CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

LE CLUB DE CHASSE ET DE PECHE STE. ANNE (PLAINTIFFS) } APPELLANT;

AND

THE RIVIERE-OUELLE PULP AND LUMBER COMPANY (DEFENDANTS) ..... } RESPONDENT.

1910
*Nov. 8, 9.
1911
*Feb. 21.

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

Construction of statute—Fishery and game leases—Personal servitude—Possession—Use and occupation—Right of action—Action en complainte—Renewed leases—Priority—Watercourses—Works to facilitate lumbering operations—Driving logs—Storage dams—Penning back waters out of track of transmission—Damages—Rights of lessees—Injury to preserves—Injunction—Demolition of works.

The lumber company are holders of timber limits in the Townships of Ixworth, Chapais and Lafontaine, in the counties of L'Islet and Kamouraska, and, assuming to act under the authority of certain statutes of the Province of Quebec, (now consolidated in

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington, Duff, and Anglin JJ.

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articles 7295 to 7300, R.S.Q. (1909)) erected dams at the outlet of the Lakes Ste. Anne into the River Ouelle to form a reservoir, by penning back the waters of these lakes, for the purpose of augmenting the natural flow of the River Ouelle during seasons when its waters had abated to facilitate the transmission of timber cut on their limits below that point and delivering it at their saw-mill further down stream. They were owners of the lands on both sides of the stream at the place where the dams were erected. The fish and game club were lessees of fishery and hunting privileges under a lease issued in virtue of the "Quebec Fisheries Act," and the "Quebec Game Laws" which had been in force for a number of years prior to the erection of the dams but which was surrendered subsequent to their construction and a new lease granted to the club in its stead by the Crown. The leases cover the territory included in the above mentioned townships and the timber limits therein held by the lumber company. The action was brought by the club to recover damages for injuries occasioned to their rights as lessees of the fishery and hunting rights in consequence of the manner in which the dams were used and lumbering operations carried on in the river by the lumber company.

Held (Fitzpatrick C.J. dissenting).—That the plaintiffs have a status to maintain an action for injuries to their rights as fishing and hunting licensees and that the judgment at the trial (Q.R. 36 S.C. 486) for such damages should be restored.

Per Fitzpatrick C.J. and Girouard and Anglin JJ.—The respondents had the right to construct and maintain the dam in question and to use it to facilitate the flotation of logs etc. in the lower reaches of the River Ouelle.

Per Idington J. (Davies J. *dubitante*).—This right exists only in respect of the streams or portions of them down which logs, etc., are actually driven by the timber licensees and does not extend to storage dams upon upper reaches and tributary waters not themselves used for the flotation of timber.

Per Duff J.—The powers conferred by the statute must be exercised reasonably. In this case, the impounding of the stream's sources, miles beyond any part of it on which any timber could be expected to pass, is not within the contemplation of the statute and would not be a reasonable exercise of the powers intended to be conferred.

Per Fitzpatrick C.J. and Girouard and Duff JJ. (agreeing with the court below (Q.R. 19 K.B. 178)).—The right to aid the user of floatable streams by artificial means authorized by article 7299 of the Revised Statutes of Quebec (1909) may be exercised at all seasons of the year.

Per Davies, Idington and Anglin JJ.—Articles 7298 and 7299 of the Revised Statutes of Quebec (1909) must be read together and,

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while the right to use floatable streams in their natural state for the flotation of timber exists at all times and in all seasons, the right to aid such user by the artificial means authorized by article 7299 may be exercised only during the periods mentioned in article 7298, viz., during the Spring, Summer and Autumn freshets.

Per Curiam, Fitzpatrick C.J. *contra*.—This right, whatever its extent or duration, is exercisable only subject to the condition that the person enjoying it shall make compensation to others holding rights such as the appellants enjoy; and, having regard to the circumstances of this case and the legislation governing it, the question of priority in the acquisition of the respective rights of the parties is of no consequence.

Leave to appeal to the Privy Council was refused, 15th May, 1911.

APPEAL from the judgment of the Court of King's Bench(1), reversing the judgment of the Superior Court, District of Kamouraska(2), and dismissing the appellants' action with costs.

The circumstances of the case are stated in the judgments now reported.

The *dispositif* of the judgment of Cimon J., in the trial court were as follows:—

"Arbitrant à quatre cent piastres les dommages que la défenderesse a causés au demandeur dans les deux années précédant l'action,

"Ordonne à la défenderesse de ne plus user de la dite écluse de manière à inonder les terrains concédés au club demandeur pour les fins de pêche et de chasse, et en ce qui concerne la dite écluse, 'd'agir en tous points de manière à donner aux eaux des dits lacs dans la dite décharge leur cours naturel' et ce tant et aussi longtemps que les baux de pêche et de chasse du demandeur seront en vigueur; et

"Condamne la défenderesse à payer au demandeur,

(1) Q.R. 19 K.B. 178.

(2) Q.R. 36 S.C. 486.

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pour dommages causés au cours des deux années qui ont précédé l'action, la somme de quatre cent piastres, avec intérêt du 11 mai, mil neuf cent huit, et les dépens de l'action."

The *considérants* of the formal judgment of the Court of King's Bench are as follows:—

"Considering that the appellant had, at all times herein referred to, a right to maintain and use as it did the dam in question in this cause and that respondent, by and in virtue of its fishing and hunting leases, acquired the right of fishing and of hunting only as they existed in the year 1905 and subject to the prior right of the appellant to maintain and use said dam as it did for and in connection with lumbering operations.

"Considering that respondent suffered no damage by the action of appellant and that it has no right to recover from it or to have appellant condemned to cease using said dam as it has done.

"Considering that there is error in the judgment appealed from.

"This court doth maintain the present appeal and reverse the judgment appealed from, * * * and, proceeding to render the judgment the said Superior Court ought to have rendered, doth maintain appellant's pleas and dismiss respondent's action with costs against respondent in favour of appellant in this court and in the Superior Court.

"Mr. Justice Carroll concurs in reversing so much of the judgment *a quo* as condemns appellant to cease using its dam as it has done, but dissents from so much of the judgment now rendered as reverses that part of the judgment *a quo* which condemns appellant in damages."

L. P. Pelletier K.C. for the appellants.

G. G. Stuart K.C. and *C. E. Dorion K.C.* for the respondents.

THE CHIEF JUSTICE (dissenting).—This is a possessory action to which has been joined a claim for damages; and were it not that, on other grounds, I have come to the conclusion that the action should be dismissed, I would have felt obliged to very seriously consider the question of the plaintiffs' right to ask, in this proceeding, for any order with respect to the construction or operation of the dam. It is undoubted law that a mere lessee cannot bring a possessory action "en complainte" although he may sue for damages.

Le preneur n'ayant qu'un droit personnel et mobilier n'a pas l'action possessoire. Guillouard, Louage, vol. 1, no. 29.

See also Pigeau, vol. 2, p. 9; S.V. 41, 1, 852 and S.V. 93, 1,237. Guillouard, ibidem, no. 174.

The right to hunt is generally considered in English law to be a grant of an interest in land. *Webber* v. *Lee* (1). In French law there is a distinction to be made which is well expressed in Fuzier Herman, Rép., *vo.* "Chasse," no. 111:—

La cession à titre onéreux du droit de chasse ne doit pas être confondue avec la location de ce même droit. La cession est consentie moyennant l'acquittement d'un prix une fois payé, tandis que la location suppose, en général, le paiement de fermages périodiques. Le cessionnaire a un droit réel, qui lui permet d'intenter directement toutes actions contre les tiers pour faire reconnaître et respecter son droit. Le locataire, au contraire, n'est qu'un créancier de jouissance; en cas de trouble occasionné par un acte juridique, il ne peut que mettre son bailleur en cause. Si le propriétaire du fonds grevé de la servitude personnelle de chasse vient y chasser indûment, il peut être poursuivi correctionnellement par le cessionnaire; le locataire, en pareil cas, à notre avis du

(1) 9 Q.B.D. 315.

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moins, n'a contre le bailleur qu'une action civile en dommages—intérêts.

See also Bélime no. 267; Garnier, "Actions Possessaires," pp. 168, 169.

I am disposed to think that the possession given by the leases relied on here must be construed to mean use and occupation and not civil possession as defined by article 2922 of the Civil Code, and that they do not confer on the licensee any higher right than the tenant would have at common law. Aubry & Rau, vol. 2, par. 177, p. 106, defines possession:—

> L'état de fait qui donne à une personne la possibilité physique, actuelle et exclusive d'exercer sur une chose des actes matériels d'usage, de puissance et de transformation.

