ALPHONSE DUMONT (PLAINTIFF) ... APPELLANT; 1912 *Nov. 4, 5.

AND

1913 *Feb. 18.

DONALD FRASER AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

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

Watercourses—Driving timber—"Damages resulting"—Reparation—Riparian rights—Construction of statute—Arts. 7298, 7349 *R.S.Q.* (1909)*—Servitude—Injury caused by independent contractor—Liability of owner of timber.*

The privilege of transmitting timber down watercourses in the Province of Quebec given by article 7298 of the Revised Statutes of Quebec, 1909, is not granted in derogation of the obligation imposed upon those making use of watercourses for such purposes to make reparation for damages resulting therefrom by article 7349(2) of the Revised Statutes of Quebec. The effect of the articles is that persons who avail themselves of the privilege thereby conferred are obliged to compensate riparian owners for all damages which result from the exercise of that right except in regard to such as cannot be avoided by the exercise of reasonable care and skill and those in respect of which the riparian proprietor himself may have contributed, or which have been occasioned by his own fault. *Tourville* v. *Ritchie* (21 R.L. 110) referred to.

The judgment appealed from was reversed, Davies and Anglin JJ. dissenting.

Per Davies and Anglin JJ., dissenting.—The evidence shewed that the damages complained of were caused by the fault of a *bonâ fide* independent contractor and, consequently, the owner of the timber which was being driven down the watercourse in question was not responsible for them.

(NOTE.—Leave to appeal to the Privy Council was granted on 15th July, 1913.)

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*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of Cimon J., at the trial in the Superior Court for the District of Kamouraska, and dismissing the plaintiff's action with costs.

The questions in issue on the present appeal are stated in the judgments now reported.

T. Chase-Casgrain K.C. and *Stein K.C.* for the appellant.

G. G. Stuart K.C. and *Cannon K.C.* for the respondents.

DAVIES J. (dissenting).—This is an action for damages caused by the negligent driving of logs by the defendants down the River Cabano. The appellant was a mill owner carrying on his business on the river banks, and the damages were sustained by the damming back of the water upon his lands caused by a jam of the logs of the defendants just below appellant's mills. This damage, it was alleged, was entirely owing to the negligence of respondents who, on the other hand, while denying any liability, contended that appellant's own negligence was largely responsible for the damages he sustained. The gist of the action is negligence causing or contributing to the damages and, if I was able to hold the defendants liable at all, I would concur in the distribution of the damages in the way and to the amounts respectively proposed by Cross J. in the court of appeal.

One main defence set up by the defendants, respondents, was that plaintiff's own negligence was the cause of the entire damage, but whether this was so or not need not necessarily be determined because

the driving of the logs was not carried out or done by the defendants or any of them, but by one Guérette, an experienced driver, with whom a contract for the driving of the logs had been entered into either by the Cabano Log Driving Association, or by its individual members, who were the owners of the logs and the defendants herein. The defendants, respondents, disclaimed having had any right of control or of having actually exercised any control over the work or driving operations of Guérette.

The question, therefore, was fairly presented. Was Guérette, in the carrying out of these log driving operations, when the damages occurred, a *bonâ fide* independent contractor? After a careful examination of the evidence given at the trial, I have reached the conclusion that he was, and that the defendants neither exercised nor claimed the right to exercise any control over his actions or operations. The contract was entered into with him by Mr. Fraser acting for himself and his co-partners in the Association, they being the owners of the logs and on behalf of the association as such. Whether the association had the corporate capacity to enter into the contract to drive the logs is beside the matter because, if it had not, the contract was made by Fraser with Guérette on behalf of himself and the log owners personally. I do not think, therefore, that these log owners are responsible for the negligence, if there was any, of Guérette in driving the logs.

I agree with the judgment of the appeal court of Quebec as stated in the opinion of Chief Justice Archambeault on this ground, and do not, therefore, find it necessary to discuss any other grounds on which that judgment was sustainable.

The appeal should be dismissed.

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IDINGTON J.—The respondents and others owned timber intended to be floated down Cabano River and same was driven down said river doing damage to the property of appellant who was the owner of a mill and dam on said stream and property on each side of it at the place in question.

The respondents were found liable by the learned trial judge, but the court of appeal reversed this judgment on the ground that the work was done by an independent contractor and that he, as alleged, having same right as any one else by virtue of a section in the Revised Statutes of Quebec, 1909, to which I will refer later, was the party liable if any one.

The circumstances are very peculiar.

These owners of timber to be floated had themselves formed into a corporation known as "The Cabano Logs Driving Association" with powers for improving the river, but no power to drive logs therein or enter upon such a business.

