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* Feb. 6, 7, 8.
* Nov. 30.

DOUGLAS RICHMOND STREET AND NORMAN BROWNLEE (PLAINTIFFS) } APPELLANTS;

AND

OTTAWA VALLEY POWER COMPANY (DEFENDANT) ..... } RESPONDENT.

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

Water-course—Dams—Lease from Government—Order in Council—Flooding of lands—Damages—Jurisdiction to entertain claims—Whether Superior Court or Quebec Public Service Commission—Work connecting two provinces—Watercourse Act, R.S.Q., 1925, c. 46, s. 12.

The Montreal Engineering Company, later replaced by the Chats Falls Power Company whose name was subsequently changed to that of the respondent company, was authorized by Order in Council to erect, operate and maintain a dam in the river Ottawa, at Chats rapids, such Order purporting to be given pursuant to sections 4 *et seq.* of the Quebec *Watercourse Act*. The appellants, alleging that they were riparian proprietors of certain properties situated west of Chats Falls and although admitting that the water level of the river was not in consequence of these works raised above the ordinary high water mark, claimed that they were nevertheless entitled to recover damages in virtue of section 12 of the *Watercourse Act* on several grounds mentioned in their statement of claim. Section 12

* PRESENT:—Duff C.J. and Rinfret, Cannon, Kerwin and Hudson JJ.

enacts that "(1) 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. (2) Such damages shall be assessed and fixed by the Quebec Public Service Commission." The respondent contested the appellants' right to claim damages and further alleged that the Superior Court had no jurisdiction to entertain the claim under paragraph (2) of section 12. The trial judge dismissed the appellants' action, finding upon the evidence that no damages had been sustained. The appellate court affirmed that decision on many grounds, holding *inter alia* that the Superior Court had no jurisdiction because such damages should have been assessed by the Quebec Public Service Commission under section 12 of the Act. The appellants also advanced before this Court a new contention that the dam of the respondent company, being part of a single work connecting the province of Quebec with the province of Ontario, was, therefore, part of a work which the former province was without legislative competence to authorize.

Held that the finding of the trial judge that no damages had been sustained by the appellants should not be disturbed, such finding being amply supported by the evidence.

Held, also, reversing the judgment of the appellate court on that point, that under articles 7295 and 7296 of R.S.Q. (1909) the Superior Court possessed jurisdiction to entertain an action for damages such as the present and to give judgment for such damages as might be assessed. Section 12 of the present *Watercourse Act* is not new legislation; similar legislation having been passed in 1856 (19-20 Vict., ch. 104), subsequently appearing as chapter 51 of the Consolidated Statutes of Lower Canada (1861) and again as articles 5535 and 5536 R.S.Q. (1888). Since the first enactment in 1861, there has been a series of decisions in the province of Quebec in which it was held that the right to damages given by the statute was one which could be enforced by action in any competent court; and the legislature of Quebec by re-enacting in 1888 and again in 1909 the legislation first passed in 1856 and later embodied in chapter 51 of the Consolidated Statutes of Lower Canada (1861) must be taken to have given statutory sanction to the course of decision culminating in the judgment of this Court in *Breakey* v. *Carter* (Cassels Digest, 2nd ed. 463). By force of articles 7295 and 7296 of R.S.Q. (1909) the Superior Court would have been, so long as that legislation remained unchanged, competent to entertain such an action as the present. It must be taken that, by these articles, the legislature declared an action for damages under article 7296 (1) to be competent in the Superior Court. Terms more explicit than those contained in paragraph 2 of section 12 would be required to deprive the courts of Quebec of the jurisdiction they possessed under the then existing statute. Subsection 2 of section 7296 R.S.Q. (1909) was providing for the ascertainment of damages by experts; and by enacting section 12 of the *Watercourse Act* to replace ss. 2 of s. 7296 R.S.Q., the legislature must be deemed not to have taken away the jurisdiction of competent courts. The more natural interpretation of the action of the legislature in enacting section 12 would be that recourse to experts for assessing damages was being replaced by the Public Service Commission and that competent courts had not been deprived of jurisdiction.

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Held, further, that the appellants' ground of appeal based on the contention that the dam was part of a simple work connecting the province of Quebec with the province of Ontario was not open to the appellants in this court. Upon the facts, the dam was a work wholly situated within the province of Quebec, constructed there under the authority of a provincial statute and the property in relation to which the appellants allege they had suffered prejudice was also situated in that province. *Prima facie,* therefore, the reciprocal rights and liabilities of the parties must be governed by the law of that province. It was not alleged in the pleadings that this dam affected the flow of the river south of the interprovincial boundary, and the issues of fact which might have to be considered for the purpose of examining this contention of the appellants are not among the issues to which an order was directed, or which were considered by the courts below, or presented to those courts by the pleadings or otherwise.

