JOHN CAVERHILL, *et al*.....APPELLANTS;

AND

ULYSSE J. ROBILLARD.....RESPONDENT.

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*Jan'y 30.
June 4.

APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Damages—Nuisance—Possession of wharf built on public property—Right of action for trespass.

C. et al. built a wharf in the bed of the River *St. Lawrence*, which communicated with the shore by means of a gangway, and had enjoyed the possession of this wharf and its approaches for many years, when *R.*, on the ground that the wharf was a public nuisance, destroyed the means of communication which existed from the wharf to the shore. *C. et al.* sued *R.* in damages, and prayed that the works be restored. After issue joined, *R.* fyled a supplementary plea, alleging: that since the institution of the action one *C. R.*, through whose property *C. et al's* bridge passed to reach the street on shore, had erected buildings which prevented the restoration of the bridge and wharf.

Held,—That *R.*, having allowed *C. et al.* to erect the gangway on public property and remain in possession of it for over a year, had debarred himself of the right of destroying what might have been originally a nuisance to him, and that, notwithstanding the subsequent abandonment of this wharf and gangway, *C. et al.* were entitled to substantial damages.

THE judgment appealed from was rendered by the Court of Queen's Bench for *Lower Canada* (Appeal Side) on the 3rd of February, 1876, confirming the judgment of the Superior Court and dismissing the action brought by the present Appellants.

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*PRESENT—Sir William Buell Richards, Knt., C. J., and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

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By their action brought in March, 1863, the Plaintiffs alleged: that they had been for upwards of eighteen years owners of certain lands, *emplacements*, in the village of *Beauharnois*, and had constructed stores, and that in 1846 they erected at great cost in lake *St. Louis*, opposite the village, a certain wharf connected with the shore by a bridge resting on the property of one *Charles Rapin*; that these erections had been made openly without any interference by the government, but with their consent, and that they had occupied such wharf and used it until the Defendant, the now Respondent, in 1862, erected certain stone buildings in the bed of the lake, in rear of *Charles Rapin's* property, and in doing so stopped and blocked up the bridge, destroying part of it, removing the materials and interrupting all communication between the wharf and the shore, thereby preventing the Plaintiffs from using or leasing their wharf; that the Defendant's erections also prevented the use of the beach and bed of the lake, and were made without permission. The Plaintiffs pray that Defendant be condemned to remove the erections by him made preventing communication with the wharf, and to restore the same within a period to be determined by the Court, and in case of a removal to pay a hundred pounds damages, and in case of failure seven hundred pounds with interest and costs.

The Defendant's plea first denies that the wharf in question was ever constructed with the sanction of any public authority, and states that it was in a navigable part of the river and had become a public nuisance in the possession of the Plaintiffs; that in erecting the said buildings mentioned in the Plaintiffs' case, the Defendant had only exercised an unquestionable right of property, having erected them on his own land; that by a deed executed before *Hainault*, notary, dated 10th March, 1860, the Defendant and several others had be-

come partners for the purpose of purchasing and maintaining the wharf in question, and that it had been leased by the said company in the interest and for the benefit of its shareholders; that Defendant had brought a barge there on the 28th September, 1862, and was prevented from using the wharf by the violence of *Coll McFee*, the agent of Plaintiffs, (*le représentant des dits démandeurs au regard du dit quai*,) he having removed some of the *madriers* of the wharf, and thus prevented communication with the land, "*et que par tel fait*," the wharf had become a public and private nuisance, "*une nuisance publique et privée que le defendeur et tous ceux que en souffraient avait le droit de démolir*," and that it encroached on the waters of the *St. Lawrence* and deprived Defendant of the right of making use of the river in front of his property.

Answer to plea: that the wharf was not built on Defendant's property, but on the beach of Lake *St. Louis;* that the *emplacement* of Defendant and that of *Charles Rapin*, behind which the wharf of Plaintiffs was built, formed part of the same lot, No. 7, and fronted on *St. Lawrence* street, whence they had the same depth to the beach of the lake—that is to say, 8 perches and 11 feet—and the surplus is occupied by the erections made by Defendant on the beach (*grêve*) of the lake. That *Coll McFee* was not *le représentant* of Plaintiffs, nor could his malicious or illegal acts he set up against Plaintiffs.

