

FIRST DIVISIONAL COURT.

NOVEMBER 8TH, 1918.

*SMITH v. ONTARIO AND MINNESOTA POWER CO.
LIMITED.

Water—Erection of Dam in Navigable River—Maintenance and Operation Causing Injury to Owners and Occupants of Lands above Dam—Overflow of Water Retained and Stored—Excessive Rainfall—Act of God—Trespass—Ashburton Treaty—Right to Maintain Dam—“Water Communications”—Jurisdiction of Dominion Parliament—British North America Act, sec. 91 (10)—Navigation, Work for Advantage of—4 & 5 Edw. VII. ch. 139 (D.)—Act respecting Works in Navigable Waters, R.S.C. 1886 ch. 92—Order in Council—Damage to Land—Compensation—Rights of Land-owners—Rights of Squatters on Crown Lands—Agreement with Government of Ontario—Validity—6 Edw. VII. ch. 132 (O).—Evidence—Negligence—Damages—Reference—Costs.

Appeal by the defendants in the above and four other actions from the judgment of KELLY, J., 42 O.L.R. 167, 13 O.W.N. 445.

The appeal was heard by MEREDITH, C.J.O., MAGEE and HODGINS, J.J.A., RIDDELL, J., and FERGUSON, J.A.

W. N. Tilley, K.C., and A. D. George, for the appellants.

R. T. Harding and C. R. Fitch, for the plaintiffs, respondents.

RIDDELL, J., read the judgment of the Court. He said that it should be added to the facts set out by the trial Judge that the defendants obtained legislation from the Dominion Parliament and that the plans of their undertaking were approved by order of the Governor-General in Council under R.S.C. 1886 ch. 92, an Act respecting certain works constructed in or over Navigable Waters.

The defendants built their dam with the natural and necessary result of holding back the water in the river and also in the lake.

In 1916 there was an unusual flood. The water was higher than usual, even where there was no dam. There was nothing to indicate that the flood came under the category of *actus Dei* or *vis major*.

The first contention of the plaintiffs was that the dam was a mere trespass, and that the defendants had no right to maintain it because it was against the provisions of the Ashburton Treaty of 1842, art. II., which states “that all the water communica-