

901.9.16

83, 1937

Bolt

In the Privy Council.

No. 70 of 1936
UNIVERSITY OF LONDON
7 - NOV 1958
INSTITUTE OF ADVANCED
LEGAL STUDIES
15127

**ON APPEAL FROM THE SUPREME COURT
OF CANADA.**

BETWEEN

HIS MAJESTY THE KING ON THE INFORMATION OF
THE ATTORNEY-GENERAL OF CANADA -
(Plaintiff) Appellant

AND

SOUTHERN CANADA POWER COMPANY LIMITED
(Defendant) Respondent

AND BETWEEN

SOUTHERN CANADA POWER COMPANY LIMITED
(Defendant) Appellant

AND

HIS MAJESTY THE KING ON THE INFORMATION OF
THE ATTORNEY-GENERAL OF CANADA -
(Plaintiff) Respondent.

(CONSOLIDATED APPEALS.)

CASE FOR THE APPELLANT AND CROSS-RESPONDENT.

RECORD.

1. This is an appeal by special leave of the King's most Excellent Majesty in Council, dated twenty-fourth day of July, A.D. 1936, from a Judgment of the Supreme Court of Canada dated the 15th day of January, A.D. 1936, reducing the amount of damages awarded by a Judgment of the Exchequer Court of Canada, rendered on the Twenty-ninth day of December, 1933, in favour of the Appellant, from \$80,923.20, with interest thereon from the date of the said Judgment, to \$31,418.03. Vol. 7, p. 32. Vol. 7, p. 6. Vol. 6, p. 1110.
2. Leave was granted to the Respondent to prosecute a cross-appeal. Vol. 7, p. 34, ll. 21-24.
3. On Easter Sunday, April 8th, 1928, at about 4.13 o'clock in the afternoon, a passenger train operated by the Canadian National Railways, proceeding westerly from Quebec to Montreal, approached the bridge carrying the railway over the St. Francis River near the Town of Drummondville. Before reaching the bridge, the train would ordinarily

RECORD. cross a viaduct about twenty feet long constructed over a public highway; thence upon an embankment about twenty feet high and ninety feet long, ending at the easterly abutment of the bridge. The train safely crossed the viaduct but was derailed when it reached the embankment, which a few minutes before had become damaged and was eventually completely destroyed by the huge volume of water and ice which had been impounded by the Respondent's dam at Hemmings Falls approximately two and a half (2½) miles south of Drummondville and which water and ice became out of control of the Respondent and rushed down the river. A woman residing in the vicinity, who had been standing on the east side of the river watching the movement of water and ice, heard the whistle of the approaching locomotive and realizing that there was danger, ran towards the train signalling it to stop. The engineer immediately applied the emergency brakes but could not, within the short distance, bring his train to a stop. The locomotive and two of the cars fell into the river. The engineer died as a result of injuries sustained; two men riding in one of the submerged cars were drowned; several passengers were more or less seriously injured and the locomotive, cars and tracks were badly damaged.

4. The Appellant has contended that the wash-out and resulting damage were due to the existence and operation of the large Power House and dam constructed in 1924-1925 across the St. Francis River by the Respondent at Hemmings Falls.

5. Upon the trial of the action instituted by the Appellant for the recovery from the Respondent of the damages resulting from the destruction of a part of the railway right-of-way and the derailment of the locomotive and two cars, the learned Judge of the Exchequer Court, Angers, J., after taking time to consider, awarded the Appellant the following damages:

Vol. 6, pp. 1107, 1108, 1109.	<i>Memo</i> S.C.	(a) Cost of repairs to locomotive No. 5253	\$10,898.82	} 30 <i>Alford</i>
		(b) Cost of repairs to car No. 8705	7,577.38	
		(c) Cost of repairs to car No. 6601	8,760.00	
		(d) Cost of repairs to tracks	5,254.57	
	<i>S.C.</i>	(e) Cost of repairs to structure	13,004.47	
		(f) Payment for medical services, claims and grants in connection with said derailment,—		
		Medical and Hospital fees	\$335.00	} 40 <i>Disburse</i> <i>S.C.</i>
		Funeral and ambulance expenses	621.00	
		Indemnities to passengers	2,083.00	
		Indemnities to employees	75.89	
		Indemnities to legal heirs of employees	13,215.50	
		Wages paid to disabled Conductor Blanchard	2,661.96	
			18,992.35	

Disburse 600 for flagging

Blanchard

<i>Lamont S.C.</i>	(g)	Cost of auxiliary and wrecking train service	= 3,276.62	RECORD.
<i>S.C.</i>	(h)	Cost of diversion of train service	- 8,744.78	
	(i)	Cost of special train service	- 4,414.21	
		making a total of	= <u><u>\$80,923.20</u></u>	

6. The Respondent appealed to the Supreme Court of Canada and that Court by a unanimous decision, held that the Respondent was liable, as the existence of the Respondent's dam led directly to the washing out of the Railway embankment. Three of the Judges, (Cannon and Crockett, J.J., and Dysart, J., *ad hoc*), held that the amount of the damages awarded by the Trial Judge should be reduced to the sum of \$31,418.03 being the cost of repairs to tracks and structures and cost of diversion of train service and cost of special train service as set out in items "D," "E," "H" and "I" of Paragraph 5 hereof. The other two Judges, (Lamont, Acting Chief Justice, and Davis, J.) held that the Appellant should be allowed the said sum of \$31,418.03 and also the sum of \$30,512.82 for cost of repairs to locomotive and cars and cost of wrecking train service as set out in items "A," "B," "C" and "G" of Paragraph 5 hereof, a total of \$61,930.85.

*Supreme Ct.
\$31,418.03*

7. The Court, by a unanimous decision, disallowed the damages awarded by the Trial Judge in the sum of \$18,992.35, being the payments for medical services claims and grants, as shown in item "F" of Paragraph 5 hereof.

Disallowed

8. The Court, by a majority's decision, disallowed the damages awarded by the Trial Judge in the sum of \$30,512.82 for cost of repairs to locomotive and cars and cost of wrecking train service, being items "A," "B," "C" and "G" of Paragraph 5 hereof.

*Abandoned
Appellant*

9. Lamont (Acting Chief Justice) and Davis, J., confirming the Judgment of the Trial Judge with respect to the said items "A," "B," "C" and "G," held that the sum represented by these items should be awarded to the Appellant, the Respondent having lawful Governmental authority to construct and maintain its works in and across the St. Francis River, subject to the obligation created by the Quebec Water Course Act, Section 12, whereby the Respondent became "liable for all damages resulting therefrom to any person whether by excessive elevation of the flood gates or otherwise."

Vol. 7,
pp. 7-22.

10. Cannon, J., in disallowing the damages awarded by the Trial Judge with respect to the said items "A," "B," "C" and "G," based his decision primarily upon the hypothesis that under the Laws of the Province of Quebec the Respondent could be held liable only for the damages caused by the injury to the employment of the rights of the Railway Company as a riparian owner, thus relieving the Respondent from responsibility for the damages set forth in these items.

Vol. 7,
pp. 22-28.

RECORD.

Vol. 7,
pp. 28-31.

11. Crockett, J. and Dysart, J., *ad hoc*, in a judgment delivered by the latter, in disallowing the damages awarded by the Trial Judge with respect to the said items "A," "B," "C" and "G," held that the failure of the Appellant's servants or agents to safeguard the train which became involved in the accident relieved the Respondent from responsibility for all damages resulting directly and indirectly from the destruction of the train. On this point Cannon, J., agreed.