On the issues thus raised the parties went to proof, and, after twelve witnesses had been examined on behalf of Plaintiffs, the Defendant was allowed, on motion made by him, to that end, to fyle a supplementary plea of *puis darrein continuance*. This plea contains two allegations, namely: That since the institution of the action, and the fyling of the plea, *Charles Rapin*, upon whose land the bridge or gangway rested on the shore

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end, had made some erections, "*a fait des constructions et nouvelles œuvres qui rendent le rétablissement des lieux impossible ;*" and second, that the wharf in question had been carried away or destroyed partly by water, "*par les eaux,*" and partly from decay, and that therefore the re-establishment of the wharf would only be a public nuisance without any utility.

By the judgment of the Superior Court, Appellants' action was dismissed with costs.

The Court of Appeals affirming the judgment of the Superior Court, rested their judgment upon the fact that the Appellants had no right to build the bridge or gangway, which by their action, they complain Respondent destroyed, but that the Appellants by their action prevented the Respondent from using the said bridge or gangway, and thereby the bridge or gangway became and was a nuisance and injurious to Respondent. The judgment also maintains that there was no portion of damages suffered by the Appellants.

From the evidence it appears, that the building of the wharf and gangway in question by Plaintiffs, was about and probably anterior to the year 1848, and that down to the end of September, 1862, they continued in possession by themselves or tenants, and that the wharf was resorted to by the public by means of the bridge in question.

That one *Coll McFee*, who was tenant of the wharf in question, did, on one occasion, in 1862, take up some of the planks of the gangway, but put them down again that day or the next. Respondent, on *McFee's* taking up the planks, said he would continue to take them up, and gave orders to his men to take up the gangway, which was done. The Respondent then erected certain stone buildings in the bed of the river, and in doing so stopped and blocked up the bridge and destroyed part of it.

That Appellants, after the institution of their action, allowed the wharf to go to ruin, and removed part of it, to rebuild it at another part of the river, and that at the time of the trespass Appellants derived an annual revenue of $200 to $300.

Mr. *Robertson*, Q C., for Appellants:—

This was an action complaining of Respondent's interference with Appellants' wharf. The complaint, in effect, says: "We were long in possession of a wharf built by us in Lake *St. Louis*, without objection by the public authority; you, in 1862, interfered illegally with the wharf and the approaches to it, and rendered it useless; and, therefore, we ask, that you put it in its first state, and pay us the damages we have suffered." The Respondent answers: "Your lessee maliciously removed some planks of the gangway, and thereby the wharf became a public and private nuisance, which gave me the right to demolish, and after bringing your action, one *Charles Rapin*, through whose property your bridge passed, has lawfully erected buildings which prevents the restoration of the wharf and its approaches." Now the judgment of the Superior Court in favor of the Respondent is based upon an implicit abandonment by my clients of their rights in the wharf, and that no damage occurred subsequent to the date of action. Now, the damage suffered was partly in removing and destroying the gangway, and partly the erection of a permanent *hangard*, in the position formerly occupied by the gangway, thereby rendering the old approach to the wharf impossible, and damaging the property. Now, the principle is laid down, and is applicable to this case, that a Plaintiff is at liberty to prove, and a Court or jury is bound to take into consideration, the direct and immediate consequences of the acts complained of, which are so closely with them as that they would not of themselves form a distinct cause of action.

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The Court of Appeals took another ground, and rested their judgment upon the fact that the Appellants, having built their gangway upon public property, and one of their lessee's having prevented the Respondent from using the gangway, it became a public nuisance.

Appellants contend that the Respondent can raise no plea in his favor from there being no evidence of any permission or license from the Government in favor of Plaintiffs to build the wharf.

It is not in Defendant's mouth to urge the want of authority from the Government to build the wharf as an authority to him to pull it down in the manner proved.

