JOHN R. BOOTH (DEFENDANT) .... APPELLANT;

AND

EDWIN D. LOWERY AND ANOTHER (PLAINTIFFS) ..... } RESPONDENTS.

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*Nov. 24, 27, 28.
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ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Negligence—Driving lumber—Rights in navigable waters—River improvements—Contract with Crown—Rights of contractor—Reckless driving —"Rivers and Streams Act" (Ont.)—"B.N.A. Act, 1867," ss. 91 (10), 92 (10).

In 1910, Parliament voted money for "Montreal River Improvements above Latchford" and the Crown, through the Minister of Public Works, gave a contract to H. in connection with the work. In performance of the work L. placed a cofferdam on each side of the river leaving an opening between them some 200 feet wide. In the spring of 1911 the cofferdam on the north side was covered by three feet of water and the logs of B., being driven down through the opening, were allowed to rest against a pier a few hundred feet below and formed a jam the rear of which was over the cofferdam. Either by weight of the jam or increased pressure by breaking it, in the ordinary mode, the destruction of the cofferdam was caused.

Held, Fitzpatrick C.J. and Duff J. dissenting, that B. was responsible for the injury so caused; that with more care in driving the formation of the jam might have been avoided; that, if breaking the jam in the ordinary way was likely to cause damage, another mode should have been adopted even if it would cause delay and greater expense; and that the employees of B. acted with a wilful disregard of the contractors' rights and caused "unnecessary damage."

Held, per Davies, Anglin and Brodeur JJ., that, in the absence of Dominion legislation to the contrary, the rights of lumbermen under the Ontario "Rivers and Streams Act" (pre-Confederation legislation) are not subordinate but equal to those of persons acting for the Dominion Government in matters respecting navigation.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ.

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Per Davies and Duff JJ., Anglin J. *dubitante*.—The cofferdam was a "structure" and subject to the provisions of section 4 of the "Rivers and Streams Act."

Per Davies and Anglin JJ.—Even if not a "structure" as it was placed in the river under sanction of Dominion legislation B.'s rights were restricted practically as they would be under section 4.

Held, per Fitzpatrick C.J. and Duff J.—A vote for "River Improvements" does not of itself authorize an interference with the rights of lumbermen under the "Rivers and Streams Act." These rights were exercised in the usual and proper manner and as no breach of duty by B. to avoid "unnecessary damage" was proved he could not be held liable for the damage to the cofferdam.

Judgment of the Appellate Division (37 Ont. L.R. 17) reversing that at the trial (34 Ont. L.R. 204), affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), reversing the judgment at the trial(2), in favour of the defendant.

The necessary facts are stated in the above headnote.

Tilley K.C. and *Wentworth Greene* for the appellant.

McKay K.C. for the respondents.

THE CHIEF JUSTICE (dissenting).—The appeal is of importance as raising a question of law of far-reaching consequence quite beyond anything involved in the particular case. It is not only the rights of the appellant which are in issue but the result must seriously affect the interests of the large class engaged in the lumber business, the oldest and still one of the principal industries of this country.

I am further of opinion that the jurisdiction in the subject-matter of both the Dominion and the provinces is involved, and that the respective governments should have had opportunity to present their views before the court if they so desired.

(1) 37 Ont. L.R. 17. (2) 34 Ont. L.R. 204.

Now no authority is shewn or even alleged for interference by the respondents with the right of floating down his logs which the appellant undoubtedly had unless lawfully deprived thereof. It is not enough to produce a contract with any one, even with the Dominion Government, unless there was competent authority for the construction of the work. The judgment appealed from is based, as the Chief Justice of Ontario says,

> on the view that the cofferdam was lawfully where it was and was placed there under the authority of the Parliament of Canada in the exercise of its exclusive authority to make laws with respect to navigation.

I know of nothing to warrant this view. The Chief Justice suggests that "it may reasonably be found on the evidence," but I can find nothing upon the subject in the evidence. In the factum of the respondents reference is made to four of the Appropriation Acts in which sums of money are authorized to be expended for Montreal River improvements. There is nothing to connect these with any particular works, they seem to be rather evidence that no works in particular were submitted to or sanctioned by Parliament. It may perhaps be assumed that the vote of those moneys was for purposes within the jurisdiction of Parliament in the exercise of its exclusive legislative authority over the subject of navigation, but I do not think the fact that Parliament has placed at the disposal of the Government certain sums of money for improving the river, can by itself authorize an interference with a public right such as is here in question.

