

Privy Council Appeal No. 77 of 1926.

Dame Zoe Turgeon, since deceased (now represented by Raoul
Richard and others) - - - - - *Appellants*

v.

The City of Quebec - - - - - *Respondents*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC
(APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 19TH JANUARY, 1928.

Present at the Hearing :

THE LORD CHANCELLOR.

LORD BUCKMASTER.

LORD CARSON.

LORD DARLING.

LORD WARRINGTON OF CLYFFE.

[*Delivered by* LORD CARSON.]

The plaintiff, Dame Zoe Turgeon, who is now represented by the appellants, in the year 1912 became the owner by purchase of certain lands at a place called Les Saules, situate on either side of the river St. Charles in the Province of Quebec, on which lands her predecessors in title had erected and for many years operated saw and flour mills worked by hydraulic power derived from the river. There is no question that the plaintiff spent a considerable sum of money in improving the mills and machinery and the water power and converted them into a cardboard mill and continued to work the same until the year 1917, when for the reasons stated later the working of the mills was discontinued.

The respondents have under their charter statutory power to make and maintain waterworks necessary to introduce and conduct in the City of Quebec and parts adjacent a sufficient quantity of good and wholesome water (including water from the river St. Charles), which the corporation is authorised to

take and distribute for the use and supply of the inhabitants of the city and for the parts adjacent thereto. Under such statutory powers the respondents in the years 1850 and 1851 constructed an aqueduct for the purpose of supplying water to the City of Quebec, and for this purpose laid a pipe of 18 inches diameter through which it drew water from the river St. Charles at a point above the appellants' mills, and in the year 1886 the respondents laid an additional pipe of a diameter of 30 inches through which it took a further supply of water at the same point for the purposes of its aqueduct. In the year 1914, and therefore after the acquisition by the plaintiff of the property purchased by her, to meet the needs of the greatly increased population of Quebec, the respondents laid a third pipe in the same manner for the supplying of water to its aqueduct from the river St. Charles, this last pipe being of 40 inches diameter. On the 16th July in that year the plaintiff complained to the Mayor of Quebec that she was suffering damage by reason of the additional diversion of water, but the Mayor replied that he was advised that there was nothing to be done in her case, and no further proceeding seems to have been taken until the present action was brought some eight years later as will presently appear.

Meanwhile, on the 17th August, 1917, as a consequence of a severe rain storm, the west wing of the plaintiff's dam, necessary for the use of the water, was destroyed, and the dam itself remaining in position the river altered its course and ploughed out a new bed on the western side; and since that date the mill has not been worked by the plaintiff or the appellants, nor has the dam been repaired, and the river has continued to flow through its new bed several hundred feet away from the head of the mill flume. The plaintiff took no proceedings until the 18th May, 1922, when she served notice of action upon the respondent and eventually, on the 6th July, 1922, brought her present action. There is no doubt that she was encouraged, if not prompted, to bring this action by the decision of this Board in the case of *The City of Quebec v. Bastien* [1921], 1 A.C. 265, in which one Bastien, owner of another property higher up the same river, was claiming damages from the City for an abstraction of water under the same statutory rights.

Now in the view this Board take of the appellants' claim it is necessary to consider the nature of the claim as expressed by the plaintiff in her declaration. Her claim is for \$60 for each workable day amounting to \$126,250.00 estimated loss from the month of January, 1914, up to the 18th May, 1922, aforesaid. She claimed that the loss had been occasioned by the action of the three pipes aforesaid in depriving her of the necessary hydraulic power to work the mills. The respondents amongst other defences pleaded that the plaintiff when she purchased the property knew of the existence of the City's waterworks and of the rights in connection therewith, that her predecessors in title, by name Tremblay, having claimed that their mill site was damaged by the diversion of water, the city had

by agreements made on the 28th January, 1896, and 21st May, 1898, by payment of the sums of \$3,000 and \$1,600 respectively obtained notarial discharges from the Tremblays for all past, present or future damage. The respondents also pleaded prescription as the plaintiff had given no notice of action before the 18th May, 1922, and also that the river had changed its course by reason of the matters already referred to.