Vol. 7, p. 28.

12. In the result the damages awarded to the Appellant by the Learned Trial Judge, were reduced by a majority of the Learned Judges of the Supreme Court of Canada to the sum of \$31,418.03 above mentioned. 10

13. The Appellant abandons His claim to the sum of \$18,992.35, being payments for medical services, claims and grants referred to as item "F" in Paragraph 5 hereof.

14. The line of railway on which this accident happened and the train which was derailed were the property of the Appellant.

15. In the year 1887, the Drummond County Railway Company constructed its line of railway through the Town of Drummondville in the Province of Quebec and in so doing, crossed the St. Francis River by means of an embankment and steel bridge.

16. In the year 1899, the Governor-General-in-Council under Statutory Authority of the Parliament of Canada, purchased the entire line of railway of the Drummond County Railway Company, which was conveyed to His Majesty by deed dated November 7th, 1899, becoming a part of the Intercolonial Railway previously incorporated under Statute of the Parliament of Canada, in order to fulfil its obligation under the British North America Act of 1867, 30-31 Victoria, Chapter 3, (Imperial Statutes) to construct a railway connecting the St. Lawrence River with the City of Halifax in the Province of Nova Scotia, the said Intercolonial Railway Company under its Statute of Incorporation being designated as a public work belonging to the Dominion of Canada. 20 30

17. The Intercolonial Railway Company forms part of the Railway System of the Canadian Government Railways the management and operation only of which system is entrusted by Order-in-Council of His Excellency the Governor-General, to Canadian National Railway Company.

18. Under the Special Act incorporating Canadian National Railway Company, R.S.C. (1927) Ch. 172, S. 33, provision is made that actions, suits or other proceedings may, with respect to the operation or management of Canadian Government Railways, be brought by Canadian National Railway Company in any Court of competent jurisdiction in Canada. Such provision is permissive only, not mandatory. His Majesty, in the right of the Dominion of Canada has not at any time relinquished his Right to sue as owner of the Canadian Government Railways. 40

19. The Exchequer Court Act confers upon the Exchequer Court of Canada concurrent original jurisdiction in Canada in all actions and suits of a Civil nature at Common Law or in equity, in which His Majesty is the

Plaintiff or Petitioner. Moreover, His Majesty is at liberty in actions in which he is Plaintiff to choose the tribunal before which such action is to be brought. RECORD.

Dominion Building Corporation vs. The King, 1930 A.C., page 90 at page 96.

20. The Respondent is responsible for the damages arising from the wash-out of the railway embankment.

21. On this point both the Exchequer Court and the Supreme Court of Canada unanimously uphold the contention of the Appellant.

(*Montreal Transportation Co. vs. The King*, (1926) 2, D.L.R., Page 862.
10 *Robbins vs. National Trust*, (1927), A.C. 515.

St. Francis Hydro Electric Company, Ltd. et al vs. The King, et al,
The Weekly Notes, March 20th, 1937, Page 141—Privy Council).

22. At the time of the construction, in 1887, of the Drummond County Railway, the St. Francis River at the location of the Railway bridge at Drummondville and as far southerly as Windsor Mills, a distance of thirty-five (35) miles from Drummondville, was undammed and in a state of nature.

23. In the year 1896, the Town of Drummondville constructed a wooden dam across the St. Francis River at a point approximately eleven hundred (1100) feet south of the Railway bridge and in 1918 the Respondent,
20 having taken over the Power Plant of the Town, constructed a new dam approximately one thousand and fifty (1050) feet south of the bridge.

24. In the years 1924 and 1925 the Respondent constructed at a point known as Hemmings Falls and approximately two and one-half ($2\frac{1}{2}$) miles south of the Railway bridge, a concrete dam across the entire width of the river, some fifty-four (54) feet in height, thereby raising the water behind it and creating a basin approximately five and one-half ($5\frac{1}{2}$) miles long, of a greater length, width and depth than previously.

25. Starting on the east side of the river there is first a concrete wing wall about four hundred and twenty (420) feet long which on the date of the
30 accident was at elevation 324 but has since been raised to elevation 327.27 apparently in consequence of the 1928 flood. At the end of this wall is the Power House, about two hundred and fifty (250) feet in length. Then there are four sluice gates, each of them fifty (50) feet wide, having with their frames a total width of approximately two hundred and seventy-five (275) feet. Adjoining these gates is the spillway five hundred and seven (507) feet long, extending to the west shore of the river. Next to the spillway and forming therewith an obtuse angle is a concrete wing wall running upstream for a distance of three hundred (300) feet; this wall abuts on a comparatively elevated point or strip of land, some three hundred (300) feet
40 wide at the shore line, forming a natural embankment. Then prolonging the wing wall and the embankment upstream is an earth dyke or fill, four thousand two hundred (4,200) feet long.

Plaintiff's
Exhibits.
No. 20.

Plaintiff's
Exhibits.
18 & 20
12 & 13.

RECORD.

Removable flash boards seven (7) feet long are placed on top of the spillway to raise the level of the water, when necessary.

Vol. 2,
p. 325, l. 38
Plaintiff's
Exhibits.
No. 19.

26. This dam has altered considerably the natural state of the St. Francis River.

27. It raised the level of the water upstream over nine (9) feet, from elevation 309 to elevation 318.2.

Vol. 1, p. 82,
l. 48 to p. 83,
l. 10.

28. It created thereby a basin extending five and a half ($5\frac{1}{2}$) miles upstream.

29. The Hemmings Falls rapids have entirely disappeared. In the state of nature, the normal drop from the foot of the Dauphinais' Rapids 10 downstream for a distance of approximately three and two-thirds ($3\frac{2}{3}$) miles, was gradual and fell from elevation 310 to elevation 309. Then there was a drop of the river of nearly forty-five (45) feet and this was called the Hemmings Falls.

Vol. 1, p. 82,
l. 40 to p. 83,
l. 10; p. 85,
ll. 30-35; p. 94,
l. 38.
Vol. 2, p. 326,
ll. 1-20;
Vol. 1, p. 140,
ll. 1-35.

30. The Dauphinais' rapids situated upstream at a distance of five (5) or six (6) miles from the dam have been affected. In state of nature, these rapids extended over a mile in length and had a drop of about fifteen (15) feet. The basin created by the dam extends three-quarters ($\frac{3}{4}$) of a mile above what was the foot of the rapids, and about two-thirds ($\frac{2}{3}$) thereof has been submerged. 20

Vol. 2, p. 216,
l. 35 to p. 217,
l. 30.
Vol. 2, p. 309,
ll. 22-29.

31. In a state of nature, the river, from Dauphinais' Rapids to the head of Hemmings Falls Rapids, was very shallow. At many places, it could be crossed afoot or in vehicles. After the dam was built, this section of the river was changed into a basin twelve (12) or thirteen (13) feet deep.

32. Because the depth of the river was affected, the velocity of the flow was considerably diminished for about six (6) miles upstream, that is from the foot of the Hemmings Falls to the Dauphinais' rapids.

33. The consequences of these changes in the natural course of the river have been :

(a) To impound huge quantities of practically still water, which 30 is conducive to the formation of sheet ice and constitutes an ideal receptacle for broken ice and frazil flowing down the river, as it does each year.

