

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Felix
Hamelin and Thomas Ayer v. Thomas
Bannerman, Alexander Bannerman, Mary
Ann Bannerman, and Mary Rose Gilborn,
from the Court of Queen's Bench for Lower
Canada, Province of Quebec; delivered 2nd
February 1895.*

Present:

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD MORRIS.

SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The Appellants Hamelin and Ayer were, in 1881, proprietors of land lying on both sides of the North River, within the town of Lachute. They were also owners of the whole water power derivable from a pool or reservoir formed by the erection of a dam across the channel of the river.

By deed dated the 15th July 1881, the Appellants sold and conveyed to the late Robert Bannerman for the sum of \$1,000, a piece of ground on the south bank of the river, "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

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“ machinery to be placed by said purchaser in
 “ his rope manufacture on the hereby bargained
 “ and sold piece or parcel of land.” The sale
 and conveyance were made, with “ promise of
 “ warranty against all troubles and hindrances
 “ generally whatsoever ”; and it was agreed that
 the purchaser should have the option, at any
 time within five years, of acquiring any additional
 quantity of water power, not exceeding fifty
 horse-power, which might be required in con-
 nection with the water-power already sold, at
 the price of \$25 for each additional horse-power.

The following condition, which is of some
 importance in this case, was inserted in this
 deed of sale:—“ 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 accident
 “ to said dam, or that it require 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.”

In pursuance of the option reserved to him by
 the deed of 1881, the late Robert Bannerman,
 on the 2nd April 1886, obtained from the Ap-
 pellants a deed conveying to him an additional
 quantity of water from the dam, equivalent to
 fifty horse-power, to be held and used by him
 and his successors, in connection with, and upon
 the same terms and conditions as the supply he
 had already purchased.

Robert Bannerman, immediately after his

acquisition of the land, established a rope work upon it, which continued in operation, at least until the date of this action. Upon his death in July 1887, his interest in the land and water-power connected with it passed to the Respondents in this appeal. Before the date of the first sale to Bannerman, the Appellants had erected, and they have since maintained and worked a woollen factory on the north side of the river, the machinery being driven by water-power from the dam. In the year 1883, a bobbin factory on the north bank of the river, a little way above their own works, was let by the Appellants to one Hambleton, who continued to be their tenant until 1890, and, during his occupation, derived his motive power from the same source. The water-supply does not appear to have ever been used for any manufactory other than these three.

The present suit was brought by the Respondents, in September 1888, before the Superior Court. In their writ and declaration, they alleged that for years past the supply of water had generally been sufficient, at all seasons of the year, to furnish the amount of water-power to which they were entitled under their conveyances from the Appellants; but that, during several seasons of drought, whilst the whole supply obtainable was about, or even less than, 100 horse-power, more than half of it had been wrongfully appropriated and used by the Appellants and their tenant; and they claimed (1) a declaration that they were entitled to a supply of 100 horse-power in priority to the Appellants or their tenant; (2) an injunction against interference with their preferable right; and (3) decree for \$1,000 as damages in respect of their having been deprived of that right.

In answer to these claims, the Appellants put forward a great variety of defences, of which

it will be sufficient to state the substance. They pleaded, in bar of the action, that, the North River being navigable, its water could not be the subject of commerce; that, according to the spirit and sense of the deeds of sale, the Respondents' right to 100 horse-power was not preferential, but without prejudice to the Appellants' right to use the water for their factory; and that, according to law, the first use of the water belonged to the Appellants as the oldest manufacturers. In answer to the Respondents' pecuniary claim they pleaded that, if the Respondents had suffered damage, it was not due to any act or default of theirs, but was occasioned by the necessity of repairing injuries to the dam from ice or floods, or by defects in the Respondents' machinery and arrangements for using the water.

The case went to trial, on these pleadings, before the Honourable Judge Taschereau, who, after a voluminous proof had been led by both parties, sustained the defence, and dismissed the suit with costs. The learned Judge held in effect, that, according to the legal construction of the deeds, the Respondents had acquired nothing more than a right to take water representing 100 horse-power from the reservoir, if and when it was possible to do so, without affecting the supply of water required for the Appellants' factory, which had existed before their rope work. That finding in law was necessarily fatal to the Respondents' claim for damages, which was based upon the assumption that they had a preferential right to their stipulated quantity of water-power. The learned Judge further held, in point of fact, that the short supply actually received by the Respondents was due partly to *force majeure*, or in other words to the low state of the river, aggravated by the disrepair of the dam, from natural causes beyond

the control of the Appellants, and partly to their defective machinery.

On appeal, the Court of Queen's Bench, consisting of Sir Alexander Lacoste C. J., with Baby, Bossé, Blanchet and Hall, J. J. unanimously reversed the decision of the Superior Court; granted a declaration and injunction to the effect craved by the Respondents; and also gave them decree for \$1,000, being the full amount of the damages which they claimed. The reasons for the judgment of the Appeal Court were fully rendered by Mr. Justice Hall.

