1925
*Nov. 11, 12.
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QUYON MILLING COMPANY LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

THE E. B. EDDY COMPANY LIMITED (DEFENDANT) ..... } RESPONDENT.

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

Watercourses—Driving timber—"Damages resulting"—Reparation—Riparian rights—Ownership of logs—Culling—Final delivery—Meaning of art. 7302a R.S.Q.—Arts. 7298 and 7349 (2) R.S.Q.—(Q) 4 Geo. V, c. 56.

The appellant company was owner of a lot comprising land on both sides of the Quyon river, in the county of Pontiac, and of the water power, water rights and hydraulic privileges connected therewith. It built thereon a flour and grain mill and a concrete dam for the purposes of developing and using the water power. The Quyon river is neither navigable nor floatable except for single pieces of timber and loose logs. The respondent company made, as buyer, a contract with B. & A. as sellers, "for the purchase and sale of spruce pulpwood and pine logs to be taken out by the sellers and delivered to the Upper Ottawa Improvement Company, Limited, on the Ottawa river at the

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

mouth of the Quyon river for the buyers * * *." B. & A. were at liberty to cut the logs and pulpwood wherever they chose and they were to pay all claims for Crown timber dues. The "drive" was made under the exclusive direction and control of B. & A. The price was made payable partly when the wood should have been cut and skidded, partly when hauled and delivered on the Quyon river and the balance "when the contract shall have been completely fulfilled." Under the memorandum of agreement, the logs and pulpwood were to be measured, culled and checked in the bush and before they were hauled for floating down the Quyon river, and they were then to be axe marked and hammer stamped with the timber mark of the respondent company. On or about May 20, 1923, pulpwood and logs cut by B. & A., while being floated down the river, reached the mill of the appellant company, which was situated at a point above the place of delivery to the respondent company, and piled with great force and pressure against and upon the dam and works of the mill, which they injured and in part destroyed. The appellant company, alleging carelessness and negligence on the part of those handling and driving on behalf of the respondent company, sued the latter for $3,140; and the main defence was a denial of ownership and possession of the logs and pulpwood and of responsibility for the drive.

Held that the respondent company was not liable, as it was not the owner of the logs and pulpwood when the damages to the dam and works of the appellant company occurred, since title to these logs and pulpwood would only pass to the respondent company upon "final delivery" being made on the Ottawa river.

Held, also, that art. 7302a R.S.Q., as enacted in 1914 (4 Geo. V, c. 56) does not apply to a person who, although not the owner, has some interest in logs floated down rivers and streams and it merely embodies an interpretation recently given by judicial authority to art. 7298 R.S.Q. as it then stood. Art. 7302a does not extend the responsibility for floating and transmitting timber down rivers and streams beyond that imposed by art. 7349 (2), under which the obligation to make compensation does not rest on persons who neither own the logs, nor control, as mandators or otherwise, the floating operations.

APPEAL from a decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court and dismissing the appellant's action.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

H. Aylen K.C. and *J. A. Aylen* for the appellant.

T. P. Foran K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—The respective rights and obligations of riparian owners and of persons engaged in the floating or transmission of logs and timber down rivers and streams in the province of Quebec have already formed the subject of a series of cases; and, so long as the law contained both in the codes and the statutes remains as it is, they are well

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settled by jurisprudence. *McBean* v. *Carlisle* (1); *Pierce* v. *McConville* (2); *Laurin* v. *The Charlemagne and Lake Ouareau Lumber Co.* (3); *Atkinson* v. *Couture* (4); *Bazinet* v. *Gadoury* (5); *Vézina* v. *The Drummond Lumber Co.* (6); *McKelvie* v. *Miller* referred to in *Ward* v. *Township of Grenville* (7); *King* v. *Ouellet* (8); *Green* v. *Blackburn* (9); *Therrien* v. *Edwards* (10); *Pepin* v. *Villeneuve* (11); *Richardson* v. *Paradis* (12); *Tanguay* v. *Price* (13); *Ward* v. *Township of Grenville* (7); *Gale* v. *Bureau* (14); *Club de chasse de Ste. Anne* v. *Rivière Ouelle Pulp & Lumber Co.* (15); *Fraser* v. *Dumont* (16). The right of lumbermen or others floating or "driving" timber is not a paramount right but an easement, which must be exercised with such care, skill and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to bridge or otherwise make use of the rivers, streams and watercourses, and the effect of the decisions is that persons who avail themselves of the privilege thereby conferred are obliged to make compensation for all damages resulting from its exercise, except in regard to such as cannot be avoided by reasonable care and skill and those to which the riparian proprietor himself may have contributed, or which have been occasioned by his own fault.

