



In the Privy Council.

ON APPEAL

*From the Court of Queen's Bench for Lower Canada
in the Province of Quebec. (Appeal side.)*

BETWEEN

FELIX HAMELIN and THOMAS AYER (Defendants) *Appellants* ;

AND

THOMAS BANNERMAN, ALEXANDER BANNER-
MAN, MARY ANN BANNERMAN and MARY } *Respondents*;
ROSE GILBORN (Plaintiffs) - - - - }

AND

DAVID HAMBLETON - - - - - *Mis-en-cause.*

CASE OF THE APPELLANTS.

This is an Appeal from a Judgment of the Court of Queen's Bench for Lower Canada, dated the 23rd day of June, 1893, reversing a Record, p. 179. Judgment of the Superior Court for Lower Canada, of the Province of Quebec, District of Terrebonne, dated the 20th of October, 1891 (which Record, p. 5. 5 had dismissed the Respondents' action with costs), and declaring the Respondents entitled to 100 horse-power of the reservoir in the North River at Lachute, belonging to the Appellants, to the entire exclusion, if need be, of any use of the said water-power of the Appellants, or by any person claiming under them by titles subsequent to the plaintiffs', and 10 enjoining the Appellants and the Mis-en-cause to abstain from the use of

the said water-power until the Respondents should have drawn from the said reservoir such power as they might require to the extent of 100 horse-power, and condemning the Appellants to pay to the Respondents \$1,000 damages and interest, and costs.

The facts of the Case are as follows:—

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1. The Appellants on and before the 15th of July, 1881, carried on, and they have since continued to and now carry on the business of woollen manufacturers in the Township of Chatham, in the District of Terrebonne, and for the purposes of their business used and are using a woollen factory worked by water-power and a dam belonging to the Appellants on the 10 North River at Lachute. The water-power required and used by the Appellants for their factory, as appears from the evidence of David Hambleton, not exceeding 20 horse-power, and as appears from the evidence of James Barley, the water supplied by the said dam amounted ordinarily to between 300 and 500 horse-power. 15

Record, p. 10.

Record, p. 63.

Record, p. 102.

2. By a deed of sale dated the 15th day of July, 1881, the Appellants sold and assigned, with promise of warranty, to Robert Bannerman, of the City of Montreal, the Respondents' predecessor in title in fee, a small piece of land on the south bank of the said North River therein described, together with a quantity of water-power equivalent to 50 horse-power, to be 20 taken off from the water-power and dam of the Appellants on the North River and then in use, to run their manufacture, the said water-power to be taken at a place convenient to run the wheels and machinery to be placed by the said purchaser in his rope manufacture on the said piece of land, together also with one improved Laffel Turbine water-wheel, and the 25 said contract provided that the purchaser should be entitled within five years to purchase an additional quantity of water-power equivalent to 50 horse-power, at \$25 for each horse-power, and with the special clause or reservation, that should any accident or breakage happen to the vendor's dam, or should it require to be repaired, the purchaser should have 30 no right to damages for any loss of time or losses occasioned by such accident to the said dam, or that it required repairing, provided that the dam be repaired or fixed in reasonable time for such repairs, during which the vendors should have the privilege of withdrawing the supply of water if absolutely necessary, and also that the purchaser 35

Record, p. 10.

should have the privilege of using the tail race water accruing from the said water so sold, and that the purchaser should have no right of erecting any woollen manufacture and fulling mills in opposition to those of the vendors.

5 3. The said Robert Bannerman erected a factory on the said piece of land, and by a deed of sale, dated the 2nd of April, 1886, the Appellants sold and assigned, with promise of warranty, an additional quantity of water power equivalent to 50 horse-power in connection with the water power above referred to, to the said Robert Bannerman in fee. Record, p. 14.

10 4. From the year 1883 to the year 1890 David Hambleton, the Mis-en-cause, occupied a bobbin factory belonging to the Appellants and erected in the year 1883, adjacent to the North River, and used the water from the Appellants' said dam equivalent to from 8 to 15 horse-power. Record, p. 62.
Record, p. 63.

15 5. On the 21st of September, 1888, the Respondents filed a writ and declaration alleging that at certain times of the year the Appellants' water-power could not for many years past furnish the Respondents with 100 horse-power of water, and sometimes not more than 20 horse-power, and that notwithstanding this the Appellants and the Mis-en-cause continued to take the water for the use of their factories, and thereby caused the Respondents great damage, and prevented the Respondents from using the said 100 horse-power of water, and they claimed— Record, pp. 6-10.
Record, p. 8.

- 20 (1) A declaration that they were the sole owners of the first 100 horse-power of water, which the Appellants' power could furnish;
- 25 (2) An injunction to restrain the Appellants and the Mis-en-cause from interfering with the said 100 horse-power of water;
- (3) \$1,000 damages.

