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Chapter 180.

Mills and Dams.

Erection of Mills and Dams, and Rights of Flowage.

Purpose and scope of mill act.—The purpose of the mill act was to prevent the erection and support of mills from being discouraged by many doubts and disputes. It was not intended to confer any new right, or to create an additional claim for damages, which did not exist at common law. Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

Mill act founded on eminent domain.—The principle on which the mill laws is founded is the right of eminent domain, the sovereign right of taking private property for public use. Ingram v. Maine Water Co., 98 Me. 566, 57 A. 893.

And its constitutionality is established.—The mill act has been so long recognized and upheld by judicial decisions that in its general scope its constitutionality is no longer debatable. Ingram v. Maine Water Co., 98 Me. 566, 57 A. 893.

The fact of the validity of the mill act is settled. Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

It is too late now to challenge the constitutionality of the mill act. Whether its validity rests upon its great antiquity and long acquiescence, or upon the principles of eminent domain, or upon the adjustment and regulation of riparian rights on the same stream, so as to best serve the public welfare, having due regard to the interests of all and to the public good, the fact of its validity is settled. Brown v. DeNormandie, 123 Me. 535, 124 A. 697.

But owner of land flowed shall be justly compensated.—Whatever the principle upon which the mill act is founded, the right thereby granted is restricted by the constitutional condition that the person whose land is flowed shall receive just compensation. Ingram v. Maine Water Co., 98 Me. 566, 57 A. 893.

Sections 1-38 applied in Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

Sec. 1. Right to erect and maintain milldams, and to divert water by canal for mills.—Any man may on his own land erect and maintain a watermill and dams to raise water for working it, upon and across any stream not navigable; or, for the purpose of propelling mills or machinery, may cut a canal and erect walls and embankments upon his own land, not exceeding 1 mile in length, and thereby divert from its natural channel the water of any stream not navigable, upon the terms and conditions and subject to the regulations hereinafter expressed. (R. S. c. 166, § 1.)

I. General Consideration.
II. Erection and Maintenance of Dams.
III. Prescriptive Right to Flow Land.

Cross References.

See c. 36, § 39, re flowage rights in lands of state held by state park commission; c. 141, § 13, re such mills and dams as or as not nuisances.

I. GENERAL CONSIDERATION.

History of section.—See Jones v. Skinner, 61 Me. 25; Brown v. DeNormandie, 123 Me. 535, 124 A. 697; Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

Mill act affects only lands within state.—It is abundantly apparent that the design of the legislature in the mill act was only to affect lands and mills within the limits of the state. Wooster v. Great Falls Mfg. Co., 39 Me. 246.

It avoids multiplicity of common-law actions.—The relief of the mill owner from the multiplicity of suits to which by the common law he would have been exposed, was an object, the attainment of which the

legislature had in view in the passage of the act under consideration. But the mill owners, to be relieved, must be those who were subject to such suits. Wooster v. Great Falls Mfg. Co., 39 Me. 246.

Statute must be complied with, or right is not given.—The license to erect dams and mills is upon certain terms and conditions, and subject to certain regulations. If the terms and conditions are not complied with, and the regulations, subject to which the right is granted, cannot be enforced, the right to "erect and maintain a watermill and dams to raise water for working it," is not given. Wooster v. Great Falls Mfg. Co., 39 Me. 246.

The mill act is a liberal exercise of power on the part of the legislature over the property of one citizen for the benefit of another. The party, therefore, seeking protection under this act must show his erection to have been upon the terms and conditions, and to be subject to the regulations which the statute has prescribed for the benefit and protection of the landowner, else he does not bring himself within its plain and obvious meaning. Wooster v. Great Falls Mfg. Co., 39 Me. 246.

And the right is not given to those against whom the statute cannot be enforced.—The mill act neither gives nor purports to give to the inhabitants of New Brunswick or New Hampshire any right within the limits of those governments to build mills and erect dams for their use, by which the lands of citizens of this state may be flowed. The right is given to those only against whom the terms and conditions of the statute can be enforced, and when the mills and mill-dams are subject to the regulations prescribed. Wooster v. Great Falls Mfg. Co., 39 Me. 246.

Floatable streams and navigable rivers distinguished.—The common-law distinction between navigable rivers, and those which are simply recognized as highways, has been fully recognized in this state. Under our mill act this distinction becomes of paramount importance, for were all our streams, which are capable of floating rafts or logs, to be deemed navigable within the meaning of the statute, it would at once place out of the protection of the law all the mills and dams now existing on the floatable streams in the state. The act contemplates no such destructive operation, and cannot receive such construction. Veazie v. Dwinel, 50 Me. 479.

All rivers where the tide ebbs and flows are, by the common law, denominated navigable rivers. Veazie v. Dwinel, 50 Me. 479.

Damming of navigable streams not authorized.—It was not the intention of the legislature by this section to authorize at the pleasure of individuals the erection of dams across navigable streams, thereby obstructing their navigation. Bryant v. Glidden, 36 Me. 36; Strout v. Millbridge Co., 45 Me. 76.

And complaint under this statute for flowage thereby caused is not maintainable.—The owners of a dam erected across a navigable river, which caused the land above to be flowed, are not liable to a complaint for flowage by the owner of such land, under the provisions of this statute. Strout v. Millbridge Co., 45 Me. 76.

Right to erect dams broadened by legislature.—The history of our mill acts for more than two hundred years shows that there has been no legislative narrowing of the granted right to erect dams and to cause flowage thereby, but rather a broadening. The development of our water power by private initiative is the settled policy of the state, and the application of the right has broadened with industrial expansion. Brown v. DeNormandie, 123 Me. 535, 124 A. 697.

Deletion of provision for necessity from section intended to aid industry.—The element of necessity was dropped from this section in 1841. The evident purpose of both the omission of necessity, and the addition of the provision in § 3 protecting other mills on the same stream, was the encouragement of manufacturing industries and the injury of none. No other class of private property is exempt from the provisions of the act. Brown v. DeNormandie, 123 Me. 535, 124 A. 697.

Every mill owner has a right to the use of the water above and below his mill, so far as such use is reasonable and conformable to the usages and wants of the community. Dwinel v. Veazie, 44 Me. 167.

Such right to use of water measured by natural flow, grant and prescription.—The rights of the proprietors of a mill in the use of water cannot be measured by the amount of grain they might have to grind within a given time, nor by the peculiar structure of their water wheels, but by the natural flow of the stream as modified by grant or prescription. Clark

v. Rockland Water Power Co., 52 Me. 68.

But the water flow must not be permanently or capriciously obstructed.—Under the provisions of this section the head of water raised by a dam may be detained a reasonable time for the beneficial use of the owner's mills. But the flow of the stream cannot be permanently obstructed, nor the water diverted by such dams, to the injury of the proprietors below, nor can the water be used capriciously to their injury. Each proprietor is entitled to the reasonable use of the water in its natural flow over his land. Clark v. Rockland Water Power Co., 52 Me. 68.

Right to erect dams on streams subject to right of public passage.—The right of erecting mills and milldams and of flowing land, conferred by this chapter, must be deemed as in subjection to the paramount right of passage of the public in all cases where the streams in their natural state are capable of floating boats or logs. Knox v. Chaloner, 42 Me. 150.

If a stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs, a public easement exists therein. Treat v. Lord, 42 Me. 552.

A dam which impedes or obstructs the right of the public, in floating boats or logs in a stream in which they can be floated in its natural state, must be held pro tanto a nuisance, when the impediment exceeds the privilege conferred by the legislature. Knox v. Chaloner, 42 Me. 150.

Notwithstanding a dam is within the protection of the mill act, and its owner is authorized to maintain a head of water therewith for the operation of his mills, he is not authorized, wholly or substantially, to obstruct the navigation of the stream. The river, if not technically navigable may still be a floatable stream, and as such, may lawfully be used as a highway for the public upon which to float boats, rafts and logs. Of this right, the public cannot be deprived, nor in its use unreasonably obstructed. A dam which impedes or obstructs the rights of the public, in floating boats or logs, in a stream in which they can be floated, must be held to be pro tanto a nuisance. Veazie v. Dwinel, 50 Me. 479.

For floatable streams are public highways.—All streams in this state of sufficient capacity in their natural condition to float boats, rafts or logs, are deemed public highways, and as such, subject to the use of the public. Veazie v. Dwinel, 50 Me. 479.

And owner is bound to provide for public passage.—The owner of a milldam has a legal right to erect and continue his dam and mills, but he is bound to provide a way of passage for the public, where logs, rafts, etc., are floated in the stream. Dwinel v. Veazie, 44 Me. 167.

While the mill proprietor may erect and maintain his dam, he must, at the same time, keep open, for the use of the public, a convenient and suitable passage way, through or by his dam. The privileges of the mill owner must be so exercised as not to interfere with the substantial rights of the public in the stream, as a highway, for the purpose of transporting such property as, in its natural capacity, it is capable of floating. The use of both parties must be a reasonable use, and the rights of both must be exercised in a reasonable manner. Veazie v. Dwinel, 50 Me. 479; Parks v. Morse, 52 Me. 260.

For a case relating to the common-law requirement of a passageway by or through a dam built across an unnavigable stream, see Lancey v. Clifford, 54 Me. 487.

Right to erect dams cannot be exercised to overflow land highways.—The statutes in relation to the right of erecting mills and milldams and flowing lands has never been so construed as to justify or excuse the erection of a dam in such a manner as to overflow a public highway already appropriated and in actual use, and thereby render it impassable, nor to interrupt or destroy a public right of way or easement in a river. Treat v. Lord, 42 Me. 552.

Dam causing injury to highway held damnum absque injuria.—When under the provisions of this section a dam has been legally and properly erected across a nonnavigable river, for the purpose of operating a mill, but by reason of such dam the current or flow of such river has been partially deflected towards the shore, thereby causing injury to a highway along the bank of such river, it was held that such damage is the damnum absque injuria of the common law. Durham v. Lisbon Falls Fibre Co., 100 Me. 238, 61 A. 177.

Limitation upon height of dams as to prior highway bridges.—There is no express prohibition in the mill act against maintaining a dam so high as to injure prior bridges, and a limitation, if any, imposed upon the height of a dam by a

prior highway bridge above on the same stream is only that the dam shall not be so high as to injure the bridge at the usual and ordinary stages of the water throughout the year including the usual recurring and to-be-expected freshets at different seasons as they occur in a series of years. If a bridge is unfavorably affected by a dam below only in extraordinary and unusual freshets which occur but seldom in a long series of years, the dam is not of unlawful height as to the bridge. Palmyra v. Waverly Woolen Co., 99 Me. 134, 58 A. 674.

No provision is made to protect unoccupied or unimproved mill sites. Nor are they included specifically as a subject of damages in § 5. Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

And owner of mill site may be flowed out by prior owner; appropriation must be actual to become right.—The owner of unoccupied water power or mill sites must submit to have them flowed out and made useless, and must content himself with the statutory compensation. When, however, a mill is once lawfully erected above him, the lower mill owner is then limited to such flowage as he had made or appropriated before the upper mill was built. This appropriation, however, must be actual to become a right. It cannot be by mere proclamation, nor even by merely marking limits. There must be an actual occupation of the space by a head or pond of water raised by dams actually constructed of the requisite height and efficiency to raise such head. National Fibre Board Co. v. Lewiston & Auburn Elec. Light Co., 95 Me. 318, 49 A. 1095.

Owner may appropriate for flowage land not already appropriated. — A mill owner can at any time appropriate for raising and maintaining a head of water for working his mill so much space in the river valley as has not already been appropriated by some other mill owner for his own mill. Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

Such prior occupancy gives prior right. —The proprietor who first erects his dam for a mill has a right to maintain it, as against the proprietors above and below who may not, because of the dam, be able to erect a mill on their land, and to this extent prior occupancy gives a prior title to such use. Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

Drawing down water of pond by lowering outlet is not within statute. — The lowering of the outlet of a pond and the drawing down of the water cannot be justified under the mill act. The mere abstraction of water can hardly be called a diversion of it, as authorized under this section. The lowering of a natural channel can hardly be called the diversion of water "from its natural channel." Nor can the water of a pond properly be called the water of a stream. The terms pond and stream do not mean the same thing. The legislature did not intend the word stream to include a pond. Fernald v. Knox Woolen Co., 82 Me. 48, 19 A. 93.