It has been suggested that the necessary authority may be found in the "Public Works Act" (R.S.C., [1906] ch. 39), which in section 9 provides that the Minister of Public Works shall have the management, charge and direction of the properties belonging to

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Canada therein enumerated which include dams and works for improving the navigation of any water, and also works constructed at the expense of Canada.

There is a similar statute to the "Public Works Act" for each of the departments of the Government service. These Acts are purely concerned with administrative arrangements and the division of Government business amongst the members of the Government and their respective departments.

I do not think the "Public Works Act" confers any authority on the Minister of Public Works to undertake works for which the sanction of Parliament is necessary; it only provides that such works when authorized by Parliament shall be under the charge of the Minister of Public Works.

I do not wish to enter on any consideration of possible doubts as to the authority of Parliament in the circumstances; we have not got the facts sufficiently before us. Whether the river is navigable in parts or only capable of being used for floating down logs, does not appear. At the point where the dam was proposed to be erected there are rapids which prevent navigation and there seems to have been no intention of taking any steps to render it possible. The requirements of the river at other points, or even those of the Ottawa River into which the Montreal River flows, may justify the storage of water at the particular point; it is for Parliament to decide whether this is necessary in the interests of navigation. If it has so decided its decision is not to be reviewed in the courts. In this connection it may be noted that the Ottawa River below its confluence with the Montreal River is not navigable throughout, but at the City of Ottawa there are rapids operating large power plants under lease from the Dominion Government. Whether

works for power purposes alone are within the authority of the Dominion Parliament may be doubted.

That the authority of Parliament is necessary is so clear as to call for little consideration. The question may not have come before the courts of this country, but there are numerous cases reported in the United States where the law is practically the same since it has been held that the jurisdiction of Congress over trade and commerce covers the subject of navigation, though not expressly mentioned as in the Canadian Constitution. I will only refer to the case of the *United States* v. *Chandler-Dunbar Water Power Co.*(1). An Act of Congess of March 3, 1909, had declared that a public necessity existed for absolute control of all the water of St. Marys River in the State of Michigan "primarily for the benefit of navigation," and the following propositions (amongst others) were upheld:—

The judgment of Congress as to whether a construction in or over a navigable river is or is not an obstruction to navigation is an exercise of legislative power and wholly within its control and beyond judicial review; and so *held* as to the determination of Congress that the whole flow of St. Marys River be directed exclusively to the improvement thereof by the erection of new locks therein.

If the primary object is a legitimate taking there is no objection to the usual disposition of what may be a possible surplus of power.

I may point out that the "Navigable Waters Protection Act" (R.S.C. [1906] ch. 115) by the 4th section provides that no dam shall be constructed so as to interfere with navigation without the approval of the site and plans by the Governor in Council.

The appellant is not suing for an interference with his rights but is being sued for damage alleged to have been caused in the exercise of such rights to works interfering with them. There can be no liability if the

(1) 229 U.S.R. 53.

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works were not duly authorized and this is not shewn.

Upon careful consideration of the evidence I am of opinion that the drive of the appellant's logs was carried out in the usual and proper manner and that nothing was done with wilful or careless disregard of injury to the respondents' property. Even, therefore, on the assumption that the respondents' cofferdam was lawfully placed where it was, I fail to see why the duty should be imposed upon the appellant when exercising his rights in the same manner as he had hitherto done of adopting, perhaps at great expense and risk through delay, extraordinary precautions to ensure the safety of the structure. The respondents, of course, knew that logs would be driven down the river in the Spring and should have taken proper measures to safeguard their own property. They themselves recognized this by putting up some measure of protection in a glance-boom which however proved defective and inadequate for its purpose. No actionable negligence on the part of the appellant is shewn and the appeal should be allowed.

DAVIES J.—I concur generally in the reasons and conclusion of my brother Anglin for dismissing this appeal, though I confess I do not share the "grave doubts" he expressed with regard to the applicability of section 4 of the "Rivers and Streams Act" to the circumstances of this case.

On the question of the applicability of that section I am in accord with the opinions of the Chief Justice of Ontario and of Magee and Hodgins JJ. that the injury done to the cofferdam was in the circumstances of this case an "*unnecessary damage*" within that section and being such was not justified or covered by the general authority to drive logs down the river conferred by the statute.

