Privy Council Appeal No. 64 of 1912.

David Maclaren and another - - - *Appellants,*

v.

The Attorney-General for the Province of Quebec - - - - - - *Respondent.*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JANUARY 1914.

Present at the Hearing.

THE LORD CHANCELLOR.
LORD SHAW.
LORD MOULTON.

[*Delivered by* LORD MOULTON.]

The Appellants in the present Appeal are David and Alexander Maclaren, the Plaintiffs in the original litigation, and the Respondent is the Attorney-General of the Province of Quebec, who intervened in the suit under circumstances hereinafter mentioned and who, since such intervention, has substantially carried on the litigation on behalf of the Government of the Province. To make clear the points in dispute it will be necessary to set out somewhat in detail the facts of the case and the history of the litigation.

The River Gatineau is a river of considerable size but irregular bed flowing into the

River Ottawa on its north bank. Starting from the River Ottawa and proceeding up the River Gatineau one passes through the township of Hull, and then through the township of Wakefield. North of the township of Wakefield the River Gatineau has on its left or eastern bank the township of Denholme and on its right or western bank the township of Low. The documents creating these townships are Letters Patent issued by the Crown, in whom, of course, the property in the soil was originally vested, and such documents specify and define the boundaries of these townships.

By Letters Patent dated 23rd of November 1860, a portion of the township of Low, known as Lot 39 of Range 2 of that township, was granted to Caleb Brooks, and subsequently by Letters Patent dated the 8th of April 1865 another portion, known as Lot 38 of Range 2 of that township, was also granted to him. Both these lots lie along the right bank of the river. By divers mesne assignments, the validity of which is not questioned, the Plaintiffs have become the owners of 17 acres of Lot 39 and about 4 acres of Lot 38, these portions being so situated that they may, for the purposes of this case, be taken to include so much of the lands comprised in Lots 38 and 39 as lies along the river.

By Letters Patent dated 24th March 1891, the west half of a portion of the township of Denholme, known as Lot 38 of Range 1 of that township, was granted to William Brooks. The land so granted (which lies along the left bank of the River Gatineau) was, by a deed of sale dated the 4th May 1894, sold by the said William Brooks to the Plaintiffs. The validity of these transactions is not questioned.

It is not disputed, therefore, that the Plaintiffs are the owners of lands on both

sides of the River Gatineau, lying opposite to each other and so situated that, if the plots comprised in the grants are riparian lands, and if the ordinary presumptions of English law hold good, they would carry with them the ownership of the bed of the river lying between them. Whether these lands are riparian and whether these presumptions do hold good in the case of the River Gatineau, are the two questions to be decided in the present case.

But these questions are raised in a very peculiar way, which necessitates the statement of certain further facts.

On December 7, 1899, S. N. Parent, Commissioner of Lands, Forests and Fisheries, of the Province of Quebec, on behalf of the Government of that Province, sold to Edwin and William Hanson, the Defendants in the Court below :—

"The water lot and water power, situate on the River "Gatineau, comprising all that portion of the bed of "that river, covered by the 'Paugan Falls and Rapids,' "and the Island and Rock situate at the front thereof, "and lying in front of Lots 38, 39 and 40 of the Second "Range of the Township of Low, and of Lots 38, 39 and "40, of the Township of Denbolme."

It is not disputed that this grant covers portions of the bed of the River Gatineau, which would belong to the Appellants if the two questions above mentioned are answered in the their favour.

The litigation was commenced by the Plaintiffs, who set up a title to these portions of the bed of the river based on the conveyance to them of the adjoining lands, and alleged that the Defendants, Edwin and William Hanson (the above-mentioned purchasers from the Crown), had illegally, improperly and without right entered on the property of the Plaintiffs and had falsely

claimed to be the owners thereof, and had offered the same for sale as such owners, and threatened and intended to re-enter and erect works thereon, and they prayed that the Plaintiffs should be declared the owners of the property in question, and that the alleged sale by Patent to the Defendants should be declared to be null and void and without effect in so far as it assumed to sell or to grant to the Defendants any part of such property. They further claimed an injunction and damages.