Applied in Clement v. Durgin, 5 Me. 9; Farrington v. Blish, 14 Me. 423; Morton v. Franklin Co., 62 Me. 455; Russell v. Turner, 62 Me. 496; Stevens v. King, 76 Me. 197.

Cited in Hill v. Baker, 28 Me. 9; Moor v. Veazie, 32 Me. 343; State v. Edwards, 86 Me. 102, 29 A. 947; Bingham Land Co. v. Central Maine Power Co., 133 Me. 519, 180 A. 363.

II. ERECTION AND MAINTENANCE OF DAMS.

Owner may build dam for use of mill and maintain or raise dam subject only to statutory conditions.—By this section any person may build upon his own land across a nonnavigable stream a water mill and dams to raise a head of water for working it, and may thereby flow back the water of the stream upon the lands above as high and as far as he deems necessary for the profitable working of his mill, subject only to the conditions and restrictions named in the mill act itself. The landowners must submit to the flowage, and content themselves with the pecuniary compensation to be obtained through proceedings provided by § 5. Such mill owner can also in the same way increase the height of his dam and the extent of the flowage from time to time as the exigencies of his business may seem to him to require, he making increased compensation for the increased flowage. National Fibre Board Co. v. Lewiston & Auburn Elec. Light Co., 95 Me. 318, 49 A. 1095.

The design of this section appears to have been to authorize the mill owner to raise a suitable head of water and to control and use it in such a manner, as to enable him to employ his mill to the best advantage during the whole year; and that he should be restricted only by the finding of the commissioners, under § 10, as to "what portion of the year the said lands ought not to be flowed." Nelson v. Butterfield, 21 Me. 220.

As to the power given, it is to flow the "lands" of any person, and the only exception is an existing mill or "any mill site" as provided in § 3. Brown v. DeNormandie, 123 Me. 535, 124 A. 697; Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

Mill and dam must both be upon land of owner.—The mill is the principal. The dam is subservient to it. The mill and the dam must both be upon the land of the mill owner to bring the case within the statute. Crockett v. Millett, 65 Me. 191.

For a case under this section of R. S. 1841, when there was no provision for erection of a dam "on his own land," such case holding that a corresponding allegation need not be made in the complaint, see Prescott v. Curtis, 42 Me. 64.

But mill owners may unite in erecting a common dam.—Several persons, being owners of mills in severalty, may unite and erect and maintain a dam in common to raise sufficient water to operate them, within the meaning and protection of the mill act. The statute does not in terms prevent mill owners from thus uniting in the maintenance of a dam. Though it does not in terms clearly permit it, it is clearly within its spirit and object. Goodwin v. Gibbs, 70 Me. 243.

Reservoir dam is within mill act; mill owner may erect more than one dam.—A reservoir dam is within the mill act; and this although such a dam may not be immediately connected with or very near the mill. It has ever been so held. This section authorizes the erection of dams. It does not restrict the mill owner to one dam. Reservoir dams for the benefit of mills upon the same stream have been held to come within the protection of the statute. Dingley v. Gardiner, 73 Me. 63.

The mill act includes reservoir dams as well as working dams. The statute itself mentions neither class. This section simply says dams to raise water for working a mill. It does not specify where they shall be located. Any dam that will raise water for working the mill answers the statutory requirement, and a reservoir dam comes within that class as certainly as a working dam. The reservoir dam conserves, equalizes and renders more uniform the flow to the mill and is obviously within both the letter and the spirit of the act, provided of course, its ownership is the same as that of the mill to be benefited. Brown v. DeNormandie, 123 Me. 535, 124 A. 697.

The statute authorizes the erection of dams. It does not restrict the mill owner to one dam. Brown v. DeNormandie, 123 Me. 535, 124 A. 697.

Reservoir dam is within the statute if erected on stream which propels owner's mill. — The fact that the stream upon which the reservoir dam is located is not the same stream upon which defendants' mills are located is of no moment. It may or may not bear the same name, but that is of no consequence. It may be tributary water. The test is not one of terminology but of hydraulic fact, namely, is the reservoir dam situated upon a non-navigable stream, whose stored water in its natural flow to the sea, regardless of intervening forms of water, whether stream or river or lake and of the names that may have been given to them, passes through and aids in propelling the wheels of mills belonging to the owners of the reservoir dam. If so, such a stream is within the contemplation of the mill act whether it requires an hour or a day or a week or longer for the water to reach its destination. Such a dam thus located and thus owned meets the purpose of the existing act and complies with both its spirit and its terms. Brown v. DeNormandie, 123 Me. 535, 124 A. 697.

Though dam is not immediately connected with mill.—Reservoir dams for the benefit of mills upon the same stream have been held to come within the protection of this section; and this, although such a dam may not be immediately connected with or very near the mill. And the dam is directly subservient to the purpose of driving the defendants' mills and increasing their water power though other dams and mills may be nearer the reservoir dam. Brown v. DeNormandie, 123 Me. 535, 124 A. 697.

Right to build such dam based upon conservation of water.—The right to build and maintain a reservoir dam is based upon its holding back the water that would otherwise run to waste in times of flood, storing it and letting it down to the owners' mills when needed in times of low water, thereby increasing the effective water power of the stream and enhancing production. The fact of distance does not enter into this proposition. Brown v. DeNormandie, 123 Me. 535, 124 A. 697.

But the dam cannot be maintained for any purpose other than that of raising water for working a water mill. Wilson v. Campbell, 76 Me. 94.

Hence dam erected for floating logs is

not within section.—The allegation in a complaint for flowage, that the defendant's intestate erected and maintained a water mill and a dam to raise water for working it, is not sustained by proof of a steam mill and a dam to raise water for floating logs. Such a case is not within the mill act. Dixon v. Eaton, 68 Me. 542.

Dam may be erected at greater or lesser distance from mill.—The first section of the statute does not prescribe the manner, in which a suitable head of water is to be raised. The means, by which the object is to be accomplished, appear to have been left to the mill owner. There is nothing in the statute to prohibit him from doing it by one or more dams situated at a greater or lesser distance from the mill, or by a dam on or near to which no mill is erected. The water may be raised and retained and conducted in a channel to any distance from the dam for use at the mill. Nelson v. Butterfield, 21 Me. 220.

If a dam is erected which retains the water of a pond and causes it to overflow the lands of others, but no mill is carried by the fall of water thus created, and such dam is only necessary to raise and preserve the water for the use of mills, lower down on the stream and carried by other waterfalls, at certain times when the water usually flowing in the stream has become diminished; these facts come within the scope of this section, and the only remedy is by proceedings pursuant to the mill act. Nelson v. Butterfield, 21 Me. 220.

But right to erect dam is given for use of a mill already erected or forthwith to be built.—To entitle a party to the protection of this statute, it is not enough that he erect a dam across a stream running through his own land. There must be a mill in connection with his dam, or an intention forthwith to erect one, else he is not a mill owner within the purview of the statute, and is liable at common law in an action on the case for damages occasioned by means of his dam flowing the dams of others. Wooster v. Great Falls Mfg. Co., 39 Me. 246.

Lower owner cannot erect dam or raise water to injury of upper mill owner.—When an upper proprietor has actually built or is building a mill on his privilege, a lower proprietor cannot, without a right acquired by grant, prescription, or actual use, erect a new dam or raise an old one, so as to destroy the upper mill privilege, simply under a liability to pay damages under the mill act, as the act does not apply in such a case. The lower proprietor cannot therefore erect or maintain his dam in such a manner as to raise the water and obstruct the wheels of the prior occupant above him. His appropriation to that extent, being prior in time, necessarily prevents the proprietor below from raising the water, without interfering with the rightful use already made. Such appropriation of the stream, however, gives the upper proprietor priority of right only so far as the use has been actual. Veazie v. Dwinel, 50 Me. 479.

Though he may repair dam, thereby raising water, without liability to prior owner.—Owners of dams have the right to repair and tighten their dams, although the water is thereby raised higher and retained longer than it was while the dam was in a dilapidated condition. Butler v. Huse, 63 Me. 447.

Prescriptive right limited to effective height of dam in good repair.—A mill owner, having a twenty-year prescriptive right to flow the land of another, has the right to keep up the water as high as it would be raised by a dam of the same height as the dam which he maintained for that period, even though the water is thereby kept more uniformly, and has flowed to a greater height than by the dam before it was repaired; and even though the land is flowed for a longer period of the year. The claim of the mill owner depends upon, and is limited by the effective height of the dam according to its strucure and operation when in repair, and in good order. Voter v. Hobbs, 69 Me. 19.

Upper owner building mill during drought cannot complain of normal flowage by dam of lower owner.—Should an upper riparian mill owner set his newer mill at the upper edge of the flowage as it is in time of drought, he would have no cause of complaint if flowed out in times of high water, the lower dam remaining the same. He could only complain of the increase of the flowage power of the lower dam by artificial means. National Fibre Board Co. v. Lewiston & Auburn Elec. Light Co., 95 Me. 318, 49 A. 1095.

Moveable gates and flashboards regularly used are part of dam.—Moveable gates and planks in the sluiceways and waste ways in a dam, regularly put in place at appropriate seasons, are practically a part of the dam, and flowage by means of them will be an effectual appropriation of the river. So flashboards on the top of a dam, regularly put in place at appropriate seasons become practically a part of the dam, and flowage by means of them will be equally an appropriation. But to effect

such an appropriation, by movable planks or boards in or on the dam, the use of them must be with some uniformity and regularity, so that the riparian owner above can see that they are regular appurtenances of the dam. National Fibre Board Co. v. Lewiston & Auburn Elec. Light Co., 95 Me. 318, 49 A. 1095.

But occasional nonuse thereof will not effect loss of appropriation.—An appropriation once made by the use of flashboards is not necessarily lost by an occasional omission to use the boards, or by occasionally and temporarily reducing their size or the length of time of their use, any more than an omission to flow while repairing or rebuilding a dam will destroy the right. Still, the boards and their use, like the dam itself, must in general be visibly uniform, regular and definite. The haphazard, the indefinite, will not suffice. National Fibre Board Co. v. Lewiston & Auburn Elec. Light Co., 95 Me. 318, 49 A. 1095.

Conveyance of mill and dam confers right to continue flowage.—The conveyance of a dam and mills, by necessary implication, carries with it the right to flow the grantor's land then flowed by such dam, and which inevitably must be flowed by a fair and proper use of the dam and mills. Butler v. Huse, 63 Me. 447.

Where one being the owner of a mill and dam, and also of certain land above, which was flowed by such dam, sold the mill, with all its privileges and appurtenances, he could not afterward compel the grantee of the mill to remunerate him for the injury caused by such flowing; and in such case the grantee of the mill would have the right to continue the dam so as to raise the same head of water, as the grantor had been accustomed to raise before the grant. Hathorn v. Stinson, 10 Me. 224.

Releases by tenants in common, one to another, awards liability of grantees for flowage.—But where a milldam owned by tenants in common flows their common lands above, a release by one to the other of the mill sites, and all the privileges and appurtenances thereto belonging, will authorize the grantee to continue the flowing of the lands above, and to transmit that right to his grantees without being liable to the payment of damages. Hutchinson v. Chase, 39 Me. 508.

Grant of right to flow construed.—The grant by deed of "a full and perfect right to flow all land belonging to" the grantors, meaning, nevertheless, to grant no right of flowage which would injure the privilege of another certain mill, conveyed the right to flow such only of the grantors' lands there as would be flowed by a dam, so constructed as not to interfere with the other mill privilege as it existed at the date of the grant. Webster v. Holland, 58 Me. 168.

Parol license to build dam on land of another held not to authorize maintaining of such dam.—Since no permanent interest in real estate can be acquired by a parol agreement, a parol license that the plaintiff or his grantor may build a dam on the land of another, to raise a reservoir of water for the use of his mill, will confer no right upon the plaintiff to maintain such dam after it is built, or control the water raised by means of it. Nor can the owner of such reservoir dam use the water raised thereby for a mill subsequently erected, to the detriment of an earlier mill, for the mere reason that it was the oldest dam. The owner of the first mill is entitled to the beneficial use of the water, as though no reservoir dam existed. Pitman v. Poor, 38 Me. 237.