(b) It causes the formation of ice jams, of very large dimension. Before the dam at Hemmings Falls was built jams occasionally 'though seldom formed at the foot of the Dauphinais' Rapids, but these were much smaller in size and had considerably less resistance than those which have formed every year since the erection of the dam. Formerly these jams went out in the Spring break-up before the ice from upstream arrived, and the river got rid of its ice and 40 overflow gradually and in a normal way.

Vol. 3, p. 274,
ll. 10-23, and
Vol. 1, p. 105
l. 5.

Vol. 1, p. 96;
p. 97, l. 58,
p. 132, l. 10.

RECORD.

(c) Without the dam, there could be no huge accumulation of ice and water as was seen on the 7th and 8th of April, 1928.

Vol. 2, p. 273, ll. 36-40.
Vol. 1, p. 108, l. 3 to p. 109, l. 15.

(d) In a state of nature, the ice arriving from Richmond and other points upstream, would have met no obstacle either at Dauphinais', at Labonté's or at Bergeron's, but would have flowed down in a comparatively free river, as it had done every year prior to the construction of the Hemmings Falls dam.

Vol. 1, p. 94, ll. 38-50; p. 96, ll. 10-25; p. 105, ll. 3-40; Vol. 1, p. 138, ll. 1-15.

(e) The worst floods experienced in this section of the river took place since the erection of the Hemmings Falls dam, namely, in the years 1927, 1928, and 1932.

10

34. During the forty years previous to the building of the dam there were four floods, namely in 1887, 1913, 1915, 1921, but these were not nearly as severe as that of 1928. The behaviour of the river above Drummondville had been changed in 1896 when the Town erected a wooden dam some eleven hundred (1100) feet upstream from the railway bridge. It was further changed when the Respondent replaced the old wooden dam by a concrete one, and floods, at Drummondville, of 1913, 1915, 1921, were partly caused by this dam.

35. In April 1928, mild weather had persisted for five days and nights in succession : April 4th, 5th, 6th, 7th and 8th. It had the effect of melting rapidly the snow on the banks of the river increasing the inflow and raising the level of the river at every point where the water was impounded and held back by dam.

36. At the foot of the Dauphinais' Rapids, at a distance of about five (5) or six (6) miles from the Hemmings Falls dam, opposite Lots 22 and 23, of the Township of Simpson and in the vicinity of an island called " Ile Ronde," No. 71 of the Township of Wickham, a huge jam of broken ice and frazil had formed and was totally obstructing the river. It was about twenty (20) to twenty-five (25) feet high, extending from shore to shore and resting upon the bed of the river.

Vol. 1, p. 83, ll. 10-50; p. 84, l. 18; p. 85, l. 42; p. 86, ll. 20-50; p. 89, l. 47 to p. 90, l. 40; p. 94; p. 100, l. 15; p. 113, ll. 22-42.
Vol. 1, p. 146, ll. 2-40.

37. The ice coming from upstream had been held at the foot of Dauphinais' Rapids by the ice jam and frazil that had been accumulating during the winter in the basin formed by the Hemmings Falls dam.

Vol. 1, p. 149, ll. 24-32, l. 43 to p. 150, l. 20.

38. At about 4.23 p.m. on Saturday, the Dauphinais' Rapids jam finally gave way under the continually increasing pressure of the ice and water coming from upstream.

Vol. 2, p. 289, ll. 18-29.

39. The pressure in the basin forced the ice upon the earth dyke on the west side of the river above the Hemmings Falls dam.

Vol. 2, p. 341, l. 42 to p. 342, l. 33; p. 343, ll. 28-37.
Vol. 1, p. 87, ll. 35-50; p. 88, ll. 1-3.

40. On Sunday the 8th of April, at about one o'clock in the afternoon, the whole basin was filled with broken ice, packed and piled up extending to the dam. The ice flowing down from upstream had forced the ice in

Vol. 1, p. 151, ll. 40-50.
Vol. 2, p. 264, ll. 10-48; Vol. 2, p. 193 l. 8 to p. 195, l. 50.

Vol. 1, p. 88, l. 40
to p. 90, l. 40;
p. 103, l. 1 to
p. 104, l. 10;
p. 111, ll. 1-20.
Vol. 1, p. 156,
l. 1, to p. 157,
l. 20; Vol. 1,
p. 132, l. 30 to
p. 133, l. 50.
Vol. 1, p. 135,
l. 33 to p. 136,
l. 30; Vol. 1,
p. 90, ll. 9-30;
p. 94, ll. 32, 33.

the basin up to the Power House, and the dam was holding back that huge mass of ice and water.

41. Finally, at 3.0 p.m. on Sunday, April 8th, the jam suddenly broke and the ice and water rushed over the dam.

42. The fact that the existence of the dam was the cause of the accident is clearly established by a large number of witnesses, including experts.

43. The accident, said D. W. McLachlan, one of the most eminent experts upon the subject, was brought about by the state of the Hemmings Falls dam without question. The building of that dam caused a jam to occur at a point it would not have occurred in nature. That jam was such that the people operating the dam and Power Plant could not control it, and it broke and went out at a time which demonstrates its force in that it caused about six hundred million (600,000,000) cubic feet of water to be discharged suddenly over the Hemmings Falls dam. That very quickly raised the portion below Hemmings Falls dam to a high level and caused about one hundred and fifty thousand (150,000) cubic second feet to pass through the St. Francis River at Drummondville half an hour afterwards, which was sixty thousand (60,000) cubic second feet at least, in excess of anything the river had been called upon to carry on any date previously.

Vol. 2,
p. 281, l. 29.

44. The Appellant's two other experts, Lea and Ouimet, both Civil Engineers of wide experience, fully agreed with McLachlan as to the cause of the accident.

45. The Respondent's experts have elaborated a theory which is the exact opposite of the Appellant's theory. They contend that there was no connection between the construction of the dam and the accident; that the railway embankment would have been washed out just the same, if no dam had existed, at Hemmings Falls, and that the disaster would have been even greater.

Their theory is fallacious and contrary to the evidence and was not accepted by either the Exchequer Court or the Supreme Court of Canada.

46. The Respondent has also contended that the flood of 1928 was due to a combination of abnormal climatic conditions amounting to *vis major*.

47. It is respectfully submitted that the flood of 1928, under the circumstances, disclosed by the evidence, cannot be considered as an unforeseen event and does not constitute *vis major*.

Corporation of Greenock vs. Caledonian Railway Company and Corporation of Greenock vs. Glasgow and South-Western Railway Company (1917) A.C. 556.

RECORD.

10 “ It is true that the flood was of extraordinary violence, but floods of extraordinary violence must be anticipated as likely to take place from time to time. It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable. Such damage is not in the nature of *damnum fatale*, but is the direct result of the obstruction of a natural watercourse by the defenders’ works followed by heavy rain.”

In the case of *Kerr vs. Earl of Orkney*, 20 Dunlop’s Reports (Scottish Court of Sessions Cases) page 298 at page 302, the Lord Justice Clerk states :—

20 “ An extraordinary fall of rain is a matter which, in our climate, cannot be called a *damnum fatale*—supposing the doctrine so denoted by that term to be applicable—generally speaking,—to a dam for collecting water. And the experience of the last fifteen years has shown that the increased drainage of the country brings down in heavy rains the whole water in a very short space of time, and therefore in floods of a weight, and power, and force of water quite unknown in former times. But against such a state of things the party forming such dams must completely provide, so as to secure safety to those lower down the stream.”