Because of the form in which the claim is made, and of the nature of the evidence adduced to support it, another question would require to be considered arising out of the distinction between the rights of the owner and those of the lessee which I find stated in these words in a note to Dalloz; 1905, 2, 10: Il ne faut pas

> confondre la possession du droit de chasse au cours des manœuvres, avec le droit de chasse lui-même, celui-ci, considéré dans son ensemble, constitue un élément souvent fort important du droit de propriété. On peut bien faire ressortir la confusion ainsi commise en opposant la privation de jouissance, qui est une servitude grevant le droit de propriété, à l'atteinte résultant du dépeuplement total ou partiel, lequel abolit en totalité ou en partie le droit de propriété lui-même.

In this case the claim is chiefly, if not entirely, for damages caused not to the fishing and hunting but to the fishery and to the hunting preserve; such damages constitute a permanent injury to the property which might well give the owner a claim, but not the lessee. If the dam is maintained and operated as at present the fish will, according to the allegations of the de-

claration, be destroyed and the other game driven from the preserve. How much of the damages allowed is to be apportioned to the permanent injury done the property and how much to the interference with the appellants' rights of enjoyment? If the respondents pay the present claim, can they set that payment up in answer to a claim from the owner for permanent damages to the property? I feel it to be my duty to mention these difficulties which must strike everyone at all familiar with the principles applicable to possessory actions as fundamental; and, although in the conclusion I have reached, it is not necessary for me to do more than to draw attention to them, they must be disposed of and decided by those who are in favour of allowing this appeal. The effect of article 1065 C.P.C. was not raised here or below.

The facts are very fully stated by my brother Anglin. The respondents are owners of timber limits, covering about 300 miles, of which they and their *auteurs* have been in possession for a great number of years under government licenses renewable annually. Those licenses convey for the period of their duration the ownership of all the timber within the area granted. Sections 1599-1600, R.S.Q.; *Watson* v. *Perkins*(1) *per* Sanborn J. at page 270; *Dupuy* v. *Ducondu*(2) *per* Fournier J. at page 463. For the purpose of manufacturing into timber the logs cut on their limits the respondents have built a saw-mill on the River Ouelle at the place called St. Pacôme. The logs are floated from the limits where they are cut to the mill, a distance of about 20 miles, on the waters of the River Ouelle and its numerous branches and tri-

(1) 18 L.C. Jur. 261. (2) 6 Can. S.C.R. 425.

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butaries. For the purpose of facilitating the conveyance of their logs from the limits where they are cut to the mill, where they are sawn, the respondents erected a dam on a stream that serves to discharge the waters of two lakes into one of the branches of the River Ouelle. The two lakes are connected together by a small stream called by the witnesses "La Passe" and are within the area covered by the timber licenses. The dam, built entirely on the respondents' own property, raises the level of the water in the lakes and floods their shores to the injury of the fishing and hunting privileges held by the appellants over a large area which includes these two lakes; hence this action.

Both parties practically agree that the dam was built by the respondents, and is used by them, to facilitate the floating of their logs down the river, from the limits to the mills at all seasons, but more particularly when the freshets of the Spring, Summer and Autumn having ceased to affect the flow of the water the river in its natural state cannot float logs. Two questions, therefore, fall to be decided on the merits of this appeal. The first is: Have the respondents the right to erect and maintain the dam complained of, subject to the obligation to pay damages, if any are occasioned? And, if to this question an affirmative answer is given, the next question to be considered is: Can the dam be utilized during all seasons? Girouard J. and I agree, for the reasons given by Mr. Justice Anglin, with the unanimous judgment of the provincial court of appeal that the respondents have the right to erect and maintain the dam to facilitate the floating of their logs; but there is a difference of opinion between us as to the periods of the year during which the dam may be used for that purpose. My brother Anglin holds that the use of the dam must be limi-

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ted to the periods of the Spring, Summer and Autumn freshets. My brother Girouard, with whom I agree, holds that the respondents may utilize the waters of the dam to aid the flotation of their logs at all times, as occasion to do so arises. I would add just one word with respect to the right to erect this dam for the purpose of storing water to aid in floating logs when the rivers are low. We are called upon to construe a statute passed for the purpose of aiding a most important industry by a legislature which presumably is familiar with the local conditions to which the provisions of that statute are made applicable. The words used, giving to them their ordinary and natural meaning, authorize the erection and maintenance of dams anywhere for the purpose of facilitating the floating of timber down all rivers, etc., the condition being payment of damages. Should we with at best a very limited knowledge of the conditions which the legislation was intended to remedy assume to say that, because of some inconveniences that may result if we give to the language used its plain and obvious meaning, the legislature did not mean what it said ?

The dam was built in the Autumn of 1903 on a lot of land acquired by the respondents in fee simple from the Crown and was first put into operation during the lumbering season of 1904. At that time the appellants held fishing and hunting leases over a small portion of the territory covered by the timber licenses; but, in March, 1905, those leases were cancelled and new leases issued which are produced as appellants' documents of title. Let me observe here that the leases of March, 1905, *are not renewals but new leases issued in lieu of the old leases which were cancelled;* and the ground of action is an alleged interference with the rights granted by these new leases within the

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two years preceding the date of the action, (1908). The rights of the lessees as to fishing and hunting are defined in sections 2256 and 2350 of the Revised Statutes of Quebec (1909) in substantially the same words in so far as they affect the issues here, and I will quote only one section :—

2256. The lease shall confer upon the lessee, for the time therein specified, the right to take and retain exclusive possession of the lands therein described, subject to the regulations, fees and restrictions which may be established, and shall give him the exclusive right to fish in the waters fronting on such lands subject to the provincial and federal laws, fees and regulations then in force, and also to prosecute in his own name any illegal possessor or offender against this section and to recover damages, if any, *but not against any person who may pass over such lands or the adjacent waters, or who engage in any occupation* not inconsistent with this section, nor against the holder of a license *to cut timber, who has, at all times, in accordance with his license, the right to cut and remove trees, lumber* and saw-logs, and other timber, within the limits of his license, and during the term thereof, to make use of any floatable river or watercourse, or of any lake, pond or other body of water and the banks thereof for the conveyance of all kinds of lumber and for the passage of all boats, ferries and canoes required therefor, subject to the charge of repairing all damages resulting from the exercise of such right.

No such lease can be issued by the Minister for more than nine years (R.S.Q. art. 2249) and the rent is payable annually in advance as a condition of renewal (art. 2255). The right to cut and remove all timber from the territory covered by their license, which includes the area covered by the hunting and fishing leases, is especially reserved to the respondents together with the right to utilize for that purpose all floatable rivers, water-courses, lakes, ponds or other bodies of water, whether they are within or without the area covered by these leases. So that if, to drive timber cut on their limits within or without the territory covered by the appellants' fishing and hunting leases, it is necessary to utilize waters situate within that territory, the respondents have authority to do it

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and the appellants cannot complain. The difficulty in this case, it is said, arises out of the fact that the timber was cut on the river below the place at which the dam is built, and it is argued that the statute does not contemplate the contingency of a dam being required above to gather water to facilitate the driving of logs cut on the river below the dam. With all deference, it appears to me obvious that the object of the statute is to increase the floatability of rivers and streams by artificial means for the driving of lumber. The statute does not limit the places at which the works designed to effect that purpose may be built provided they aid in the result which the legislature had in view; and there is no more effective way to reach that result than by creating a reservoir at the source to increase the flow of water in the river during the dry seasons. I will not press this point further, as I am of opinion, for the reasons given by Mr. Justice Anglin, that the right to build the dam must be maintained.