Their Lordships have not found the questions of law, which were raised and discussed by the Appellants, in the course of the argument addressed to them, to be attended with difficulty. The fact that the North River may be in some sense navigable, cannot prevent a riparian owner from acquiring an interest in its water-power, which he can sell along with and as appurtenant to a parcel of his land. Even if the Appellants had been unable, as they say they were, to give the Respondents a good title as against the public, the law would not have permitted them first to sell a prior right to the water-power, and pocket the price, and then to pose as members of the public, and to deprive their purchaser of the water, by using it themselves.

Again, their Lordships see no reason to doubt that, in a question with the Appellants, or any one who has derived an interest from them since April 1886, the Respondents have a preferable right to take water from the reservoir in question, to the extent of 100 horse-power. The deeds of sale are in terms absolute; they do not contain any reservation to the sellers to take a supply of water-power, either in priority to, or *pari passu* with, the purchaser; and they are

granted with full warranty against eviction. The warranty imports that the purchaser, and his successors in title shall not be hindered by any one in the exercise of their right to take preferably, from the water of the reservoir, a supply for their factory equivalent to 100 horse-power. There is no warranty that the river will bring to the reservoir a sufficient quantity of water to yield that amount of motive power, at all seasons. And, there is an express exception from the warranty, in the clause, which has already been quoted, with reference to necessary repair of the dam by the Appellants. During legitimate repairs, the reservoir may cease to supply water available for manufacturing purposes; or, it may supply less than the amount to which the Respondents are entitled. The clause protects the Appellants against liability in respect of such failure or short-coming; but it gives them no right, when the actual supply of water is less than 100 horse-power, to appropriate any part of it which may be required for the use of the ropework, in prejudice of the Respondents.

In these circumstances, the case presented by the Appellants appears to their Lordships to resolve into two questions, which are questions of fact depending on the evidence:—(1) Were the Respondents, through the act or default of the Appellants, hindered from obtaining the full amount of water-power required for their factory, such amount not being in excess of 100 horse-power? (2) Was any deficiency in the Respondents' water-power due to their own failure to make proper arrangements for its reception, and to provide proper machinery? In the event of the first of these questions being answered in the affirmative, and the second in the negative, a further question

arises, as to the amount of damage, if any, which the Respondents have suffered through the illegal conduct of the Appellants.

The proof led by the parties, in so far as it relates to the dam, to the storage capacity of the reservoir which it forms, the precise means which have been employed, and the best available means which could be employed, for distributing the water-power which it represents among the parties interested, cannot be regarded as satisfactory. Facts capable of precise ascertainment, by measurement and otherwise, are left to speculation, and the estimates of the witnesses differ widely. But, so far as their Lordships are able to judge, the evidence favours the conclusion that the relative levels of the intake sluices, for the Appellants' and Respondents' works, have remained unchanged since the date when the Respondents' factory was started, and that no substantial alteration has been made, since that time, upon any of the mechanical arrangements for distributing and utilizing the water-power of the reservoir. Their Lordships must not be understood as indicating an opinion that the arrangements then made must remain stereotyped for ever; but they are of opinion that, until some steps were taken by the Appellants, with a view to a new adjustment, the Respondents were justified in leaving their original arrangements and machinery unaltered.

Their Lordships have been unable to find, in the evidence, any ground for affirming, either that the pier erected by the Respondents in connection with their factory had any effect in diminishing the motive force of the water which they used, or that the machinery through which that force was developed was in any respect defective.

Keeping in view the opinion already expressed by their Lordships, with regard to the nature of the warranty undertaken by the Appellants, it does not admit of doubt, that, for at least 18 months before this suit was brought, they acted in persistent violation of the warranty. During that period there were two exceptionally dry seasons; and the effect which the prevailing drought had, in diminishing the supply of water, was seriously aggravated by the state of disrepair into which the dam had fallen, owing to the action of floods and ice. It is neither alleged nor proved that the Appellants failed to take proper measures for the restoration of the dam, or failed to execute the necessary repairs within a reasonable time. But the evidence shews that, whilst the river was low, and the repairs were going on, there was generally, if not constantly, an available supply of water-power obtainable from the reservoir. The evidence does not suggest that the total amount of water-power available at these times ever exceeded 100 horse-power. On the contrary, the evidence on both sides points to the inference that it frequently was considerably short of that amount. And it is proved beyond question, that the Appellants and their tenant appropriated the bulk of the horse-power available, with this result, that, when the Appellants and their tenant stopped working, the Respondents had ample water-power to drive their machinery, and that, whilst the factories of the Appellants and their tenant were in operation, the Respondents' supply of water-power was either insufficient, or wholly ineffective.

The conclusion appears to their Lordships to be inevitable, that the Appellants must bear the loss resulting to the Respondents, from their having, during the period already indicated,

systematically deprived the Respondents of the amount of water-power to which they were legally entitled. Their Lordships, having examined the evidence bearing upon the pecuniary estimate of that loss, are unable to differ from the result arrived at by the Court of Queen's Bench. They will, accordingly, humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The Appellants must bear the costs of this appeal.
