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*Nov. 15, 18.
*Dec. 23.

SHIVES LUMBER COMPANY (DEFENDANT) ..... } APPELLANT;

AND

PRICE BROTHERS & COMPANY. (PLAINTIFF) ..... } RESPONDENT.

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

Evidence—Ambiguity—New trial—Parol evidence—Admissibility—Art. 1234 C.C.; art. 1341 C.N.

The action was for the recovery of damages for wood cut by S. upon timber limits of which boundary lines were in dispute between S. and P. The Quebec Wood and Forest Regulation No. 24 provides that the survey of Crown timber limits, to be valid, must be made according to instructions "previously approved by the Minister" of Lands and Forests, and when the survey is completed, the reports, plans and field notes of the surveyor must "be submitted to the Minister" and "approved by him." In this case, the instructions, after being issued, were modified by the Chief Superintendent of Surveys, who, being called upon to explain these changes, made a report to the Minister containing his reasons for making them and also annexed to it a plan of the survey operations which had been carried out on those amended instructions. The Deputy Minister, whose approval was equivalent to that of the Minister, then placed his initials on the report with the letters "Appd."

Held, Davies C.J. and Mignault J. dissenting, that a new trial should be had to determine whether the Deputy Minister of Lands and Forests had merely approved the explanations given by the Superintendent of Surveys or whether he meant to give his approval to the survey operations as required by Regulation No. 24.

Per Idington, Anglin and Brodeur JJ.—Parol evidence is admissible to remove such a latent ambiguity.

Per Brodeur and Mignault JJ.—The requirements of Regulation No. 24 are of the nature of rules of procedure, and the approval of the Minister covers any previous informality in the fulfillment of these requirements. *Alexandre* v. *Brassard* ([1895]A .C. 301,) *followed.*

Per Davies C.J. and Mignault J. dissenting.—Upon evidence, the intention of the Deputy Minister in approving the report of the Superintendent of Surveys was to give the approval required by Regulation No. 24.

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*Present:—Sir Louis Davis C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Rimouski, which dismissed the plaintiff's action.

The material facts of the case are fully stated in the above head-note and in the judgments now reported.

Alex. Taschereau K.C. and *J. Hall Kelly K.C.* for the appellant.

Tessier K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—This is an appeal from the judgment of the Court of King's Bench which reversed a judgment of the Superior Court and awarded the respondent, Price Brothers & Company, the sum of $1,367.45 as damages for wood cut by the appellants upon the respondent's timber limit.

The dispute between the parties was as to boundary lines of their respective timber limits and that dispute depended largely, if not altogether, upon the result of a survey of these limits made by surveyor Addie, the plans and report of which survey Addie had reported to Mr. Girard, the Director and Inspector of Surveys, who in his turn had formally submitted Addie's report to the Hon. Jules Allard, Minister of Crown Lands, with very full explanations as to certain changes in the instructions for the survey which had been made by him and the reasons why they had been made.

This latter report had been approved of by the Deputy Minister of the Department of Lands and Forests on the 7th April, 1914, and it is conceded that the approval of the Deputy Minister is equivalent by statute to the approval of the Minister himself.

The main contention of the appellant Shives Lumber Company on the appeal was that the report of

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Girard, the Director and Inspector of Surveys, was only one relating to the changes he had made in the "instructions" for the survey and did not cover the survey itself which consequently had not been approved of as required by statute before it becomes binding upon interested parties.

I am quite unable to accept this argument.

It is true Girard deals at length in his report with the reasons why he had altered the original instructions, such reasons being that both the parties interested had desired and consented to the changes made, because while one would on the altered instructions gain somewhat on the west the other would receive compensation on the east.

The conclusions of his report, however, contain its pith and substance and read (as I translate) as follows: (The italics are mine.)

> I will draw your attention also to the fact that said instructions were modified in March, 1912, that the line in question was run according to them, in 1913, giving therefore to the Shives Lumber Co. all the time necessary to oppose said instructions before the work was done on the ground, and that the protest was handed over to Price Bros. and to the Department only on the 15th March last (1914).
>
> To the present report I attach a copy of the local map, shewing in yellow the dividing lines between the timber limits belonging to the Shives Lumber Co. and the Price Bros., *as well as a blue copy of the plans of the work of Surveyor Addie dividing the timber limits belonging to the two companies on River Rimouski as well as on River Kedzwick. I respectfully submit the whole matter.*

In my opinion this report of Girard with its accompanying map and

> plans of the work of Surveyor Addie dividing the timber limits belonging to the two companies

on both rivers contains all the essentials required by the law to enable the Minister to approve or otherwise of the report of the survey, and when approved by the Deputy Minister became binding on the parties.

Many other questions were argued by counsel at bar. I have had the opportunity of reading the reasons for judgment prepared by Mr. Justice Mignault on all of these points and his conclusions are quite satisfactory to me and need not be repeated. In a letter of the 14th August, 1914, sent by the Deputy Minister of the Department to each of the parties and enclosing copies of the report of Mr. Girard, Superintendent of Surveys, the Deputy says expressly: "This report has been approved by this Department." Nothing could be plainer or clearer than this as shewing departmental approval.