30 48. The Water Course Act of the Province of Quebec, R.S.Q. 1925, Chap. 46, requires that the construction of a dam must be authorized and approved by the Lieutenant-Governor in Council. Section 12 of the Act provides :—

“ 12. The owner or lessee of any such work shall be liable for all damages resulting therefrom to any person whether by excessive elevation of the flood gates or otherwise.”

Under this Statute the Respondent must pay all damages caused by the accident.

40 49. “ Il n’y a pas non plus, juridiquement cas de force majeure lorsque l’obstacle apporté à l’exécution par l’événement qui, en lui-même, a le caractère de cas fortuit, été occasionné par une faute du débiteur survenue avant, pendant ou depuis cet événement. En un mot, le débiteur n’est pas libéré si une faute commise par lui a été la cause occasionnelle de l’inexécution ”—(Baudry-Lacantinerie, XII des Obligations, 3rd, édic. no. 460, p. 490).

Appellant
Atkin M.C.
Nichols &
Negligent

RECORD.

50. In the case of *Thomas vs. the Southern Canada Power Company Ltd.* (Respondent in this case) the Defendant was condemned to pay damages caused in 1921 by reason of the dam at Drummondville. The Superior Court, affirmed by the Court of Appeal, held that : “ le fait que la débâcle sur la rivière St-François, en 1921, aurait eu lieu soudainement et après de grands abats de pluie, ne constitue pas une force majeure qui dégage la responsabilité de la défenderesse.”

51. It was held in the case of *Montreal Light, Heat & Power Co., et al vs. The Attorney General of the Province of Quebec* (Archangeault's case) 41, S.C.R., p. 116, that those who construct works in a river to alter its natural conditions, and create a reservoir in which ice is formed in larger quantities than it was prior to such works, and which, during the Spring freshets after a severe winter, was driven with such force against the superstructure of a bridge as to partially demolish it, are responsible for the damage caused. 10

52. The Respondent was also negligent in manipulating the sluice gates.

Vol. 6,

p. 1105, l. 41.

53. The Trial judge was inclined to think that the disaster might have been averted had the Respondent manipulated its sluice gates in such a manner as to lower the level of the water in the basin as much as possible by opening the four gates wider from the time the weather turned decidedly mild, on Thursday, April 5th until after the final break-up on Sunday afternoon, April 8th. 20

54. The sections of the Quebec Civil Code and the jurisprudence cited by Cannon J., do not apply to this case.

55. The St. Francis River is a navigable river and consequently forms part of the public domain (Section 400, Quebec Civil Code), and section 503 of the Quebec Civil Code has no application.

56. The law on servitude, as it appears at sections 501, *et seq.* of the Quebec Civil Code has been amended and modified in various subsequent Statutes, the pertinent sections of which have now been codified and appear in the Water Course Act of the Province of Quebec. R.S.Q. 1925, Ch. 46, S. 5 to 11 and S. 16 to 25. 30

Vol. 1, p. 3.

57. The Respondent must pay all damages caused by the wash-out, and set out in the Information, as items “ A,” “ B,” “ C,” “ D,” “ E,” “ G,” “ H ” and “ I ”.

The Quebec Water Course Act is specific upon the question of liability for damages. Respondent obtained the right to obstruct the St. Francis River with its dam, only upon condition that it will pay all damages resulting therefrom to any person. 40

58. Crockett, J. and Dysart, J., *ad hoc*, of the Supreme Court, held that damages should not be allowed to Appellant for the cost of repairs to the locomotive and two cars and the cost of auxiliary and wrecking train service, a total of \$30,512.82, for the reason that the Appellant's employees should have safeguarded the train, and that there had been a failure in duty on their part. Vol. 7, pp. 28-31.

59. The Learned Trial Judge held that no blame could attach to the Plaintiff in the circumstances for not having stopped the train; it was impossible in his opinion to do it. This finding of the Trial Judge is supported by Lamont, Acting Chief Justice, and Davis, J., of the Supreme Court of Canada, who state— Vol. 6, p. 1095. Vol. 7, p. 21.

“ then as to the failure of the Officials of the Respondent in the immediate vicinity of Drummondville to warn the oncoming train, there is no evidence to show that any Official of the Respondent at or near Drummondville, had any such notice or knowledge of the probability of the wash-out occurring as to put the blame for the destruction or damage to the locomotive or cars upon the Respondent itself.”

60. Mrs. Martel, who resided on the east side of the river near the Railway bridge, asked King, a Foreman of the Respondent, if he thought it would be dangerous when the ice came down and he replied that he did “ not think there is any danger ”. This was at three o'clock in the afternoon of April 8th. Vol. 1, p. 41, ll. 20 to 40.

61. The Respondent's employees were the first to know that the dam had failed to hold the water and ice which had accumulated in the basin. This was at three o'clock in the afternoon and they could have telephoned the Railway Agent at Drummondville if they considered there was danger.

62. Lamont, Acting Chief Justice, and Davis, J., of the Supreme Court of Canada, in their Judgment, point out that if those in charge of the Power House and dam of the Respondent had expected that the Railway embankment might be washed out, they undoubtedly would have notified the Appellant's representative at Drummondville to be on guard. These Justices further state “ they did not foresee what actually happened and no blame is attached to them for not foreseeing the danger at the Railway bridge, and I cannot see that we would be justified in attaching blame to the Officials of the Respondent ” (Appellant in these proceedings) “ at Richmond, twenty-five (25) miles or more away.” Vol. 7, p. 20.

63. The bridge and embankment had existed for forty (40) years and had resisted all floods prior to the date in question. The bridge and embankment had always been maintained in good order at much expense and were examined every day, even on April 8th. An express train had passed over the bridge about one o'clock in the afternoon of April 8th. Vol. 5, p. 858, ll. 35-40; p. 860, ll. 14-26; p. 874, l. 38 to p. 875, l. 27; p. 876, ll. 23-44; p. 877, ll. 10-20. Vol. 5, p. 869, l. 37 *et seq.*, p. 872, ll. 39-41. p. 873, l. 30 to p. 874, l. 15.

RECORD.

Vol. 1,
p. 51, ll. 35
to 45; p. 52,
ll. 5 to 20;
p. 53, ll. 18
to 48.

64. Pineau, the Appellant's Agent at Drummondville, was not on duty on Sunday, but went for a walk to the river about noon time. The water was normal and not high. There was no ice of any moment and a man named Fournier told him that the ice had gone out the previous night. At four o'clock Pineau again went out for a walk and saw people along the river bank. He went towards the river. Ice was coming down rapidly and in large quantities. He was standing on the west side of the river and could not see the east side of the bridge. He noticed, however, that the ice and water were damaging the Railway embankment on the west side. Immediately, he went to a telephone to have the Operator on duty at 10 Drummondville stop the train and learned that the train had passed St. Cyrille the next station east of Drummondville. He had just finished telephoning when he was told that the train had plunged into the river.

Vol. 1,
p. 30, ll. 28
to 33, and
p. 31, ll. 30
to 40.

65. The wash-out came very suddenly. A few minutes before the arrival of the train, no damage had been noticed. The embankment was washed out just a few minutes before the train plunged into the river.

66. Negligence is a breach of duty and there is no duty to guard against contingencies too remote to be reasonably anticipated.

