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LA COMPAGNIE ELECTRIQUE DORCHESTER (DEFENDANTS). } APPELLANTS;

AND

HESIODE ROY (PLAINTIFF) ..... RESPONDENT.

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

Rivers and streams—Industrial improvements—Penning back waters—Permanent works—Damages—Measure of damages—Expertise—Arbitration—Reparation—Loss of water-power—Future damages—Compensation once for all—Right of action—Practice—Statute, R.S.Q., 1909, *arts.* 7295, 7296.

Per Davies, Duff and Brodeur JJ., Idington and Anglin JJ. *contra.*—In an action for damages occasioned by constructions in a stream for industrial purposes the plaintiff is entitled, under the provisions of article 7295 of the Revised Statutes of Quebec, 1909, to recover the full extent of damages which experts acting under article 7296, R.S.Q., 1909, would have authority to award as compensation, once for all, for the injuries sustained. *Breakey* v. *Carter* (Cass. Dig. (2 ed.) 463) and *Gale* v. *Bureau* (44 Can. S.C.R. 312), referred to.

By the judgment appealed from it was held that the plaintiff was entitled to reparation for loss incurred in respect of the diminution in value of his water-power and the adjoining property on account of the construction of the works in question.

Held, affirming the judgment appealed from (Q.R. 22 K.B. 265), Idington and Anglin JJ. dissenting, that the plaintiff was entitled to reparation for such injuries.

Per Idington and Anglin JJ.—As it was apparent that the defendants could operate their works in such a manner as to avoid, or diminish, the inconveniences occasioned thereby, it would not be proper, in such an action, to include possible future losses in assessing the damages to be given as compensation for the injuries complained of. *Montreal Street Railway Co.* v. *Boudreau* (36 Can. S.C.R. 329); *Chanbly Manufacturing Co.* v. *Willett* (34 Can. S.C.R. 502); and *Backhouse* v. *Bonomi* (9 H.L. Cas. 503), referred to.

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*PRESENT: Davies, Idington, Duff, Anglin and Brodeur JJ.

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Per Davies, Anglin and Brodeur JJ.—Where no effective steps have been taken by the party from whom damages are claimed to have the damages resulting from improvements constructed in a stream ascertained by an expertise, in the manner provided by article 7296, R.S.Q., 1909, he cannot set up a mere proposal of such an arbitration as an exception to an action against him to recover compensation.

Per Duff J.—The defendants not having taken steps under the statute for several months, and not having shewn that they were in fact ready and willing to proceed under the statute, the action lies.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), which varied the judgment of McCorkill J., in the Superior Court for the District of Quebec(2), by increasing the damages awarded to the plaintiff.

The plaintiff was the owner of a mill driven by water-power, on the River Etchemin, near the site of which the company, defendants, erected a dam in connection with a power-house which they were constructing on the same stream a short distance below the plaintiff's mill. The dam was of a permanent character and had the effect of penning back the water, raising its level and flooding the tail-race of plaintiff's mill to such an extent that his mill-wheels were drowned. Another effect of the dam was to make still water where previously there had been a rapid, that ice formed in the pond so created and, when it came out in freshets, the ice carried away the plaintiff's mill. For all these injuries the plaintiff sued to recover $6,000 damages and, at the trial, McCorkill J. assessed the damages at $1,070, being for the actual losses incurred up to the time of action, less $110 for some of the machinery which had been saved, and re-

(1) Q.R. 22 K.B. 265. (2) Q.R. 22 K.B., at p. 266.

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course was reserved to the plaintiff to bring further actions for any damages happening subsequently. Both parties appealed and, by the judgment now appealed from, the Court of King's Bench dismissed the appeal taken by the company and allowed that of the plaintiff by increasing his damages to $3,685 in consideration of the diminished value of the plaintiff's water-power and adjoining property.

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

L. A. Cannon K.C. for the appellants.

Eusèbe Belleau K.C. for the respondent.