This appeal should be dismissed with costs.

IDINGTON J.—This is an action by the respondent claiming by virtue only of being licensee of the Crown on behalf of Quebec, of a right to cut timber on the Crown domain, to recover from the appellant, which also is a licensee of the said Crown, the value of certain timber alleged to have been cut by the latter.

The licences issued by the Crown for such purposes are somewhat indefinite in regard to the exact area supposed to be covered thereby. They transfer no right of property. They are mere licences to cut. The fruits thereof are not such tangible things that trespass or trover may lie for, against one claiming as of right (whatever might be such right against a third party who was a mere tort feasor), unless and until the area covered thereby has been delimited.

The parties hereto are rival claimants. The Crown owns the land and the timber and, in order, I presume, to keep in its own hands the control of the delimitation of such lands as a licence may be applicable to and cover, and avert the possibility of confusion arising from mistakes, or worse, on the part of any of those

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claiming under such licences and consequent loss of revenue, as well as for the protection of all concerned, there are, amongst others of a like kind, regulations passed by the Lieutenant-Governor in Council, authorized by statute, of which the important one now in question is as follows:—

> 24. Crown timber agents, or any other authorized person shall, at the joint written request of holders of adjacent limits, give instructions as to the manner of surveying and running the boundaries of such lands in order that they may be conformable to existing licenses. But, in order to be valid, such instructions must be previously approved by the Minister. Surveys shall be made at the expense of the parties requiring the same, and, when completed, the reports, plans and field notes shall be submitted to the Minister and, if approved by him, a copy shall be sent to the office which issued such instructions and be kept in its archives. The boundaries so established at the joint request of the interested parties shall be fixed and permanent and cannot be altered.

There had been instructions by the Deputy Minister, presumably pursuant to another regulation, issued to a surveyor at the request of respondent, to make a survey which might, if fully executed and the results had been duly adopted by the Minister, have been held to have delimited the line between these parties. That work, however, was interrupted upon the appellant complaining to the Minister or his Department.

I am unable to see how the respondent can found upon that alone any claim.

Indeed it is not pretended that in law such work as done thereunder can of itself support the respondent's claim.

It is useful as an historical introduction to that which transpired later and then coupling what had been so done with later work founded upon a variation of the prior instructions it is contended the whole proceedings constituted a compliance with the above quoted regulation, and thereby in law finally deter-

mined the line between the parties and consequently the right of property in that in question.

It is not seriously disputed, I imagine, that if such a line had been duly established then the appellant must be held on the facts to have cut some timber within the respondent's limit so established.

It is clear that there was a meeting, after the interruption of the survey as directed, of some persons representing in some capacity or other the parties concerned, in presence of the Superintendent of Surveys.

It is surprising that they should have left the nature of their decision, if any, of a clear definite nature ever reached, to be the subject matter of dispute, as it is herein, instead of putting in writing what the above quoted regulation requires, namely, "a joint written request of holders of adjacent limits" to a Crown timber agent or other authorised person, which I presume the Superintendent of Surveys was. Even then the Minister must previously have approved of the instruction to execute the purpose of said owners before proceeding therewith.

Instead of such a simple and direct method of procedure as the "joint written request," we are asked to accept instead thereof what may be extracted from an involved, long drawn out correspondence from which assent or conditional assent by each party might be found in the nature of ratification or a willingness to join in such written request. I cannot think that should be accepted as a substitute for the express requirement of the regulation.

Nor can I accept in substitution for the previous approval of the Minister, required by the regulation, a later adoption thereof long after the work relied upon had been completed. And much less so when there is

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the gravest reason to doubt the import of that which is relied upon as approval.

Long after the work now relied upon as establishing the line in question was done pursuant to such loose and unbusinesslike methods as I have adverted to, upon appellant complaining of the original instructions having been improperly changed, there seems to have been a request made by the Deputy Minister to the Superintendent of Surveys, to report upon that subject.

I infer from the contents of the report itself that such was the nature of the request the Superintendent refers to, for we have not in the record the written request for a report. Why that is so, I am at a loss to understand but must do the best I can with the material placed before us. I cannot, under these circumstances, draw from the initialled mark of approval by the Deputy Minister any such sweeping conclusions as we are asked to do from such dubious mark of approval.

That was no more nor less than a proper exoneration of an officer charged with erroneously having interpolated something into the original instructions his predecessor had framed, and which the Minister had acted upon.

It was an entire work, founded entirely upon instructions previously given or approved by the Minister, that the exigencies of the situation demanded.

What is produced and relied upon as in conformity with the exacting requirements of the regulation falls very far short thereof.

Indeed no ratification would seem permissible under the regulation in the way of substitution therefor, no matter how desirable.

Ratification was beyond the power of the Minister or his deputy.

Nor could the assent of the parties concerned either previous to or after the work was done alter the nature or quality of the proceeding or its results.

The rights of the Crown the dominant proprietor could not be thus disposed of.

Until the relation between the Crown and each of its licensees in question herein had been accurately determined or the lines thereof laid down as required by law, there was no property vested in respondent, or even right of property which it could assert.