Judgment of the Court of King's Bench (Q.R. 65 K.B. 504) aff.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Trahan J. and dismissing the appellants' action for damages.

The material facts of the case are stated in the above head-note and in the judgment now reported.

W. B. Scott K.C. and *P. F. Foran* for the appellants.

Aimé Geoffrion K.C. for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—The appellants' claims are in two separate groups. The first of these is based upon the ground that for various reasons the works of the respondents are illegal; those in the second group are founded on the right to damages given by section 12 of the Quebec *Watercourse Act.*

It is convenient to deal first with these latter. Section 12 is in these words:

12. (1) 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 floodgates or otherwise.

(2) Such damages shall be assessed and fixed by the Quebec Public Service Commission.

The works in question were constructed under authority of an order of the Lieutenant-Governor in Council of the 20th of June, 1930, purporting to be given pursuant to sec-

(1) (1938) Q.R. 65 K.B. 504.

tions 4 *et seq.* of *The Watercourse Act.* Admittedly, the water level of the river was not, in consequence of these works, raised above the ordinary high water mark; but it is urged that the appellants as riparian proprietors are entitled to recover damages in virtue of section 12 on several grounds.

The damages under that section are claimed in virtue of the allegations in paragraphs 13 to 18 inclusive in the declaration, and these paragraphs are textually as follows:

13. That since the erection and construction of the said dams as aforesaid the said defendant has caused the waters of the said river Ottawa to be raised thereby to a level corresponding to and exceeding the level of the said river in the spring time at high water mark notwithstanding the protests of the plaintiffs against such action and have since maintained said waters at said unnatural level throughout all periods of the year.

14. That the action and conduct of the defendant has caused loss, damage and injury to the plaintiffs by the continuous presence of a large body of water adjoining their properties, because of the perpetual seepage, percolation and changes in the bank of the said river opposite the properties of plaintiffs by which the bank of the river has been weakened and destroyed and the flowing of the said river on to the property of the plaintiffs has ensued, especially after wind storms, and from the action of the ice on the shore and the breaking up of the ice in the spring time of the year; and the drainage of the said lots and the dwellings thereon for sanitary and other purposes has been rendered impossible, and the shade and ornamental and useful trees growing thereon have been undermined and destroyed and their replacement rendered impossible.

15. That the defendant has neglected to strengthen the shores of the said river so altered by them so as to prevent such percolation and changes weakening in the said shores.

16. That the said property of the plaintiffs was naturally well adapted to the laying out of a summer resort.

17. Plaintiffs' property as a summer resort has been further damaged because the raising of the waters of the said river has interfered with boating, bathing, and landing facilities connected therewith, and has taken away all rights of accession and alluvion.

18. That the sales and the disposal of the lots of the plaintiffs have been lessened and the market therefor has been destroyed because of the degradations and changes which have been caused on the said lots of the plaintiffs by the above-mentioned acts and proceedings of the defendant in connection with the waters of the Ottawa river, and the said market in any event can never be reopened so long as the present state of affairs caused by the action of the defendant is allowed to continue.

By the plea these allegations are denied. The trial lasted several days and evidence was given on both sides on the issue thus raised and the learned trial judge held

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that the evidence did not justify a finding that the plaintiffs were entitled to such damages. He found:

> Considérant que les faits révélés par la preuve ne donnent pas ouverture aux conclusions de la demande et que, d'ailleurs, ils ne sont pas suffisamment précis et concluants pour permettre au tribunal d'asseoir une condamnation à des dommages-intérêts;
>
> Considérant que la défenderesse a établi en fait et en droit le bien fondé de son plaidoyer.

Having regard to the character of the allegations which are denied by the plea and which the learned trial judge thus found to be negatived by the evidence, it is plain that the learned judge was in an exceptionally advantageous position to pass upon the issues with which he was dealing; and, having fully considered that evidence, I am quite satisfied that we should not be justified in interfering with his findings.

There is one topic upon which it is desirable, perhaps, to make an observation, and that concerns the claim based upon the alleged reduction in the width of the beach.

