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*Oct. 8, 9.
*Nov. 16.

FELIX HAMELIN, *et al.* (DEFENDANTS) ..... } APPELLANTS;

AND

THOMAS BANNERMAN, *et al.* (PLAINTIFFS)..... } RESPONDENTS.

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

Deed of lands—Riparian rights—Building dams—Penning back waters—Warranty—Improvement of watercourses—Art. 5535 R. S. Q.—Arbitration—Condition precedent—New grounds taken on appeal—Assessment of damages—Interference by appellate court.

A deed conveying a portion of the vendor's lands bordering on a stream granted the privilege of constructing dams, etc., therein, with the proviso that, in case of damages being caused through the construction of any such works, the vendor or his successors in title to the adjoining lands should be entitled to have the damages assessed by arbitrators and that the purchasers should pay the amount awarded.

Held, that, under the deed, the purchasers were liable, not only for damages caused by the flooding of lands, but also for all other damages occasioned by the building of dams and other works in the stream by them; and, that the provisions of Art. 5535 R. S. Q., did not entitle them to construct or raise such dams without liability for all damages thereby caused.

Held, also, that an objection as to arbitration and award being a condition precedent to an action for such damages which had been waived or abandoned in the Court of Queen's Bench, could not be invoked on an appeal to the Supreme Court.

On a cross-appeal the Supreme Court refused to interfere with the amount awarded for damages in the court below upon its appreciation of contradictory evidence.

APPEAL from the judgment of the Court of Queen's Bench (appeal side), reversing the judgment of the Superior Court, District of Terrebonne, and maintain-

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and Davies JJ.

ing the plaintiffs' action for damages to the extent of $510, with costs.

The circumstances under which the action was brought and the questions at issue are sufficiently stated in the judgments now reported.

The defendants' appeal asked for the restoration of the judgment at the trial by which the action had been dismissed with costs. The plaintiffs by cross-appeal asked for increased damages.

J. A. N. Mackay K.C. and *Alfred Mackay* for the appellants. By the special terms of their title deed, as well as by the common and statute law, the appellants, having their mills in operation, are entitled to use the waters of the stream and improve the water-power by the construction of the dams complained of, paying, however, such damages as might, on reference to arbitration, be awarded for injury to the lands bordering on the stream. Art. 503 C. C.; Art. 5535 R. S. Q.; C. S. L. C. ch. 51; *Jones* v. *Fisher* (1).

The vendor of the appellants was not a mill-owner, but a farmer, and no mills, at the time, existed on the stream; the clause relating to damages was clearly intended to protect the farm lands in view of the extensive rights in the stream then conveyed to the manufacturers proposing to utilise the water-power. The estimate of the experts as to damages covered alleged injury by the damming back of the water. This right was granted by the deed which, by its registration, was sufficient notice to respondents, who purchased subsequently, that this right was a prior charge upon the waters of the stream.

The court was not bound by the report of the experts; Art. 409 C. P. Q.; *Bell* v. *City of Quebec* (2); Arts. 1013-1019 C. C.; *City of Montreal* v. *Drummond* (3).

(1) 17 Can. S. C. R. 515. (2) 5 App. Cas. 84.
(3) 1 App. Cas. 384.

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In any case the action is premature, because both under the agreement and by the law relating to the improvement of watercourses, a reference to arbitration and award had thereon are conditions precedent. *Guerin* v. *Manchester Insurance Co.* (1).

Atwater K.C. and *Beauchamp K.C.* for the respondents. Neither Art. 5535 nor the agreement as to arbitration can oust the tribunals of their jurisdiction. The cumulative remedy afforded thereby leaves the jurisdiction of the courts as it was before. Hardcastle on Statutes (3 ed.) pp. 130-136. By consenting to *expertise* the defendants waived arbitration, and they failed to ask it when served with the notarial protest in 1888.