The Defendants in their defence denied that any portion of the bed of the river belonged to the Plaintiffs or had been included in the grants made to the Plaintiffs' predecessors in title. Among other allegations of fact they set up that the River Gatineau is a navigable and floatable river, whose bed formed part of the Crown domain, and that accordingly no part of such bed was included in the grants in question. This issue, as will presently be seen, has eventually become the main issue in the case.

Shortly before the Plaintiffs put in their answer to the Defendants' plea (which consisted substantially of a joinder of issue), the Attorney-General of the Province of Quebec intervened, as being interested in the event of the suit and entitled to be heard therein. As the grantor to the Defendants, the Government of the Province was interested in defending the validity of its grant. Since this intervention the litigation has in substance been confined to the questions raised by the Intervener, and it has been carried on between the Plaintiffs on the one side and the Government, represented by the Attorney-General of Quebec, on the other. It is, therefore, not necessary to refer to the cross-demand of the Defendants, or the claim for damages on the part of the Plaintiffs, as the only point now

before the Board is the question of title to the bed of the river.

The history of the litigation shows great differences of judicial opinion on the issues involved therein. Champagne, J., the Judge at the trial, decided in favour of the Plaintiffs on all points. On appeal to the Court of King's Bench (Appeal Side) that Court (consisting of five Judges) decided against the Plaintiffs on all points. Appeal was then brought to the Supreme Court of Canada, and the six Judges who heard the Appeal were equally divided on the question of the Plaintiffs' title, although on other points they agreed with the Judgment of Champagne, J. The Appeal was accordingly dismissed, and it is from this decision of the Supreme Court of Canada that the present Appeal is brought.

The case divides itself into two heads. In the first place, the Respondent denies that the descriptions in the grants, through or under which the Plaintiffs hold, are such as would carry the bed of the river, even under English law. In the second place, he says that even if such were the case, it is not in accordance with the law of the Province to apply the English presumptions as to the ownership of the bed of a river or its inclusion in grants of the lands forming its banks to the case of a river such as the River Gatineau. In other words, he alleges that the River Gatineau is a navigable and floatable river, and that, by the law of Quebec, no portion of the bed of such a river goes with a grant of the land on its banks.

Excepting upon one point, there has been no dispute as to the facts of the case. At the trial the Defendants sought to show that the River Gatineau is navigable and floatable both

to ships and rafts. The Plaintiffs admitted that loose logs can be floated down it at certain times of the year, but they contended that it is not floatable otherwise than *à bûches perdues.* After hearing evidence on both sides, the learned Judge at the trial found that (so far as is material to this case) the Plaintiffs' contention was correct. His decision was reversed by the Judges of the Court of King's Bench, who decided (Carroll, J. dissenting) that the river was both navigable and floatable, but it is difficult to determine how far this reversal was due to their view of the law and how far to their view of the facts. On the Appeal to the Supreme Court four out of six Judges agreed with the conclusion of the Judge at the trial on the facts, and the other two expressed no opinion thereon. Their Lordships agree with the view taken by the Judge at the trial, by Carroll, J. in the Court of King's Bench, and by the majority of the Judges of the Supreme Court, and hold that on the evidence the River Gatineau must be taken to be "*flottable* "*à bûches perdues*" only, and to be neither "*navigable*" nor "*flottable en trains ou radeaux.*" Indeed, the correctness of this view of the facts was hardly contested at the hearing of the Appeal.

In order to decide the first point it is necessary to examine the documents of title under which the Plaintiffs hold their lands. Taking first the history of the title of that portion of the Plaintiffs' lands which lies on the right bank of the river, we commence with Letters Patent dated December 1st, 1859, creating the township of Low. These Letters Patent, after reciting that it is expedient to erect into a township a certain tract of waste land lying in the county

