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* Apr. 24, 25, 26, 29, 30.
1936
* Jan. 15.

THE SOUTHERN CANADA POWER COMPANY LTD. (DEFENDANT)..... APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF).. RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Canadian National Railways—Railway embankment—Washed out by overflow of water and ice during spring—Construction of dam upstream—Interference of natural course of river—Derailment of train—Damages—Servitude—Riparian owner—Liability of owner of dam—Ruling as to various species of damages caused to the railway company—Water-Course Act, R.S.Q., 1925, c. 46, s. 12—Arts. 499, 500, 501, 503, 508 C.C.

The Crown, as owner of the Canadian National Railways Company, brought an action against the appellant company for the recovery

* PRESENT:—Lamont, Cannon, Crocket and Davis JJ. and Dysart J. *ad hoc.*

(1) (1908) 14 Can. Cr. Cas. 221, at 237.

of a sum of $81,523.20 for damages caused through the derailment of a train in consequence of a sudden washout of the railway embankment between the viaduct over the highway and the railway bridge crossing the St. Francis river, near Drummondville, P.Q. The Crown alleged that the loss and damage were the consequence of the construction, in 1928, of a large power house and dam, across the river about two and a half miles upstream from the embankment, which were owned, maintained and operated by the appellant company. The Exchequer Court of Canada maintained the respondent's action for the full amount claimed, less a sum of $600.

Held that the appellant company was liable, as the existence of the appellant's dam led directly to the washing out of the railway embankment, but that the amount of the damages awarded by the trial judge should be reduced to $31,418.03.

Held, per Cannon and Crocket JJ. and Dysart J. *ad hoc,* that, under the laws of Quebec, the appellant company could be held liable only for the damages caused by the injury to the enjoyment of the rights of the railway company as riparian owner; and thus it would not include the locomotive and rolling stock which happened to reach the site of the embankment after the washout. The statutory liability cannot be extended beyond what the law has fixed as the price of the servitude on riparian owners, i.e., the damage caused to the riparian owner, as such, of any property by the damming of the waters. Under the 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 damages resulting directly or indirectly from the destruction of the dam. Consequently, the respondent was entitled to recover only the costs of repairs to tracks, $5,254.57, the costs of repairs to structure, $13,004.47, and the costs of diversion of train service and of special train service, $13,158.99, making a total sum of $31,418.03.

Per Lamont and Davis JJ.—In addition to the above-mentioned damages, a further sum of $30,235.78 should be awarded to the respondent for costs of repairs to the locomotive and the cars. The liability for damages resulting from the construction and maintenance of the works of the appellant was not confined to such damages as might reasonably have been anticipated by the appellant; when it is found that a man ought to have foreseen in a general way consequences of a certain kind it will not affect him to say that he could not foresee the precise course or the full extent of the consequence which in fact happened. If liability is once established by proof of the relation of cause and effect, then those damages that flow directly are recoverable. The appellant had lawful governmental authority to construct and maintain its works in and across the St. Francis river, but it took that authority subject to the obligation created by section 12 of the *Water-Course Act,* R.S.Q. 1925, c. 46, of becoming "liable for all damages resulting therefrom to any person, whether by excessive elevation of the flood-gates or otherwise." While the appellant was put by the statute into the position of being able lawfully to construct, maintain and operate its works, it was under the condition subsequent that it should, notwithstanding that there was no injuria, pay, under a liability imposed by the statute, for the damnum which should from time to time prove to have been

(1) [1934] Ex.C.R. 142.

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occasioned to any person therefrom; and the language of the statute embraces damages, whether they occur above or below the obstruction in the river, that result from any of such works.

Held that the respondent was not entitled to recover the sum of $19,592.35 for medical and hospital services to employees and passengers who were victims of the accident, for funeral and ambulance expenses, for indemnities to passengers and employees and for wages paid to disabled employees.

Judgment of the Exchequer Court of Canada ([1934] Ex.C.R. 142) varied.

APPEAL from the judgment of the Exchequer Court of Canada (1), maintaining the respondent's action.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

J. L. Ralston K.C., Alphonse Décary K.C. and *Joseph Marier K.C.* for the appellant.

L. E. Beaulieu K.C. and *J. P. Pratt K.C.* for the respondent.

The judgment of Lamont and Davis JJ. was delivered by

DAVIS J.—On Easter Sunday, April 8, 1928, at about four o'clock in the afternoon, a passenger train of the Canadian National Railways bound for the city of Montreal from the city of Quebec was derailed near the town of Drummondville in the province of Quebec in consequence of the sudden washout of the railway embankment on the east side of the St. Francis river. The locomotive and the baggage car were thrown into the bed of the river and the second-class passenger coach fell upon the baggage car though its rear truck remained on the rails. The railway embankment was a little over 90 feet in length and about 20 feet in height. Railway men speak of this embankment as part of the bridge, but it was in fact a gravel embankment in use to carry the railway tracks to the level of the bridge proper that crossed the river. This embankment was suddenly washed out shortly before the arrival of the train at that point by a tremendous overflow of water and ice which had come down the St. Francis river. The tracks that had lain upon the embankment were left hanging over the gap caused by the washout of the embankment and the trainmen being unaware of this condition until a moment or so

(1) [1934] Ex. C.R. 142.

before reaching the place of the embankment, the calamity occurred. A woman residing in the vicinity who had been watching the movement of the water and ice in the river heard the whistle of the locomotive and realizing the danger ran along the tracks towards the approaching train and signalled the engineer to stop. The engineer immediately applied the emergency brakes and reduced the speed of his train as best he could but the distance was too short within which to bring his train to a stop and the locomotive and cars plunged into the bed of the river. The engineer was so seriously burnt in the cab of his engine that he died within the week as a direct result of the accident; two men in the baggage car were drowned; several passengers were more or less seriously injured; and the cars and the trackage were badly damaged.

The construction of the embankment dated back to 1887. It had been built in that year by the Drummond County Railway Company and when in 1899 the Government of Canada bought the railway and undertaking of the Drummond County Railway Company, the embankment became and remained the property of His Majesty and had been in continuous use since 1887 in connection with the railway line across the St. Francis river bridge. The embankment had been inspected regularly by the railway men and had been kept in what appears to have been a reasonably good state of repair. The railway at this point is part of what is known as the Canadian National Railway System owned by the Dominion Government and the loss and damage were attributed by those in charge of the operation of the railway to the existence of a large power house and dam constructed in 1925 across the St. Francis river about two and a half miles upstream from the embankment and owned, maintained and operated by the appellant, The Southern Canada Power Company, Limited.

His Majesty on information of the Attorney-General of Canada commenced proceedings in the Exchequer Court of Canada against the appellant to recover the loss and damages sustained by the railway. The total claim amounted to $81,523.20. His Majesty recovered judgment in the Exchequer Court of Canada for the full of the 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

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stop. The different items of damage in the claim may be conveniently divided for consideration into three general classes. Firstly, there is the damage involved in the destruction of the embankment and the damage to the tracks amounting in all to $18,259.04. 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 total $43,671.81. Thirdly, there is 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 above referred to. These items in this class total $19,592.35. The appellant appeals to this Court from the judgment rendered against it in the Exchequer Court of Canada.

The quantum of damages in respect of each of the items in the claim is admitted but liability is denied in respect of the entire claim.

A preliminary objection was raised by the appellant at the trial and renewed before us that the Crown had no right to take these proceedings in the Exchequer Court of Canada, the contention being that the right of action was by statute vested in the Canadian National Railways Company and that that company could only sue in the ordinary courts and not in the Exchequer Court of Canada. 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 sec. 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 fulfillment of that duty imposed upon the Government of Canada by the Act of Confederation that the undertaking of the Drumond 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 sec. 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 in 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.

