FRANCIS G. GALE (DEFENDANT) ....APPELLANT;

AND

MARCELLIN BUREAU (PLAINTIFF) ..RESPONDENT.

1910
*Nov. 15.

1911
*Feb. 21.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Rivers and streams—Industrial improvements—Raising height of dam—Nuisance—Damages—Expertise and arbitration—Right of action—Measure of damages—Practice—Future damages—Pleading—New objection raised on appeal—Prescription—R.S.Q., 1888, *arts.* 5535, 5536—*Arts.* 2242, 2261 *C.C.*

The provisions of the statutes respecting the improvement of watercourses in the Province of Quebec, permit the raising of the height of dams erected by proprietors of lands adjoining streams; this right is subject to the liability to make compensation for all damages resulting to other persons from such works.

The mode of ascertainment of such damages by the arbitration of experts provided by article 5536 of the Revised Statutes of Quebec, 1888, does not exclude the right of action to recover compensation in the courts.

In such cases the measure of damages is the amount of compensation for injuries sustained up to the time of the action; they ought not to be assessed once for all, *en bloc*, but recourse may be reserved in regard to future damages arising from the same cause.

Per Idington and Anglin JJ.—Objections based upon provisions of enabling statutes which have not been set up in the pleadings nor relied upon in the courts below cannot be entertained upon an appeal to the Supreme Court of Canada. *Hamelin* v. *Bannerman* (31 Can. S.C.R. 534) followed.

Per Anglin J.—An action, brought in 1908, for recovery of damages in respect of injuries occasioned by improvements executed in 1904, upon works constructed many years before that time, is not subject to the prescription of thirty years; nor can the prescription provided by article 2261 of the Civil Code be applied where the action has been commenced within two years from the time the injuries complained of were sustained.

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

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APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Saint Francis, by which the plaintiff's action was, in part, maintained with costs.

The appellant (defendant) was the owner of mills and factories, at Waterville, Que., in connection with which he also owned a dam, which had been erected in the Coaticook River about the year 1856, and, in 1904, he made improvements to the dam and placed flash-boards upon it which slightly increased its height and had the effect of penning back the waters of the stream so as to flood the lands of the plaintiff and cause the destruction of his bridge and the drowning of some of his cattle during the Spring and Summer of the year 1907. In the year 1908, instead of availing himself of the method provided by article 5536, R.S.Q., 1888, for ascertaining the amount of damage and abating the nuisance, the plaintiff brought an action in the Superior Court for the District of Saint Francis to recover compensation for the injuries he had thus sustained, in consequence of the raising of the dam, which was maintained, in part, by the trial judge who refused, however, to make an assessment of the damages resulting from the works once for all, *en bloc*, allowed only compensation for the injuries sustained up to the time of the action and reserved to the plaintiff any recourse which he might have for future damages arising from the same cause. This judgment was affirmed by the Court of King's Bench which also held, on the appeal by the defendant, that he had acquired no prescriptive rights in respect of the dam by user for a period of over thirty years. The defence had not set up the provisions of the statutes respect-

ing the improvement of watercourses, but, on his appeal to the Supreme Court of Canada, the defendant took the objection that the right of action for damages sustained as the result of the works in question had been taken away by the effect of articles 5535 and 5536, R.S.Q., 1888.

The questions at issue on the appeal are stated in the judgments now reported.

Lafleur K.C. and *C. D. White* for the appellant.

Panneton K.C. and *LeBlanc* for the respondent.

THE CHIEF JUSTICE.—From time immemorial, under the French civil law, the proprietor whose land borders on or is crossed by a running stream had the right subject to certain restrictions, to use the waters of that stream for certain limited purposes. By statute 19 & 20 Vict. ch. 104, consolidated, in 1861, as chapter 51, C.S.L.C., and, in 1888, as article 5535, R.S.Q., and, in 1909, as article 7295, R.S.Q., those proprietors were authorized to improve such watercourses for industrial purposes subject to the payment of such damages as might result from these improvements to other persons, to be ascertained by experts. That the plaintiff (respondent) suffered damage by reason of the construction of the defendant's (appellant's) dam must, I presume, be admitted here in view of the concurring judgments below. Nor is it open to us, for the same reason, to reconsider the amount of such damages, if they were properly assessed. The only question we are now called upon to decide is with respect to the mode of assessing those damages. They were not assessed by experts as provided by the

