THE MONTREAL WATER AND POWER COMPANY (DEFENDANTS)..... } APPELLANTS;

AND

HARRIET SIMPSON DAVIE (PLAINTIFF)..... } RESPONDENT.

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*Oct. 4.
*Nov. 3.

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

Appeal—Jurisdiction—Partial renunciation—Conditions and reservations—Amount in controversy—Supreme Court Act, s. 29—Refusal to accept conditional renunciation—Costs on appeal to court below—Costs of enquête—Nuisance—Statutory powers—Negligence—Legal maxim.

Where a conditional renunciation reducing the amount of the judgment to a sum less than $2,000 has not been accepted by the defendant, the amount in controversy remains the same as it was upon the original *demande* and, if such *demande* exceeds the amount limited by section 29 of the Supreme Court Act, an appeal will lie.

In an action for $15,000 for damages occasioned by a nuisance to neighbouring property, the plaintiff recovered $3,000, assessed *en bloc* by the trial court without distinguishing between special damages suffered up to the date of action and damages claimed for permanent depreciation of the property. Before any appeal was instituted, the plaintiff filed a written offer to accept a reduction of $2,590, persisting merely in $410 for special damages to date of action, with costs, and reserving the right to claim all subsequent damages, including damages for permanent depreciation, but without admitting that the damages suffered up to the time of the action did not exceed the whole amount actually recovered. This offer was refused by the defendants as it did not affect the costs and contained reservations, and an appeal was taken by them, on which the Court of King's Bench, in allowing the appeal, reduced the amount of the judgment to $410, reserved to plaintiff the right of action for subsequent special damages and damages for permanent depreciation and gave full costs against

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies and Nesbitt JJ.

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the appellants, on the ground that they should have accepted the renunciation filed.

Held, Davies J. dissenting, that the Court of King's Bench erred in holding that the defendants had no right to reject the conditional renunciation and in giving costs against the appellants; that the action should be dismissed as to the $2,590 with costs, and the reservation as to further action for depreciation disallowed, but that the judgment for $410 with costs as in an action of that class, with the reservation as to temporary damages accruing since the action, should be affirmed. As the costs at the enquête were considerably increased on account of the large amount of damages claimed, it was deemed advisable, under the circumstances, to order that each party should pay their own costs thus incurred.

Held, also, that, although the nuisance complained of was caused by the defendants acting under rights secured to them by special statute, yet, as there was negligence found against them upon evidence sufficient to support that finding, the maxim *sic utere tuo ut alienum non lædas* applied and the powers granted by their special charter did not excuse them from liability. *The Canadian Pacific Railway Co.* v. *Roy* ([1902] A. C. 220) distinguished.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, which maintained the plaintiff's action with costs.

The facts of the case and questions at issue on this appeal are stated in the judgments now reported.

Beaudin K.C. and *W. J. White K.C.* for the appellants cited arts. 275, 548 C.P.Q.; art. 356 C. C.; *The Canadian Pacific Railway Co.* v. *Roy* (1); *Molleur* v. *Dougall* (2); *Lusignan* v. *Sauvageau* (3); *Bellay* v. *Guay* (4); *Archbald* v. *Delisle* (5); *Drysdale* v. *Dugas* (6); *Williams* v. *Stephenson* (7); *Coghlin* v. *La Fonderie de Joliette* (8), per Girouard J., at page 159; 6 Laurent, nn. 150, 151; 3 Carré & Chaveau, quest. 1460; 3 Bioche, Procédure, 152.

(1) [1902] A. C. 220.
(2) 33 L. C. Jur. 105.
(3) Q. R. 3 S. C. 448.
(4) 4 Q. L. R. 91.
(5) 25 Can. S. C. R. 1.
(6) Q. R. 6 Q. B. 278; 26 Can. S. C. R. 20.
(7) 33 Can. S. C. R. 323.
(8) 34 Can. S. C. R. 153.

Cross for the respondent, referred to arts. 1053, 1054 C. C.; *Geddis* v. *Proprietors of Bann Reservoir* (1); *The Hammersmith and City Railway Co.* v. *Brand* (2); *Metropolitan Asylum District* v. *Hill* (3); *Hopkin* v. *The Hamilton Electric Light and Cataract Power Co.* (4); *Meux Brewery Co.* v. *City of London Electric Lighting Co.* (5); *National Telephone Co.* v. *Baker* (6); *Rapier* v. *London Tramways Co.* (7); *Canadian Pacific Railway Co.* v. *Parke* (8); *Attorney-General* v. *Cole* (9); *Montreal Street Railway Co.* v. *Gareau* (10); *Sanders-Clarke* v. *Grosvernor Mansions Co.* (11); *North Shore Railway Co.* v. *Pion* (12); *Canadian Pacific Railway Co.* v. *Couture* (13); 6 Laurent nn. 145, 147.

