DOMINION TEXTILE COMPANY, LIMITED (DEFENDANT) ..... APPELLANT;

AND

DAME MARY LUCY SKAIFE ET VIR (PLAINTIFF) ..... RESPONDENT.

1926
*Oct. 20.
*Dec. 1.

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

Practice and procedure—Pleadings—Inscription-in-law—Watercourses—Dam raising level of water—Action for damages and demolition—Defence alleging existence of dam for long period and act by owner of removing obstructions—Materiality of these facts—Trial judge—Demolition of a thing—Direction of the court—Art. 1066 C.C.—Arts. 105, 108, 110, 191, 192 C.C.P.

The plaintiff respondent alleged in her statement of claim that she had been, since 24th July, 1914, owner of a parcel of land situate in the township of Magog and bounded on the west by lake Memphremagog; that the defendant company had been for several years the owner of certain dams and constructions at the outlet of the lake and by reason of their illegal use and maintenance had been interfering with and changing the "normal, usual and natural level" of the waters; that the appellant had created a public nuisance and thus gradually had damaged the respondent's land; and the respondent claimed not only to recover the loss so caused but also that the dam be demolished. The appellant, among other allegations of its defence, pleaded in paragraph 4 that the dam had existed since 1835 and at its present elevation since 1882; and that in 1915 the dam was carried away and replaced by a temporary structure erected in that year, which in turn was succeeded by the present dam in 1920 and 1921; and the appellant pleaded further in paragraph 5 that the appellant's auteurs, far from having caused the waters to rise, had removed obstructions from the outlet of the lake and enlarged the discharge, thereby preventing the water from reaching its normal height during freshets. The respondent inscribed in law against these two paragraphs of the defence, objecting that the facts therein alleged were irrelevant and did not support the conclusions of the defence.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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Held that the facts pleaded in these two paragraphs were not irrelevant to the issues between the parties and their proof should not have been excluded as immaterial, upon an inscription in law.

Held also that, under the Quebec "rules of pleading" (Arts. 105, 108, 110, 191, 192 C.C.P.), a paragraph of a defence is sufficient in law if it allege a material fact, even although the proof of other facts, which may be alleged in other paragraphs, be essential to justify the defendant's conclusion. Moreover a fact pleaded is not immaterial, although it have relation only to the damages claimed, or a part of the damages, as distinguished from the right which the plaintiff alleges to maintain the action. Mignault J. expressing no opinion.

Held, further, that, although by the terms of article 1066 C.C. a court may order demolition of a thing to be effected by its officer, or authorize the injured party to do it at the expense of the other, it seems only consistent with justice, and no doubt is intended, that that power shall be exercised by the court at its discretion. Mignault J. expressing no opinion.

APPEAL (1) from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of Coderre J. and maintaining the respondent's inscription in law against two paragraphs of the appellant's plea.

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

W. F. Chipman K.C. for the appellant.

A. Chase-Casgrain K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The plaintiff (respondent), by her declaration, filed 5th February, 1925, alleged that she had been, since 14th July, 1914, owner of a parcel of land therein described, situate in the township of Magog, and bounded on the west by lake Memphremagog; she made the following allegations against the defendant (appellant) in pars. 2 and 3 of her declaration:

2. The defendant is, and has been for several years, the owner of certain dams or constructions at the outlet of lake Memphremagog, and by reason of its illegal use and maintenance of said dams and construc-

(1) *Reporter's Note.*—Jurisdiction of this court was affirmed by a judgment of 2nd February, 1926, reported in [1926] S.C.R. 310; the court holding that the judgment appealed from was a "final judgment" within the meaning of par. *e* of s. 2 of the Supreme Court Act.

tions the defendant has for several years been interfering with and changing the natural course and level of the waters in lake Memphremagog, causing the same to rise beyond their normal and usual height to the detriment and loss of the plaintiff as hereinafter alleged.

3. By reason of such illegal interference with the level of the waters in lake Memphremagog, the defendant has not only caused the said waters to rise beyond their normal and usual height, but has caused said waters to remain at a higher level for considerable periods beyond the normal, usual and natural level of the said waters and were it not for the said acts of the defendant the average level of the said waters would be much lower.