The real question is that of liability, and apart from considering the items in the three classes of claims in the light of the law applicable to each of these classifications taken separately, the general question of liability is very largely one of fact. The learned trial judge has very carefully reviewed the evidence in great detail and at considerable length and counsel before us readily conceded that the recital of facts was substantially accurate in all respects. It is unnecessary therefore to repeat them here except in so far as may be necessary to indicate in a general way the problem that confronts us in the consideration of this appeal.

Nothing further need be said for the moment as to the construction and state of repair of the railway embankment but some general remarks at the outset as to the construction and maintenance of the dam and power house of the appellant may be appropriate. There were in fact two dams of the appellant. One, with which we are only incidentally concerned, was situate about 1,100 feet upstream from the railway bridge. Its history goes back to 1896, when the town of Drummondville built a wooden dam at substantially the same point. In 1918 the appellant acquired the power plant of the town of Drummondville, including this old wooden dam, and erected a new dam a few inches higher than the old one and at a location approximately 50 feet

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below the old dam which was demolished. This dam of course constituted an obstruction in the river and no doubt had some effect upon the ordinary flow of the river in its natural state but standing alone would not, I think, have been charged with the cause of the accident. In 1925 the appellant built a large power plant and dam across the St. Francis river about two and a half miles upstream from the railway bridge at what was known as Hemmings falls. The appellant is a company incorporated under the Dominion *Companies Act* in 1913 with its chief place of business in the province of Quebec. Carrying on its operations in that province it became subject to the laws of that province and particularly to the *Water-Course Act,* R.S.Q. 1925, ch. 46, to which I shall later refer. The St. Francis river being a navigable river, it was necessary under federal legislation that the plans of the works to be undertaken in the river by the appellant should be submitted to and approved by the Minister of Public Works of Canada. While there is neither proof nor admission that such approval was obtained, it has been assumed throughout that there was such authority and no point has been made of any lack of governmental authority in connection with the construction and maintenance of the power house and the dams. The question of liability for damages that might result from the construction or maintenance of the works need not be discussed until we have a clear understanding of the facts. It is sufficient for the moment to state that under sec. 12 of the *Water-Course Act,*

> 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 real question, apart from any consideration of the statute, is a question of fact as to whether or not the damages claimed in the action resulted from the presence in the river of the works of the appellant.

Reverting then to the large dam at Hemmings falls, the construction of that dam raised the level of the water upstream 9·2 feet and created a basin about five and a half miles in length where previously there had been one not exceeding three and a half miles. The natural width of the river within the five and a half miles of basin was inevitably widened and at some point very considerably. At one point the width became almost doubled and reached a distance of

over half a mile. The dam itself was some fifty-four feet in height of solid concrete wall. This dam with the large power house stretches across the entire width of the river. There are, of course, sluice-gates and a spillway and on top of the spillway are placed removable flash boards seven feet high to further raise the level of the water when necessary. Farther upstream from Hemmings falls, a distance of about five and a half miles, was what was known as the Dauphinais rapids. The water level from the foot of the Dauphinais rapids downstream for a distance of about three and a half miles, before the construction by the appellant of the dam at Hemmings falls, gradually fell about one foot. Then from that point to a point approximately five hundred feet below the point where the dam now stands there was a drop in the level of nearly forty-five feet which was what was called the Hemmings falls. As a consequence of the erection of the dam the Hemmings falls rapids were entirely wiped out and about two-thirds of the Dauphinais rapids were wiped out, and the level of the river between the head of Hemmings falls rapids and the foot of the Dauphinais rapids was raised 9·2 feet.

The basis of the claim against the appellant is that the tremendous rush of water and ice that so suddenly washed out the railway embankment on the day in question was the direct result of the interference of the appellant with the natural condition of the St. Francis river by the obstructions caused by the erection and maintenance by the appellant of its two dams, the one built in 1918 about 1,100 feet upstream from the railway bridge, and, principally, the other dam, constructed in 1925 at Hemmings falls. Did the damage result from these works of the appellant? That is the real problem in this case. And it is almost entirely, if not entirely, a question of fact. The substantial defences to the action were: (1) That the events which took place on the occasion of the ice break of 1928 were brought about by causes of nature that were entirely abnormal and to which the existence of the dam had no reference. Great formations of ice, unusually heavy rainfall, sudden rise of temperature, were said to have united in creating such a combination of abnormal natural conditions as to cause the accident without reference to the existence of the dams. (2) That if the dam had in fact any influence upon the

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situation, it acted as a regulator and moderator controlling to some extent the spring floods and distributing their effect so as to reduce what would otherwise have been a worse condition. (3) That the railway had itself been negligent in continuing to use the old gravel embankment, having regard to the history of the conditions on the river which had occurred periodically during some years past, and which called for precautionary measures on the part of the railway company in the construction of a substantial structure to carry the tracks between the viaduct over an adjacent highway and the bridge in question. (4) That having regard to the known condition of the river during two or three days before the accident, the railway company should have taken heed of the probability of the embankment being washed out and have watched the place of the embankment to guard against any train passing over until satisfied that it was safe to do so. I purposely refrain for the moment from discussing other questions of defence that go to liability, if any, in respect of the different classes of claims treated separately. The basic problem is the general question whether or not the washout of the railway embankment resulted directly from the existence of the works of the appellant in the river. And that is a question of fact.

The learned trial judge put his conclusion in these words:

> After weighing carefully all the evidence, oral and literal, I can reach no other conclusion than that the dam of the defendant company at Hemmings falls was responsible for the washout of the railway embankment at Drummondville on Sunday, April 8, 1928.

The trial of the action took fourteen days. There are 959 pages of evidence besides 133 exhibits, including maps, plans, profiles, charts, photographs, records, water levels, records of flow, meteorological reports, vouchers, etc. More than one hundred witnesses gave evidence at the trial and over sixty per centum of the oral testimony was given in French. The learned trial judge, with his mastery of both the English and the French languages, was specially qualified to fully appreciate the oral testimony and has with great care minutely reviewed all the evidence in a judgment extending to fifty-eight pages. He heard and saw the expert witnesses and all the lay witnesses, the latter being mostly residents in the vicinity who described what they saw and told what they knew not only of the immediate events of the accident but of the happenings upon the

river over the past many years. On a question of fact as to whether the damage to the railway embankment was caused by the existence of the works of the appellant, the trial judge was in a particularly advantageous position to properly weigh the mass of contradictory testimony and it would need something very clear and definite in the evidence to satisfy any court of appeal that findings of fact of a trial judge in such a case should be reversed. Counsel for the appellant very ably presented to us their analysis of the evidence in support of their contention that the trial judge had upon the evidence reached a wrong conclusion. During a lengthy argument they raised in our minds at times certain doubts but the very nature of the problem is such that one cannot look for certainty and must be content upon the balance of probabilities as to whether or not there was any direct relation between the existence of the dam and the damage to the embankment. A careful study of the evidence in the light of the arguments presented to us by counsel for the appellant has failed to satisfy me that the trial judge was wrong in the conclusion that he reached on the general question of liability.