6. To this the Appellants filed a plea on the 20th January, 1889, in which they answered— Record, p. 20.

- 30 (1) That the North River was a navigable stream, and that its waters could not be sold;
- (2) That according to the spirit and sense of the said two deeds of sale, the intent of the parties thereto was that the 100 horse-power of

water was to be taken at the dam then used by the Appellants to the knowledge of the said Robert Bannerman for the purposes of their woollen factory only if sufficient water was to be found there;

(3) That according to the said deeds, the Appellants were not to cease to work their factory if the said Robert Bannerman could not obtain 100 horse-power of water; 5

(4) That whatever the literal construction of the said deeds, the Appellants did not intend to sell, and had not sold 100 horse-power of water, except without prejudice to their right to use the water for their factory; 10

(5) That by the said deeds they had not sold any preferential rights in respect of the use of the water;

(6) That according to law the first right to the use of the water was in the Appellants, as the oldest manufacturers; 15

(7) That if the Respondents suffered any damage it was not due to the fault or neglect of the Appellants, but to damage to the dam owing to ice and floods, to the erection by the Respondents of a pier too close to the Appellants' dam, and to defects in the Respondents' machinery for the use of the said water; 20

(8) That at all seasons of the year the reservoir created by the dam had been running over the dam, and the Respondents could have used 200 horse-power ;

(9) That there always had been more than sufficient water for the Respondents at the Appellants' dam except at times when the river was low, and the owners higher up the river accumulated the water for a few hours ; and 25

(10) That the Appellants had caused no damage to the Respondents.

By his declaration dated the 16th of November, 1888, the Mis-en-cause submitted himself to the Judgment of the Court. 30

7. On these points raised, issue was joined and evidence adduced on both sides. It is submitted that this Case presents but two questions for consideration; 1st, a question of law arising out of the construction of the two deeds of sale; 2nd, a question of facts arising out of the appreciation of the evidence adduced. 35

Record, pp. 21 & 22.

Record, p. 22.

Record, p. 27.

QUESTION OF LAW.

Two principles may be applied to the interpretation of those deeds, the one referred to in Respondents' factum before the Court of Queen's Bench (*vide* page 154 to 160) which lays down the rule that when the Record, p. 154.
 5 covenants of parties are clearly set forth in deeds as in the present case such Record, p. 160.
 covenants must be interpreted in their literal sense.

The other principle referred to by Appellants in their factum before the Court of Queen's Bench (*vide* page 176 to 178) lays down the rule Record, p. 176.
 that in the construction of contracts, the true intent of parties should be Record, p. 178.
 10 sought and should govern the Courts. These two principles are incontestable and are accepted by both parties, but which of them should apply is the question. The Appellants respectfully submit the principle invoked by them should apply, under the circumstances, as being more equitable and more in harmony with the intent of the parties contracting, and what they
 15 had in view at the time of contracting.

These deeds should be examined in their entirety. In perusing their different clauses, nothing therein contained reveals the least intention on the part of the vendors to sell, or on the part of the vendees to purchase, such an amount of water-power as would eventually deprive the vendors of
 20 their established and known right to operate their factory at any time. A glance at the map annexed to the Case is sufficient to show that such a large and valuable property as that of the Appellants was never intended to be sacrificed for the mere trifle of \$2,250.00, payable by instalments, nor were the costs of keeping and repairing such a large dam transferred
 25 over to vendees for the same small sum.

In those deeds not a word is written even to insinuate that a privileged or preferential right was ever intended to be sold to the entire destruction of vested rights in large factories of the Appellants then in operation (*vide* Record, p. 10.
 deed of sale, page 10 of the Case). A small *resumé* of the particular
 30 clauses of this deed of sale (the first) bearing on this case will assist in arriving at a true and correct interpretation of their meaning.

The sale is made of a small piece of land described, and of 50 horse-power, to be taken at a convenient place at the dam *then used* to run or operate the vendor's manufacture, at which dam the vendees could place
 35 wheels (not but one wheel) and machinery to run a rope factory, and after viewing the same they declared themselves *content and satisfied*. The

words "with warranty" are mentioned, but as the Appellants submit, they are to apply to the piece of land sold and not to the water, as it was and is impossible to warrant that the quantity of water shall always be there. The other words "without any restriction or reservation" follow; but these words are "de style de notaire" which, if necessary of construction, should simply mean "without restriction or reservation as to the portion sold," nothing else. Another clause of the deed of sale (pages 12 and 13 of the Case) sets forth that both parties bound themselves under a penalty of \$2,000 not to run factories in opposition to one another in their mutual branches of commerce. This clause clearly demonstrates that both parties expected to run their factories concurrently, never and for a moment to suspend or cease their operations. The above illustrations it is submitted establish that the Superior Court was well founded in interpreting not in a narrow and literal sense, but in a broad and liberal sense, the "general spirit" as well as the different parts of this deed of sale so as to discover the true intent of the parties contracting. That in its interpretation of the deeds, the Superior Court, presided over by Taschereau, Judge, was rightly supported by the authorities referred to at pages 176, 177 and 178 of the Record, quoting Articles 1,013 to 1,022 of the Civil Code of Lower Canada, and by the principles laid down at note 1st of Article 1,156 of the Napoleon Code, which last Article has been reproduced by Article 1,013 of the Canadian Code.

The Respondents, indeed, seem to admit the true interpretation put upon these deeds by Appellants when in their factum before the Court of Queen's Bench, at page 158 of the Case, they say:—"Il est possible, probable même que les vendeurs n'entendaient pas sciemment en vendant les cent forces de chevaux se priver eux-mêmes de l'eau nécessaire pour opérer leur manufacture." . . .

QUESTION OF FACTS.

GENERAL REMARKS.

