CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES AND THE TERRITORIAL COURT OF THE YUKON TERRITORY.

NAPOLEON P. TANGUAY (DEFENDANT) ..... } APPELLANT;

AND

THE CANADIAN ELECTRIC LIGHT COMPANY (PLAINTIFFS) } RESPONDENTS.

1907
*Oct. 10.

1908
*Feb. 18.

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

Rivers and streams—Crown domain—Title to land—"Flottage"—Driving loose logs—Public servitude—Riparian ownership—Action possessoire—Arts. 400, 503, 507, 2192 *C.C.—Art.* 1064 *C.P.Q.*

In the Province of Quebec, watercourses which are capable merely of floating loose logs, (*flottables à bûches perdues,*) are not dependencies of the Crown domain within the meaning of article 400 of the Civil Code. The owners of the adjoining riparian lands are, consequently, the proprietors of the banks and beds of such streams and have the right of action *au possessoire* in respect thereof.

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

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There is, however, a right of servitude over such watercourses in respect to all advantages which the streams and their banks, in their natural condition, can afford to the public, there being no distinction, in this regard, between navigable or floatable streams and those which are neither navigable nor floatable. *McBean* v. *Carlisle* (19 L.C. Jur. 276) and *Tanguay* v. *Price* (37 Can. S.C.R. 657) followed.

Judgment appealed from (Q.R. 16 K.B. 48) affirmed, Girouard and Idington JJ. dissenting.

APPEAL from the judgment of the Court of King's Bench, appeal side(1), affirming the judgment of Larue J., at the trial(2), in the Superior Court for the District of Quebec.

The action was *au possessoire et en démolition de nouvelles œuvres* and was brought by the respondents to obtain a declaration of their rights in the banks and bed of the River Chaudière as riparian proprietors of certain lands on both sides of that river. It was admitted that, at the *locus in quo,* the river was neither navigable nor floatable except for loose logs (*à bûches perdues*), that the plaintiffs had been for some years in actual possession of the banks and bed of the river and had constructed dams and done other works there for the purpose of creating a reservoir and developing water-power for the operation of their electric light system installed in their power-house on the lands in question. They contended that the defendant had illegally disturbed them in their possession and prayed for the demolition of certain wharves and piers placed by the defendant on the banks and booms stretched across the river for the purpose, as alleged by him, of improving the floatability of the stream to carry on his lumbering operations with better advantage. At the trial,

(1) Q.R. 16 K.B. 48. (2) Q.R. 28 S.C. 157.

the questions at issue were whether or not the plaintiffs were in possession of the bed and banks of the river, at the place where the encroachments complained of occurred, within the meaning of articles 2192 of the Civil Code and 1064 of the Code of Civil Procedure, and if the defendant was entitled, under the circumstances, to invoke the benefit of the provisions of articles 5535 and 5536 of the Revised Statutes of Quebec and of the Act, 54 Vict. ch. 25 (Que.).

The courts below unanimously held that the defendant did not come within the provisions of the provincial statutes referred to, and the majority of the Court of King's Bench, held that, as the river was floatable merely *à bûches perdues,* it was not part of the Crown domain, and affirmed the judgment of Larue J. which maintained the plaintiffs' action, Lavergne J. dissenting.

The questions raised on the present appeal are fully discussed in the judgments now reported.

Lane for the appellant.

G. G. Stuart K.C. and *L. P. Pelletier K.C.* for the respondents.

THE CHIEF JUSTICE.—The plaintiffs in the court of first instance (respondents) brought against the defendant (appellant) an action known in the Province of Quebec as an *action possessoire et en démolition de nouvelles œuvres,* whereby they sought the demolition and removal of certain piers and wharves built on the bed and the shores together with certain

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booms stretched across the waters of the River Chaudière.