There is no attempt to prove that the wharf or gangway was an obstruction to navigation: they are shewn to have been useful to it, and a convenience to the public, as well as a means to Plaintiffs and their successors in their stores adjoining *Richardson* street, to load their grain and receive their goods without paying other wharf owners the usual rates of wharfage.

The proprietor who builds a wharf, although he cannot invoke against Government any right of prescription, may well invoke as against third parties his possession of the wharf as giving him a right to contiuue it. If the possession is long enough to give him title by prescription, "il sera prouvé (*by that very fact*) qu'il ne peut nuire à personne, et que le propriétaire qui l'a fait bâtir, aura acquis la propriété *du droit de la conserver;* un système contraire entrainerait les plus étranges conséquences. Il n'y aurait pas de terme de l'exigence de la production d'une permission; un établissement qui aurait plusieurs siècles d'existence pourrait être detruit." *Garnier, des Eaux* (1); *Daviel des cours d'eaux* (2); *Toullier* (3).

(1) No. 1,099, 4 vol., See also 2 vol. Nos. 621, 622.

(2) Nos. 346, 369.

(3) Vol. 3, No. 674.

Moreover Appellants' lessee was not "*leur représentant*," nor could his illegal or malicious acts be set up, or be of any effect against them, who had brought their action solely to be protected in their rights against the illegal acts of the Respondent.

Mr. *L. Laflamme*, for Respondent:

Appellants have, since the institution of their action, allowed the wharf to go to ruin, and having rebuilt it in another part of the river and obtained a direct communication to it, they have impliedly renounced the rights which they had, or might have to obtain a judgment against the Respondent. Moreover, the gangway was on public property and was a nuisance and injurious to the Respondent.

The non-interference on the part of the Government would not validate the encroachment on the public domain by Appellants, and no possessory right could be obtained by the use of a servitude on private property even with the toleration of the proprietor. It is evident, therefore, that this gangway was either on the property of the Defendant, or it was on the public domain with respect to that portion connecting the wharf with *Richardson* street. If it was resting on private property it could not be considered in any other light than a servitude on Defendant's property, and, therefore, the Plaintiff, having no title and being incapable of obtaining any possessory right, whatever use he would have made of the portion of private property, could in no manner constitute a right, even a possessory one, and the Defendant was entitled at any time to remove any obstruction so existing on his property or to cease tolerating such servitude. If it was below the water edge and the limit of Plaintiff's property, the Defendant, as riparian proprietor, was the only individual who could take advantage, according to law, of the use of the beach

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for the purpose of constructing thereon, and the only authority which could interfere with the exercise of his right was the public through the crown, the Plaintiff having no claim whatever to prevent him so long as the crown did not interfere with the exercise of such privilege. Reference was made to the following authorities: *C. C. L. C.* (1); *Proudhon* (2); *Enyot* (3); *Garnier* (4); *Code Nap.* (5); *Dubreuil* Legislation sur les eaux (6); *Proudhon* (7).

One of the honourable judges dissenting in the Court of Queen's Bench, Chief Justice *Dorion*, stated, as one ground of his dissent, that the Defendant had failed to prove that the structures he had made were on his own property, but that the fact was that he carried a wharf from his property into the river and erected upon it. The admission made by the honorable judge is enough to justify the conclusion of the Court. If it be established that the Defendant built from his property into the river, or extended his property into the river and erected a store upon it, there can be no question that such construction cannot be interfered with, except by public authority, and that he alone, according to the above authorities, was entitled as riparian proprietor to the use of the river opposite his property for such purposes to the exclusion of all others; but Respondent respectfully submits that there is sufficient evidence in the record to prove conclusively that the buildings in question were erected on the Defendant's own property.

Now, Respondent submits that the Court should take

(1) Art. 400, 499, 500, 507, 549, 550 and 585.

(2) Domaine Public, Vol. 3, p. 17, No. 680; p. 70, No. 734; p. 34 & 35, No. 701 et seq.; p. 71, No. 735; p. 93, No. 748, p. 94, No. 750; p. 266-7, Nos. 201, 202.

(3) Rep. de Jur. Vo. *Voies de fait.*

(4) Régime des Eaux. Nos. 73, 74.