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The Appellants submit, as a recognised principle of jurisprudence, that unless a substantial injustice or a gross error has been committed by the Court of first instance, Courts of Appellate jurisdiction should not interfere in matters of appreciation of facts, as Judges before whom the

Case is tried are in a more favourable position to form a correct opinion on the facts which are developed under their own eyes ; besides, the dispositions contained in Articles 1,013 to 1,022 are rather advice given to Judges for their guidance than imperative rules laid down for the same purpose. See notes on Article 1,156 of the Napoleon Code, Sirey and Gilbert Codes annotés, which Article 1,156 is reproduced by Article 1,013 of the Canadian Code:—“ Les dispositions du Code Civil sur l'interprétation des contrats sont plutôt des conseils donnés aux juges que des règles rigoureuses et impératives. En consequence, il n'y a pas ouverture à cassation contre un jugement qui, négligeant de suivre ces règles, aurait, déterminé par les circonstances, expliqué le contrat d'après d'autres principes.” C'est un point sur lequel il y a unanimité, *vide* Merlin repertoire, verbo convention, paragraphe 7 in fine, Toullier, Tome 6, Np 533. Championnière et Rigaud, droit d'enregistrement, Tome 1er No. 78.

The question to decide is, whether the Appellants have disturbed the Respondents in their rights to use 100 horse-power, and have thereby caused them to suffer damages? The Appellants submit that, to succeed in establishing satisfactorily such disturbance and its consequences, it was incumbent on the Respondents to prove (1) by primary evidence, experts, engineers in hydraulics, that the water-power at the dam (the reservoir) at or about the time complained of (the complaint is general stating for several years) did not contain more than 100 horse-power, for the Appellants specially pleaded the water was always over several hundred horse-power ; (2) the real power of the wheel used by them, and if two, three, four, or more wheels could not be used at the dam to utilise the power purchased, so as to double, treble, and quadruple the head power at the dam as well as the volume of water they could obtain at the head gates. It must be noticed that by the first clause of their deed of sale (*vide* page 10 of the Case) Respondents have the right to place wheels (not but one wheel) at a convenient place at the dam, which is (300) three hundred feet long (*vide* Dep. Deslauriers, page 126 of the Case), and that (42,000) forty-two thousand feet of water could be had at their head gates alone, when but (8,000) eight thousand feet are needed to run their wheel (*vide* Douglass, dep., pages 110 and 112 of the Case). Of course, nothing could prevent them using as many wheels as were needed ; (3) the power necessary to propel, move, run, and operate the *whole*

Record, p. 10.

Record, p. 126.

Record, pp. 110, 112.

machinery of their factory ; (4) the proper management and supervision by a practical engineer of this machinery, and of all essentials and accessories constituting a water-power, and the right way of using it ; (5) that the wheel had been placed, so as to get all the power the dam could furnish ; (6) that the flume, wheel-case, or penstock, even called bulkhead by some, 5 wheelpit, tail-race or canal of discharge, and other essentials necessary to constitute a water-power, were built of such materials, of such dimensions and otherwise, according to recognised rules and principles, so as to give the water-power all its capacity, for it is evident that such pieces of work may considerably add to or take from the water-power ; (7) that at last 10 they took ordinary measures of precaution to utilise the water-power sold, so that no fault or negligence could be imputed to them.

From the terms of the deed of sale of 15th July, 1881, no damages or losses of any kind whatsoever could be claimed by the Respondents through leakage or accident happening to the dam (meaning failure of water) if such 15 accident and leakage are attended to in due time. No claim ever can be entertained should the dam require repairing for *any cause or reason*. The whole supply of water may also be cut off under such circumstances if necessary. It is also clear by this deed, treating it that the Respondents suffered loss of time and otherwise by the failure of water power at the 20 dam, *that if at the time complained of the dam leaked, or was injured by force majeure or otherwise not the fault of the Appellants*, it required rebuilding (but that it was fixed, repaired and rebuilt in due course) (admitting for a moment Respondents had fully made out their case, by proper evidence, as the Appellants allege was necessary to be adduced) the Respondents' action 25 should fail, and the judgment of the Superior Court should be maintained.

The Appellants claim to have established by conclusive evidence that "accidents to the dam by force majeure, the *leakage* of it, for *reasons uncontrollable not their fault*, the rebuilding of the same when it became necessary have at all times and promptly been attended to, that even they 30 stopped the running of their own factory to enable Respondents as much as possible to operate their own.

Eight witnesses were heard on behalf of the Respondents in support of their action, but their principal witnesses are mere daily labourers without technical or practical knowledge ; their evidence is of no value as disclosed 35 by their cross-examination, especially that of John Clansey, the only person who pretends to have kept a diary of the time lost by the Respondents.

The time lost coincides with the time occupied by the re-construction and repair of the dam in 1887 and 1888. Pringle and Parent who made the examination of the Respondents' factory in 1891 (3 years after the institution of the present action) are the only persons possessing some technical knowledge, their evidence is favourable to the Appellants' contentions on all points, except as to the placing of the wheel, they having found a deficiency of 5 per cent. in the power of that wheel; 2ndly, a deficiency of 1 horse-power through cracks in the flume; 3rdly, a loss of one foot head on a 5 ft. dam, thus lessening the power of the wheel from 47 to 34 horse-power; 4th, a loss of horse-power of 5 to 8 per cent. by the wheel-pit not having a proper depth; 5th, a difference of about 12 per cent. between the power as advertised on the market and the actual power of the wheel when tested.