I now come to the point of difference between my brother Anglin and myself which I have already explained. Because of the enormous importance of the issue involved to the respondents who, by the use of the dam, have been able to increase their output of logs from about eighty thousand per annum to over three hundred thousand and generally to the lumber industry, which is by far the most important in the Province of Quebec and which will be seriously affected by this judgment, I will endeavour to explain my view of the rights enjoyed by timber-limit holders in Quebec. It is and always has been (since the ordinance of 1669, "Ordonnance des eaux et forêts") the law in the Province of Quebec that the public have a legal servitude for floating down logs or rafts at all seasons of the

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year on all rivers, streams and water-courses of the province. See "Ordonnance des eaux et forêts, 1669"; *Oliva* v. *Boissonnault*(1); *McBean* v. *Carlisle*(2); *Tanguay* v. *Price*(3). The right to use the water-courses of the province for the conveyance of all kinds of lumber was extended to their banks by 20 Vict. ch. 40, sec, 2 (C.S.L.C. ch. 26, sec. 2, sub-sec. 2). This right is re-affirmed in article 891 of the Municipal Code and will be found in the Revised Statutes of Quebec (1886) section 5551, and in the new Revised Statutes of Quebec (1909) section 7349; and any interference with this somewhat exorbitant right renders the person interfering liable in damages, *Atkinson* v. *Couture*(4). Incidentally I may here observe that, the right to use the waters of all rivers, streams, and water-courses and their banks at all seasons being indisputably the law, the necessity for adding to the Revised Statutes (1886) section 2972 (*d*), which is also re-enacted as section 7298 of the new revision (1909) is not very apparent, purporting, as it does, to convey the more limited right to use the waters but not the banks for the purpose of driving logs during the Spring, Summer and Autumn freshets. However, it is not argued that the general right has been in any way limited by this amendment, and I must now consider the legislation passed to authorize the making of improvements to facilitate the floating of logs on those water-courses which are subject to this legal servitude in favour of the public.

It is common knowledge that as the forests in Quebec became depleted it was necessary for the lumbermen to go further up the rivers towards their sources

(1) Stu. K.B. 524.
(2) 19 L.C. Jur. 276.
(3) 37 Can. S.C.R. 657, at p. 665.
(4) Q.R. 2 S.C. 46.

to procure a supply of logs for their mills, and, as a result, they had a longer distance to drive their timber and less water. To this difficulty was added the shortening of the period of high water through deforestation, as the water where the lumber is cut down runs off more freely. Then it became necessary to provide artificial means to improve the rivers and streams for lumbering purposes, and 16 Vict. ch. 191 was passed to authorize the incorporation of companies to facilitate the floating of timber down rivers and streams. The provisions of this statute were re-enacted in the Consolidated Statutes of Canada, ch. 68, and in the Revised Statutes of Quebec (1888), section 4921, new revision (1909), section 6266:—

6266. Any number of persons, not less than five, may form themselves into a company under the provisions of this section, for the purpose of acquiring or constructing and maintaining any dam, slide, pier, boom, or other work necessary to facilitate the transmission of timber or pulp-wood down any river or stream in this province, and for the purpose of blasting rocks, or dredging or removing shoals or other impediments, or otherwise of improving the navigation of such streams for the said purpose.

No such company shall construct any such work over or upon, or otherwise interfere with or injure any private property or the property of the Crown, without first having obtained the consent of the owner, or occupant thereof, or of the Crown, except as hereinafter provided.

By 54 Vict. ch. 25, a new section was added to the old Revised Statutes as 2972 (*e*), now in the new revision 7299, which I quote:—

It is and always has been lawful to erect and maintain dams, slides, aprons, booms, gate-locks or other necessary works to facilitate the floating or transmission of timber, rafts or craft down such (*i.e., all; v.* art. 7298 R.S.Q. 1909), rivers, streams, lakes, ponds or creeks, to blast rocks, dredge or remove sand-banks, remove trees, shrubs or other obstacles without, however, doing any damages to such rivers, lakes, ponds, streams or creeks.

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If it is absolutely necessary for the construction of such improvements to take and occupy any private property, expropriation proceedings shall be taken for the land strictly required for such purpose, by observing, for the valuation of the land and the damages resulting from the works, the provisions respecting expropriations for railways.

No work to which this sub-section applies shall be done in rivers to which salmon resort, unless previously authorised by the Lieutenant-Governor in Council, who shall determine how the work is to be done and the conditions to which it shall be subject.

In effect this section extends the powers theretofore vested in joint-stock companies with respect to improvements on all rivers, streams and water-courses in the province to individuals, and it is with respect to the construction of this new section 7299 that a difference of opinion exists between Anglin J. and myself. While we both agree that the right to erect and maintain dams to facilitate the floating of timber is absolute, my brother Anglin would restrict the use of these dams and the enjoyment of the benefits they confer to the period of freshets in Spring, Summer and Autumn. I contend, on the contrary, that the section is general in its terms and purports to be declaratory of the law. The terms used are:—

It is and has always been lawful to erect and maintain dams, etc.

For what purpose? "To facilitate the floating or transmission of timber" down all rivers, streams, etc.; there is no limitation as to the seasons during which they are to be operated, or with respect to the places at which they are to be built. It is lawful to erect dams anywhere provided the effect be to facilitate the floating or transmission of timber down the rivers and streams of the province. I do not find in the words used any intention to limit the places at which dams may be built or to exclude the right to build a dam at the source of the river or on one of the tributaries as was done in this case. The scope and object of the Act is to authorize improvements to facilitate the

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floating or transmission of timber down rivers or streams and there is no limitation either expressed or implied with respect to the periods of time during which these improvements are to be utilized. If the right to erect and maintain is absolute, I do not find in the statute any limitation of the resulting right to use. Construed literally and giving to the words of the statute their natural meaning there is no limitation of the exercise of the right conferred to any particular season. The right to float timber at all seasons and for that purpose to use the banks of all streams was part of the law of the province when this statute was passed declaring in express terms that it has always been permissible to facilitate the exercise of that right by making such improvements as are now in question. If the right to use the rivers to drive logs exists at all seasons, which is undoubted, and the statute gives the right to make improvements to facilitate that use, how can it be said that, although the right to use the river may be exercised at all times, the right to use the improvements is to be limited to those periods — the season of freshets — when these artificial aids are unnecessary ? If the section we are now considering (7299) is to be read with the preceding one (7298), which latter purports to create a new right, how can it be said that it was the intention of the legislature to declare that it has always been legal to do something in aid of the exercise of a right created then for the first time? It is clearly not necessary to have recourse to artificial means to create a flow of water at those seasons of the year when nature makes ample provision for that purpose. To store water to aid the drive during the Spring, Summer or Autumn freshets would appear to be a very useless proceeding. But what more ef-

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fective means could be devised to aid the lumberman in his operations than to give him the right to store water during those seasons of abundance to be used in water famine times ? If there is any doubt as to the proper construction to be put upon this section, I would refer to article 12 C.C. and article 13 R.S.Q. What was the intention of the legislature? What was the object for which the Act was passed?—To authorize the making of improvements to facilitate the floating of logs not during the freshets, but in the lean period when the water had subsided. I can entertain no doubt as to this. The effect of this new section (7299) is to declare that a private individual may, for the purpose of his industry, do that which may be done by a company for the same purpose. A joint-stock company may use their dams and other improvements at all seasons of the year and there is no reason either in justice or on a fair construction of the statute to say that an individual may not in the like circumstances do the same.

Coming now to the damages. The right to make improvements is impliedly made subject to the condition that damages are to be paid; but these damages must be limited in this case to the injury done the appellants in the enjoyment of their rights to fish and hunt. "L'intérêt est la base et la mesure des actions." When they entered into possession in March, 1905, the dam existed and had been in operation for a year to the appellants' knowledge. There was no change in the local conditions and there is no evidence that the damages increased after 1905. I adopt this *considérant* of the court of appeal:—

Considering that the appellant had at all times herein referred to, a right to maintain and use as it did the dam in question in this cause and that respondent, by and in virtue of its fishing and hunting leases, acquired the right of fishing and hunt-

ing only as they existed in the year 1905, and subject to the prior right of the appellant to maintain and use said dam as it did for and in connection with lumbering operations.

See also *Chaudière Machine Co.* v. *Canada Atlantic Ry. Co.*(1).

I would dismiss this appeal with costs.

GIROUARD J.—I would allow this appeal in part. I agree with Carroll J. that only that part of the conclusion of the action claiming damages can be maintained and that no order can be issued by the court respecting the use of the dam. The construction and use of that dam is authorized by statute, subject to the payment of such damages as may be caused. I would, therefore, allow the appeal from that part of the judgment which refuses those damages. Furthermore, I would reserve to the appellants any right they may have to claim damages which have accrued since the institution of the action, the whole with costs against the respondents in all the courts.

Girouard, J.

DAVIES J.—The controversy in this case turns upon the right claimed by the respondents to build a dam across a small river or stream flowing from the Lakes Ste. Anne and by means of it to dam back and raise in height the waters of these lakes and overflow the lands surrounding them. The object in so damming back these waters was to create a huge reservoir to be utilized by the respondents during the dry seasons of the year to facilitate the floating of their timber down the Grande Rivière to their mills from the junction of the river flowing from the lakes with the Grande Rivière.

(1) 33 Can. S.C.R. 11.