III. PRESCRIPTIVE RIGHT TO FLOW LAND.

Prescriptive right to flow land is valid as deed of right.—Where for more than fifty years the tenant and his grantors had exercised the right to maintain a dam at a certain height, such right was as good as if he had had a deed of a right to flow from the owner of the land. But if, within 20 years of a complaint, the respondent or his predecessor, has by increasing the height of the dam, flowed beyond his right, he will be liable therefor upon the complaint. Russell v. Turner, 59 Me. 256.

Flowing of land without damages creates no right of prescription.—When land has been flowed by means of a dam erected for the use of a watermill, while the owner of the land suffers no damage, and can therefore maintain no suit or process, or in any way prevent such flowing, he cannot be presumed to have granted, or in any manner to have surrendered or relinquished any of his legal rights; and no prescriptive right to flow his lands without payment of damages can be acquired against him. Nelson v. Butterfield, 21 Me. 220; Wentworth v. Sanford Mfg. Co., 33 Me. 547; Foster v. Sebago Improvement Co., 100 Me. 196, 60 A. 894.

If the owner of the land flowed by the defendant sustained no damage by the flowing, then his acquiescence ought not to be construed into an admission of right, or taken as evidence against him, either of grant or license. Hathorne v. Stinson, 12 Me. 183.

If the owner of the land flowed, has not been injured by the flowing, he cannot maintain the action under the statute, against the owner of the mill for flowing his land; and having no power to prevent the flowing in such case, no prescriptive right to flow the lands without the payment of damages can be acquired against him. Underwood v. North Wayne Scythe Co., 41 Me. 291.

But where damages occasioned, such right may be acquired by flowing for 20 years.—If the owner of the land flowed, has a right to maintain a complaint against the owner of the mill for such flowing, the latter may acquire a prescriptive right to flow the land without the payment of damages. It follows, that to maintain this prescriptive right to flow, it must be shown that the flowing for twenty years has caused damages to the owner of the land. Nelson v. Butterfield, 21 Me. 220; Underwood v. North Wayne Scythe Co., 41 Me. 291; Prescott v. Curtis, 42 Me. 64.

In a complaint under § 5 for flowing land, to establish a prescriptive right of the mill owner to flow, it must appear that he and his grantors have been accustomed to flow the land, without interruption, for twenty years or more, prior to the date of the complaint, thereby causing, during that period, actual damage. Gleason v. Tuttle, 46 Me. 288; Foster v. Sebago Improvement Co., 100 Me. 196, 60 A. 894.

And claimant must show occupation by or for himself.—Though a dam may have flowed land for more than twenty years, a prescriptive right, set up by the defendant is not established, unless the occupation was by himself or some person under whom he claims. Benson v. Soule, 32 Me. 39.

No presumption of prescriptive right; occupation not interrupted by temporary incapacitation of dam.—Damages, for the purpose of establishing prescriptive right to flow land, are not to be presumed from the mere act of flowing. They must be proved to have been of yearly occurrence, unless a temporary omission to flow may have been occasioned by the leaky condition or prostration of the dam, in which case the time necessarily and reasonably spent in repairing or rebuilding the dam, will not interrupt the running of the twenty years, or prevent the acquisition of the right to flow. Gleason v. Tuttle, 46 Me. 288.

But voluntary omission to flow may interrupt occupation.—A voluntary omission to flow in such a manner as to occasion annual damage, when such omission is accompanied by no acts indicative of an intention to resume the right, will afford no evidence of a continued adverse claim to exercise such right. Unless the flowing is of such a character as to enable the owner of the land to maintain a process to recover damages, no prescriptive right to flow the land will be acquired. Gleason v. Tuttle, 46 Me. 288.

It is sufficient if dam has remained on one mill site, though in different positions.—To establish a prescriptive right of flowing water by a dam for the use of a mill, it is not necessary that the dam should have been maintained for the whole period, upon the same spot; it is sufficient if shown to have been maintained upon the same mill site, though removed from time to time to different places upon such site. Stackpole v. Curtis, 32 Me. 383.

Sec. 2. Right to divert water by canal by owner of all riparian rights. — Any person, authorized to erect and maintain a watermill and dams on a stream not navigable and to divert the water of such stream from its natural channel by a canal not exceeding 1 mile in length for the purpose of propelling mills or machinery under the provisions of section 1, may so divert such waters without said limitation to 1 mile, provided he is the owner of the land on which the canal is to be located or has the consent of the owners thereof, and provided he is the owner of all riparian rights on said stream between the point of diversion and the point at which the waters are returned to the stream, upon the terms and conditions, and subject to the regulations under the provisions of this chapter. Under the provisions of this section, "canal" shall include excavations in the ground and closed flumes, penstocks, pipe lines and other appropriate means of conveying water from the point of diversion to the point of return to the stream. (1945, c. 154.)

Sec. 3. Not to injure mill or canal previously built.—No such dam shall be erected or canal constructed to the injury of any mill or canal lawfully existing on the same stream; nor to the injury of any mill site, on which a mill or milldam

has been lawfully erected and used, unless the right to maintain a mill thereon has been lost or defeated. (R. S. c. 166, § 2.)

Diversion of water from old mill by newer mill is violation of section.—Where the plaintiff's mill was lawfully existing upon a river, and the defendant erected a dam immediately above it, causing an injury to the mill by diverting the water, it is a violation of this section. Thomas v. Hill, 31 Me. 252.

As is such use of water as to render older mill less profitable.—The owner of a mill erected subsequently to one lawfully existing upon the same stream is liable in damages, if, by his mode of using the water, the first mill is rendered less beneficial and profitable than it was before. And this liability is not lessened merely because the damages arise from the use of improved machinery by the owner of the second mill. Wentworth v. Poor, 38 Me. 243.

Or raising water level so as to impair operations of older mill.—The owner of a mill privilege has no right to raise a head of water so high as to injure the operations of an older mill above his dam, or to obstruct the public use of the river. Dwinel v. Veazie, 44 Me. 167.

But neither can older mill increase flowage so as to injure newer mill above.—It follows, as a corollary to this section, that when a second mill has been built above the flowage of the first and older mill and dam, such flowage cannot be increased by raising the dam or by other appliances, so as to lessen the original efficiency of the mill above. Whatever the greater age of his mill, the right of a mill owner to increase his head of water ceases when the flowage begins to injure the operation of a mill, however new, if already lawfully erected before the injurious flowage began. National Fibre Board Co. v. Lewiston & Auburn Elec. Light Co., 95 Me. 318, 49 A. 1095.

Cited in Palmyra v. Waverly Woolen Co., 99 Me. 134, 58 A. 674; Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498; Bingham Land Co. v. Central Maine Power Co., 133 Me. 519, 180 A. 363.

Sec. 4. Restrictions and regulations.—The height to which the water may be raised, and the length of time during which it may be kept up in each year, and the quantity of water that may be diverted by such canal, may be restricted and regulated by the verdict of a jury, or report of comissioners, as is hereinafter provided. (R. S. c. 166, § 3.)

Stated in Wilson v. Campbell, 76 Me. 94.

Sec. 5. Damages for flowing or by diversion of water.—Any person whose lands are damaged by being flowed by a milldam, or by the diversion of the water by such canal, may obtain compensation for the injury, by complaint to the superior court in the county where any part of the lands are; but no compensation shall be awarded for damages sustained more than 3 years before the institution of the complaint. (R. S. c. 166, § 4.)

I. General Consideration.

II. Procedural Aspects.

III. Liability.

Cross References.

See note to § 1, re consideration of jurisdictional allegations in the complaint; note to c. 121, § 1, re action for flowage proper subject of reference.

I. GENERAL CONSIDERATION.

The mill act substitutes new remedy for the common-law remedy.—The effect of the mill act, under the conditions prescribed in this section, was to take away from the landowner his common-law remedy for the invasion of the enjoyment of his land, which would compel the mill owner to prostrate his dam, and by reducing his head of water destroy the benefit of his mill; to change the tort into a statute right authorizing the mill owner or occupant to continue the same head of water and so far as it may operate an injury to the landowner, to substitute for the common-law remedy a mode of redress, sui generis—in the nature of a bill in equity—simple, plain, and certain, whereby all parties can have their past, present, and future rights adjusted. To this extent the statute is in derogation of the common law. Jones v. Skinner, 61 Me. 25.

Procedure under the mill act is substituted for an action at common law for

damages. Though brought at law and not in equity, the process authorized against them is not as tort feasors, but is rather in the nature of a bill in equity, to obtain redress for the injury occasioned by the flowage. Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

And common-law remedy is abolished.—By the mill act the action at common law for flowage caused by dams erected under that act, except under particular circumstances, is abolished. There is now no remedy for an individual so injured, except under the statute, or when mill owners fail to comply with its provisions. Hill v. Baker, 28 Me. 9.

In all cases when the party is entitled to his damage upon complaint under the mill act, his common-law remedy by an action is taken away. Veazie v. Dwinel, 50 Me. 479.

New remedy is deemed simpler and more expeditious mode of assessing damages.—The mill act only substituted in the place of the common-law remedies, a simpler, more expeditious, and comprehensive mode of ascertaining and assessing damages to persons whose lands were overflowed or otherwise injured by the erection and maintenance of dams on the same stream, for the purpose of creating a water power and carrying mills. Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

But statute must be complied with.—A complaint for flowage is a statutory proceeding. It is not authorized by the common law. And to maintain it, the statutory conditions must be complied with; one of which is that the dam which causes the flowing must have been erected or maintained upon the land of the defendant, as provided in § 1. Stevens v. King, 76 Me. 197.

Proceedings under section refer to claims authorized by the mill act.—The language used in this section is unlimited, but it must be considered in connection with other provisions of the mill act, for the act was not designed to afford this remedy and to protect a dam from removal as a nuisance and to decide upon the manner in which it should be used, when it could have no legal existence. The whole proceedings have reference to claims authorized by the act and not to claims not authorized by it. The statute was not designed to make an illegal act valid. Bryant v. Glidden, 36 Me. 36; Strout v. Millbridge Co., 45 Me. 76.

It is for an erection or maintenance of a dam only that a complaint for flowage is authorized. In other cases the common-law remedy still exists, and must be resorted to for redress of injuries occasioned by the unlawful flowing of another's land. Stevens v. King, 76 Me. 197.

And such claims are recoverable only under this section.—The mill act takes away the common-law remedy for the flowing of another's land by the owner of a mill by means of a dam, the mill and dam standing upon his own land, and the injured plaintiff can recover in such case against the owner of the mill only by complaint under this section. Underwood v. North Wayne Scythe Co., 41 Me. 291.

"Lands" defined.—The word "lands" is not confined to field or meadow. The word "land" or "lands" and the words "real estate" include lands and all tenements and hereditaments connected therewith, and all rights thereto and interests therein. It includes buildings and improvements on the land as well as the land itself. The only exception to this broadly inclusive term is other manufacturing industries on the same stream. Section 38 is an explicit recognition of the validity of the common practice of flowing other property than fields or meadows. Brown v. DeNormandie, 123 Me. 535, 124 A. 697.

Lands "flowed by a milldam" refers to lands above dam. — The words "whose lands are damaged by being flowed by a milldam," evidently refers to lands flowed by water raised by the dam, and situated above the dam, especially when considered in connection with other provisions of the chapter. Wilson v. Campbell, 76 Me. 94.

Case not within the statute is not subject to action by complaint.—A plaintiff whose land has been overflowed by a reservoir dam erected by the defendants upon their own land, but for the use of a mill not owned by them nor standing upon their land, may maintain an action on the case for the damages caused by such dam. The process by complaint, under this section, cannot be sustained upon these facts. Crockett v. Millett, 65 Me. 191.

And mills without the state not subject to statute; common law applies.—Mills without the jurisdiction of the state, not being subject to the terms, conditions, and regulations of the statutes, are not entitled to its benefits; and the common-law remedy remains unaffected by its provisions. Wooster v. Great Falls Mfg. Co., 39 Me. 246.

Where there is no mill in this state connected with the defendants' dam, and the defendants are not within the spirit or

meaning of the mill act, they have not afforded the plaintiff, by any erection of theirs, the security which the statute contemplates. Wooster v. Great Falls Mfg. Co., 39 Me. 246.