One of the respondents says he bought from the association, for one Guérette, the job of driving said logs at so much per thousand feet.

It seems quite clear in law such a contract, being *ultra vires* the corporation, could give thereby no legal rights to any one.

Guérette, who claims to have become their contractor, could not sue them.

That contract cannot, so far as I see, be relied upon as in law a contract independent or otherwise.

The consequence seems to be that the respondents, who in fact seem to have managed the whole business, must be looked upon as those who caused the logs to be floated and driven.

In law they had a right to have stopped Guérette

at any time, for by law he could not in such circumstances set up his alleged contract.

It may be that had he under such error done work at the instance of respondents he might have been able to recover some compensation for such work as he might have done, but he certainly could not have relied upon this contract.

Nor could he have sued for damages had he been dismissed from his employment.

I fail to see how this sort of alleged contract can be set up as an independent contract over which respondents had no control.

And to shield the employer by virtue of an independent contract he must not only shew he by the contract was or became powerless to interfere, but also where there is or may be risk of danger or injury to others as, for example, upon a public highway he must be able to shew that he has by his contract or otherwise taken care to guard against such danger or injury. How can he in such a case rest on an absolutely void contract?

Again, it is alleged that under article 7298, either the respondents or Guérette had a perfect right to drive logs down the river in question and neither were responsible for damages unless by way of negligence in the driving and any such negligence as is apparent was that of Guérette and not respondents.

Passing the question of an employer without contract to shield him, as I have already indicated was the position of respondents, let us see how this legislation came to be in the singular position it is and how it is found in the revised statutes in the somewhat isolated position it is — and what the legal effect thereof is.

The construction put by this court on the Code and

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result in law in the case of *Tanguay* v. *Canadian Electric Light Co.* (1) seems to take away any right in such a stream as this, only available at times of freshets for driving timber, save such as a statute may have given.

In fact the case has turned in the courts below upon statutory rights parties may have in such case.

The history of this legislation may, for practical purposes herein, begin with 20 Vict. ch. 40, sec. 2, of which the first two sub-sections are as follows:—

> II. 1. No person shall enter upon or pass over the land of another, without permission of the owner or his representative, upon pain of incurring a fine of not less than five, nor more than thirty shillings, excepting, however, any person in the discharge of any of the duties imposed by law;
>
> 2. It shall be lawful, nevertheless, to make use of any navigable river or watercourse, 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 enjoyment of such right, and all fences, drains or ditches which may have been so damaged.

This passed into the Consolidated Statutes of Quebec, (chap. 26,) with an amendment of the first two lines of sub-section 2, to read as follows instead of as above:—

> 2. It shall be lawful, nevertheless, to make use of any navigable or floatable river or watercourse, and the banks thereof, for the conveyance of all kinds of lumber,

otherwise the statute was as first enacted.

Again, these sub-sections passed into the Revised Statutes of 1888, as article 5551, slightly varied and improved, but not departing in any essential from the two features of legislative concession of right to pass over property of others and the indemnification for all damages resulting from the exercise of that right so given.

(1) 40 Can. S.C.R. 1.

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The question is now raised whether or not this simple, just and comprehensive state of the law has been entirely changed by section 7298 in the Revised Statutes, 1909, which reads as follows:—

7298. Subject to the provisions of this sub-section, any person, firm or company may, during the spring, summer and autumn freshets, float and transmit timber, rafts and craft down all rivers, lakes, ponds, streams, and creeks in this province.

The history of it seems to be this, that, in the Revised Statutes of 1888, art. 2972, under the caption of "Toll-bridges," were embodied provisions for the protection of these bridges.

Then, in 1890, these bridges apparently needing further legislative protection, 53 Vict. ch. 37 expressly enacted that sections therein should be added to said section next after sub-section 3 thereof. There were thus added sub-sections (*a*) and (*b*) clearly relevant to these bridges and nothing else but their protection.

The next session 54 Vict. ch. 25 was passed, whereby sub-section (*c*) was expressly added to same section 2972, and, as if relating to same law, a number of sub-sections designated (*d*), (*e*), etc., follow under different headings.

Of these, this sub-section (*d*) reads as follows:—

2972(*d*). Subject to the provisions of this law, any person, firm or company is allowed, during the Spring, Summer and Autumn freshets, to float and transmit timber, rafts and crafts down all rivers, streams and creeks in this province.

This clearly is the section which was intended to be and should have been inserted in the Revised Statutes where it could by relation to the context be given an intelligible meaning.

As it read originally, using the words "subject to the provisions of this law," it was intelligible, either

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as relative to the whole Act then being passed, or in the larger sense if read as part of the Revised Statutes which were to stand amended by those sections; numbered as if part of the Revised Statutes.