The appellants have no special or exclusive rights either by virtue of the statute or under the agreement; they must in any case pay all damages caused by damming the stream whether it be by the flooding of the lands or by drowning the water-power above them. We rely upon *Emond* v. *Gauthier* (2); *Jean* v. *Gauthier* (3); *Frechette* v. *Compagnie Manufacturière de St. Hyacinthe* (4), remarks by Sir Arthur Hobhouse at pages 178-180; *Megantic Pulp Co.* v. *Village of Agnès* (5); *Merchants Marine Ins. Co.* v. *Ross* (6); *Anchor Marine Ins. Co.* v. *Allen* (7); *Breakey* v. *Carter* (8); *Bazinet* v. *Gadoury* (9); *Demers* v. *Germain* (10); 2 Demolombe "Contract" No. 4.

The registration of appellants' deed has no effect upon our rights in the waters of the stream. Art. 2085 C. C. *Trainor* v. *Phœnix Fire Ins. Co.* (11), at page 39; *Attrill* v. *Platt* (12).

(1) 29 Can. S. C. R. 139.
(2) 3 Q. L. R. 360.
(3) 5 Q. L. R. 138.
(4) 9 App. Cas. 170.
(5) Q. R. 7 Q. B. 339.
(6) 10 Q. L. R. 237.
(7) 13 Q. L. R. 4.
(8) 7 Q. L. R. 286; 15 R. L. 513; Cass. Dig. (2 ed.) 463.
(9) M. L. R. 7 Q. B. 233.
(10) 14 R. L. 369.
(11) 8 Times L. R. 37.
(12) 10 Can. S. C. R. 425.

On cross-appeal to increase the damages we refer to *The Queen* v. *Paradis* (1); *The Village of Granby* v. *Ménard* (2); *Morrison* v. *City of Montreal* (3); *Lemoine* v. *City of Montreal* (4).

The judgment of the majority of the court was delivered by:

TASCHEREAU J.—The plaintiffs, respondents, who are owners of a lot of land and a dam across the North River, at Lachute, allege that the appellants who own a property and a dam across the said river a few hundred feet further down, have, in 1888, by raising their said dam and increasing thereby the volume of water backed up by it, overflowed the respondents' own dam, diminished the force of their water power, flooded their land, and damaged trees and a quarry thereon, for which they claim $5,000 by this action.

Both parties derive their titles from one Peter Cruise, the appellants by a deed of 1876, the respondents by a deed of 1880, both duly registered.

The appellants pleaded to the action that by their deed of purchase of 1876, from Cruise, they had acquired, in addition to the land therein specified, the right to use the waters of the said river as they please wherever the said river flows past any of the land then bought by them, as well as wherever it flows past Cruise's land above it, comprising the land since sold by said Cruise to the respondents, and that consequently, they had the right to overflow the respondents' dam as they had done. The clause of their deed under which the appellants base their said claim to so dam the said river, whatever may be the effect of it on respondents' own dam further up the river, reads as follows: The vendor sells, assigns and transfers to Hamelin and Ayers, present appellants

(1) 16 Can. S. C. R. 716.
(2) 31 Can. S. C. R. 14.
(3) 3 App. Cas. 148.
(4) 23 Can. S. C. R. 390.

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A certain piece or parcel of land lying, being and situated in the seigniory of Argenteuil forming part and being comprised in the quantity of land purchased by the seller as hereinafter stated, containing one acre in width running along the shore of the North River on the south side thereof, by an acre in depth towards the property of the seller in such a manner as to form the quantity of two acres in superficies of the property of the said seller, bounded in front by the waters of the said North River, and in rear on both sides by the said seller, with all ways, water, watercourses, privileges, commodities, advantages, emoluments, appurtenances whatsoever in, over and upon that part of the said North River in and appertaining to the said premises as the said purchaser may choose to disturb, arrest, impede and cause to raise up by dams or other artificial means.

This deed, however, contains another clause, which the respondents invoke as giving them the right to be indemnified for the damages which the appellants have caused to them by the overflowing of their (the respondents') land and the diminution of their water power by the appellants raising their own dam in 1888. This other clause reads as follows:

It being well understood between the said parties that should the said seller or his heirs or assigns at any time hereinafter sustain any damage or loss, for and by reason of any work, construction or erection of dams or other fixtures or building by and on the part of the said purchasers or their heirs or assigns in and about the said premises that then and in that case such damages and losses shall be submitted to the award, order, arbitrament final end and determination of two persons indifferently chosen between them as arbitrators with power to the said arbitrators to name an umpire or third arbitrator, in case of a difference of opinion between them touching and concerning the matter so submitted to them, by either of the said parties hereunto, for final adjustment. The said parties hereunto agreeing to stand to, obey, abide, observe, perform, fulfil and keep the award, order, arbitrament, final end and determination of the said arbitrators or any two of them in and about all or any of the matters to be submitted to them, the whole under all costs, losses, damages and interests.