The plaintiff proceeds to allege that, in consequence, a considerable part of the margin of her property upon the lake has been undermined and carried away by flooding, or had been rendered useless by the overflow; that the vegetation and a number of trees had been destroyed, and, by par. 5, that these damages had been caused gradually from day to day. The plaintiff moreover alleges by pars. 11 and 12 that:

11. As the dam constructed by the defendant at the discharge of of the said lake Memphremagog, which causes the above mentioned change in the level of the waters of the said lake, has been constructed by the defendant and has been kept and maintained by the defendant for the said discharge illegally and without right and constitutes a public nuisance which causes damage and will continue to cause damage to the plaintiff and to the plaintiff's said property hereinabove mentioned because the raising of the level of the said waters will continue to act as it has been acting for these last years, the plaintiff is entitled to ask that the defendant be enjoined from using the same dam and maintaining the same and be ordered to demolish the same, or at least any part thereof which causes or may be apt to cause a change in the level of the waters of the said lake Memphremagog opposite the plaintiff's said property.

12. Even if the defendant had the right to maintain and operate the said dam and raise the level of the said lake, as aforesaid, which the plaintiff denies, its exercise of such right would nevertheless in law be subject to the condition of paying all damages caused to third parties by the exercise thereof and the defendant would all the same be responsible towards the plaintiff for the said damages.

The conclusions are for damages; demolition of the dam, or such part thereof as may cause the flooding of which the plaintiff complains, and, "subsidiarily," that the defendant be enjoined from using the dam in such a way as to cause flooding of the plaintiff's land.

The defendant company, by its statement of defence, denied these allegations and pleaded two paragraphs, 4 and 5, the sufficiency of which is now in controversy. These paragraphs read as follows:

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4. That dams or constructions at the point in question have existed since the year 1835, and have moreover existed at the same elevation since the year 1882, the dam erected in that year having been carried away in 1915. The said dam or construction was replaced by a temporary dam erected in the same year which was replaced by the present dam in the year 1920 and 1921, all of which dams or constructions had approximately the same elevation.

5. So far from having caused the waters in the said lake to rise beyond their normal and usual height, defendant's auteurs, by means of removing certain obstructions from the outlet of the said lake, and enlarging its sluice openings, prevented the waters in the said lake from rising to their normal height at times of freshets.

By par. 9 of the defence, the defendant also pleaded prescription of the damages alleged. The defendant, upon these and other allegations, concluded for the dismissal of the plaintiff's action.

The plaintiff, by her reply, under reserve of her partial inscription in law, to which I shall immediately refer, prayed acte of the admission that the defendant had been owner of the dam since April, 1923, alleging that, if

the defendant was not itself the owner of such dam prior to that date, it is in the rights and obligations of its auteurs in connection therewith and everything caused thereby,

and joined issue upon the other paragraphs of the defence, submitting however that the facts alleged therein were irrelevant. At the same time the plaintiff inscribed in law against pars. 4 and 5 of the defence, objecting that the facts therein alleged were irrelevant and did not support the conclusion of the defence, and in particular that, even if the facts were as pleaded in par. 4 of the defence, they would not justify the maintenance of the dam, as no such right could be acquired by prescription, or by user for any number of years, and that the facts alleged in par. 5 of the defence did not constitute a reason why the defendant should be entitled to keep the waters of the lake at a higher level than they would naturally reach at other times than in freshets, nor to change the natural conditions of the lake.

At the hearing of the inscription in law before Coderre J. of the Superior Court, the learned judge maintained the inscription, and ordered pars. 4 and 5 of the defence to be stricken out upon the considerant that the facts alleged did not constitute in law

valid reasons in support of the defendant's conclusions asking for dismissal of the plaintiff's action;

and, upon appeal to the Court of King's Bench, this judgment was, for the same reason, affirmed.

The pleadings are regulated by chapter XI of the Quebec Code of Civil Procedure, under the caption "General rules of pleading," by which it is provided (Arts. 105, 108 and 110) that

> in any proceeding it is sufficient that the facts and conclusions be concisely, distinctly, and fairly stated, without any particular form being necessary, and without entering into particulars of evidence or of argument; (that) the allegations are divided into paragraphs numbered consecutively; and each paragraph must contain, as nearly as may be, only one allegation, (and that) every fact which, if not alleged, is of a nature to take the opposite party by surprise, or to raise an issue not arising from the pleadings, must be expressly pleaded.

By arts. 191 and 192 C.C.P. it is provided, with regard to inscription of law, that an issue of law may be raised, as to the whole or part of the demand, whenever the facts alleged, or some of them, do not give rise to the right claimed; that the inscription must contain all the grounds relied upon, and that no other ground can be alleged at the hearing.