It is conceivable that two such licensees as those in question might frame a contract between them providing that in certain contingencies in relation to such districts as in question either should pay or indemnify the other for some supposed wrong done to the other's interest under its licence and thus found a something out of which an action at law upon that contract might arise even if independent of the regulation in question. But nothing of that sort exists in fact herein nor is any such like claim pleaded or attempted to be proven.

The action is founded upon a supposed wrong done in or upon or in relation to property which had not yet in law or fact become the property of respondent.

I can see no possibility of such a right of action being maintainable at present under existing circumstances. Nothing is existent capable of supporting a claim for damages or enabling the proper assessment thereof. Nor can there be unless and until, if ever, the delimitation of the properties under licence has been established either pursuant to the section quoted above or the following sec. 25 of the regulations which does not seem to have been invoked herein as foundation for present claim. I assume above it had originally been acted upon but was not pursued in such a way as to lead to any definite results.

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I am, therefore, not surprised to find that upon appellant pressing its complaints on the attention of the Minister that he finally decided to refer the question to the law officers of the Crown and as a result thereof that he found it necessary to inform these litigants that he had decided that the modification of instructions, not having been officially made, were of no value and proceedings would have to be taken "to have this error straightened up," to use the phrase announcing the result.

The respondent saw fit to take and prosecute this action instead of abiding thereby.

It thus assumed the heavy burden of proving a compliance with the regulation and attempted it by circuitous methods which I find failed.

The onus of proof resting upon it, the proper and direct method would have been to call the Minister or his deputy as a witness.

I infer that by reason of the impossibility of shewing that the surveyor's instructions, as amended, had the previous approval of either the Minister or his deputy, which was needed to render same valid, either would have failed to supply the needed proof.

I, therefore, am of opinion, that the appeal should be allowed with costs throughout and the action be dismissed with costs without prejudice to the new survey being had under either regulation—24 or 25—with the approval of the Minister or his deputy and to such, if any, rights as the result thereof may disclose the respondent to have.

Since writing the foregoing I find that I am alone in the result just reached, and to render a judgment of the court possible I assent to the result expressed by those desiring a new trial as being nearest of the divergent opinions of my colleagues to what I conceive right.

ANGLIN J.—I concur with Mr. Justice Brodeur.

BRODEUR J.—Il s'agit dans cette cause du bornage de terres publiques sur lesquelles l'appelante et l'intimée ont des permis de coupe de bois qui leur ont été octroyés en vertu des articles 1597 et suivants des Statuts Refondus de la province de Québec.

Le bornage de ces concessions forestières ne peut pas se faire de concert entre les propriétaires voisins, ou par l'intervention de l'autorité judiciaire, ainsi que les articles 504 et 505 du Code Civil le prescrivent pour les terrains des particuliers, mais il ne peut avoir lieu que sur les instructions de l'autorité administrative et il ne devient effectif et légal qu'après avoir été approuvé par le ministre ou le sous-ministre des Terres et Forêts (arts. 24 et 25 des Règlements des Bois et Forêts; et arts. 1527 et 1597 S.R.P.Q.).

Toute la question dans cette cause est de savoir si le bornage invoqué par la demanderesse intimée a été fait suivant des instructions valables de l'autorité administrative et s'il a été approuvé par le sous-ministre.

Il devient nécessaire de raconter brièvement les faits importants qui ont donné lieu au litige. Je citerai cependant d'abord le texte de l'article 24 des Règlements des Bois et Forêts qui détermine dans quelles conditions l'arpentage doit se faire, et quel en est l'effet:—

"Les agents de bois de la Couronne," dit l'article 24, "ou toute autre personne autorisée donnent, à la demande *écrite et conjointe* des possesseurs de locations voisines, des instructions sur la manière d'arpenter et de délimiter ces terrains pour les rendre conformes aux licences existantes; mais ces *instructions, pour être valables, doivent être préalablement approuvées par le ministre.* Les arpentages se font aux frais des requérants et lorsqu'ils sont complétés, les rapports, plans et notes de l'arpentage sont soumis au ministre et *s'il les approuve* copie en est transmise au bureau qui a émis ces instructions et gardée dans ses archives. Les bornes ainsi établies à la demande conjointe des intéressés sont fixes et permanentes et *ne peuvent être changées.*"

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J'ai souligné dans cette citation les parties qui portent sur le présent litige.

Voici maintenant les faits de la cause.

En 1909, la compagnie Price s'est adressée par écrit au Département des Terres pour faire faire le bornage de plusieurs concessions forestières qu'elle avait dans la région de la rivière Rimouski et de la rivière Kedzwick. Des instructions furent préparées par M. Gauvin, qui était alors surintendant des arpentages, approuvées par le sous-ministre du temps, M. Taché, et transmises à l'arpenteur Addie. Cette procédure était irrégulière, car cette demande de bornage devait se faire, suivant l'article 24 des Règlements, par les deux parties intéressées conjointement. Il n'y a que dans le cas où l'un des possesseurs (art. 25) refuse de se joindre à son voisin pour faire le bornage que ce dernier a le droit de faire seul la demande. Il n'y a pas de preuve dans le cas actuel que la compagnie Shives ait refusé de faire une demande conjointe. Mais ce défaut initial a été certainement couvert par les démarches subséquentes de la compagnie Shives qui, en 1911, a demandé à la compagnie Price de faire ce bornage en commun et, sa demande ayant été acceptée, les compagnies ont toutes deux fait l'organisation nécessaire pour que l'arpentage de leurs lignes de division soit effectué suivant les instructions qui avaient été approuvées par le sous-ministre; et elles ont toutes deux envoyé des représentants pour assister l'arpenteur Addie et surveiller ses opérations. C'était dans l'hiver 1912.