DAVIES J.—The trial judge did not grant damages once for all because he felt himself concluded from doing so by the decision of this court in *Gale* v. *Bureau* (1). I do not think, however, that that case decided that point absolutely. There are obviously many cases in which future damages may or may not arise and which may or may not be foreseen or capable of being estimated at the time action is brought or proceedings begun under the statute to fix them. In all such cases recourse may be reserved for future damages. But with respect to damages which have been incurred and which are capable of being estimated when action is brought or proceedings taken under the statute to estimate them I see no reason whatever why they should not be estimated and determined.

With respect to the value of the water-power of the plaintiff which the trial judge did not include in his

(1) 44 Can. S.C.R. 305.

judgment, because he thought it was a subject-matter for future damages which the authorities prohibited him from considering, I cannot see why such value may not now be estimated as well as later.

It is found as a fact by both courts that the plaintiff's mill has been destroyed and his water-power had ceased to be a water-power — as such it has been destroyed. The defendant does not plead that the dam erected by him which caused this destruction was a temporary construction or other than a permanency. In the absence of any such plea we must hold it to be intended as a permanent work. If the plaintiff is not now entitled to be compensated for the loss of this water-power, when will his future right to such compensation arise? A reservation of future rights in such a case would be an illusory one. He has, in my opinion, under the circumstances a right to damages as well for the destruction of his water-power as for the destruction of his mill. The assessment of damages made by the court of appeal, on the basis of the plaintiff being entitled to such damages once for all, I see no reason to quarrel with.

On the other question as to the right of the plaintiff to take proceedings for the recovery of the damages in the courts, without resorting to the method prescribed by the statute, I am of opinion that we are bound by the authorities to hold that the statute does not take away the common law right of the party damnified to sue unless at any rate proceedings had been properly commenced and prosecuted under the statute for the assessment of the damages.

I do not think the letter written to the plaintiff in this case before suit began constituted such a valid commencement of proceedings under the statute. It

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was, no doubt, an invitation to the plaintiff to name an arbitrator under the statute, but that was all and such a mere invitation without the naming of an arbitrator by the party himself making it cannot be held to constitute a valid commencement of proceedings.

I would dismiss the appeal.

IDINGTON J. (dissenting).—It seems to me that to allow damages based on the supposition that the respondent's water-power has been permanently taken away, is contrary to the law as laid down in the judgment of this court in the case of *Montreal Street Railway Co.* v. *Boudreau*(1), which I think should be followed.

It was and is quite competent for the appellant to so lower its dam as to avert future damages.

Of course, if the appellant chose to avail himself of the statutory provisions for assessing damages what is allowed here might well be proper measure of such.

But in an action even where the right to assess damages is provided by arbitration under a statute that does not necessarily determine same measure of damages in each case.

The appellant being liable for actions from day to day we ought not in this case to depart from the law so laid down and add to the confusion that prevailed before that case.

The appeal should be allowed with costs.

DUFF J.—The respondent was the proprietor of a mill situate on the River Etchemin worked by the

(1) 36 Can. S.C.R. 329.

direct application of water-power derived from the river. The appellant company, at a place below the respondent's mill, erected a dam, for the purpose also of obtaining water-power for working its plant. The respondent's mill was carried away by a freshet in April, 1911, and it was charged by the respondent and has been held by the courts below that this was due to the presence of the appellant's dam. It has also been found as a fact that the effect of erecting the dam was to raise the level of the river to such an extent as to submerge the respondent's turbines and permanently to diminish the head of water available for the working of his mill. The learned trial judge held that the plaintiff was entitled to compensation in respect of the injury proved to have been suffered by him down to the time of the commencement of the action — such damages comprising the value of the mill swept away and loss of profits arising, first from the diminished efficiency, and afterwards from the destruction of the mill. The court of appeal held that the plaintiff was entitled to reparation not only in respect to the damages mentioned, but also for loss in respect of the diminution in the value of respondent's land by reason of interference with his water-power. Two questions arise: First: Can compensation for such loss be awarded ? and, Secondly: Whether, by reason of certain proposals made by the appellant's solicitors, prior to the commencement of the action, the action ought to be entirely dismissed ?