The proceedings under the mill act are against the property, and protect the landowner by giving him a lien for his damages upon the same. When the mill upon which the security is given is without the state, all these statute proceedings are unavailing. As the landowner cannot obtain any of the benefits given him in lieu of his common-law rights, he must be regarded as remitted to those rights. Wooster v. Great Falls Mfg. Co., 39 Me. 246.

Section does not comprehend recovery for water discharged from dam; remedy is at common law. — Damages caused by water let out of the dam is nowhere hinted at in the statute. If the dam is rightfully built, the statute provides the remedy for persons injured in their lands by flowing caused thereby; but the water thus rightfully accumulated must be let out with ordinary care, or the party will be liable at common law for negligence. Wilson v. Campbell, 76 Me. 94.

Complaint not maintainable by town not having fee in road flowed; maintainable by owner of easement or term of years.—The remedy by complaint under this section for the owner of lands flowed by the erection of a milldam does not lie for a town, against one who has flowed a town road, the fee still remaining in the original owner. For such injury the remedy is by special action on the case. But it seems that it does lie for one who has only a private easement in the land; and also for a tenant for years. Calais v. Dyer, 7 Me. 155.

Owner not precluded by possible defeasance of fee. — That the fee, of which a complainant is sole seized, is liable to be defeated by the nonperformance of some condition subsequent by some former owner, will not preclude him from recovering of a stranger to the title the damage sustained by flowage while he is in possession, no one having entered to claim a forfeiture for condition broken. Webster v. Holland, 58 Me. 168.

Complaint maintainable by owner within 3 years.—A complaint to recover damages caused by flowage, under this section, may be maintained by one who has been the owner of the land described, at any time within three years previous to the institution of the complaint. Turner v. Whitehouse, 68 Me. 221.

Applied in Whitney v. Gilman, 33 Me. 273; Prescott v. Curtis, 42 Me. 64; Gleason v. Tuttle, 46 Me. 288; Russell v. Turner, 59 Me. 256; Voter v. Hobbs, 69 Me. 19.

Cited in Pierce v. Knapp, 34 Me. 402; Davis v. Mattawamkeag Log Driving Co., 82 Me. 346, 19 A. 828; Bingham Land Co. v. Central Maine Power Co., 133 Me. 519, 180 A. 363.

II. PROCEDURAL ASPECTS.

Nature of action authorized.—The process in this case, is an action. An action is the lawful demand of one's rights in the form given by law. This form is given by statute, and a mode of service pointed out in this section and § 6. This action is undoubtedly local. It is made so expressly by § 5 giving the remedy. It resembles an action for trespass on land, or, perhaps, more nearly, an action for diverting a watercourse, or one for damages to a mill by causing the water to flow back upon it. Hall v. Decker, 48 Me. 255.

This section prescribes the form of the proceeding only. It is to be by complaint which may be inserted in a writ of attachment and served by summons and copy as required by § 7. It takes the place of the action at common law. It must be regarded simply as the statutory substitute for such action. Quinn v. Besse, 64 Me. 366.

Complainant acquires lien on dam, mill, and privileges, for damages; and execution issues thereon.—The rights of all those interested in the dam are to be affected by a complaint under this section to recover damages for flowage. The applicant is to have a lien, from the time of his application, upon the dam, mill and privileges (§ 18) for his damages. The restrictions upon flowage are to affect all the owners alike. It would be impracticable to regulate it otherwise. If judgment is obtained in a suit, and execution is thereon issued for the damages awarded (§ 19) it may be levied upon the whole of the dam, mill, and privilege by a sale at auction. The rights of no one should be affected without an opportunity to be heard in his defense. All the owners of the mill and dam, therefore, should be before the court before any proceeding should be had against them. Hill v. Baker, 28 Me. 9.

Complaint is not in tort, but in nature of bill in equity; all parties in interest must be before court.—The mill owners in flowing the lands of others are not originally tort feasors. The process authorized against them is not as tort feasors, but is rather in the nature of a bill in equity to obtain redress for the injury

occasioned by the flowage, and to obtain that which is in effect an injunction against an unreasonable exercise of the right of flowage. It is manifest in such case that all the parties in interest should be before the court. The statute seems clearly to contemplate that such should be the case. Hill v. Baker, 28 Me. 9.

The process under the mill act is not an action at law. It is sui generis in its nature, partaking of some of the elements of a suit at law, but resembling much more a process in equity. It is not commenced by a writ but by a bill of complaint. Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

Rules in equity apply to pleading under this section.—The strict rules of pleading applicable to suits at law commenced by writs cannot apply in a proceeding under the mill act; but the rules in cases in equity do apply. Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

Complaint is proper remedy for flowage due to flashboards. — A complaint under the mill act is the proper remedy, and may be maintained by one whose lands are injured by flowage caused by flashboards erected upon a dam when the dam itself is within the mill act. Dingley v. Gardiner, 73 Me. 63.

No presumption of jurisdiction. — The proceedings as a whole are not according to the course of the common law. There is therefore no presumption of jurisdiction although they were had in a court of general jurisdiction; and every fact essential to the exercise of the special jurisdiction must appear upon the record. Prentiss v. Parks, 65 Me. 559.

Complaint should contain averments of all essential facts. — The process is one specially given, which should contain averments of all the facts made essential by the statute, to enable the complainant to avail himself of the remedy prescribed. Jones v. Skinner, 61 Me. 25.

A complaint under this section should allege that the respondent owns the land on which his mill stands. Goodwin v. Gibbs, 70 Me. 243.

And it should allege erection of dam on stream not navigable.—The statute giving protection to milldams extends only to such streams as are not navigable, and a complaint for flowing land by means of a milldam should therefore allege it to have been erected on a stream not navigable. The omission of such an allegation should be taken advantage of before verdict, for the process being a civil suit, no motion in arrest of judgment can be allowed under c. 113, § 52. Bryant v. Glidden, 36 Me. 36.

For owners of dam across navigable river not liable under section.—The owners of a dam erected across a navigable river, which caused the land above to be flowed, are not liable to a complaint for flowage by the owner of such land, under the provisions of § 5. Strout v. Millbridge Co., 45 Me. 76.

Necessary averments under early form of § 1.—For a case setting forth the necessary averments of a complaint in accordance with an early form of § 1, prescribing the conditions under which mills may be erected, see Farrington v. Blish, 14 Me. 423.

Complaint held defective.—A complaint is clearly defective in omitting averments essential to its prosecution, where it contains no averment that the respondents had erected, or caused to be erected on their own land, any watermill. Jones v. Skinner, 61 Me. 25; Morton v. Franklin Co., 62 Me. 455; Dixon v. Eaton, 68 Me. 542.

In a complaint where there was no allegation that the stream across which the dam was erected was "not navigable," as provided in § 1, the omission was held fatally defective. Jones v. Skinner, 61 Me. 25.

Omission of allegation of ownership of land taken by demurrer.—Under this section the complaint must allege the defendant's ownership of the land on which the dam causing the flowage is erected, and if this allegation is omitted, it is bad on demurrer. Crockett v. Millett, 65 Me. 191.

Amendment after trial allowed.—A complaint for flowage may be amended after trial on the merits and verdict by the insertion of the words "on his own land," so that it may be alleged that the dam causing the injury complained of was erected upon the land of the defendant, if that was conceded to be the fact upon the trial of the cause. Russell v. Turner, 62 Me. 496.

One of the essential facts that the record must show is due notice to the respondent. Prentiss v. Parks, 65 Me. 559.

In a complaint under this section all the owners of the dam must be joined as respondents. Butler v. Huse, 63 Me. 447.

And issue of nonjoinder may be raised at any time.—It must appear that all the part owners are joined in a complaint under this section. Nor is it necessary to take advantage of an omission in this respect by plea in abatement, but the issue

may be raised by the proper pleading at any time. Hence, where an issue is made upon this point, it is not necessary that the plea should state the names of the part owners omitted. The allegation that they are unknown is sufficient. Turner v. Whitehouse, 68 Me. 221.

Dismissal allowed for nonjoinder. — If all the owners of the milldam complained of are not joined, the complaint will be dismissed, if the nonjoinder be pleaded in abatement. Hill v. Baker, 28 Me. 9.

Submission of complaint to referees.—A statute complaint for flowage may be submitted to the determination of referees, under c. 121, § 1, unless it expressly appears that the title to real estate is necessarily involved. Quinn v. Beese, 64 Me. 366.

III. LIABILITY.

Owner of mill responsible in damages. —It is the owner or occupant of the mill for the use of which the head of water is raised, who is especially made responsible in damages. Nelson v. Butterfield, 21 Me. 220.

And it is no defense that owner has relinquished ownership. — This section does not exempt a person merely because he is not the present owner. It is no defense that the respondent's ownership had ceased prior to the instituting of the complaint. For damage done within three years before commencing the suit, and before the owner had ceased to own the dam, he is responsible. Bean v. Hinman, 33 Me. 480.

But if any of several owners had right to flow as alleged, complaint cannot be sustained.—A complaint for flowage cannot be sustained if either of several respondents had the right to flow the complainant's premises in the manner and to the extent stated in the complaint. Butler v. Huse, 63 Me. 447.

Owner of land flowed cannot recover unless damages sustained. — It is a well settled principle that the owner of land flowed by means of a dam erected for the use of a water mill cannot maintain an action against the person who erects and keeps up the dam, unless he has sustained damages by reason of such flowing. Wentworth v. Sanford Mfg. Co., 33 Me. 547.

And if no damages, no prescriptive right can be acquired.—If the owner of the land flowed has not been injured by the flowing, he cannot maintain the action under the statute against the owner of the mill for flowing his land; and having no power to prevent the flowing in such case, no prescriptive right to flow the lands without the payment of damages can be acquired against him. Underwood v. North Wayne Scythe Co., 41 Me. 291.

Where mill owner is not owner of dam from which he gets water, he is not liable for flowage.—If a blacksmith's shop, in which the bellows is worked by a waterfall, can be considered a mill, yet if there is only a right to use the water for that purpose at the will of the owners or occupants of the dam, and at such times and under such restrictions as they may please to prescribe, the owner of such shop is not liable for the payment of damages for the flowing of the water. It would not be a mill for whose use the water was either raised or continued. Nelson v. Butterfield, 21 Me. 220.

And one merely benefited by flow from dam is not liable.—The owner or occupant of the mill, for the use of which the water is raised, is by the statute made liable for the payment of the damages. One, who is neither the owner nor occupant of a watermill, for the use of which the water has been raised or continued, nor the owner or occupant of the milldam, is not made liable, although he may appear to be benefited by the flow of the water. Nelson v. Butterfield, 21 Me. 220.

Nor can recovery be had for damages to unimproved mill site by dam erected below.—As a riparian proprietor could recover at common law no damages occasioned to an unimproved or unappropriated mill site by the erection of a dam and mill on the same stream below, he cannot maintain a complaint under the mill act to recover similar damages. Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

Nor for reflowing of drained pond. — Where ponds over ten acres in extent are drained by lowering the outlet, the flowing again of the land thus exposed, by the erection of a dam at the outlet of the same height as the bed of the outlet channel before it was lowered, in no way injures the littoral proprietor. Ray v. E. I. DuPont De Nemours Co., 122 Me. 350, 120 A. 47.

But one tenant can maintain process against cotenant who flows him out.—To flow the land owned in common, by one tenant in common, operates as an absolute exclusion of the cotenant, pro tanto, from the beneficial use of the common estate, for which he would have been entitled to a remedy at common law. In all cases where applicable, the proceeding by complaint has been substituted by the legislature of this state for an action at common law. No practical difficulties are perceived

in the way of maintaining this process, and it cannot be defeated by technical objections. Hutchinson v. Chase, 39 Me. 508.

Acquisition of title to land flowed by one liable for flowage extinguishes right thereto.—If one, liable to damages for flowing the land of another, acquires a title to the land flowed, the right to recover damages for such flowing is absolutely extinguished, and not merely suspended; so that upon the unity of title being afterwards destroyed by conveyance or otherwise, the right to compensation for the injury of flowing would not thereby be revived. Hathorn v. Stinson, 10 Me. 224.