The Superior Court (Sir F. Lemieux, C.J.) gave judgment for the appellants for the sum of \$2,500 on the grounds that the placing of the 40-inch pipe had caused damage as alleged. He was of opinion that the transactions of 1896 and 1898, which he held to be binding on the plaintiff, applied only to the diversion resulting from the 18-inch and 30-inch mains and could not extend to damage caused by the further diversion resulting from the installation of the 40-inch main. He was of opinion that the plaintiff could reasonably expect to make \$25.00 per working day, and that she had been deprived of profits amounting to that sum for each working day since the 40-inch main had been put into operation. The learned Chief Justice, however, having discussed at length the articles of the charter and the statutes applicable, and which will be referred to later, held that the plaintiff's claim for damages suffered more than six months before the institution of the action was prescribed. The respondents appealed from this judgment to the Court of King's Bench (Appeal Side) and the appellants cross appealed.

The Court of Appeal, consisting of Flynn, Allard, Rivard and Bernier, JJ., by an order dated the 15th June, 1925, allowed the appeal (Guerin, J., dissenting). The majority of the Court based the judgment on the ground that the City of Quebec had by statute the legal right to divert enough of the water of the St. Charles River for the use of its inhabitants, subject only to the payment of compensation for the injury done thereby to riparian rights, and that all recourse for past, present and future damages in that respect had been extinguished by the settlements made by the plaintiff's predecessors in title in 1896 and 1898, that under the charter all actions in damages against the City were limited to six months, and that since 1917 the plaintiff's property had been in such a state that she could not in any event succeed on the action she had brought for damages alleged to have been suffered from day to day at a time when, through no fault of the City, her mill could not be operated.

Mr. Justice Flynn agreed in dismissing the appeal, but on the ground that the evidence showed that to be operated, the mill would have required expensive repairs, and on the whole that the injury to the plaintiff was not a certain loss suffered from day to day, but a permanent diminution in the value of her property, for which her claim was not prescribed, but that her action as brought was unfounded.

It is necessary to bear in mind that thus no question arises as to any unlawful act on the part of the respondents,

who are empowered by statute to carry out the works (including those out of which the claim in this action arises) for the purpose of the water supply to the City, subject only to the obligation of paying compensation for injury to buildings or lands affected thereby. With respect to such compensation in the present case, so far as the claim has reference to damages alleged to have been suffered after the month of August, 1917, when, as before stated, the west wing of the plaintiff's dam was destroyed and the river altered its course, their Lordships are unable to see how it is possible to hold that such damage was caused by the subtraction of water by the respondents. The appellants admit that no attempt was made to repair the dam, as the plaintiff declined to incur the expense, and eventually abandoned all attempt to operate the mill. Upon this point, therefore, their Lordships agree with the Appellate Court that the claim of the appellants for that period fails.

It has, however, been argued that the appellants are in any event entitled to compensation for the damage caused by the increased loss of water from the year 1914—the date when the respondents laid the third pipe, 40 inches diameter, to its aqueduct—to the month of August, 1917. As a defence to this claim, the respondents pleaded, in addition to prescription (*i.e.*, that the damages complained of by the plaintiff were suffered more than six months before the institution of her action), that the transactions with the Tremblays of 1896 and 1898 and the discharges already referred to involved a complete discharge for all past, present or future damages, and bound the lands in the hands of the plaintiff.

As regards the question of prescription, assuming that Article 689 of the Charter 29 Vic., c. 57, s. 36, para. 35, is the proper section to apply, a difference in the English and French versions of the paragraph has been pointed out. In the English text, the words run as follows: "All actions or suits against anyone whomsoever for anything done under this section respecting the waterworks, shall be instituted within six months after the commission of the act or thing done or, in case of damages, within six months after the damage shall have been done, etc.," whereas in the French text the latter words are "ou s'il y a continuation des dommages dans les six mois après que le dommage a cessé, etc." The apparent difference does not, however, appear to their Lordships to be material in the view which commends itself to their Lordships that, even taking the literal meaning, the damage complained of *quoad* the City of Quebec must be held at all events to have ceased after the month of August, 1917. It is further to be observed, as pointed out by Flynn, J., that the claim of the plaintiff is not for permanent injury or diminution of the value of the property, but for a certain specific loss sustained by her separately on each one of the several days on which the mill was not in operation. Having come to this conclusion it is not necessary to discuss the effect of the settlements and

discharges effected by the Tremblays, but as the matter has been raised and their Lordships have been asked to express an opinion thereon, they have no hesitation in stating that in their view these could not operate to discharge the respondents from any further injury caused by the additional subtraction of water caused by the erection of the 40-inch pipe during and after the year 1914. Their Lordships are of opinion that this appeal fails, and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

DAME ZOE TURGEON, SINCE DECEASED (NOW
REPRESENTED BY RAOUL RICHARD AND
OTHERS)

v.

THE CITY OF QUEBEC.

DELIVERED BY LORD CARSON.

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