

11 OCT 1956

In the Privy Council.

No. 85 of 1893.

ON APPEAL

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

Between FELIX HAMELIN and ANOTHER (Respondents in
Queen's Bench.) - - - APPELLANTS

AND

10 THOMAS BANNERMAN and OTHERS (Appellants
in Queen's Bench.) - - - RESPONDENTS.

RESPONDENTS' CASE.

1. This is an Appeal from an unanimous Judgment of the Court of Queen's Bench for Lower Canada (Appeal side), dated 23rd June 1893, reversing a decision of the Superior Court for Lower Canada in an action in which the above-named Appellants were the Defendants and the above-named Respondents were the Plaintiffs.

20 2. The main questions in the case turn upon the construction of two agreements for the sale by the now Appellants, to the Respondents (or their predecessors in title), of 100 horse-power of water-power, from a dam of the Appellants, situated on the North River at Lackute; the Respondents (Plaintiffs in the action) contending that those agreements entitled them to 100 horse-power in priority to the Appellants and those claiming under them by subsequent grant, the Appellants contending, (1.) that the contract was void, because the water of the said river was part of the public domain; (2.) that

Declaration
Record p. 6-8.

Plea p. 20, l. 44

p. 21, l. 6-44.

despite the literal sense of the contracts (which they admit to be against them), the 'spirit' of the agreements, not only does not give any priority to the Respondents, but actually gives such priority to the Appellants, and that it is by error that any contrary stipulation has been inserted, they do not however claim to have the contract reformed ; (3.) that even if the Respondents are preferentially entitled to the first 100 horse-power, it is subject to the condition of only using it during 10 hours out of 24. The Appellants further contended on the facts ; (4.) that if the Respondents have not had the agreed quantity, it was not due to the fault of the Appellants, but (a.) to damage done to the dam by ice and floods, (b.) to the Respondents pier preventing necessary repairs to the dam, (c.) to defects in the Respondents own machinery ; (5.) that at no time have the Respondents ever had less than the agreed quantity ; (6.) that they have never had less, except at the times of low water in the river, when the mills higher up close all the issues in order to fill their reservoirs. 10

p. 21, l. 45 -
p. 22, l. 39.

p. 22, l. 40 -
p. 23, l. 14.

p. 23, l. 15-22.

p. 23, l. 23-39.

3. As the Court of Appeal were unanimous upon the facts, and that upon evidence abundantly sufficient to sustain their decision, it is submitted that no appeal can reasonably be taken upon this part of the case, and that it is unnecessary to enter largely into the contradictory statements of witnesses.

The following are the facts which raise the main issues :—

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4. Prior to the making of the Contract of Sale hereinafter mentioned, the Appellants, who are Woollen manufacturers, trading under the firm of Hamelin & Ayers had constructed a dam across the North River at or near Lachute, and used the water-power so created to run their woollen mill at that place.

Record p. 10-
13.

5. By a notarial Contract of Sale dated the 15th July 1881 and made between the Appellants and Mr Robert Bannerman, Rope-manufacturer, the Respondents predecessor in title, the Appellants " did and do hereby " bargain, sell, assign, transfer and make over *with promise of warranty* " against all troubles and hindrances generally whatsoever unto Mr. 30
" Robert Bannerman, of the City of Montreal, manufacturer and trader
" hereunto present and accepting hereof purchaser for himself his heirs and
" assigns, to wit : A certain piece or parcel of land " [Here follows description by metes and bounds] " together with a quantity of water-power
" equivalent to fifty horse-power to be taken off from the water-power and
" dam of said Vendors on the North River and now in use to run their
" manufacture, said water-power to be taken at a place convenient to run the
" wheels and machinery to be placed by said Purchaser in his rope
" manufacture on the hereby bargained and sold piece or parcel of land,
" together also with one improved Laffel Turbine water wheel, with all and 40
" every the members and appurtenances thereunto belonging wherewith said
" Purchaser is content and satisfied, *without any reservation or restriction*
" on the part of the said Vendors, who are lawfully seized thereof as having

“acquired the same with larger quantity from” &c.—“To have and to hold, use
 “and enjoy the said hereby bargained and sold premises with all and singular
 “their rights members and appurtenances unto the said Purchaser his heirs
 “and assigns as his and their own property for ever by virtue of these
 “presents, to enter upon and take possession thereof immediately—It is
 “hereby agreed upon by and between the said parties that the said Purchaser
 “or legal representatives shall have the right during the course of five years
 “from this day of purchasing from the said Vendors or legal representatives
 “an additional quantity of water-power equivalent to fifty horse-power or
 10 “any quantity less which he or they may require in connection with the
 “water-power hereby sold, which the said Vendors or legal representatives
 “shall be held and bound to sell to said Purchaser or legal representatives for
 “and in consideration of the price and sum of \$25 for each such additional
 “horse-power of water-power so bought—It is hereby further agreed by and
 “between the said parties that should any accident or leakage happen to the
 “dam of said Vendors across said North River, or that said dam should
 “require to be repaired from any cause or reason, the said Purchaser or legal
 “representatives shall have no right whatever of claiming any damages from
 “said Vendors for any loss of time or losses caused by such accidents to said
 20 “dam or that it required repairing provided that the said dam be repaired or
 “fixed in the course of the time reasonable and required for such repairs,
 “during which time the said Vendors shall have the privilege of withdrawing
 “the supply of water from said Purchaser if absolutely necessary.”