And owner of land flowed may waive damages by parol. — The right to flow, subject to the claim of the party injured for damages, is given by statute. These damages the party may waive or relinquish by parol. He thereby gives the other party no new interest in or right over his lands; but he foregoes a right to damages, which he might have enforced by complaint in the nature of a personal action. Waiver of damages for flowage, therefore, need not be in writing under the statute of frauds. Clement v. Durgin, 5 Me. 9.

Owner liable for diversion of water.— Where one mill owner without right has diverted water from the mill of another so as to diminish its power of performance to the extent of its capacity, he will be liable in damages therefor. Stickney v. Munroe, 44 Me. 195.

Sec. 6. Complaint.—The complaint shall contain such a description of the land flowed or injured, and such a statement of the damage, that the record of the case shall show the matter heard and determined in the suit. (R. S. c. 166, § 5.)

This section does not profess to provide what shall constitute a full formal complaint, but simply directs that the description of the land injured, and the statement of the damage shall be full. Jones v. Skinner, 61 Me. 25.

Applied in Jones v. Pierce, 16 Me. 411; Prescott v. Curtis, 42 Me. 64; Hall v. Decker, 48 Me. 255.

Sec. 7. Presentment and service of complaint; inserted in writ. — The complaint may be presented to the court in term time, or be filed in the clerk's office in vacation; and the proper officer shall serve the same, 14 days before the return day, on the respondent, by leaving a copy thereof at his dwelling house, if he has any in the state; otherwise, he shall leave it at the mill in question or with its occupant; or the complaint may be inserted in a writ of attachment and served by summons and copy. (R. S. c. 166, § 6.)

Purpose of provision as to complaint not inserted in a writ is to provide for service.—The purpose of the requirement of this section that the complaint, if not inserted in a writ, should be presented to the court in term time, or filed in the office of the clerk in vacation, is clearly that the court in term time may fix the return term and order service of the complaint upon the respondent; or that a justice of the court, in vacation, may make such an order. Wyman v. Piscataquis Woolen Co., 100 Me. 546, 62 A. 655.

Clerk cannot certify copy for service; nor can service be made without order.— This section contains no authority for the clerk to make a certified copy of the complaint for service, and the requirement that the complaint may be filed in the clerk's office is not for this purpose. Neither does this section, by implication, authorize service without an order therefor. Wyman v. Piscataquis Woolen Co., 100 Me. 546, 62 A. 655.

Constable may serve precept. — An action for damages for flowing land is a personal action within the meaning of c. 89, § 207, and a constable may serve the precept. Hall v. Decker, 48 Me. 255.

Service held insufficient.—The delivery of a copy of the complaint, attested by the clerk of court, by a sheriff to the respondent, without an order of the court, is not a sufficient service under this section. Wyman v. Piscataquis Woolen Co., 100 Me. 546, 62 A. 655.

Applied in Prentiss v. Parks, 65 Me. 559.

Cited in Quinn v. Besse, 64 Me. 366.

Sec. 8. Pleas in bar.—The owner or occupant of such mill or canal may plead in bar that the complainant has no right, title or estate in the lands alleged to be injured; or that he has a right to maintain such dam, and flow the lands, or divert the water for an agreed price, or without any compensation; or any other

matter, which may show that the complainant cannot maintain the suit; but he shall not plead in bar of the complaint, that the land described therein is not injured by such dam or canal. (R. S. c. 166, § 7.)

Matters may be pleaded though not enumerated in section. — In the proceedings under the mill act the respondent may plead any matter showing sufficient cause why further proceedings should not be had; though such plea is not enumerated in this section. Axtell v. Coombs, 4 Me. 322.

Title not controverted is deemed in complainant.—In a complaint by a complainant for flowing land claimed to be his, if the defendant does not controvert the title, it is to be considered in the complainant. Benson v. Soule, 32 Me. 39.

License to flow may be proved in bar by parol.—Parol proof that the complainant had licensed the respondent to flow the former's lands is a good defense to a complaint for damages for flowage. Clement v. Durgin, 5 Me. 9.

Objections to report are not available after default.—Objections to the acceptance of the report of the commissioners on the ground that the complaint is defective cannot avail, as that should have been taken advantage of before the respondent submits to a default. The same principles would seem to be applicable as if a verdict had been rendered, in which case the verdict would not be arrested nor the proceedings be quashed on certiorari. Even before default, the objections taken might have been cured by amendment. Coleman v. Andrews, 48 Me. 562.

And leave to file plea in bar after report held discretionary with court. — Where the defendant asked leave to file a plea in bar after the report, alleging that the plaintiff was not the owner of the land described in the complaint, it was held that this was discretionary with the court, that it could not be claimed as a matter of right. The defendant's request was denied and the complaint was sent directly to the committee to assess the damages according to the state of the title found before him. Penobscot Log Driving Co. v. West Branch Driving & Reservoir Dam Co., 99 Me. 452, 59 A. 593.

Former provision of section. — For a case relating to a former provision of this section providing for appeal to the supreme judicial court, see Cowell v. Great Falls Mfg. Co., 6 Me. 282.

Applied in Hathorne v. Stinson, 12 Me. 183; Stackpole v. Curtis, 32 Me. 383; Simpson v. Bowden, 33 Me. 549; Bryant v. Glidden, 36 Me. 36; Prescott v. Curtis, 42 Me. 64; Gleason v. Tuttle, 46 Me. 288; Hersey v. Packard, 56 Me. 395; Prentiss v. Parks, 65 Me. 559.

Stated in Hutchinson v. Chase, 39 Me. 508; Underwood v. North Wayne Scythe Co., 41 Me. 291.

Cited in Nelson v. Butterfield, 21 Me. 220.

Sec. 9. Trial; costs.—When any such plea is filed and an issue in fact or in law is joined, it shall be decided as similar issues are decided at common law; and if judgment is for the respondent, he shall recover his costs. (R. S. c. 166, § 8.)

Applied in Prentiss v. Parks, 65 Me. 559.

Cited in Nelson v. Butterfield, 21 Me. 220.

Sec. 10. Complainant recovers; damages in gross; annual damages if owners do not elect to pay.—If the issue is decided in favor of the complainant, or if the respondent is defaulted or does not plead or show any legal objection to the proceedings, the court shall appoint three or more disinterested commissioners of the same county, who shall go upon and examine the premises and make a true and faithful appraisement, under oath, of the yearly damages, if any, done to the complainant by the flowing of his lands or the diversion of the water described in the complaint, and determine how far the same is necessary, and ascertain and report for what portion of the year such lands ought not to be flowed, or water diverted, or what quantity of water shall be diverted. They shall also ascertain, determine and report what sum in gross would be a reasonable compensation for all the damages, if any, occasioned by the use of such dam, and for the right of maintaining and using the same forever, estimated according to the height of the dam and flashboards as then existing; and if within 10 days after said report is presented to the court, the owners of said dam or mills elect to pay the damages in gross, the court, where the judgment is entered, shall fix the

time in which said damages shall be paid, and if not paid within that time, the owners of the dam or mills lose all benefit of their election, and the annual damages shall stand as the judgment of the court, and, except as herein provided, all proceedings shall be in conformity with the other provisions of this chapter. (R. S. c. 166, § 9.)

Question of right to flow determined before appointment of commissioners.— The statute unquestionably contemplates that when the right to flow is controverted, such fact must be established or admitted before the appointment of commissioners. It is no part of their duty, nor is it within their power, to determine that question. Hubbard v. Great Falls Mfg. Co., 80 Me. 39, 12 A. 878.

And question whether any damages suffered determined only when amount of damages determined.—In a complaint under the statute to recover damages to land, occasioned by its being flowed by a dam erected for the use of mills, the question whether the complainant has suffered any damages is to be determined only when the amount of damages is under consideration. Nelson v. Butterfield, 21 Me. 220.

The issue, whether complainant has suffered such injury or not, must first be made before the commissioners appointed by the court. Prescott v. Curtis, 42 Me. 64.

Whether damages have been suffered by the complainant is not an issue to be made and tried in the court in which the complaint is entered, before the appointment of commissioners. Underwood v. North Wayne Scythe Co., 41 Me. 291.

Presence of parties is indispensable, and notice to them is requisite. — The presence of the parties is indispensably necessary to a just understanding of the cause by the commissioners appointed in accordance with this section. But unless notified, they could not know of the time and place of hearing. The proceedings of the commissioners are judicial in their character, and if affirmed form the basis of a judgment of the court. The rights of the defendant are the subject matter of their adjudication, and should have notice of the time and place of hearing, that they may be enabled to appear and protect their rights. Coleman v. Andrews, 48 Me. 562.

Notice required before appointment of commissioners.—The order for the appointment of commissioners is a species of interlocutory judgment, before the entry of which it should be made to appear that the respondents have had notice and an opportunity to be heard. This is expressly required by §§ 7-10. If the respondent has nothing to offer in defense he may still wish to be heard as to the appointment of the commissioners. Prentiss v. Parks, 65 Me. 559.

And warrant to commissioners cannot supply defect of notice.—The warrant to the commissioners is a process in pursuance of the interlocutory judgment. It cannot be used to supplement a record of such judgment that is defective in the matter of a jurisdictional fact like that of notice. A recital in the warrant that there was due notice to the respondents does not amount to proof that such notice was given. Prentiss v. Parks, 65 Me. 559.

Report recommitted or amended to show notice. — Where the report of the commissioners does not disclose the fact of notice to the defendant, the report should be recommitted if in fact there was no notice. If there was notice, the report of the commissioners may be amended by showing that fact. Coleman v. Andrews, 48 Me. 562.

Failure to plead to complaint or object to proceedings amounts to default. — Where the defendants did not plead to the complaint before the appointment of commissioners, and did not show "any legal objection to the proceedings," the effect was practically the same as if a default had been entered; and all matters that should have been determined by the proper tribunal before such appointment were shut out. It only remained for the commissioners to proceed in accordance with the authority with which they were invested under this section and their warrant issued from the court. Hubbard v. Great Falls Mfg. Co., 80 Me. 39, 12 A. 878.

And objections to report not available after default.—Objections to the acceptance of the report of the commissioners, on the ground that the complaint is defective, cannot avail where that was not taken advantage of before the respondent submitted to a default. The same principles would seem to be applicable as if a verdict had been rendered, in which case the verdict would not be arrested nor the proceedings be quashed on certiorari. Even before default, the objections taken might have been cured by amendment. Coleman v. Andrews, 48 Me. 562.

Duties of commissioners.—The commissioners when appointed are to appraise the yearly damages, if any, done to the com-

plainant, determine how far the flowing is necessary, and during what portion of the year such lands ought not to be flowed. Either one of these several duties may be performed without the other. Turner v. Whitehouse, 68 Me. 221.

If the complainant within the three years has suffered damages, they may be appraised by the commissioners. At the same time, if the facts of the case show no occasion for regulating the extent or duration of the flowage, if the complainant has parted with his title so that an adjudication upon these matters would not be binding upon the then owner, such an adjudication may be omitted without affecting the question of damages. Turner v. Whitehouse, 68 Me. 221.

Mere inspection by commissioners is not enough to determine damages.—To enable the commissioners to make the appraisement prescribed by this section, the mere inspection of the land flowed or the dam by which the flowage is caused, is not enough. It may be necessary that witnesses should be called to state the condition of the land and its yearly value before the dam complained of was erected. There will be proofs and counter proofs of the several questions and facts in dispute. Coleman v. Andrews, 48 Me. 562.

Damages found in aggregate and yearly terms.—The damages occasioned for three years before the complaint is filed may be assessed in one aggregate sum. The subsequent damages should be found in "yearly damages," for the recovery of which the owner of the land has a lien "from the time of the institution of the original complaint on the mill and milldam," under § 18. These damages cannot be found to be different in different years and be incorporated with those occasioned before the complaint was filed, as this course would deprive the owner of the land of his lien and other parties of rights secured to them by the statute. Bryant v. Glidden, 36 Me. 36.

Gross damages ascertained by same mode and on same facts as yearly damages.—The provision of the statute which authorizes the assessment of gross damages is not a new issue which requires decision by a jury; it is only a judicial question. Gross damages are simply the equivalent of annual damages which are to be ascertained by the same mode and upon the same facts. Ingram v. Maine Water Co., 98 Me. 566, 57 A. 893.