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statute, and the question is: Should we hold that, if the regulations or formalities fixed by the statute for the purpose of ascertaining the damages resulting from the exercise of the right to make improvements are not observed, the party injured is without a remedy in the courts on the assumption that such was the intention of the legislature? This question arose for the first time in the Quebec courts, as far as I have been able to ascertain, in 1869, in the case of *Nesbitt* v. *Bolduc*(1), 1 Loranger, Civil Code, p. 140, No. 25, and it was then held that the recourse given by the statute is not exclusive, and the remedy by direct action in a competent court is not taken away. That case was followed in *Emond* v. *Gauthier*(2); in *Breakey* v. *Carter*(3); in *Cie. de Pulp de Mégantic* v. *Village d'Agnès*(4); and in *Leclerc* v. *Dufault*(5). It would seem rather a hazardous undertaking to interfere with such a well settled jurisprudence, especially as there is no provision in the Quebec Municipal Code for the appointment of experts by the warden of the county, as the statute requires, if the parties should fail to agree. It may be also that the damage to be recovered arises with respect to property situate within the limits of a town or city municipality where there would be no warden, the municipal organization of Quebec differing in this respect from that which, I understand, exists in other provinces. The warden in the Province of Quebec is the head of the county council which is composed of the mayors in office of the local municipalities subject to the provisions of the Municipal Code (arts. 246, 247 M.C.); and that code does not apply to cities and

(1) 15 R.L. 513 note.
(2) 3 Q.L.R. 360.
(3) 7 Q.L.R. 286.
(4) Q.R. 7 Q.B. 339.
(5) Q.R. 16 K.B. 138.

towns; (art. 1). To reverse, therefore, on the ground that the damages were not ascertained by experts, as the statute provides, might mean that the injured party would be without any recourse. The effect of the reservation in the judgment of the right to the plaintiff to claim damages which may arise in the future is well understood by those familiar with Quebec procedure, but does not call for consideration on this appeal. I may, however, say that the course followed by the trial judge in limiting the damages to those found to have been actually sustained has the sanction of the highest authority. Sourdat, Nos. 110 and 132 bis.

I would dismiss the appeal with costs.

DAVIES J. agreed with Duff J.

IDINGTON J.—The Parliament of old Canada enacted what still remains part of the statute law of Quebec, as follows:

> 5535. Every proprietor of land may improve any watercourse bordering upon, running along or passing across his property, and may turn the same to account by the construction of mills, manufactories, works and machinery of all descriptions, and, for this purpose, may erect and construct in and about such watercourse all the works necessary for its efficient working, such as flood-gates, canals, embankments, dams, dykes and the like.

Following this clause are a number of provisions for determining by means of arbitration the amount of compensation due those damnified by exercise of said power.

Disregarding the arbitration proceedings provided by the Act, the respondent brought an action complaining of appellants having, in A.D. 1903, raised this dam constructed, it is assumed, but not proven,

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in an exercise of this statutory power nearly half a century previously.

The appellant takes the ground now, for the first time, that the dam was constructed in the lawful exercise of said statutory power, and all he has done being, therefore, legal, no action can be founded upon acts done within the exercise of such power, and he alleges if any remedy exists it must be found in the arbitration proceedings provided in such case by the said Act.

The appellant will not admit, though the learned trial judge has found as a fact, that this dam was raised, as respondent's pleadings allege, still higher than when constructed.

Assuming, however, the fact of such increased height in the dam, the first question we would have to ask, if we had to solve all the questions raised, would be whether or not this statutory power, which does not embody any express right to exercise it from time to time, can be repeatedly exercised and added to.

However that may be I am quite sure that any person thus relying upon a statute must plead it and bring himself within its protection. I cannot find anything of that sort in the appellant's pleadings to give him even a colour of right to set up now for the first time this new defence.

The respondent has relied upon the case of *Hamelin* v. *Bannerman*(1), as an answer to this new defence. I think the point is well taken.

I do not think the reply of appellant's counsel trying to distinguish that case from this by reason of that turning upon an arbitration provided for in a

(1) 31 Can. S.C.R. 534.

deed and this being upon a statute, meets the point taken.

An arbitration, as a condition precedent, if properly framed may be as effectual an answer to an action as can well be, and yet, when so, it must be pleaded or claimed as defence before the case reaches here.

The principle upon which that case went was the need for this. The principle applies here just as well and is so well known it does not need authority.