The appellants' contention is that this reserve of the right to claim damages is confined to damages to the land itself, and cannot be construed as extending to

damages caused by the use of the water power itself, which was sold to them together with the land. That contention was upheld by the Superior Court. but rejected by the Court of Appeal.

The appellants seem to me right in their contention that, by the deed of 1876, they have acquired the right to dam this river as they have done, and cause the waters to rise over the respondents' premises. I take that to be conceded by the respondents who by their protest in 1888, and by this action merely claim the damages resulting to them from the appellants' works under the clause of the deed to appellants by which they bound themselves to pay such damages, when arising.

But the appellants' further contention that they are not liable for all the damages caused to their seller (or to respondents, his representatives) but only for the damages caused to the land itself, by the erection of dams or other works on the property bought by them is, in my opinion, unfounded.

Their deed of purchase, as I read it, clearly says that if any damage whatsoever is later on sustained by Cruise or his representatives by reason of any dam or work erected by the appellants on the property purchased, the amount of the said damages shall be ascertained by arbitration. I cannot see how such a general, unambiguous clause can by interpretation be restricted as applying exclusively to damages to the land. They purchased two acres of land, with in addition the right to cause the waters to back up and so destroy all the benefit that their seller could derive from that part of the river that flowed past the property he retained above the one sold for the sum of $60, and $60 only, because the damages to the seller could not then be ascertained, depended on an eventuality and the lesser or greater elevation of the dam the

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purchaser might build, and might never accrue; therefore not including them, but reserving the amount thereof to be determined later on whenever they accrued, if ever they did. It is incumbent on the appellants who claim the exorbitant right of causing damage and not to pay for it to establish their contentions by an unequivocal title. And they have failed to do so. Indeed, they have proved the contrary. By their own title, they are liable for all damages, without any reserve or restriction.

The fact that by Art. 5535 of the Revised Statutes (Q.) the appellants might have had the right of raising their dam as they did on condition of paying all the damages resulting therefrom does not, that I can see, militate against the respondents' contention. Assuming that it might be so if the deed of 1876 were ambiguous as to the damages, its language is so clear that it cannot but be held to mean what it says. Moreover, though legal warranty, for instance, is implied by law without stipulation in a contract of sale it could not be contended that a stipulation amounting to nothing more in a deed of sale is to be read out of the deed. Likewise as to legal community, a clause in a contract of marriage stipulating it is not void because it is superfluous.

The appellants further contended that no damages recoverable in law had been proved by the respondents. The Court of Appeal allowed $500, being the depreciation of the value of their property resulting to them from the appellants' raising of their dam in 1885. That seems to have been a fair basis of the amount of damages in this case.

As to the arbitration being a condition precedent to respondents' action, that point must be considered as abandoned. There is no allusion whatever to it in the appellants' factum, and there was none in their

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factum in the Court of Appeal, in whose formal judgment the point is consequently not alluded to. They cannot raise here an objection which they waived in the court appealed from.

As to the amount of damages, on the cross appeal of the respondents, I do not see that there is any room for our interference. The evidence on this point is very contradictory. According to some of the witnesses, the respondents would have suffered none at all.

I would dismiss appeal and cross-appeal with costs.