The judgment of the majority of the court was delivered by:

THE CHIEF JUSTICE.—The respondent by her action claimed $15,000 as damages from the appellants:—

For that a certain pumping station erected by them near her property at Westmount has caused damage to the plaintiff by continuous noise and vibration such as to cause her said house to shake and the windows and movables therein to rattle to such an extent as to deprive the plaintiff and the members of her family of rest and sleep and to injure her and their health, the whole for and throughout one year and ten months now past.

Moreover, the defendant in operating the said pumping station has from time to time during the period last above mentioned, by causing smoke, cinders, water and moisture to be directed against and to fall upon the said dwelling and property of the plaintiff, caused great damage to the latter.

By reason of the premises and by the said acts and faults of defendant the plaintiff's said immovable property has been rendered unfit for occupation as a plac residence and so depreciated as to be unsaleable.

(1) 3 App. Cas. 430.
(2) L. R. 4 H. L. 171.
(3) 6 App. Cas. 193.
(4) 2 Ont. L. R. 240.
(5) 72 L. T. 34.
(6) [1893] 2 Ch. 186.
(7) 63 L. J. Ch. 36.
(8) [1899] A. C. 535.
(9) 70 L. J. Ch. 148.
(10) Q. R. 10 Q. B. 417; 31 Can. S. C. R. 463.
(11) 69 L. J. Ch. 579.
(12) 14 App. Cas. 612.
(13) Q. R. 2 Q. B. 502.

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The said damages and depreciation in value (of which no detail can at present be given) amount to at least $15,000.00.

Wherefore plaintiff brings suit and prays that the defendant be adjudged and condemned to pay to the plaintiff the said sum of $15,000.00 with interest and costs of suit and of exhibits.

After issue joined and a long *enquête*, the Superior Court gave judgment against the appellants for $3,000 as well for the respondent's personal damages as for the damages to her property by the depreciation of its value.

Before an inscription in appeal by the appellants, the respondent produced upon the record an offer of renunciation to $2,590 of the judgment so rendered for $3,000 in her favour by the Superior Court. That offer is couched in the following terms:

> The above named plaintiff, with a view to avoid costs, appeals and uncertainty, hereby offers to renounce part of the judgment for $3,000.00 herein rendered on the eight day of January instant, to wit, the sum of two thousand five hundred and ninety dollars, persisting in the said judgment for the remainder thereof and costs, to wit, for the sum of four hundred and ten dollars ($410.00) in satisfaction of the damages mentioned in her declaration in this cause, caused and accrued and suffered prior to the 26th November, 1901 (other than permanent depreciation in value of the property) and costs, but at the same time, reserving to herself to claim hereafter from the defendant the amount of all damages subsequent to the said last mentioned date including the amount of such permanent depreciation as may be established; and she hereby tenders to the defendant a renunciation as aforesaid.
>
> These presents being made for the reasons hereinabove stated are not to be taken as an admission either that the damages do not exceed the sums above mentioned or that the said judgment is not well founded.
>
> Witness the signature of the said plaintiff, this 15th January 1903.
>
> (Signed) HARRIET S. KERR.

The appellants refused to accept that offer; First, because it did not cover the costs on the dismissal of the largest part of the action; Secondly, because the offer was a conditional one, and was made subject to a

reserve of the right to bring another action for the same cause, and brought on their appeal upon which the judgment now complained of by them was rendered. It reads as follows:—

Considérant que l'intimée demanderesse a clairement prouvé qu'elle a été troublée dans la jouissance de sa propriété par la faute de la défenderesse, et que ce trouble résultait des inconvénients qui provenaient du fonctionnement des machines construites par l'appelante sur la propriété voisine de celle de l'intimée ;

Considérant que l'appelante a ainsi violé les lois du voisinage et est responsable des dommages que l'intimée a subis ;

Considérant que ces dommages (en dehors de la dépréciation de la propriété sur laquelle il n'y a pas d'adjudication) s'élèvent, à venir au vingt-six novembre mil neuf cent un, à la somme de quatre cent dix dollars ;

Considérant qu'avant l'institution du présent appel, l'intimée s'est désistée de cette partie du jugement qui lui accordait des dommages à raison de la dépréciation de sa propriété et a consenti à ce qu'il fut réduit a la somme de quatre cent dix piastres :

Considérant que dans les circonstances le jugement de la cour supérieure rendu a Montréal, le huit janvier mil neuf cent trois, doit être réduit a ce montant de quatre cent dix piastres, avec dépens d'une action de cette classe ;

Maintient l'appel, mais avec dépens contre l'appelante ;

Confirme le jugement de la cour supérieure jusqu'a concurrence de quatre cent dix piastres avec intérêt de la date du dit jugement et les dépens d'une action de quatre cent dix piastres en faveur de l'intimée, et la cour donne acte a l'intimee de la reserve faite dans le dit desistement pour le recouvrement des dommages subsequents au 26 novembre 1901 et ceux resultant de la depreciation de la propriéte pour valoir ce que de droit.

