person within 15 miles of the City of London, and to survey, set out, and ascertain such parts thereof as they may require for the purposes of their waterworks, and also to divert and appropriate any river, pond, spring, or stream of water 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 privilege that might be required for the purposes of the Commissioners, and in case of any disagreement between the 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 any such privilege as aforesaid respecting the amount of purchase or value thereof, or as to the damage such appropriations should cause to them or otherwise, it was provided that the same should be decided by three arbitrators to be appointed in a prescribed manner.

It was argued that the appropriation by the Commissioners of the Appellant's land and water rights was not within their powers, because the dam complained of was constructed and used, not for the purpose of storing water to be supplied for the use of the inhabitants, but for generating power to raise the water to the required height. Their Lordships agree with the opinion expressed by the majority of the Judges in the Supreme Court that, assuming this to be so, the water is nevertheless required for the purpose of the waterworks within the meaning of the Act, and the Commissioners would be acting within their powers in appropriating the Appellant's land and water rights, provided they had taken the necessary steps for that purpose. The question is whether they have done so.

Their Lordships are of opinion that, before the Commissioners can expropriate a land owner, they must first set out and ascertain what parts of his land they require, and must endeavour to contract with the owner for the purchase thereof. In other words they must give to the land owner notice to treat for some definite subject

matter. And a similar procedure seems to be necessary where the Commissioners desire to appropriate a person's water rights, or to acquire some easement over his property. The arbitration clauses only come into operation on disagreement as to the amount of purchase money, value, or damages, which, in itself, implies some previous treaty or tender involving notice of what is required. Their Lordships therefore are of opinion that the Commissioners have not put themselves into a position to compel the Appellant to go to arbitration. Provisions for that purpose, such as are found in the present Act, are only applicable to acts done under the sanction of the Legislature, and in the mode prescribed by the Legislature. In this instance the Commissioners have not proceeded in accordance with the directions of their Act; and consequently the Appellant has not lost his ordinary right of action for the trespass on his property. In coming to this conclusion their Lordships follow the principles laid down by this Board in *The Corporation of Parkdale* v. *West* (12 Ap. Ca. 602) and *North Shore Railway Company* v. *Pion* (14 Ap. Ca. 612), though the provisions of the Acts in question in those cases were somewhat different.

It was contended by Mr. Aylesworth that, at any rate, the Court, in the exercise of its discretion, should have given the Appellant a judgment for damages only, and not for an injunction. The acts complained of in the present case are an illegal taking of the Appellant's land, and an interference with the free use by him of his property, and the damages have been found to be of a substantial character. It has been frequently pointed out that to refuse an injunction in such a case would be to enable the Defendant to expropriate the Plaintiff without statutory authority, or without following the

procedure pointed out by the statutory authority (if any). See *The Imperial Gas Light and Coke Company* v. *Broadbent* (7 Ho. Lds. 600) and *Shelfer* v. *City of London Electric Lighting Company* (1895, 1 Ch. 287). If and when the Respondents think fit to proceed under the Act to expropriate the Appellant the injunction will come to an end, but it is not necessary to qualify it by any words for that purpose.

Their Lordships will therefore humbly advise His Majesty that the Judgment of the Supreme Court, dated the 27th April 1904, be discharged, and the Judgment of the Court of Appeal for Ontario, dated the 14th September 1903, confirming the Judgment of the Chief Justice of the King's Bench Division of the High Court of Justice for Ontario, be restored, with the variation that the damages be confined to the period beginning six months prior to the commencement of the action, and that the Respondents should pay the costs of the Appeal to the Supreme Court. The Respondents will also pay the costs of this Appeal.