Navigable or floatable rivers (whether they be dependencies of the Crown domain or subject of private property), and the rights of user of these rivers for the purposes of navigation or the carriage of timber have already been defined by the Supreme Court of Canada (*Tanguay* v. *Canadian Electric Light Company* (17) and by the Judicial Committee of the Privy Council (*Maclaren* v. *Attorney General for the province of Quebec* (18).

(1) [1874] 19 L.C.J. 276.
(2) [1898] 5 R. de J. 534.
(3) [1899] 6 R. de J. 49.
(4) [1892] Q.R. 2 S.C. 46.
(5) [1891] M.L.R. 7 Q.B. 233.
(6) [1904] Q.R. 26 S.C. 492.
(7) [1902] 32 Can. S.C.R. 510, at p. 526.
(8) [1885] 14 R.L. 331.
(9) [1910] 16 R.L.n.s. 420.
(10) [1915] 21 R.L.n.s. 526.
(11) [1913] Q.R. 22 K.B. 520.
(12) [1914] Q.R. 24 K.B. 16.
(13) [1906] 37 S.C.R. 657.
(14) [1910] 44 Can. S.C.R. 305.
(15) [1910] 45 Can. S.C.R. 1.
(16) [1912] 48 Can. S.C.R. 137.
(17) [1907] 40 Can. S.C.R. 1.
(18) [1914] A.C. 258.

In the present case, the Quyon Milling Company Limited was in possession as owner of a certain lot comprising land on both sides of the Quyon river, in the village of Quyon, in the county of Pontiac, and of the water power, water rights and hydraulic privileges connected therewith. It built thereon a flour and grain mill and a concrete dam for the purposes of developing and using the water power.

It says in its declaration that this Quyon river is neither navigable nor floatable, except for single pieces of timber and loose logs ("à buches perdues").

On or about May 20, 1923, so it is alleged, pulpwood, logs, timber and wood goods said to belong to the E. B. Eddy Company Limited, while being floated down this river, reached the mill of the Quyon Company and piled with great force and pressure against and upon the dam and works, which they injured and in part destroyed.

The Quyon Company said that this was due to the carelessness and negligence of those handling and driving these logs and pulpwood on behalf of the Eddy Company, and therefore prayed that the latter be adjudged and condemned to pay $3,140 with interest and costs.

The Eddy Company, while asserting that the damage done was due to the inherent weakness of the dam and works and their incapacity to resist the natural pressure of water suddenly increased in the river at that time of the year, mainly rested its defence upon a denial of ownership and possession of the logs and pulpwood in question and pleaded that the floating or driving thereof was in no sense made or carried on under its control.

To this, the Quyon company answered that even if the logs were being driven by independent contractors, who were to deliver them to the Eddy Company on the Ottawa river, at or below the mouth of the Quyon river, the damages could not be recovered from the contractors, who were of weak financial standing, and the Eddy Company could not by its contracts exclude or relieve itself from liability for these damages.

The trial judge found that, on the 20th May, 1923, the logs, etc., were not the property of the Eddy Company, that they were not under its control, but that the floating and "drive" was being operated by Messrs. Bolam & Rich-

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ard, acting not as mandatories of the Eddy Company but on their own account.

Having reached such conclusions, he felt it unnecessary further to examine the cause of the collapse of the Quyon works or the nature and extent of the damages and he dismissed the action. Upon appeal, his judgment was unanimously confirmed by the Court of King's Bench.