Canadian Pacific Railway vs. Fréchette, (1915) A.C. Page 871.

67. Respondent has also contended that Appellant should have adopted 20 new devices in order to strengthen such a structure.

Vol. 7, p. 17.

68. As Davis, J., states,— “ I cannot think if what I have upon my property has adequately served my purpose for fifty (50) years or more there is any duty in law upon me to protect it against what may be the result of the establishment and maintenance of a nuisance created by my neighbour upon his land.”

In the case of *Withers vs. The North Kent Railway Company* (1858) 27 L.J. (N.S.) Common Law (Ex.) P. 417, at page 418, Pollock, C.B. states,—

“ The line had lasted five years in a country subject to floods, 30 and it does not appear that there had been any accident or objection to its construction until this extraordinary flood occurred. The Company were not bound to have a line constructed so as to meet such extraordinary floods.”

69. The Appellant submits that the appeal should be allowed and that it should be declared that the Appellant is entitled to \$61,930.85 as damages instead of \$31,418.03 as allowed by the majority of Judges of the Supreme Court of Canada for the following, amongst other

\$80000
Can. F.
\$180000

REASONS

- (1) Because it has been held by the unanimous decision of the Trial Judge and the Supreme Court of Canada that the Respondent was liable because the damage in question was caused by reason of the construction of the Respondent's Dam at Hemmings Falls.
- (2) Because there was abundant evidence upon which the Trial Judge based his findings of fact.
- 10 (3) Because the majority of the Judges of the Supreme Court of Canada erred in reversing findings of fact of the Trial Judge.
- (4) Because the Statute under which the Respondent constructed its Dam at Hemmings Falls imposed an absolute liability upon the Respondent for all damages resulting therefrom to any person.
- (5) Because the provisions of the Quebec Civil Code referred to by Cannon, J., of the Supreme Court of Canada are not applicable to this case.
- 20 (6) Because the Appellant had the right to institute this action and recover damages for destruction of its embankment and damage to its train.
- (7) Because the said damage occurred without fault on the part of the Appellant or any of its servants or agents.
- (8) Because the Respondent continued to be responsible for all damage caused by reason of the construction of the Respondent's dam at Hemmings Falls during the entire period of discharge of water and ice impounded by said dam.

J. E. PERRAULT.

J. P. PRATT.

In the Privy Council.

No. 70. of 1936.

ON APPEAL
FROM THE SUPREME COURT OF CANADA.

BETWEEN

HIS MAJESTY THE KING ON
THE INFORMATION OF THE
ATTORNEY - GENERAL OF
CANADA - (*Plaintiff*) *Appellant*

AND

SOUTHERN CANADA POWER
CO. LTD. - (*Defendant*) *Respondent*

AND BETWEEN

SOUTHERN CANADA POWER
COMPANY LIMITED
(*Defendant*) *Appellant*

AND

HIS MAJESTY THE KING ON
THE INFORMATION OF THE
ATTORNEY - GENERAL OF
CANADA - - (*Plaintiff*) *Respondent*.
(CONSOLIDATED APPEALS.)

CASE FOR THE APPELLANT
AND CROSS-RESPONDENT.

CHARLES RUSSELL & CO.,
37, Norfolk Street,
Strand, W.C.2.
Solicitors for the Appellant and Cross-Respondent.

EYRE AND SPOTTISWOODE LIMITED, EAST HARDING STREET, E.C.4

Privy Council Appeal No. 70 of 1936

-6 JUL 1953

The King	-	-	-	-	-	-	-	-	-
									<i>v.</i>
Southern Canada Power Company, Limited	-	-	-	-	-	-	-	-	<i>Respondents</i>
Southern Canada Power Company, Limited	-	-	-	-	-	-	-	-	<i>Appellants</i>
									<i>v.</i>
The King	-	-	-	-	-	-	-	-	<i>Respondent</i>

INSTITUTE OF ADVANCED
LEGAL STUDIES

Consolidated Appeals

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 28TH JULY, 1937.

Present at the Hearing :

- LORD ATKIN.
- LORD MACMILLAN.
- LORD WRIGHT.
- LORD ALNESS.
- LORD MAUGHAM.

[*Delivered by* LORD MAUGHAM.]

INSTITUTE OF ADVANCED
LEGAL STUDIES,
25, RUSSELL SQUARE,
LONDON,
W.C.1.

This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 15th January, 1936, reducing the amount of damages awarded by a judgment of the Exchequer Court of Canada, rendered on the 29th December, 1933, in favour of the appellant, from \$80,923.20, with interest thereon from the date of the judgment, to \$31,418.03. There is a cross-appeal, also by special leave, by which the respondents in the original appeal seek to have the judgment of the Supreme Court reversed and the action dismissed. It will be convenient to describe the original appellant as "the Crown" and the original respondents as "the Power Company."

The litigation arises from the fact of the construction by the Power Company in the year 1925 of a large power plant and dam across the St. Francis River in the Province of Quebec about two and a half miles above a railway line and bridge belonging at the material time to the Crown in right of the Dominion of Canada, and managed by the Canadian National Railways Company. It is not in dispute that the power plant and dam were erected according to plans approved by the Minister of Public Works of Canada pursuant to the provisions of a law of Quebec, generally known as the Watercourse Act (Revised Statutes of Quebec, 1925, ch. 46). By section 12 of that Act it is provided in reference to any dam or similar structure in a river constructed pursuant to the provisions of the Act that, "the owner or lessee of any such work shall be liable for all damages resulting therefrom

to any person, whether by excessive elevation of the flood-gates or otherwise." The action was brought by the Crown for damages alleged to have been caused by a disastrous rush of water and ice in the spring of 1928 by which damages of different kinds were occasioned to a railway embankment near the town of Drummondville, to rolling stock and in other ways. The learned trial Judge (Angers J.) after a trial which lasted fourteen days and at which more than a hundred witnesses gave evidence, came to the conclusion, which he stated in a very careful judgment, that the Power Company's dam "was responsible for the wash-out of the railway embankment at Drummondville on Sunday, 8th April, 1928," and he awarded to the Crown the sum of \$80,923.20 as damages. On the appeal to the Supreme Court of Canada that Court by a unanimous decision agreed with the trial judge that the Power Company's dam was responsible for the washing out of the railway embankment. As will be seen there was a difference of opinion on other matters arising on the appeal; but the question whether the tremendous rush of water and ice which occasioned some at least of the damage, was caused by the interference of the Power Company with the natural condition of the St. Francis River is a pure question of fact. Their Lordships see no reason for departing from their long established rule in relation to concurrent findings of fact, and they must accordingly deal with this appeal upon the basis that this difficult question has been decided adversely to the Power Company. It will accordingly be necessary to state the facts only so far as they are relevant to the other questions that arise on the appeal.

The dam of the Power Company, commonly called the Hemmings Falls Dam, raised the level of the water upstream by 9.2 feet and created a basin about $5\frac{1}{2}$ miles in length where there had previously been one about $3\frac{1}{2}$ miles in length. This basin had also become much wider. The dam consists mainly of a concrete wall about 54 feet in height, and there are of course sluice-gates and a spillway in connection with it. About $5\frac{1}{2}$ miles upstream from the dam there are some rapids called the Dauphinais Rapids. At the foot of these rapids near an island called "La Ronde," No. 71 of the Township of Wickham, an extensive jam of broken ice and frazil had formed before the end of March, 1928. It was almost totally obstructing the river, since it rested upon the bed of the river, extended from shore to shore, and was some 20 to 25 feet high.