It is quite clear that the right of *accès* and *sortie* to the river as a navigable river is in no way interfered with. It should also be noticed that in the province of Quebec the beds of navigable rivers, as well as the banks, are the property of the Crown (article 400 C.C.); and the appellants, whose property is bounded on the southerly side by the Ottawa river, have no title to any of the soil below high water mark. The learned trial judge has found, and this is not now disputed, that the respondents' works have not the effect of elevating the waters of the river above ordinary high water mark and that the property of the appellants has, therefore, not been inundated; and it seems indisputable that the respondents, who *ex hypothesi* in virtue of the Order in Council, have authority from the Crown for raising the waters of the river, are not in consequence alone of this inundation of Crown property answerable at the suit of the appellants. They could have no claim as against anybody acting for the Crown for prejudice suffered by reason of the deepening of the channel or by reason of the penning back of the waters of the river on Crown property; and, if there were any prejudice arising from the sole fact that as a result of the work constructed by the respondents under contract with the Crown, the beach became covered with water at sea-

sons when it would otherwise be bare, that prejudice could, in my opinion, not be the basis of a claim for damages under section 12.

I rest my judgment, however, in this respect upon the finding of the learned trial judge that no such damages were sustained and that this finding is amply supported by the evidence.

As to illegality, the grounds of complaint, including the claim in respect of the lodging of the plans and other documents in the Registry Office have, I respectfully think, been satisfactorily dealt with in the Court of King's Bench and I say nothing further about any of them with the exception of one which was raised in this court for the first time.

The appellants sought to advance a contention not mentioned in the courts below that the dam of the respondents is part of a single work connecting the province of Quebec with the province of Ontario and is, therefore, part of a work which the former province is without legislative competence to authorize.

This is a contention which is clearly not open to the appellants in this court. As the facts appear from the record before us, the respondents' dam is a work wholly situated within the province of Quebec, constructed there under the authority of a provincial statute, and the property in relation to which the appellants allege they have suffered prejudice is also situated in that province. *Prima facie,* therefore, the reciprocal rights and liabilities of the parties must be governed by the law of that province. It is not alleged in the pleadings that this dam affects the flow of the river south of the interprovincial boundary, and the issues of fact which might have to be considered for the purpose of examining this contention of the appellants are not among the issues to which evidence was directed, or which were considered by the courts below, or presented to those courts by the pleadings or otherwise.

Another question of law of great importance was raised and argued which, in the views above expressed, it is strictly unnecessary to pass upon. I think, however, it is inadvisable to put it aside without comment.

Section 12 of the *Watercourse Act* has already been quoted. The Court of King's Bench has held, acceding to the contention of the respondents, that this enactment

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must be interpreted according to the generally recognized rule that, where a right of compensation is given by statute, in respect of something the statute authorizes, and by the same enactment extrajudicial machinery is provided for ascertaining the amount, the matter of compensation is not cognizable by the courts, until, at all events, the amount has been determined in accordance with the statutory method; and accordingly that the Superior Court had no jurisdiction to entertain the claim for damages arising under section 12.

Section 12 is not new legislation. In 1856, the legislature of the old province of Canada passed a statute, restricted in its operation to Lower Canada which, in its title, is described as *An Act to authorize the improving of Watercourses.* Thereby (sections 3 and 4) riparian proprietors were authorized to improve any watercourse bordering upon or passing through their property for industial purposes, subject to the payment of such damages as might result from these improvements to other persons in the ordinary manner.

This statute, which was chapter 104 of 19-20 Vict. appeared as chapter 51 of the Consolidated Statutes of Lower Canada of 1861, and again as articles 5535 and 5536, R.S.Q. (1888).

Since the first enactment of this legislation in 1861 there had been a series of decisions in the province of Quebec in which it was held that the right to damages given by the statute was one which could be enforced by action in any competent court. This appears to have been first held in 1869 in the case of *Nesbitt* v. *Bolduc* (1); Loranger Commentaires du Code Civil, vol. I, p. 140, no. 25. This decision was followed in *Jean* v. *Gauthier* (2); and in *Breakey* v. *Carter* (3).