Our attention was drawn to a statute enacted on the 19th February, 1914, being 4 Geo. V, c. 56, which, by section 3, added article 7302a to the Revised Statutes of Quebec, 1909. This amendment relates to the responsibility of those bringing logs down rivers and streams, and provides that

> No person can exercise the rights and privileges conferred by this subsection without being liable for the damages caused by his operations on rivers, streams, creeks, lakes or ponds, or on the banks or shores of the same.

The "subsection" there referred to is s.s. II of par. 2 of section VIII of the first chapter of Title XII of the Revised Statutes, 1909. It deals with the

> right of floating and transmitting timber, etc., down rivers, streams and creeks, and of executing works for that purpose.

It begins by art. 7298, which reads as follows:

> 7298. Subject to the provisions of this subsection, 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 was argued at Bar that art. 7302a so added to the "subsection" was meant to apply to any person having any interest whatever in the logs and was therefore sufficient to fasten responsibility upon the Eddy Company in this case, even if it was not the owner of the logs, because eventually these logs were to be delivered to it and it was proven to have advanced money against the price of the logs, under the terms of its contract with Bolam & Richard.

We do not think however that this was the intent of the amendment.—It was enacted shortly after the judgments of the Supreme Court of Canada in *Dumont* v. *Fraser* (18th February, 1913) (1), and of the Court of King's Bench in the case of *Pepin* v. *Villeneuve* (18th June, 1913) (2). In the course of these judgments, both courts pointed to the apparent inconsistency between R.S.Q. 7298, as it then stood, and R.S.Q. 7349 (2):

(1) 48 Can. S.C.R. 137. (2) Q.R. 22 K.B. 500.

7298. Subject to the provisions of this subsection, 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.

7349 (2). It shall be lawful, nevertheless, to make use of any river or water-course, 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 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.

After having gone most completely into the history of this legislation, both courts held that

the privilege of transmitting timber down watercourses in the province of Quebec given by article 7298 of the Revised Statutes of Quebec, 1909, was 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.

Admittedly however this interpretation was not free from difficulty; and it is only natural to assume that in enacting article 7302a, the legislature had in view nothing more than to do away with the seeming discrepancy between the two earlier articles and thus to indicate that it was in complete agreement with the views already expressed by the court of final resort in the province and the court of final appeal in the country. This, in our opinion, is the true import of s. 3 of c. 56 of 1914 (Que.). This statute introduced nothing new. It only declares legislatively what had been by judicial authority pronounced to exist in fact. It does not extend the responsibility of those floating and transmitting timber down rivers and streams beyond that to which art. 7349 (2) already subjected them; and it was never suggested until now that, under art. 7349 (2), the obligation to make compensation could rest on persons having neither ownership of the logs, nor the control, as mandators or otherwise, of the floating operations.

That being so, we think the trial judge and the court of appeal were right in their view that this question of ownership or control had first to be decided, and if, as they held, the logs were not the property of the Eddy Company nor under its control on the 20th May, 1923, it follows that the action of the Quyon Company was rightly dismissed.

These are, therefore, the questions presently to be examined. The answer to them must depend upon the par-

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ticular contract and the special circumstances of the case (*Joyal* v. *Beaucage* (1)).

The memorandum of agreement, dated the 10th February, 1923

between The E. B. Eddy Company, Limited, of Hull, Quebec, as buyers and Wm. Bolam and Albert Richard, of Campbell's Bay, Quebec, as sellers (provides), for the purchase and sale of spruce pulpwood and pine logs to be taken out by the sellers and delivered to the Upper Ottawa Improvement Company, Limited, on the Ottawa River at the mouth of the Quyon River for the buyers, and also for the purchase and sale of spruce and balsam pulpwood, delivered f.o.b. cars on the Pontiac line; also for white pine logs to be taken out by the sellers and delivered to the Upper Ottawa Improvement Company on the Ottawa River between Ottawa and Allumette Island for the buyers.

Then follow specifications as to the approximate quantities of the "river wood," the "rail wood" and the "white pine" forming the subject of the agreement, the proportions of qualities, the diameters and the lengths. We are concerned only with the "river wood" and therefore leave out anything relating to the "rail wood."