Record, pp. 34, 35, 38, 39, 40, 50, 51.

Record, pp. 79, 81, 84, 86, 89, 90, 93, 94.

And even their evidence as to the setting of the wheel and the tail-race is of little value owing to the fact that their examination was made 3 years after the institution of the present action in mid-winter, *i. e.*, January, when everything was covered with ice and snow.

The Appellants contend on this last point that the evidence of Barley and Douglass (practical men) made in due season should have more weight in a case like this than that of Pringle and Parent.

Record, pp. 99, 100, 103.

Such is the substance of Respondents' evidence. In view of this evidence, it is submitted that the Appellants were really not obliged to bring any counter evidence. It appears sufficiently by such evidence that the alleged disturbance and damage, if they ever existed, took place in the years 1887 and 1888, when part of the dam was carried away by the ice and the spring flood, and a new dam was built to increase the water-power, and when it was necessary that it should be built, which dam could not then be completed on account of the Respondents erecting a pier too near it.

The Appellants respectfully submit that their case is fully made out even by the Respondents' evidence. But considering the importance of their position, the Appellants deemed it prudent to call witnesses of practical knowledge, well acquainted with all the circumstances of the case. Five witnesses were called by them, including Thomas Bannerman, one of Respondents (Robert Bannerman, the original purchaser, being dead), and his evidence establishes the correction of the map produced as Exhibit A, showing the position of the contested properties and their relative value.

The other four witnesses were all practical men of long experience,

Record, pp. 99 to 109, 109 to 115, 120 to 136.

who examined the works at proper times of the year, and consequently are more reliable than the Respondents' witnesses; they sufficiently establish the capacity and power of the Appellants' dam being at all times over 300 horse-power; they also fully establish the fact of the repairs made to the dam in 1887, and its practical reconstruction in 1888, being 5 the periods in respect of which the Respondents claim for damages for interference with their alleged rights; their evidence is also corroborated by Pringle and Parent as to deficiencies in the flume, wheel-case and wheel pit.

8. In fact, Appellants submit that by the evidence given in the 10 Superior Court it was clearly proved—

Record, pp. 102,
108, 117, 128.

- (1) That there had always been more than 100 horse-power of water at the dam available for the Respondents;
- (2) That if at any time there was less than 100 horse-power, it was due to one or other of the following accidents:— 15

Record, pp. 51,
100, 101, 107, 111,
120, 124 & 125.

- (A) The destruction in the year 1887 of part of the dam, which had been originally properly constructed, by ice and floods, which damage was at once repaired by the Appellants with reasonable diligence, and by the reconstruction of the dam in the year 1888; 20

Record, p. 121.

- (B) The building of a pier by the Respondents, which, being too near the dam, caused a loss of water-power;

Record, pp. 24 &
25.

Record, p. 105.
Record, p. 127.
Record, pp. 79, 81,
84, 89, 90, 93, 94,
103, 104, 108, 110,
116, 117, 121, 123,
124, & 125.

- (C) Defects in the construction, arrangement and repair of the wheel works and machinery erected by the Respondents for the use of the water-power; 25

Record, p. 150.

and that the Respondents had not suffered any damage from its absence.

Indeed the Appellants submit that from a fair analysis of the total evidence adduced on both sides, the Respondents have completely failed to produce one single witness to establish the essential points of their complaint above *indicated as necessary* by the Appellants, with the excep- 30 tion only of one of them, that which refers to the setting of the wheel, and which at first sight appears to have been made out by Pringle and Parent. It should, however, be borne in mind that these two witnesses could not, like Douglass and Barley, pass a proper judgment even on that point, not having been in a position to know and see the nature of the ground, its 35 inclination, or the fall of the stream, and thereby enabled to state whether

the tail-race could be placed lower, and in consequence the wheel also, so as to add to its power, for, as a matter of fact, they did not examine the tail-race outside on account of ice, snow and stones. As another consequence of this want of examination of the tail-race, a most important factor of a water-power, they could not state if this tail-race was not too small (as proved by Barley), and how far it impeded the power by back water. On the contrary, the Respondents considerably strengthened the position of the Appellants by establishing by their engineers (1) that the wheel used by them as representing a 47 $\frac{8}{10}$ horse-power, has really but a capacity of about 35 horse-power when tested, for the book, which represents its force as of (87) eighty-seven per cent., according to Pringle, is made only for *advertisement*, it is prejudiced, *incorrect* and *untrue*; consequently the Respondents have established a probable loss of 12 per cent. by the wheel itself; (2) another loss of 5 to 8 per cent. by the wheel pit; (3) another loss of 1 horse-power for cracks in the flume, another loss of 5 horse-power by the wheel case and a loss of 13 horse-power on account of a wash-out and a throw of stones found in the tail-race inside of the mill, thus taking one foot off a five feet dam, which losses added represent a deficiency of about 38 horse-power to be put on Respondents' account.

Such, it is submitted, is the clear result mathematically arrived at after a proper analysis made of Respondent's evidence. It should however be remarked that a 47 horse-power wheel can furnish more than its represented capacity under a certain head of water, and that if the figures given by the engineers are correct as to the loss of power, the head power of the dam must be stronger than it is represented by them, which fact should considerably add to the weight of Douglass' and Barley's evidence. There is nothing in the Respondents evidence to indicate that they attempted to use, as they had a clear right to use by their contract, more wheels than one at the dam, nor to establish the power required to run the whole machinery of their factory. The absence of evidence on such points strongly indicates that the Respondents had no engineers at all at their factory, a fact also illustrated by the appliances above mentioned strongly condemned by their own engineers. The remainder of Respondent's evidence is corroborative of Appellant's as to accident to the dam, its construction and to the suspension of work owing to these circumstances.