The appellant's dam was erected and worked under the authority of article 7295 of the Revised Statutes of Quebec of 1909. That article and the succeeding article 7296 are as follows:—

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7295. Every proprietor of land may improve any water-course 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 kinds, and for this purpose may erect and construct in and about such water-course, all the works necessary for its efficient working, such as flood-gates, flumes, embankments, dams, dykes and the like.

7296. (1) The proprietors or lessees of any such works are liable for all damages resulting therefrom to any person, whether by excessive elevation of the flood-gates or otherwise.

(2) Such damages shall be ascertained by experts to be appointed by the parties interested in the ordinary manner.

(3) In default of either of the said parties appointing an expert, experts selected by the warden of the county shall act; and, in case of difference of opinion, the two experts appointed shall choose a third.

(4) The experts shall be sworn before a justice of the peace faithfully to perform their duty as such.

(5) In assessing the damages and fixing the compensation to be paid, the experts may, whenever proper, set off against the whole or any part of such damages, any increased value which the property of the claimant has acquired by reason of the erection of such works, mills, manufactories or machinery.

(6) In default of payment of the damages and indemnity so awarded, within six months from the date of the report of the experts, together with legal interest to be computed from the said date, the party by whom the payment is due, shall demolish the works which he shall have erected, or they shall be so demolished at his expense, upon judgment to that effect rendered, the whole without prejudice to the damages already incurred.

It was held by this court in *Breakey* v. *Carter*(1), (I am quoting for convenience from my own judgment in *Gale* v. *Bureau*(2)):—

That the right given by article 7295, in so far as it justified 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.

It was also held in that case(1), and the decision on that point was followed in *Gale* v. *Bureau*(2), that this statutory right to reparation was one in respect

(1) Cass. Dig. (2 ed.) 463. (2) 44 Can. S.C.R. 305, at p. 312.

of which the person damnified has recourse to the courts as damage from time to time accrues notwithstanding the provisions of article 7296. I think, moreover, that there is no satisfactory ground for holding that (assuming an action to lie in the circumstances) the plaintiff cannot recover in the action reparation once for all to the full extent to which experts proceeding under the Act would be entitled to award him compensation. I may add that I regard this action as a proceeding to recover compensation under this statute; I decide nothing as to the rules of law by which, apart from the statute, the measure of damages would be determined.

As to the second ground of appeal, I think that, in the circumstances, the appellants were, at least, bound to shew that they were in point of fact ready and willing to proceed under article 7296 and, having regard to the delay that had already taken place, I agree with Mr. Justice Cross that they have failed to do so.

ANGLIN J. (dissenting).—Two questions arise on this appeal — the first, whether the plaintiff's right of recourse to the courts is taken away by article 7296, R.S.Q. 1909; the other, whether the plaintiff's recovery should be once for all, in respect of damages future as well as past, or should be confined to damages already sustained.

No case was made for a review of the finding that the appellants' dam caused the injuries complained of. The quantum of the damages awarded in the Superior Court, if they should be confined to injuries already sustained, or of those awarded by the court of appeal,

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if they should be now allowed once for all, has not been seriously attacked.

If the first of the two substantial questions presented for determination, were *res integra,* I should incline to the view that the appellant's contention upon it is well founded. By article 7295 certain works are authorized; by article 7296 the proprietor or lessee of such works is required to pay "all damages resulting therefrom," and it is provided that "such damages shall be ascertained by experts, etc." the liability thus created would seem to be only for damages so ascertained. But it has been held in a series of cases in the Province of Quebec (see *Gale* v. *Bureau* (1), at page 308), and by this court in *Breakey* v. *Carter* (2), followed in *Gale* v. *Bureau* (1), that the jurisdiction of the courts is not ousted by these statutory provisions. If, as Mr. Justice Cross appears to think, effective steps to commence proceedings under article 7296, taken before action has been brought in the courts, would oust the jurisdiction of the latter, I agree in his view that it has not been established in the present case that such steps were so taken. The appeal on this branch fails.