The contract goes on:

All the above pulpwood and logs to be sound and cut from live or green trees, free from rot or doze, straight and cut square at the ends, and the knots trimmed flush with the body of the wood; the said pulpwood and pine logs to be measured, culled and checked by the culler of the buyers, such measurements to be final and binding on both parties.

The sellers agree to supply boom timber and chains to contain all said river pulpwood and pine logs, and to boom out and deliver same to the Upper Ottawa Improvement Company on the Ottawa River at the mouth of the Quyon River, or elsewhere on the Ottawa River for part of the pine logs at as early a date as possible during the spring of 1923.

* * * * *

The sellers further agree to indemnify the buyers against any and all claims for Crown timber dues, and tolls for use of improvements on streams on which any of said pulpwood and pine logs are floated into the Ottawa river.

They also agree to axe mark each log of river wood and pine on both ends and on opposite sides about a foot from each end with the letter "N" a sufficient depth in the wood to insure a good plain mark, and also to hammer stamp each log at least four times on each end with a stamping hammer "E" supplied by the buyers.

The price, which the buyers agree to pay "at their office in Hull, Quebec," is then fixed at varying "rates" for the spruce and balsam "for river shipment," and for the white pine. It is made payable partly when the wood shall have been cut and skidded; partly when hauled and delivered

(1) [1920] Q.R. 59 S.C. 211, at pp. 213-215.

on the Quyon river, and the balance "when the contract shall have been completely fulfilled."

All above payments to be made on receipt of cullers' certificate that the wood has been delivered as per contract.

It is also understood that any money advanced on said spruce and balsam pulpwood and white pine logs taken out under this contract and not delivered in the spring of 1923, as per contract, shall bear interest at the rate of six per cent (6%) per annum dating from January 1, 1923, until final delivery is made of such spruce and balsam pulpwood and white pine logs.

It will at once be seen that this is not a contract to cut standing trees or to float and deliver logs already owned by the Eddy Company or taken out of "limits" belonging to it. Bolam & Richard could cut the logs and pulpwood wherever they chose. Their obligation was to manufacture logs and pulpwood and to deliver them for the buyers to a company indicated and at a place fixed in the contract.

They are to pay all claims for Crown Timber dues.

For the purpose of floating down the Quyon river and of delivery to the Upper Ottawa Improvement Company, they agree "to supply boom timber and chains," "to boom out" the logs and pulpwood and to pay the

tolls for use of improvements on streams on which any of said pulpwood and pine logs are floated into the Ottawa river.

It is proven that the Eddy Company did not hire any of the men on the "drive," nor pay any of them, nor "get any accounts from any of them" and that it "had no authority over the way they drove" the logs and pulpwood.

Incidentally, therefore, it is apparent, both by the terms of the agreement and from the evidence, that the holding of the trial judge that the "drive" was made under the exclusive direction and control of Bolam & Richard cannot in fact be questioned—subject to the consideration of the further point whether Bolam & Richard were then acting merely as the mandataries of the Eddy Company which, it is argued, had measured, culled and accepted the logs and pulpwood in the bush, before the "drive" began.

The contract does say that a certain payment is to be made when the logs and pulpwood have been "cut and skidded" and that, for the purpose of such payment, certificates are to be issued by the culler after he has "measured, culled and checked" the wood. As the contract reads, however, the like operation would be equally required for the payment stipulated to be made when

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the logs have been "hauled and delivered on the Quyon river" and also for the final payment "when the contract shall have been completely fulfilled." So that, under the terms of the agreement, the measurements before the "drive" are only provisional and gone into for the purpose of ascertaining the amount of money which is to be "advanced," and which "shall bear interest at the rate of six per cent (6%) per annum, dating from January 1, 1923," as a loan against the price that will be due "when the contract is completely fulfilled" and "final delivery is made of such spruce and balsam pulpwood and white pine logs."

