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 THE CHAMBLY MANUFACTUR- } APPELLANTS;  
 ING COMPANY (DEFENDANTS)..... }

\*March 3, 4.

\*Marh 25.

AND

SAMUEL T. WILLET (PLAINTIFF).....RESPONDENT.

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

*Appeal — Practice — Exception — Art. 1220 C. P. Q. — Acquiescence —  
 Motion to quash — River improvements — Continuing damages —  
 Contract—Protective works—Discretion of court below — Practice—  
 Varying minutes of judgment—Costs..*

Owing to the condition of the locality and the character of certain improvements made for the purpose of increasing the water power at Chambly Rapids, in the Richelieu River, the parties entered into an agreement respecting the construction of dams and other works at the *locus in quo*, and it was provided that the company should assume the responsibility and pay for all damages caused by "flooding of land, bridges or roads, if any, as well as all other damages caused" to the plaintiff "during or by reason of" the constructions.

*Held*, reversing the judgment appealed from, that, under the agreement, the plaintiff could recover only such damages as he might suffer from time to time in consequence of the floods at certain seasons being aggravated by the constructions in the stream and that, in the special circumstances of the case, the courts below erred in decreeing the construction of protective works, inasmuch as the company was entitled to take the risks on payment of indemnity as provided by the contract.

Where a respondent, on an appeal to the court below, has failed to set up the exception resulting from acquiescence in the trial court judgment, as provided by article 1220 of the Code of Civil Procedure, he cannot, afterwards, take advantage of the same objection by motion to quash a further appeal to the Supreme Court of Canada.

On an application to vary the minutes of judgment, as settled by the Registrar, for reasons which had not been mentioned at the hearing of the appeal, the motion was granted, but without costs.

\*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Nesbitt and Killam JJ.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, which maintained the plaintiff's action with costs.

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The action was brought by the respondent, owner of certain water privileges and mills on the Richelieu River at Chambly Canton, against the company, which has power to erect dams and works on that river, and to expropriate private property for their purposes. The parties entered into an agreement as to the use of the water power at the point in question, the company agreeing that they would not expropriate any properties belonging to the plaintiff. The company was bound by its charter of incorporation to indemnify riparian proprietors for any damages which might be caused by the works constructed by them in the river for their purposes, but, by another agreement with the plaintiff, the company specially covenanted to indemnify the plaintiff for all damages that might be caused to his properties in consequence of the works constructed and to be constructed by the company, by the flooding of land, bridges or roads, and also all other damages caused to the plaintiff during or by reason of the construction of the dams and other works undertaken by them for the purpose of increasing and utilizing their water power at the Chambly Rapids, opposite the plaintiff's mills.

The company constructed certain dams and other works, at the point in question, which, the plaintiff alleged had the effect of flooding his lands, injuring his water power and otherwise causing him damages. He claimed \$22,000 for damages and asked that the company should be ordered to demolish the works and to have protective works erected to prevent further damages to his properties.

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At the trial Mr. Justice Davidson was of the opinion that the plaintiff had suffered damages to the extent of \$12,042, but, before pronouncing final judgment, ordered an *expertise* for the purpose of determining the extent and nature of the works which were necessary for the protection, in future, of the plaintiff's property from floods and the deflection of the outflow of the river caused by the dam in question, and for further report as to how far the proposed protective works would do away with certain items of damage included in the said sum of \$12,042.

Upon the making of the expert's report, Mr. Justice Davidson, on the 18th day of November, 1902, made his final judgment awarding to the plaintiff the sum of \$9,247.75 with interest, and ordered and directed the defendants to construct certain protective works as therein set out.

This judgment was affirmed, with slight modifications, by the judgment now appealed from. The appellants now ask for the dismissal of the action, or, at any rate, that the order respecting protective works should be struck out and the damages reduced in respect to the items added by the Court of King's Bench, on appeal.

At the hearing of the appeal, in the Supreme Court of Canada, the respondent moved to quash the appeal on the ground that, by the construction, or attempted construction of certain of the protective works, the company had acquiesced in the judgment appealed from and that their appeal could not now be asserted. This ground had been open to the respondent on the appeal in the court below but he had not there taken the objection by means of the exception provided by article 1220 of the Code of Civil Procedure.