(5) Art. 650.

(6) No. 252, p. 14 & Nos. 290, 293.

(7) Domaine Public, No. 843.

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into consideration the fact that the Appellants, by their action, claimed £100 of damages, when not one cent of damage up to that time could be proved, and that the reconstruction of the bridge was simply a question of one day's work, and as they asked that Respondent be condemned to repair the bridge, they failed to prove any damage whatsoever up to the institution of the action.

This total absence of any proof of damages was the main ground for dismissing the appeal, but was an additional reason tending to show that, even from the Plaintiff's standpoint, this appeal is reduced virtually to a question of costs. And as it has already been held that a Court of Appeal is not disposed to interfere with judgments of the Court below, when only a question of costs was involved, this is an additional ground for maintaining the judgment of the Court below.

The Respondent holds, moreover, that, even granting to the Appellants all they claim in this action, taking into consideration the authorities above cited, they could not bring their action before this Court, it being simply an offence, *delictum*, which was of the jurisdiction of a magistrate or of the Trinity House of *Montreal*.

See 2nd. Vic. ch. 19, sec. 1, 3 and 7 Act of 1849, ch. 117.

Mr. *Robertson*, Q.C., in reply.

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RITCHIE, J.:—

Defendant's contention in this case, so far as I can appreciate it, seems to me practically neither more nor less than this: The Plaintiffs, having erections in a navigable river which are convenient, useful and valuable to him, and the Defendant, being desirous of having a similar accommodation, claims the right to remove such

* The Chief Justice was absent when judgment was delivered.

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erections, which he calls obstructions, and substitute structures equally objectionable, though convenient, useful and valuable to himself, in lieu thereof.

This, I think, he cannot do; and with this I understand the Courts below agree.

But, as Plaintiffs, after action brought, and pending litigation, by which they sought damages and a removal of Defendant's erections, and a restoration to his original position, removed a portion of what was left by Defendant, and in the meantime sought and obtained other accommodation, it was considered they had estopped themselves from recovering any other redress than for the actual damage they had sustained, previous to the bringing of their action, and no actual pecuniary damage having been shewn, their action was dismissed.

It was certainly an infringement of Plaintiffs' rights to have their property destroyed and themselves inconvenienced, and every injury imports a damage; and, if Defendant had no right to interfere with Plaintiffs for the wrongful invasion of their property, they would be entitled to some damages, though they might be of small amount, or even nominal. I fail to see on what principle Defendant can claim immunity, merely because Plaintiffs do the best they can to remedy the inconvenience Defendant has imposed on them, till they can obtain a judgment compelling Defendant to remove his works and restore them to their original position. I think the damages suggested of $50 moderate in the extreme.

STRONG, J., delivered an oral judgment holding that the appeal should be allowed.

TASCHEREAU, J., (translated):

The Appellants, by their action brought in March, 1863, claimed a sum of seven hundred pounds damages

from the Respondent for having disturbed them in their lawful ownership and possession of certain lands on which they had constructed stores, *hangards* and buildings, for their trade and commerce, and of a wharf built at a great expense out to deep water, which was connected with the shore by a wooden bridge, built in the bed of Lake *St. Louis*, which comes down to the shore and rested there on the property of one *Charles Rapin*; they also alleged that these constructions were erected for the benefit of their trade, and had also been of use to the public.

They further averred, that these erections had been made openly and with the knowledge of the Government, and that they had been in peaceful possession of the same for upwards of eighteen years by themselves or by their tenants.

The conclusions of the declaration were that the Respondent be condemned to remove the erections by him made, and which prevented communication with the Appellants' wharf, and in case of removal to pay £100 damages; and to pay £700 damages in case of failure in removing the obstructions. The Defendant's plea was that the wharf was not built with public authority, nor for the public good; that it had become a nuisance to the public and to the Defendant, and that, in destroying part of the bridge, Defendant had simply exercised a lawful right, and that Plaintiffs had suffered no damage.