In 1885 the Supreme Court of Canada held (in *Breakey* v. *Carter*) (4) that the mode of assessing damages prescribed by chapter 51 of the Consolidated Statutes of Lower Canada did not exclude the right to proceed by ordinary action; and after this decision the legislation was re-enacted by R.S.Q. (1888), articles 5535 and 5536. Later, the construction of these articles of R.S.Q. (1888) came

(1) (1869) 15 R.L. 513, note.
(2) (1877) 3 Q.L.R. 360.
(3) (1881) 7 Q.L.R. 286.
(4) Cassels Digest, 2nd ed. 463.

before this Court in *Gale* v. *Bureau* (1); and it was there held that, in view of the previous course of jurisprudence in the province of Quebec and the decision of this Court in *Breakey* v. *Carter* (2) (and the subsequent re-enactment of the legislation in identical terms) the statute must be construed and applied conformably to those decisions; and, consequently, that the Superior Court of the province of Quebec had jurisdiction to entertain an action for damages and to assess the damages under article 5536, R.S.Q. (1888). During the progress of the litigation in *Gale* v. *Bureau* (1) through the Courts the legislation was again re-enacted in identical terms by articles 7295 and 7296 of R.S.Q. (1909).

There appears to be no room for doubt that, under these articles of the Revised Statutes of 1909, the Superior Court possessed jurisdiction to entertain an action for damages such as the present and to give judgment for such damages as might be assessed. The legislature of Quebec, by re-enacting in 1888 and again in 1909 the legislation first passed in 1856, and later embodied in the provisions of chapter 51, C.S.L.C. (1861), must be taken to have given statutory sanction to the course of decision culminating in *Breakey* v. *Carter* (2), decided by this Court in 1885. The rule in such a case is stated by Lord Halsbury in *Webb* v. *Outrim* (3) in a passage quoted from the judgment of Griffith C.J. in these words:

> When a particular form of legislature enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the legislature to bear the meaning which has been so put upon them.

This rule was affirmed afresh and applied in *Barras* v. *Aberdeen* (4). In that case, three of the Law Peers, Lord Buckmaster, Lord Warrington of Clyffe and Lord Russell of Killowen, adopted and applied the rule as laid down by Lord Halsbury and also as laid down by James L.J. in *Ex parte Campbell* (5). Lord Blanesburgh and Lord Macmillan would appear to have thought that the language of James L.J. required some qualification, but neither of them would, as their judgments shew, have had

(1) (1910) 44 S.C.R. 305.
(2) Cassels Digest, 2nd ed. 463.
(3) [1907] A.C. 81, at 89.
(4) [1933] A.C. 402.
(5) 1870) L.R. 5 Ch. App. 703.

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any doubt about the application of the rule in a case like the present; where a course of decision in the province of Quebec, beginning in the year 1869, culminated in a decision of this Court in 1885 and the statute, which was the subject of these decisions, was thereafter re-enacted without modification in its terms. It is evident, I think, that Lord Blanesburgh, who thought the rule not applicable in *Barnes* v. *Aberdeen* (1), would have had no hesitation in applying it in the circumstances now under consideration. That, I think, sufficiently appears from his observations at page 433.

We start from the premise then that, by force of articles 7295 and 7296 of R.S.Q. (1909), the Superior Court would have been, so long as that legislation remained unchanged, competent to entertain such an action as the present. It must be taken that, by these articles, the Legislature declared an action for damages under article 7296 (1) to be competent in the Superior Court.

The question raised by the contention of the respondents is this: by the change embodied in subsection 12, as it now appears in the Revised Statutes, has the Legislature taken away this jurisdiction?

For subsection 2 of article 7296 R.S.Q. (1909) providing for the ascertainment of damages by experts, the following is substituted:

> Such damages shall be assessed and fixed by the Quebec Public Service Commission.

I am very much disposed to think that something more explicit than this is required to deprive the courts of Quebec of the jurisdiction they possessed under the existing statute. The legislature is conclusively presumed to have known the effect of the re-enactment of the statute after the earlier decisions,—to have known, that is to say, that by the statute, as it stood before it was amended, the Superior Court had jurisdiction, but that the proceeding by way of assessment by experts was also available. There is at least much to be said for the view that the more natural interpretation of the action of the Legislature in amending subsection 2 is that recourse to experts is being replaced by the Public Service Commission, and that the courts have not been deprived of jurisdiction.

(1) [1933] A.C. 402.

Reference ought to be made to *The King* v. *Southern Canada Power Co.* (1) and to the judgment therein delivered by Lord Maugham. Damages were recovered under section 12 of the *Watercourse Act* in that case by the Crown in an action brought in the Exchequer Court of Canada. It does not appear to have been suggested throughout the litigation that the jurisdiction of the Quebec Public Service Commission in respect of damages was exclusive although an objection was taken by the defendant to the jurisdiction of the Exchequer Court, the contention being that the action ought to have been brought in the Superior Court.

This appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Foran & Foran.*

Solicitors for the respondent: *Geoffrion & Prud'homme.*