Les concessions forestières de la compagnie Shives sont entourées au nord, à l'est et à l'ouest par celles de la compagnie Price. L'arpenteur Addie a d'abord commencé à l'ouest de la concession Shives, sur la rivière Rimouski, et, suivant les instructions qu'il avait

du département, il procéda à tirer les lignes en droite ligne astronomique. Cette opération faisait gagner environ sept milles de terre à la compagnie Shives.

Quand l'arpenteur fut arrivé pour déterminer la ligne orientale de la concession Shives, il a naturellement suivi la même direction; mais alors la compagnie Shives s'est opposée énergiquement à ce que l'arpenteur continuât ses opérations; et ce dernier, accompagné des parties intéressées, s'est rendu à Québec pour voir l'arpenteur général du département, qui était alors M. Girard.

Celui-ci, après avoir entendu les parties et leurs suggestions, a reconnu que l'arpentage à angle droit avec les rivières serait plus juste; et, pour donner effet à ce qu'il considérait le consentement des intéressés, il a modifié les instructions de l'arpenteur. Mais, par oubli ou autrement, il n'a pas fait approuver cette modification par le ministre ou le sous-ministre.

L'arpenteur muni de ces nouvelles instructions en a fait tenir une copie à la compagnie Shives le 23 mars 1912 et cette dernière en a accusé réception en disant:

> The correct instructions which you now have from the department are in keeping with what was agreed upon.

Quelques jours plus tard, la compagnie Shives demandait combien la compagnie Price Bros. se trouverait à gagner de terrain dans la ligne ouest par ces nouvelles instructions; et l'arpenteur lui a répondu, par lettre du 4 avril 1912, qu'elle gagnerait environ 7 milles.

La ligne fut dans l'hiver suivant, en 1913, tirée suivant les nouvelles instructions et la compagnie Price s'est trouvée à reprendre les sept milles de terrain qu'elle avait perdus par l'arpentage de l'hiver précédent. D'un autre côté, la compagnie Shives se trouvait à gagner considérablement de terrain dans sa ligne est.

L'arpenteur déposa au ministère son rapport, ses

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notes d'arpentage et le plan du bornage fait et il fut payé de ses frais d'arpentage par les deux compagnies; mais la compagnie Shives fit ce paiement sous protêt, en disant que la compagnie Price avait eu plus de terrain qu'elle n'avait droit d'en avoir. Elle se rendit alors auprès du département pour s'objecter à ce que le rapport et le plan de l'arpenteur fussent acceptés parce que les instructions de ce dernier n'avaient pas été au préalable approuvées par le ministre ou le sous-ministre.

Les choses en restèrent là pour un an environ, quand le surintendant des arpentages, M. Girard, le 7 avril 1914, fit un rapport au ministre sur la plainte faite par la compagnie Shives. Il reconnait dans son rapport qu'il a peut-être eu tort d'avoir modifié les instructions sans en avoir reçu l'autorisation du département; mais, cette modification ayant été basée sur le consentement des parties, il ne croit pas qu'il y aurait lieu maintenant de changer de nouveau ces instructions sans le consentement de la compagnie Price. Il déclare aussi que les descriptions des locations forestières pouvaient être interprétées de différentes manières et que c'est la raison pour laquelle il a fait le changement demandé par les intéressés.

Il annexe à son rapport une copie du plan de l'arpentage.

Ce rapport, autour duquel roule tout le litige, a été approuvé par le sous-ministre actuel en y inscrivant le mot "app." suivi de ses initiales: "E. M. D." et des chiffres "8-4-14," ce qui signifierait, suivant la preuve, approuvé le 8 avril 1914.

Il s'agit de savoir si cette action du sous-ministre constitue l'approbation requise par l'article 24 des Règlements au sujet du plan de l'arpenteur ou bien si l'approbation du sous-ministre porte simplement sur

la conduite de M. Girard et de la modification faite par lui dans les instructions.

J'aurais été d'abord porté à croire que cette signature du sous-ministre sur le rapport de M. Girard constituait une approbation non-seulement des instructions données à l'arpenteur mais aussi du rapport et du plan d'arpentage faits par ce dernier. Mais M. Girard, dans sa déposition, nous dit que le ministre ou le député-ministre n'a pas pris action sur le plan de l'arpenteur. Voici le texte de cette partie de sa déposition:—

D. Est-ce que le ministre a pris quelque action sur ces plan et *field-notes*, depuis qu'ils sont là? R. Non, monsieur.

D. Ni le sous-ministre? R. Non.

D. Ni le département? R. Non. Je peux ajouter que j'ai fait vérifier les notes et le plan pour voir si tout était correct, pour voir si les pièces de monsieur Addie concordaient entre elles.