No useful purpose is to be served by reviewing again the evidence in the case. The main defence of the appellant was that the accident was simply the result of a combination of natural forces and should be attributed to the act of God. In the carefully prepared factum presented to this Court by counsel for the appellant it is stated that they believe they are

> in a position to successfully demonstrate that the evidence, although contradictory on many points, confirms

their contention. Where the question is one of fact and the evidence is admittedly " contradictory on many points," the findings of fact by the trial judge cannot lightly be disturbed. Counsel for the appellant in discussing the evidence complain that in their view the learned trial judge rejected as a whole the evidence adduced by the experts and improperly declined to accept the evidence of the appellant's expert witnesses; improperly, they say, because in their opinion the expert evidence on behalf of the appellant was consistent and the expert evidence on behalf of the respondent disclosed contradictory theories. There were three expert witnesses called by the respondent and four by the appellant. The evidence of all these witnesses

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was largely theoretical and we could quite appreciate the trial judge, if he had done so, disregarding such evidence and seeking a solution of the problem before him in the evidence of about one hundred lay witnesses who told from their own actual experiences and observations over a period of many years of the action of the St. Francis river at the time of spring floods and of the carrying off of the ice jams at the end of the winter seasons. But in point of fact the trial judge did not disregard the evidence of the expert witnesses. He has in his judgment carefully reviewed the evidence of these witnesses, taking first the expert evidence on one side and then the expert evidence on the other side. Having done that, he says that he found himself in a certain state of perplexity not only because the evidence of all the witnesses consisted largely in statements of theory but because these witnesses differed fundamentally among themselves. It was then that the trial judge turned to the evidence of the lay witnesses for an appreciation of the real facts in the case. Counsel for the appellant contend that a case of this nature should be determined largely upon evidence of witnesses who speak from certain precise data and known principles of science and that it is upon such evidence and not upon evidence of laymen who have not at their command such data or scientific knowledge that such a question as is involved in this action should be determined. In my view the trial judge approached the evidence, and I think rightly, in this manner: Having carefully reviewed and considered the evidence of all the expert witnesses and finding marked differences of opinion among them, he turned to the great mass of lay evidence and then accepted the theory of those experts that was consistent with the evidence of those lay witnesses whose evidence he accepted because of their practical experience and credibility. It is plain that the trial judge was much impressed with the evidence of one Mercure. Mercure lived for nearly fifty years in Drummondville alongside the river between the locations of the Drummondville dam and of the Hemmings falls dam. He had driven lumber down the river every spring for about forty years. He had a wide experience on the St. Francis river, at least in the section of it with which we are concerned. He had known the river in its different conditions, first in a state of nature, then with

the dam that the town of Drummondville erected in 1896, later with the dam the appellant built in 1918 replacing the wooden dam that the town had built in 1896, and finally with the large dam and power house built across the river at Hemmings falls by the appellant in 1925. The result of his evidence was that before the dam at Hemmings falls was built there had never been floods as considerable as the one of 1928 and that there had never been ice jams of the size of those which had formed since the construction of that dam. He stated that prior to the erection of the dam and power house in 1925 there were rapids with a drop of over thirty feet and that ice very seldom formed in those rapids and that, when it did, it was not solid. He said that the long and wide basin of deep and still water created by the dam upstream a distance of about five and a half miles was an ideal "vessel," to use his expression, for the formation of ice and the accumulation of frazil. Mercure had been accustomed, prior to the construction of the dam, to place logs during the winter months on the slope of the river bank to be taken away in the spring, and he said that if he had done the same in 1928 the logs would have been covered with at least twenty feet of ice. I quote the words of the trial judge:

> Mercure is not expounding theories, but relating facts whereof he has been witness. He has rafted logs on the St. Francis river since 1885; he knows all the holes and nooks in the river; he has seen the river in its natural state and also since it has been dammed at Drummondville and later at Hemmings falls; he witnessed all the ice break-ups and spring floods for over forty-five years and always took a keen interest in them, as every spring he was waiting for the river to get clear to start floating his logs. I believe his testimony is of great value to the Court * * * he impressed me as being frank and honest and I have no reason not to believe his testimony. Besides, Mercure is corroborated by a number of witnesses, particularly with respect to the greater seriousness of the floods and jams since the construction of the Hemmings falls dam and the fact that, prior to such construction, the ice below the Dauphinais rapids always left in the spring before the ice from upstream arrived.

The trial judge then directs attention in his judgment to particular portions of the evidence of thirteen witnesses in corroboration generally of Mercure's evidence, and concluded that he saw no reason to believe that the ice and water running down normally in the river in a state of nature, though somewhat more abundant than in previous years as a result of persistently mild weather, would have been sufficient to damage the railway embankment. That

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conclusion was reached after a careful review of all the evidence of both the expert and the lay witnesses, and is a conclusion that agrees entirely with the evidence of the expert witness, McLaghlan. McLaghlan is an hydraulic engineer who has been employed by the Department of Railways and Canals since 1907. He made a special study of the St. Francis river during the two months prior to the trial of the action. Asked directly,

> What is the cause of this washout suffered by the railway at Drummondville on the 8th April, 1928?

he answered:

> The accident to the Canadian National Railway was brought about by the state of the Hemmings falls dam without question. The building of that dam caused the jam to occur at a point it would not occur in nature. That jam was of such a nature that the people operating that plant could not control it, and it broke and went away at a time which shows itself the nature of the force on it.

And again he says:

> That jam was caused by the dam, and the impounding of the water was caused by the jam, all attributable to the building of the Hemmings falls dam. Why? Because that Hemmings falls dam transferred a jam from below the rapids where it impounded practically nothing to a point upstream where it impounded an enormous quantity of water.
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> * * *
>
> That excess flow was caused by the jam, suddenly breaking; the jam itself was caused by the building of the Hemmings falls dam where it is * * * The whole accident is traceable directly to interfering with nature by building the Hemmings falls dam at a point which was not suitable to stowing the ice that comes out of that river in the break-up period.

Upon the evidence the learned trial judge said he could reach no other conclusion than that the dam at Hemmings falls was responsible for the washout of the railway embankment at Drummondville. But counsel for the appellant argue that it was not fair for the trial judge to accept the evidence of Mercure in that he had a personal interest in the claim the Mercure Company had against the appellant for damages resulting from the floods of 1927 and 1928 and had assisted financially or otherwise in support of two other claims against the appellant, and was therefore vitally interested in this litigation. That was undoubtedly something that had to be seriously considered by the learned trial judge in weighing the evidence of Mercure. It was a powerful basis of attack by the appellant upon the whole evidence of Mercure but the trial judge saw and heard the witness and was told the facts upon which the alleged bias

of the witness was asserted and notwithstanding this the trial judge said:

> I do not think that this can in the least affect the credibility of the witness; he impressed me as being frank and honest and I have no reason not to believe his testimony.

It seems to me quite impossible for us upon an appeal, accepting as we should the learned trial judge's view of the credibility of witnesses and his findings of fact on evidence that was admittedly contradictory both on theories and on facts, to set aside the finding made by the trial judge upon the main issue unless it is abundantly plain that he was obviously wrong in his conclusion. Not only do I think that there is nothing substantial to satisfy us that the trial judge was wrong but I think his conclusion was right.