GWYNNE J. (dissenting).—The plaintiffs in their declaration allege that the defendants are in possession of certain lands abutting on the North River at Lachute, in the Province of Quebec, which they purchased from one Peter Cruise in 1876 and 1880. That it was specially stipulated by the said deeds of sale that the said defendants, their heirs and assigns should be responsible for all loss or damage which should at any time be sustained by the said Peter Cruise, his heirs or assigns, by reason of the erection of a dam or other obstructions by the said defendants upon the said pieces of land. That the defendants erected a dam of five feet in height upon the said pieces of land. That subsequenly in 1886 one Robert Bannerman being then seized of a piece of land abutting on the North River, about 1,500 or 1,700 feet higher up the river than the piece sold by Cruise to the defendants which said piece of land the said Robert Bannerman also acquired by purchase from the said Cruise, and that he conjointly with one J. C. Ireland, who was proprietor of land at the other side of the North River, opposite to the piece of land purchased by Bannerman from Cruise, built upon their land a dam across the river. The declaration then alleges the death of the said Robert

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Bannerman and the acquisition by the plaintiffs of the property of which he died seized, including the piece of land so purchased by him from Cruise, and the half of the said dam so constructed conjointly with Ireland across the river. The declaration then alleges that in the months of August and September, 1898, the defendants increased considerably the height of the dam which they had erected across the river and thereby forced back the waters of the river to the prejudice of the plaintiffs' one-half interest in the said dam of five hundred dollars, and also thereby inundated the plaintiffs' land and destroyed divers trees growing thereon, and inundated a large quantity of valuable stones the property of the plaintiffs, and damaged a rope walk, &c., &c. To this declaration the defendants pleaded by way of peremptory exception that by article 5535 of the Revised Statutes of the Province of Quebec the plaintiffs' remedy for the causes of action stated is by arbitration as provided in that section, and not by an action, and that moreover by deed of sale of the date of 4th of November, 1876, from Cruise to the defendants of part of the land whereon the defendants erected their dam he, Cruise, granted to the defendants the right and privileges of inundating the lands in question by reason of dams or otherwise, and that if any damage should be thereby caused to the said lands the same should be ascertained and determined by arbitration as therein provided. That the lands in respect of which the plaintiffs claim damages are some of which Cruise was proprietor at the time of the passing of the deed of the 4th November, 1876, and which he subsequently by a deed of the 18th June, 1880, sold to the plaintiffs' *auteur*.

The defendants plead further that by the deed of 4th November, 1876, they acquired all the water power and absolute right to all the water power of the river

as abutting on the land sold by Cruise to Bannerman as on that sold to the defendants. They then plead that Ireland's interest in the same was sold to the defendants by deed dated the 25th February, 1892. That this last mentioned dam whereof the plaintiffs are possessed in common with the defendants has never been used for any purpose. That it serves no useful purpose. That the plaintiffs have never expressed an intention of utilising it for any purpose whatever, and that up to the present day no use whatever has been made of it nor has there been any need of it for any purpose whatever.

To these pleas the plaintiffs answer in law to the peremptory exception, and as to the other pleas of the defendants they simply assert that the allegations of the defendants are in point of fact false.

The court having ordered the issues of fact to be tried before determining the issue in law the case was brought down for trial before experts to whom these issues had been remitted by the court. In the reference to the experts several questions were submitted to them to inquire into and report upon. To only some of them will it be necessary to refer, but before doing so it will be proper here briefly to refer to the agreement between F. C. Ireland and Robert Bannerman in virtue of which the dam was erected of which the plaintiffs as they themselves claim and the defendants are now proprietors in common. That agreement is contained in a notarial deed bearing date the 31st day of July, 1886, whereby it was agreed that a dam should be abutted on the property of Ireland upon one side of the river and of Bannerman on the other; and that it should be constructed across the river in the form prescribed in the deed to the height of four feet and a half from lower water mark, and when built should be maintained at the common and equal cost

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and charge of Ireland and Bannerman and of their respective heirs and assigns. Then follows the special provision following:

Should the said dam require to be raised beyond the height herein above mentioned to furnish more power, or lowered on account of causing any damage to the water power above as hereinafter stipulated such works shall be performed at equal costs and expenses by the said parties, but the said dam shall in no way interfere with the rights already accrued to other interested parties having water power above the said dam to be constructed by the said appearants. *Should either of the said parties require to make additional works* other than *the dam proper* such work shall be performed by one of the said appearants requiring the same, and should any such additional works *other than the dam proper* made by either of the said parties requiring the same for supply of water in any way, cause a leakage *or damage to the said dam proper and lessen or interfere with the water power of the other it shall be repaired immediately* by the one of the said appearants who shall have built the same on pain of all costs, damages and interest to the party suffering from the same. Each of the said appearants *shall be the proprietor of the one half of the water furnished by the dam so intended to be erected as aforesaid.*

The first two questions submitted by the court to the experts to report upon are as follows:

1st. Have the defendants, by raising the height of the dam, inundated that of the plaintiffs and have they thereby caused the plaintiffs damage as alleged in the declaration?