D. Qu'est-ce que vous entendez par ces mots? R. J'ai fait faire par un dessinateur, j'ai fait reconstruire les plans pour voir si le plan est conforme à celui qui est produit, pour voir si le plan est parfaitement conforme aux notes fournies; c'est ce que l'on fait toujours.

D. Tout ceci n'a pas été soumis au ministre ou au sous-ministre pour son approbation? R. Non, monsieur.

Il me semble qu'il aurait été nécessaire d'avoir sur ce point le témoignage du sous-ministre pour savoir exactement ce qu'il a entendu approuver quand il a mis ses initiales sur ce rapport, d'autant plus que l'action du département, en transmettant une copie du rapport tel qu' approuvé aux parties intéresséest, a été interprétée par l'intimé comme signifiant que le bornage fait par Addie était approuvé par le sous-ministre et que certaines expressions relevées dans les lettres de l'avocat de la compagnie Shives nous portent à croire que, dans son opinion, l'approbation du rapport Girard par le sous-ministre mettait à néant les prétentions de cette compagnie quant à la légalité de l'arpentage.

Il est important de mettre fin à ces difficultés entre

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les deux compagnies. Je ne serais pas prêt, pour ma part, à renvoyer l'action de la demanderesse si, par oubli ou autrement, on n'avait pas mis au dossier le témoignage du sous-ministre, car en renvoyant l'action les parties auraient à procéder de nouveau au bornage et à encourir des frais bien plus considérables que la valeur du bois en litige. S'il s'agissait d'un bornage entre particuliers où l'autorité judiciaire pourrait elle-même faire tracer les bornes (art. 504 C.C.) nous pourrions, je crois, disposer du litige avec les pièces que nous avons devant nous. Mais les tribunaux, dans le cas de concessions forestières, n'ont rien à faire avec la légalité du bornage. Cette question est du ressort exclusif de l'autorité administrative.

Dans la présente cause nous avons d'abord à rechercher si le bornage a été approuvé par le député ministre.

Le document que nous avons devant nous est certainement ambigu. Le rapport de M. Girard nous indique bien les circonstances dans lesquelles il a modifié les instructions de l'arpenteur; et comme son rapport est approuvé, il en résulterait alors que les instructions qu'il a préparées sont également approuvées.

Il est bien vrai que ces instructions n'auraient pas alors été approuvées avant d'avoir été transmises à l'arpenteur. Mais la ratification postérieure de ces instructions par l'autorité administrative serait suffisante pour les valider. C'est ce qui résulte de la décision rendue par le Conseil Privé dans la cause de *Alexandre* v. *Brassard* (1), ou Lord Macnaghten, en parlant de ce qui devait se faire devant l'autorité religieuse pour l'érection canonique d'une paroisse, disait:—

(1) [1895] A.C. 301, at p. 307.

It is rather in the nature of a rule of procedure, and in their Lordships' opinion it is for the ecclesiastical authorities and for them alone to decide as to the validity of any objection founded on non-compliance with it.

Dans le cas actuel, c'était aux autorités administratives du Département des Terres de décider si les instructions avaient été émises régulièrement ou non. Et comme le sous-ministre a approuvé la conduite de son officier, M. Girard, il a, par là même, suivant moi, approuvé les instructions qu'il avait données à l'arpenteur.

Et quand subséquemment il envoyait copie du rapport à la compagnie Shives et disait que ce rapport avait été approuvé, il ne faisait que porter à la connaissance de cette partie le fait que l'on décidait que ces instructions étaient valides et acceptées comme telles par le ministre.

On dira peut-être que la demanderesse ne pourrait pas faire la preuve testimoniale du fait que le sous-ministre a approuvé non-seulement les instructions préparées par M. Girard mais aussi le rapport et le plan de M. Addie.

La règle édictée par l'article 1234 C.C. est que la preuve testimoniale ne peut pas être admise pour contredire ou changer les termes d'un écrit valablement fait. Les termes de cet article sont évidemment pris de Greenleaf on Evidence, qui est d'ailleurs cité par les codificateurs sous cet article 1234 C.C. Cet article 1234 C.C., dans la version anglaise, se lit comme suit:—

Testimony cannot in any case be received to contradict or vary the terms of a valid written instrument.

Greenleaf, au paragraphe 275, cité par les codificateurs, énonce la même règle en se servant des termes suivants:—

Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid instrument.

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L'article correspondant du Code Napoléon, qui est l'article 1341, est dans des termes plus restrictifs, vu qu'il dit qu'il n'est reçu aucune preuve par témoins *contre* et *outre* le contenu des actes.

Cependant Bonnier, Traité des Preuves, p. 120, no. 143, en commentant cet article déclare que:—

> Ce n'est point prouver outre le contenu aux actes que de compléter au moyen de la preuve testimoniale des énonciations ambigues ou insuffisantes.