Much stress was laid by counsel for the appellant upon their contention that having regard to the combination of abnormal natural forces it was really a case of *vis major* or *damnum fatale*. Great quantities of ice formed during the severe winter; heavy rainfall and high temperature followed in the spring; all of which were said to have constituted a combination of natural forces so unprecedented and beyond the control of the appellant as to relieve it of any liability. But all the evidence on this view of the action was carefully considered by the trial judge. This question involved a consideration of the evidence of other somewhat similar floods and ice jams in the St. Francis river at the same location in other years, particularly in 1887, 1913, 1915 and 1921, and a great deal of evidence was directed to these events, before the construction of the Hemmings falls dam, and to the severe flood and break-up in 1927 after the construction of the dam. Evidence was also given about the flood of 1932 (the accident in question in this case was in 1928). The trial judge was satisfied on the evidence that the three worst floods in the section of the river with which we are concerned were those of 1927, 1928 and 1932, and that the floods in 1887, 1915 and 1921 were lesser floods, and he found it difficult to think that this was a mere coincidence. I again quote the exact words of the trial judge:

> I am convinced that these dams, particularly and to a much greater extent the dam at Hemmings falls, had the effect of facilitating and increasing the formation of sheet ice and the accumulation of broken ice and frazil underneath or behind it. The five and a half mile basin above Hemmings falls dam impounded enormous quantities of water, ice and frazil. Such a state of affairs is unquestionably conducive to the formation

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of ice jams of large proportion. Jams may have formed at the foot of Hemmings falls rapids prior to the construction of the dam, but in no wise comparable to those which formed upstream after the dam was erected. And I am satisfied that a jam formed at the foot of the Hemmings falls rapids, under natural conditions, would have gone down during the break-up period in an open river, before any ice jams at Labonté's, at Dauphinais', at Ulverton rapids, at Richmond or at any other place upstream would have reached the Hemmings falls rapids, as it has been asserted by several witnesses, all of them well acquainted with the behaviour of the river prior to the construction of the dam.

That there was a combination in the spring of 1928 of natural forces of an unusual nature is apparent from the evidence but that does not, as a matter of law, entitle the situation to be treated at *damnum fatale* or *vis major*. In the House of Lords in *Greenock Corporation* v. *Caledonian Railway* (1), referred to by the learned trial judge in his judgment, it is laid down to be 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. In that case a municipal authority, in laying out a park, constructed a concrete paddling pond for children in the bed of a stream and altered the course of the stream and obstructed the natural flow of water therefrom. Owing to a rainfall of extraordinary violence the stream overflowed at the pond, and, as the result of the operations of the authority, a great volume of water, which would have been carried off by the stream in its natural course without mischief, poured down a public street into the town and damaged the property of two railway companies. It was held that the extraordinary rainfall was not a *damnum fatale* which absolved the authority from responsibility, and that they were liable in damages to the railway companies. Lord Dunedin there quotes with approval the language of Lord Westbury, L.C., in *Tennent* v. *Earl of Glasgow* (2),

> If anything be done by an individual which interferes with natural occurrences, such as, for example, in *Lord Orkney's* case (3), throwing a dam across the course of a stream, it is undoubtedly the duty of that individual so to construct the work as to provide in an efficient manner, not only against usual occurrences and ordinary state of things, but also to provide against things which are unusual and extraordinary.

(1) [1917] A.C. 556.

(2) (1864) 2 M. (H.L.) 22.

(3) (1887) 20 D. 298.

The *Greenock* case (1) was a Scottish case but we find Lord Haldane in the House of Lords in the English case of *Attorney-General and others* v. *Cory Brothers and Company Limited* (2) referring to the *Greenock* case (1) in these words:

> The rainfall proved to have occurred at the period of the slide was no doubt unusually heavy, but it was of no unique character, nor of such as ought not to have been foreseen as possible. It could not be contended that it amounted to an "act of God," to what is called in the jurisprudence of Scotland, a *damnum fatale*. Indeed, were your Lordships inclined to take a different view, you would be precluded from doing so by the judgment of this House in the recent case of *Greenock Corporation* v. *Caledonian Railway Co.* (1).

The *Greenock* case (1) was subsequently referred to in the Privy Council in a Quebec case, *Montreal City* v. *Watt and Scott Limited* (3), in the judgment delivered by Lord Dunedin.

The evidence in this case, tested by the standard laid down in the *Greenock* v. *Caledonian Railway* case (1), was held by the learned trial judge not to constitute a *damnum fatale* or *vis major* and so relieve the appellant from liability. In that view of the evidence I entirely agree.

Then it was argued by counsel for the appellant that, in any event, the washout of the railway embankment was really due to the fault of the railway company itself in continuing to use the old gravel embankment instead of replacing it with a substantial modern structure, and it was suggested that if the alleged negligence of the railway company did not constitute a complete defence to the action, it at least constituted contributory negligence and would involve an apportionment between the parties of the amount of damages sustained. It is plain that the law of Quebec, unlike the law of England, as was admitted in *Canadian Pacific Railway Co.* v. *Fréchette* (4), and referred to by Lord Dunedin in the concluding paragraph of his judgment in the Privy Council in the *City of Montreal* case (3), enjoins apportionment of the damage where there has been a negligence of the plaintiff contributing to the accident and their Lordships in the Privy Council in the *City of Montreal* (3) case agreed that the doctrine is applicable to modify a liability established by article 1054 of

(1) [1917] A.C. 556.
(2) [1921] 1 A.C. 521, at 536.
(3) [1922] 2 A.C. 555, at 563.
(4) [1915] A.C. 871.

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the Civil Code. But this action is not founded, except incidentally as to the use of some dynamite and the operation of the gates in the spillway, upon the ground of negligence; it is in substance a case of nuisance. I cannot think that if what I have upon my property has adequately served my purpose for fifty 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. As between the owner of a dam and other persons, it may not be a question of negligence in construction or operation of the dam but the fact of the interference with the natural level and flow of the river caused by the obstruction in the river, that may give rise to a liability to the other persons to whom a duty lies not to interfere with the natural level and flow of the river, notwithstanding that there be no negligence in the actual construction or operation of the dam. Of course if statutory power is given to construct the works without reserving any remedy to private persons adversely affected, that is a different case as was pointed out by Lord Macnaghten in *East Fremantle Corp.* v. *Annois* (1).

Quite apart from the question of law, the fact is that the railway embankment had withstood all the spring floods and break-ups since the time it was built in 1887. The section of the railway line where the embankment was located was inspected daily by the railway as to the state of repair and the evidence satisfied the trial judge that the embankment was in good condition at the time the accident occurred. It undoubtedly would have been an act of wisdom, in the light of what happened, for the railway company to have discarded this old gravel embankment and substituted for it a substantial modern structure for carrying the tracks between the bridge and the viaduct over the highway. But if, as it has been found, the embankment was washed away by conditions which directly resulted from the obstruction in the river of the appellant's dam and power house, it is no answer to the respondent's claim for the damage to the embankment that the railway might have constructed something so substantial at that point as to withstand the force of the ice jam on the day of the accident. When the appellant undertook the construction

(1) [1902] A.C. 213.

and maintenance of its works in and across the St. Francis river, it is not disputed that it had lawful governmental authority to do so. But it took that authority subject to the obligation of becoming responsible for all damages that might result therefrom to any person. That is the effect of sec. 12 of the Quebec *Water-Course Act,* which I have set out above. It was argued that the words in that section, " whether by excessive elevation of the flood-gates or otherwise," only refer to damage that may occur upstream and not to damage that may occur downstream and that the words " or otherwise " should be confined to such things as flood-gates. But in my view that is too narrow an interpretation to put upon the section. It seems to me plain that the legislature intended that the words "all damages resulting therefrom to any person " should embrace damages whether they occur above or below the obstruction in the river that result from any of the works of the owner or lessee. It is true that the appellant was put by the statute into the position of being able lawfully to construct, maintain and operate its works but only under the condition subsequent that it should, notwithstanding that there was no injuria, pay, under a liability imposed by the statute, for the *damnum* which should from time to time prove to have been occasioned to any person therefrom.