of Ottawa, proceed to describe that tract as follows :—

"All that certain tract or parcel of land bounded and " limited as follows, that is to say : On the North by the " Township of Aylwin ; on the South partly by the Township " of Masham and partly by the Township of Wakefield ; on " the East by the River Gatineau, and on the West partly " by the Township of Cawood and partly by the Township of " Aldfield ; beginning at a post and stone boundary erected " on the Western bank of the River Gatineau aforesaid at " the intersection of the North line of the Township of Wake- " field aforesaid and marking the South-east angle of the said " tract or parcel of land ; thence along the said North line of " the Township of Wakefield . . . . thence along the said " South outline of the Township of Aylwin astronomically " East nine hundred and thirteen chains ninety-one links more " or less to the intersection of the West bank of the River " Gatineau aforesaid at a post and stone boundary, marking " the South-east angle of the said Township of Aylwin, and " the North-east angle of the said tract or parcel of land ; " thence Southerly along the said West bank of the River " Gatineau and following its sinuosities as it winds and turns " to the place of beginning. The said tract or parcel of " land thus circumscribed . . . . has been further laid out and " subdivided . . . . into Ranges and Lots in the manner follow- " ing . . . . Range First into 34 lots numbered from North " to South, namely, from No. 1 to 34 inclusive, the same " being broken lots and bounded towards the East individually " and collectively by the River Gatineau aforesaid ; Range " Second into 56 lots numbered from North to South, namely, " from No. 1 to 56 inclusive . . . . the whole as represented " on the plan of the said tract or parcel of land hereunto " annexed as near as the nature and circumstances of the " case will permit, and in conformity to the actual survey in " the field as returned and of record in the Crown Lands " Department."

The actual plan referred to in these Letters Patent does not appear to have been put in at the trial by either party, but the plan which is now of record in the Public Department and which came into force on the 20th January 1902 was put in by the Appellants at the trial, and no objection was taken to it (otherwise than that the document actually put in was a copy and not the original), and it has been freely referred to without objection at the hearing of this

Appeal, so that their Lordships conclude that it must have been taken by the parties as representing or reproducing the plan referred to in the Letters Patent. It accords exactly with the above description, and shows the township as bounded on the East by the River Gatineau.

Whether the map or the verbal description of the parcels be taken as defining the land, their Lordships have no doubt that it was meant to be riparian. The dominant words in the description are that the land is bounded "on "the East by the River Gatineau," and this is precisely what is represented on the map. It would require words in some other part of the Letters Patent plainly inconsistent with this to justify a construction being put on these Letters Patent which would make the land which they cover a parcel which is not bounded "on the East by the River Gatineau." So far from any such words being present, the only other description of the boundary agrees with and emphasises this language. It starts from the post on the bank which marks the point where the township commences to be bounded by the River Gatineau and proceeds as follows:— "Thence Southerly along the said West bank of "the River Gatineau, and following its sinuosi- "ties as it winds and turns." This is just such a description as one would give of the metes and bounds of a riparian property which was bounded by the river, and, in their Lordships' opinion, the use of this form of words in the detailed description of the boundaries of the township does not qualify in any way the simpler description that it is bounded "on the East by the "River Gatineau."

The township of Low is, therefore, riparian, and from the position of the Plaintiffs' land in

the township, it follows that it also is riparian. But the fact that the portion of the Plaintiffs' property which is situated in this township is riparian is made still more clear when we examine the grants under which it passed to his predecessors in title whether we take those grants by themselves or in conjunction with the above Letters Patent creating the township of Low. The Letters Patent granting Lot No. 38 to the predecessor in title of the Plaintiffs describe the parcel thus:—

"The lot number thirty-eight in the second range of the "Township of Low aforesaid; being a broken lot bounded "in front to the East by the River Gatineau and to the "West by the third range of said Township."

And the Letters Patent granting Lot 39 adopt exactly the same phraseology. The Crown had undoubtedly the power to make a grant of riparian land thus situated, and these two grants clearly grant it. This would suffice to decide the point, but it is to be noticed that each plot is spoken of as forming part of the township of Low, which shows that those acting for the Crown in making these grants interpreted the Letters Patent creating the township as including the land down to the river, which is the interpretation which their Lordships hold that they must bear.

The case as to the land of the Plaintiffs which lies on the left bank of the river and is situated in the township of Denholme is substantially the same, but in this case the grant to the predecessor in title of the Plaintiffs does not assist us. It merely describes the land granted as:—

"The West half of the lot number thirty-eight in the first "range of the aforesaid Township of Denholme."

So that we are thrown back upon the Letters Patent creating that township in order to ascertain the position of the land thus granted.