Langelier, De la Preuve, nos. 584-585, après avoir déclaré que les rédacteurs de notre article ont copié la règle du droit anglais plutôt que celle du droit français et après avoir énoncé au no. 603 la règle que l'on ne pourrait prouver par témoins la manière dont les parties à un acte l'ont elles-mêmes entendu, dit au no. 604 que si l'écrit donne une désignation de chose qui peut s'appliquer à plusieurs choses, on peut prouver quelle est la chose que l'auteur de l'écrit a voulu désigner ainsi.

Le même principe est énoncé dans Taylor, on Evidence, 10th ed., p. 855, par. 1194, et dans Best, on Evidence, 10th ed., p. 208, par. 226.

Dans la présente cause on pourrait donc prouver par témoins si le sous-ministre entendait, en approuvant le rapport de M. Girard, approuver en même temps le plan de l'arpenteur qui lui était soumis. Les tribunaux pourront ensuite avec cette preuve décider d'une manière certaine si le bornage fait par l'arpenteur Addie a été approuvé par l'autorité administrative et si l'action de la demanderesse était bien fondée.

Partant du principe que les tribunaux n'ont pas juridiction pour décider de la légalité d'un arpentage de locations forestières, mais que c'est là une question dont la décision appartient exclusivement au ministre ou au sous-ministre des terres; étant donné le fait que nous avons à interpréter une ambiguité cachée (latent

ambiguity) et que la preuve écrite ne dit pas clairement si le sous-ministre a approuvé le bornage, je serais d'opinion, dans ces circonstances, de renvoyer le dossier en Cour Supérieure pour qu'on y prouve si le sous-ministre, en initialant le rapport Girard, a ou non approuvé le bornage et a eu ou n'a pas eu l'intention de donner lui-même l'approbation requise par l'article 24 des règlements.

Les frais de cette cour, ainsi que des cours inférieures, devront suivre le sort de la cause.

MIGNAULT J. (dissenting)—At first sight this case appears quite a complicated one, but when the voluminous record and the lengthy factums are examined, the question to be decided is restricted into a very narrow compass.

The appellant and the respondent hold adjoining timber licences from the Government of the Province of Quebec. The respondent has, towards the west, timber limit River Rimouski No. 1 East, and, towards the east, timber limit Kedzwick No. 2. Between these limits, going in an easterly direction, the appellant holds timber limits River Kedzwick No. 3 and Kedzwick East. Consequently, the parties occupy neighbouring territory both on the east and on the west, and the difficulty between them arose in connection with the running of the boundary line between their respective concessions.

It is to be remarked that in as much as timber licences confer no right of ownership in the land, the provisions of the Civil Code as to boundaries are without application. The whole matter is governed by the provisions of the Quebec revised statutes concerning public lands, and by regulations made by

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order-in-council under these provisions (art. 1534 R.S.Q.).

The regulation governing the parties in this case is Regulation No. 24 of the Wood and Forests Regulations and reads as follows:—

SURVEYS.

24. Crown Timber Agents, or any other authorised person shall, at the joint written request of holders of adjacent limits, give instructions as to the manner of surveying and running the boundaries of such lands in order that they may be conformable to existing licences. But, in order to be valid, such instructions must be previously approved by the Minister. Surveys shall be made at the expense of the parties requiring the same, and when completed, the reports, plans and field-notes shall be submitted to the Minister and, if approved by him, a copy shall be sent to the office which issued such instructions and be kept in its archives. The boundaries so established at the joint request of the interested parties shall be fixed and permanent and cannot be altered.

It is common ground between the parties that, although the approval of the Minister of Lands and Forests is required by this regulation, the approval of the Deputy Minister is to the same effect and is binding upon the licensees.

Some time in 1909, the respondent applied to the Crown Lands Department to have boundaries run between their respective limits, and Mr. George K. Addie, provincial land surveyor, was charged with the tracing of these boundaries under instructions issued by the Department.

This was not the joint written request required by Regulation 24, but the correspondence exchanged between the appellant and the respondent in 1911 and 1912 shews that the latter company agreed, and even proposed to the respondent, to join it in having the survey made jointly and to pay one-half of the expense, and in view of this agreement it is somewhat singular that the appellant should now raise the technical objection that a joint request from both parties for the

survey should have preceded the instructions given by the Department in 1909. I think the appellant should not be heard now to urge this objection in view of the full consent which it gave to the survey being made at the joint expense of the parties and of its participation therein.

I may, moreover, dispose of the objections of the appellant that, under Regulation 24, a joint written request of the parties should have preceded the instructions given to the surveyor, and that these instructions should have been previously approved by the Minister, by stating that, in my opinion, all these requirements, and also the approval of the field notes, strenuously insisted on by the learned counsel of the appellant at the argument, are of the nature of rules of procedure and are not a condition precedent to the validity of all subsequent proceedings. These rules are useful ones for the guidance of the Minister and to permit him to give a sanction, by his approval, to the survey made with the concurrence of the holders of contiguous timber limits, but the whole matter is one for the consideration of the Minister alone, and if he gives his approval to the survey and tracing of the boundary, this approval, when sufficiently expressed, covers any previous informality of the proceedings.