9. The Appellants had, it is submitted, to prove—(1) That if the water-

power was sometimes short, it was owing to *force majeure* or accidents, or to some other reasons imputing no fault on their part, and that they promptly attended to these unexpected circumstances. On those points the evidence is conclusive in their favour ; but their evidence goes further, and clearly demonstrates that when the Respondents complain of injuries and disturbance caused by the Appellants, the blame is really to be attributed to their own negligence and want of skill, and that their mills were frequently stopped running, not on account of lack of water only, but on account of repairs needed to their machinery. The Appellants also submit that they have sufficiently established the capacity of the reservoir at their dam. By the evidence of Barley and Douglass, the former of whom states that 887 forces were running wheels at mills situate on the same stream, a small distance above the dam, and the latter says he measured the opening at the Respondents' head gates, which furnishes (42,000) forty-two thousand cubic feet of water, whilst the wheel requires but (8,000) eight thousand cubic feet of water. These statements are uncontradicted, and it is submitted that they are sufficient to establish satisfactorily the power of the dam, and to corroborate the evidence adduced by the Appellants by other witnesses, that the dam had a capacity of over 300 horse-power.

Record, p. 116.

Record, pp. 102,
103, 109 to 115.

Record, pp. 115
to 120, 120 to
136.

Record, p. 5.

10. On the 20th of October 1891, Judgment was delivered by the Superior Court in favour of the Appellants and dismissing the Respondents' action with costs.

Record, p. 2.
Record, pp. 152-
174.
Record, pp. 174-
178.
Record p. 178.
Record, pp. 179,
180.

11. The Respondents filed their Notice of Appeal to the Court of Queen's Bench for Lower Canada in the province of Quebec (Appeal side) on the 9th of November, 1891, and their case was dated August, 1892. The Appellants' case was dated the 7th of November, 1892. The appeal was heard on the 18th of May, 1893, and on the 23rd of June, 1893, the Court allowed the appeal and gave Judgment in favour of the Respondents.

Record, p. 180.

Record, pp. 180,
181.

12. The Appellants, feeling themselves aggrieved by the said Judgment of the 23rd of June 1893, moved the said Court for leave to appeal to Her Majesty in Council, and such leave was, on the same 23rd of June, 1893, granted on the usual conditions as to security, which conditions have since been duly complied with.

13. The Appellants humbly submit that the said Judgment of the Court of Queen's Bench (Appeal side) was erroneous, and should be reversed, and that Judgment should be entered for the Appellants in respect to all the causes of action, with costs, including the costs of the
 5 Appeal to the Court of Queen's Bench (Appeal side), and of this Appeal for the following (among others):—

REASONS.

- 10 1. Because, as the Appellants submit, the Judgment of the Superior Court of the Province of Quebec, was right and ought to be maintained, as (1) It interpreted the contract in question according to law and equity the true intent of the parties and the circum-
 15 stances of the case; (2) Any deficiency of water power was owing to the Respondents' negligence and their want of knowledge, caution and prudence in the building and placing of their
 20 machinery necessary to utilise the water-power, and to causes over which the Appellants had no control.
- 25 2. Because, in fact, sufficient water to supply 100 horse-power, if properly utilised, has always been available for the Respondents' mill.
- 30 3. Because according to the spirit and sense of the said deeds of the 15th of July, 1881, and the 2nd of April, 1886, and the intention of the parties, the said Robert Bannerman and the Respondents claiming through him, did not acquire a right to 100 horse-power of water pre-

ferential to the rights of the Appellants, or so as to entitle them to prevent the Appellants from using the said water at their factories, and the warranty of title in the said deeds did not apply to the 5 supply of water.

4. Because even if the Respondents have not always had 100 horse-power of water, such absence of water was due to force majeure, or to defects in the construc- 10 tion and arrangement of the Respondents' works and machinery, or to the purposes of repairs, and reconstruction of the Appellants' dam, which is protected by the terms of the deed of sale. 15
5. Because the Judgment of the Superior Court was given on the facts of the case, and after the evidence had been heard and minutely and carefully con- 20 sidered by the Judge, and no injustice or error was committed, and accordingly the Court of Queen's Bench, who had no opportunity of seeing the witnesses, should not have reviewed such Judgment.
6. Because the Respondents have not suffered 25 any damage through the act or default of the Appellants.
7. Because the Judgment of the Court of Queen's Bench (Appeal side) was against the weight of the evidence, and 30 on the facts proved they ought to have declared that the issues were found for the Appellants, and that the Respondents were finally unsuccessful.

5 (8) Because, treating it that the contract
 should be interpreted according to the
 contention of the Respondents, and that
 they had in fact produced satisfactory
 10 evidence to establish that their mills
 and machinery were so arranged and
 adapted as to fully utilise the water-
 power available for them, still owing
 to the due and proper diligence shown
 by the Appellants, they were under
 the circumstances absolutely free and
 relieved by their contract from any
 liability for disturbance or damages.