2nd. If such damage has been caused to the plaintiffs what is the total amount of it?

To which the experts in their report reply

that the information given at the enquête respecting damage caused to the said dam proper of the plaintiffs arising from the raising of the defendants' dam does not present any quality of certainty and does not rest upon any accurate observation—that such damages can be established by the assistance of special tests; that under these circumstances the experts thought it to be their duty to rely more especially upon the results furnished by their own observations—and *so doing they arrived at the conclusion that the raising of the defendants' dam has not inundated the said dam proper of the plaintiffs, and so that there has been no damage upon that head.*

3rd. Is there at the foot of the said dam of the plaintiffs a fall in the water furnishing them with an additional height of about four feet and one-half or, if not, how much?

To which they answer that

from the foot of the dam to the surface of the still waters there is *une dénivellation superficielle* which furnishes an equivalent to 2 feet $\frac{9}{100}$.

4th. How much loss of horse-power has the raising of the defendants' dam caused to the dam of the plaintiff, and what value does such loss represent?

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7th. What is the value of one horse power at the place where the plaintiffs' dam is built?

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11th. Has the dam of the plaintiffs ever served any purpose of commerce or manufacture whatever and has it ever, up to the day upon which the present action was commenced, been of any use to the plaintiffs?

12th. Has the dam of the plaintiffs lost value on the market or otherwise by the act of the defendants?

I have grouped these questions together because they al relate to the plaintiffs' claim for damages alleged to have been caused to them at the dam.

In answer to the sixth question the experts, expressing their own opinion, for there was no evidence before them on the subject, say that, in their opinion, the height of the fall at the plaintiffs' dam is to be measured from the height at the water above the dam to the surface of the water at the foot of a current which flows from the foot of the dam and so measuring that they find the penning back of the waters in the current below the dam to have diminished the disposable fall at plaintiffs' dam by two feet and one half.

Now the dam of the plaintiffs is in a particular form prescribed by the terms of the deed in virtue of which it was erected namely in the shape of a $\overset{A\ B}{\underset{C}{V}}$ with its apex in the centre of the river; calling then the apex C and the terminus of the leg on the plaintiffs' side of the river and that of the leg on the defendants' side A, and the current commencing at the foot of the dam at say the point marked C, and as the plaintiffs

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could never have any use of the water-power created by the dam unless the water should be drawn off on to their own land behind the point B it does not appear clear how the doing away with the current below the dam can diminish the *fall* of the water drawn off behind the point B. The experts however in estimating the value of an alleged diminution of power from such causes, say that in view of the topography of the places a manufactory could be placed upon the plaintiffs' property in such a manner as to use, as I understand them the whole of the plaintiffs' share in the water power created by the dam which by the terms of the deed in virtue of which the dam was erected was, as we have seen one half of such water power; but the works in such manufactory for the operation of which the water from behind the dam should be conducted would naturally be above the surface of the waters in the river at the foot of the dam, and why the height of the surface waters behind the dam should be measured to a point two feet and one half *below* the surface of the waters in the river at the foot of the dam and should be introduced as an element in determining the force of the water conducted to such works for their operation no evidence was adduced or explanation offered; it may be moreover that the cost of erecting such manufactory and of conducting the water into it for the purpose of using such half of such water power would not justify a prudent person in incurring the expense; and it may be that herein can be found a sufficient reason to account for the fact that the water power never has been used by the plaintiffs or their predecessors in title for any commercial or useful purpose, or by the plaintiffs for any purpose whatever save only that to which it has been applied in the present action, namely to base thereon a claim of right to prevent the

defendants from using at their dam for manufacturing purposes the waters of the river up to the foot of the dam in which the plaintiffs have a half interest in common with the defendants.