I do not interpret the rules of pleading to mean that every paragraph of a defence, separately numbered, must in itself contain an allegation which, if proved, would negative the cause of action as to which the paragraph is pleaded; and, in the narrative form which is contemplated, a paragraph is, I think, sufficient in law if it allege a material fact, even although the proof of other facts, which may be alleged in other paragraphs, be essential to justify the defendant's conclusion; moreover a fact pleaded is, I should think, not immaterial, although it have relation only to the damages claimed, or a part of the damages, as distinguished from the right which the plaintiff alleges to maintain the action. These rules are less exacting than the corresponding rules of pleading in England and in the other provinces, and they are remarkable for the absence of the exception which the latter rules contain that no denial or defence shall be necessary as to the damages claimed or their amount.

Coming then to the two paragraphs of the defence which are subject to objection upon the inscription in law, it must be observed that they are not very artistically pleaded and admit perhaps of some question as to their

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intent and purpose, but that is not one of the grounds of the inscription; they are subject to attack here for legal insufficiency, and each of them must be held good or bad depending upon the enquiry as to whether it contain a material allegation.

It will have been perceived that, according to the declaration the plaintiffs sue as riparian owners on lake Mamphremagog to recover damages for the flooding of their land for several years by the use and maintenance of a dam at the outlet of the lake. They allege that their land along the margin of the lake has been undermined and flooded; that it has in consequence become unfit for use, and that the vegetation and trees thereon have been destroyed; the relief claimed is not only damages, but the demolition of the dam. Now while it is true, as pointed out by the Court of King's Bench, that title to a servitude cannot be acquired by possession, art. 549 of the Civil Code, nevertheless I should think that long possession of the dam by the defendant company and its auteurs, and delay on the part of the plaintiff in the assertion of the right claimed, are facts material for the consideration of the court at the trial, as affecting the remedy if not the right. The question of demolition is an important one. It is claimed under art. 1066 of the Civil Code, but, although by the terms of that article the court may order demolition to be effected by its officer, or authorize the injured party to do it at the expense of the other, it seems only consistent with justice, and I have no doubt is intended, that the power shall be exercised at discretion. There can be no doubt as to the materiality of delay or laches upon applications for injunctions; cases of acquiescence are numerous, and mandatory injunctions are not infrequently refused because it would be oppressive to grant them. In *Claude* v. *Weir* (1), the plaintiff claimed as a lower riparian to have the defendant enjoined. The court considering the circumstances of the case, refused to grant an injunction, seeing that the effect of it would be to destroy a principal industry of the locality. In *Lid-*

(1) [1888] M.L.R. 4 Q.B. 197.

stone v. *Simpson* (1), it was held by the Court of King's Bench that a slight encroachment on neighbouring land by a party who builds a house, made in good faith and with the knowledge of the owner of the land, and without objection on his part, would not give the latter a right to sue for demolition, his recourse being for indemnity, the measure of which would be the value of the land so occupied. There are other cases in the province to the like effect, but it seems unnecessary to cite them, the principle of the decisions having recently been considered and applied by the Judicial Committee of the Privy Council in a Quebec case, *Michaud* v. *Cité de Maisonneuve and Cité de Montréal* (2). In that case the plaintiff asserted a claim to land in the city of Maisonneuve. There had been some negotiations for a gift of the land to the city for highway purposes, and the city had taken possession and paved the land as part of the public way, with the plaintiff's full knowledge, and without any objection or warning by him. The Court of King's Bench of Quebec, on its appeal side (3), affirming a judgment of the Superior Court of the district of Montreal, had dismissed the plaintiff's action. The judgment of the Board was delivered by the Lord Chancellor, who, disposing of the case, said that the principle to be followed was that which had been applied in some well known English cases, and he mentioned *Laird* v. *Birkenhead Railway Company* (4); *Ramsden* v. *Dyson* (5); he said that, under circumstances such as were disclosed in that case a man would not be permitted to assert his title to the land in question.

In *Crawford* v. *The Protestant Hospital* (6), Jetté J., having observed that the English and French law upon the subject were alike, said that one of the questions he had to answer was:—

Quel recours la loi reconnait-elle au voisin qui souffre préjudice de l'entreprise ou de la construction faite par le propriétaire sur son fonds?

and, in the course of his judgment,

Entrons maintenant dans l'étude des principes qui doivent nous guider, afin d'en faire ensuite l'application aux faits de la cause. Puisés à une

(1) (1907) Q.R. 16 K.B. 557.
(2) [1923] 3 D.L.R. 487.
(3) (1919) Q. R. 30 K.B. 46.
(4) (1859) 1 John. 500; 70 E.R. 519.
(5) (1865) L.R. 1 H.L. 129.
(6) (1889) M.L.R. 5 S.C. 70, at p. 73.