The second question presents a little more difficulty. The decision of this court in *Gale* v. *Bureau* (1) does not appear to be decisive upon it. There is no suggestion made that the structure of the defendants is not meant to be permanent or that the invasion of the plaintiff's rights was unintentional. In *Gale* v. *Bureau* (1) the defendant appears to have done what was complained of inadvertently (p. 311) and it was not his avowed intention to maintain the dam in such

(1) 44 Can. S.C.R. 305. (2) Cass. Dig. (2 ed.) 463.

a way as to continue the flooding complained of (p. 317). In the present case the appellants may so manage the gates of their dam in future years that the water privileges of the respondents will not be affected at all, or at least, not to the same extent as during the period complained of.

I incline to think that the plaintiff did not in his declaration claim to recover for permanent loss of his water-power. The judgment awarding damages for that loss seems, therefore, to be *ultra petita,* and, as such, in contravention of article 113, C.P.Q.

The case is not one of trespass. The appellants were not wrong-doers in constructing the dam. They had statutory authority to do so, subject to the condition that they should pay "all damages resulting therefrom." It is the resulting damages which constitute the cause of action and they are recoverable when and as they occur. *Chambly Mfg. Co.* v. *Willet*(1); *Montreal Street Railway Company* v. *Boudreau*(2). The well-known principle of the decision in *Backhouse* v. *Bonomi*(3) seems to be applicable. Although the appellants have not exercised a right of expropriation, yet it would appear to be within the purview of article 7296 that damages once for all may be awarded in the expertise for which it provides. But I do not think that future damages are recoverable in an action such as that now before us.

I would for these reasons allow this appeal to the extent of restoring the judgment of the learned trial judge.

(1) 34 Can. S.C.R. 502. (2) 36 Can. S.C.R. 329.
(3) 9 H.L. Cas. 503.

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BRODEUR J.—Le demandeur intimé avait un moulin sur la rivière Etchemin dans le comté de Dorchester. Ce moulin était mû par un pouvoir d'eau et existait depuis un grand nombre d'années. La compagnie appelante, en vertu de l'article 7295 des Statutes Revisés de Québec, érigea dans l'automne de 1910 une digue à quelques arpents plus bas de l'endroit où était le moulin en question.

Cette digue a eu pour effet de faire refluer l'eau et de rendre absolument sans valeur le pouvoir d'eau qui alimentait le moulin du demandeur.

De plus, la rivière, à cet endroit, ne gelait presque jamais; mais, à raison de la construction de cette digue, l'eau est devenue plus limpide, la glace s'est formée; et, au printemps de 1911, en se dégageant, elle est venue frapper le moulin, l'a emporté et a causé de très grands dommages. Le demandeur, à raison de cela, réclame une somme de $6,000 par son action instituée le 28 avril, 1911.

Vers le même temps où cette action était instituée, mais avant qu'elle fût signifiée, la défenderesse appelante a, par lettres de ses avocats, du 2 mai, 1911, invité le défendeur à faire évaluer ces dommages par arbitres, suivant les dispositions des articles 7295 and 7296 des Statuts Revisés de la province de Québec.

Le demandeur n'en a pas moins persisté dans son action et, après enquête, la cour supérieure lui a accordé une somme de $1,070 pour les dommages jusqu'alors encourus et lui a réservé sa réclamation pour les dommages futurs.

La première question qui se soulève est de savoir si le demandeur pouvait procéder par action directe sans avoir ces dommages déterminés par experts.

Cette question a déjà fait l'objet de nombreuses

décisions devant les tribunaux et elle s'est présentée devant cette cour dans une cause de *Gale* v. *Bureau* (1). Il a alors été décidé que les dispositions de la loi statutaire n'empêchaient pas le recours par action ordinaire.