It is now made to read as if subject to the section itself, but if we pay heed to the divisions of this revision of the statutes we find "section" is used as a sub-title designating a group of sections.

I must say this sub-section which has become so important in this case does not seem exactly in proper place where it is put, yet I cannot say it has been clearly misplaced, for it never seemed appropriately placed. Bearing in mind the history I have given of it and that it seemed as if a corrective of what had preceded it in legislative history, but to be read as if in harmony with the rest of the Revised Statutes of 1888, can I say it was intended to repeal the law as expressed in art. 5551 of said Revised Statutes?

If not, was it so repugnant to any part thereof as by implication to repeal any part of it ? I think not.

Then, does it confer any new right or is it merely a declaratory enactment to remove doubts in some one's mind relative to the extent of the operative effect of art. 5551 ?

Counsel could not suggest why it was passed.

Inasmuch as art. 7349, of the revision of 1909, appears therein repeating the law of which I outlined the history above from 20 Vict. (1857,) down to then, it clearly was not the intention to repeal the law which with amendments from time to time had remained substantially the same for half a century.

Indeed, the like legislation had existed from 13 & 14 Vict. ch. 40.

When this puzzling section was put into 54 Vict.

ch. 25, that Act began with a distinct heading for its first section to indicate declaratory legislation was deemed necessary.

If permitted to surmise I would suggest that this new section was also intended to have been also declaratory to meet some ingenious objection that the law as it stood did not cover the possible case of streams which were mere streams at freshet times and at other times dry, and hence could not fall within the description given in the revision of 1888, and now art. 7349 of the revision of 1909.

If that was the case then this stream does not, from what we are told at the bar, fall within the class the new section was intended to cover, for it runs continuously. If this stream then does not fall within the language of art. 7349, of the revision of 1909, I fail to understand what could.

No case of the kind I suggest is made by the pleadings or is proven and I assume, therefore, that art. 7349 is what entitled the respondents to claim a statutory servitude over appellant's property. It was clearly in exercise of that right they had driven these logs and they must compensate for any damages done in this operation of driving.

In such case they fall within the law as declared by this court in the case of *Dickie* v. *Campbell*(1) in construing an enactment less express than art. 7349 in its provision for indemnification.

The statute that case turned upon gave indemnification rather by an implication derived from an exception relative to damages than from an express provision providing therefor.

(1) 34 Can. S.C.R. 265.

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In disposing of that case the court expressly anticipates the case of an independent contract and overrules such a defence. Whether this arose from facts which do not appear in the meagre report I cannot say; yet on the possible facts the judgment deals with it expresses sound law. Nay, more, it surely is absolute justice that when a man acquires the right, as a matter of public expediency, to invade another's possession he should, when no other compensation is given, at least indemnify that other for the loss or expense he is put to by the exercise of the statutory right.

It would probably be impossible to estimate compensation in anticipation of what might happen in such cases and the least that should be done is to see that the man whose property is thus subjected to a servitude by law does not suffer.

This principle has been so long adhered to by the legislature and in so many forms that one must be slow in giving an interpretation to an ambiguous sort of legislation that would conflict therewith.

The rules laid down in the interpretation clauses introductory to the revision of the statutes clearly indicate that such revision is to be treated, at least *primâ facie,* as declaratory of the law.

On the facts, I repeat, we must find, and, except in a very express case pleaded and proven, assume the respondents were acting in the drive they directed under the law as set forth in art. 7349 and, therefore, be held responsible for the consequences of such act.

I do not think we can rely entirely upon the grounds taken by Mr. Justice Cross; yet I feel there is great force in the facts he refers to shewing the respondents had no such independent contract as clearly

put the movements of Guérette out of their control. I see no such clear governing reasons to quarrel with the findings of fact and assessment of damages made by the learned trial judge as to render it imperative we should here interfere therewith, and, therefore, conclude the appeal should be allowed with costs here and in the court below, and the judgment of the learned trial judge should be restored.

DUFF J.—The first question arises upon the appellant's contention that the damages sustained by him in respect of which he claims compensation were "damages resulting" from the driving of the logs of the respondents and their associates and that he is entitled, under article 7349(2) of the Revised Statutes of Quebec, 1909, to reparation for that loss. I will first consider the appellant's proposition of law that for all "damages resulting" from the driving of the logs in question the respondents are liable to an action before discussing the question how far the loss for which compensation is claimed falls within that category.