These Letters Patent are in the French language, but their purport is precisely the same as that of the Letters Patent creating the township of Low. The close correspondence may be judged from the following extracts which give the more material parts of the description of the lands included. The area is described as being—

" délimitée et décrite comme suit . . . . au Nord par le
" Township de Hincks, au Sud par le Township de Wake-
" field, à l'Est, partie par le Township de Bowman et
" partie par le Township de Portland et à l'Ouest par la
" Rivière Gatineau "

and in going over the metes and bounds it says :--

" De là, le long de la dite ligne extérieure Sud du Town-
" ship de Hincks, plein Ouest, six cent. quarante-quatre
" chaînes, plus ou moins, jusqu'à la rive Est de la Rivière
" Gatineau, jusqu'à un poteau ou borne de pierre marquant
" l'angle Sud-ouest du dit Township de Hincks et l'angle
" Nord-ouest de la date étendue ou portion de terre. De
" là, le long de la rive Est de la dite Rivière Gatineau,
" dans une direction généralement Sud-ouest et suivant
" ses sinuosités jusqu'au point de départ."

It will be seen that for all practical purposes the Letters Patent may be taken *mutatis mutandis* as mere translations the one of the other, so that the reasoning which has led their Lordships to the conclusion that the land of the Plaintiffs in the township of Low is riparian applies with equal force to their lands in the township of Denholme and it is not necessary here to repeat it.

In some of the Judgments in the Courts below the learned Judges have held that the presumption that the bed of the river *ad medium filum aquæ* was included in the grant

is negatived by the fact that the metes and bounds of the parcels forming the townships as described in the Letters Patent make them terminate at the bank of the river. But their Lordships are of opinion that in so holding they are not giving full effect to the presumption or (as it should rather be termed) rule of construction which is so well established in English law. It is precisely in the cases where the description of the parcel (whether in words or by plan) makes it terminate at the highway or stream and does not indicate that it goes further that the rule is needed. If there is any indication of the parcel going further there is no place for its operation. The application of the rule is strikingly illustrated in the latest case in which the point was considered in the House of Lords (*City of London Land Tax Commissioners* v. *Central London Railway*, 1913, A. C. 364). In that case the plots under consideration were described in language which undoubtedly represented them as plots terminating at the highway. In one instance the description was—

> "Vacant ground formerly two houses and premises "situate and known as Nos. 36 and 37, Newgate Street"

and in another instance the description was—

> "All those pieces of land now or formerly known as "85 and 86, Newgate Street, . . . more particularly "delineated and described on the plan hereto annexed "marked A and thereon coloured pink"

and on reference to that plan it was seen that the coloration stopped at the edge of the highway. Yet in all these instances their Lordships were unanimously of opinion that the rule ought to be applied, and that the lands up to the middle line of Newgate Street were included in the certificates of redemption of land tax.

In construing the parcels in a document affecting land, say for example a grant, the law treats the parties as describing the land of which the full use and enjoyment is to pass to the grantee. But in cases where the possession of the parcel so described would raise a presumption of ownership of the land in front of it *ad medium filum aquæ* or *viæ* the law holds that it is the exclusion of that land which must be evidenced by the terms of the grant and not its inclusion, and that if not so evidenced that land will be deemed to have been included in the grant if the grantor had power to include it. Hence it is settled law that no description in words or by plan or by estimation of area is sufficient to rebut the presumption that land abutting on a highway or stream carries with it the land *ad medium filum* merely because the verbal or graphic description describes only the land that abuts on the highway or stream without indicating in any way that it includes land underneath that highway or stream. This is precisely what we have here. The land is shown as abutting on the river and is described as bounded by the river, and again as bounded by a line following the windings and sinuosities of the river bank. This clearly makes it abut on the river and gives rise, according to English law, to the presumption in question.

The first question, therefore, must be answered in the Plaintiffs' favour. There remains the question whether the presumption of English law that the bed of the stream *ad medium filum aquæ* belongs to the riparian proprietors holds good under the law of Quebec in the case of a river such as the River Gatineau.

Before examining into this question, their Lordships think it desirable to deal with some matters which figured prominently in the argument and undoubtedly affected greatly the mode in which the case was presented to the Board although they do not determine the issues in the case.