In answer to the seventh question the experts say in substance that the evidence is so very contradictory that the only conclusion which can be drawn from it is that the value of a horse power is something between fifty (50) cents and thirteen dollars and fifty cents and they say that the conclusion they have drawn from this evidence aided by their own experience is, that a horse power is worth five dollars ($5) per annum, and they estimate therefore the loss of the 2½ feet in the fall mentioned in their answer to the sixth question at 53 horse power which at $5 per horse power makes $265 per annum.

In answer to the eleventh question they say that it does not appear in the evidence that the dam of the plaintiffs has ever served any purposes of commerce or manufacture whatsoever, and that up to the present time it has not been of any use whatever to the plaintiffs.

They answer the twelfth question by referring to their answers to the sixth and seventh questions, and say that the raising of the defendants' dam having diminished (according to their opinion) the plaintiffs' use of their share of the water power usable at the dam by 53 horse-power the market value of the plaintiffs' share in the dam has been diminished. This answer simply amounts to this that diminution of water power at a dam by 53 horse-power *necessarily* diminishes the market value of the dam by the value of 53 horse-power which in the present case the experts estimate at $5 per horse-power or $265 per annum, but this argument is based upon the assumption of a fact which is wanting in the present case namely that

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water-power for which since its creation in 1886 no use whatever has been found had a market value capable of being injuriously affected by the diminution of the power. Now from the report of the experts and the evidence taken before them it is established that the dam in which the plaintiffs have a share has never since its erection, nor the water power thereby created, been applied to any useful purpose whatever —that the plaintiffs have never made any use of the dam save, as already observed, the use made of it in the present action—that the dam has not been damaged by the raising of the defendants' dam, and that the plaintiffs have not sustained any actual damage whatever of the nature complained of in the plaintiffs' declaration, but that from the foot of the dam to the tranquil waters further down there was a current in the river having a fall of about 2½ feet (two and one half feet;) that this current has been done away with by the back waters caused by defendants' dam, and that in the estimation of the experts such change in the condition of the waters in the current has diminished the plaintiffs' share in the water power created by the dam which, although not made any use of by the plaintiffs hitherto could, in the opinion of the experts, be made use of if a manufactory should be erected on the plaintiffs' property at a point and in a manner observed by the experts as capable of using the whole of the plaintiffs' share in such water power, but whether the cost of erecting such manufactory and of conducting the water into it for manufacturing purposes would justify any prudent man in incurring the necessary expenditure no evidence whatever has been produced upon which to form any opinion.

The only loss which the experts have suggested that the raising of the defendants' dam has caused to the plaintiffs is the possible diminution theoretically

conceived in the market value of a dam which since its erection to the present time has never served any useful purpose whatever and which for that reason may fairly be assumed to have had no market value. In estimating the marketable value of water power created by a dam there are many things to be taken into consideration besides an estimate of the cubic contents of the water used or capable of being used and of the height of the fall from the top of the dam where the water is drawn off for use to the place where the water is to be used. The cost of constructing a manufactory in which to use the water power and of conducting the water to the works in the manufactory must be taken into consideration, also the beneficial purpose to which the water power has been or can be applied, and the profitable character of such use based either upon experience by actual use of the water power or based upon some substantial material as to the profitable purpose to which the water power can be applied. None of those things have been taken into consideration by the experts in the present case, the estimate therefore which has been made by them is, in my opinion, not only theoretical, speculative and illusory and of no practical value but, in the present action, is irrelevant. The estimate is of a permanent diminution in value, by the act of the defendants, of the plaintiffs' share in the water power created by the dam, is purely theoretical, not based upon any practical experience in the use of the power, but it is as to the value of a permanent deprivatory of the plaintiffs of water power equivalent to 53 horse power but the plaintiffs do not by their action ask for any damages upon such a calculation—they do not offer to surrender to the defendants the right to continue to deprive the plaintiffs of the water power if any there be by which the share of the plaintiffs in the water-power at the