VERNON R. SMITH.

15 The Appellants having, from a perusal of the Appendix for the first
 time, had an opportunity of perusing the Reasons of the Honorable
 Judge Hall for the said Judgment of the Court of Queen's Bench, desire
 respectively to submit their Answers to these Reasons in the following
 manner:—

20 REASONS OF HONORABLE JUDGE HALL.

ANSWER TO THESE REASONS BY APPELLANTS.

The Honorable Judge, after a succinct *exposé* of the pretensions of both
 parties, says:—" With the first reason upon which the Judgment is rendered
 this Court cannot agree," and then proceeds to demonstrate that while the
 25 water of a navigable stream cannot be made the subject of a private
 contract, improvements made to that stream, being a commercial commodity,
 can be legally disposed of. The first Court impliedly admitted that principle
 (*vide* Judgment, page 5). It purely and simply applied to the contracts Record, p. 5.
 made by the parties, the ordinary rules of construction and interpretation

of law according to what it considered to be the true intent of the parties contracting and no more, and by the last considerations of its Judgment it has disposed of the evidence adduced. The Appellants themselves never denied the principle enunciated above before the Courts, nor by their factum before the Court of Queen's Bench; they merely set up in their pleas that the water of a navigable stream could not be made the subject of a sale as a principle, merely to show that no *warranty* could apply to the water sold, as it could not be furnished when it was not to be had. Consequently this scientific demonstration of an admitted principle was uncalled for, had no *raison d'être* so far as the Judgment of the Superior Court is concerned. 10

The conclusion is afterwards deducted from the above demonstration that nothing but *force majeure* could relieve the Appellants from the warranty stipulated in the contract. *Force majeure* only does not seem to be altogether correct. (*Vide* page 12 of the Case) where it appears Appellants are relieved for all cases of accident or leakage or that the dam should require to be repaired for any *cause or reason*. 15

Record, p. 12.

The learned Judge then draws a parallel, and compares the position of Appellants to that of a farmer who sells 100 bushels of wheat, and afterwards seeks relief when he discovers he has not enough left for his requirements. This comparison seems unfair and incorrect, the similarity attempted to be made being strikingly so different. In the sale of 100 bushels of wheat there are no other stipulations but a fixed quantity, a price, and a delivery certain: no such conditions exist as in the present case, to wit: that 100 horse-power may be taken at a dam at a convenient place for the Vendees *there to be seen*, without any recourse for non-delivery happening, certain events or conditions, and under other circumstances as to be provided with all that is necessary to take and use the 100 horse-power sold, &c., &c. If carried to its extreme limits the comparison would necessarily lead to lessen the gravity of a judicial disposition. 25

But let us continue on the parallel in one instance, as it may prove useful, when applied to the facts of this case, since the Honorable Judge says with truth that the power of a flowing stream is now a commercial commodity capable of being measured with accuracy (page 189) and admit for a moment that 100 horse-power are, like 100 bushels of wheat, sold (of course with the condition as in the present instance that the vendee shall be obliged to take it and draw it away) to be taken from a larger quantity in possession of the vendor. When the time arises for the vendee to take 30

Record, p. 189.

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and use his 100 bushels of wheat, he complains he cannot get them, alleging that they are not to be had from the pile of wheat shown him by the vendor at the date of the sale, for the vendor has since been drawing part of it away, and is still drawing it for his own use. The vendor denies
 5 the charge, and on his part alleges that one, two, three hundred bushels and more of wheat are constantly there to be had, and the vendee according to contract is at liberty to take all he purchased, not only with one vehicle but with as many as he chooses, and proper conveyances also, for it is for him (the vendee) to take it away, and not for him (the vendor) to bag it
 10 and deliver it over.

It is not clear that if the vendee wishes to recover damages and procure an injunction, he must clearly prove by precise and correct measurement, by evidence of a primary character, the truth of his allegation. Or will it be pretended, against all rules of law and common reason, that the vendor
 15 will be bound to establish his denial? Accordingly the Respondents in the present instance were bound to establish, by proper measurement (since it could be measured with accuracy according to the Honorable Judge's pretensions, and Mr. Pringle and Parent's statements), the quantity of water at the dam, its reservoir from which they were at all
 20 times at liberty to have the right, and were bound to take the 100 horse-power, bought before it could be said that 100 horse-power and more was not to be had there. No such assertion could be based on a mere presumption or inference deducted from the general vague and unreliable evidence of ignoramus, when they stated Respondents had
 25 water at night to run their machinery; for then Appellants used to stop work. It must not be forgotten that evidence of primary character could have been easily procured in summer time to test and establish the power of the dam where the water was the lowest, since engineers in hydraulics were had to make a most superficial examination of works in the
 30 worst and hardest time of the season for this province—that is, in January. It seems strange that the Court of Queen's Bench did not see proper to apply any precise and reliable rule of measuring in this the most important and glaring point of the case, when that rule is applied with the greatest severity to Appellants the moment measuring is to be applied to the
 35 warranty of power sold, or to the *precise duration and extent of repairs* made at the dam in 1887 and 1888, which repairs relieve Appellants of all recourse by the clause of their contract (page 12 of the Case). It seems Record, p. 12.

likely strange to Appellants that it limited its interpretation of the contracts in question to a simple demonstration of a recognised principle, without attempting to comment the different clauses of the contracts as showing or indicating the common intent of the parties contracting, which Appellants consider to be the real point in issue duly submitted to the appreciation of 5 the Courts.