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The stream or overflow from the lakes did not join the Grande Rivière until it had flowed from the lakes 7 to 10 miles. No timber or lumber was floated from the lakes down the overflow stream. The object was not to facilitate transmission of logs or timber on the lakes or from the lakes down the overflow stream to the Grande Rivière, but to facilitate during the dry season of each year the transmission of logs from the junction of this lake overflow stream with the Grande Rivière down that river to the defendants', respondents' mills.

The plaintiffs had Crown leases giving them the exclusive right of fishing in these lakes, and the exclusive right of hunting in certain territory surrounding the lakes.

The defendants held certain timber limits under which they had a right to cut timber on a large part of this hunting area of plaintiffs.

No question appears to me to arise out of the priority of either of the fishing, hunting or timber leases.

The manner in which the defendants used the dam constructed by them caused damage to the plaintiffs as such fishing and hunting lessees, which were assessed by the trial judge at $400, and, so far as the amount of the damage is concerned, I see no reason to quarrel with it. The rights conferred on the plaintiffs as fishing and hunting lessees by the statutory provisions now consolidated in articles 2256 and 2350 R.S.Q. were seriously injured and partially destroyed by the manner in which the defendants used the dam complained of. I think it appeared clearly that the dam had been constructed upon lands of the respondents of which they had a grant from the Crown and so the only question remaining open was the right of

the defendants by means of this dam to raise the waters of the lakes as and when they did, even to the injury of the plaintiffs as hunting and fishing lessees as above stated, and without compensating them for such damage. The defendants attempted to justify the raising of these waters by means of this dam even to the injury of the plaintiffs under several statutory provisions of the Province of Quebec.

In my judgment, however, the only statutory provisions which could with any shew of reason be invoked to justify the claim of right of the defendants to do the plaintiffs the injuries they did, were the provisions now embodied in the R.S.Q. (1909), articles 7298 and 7299.

The questions which at once arise as to the permissive powers declared and allowed by these sections are:—Have they any and what limitations as to the places where and times and seasons during which they can be exercised? And do the rights to construct and maintain dams, etc., conceded to any person, firm, or company by the article, 7299, R.S.Q., carry with them the obligation to compensate riparian or other owners of property who may be damaged in their property rights by the exercise of the permissive privileges conferred?

It was strenuously contended at bar by Mr. Pelletier that this statutory right of constructing and maintaining dams, etc., to facilitate the floating or transmission of timber, etc., down the rivers and streams cannot receive such a broad construction as would justify the erection and maintenance of the dam in question on the stream or overflow from Lakes Ste. Anne, and the formation of a huge reservoir there, because no timber or logs were transmitted or floated

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down these lakes or on this stream or river flowing from these lakes, and that the avowed and admitted object of the construction of the dam and the use to which it was put were to create and make a reservoir of water which might be used during the dry seasons of each year and between the freshets to float and transmit timber and logs not on the river or stream whereon the dam was built, but on the Grande Rivière below the junction of the overflow stream from the lakes with such river, on which latter river alone the defendants floated down their logs or timber.

I confess there is very much in this argument which appeals to me as putting a fair and reasonable construction and limitation upon the article 7299, but, in the view I take of both these articles now under consideration, I do not find it necessary to decide the point.

In my opinion the two articles must be read together and, comparing them with several other articles of the statutes of Quebec relating to the same subject matter of the transmission of timber and logs down rivers and streams, such as articles 6266-6275, it seems to me that these articles are merely intended to affirm and declare such rights of transmission and to declare the times and seasons when, as well as the manner and extent to which, they might be exercised.

The articles so far as they relate to the points under discussion read 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.

7299. It is and always has been lawful to erect and maintain dams, slides, aprons, booms, gate-locks or other necessary works to facilitate the floating or transmission of timber, rafts, or craft down such rivers, streams, lakes, ponds or creeks, to blast rocks,

dredge or remove sand-banks, remove trees, shrubs or other obstacles without, however, doing any damage to such rivers, lakes, ponds, streams or creeks.

Now it will be observed that the article 7298 starts out with the statement "subject to the provisions of this sub-section any person," etc. So that it is clear the legislature intended all the articles comprised in the sub-section to be read and construed together, and that the general rights declared by articles 7298 should only be exercised subject to the provisions of the entire sub-section which included article 7299. Then the declared rights were expressly limited as to the times of their exercise to the periods of the freshets, "during the Spring, Summer and Autumn freshets"; and then article 7299 declared it to be and to always have been lawful to erect and maintain dams, etc., to facilitate the doing on *such* streams, etc. (that is on the streams mentioned in article 7298) of the very thing article 7298 had declared might be done. What was that?—It was that *during the Spring, Summer and Autumn freshets* it was lawful to float and transmit timber, etc., down the rivers and streams. One article asserted and declared the rights, the other article authorized the doing of certain things necessary for their proper exercise. As the article, 7298, conferring the rights limited their exercise to a special period of the year, namely, during the freshets, article 7299 regulating these rights and authorizing the doing of certain things to facilitate their exercise, might be read subject to the same controlling limitation.

But even if I was wrong in this construction of these articles; even if it could be held that article 7299 R.S.Q. should be construed without any limitation as to seasons, and that under it dams could be erected, main-

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tained and used in the seasons between the freshets, I should entertain no doubt that the party exercising the permissive powers conceded by the section would be liable for all damages caused by the maintenance of the dams, etc., to either the riparian proprietors above or below him, or to other proprietors abutting upon the lakes or streams whose property or rights were injured or destroyed by the manner in which the dams were maintained and used.

The permissive powers declared by article 7299 to exist in regard to the erection and maintenance of dams, etc., to facilitate the floating of timber down rivers and streams were not intended in my judgment to authorize the user of such dams in a way to injure riparian or other proprietors above or below the dams. The very great care taken by the legislature in articles 6266-6275 to guard and protect alike public and private interests from damage in the case of companies formed under those sections for the identical purposes expressed in article 7299 of facilitating the transmission of timber, etc., down rivers and streams, convinces me that the latter article could not be and was not intended to give permission to all persons and companies not formed under articles 6266-6275 to do with respect to riparian and other proprietors what is expressly forbidden and guarded against in these articles with respect to all companies formed under them.

In the absence of express language to the contrary, articles 7299 cannot be construed as conferring a legal right to damage, by overflow, or otherwise injure, the rights of the riparian proprietors on these rivers.

The principle laid down by the Judicial Committee in their judgment in *Canadian Pacific Ry. Co.* v. *Parke*

(1), at page 544, is the one which I think must apply and govern in the construction of this article 7299 R.S.Q. Their Lordships say:—

> Whenever, according to the sound construction of a statute, the legislature has authorised a proprietor to make a particular use of his land, and the authority given is, in the strict sense of the law, permissive merely, and not imperative, the legislature must be held to have intended that *the use sanctioned is not to be in prejudice of the common law right of others.*

In the case before us the use permitted is not confined to the proprietors' own land, but is the right to dam back the water of the rivers or streams of the province to facilitate the floating of timber down them, and the rights injured are statutory rights and not strictly common law rights. But the controlling distinction enunciated as it seems to me by the Judicial Committee is that which exists between a permissive act done under and by virtue of a statute, and an imperative one. In the former case it will not, in the absence of clear language to the contrary, be construed to sanction a use to the prejudice of the common law rights, and *a fortiori* statutory rights of others; in the latter it may be.

For these reasons I am of the opinion that the appeal should be allowed as to the damages awarded by the trial judge, and his judgment as to such damages restored with costs in all courts.

IDINGTON J.—Notwithstanding the wealth of legal lore bestowed on the argument of this case, I respectfully submit that the greater part of it is entirely irrelevant to the proper determination of the issues involved.

I agree that in giving effect to any legislation in-

(1) [1899] A.C. 535.

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vading the common law of any country we must have due regard to that law and restrict legislation of an invasive character to the clear and distinct expression thereof before allowing it to change the common law.

Here we have hardly any need for the application of so elementary a principle of law.

We have presented to us as the basis of all else to be considered a piece of Crown domain freed from the embarrassments of there being inherent therein relative to its tenure anything but what the legislature may have seen fit to stamp thereon in its administration thereof, or the lines it may have laid down by statute for such administration.

We have statutes enabling the Crown through its ministers to dispose thereof or of defined interests therein.

Pursuant to the powers thus conferred by legislation we have rights given each of these respective litigants. We must find these rights if we can, neither inconsistent nor incompatible. If we should unfortunately find them so then the priority of grant might become an important factor. But inasmuch as I think that the learned trial judge has rightly found them possible of conciliation, I am not at all troubled with such difficulties as might in the converse case have arisen.