The measurements and culling in the bush and on the Quyon river were necessary to carry out the contract with respect to these advances and for the purpose of determining their quantum. It is evident that these measurements are declared "to be final and binding on both parties" for that purpose only and in the sense that the decision of the culler was not open to discussion by the parties, for it cannot be understood to mean that the measurements in the bush will conclusively determine and appropriate the subject matter of the contract, since the provision that the culler's measurements "shall be final and binding on both parties" applied alike to measurements in the bush, on the Quyon river and on delivery at the mouth of that river.

In practice, Mr. Seymour Fisher, manager of the Woodsland division of the Eddy Company, explains how the operations were carried out:

Witness: The bark mark and hammer mark were placed on the logs for identification purposes, so we could distinguish our logs from those of other people, and also to see that we got delivery at our mill of the amount of logs placed in the river.

Q. When the logs would have reached the Ottawa river, according to the contract which I read as follows: "to be taken out by the sellers and delivered to the Upper Ottawa Improvement Company on the Ottawa River between Ottawa and Allumette Island for the buyers"—when the logs would have been delivered there in the Ottawa river how would you know you got all the logs contracted for or for which an account was sent to you?

A. Well, you would know just by having your culler travel the river and see that a good drive had been made and no logs left along the bank of the river, and then you would get a second check by checking up the logs when they came to Ottawa.

Q. And how would you check them at Ottawa?

A. Only by the hammer and bark marks.

Q. And how check them along the Quyon?

A. Only by the hammer marks or bark mark—any log that did not contain those marks we could not consider as our logs.

Q. Supposing you had hammered and bark-marked 10,000 logs in the bush and on the bank of the river in the winter time and you found 5,000 at the mouth of the Quyon or in the hands of the "Upper Ottawa Improvement Company," what payment would you make?

A. We would pay only for the logs that were delivered.

Q. Delivered where?

A. At the mouth of the Quyon on the Ottawa River.

Q. And before making that payment what would you do with regard to the Quyon?

A. We would have the man who measured the pulpwood and saw logs travel the banks of the river and ascertain whether it was all driven or not.

Q. And if you found several hundred logs still on the banks of the Quyon river what would you do?

A. We would only pay for the logs delivered at the mouth of the river, at the Ottawa.

The terms of the agreement therefore and the manner in which it was being carried out bring this case within the line of decisions where, provision being made for several successive measurements during the progress of the contract, it was held that title to the goods did not pass until the final measurement has been made, such as *Théberge* v. *Lavoie* (1), where the holding was:

Confirming judgment of the Superior Court which had dismissed appellant's petition in revendication, that the making of the first payment of $3.50 per thousand feet made pursuant to calculation of the estimated lumber contents of the logs and stamping thereof with the buyer's mark by his culler, could not be considered a payment of the price of the logs and an acceptance of delivery thereof such as to pass the ownership of them to the buyer; the object of the operation of culling and stamping being, in view of the contract, to determine the amount of advances to which the seller was entitled before sawing and that consequently the insolvent still remained proprietor of the logs which had not yet been sawn.

See also *Loiselle* v. *Boivin* (2); *Villeneuve* v. *Kent* (3); *Curtis* v. *Miller* (4).

However, the logs and pulpwood were not only measured, culled and checked in the bush and before they were hauled for the floating on the Quyon river, they were also, as provided for by the memorandum of agreement, axe marked and hammer stamped with the timber mark of the Eddy Company; and it is urged that this, at least, was a setting

(1) [1908] 15 R. de J. 279.
(2) [1910] 16 R. de J. 50.
(3) [1892] Q.R. 1 Q.B. 136.
(4) [1898] Q.R. 7 Q.B. 415.

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apart sufficient to vest in that company the ownership of the logs and pulpwood.

In the words of Demolombe (vol. 24, no. 478),

> La solution depend des circonstances et des caractères plus ou moins extérieurs et probants de la marque.