The enactments to be examined are articles 7349 and 7298, R.S.Q., 1909; and it will be convenient to quote them in full:—

II.—TRESPASS ON THE PROPERTY OF OTHERS AND DAMAGE CAUSED THERETO.

7349(1). Except in the discharge of any duty imposed by law, no person shall enter upon or pass over the land or beach-land belonging to any other person or corporation, without permission of the owner or his representative, under penalty of a fine of not less than one nor more than six dollars.

(2) It shall be lawful, nevertheless, to make use of any river or watercourse, lake, pond, ditch, drain or stream, in which or to the maintenance of which one or more persons are interested or bound, and the banks thereof, for the conveyance of all kinds of lumber, and

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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.

(3) The proprietor, or his representative or servant may arrest without warrant any person in the act of contravening this article, and bring him or cause him to be brought forthwith before a justice of the peace.

* * * * *

Protection of Public Interest in Rivers, Streams and Creeks.

* * * * *

II. RIGHT OF FLOATING AND TRANSMITTING TIMBER, ETC., DOWN RIVERS, STREAMS AND CREEKS, AND OF EXECUTING WORKS FOR THAT PURPOSE.

7298. Subject to the provisions of *this sub-section,* any person, firm or company may, during the Spring, Summer and Autumn freshets, float and transmit timber, rafts and craft down all rivers, lakes, ponds, streams and creeks in this province.

It is not disputed that if article 7349 stood alone the appellant would be entitled to reparation for all loss that can be described as "damages resulting" from the driving of the logs in question within the meaning of that article. The contention of the respondents is that the rights and obligations of persons making use of streams for the driving of logs during the "Spring, Summer and Autumn freshets" are stated in article 7298; and that the provisions of article 7349 (2) have no application to "damages resulting" from such operations when carried on during those seasons.

The enactment that is now article 7298, (in a form not quite identical with its present form,) became law in 1890; and, at that time, the enactments now reproduced in article 7349 had been in force for many years. The majority of the Court of King's Bench have given effect to the contention of the respondents that, in respect of the matter to which it relates — the use of streams during the seasons mentioned — the later enactment must be taken to have displaced the earlier; and that, no duty to

make reparation having been imposed by the governing enactment, the respondents' responsibility is only such as the law implies, namely, to make good such damages as arose from the negligence of the respondents themselves or of those for whose acts they are answerable according to the general principles of law.

The effect of this view of the Act of 1890 put in concrete form is that when the driving is undertaken by a competent independent contractor during any of the seasons mentioned the owner is not, save in very exceptional circumstances, answerable for the consequences of any negligence in the execution of the work.

With great respect, I cannot agree that the obligation imposed by article 7349 (2) was affected by the later enactment. Before the passing of the last-mentioned Act (now articles 7297-7305) the owners of logs were entitled to make use of the streams of the province for floating them, but the owners of the lands traversed by such streams had a correlative right to be compensated for damages occasioned by such use. I have already said it is not disputed that this obligation to make such compensation (under the law as it was prior to the Act of 1890) rested on all persons availing themselves of the right, whether through independent contractors or otherwise; and, according to the construction we are now considering, this right of compensation, as regards damages caused during the seasons of high-water, was taken away by the Act of 1890. One of the most important principles of interpretation is that which rests upon the presumption that the legislature does not take away vested private rights or impose new servitudes upon private property without compensation. It is not suggested that for the valuable right of which riparian owners are said

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to have been deprived by the Act of 1890 any compensating benefit was conferred upon them; and the effect of that Act, according to the construction proposed by the respondents, would, of course, be to augment the burden of the servitude declared by the earlier legislation. As the principle just indicated seems to apply to such a case, one is bound, before adopting a construction having that effect, to see that it is quite clear that the proposed construction really gives effect to the intention of the legislature, as shewn by the statute.

Looking at the provisions of the Act of 1890 as a whole one sees that the main object of the enactment was to sanction the maintenance of booms and other works for facilitating the use of the streams of the province for floating craft and timber and the improvement of the floatability of such streams and to define in a general way the rights and obligations *inter se* of the owners of such works, on the one hand, and other persons making use of the streams for the transmission of craft and timber, on the other.

The Act was passed in December, 1890. In November of the previous year, the Court of Queen's Bench had held, in *Tourville* v. *Ritchie*(1), that the plaintiff, the owner of a boom in the River St. Francis, was not entitled to charge the defendant for the use he had made of that boom in floating his logs down the river; but, on the contrary, that the boom was an obstruction and that the plaintiff was liable for all damages occasioned by its presence in the river. The Act of 1890 first declares the public right to use the streams of the province during the Spring, Summer

(1) 21 R.L. 110.

and Autumn freshets for flotation purposes. The provision quoted textually, (54 Vict. ch. 25,) is as follows:—

2972(*d*). Subject to the provisions of this law, any person, firm or company *is allowed*, during the Spring, Summer and Autumn freshets, to float and transmit timber, rafts and crafts down all rivers, streams and creeks in this province.