The Honorable Judge also comments the question of facts which, in his opinion, are sufficiently established to support Respondents' claim— (1) Because the evidence adduced has shown that the water-power bought was not at the dam; (2) Because the wheel used is a 74-inch wheel, 10 representing $47\frac{8}{10}$ horse-power, *as established by the book of tables* produced, and by the *expert testimony* in the Record; (3) Because the wheel used furnished ample power for the effective use of all the machinery of Respondents, for when Appellants and Mis-en-cause stopped work at night Respondents could run their mills; (4) Because Parent and Pringle, authorities 15 in such matters, have established the wheel was placed as low as the tail-race permitted; (5) Because, although Appellants' witnesses asserted the tail-race could be lowered, it has been proved it could not be done within the limits of Respondents' property; (6) Because Appellants' witnesses are common labourers; (7) Because, although it is quite *probable*, as Appellants 20 contend, that a part of the deficiency resulted from necessary repairs in the year 1887, and the reconstruction of the dam in 1888, from the consequences of which they are relieved by their contract; the *precise duration and extent of these repairs is not clearly shown*.

Appellants will proceed to answer the grounds or reasons given by the 25 Honorable Judge, as if questions were put in numerical order—(1) To the first ground they answer, Yes, sometimes, on account of repairs and construction necessary and promptly attended to. (2) The book of tables represent the power of the wheel as being $47\frac{8}{10}$, but Mr. Pringle condemns that book, at pages 89 and 90 of the Case, as being *prejudiced*, made for 30 *advertisement, not correct and not true*. Let us quote from Mr. Pringle's evidence. (*Vide* page 89 of the Case). “Q. You stated that you did not “measure the space between the bottom of the wheel and the bottom of “the pit; is it not the case that you cannot state the power which could “be used by the wheel in question?—A. It is impossible for anyone to 35 “give the power of that wheel without proper test, it is the only “way to get at that (page 85). Q. Now, as result, what would be given,

Record, pp. 89,
90.

Record, p. 89.

Record, p. 85.

“ what is the full power of that wheel you have seen in the manufacture of
 “ Mr. Bannerman? A. Of that wheel nobody can say without testing the
 “ power. There is not a man living that can tell about that, I could *not*
 “ *answer this question*” (at page 89 at the bottom of the page). “ Q. Are Record, p. 89.
 5 “ you aware that this book ‘ E ’ is looked upon as being the best authority
 “ on such wheels? A. No, as I have been telling you already. Q. Which
 “ is the best regarding the ‘ Leffel ’ Wheel? A. It is the testing power.
 “ You can test them in a test room. Now *these* are figured at 87 per cent.
 “ and when tested in a test-room it is only 75 per cent., and the most of the
 10 “ wheels made in Canada only gives 60 to 65 per cent.” (*Vide* page 90 at Record, p. 90.
 the head of the page). “ Q. Do you know any authority that is *written*
 “ authority superior to this one? I am not speaking of *practical* authority
 “ but a *written* authority. State if you know any superior to this book?
 “ A. Yes, one or two.”
 15 *This* I consider is *prejudiced*, it is for *advertising*, and “ it is not,
 “ *correct*, it is *untrue*. They *claim to get what they have not got*.” At
 same, page 90, at the bottom, to a question put by Respondent’s Attorney. Record, p. 90.
 “ Q. Refer to the penstock mentioned in exhibit ‘ E,’ and state if these
 figures are right? A. They are large.” Mr. Parent corroborates this
 20 evidence. Is this *expert testimony* of the capacity and power of the wheel
 as represented to be $47\frac{8}{10}$ horse-power? and must the *book of tables* be
 accepted as an authority establishing conclusively such a power?
 (3) To the third reason Appellants state it is based on Clansey’s
 evidence, which Appellants consider worthless, as appears by the analysis
 25 made of it. It is a statement of fact which, if even true, does not
 prove the power requisite to *run* the machineries. Where is the
 proof that Respondents required less or more than 100 horse-
 power to run them? Besides, it does not make away with the fact
 that other wheels could and should have been used by Respondents
 30 if necessary. (4) To this reason Appellants answer by referring to
 Mr. Pringle’s evidence and by quoting at page 83 of the case the Record, p 83.
 following:—Q. Did you examine the outside building of the flume as
 far as the tail-race? A. The outside of the flume? No, the inside only.
 Q. You are speaking of the outside? A. I examined the outside of the
 35 flume in the mill. Q. Outside? A. No, not the tail-race. Q. Was it not
 necessary to give a clear testimony? A. No, not as to the setting of the
 wheel and flume, it was not necessary to examine the tail-race outside. Q.

But to see if there was a free discharge of water and if it was not blocked, “ was it not necessary to examine the tail-race? Q. If the tail-race was “ too narrow as not to allow a free discharge of water, such an error “ would injure the water-power of the wheel, would it not?—A. I “ examined the tail-race inside of the mill, and found there had been 5 “ a wash-out, and a throw of stones in the tail-race, and the tail-race “ outside of the mill could not be examined for ice and snow, so that I “ cannot give any evidence on the tail-race. Outside it is blocked with “ stones, so that I cannot tell whether it is too large or too narrow.”