A preliminary objection to our jurisdiction to entertain the appeal was taken by the respondent on the ground that, by her renunciation, the amount demanded is now $410 only. There is nothing however in this objection. The original demand was for $15,000 and the conditional renunciation to a part of her claim not having been accepted, the controversy as to the amount claimed remained as it had been before the Superior Court. It was quite open to her, notwith-

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standing her offer, to cross appeal and ask judgment for a higher sum than the $3,000 that the Superior Court had given her. The appeal taken by these appellants to the Court of Appeal was from a judgment for $3,000, in a case where the amount demanded originally was $15,000. The case is therefore clearly appealable. We have not to determine what would be the consequence as to our jurisdiction if the renunciation had been accepted.

As to the merits of the appeal, the judgment *a quo* seems to me erroneous.

The respondent's offer of a conditional renunciation not having been accepted by the appellants, their appeal, as I said, was from a judgment condemning them to $3,000 and the respondent had the right, on that appeal, to treat that offer as out of the record, as it had been expressly made without admission, and to insist upon keeping the judgment of $3,000 that she had recovered in the Superior Court. And that is what she did. And not only did she ask the confirmation of that judgment *in toto* and the dismissal of the appeal, but added in her factum before that court:

> The undersigned would only add that upon the evidence the award (of $3,000) has been very moderate and that the evidence would have justified a condemnation for over $5,000.

However, not having cross-appealed, she could not expect more than a confirmation of her judgment for $3,000.

The Court of Appeal, refusing to adjudicate upon that part of the respondent's claim for damages caused by the depreciation in value of her property and to dismiss the action *pro tanto*, allowed the appeal however for an amount of $2,590 as being so much given for that depreciation in value by the Superior Court, and deducted that sum from the $3,000 awarded by

the Superior Court, leaving the small balance of $410 to the respondent. These figures were taken from the *ipse dixit* of the respondent, for the judgment of the Superior Court allows her $3,000 *en bloc*. However, they may be assumed to be correct for the purposes of this appeal.

Now, what the appellants complain of is that though their appeal was so allowed as to $2,590 out of $3,000, yet they were condemned to pay all the costs of the trial and of the appeal on both sides upon the ground that they should have accepted the respondent's offer to renounce that part of the judgment, and, as another ground of grievance, that the non-dismissal of the action as to the $2,590 and the reservation granted by the Court of Appeal to the respondent of the right of bringing another action against them for these $2,590 is unjust and unlawful.

In my opinion, on both these grounds, their appeal should be allowed. The respondent had no right to that reservation, and the appellants were justified in refusing her offer coupled with it as it was. The action had been tried and judgment given by the Superior Court as well for the damage caused by the depreciation in value of respondent's property as for the other part of her claim; and the Court of Appeal had not the right to refuse to adjudicate upon that part as well as upon the other simply because the respondent asked them conditionally not to do so. She was not, upon the record, entitled to this sum of $2,590, as she now admits, by not cross-appealing for it here and by asking us, on the contrary, to confirm the judgment.

Now, having so failed as to that part of her claim, upon what ground could she ask the court to reserve the right to her of vexing and harassing the appellants a second time for the same cause? She says in her factum:

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It was in view of the fact that the evidence at the trial did not make it clear to what extent the nuisance was attributable to defective construction or bungling which might he regarded as being of a temporary character, and to what extent it was attributable to a cause which would be certain to continue in permanent operation, that the respondent decided to relinquish as much of the judgment in her favour as represented permanent damage and to adhere to it only for an amount representing damages actually suffered prior to action brought.

But if she had not proved her case as to that part of her demand it should have been dismissed by the Superior Court. And she then would have no right to another action.

There is no reason, that I can see, for reserving her that right. Her claim, if not proved, not having been dismissed by the Superior Court ought to have been dismissed by the judgment of the Court of Appeal. By her offer of renunciation, she said to the appellants: "I will abandon my judgment for the $2,590, because I may not have given sufficient evidence of the depreciation in value of my property and the Court of Appeal might reverse it, but only if you consent to my suing you again for it."