In their declaration the plaintiffs set forth their documents of title and allege that they are proprietors and in possession of several lots of land fully described in such documents and situate within the parishes of St. Nicholas, St. Etienne de Lauzon and St. Jean Chrysostome, in the County of Levis, all crossed by or fronting on the River Chaudière. The plaintiffs further allege that as owners of the soil on both sides of the river (which they state to be at the *locus in quo* neither navigable nor floatable, except for loose logs) they are the owners of the land under the waters and that they have taken actual pedal possession of the same for the purpose of building a dam and creating a reservoir for the development of their electric light system. They complain that the defendant encroached on the bed of the river and its banks within the limits of their possession, and there proceeded to erect piers and wharves. By their conclusions, the plaintiffs pray for a declaration of their rights, for a declaration that the defendant has illegally disturbed the enjoyment of such rights, and for a declaration authorizing the demolition of the works complained of.

The defendant, without denying the alleged acts of trespass, except those that are charged with respect to the lands above high water mark, says:

1st. That the Chaudière is a navigable and floatable river, and consequently its bed forms part of the Crown domain. (Art. 400 C.C.)

2ndly. That the piers and the wharves in question were built by him on the bed and banks of the stream to improve its floatability and were necessary to carry on with advantage his lumber business, he being the

proprietor of extensive timber limits on the river above; and he claims the benefit of articles 5535 and 5536 of the Revised Statutes of Quebec and of the provincial statute, 54 Vict. ch. 25.

The questions in issue at the trial were, therefore:

1st. Were the plaintiffs in possession of the bed and banks of the River Chaudière, at the place where the encroachments complained of occurred, within the meaning of articles 1064 C.P.Q., and 2192 C.C.?

2ndly. Is the defendant, in the circumstances, entitled to claim the benefit of the statutory provisions he invokes?

The judges below are unanimously of opinion that the defendant did not come within the exceptional provisions of the Revised Statutes of Quebec which are applicable only to a proprietor whose lands border on a water-course, or to the owner of property along or across which a water-course runs or passes (art. 503 C.C.) and that defendant is not in either class.

Both courts also find that the Act, 54 Vict. ch. 25, does not, if applicable to the circumstances of this case, confer on the appellant power to do the acts complained of, unless and until certain conditions have been performed by him which have not been performed.

With the unanimous conclusions reached on these two points I agree; and the only question to be considered on this appeal, and it is of the greatest importance, is the one with respect to which there was a dissenting opinion below, viz.: Were the plaintiffs in possession of the bed and banks of the river as alleged in their declaration; or, in other words, is the Chaudière River navigable and floatable at the place where

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it crosses or passes over the plaintiff's property so as to make it part of the Crown domain?

The answer to this question depends upon the construction to be put upon the word "floatable" in article 400 of the Civil Code of the Province of Quebec.

It is unnecessary to add that the case must be decided according to the French law as it exists in that province.

Some reference was made to a supposed defect in the respondent's title resulting from the description of the lots which are stated to be bounded by the river.

In my opinion, this difficulty is disposed of by the judgment of this court in *Massawippi Valley Railway Co.* v. *Reed*(1). See also *Attorney-General of Quebec* v. *Scott*(2).

Admittedly the river is not navigable.

In *Bell* v. *The City of Quebec*(3), their Lordships, citing Dalloz, Rep. tit. *"Voirie par eau,"* no. 39, say the test of navigability of a river is its possible use for transport in some practical and profitable manner.

It cannot be said, taking the most favourable view of the evidence, that this river could be used in a profitable or practical manner for the purpose of navigation, and for that the defendant did not contend here. On this appeal, as in the courts below, the issue was as to the floatability of the river; and this issue involves the decision of a preliminary question which, from its very nature, is exclusively one of fact and as to which, under the French system, the finding of the trial judge

(1) 33 Can. S.C.R. 457. (2) 34 Can. S.C.R. 603.
(3) 5 App. Cas. 84.

is practically conclusive. (Beaudry-Lacantinerie, Des Biens, no. 174; *Attorney-General of Quebec* v. *Scott* (1)). The learned trial judge, who heard all the witnesses, after having described the character of the river throughout its entire course, from Lake Megantic to the estuary or basin at the foot of the falls below the plaintiff's property, sums up in these terms:

La preuve démontre de la manière la plus convaincante que cette rivière n'est navigable d'une manière pratique, dans son état naturel, dans aucune partie de son parcours, sauf en bas de la chaussée de la demanderesse dans l'estuaire du bassin de la rivière jusqu'à sa jonction avec le fleuve St. Laurent.