But if I am wrong in my holding of the applicability of that section to this case, I agree with Anglin J. that the presence of the cofferdam

> in the river under the sanction of Dominion legislation imposed upon the exercise by the defendant of his driving rights a restriction almost, if not precisely, the same as that to which section 4 would, if applicable, have made them subject. There was, no doubt, a correlative obligation on the part of the plaintiffs not unnecessarily or unreasonably to hamper or interfere with the exercise of the defendant's rights.

DUFF J. (dissenting).—I think the reciprocal obligations of the appellant and the respondents are determined by the application of sections 3 and 4 of the "Ontario Rivers and Streams Act." I think the cofferdam was a "structure" within section 4; and that in order to succeed it was incumbent upon the plaintiffs to shew that "unnecessary damage" within the meaning of that section had been caused by the servants of the defendant, the appellant. "Unnecessary damage," in my opinion, means damage which it was reasonably practicable to avoid under the existing conditions having regard to the nature of the "opening" provided. I agree with Mr. Justice Garrow that the plaintiffs, respondents, failed to show neglect of the duty to avoid "unnecessary damage" in this sense.

It is necessary to consider the view of the Chief Justice of Ontario in which Mr. Justice Magee and Mr. Justice Hodgins concurred that,

> the appellant's cofferdam 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;

and consequently that the,

> rights conferred by the "Rivers and Streams Act" were * * * subordinate to the right to maintain the cofferdam and the provisions of section 4 of the "Rivers and Streams Act" as to the dam or other

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structure being provided with a convenient "apron, slide gate, lock or opening for the passage of timber, rafts and crafts" authorized to be floated down the river, cannot cut down or impair the paramount right to maintain the cofferdam.

The "Rivers and Streams Act" was originally enacted by the Legislature of the Old Province of Canada (12 Vict. ch. 87). It may be that it is not within the power of the Parliament of Canada directly to repeal or amend any of the provisions of the Act; *Attorney-General for Canada* v. *Attorneys-General for Ontario, etc.* (1); but its provisions may of course be superseded or overridden by the enactments of Parliament within its jurisdiction, and rights given by these provisions may be completely nullified by the competent enactments of Parliament or made subordinate to other rights created by such enactments.

The view of the Chief Justice of Ontario indicated above assumes, first, that it is competent to Parliament in exercise of its legislative authority derived from section 91 (10) of the "British North America Act" in relation to "navigation and shipping" to authorize the construction and maintenance of the work which the plaintiffs were engaged in constructing in such a manner as to interfere with the exercise of the rights of the defendant under the "Rivers and Streams Act," and secondly, that in virtue of legislation by the Parliament of Canada the plaintiffs were invested with authority so to construct the work.

The power of Parliament to give such authority under section 91 (29) and section 92 (10) of the "British North America Act" is of course unquestionable, but it is not suggested that this work is part of any work which has been declared to be a work for the general

(1) 1898 A.C. 700.

advantage of Canada; and there is nothing before us to shew that it is part of a work or undertaking extending beyond the limits of the province or connecting the province with one of the other provinces.

Moreover, I cannot agree that we are entitled to say that the object of Parliament in authorizing the use of public moneys in the construction of this dam was the improvement of navigation; I know of nothing in the record which justifies that conclusion.

It should be presumed that the Minister of Public Works had acquired on behalf of the Crown the right to occupy the site of the dam; and no question has been raised as to his right representing the Crown as occupier to construct and maintain the dam just as any other riparian proprietor could do so long as public or private rights are not invaded.

But *primâ facie* as an object of legislative jurisdiction the work which the plaintiffs were engaged in constructing was a "local work" within the meaning of section 92 (10) and therefore *primâ facie* subject to the exclusive legislative authority of the province except in so far as rights of navigation or other rights under the exclusive control of the Dominion might be affected by it.

I am not, without further examination of the question, prepared to accede to the proposition that the power of Parliament derived from section 91 (10) in relation to the subject of "navigation and shipping" involves in itself without the aid of the powers conferred by section 91 (29) and section 92 (10) the power to grant authority to construct and maintain works entirely local as to a particular province though connected with navigation and shipping in such a manner as to constitute what otherwise would be an invasion of private or public rights which are not rights of navi-

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gation or incidental thereto and which otherwise would be within the exclusive control of a local legislature. It is unnecessary to decide the general question for the purposes of this appeal; but it may safely be affirmed that the assumption that every work designed for the improvement of navigation or to provide facilities for navigation and shipping is necessarily a work within the exclusive authority of Parliament for all purposes in virtue of section 91 (10) cannot be supported consistently with due effect being given to the language of section 92 (10) which plainly shews that the expression "local works and undertakings," as used there, embraces "canals" and "lines of ships."