The profuse denials in appellant's pleas might have been, as sometimes happens, forgotten, as the real issues to be tried and new ones started at the trial, threshed out there and afterwards, so that the case tried differed so much from that upon which issue was joined, as to enable us to give effect to a point tried in fact though not pleaded.

The pleading could be amended to conform to the actual issues really decided.

That is not this case. The pleading in defence is all denial or relates to original construction and in no way pretends to claim a right to increase the height. Indeed, the pleas bearing upon the right of original construction need much charity to extend them to cover rights acquired under this statutory power. And, for aught that appears, the dam may have been built before the statute.

The respondent has only had damages assessed up to the trial, and I hardly see how he could recover more from a defendant who seems to have inadvertently done what is complained of. The fact is the case has been ended in the only way it should, on the findings of fact and as pleaded, be ended.

The appeal should be dismissed with costs.

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DUFF J.—The authority conferred by article 7295, R.S.Q., 1909, appears to be sufficient to justify the alterations in the appellant's dam which took place in 1904. I think it is too narrow an interpretation of that enactment to hold that such alterations are not permitted when occasion for them arises. The language itself is sufficient to create such authority and the obvious purpose of the legislation — to enable the proprietors of land to utilize waterways passing through or by it, in the operation of mills and machinery — seems to require that the words should be read without any such restriction upon their ordinary meaning.

The determination of the other points is ruled by the authority of *Breakey* v. *Carter*(1). The effect of that decision (by which this court is bound) is that the right given by article 7295, 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. In that view there appears to be no reason why the exercise of this statutory right should not, from time to time, as damage thereby accrues, give rise to a right to claim the correlative indemnity.

The decision mentioned also meets the objection that the respondent's right to compensation is limited to that ascertained in the manner pointed out by the statute.

There may be difficulties in reconciling the decision on this point with the generally recognized rule, that where a right of compensation is given by a statute and by the same enactment extra-judicial machinery

(1) Cass. Dig. (2 ed.) 463.

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is provided for ascertaining the amount, the matter of compensation is not cognizable by the courts until, at all events, the amount has been fixed in accordance with the statutory method. This, however, is only a rule of construction which must, like all such rules, yield where a contrary intention appears; and it is possible that the difficulties of putting into operation the machinery provided by this statute are sufficient to support the inference that the legislature did not intend, in this case, to exclude recourse to the courts.

At all events, whatever view one might have been disposed to take, had the question now presented itself for the first time, the decision of this court, sanctioned moreover by the subsequent re-enactment of the statute in identical terms, is conclusive of the point on this appeal.

ANGLIN J.—The plaintiff, Bureau (respondent) sues to recover for the flooding of his farm, caused, he alleges, by a dam owned by the defendant and in part due to the raising, in the year 1904, of the height of this dam. His original claim was for $3,053.50 — $800 in connection with a bridge, $200 for cattle destroyed, $2,000 for damages to the land once for all, and $53.50 for a surveyor's expenses in making measurements and preparing a plan shewing the flooded lands for use on the trial.

The Superior Court rejected the first two items as insufficiently proved, and allowed the plaintiff $100 damages for injury to his land due to the raising of the dam up to the date of the commencement of the action, and $53.50 for the expenses of the surveyor, and the cost of the plan prepared by him — refusing to assess damages once for all because the works which

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actually caused the damage allowed for are not permanent in character and the damages themselves are variable, but reserving to the plaintiff a right of recourse for future damages. From this judgment the plaintiff appealed to the Court of Review seeking to have the amount awarded to him increased and claiming assessment of damages once for all. His appeal was dismissed(1) and he has not further pursued it.

From the judgment thus affirmed the defendant appealed to the Court of King's Bench on the ground that there had been no increase in the height of the dam in 1904, that he had acquired a prescriptive right to flood the plaintiff's lands by thirty years' user of the dam and that the compensation or damages, if the plaintiff is entitled to recover, should have been estimated once for all as demanded in his declaration. His appeal was dismissed, the majority of the court holding that damage by additional flooding owing to increased height of the dam was sufficiently established by the evidence; that the prescription of thirty years relied upon had no application to the claim for such damages; and that it was competent for the court, while declining to assess compensation or damages once for all as claimed by the plaintiff, to award damages in respect of injury suffered prior to the bringing of the action.

On his appeal to this court the defendant takes the following grounds in his factum:

First.—The statute provides a special way of assessing the damages, and the respondent must proceed in that way, and not by an action before the courts.