Support for the position I take is afforded by the decision of the Judicial Committee of the Privy Council in the case of *Alexandre* v. *Brassard* (1). The question there was whether a decree of the Archbishop of Montreal, followed by civil recognition, canonically erecting the parish of St. Blaise, which had been formed by the dismemberment of three old parishes, could be sustained in view of the fact that it was alleged that the requirements of the Quebec revised

(1) [1895] A.C. 301.

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statutes concerning the erection of parishes and their civil recognition had not been complied with. And it was contended that, although it was not competent for the court to set aside a canonical decree for the erection of a parish for ecclesiastical purposes, the court was at liberty to inquire into the proceedings which gave rise to the decree and that if these proceedings were found not in accordance with the provisions of the law, the decree could not be treated as a decree available for the purposes of founding civil recognition.

Answering this contention, Lord Macnaghten said, at p. 307 of the report:—

> Their Lordships cannot take this view. It appears to them that the provision in question is not a limitation on the jurisdiction of the ecclesiastical authorities, or a condition precedent to the validity of all subsequent proceedings. It is rather in the nature of a rule of procedure, and in their Lordships' opinion it is for the ecclesiastical authorities and for them alone to decide as to the validity of any objection founded on non-compliance with it.

I would apply this test to determine the validity of all the proceedings previous to the approval of the Minister, and state that, in my opinion, it is for the Minister alone to decide as to the validity of any objection with regard to the regularity of the proceedings. If he gives his approval, it precludes any question being raised as to the regularity of the proceedings.

Returning now to the recital of the pertinent facts, I may say that Mr. Addie went on the ground in February and March, 1912, and proceeded, in presence of representatives of the parties, to run these boundaries. Without any opposition whatever he ran the boundary between River Rimouski No. 1 East, held by the respondent, and River Kedzwick No. 3, occupied by the appellant. He then prepared to run the boundary between Kedzwick East (the appellant's) and

Kedzwick No. 2 (the respondent's), when Mr. Dickie, representing the appellant, objected to the manner in which Mr. Addie desired to trace the boundary, and, in view of this opposition, Mr. Addie suspended operations and with, or followed by, representatives of the parties, he returned to Quebec.

Next in sequence in the recital of the facts comes a meeting, on 20th March, 1912, between Mr. Addie and representatives of the parties, to wit, Mr. Anderson on behalf of the appellant and Mr. Sissons on behalf of the respondent, in the office of Mr. Plamondon, an employee of the Department, at which Mr. Girard, Superintendent of Surveys, assisted. At this meeting, an agreement was arrived at by the parties as to the running of the boundaries between their respective limits on both the west and the east side, and the former instructions to Mr. Addie were modified. It is alleged that Mr. Girard made some changes in these instructions, but it was stated at the hearing by the learned counsel for the respondent that the changes in the instructions of 1909 were mentioned in Mr. Addie's letter to the appellant, dated 23rd March, 1912, and if so the appellant fully acquiesced therein by its letter to Mr. Addie of 27th March, 1912.

Mr. Addie returned on the ground in February and March, 1913, and then and there, in presence of the representatives of the parties, and without any opposition from them, he ran new boundary lines between River Rimouski No. 1 East and River Kedzwick No. 3 on the one hand, and between Kedzwick east and Kedzwick No. 2 on the other. On the 14th May, 1913, he made a full report to the Minister, with a plan of his operations and his field notes thereunto annexed. He also sent a full report to the appellant on the 27th May, 1913, with a copy of his report to

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the Minister and duplicates of the plans accompanying the latter report.

The appellant, on the 7th June, in a letter to Mr. Addie, acknowledged receipt of this report, sent to Mr. Addie a cheque for $1,085.54, for its share of the expenses of the survey, but stated that it was not at all satisfied with the result as it could not understand why there should be the great difference between the first and last lines that Mr. Addie ran out.

Some months later, 8th October, 1913, the Hon. Mr. John Hall Kelly, K.C., Legislative Councillor, wrote to the Department on behalf of the appellant expressing the same dissatisfaction, and asking for a copy of all instructions given for the survey. It does not appear what answer was made to this letter, but nearly six months after, 14th March, 1914, Mr. Kelly caused to be served on the respondent and on the Minister a formal protest against the running of the line. At least one ground of this protest, that the line was run without the consent of the appellant, appears to me contrary to the facts proved in this case. Mr. Kelly followed this protest by a letter to the Minister of the 28th March 1914, in which he alleges that the first instructions were changed at the request of the respondent, an assertion also controverted by the evidence. Mr. Kelly asked the Minister to give the matter his consideration at once, as otherwise the matter will have to be thrashed out before the courts to have it decided.

It is under these circumstances, and in view of these letters and protests and of the request of Mr. Kelly that the Minister should give the matter his consideration at once, that Mr. Girard, Superintendent of Surveys, made his report to the Minister of Lands and Forests on the 7th April, 1914, in which he refers to Mr.