Quant á sa flottabilité elle est impossible pour les radeaux et trains de bois. Lors des grosses eaux du printemps et des pluies extraordinaires amenant une crue subite *le flottage à bûches perdues est le seul genre de flottage qui puisse s'y faire.*

Dans les basses eaux, les gens peuvent traverser à pied.

This finding of fact is concurred in by the majority of the court of appeal and is not expressly dissented from by Mr. Justice Lavergne, who says, at page 422:

La Chaudière est une des rivières les plus considérables. Sa larguer moyenne est de trois arpents; elle en a atteint jusqu'à 8 a 9. Au printemps et aux coups d'eau d'été, les eaux sont très hautes et alors se fait le flottage de centaines de milliers et peut-être de millions de billots qui se rendent aux divers moulins où ils sont sciés et mis sur le marché. Cependant de St. François à la jonction Scott, distance de 20 à 30 milles, il y a assez d'eau pour les petites embarcations, et même pour les bateaux à vapeur. *De la jonction Scott jusqu'à la chûte, suite de rapides.* Dans l'été, à eau basse, il n'y a de navigable ou de flottable que la partie de St. François à la jonction Scott.

See also *O'Farrell* v. *Duchesnay* (2).

The plaintiff's property is between *"la jonction Scott"* and *"la chûte."* *Vide The Queen* v. *Robertson* (3), *per* Strong J., at page 130.

(1) 34 Can. S.C.R. 603, at p. 614.
(2) 9 Leg. News 259.
(3) 6 Can. S.C.R. 52.

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Therefore I assume that the river is found to be in fact floatable only for loose logs; and, on that assumption, I proceed to examine the question as to whether such a river forms part of the Crown domain as being a floatable river within the meaning of article 400 C.C. The question is very frankly and very fairly put by Mr. Justice Lavergne in his dissenting judgment, when he says:

> Il est indéniable qu'aux hautes eaux la rivière est flottable pour des *flots de billots*. L'intimé nous dit que c'est là le flottage à bûches perdues et que les rivières flottables à bûches perdues ne sont pas des dépendances du domaine public.
>
> Cette distinction ne se trouve pas dans le code et il me semble qu'elle n'a pas lieu d'être dans le pays. Dans l'ancienne France elle n'était donnée que par un certain nombre d'auteurs. Le Code Napoléon ne distingue pas.

Here, I venture to say with deference, is the fundamental error which has led the learned judge to the erroneous conclusions he has reached. In France, before the Code, there was a broad distinction between streams that were floatable in the sense that they could be used for the transport of boats, flats or rafts (the words used are "*portant bateaux, trains ou radeaux*") and those streams that were floatable for loose logs only; and since the Code, as Laurent says, the distinction is universally admitted.

Dalloz, Rép. Jur. *Eaux,* no. 61:

> Il est vrai (dit-il), que le code civil n'a établi aucune distinction entre les deux sortes de flottage; il a même gardé un silence absolu à cet égard; mais la distinction se retrouve *dans toutes les anciennes lois,* comme dans *tous les monuments de la jurisprudence.*

Proudhon, Domaine public, vol. 3, no. 857:

> Il est essential de remarquer que les rivières flottables doivent être rangées dans deux classes très distinctes.
>
> La première classe comprend celles des rivières où le flottage s'exerce par trains ou radeaux, et la seconde celles où il ne se pratique qu'à bûches perdues.

On entend ici par trains, ou trains de bois, les groupes ou faisceaux de bois coupés en bouts de moindre ou médiocre longueur, que l'on assujettit les uns aux autres par des perches et des liens, pour pouvoir les soigner ensemble comme un seul corps lancé à flot dans la rivière par laquelle on veut les faire descendre.