In the first place it was spoken of as though it gravely affected the rights of the public, and indeed as though the success of the Appeal would close the River Gatineau to them. Their Lordships recognise the importance of the case, but they cannot agree that it involves any such consequences. The rights of user of rivers for the purposes of navigation and the carriage of timber are independent of the ownership of the bed of the river, and whatever be the source from which they originally came are now protected by statutes which are very far-reaching in their provisions. For instance, in the Revised Statutes of Quebec, 1888, Section 5,551 provides as follows:—

"2. It shall be lawful nevertheless to make use of any "river or watercourse ditch drain or stream in which "one or more persons are interested and the banks thereof "for the conveyance of all kinds of lumber and for the "passage of all boats ferries and canoes subject to the "charge of repairing as soon as possible all damages "resulting from the exercise of such right and all fences "drains or ditches damaged."

This is only one of many statutable provisions securing to the public the use of the rivers whatever be the private rights existing therein, and however this Appeal be decided, these rights of the public will remain unaffected.

But this is not all. The rights of the public in the River Gatineau are not in any way put in issue in this case. The parties to this Appeal are substantially at one on the question of the private ownership of the bed of the River

Gatineau. The only difference between them is as to which of two private owners possesses it. The Appellants contend that the portion of the bed of the river which is in question passed to their predecessors in title by the grants to Caleb Brooks, in 1860 and 1865, and that to William Brooks in 1891. The Respondent contends that it passed to the Defendants under the grant to them in 1899. Neither party, therefore, sets up a title in the public. So far as the River Gatineau is concerned, the decision of this case will do no more than decide whether or not the language of certain existing grants was sufficient to pass particular portions of that bed, or whether after such grants were made they still remained in the hands of the Crown so that it had power to grant them by a later grant.

Nothing, indeed, could be more foreign to the contentions of either party than to deny that the bed of the River Gatineau has largely passed into private hands. It was admitted that the townships of Hull and Wakefield include the bed of the river so far as it flows through them. The plots in those townships are rectangular, so that in the case of river lots the bed of the river is included within the metes and bounds of the lots in question without any appeal to the doctrine of *ad medium filum aquæ*. Counsel for the Respondent emphatically disclaimed the doctrine that the Crown could not alienate the river bed in precisely the same manner as any other public lands. But if this be the correct view of the law, we have here an example of a very simple case of the application of the presumption. *A* being absolute owner of the land on the banks and the bed of the stream grants to *B* a plot bounded by the stream.

In such a case it is established law that the conveyance is construed as passing also the bed of the stream *ad medium filum aquæ*.

Notwithstanding the fact that the Respondent admitted and indeed relied on the alienability of the river bed by the Crown the argument before this Board, as also the argument in the Courts below, turned largely on the provisions of section 400 of the Civil Code of Lower Canada. This reads as follows:—

"Roads and public ways maintained by the State navi-
" gable and floatable rivers and streams and their banks,
" the sea shore, lands reclaimed from the sea, ports, harbours
" and road-steads and generally all those portions of territory
" which do not constitute private property are considered
" as being dependencies of the Crown domain."

As is the case with so many others this section is taken almost unchanged from French sources, and, as is natural, the French text is the more helpful to arriving at the true interpretation. It reads as follows:—

"Les chemins et routes à la charge de l'Etat, les fleuves
" et rivières navigables et flottables et leurs rives, les
" rivages, lais et relais de la mer, les ports, les havres et
" les rades et généralement toutes les portions de territoire
" qui ne tombent que dans le domaine privé, sont considérées
" comme des dépendances du domaine public.

The principal aim of Counsel for the Respondent in the argument before this Board was to establish that the River Gatineau was a floatable river in order to bring it within the operation of this section, and the efforts of Counsel for the Appellants were to show that it was not a floatable river and that, therefore, this section did not apply to it.