The respondents became licensees of the Crown giving them the right to cut timber over certain limits. The appellants became exclusive licensees of the Crown to hunt or fish within certain defined limits.

Only at two points of small extent do these limits overlap each other.

Although each is called an exclusive right, and each party is spoken of as having an exclusive pos-

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session, I think this latter word must be given, of its many possible uses or meanings, no more force than simply as to each party that exclusive right to possess to the extent necessarily implied by the legal limits of the rights to be respectively exercised within the terms of their respective grants.

I am not, when I find the exercise by each of its own rights quite compatible with the fullest exercise by the other of its rights, concerned with the fact that there is an overlapping in the territorial sense of their common ground for operating upon.

The respondents, so far as their operations in the way of cutting timber up to the present time are concerned, have not cut off or upon any of the territory over which the appellants' rights extend and thus the matter is further simplified.

The appellants' claim extends over two lakes of which the larger empties into the smaller, and from this smaller one there is a river, called Décharge, forming its outlet and running some seven or eight miles before it empties into the long River Ouelle.

It is said the Décharge carries in fact, though short, the larger quantity of water.

The respondents in carrying on their business as lumbermen have mills some miles below the confluence of these streams.

Their lumbering operations as to cutting logs and floating them to the market or their saw-mills have been confined solely to the River Ouelle.

They have never attempted and do not now claim it is part of their purpose to attempt to float logs over or through the lakes in question or the River Décharge.

What they do claim is that being owners of a lot

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granted to them by the Crown, and through which the Décharge runs, they can erect thereon at the point where it passes through said lot, a dam by means of which they can dam back the water in the lakes and river so as to form therein and upon the lands bordering same a large reservoir for storing water by means of which, and the flood-gates for the purpose, they can from time to time let off the water so stored and assist the floating of logs in the River Ouelle.

They erected such a dam and have had it in operation for some years and the appellants claim they have thereby impaired the utility of the lakes as a fish-pond of which appellants have been by their licenses put in exclusive possession for fishing purposes, and destroyed the utility of the Crown road by which the lake was reached, by submerging it.

The learned trial judge found the respondents had no right to do this and other such things, and assessed the damages at $400, and enjoined them from continuing it. I will refer to the terms of this injunction later.

The questions raised thus must to my mind be resolved by the interpretation and construction of two or three statutes now brought together in the recent revision of the statutes of Quebec, and numbered articles 7295 to 7300 inclusive.

Article No. 7295 is as follows:—

> 7295. Every proprietor of land may improve any watercourse bordering upon, running along or passing across his property, and may turn the same to account by the construction of mills, manufactories, works and machinery of all kinds, and for this purpose may erect and construct in and about such watercourse, all the works necessary for its efficient working, such as flood-gates, flumes, embankments, dams, dykes and the like.

This was first enacted by 19 and 20 Vict. ch. 104,

sec. 1, of the Parliament of Old Canada but confined in its operation to Lower Canada, now Quebec.

I am unable to comprehend how a statute of which the purview seems so clearly related to the turning of power thus provided to the designated purposes can be made to directly subserve an entirely different purpose.

Where would such a method of construction end in extending the purposes thus expressed to something or everything merely incidental to and very remotely if at all, connected with the execution of the expressed purposes ?

If this contention for the extension of the operation of such a statute could be held tenable, I should expect next to hear of its use in enabling the creation of rice-fields, or farms of fur-bearing animals to supply men engaged in milling or manufacturing with such needful products.

This statute came under the notice of this court in the case of *Jones* v. *Fisher* (1), but such remote contingencies failed to be encouraged.

Somebody, however, would seem to have raised questions of its operating in a way to hinder the very industry it is now alleged to have some remote relation to.

In consequence thereof the legislature enacted what is now article 7297 R.S.Q., providing as therein appears and especially protecting joint stock companies in their business of floating timber.

It had so happened that a year or two before the first mentioned statute was passed, an Act was passed to facilitate the creation of such companies and regu-

(1) 17 Can. S.C.R. 515.

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late their operations. Are these the companies referred to in article 7297? If, as I so suspect, then the public utility of said statute does not appear to have had much to do with floating logs, or to have led anyone to suppose it related thereto.

As if determined to put an end to the obstruction, such as an unrestricted exercise of power, which the first statute enabled might create, the legislature enacted also that which appears now in articles 7298 and 7299, R.S.Q., of which the following are the chief parts concerning us:—

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.

7299. It is and always has been lawful to erect and maintain dams, slides, aprons, booms, gate-locks or other necessary works, to facilitate the floating or transmission of timber, rafts or craft down such rivers, streams, lakes, ponds, or creeks, to blast rocks, dredge or remove sand-banks, remove trees, shrubs or other obstacles without, however, doing any damage to such rivers, lakes, ponds, streams, or creeks.

If it is absolutely necessary for the construction of such improvements to take and occupy any private property, expropriation proceedings shall be taken for the land strictly required for such purpose, by observing, for the valuation of the land and the damages resulting from the works, the provisions respecting expropriations for railways.

Article 7300 provided for the compensation of such persons as made such erections by fixing tolls to be paid for their use.

In default of being permitted to rest upon the first statute the respondents seek to rest their rights to do what they have done upon article 7299.

It seems to me there are two or three complete answers to this latter claim. In the first place it does not seem to me that these two articles which must be read together, cover this case at all or ever were in-

tended to sanction such a proceeding as that of the respondents.

Any one conversant with the history of litigation in the Province of Quebec relative to the rights thus definitely established need not have far to seek to find good reason for this legislation.

But I have failed to find or hear of any such attempt ingenious and praiseworthy as it is (if only legal) to impose upon others by process of law any such unexpected burdens as this must of necessity involve.

If some such thing had been tried it would likely have been made to appear in the litigation in and jurisprudence of the province.

It seems as if the respondents feel they can only succeed by using the article 7299, and discarding the preceding article.

I think we may well look to their origin and past relation, as well as the present, though amended by Acts incorporated in the revision, and in such case anything to be done seems to have been contemplated as relating to the seasons of freshets, whereas this expedient in question here is to aid chiefly in the dry seasons.

Indeed its use mostly objected to is that in such seasons.

Passing all that and reading these articles in their plain ordinary meaning do they, or either involve any such thing as the storage of water in a branch or feeder over which no timber is ever supposed to have passed? I confess I cannot so read them or either of them. And with that must fall the respondents' whole contention.

In the next place if we try to find herein a provi-

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sion for the storage of water supplemental to the river on which the floating of timber is to be operated, how can we suppose such a purpose was ever intended to have been expressed by such inapt language.

It is expressly declared that the dams, etc., provided for must not do "any damage to such rivers, lakes, ponds, streams or creeks."

How can you more effectually destroy or damage the utility of a stream of which every riparian proprietor is to be supposed to be entitled to use, as it passes, the waters thereof, than by shutting up its waters until a vast reservoir has been filled? It might take days or weeks to fill, and during all this time those down the stream are not to have their use of water for use of mills or herds or other domestic purposes.

It may be said this instance does not involve any such consequences. But it is not this case alone or its peculiar facts we must consider. It is the possible and probable operation of the construction (implying this enactment provided for auxiliary storage dams) which is contended for and has to be borne in mind.

Now let us look at the provision for compensation to those damnified by any such operation as implied in that construction and see how badly it fits.

It is clearly not applicable to any such case as that of those deprived of their use of water but those whose land has to be taken to enable the construction of any of the contemplated works.

It is not to be imagined that the legislature ever intended, when so careful of so small consequences as the expropriation of a bit of land, to deprive anyone of that of which the deprivation would do infinitely more harm, as in the case of such riparian proprietors.

If again the principle of the railway legislation taken as the measure of right between the parties is to be applied, how can it be applied here where the thing is first taken possession of and used?

The railway expropriations are preceded by an arbitration or by an order of the court and deposit presumed to meet the damages or compensation to be fixed by arbitration.

A railway company failing to observe such conditions is treated as a trespasser just as the learned trial judge treated the respondents.

Again we are told the Government having power to fix the tolls has fixed them, and hence it must be taken to have revoked the appellants' license *pro tanto.*

In the first place the order does not name any works on the Décharge River, but on the Ouelle River.

If that is not conclusive, how can the provision for tolls have any relation to such a work as this?

A dam or slide on a river over which timber is floated is for common use and hence the provision for tolls in legislation of this character is a most justifiable expedient.