It then proceeds to declare that the maintenance of booms and other works for facilitating the use of streams for such purposes and for improving the floatability of streams is and always has been lawful. Then follows a provision that the owner of any such work shall not be entitled to the exclusive use of it, but that he may acquire, upon application to the Lieutenant-Governor in Council, the right to charge tolls for the use of it by others. It seems to be clear enough that the subject the legislature is really dealing with is the rights and obligations *inter se* of persons who are engaged in exercising the public rights mentioned in the statute and not the private rights of riparian owners. One is not surprised to find in a statute dealing with that subject a declaration, on the one hand, of the existing right to use the streams of the province for floating purposes and, on the other, of the existing right to maintain works of the description mentioned for facilitating such use. Looking more particularly at the language of article 7298—the article does not expressly or by necessary implication refer to the right of compensation given by the then existing law.

The right of compensation was not a right of action for a wrong; it was strictly a right to be compensated for the injurious consequences following upon the exercise of another right. The declaration in article 7298, therefore, of the existence of the public

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right does not necessarily involve any negation of the correlative private right. In the absence of any indication that the legislature had such private rights in view I think the weight of argument favours the narrower construction.

There is a passage in Lord Selborne's judgment in *East and West India Dock Co.* v. *Hill*(1), at page 23, which seems to me to be directly applicable here:—

> On principle it is certainly desirable in construing a statute, if it be possible, to avoid extending it to collateral effects and consequences beyond the scope of the general object and policy of the statute itself, and injurious to third parties with whose interests the statute need not, and does not profess to, directly deal.

Subsequent legislation lends some confirmation to this view of the Act of 1890. That Act was amended, in 1904, by making its provisions applicable to "lakes and ponds." By the same statute the enactments now reproduced as articles 2256 and 7349(2) were similarly amended. If the rights of compensation declared by article 7349(2) and article 2256 were regarded as no longer available during the seasons of high-water, by reason of the provisions of the Act of 1890, it is strange that the language of those enactments was not brought into harmony with that state of the law by appropriate amendments. This consideration receives some additional weight from the fact that these same provisions of the law, without additional amendment indicating that they had in effect been modified by the enactment of the Act of 1890, were reproduced in the Revised Statutes of 1909.

In this view of the enactments in question, the law imposes upon persons who avail themselves of the public right the obligation to compensate riparian pro-

(1) 22 Ch. D. 14.

prietors at least for all damages which are caused by the exercise of the right and which could be avoided by the exercise of reasonable care and skill except in so far as they may have been contributed to by the fault of the riparian proprietor himself. It is not necessary for the purposes of this case to consider whether the right of the riparian proprietor is any higher. The learned trial judge has appraised the damages upon this principle and the questions involved on this head being questions of fact and the trial judge having heard the witnesses his conclusion ought to be accepted unless it is clearly erroneous. I think there is no sufficient reason for holding that it is.

But there is another ground on which I think the appellant is entitled to succeed. I shall assume that the provisions of article 7349(2) do not apply in cases to which article 7298 is applicable and, consequently, that the appellant's right to compensation, if any, must rest upon some other foundation than the first-mentioned article. I shall assume also, for the purposes of this appeal without expressing any opinion upon the point, that an owner of logs who, during Spring, Summer or Autumn freshets entrusts the driving of his logs to a competent independent contractor without retaining any control over the execution of the contract, and without actually interfering in fact with the execution of it, is not answerable for damages resulting from the contractor's negligence.

Having made these assumptions, I still think the evidence supports the view at which the learned trial judge, as well as Cross and Carroll JJ. in the Court of King's Bench, arrived — that the drive was not entrusted to an independent contractor and that it was in fact executed under the control of the respondents.

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It was clearly beyond the powers of the Cabano Association either to undertake the driving of logs or to let contracts for the driving of the logs owned by the members of the association; and the so-called contract, therefore, between the association and Alexander Fraser, which the latter alleges was assigned to Guérette, was a mere nullity and may be entirely put out of view.

The facts mentioned by Mr. Justice Cross and by the learned trial judge justify the conclusions, in my opinion, that in fact the understanding at the meeting of the association (at which the so-called letting of the contract to Alexander Fraser took place) was that Donald Fraser & Sons should undertake the drive and that in fact they never relinquished control of it.

The appeal should be allowed and the judgment of the learned trial judge restored.

