

situated that they must be more or less affected by flood waters at certain seasons. Defendants right to maintain their dam at its present height was not disputed. Plaintiffs rested their case upon a judgment in a former action by which it was considered, in effect, that defendants had the right to so maintain it except during freshets and periods of overflow of the dam, and that at such periods it was the duty of defendants, by means of proper waste gates, to lower the water to the level of the dam with reasonable expedition. There was no complaint that the height of the dam exceeded that provided for in the judgment. What was complained of was, that defendants did not during the spring freshet of 1901, by means of proper flood gates, lower the water to the level of the dam with reasonable expedition. The only questions were: (1) Have defendants been guilty of a breach of their duty in this respect—have they been guilty of negligence? (2) Was such negligence the cause of plaintiffs' injury?

R. T. Walkem, K. C., and G. F. Shepley, K.C., for plaintiffs.

G. H. Watson, K.C., and W. B. Carrol, Gananoque, for defendants.

MEREDITH, J.:—The onus of proof is on plaintiffs, and they fail in both branches.

There is no contention that at the time in question defendants failed to take usual care, the usual means for expeditiously lowering the water; there is no evidence in support of such a contention, if made. Then ever since the judgment, now 16 years, with no greater care taken, there has never but once before been any complaint such as that now in question. Upon that other occasion the defendants paid some comparatively small amount, saying, as plaintiffs now assert, that they had that year employed a new caretaker, and that possibly through his inexperience some injury might have been caused, but, as defendants now assert, merely to buy peace. When for fourteen years the like course has been pursued without injury, without complaint, it can hardly be said that defendants were negligent in following in the old footsteps.

After extraordinary efforts to make a case against defendants, the most that the expert witnesses for plaintiffs have been able to say was that, in their opinion, if another flood gate were made in the dam, and if the gates were open for a greater length of time before floods, plaintiffs would have been saved some of the flooding from which their low lying lands suffered.