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dam has been diminished by the defendants' dam of which diminution there is no sufficient evidence, upon payment either of a sum calculated on the estimate of the experts nor upon payment of any sum nor would judgment for the plaintiffs in the present action have the effect of vesting in the defendants or of securing to them the permanent right forever of depriving the plaintiffs of the water-power, if any there be, of which the raising of the defendants' dam has deprived the plaintiffs. What the plaintiffs claim in their action, and what judgment in their favour therein would give them, would be compensation for whatever actual damages if any that they can shew they have already sustained, or nominal damages in case of infringement of a right without actual damages as yet sustained and judgment affirming their right to the continual enjoyment of the water-power if any there be of which they have been deprived, and to have the cause of such diminution of the water power removed and to restrain the continuance of the wrong, if any there be, which, as alleged in the declaration, has caused—is causing and will continue to cause damage to the plaintiffs. Beyond this the court has no jurisdiction in the present action and it would be preposterous that the defendants should be compelled by the judgment of the court to pay to the plaintiffs the full value of the permanent deprivation of them of a thing the permanent retention of which the judgment cannot secure to the defendants.

As to the remaining heads of inquiry, namely, relating to damages alleged in the declaration to have been sustained by the plaintiffs—by their land having been inundated a quantity of valuable stone flooded—a rope-walk damaged—and trees destroyed, it is sufficient to say that the experts report and that the evidence justifies such report that

no damage whatever has been sustained by plaintiffs' land by flood-waters backed from the defendants' dam —no damage done to any stones or stone quarry, and no damage done to plaintiffs' rope-walk, and as to the damage claimed for trees alleged to have been destroyed they say that the evidence was wholly contradictory, and they set out in their report that evidence which on the plaintiffs' side consisted of the evidence of one of the plaintiffs who claimed that trees to the value of from $100 to $150 had been killed by the backwater—and of Peter Cruise who thought this too high an estimate and would go no further than $35, while five witnesses on the part of the defendants testified that there were no trees at all killed or damaged by back-water, and certainly it seems difficult to understand how trees could have been killed on plaintiffs' land by flood waters from the dam consistently with the finding that no damage was done to the plaintiffs' land from such cause although one of the plaintiffs swore that one half of the value of his land was destroyed by such cause. It would certainly seem that the evidence on the part of the plaintiffs as to the destruction of trees was as unreliable as that in relation to the flooding of their land; however the whole weight of the evidence was that no trees were damaged by back water and yet the experts in their report say that they were of opinion that damage to trees to the amount of $10 was caused by back water.

Upon this report and the evidence referred to therein, the case came down before Mr. Justice H. T. Taschereau of the Superior Court who pronounced judgment therein allowing the answer in law to the peremptory exception and gave judgment in favour of the defendants upon the residue of the issues joined in the action. Among the reasons upon which that judgment is founded the following are stated in the judgment:

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Considering that the report of the experts establishes that the defendants have not by the raising of their dam inundated that of the plaintiffs and that there is nothing due for damage upon that head, and that there has not been any inundation of the land of the plaintiffs nor damage caused to their manufacture (that is the rope walk claim), and that the plaintiffs have no claim for indemnity in respect of the pretended loss of a stone quarry.

Considering that the sole damage as ascertained by the experts has been caused to certain trees which the report values at ten dollars, *but that this opinion of the experts is not supported by the evidence* and cannot be sustained by the court.

And, considering that the plaintiffs' dam is of little value and has never been utilized, and that it is impossible *upon the evidence* to say that it ever can be advantageously made use of, and that a water power can only be valued in connection with a manufactory or manufacture already in existence with motive powers, and that in the absence of such industry and of these motive powers the dam alone cannot have any appreciable mercantile value in prospect of the water which it may later on be employed to help more or less according to the industry and motive powers which may be connected with it, and so that the existence of a dam alone can give no more right to indemnity than the existence of the power of the water itself so long as it is not in active condition,

and he concludes his judgment by saying:

Considering that from all the circumstances of the action, disclosed by the *enquête*, the plaintiffs' action appears vexatious and to have no legitimate foundation.

Upon a consideration of the whole case I can see no just ground of objection to these reasons upon which the learned judge has based his judgment. In my opinion, as already stated, there was no evidence whatever adduced from which an intelligent opinion can be formed of the market value of the plaintiffs' interest in the dam possessed by them in common with the defendants, or of the value of any diminution of such value, if any such there be, or which would justify the conclusion that in point of fact any diminution of the water power created by the dam, or any damage past, present or prospective, has in reality, been caused to

the plaintiffs' share in the water power created by the dam, by the raising of the defendants' dam.