But how can that have any relation to the case of a storage dam on a branch of such a river? Let us suppose the branch and lands on both sides or either side thereof entirely, as it might well be, the property of those erecting such a storage dam. What right could anyone else have to use the storage dam thereon? Or what right has been given to any power to fix tolls in such a case? We might as well say the Government had power to fix tolls for the use of any patent device and machinery one company had for overcoming such obstacles, and thereby impose the

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duty upon an enterprising party to lend its apparatus and skill to someone else. The legislature has not yet gone so far.

So far from finding any consolation for respondents in the fixing of tolls, I find in the provision therefor in the Act one of the most destructive arguments against their whole contentions.

It is the common path, the common highway over which this method of transportation is a matter of supreme importance for an important industry that the entire legislation relates to and nothing else.

I think the learned trial judge was right in his conclusions and almost entirely so in his reasoning.

I have had only one doubt of practical importance relative thereto, and that is this: The judgment enjoins the interference with the current and it may be that this is too wide.

It may well be the respondents have the right to raise the water within the range of their own premises in a way that the appellant has no right to complain of.

But this is a minor matter and so far as I could gather from answers to questions put, is of no consequence.

But if it is, then the judgment ought to be varied in that regard if the respondent so desires.

I think that, however, merely an incident or accident and not what the parties are here for.

I think it is not common to give rights of action to Crown locatees and licensees, and that the right of action given by the statute to the appellants as licensees is of that character and by virtue thereof as well as other rights of action, the appellants are entitled to protect their rights and subject to such vari-

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ation of the judgment, and whether judgment so varied or not, the appeal should be allowed with costs here and in the court below, and the judgment of the trial judge be restored so far as consistent with said variation.

DUFF J.—The respondents, the lumber company, professing to act under the authority of article 7299 R.S.Q., have erected a dam in a stream through which the waters of two lakes (known as the Lakes of Ste. Anne) in the county of Kamouraska, are discharged into the Grande Rivière. The dam is situated at the debouchement of this stream from the more northerly of the two lakes. The purpose which it is made to serve is this:—The respondents have a saw-mill on the Grande Rivière twenty miles below its point of confluence with the discharge. The timber (cut upon the banks of the Grande Rivière and its tributaries) is brought to that river at places below this point. The waters of the two lakes impounded by the dam are, at times when those of the Grande Rivière (unless artificially augmented) would be insufficient for that purpose, discharged into the river for conveying this timber to the respondents' mill.

The appellants, the game club, have licenses to fish in the Ste. Anne Lakes, and hunting privileges in the surrounding territory. It is hardly open to dispute that these rights of the club have been prejudicially affected by the operations of the lumber company, and the question is whether, in respect of this prejudice, they are entitled to reparation.

By the law of Quebec, streams (although not navigable in the strict sense) so far as they may be capable of conveying small craft and rafts of timber, have

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always, under the denomination of "floatable" streams, been subject to public use for such purposes. Some question which appears to have arisen touching the exercise of this right during seasons of high water in respect of streams not ordinarily floatable, is set at rest by article 7298 R.S.Q., one of the provisions of enactment under which the lumber company justifies the operations out of which the action arises.

This enactment authorizes the construction of works improving the floatability of streams already floatable, or making floatable such streams as do not already fall within that category. The scheme of the Act—expressed very summarily—appears to be to authorize persons having occasion to use as a public highway a stream already *publici juris,* to remove obstructions and to construct artificial works for the purpose of improving it as a highway, and in the case of streams not *publici juris,* to convert them into public highways by works of a similar character. The form of the leading provision of the enactment—though not necessarily incompatible with another view—appears to suggest the design on the part of the legislature that improvements executed under the authority of the Act should be situated on the stream which they are intended to affect; and this suggestion receives confirmation from article 7301 R.S.Q.

It seems to be necessary that some such limitation as to the situation of such works should be implied. If the legislature had intended that any person having occasion to use a stream for the conveyance of timber should be entitled to impound the sources of the stream miles beyond that part of it over which any timber could be expected to pass, one would have looked for some provisions aimed at protecting the

interests of other persons having occasion to use the stream for similar purposes; and affording some means of adjusting the rights of such persons in respect of the use of such improvements.

This view receives illustration from an enactment (now articles 6266 to 6340 R.S.Q.), providing for the incorporation of companies authorized to construct and maintain works of the same character and for the same purposes as those mentioned in article 7299 R.S.Q. The legislature in framing that enactment has been careful to provide that such works are to be permitted only after approval by a Minister of the Crown, and for the regulation of the use of such works in a "safe and orderly" way (R.S.Q. articles 6276, 6323, 4 and 7). The provisions of the statute, even with these precautions, pointedly suggest that the legislature had in contemplation only works situated on that part of a stream over which timber might be expected actually to pass. The point is not free from difficulty, but on the whole, balancing the relevant considerations, it seems improbable that the legislature had in view, in enacting article 7299 R.S.Q., such works as that in question here; and that the use of such works for the purposes to which the respondents have put them is not a reasonable exercise of the powers conferred by the Act.

I do not pursue the argument into its details, because, since on this point the court is equally divided, the appeal actually falls to be determined upon the hypothesis that such plans as those of the respondents are within the authority given by the statute.

On that hypothesis, the appellants do not appear to me to be entitled to a restraining order. I am not able to read article 7398 R.S.Q. as restricting the scope of the subsequent articles. That article, in my view, as

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already indicated, is to be explained as intended to remove some doubt which the legislature thought it worth while to allay. I do not think I can affirm that the doubt was groundless; if I should have been able to do so, still I should have preferred to act on the assumption that the legislature had enacted a wholly superfluous provision, rather than limit the beneficial operation of the subsequent articles in a manner which appears to be opposed to every consideration of practical convenience; and which it would be very difficult indeed to reconcile with the purpose the legislature obviously had in view. See *Hough* v. *Windus*(1), at page 229, *per* Lord Selborne.

The question of compensation remains. The right to use public rivers for the purpose of conveying timber, has always been subject (in Quebec) to the condition that the person so using them shall make compensation for injuries thereby caused (Mun. Code, sec. 891; and R.S.Q., art. 2256). There is, I think, the strongest presumption that the legislature, in declaring the existence of the auxiliary right to execute improvements of the kind mentioned in article 7299 R.S.Q., did not intend to deprive persons prejudicially affected by the use of such improvements, of this right of compensation — without providing a substitute for it. The right to use the improvements has for its basis the right to use the stream. The duty to compensate must, I think, be assumed to be co-extensive with the right to use; and consequently to be attached to the exercise of the right as well in the improved as in the unimproved state of the water-way.

(1) 12 Q.B.D. 224.

ANGLIN J.—The facts of this case are fully stated in the judgments of the provincial courts.

Three questions present themselves for determination: the first, whether as holders of fishing and hunting leases from the Quebec Government the appellants have a status to maintain this action; the second, whether the acts of the respondents, which interfered with the natural levels of the waters of the two lakes Ste. Anne, and caused flooding of adjacent lands, thus injuriously affecting the appellants' rights of fishing and hunting, are or are not authorized by statute; and the third, whether, if such acts are so authorized, the respondents are or are not liable to make compensation for damages thereby occasioned.

The first question is, I think, concluded in favour of the appellants, at all events as to their right to maintain an action for damages, by the statute 62 Vict. (Que.) ch. 23, which re-enacts (as article 1383 R.S.Q.) with a slight alteration, article 1376(2) of the Revised Statutes of Quebec, 1888, declaratory of the effect of fishing leases, and the statute 1 Edw. VII. (Que.) ch. 12, sec. 6, similarly declaratory of the effect of hunting leases.

Article 1383 R.S.Q., as enacted by 62 Vict. ch. 23, reads as follows:—

1383. The lease confers upon the lessee, for the time therein determined, the right to take and retain exclusive possession of the lands therein described, subject to the regulations and restrictions which may be established, and gives him the exclusive right to fish in the waters fronting on such lands in conformity with the provincial and federal regulations, then in force, and also to prosecute in his own name any illegal possessor or offender against any provision of this Act, and to recover damages, if such exist, but not against any person who may pass over such lands or the adjacent waters, or who engages in any occupation not inconsistent with the provisions of this section, nor against the holder of a license to cut timber, who has, at all times, in accordance with his

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license, the right to cut and remove trees, lumber and saw-logs and other timber, within the limits of his license, and, during the term thereof, to make use of any floatable river or watercourse, or of any lake, pond or other body of water and the banks thereof for the conveyance of all kinds of lumber and for the passage of all boats, ferries and canoes required therefor, subject to the charge of repairing all damages resulting from the exercise of such right.