ANGLIN J. (dissenting).—I would dismiss this appeal for the reasons given by the learned Chief Justice of the Court of King's Bench.

BRODEUR J.—Deux questions principales se présentent dans cette cause ci. La première est de déterminer l'étendue de la responsabilité d'un marchand de bois qui en descendant ses billots cause des dommages aux propriétaires riverains, et nous avons aussi à examiner si l'entrepreneur qui a fait la descente du bois dans le cas actuel était le prête-nom des défendeurs intimés.

Ces derniers sont des concessionnaires de coupes de bois sur les terres de la couronne dans la province de Québec. Ils coupent leur bois en billots dans le cours de l'hiver et au printemps ils jettent ces billots dans un petit cours d'eau; qui s'appelle la rivière

Cabano, pour les descendre à leur moulin qui est situé à son embouchure. Ce cours d'eau est du domaine privé et les riverains en sont les propriétaires. Plusieurs dispositions statutaires ont été passées cependant pour autoriser le flottage du bois dans ces cours d'eau privés. Celle qui je crois doit régir le cas actuel se trouve reproduite dans les statuts refondus de 1909 à l'article 2256. Elle se lit comme suit:—

> Lequel (le porteur l'un permis de coupe) a en tout temps, conformément à son permis, le droit * * * de se servir des rivières ou cours d'eau flottables et des lacs, étangs ou autres étendues d'eau et de leurs berges, pour transporter toutes sortes de bois * * * à *condition de réparer les dommages résultant de l'exercice de ce droit.*

Cette disposition de la loi est très juste et très équitable. Le cours d'eau étant propriété privée le propriétaire devrait pouvoir en jouir comme bon lui semblerait. Il est incontestable, par exemple, qu'il peut y ériger des digues pour faire mouvoir un moulin et ce droit lui a été formellement reconnu par la législation de 1854 dont il est fait mention à l'article 503 du Code Civil. La législature voulant favoriser l'exploitation des forêts sur les terres de la couronne a adopté la loi ci-dessus citée et elle a donné le pouvoir aux porteurs de permis de descendre leur bois sur les cours d'eau pourvu qu'ils paient les dommages qu'ils causeraient. Ce privilège accordé aux marchands de bois restreignait nécessairement le droit de propriété du riverain. Par exemple ce dernier, s'il avait érigé des écluses, était obligé d'y percer des glissoires pour y faire passer les billots des marchands de bois mais il devait être indemnisé si on lui causait des dommages.

Dumont, l'appelant, est un de ces propriétaires riverains sur le cours d'eau Cabano. Il avait érigé une écluse pour alimenter ses moulins à scie et à farine et afin de faciliter la descente du bois il avait une glis-

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soire dans son écluse. Il est d'usage qu'à quelque distance de ces écluses ainsi pourvues de glissoires les proprietaires du bois tendent des estacades et dirigent ensuite les billots vers ces glissoires. Il est allégué et il est prouvé que les estacades érigées près de l'écluse du demandeur n'etaient pas attachées soigneusement et alors une crue soudaine s'étant produite les billots ont brisé l'écluse et sont venus s'arrêter un peu plus bas et ont complètement barré le cours de la rivière qui est sorti de son lit, et qui se frayant un passage sur le terrain de Dumont lui a causé de grands dommages. Tout cela aurait pu être évité si on avait suivi les conseils de Dumont et si on avait, la veille de la nuit où l'accident s'est produit, fait passer les billots dans la glissoire de l'écluse. Mais les défendeurs Fraser n'avaient pas étendu leurs estacades à l'embouchure de la rivière et alors la descente n'a pas pu se faire.

Si les estacades (booms) audessus de l'écluse avaient été fortement attachées l'accident aurait probablement été évité. Mais les défendeurs disent "c'est la faute de l'entrepreneur à qui nous avons confié cette entreprise et nous ne sommes pas responsables de sa négligence." J'examinerai plus loin cette prétention. Pour le moment je vais examiner la question de savoir si les défendeurs sont responsables qu'il y ait négligence ou non.

Le propriétaire d'un cours d'eau privé, comme nous venons de le voir, est obligé de subir le flottage des billots des concessionnaires de coupes de bois, mais ces derniers, par contre, sont responsables des dommage qu'ils causent. Il n'est pas nécessaire qu'il y ait négligence de la part de ces marchands, ils engagent leur responsabilité du moment qu'ils causent des dom-

mages. C'est ce que cette cour a décidé dans la cause de *Dickie* v. *Campbell*(1).