Such an offer the appellants had the right to reject, and the Court of Appeal erred in holding the contrary.

Further, the appellants were not bound to accept the respondent's offer of renunciation for the additional reason that it did not cover the costs occasioned by her claim for the $2,590 that she offered to renounce. By her demand of $15,000, now conceded to have been grossly excessive and unfounded to the amount of $14,590, she tripled, if not more, the appellants' costs of defence to her action.

Now, by the judgment *a quo* not only have they to bear the burden of their own costs, but they are also mulcted, in addition to all the costs of the appeal on both sides, with all the respondent's costs occasioned

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by her claim for the $2,590, although they succeed on that part of the case. To so put on the appellants the consequences of the exaggeration of the respondent's original claim is a manifest injustice to them. And though the allowance of the appeal will affect principally the costs; *Archbald* v. *Delisle* (1); yet, as the Court of Appeal came to the determination of giving them all against the appellants on the erroneous ground that they should have accepted the respondent's conditional offer of renunciation, we must interfere and redress the injustice that the appellants would suffer if the judgment were to stand. Then the appellants are entitled to have the reservation to the respondent of the right to another action for the depreciation in value of her property struck out of the judgment.

As to the $410 to which the appellants are condemned for personal damages to the respondent, there is nothing in their contention, based on the decision of the Privy Council in the *Canadian Pacific Railway Co.* v. *Roy* (2), that they are not liable because they were acting under their statutory charter. There is a finding of negligence against them on this part of the case, in support of which there is ample evidence, and their charter does not authorise them to be negligent. The maxim *sic utere tuo ut alienum non lædas* has to be read into it.

I would allow the appeal with costs in this court and in the Court of Appeal, dismiss the action as to $2,590 with costs, strike out of the judgment the reservation in favour of respondent of another action for the depreciation in value of her property; reservation of action for damages accrued since first action, if any, to stand; judgment against appellants for $410 with interest from the date of the judgment of the

(1) 25 Can. S. C. R. 1. (2) [1902] A. C. 220.

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Superior Court, and costs of an action of that class to stand. As to the costs of the *enquête*, as it would otherwise create difficulties in the taxation, I would order that each party pay his costs thereof.

DAVIES J. (dissenting).—The two substantial points submitted by the appellants as defences to this action for damages arising out of an alleged nuisance caused to respondent and her property by the operation of appellants' water-pumping station were:—First, that they had legislative authority to commit the nuisance, if nuisance there was, and:—Secondly, that no nuisance had been committed.

On both points, in my opinion, their contention is untenable. They had no legislative authority to erect their pumping station on any particular piece of property, but a general power to do as a company, in this particular, what a private person could do. In doing what they did they are clearly responsible, just as private persons would be for all damages caused thereby to their neighbours.

As to the amount of these damages, they were assessed by the Superior Court at three thousand dollars.

The present appellants then appealed to the Court of King's Bench, persisting in their claim of immunity from an action such as this and in their contention that the plaintiff had not sustained any damage.

Before the appeal was inscribed, the plaintiff, the present respondent, offered in writing to give up $2,590 of the judgment awarded her by the Superior Court and thus reduce her judgment to $410. This $410 which the plaintiff thus offered to accept was expressed to be in satisfaction of the damages caused to her up to the commencement of the action, other than permanent depreciation in value of her property. In the same writing, she expressly reserved to herself the

right to recover all subsequent damage, together with any permanent depreciation she could establish.

The appellants refused to accept this offer, partly on the question of costs and partly because of the reserve made, and persisted in their appeal.

The Court of King's Bench maintained the legal contention of the plaintiff as to her right to bring the action for such damages as she had sustained up to the commencement of the action, which they assessed at $410, but allowed the appeal for $2,590, as being the amount allowed for depreciation of the plaintiff's property by the Superior Court. They also gave the plaintiff her costs in the Superior Court as for an action brought to recover the actual amount allowed by them and damages and on appeal.

I am not disposed, with the facts we possess, to interfere with the judgment below on the question of costs simply. I think the judgment of that court on the substantial questions of law and fact was correct and that they were right in making the reservation they did in the plaintiff's favour as to future actions for damages for depreciation of property. It may well be that the appellants will so improve the working of their pumping power that all reasonable ground for complaint will be removed and the future damages to the plaintiff's property largely decreased, possibly reduced to a minimum. Or they may remove the site of the pumping power to another place, or they may persist in going on as at present. But, in any contingency, the plaintiff's rights were properly conserved by the Court of King's Bench by the reservation made by it in its judgment appealed from.

I think that the appeal should be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellants: *White & Buchanan.*

Solicitor for the respondent: *A. G. Cross.*