I think it is clear that in fact the plaintiffs were not invested with any authority by Dominion legislation to interfere with the defendant's rights under the "Rivers and Streams Act." The plaintiffs rely upon clauses in the "Appropriation Act," 9 & 10 Edw. VII. ch. 1 schedule C, and 1 & 2 Geo. V. ch. 2, schedule C, by which moneys were appropriated for "Montreal River improvements above Latchford." The mere appropriation of public moneys would not of course in itself give the sanction of law to acts which would otherwise be an invasion of rights given by statutory enactment or public or private rights under the common law. Sections 9 and 12 of the "Public Works Act," R.S.C. ch. 39, do not profess to empower a Minister of Public Works to do acts of that character; and it would of course be quite contrary to settled principles to imply any such authority from doubtful expressions.

By ch. 143 R.S.C. (the "Expropriation Act"), however, compulsory powers are conferred upon the Minister who is the head of a department charged with the construction and maintenance of a "public work;" the "public work" (it must be implied) being of

such a character that Parliament has authority to confer these powers for the construction and maintenance of it. The work in question (which I assume at this point to be a work of that character) being a work in respect of which public moneys were appropriated by Parliament, it is by section 2 a "public work" within the meaning of that statute. By section 3 large compulsory powers are given to the Minister and it is arguable that these powers are extensive enough to authorize interference with a river or stream in such a manner as to interrupt the exercise of rights arising from the provisions of the "Rivers and Streams Act;" although it should be observed that by force of section 35 authority to interfere with "navigation" in the construction or maintenance of a public work can only be acquired from the Governor in Council.

But however extensive the powers of the Minister may be under the "Expropriation Act" in relation to the construction of "public works" in streams, it is made plain by the contract executed by the Minister under which the work now in question was being constructed, that no authority to interfere with rights such as those given by the "Rivers and Streams Act" was vested in the contractors by that contract. Paragraph 20 is conclusive upon this point, providing that the contractors

> shall and will, at their own expense, make such temporary provision as may be necessary for the protection of persons or lands, buildings, or other property, or for the uninterrupted enjoyment of all rights of persons or corporations, in and during the performance of said works.

For these reasons I think the appeal should be allowed and the action dismissed with costs.

ANGLIN J.—The plaintiffs sue to recover damages for injuries to a cofferdam erected by them in the

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Montreal River caused by the defendant in driving pulpwood logs during the Spring freshet of the year 1911.

On evidence warranting that conclusion, Middleton J. found that the destruction of the cofferdam "was brought about by the defendant's logs," but absolved him from liability on the grounds that in driving the river he was exercising a statutory right conferred by the "Rivers and Streams Act" (now ch. 130 of the R.S.O. 1914), with due caution and in a usual and reasonable manner and that the damage sustained by the plaintiffs was therefore not "unnecessary damage" within the meaning of sec. 4 of that statute, which the defendant had apparently invoked (though he now contends that it does not apply) and the learned judge regarded as applicable.

In the Appellate Division the majority of the court (Meredith C.J.O. and Magee and Hodgins JJ.A.) held the defendant liable on the ground that the plaintiffs in carrying out their contract with the Government of Canada had a paramount right to construct and maintain the cofferdam which the defendant in the exercise of his right of driving was bound to respect, at least to the extent of taking all practicable precautions to avoid doing injury to the structure—even such as would involve expense, delay and risk of partial failure of the drive—and that the injuries sustained being ascribable to failure to take such precautions amounted to "unnecessary damage" within sec. 4 of the "Rivers and Streams Act," and apparently would be actionable apart from that statutory provision.

Garrow and Maclaren JJ.A. dissented on the grounds that the rights conferred by the "Rivers and Streams Act" as pre-Confederation legislation,

which Parliament has not qualified or modified, are not subordinate to, but are co-ordinate with, the rights of persons acting under Dominion legislation for the improvement of navigation; that, although the building of the cofferdam by the plaintiffs had the sanction of Parliament as incidental to the construction of the works for the improvement of navigation which they had undertaken, the exigency of their contract did not justify or require that the cofferdam should remain in the river during the Spring freshet; and that, while the defendant would be liable for wilful injury to it, and might be answerable for injury due to negligence, the evidence shews neither the one nor the other.