Dans une autre cause jugée par cette cour, *Ward* v. *Township of Grenville*(2), le juge Girouard, à la page 526, dit en examinant une disposition statutaire rédigée dans les mêmes termes, que l'article 2256, R.S.Q., 1909:—

It lays down the rule that the owner of logs and timber floating on a private river, like the Rouge, is responsible for the damage caused by that passage, *whether he is in fault or not*, provided, of course, the riparian proprietors are not in fault. It was quite recently, (1902,) applied by the Superior Court, in Sherbrooke (Archibald J.,) confirmed in review by Tait, A.C.J., Loranger and Fortin JJ., in *McKelvie* v. *Miller*.

La cour de révision, dans une cause du *Club de Chasse et de Pêche Ouiatchouan* v. *La Cie. de Pulpe de Ouiatchouan* (3), a jugé ce qui suit:—

1. Les fabricants de bois, concessionnaires de coupes de bois, etc., ont le droit de flotter le bois qu'ils fabriquent dans les rivières et cours d'eau de la province, à la condition de payer les dommages qu'ils peuvent causer.

2. Ils ne peuvent se soustraire à cette responsabilité en faisant faire le flottage de leur bois à l'entreprise par des tiers.

L'Hon. Juge Lemieux, à la page 140, dit:—

Comme on le voit, le statut ne confère qu'au porteur d'un permis de coupe de bois le droit de se servir des rivières flottables, en tout temps, pour transporter son bois, sauf à payer les dommages, etc. * * * Nous considérons que ce privilège * * * est inhérent à la personne et ne peut être exercé que par un porteur d'un permis de coupe de bois.

Et s'il en est ainsi, il ne peut être cédé ou transporté à des tiers.

Autrement le marchand de bois pourrait toujours se libérer du recours en dommages * * * en donnant des contrats pour la descente de ce bois à des personnes insolvables, etc. * * * Et il s'en suivrait que ces contracteurs, au défi de la loi, pourraient * * * faire le flottage ou la descente des billots * * * qui, en s'échouant, * * * nuiraient aux riverains, et commettraient des torts considérables, sans aucune crainte de recours en indemnité.

(1) 34 Can. S.C.R. 265. (2) 32 Can. S.C.R. 510.
(3) Q.R. 31 S.C. 133.

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La loi ne peut pas permettre un semblable état de choses, qui entrainerait tant d'injustices.

Ce principe est parfaitement reconnu dans la jurisprudence mais on dit qu'une loi passée en 1890, 54 Vict. ch. 25, a restreint la responsabilité du marchand de bois. Un article de cette législation de 1890 se lit comme suit:—

Sujet aux dispositions de la présente loi, il est permis, lors de la crue des eaux au printemps, en été et en automne, à toute personne, société et compagnie, de faire flotter et descendre les bois, radeaux et embarcations dans les rivières, criques et cours d'eau dans cette province.

Cette disposition ne doit pas s'appliquer au cas actuel.

Les defendeurs sont concessionnaires de coupe de bois, leurs droits et leurs obligations sont régis par les lois des terres de la couronne ou ce que j'appellerai notre code forestier. Ainsi, par example, dans une limite à bois il se trouve parfois des terrains qui ont été condédés à des agriculteurs. La loi, à l'article 1627, S.R.P.Q., 1909, dit que

les propriétaires de limites à bois et toute personne ayant du bois à flotter, ont le droit, durant l'hiver, de transporter du bois et des provisions en passant sur les propriétés de personnes qui ont des terres dans ces limites; pourvu qu'ils soient tenus d'indemniser ces propriétaires pour tous dommages qu'ils pourraient y causer.

Ces dispositions du code forestier lient les porteurs de coupe et ces derniers n'ont pas le droit de s'y soustraire en invoquant la loi commune. C'est une des raisons pour laquelle les défendeurs ne peuvent pas invoquer la loi de 1890.

D'ailleurs il suffit d'examiner un instant les circonstances qui ont donné lieu à l'adoption de cette loi de 1890 pour se convaincre qu'elle ne saurait être invoquée par les défendeurs.

Dès 1857, par l'acte 20 Vict. ch. 40, on per-

mettait de faire usage des rivières et cours d'eau pour le transport du bois *mais à la charge de réparer tous les dommages résultant de l'exercice de ce droit.*

En 1891, lors de la codification du Code Municipal, on y a déclaré à l'article 891 que l'on pouvait utiliser les cours d'eau municipaux et leurs rives, mais, encore, *avec l'obligation de payer tous les dommages causés.*

La même responsabilité est enoncée dans les lois organiques forestières que nous retrouvons dans les statuts refondus de 1888. Cependant, en reproduisant dans ces derniers statuts la loi de 1857 on a eu le soin de retrancher les rivières navigables vu que leur contrôle législatif, par l'acte de la Confédération, était passé au parlement fédéral. Dans une multitude de procès célèbres de Tourville et Ritchie où l'on soulevait les droits du public dans les rivières navigables, où l'on discutait le droit d'ériger des *booms* dans ces rivières et d'exercer des saisies gagerie sur le bois qui y était retenu, il y a eu en définitive des décisions rendues par la cour d'appel, en 1889, qui paraissent basées sur l'équité plutôt que sur le droit strict. Nous retrouvons quelques uns de ces jugements dans la cause de *Tourville* v. *Ritchie*(1).