It is this part of the case which has given to their Lordships the greatest difficulty and anxiety. The importance attached to it in the Judgments that were delivered in the Courts below claims for it the most careful attention. Nevertheless their Lordships cannot

but feel that the parties have not fully appreciated the bearing of this section on their respective contentions. If its meaning be that the beds of navigable and floatable rivers are in their nature incapable of constituting private property and necessarily remain public, a decision that the River Gatineau is floatable within the meaning of this section would be as fatal to the validity of the grant which the Intervener seeks to defend as it would be to the grants on which the Plaintiffs base their title. If, on the other hand, the section means only that the beds of navigable and floatable rivers initially form part of the Crown domain, but that they, like other public lands, are alienable and may form the subject of grants by the Crown, the section is well-nigh immaterial in the present case. The application of the principle of *ad medium filum aquæ* does not depend in any way on the nature or origin of the title of the grantor. Provided that the land on the banks and the bed of the river belong alike to the grantor and are alike alienable by him the principle applies.

One further matter must be borne in mind. There is no trace in Canadian law of any exception to the rule that the bed of a stream presumably belongs to the riparian owners except in the cases where that bed is in its nature public property and therefore such presumption of ownership cannot exist. A perusal of the Seignicrial decisions and the Judgments of those who took part in them makes it clear that the exclusion of the beds of navigable and floatable rivers from the grants to Seigniors was not by reason of express words in the grants nor of any special rule of law formulated *ad hoc*, but was a consequence

flowing from the jurisprudence then existing derived from French sources under which the beds of such rivers were held to form part of the *domaine public* and thus to be incapable of becoming private property. But it followed that they were inalienable and this was fully recognised. They are always spoken of as *inalienable et imprescriptible.* So much of that jurisprudence as remains is to be found in section 400 of the Civil Code, and on the construction to be given to that section must depend the status of the beds of these rivers from the point of view of property.

The interpretation of section 400 appears to their Lordships to be a question of importance to the public so great that it can hardly be exaggerated. If it be the law that the beds of navigable and floatable rivers are public property incapable of being alienated, and that this principle has not been generally regarded in the actual Crown Grants that have hitherto been made, the effect of a decision in the one way might have a widespread effect on the rights of individuals. On the other hand, a decision to the opposite effect must have a widespread effect on the rights of the public. In these circumstances their Lordships feel that it is desirable that a point of such importance should only be decided in some case in which the parties are respectively interested in the one and the other of the two rival interpretations so that there has been opportunity for full argument thereon. In the present Appeal this has not been the case. Neither party was interested in supporting the interpretation that section 400 means that the beds of navigable and floatable streams remain public property. Yet it is evident to their Lordships that this is a view

of the section which cannot summarily be dismissed. The section clearly points to these lands standing in an exceptional position as contrasted with other lands. They are associated with specific types of land which are evidently intended to remain for all time the property of the State as contrasted with the individual, and the class is completed by the important category, "and generally all those portions of territory "which do not constitute private property." In the face of all this it is impossible not to feel that there are great difficulties in accepting an interpretation which would leave them in the same position as to title and ownership as all other lands. On the other hand the proposition that the beds of these rivers, though of undoubted economic value, constitute a type of property which is vested in the Crown but which it cannot alienate presents very serious difficulties of another kind. It happens that the view which their Lordships take of the facts in this case renders it unnecessary that they should decide this point, and they, therefore, desire to make it plain that they express no opinion thereon holding that it is more consonant with the practice of the Board to leave such a question to be dealt with in some case in which it is raised in a way which makes it essential to the decision of the case.

There remains the important question whether the River Gatineau is a river which comes within the words "*navigable et flottable*"? If this is answered in the negative, the river bed does not come within the provisions of section 400 of the Civil Code, and it becomes unnecessary to consider the difficulties which that section presents.

This question is a mixture of fact and law. So far as fact is concerned the material for its decision consists mainly of the finding of the learned Judge at the trial that the

" river is floatable only for loose logs (*flottable à bûches* " *perdues*), and that it is not floatable for cribs or rafts " (*flottable en trains ou radeaux*),"

which their Lordships accept in its entirety. In addition to this there are, of course, certain facts as to the magnitude of the Gatineau, the nature of its bed, and of the flow of water in it at various periods of the year. On these matters there is no dispute between the parties. The river bed is irregular and it varies greatly in breadth, so that in some places it is a wide river. The bulk of water that goes down it in times of freshet is very large, and at other times is comparatively small. Reaches in it may be navigated, but they are comparatively short, and it cannot be said that they affect the economic use of the river, excepting strictly locally, just as the extension of any other river into a lake, or the like, might give it a local usefulness.

