

FIRST DIVISIONAL COURT.

APRIL 19th, 1916.

*LOWERY AND GORING v. BOOTH.

Water—Rights of Lumbermen Floating Logs in River—Injury to Dam—“Unnecessary Damage”—Rivers and Streams Act, R.S.O. 1914 ch. 130, sec. 4—Negligence—Damages—Reference—Costs.

Appeal by the plaintiffs from the judgment of MIDDLETON, J., 8 O.W.N. 529, 34 O.L.R. 204.

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

R. McKay, K.C., for the appellants.

W. N. Tilley, K.C., and Wentworth Greene, for the defendant, respondent.

J. R. Cartwright, K.C., for the Attorney-General for Ontario.

MEREDITH, C.J.O., read a judgment in which he said that if, as might reasonably be found on the evidence, the appellants' coffer-dam was lawfully constructed and maintained under the authority of the Dominion Parliament, for the purpose of improving navigation, either in the Montreal river or below that river, by the creation of a storage-dam to conserve the head-waters, the respondent was bound to exercise his rights under the Rivers and Streams Act, so as not, at all events unnecessarily, to destroy or injure the coffer-dam.

That the coffer-dam was there, the foreman knew or ought to have known, and yet no precautions were taken by him to prevent injury being done to it. The logs might have been brought down without the formation of side-jams, though at certain risks. The respondent was bound to take those risks if he knew or ought to have known that there would be danger of the coffer-dam being destroyed or seriously injured if the driving were done in the manner in which it was done; and the damage that was done was, therefore, an unnecessary damage within the meaning of sec. 4 of the Rivers and Streams Act.

The rights conferred by the Rivers and Streams Act were subordinate to the right to maintain the coffer-dam; and sec. 4 of that act could not cut down or impair the paramount right to maintain the coffer-dam.

The appeal should be allowed, and judgment should be entered for the plaintiffs, for the recovery of the damages sustained by them, owing to the destruction by the respondent's logs of the coffer-dam, with costs. If the parties were unable to agree as to