On these issues the parties went to proof, and after twelve witnesses had been examined the Defendant was allowed to fyle a supplementary plea, *puis darrein continuance*, alleging: 1st. That since the institution of the action, *Charles Rapin* had made some new erections upon his land, on which rested the gangway which rendered impossible the rebuilding of the erections "*a fait des constructions et nouvelles œuvres*

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qui rendent le rétablissement des lieux impossible." 2nd. That the wharf in question had been carried away or destroyed partly by water, and partly from decay, and that therefore the re-establishment of the wharf would only be a public nuisance without any utility.

The judge of the Superior Court at *Beauharnois* dismissed the Plaintiffs' action on the 30th October, 1864, on the ground that they had proved no damage, although he did not deny to them their right of action. His judgment, carried into appeal, was confirmed by three out of five members of that Court; the minority holding that the Appellants had a good right of action, and ought to have been adjudged damages. One of the honorable judges forming part of the majority states, that, in his opinion, the Appellants had a good right of action, but that they failed to prove any damage. He added:—

> It was then a matter of costs, and this Court is not disposed to interfere with the decision of the Court below, which dismissed the action with costs.

The first question which arises is, whether the Appellants had a right to bring this action against the Respondent.

I am of opinion, that, inasmuch as the Appellants had publicly and with the knowledge of the Respondent, and with the implied consent of public authority, built the said wharf in the bed of Lake *St. Louis*, and had peaceably enjoyed the possession thereof during 16 to 18 years, they were entitled to the benefits of their peaceful and public possession of this wharf, and that the Respondent had no right whatever *vi et armis* to destroy the gangway or means of communication which existed from the wharf to the shore. The Appellants, being disturbed in their possession, had a right of action *en complainte* against the Respondent. All authors agree on this principle, and specially *Garnier*, *Daviel* and

Toullier. The Appellants, it is true, could not avail themselves of prescription against the rights of the crown on any part of the beach and lands reclaimed from the river or of the lake in question, but they could acquire such a possession as would justify them in bringing this action as first occupants without any objection on the part of the Crown. This doctrine is clearly laid down in the following authorities :—

Garnier des eaux :

Il n'appartient qu'à l'état de se plaindre de la construction d'un établissement sans autorisation et si l'état ne se plaint pas, soit que dans la réalité l'établissement est utile, soit pour tout autre motif, pas de droit en faveur de l étranger. Et quant à l'action en réintégrande a plus forte raison le possesseur peut l'intenter même sans une possession annuelle ni celle *d'animo domini.*

Daniel (1) says :—

C'est une maxime de politique fondée sur le but essentiel de toute société, de permettre aux particuliers l'usage de choses publiques en tout ce qui n'est pas contraire à leur destination commune.

I might add a great many French and English authorities in support of Appellants' contention, but it is not necessary, as all the judges, with one exception, of the Court of original jurisdiction, as well as of the Court of Appeal, have admitted this doctrine. The only judge who did not concur in this opinion qualified his dissent by stating that if this bridge prevented the Respondent from communication with the river it became a public nuisance, and that, therefore, the Respondent had the right to destroy it *proprio motu*, &c., &c.

I fail to see in the record before us any evidence that this wharf was either a public or private nuisance ; on the contrary, I can find proof that this wharf was of a public utility to the persons of that locality as well as to those of the surrounding localities, on account of the facility it gave the steamboats and other vessels

(1) No. 346.

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to land and take away the products of agriculture and articles of commerce.

As I have already stated, the judge who tried the case admitted in principle the Appellants' right, but because they allowed the wharf to go to decay, the honorable judge concluded two things:—1st. That the abandonment of the gangway was an implicit abandonment by the Plaintiffs of their rights in the wharf, and of obliging the Respondent to demolish and take away his new works. 2nd. That the Appellants had suffered no damage. This is the second question raised by this appeal.