A case against the appellant was incidentally attempted to be made on the ground of alleged negligence of the appellant in two respects. One was the fact that the appellant exploded about 200 pounds of thermite in the river on the morning of the day of the accident at a point some distance upstream from the Hemmings falls dam with the object of relieving the pressure. The other ground of alleged negligence was the manipulation of the sluice-gates by the appellant during the day before as well as during the day of the accident. Nothing much turned upon either of these complaints. The trial judge found that the explosion of the thermite had very little effect. As to the operation of the sluice-gates, he was inclined to think that the disaster might have been averted had the appellant 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 and the inflow increased (on Thursday preceding the

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Sunday of the accident) until after the final break-up on Sunday afternoon. The appellant operated the gates to keep the water at a certain level in order to use its turbines. But the trial judge treated this matter as of little, if any, practical importance, because of the conclusion he had reached that the dam itself, independently of the manner in which the sluice-gates had been operated, had been responsible for the washout of the embankment.

The amount of the claim for damages to the embankment is not questioned by the appellant, if there be liability. Therefore upon the grounds above stated I think the judgment must be sustained in respect of the items in what I described in opening as the first of the three classes of claims involved in the action. The first class as so described consists of items D and E in paragraph 8 of the Information, which items aggregate $18,259.04.

That brings us to a consideration of the items in what I have described as the second class of claims, being the cost of repairs to the locomotive and cars and the cost of auxiliary and wrecking train service, diversion of train service, and special train service resulting from the interruption to traffic on the railway line in the section in which the embankment was located. These are items A, B, C, G, H and I, aggregating $43,671.81. This branch of the case has given me a good deal of trouble. Almost at the moment that the embankment was washed out, the passenger train reached that point. Can liability properly be put upon the appellant for that portion of the respondent's damages that consisted in the destruction or damage of the locomotive and the cars and in the cost necessarily involved in rearrangement of train service? Is the liability for damage resulting from the construction and maintenance of the works of the appellant confined to such damages as might reasonably have been anticipated by the appellant? The authorities seem to establish that when it is found that a man ought to have foreseen in a general way consequences of a certain kind, it will not affect him to say that he could not foresee the precise course or the full extent of the consequences which in fact happened. If liability is once established by proof of the relation of cause and effect, then under the authorities as I understand them those damages that flow directly are recoverable.

The appellant alleges, however, that it was the respondent's own fault that the train in question was permitted to reach the point of the embankment at the time it did on the day in question, having regard to the notice or knowledge which it is argued the respondent had of the probability of the embankment being washed out that day. Emphasis is laid by counsel for the appellant upon the fact proved in evidence that a day or two before the accident the railway tracks at the village of Richmond, 25 miles away from Drummondville, were all under water, traffic interrupted there and the flood so great as to put the railway upon its guard against great ice jams and flood waters reaching the railway bridge with great force within a day or two and the probability of the washout that actually happened. Further it is argued that the respondent knew of the weakness of its gravel embankment to withstand a spring break-up of the extent that existed at that time. Much was made in the argument before us of a cavity in the embankment shewn on a photograph put in at the trial. Further it was argued that the respondent's railway officials at Drummondville should have been alert at least an hour or so before the embankment was washed out, and have given the train ample signals not to proceed across the St. Francis river unless satisfied that there was no danger. During the argument I was rather impressed with these contentions and I have given them anxious consideration. The destruction of the embankment itself was one thing. The damage to the locomotive and cars stands on a different footing. It is difficult to see how the loss of the embankment could have been avoided but it is not unreasonable to suggest that the train might have been stopped before it reached the point of the calamity. The trial judge carefully considered the facts upon which this contention was based and after all it is a question of fact. As to notice and knowledge of the respondent at Richmond, it seems to me that Richmond being 25 miles away it is too much to impose upon the respondent that the railway agents or servants at Richmond should have anticipated what actually happened a day or two later at the railway bridge at Drummondville. Those in charge of the power house and dam of the appellant at Hemmings falls were sufficiently alert to the existence of the ice jam and its probable move-

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ments the very day of the accident to go upstream and explode two hundred pounds of thermite at two different places in the basin, and if they had themselves expected that the railway embankment only two and a half miles downstream from the dam might be washed out, they undoubtedly would have notified the respondent's representative at Drummondville to be on guard. 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 at Richmond 25 miles or more away. Then as to the cavity in the embankment, shewn in the photograph, as indicating the knowledge that the railway had or ought to have had of the risk of the embankment being carried away in any severe break-up. The evidence as to this photograph was all carefully considered by the trial judge. The photograph was taken in 1918, ten years before the accident, by an engineer named Dick of the contracting firm of Morrow & Beatty which was at that time engaged in building the appellant's first dam and power house at Drummondville—the dam that replaced the town's wooden dam in 1918 almost 1,100 feet from the bridge. Dick said the photograph was taken a day or two after the break-up of that year had occurred. It shews a cavity near the end of the embankment on the west side of the river looking from upstream. Dick was unable to give the dimensions of the cavity but a witness named Toupin said he saw the cavity in question, that it was about five feet long by two feet wide and that it seemed bigger on the photograph than it really was. In the opinion of Toupin, who had been a section foreman for the respondent, the cavity did not affect the solidity of the embankment. He said repairs were made three or four months later and it was the only cavity he had ever noticed. The trial judge inclined to the view that the cavity did not have as much importance as the witness Dick was disposed to ascribe to it and the trial judge was not convinced that the cavity was caused exclusively by the action of ice and water, but that the continual use of this part of the embankment by people desiring to go to the river may have been the origin of a hole in the embankment and once the surface had been broken it would take less and less force and time to wear

away the inner part of the gravel embankment. This being the view of the trial judge on the evidence as to the cavity that temporarily existed in 1918, it would be difficult for us to impute to the respondent any blame arising out of this incident. 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 shew that any official of the respondent at or near Drummondville had any such notice or knowledge of the probability of the washout occurring as to put the blame for the destruction or damage to the locomotive and the cars upon the respondent itself.

The quantum of damages not being questioned in the appeal, the judgment in so far as it relates to the second class of items in the claim must for the reasons above stated, be affirmed.

Then as to the items of damages which I described for convenience as the third class, being items under F. in paragraph 8 of the Information, aggregating $18,992.35. These items consist of actual payments made by the railway for medical and hospital services, funeral and ambulance expenses, indemnities to passengers and to employees, compensation to the heirs of employees who were killed, wages paid to the disabled conductor, and a grant of $600 to the woman who flagged the oncoming train. All these items were allowed, except the $600 item for flagging the train. Now the railway was not an insurer of the lives of either its passengers or its employees. If it was the negligence of the railway company that caused the personal injuries or death of some of the passengers and employees on the train, the respondent could not succeed in the action. The whole case was brought by the respondent upon the basis that the appellant's works in the river had been the direct cause of the accident and that being so the respondent became under no legal obligation to either the passengers or employees on the train. The railway made these substantial payments as compassionate allowances on its part if its position in this action as to the liability of the appellant is right. These payments were made without any litigation between the parties and without any notice to or knowledge by the appellant. The respondent

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has not made out a case for these payments within article 1141 C.C. or established any agency, and these items in the claim cannot be allowed. They were allowed by the learned trial judge at $18,992.35 and the total amount of the judgment directed to be entered by the learned judge against the appellant in the sum of $80,923.20 must be reduced by the said sum of $18,992.35.

I would vary the judgment appealed from by reducing the amount thereof by the said sum of $18,992.35 and would allow the appellant its costs of this appeal.

CANNON J.—The facts that gave rise to this litigation are amply set forth in the very carefully prepared notes of my brother Davis. I feel that I should explain how I have reached a conclusion under the laws of Quebec, which are found in the following articles of the code:

Of real servitudes.
General provisions.

499. A real servitude is a charge imposed on one real estate for the benefit of another belonging to a different proprietor.