Le mot radeau s'applique plus spécialement aux grands bois de charpente ou de mâture qu'on lance en rivière et qu'on y assujettit de même les uns aux autres par des perches et des liens, pour pouvoir les soigner ensemble et en gouverner la conduite comme s'ils ne formaient qu'un seul corps.

Il est aisé de comprendre que cette espèce de flottage ne peut s'exercer que dans les grandes rivières, où le volume des eaux est partout suffisant pour porter à flot les trains et radeaux, et dans le lit desquelles on ne trouve ni cataractes, ni cascades, ni rochers qui embarrassent le cours d'eau.

Tels sont les caractères par lesquels on distingue la première classe des rivières flottables.

Again at no. 860:

Il y a donc deux espèces bien distinctes de rivières flottables:

La première comprend celles sur lesquelles le flottage s'exerce par grosses masses de bois réunis et enlacés en trains ou radeaux; et cette espèce appartient, sous tous ses rapports, au domaine public, comme celle des rivières navigables:

La seconde espèce comprend celles des rivières ou même des gros ruisseaux qui ne sont flottables qu'à bûches perdues; et cette dernière classe reste, quant à tous ses usages, excepté celui de la flottabilité, dans le domaine privé des propriétaires riverains.

See also nos. 390 and 391.

The earliest reported case is in Dalloz, 1823, 1. 371, where it was held:

Les rivières ne doivent être considérées dépendant du domaine public que lorsqu'elles sont flottables à train ou à radeau. Celles qui ne sont flottables qu' à bûches perdues sont la propriété des riverains.

Reference is also directed to the note to this case, *loc. cit.*

Laurent, *Supplément des Principes du Droit Civil,* vol. 2, one of the most recent books, sums up the doctrine in these words:

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Une rivière n'est pas flottable dans le sens de l'article 538 quand elle ne l'est qu'à bûches perdues; ceci est universellement admis.

Beaudry-Lacantinerie, "Des Biens," page 134, no. 174, says:

174. *Les fleuves et les rivières navigables ou flottables.* Ce sont des chemins qui marchant, dit Paschal. Une rivière * * *. peut servir au transport des bois par le flottage ou la flottaison. On distingue deux espèces de flottages, le flottage avec *trains ou radeaux*, * * * et le flottage *à bûches perdues* * * * . Il n'y a que les rivières flottables avec trains ou radeaux qui fassent partie du domaine public.

2 Plocque, Législation des *Eaux,* no. 174:

On appelle flottable une rivière sur laquelle on conduit des trains ou brelles, c'est-à-dire, des masses de bois de charpente, de menuiserie ou de chauffage, assujetties avec des perches ou des liens, en forme de radeau. Mais on ne comprend pas dans le nombre des rivières flottables les cours d'eau sur lesquels on fait flotter des bois isolés ou bûches perdues.

It is useless to accumulate references to books and cases; all the learning on the subject will be found in Fuzier-Herman, vbo. "*Rivières,*" nos. 80 *et seq.,* where there is authority in abundance to support my submission that the distinction referred to by Mr. Justice Lavergne was universally admitted in France both before and since the Code. The distinction was recognized and acted upon in this court in *Ward* v. *Township of Grenville*(1). Mr. Justice Girouard, at page 524, says that the Rouge River

which in no sense is navigable *but only floatable à bûches perdues.* is the *property of the riparian proprietor.*

And again at page 526, he speaks of the rights of the public with respect to the use of a private river for the purpose of floating logs. However, as to the ownership of the beds of rivers floatable only for loose

(1) 32 Can. S.C.R. 510.

logs (*bûches perdues*), which is the point at issue on this appeal, Laurent, who with Daviel and Championnière, holds that the riparian proprietor is the owner of the bed of the stream opposite his property, says(1):

Il y a sur ce point un véritable chaos d'opinions, et dans la doctrine et dans la jurisprudence.

In 1846, however, the Cour de Cassation(2) decided that the beds of such rivers were *res nullius,* and this doctrine seems to have been finally adopted by the French courts(3).