6. Within five years from the date of the said Contract of 15th July,
 1881, Mr. Robert Bannerman, the above-named Purchaser availed himself of
 the right reserved thereby to him, to purchase an additional 50 horse-power,
 and on the 2nd April, 1886, a further notarial Contract of Sale was entered
 into between him and the Appellants, whereby the Appellants, after reciting
 the provisions of the Deed of 15th July, 1881, “did and do hereby bargain,
 30 “sell, assign, transfer and make over *with promise of warranty against all*
 “*troubles and hindrances generally whatsoever* unto the said Robert
 “Bannerman, hereto present, and accepting Purchaser for himself, his heirs,
 “and assigns, to wit :—The said additional quantity of water equivalent to 50
 “horse power in connection with the water-power above referred to, sold to
 “said Purchaser by said Deed of 15th July, 1881 ; To have, hold, use, and
 “enjoy unto the said purchaser his heirs and assigns the said hereby
 “bargained and sold water power as his and their own property for ever by
 “virtue of these presents, to take possession thereof immediately—And in
 “consideration of the premises the said Vendors do hereby transfer and make
 40 “over to the said Purchaser all right of property, claim, title, interest, demand,
 “seizin, and possession which they may have, demand or pretend in or upon
 “the said hereby bargained and sold water power of which they divest
 “themselves in favour of said Purchaser, his heir and assigns.”

Record p. 14.

7. Between the dates of these two Contracts, the Appellants let to one

David Hambleton a part of their property adjoining their Woollen Mill to be used by him as a bobbin factory together with the right to use the water power from their dam for such factory. This letting was originally verbal only, but afterwards the Appellants prepared a lease, which however Hambleton never signed. Being called as a witness for the Appellants, and being cross-examined as to his reason for not executing this lease, Hambleton reluctantly and hesitatingly admitted that the Appellants had inserted or wanted to insert something to the effect that Mr. Bannerman [Respondents predecessor in title] would have the first privilege on the dam, the Appellants would have the second, and Hambleton himself the third. He also admitted that he "might have told" Mr. Bannerman this, and that it was the reason why he did not sign the lease; but professed not to remember distinctly enough to swear whether it was so or not. This evidence throws grave doubt on the accuracy and *bona fides* of the statement in the Appellants plea in this Action that they did not intend by the Deed of 15th July 1881, to give Mr. Bannerman such priority. However, such intention, even if it existed, would be immaterial, as it is not only not expressed in the Deed but is even inconsistent with the actual wording of the deed.

Record p. 64.

Record p. 21,
l. 17.Record p. 63,
l. 11-43.
Record p. 34,
l. 39-p. 35, l. 40.
Record p. 85,
l. 15-25.
p. 37, l. 26.
p. 35, l. 35 -
p. 36, l. 9.
p. 54, l. 8-20Exhibit F.
Record p. 143,
89q.Exhibit H.
Record p. 146.Record p. 191,
l. 5.

8. During the years intervening between the date of the Contract, 2nd April 1886, and the commencement of this Action on the 21st September 1888, both the Appellants and Hambleton increased their manufacture; and the Respondents soon found that enough water-power was not being left to them to run their wheel, although the said wheel is under 50 horse-power. Frequently they could not run at all, except by running at night when the Appellants and Hambleton's wheels happened not to be running; whenever these were not running the Respondents had ample power. From the 13th August 1887 to the end of August 1888 they caused entries to be made of the condition of their running power and whether the Appellants and Hambleton were running. Those entries form Exhibit F, and are set out at p.p. 143 to 146 of the Record.

9. In consequence of want of water-power they were obliged to decline many valuable orders, and were also prevented or greatly delayed in executing orders which they had accepted. Their actual loss they calculate as between \$5,000 and \$6,000 as shown in Exhibit H set out at pp. 146 to 148 of the Record. But, being anxious to avoid all contest as to the mere quantum of damage, so long as they established their right, they have limited their claim to \$1,000 only; and upon this the Court of Appeal below remarked that "as the Plaintiffs limit their demand in the way of money damages to the sum of \$1,000, and general evidence is adduced pointing to damage four or five times greater than that, we have no difficulty in maintaining their action to that extent, without the necessity of a critical analysis of its full extent in detail."

10. The Respondents addressed repeated remonstrances to the Appellants, both written and verbal, informing them of their want of power

and claiming of them to give them sufficient power to run their wheel, which was a 47 horse-power wheel, and if necessary to stop their own wheel, but these remonstrances and demands were in no case complied with. The instances of such written remonstrances are set out at pp. 140 and 141 of the Record.

Record p. 85
l. 15.

Remonstrances
Record p. 140-
41.