The *Timber Marking Act* (c. 72, R.S.C., 1906), enacts that a

> person who registers such timber mark shall thereafter have the exclusive right to use the same to designate the timber got out by him and floated or rafted

by him and that no other person shall mark any timber with any mark so registered, but it does not go the length of saying that the mere marking or stamping of logs or timber is in itself evidence of ownership. In each of the cases above referred to: *Théberge* v. *Lavoie* (1); *Loiselle* v. *Boivin* (2); *Villeneuve* v. *Kent* (3), and *Curtis* v. *Millier* (4), the lumber had been so marked or stamped and the Court of King's Bench refused to accept that as sufficient to pass the title in the lumber to the purchaser.

Stamping and marking are no doubt an important, but not a determining factor. Here, it was merely an incident in the carrying out of the agreement and it is made clear by the evidence that the marks "were placed on the logs for identification purposes," so that they would be followed through the drive and "distinguished from those of other people"—to earmark the logs and pulpwood against the price of which the loan had been advanced.

The real point in the agreement between Bolam & Richard and the Eddy Company is that the logs and pulpwood respectively bought and sold are not logs and pulpwood "cut" and skidded" in the bush, not logs and pulpwood "hauled and delivered on the Quyon river," but logs and pulpwood "delivered to the Upper Ottawa Improvement Company, Limited, on the Ottawa river at the mouth of the Quyon river." Those words, contained in the initial paragraph of the memorandum of agreement, are descriptive of the subject-matter of the sale. Until delivery had been so made on the Ottawa river, the subject-matter had not been ascertained, for it was only the logs and pulpwood which reached such delivery point that the Eddy Company bought. It

(1) 15 R. de J. 279.
(2) 16 R. de J. 50.
(3) Q.R. 1 Q.B. 136.
(4) Q.R. 7 Q.B. 415.

was only as to such logs and pulpwood that "the contract (was) completely fulfilled" and that the company agreed to pay the price fixed, provided they were so "delivered in the spring of 1923." As for logs in the bush or along the Quyon river there exists no agreement to buy them, nor to pay for them. "Any money advanced" in respect of them stands as a loan which shall bear "interest at the rate of six per cent (6%) per annum dating from "January 1, 1923," and which must be reimbursed by Bolam & Richard after the "spring of 1923," being the time stipulated for "final delivery."

It was only when this "final delivery" was made on the Ottawa river that the title in the logs and pulpwood passed to the Eddy Company. That company was not therefore the owner, when these logs and pulpwood are alleged to have demolished the dam and works of the Quyon company on the 20th May, 1923.

A case in point is *Logan* v. *LeMesurier* (1) decided by the Privy Council (1):

Messrs. H. L. & Co., of Montreal, entered into a written contract with Messrs. L. & Co., for the sale of a quantity of red pine timber, then lying above the rapids, Ottawa river, stated to consist of 1,391 pieces, measuring 50,000 feet, more or less, to be deliverable at a certain boom at Quebec, on or before the 15th of June, then next, and to be paid for by the purchasers' promissory notes of ninety days from that date, at the rate of 9½d. per foot, measured off; if the quantity turned out more than above stated, the surplus was to be paid for by the purchasers at 9½d. per foot, on delivery; and if it fell short, the difference was to be refunded by the sellers. The price of the 50,000 feet at the agreed rate, was paid by Messrs. L. & Co. according to the terms of the contract. The timber was not delivered on the day prescribed in the contract of sale, and when it arrived at Quebec, and before it was measured and delivered, the raft was broken up by a storm, whereby the greater part of the timber was dispersed and lost. Messrs. L. & Co., after the storm, collected such of the timber as could be saved, paid salvage for it, and applied the timber saved to their own use. In an action brought by Messrs. L. & Co. against Messrs. H. L. & Co., to recover the amount paid on their promissory notes, and for a breach of the contract, and for the difference between the contract price of 9½d. per foot and 10½d. per foot, the market price when the timber was to have been delivered;

It was

held by the Judicial Committee, affirming the judgment of the Court of Appeals in Lower Canada,

I. That the action was maintainable.

II. That, by the terms of the contract, until the measurement and delivery of the timber was made, the sale was not complete; and that the

(1) [1847] 6 Moore's P.C. 116.

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transfer of the property was postponed until the measurement at the delivery; and that the risk remained with the sellers.