Two very instructive notes to the cases cited shew how reluctantly the text-writers accepted this jurisprudence; but finally, in 1898, the doctrine propounded by Laurent, Daviel and Championnière prevailed, and legislation introduced in that year set at rest the long standing controversy in France. See "Loi du 8 avril, 1898," article 3 of which reads:

Le lit des cours d'eau non navigables et non flottables appartient aux propriétaires des deux rives.

In a note to the judgment rendered in 1846, Mr. Deville says(2):

La cour de cassation résout ici, pour la première fois, une question depuis longtemps controversée entre les jurisconsultes et qui, chaque fois qu'elle se présente, y est un sujet de grave perplexité.

* * * * * * * * *

L,arrêt que vient de rendre la cour mettra-t-il un terme à ce long débat, et fixira-t-il la jurisprudence? Il est permis d'en douter. Il est même remarquable qu'au moment où cet arrêt est rendu apparaît un ouvrage de l'un de nos plus savants jurisconsultes, ayant pour objet d'établir la thèse contraire à celle que vient de consacrer la cour suprême. Dans cet ouvrage intitulé "De la propriété des eaux courantes," etc., et appelé, nous n'hésitons pas à le dire, à faire sensation dans la science, l'auteur, M. Championnière, se livre

(1) Vol. 6, p. 25, no. 15. (2) S.V. 1846, 1. 433.
(3) See S.V. 1865, 1. 109.

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à une étude approfondie de l'état de la propriété foncière en général, et en particulier de celle des cours d'eau, sous l'empire de notre ancien régime féodal et des institutions seigneuriales, pour en faire ressortir la solution de la question qui nous occupe, et il en arrive à cette conclusion, qui nous semble irrésistible, qu'en France la propriété des rivières non navigables ni flottables n'a jamais appartenu au domaine, ni aux anciens seigneurs; qu'elle a toujours appartenu aux riverains; que, par conséquent, l' abolition du régime féodal n'a pu la transmettre à l'état; et qu'enfin, soit la législation intermédiaire, soit le code civil, l'ont laissée, comme elle l'avait été de tout temps, dans le domaine privé des particuliers.

In the Province of Quebec this question was the subject of judicial examination and decision by the special court established under the Seigniorial Act of 1854; and Sir Louis LaFontaine in his judgment(1) goes into the whole subject at great length. In the result it was held, in accordance with the earliest French decisions, that the beds of rivers floatable only for loose logs were not part of the Crown domain, but passed by the King's grant to the seignior and from the latter by subinfeudation or *accensement* to the *censitaire*. (See 70, 71, 72*a*, Vol. A, Quest. Seig.; and opinions of Day J., p. 50(*e*), Mondelet J., p. 34(*g*), Smith J. 80(*f*), and Meredith J., p. 79(*h*), Vol. B, Quest. Seig.)

At page 80(*h*), after a careful examination of all the authorities, Meredith J. states his conclusions as follows:

> There has been much controversy as to whether under the *code civil* (Code Napoléon) even unnavigable rivers are susceptible of being private property; but whatever doubts may exist as to the bearing of the modern law of France on this subject, it is indisputable that, before the revolution of 1789, unnavigable rivers in France were *universally* held as private property, subject to certain easements and servitudes in favour of the public, and that the state did not pretend to have any right of ownership therein.

And at page 81(*h*) he adds:

(1) Vol. A, Quest. Seig. p. 34*a*.

It appears to me to be clear that when the King of France made grants of lands in Canada the unnavigable rivers within the limits of the lands so granted were included in the grants.

It is needless however to dwell upon this point, as it is admitted both by the counsel for the seigniors and by the counsel for the Crown.

This principle admitted, as this eminent judge says, by all the great lawyers engaged in that case, and accepted by the thirteen judges who sat in the court as a legal axiom, would appear to me to be conclusive on the point we are considering. It is not contended, and no such contention could be successfully maintained, that the law has been changed by the Code. If the river is not floatable, as found by the trial judge (and there is no dispute as to the facts); and conceding, as stated by Meredith J., that by the King's grant the bed of the river passes to the grantee, *cadit quæstio* and the plaintiffs must succeed. In this view it is immaterial whether the lands in question were situated within what was called "le Canada seigneurial" or were granted by the King directly "en franc et commun soccage." In either case the beds of the unnavigable rivers—giving to the word "navigable" its widest and most comprehensive meaning as including floatable—contained within the limits of the lands so granted were included in the grants.