It becomes necessary, therefore, to determine the status of the plaintiffs in regard to the work in question and to consider to what restriction, if any, the exercise by the defendant of his statutory right of driving was subject.

That the jurisdiction of the Dominion Parliament to legislate in respect of matters affecting navigation is paramount ("British North America Act," ch. 91 (10)), and that the authorization of works for the improvement of navigation falls within that power is unquestioned. By the "Public Works Act" (R.S.C. ch. 39, sec. 9), the Minister of Public Works is given the management, charge and direction *inter alia* of "works for improving the navigation of any water." By sec. 12, he is required to direct the construction of public works (to be) constructed at the expense of Canada, and by sec. 13, it is declared that, except for necessary repairs and alterations, nothing in the Act shall authorize him to cause expenditure not previously sanctioned by Parliament. By implication Parliament in this legislation has authorized and empowered the Minister of Public Works to direct and cause the con-

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struction of "works for improving navigation" for which it may provide that public moneys of Canada shall be expended. By 9 & 10 Edw. VII. (D.), ch. 1, sch. C, and 1 & 2 Geo. V. (D.), ch. 2, sch. C, public moneys were appropriated by Parliament for

Montreal River improvements above Latchford.

Upon the evidence in the record I agree with the learned Chief Justice of Ontario that the erection of the conservation or regulation dam, for which Messrs. Lowery and Goring had contracted with the Government of Canada, through the Minister of Public Works, was part of the Montreal River improvements above Latchford, for the construction of which the expenditure of public moneys of Canada had been authorized by Parliament, and, as such, had been undertaken by the Minister under the sanction of Dominion legislation. The construction of a cofferdam as a proper means for the carrying out of that work was within the authorization and I am, with respect, unable to agree with the view of Garrow and Maclaren JJ.A. that its maintenance from one working season to another in order to complete the work was not likewise authorized.

If the driving rights of lumbermen had been derived from post-Confederation provincial legislation, or if the Dominion Parliament had declared them to be subject to the rights of persons engaged in carrying out works sanctioned by it for the improvement of navigation, I should agree with the learned Chief Justice of Ontario that they were subordinate to the plaintiffs' right to maintain their cofferdam and must be so exercised as not to infringe that paramount right.

But since, as Garrow J.A. points out, the privileges asserted by the defendant were declared or conferred

by a pre-confederation statute, and have been left unmodified by the Dominion Parliament, I think they are on an equal footing with those possessed by the plaintiffs in carrying out their contract with the Minister of Public Works. Sanctioned respectively by legislatures each endowed with plenary and exclusive authority over the subject-matter with which it dealt, derived from the same source—the Imperial Parliament,—the several rights of each of the parties litigant are on the same plane, and, in my opinion, must be exercised with due regard to those of the other.

If the 200-foot channel left between the plaintiffs' cofferdam and the nearest of the south side piers was a convenient opening in a dam or other structure within the meaning of sec. 4 of the "Rivers and Streams Act" even after the waters of the river had entirely submerged the cofferdam, I would agree with the learned Chief Justice of Ontario and Magee and Hodgins JJ.A. that the injury done to the cofferdam was "unnecessary damage" within that section and, as such, not within the authority to drive conferred by the statute on the defendant. With the latter learned judge I think that,

> the statute * * * includes both damage unnecessarily caused during the normal and usual process of driving as well as that which arises, though inevitably, from a method of operation, originally improper, unnecessary or negligent.
>
> The respondent (defendant) may have followed the practice generally adopted in these and similar rapids. But it is no answer that the damage thereby caused was inevitable if that method should have been modified in view of the circumstances of the particular case, and because the rights of others intervened.

I gravely doubt the applicability of sec. 4 of the "Rivers and Streams Act," however, to the circumstances of the case at bar. Yet, although the plaintiffs' cofferdam may not have been a "structure"

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within the protection of that section, its presence in the river under the sanction of Dominion legislation in my opinion imposed upon the exercise by the defendant of his driving rights a restriction almost, if not precisely, the same as that to which sec. 4 would, if applicable, have made them subject. There was, no doubt, a correlative obligation on the part of the plaintiffs not unnecessarily or unreasonably to hamper or interfere with the exercise of the defendant's rights: *Hewlett* v. *Great Central Railway Co.*(1).