That such a river is not navigable is evident, and it was indeed practically conceded by the Respondent's Counsel in the argument before us. The contest raged round the word "*flottable*," and a great wealth of legal knowledge and research was displayed on both sides, and a mass of material of very unequal value bearing upon it was placed before their Lordships. The outcome seems to them to be as follows :—

It is abundantly clear that the distinction between the legal status of the beds of streams which were "*navigable et flottable*" and the beds of other streams, existed in French Jurisprudence long prior to the compilation of the

Code Napoleon. The former belonged to the *domaine public*, while the latter belonged to the riparian owners *ad medium filum aquæ*. Accordingly, when the Code Napoleon was compiled the law in this respect was expressed in Art. 538 in language identical to that which is now found in section 400 of the Canadian Civil Code. But although the law was thus authoritatively formulated there was great diversity of opinion as to its meaning. One school of lawyers insisted that streams that were only *flottables à bûches perdues* were within the Article and others denied it. On the whole, the balance of authority was greatly in favour of the latter, and in 1823 the Court of Cassation gave a decision in that sense. But even this did not settle the matter, and conflicting decisions were given in the different Courts. At length, in 1898, the Legislature put an end to the confusion by passing a law that streams should not be considered *flottables* if they were only *flottables à bûches perdues*, and, speaking generally, the authorities treat this as being a declaration of the law in accordance with the better opinion prevailing at the time. All this legal history, although interesting, can have no substantial bearing on the present case. The connection between Canadian law and French law dates from a time earlier than the compilation of the Code Napoleon, and neither its text nor the legal decisions thereon can bind Canadian Courts or even affect directly the duty of Canadian tribunals in interpreting their own law. Still less can it be suggested that the decision of the French Government to end disputes by a statute can have any weight in the matter. The only conclusion that can legitimately be drawn from the above chapter of French legal history is

that the meaning of the word "*flottable*" was very uncertain in French jurisprudence at the critical date when French law became recognised as the basis of the law of the Colony of Canada, but that there was certainly no consensus of opinion that a river was *flottable* in a legal sense if it was only *flottable à bûches perdues* in fact.

Nor, in their Lordships' opinion, is much light to be derived from the decisions during the period between 1791 and the extinction of the feudal rights in Lower Canada in 1854. Judging from the material presented to their Lordships in the argument, there seems to have been no very settled jurisprudence, and no doubt many questions remained in a state of uncertainty. The case of *Oliver* v. *Boissonnault* in 1832 is of value from this point of view. We there find the Judges of First Instance treating "floatable" as equivalent to "capable of floating logs or rafts." But the Court of Appeal doubted the correctness of this view, and Reid, C.J., in giving the Judgment of the Court, indicates that in their opinion "*flottable*" was not applicable to a river which could only float logs. They evidently inclined to the view that "*flottable*" as applied to a river implied that it was ranked among navigable rivers "*portant bateaux et radeaux* " *pour le transport du bois et autres mar-* " *chandises,*" a view which, as will presently appear, has subsequently received the support of high authority. But, speaking generally, no substantial help is obtained until we come to the inquiry which took place under the authority of the Seigniorial Act of 1854.

By that Act certain Commissioners were appointed to settle the value of the Seigniorial

rights which were about to be abolished, and for that purpose to draw up schedules of such rights in each case. In order to settle the numerous legal questions which must necessarily arise in the performance of their duties, the Judges of the Court of Queen's Bench and the Superior Court for Lower Canada were erected into a tribunal to decide such questions, and the Attorney-General and the parties interested were entitled to appear before that tribunal and submit questions to it for decision. They might also submit their own views as to what the answers ought to be in the shape of legal propositions which they asked the Court to declare to be the answers to the questions put. After thus hearing the rival contentions, the Court had to decide what was the proper answer. In this way a body of decisions of the highest authority as to the law then prevailing in Lower Canada was collected, to which an almost authoritative sanction has been given by statute, and which, apart from statute, naturally command the highest respect by reason of the composition of the tribunal which pronounced them.