*R. C. Smith K.C.* and *Campbell K.C.* for the appellants.

*Lafleur K. C.* and *Aimé Geoffrion K. C.* for the respondent.

The judgment of the court was delivered by :

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GIROUARD J.—In this case there is first to be disposed of a motion to quash the appeal upon the ground of acquiescence in the judgment of the trial court. The respondent has failed to take advantage of this exception before the Court of Appeal in accordance with article 1220 of the Code of Civil Procedure. He is too late do so now and the motion is rejected with costs.

On the merits, we have only a few remarks to make. While recognizing the power of the Superior Court of the Province of Quebec, and in some cases its duty, to provide for the construction of protective works for the purpose of putting an end to further damages and of avoiding multiplicity of actions for the same causes, we do not think that this is a case where that power should be exercised.

The dam ordered by the court to be constructed in the Chambly Rapids is a difficult piece of work, involving the expenditure of a large sum of money, fixed by the experts named by the court at \$20,993; it may be more, for, as we know, experts' estimates are seldom not exceeded in the execution. After the rendering of the judgment of the trial court, the appellants commenced to comply with its directions, but they soon had to stop, the work done being carried away by the strong current. It was, no doubt, in view of these difficulties, due to the locality and the character of the constructions, that the building of the original dam and other works and the specifications were settled and agreed to by both parties. They proved to have been insufficient. The parties had foreseen this possible result and have agreed upon the remedy

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to be taken in such an eventuality. Clause 11 of the agreement says:

The said parties of the first part shall also be responsible for and shall pay all damages caused by flooding of land, bridges or roads, if any, as well as all other damages caused to the party of the second part during or by reason of the construction of said dam.

We believe that, under this clause, the respondent has only an action for the recovery of such damages as he may suffer from the works in question at any time, and especially in the spring, for it is admitted that it is generally during that season that floods may happen. The appellants prefer to run the risk of the money satisfaction or indemnity provided for in the contract rather than the more or less expensive and uncertain protective works ordered by the court. We believe that this agreement between the parties should be carried out. We will, therefore, reform the judgment appealed from by striking out that part which provides for the construction of protective works.

We have also come to the conclusion not to admit the three items of \$150, \$350, and \$347, which the Superior Court had also rejected and the Court of Appeal accepted, for no apparent reason, amounting altogether to \$747.

The appeal is allowed with costs. The judgment appealed from is modified accordingly, and the judgment on the appeal from the interlocutory judgment of the 10th of June, 1901, is reversed with costs, on both appeals, against the respondent. The action of the respondent is maintained for \$8,500 and interest from the date of the judgment of the Superior Court, 18th November, 1902, and costs of suit incurred in said Superior Court, less all costs of *expertise* which shall be paid by the respondent.

*Appeal allowed with costs.*

Upon the argument of the appeal the attention of the court was not called to the fact that if the appellant succeeded in having the order for the protective works set aside, the items of damage which had been struck off by reason of the contemplated works should be added to the damages awarded to the plaintiff, or a reference made to the courts below for some final adjudication with respect thereto. This point was first raised upon the settlement of the minutes of judgment, and an application was subsequently made, on 31st May, 1904, to the full court\* to vary the form of the judgment as pronounced, and to increase the amount of damages to the \$12,042 found by the trial judge.

The court having heard the parties by their counsel upon the motion to vary the minutes of judgment, as drafted by the Registrar, on the 1st June, 1904,\* added a paragraph to the minutes reciting that, whereas three items of damages forming part of the statement or group of items referred to in the judgments of the Superior Court as "Group B.," namely, item 2, for \$3,300; item 7, for \$190; and item 12, for \$1,650, had not been finally passed upon, either by the Superior Court or the Court of King's Bench, and inasmuch as they were considered as provided for and included in the protective works recommended by the experts, and it was ordered that the said three items should be referred back to the Superior Court to be investigated and adjudicated upon, the costs of such investigation and adjudication to follow the event. No costs were allowed on the motion, as the question was not raised at the hearing of the appeal.

*Motion allowed without costs.*

Solicitors for the appellants: *Campbell, Meredith,  
Macpherson & Hague.*

Solicitors for the respondent: *Geoffrion, Geoffrion &  
Cusson.*

\* PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

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