A perusal of the evidence has satisfied me that the defendant's employees acted with reckless indifference to, and an entire disregard of, the plaintiffs' rights. They proceeded on the assumption that they had an absolute and unqualified right to drive their logs, using whatever means they might find most convenient and best adapted to accomplish that purpose regardless of the effect of employing such means upon the plaintiffs' rights or of the damage to their property which might ensue. I am convinced that the men in charge of the defendant's drive knew that the cofferdam was in the river and knew or should have known that the method of driving which they adopted would imperil its existence. I am also satisfied that, although to do so would have entailed delay and expense and possibly the detention of a portion of his logs until the following season, it was not impracticable for the defendant's men to have driven the river in such a manner that the plaintiffs would have sustained no injury.

If the formation of a side jam extending from the piers of the railway bridge 600 feet up the river over the cofferdam and on to MacNeill's Point was not deliberately brought about by the defendant's men, as

(1) 32 Times L.R. 373.

I incline to think it was, they certainly made no attempt to prevent it. Upon the evidence I think it was practicable to have prevented it. A perfectly proper and reasonable method to employ under ordinary conditions to facilitate the driving of rapids such as those above Latchford, the presence of the plaintiffs' cofferdam rendered the formation of this side jam improper and unreasonable because it involved unnecessary danger to the cofferdam. Again, when breaking the side jam in the sweeping process, instead of first removing the logs above and over the cofferdam, which probably might have been done, though at greater expense, the defendant's men followed the usual, and, in ordinary circumstances, not improper course of breaking the jam from below, thus allowing the mass of logs above the cofferdam to press down upon it with great force and violence. The damage complained of was due either to the formation of the side jam over and above the cofferdam, or to the pressure upon it occasioned by the method pursued in breaking it. In both these operations there was, in my opinion, an unjustifiable disregard of the plaintiffs' rights. To quote Mr. Justice Hodgins again:—

> The respondent (defendant) may have followed the practice generally adopted in these and similar rapids. But it is no answer that the damage thereby caused was inevitable if that method should have been modified in view of the circumstances of the particular case, and because the rights of others intervened.

But it is said that the plaintiffs should have protected the cofferdam with an adequate glance-boom, whereas the glance-boom which they hung from MacNeill's Point, apparently for the protection of a green cement pier, was insufficient to safeguard the cofferdam. There was nothing to indicate to the plaintiffs that the river would be driven in a manner that would

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render such protection of the cofferdam necessary. Before the defendant's drive of comparatively small pulpwood began, Gillies's drive of 40,000 large logs had all gone down without the formation of a side jam or any other inconvenience or detriment to the plaintiffs. If the defendant's men proposed to drive his pulpwood so as to bring about the formation of a side jam and thus endanger the cofferdam it was at least their duty to have notified the plaintiffs in order that they might have an opportunity, if possible, to provide an adequate glance-boom to protect the cofferdam. Moreover, I am not satisfied on the evidence that even a glance-boom such as the defendant's witnesses describe would have saved the cofferdam.

On the whole case I think the proper conclusion is that in the management of their drive the defendant's men utterly disregarded the plaintiffs' rights, ignoring the golden rule expressed in the maxim *sic utere tuo ut alienum non lædas.* For the consequences, which should have been anticipated, the defendant should be held accountable.

I would dismiss the appeal with costs.

BRODEUR J.—The Dominion Parliament voted in 1910 a sum of $25,000 "for Montreal River improvements above Latchford." Those works consisted in the construction of dams for which a contract was made by the Department of Public Works with the plaintiff-respondent. In the carrying on of the work the contractors had put in two cofferdams, one on the south side of the river and the other on the north. No question arises as to the cofferdam on the south, the claim being entirely in respect of damages to the cofferdam on the north.

During the Fall and the Winter of 1910, one of the

three piers which were to be erected in the place where the cofferdam on the north side was put was built. The two others were to be built in the Spring.

During the Spring of 1911, the level of the water rose above the cofferdam, which became entirely covered. In the Fall previous, however, the superintendent of the defendant-appellant had visited the works and knew of the existence of that cofferdam and of the one pier which had been built. He must have known also that two other piers were to be built in the space covered by that cofferdam.