And value is same whether taken for free or compensated public use.—If the taking is required by public exigencies, i. e., public welfare, and if the purpose is public (an issue which in case of the mill act is no longer open to question), the rule for assessing land damages is the same, whether the land is taken for free or compensated public use. Gilmore v. Central Maine Power Co., 127 Me. 522, 145 A. 137.

Value of land appropriated contemplates market value with view to uses adapted to.—In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its availability for valuable uses. Gilmore v. Central Maine Power Co., 127 Me. 522, 145 A. 137.

Thus it is not valueless merely because not in use.—Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. Gilmore v. Central Maine Power Co., 127 Me. 522, 145 A. 137.

And account may be taken of value of land if no dam existed; direct damages allowed.—In assessing damages under this section there may be taken into account what would have been the condition of the land if no dam had been erected; and comparison may be made between the present value and productiveness of the land and what it would have been if it had not been injured by the dam; all direct damages shall be allowed. Gilmore v. Central Maine Power Co., 127 Me. 522, 145 A. 137.

But complainant cannot claim value to respondent for water power.—The complainant cannot claim to be allowed damages based upon the value of the property to the respondent for water power purposes. The "value for water power purposes" theory has no foundation either in reason or authority. For this theory, if adopted, would make the owner of any land flowed in a hydroelectric development a quasi partner entitled to share in the value of the entire development without sharing in the burden of its cost or the risk of its failure. Gilmore v. Central Maine Power Co., 127 Me. 522, 145 A. 137.

He can claim value to seller, not to taker.—Compensation should be made for all

property taken at its full value, not to the taker but to the seller. The real question is, what has the owner lost, not what the taker has gained. The compensation to which the owner is entitled is what the property in question would, immediately prior to the taking, have produced for him in the open market, not what it might be worth to the defendant taking it. Gilmore v. Central Maine Power Co., 127 Me. 522, 145 A. 137.

If land wholly appropriated, market value applies; if partially taken, compensation is diminution of market value.—When a tract of land is wholly taken or wholly submerged so that nothing is left for the owner's use the only thing to be determined is the market value of the land at the time of taking. If a part only is taken, or damaged market value should first be determined, then there must be found the extent to which such value has been diminished by its flooding or saturation. Gilmore v. Central Maine Power Co., 127 Me. 522, 145 A. 137.

Indirect damages not allowed.—The flooding of land may depress or may enhance the value of any parcel of land lying in or near it; it may cause neighbors to abandon their farms; it may change the population; it may cause the discontinuance of schools or possibly the abatement of nuisances. These results may cause damage, but if so it is indirect and not the basis of recovery. The damages must be direct, not such as are general or common to others or to the whole community. Gilmore v. Central Maine Power Co., 127 Me. 522, 145 A. 137.

Nor are damages for destruction of possible water power development by dam below.—Damages for destruction of possible water power development by a dam built below the property of the plaintiff are not allowable under the mill act. Nor is this repugnant to the due process clause of the fourteenth amendment of the federal constitution. Bingham Land Co. v. Central Maine Power Co., 133 Me. 519, 180 A. 363.

Applied in Bryant v. Glidden, 39 Me. 458; Davidson v. Linn Woolen Co., 107 Me. 530, 80 A. 1131.

Quoted in Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

Stated in Norris v. Pillsbury, 74 Me. 67; Wilson v. Campbell, 76 Me. 94.

Cited in Lowell v. Shaw, 15 Me. 242; Hersey v. Packard, 56 Me. 395.

Sec. 11. Payment of damages in gross.—If the damages in gross are paid within the time fixed, the judgment is a bar to any further complaint so long as the dam and flashboards remain at the same height, but if thereafter either is raised, a new complaint may be made by the owner of the lands flowed for any additional damages caused thereby, and the proceedings in said new complaint shall be as hereinbefore prescribed. (R. S. c. 166, § 10.)

Stated in Norris v. Pillsbury, 74 Me. 67; Brown v. De Normandie, 123 Me. 535, 124 A. 697.

Sec. 12. Owners may apply to have damages assessed in gross.—In any case where annual damages have been determined by a judgment of the court, the owners of the dam or mills may apply to the court by a new complaint, to have the damages assessed in gross, and commissioners may be appointed as in other cases to ascertain, determine and report the damages in gross, and like proceedings shall then be had as are provided in the 2 preceding sections. (R. S. c. 166, § 11.)

Quoted in Norris v. Pillsbury, 74 Me. 67.

Sec. 13. Commissioners' report evidence in trial by jury.—If either party requests that a jury may be impaneled to try the cause, the report of the commissioners shall, under the direction of the court, be given in evidence to the jury; but evidence shall not be admitted to contradict it, unless misconduct, partiality or unfaithfulness on the part of some commissioner is shown. (R. S. c. 166, § 12.)

Section insures impartial tribunal.—The authorized retrial of the cause by a jury is a statutory proceeding designed to insure the decision of an impartial tribunal. Section 13 secures the constitutional rights of the parties. Ingram v. Maine Water Co., 98 Me. 566, 57 A. 893.

Jury trial is matter of right; claim is not suit concerning property within meaning of constitution.—A party is entitled as a mat-

ter of right to a trial by jury. The claim for damages is not a civil suit or a controversy concerning property within the meaning of the constitution. The proceeding is judicial in character, and it is sufficient if the designated tribunal is impartial. Ingram v. Maine Water Co., 98 Me. 566, 57 A. 893.

Former provision of section.—For cases relating to a former provision of this section whereby the report of the commissioners could be "impeached by evidence," see Bryant v. Glidden, 36 Me. 36; Bryant v. Glidden, 39 Me. 458; Prescott v. Curtis, 42 Me. 64.

Sec. 14. Acceptance.—If neither party requests a trial by jury, the report of the commissioners may be accepted by the court and judgment rendered thereon. (R. S. c. 166, § 13.)

Sec. 15. Verdict or report bars future action.—The verdict of the jury or the report of the commissioners so accepted is a bar to any action brought for such damages; and the owner or occupant shall not flow the lands nor divert the water during any portion of the period when prohibited, nor divert the water beyond the quantity allowed by the commissioners or jury. (R. S. c. 166, § 14.)

Stated in Bryant v. Glidden, 36 Me. 36.
Cited in Quinn v. Besse, 64 Me. 366; Wilson v. Campbell, 76 Me. 94.

Sec. 16. Yearly damages.—Such verdict or accepted report of the commissioners, and judgment thereon, shall be the measure of the yearly damages, until the owner or occupant of the lands or the owner or occupant of the mill or canal, on a new complaint to the court and by proceedings as in the former case, obtains an increase or decrease of such damages. (R. S. c. 166, § 15.)

"Yearly damages" commence as of institution of complaint; subsequent purchaser liable.—When yearly damages are found, the time of their commencement is determined by "the institution of the original complant," and not by the time of finding the verdict. A subsequent purchaser of the dam and mill is liable for the year's damages becoming payable after his purchase. Bryant v. Glidden, 36 Me. 36.

The date of the filing of the complaint is the beginning of every new year. The past year's damages become due at that time; and whoever is then the owner of the dam and mill is liable for the year then terminated. Billings v. Berry, 50 Me. 31.

Judgment should embrace all yearly payments then due.—Where yearly damages are assessed, when the judgment is rendered, it should embrace all the yearly payments that have then become due. Billings v. Berry, 50 Me. 31.

Statute contemplates accrual of one payment before second complaint.—The statute evidently contemplates in the determination of yearly damages that there shall be one yearly payment, not embraced in the judgment on the first complaint, accruing before the second shall be commenced. Or in other words, the judgment on the first shall be "the measure" of damages for at least one year that shall not be embraced in the second. Billings v. Berry, 50 Me. 31.

And notice of new complaint may be given when new payment becomes due.—But the new yearly payment is not likely to become due a whole year after the judgment is rendered, as the year is reckoned, not from the date of the judgment, but from the date of filing the complaint. Therefore a yearly payment not embraced in the judgment may become due very soon after it is rendered. And, when such new payment becomes due, though it should be the next day after the rendition of the judgment on the first complaint, either party may give the notice preliminary to instituting another. Billings v. Berry, 50 Me. 31.

Stated in Lowell v. Shaw, 15 Me. 242.
Cited in Wilson v. Campbell, 76 Me. 94.

Sec. 17. Security required for yearly damages. — When any person whose lands are so flowed or from whose lands the water is so diverted files his complaint for acertaining or increasing his damages, or brings his action of debt as provided in the following section, and moves the court to direct the owner or occupant of such mill or canal to give security for the payment of the annual damages, and the court so orders, the owner or occupant refusing or neglecting to

give such security shall have no benefit of the provisions of this chapter; but is liable to be sued for the damages occasioned by such flowing in an action at common law. (R. S. c. 166, § 16.)

Sec. 18. Complainant may sue for damages, if unpaid; lien upon mill and land.—The party entitled to such annual compensation may maintain an action of debt or assumpsit therefor against any person who owns or occupies said mill, or canal and mills supplied thereby, when the action is brought; and shall therein recover the whole sum due and unpaid, with costs; and shall have a lien for such compensation, from the time of the institution of the original complaint, on the mill and milldam, or on the canal and the mill supplied thereby, with the appurtenances and the land under and adjoining them and used therewith, for any sum due not more than 3 years before the commencement of the complaint. (R. S. c. 166, § 17.)

The action authorized by this section may be against owners or occupiers. Hathorn v. Kelley, 86 Me. 487, 29 A. 1108.

It is grounded on and evidenced by the judgment.—The action given under this section is not strictly upon the judgment itself, but is one flowing out of it, and to be evidenced by it—grounded upon it, as the earlier statute on the subject expresses it—an action of assumpsit implying a promise to pay fixed annual damages. Hathorn v. Kelley, 86 Me. 487, 29 A. 1108.

The plaintiff, to show himself "entitled to such annual compensation," must show a valid judgment therefor obtained in his favor against the proper parties as respondents, under the provisions of this chapter. Prentiss v. Parks, 65 Me. 559.

And regular service or waiver requisite.—Unless the record shows either a regular service according to the statute, or a waiver by an appearance on the part of the original respondents, or otherwise, the judgment cannot avail the plaintiff, nor show him "entitled to such annual compensation" within the meaning of this section. Prentiss v. Parks, 65 Me. 559.

Yearly damages attach to estate of milldam, purchaser takes cum onere.—The intention of the legislature appears to have been that the yearly damage should become attached to the estate of the milldam so as to make any owner or occupant liable to pay it. It is a burden upon the estate imposed by the law as a remuneration for the injury occasioned by it. Whoever becomes the owner must take the estate cum onere, and the owner of the land flowed will be entitled to call upon him to pay whatever may be due from the land. Lowell v. Shaw, 15 Me. 242.

Damages run with land.—It is manifestly the intention of the legislature that the damages, which have been established, shall run with the land, and any assignee of the mill owner shall be held to pay them. Pierce v. Knapp, 34 Me. 402.

And owner is liable for damages in arrear before title commenced.—Where a judgment for yearly damages has been recovered for flowing plaintiff's land, the judgment is a charge upon the estate complained of, and the owner and occupier of the mill and dam is liable in an action of debt, not only for what may fall due while he is owner, but for all that was in arrear before his title commenced. Knapp v. Clark, 30 Me. 244.

Nonuser, to exonerate owners from yearly damages, must be absolute.—To constitute an abandonment of a milldam so as to exonerate its owners from liability to pay the annual damages previously established in favor of land owners in proceedings for flowage, the nonuser must have been absolute and complete, and not partial or temporary merely. Hathorn v. Kelley, 86 Me. 487, 29 A. 1108.

Equitable doctrine of laches may apply in action to recover yearly damages.—The proceedings in a complaint for flowage partake so much of equitable forms and principles as to allow the equitable doctrine of laches to be administered in an action to recover annual damages which were established, but not sued nor demanded for twenty years next preceding the date of the writ. Hathorn v. Kelley, 86 Me. 487, 29 A. 1108.

Cited in Bryant v. Glidden, 36 Me. 36.

