

does not satisfy me that there was anything negligent or improper in its construction or in the use made of it by defendants in the exercise of the rights conferred by sec. 1 of R. S. O. 1897 ch. 142. They used the dam during the spring freshet of 1905, which . . . seems to have been unusually great. They finished their drive on 27th May, 1905, and then left the sluice gates of the dam open. Upon the evidence, the spring freshet had not before this time entirely subsided.

After defendants had finished their drive, one Anderson, another lumberman, with the express consent of plaintiff, used the dam, keeping the sluice gate closed during a great part of the time, until 18th June.

It is also in evidence that the James Bay Railway Company have interfered with the channel of the river Boyne between the dam in question and Otter Lake. They have diverted the river from its former bed for their own purposes, and it is reasonably clear that the substituted channel which they have provided, while more direct, is of smaller capacity than the old channel, and is in fact inadequate to carry the waters of the river, which have consequently spread over the adjoining flat lands at this point. The current of the Boyne river is naturally very sluggish, and it seems highly probable that these works of the James Bay Railway Company seriously affect the outflow from Otter Lake.

That plaintiff's lands have been injuriously affected during 1905—some  $4\frac{1}{2}$  acres being flooded and from 10 to 14 acres kept in a more or less sodden state—is, I think, established. The damages which he claims, \$500, are, however, in my opinion, very extravagant. If defendants should be held liable, I would assess plaintiff's damages at \$150; moreover, I would award him only the costs of proceeding under R. S. O. 1897 ch. 85, allowing to defendants a set-off of the excess of their costs incurred in defending this action in the High Court over the costs to which they would have been put had plaintiff proceeded under the statute: *Neely v. Peter*, 4 O. L. R. 293, 295, 1 O. W. R. 499, 2 O. W. R. 114.

But the evidence by no means satisfies me that the erection and use of the dam of defendants is the real cause of the flooding of plaintiff's lands. The use made of the dam by Anderson, pursuant to plaintiff's license to him, and the probable effect of the works of the James Bay Railway Company,