The defendant-appellant had a very large quantity of logs to drive in that river. Those logs were in sixteen booms of fifty thousand each.

The logs reached the place about the 18th of May and the water was then running between three and four feet over the cofferdam. The logs stuck on the pier of a railway bridge which was a few hundred feet below and piled back and formed a jam on both sides of the river. There was left in the centre of the stream a channel of about twenty-five feet wide through which all the logs ran. When all the logs were removed, it was found that the cofferdam had been destroyed.

I do not think there is any doubt as to the jam being the cause of that destruction. It remains to be seen, however, who should stand the loss which has been incurred.

It is claimed by the plaintiffs that the driving of the logs was negligently done and the damage could have been avoided by reasonable care either in stationing men at the bridge so as to keep the jam from forming, or by ceasing to open new booms until after they had cleared below and thus avoiding the formation of side jams.

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The six judges in the courts below who heard the case were equally divided. The action was dismissed by the trial judge but that judgment was reversed by the Appellate Division by a majority of three to two.

The main ground of the Court of Appeal is that the cofferdam having been placed under the authority of the Parliament of Canada, the rights exercised by the defendant under the "Rivers and Streams Act" to drive his logs were subordinate to the right of the Dominion contractors, the Parliament of Canada having exclusive authority to make laws with respect to navigation.

I am unable to agree with that proposition.

The "Rivers and Streams Act," which is to be found in the Revised Statutes of Ontario, contains provisions which were in the law long before Confederation.

It provided that the lumbermen would have the right to float and transmit timber down all rivers, and that no person could place any obstruction in those rivers in order to prevent the passage of timber.

It was provided also that if it became necessary to construct any dam in order to facilitate the floating of timber, any person was authorized to construct those dams without doing any unnecessary damage to the river or to its banks.

The lumbermen were also given the right to go along the banks of the river for the purpose of assisting the passage of the timber without doing any unnecessary damage to the banks of the river and it was also provided that where there was a convenient opening in a dam for the passage of timber, no person should injure or destroy that dam or do unnecessary damage to it.

Those rights of the lumbermen existed at the time of Confederation and could not be considered as in-

ferior to the rights which the federal authorities possess to deal with navigation or with the improvement of navigation.

The question then in this case resolves itself, according to my view, as to whether the defendant-appellant has done unnecessary damage.

It appears that the jam on the two sides of the river was created by the logs which were contained in the first three or four booms, and at one time even the middle channel was closed. Efforts then were made by the appellant to open that middle channel and those efforts were successful and instead of removing the logs which were jammed on both sides of the river he opened the other booms and let the logs of those booms go down. That necessitated, of course, a stronger pressure on the cofferdam and was, according to my view, the cause of damage which was not necessary.

If immediately after the middle channel had been opened the appellant had driven the logs which were in the jam on the two sides of the river, the damage done to the cofferdam could have been avoided or the damage would have been less. But that would have required some more work and some more expense which the appellant did not feel inclined to do and incur.

The plaintiffs and the defendant were both having rights and duties with regard to the use of that river. The plaintiffs, as builders of the dam, were bound to see that the construction of that dam would not interfere to any unreasonable extent with the driving of the logs. The defendant had the right to drive his logs into that river, but he should have done it in such a way that unnecessary damage should not be caused to the builders of the dam.

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BOOTH v. LOWERY.

Brodeur J.

He does not seem to have discharged that duty which the law imposed upon him and should then be liable for the damage which he unnecessarily imposed upon the plaintiffs.

It was urged by Mr. Tilley that the clause of the contract between the Government and the contractors providing that the contractors

> shall and will at their expense make such temporary provisions as may be necessary for the protection of persons or lands, buildings or other property or for the uninterrupted enjoyment of all rights of persons or corporations in and during the performance of the said works

has not been carried out.

I am unable to agree with that proposition.

A glance-boom had been erected, which perhaps it was not necessary for the constructors to do, but was put up all the same in order to prevent the logs from passing over the cofferdam. It was not to be expected that a jam would take place below the cofferdam and would reach it and if such jam has taken place, as I have said, it is only due to the negligence of the appellant. The plaintiffs had done what they had contracted to do.

For these reasons, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Greene, Hill & Hill.*
Solicitors for the respondents: *Griffiths & Upper.*