Secondly.—Even if the right of action is not taken away by the statute, it is extinguished by the prescription of 30 years.

Thirdly.—The compensation or damages should have been estimated "once for all" as contemplated by the statute, and as prayed for by respondent in his declaration.

(1) Q.R. 36 S.C. 85.

The trial judge found that the height of the dam was slightly raised in 1904 — so much the defendant's expert almost admits — and, upon conflicting evidence, he also found that the effect of this increase in height was that the lands of the defendant were flooded more extensively and for longer periods after the year 1904 than they had been theretofore. These findings of fact have been affirmed by the Court of King's Bench. Though impugned at bar, they are well supported by the evidence and should not, in my opinion, be disturbed by this court.

That the provisions of articles 5535 and 5536, R.S.Q. (1888), preclude any right of action for such damages as the plaintiff sustained by reason of the increase made in the height of the dam appears not to have been urged by the defendant in the provincial courts. This objection has been raised upon this appeal — probably because of a suggestion in the dissenting judgment of Mr. Justice Trenholme. Apart from that formidable difficulty (*Hamelin* v. *Bannerman* (1)), and whatever view might be taken upon this question were it *res integra,* for me it is concluded against the appellant by the decision in *Breakey* v. *Carter* (2), which, notwithstanding the observations of Taschereau J. in *Jones* v. *Fisher* (3), at page 525, for reasons fully stated in *Stuart* v. *Bank of Montreal* (4), at pages 541 *et seq.,* I regard as not open to review in this court.

It is obvious that the prescription of thirty years relied upon by the appellant has no application to the plaintiff's claim in respect of injuries sustained as a result of the raising of the dam in 1904. I fully ap-

(1) 31 Can. S.C.R. 534, at p. 540.
(2) Cass. Dig. (2 ed.) 463.
(3) 17 Can. S.C.R. 515.
(4) 41 Can. S.C.R. 516.

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preciate Mr. Justice Lafontaine's difficulty(1) in concurring with the learned trial judge in holding article 1608 C.C., applicable, by analogy, to the plaintiff's claim. The judgment in review points out the clear distinction which exists between the facts of the present case and those upon which the claim in *Breakey* v. *Carter*(2) was held by this court to fall under article 1608 C.C. The judgment in *Breakey* v. *Carter* (2) appears to be also opposed to the applicability to the present case of article 2261 of the Civil Code. But if articles 2261 and 2267 C.C., apply, and if, although these articles have not been pleaded, under article 2188 C.C., the court should of its own motion supply the defence and hold that the plaintiff's right of recovery is limited to damages sustained within two years before the date of his writ — 3rd February, 1909, — (*Breakey* v. *Carter*(2)) — they do not help the defendant. The learned trial judge has in effect found that the plaintiff sustained his only real injury in 1907 — of course in the Spring and Summer of that year — and the allowance of $100 was no doubt in respect of that injury which occurred within two years before action. Article 2261 C.C., if pleaded would, therefore, not be an answer to that part of the plaintiff's claim in respect of which he recovered judgment.

The appellant contends that if the plaintiff has a right of action it can only be for an indemnity once for all, and that having brought his action in this form he should not be allowed to recover in respect of past damages only, with reservation of rights in regard to future damages. I incline to agree with the view of Mr. Justice Archambault that the court had

(1) Q.R. 36 S.C. 85, at p. 87. (2) Cass. Dig. (2 ed.) 463.

the right to grant damages for the past and to refuse, at present, to allow or to assess them for the future. But I think we are not now concerned with that question. The plaintiff's claim was for damages once for all. He has been allowed only $153.53. He appealed unsuccessfully to have this amount increased. He is not pursuing this claim further in the present action. The dam may be lowered and the plaintiff may sustain no further actionable damages. He may never bring another action. If he does and if it be found that he has sustained further loss, as a result of the defendant's work of the year 1904, it may then be necessary to determine whether he is entitled to a second assessment of damages and to consider the value and the efficacy of the reservation of his right of recourse in respect of future damages made by the trial judge. But, at present, the plaintiff has a judgment for damages to which upon the evidence he appears to have been entitled, whether his claim should be regarded as confined to past damages or as necessarily including full indemnity for the past and future exercise of a servitude in respect of his lands by the defendant. With any future right of action which he may have we are not presently concerned.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Cate, Wells, White & McFadden.*

Solicitors for the respondent: *Panneton & Leblanc.*