From the judgment of the Superior Court the respondents appealed to the Court of Queen's Bench in Appeal, at Montreal; that court reversed the judgment of the Superior Court and pronounced judgment for the plaintiffs for $510 damages made up of $500 which the court estimated as representing the permanent loss of one-fourth of what the court estimated as being the full market value of the plaintiffs' interest in the dam, and $10 as the experts' estimate of injury to trees.

As to the $500, although not as extravagant as the estimate of the experts, it is nevertheless open to the same objections, namely, that it is not founded upon any sufficient evidence of any permanent or temporary damage past, present, or prospective, having been in fact occasioned to the plaintiffs' interest in the dam in question—this estimate of total market value, and also of the one-fourth diminution of such value are also wholly arbitrary, unsupported by any sufficient evidence and moreover the judgment is also open to the same abjection as already alluded to in relation to the estimate of the experts, namely, that it awards the plaintiffs a sum of money estimated to be the full value of the permanent deprivation of the plaintiffs, of one-fourth of the whole market value of the plaintiffs' interest in the dam, while the judgment does not secure to the defendants the right to enjoy permanently the thing for which they are adjudged to pay unconditionally the estimated full value.

As to the ten dollars in respect of trees, that sum, as already shewn, was in the opinion of the learned judge of first instance and in fact not authorised by the evidence. The judgment of the Superior Court so adjudged, and I can see no reason for varying that judgment upon that point.

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HAMELIN v. BANNERMAN.

Gwynne J.

There remains only the construction of the defendants' title from Peter Cruise of the 4th of November, 1876, which the defendants have in their plea, insisted to be and still insist upon its being an absolute grant by Peter Cruise to the defendants, their heirs and assigns to pen back at their dam all the water in the river flowing along the whole extent of the land then owned by Cruise alongside of the river, of which he, by the deed of 4th November, 1876, sold a small piece to the defendants for the abutment of a dam then proposed to be erected by the defendants across the river.

Now it may be admitted that in November, 1876, when Cruise sold that small piece of land to the defendants, as he owned no land on the opposite side of the river and had consequently no mill site which he could then effectually use, the only damage which he contemplated as being possible to be done to him by the proposed dam of the defendants was in respect of his land remaining to him being flooded by the backwater caused by the dam—the language of the deed, it is not disputed, secures to him that right but it is short of containing a *grant* as is contended by the defendants of all Cruise's interest in the water flowing past the whole of his land. On the contrary the words used literally pass only the small piece particularly described, including to the middle of the stream together with all the waters of the river passing along such small piece of land alongside of the river. A careful perusal of the sentence relied upon by the defendants shews that it is not very grammatically expressed but however read there is nothing in it I must say, which can, I think, warrant the contention of the defendants.

It was, I think, quite competent for Cruise notwithstanding his deed to the defendants, subsequently to

acquire, on the opposite side of the river, a site whereon to abut, on that side, a dam to be built across the river to utilise any water-power available above the piece sold to the defendants, and Cruise's assignee, Robert Bannerman, would have the same right.

Judgment therefore must be given against the defendants upon that plea; but this does not, except as to costs, affect the right of the defendants to judgment in the action which in my opinion, for the reasons already given, they ought to have. The appeal therefore of the defendants ought, in my opinion, to be allowed but without costs, because of the defendants failing upon their plea of a grant from Cruise of the whole of the water-power in the river as aforesaid.

The cross-appeal of the plaintiffs, the now respondents, should be dismissed but without costs also for the reason that I do not think the costs have been appreciably increased by such cross-appeal.

Each party should bear the costs of the appeal from the Superior Court to the Court of Queen's Bench, in appeal, for the reason that, as I think, the appellants there were only entitled to succeed in part, namely, on the defendants' plea of grant from Cruise.

The plaintiffs should have costs incidental to the peremptory exception having been pleaded and all costs in the Superior Court incidental upon the plea of the grant of all the water in the river from Cruise, and the defendants should have all the residue of the costs in the action.

Each party should have the right of setting off one set of costs against the other.

Appeal dismissed with costs.

Solicitor for the appellants: *J. A. N. Mackay.*

Solicitors for the respondents: *Beauchamp & Bruchesi.*