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source commune—le droit romain—ces principes sont les mêmes d'ailleurs, en droit anglais qu'en droit français, et nous les trouvons aussi facilement reconnaissables dans l'ensemble de la jurisprudence anglaise que dans les textes précis de notre droit français.

This passage received the approbation of Sir Henry Strong in *Drysdale* v. *Dugas* (1), which was an action to recover damages for nuisance under the Quebec law. And, in that connection, it may be useful, by way of illustration or examples, to mention *Attorney General* v. *Sheffield Gas Consumers Co.* (2); *Attorney General* v. *Grand Junction Canal Co.* (3); *Gaunt* v. *Fynney* (4); *Rogers* v. *Great Northern Ry. Co.* (5), all cases where mandatory injunctions were refused on the ground of laches and acquiescence.

Now what is the case as alleged by the pleadings? It is that the plaintiff became owner in July, 1914: that the defendant company has, for several years, been the owner of the dam, and that, for the same time, it has been interfering with the water and raising the level, creating a public nuisance, and thus gradually has damaged the plaintiff's land, and the plaintiff claimed therefore not only to recover the loss so caused, but also that the dam be demolished. The defendant, among other allegations of its defence, says in par. 4, in effect, that the dam has existed since 1835, and at its present elevation since 1882; that in 1915 the dam was carried away, and replaced by a temporary structure, erected in that year, which in turn was succeeded by the present dam in 1920 and 1921. There is no allegation or suggestion as to any protest or complaint by the plaintiff's auteurs, or by the plaintiff herself, previously to this action, the declaration in which was filed on 5th February, 1925. I have intended and endeavoured to say nothing more than is necessary which might affect the course of the trial, or the disposition of the case when it comes to be heard. It will be for the trial judge to consider all the facts as they may then appear, and to give such effect to them as the justice of the case may require, but for the reasons which I have stated, I do not consider that proof of the facts alleged in the 4th paragraph of the

(1) (1895) 26 Can. S.C.R. 20 at p. 23.
(2) (1853) 3 DeG. M. & G. 304.
(3) [1909] 2 Ch. D. 505, at p. 508.
(4) (1872) L.R. 8 Ch. Ap. 8.
(5) (1889) 53 J.P. 484.

defence should be excluded as immaterial; and, if not, they are facts which may be pleaded.

As to par. 5, the substantial fact pleaded is that the defendant's auteurs removed obstructions from the outlet of the lake, and enlarged the discharge, thereby preventing the water from reaching its normal height during freshets. This is, in my view, an answer to the declaration in so far as it applies to the raising of the level of the water in times of freshet. The complaint is that the defendant, by the works which it maintained, raised "the normal, usual and natural level." The defence, as stated in par. 5, is, in effect, that the defendant did not raise the level of the water during freshets, but, on the contrary, that the level was reduced. There is thus, although perhaps in an argumentative form, a denial of the defendant's responsibility for the damage complained of for at least a part of the period during which the damage is alleged to have been gradually taking place, and therefore I think that this paragraph must be maintained as against the reasons of insufficiency alleged.

I would allow the appeal with costs throughout.

MIGNAULT J.—In this case I would allow the appeal and set aside the judgments of the two courts below which struck from the appellant's plea to the respondent's action paragraphs 4 and 5 which are quoted in the judgment of my brother Newcombe. In my opinion, the fundamental question underlying the issue between the parties is: What is the normal and natural level of the waters of lake Memphremagog which the respondent says the appellant has raised to her detriment? Evidence adduced under these two paragraphs may be useful for the proper decision of this question, and I cannot therefore say that they are irrelevant to the issues.

I express no opinion as to the construction of art. 1066 of the civil code, nor with respect to the principles which should govern the decision of this case. I would merely leave these paragraphs in the plea, believing that the judge at the trial will be in a better position to determine the

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materiality of any fact which it may be desired to put in evidence.

The appellant is entitled to its costs here and below.

Appeal allowed with costs.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Casgrain, McDougall, Stairs & Casgrain.*