500. It arises either from the natural position of the property, or from the law, or it is established by the act of man.

501. Lands on a lower level are subject towards those on a higher level to receive such waters as flow from the latter naturally and without the agency of man.

The proprietor of the lower land cannot raise any dam to prevent this flow. The proprietor of the higher land can do nothing to aggravate the servitude of the lower land.

503. He whose land borders on a running stream, not forming part of the public domain, may make use of it as it passes, for the utility of his land, but in such manner as not to prevent the exercise of the same right by those to whom it belongs; saving the provisions contained in chapter 51 of the Consolidated Statutes for Lower Canada, or other special enactments.

He whose land is crossed by such stream may use it within the whole space of its course through the property, but subject to the obligation of allowing it to take its usual course when it leaves his land.

508. The law subjects proprietors to different obligations with regard to one another independently of any stipulation.

Chapter 51 of the Consolidated Statutes for Lower Canada, which was originally enacted as 19-20 Vict., ch. 104, and is now found in ch. 46 of the Revised Statutes of Quebec (1925), gives to the riparian owner the right to erect dams to utilize the stream but provides that such owner of any such works shall be liable for all damages resulting therefrom to any person, whether by excessive elevation of the flood gates or otherwise.

In *Jean* v. *Gauthier* (1), the Court of Review, composed of Stuart, Casault and Caron, JJ., considered the effect of this amendment to the common law, which the late Chief Justice Casault explains as follows:

Avant le 1er juillet 1856, l'emploi comme pouvoir moteur des rivières et des cours d'eau n'était permis aux propriétaires riverains qu'à la condition de ne faire aucun dommage aux propriétés voisines. Si les chaussées, les écluses ou les digues requises pour obtenir d'un pouvoir d'eau la force motrice nécessaire pour exploiter un moulin, une manufacture ou une usine faisaient déborder les eaux sur les propriétés voisines, ou y causaient d'autres dommages, celui qui les avait construites sur sa propriété avait violé la règle de droit qui met à la jouissance de sa chose la condition qu'il ne fera pas tort à celle du voisin.

Aussi le propriétaire du terrain qui souffrait de ces constructions avait, outre le droit de recouvrer les dommages qu'elles lui causaient, celui de les faire changer, et même détruire, quand la destruction seule pouvait mettre fin au tort qu'il en souffrait. A cette date, la législature a rendu licite ce qui ne l'était pas auparavant, et a permis, comme l'exercice d'un droit, ce qui jusque-là était la violation du droit d'autrui. L'acte 19-20 Vict., 104 (S.R.B.C. 51) a permis au propriétaire l'exploitation des cours d'eau sur sa propriété, en y construisant des usines, moulins et manufactures, et l'érection dans le cours d'eau, pour cette fin, de chaussées, digues, écluses et autres travaux; il n'a réservé aux propriétaires voisins qui en pourraient souffrir que le droit à une indemnité, et ne leur a conservé celui de demander la démolition des travaux que comme accessoire du premier, savoir, dans le cas seul où la compensation ne serait pas payée. C'est une servitude légale qu'a créée cette loi, servitude analogue à celle de mitoyenneté entre propriétés voisines, et à celle du passage pour l'enclave.

Les dommages et les indemnités que réserve la loi n'ont pas un caractère autre que le prix qu'est obligé de payer, pour la partie du terrain et du mur qui y est assis, le voisin qui veut en acquérir la mitoyenneté, ou que la valeur du terrain que l'enclavé veut affecter à son passage.

* * *

Mais, entre le propriétaire des travaux et celui de l'héritage qui en souffre, dommages signifient *indemnité* pour la *détérioration* que les constructions font subir à son bien. Cette indemnité ne peut par conséquent être demandée que par le propriétaire du fonds que la loi a fait servant à celui du fonds qu'elle a fait dominant, ou par celui de l'héritage détérioré à celui des travaux qui le détériorent.

In *Breakey* v. *Carter* (2), Casault, J., referred to *Jean* v. *Gauthier* (1) and said:

J'ajouterai, comme je l'ai fait dans cette cause de *Jean* v. *Gauthier* (1), qu'il ne peut y avoir ni délit ni quasi-délit dans l'exercice d'un droit, et que le recours pour le prix de son obtention, ou pour l'*indemnité* que doit payer pour son exercice le propriétaire du fonds dominant au fonds servant n'est pas soumis à la prescription de deux ans à laquelle le code (art. 2261) soumet le recours pour dommages résultat de délits ou de quasi-délits.

This case of *Breakey* v. *Carter* (2) came before this court which confirmed the opinion of Casault, J., that that chap-

(1) (1879) 5 Q.L.R. 138. (2) (1881) 7 Q.L.R. 286 at 287.

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ter 51 of the Consolidated Statutes of Lower Canada recognizes the right of a proprietor to erect works which may have the effect of damming back the water on a neighbouring property, the construction of a dam having that effect, could not be considered a *quasi-délit*, but rather as a right of servitude which gave to him who was injured by it a legal recourse for indemnity for the damage. (Cassel's digest, p. 464, 12th May, 1885).

In *Gale* v. *Bureau* (1), the present Chief Justice said, at p. 312:

The effect of that decision (2) (by which this Court is bound) is that the right given by article 7295 (or the then Revised Statutes of Quebec), in so far as it justifies the penning back the waters of a stream upon the upper riparian proprietors, is to be regarded as a right of servitude to which is attached an obligation to indemnify the proprietor who is prejudiced by the exercise of it.

Another case, *Proulx* v. *Tremblay* (3), dealing with damages caused by the erection and operation of a dam to a proprietor below the dam may be considered as helpful to apply the provisions of the statutes to the present case where the damages claimed were caused by the respondent railway's embankment situate at some distance below the appellant's dams. Sir L. N. Casault says at p. 358:

Il n'est pas douteux que cette disposition statutaire (S.R.B.C. ch. 51) a fait légal ce qui auparavant était illégal, et a permis de faire des eaux courantes un usage que le droit antérieur n'autorisait pas et une appropriation qu'il prohibait. Avant la passation de ce statut, le propriétaire inférieur eut pu forcer celui du fonds supérieur à enlever les barrages et les obstacles qui empêchaient les eaux communes d'arriver librement à son fonds. Quelles qu'utiles qu'eussent pu être, pour le propriétaire supérieur ou même pour le public, les usines ou les machines que ces barrages servaient à alimenter et à mettre en mouvement, le propriétaire du fonds inférieur ou supérieur n'était pas obligé d'en subir les inconvénients si petits qu'ils fussent; il pouvait exiger leur destruction. Cette loi ne leur a permis d'obtenir la démolition des ouvrages, qui retenaient les eaux sur les cours d'eau pour les besoins d'une usine ou d'une manufacture quelconque, que lorsque l'usinier ou le manufacturier négligeait l'accomplissement de la condition qu'elle mettait à l'exercice du privilège qu'elle conférait. Cette condition était le paiement des dommages que pouvait causer à autrui l'usage que faisait de l'eau le propriétaire des machines qu'elle servait. Elle est écrite à la section 2 de l'acte comme suit:

Sect. 2. Les propriétaires ou fermiers des dits établissements resteront garants de tous dommages qui pourront en résulter ou être causés à autrui, soit par la trop grande élévation des écluses ou autrement.

Cette dernière expression, *ou autrement*, ne laisse aucun recours à

(1) (1910) 44 S.C.R. 305.

(2) *Breakey* v. *Carter* (1881) 7 Q.L.R. 286.