About the 4th April weather of remarkably warm character set in. The minimum temperatures in the neighbourhood were well above freezing point and the maximum temperatures rose steadily and on the 6th and 7th April exceeded 70° F. The snows on the banks of the river melted rapidly and water and ice began to come down in large quantities from above the jam. At about half past four in the evening of Saturday the 7th April the Dauphinais Rapids jam finally gave way and the ice flowed down the river till held up by the ice in the basin above the Hemmings Falls Dam. On Easter Sunday, the 8th of April, at about one

o'clock in the afternoon, the whole basin above the dam was filled with broken ice and frazil (ice needles which form in waters flowing too rapidly to allow the formation of surface ice) gradually piling up where it was held by the dam. This artificial jam, if it may be so described, must be taken according to the findings above mentioned to have occurred at a place where it would not have occurred in nature. At 3 p.m. on Easter Sunday the water in the basin having risen, this jam suddenly gave way and vast quantities of ice and water amounting it is said to 600 million cubic feet rushed over the dam and in due course reached the railway bridge over the river some $2\frac{1}{2}$ miles downstream. The river here runs from South to North. The railway which crosses the bridge is the line from Quebec to Montreal, and the station close to the river is at the town of Drummondville, which is on the West side of the river. Before reaching that station the line, coming from Quebec, crosses a viaduct over a highway, and reaches the railway bridge some 100 feet further on; but between the viaduct and the bridge there is an embankment of gravel about 90 feet in length and 20 feet in height. On the other, the West, side of the bridge there is another similar embankment. North of the railway bridge and close by there is a road bridge which carries the road from Drummondville in the direction of Quebec.

When the flood reached the bridge on the 8th April the railway embankment on the East side of the river began to be undermined by the sudden rush of water and ice. The sleepers and rails were soon hanging over a gap. A passenger train from Quebec bound for the City of Montreal was expected. It was due at 4.15 at Drummondville about half a mile from the bridge and it was on time. A woman residing on the East side of the river, Madame Malvina Grondin, whose name deserves to be recorded for her exceptional presence of mind and energy, had been watching the rising flood of water and ice. She heard the whistle of the locomotive, and having told her sister and child who were with her to save themselves, she ran along the track towards the approaching train. She signalled and doubtless screamed to the engineer to stop and he at once applied the emergency brakes. She called to the fireman who was leaning out of the cab to jump; he jumped and in jumping knocked her down. The brakes greatly reduced the speed of the train, but the engineer could not altogether stop the train before the gap was reached and the locomotive and two leading cars subsided or plunged downwards into the water. The engineer was so seriously burnt in the cab of his engine that he died within a week. Two men in the baggage car were drowned. Several passengers were injured. The cars and of course the track were badly damaged. The fireman escaped.

As already stated the Crown recovered judgment in the Exchequer Court of Canada for the full amount of the claims less only the sum of \$600, being the amount of a gratuity made to the woman who had signalled the train

to stop. The different items of damage in the claim fell into three general classes. Firstly, there was the damage involved in the destruction of the embankment and the damage to the tracks amounting in all to \$18,259.04. It should be explained that the bridge itself was in no way injured. Secondly, the cost of repairs to the locomotive and the cars and the cost of auxiliary and wrecking train service, and of the diversion of the train service. These items amounted to \$43,671.81. Thirdly, there was a class of items made up of disbursements for medical and hospital services, funeral and ambulance expenses, indemnities to passengers and employees, wages paid to the disabled conductor of the train and the \$600 gratuity paid to Madame Grondin. The items in this class amounted to \$19,592.35.

There was a preliminary objection raised by the Power Company which, if successful, related to the whole action, namely, a contention that by statute the right of action was vested in the Canadian National Railways Company and that that Company alone could sue for the damages in question and that the action should not have been brought in the Exchequer Court of Canada. This objection failed in the Supreme Court as in the trial Court but it is raised by the cross-appeal. In the Supreme Court all the Judges held that the third class of damages amounting to \$19,592.35 was not recoverable, and the Crown has abandoned its claim to recover these damages which need not further be mentioned. The learned Judges held unanimously that the Power Company was responsible for the damage caused to the embankment, the tracks and the diversion of the train service, i.e., \$31,418.03. Assuming that the preliminary objection fails, and that the main question of responsibility is not now open having regard to the concurrent findings above mentioned, the Power Company does not dispute liability for these damages. But the Supreme Court by a majority of three to two (Cannon, Dysart and Crocket JJ. against Lamont and Davis JJ.) held that the damages caused to the locomotive and the two cars and certain incidental expenses were due to the failure of the railway employees to guard against the danger to the railway embankment and that the Power Company was accordingly relieved from liability in respect of this item of damage which amounts to \$30,512.82. The judgment of the trial Court was therefore reduced to the sum of \$31,418.03. Hence the present appeal is by the Crown claiming to recover the additional sum of \$30,512.82 and interest, while the cross-appeal by the Power Company seeks to set aside the whole judgment on the ground that the Crown is not entitled to sue. The alternative claim to set aside the judgment on the ground that the events which led to the damage were not due to the dam at Hemmings Falls is one which for the reason already given must be rejected by their Lordships.

On the objection that the Crown had no right to sue and that the action should not have been brought in the Exchequer Court of Canada, the Power Company has

failed to obtain any encouragement from any of the six Judges who have had to deal with the case. It seems to their Lordships that on these points there is little to add to the admirably clear statement contained in the judgment of Davis J. concurred in apparently by the other learned Judges. After stating the contention, Davis J. observed:—

“ The learned trial Judge carefully reviewed the statutory law upon the subject and concluded, I think rightly, that the Crown was the owner of the railway and had never given up its right to sue for any claim it had in connection with the operation of the railway. The particular section of the railway in which the accident occurred has an interesting history as part of the old Intercolonial Railway, it having become the duty of the Government of Canada by virtue of section 145 of the British North America Act to provide for the commencement within six months after the Union of a railway connecting the River St. Lawrence with the City of Halifax in Nova Scotia, and for the construction of such railway without intermission and its completion with all practicable speed. It was in the fulfilment of that duty imposed upon the Government of Canada by the Act of Confederation that the undertaking of the Drummond County Railway Company was acquired in 1899, and thereafter formed part of the Intercolonial Railway. It became and has continued to be the property of His Majesty in right of the Dominion of Canada. The ownership has never been conveyed to the Canadian National Railways Company, but to that company the management and operation of the railway have been entrusted by statute. While a right of action was given to the railway company by section 33 of the Canadian National Railway Act, R.S.C. 1927, ch. 172, and this action might have been taken in the name of the Canadian National Railways Company, His Majesty in right of the Dominion of Canada did not relinquish his right as owner to sue. That being so, there is no ground for the further objection that the action should not have been brought to the Exchequer Court of Canada. The learned trial Judge has carefully and correctly reviewed and stated the pertinent statutory provisions and the authorities, and it is unnecessary to repeat them.”

