1948
*June 13, 14
1949
*Oct. 4

BETWEEN

THE K.V.P. COMPANY LIMITED (DEFENDANT) ..... } APPELLANT;

AND

EARL McKIE *et al.* (PLAINTIFFS) ... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Waters and Watercourses—Rights of Riparian Owners—New trial, discovery of new evidence as ground for—Jurisdiction to award damages in lieu of Injunction—The Supreme Court Act, R.S.C., 1927, c. 35, s. 68—Ontario Judicature Act, R.S.O., 1937, c. 100, s. 17.

The plaintiffs, lower riparian owners on the Spanish River, sued the defendant, the operator of a pulp and paper mill situate up the river at Espanola, Ontario, for pollution of the waters of the river by discharges from its mill. They secured a judgment in damages and an injunction restraining the defendant from depositing foreign substances in the river waters which alter the character or quality of the water to the injury of the plaintiffs. The Ontario Court of Appeal affirmed the judgment, subject to a variation in the form of the injunction granted.

The defendant appealed to this Court alleging error in the granting of the injunction when damages would have been an adequate remedy and prayed that a new trial be granted upon terms, limited to the issue as to whether an injunction should go.

Held: A new trial could not be granted as it had not been shown that new evidence had been found which the defendant could not have found by the exercise of reasonable diligence prior to the trial, and that if adduced, would be practically conclusive. *Varette* v. *Sainsbury* (1) applied.

Held: Also, that the provisions of the Ontario *Lakes and Rivers Improvement Act,* even if it purported to do so, would not enable this Court to give a judgment that was impossible in law at the time of the decision of the Court of Appeal, and that the amendment to s. 68 of the *Supreme Court Act* refers only to further evidence upon a question of fact. *Boulevard Heights* v. *Veilleux* (2).

Held: Further, that although under s. 17 of the *Ontario Judicature Act,* the Court has jurisdiction to award damages in lieu of an injunction, its discretion is governed by the consideration of whether the granting of damages would be a complete and adequate remedy, and since pollution has been shown to exist, it would not be, and the injunction should therefore, go. *Leeds Industrial Co-Operative Society Ltd.* v. *Slack* (3)—referred to.

Injunction ordered stayed for period of six months. *Stollmeyer* v. *Petroleum Development Co. Ltd.* (4) and *Stollmeyer* v. *Trinidad Lake Petroleum Co. Ltd.* (5) referred to.

*Present: Kerwin, Taschereau, Rand, Estey and Locke JJ.

(1) [1928] S.C.R. 72.
(2) (1916) 52 Can. S.C.R. 185.
(3) [1924] A.C. 851.
(4) [1918] A.C. 498.
(5) [1918] A.C. 485.

1949

K.V.P. Co. LTD. v. MCKIE et al.

APPEAL from a judgment of the Court of Appeal for Ontario, (1) affirming with a variation as to the form of injunction granted, the judgment of McRuer, Chief Justice of the High Court of Ontario (2).

J. R. Cartwright K.C. and *J. J. Robinette K.C.* for the appellant.

A. W. Roebuck K.C. and *D. R. Walkinshaw* for the respondent.

The judgment of the Court was delivered by:

KERWIN, J.: The K.V.P. Company Limited appeals from five judgments of the Court of Appeal for Ontario (3) affirming, with a variation, the judgments of the Chief Justice of the High Court (4) granting the plaintiffs in each action damages for the pollution of the Spanish River, and an injunction. The variation is merely in the form of the injunction granted and counsel admitted that the form adopted by the Court of Appeal was taken from the order made in *Lingwood* v. *Stowmarket Co.* (5).

The respondents (plaintiffs) are owners of lands on the Spanish River, which flows into Lake Huron, and the appellant operates a pulp and paper mill higher up the river. While the respondents' lands are not particularly suitable for agriculture, some are farmed and are used to grow vegetables. The respondent in one action has a summer residence on his property; another has a grant of a water lot on the river so that in his case the injunction applies to the water flowing over his lands; and the lands of the others have cabins erected on them which, together with the house in some cases, are used for roomers and boarders in the tourist industry.