(3) (1881) 7 Q.L.R. 353.

découvert, elle les comprend tous; et met aussi bien à couvert le dommage que peut causer la rétention de l'eau que celui qui résulte de son extension ou épanchement sur les propriétés voisines. Elle empêche la restriction aux dommages causés par la trop grande élévation des écluses des droits qu'elle sauvegarde, lors même que cette mention spéciale ne serait par là simplement pour exemple et qu'elle aurait une tendance limitative et exclusive qu'elle n'a pas.

* * *

J'ai déjà, dans la cause de *Jean* v. *Gauthier* (1), exprimé l'opinion que le statut 19-20 Vict., ch. 104, avait créé une servitude qui, comme toutes les servitudes légales qui s'acquièrent, ne peut s'exercer qu'en en payant le prix. Le défendeur ne peut appuyer que sur ce statut ou mieux celui qui le refond, le droit qu'il invoque de retenir pour les besoins de son moulin les eaux de la rivière Giasson; c'est là l'exercice de la servitude qu'a créée cette loi, il ne peut pas l'exercer au détriment des fonds servants sans leur payer l'indemnité qui en est le prix. Cette indemnité est pour le demandeur la valeur des dommages que lui cause la rétention de l'eau.

In the same case of *Proulx* v. *Tremblay* (2), Stuart, J., while agreeing with the views of Casault, J., that, before the passing of the statute, a dam could not legally be placed across rivers to retain the waters, goes even further, when he says:

The claim for damages must rest, not upon the act of erecting the dam, but upon its improper construction and the abuse of the licence which the law gave him.

* * *

The law of servitudes must necessarily affect the decision of a case like this, and may properly be referred to.

* * *

The plaintiff in this case is proprietor of the land on the lower level which is subject to the servitude of receiving such waters as flow from the land of the defendant which is on the higher land, naturally and without the agency of man. He complains not that the defendant aggravates his servitude, but that he arrest the flow for a time, by means of a dam established for his own utility. The prohibition which existed at common law to construct a dam attached to the proprietor of the *lower* level, not to the proprietor of the higher level. And the reason is manifest in the text. The certain result of a dam is to raise the level of the river and to cause a reflow of the waters upon the lands of all those above it, but it in no way aggravates the servitude to which is subject the land of the lower level. Even under the old law the plaintiff would not rest this action upon article 501, and would have to show a special damage irrespective of any falling within the purview of this servitude.

The preamble of the statute invoked shews it to have been called for by considerations of public expediency. "Vu que l'exploitation des "cours d'eau serait un grand moyen de prospérité pour le pays." 19 and 20 Vict., ch. 104, 1856. Its public design cannot be overlooked in its interpretation, and the interests of the country at large must prevail over private interests.

(1) (1879) 5 Q.L.R. 138. (2) (1881) 7 Q.L.R. 353.

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These views are discussed by Mignault, in " Droit Civil," vol. 3, pp. 25 and 26, and he concludes as follows:

> Je crois que le législateur a voulu préserver les droits en limitant toutefois le recours des autres riverains au paiement des dommages qu'il a pu éprouver.

From the perusal of the above authorities, it seems to me abundantly clear that the damages contemplated by the statute are those suffered by any person as riparian owner, either below or above the dam and would be limited to the actual damages caused to the owner of a riparian piece of land as a result of the construction and maintenance of the dam. Although there is no direct evidence of title to the riparian lots on which the embankment that was destroyed rested, I would assume that the Crown owns the property, is a riparian owner and is bound to receive in its natural state the waters after their use by the appellant for a purpose which must be considered as of public interest.

The latter must be held responsible for the damages to any property below the dam by the construction of its works. Although the evidence is somewhat perplexing, I cannot reach the firm conclusion that the trial judge was clearly wrong in his finding that the natural conditions of the river were altered by the construction of the dam and in his view that the ice jam which caused the enormous accumulation of water resulted from the longer, wider and deeper basin created by the appellant. The latter would, therefore, be responsible for the damages caused by the injury to the physical property of the riparian owner; but this would not include the locomotive and rolling stock which happened to reach the site of the embankment shortly after the accident.

The codifiers inserted the reference to chapter 51 of the Consolidated Statutes of Lower Canada (now embodied in chapter 46 of the Revised Statutes of Quebec) in title 4 of the Civil Code dealing with real servitudes and in its first chapter dealing with " servitudes which arise from the situation of property."

The obligation to indemnify would, under the statute, result from the sole and direct operation of law and would

be one of the obligations described in article 1057 C.C. See on this point the learned discussion by Sir Henry Strong, C.J., in *City of Quebec* v. *The Queen* (1).

The statutory liability cannot be extended beyond what the law has fixed as the price of the servitude on riparian owners, viz. the damage caused to the owner of any property by the damming of the waters. I would, therefore, award the cost of reconstructing the embankment and the railway track. I would also allow the cost of the temporary railway service during the necessary period of repairs to the embankment and railway track. This cost of maintaining the service may fairly be considered as a damage occasioned to the enjoyment of the right of the respondent as riparian owner. See *City of Quebec* v. *Bastien* (2).

The respondent also alleged two grounds of special negligence: the use of thermite to break the jam and the opening of the sluice gates which would have started the movement of a tremendous volume of ice and water washing out the railway embankment. The trial judge found that the explosions of the two cans of thermite did not have such effect. He does not find that the respondent's complaint about the opening of the sluice gates is well founded; on the contrary, he says that the four gates should have been opened wider in order to lower the level of the water in the basin.

These findings would eliminate the recovery of damages under article 1053 C.C. Article 1054 does not apply for the reasons given above. The water and ice were not legally under the care nor under the control of the appellant; the latter were in duty bound to restore it to its normal course down the St. Francis river; they are responsible for the mischief if the abnormal flow of the river when it reached the embankment can be traced back to the presence of the dam across the river 2½ miles above.

Pothier (éd. Bugnet) IV, p. 330, may be quoted:

235. Le voisinage oblige les voisins à user chacun de son héritage, de manière qu'il ne nuise pas à son voisin: *Domun suam unicuique reficere licet, dummodò non officiat invito alteri, in quo jus non habet:* L. 61, ff. *de Reg. jur.*

Cette règle doit s'entendre en ce sens, que, quelque liberté qu'un chacun ait de faire ce que bon lui semble sur son héritage, il n'y peut faire rien d'où il puisse parvenir quelque chose sur l'héritage voisin, qui

(1) (1894) 24 Can. S.C.R. 420, at 439, 440, 441, 443 and 446.

(2) [1921] 1 A.C. 265, at 269.

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lui soit nuisible; *In suo hactenus facere licet quatenus nihil in alienum immittat;* L. 8 §5, ff. Si serv. vind.

236. C'est sur ce principe qu'est fondée l'action *aquæ pluviæ arcendæ.*

Il y a lieu à cette action de la part du propriétaire ou possesseur du champ inférieur contre son voisin propriétaire ou possesseur du champ supérieur, lorsque le possesseur du champ supérieur, par le moyen de quelque ouvrage qu'il a fait dans son champ, rassemble les eaux qui y tombent, d'où il les fait tomber dans le champ inférieur avec plus d'abondance et de rapidité qu'elles n'y tomberaient naturellement, et lui cause par ce moyen quelque dommage.

Mais lorsque c'est naturellement que les eaux tombent du champ supérieur dans le champ inférieur, le possesseur du champ inférieur ne peut pas s'en plaindre; car ce n'est pas en ce cas le possesseur du champ supérieur qui les y fait tomber, c'est le nature des lieux: *Si aqua naturaliter decurrat, actionem cessare;* L. 1, § 10, ff. *de Aqu. et aq. Non aqua, sed loci natura nocet;* eâd. L., § 14.

which would show that the only remaining ground in the Crown's case is not "*faute*" or negligence, but a breach of the duty imposed by the law, or in the nature of a quasi-contract, namely, the duty which is imposed upon the owner of the superior heritage, who executes works on his land or alters its natural state, to indemnify the owner of an inferior property if any damage should be caused by such works.