(See now R.S.Q., 1909, art. 2256.)

The language of 1 Edw. VII. ch. 12, sec. 6, is the same. (See now R.S.Q. 1909, art. 2350.) For convenience in discussing this legislation I shall refer to the numbers of the articles in the Revised Statutes of Quebec, 1909.

Though by no means free from ambiguity — indeed each at first blush appears to be self-contradictory — articles 2256 and 2350 R.S.Q., upon their proper construction, in my opinion, give to the holders of fishing and hunting leases the right to maintain an action against any holder of a license to cut timber who, in the exercise of his rights in making use of a floatable river, watercourse or lake, has done damage which he has failed to repair. The rights of timber licensees are "subject to such regulations and restrictions as may be established" (R.S.Q. 1888, art. 1311; now R.S.Q. 1909, art. 1599): *inter alia* they are subject to the obligation of the licensees to repair any damage occasioned by their exercise to fishing and hunting lessees of the Crown. If the right of damming asserted by the respondents is one of the rights of a holder of a license to cut timber referred to in articles 1156 and 2350 R.S.Q. (1909) — I think it is not — it is only exercisable subject to the charge of repairing all damages thereby occasioned. If it is not such a right, the defendants in interfering with the rights of the appellants, unless justified by other statutory authority, were "offenders" against the "sections" of which these

articles form parts, and as such are made liable to an action at the suit of these Crown lessees of fishing and hunting rights for damages sustained by them. To declare the rights of timber licensees to make use of rivers, lakes, etc., to be

> subject to the charge of repairing all damages resulting from the exercise of such rights

would indeed be futile, unless failure to make such reparation should give to the person injured a right to compel it by action. The only possible reparation for injury such as is complained of by the appellants is pecuniary compensation for their loss. I am, therefore, of the opinion that the acts of the defendants which caused damage to the plaintiffs for which reparation was not made — if such acts are authorized only by a statute which does not relieve from liability for consequential damages, or are unauthorized — gave to the appellants, as holders of fishing and hunting leases, a right of action for compensation.

It may be important to note at this point that the statutory provisions to which I have alluded were both enacted, or re-enacted, by the legislature subsequently to the enactment of those under which the respondents claim authority to do the acts of the effect of which the plaintiffs complain, viz.: R.S.Q. (1888) arts. 5535-6, and 54 Vict. ch. 25, sec. 1. Both sets of statutory provisions are now found consolidated in the Revised Statutes of Quebec, 1909.

In support of their allegation of statutory authorization, the respondents first invoke articles 5535-6 of the Revised Statutes of Quebec, 1888, which are re-enacted in the Revised Statutes of Quebec (1909), as follows:—

> 7295. Every proprietor of land may improve any watercourse bordering upon, running along or passing across his property, and

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may turn the same to account by the construction of mills, manufactories, works and machinery of all kinds, and for this purpose may erect and construct *in and about such watercourse*, all the works necessary *for its efficient working*, such as flood-gates, flumes, embankments, dams, dykes and the like.

7296. (1). The proprietors or lessees of any such works are liable for all damages resulting therefrom to any person, whether by excessive elevation of the flood-gates or otherwise.

In my opinion these provisions have no application to the present case. It is true that the respondents have a mill on the Rivière Ouelle some miles below the point at which the discharge from the Ste. Anne Lakes flows into it. But the dam here in question is not erected "in and about the water-course" on which the defendants' mill is constructed and it certainly is not a work necessary or helpful for the "efficient working" of the machinery of such a mill. There is "no mill or machinery operated by this dam." *Jones* v. *Fisher*(1), at page 525. Improving a water-course in order to provide material for manufacture in a mill is not improving it or turning it to account for the efficient working of the machinery of the mill. It should be noted that, if article 7295 R.S.Q. did apply, under article 7296 the defendants would be liable in damages.

The respondents next invoke the statute 54 Vict. (Que.), ch. 25, sec. 1, as amended by 4 Edw. VII. ch. 14, sec. 2. These provisions are now found in the Revised Statutes of Quebec, 1909, 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.

7299. It is and *always has been* lawful to erect and maintain dams, slides, aprons, booms, gate-locks, or other necessary works to facilitate the floating or transmission of timber, rafts or craft

(1) 17 Can. S.C.R. 515.

down such rivers, streams, lakes, ponds or creeks, to blast rocks, dredge or remove sand-banks, remove trees, shrubs or other obstacles without, however, doing any damage to such rivers, lakes, ponds, streams or creeks.

It was provided by 54 Vict. ch. 25, that nothing therein should

affect the rights of joint-stock companies for the transmission of timber down rivers or streams.

This provision is found, slightly altered, in article 7297 R.S.Q., 1909, and, though now couched in general terms, it probably refers only to companies incorporated under the legislation consolidated in articles 6266 *et seq.* (R.S.Q., 1909), which have no application to the present case.

Although my first impression was that article 7299 R.S.Q., because of its intimate connection with article 7298, and because of the provisions of article 7301, confers the right to erect dams and other improvements only upon water-courses down which timber, etc., is actually floated or transmitted, after a study of the history of this legislation and careful consideration of its terms that interpretation appears to me to be too narrow. First introduced in Quebec in 1890, as 54 Vict., chapter 25, the prototype of this provision is to be found in the Ontario Statute 47 Vict. ch. 17, enacted after the decision of this court in *McLaren* v. *Caldwell*(1), and while that case was standing before the Privy Council for judgment(2). The Ontario statute is preceded by a preamble containing this recital:

Whereas grants have been made by the Crown of lands situated upon such streams; the said licensed and granted lands being above *as well as below* the places where such obstructions were or are, or where such works are or may be constructed.

(1) 8 Can. S.C.R. 435. (2) 9 App. Cas. 392.

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The Ontario provision corresponding to article 7298 R.S.Q. is much older (12 Vict. ch. 89, sec. 5).

It is obvious that "to facilitate the floating of timber" upon the lower reaches of a river the water from the several forks of its upper reaches, or from tributary streams may be equally serviceable. Article 7299 R.S.Q. does not require that the dams declared to be lawful shall be constructed on that part of the river in which the timber is actually floated; it does sanction the construction of improvements which will facilitate flotation and transmission. These improvements may be above or below the point at which such flotation or transmission begins; and if above, why on one fork rather than on another? Why on the main river, and not on the tributary? A dam on either, if above the part of the river on which flotation or transmission is carried on, may equally facilitate it. Although the Quebec statute lacks the preamble found in the original Ontario Act, its enacting or declaratory language is itself wider; it omits the words "therein or thereon" found in the Ontario statute. Not, I confess, without some lingering doubts, due chiefly to the terms of article 7301 R.S.Q., I have come to the conclusion that the situation of the dam in question, having regard to the flotation which it is used to facilitate, does not preclude the application to it of the provisions of article 7299 R.S.Q.

But article 7299 is, in my opinion, clearly auxiliary to article 7298 R.S.Q. The erection of dams, etc., which it authorizes, is for the purpose of facilitating the floating or transmission of timber declared to be lawful by article 7298 R.S.Q. "during the Spring, Summer and Autumn freshets." The rights conferred by the statute are limited to the periods of

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these freshets (*Caldwell* v. *McLaren*(1); *Neely* v. *Peter*(2). The use of the dams and other improvements sanctioned is to enable lumbermen to take full advantage of them. It may be that under the powers recognized by article 7299 R.S.Q., as a result of the legitimate use of dams within its purview, the duration of these freshets may be slightly prolonged. But this article does not contemplate the construction of dams for the storage and retention of a supply of water to be used for floating and transmitting timber during the dry seasons. The evidence shews that, their mill-pond being too small to hold all the logs needed to supply their mill, the respondents after the freshets kept great quantities of logs along the bed and banks of the Rivière Ouelle, and from time to time during the dry season allowed the waters stored by the dam in question in the Lakes Ste. Anne to escape and by the artificial freshets thus created carried the logs lying in the river, or such numbers of them as they required, down to their mill. This use of the dam was, in my opinion, not sanctioned by article 7299 R.S.Q. and was the chief, if not the sole, cause of the injuries of which the appellants complain. A comparison of articles 7298 and 7299 R.S.Q. with 47 Vict. ch. 17, sec. 1 (Ont.), is instructive. I entertain no doubt that article 7299 R.S.Q. does not sanction the use of dams, etc., to facilitate or make possible the flotation or transmission of timber in the dry seasons.