The trial judge found that the appellant had polluted the waters of the river and awarded the respondents damages of $450, $1,250, $300, $2,100, $1,000 and $500. The Court of Appeal agreed with these findings and the appellant does not now attack them. The sole point argued before us was as to the injunction.

The suggestion that there should be a new trial upon any terms that the Court might see fit to impose, limited

(1) [1949] 1 D.L.R.
(2) [1948] O.R. 398.
(3) [1949] 1 D.L.R. 39.
(4) [1948] O.R. 398.
(5) (1865) 1 Eq. 77 and 336.

1949

K.V.P. Co. LTD. v. McKIE et al.

Kerwin J.

to the issue as to whether an injunction should be granted, cannot be entertained as it is not shown in any way that new evidence had been found which could not have been discovered by the appellant by the exercise of reasonable diligence and that, if adduced, it would be practically conclusive: *Varette* v. *Sainsbury* (1). It was then argued that by section 30 of the *Lakes and Rivers Improvement Act,* R.S.O. 1937, chapter 45, as enacted by section 6 of chapter 48 of the Statutes of 1949, this Court is empowered to refuse to grant an injunction against the owner or occupier of a mill under certain named conditions, or to grant an injunction to take effect after such lapse of time or upon such terms and conditions or subject to such limitations or restrictions as may be deemed proper, or, in lieu of granting an injunction, to direct that the owner or occupant of the mill take such measures or perform such acts to prevent, avoid, lessen or diminish the injury, damage or interference complained of as may be deemed proper. Other provisions are made as to damages already suffered and as to subsequent damages. Reliance is placed upon subsection 2 by which it is provided that subsection 1, re-enacting section 30 of the original Act, shall apply to every action or proceeding in which an injunction is claimed in respect of any of the matters mentioned including every pending action and proceeding and including every action or proceeding in which an injunction has been granted and in which any appeal is "pending". The amended Act came into force on the day it received the Royal Assent, April 1, 1949, and while the judgment of the Court of Appeal was given November 22, 1948, it is contended that the appeal to this Court is "pending" within the meaning of the enactment.

It has been decided in *Boulevard Heights* v. *Veilleux* (2), that since section 46 of the *Supreme Court Act* provides that this Court may dismiss an appeal or give the judgment which the Court whose decision is appealed should have given, and since a provincial legislature may not extend the jurisdiction of this Court as conferred by Parliament, such a provision as the one here in question would not, even if it purported so to do, enable this Court to

(1) [1928] S.C.R. 72.

(2) (1915) 52 Can. S.C.R. 185.

give a judgment that was impossible in law at the time of the decision of the Court of Appeal. The 1949 Act is not an enactment declaratory of what the law was deemed to be. Mr. Cartwright sought to overcome this difficulty by pointing to the amendment to the *Supreme Court Act* in 1928 by which the following proviso was added to section 68:

> Provided that the Court may, in its discretion, on special grounds, and by special leave, receive further evidence upon any question of fact, such evidence to be taken in the manner authorized by this Act, either by oral examination in Court, by affidavit, or by deposition, as the Court may direct.

It is apparent that this refers only to further evidence upon any question of fact, and the decision in the *Boulevard Heights Case* therefore applies. Leave was asked to file an affidavit of Ralph A. Hayward under this proviso but leave has never yet been given thereunder and the circumstances are not such as to warrant making an order on this occasion.

It was next contended that on the evidence in the record and even without the 1949 amendment to the *Lakes and Rivers Improvement Act,* this Court should, in the circumstances, decline to grant an injunction and should confine the respondents to damages. The damages are those assessed by the trial judge and those to be fixed by the local master at Sudbury upon a reference directed to him to ascertain the damages sustained by the respondents from the date of trial "to the date that the injunction becomes effective", which date was fixed as the expiration of six months from the date of the trial judgment, April 15, 1948. Following the notice of appeal from the judgment of the Court of Appeal to this Court, the appellant obtained an order staying the operation of the injunction until the final determination of the appeal.