Moreover, the damages to the train equipment did not flow solely and necessarily from the presence of the dam in the river; other agencies intervened to cause this result, which, in my opinion, could and should have been avoided by the railway. The employees in charge did not show the zeal and diligence to be expected under the abnormal conditions facing them, as well as all proprietors along the St. Francis river, on that Sunday afternoon. I agree on this point with Dysart, J. *ad hoc.*

Even if the Crown had a recourse for repayment of what was disbursed to pay the railway's own debt for damages resulting from bodily injuries to the victims of the accident (employees and passengers), I believe that, under *Regent Taxi & Transport Coy.* v. *Petits Frères de Marie* (1), any action for bodily injuries caused by appellant's negligence was prescribed when brought on the 3rd of September, 1929, as to these special items. Art. 2262, C.C.; art. 1056, C.C.

I would, therefore, allow the appeal in part, with costs to the appellant, and restrict the recovery to the following items: costs of repairs to tracks, $5,254.57; costs of repairs

(1) [1932] A.C. 295. at 302.

to structure, $13,004.47; costs of diversion of train service and of special train service, $13,158.99, making a total of $31,418.03 with interest from date of the judgment of the trial court and costs.

The judgment of Crocket J. and Dysart J. *ad hoc* was delivered by

DYSART J. *ad hoc.*—The conclusions at which I have arrived in this case are in harmony, as they should be, with relevant Quebec jurisprudence as set forth in the judgment of Cannon, J., but while the conclusions harmonize, the considerations upon which they are founded may be different.

We are all in accord that the appellant must be held liable for some damages. The presence of the appellant's dam in the St. Francis river led directly to the washout of the respondent's railway embankment, and the appellant must, therefore, make compensation for all damage directly attributable to the washout. The only question on which there is difference of opinion is the extent of the damage for which compensation must be made to the Crown as the owner of the railroad.

For my purpose, it will be convenient to divide the claims of the railway company into four groups and to deal with the groups seriatim.

The first group will consist of two items,—"cost of repairs to tracks" ($5,254.57) and "cost of repairs to structure" ($13,004.47), a total of $18,259.04. These repairs were required in order to bring the embankment and track back to the condition of passability in which they were immediately before the washout, and do not include the permanent improvements to the embankment which were subsequently made. I agree with both that the appellant must pay this sum as compensation, because the damage is the direct and natural result of the injuries to the embankment.

The second group of claims will include two items covering "cost of diversion of train service" ($8,744.78) and "cost of special train service" ($4,414.21), aggregating $13,158.99. I would hold the appellant responsible for this group of damages. The evidence of the details of these

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items confirms what we had assumed, namely, that these two items of cost were incurred in an attempt to overcome the interruption to train service resulting from the destruction of the road bed,—an interruption which would inevitably have followed from the washout even if the train in question had not been wrecked. The washing away of the road bed by ice and water completely severed the line of rail communication and stopped the passage of all trains, resulting in an interruption which continued from Sunday, April 8, at 4.45 p.m. until Saturday, April 13, at 7.30 p.m. Instead of standing idly by until the necessary repairs could be made to permit of the resumption of train traffic over the embankment, the railway officials acting in the interest of all concerned—the public, the appellant and railway—provided substitute train service, thereby avoiding, as it was their duty to avoid, some of the loss which otherwise would have ensued. The substituted service took two forms: (1) "through traffic" between the cities of Quebec and Montreal which had previously been routed via the embankment, was diverted to another route, (2) "local traffic" for a necessary distance on each side of the washout was taken care of by a series of trains running to and from the washout. These train services were in no wise connected with the loss of the train which went down the embankment, and as I understand it, only that portion of the cost of the services has been charged which might be considered an extra cost occasioned by the washout.

The third group of claims includes items for "costs of repairs" to the locomotive and to two cars ($27,236.20) and an item for "cost of auxiliary and wrecking train service" ($3,276.62), a total of $30,512.82. The appellant should not be held responsible for these costs. I should state that my understanding of the facts in respect of these costs is that the auxiliary and wrecking train service was necessitated by, and devoted to, the recovery and removal of the damaged train, and not to the repair of the road bed, and that, but for the damage to the train, this service would not have been required. It is, therefore, so intimately associated with the damage to the train as to be properly included in the groups of items covering repairs to the train. This group of claims introduces a new link into

the chain of causation and calls for some extended comment. Here the conduct of the railway company must be taken into account, because if by the exercise of reasonable precautions on its part, the company which operates the railway could have avoided these damages, the Crown can not now recover for them.

In order to determine what, if anything, the railway employees should have done, we must look at the flood situation as it developed and culminated in the washout. The evidence on this point presents its own picture, the features of which should be noted. (1) Spring "break-ups" on the St. Francis river increased in violence after the erection of the dam at Hemmings falls in 1924,—in fact, the railway's case is based upon that fact; (2) the natural conditions during the first week of April, 1928, were particularly conducive to flooding and violent break-up,—unusually great quantities of snow were melted very rapidly in the exceptionally warm weather of that week, with the result that the river rose to almost unprecedented heights; at Richmond, for instance, twenty-five miles up stream, the river overflowed its banks and covered the railway yards and tracks to a depth of two or three feet, so that men had to be assigned by railway officials to watch and guard railway property at that place; (3) the swollen waters carried great masses of broken ice, and during the two or three days preceding the washout, the river for some miles above the dam was choked with millions of tons of ice; (4) this enormous mass of ice and water, always growing in quantity, slowly forced its way down the river, the ice grounding occasionally on ridges or shallows and halting until an increasing height of water floated the mass and forced it forward; (5) the forefront of the flood reached the broad basin immediately above the dam on Saturday, April 7th, where its progress was delayed for many hours by a large field of unbroken surface ice which covered that basin; (6) the basin ice was eventually lifted by the swelling waters and broken up and became part of the greater mass as that mass moved forward; (7) this final break-up occurred on Sunday, the 8th, and the whole mass of many millions of tons of ice and water rushed over the dam and down the river with terrific force and violence, carrying

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away the embankment in its mad career; (8) for some days prior to the washout, 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 washout nor during the final critical hours, any steps were taken by them to safeguard the trains; (9) 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 a lady, who, when she heard the distant whistle of an approaching train, ran back along the track and flagged the train in time to enable it to slow down, but not completely to stop; she saved much, but not the engine and the two forward cars—these fell into the newly created cavity.

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. This disposes of the third group of claims adversely to the claimant.

The fourth and final group of claims consists of "payments" ($19,592.35) made by the railway company, for "medical and hospital treatment," for "ambulance and funeral expenses," for "indemnities" to injured passengers and employees, for "wages to disabled employees," and for some bounties. I fully agree that these claims cannot be allowed. My reason briefly is that these payments were occasioned by circumstances surrounding the wrecking of the train, and would not have been occasioned at all if the train had not been wrecked. Moreover, the payments were made without established legal obligation.

In the result, therefore, I would allow the appeal to the extent, but only to the extent, of reducing the judgment of the trial court to the sum of $31,418.03, on which interest should be allowed from the date of that judgment. The appellant should have the costs of this appeal.

Appeal allowed in part with costs.

Solicitors for the appellant: *Décary & Marier.*

Solicitor for the respondent: *L. E. Beaulieu.*