If after fifty years this principle of French law, so accepted by this great body of jurists as settled beyond controversy, is now to be upset, I must be content to say (paraphrasing and adapting the language of Mr. Justice Girouard in *Consumers Cordage Company* v. *Connolly*(1), at page 310), that I cannot disregard the opinions of these great jurists, three of whom subsequently drafted the Quebec Code; and

(1) 31 Can. S.C.R. 244.

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that if I did entertain a different view from theirs I would hesitate to express it, in view of the fact that it has within the last few months on two different occasions been re-affirmed and acted upon by the highest court of appeal in the province, composed of men specially trained in the principles of the law by which we must be guided in this case.

The court of appeal for the Province of Quebec in *Boswell* v. *Denis*(1), held that rivers non-navigable (*non navigables et non flottables*) are the property of the riparian proprietor who has the exclusive control of the same. The Chief Justice, Sir Louis LaFontaine, disposes of the question without distinguishing as to whether the lands through which the river flows were seigniorial or not, in these words:

It has been clearly proved that the river is neither navigable nor floatable; this being proved, the appellant has admitted having fished in it, on the side of and opposite to the respondent's property; and by the decision of the seigniorial court it is held and decided that rivers *non navigables et non flottables* belong to the riparian proprietors, the judgment of the court below must, therefore, be maintained.

This judgment, rendered in 1859, has never been reversed, nor, so far as I have been able to find, questioned. Article 400 of the Civil Code, promulgated in 1866, is not given as new law and reproduces article 538 of the Code Napoléon. It is to be borne in mind that the Quebec Civil Code and the Code Napoléon both proceed on the general principle that all property is private, and that to this general principle, articles 400 C.C. and 538 C.N. are exceptions. Laurent, Vol. 6, no. 16, makes this so clear that I cannot resist the desire to quote what he says:

16. Le Code Napoléon contient un chapitre spécial sur les biens dans leurs rapports avec ceux qui les possèdent, c'est-à-dire sur la

(1) 10 L.C.R. 294.

division des biens considérés quant à la propriété, car ce chapitre est le troisième du titre ler., intitulé "De la distinction des biens." Or, il n'y a qu'une seule classification dans le dit chapitre; il y est question de biens appartenant à des particuliers et de biens n'appartenant pas à des particuliers (art. 537). La loi prend soin d'énumérer les biens qui n'appartiennent pas à des particuliers, ce sont les biens du domaine public et les biens communaux. Tous les autres biens sont donc propriété privée. En d'autres termes, le domaine privé est à l'égard du domaine de l'Etat et des communes, ce que la règle est à égard de l'exception. Le domaine privé est certes la règle; nous avons déjà dit que c'est par nécessité que le législateur enlève une certaine partie du sol à l'exploitation des citoyens, toujours plus active et plus profitable que celle de l'Etat. Dès qu'il n'y a pas de nécessité publique en cause, les biens doivent rester dans le domaine des particuliers. Ce principe suffit, nous semble-t-il, pour décider la question. L'article 538 place dans le domaine public de l'Etat les fleuves et rivières navigables ou flottables. Cela implique d'abord que les cours d'eau non navigables ni flottables ne sont pas une dépendance du domaine public; sinon les mots *navigables* ou *flottables* de l'article 538 n'auraient pas de sens. L'article 644 est conçu de la même manière; il porte: "Celui dont la propriété borde une eau courante, autre que celle qui est déclarée dépendance du domaine public par l'article 538, peut s'en servir * *" Il y a donc une distinction; les cours d'eau navigables appartiennent à l'Etat; les cours d'eau non navigables ne lui appartiennent pas.

The question as to which the French text-writers and the courts were mainly divided, namely, as to whether the bed of a river, such as the Chaudière, was *res nullius,* does not seem to have ever been considered in Quebec; and it was not argued here nor decided by the judges below.