11. As to the Appellants contention that the custom of the Country limited the Respondents to ten hours use of water power per diem, no evidence of such custom was given. On the contrary, it was proved that both the Appellants and their lessee, Hambleton, worked by night as well as
10 by day, as it suited them ; and the latter in answer to a question, " Is it not
" customary for all the manufacturers to work night and day according to their
" orders ?" answered, " I suppose as much as it is wanted," and being further
" asked, " Have you any knowledge of any manufacture working during the
" night," answered, " Yes, sometimes when they are pressing," and that to his
knowledge the Defendants had worked during the night, though but seldom,
and that he himself had done the same.

Record p. 35,
l. 41.
P. 66, l. 1-14.

12. As to the Appellants contention that the deficiency in power from which the Respondents suffered was due to the improper placing of Respondents wheel, it will suffice to cite the remarks of the Honourable
20 Judge Hall, in giving thereasons of the Court of Appeal, Record p. 190, l. 24.
" Defendants allege and attempt to prove that this deficiency in power resulted
" from the Plaintiffs water-wheel being improperly placed, but it is significant
" that when the Defendants and their tenant Hambleton stopped work at
" night, and plaintiffs were thus able to utilise the full power of the reservoir, their
" 47.8-10 horse-power turbine furnished ample power for the effective use of
" all their machinery. Apart from this practical test the expert evidence of
" Messrs. Pringle and Parent removes all doubt upon this point. Defendants
" asserted and attempted to prove by common labourers, without scientific
" knowledge or experience, that plaintiffs' wheel might be placed lower, and
30 " thus increase its power. Both Pringle and Parent, disinterested witnesses
" of recognized authority in such matters, state that the wheel was as low as
" the tail race permitted, and that had it been lower, no sufficient outlet or
" discharge would have existed for the water after passing through the wheel,
" and that the obstruction thus caused, known as " back water," would have
" more than offset the additional power gained, theoretically, by lowering the
" wheel. Although some of the Defendants' Witnesses assert that the tail
" race itself might be lowered, it is shown that this could not be done within
" the limits of Plaintiffs' own property ; and they cannot be responsible for a
" possible improvement, the completion of which is not within their own
40 " control. Upon the whole we are satisfied that Plaintiffs' complaint in
" reference to shortage of power was well founded, and that it resulted, in
" part, from defects in the dam, and partly from the concurrent use of the
" water by Defendants and their lessees, the *mis-en-cause*."

Record p. 190,
l. 24.

13. The whole of the evidence of the Plaintiffs (now Respondent's

witnesses, both original and in rebuttal including that of the Defendant and of the *mis-en-cause*, was by common consent for convenience taken in the form of Depositions in the absence of the learned Judge who tried the cause in the Superior Court; and are accordingly all headed "by consent;" so that he was not in better condition than the Court of Appeal to decide the questions of fact by comparison of the demeanour of the witnesses.

14. On the 20th October, 1891, the Superior Court, Honourable Judge Taschereau, gave judgment dismissing the action with costs. The Judgment is set out at p. 5 of the Record.

Judgment of
Queen's Bench
Record p. 179. 15. Against this judgment the now Respondents appealed, and on the 23rd June, 1893, the Court of Queen's Bench for Lower Canada (Sir Alexandre Lacoste, C.J., Baby, Bossé, Blanchet, Hall J.J.) gave an unanimous Judgment reversing the Judgment below, and giving Judgment for the Plaintiffs (now Respondents) for \$1,000 damages and an Injunction. The Judgment is set out at p. 179 of the Record. 10

Reasons.
Record p. 188 16. The Reasons of the Court were given more fully by the Honourable Judge Hall. They are set out at p. 188 of the Record.

17. Against this Judgment the Defendants (now Appellants) obtained leave to appeal on the usual terms. 20

18. The Respondents submit that the Judgment appealed from is correct and should be affirmed for the following among other

REASONS.

1. The contracts are not void nor are they contracts for the sale of any part of the public domain.

2. The true meaning and effect of the contracts is to give the Respondents priority over the Appellants and those claiming under them by a later grant, in case the dam should not furnish sufficient to give to the Respondents the agreed amount of water-power concurrently with the Appellants. 30

3. The Appellants cannot be heard on these pleadings to say that the contracts do not represent the true agreement.

4. The Contracts do, in fact, represent and constitute the true agreement.

5. The Respondent's right to the agreed water-power is not restricted to 10 hours out of the 24, nor to any particular time of the day or year.

6. The suggested custom to the above effect is not proved ; and is, in fact, disproved by the evidence.

7. There has been a breach of their Contract by the Appellants.

8. The Respondents have suffered damage from such breach to the amount recovered.

9. The Respondents are entitled to the Injunction granted by the Judgment appealed from.

10. The said Judgment is correct in fact and in law.

ON APPEAL

From the Court of Queen's Bench for Lower Canada
in the Province of Quebec.

(APPEAL SIDE.)

BETWEEN

HAMELIN & ANOTHER - APPELLANT

AND

BANNERMAN & OTHERS - RESPONDENTS

RESPONDENTS' CASE

SIMPSON & Co.

6, Moorgate Street, E.C.

Respondents' Agents.