It may be added that section 33 of the Canadian National Railway Act, using as it does the word “ may ” in empowering certain actions, suits or other proceedings to be brought by the Canadian National Railways Company, contains nothing to indicate that the Crown, in right of the Dominion, was giving up its right to bring such proceedings. There was an obvious convenience, from the point of view both of Crown and subject, in permitting the managing company, though it possessed as owner neither the line nor the rolling stock, to bring actions and to be sued without the fiat of the Attorney-General; but it seems to their Lordships that no good reason can be stated for holding that the Crown by implication was itself precluded from suing. Their Lordships observe that this conclusion is in line with a statement which is to be found in the judgment of this Board in the case of *Dominion Building Corporation, Ltd. v. The King* [1930] A.C. 90 at p. 96).

The question as to the correct quantum of damages must now be dealt with. It raises two points, first, a question as to the true construction of section 12 of the Watercourse Act (R.S.Q. 1925, chap. 46) and, secondly, a question of fact which will be defined later upon which the right to recover the damages to the locomotive and two cars will turn.

The Watercourse Act of 1925 was originally enacted as 19-20 Vict. ch. 104, and has been the subject of many judicial pronouncements, some of which have been referred to in the judgment of Cannon J. in the Supreme Court. He held that the damages contemplated by section 12 of the statute are those suffered by any riparian owner in respect of his riparian property either above or below the dam, and must be limited to actual damages caused to the owner of a riparian piece of land as a result of the construction and maintenance of the dam. This view has not found favour with any of the other Judges, and their Lordships are unable to accept it. It may be observed that it has always been held in Quebec that section 12 is not limited to damages caused by the original construction of a dam and that damages occurring long after the construction is complete can be recovered in the Courts of Quebec; and this view was not contested at the hearing. Why then should the generality of the words "all damages resulting therefrom to any person" be limited in the way suggested. It is plain that lands and houses belonging to persons who are not riparian owners but occupiers of low-lying land in the vicinity of the river, may well be damaged as the result of a flood due to the dam. Why should these people not be within the words "any persons"? Moreover it is difficult to see why the liability imposed on the persons who are allowed under a statute to interfere with the flow of a natural watercourse on the terms of being liable for all damages should be limited in the way suggested. On this point the judgments of Lord Finlay and Lord Dunedin in the case of *Corporation of Greenock v. Caledonian Railway* ([1917] A.C. 556) and the authorities therein cited are conclusive to show that at common law apart from statute the duty of one who obstructs the natural flow of a river is to prevent damage and if damage results to any persons he will be liable to them irrespective of whether they are riparian owners or not. Their Lordships are of opinion, in agreement with the other Judges before whom this case came, that the liability under the section cannot be limited by the articles of the Code of Quebec dealing with real servitudes; and they think that the authorities cited by Cannon J. have not the effect which he attributes to them, though no doubt Judges dealing with cases of injury sustained by riparian owners have at times used language which referred only to the cases they were considering. Their Lordships need not add anything in relation to the final words "or otherwise" in the section, since it is well settled in Quebec that they are quite general. See *Proulx v. Tremblay* (1881 7 Q.L.R., 353) where Sir L. N. Casault (at p. 358) remarks after quoting the section "*Cette dernière expression, 'ou autrement,' ne laisse aucun recours à découvert; elle les comprend tous.*"

It is now necessary to deal with the question whether the Power Company ought to be held liable for the damage to the locomotive and cars disallowed, as already stated by the majority of the Supreme Court.

In order to appreciate this point some further facts should be stated. The railway bridge over the River St. Francis was constructed in the year 1887 by the Drummond County Railway Company. The connecting embankments on the east and west sides of the bridge were constructed of the gravel material commonly used in the district. They were normally on land above the level of the water; but in floods and freshets the lower parts of them would be under water. In 1899 the Government of Canada bought the railway and undertaking. As already stated the Hemmings Falls dam was built in 1925. There was also a much smaller dam, originally of wood, some 1,100 feet upstream from the bridge; but the part it played as a cause of the accident is so small that it may for the present purpose be disregarded.

The Canadian National Railway Company were managing not only the line from the City of Quebec to the City of Montreal but a line with a station at Richmond, 25 miles in a straight line from Drummondville and about 42 miles upstream from the railway bridge. The thaw having begun at the beginning of April, the railway tracks at Richmond were flooded, and traffic over them was stopped. The fact is mentioned because the Power Company rely upon it. It was a matter of general knowledge that the ice jams on the river would break up in a few days, and when that happened the river at the railway bridge would no doubt rise several feet. Floods on such occasions are not unusual on this part of the river. Before the dam was constructed there were floods in 1887, 1913, 1915 and 1921; after the dam was made (in 1925) there was a very severe flood in 1927 which gave rise to several actions against the Power Company. It should be mentioned that the learned trial Judge found that the three worst floods in that section of the river were those of 1927, 1928, and 1932.

The reasons which induced the majority of the Supreme Court to come to the conclusion that the Crown could not recover damages in relation to the locomotive and the two cars are very clearly stated in the judgment of Dysart J. After describing the "break-up" which caused the damage on Sunday, the 8th April, he proceeds as follows:—

"For some days prior to the wash-out, the local community was well aware of the condition of the river, and many citizens were watching the progress of the flood, and on Sunday, for several hours preceding the final burst, and during its progress, hundreds of citizens lined the banks, watchful and expectant. Although the railway company has within a few hundred yards of the embankment a station at which it maintains a staff, its railway officials or employees do not appear to have been on the scene. There is no suggestion that, at any time during the several days preceding the wash-out nor during the final critical hours, any steps were taken by them to safeguard the trains; even when the washing out process began—and it continued for some little time before finally completed—the only person of all the throng to do anything effective in giving warning to approaching trains was . . .

Madame Grondin whose action in the matter has been already described. He continues thus:—

“ Common knowledge of the conditions which had been prevailing should have been sufficient to put railway officials on guard as to the possibility—not to say probability—of danger to the embankment and connecting bridge with all that such dangers entailed. The mere fact that the power company’s employees did not call upon the railway employees to take precautions does not of itself relieve the latter from performance of their duty—nor mean that the need of precautions was not apparent, we may fairly suppose the appellant’s employees were engrossed in trying to minimize the flooding and to protect their own property, and that they naturally assumed that the railway employees would look after the protection of railway property. In all these circumstances, the failure of the railway employees to safeguard the train was a failure in an obvious duty, and relieves the appellant from responsibility for all damage resulting directly and indirectly from the destruction of the train.”

If the employees of the Railway Company had owed a duty (on behalf of the owners) to the Power Company to safeguard the embankments and the bridge from possible damage arising from a spring “ break-up ”, these reasons if fully justified on the evidence would have considerable force. In the first place, however, their Lordships must observe that there was no such duty in a legal sense since they are dealing with the obligations of the Power Company under a statute; and that no question of negligence or contributory negligence properly so called on the part of the employees of the Railway Company can arise. The liability of the Power Company under section 12 of the Watercourse Act for the damages resulting from the interference with the natural flow of the river is not qualified in any way. This is not to say that claims for damage in such a case can include damages due to the foolish and irrational acts of the claimants. The latter are expected to behave as reasonable men, and in the event of probable danger to take such steps to avoid injury or damage as reasonable men would take, and to minimize damage if an accident occurs. This obligation will not, however, require them to foresee dangers which ordinary men would not be likely to anticipate. The onus of establishing the case against the Crown on these lines is clearly on the Power Company. It is from this standpoint that their Lordships have examined the evidence in the case.