La jurisprudence a d'abord hésité; mais elle est maintenant bien établie. Il ne peut y avoir de doute que les personnes qui souffrent à raison de l'érection de digues peuvent procéder par voie d'action ordinaire. (1869) *Blais* v. *Blais*(2); (1869) *Nesbitt* v. *Bolduc*(3); *Emond* v. *Gauthier*(4); (1879), *Jean* v. *Gauthier*(5); (1878) *Breakey* v. *Carter*(6); (1881) *Proulx* v. *Tremblay*(7); (1898) *Cie. de pulpe de Mégantic* v. *Village d'Agnes*(8); (1906) *Leclerc* v. *Dufault*(9).

Quant aux dommages, je dois dire que la cour d'appel a modifié le jugement de la cour supérieure et a condamné la compagnie défenderesse à payer une somme de $3,685. L'appelante nous demande de rétablir le jugement de la cour supérieure et de renverser celui de la cour d'appel.

Dans son action, le demandeur disait que la construction de la digue avait eu pour effet de faire refluer l'eau sur sa propriété, d'inonder son moulin, de noyer ses turbines et d'empêcher son exploitation. Il ajoutait aussi que la crue des eaux occasionnée par la chaussée et l'amas de glace qui en avait été la suite

(1) 44 Can. S.C.R. 305.
(2) 13 L.C. Jur. 277.
(3) 15 R.L. 513, *note* 1.
(4) 3 Q.L.R. 360.
(5) 5 Q.L.R. 138.
(6) 4 Q.L.R. 332; Cass. Dig. (2 ed.) 463.
(7) 7 Q.L.R. 353.
(8) Q.R. 7 Q.B. 339.
(9) Q.R. 16 K.B. 138.

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avaient détruit complètement la bâtisse où se trouvait son moulin et il réclamait une somme de $6,000.

La cour supérieure a évalué les dommages, et a accordé au demandeur la valeur du moulin détruit plus la perte que le demandeur avait subie par le fait qu'il n'avait pas pu exploiter son moulin depuis l'érection de la chaussée jusqu'au moment de l'institution de l'action; mais elle ne lui a rien accordé pour la destruction de son pouvoir d'eau et pour l'impossibilité où il va se trouver à l'avenir de pouvoir continuer son exploitation.

La cour supérieure a réservé ces dommages pour l'avenir; et l'honorable juge dans ses notes nous dit qu'il n'a pas accordé tous ces dommages, vu la décision de *Gale* v. *Bureau*(1).

En lisant, en effet, la note qui se trouve en tête de la décision on serait porté à croire qu'il a été décidé dans cette cause que les dommages qui seraient accordés ne devaient pas être des dommages globaux mais des dommages annuels.

Dans cette action de *Gale* v. *Bureau*(1) le jugement avait accordé une somme annuelle et on disait que c'était là une illégalité. Le juge-en-chef de cette cour, se basant sur l'autorité de Sourdat, décida que la cour avait parfaitement le droit d'accorder des annuités ou une rente. Il n'a jamais été décidé dans cette cause que la cour ne pouvait pas accorder une somme fixe une fois payée.

En effet, si nous consultons Sourdat, qui a été mentionné dans le jugement de l'honorable juge-en-chef, vol. 1, No. 132 *bis*, il dit ceci:—

> Du principe que les tribunaux apprécient souverainement le dommage et l'étendue de la réparation, il suit qu'ils peuvent accorder *soit une somme fixe une fois payée, soit une rente ou annuité.*

(1) 44 Can. S.C.R. 305.

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Et comme le dommage peut cesser ou se restreindre dans un temps donné, ils peuvent également réduire l'indemnité dans ces prévisions. Ainsi dans une affaire jugée par la Cour de Dijon, l'on a maintenu la disposition d'un jugement qui allouait, à une femme dont le mari avait été tué, une rente, avec condition que cette rente serait réduite de moitié si la veuve convolait à un second mariage.