I cannot admit for a moment the reasoning of the learned judge on this ground. In allowing their wharf to go to waste in 1864 and 1865, the Appellants were forced to submit to the natural and immediate consequences which followed the Respondent's trespass. They never waived their right to real and vindictive damages, which damages were continuing and increased from day to day after the institution of the action. Moreover, the evidence of *Alexander Parker*, *William Henderson*, *Frederick Ward* and *James Linch* clearly establishes the fact that by means of this wharf the Appellants derived an annual revenue of $200 to $300. We have, therefore, a good base to estimate the damages which the Appellants must have suffered from the month of July, 1862, until the institution of this action in March, 1863. This would give at least $75, on allowing Appellants $200 per annum, and if we add to this amount vindictive damages, which a jury or a Court might have given under the circumstances, I think there were ample means of estimating the damages. This was the opinion of the two judges of the Court of Queen's Bench who were in the minority.

It was also argued on the part of the Respondent that one *Coll McFee*, who was a tenant of the Appellants,

had been guilty of a trespass (*voie de fait*), by taking away a certain number of deals from the gangway, which had the effect of cutting off the communication with the shore, and that the wharf then became a public and private nuisance, and this would give the right to the Respondent to destroy it. Admitting for a moment the truth of this allegation, I am of opinion that there is no evidence in the record which would warrant us in coming to the conclusion that *Coll McFee*, although their tenant, was the Appellants' representative or authorized agent to commit such a trespass (*voie de fait*). Moreover, this act on the part of *McFee* seems somewhat justifiable from the fact that the Respondent at the time was obstructing the wharf and its approaches by taking considerable time in loading his carts on the wharf; even this light obstacle was removed the next day, as the deals were immediately replaced. The only right of action the Respondent could have was, in my opinion, not against the Appellants, but against *McFee*.

The above facts being satisfactorily established to my mind by the printed case, I cannot arrive at any other conclusions than the following :—

1st. That the building of the wharf in question by the Appellants was not a public nuisance, but that, on the contrary, the said wharf was of advantage to that locality in particular, and to the public in general.

2nd. That by allowing the wharf and other erections appertaining to the same to go to waste, the Appellants did not thereby waive their right to recover substantial damages against the Respondent.

3rd. That the Appellants, under the circumstances, had the right to bring their action, and that the Respondent could not, without exposing himself to pay damages, take upon himself to destroy the approaches to Appellants' wharf.

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4th. That Appellants have proved that they are entitled to $50 damages.

I am, therefore, of opinion, that the judgment appealed from should be reversed, and that the Respondent should be condemned to pay to the Appellants $50 damages with costs in all Courts.

FOURNIER, J., concurred.

HENRY, J.:—

I concur in the judgment that has just been read. The Respondent's pleas have not been proved. He pleads that it was a nuisance of a public and private character. He certainly has failed to prove that it was a nuisance of a public character, and he does not set out how it would become a private nuisance to him more than to anyone else. Therefore, there is no justification for his removing it, further than there would be on the part of any other in the country. I think the law justified the parties having a wharf outside in putting that gangway on to the wharf. This party says, however, that he abated the nuisance, but it appears he only abated it by putting another in its place. If it was a nuisance, the erection put in place of it by his orders was, as far as the public were concerned, as great a nuisance as the one complained of. I think the plea is not proved in any way. His other plea has only reference to the claim that the property should be restored to its original position, and not at all to the damages. Such a plea as that, after the damages were incurred and the action commenced, could not be an answer. It does not affect the judgment at all, in my view. He is to make out, first, that it was a public nuisance, and secondly, that he had a justification in abating it. But the evidence does not prove he did abate the nuisance, because, as far as the

public and the navigable qualities of the bay are concerned, he did not abate the nuisance. It would be a queer way on a public highway to abate a nuisance if a party tore a building away and left another in its place. There is no justification whatever shown here, either by the pleas themselves, even if true, or by the evidence by which they were attempted to be sustained. I entirely agree that the action was a good action when commenced, that the subsequent plea did not affect it, that there were damages and injuries sustained, and that Plaintiff is entitled to recover for those damages. I think $50 very reasonable, under all the circumstances, and my opinion is that the judgment of the Court below should be reversed, and judgment given for $50 and all the costs.

Appeal allowed with costs in all the Courts and $50 *damages.*

Solicitors for Appellants: *A. & W. Robertson.*

Solicitors for Respondents: *Charles Thibault.*