III. That the taking possession of a part of the timber by Messrs. L. & Co., after the day mentioned for the delivery thereof, in the contract, and not at the place, could not be considered as an acceptance of the whole; nor could it be considered as an admission, that the property in the timber passed to them before the storm which broke up the raft.

The Court of Appeals of Lower Canada had held (p. 125) that the stipulation of admeasurement and of delivery at a particular place, rendered the sale conditional and incomplete until the occurrence of those events, and that in the meantime the risk *periculum rei venditae* is not to be borne by the purchasers, etc.

There the circumstances were more favourable to the vendor company's contention than they are here to that of the Quyon Company. *The timber was*

fully specified by the description and the place where it lay,

the price was "fixed in reference to an assumed measurement," the price was paid immediately, but

with a reserved right for the one party to recover part of that price, and for the other party to receive more, in case that assumption should prove to have been incorrect,

yet the transfer of property was held to be "postponed until the measurement at the delivery."

In the present case, at the time the contract was entered into, no determined or ascertained timber was in existence to form the subject-matter of the contract; the logs and pulpwood bought and sold were stated to be those that would be delivered on the Ottawa River to the Ottawa Improvement Company, and any logs and pulpwood which did not reach such delivery point were not part of the subject-matter of the contract; no price was fixed, only the rates were agreed upon; no price was paid, but money was only advanced. It seems clear that *a fortiori*, under the present agreement, the intention of the parties was that the E. B. Eddy Company should become the owner only at the point of delivery on the Ottawa river and, as a consequence, only of such logs and pulpwood as would eventually reach that point.

In this view, this case must be distinguished from *King* v. *Dupuis* (1), and *Dallaire* v. *Gauthier* (2). In the former case, the agreement amounted to an absolute sale of the mill output for the season. It was not a question of goods sold by weight or measure but a "lump" sale of effects,

(1) [1898] 28 Can. S.C.R. 388. (2) [1903] Q.R. 24 S.C. 495.

certain, fixed and well defined. The logs had been culled and stamped and, upon the receipt of the return of the cullers, they had been paid for. Yet this stamping of the logs was looked upon as a presumption only until "the contrary be proved." The title was held to have passed because

the presumption was supplemented by oral evidence that a transfer of property was really intended.

and because

the proof of the sale (appeared) upon the face of the written agreement.

It was

therein stipulated that all logs paid for by the purchasers shall be their property and shall be received and stamped with their name.

Dallaire v. *Gauthier* (1), in the Superior Court at Chicoutimi, was a similar case. It was found there that, by culling and stamping the wood, the parties had intended respectively to deliver and to accept it.

After all, as Lord Brougham said in *Logan* v. *LeMesurier* (2) (p. 132):

The question must always be: what was the intention of the parties in this respect; and that is, of course, to be collected from the terms of the contract.

In the present case, we think the contract shows that the parties did not intend the ownership to pass until the logs and pulpwood had reached the Ottawa river.

If the ownership had not passed, it becomes unnecessary to consider whether, had the Eddy Company been the owner, it would have been relieved from liability because the damage was done while the logs were being transmitted by another person under contract with it. In *Dickie* v. *Campbell* (3), it was held that any one intending to carry on the transmission of logs down rivers in Nova Scotia, under the authority of R.S.N.S. (1900) c. 95, s. 17, could not, on account of the provisions of that statute, get rid of his liability for all damages caused thereby

by simply having the operations put into execution by a contractor.

Whether this would also hold good in Quebec and under Quebec law and statutes may be considered as an open question, notwithstanding the judgment of the Court of Review in *Le Club de Chasse et de Pêche de Ouiatchouan*

(1) Q.R. 24 S.C. 495.
(2) 6 Moore's P.C. 116.
(3) [1903] 34 Can. S.C.R. 265.

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v. *La Compagnie de Pulpe de Ouiatchouan* (1), in view of the different expressions of opinion in *Dumont* v. *Fraser* (2). In the present case, the sellers were entitled to float logs and pulpwood in their own right and to keep to themselves the privilege of driving them.

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

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