

FIRST DIVISIONAL COURT.

APRIL 26TH, 1920.

ELLIOTT v. HEWITSON.

Water—Obstruction of Flow of Natural Watercourse by Building of Tunnel—Flooding of Neighbour's Land—Cause of—Evidence—Onus—Finding of Trial Judge—Appeal—Future Damage—Reasonable Apprehension.

Appeal by the plaintiff from the judgment of SUTHERLAND, J., 16 O.W.N. 364.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, and FERGUSON, JJ.A.

I. F. Hellmuth, K.C., and Thomas Moss, for the appellant.

W. N. Tilley, K.C., and G. W. Mason, for the defendant, respondent.

FERGUSON, J. A., in a written judgment, said, after stating the facts, that the erections of the defendant were upon her own property; as owner of the land, she had the right to build on the banks and bed of the stream and to prevent the water from overflowing her low lands, provided that she did not, by the building or works, back or throw water on the plaintiff's lands or otherwise interfere with the reasonable use and enjoyment by the plaintiff of his lands and of the waters of the stream: *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839. The onus of establishing that the defendant's works or erections backed water on the plaintiff's lands, and thereby caused the flooding and damage or interfered with the plaintiff's riparian rights, was upon the plaintiff: *Greenock Corporation v. Caledonian R. W. Co.*, [1917] A. C. 556; *Smith v. Ontario and Minnesota Power Co. Limited* (1918), 44 O.L.R. 43, 51; *Coulson & Forbes's Law of Waters*, 3rd ed., pp. 100 to 104.

The plaintiff failed to convince the trial Judge that any of the damage claimed by him was the result of flooding caused by the erections or works of the defendant.

The evidence was not sufficient to enable the Court to find that these works of the defendant had backed or would back water on the plaintiff's lands, or cause any appreciable change in the natural flow of the waters of the creek as they pass through the plaintiff's lands or cause damage to the plaintiff's land or property.

It was not necessary for the purpose of this appeal to find that the defendant's works might not, in the future, cause damage to the plaintiff or interfere with the flow of the waters through