My attention has been drawn to article 891 of the "Municipal Code," not cited at bar or referred to in the factums. Unlike article 7299 of the Revised Statutes of Quebec this article of the "Municipal

(1) 9 App. Cas. 392.

(2) 4 Ont. L.R. 293, at p. 296; 5 Ont. L.R. 381.

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Code" appears to declare the right of every person at all times (comp. articles 2256, 2350 and 7349(2) R.S.Q.) to use any municipal water-course for the conveyance of timber — subject to payment of all damages resulting from the exercise of the right.

Every river or natural watercourse, in the parts thereof which are neither navigable or floatable (except at certain periods of the year after rains) is a municipal watercourse. (Art. 868 Mun. C.)

Article 891 (Mun. Code) is declaratory of rights in water-courses only in their natural state. Article 7299 R.S.Q., in my opinion, has no application to or connection with it, or with article 7349 R.S.Q. Article 7299 R.S.Q. is historically and by its terms so intimately connected with article 7298 R.S.Q., that it must, as I have said, be regarded as accessory or ancillary to it, and the rights for which it provides are exercisable only for the purposes of the flotation or transmission declared by article 7298 R.S.Q. to be lawful.

The right of all persons to use water-courses in their natural state *at all times* for the flotation and conveyance of timber had, long before 54 Vict., been fully recognized and provided for by the legislation now consolidated in articles 2256, 2350 and 7349 R.S.Q., and article 891 Mun. Code, already referred to. Except that it expressly mentions "rafts," article 7298 R.S.Q. (54 Vict. sec. 1, 1972*d*), if read apart from and independently of article 7299 R.S.Q., would merely re-affirm the existence of this right during freshets. I cannot think that this article was passed simply to give to the transmission of "rafts" the same statutory sanction which had already been given to the conveyance of all kinds of timber. Unless it is to be deemed quite superfluous and to have been enacted *per incur-*

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iam — such a construction is to be admitted only if inevitable (*The Queen* v. *Bishop of Oxford* (1), at page 261) — this article must apply to the right to use water-courses, or parts thereof, with the aid of such artificial means as are provided for by article 7299 R.S.Q. Otherwise its enactment is simply unintelligible. Apart from the inapplicable provisions of article 7295 R.S.Q., the only statutory sanction for the construction of improvements which interfere with private rights in or along watercourses, except by companies formed for the purpose (article 2266 R.S.Q.), is that given by article 7299 R.S.Q. The conditions under which these companies may exercise such powers are onerous and special. See articles 6272-8 and 6305 R.S.Q. Why should the legislature, when expressing its sanction of the making and use of such improvements by persons or companies other than those incorporated under R.S.Q. articles 6266 *et seq.* without the safeguards and free from the conditions by those articles imposed, by the same statute declare a limited right of flotation — quite unnecessary, because already more fully provided for, if user of water-courses in their natural state were in its mind — unless it were for the purpose of defining the periods during which the right of flotation with the aid of such newly declared statutory privileges might be exercised ?

Again it is urged that during the freshets waters held in storage are not required and that to confine the use of such waters as are retained by the defendants' dam to those periods will, in fact, render the dam of no value and will give no effect to article 7299 R.S.Q. That article provides for other improvements, all of

(1) 4 Q.B.D. 245.

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which, including dams constructed on the parts of the river actually used for the flotation of timber, may be of great service during the freshets. Even dams situated, as is that here in question, above the part of the river in which it is sought to facilitate driving may be useful in regulating the flow of the water during these periods and thus be of material assistance in the transmission of the logs. The construction which I have put upon it by no means deprives article 7299 R.S.Q. of all effect. It is the only one, in my opinion, admissible, having regard to its collocation, its terms and its history. If this interpretation be narrower than the legislature intended, by a very simple amendment the article can be made to cover that for which the respondents contend.

I am further of opinion that, although the use made of their dam by the respondents should be deemed to be authorized by article 7299 R.S.Q., they nevertheless could enjoy that privilege only subject to the obligation of indemnifying persons injured by its exercise. Apart from statutory authorization there can be no right to interfere with the natural level or flow of waters to the prejudice of persons having riparian or other interests which would be affected. Article 7299 R.S.Q., though declaratory in form, in fact confers new rights and should, I think, be regarded as merely permissive — not imperative; and should the infliction of injury upon others follow the exercise of the rights thereby recognized or conferred, if there were no provision for compensation, it is possible that their exercise should be restrained. *Canadian Pacific Railway Co.* v. *Parke*(1), at pages 544-5. But, in the

(1) [1899] A.C. 535.

absence of any declaration of a contrary intention, articles 2256 and 2350 R.S.Q. may, in the cases of fishing and hunting lessees of the Crown, be taken to supply the provision for compensation which in modern times is generally found in a statute authorizing interference with private rights. *Managers of Metropolitan Asylum District* v. *Hill*(1), at page 208.

The opening words of the article, "It is, and always has been lawful" are worthy of further notice. If owing to their presence it must be assumed that article 7299 R.S.Q. is merely declaratory of powers already existing, the inference of a right in persons injured by their exercise to compensation seems irresistible, because without statutory authority it cannot have been lawful by the use of dams to alter the flow and levels of streams and lakes to the injury of persons interested in such waters as riparian owners or otherwise — at all events without making compensation for such injury.

After comparing article 7299 R.S.Q. with section 1 of the "Ontario Act," 47 Vict. ch. 17, I entertain some doubt whether the concluding clause "without however doing any damage, etc.," is applicable to the whole section, or only to blasting rocks, dredging or removing sandbanks and removing trees, shrubs or other obstacles. The absence of the conjunction "and" at the end of the fourth line leads me to think that the former is probably the correct construction. I am, however, not satisfied that the raising and lowering of the waters of which the plaintiffs complain does any damage to the lakes themselves. Injury caused by flooding

(1) 6 App. Cas. 193.

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to fishing and hunting privileges merely does not necessarily involve damage to the rivers and lakes in and about which they are enjoyed. Neither is it injury caused by the erection and maintenance of the dam, but rather by the use made of it. I, therefore, rest the right of the appellants to recover damages not upon the concluding clause of the first paragraph of article 7299 R.S.Q., but upon the fact that the use by the respondents of their dam to provide water for the flotation of timber during the dry seasons was not authorized by that article, and upon the absence from it of a provision depriving the plaintiffs of the right to compensation for injury which the exercise by the defendants of any right conferred by it might entail, coupled with the rights conferred on fishing and hunting lessees by the statutory provisions now consolidated in articles 2256 and 2350 R.S.Q.

The rights of the timber licensees being, not absolute, but "subject to such regulations and restrictions as may be established" (article 1599 R.S.Q., 1909), the respondents acquired their rights subject to the reservations declared by articles 2256 and 2350 R.S.Q. in favour of the holders of any existing or future fishing and hunting leases which the Government had granted or might see fit to grant. It is, therefore, I think, immaterial that the appellants obtained renewals of their fishing and hunting leases after the construction of the respondents' dam. The respondents' rights always were and remained subject to the provisions of articles 2256 and 2350 R.S.Q.

The provision for expropriation in article 7299 R.S.Q. has no application, in my opinion, to the case of lands not "taken and occupied" in the erection and maintenance of the improvement, but merely injuri-

ously affected by flooding. Compare article 6305 R.S.Q.

The appellants are, I think, entitled to the damages awarded, which were confined by Cimon J. to the injury done to their fishing and hunting rights during the two years immediately preceding the action. That the amount allowed was excessive was not seriously argued.

Subject to the question whether as mere lessees, though given by the statute a right to exclusive possession, they have a status to maintain a possessory action (*Price* v. *Girard*(1); *Baptist* v. *La Cie. de Papier des Laurentides*(2), at page 479) (see Fuzier-Herman, Rep. *vo.* "Chasse" No. 111) the appellants would, in my opinion, be also entitled to an order requiring the defendants to refrain from so using their dam as to affect the levels of the waters of the two Lakes Ste. Anne *to the prejudice of the fishing and hunting rights of the appellants, except during the Spring, Summer and Autumn freshets.* The result of the opinions of the majority of my learned brothers renders it unnecessary to determine whether these plaintiffs can or cannot maintain an action for this relief.

Because the dam is on the defendants' property, and because its use at certain times is legitimate, the prayer for its demolition was, in any case, properly refused.

Appeal allowed in part with costs.

Solicitors for the appellants: *Pelletier, Baillargeon & Alleyn.*

Solicitors for the respondents: *Pentland, Stuart & Brodie.*

(1) Q.R. 28 S.C. 244. (2) Q.R. 16 K.B. 471, at p. 478.