(5) To the fifth reason Appellants affirm that Paquette is the only witness 10 who made this assertion, and his evidence is worthless, see analysis.

Record, p. 77.

Besides, at page 77 of the Case, Paquette states he does not know the limits of Respondents’ property. (6) To this reason, asserting Appellants’

Record, pp. 109, 115 & 99.

witnesses are common labourers, reference is made to pages 109, 115 & 99, of the Case, where it appears two of the witnesses are millwrights of 15

great many years’ experience, whilst the other is the proprietor of a large foundry on the same stream, and is an expert founder and mackinist whose services were always retained by Respondents to make repairs at their factory. (7) To this last and important reason Appellants answer

that the allegations of Respondents’ declaration are vague and general, 20 simply complaining that they had to stop work during *several years* only, and no more, with no dates as to days, weeks or months, not even as to a particular year. To such allegations Appellants could oppose but a

general denegation. The evidence alone has limited the general facts alleged in the declaration or complaint of Respondents to a failure of water 25

in 1887 and 1888 exactly at the time Appellants made their repairs to the first dam and constructed a new one, which fully explains the deficiency of

power at those dates. But can it be pretended Appellants were bound to keep a journal of each day’s work and repairing, and notify

Respondents of each day’s work so as to be relieved? Witness 30

Deslauriers and other witnesses state repairs were made promptly at all times as soon as wanted (*vide* page 124 and following—Deslauriers (about

Record, p. 124.

35th line). Question. Combien d’hommes prenaient-ils pour faire les réparations tous les ans, combien? Réponse. Lorsqu’on était pressé c’en

prenait plusieurs. Question. Combien en employaient-ils tous les ans? 35 Réponse. Une douzaine. Souvent j’ai vu une douzaine d’hommes et plus.”

Record, p. 51.

Paquette, at page 51 of the Case, states work was stopped at Respondents’

1 factory in 1888 whilst Appellants were constructing the dam ; such is the
 uniform testimony on that point given by all the witnesses, with the
 exception of Clansey, whose evidence is worthless and unreliable, as already
 stated, and as it appears by the analysis made of it. To compel
 5 Appellants to show the *precise duration and extent of their re-*
pairs to the dam, as against a complaint most vague and
 general of disturbance of pretended rights and of damages suffered, is
 suggestive of unfairness, not to say injustice, and is clearly in opposition to
 all rules of procedure and law. A specific charge called for a special
 10 answer, to be supported by special evidence, not otherwise, so that in the
 absence of any specific complaint Appellants' pretension is—it was
 incumbent on Respondents to prove that no necessary repairs or works
 were proceeded with when they were short of power, which they signally
 failed to do. In face of the evidence adduced in this case, it is manifest
 15 that this clause of their contract which relieves them of all recourse should
 receive its full application. What use or relief will this important clause
 of their contract be to Appellants if it is overlooked by Courts of Justice
 and considered but a *dead letter* (lettre morte) ?

Appellants think they should not close this answer to the Honorable
 20 Judge's reasons without referring to certain expressions used by him as
 strongly indicative of a certain uneasiness or difficulty on the part of the
 Court of Queen's Bench, under the circumstances, to make a satisfactory
 appreciation of the evidence. The expressions used by the Honorable
 Judge are the following (*vide* page 189): "After a lengthy and somewhat Record, p. 189.
 25 "contradictory *enquête*" (page 190). "The evidence, while not satis- Record, p. 190.
 "factory."—These expressions Appellants submit are illustrative of the
 principle of the jurisprudence set by them in their factum. "That unless
 "a substantial injustice or error has been committed by the first Court,
 "Courts of Appellate jurisdiction should not interfere in matter of appre-
 30 "ciation of evidence." Attention is also called to a particular reason given
 by the Honorable Judge, at page 190, which is the following:—"The Record, p. 190.
 "evidence, while not satisfactory if *nice questions of power or damages* were
 "to be determined, is quite sufficient, in our opinion, for the purposes and to
 "the extent of plaintiffs' demand." Such a reason Appellants submit is
 35 unjust and unfair in view of the consequences that would follow if applied as a
 correct rule of law, especially under the circumstances, for until this
so-called nice question of power is *determined*, cannot the Respondents

with the Judgment of the Court of Queen's Bench in their hands, and upon the strength of evidence of a general character, and although *somewhat contradictory and not satisfactory*, issue as many writs of injunction and suits for damages against Appellants as they please? Can that be law and justice? Assuredly the learned Judge, when writing his reasons, must have forgotten 5 those portions of Pringle's and Parent's evidence, who, with Appellants' witnesses, clearly and sufficiently determined the power in question so far by establishing its deficiencies in the wheel pit, flume, tail-race, wheel-case, the power of the wheel as between that tested and the one placed on the market, which deficiencies represent a net loss of power of about 38 horse- 10 power (*vide* analysis of Pringle's evidence in Appellants' factum). The technical parts of this case, or misunderstanding of the bearing of the evidence, can only explain, in Appellants' opinion, the apparently complete absence of attention and reference to these important points of the case, and which must prove fatal to Respondents' pretensions.

In the Privy Council.

ON APPEAL

*From the Court of Queen's Bench for Lower
Canada in the Province of Quebec. (Appellant
side.)*

H A M E L I N

v.

B A N N E R M A N .

Case of the Appellants.

BIRCHAM & CO.,
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