Et alors, l'année suivante la législature de Québec, afin de mettre fin à l'incertitude qui existait, a légiféré et a reconnu le droit d'ériger des estacades dans toutes les rivières, de pratiquer des saisies et de faire flotter le bois. Le but de cette législation était de faire disparaître le doute qui pouvait exister quant à l'installation d'estacades sur les rivières navigables et ne peut pas être interprêté comme diminuant la responsabilité de ceux qui pourraient causer du dommage. Cela est

(1) 34 L.C. Jur. 243, 312.

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tellement évident que la vielle loi de 1857 et celle de 1890 ont été amendées, en 1904, par chap. 14, 4 Ed. VII. de manière à ce que deux dispositions statutaires couvrent également les lacs et les étangs.

S'il y avait eu intention de la part de la législature en 1890 d'abolir la législation antérieure de 1857, et si c'est par oubli comme on le prétend que cette ancienne législation n'a pas été abolie, pourquoi alors l'amender en 1904 ? Dailleurs, dans cette législation de 1890 on y déclare formellement qu'elle n'affecte pas les écluses. Donc ces dernières continuent à être régies par la vielle loi de 1857, et comme les dommages en question dans cette cause se rapportent pour grande partie à l'écluse du demandeur les défendeurs ne peuvent pas se soustraire à leur responsabilité.

Ces lois de 1857 et de 1890 ont été reproduites dans nos statuts revisés de 1909. L'une est reproduite au titre des servitudes; c'est la loi de 1890. L'autre se trouve au titre de la responsabilité. Il est donc evident aujourd'hui que, ces dispositions statutaires se retrouvant dans nos statuts, nous devons les interpréter l'une par l'autre. Je suis d'opinion, en resumé, que le marchand de bois peut descendre ses billots dans les cours d'eau et les rivières, mais que dans le cas de cours d'eau privés ce droit est subordonné à l'obligation de payer les dommages.

Ce point décidé, l'appelant devrait réussir. Mais je dois ajouter que les intimés doivent aussi être condamnés parce que leur prétendu entrepreneur n'était que leur prête-nom et que la descente des billots se faisait virtuellement sous leur contrôle. Or, en vertu de l'article 1054 du Code Civil, ils se trouvent responsables du dommage qu'ils ont alors causé. C'est là principalement une question de fait que de savoir si

Guérette avait réellement l'enterprise à forfait, et était indépendant des intimés. La preuve n'est pas absolument certaine et quelque peu contradictoire. Aussi les six juges qui se sont prononcés, en cour supérieure et en cour d'appel, sur ce point sont également divisés. Mais, comme le juge instructeur a vu et entendu les témoins, il est, je crois, en meilleure position de peser leurs déclarations. Il est d'opinion que l'entrepreneur n'était que le prête-nom des intimés et je crois que nous devons accepter son verdict.

En principe l'entrepreneur est responsable à l'exclusion du propriétaire des accidents et dommages survenus au cours du travail; ce dernier, cependant, est responsable lorsqu'il résulte des circonstances de la cause que le contrat est simulé et n'a eu d'autre but que de substituer au regard des tiers à la responsabilité effective du propriétaire celle d'un répondant absolument insolvable. *Longmore* v. *The J. D. McArthur Co.*(1); Sirey, 1901-2-163; Dalloz, 1860-2-231; Fuzier-Hermann, Répertoire, *vo.* "Responsabilité Civile," no. 620; Larombière, "Obligations," 5ème édition, vol. 7, page 606.

Il est bon d'ajouter que dans le cas actuel certains travaux de démolition de la digue de l'appelant ont été faits sous la surveillance et les ordres formels des défendeurs.

L'appel doit être maintenue avec dépens et le jugement de la cour supérieure rétabli.

Appeal allowed with costs.

Solicitors for the appellant: *Lapointe & Stein.*
Solicitors for the respondents: *Taschereau, Roy, Cannon, Parent & Fitzpatrick.*

(1) 43 Can. S.C.R. 640.