Turning to these Seigniorial decisions, and the Judgments of the individual Judges which accompany them, one cannot find any specific reference to the status of the beds of rivers which were only "*flottable à bûches perdues.*" But on the other hand, one finds clear statements that the Seigniors became by their grant proprietors of the non-navigable rivers which passed through the fief subject to legal servitudes, and to the *ad medium filum* rule. Some of the Judges use the single term "*non-navigable*" and some (among whom is Sir Louis Lafontaine, C.J.) use the more exact phrase

"*non-navigable and non-flottable.*" But a perusal of these able and exhaustive Judgments makes it abundantly clear that this difference of phraseology does not indicate any difference of opinion. Indeed, the agreement between the members of the tribunal on important questions is very striking. In truth "*non-flottable*" was looked upon as a special form of "*non-navigable*" and the word was evidently put in by those who used it for the purpose of preventing its being thought that the only form of navigation contemplated was by ships (*navis*). The word "*flottable*," therefore, referred to navigation by cribs or rafts (*en trains ou radeaux*). In this connection the Judgment of Day, J. (51 e Seign. Quest. B.) is instructive. After using the single term "*navigable*" throughout he says :—

"Ces observations s'appliquent également aux rivières "flottables propres au transport des objets de commerce."

Even if their Lordships had to rely alone on these Seigniorial decisions they would come to the conclusion that the Courts that pronounced them were of opinion that a river that was utilisable only by flotation "*à bûches perdues*" was not navigable or floatable, and that its bed was the subject of private property.

But on this point their Lordships are not left to mere inference. In the year 1859, the case of *Boswell* v. *Dennis* came before a Court presided over by Chief Justice Sir Louis Lafontaine, who took a leading part in deciding the Seigniorial questions. This was only three years after the decision of the Seigniorial questions, and it related to a river as to which the Judge at the trial reported "that the "proof clearly established that the river was "neither floatable nor navigable but that it

" was merely *flottable à bûches perdues.*" This being the finding in fact the Chief Justice says in his Judgment that it had been already proved that the river was neither *navigable* nor *flottable*, and that, according to the decision of the Seigniorial Court, such rivers were held to belong to the riparian proprietors. Four other members of the Court had also been members of the Seigniorial Tribunal, and though one of them dissented, it was apparently on the effect of the evidence and not on the point of law. Their Lordships consider that this decision justifies them in regarding the answers to the Seigniorial questions as meaning that rivers were not *flottable* in the legal sense of the term if they were only so *à bûches perdues.*

Finally, this precise question came on Appeal before the Supreme Court of Canada, in the year 1907, in the case of *Tanguay* v. *The Canadian Electric Light Company* (40 Can. S.C.R. 1). Very learned Judgments were pronounced in that case, indicating a wide difference of opinion among its members, but the Court, by a majority consisting of the Chief Justice and Davies, McLennan, and Duff JJ. (Girouard and Idington, JJ., dissenting), decided that rivers which were only *flottable à bûches perdues* were not *flottable* in the legal sense of the word, and, therefore, did not come within section 400 of the Code. Their Lordships are of opinion that this decision was right. The elaborate reasoning which is to be found in the Judgment of the Chief Justice in this case (with which their Lordships agree), renders it unnecessary to go more in detail into this question.

No doubt there are to be found decisions to the contrary in some of the Courts during the period between 1854 and the decision of the case of *Tanguay* v. *The Canadian Electric Light Company* in the Supreme Court. But these decisions are of inferior authority, and it will be found on examination that the real question in issue in those cases was not the ownership of the bed of the river but the rights of the public to use the river for commerce, which is a different question depending on wholly different principles.

It follows, therefore, that the River Gatineau, so far as is material to this case, does not come within section 400 of the Code, and consequently it is not necessary to construe that section. It also follows that inasmuch as their Lordships are of opinion that the grants under which the Plaintiffs hold fully establish their title to those portions of the bed of the river which are in issue, Judgment ought to have been given for the Appellants in the Court below. Their Lordships will therefore humbly advise His Majesty that this Appeal should be allowed. The Orders of the Supreme Court and the Court of King's Bench will accordingly be set aside, and the Judgment of Champagne, J., restored. The Respondent will pay the costs of the Appellants in all the Appeal proceedings, including the Appeal to this Board.

In the Privy Council.

DAVID MACLAREN AND ANOTHER

v.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC.

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