Kelly's letter of the 28th of March, and in which he makes a complete report of all the operations connected with the survey and the running of the line, frankly admitting that he had made some changes in the instructions to the surveyor without the authority of the Department. He concludes by saying:—

J'annexe au présent rapport copie de la carte régionale, indiquant en jaune les lignes divisant les diverses locations forestières appartenant à la "Shives Lumber Company" et à "Price Bros.," ainsi qu'une copie bleue des plans du travail de monsieur l'arpenteur Addie divisant les locations forestières appartenant à ces deux compagnies sur la rivière Rimouski aussi bien que sur la Kedzwick.

At the foot of this report we find the following:—

App.
E.M.D.
8, 4, 14.

This, Mr. Girard states, means:—

Approved E. M. D. (being the initials of the Deputy Minister, Mr. Elzéar Miville Déchênes) and the date, 8th April, 1914.

I fail to see how it can be disputed that this was a decision by the Deputy Minister on the very point which Mr. Kelly had asked the Minister to consider. And although it is argued that this is merely an approval of Mr. Girard's explanation why the former instructions were modified, I am of the opinion that the approval so given extends to the whole report and to the plans and maps submitted with it. I cannot see the object of so initialling the report, if the intention was merely to accept Mr. Girard's explanation, and not to give official approval to the survey.

Mr. Kelly evidently placed this construction on the approval, for, on the 13th August, 1914, he wrote to the Minister, referring to a letter from the Department of the 16th April, enclosing a copy of Mr. Girard's report, and in this letter he says:—

I also note that this report has been approved by the Department;

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and he expresses the regret that he had not been given the opportunity

> to answer the said report, before the approval of the Department was obtained.

In this letter Mr. Kelly submits that the instructions could not be modified without the written request of his clients and that these instructions should have been previously approved by the Minister, and he requests that these two points be submitted to the law officers,

> because a suit of considerable importance will be pending between Price Brothers and the Shives Lumber Company and the Department, in the event of the Department maintaining the position that it has taken that the line, as run in the last instance, is a legal one.

Finally, we have a letter of the 14th August from the Deputy Minister to the respondent, in which the Deputy Minister transmits a copy of Mr. Girard's report, adding:—

> This report has been approved by the Department.

I cannot but believe that the intention of the Deputy Minister, in approving Mr. Girard's report, was to give the approval required by art. 24 of the Wood and Forests Regulations, for if the object of the Deputy Minister was merely to accept, as argued, the personal explanation of Mr. Girard and not to approve the report itself, there would have been no reason for writing a formal approval at the foot of the report itself. And, as already stated, Mr. Kelly's letter of the 13th August shews that he placed the same construction on the approval.

It is true that, at Mr. Kelly's request, the Department referred the points raised by him to its law officers and subsequently to the Attorney-General. It is also true that the Deputy Attorney-General reported that Mr. Kelly's objections were well taken, and that the Department thereupon notified the parties that a

new survey and determination of the boundary would be necessary. But I have, with deference, to disagree with the conclusions of the learned Deputy Attorney-General, and I think the approval of the Deputy Minister, covering, as it does, the whole of Mr. Girard's report, necessarily carries with it approval of the instructions issued to Mr. Addie. While no doubt it would have been more regular to insert the approval of the Deputy Minister on the plan itself, and the Department should see that this is done now, I cannot take the responsibility of exposing the parties to the expenses of a new survey when I am convinced that there has been substantial compliance with the requirements of Regulation 24, and that, if there be any informality, the approval of the Minister disposes of any question as to the validity of the proceedings.

This is the only point on which this court is called upon to express any opinion, and it has not to say whether the lines run in 1913 gave to each party the territory to which it was entitled. This is a point as to which the Minister, or his Deputy, is the sole judge, and as I find that the Deputy Minister, by approving Mr. Girard's report, has given his approval to the line run by Addie, I can only concur in the exhaustive and very complete opinions of the late lamented Sir Horace Archambeault, Chief Justice, and of Mr. Justice Carroll in the court below.

The lumber, the price of which is claimed by the respondent, was cut in territory which the survey of 1913 placed within the limits granted to it. The value of the lumber was admitted, and the appellant was condemned to pay it to the respondent. With this determination of the litigation between the parties I concur.

Some point has been made of the fact that the

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Deputy Minister was not called as a witness to state what he intended when he wrote his approval at the foot of Mr. Girard's report. Another question would be upon whom rested the onus of so calling Mr. Dechênes, on the respondent who relied on the approval as extending to the entire report, or on the appellant who sought to restrict this approval to the personal explanations of Mr. Girard? My personal view is that the respondent could rely on the approval as extending, as its unqualified terms shewed, to the whole report, and that if the appellant desired to limit in any way the general effect of this approval, the onus of proving the limitations rested on it. At all events, neither party saw fit to call Mr. Déchênes, and I do not think that the omission is one for which the respondent alone should be considered liable.

In my opinion substantial justice has been done to the parties by the judgment of the Court of King's Bench. A new survey might possibly give the same result and would undoubtedly expose the parties to considerable expense. It seems in every way desirable to bring the litigation to a close, and I would not lightly disturb so well considered a judgment as the one appealed from.

For these reasons, I am of the opinion that the appeal should be dismissed with costs.

Appeal allowed, new trial ordered.

Solicitor for the appellant: *John Hall Kelly.*
Solicitors for the respondent: *Tessier & Côté.*