Sec. 19. Mill and land sold on execution.—The execution on such judgment, if not paid, may at any time within 30 days be levied on the premises subject to the lien; and the officer may sell the same at public auction, or so much thereof in common with the residue as is necessary to satisfy the execution, proceeding in giving notice of such sale as in selling an equity of redemption on

execution. Such sale is effectual against all persons claiming the premises by any title which accrued within the time covered by the lien. (R. S. c. 166, § 18.)

Sec. 20. Right of redemption.—Any person entitled to the premises may redeem them within 1 year after the sale by paying to the purchaser, or the person holding under him, the sum paid therefor, with interest at the rate of 12%, deducting therefrom any rents and profits received by such purchaser, or person holding under him; and may have the same process to compel the purchaser to account as he might have had against a purchaser of an equity of redemption. (R. S. 166, § 19.)

Sec. 21. New complaint.—When either party is dissatisfied with the annual compensation established as aforesaid, a new complaint may be filed, and proceedings had and conducted substantially as in case of an original complaint. (R. S. c. 166, § 20.)

Upon complaint, judgment as to future damages not conclusive.—Upon a complaint under the statute to recover damages caused by flowing lands, the judgment in regard to future compensation is not conclusive upon either party. Billings v. Berry, 50 Me. 31.

Single new complaint allowed, combining several judgments. — Where the propriety of land, overflowed by a dam owned by different persons, proceeded by separate complaints, and recovered a judgment for yearly damages against each owner of the dam for flowing different portions of the complainant's land, and where afterwards one of the respondents becomes sole owner of the dam; if the proprietor of the land seeks an increase of his yearly damages, he may combine the whole subject matter in one complaint against the then owner of the whole dam. Jones v. Pierce, 16 Me. 411.

When damages have been once assessed in gross there can be no reassessment nor new complaint. The sections following § 22 are obviously inapplicable to a complaint when it is sought to have damages assessed in gross. Norris v. Pillsbury, 74 Me. 67.

Sec. 22. Restriction.—No new complaint shall be brought until 1 month after the payment of the preceding year is due and 1 month after notice to the other party; and the other party may within that time make an offer or tender as is hereinafter provided. (R. S. c. 166, § 21.)

History of section. — See Billings v. Berry, 50 Me. 31.

This section refers exclusively to cases under § 21 where either party being dissatisfied with the annual compensation as established, seeks to increase or diminish such compensation for the future. Norris v. Pillsbury, 74 Me. 67.

The date of the filing of the complaint is the beginning of every new year. The past year's damages become due at that time; and whoever is then the owner of the dam and mill is liable for the year then terminated. Billings v. Berry, 50 Me. 31.

And notice of new complaint may be given when new payment becomes due—within year of judgment. — But the new yearly payment is not likely to become due a whole year after the judgment is rendered, as the year is reckoned, not from the date of the judgment, but from the date of filing the complaint. Therefore a yearly payment not embraced in the judgment may become due very soon after it is rendered. And when such new payment becomes due, though it should be the next day after the rendition of the judgment on the first complaint, either party may give the notice preliminary to instituting another. Billings v. Berry, 50 Me. 31.

Motion in abatement held overruled on ground payment may become due within less than year. — Upon a motion in abatement on the ground that the complaint was brought before the expiration of one year after the rendition of judgment upon the original complaint would be properly overruled, since, admitting the truth of the allegation, it does not necessarily follow that the new complaint was premature. A yearly payment, not embraced in the original judgment, might become due long before the expiration of a year. Billings v. Berry, 50 Me. 31.

Sec. 23. Owner may offer increased compensation. — The owner of the mill, dam or canal may, within said month, offer in writing to the owner of the land injured, an increase of compensation for the future; and if the owner of

the land does not agree to accept it, but brings a new complaint for the purpose of increasing it, he recovers no costs unless he obtains an increase greater than the offer. (R. S. c. 166, § 22.)

Sec. 24. Injured party may offer to accept less compensation.—The owner of the land injured may, within said month, offer in writing to the owner of the mill, dam or canal to accept a reduced compensation for the future; and if the owner of the mill, dam or canal declines to pay it, and brings a new complaint to obtain a reduction, he shall recover no costs, unless such compensation is reduced to a sum less than was offered. (R. S. c. 166, § 23.)

Sec. 25. Tenants may make such offers.—Such offers may be made by or to the tenants or occupants of the land, and of the mill and dam, or canal, in like manner and with like effect as if made by or to the owners; but no agreements founded thereon bind the owners, unless made by their consent. (R. S. c. 166, § 24.)

Sec. 26. Remedy at common law limited.—No action shall be sustained at common law for the recovery of damages occasioned by the overflowing of lands or for the diversion of the water as before mentioned, except in the cases provided in this chapter, to enforce the payment of damages after they have been ascertained by process of complaint as aforesaid. (R. S. c. 166, § 25.)

Mills without state not subject to statute; common law applies.—Mills without the jurisdiction of the state, not being subject to the terms, conditions and regulations of the statutes, are not entitled to its benefits; and the common-law remedy remains unaffected by its provisions. Wooster v. Great Falls Mfg. Co., 39 Me. 246.

The proceedings under the mill act are against the property, and protect the landowner by giving him a lien for his damages upon the same. When the mill upon which the security is given is without the state, all these statute proceedings are unavailing. As the landowner cannot obtain any of the benefits given him in lieu of his common-law rights, he must be regarded as remitted to those rights. Wooster v. Great Falls Mfg. Co., 39 Me. 246.

The cases "before mentioned" are those to which the previous provisions of the statute apply. As to all such, the landowner receives the protection intended by the legislature. But when, from the nature of the case, he cannot derive any benefit from the various provisions of the statute for his security, the section cannot apply. Wooster v. Great Falls Mfg. Co., 39 Me. 246.

Quoted in dissenting opinion to Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498.

Cited in Quinn v. Besse, 64 Me. 366.

Sec. 27. Double damages, if restrictions violated. — If, after judgment, the restrictions imposed by the report of the commissioners or finding of the jury respecting the flowing or diverting of the waters are violated, the party injured thereby may recover of the wrongdoers double damages for his injury in an action at common law. (R. S. c. 166, § 26.)

Sec. 28. Agreement of parties binding, if recorded. — When an annual compensation, upon the acceptance by 1 party of an offer made by the other, is established and signed by the owners of the mill, dam or canal, and of the land, and recorded in the office of the clerk of the court in which the former judgment was rendered, with a reference on the record to the former judgment, and to the book where the agreement is recorded, such agreement is as binding as a verdict and judgment on a new complaint. (R. S. c. 166, § 27.)

Sec. 29. Judgment no bar to new complaint.—A judgment against a complainant as not entitled to any compensation is no bar to a new complaint for damages, arising after the former verdict, and for compensation for damages subsequently sustained. (R. S. c. 166, § 28.)

Sec. 30. Tender of damages.—In case of an original complaint, the respondent may, with the same advantages to himself, tender and bring money into

court, or if the issue is decided in favor of the complainant, or if the respondent is defaulted or does not plead or show any legal objections to the proceedings, the respondent may, in writing entered of record with its date, offer to be defaulted for a specific sum for the yearly damages or a sum in gross as reasonable compensation for all damages, as in an action at common law; and if either is accepted, the judgment has the same effect as if rendered on a verdict. If not accepted within such time as the court orders, it shall not be offered in evidence or have any effect upon the rights of the parties, or the judgment to be rendered except the costs. If the complainant fails to recover a sum greater than the sum tendered or offered, he recovers such costs only as accrued before the offer, and the respondent recovers costs accrued after that time, and his judgment for costs may be set off against the complainant's judgment for damages and costs. (R. S. c. 166, § 29.)

Sec. 31. No abatement by death of either party.—No complaint for so flowing lands or diverting water abates by the death of any party thereto; but it may be prosecuted or defended by the surviving complainants or respondents, or the executors or administrators of the deceased. (R. S. c. 166, § 30.)

Complaint for flowage survives, and administrator of deceased may be summoned. — Under this section a complaint for flowage survives because the statute says it does not abate. If it survives, it seems clear that the plain intendment of the statute is to provide for the necessary steps by which it may be prosecuted. It cannot be prosecuted without a party complainant and a party defendant. If either party dies, the other party is still in court with a litigant's rights. The administrator of either party may be summoned in by the other. It is true that the administrator of the complainant, after being summoned in may elect to abandon the suit, as all complainants and plaintiffs may do, and be liable to pay such costs as the law awards. Not so with the administrator of a defendant. He, like all other defendants, must answer, or be defaulted and suffer judgment against him. Geyer v. Cook, 111 Me. 341, 89 A. 147.

The word "may" in the phrase, "may be prosecuted or defended" is not used in a mere permissive sense. Geyer v. Cook, 111 Me. 341, 89 A. 147.

Sec. 32. If complaint abates, rights preserved by new complaint.—If such complaint is abated or defeated for want of form, or if, after a verdict for the complainant, judgment is reversed, he may bring a new complaint at any time within 1 year thereafter and thereon recover the damages sustained during the 3 years preceding the institution of the first complaint, or at any time afterwards. (R. S. c. 166, § 31.)

Cited in Pierce v. Knapp, 34 Me. 402.

Sec. 33. Streams forming boundary of state.—The provisions of this chapter apply to mills and dams erected upon streams forming the boundary line of the state although a part of the dam is not in the state; and the rights and remedies of all parties concerned shall be ascertained and determined as if the whole of such streams were in the state; provided, however, that the provisions of this chapter shall not apply to mills and dams erected upon streams whose waters ultimately reach the ocean at a point wholly outside the territorial limits of the United States of America unless said dams are authorized by act of legislature or by a decree of the public utilities commission made after public notice and hearing on petition for such authorization. (R. S. c. 166, § 32.)

Applied in Wooster v. Great Falls Mfg. Co., 39 Me. 246.

Sec. 34. Compensation of commissioners. — The court shall award a suitable compensation to be paid to the commissioners, and taxed and recovered by the prevailing party. The prevailing party recovers costs, except where it is otherwise expressly provided. (R. S. c. 166, § 33.)

Sec. 35. Owner or mortgagee in possession, liable for acts of tenants.—The owner or mortgagee in possession, as well as any tenant, of any mill

used for manufacturing lumber is liable for the acts of such tenant in unlawfully obstructing or diverting the water of any river or stream by the slabs or other mill waste from his mill, but no action shall be maintained therefor without a demand of damages, at least 30 days prior to its commencement. Such unlawful obstruction or diversion by the tenant shall, at the election of the owner or mortgagee and on written notice to the tenant, terminate his tenancy. (R. S. c. 166, § 34.)

Sec. 36. Damages by flowage for cranberry culture. — When dams are erected and maintained on streams not navigable, for the purposes of cranberry culture, and lands are flowed thereby and injured by such flowage, the owners thereof shall proceed for the recovery of damages for such flowage in the same manner as in case of flowage by dams erected and maintained for mill purposes. (R. S. c. 166, § 35.)

Applied in Geyer v. Cook, 111 Me. 341, 89 A. 147.

Sec. 37. Dams for ice cutting and harvesting, erected on certain streams; damages.—In order to create ponds for the cutting and harvesting of ice for the market, any persons or corporations may erect and maintain, on their own land, dams on streams not navigable or floatable, but emptying into tidewaters navigable in the winter, and may flow the lands above during November, December, January, February, March and April; but they shall draw off the water to its natural state by the 20th day of May yearly. If any lands are injured by such flowing, the owners thereof have the same remedies as in case of lands flowed by dams erected and maintained for mill purposes; but no right is granted by this or the preceding section to flow any milldam or any mill privilege improved or unimproved. This section shall not be construed as authorizing any persons or corporations to cut ice on any pond created as provided herein over any area the soil of which such persons or corporations do not own or lease or possess as tenants at will, or by reason of a valid agreement with the owner or lessee or tenant thereof when said owner or lessee is not the state and the pond is not a great pond. (R. S. c. 166, § 36.)

