

of the Crown in Ontario and not under the control and administration of the said Government . . ." There was nothing anywhere in the Ontario proceedings giving the defendants the right to overflow land not that of the Crown and not under the control of the Crown.

As against the plaintiffs Tighe and M. H. Smith, the defendants were not protected by the Ontario proceedings; but the other plaintiffs were in a different position.

If the agreement was valid—and it had been recognised by the Ontario Legislature in 1906 by 6 Edw. VII. ch. 132—the defendants had the right to flood the lands upon which the plaintiffs' buildings stood, being given such right by the owner. As to the plaintiffs Seth Smith, Gagne, and Foster, the appeal should be allowed and their actions should be dismissed, but without costs in view of the facts.

As to the plaintiffs Tighe and M. H. Smith, the principle of the decision of the House of Lords in *Greenock Corporation v. Glasgow and South-Western R. W. Co.*, [1917] A.C. 556, was applicable. There was no pretence of prescription, and but for the dam the flood would have passed these two plaintiffs (not wholly but in part) scatheless.

If the case depended upon negligence, negligence could not be found on the evidence.

As to damages, the plaintiffs Tighe and M. H. Smith were entitled to recover the difference between the whole and what would have occurred in the absence of the dam: *Nitro-Phosphate and Odam's Chemical Manure Co. v. London and St. Katharine Docks Co.* (1878), 9 Ch. D. 503; *Workman v. Great Northern R.W. Co.* (1863), 32 L.J.Q.B. 279.

As to these two plaintiffs there should be a reference to the Master to fix the damages if the parties could not agree. The damages should be confined to lands not on the reservation for roads. The costs of the reference and of this appeal should be disposed of by the Master, but the defendants should pay the costs of the action, including the trial before Kelly, J., on the Supreme Court scale. If these plaintiffs prefer not to take a reference, the action as to them will be dismissed without costs, and there will be no costs of the appeal to them or to the defendants.

*Judgment below varied.*