The rights of riparian owners have always been zealously guarded by the Court. It is unnecessary to discuss all the decisions referred to by Mr. Cartwright and it suffices to quote the remarks of Lord Sumner, speaking on behalf of the Judicial Committee, in *Stollmeyer* v. *Petroleum Development Company Limited* (1) at 499:

> The grant of an injunction is the proper remedy for a violation of right according to a current of authority, which is of many years' standing

(1) [1918] A.C. 498.

1949

K.V.P. Co. LTD. v. McKIE et al.

Kerwin J.

and is practically unbroken: *Imperial Gas Light and Coke Co.* v. *Broadbent* (1); *Pennington* v. *Brinsop Hall Coal Co.* (2). In *English* v. *Metropolitan Water Board* (3), there is a mere dictum to the contrary. The discretion of the Court in the grant of such injunctions is regularly exercised in this sense.

Section 17 of the *Ontario Judicature Act* provides:

> Where the Court has jurisdiction to entertain an application for an injunction against a breach of a covenant, contract or agreement or against the commission or continuance of a wrongful act, or for the specific performance of a covenant, contract or agreement, the Court may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the Court may direct, or the Court may grant such other relief as may be deemed just.

Under the precursor of this section, Lord Cairns' Act, 1858, the House of Lords decided in *Leeds Industrial Co-operative Society Limited* v. *Slack* (4), that jurisdiction was thereby conferred to award damages in lieu of an injunction in the case of a threatened injury, but Viscount Finlay, with whom Lord Birkenhead expressly agreed, and of whose judgment Lord Dunedin stated that "he has exactly expressed my views", pointed out at page 860 that the Courts have on more than one occasion expressed their determination to prevent any abuse of the Act by legalizing the commission of torts by any defendant who was able and willing to pay damages. He said it was sufficient to quote two passages from the reports, the first of which occurs in the judgment of Lord Justice Lindley in *Shelfer* v. *City of London Electric Co.* (5), and the second of which occurs in the judgment of Buckley J. in *Cowper* v. *Laidler* (6).

In *Canada Paper Co.* v. *Brown* (7), Duff J., in an obiter at page 252, stated that he was far from accepting a contention that considerations touching the effect of granting the injunction upon residents of the neighbourhood, and indeed upon the interests of the appellant company, were not considerations properly to be taken into account in deciding the question whether or not the remedy by injunction should be accorded the plaintiff under the law of Quebec. He continued, however, by pointing out that it

(1) (1859) 7 H.L. Cas. 600, 612.
(2) (1877) 5 Ch. D. 769.
(3) [1907] 1 K.B. 588, 603.
(4) [1924] A.C. 851.
(5) [1895] 1 Ch. 287, at 315-6.
(6) [1903] 2 Ch. 337 at 341.
(7) (1922) 63 Can. S.C.R. 243.

is a judicial discretion that is exercised, that is, one regulated in accordance with judicial principles as illustrated by the practice of the Courts in giving and withholding the remedy. In the subsequent case of *Gross* v. *Wright* (1), that same learned judge, in a case from the Province of British Columbia, stated that he had no doubt, as laid down by the Lord Justices in *Kennard* v. *Cory* (2), that the primary point for consideration in every case where the question is injunction or no injunction is whether or not the wrong complained of is a wrong "for which damages are the proper remedy" to use the phrase of Lindley L.J. in *London & Blackwall Ry. Co.* v. *Cross* (3), that is to say, a complete and adequate remedy.

Pollution has been shown to exist, damages would not be a complete and adequate remedy, and the Court's discretion should not be exercised against the "current of authority which is of many years' standing".