Ils peuvent encore limiter le service de la rente à un certain temps, passé lequel il sera statué de nouveau, les droits du plaignant étant ainsi réservés quant au préjudice qui se manifesterait ultérieurement,

On a référé à la cause de *Montreal Street Railway* v. *Boudreau*(1), et on a dit que la décision dans cette cause ne justifie pas une indemnité définitive.

Je crois que les deux cas ne sont pas analogues.

Dans la cause de *Boudreau*(1), le caractère permanent des dommages ne pouvait pas être assumé par la manière dont les travaux avaient été faits; au contraire, la cause de ces dommages pouvait être facilement évitée. Et, à raison de cela, il n'a pas été jugé à propos d'accorder des dommages globaux.

Il fait bon de mentionner le fait que la cour était divisée sur cette question et que le juge-en-chef, Sir Elzéar Taschereau, et M. le Juge Girouard étaient d'opinion qu'une indemnité définitive devait être accordée, suivant en cela la décision de cette cour dans une cause de *Gareau* v. *Montreal Street Railway*(2).

Nous sommes dans la présente cause en présence d'un statut qui invite à régler définitivement cette question d'indemnité, vu qu'il s'agit virtuellement de l'expropriation d'un droit dont jouissait le demandeur. Or, en vertu de l'article 407 du Code Civil, l'exproprié a droit à une indemnité *juste et préalable.* Cette indemnité doit couvrir tous les dommages.

La compagnie défenderesse ne suggère pas dans ses plaidoiries, ou dans ses prétentions, que la digue

(1) 36 Can. S.C.R. 329.

(2) 31 Can. S.C.R. 463.

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qu'elle a élevée n'est que temporaire. Au contraire, cette digue a un caractère de permanence.

Le pouvoir d'eau dont le demandeur jouissait se trouve détruit par le fait de cette digue. Le préjudice qu'il éprouve a donc un caractère permanent et la suggestion que cet homme pourrait venir tous les ans devant les tribunaux pour réclamer de la compagnie défenderesse le dommage résultant du fait qu'il ne peut plus exploiter son moulin parait contraire à l'idée que nous devons empêcher autant que possible la multiplicité des procès.

Mais on dit: Vous accordez alors des dommages futurs.

Je ne crois pas que cela soit exact. Le dommage peut être futur en ce sens qu'il se réalisera dans l'avenir par suite du fait dommageable; mais à vrai dire le préjudice est actuel et il continuera à se manifester. (Laurent, vol. 20, p. 570.)

Fuzier-Herman dans son code annoté sous l'art. 1382 nous rapporte aux nos. 116 et 117 un jugement de la cour de cassation au sujet d'une mine dont les travaux d'exploitation avaient altéré les eaux d'une source où il a été décidé

qu'il peut être alloué aux propriétaires inférieurs à titre de dommages-intérêts au lieu d'une rente annuelle un capital une fois payé, répondant à la fois à la perte déjà subie et à celle qui doit être éprouvée.

L'appelante prétend que la cour d'appel a ajugé au-delà des conclusions de l'action en indemnisant le demandeur intimé pour la perte de son pouvoir d'eau.

Je vois au contraire dans la déclaration que le demandeur allègue spécialement que la construction de la chaussée a eu pour effet d'inonder ses moulins, de noyer ses turbines et l'a empêché de les exploiter; et

après avoir ensuite allégué la crue des eaux et l'amas de glaces occasionnés par la chaussée, il demande une condamnation contre l'appelante de $6,000 de dommages. Ces allégations étaient certainement suffisantes pour justifier la cour d'appel de faire l'évaluation de tous ces dommages et d'accorder $3,685.

Dans ces circonstances, je suis d'opinion que le jugement de la cour d'appel est bien fondé et que l'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellants: *Taschereau, Roy, Cannon & Fitzpatrick.*

Solicitors for the respondent: *Pelletier, Belleau, Baillargéon & Belleau.*