The learned trial Judge in his judgment dealt with great care with the material before him relating to this point. He appreciated that there were two matters to be considered, first, whether the persons in charge of the railway in the Drummondville area ought to have foreseen for some days prior to the 8th April the probability or possibility of the damage to the railway line when the break-up of the ice should take place, and should therefore have taken special precautions; and secondly, whether they ought to have stopped the approaching train on the 8th April as soon as it became apparent that the two embankments or either of them was being seriously damaged by the ice and flood. He came to the conclusion that neither of these propositions had been made out, and since he had heard

the evidence of many local witnesses and had carefully considered the mass of documentary evidence (records, plans, charts, photographs and so forth) as to previous floods, his view is entitled to great respect. As already stated Lamont and Davis JJ. in the Supreme Court agreed with him, and held that no blame could be attached to those in charge of the railway for not foreseeing the danger to the bridge, or for not stopping the approaching train which met with so disastrous an accident.

In order to appreciate their view, certain circumstances of considerable importance should be stated. The first is that the embankments on both sides of the bridge, constructed as we have seen in 1887, had resisted the floods and the ice "break-ups" for 40 years without damage, and in particular had suffered no injury from the serious flood of 1927. The second is that there seems to have been no reason in the spring of 1928 for anticipating a worse flood at the railway bridge than that of the preceding year. The third is that the officials of the Power Company who were carefully watching the progress of events above the dam, being naturally concerned with the possible damage to their power-house and other buildings, gave no notice or warning whatever to the station-master or other railway employees at Drummondville that any exceptional *débâcle* of ice and water was to be anticipated or had taken place. There was indeed till 3 p.m. on the 8th April nothing unusual in the height of the water at the dam; and the flooding at Windsor, where the railway lines are on low-lying land, was not exceptional and suggested no risk of danger below the dam. The recorded water level at Hemmings Falls on 7th April at 7 p.m. was 320·5 feet. It could be controlled, at least to some extent, by opening or closing the sluice-gates. They were fully opened, and the water level fell till, at 9 a.m. on the 8th, the level was 316·8 feet. By 3 p.m. this level had only increased to 317·4 feet; but a few minutes later it rose suddenly and reached its peak, namely, 325·6. It was at this moment that the ice, which had previously begun to move in the middle of the basin, leaped over the dam. When this unusual occurrence took place it did not apparently suggest danger to the employees of the Power Company; they sent no telephone message to the station as they might have done, and the persons who were there on duty could not know what had happened $2\frac{1}{2}$ miles upstream. It may be observed here that no such event took place on the *débâcle* of 1927. In that year except for a few pieces of ice that went over the spillway, the large amount of ice in the basin melted gradually. It seems reasonable to suppose—as did Lamont and Davis JJ.—that the Power Company's officials did not think there would be any trouble at the railway bridge due to the ice and water jumping the dam.

It is at first sight very strange to hear that on Sunday the 8th April a large number of citizens of Drummondville for some hours before the accident to the train were watching the progress of the flood; but if this statement is carefully analysed it is difficult to see that it suggests that the officials

of the railway company are in any way to blame in not stopping the train expected at Drummondville at 4.15 before it reached the embankment. The *débâcle* or spring flood is of annual recurrence, and on an Easter Sunday afternoon many sightseers would come to watch it. There was, however, nothing unusual to be seen till after 3.30. The water was fairly high, but normal for the season. The bridge and embankments were intact and an express had passed a little after 1 p.m. It was proved beyond doubt that the "washing out" of the embankments was remarkably sudden; and it seems to have been this circumstance which led to so many spectators continuing to watch the flood and the catastrophe and not one of them taking the course of running back a few hundred yards to the station and warning the station-master that the embankments were giving way.

From this point of view the time factor is very important. The ice and water as stated came over the dam soon after 3 p.m., and could not have reached the railway bridge till about 3.40, perhaps 3.45, about half an hour before the train from Quebec was due. The railway men would in the ordinary course have been on their way to the station or have already reached it, and it is not at all surprising that none of them were at the railway bridge watching the flood. The train could have been stopped at St. Cyrille, some five miles-and-a-half from Drummondville, and apparently not at a later stage of its journey except by the method adopted by Madame Grondin; but their Lordships, like the trial Judge, have been quite unable on the evidence to conclude that the railway employees had or ought to have had any knowledge of the fact that an unusual flood of water and ice had reached the railway bridge, still less that some minutes later the railway embankments were being cut into by the ice and the water, a process which according to the evidence did not become apparent till shortly before 4 p.m. The evidence of Severin Pineau, an agent of the Canadian National Railway at Drummondville, may here be cited. On the day of the accident he was off duty. At noon he went to the river: the water was high, but normal for the season: it carried little ice. About 4 p.m. he went down towards the railway bridge. Large quantities of ice were then going down the river. After watching for some minutes he went closer to the bridge. He then noticed that at one place the embankment on the east side of the bridge was beginning to disintegrate. He at once thought of signalling the train to stop, but realised on looking at the time that the train had probably passed St. Cyrille and that he had not time enough to cross to the other side of the river to give the signal to stop. He telephoned to the station agent and told him to telephone; but it was too late to stop the train and at 4.13 the accident occurred. A number of witnesses speak to the suddenness of the collapse of the embankment. "*C'est parti tout d'un coup*" is a phrase which represents this impression. No doubt it is only an impression, for the undermining of a substantial embankment would take a little time even if

bombarded by blocks of ice borne by a flood of water. The probability is that during the first minutes of the process it would not be noticed by persons at a higher level. The point is that the disintegration process was not apparent till a moment of time when the train, unfortunately up to time, was too near the embankment to be stopped by ordinary means. This fact is a sufficient answer to the criticism that the railway officials at Drummondville should have stopped the train, unless it can be established that special guards (two at least would have been necessary) ought to have been continually watching the embankments to see that they were not being damaged.

It seems to their Lordships that it is impossible in the circumstances to reach the conclusion that the railway company acted with a lack of ordinary prudence in not placing such guards. There was no reason to suppose that the mass of ice and water would come over the dam in the way it did. In the high flood of the previous year, as already stated, it did not. It was impossible with ordinary prescience to foresee either the event or the time at which it would take place; nor was there any reason to suppose that that which did in fact happen would with such startling rapidity wash out embankments which had stood uninjured for 40 years. It seems to be a probable conjecture, though it is no more, that the unusually high temperature during the preceding three days had had the effect of thawing the surface of the embankments so as to deprive them of the resisting power which they would usually have possessed at the time of the annual *débâcle*. The railway company took the usual precautions of having the whole of the line inspected daily. This duty was performed on Easter Sunday by one Noel Tessier, who passed the embankments between 7.15 and 7.30 a.m. and again about an hour later. Everything was then in order, and in the circumstances above stated there was no reason for anticipating that which actually happened some hours later.

On a careful review of the whole of the evidence relevant to the issue now under consideration, their Lordships must come to the conclusion that the respondents have failed to establish any failure of the ordinary duty of managing the railway with reasonable care. The result is that there is no interruption of the chain of causation between the flood of water and ice due to the dam on the 8th April and the damage caused to the oncoming train, and this damage must therefore be taken to be part of the damages sustained by the Crown. The judgment of the learned trial Judge on this point concurred in by Lamont and Davis JJ. was correct.

For these reasons the appeal must succeed with costs and the Crown must have judgment for a sum of \$30,512.82 and interest in addition to the sum of \$31,418.03 and interest. The cross-appeal must be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council

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