Sec. 38. Petition to remove timber, etc., on lands flowed by erection of dam.—When any person or corporation shall have decided to erect a dam across a nonnavigable stream under the provisions of this chapter or under special authority granted by the legislature, and shall have filed the specifications required by section 11 of chapter 44, and it appears that standing timber or other property of value upon the land intended to be flowed will constitute a menace to the safety of such person or corporation or to persons or property upon and along the banks of said stream below the intended location of said dam, the supreme judicial court or the superior court shall have jurisdiction in equity, upon petition of such person or corporation, to authorize said petitioner to remove and sell such timber or other property and to order the payment to the owner thereof of the gross proceeds of such sale and such further sum, if any, as said court shall deem just. Said court shall require the petitioner to furnish security for such payment and for an additional penalty not less than double the amount to be received from such sale and shall include in its decree a condition that such additional sum shall be paid to said owner as damages if the dam is not completed and the land flowed within a time to be therein specified; provided, however, that such time may be extended for good cause shown. (R. S. c. 166, § 37.)

Cited in Brown v. DeNormandie, 123 Me. 535, 124 A. 697.

Sec. 39. Damages.—Damages caused by flowage of lands from which timber or other property shall have been removed under the provisions of section 38 shall be assessed as though there had been no severance, and the amount paid for such timber or other property with interest to the date of the judgment shall be

credited thereon, provided that the owner of the land shall have the right to elect whether his damages shall be assessed for flowage as of the time of taking or of flowing. (R. S. c. 166, § 38.)

Protection of Ways from Overflow.

Dam causing bridge to be destroyed in unusual freshet, not within statute.—A case would not seem to be within §§ 40-45, where a bridge was swept away in an unusual freshet because of a dam erected too high below such bridge. Palmyra v. Waverly Woolen Co., 99 Me. 134, 58 A. 674.

Sec. 40. Petition for right to raise ways and enlarge water vents; notice.—When the owners of mills carried by the water of a stream, or the owners of water power for operating mills, find or apprehend that the necessary head of water for working or reservoir purposes cannot be obtained, or when their existing rights in respect to the same cannot be exercised without overflowing some highway or town way, they may petition the county commissioners for permission to raise such ways and to enlarge the water vent thereof. Such commissioners shall appoint a time and place for a hearing on the petition and give notice thereof to all parties interested as provided in section 36 of chapter 89, and such notice may be proved in the manner therein provided. (R. S. c. 166, § 39.)

Sec. 41. Proceedings of commissioners. — On the day appointed, the county commissioners shall meet, examine the premises described in the petition and hear the parties present, and thereupon they shall determine whether said ways shall be raised and the water vents enlarged and to what extent, and shall prescribe the manner in which it shall be done, and what portion of the expenses thereof and the costs of the hearing shall be borne by the petitioners, and what portion, if any, by the town where the way is located. (R. S. c. 166, § 40.)

Sec. 42. If decision in favor of petitioners.—If the decision is in favor of the petitioners, said commissioners shall direct the town, in writing, to make the alterations prescribed and fix the time within which the same shall be done, and if not done within the time fixed, the same may be done by the petitioners; and whether by the town or by the petitioners, it shall be done in a faithful manner and to the acceptance of the commissioners; and whichever party makes said alterations has a claim upon the other for the proportion fixed by the commissioners for said other party to pay, and if it is not paid within 30 days after its approval by said commissioners and a demand therefor, it may be recovered in an action on the case. (R. S. c. 166, § 41.)

Sec. 43. Costs, if decision against petitioners.—If the decision of the county commissioners is against the petitioners, they shall pay the costs of the hearing, taxed as in other cases before county commissioners. (R. S. c. 166, § 42.)

Sec. 44. Appeal.—Any party aggrieved may appeal from the decision of said commissioners in the same manner and subject to the same conditions as in case of highways. (R. S. c. 166, § 43.)

See c. 89, § 59, re proceedings before county commissioners for ways in incorporated places.

Sec. 45. Flowage rights not affected.—Nothing in the 5 preceding sections affects any right of flowage or damage therefor. (R. S. c. 166, § 44.)

Inspection of Dams and Reservoirs.

Sec. 46. Inspector of dams and reservoirs; appointment; duties.—The governor with the advice and consent of the council shall annually appoint a competent and practical engineer, a citizen of the state, who shall hold said

office until his successor is appointed and qualified, and who shall, upon petition of 10 resident taxpayers of any town or several towns, the selectmen or assessors of any town or the county commissioners of any county, inspect any dam or reservoir located in such town or county erected for the saving of water for manufacturing or other uses, and after personal examination and hearing the testimony of witnesses summoned for the purpose, shall forthwith report to the governor his opinion of the safety and sufficiency thereof. (R. S. c. 166, § 45.)

Sec. 47. If dam or reservoir reported unsafe.—If, after such personal survey and inspection, the engineer reports that such dam or reservoir is unsafe or dangerous to the lives or property of persons residing, carrying on business or employed near or below the same, then the owners, occupants or lessees thereof shall immediately make such alterations, repairs and additions to said dam or reservoir as such engineer recommends; and in default thereof, upon application of said engineer to any justice of the supreme judicial court or of the superior court, the said owners, occupants or lessees shall be enjoined from the use of such dam or reservoir and the water therein contained, until they or either of them comply with the requirements of said engineer, and the water contained in said dam or reservoir may be discharged therefrom, by order of said engineer, in such manner as he directs as in his judgment most conducive to the safety of human life, and consistent with the protection of property. (R. S. c. 166, § 46.)

Sec. 48. Compensation of engineer.—Said engineer shall receive, as full compensation for his services, $5 a day while actually employed in such service, together with his actual traveling expenses to be audited, allowed and paid from the state treasury, in cases where such dam or reservoir is by him adjudged safe and sufficient; and by the owners, occupants or lessees of said dam or reservoir, in cases where said dam or reservoir is by him adjudged unsafe and insufficient, to be recovered by said engineer in an action on the case. (R. S. c. 166, § 47.)

Mills and Their Repair.

Sec. 49. Manner of calling meeting of mill owners.—When an owner of a mill or of the dam necessary for working it thinks it necessary to rebuild or repair it in whole or in part, he may apply in writing to a justice of the peace in the county where it is situated, or if partly in 2 counties, to a justice of the peace in either, to call a meeting of the owners, stating the object, time and place of the meeting; and such justice may issue his warrant for the purpose, directed to such owner, which shall be published in some newspaper printed in such county, if any, 3 weeks successively, the last publication to be not less than 10 nor more than 30 days before the meeting; or a true copy of the warrant may be delivered to each of said owners or left at his last and usual place of abode; and either notice is binding on all the owners. (R. S. c. 166, § 48.)

Notice left at last and usual place of abode must be done in reasonable time.—No time is prescribed in which the notice must be delivered to the owner or left at his last and usual place of abode. But where the law allows an act to be done, and does not prescribe the time for doing it, it is to be done in a reasonable time. Buck v. Spofford, 31 Me. 34.

Applied in Conner v. Atwood, 57 Me. 100.

Sec. 50. Owners of ½ or more may repair or rebuild.—At such meeting, whether all the owners attend or not, the owners in interest of at least ½ of such mill or dam may rebuild or repair so far as to make them serviceable; and shall be reimbursed out of said mill or its profits, what they advanced therefor beyond their proportions, with interest in the meantime. (R. S. c. 166, § 49.)

Repairs limited to making mill or dam serviceable.—The only rule laid down in this statute in relation to the extent and kind of repairs is "so far as to make them serviceable," that is, so far as to make the mill or dam serviceable. The statute does not make the decision of the owners, as to the extent or kind of repairs, conclusive;

it does not allow them to make such repairs as they please, but limits them to such only as will make the mill or dam serviceable. Buck v. Spofford, 31 Me. 34.

And owners of mill, dispossessing dissenting owner while recouping expenses of rebuilding, not liable for use of mill. — Where the joint owners of a sawmill, excepting one, who refused to unite with them for that purpose, rebuilt the mill, and the former retained and used the excepting owner's share to reimburse themselves for expenses incurred for him in rebuilding it, refusing to give him possession thereof when demanded, and claiming a right to hold until fully reimbursed; it was held that the excepting owner could not maintain assumpsit against them for use and occupation, there having been no contract between them, either express or implied. Porter v. Hooper, 11 Me. 170.

Sec. 51. Reimbursement.—If they are not reimbursed by the profits of the mill or paid by the other owners within 6 months after the work is completed, they may charge 1% a month on the amount advanced, from the end of 6 months until so reimbursed; and if a delinquent owner dies or alienates his interest in the premises, the advancing owners have a continuing lien thereon for reimbursement; but no special contract made by the owners respecting the building or repair of such mill or dam is hereby affected. (R. S. c. 166, § 50.)

Rebuilding of mill by one co-owner at most gives lien; it does not confer title.— Where a sawmill, owned by the plaintiff and the defendant as tenants in common, was destroyed by fire, and subsequently the latter called a meeting of the owners, and proceeded to rebuild it under § 49 et seq., it was held that the proceedings under the mill act could, at most, give him a lien to be reimbursed for such sums as he had advanced thereon, and did not confer title upon the defendant to the entire property so rebuilt; and that a separation of the claim from the security would effect a dissolution of the lien. Moore v. Gibson, 53 Me. 551.

And lien subsists for sums properly expended though repairs exceeded authority. —Although the plaintiff may have made repairs beyond what the law will allow, yet he will retain his lien upon the mill for such of them, as have been properly expended to make the mill serviceable. Buck v. Spofford, 31 Me. 34.

Cited in Alden v. Carleton, 81 Me. 358, 17 A. 299.

Sec. 52. If part owner minor, or otherwise disqualified. — Where any part of such mill or dam, at the time of meeting and notice, is owned by minors, tenants by courtesy, in tail, for life or years, or by mortgagor or mortgagee, the guardians of such minors, such tenant, mortgagor or mortgagee shall be deemed, for the purposes of sections 49 to 54, inclusive, the proprietors thereof, and shall be notified, vote and contribute accordingly; and all advances so made by them, if not paid, may be recovered in a special action on the case, with interest. (R. S. c. 166, § 51.)

Grist Mills.

Sec. 53. Owners of grist mills to furnish scales for weighing grain; order of grinding.—The owner or occupant of every grist mill shall keep scales and weights therein to weigh corn, grain and meal, when required; and he shall well and sufficiently grind as required, according to the nature, capacity and condition of his mill, all grain brought to his mill for that purpose and in the order in which it shall be received; and for neglecting or refusing to weigh the same when required, or failing to grind the same in the order received, or for taking more than lawful toll, he shall be punished by a fine of not less than $10 nor more than $50, for each offense; provided that this section shall not be so construed as to preclude the right of any owner or occupant of any mill to enter into any mutual agreement with any customer or customers as to the order in which the grain of such customers shall be received and ground, made at the time said customer or customers shall bring his or their grain to the mill for the purpose of being ground. (R. S. c. 166, § 52.)

Common grist mills are subject to public control.—Common grist mills are of that public nature to be put under public control, whether operated under the authority of charters from the state, or by individual enterprise. State v. Edwards, 86 Me. 102, 29 A. 947.

Statute toll imposed, and equal dispatch

required.—Owner or occupant of a grist mill is required to run his public mill for statute toll, with equal dispatch for all the patrons of the mill. They are required to receive grists and grind them in their turn, without motive for unequal dispatch to those willing to pay an extra price for it. State v. Edwards, 86 Me. 102, 29 A. 947.

For so long as mills are dedicated to public use.—When a proprietor makes his mill public, and assumes to serve the public, then he dedicates his mill to public use and it becomes a public mill, subject to public regulation and control. He is not compelled to continue such public use, but so long as he does, he becomes a public servant and may be regulated by the public. State v. Edwards, 86 Me. 102, 29 A. 947.

Sec. 54. Tolls.—The toll for grinding, cleansing and bolting all kinds of grain shall not exceed 1/16 part thereof. (R. S. c. 166, § 53.)

Excessive toll is violation of section, with or without consent of patron.—The act of the owner or occupant of a grist mill in taking excessive toll is just as much in defiance and violation of the statute, when taken by agreement with the owner of the grist, as if taken without his consent. State v. Edwards, 86 Me. 102, 29 A. 947.

And such excessive toll may be recovered.—The taking of usury by agreement with the borrower of money is analogous to the levy of an excessive toll with consent of the owner of the grist. Freedom from blame on the part of the lender is not a bar to the borrower's right to recover back the usury. State v. Edwards, 86 Me. 102, 29 A. 947.