An injunction should, therefore, go but it is argued that this Court should adopt the course followed by the Judicial Committee in the *Stollmeyer Case,* referred to above. Before considering that case attention should be directed to the decision of the Judicial Committee immediately preceding in the case of *Stollmeyer* v. *Trinidad Lake Petroleum Co. Ltd.* (4). There it was held that an owner of land upon a stream flowing in a permanent defined channel, although fed exclusively by rain water running off the surface of the land in certain seasons, was entitled to have the natural flow of the water without sensible diminution or increase (subject to the lawful rights of upper riparian owners) and without sensible alteration in its character or quality. A stream of the above description flowed through lands, the whole of which belonged to the respondents with the exception of a plot situated at its mouth, which belonged to the appellants. The latter's land was unsuitable for agriculture and it was not used for any purpose. The respondents carried on upon their land the business of boring for oil, which was the sole industry of the locality, and diverted part of the water of the stream in order to supply water to other property, thereby sensibly diminishing the flow past appellants' land. They also, without

(1) [1923] S.C.R. 214 at 227.
(2) [1922] 2 Ch. 1.
(3) [1886] 31 Ch. D 354 at 369.
(4) [1918] A.C. 485.

1949

K.V.P. Co. LTD. v. McKIE et al.

Kerwin J.

negligence, caused a sensible pollution of the water by oil and salt. The appellants had suffered no pecuniary damage and the Trinidad Courts dismissed an action for damages and an injunction. The Judicial Committee decided that the appellant had suffered an injuria and was entitled to an injunction. The Judicial Committee made certain declarations as to the use of the water by the respondents and as to the pollution of the River Vessigny, and then gave leave to the appellants to apply for an injunction to the Court of first instance after a period of two years. In that case it will be noted that (1) the lands of the appellants were unsuited for agriculture; (2) the lands were not being used for anything; (3) the appellants had suffered no damage; (4) the Courts below had refused the injunction.

When we come to the subsequent case, we find that the respondent and the appellant were respectively upper and lower riparian owners upon the banks of a river in Trinidad and carried on upon their respective lands the business of boring for oil. The trial judge found that the respondents had polluted the water with both oil and salt, and awarded the appellant £50 damages but refused to grant an injunction. An appeal to the full Court against the refusal to grant an injunction was dismissed upon an equal division of opinion between the two members of the Court. The Judicial Committee reversed that decision and it was in the course of delivering the judgment of their Lordships that Lord Sumner used the language quoted above. At the conclusion he pointed out that the loss to the respondents would be out of all proportion to the appellant's gain and that, the respondents undertaking to pay from time to time such pecuniary damages as their work may be found to have caused to the appellant on inquiry before the Court of first instance, the operation of the injunction should be suspended for two years to give an ample opportunity to the respondents to carry out any works necessary to remove the causes of complaint with liberty to apply to the Court of first instance for a further suspension if special grounds could be shown.

The writs in the actions before us were issued in May and June, 1947, complaining of damages since May 1, 1946.

The actions were tried in December 1947 and judgment was given by the Chief Justice of the High Court on April 15, 1948. The judgment of the Court of Appeal was given November 22, 1948, and the appeals before us were argued on June 13 and 14, 1949. The lands of the respondents are being used; considerable damages have been awarded and the appellant has had before it the fact of the injunction since April 15, 1948. The two cases decided by the Judicial Committee are quite distinguishable but, under all the circumstances, we have concluded that the operation of the injunction should be stayed for a period of six months.

Subject to this variation, the appeal and the appellant's motion to introduce new evidence should be dismissed with costs. Notice of a motion had been given by the respondents for leave to file an affidavit of Maurice Adelman but the matter was not mentioned at the argument, and that motion should, therefore, be dismissed without costs.

Subject to a variation whereby the operation of the injunction is stayed for a period of six months, the appeal and the appellant's motion to introduce new evidence are dismissed with costs. The respondent's motion is dismissed with costs.

Solicitors for the appellant: *McGuire, Boles & Worrall.*

Solicitors for the respondents: *Bagwell & Walkinshaw.*

Reporter's Note: On November 21, 1949 the appellant moved before the Court for an Order to vary the judgment to allow it to apply to the High Court of Justice for a further suspension of the injunction in the event of the appellant being able to show special grounds. The Court, without calling on the respondent, dismissed the motion with costs.

Cartwright K.C. for the Motion.

C. F. Scott, contra.