All the commentators of the French Code and the Cour de Cassation agree in distinguishing rivers floatable for rafts (*flottables en trains*) from those floatable only for loose logs (*flottables à bûches perdues*); and I can see no reason why the distinction which they make should not be applicable to the words used in the same connection in our Code, which is copied from the French. At the time the Quebec law was codified the word *"floatable"* had acquired a well defined and well settled meaning; and the reasonable

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presumption is that the well settled interpretation of the words was adopted with the words themselves by the codifiers. I have carefully examined all the cases decided before and since the Code to which my attention has been drawn, and if there are any in the Quebec court of appeal that in any way affect the holding in *Boswell* v. *Denis*(1), I have not been fortunate enough to see them. The only other case in which the question raised here was formally decided since the Code by the court of appeal is *Turcotte* v. *Laferrière Lumber Co.*(2), and in that case *Boswell* v. *Denis*(1) was followed.

Mr. Justice Bossé, in his notes, examines a great number of cases relied on by the appellant, such as *Hurdman* v. *Thompson*(3); *Tourville* v. *Ritchie*(4); *Pierce* v. *McConville*(5); *Laurin* v. *Charlemagne, etc., Lumber Co.*(6); *Bell* v. *Corporation of Quebec*(7); *McBean* v. *Carlisle*(8), and *Bourque* v. *Farwell*(9), in several of which he himself sat, and comes to the conclusion that they are not applicable to the point raised in this appeal. All of them, except *Hurdman* v. *Thompson*(3), refer to obstructions such as wharves, booms, dams and bridges which interfere with the free use of the waters of non-navigable and non-floatable streams. In *Hurdman* v. *Thompson* (3), the principal question at issue was as to whether the Ottawa River, because of the natural obstacle created by the Chaudière Falls, was to be considered, at that point, a navigable and floatable river.

(1) 10 L.C.R. 294.
(2) Beaubien, 290.
(3) Q.R. 4 Q.B. 409.
(4) 34 L.C. Jur. 312.
(5) 5 Rev. de Jur. 534.
(6) 6 Rev. de Jur. 49.
(7) 7 Q.L.R. 103.
(8) 19 L.C. Jur. 276.
(9) 3 R.L. 700.

In effect these cases, as also *Oliva* v. *Boissonnault* (1), and *Reg.* v. *Patton*(2), decide that there can be no interference with the rights of the public to the free use of the waters of a navigable or floatable river, including rivers floatable only for loose logs, except under legislative authority.

It is to be observed that Mr. Justice Bossé delivered the principal judgment in *Hurdman* v. *Thompson*(3), and Mr. Justice Larue, the trial judge in this case, delivered the judgment, which this court subsequently maintained, in the Moisie River Case (*Attorney-General of Quebec* v. *Fraser & Adams*(4)).

In *McBean* v. *Carlisle*(5), there is an expression of opinion by Dorion C.J. that might have some bearing on the question at issue; but that eminent judge, with characteristic reserve, added that the distinction between rivers that are floatable or navigable and those that are not was of no importance in that case, where it was not necessary to decide as to the ownership of the river, and whether or not it was private property.

The text-writers on the Quebec Code, Langelier and Mignault, both maintain that rivers that are floatable only for loose logs do not form part of the Crown domain and belong to the riparian owner. (2 Langelier, p. 130; 2 Mignault, p. 458.)

In conclusion, I must say that a careful examination of the authorities has convinced me that by the law of the Province of Quebec the plaintiffs, as owners of the soil on both sides of a stream floatable only for loose logs are owners of the soil that forms the bed of the stream, and as such are entitled to bring this action. In so holding, I do not for a moment

(1) Stu. K.B. 524.
(2) 11 R. Jud. Rev. 394.
(3) Q.R. 4 Q.B. 409.
(4) 37 Can. S.C.R. 577.
(5) 19 L.C. Jur. 276.

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question the right that the public have to all the advantages that a river, in its natural state, and its banks can afford to the public; and there is no difference in that respect whether the river is navigable or not, floatable or not. (Municipal Code, 868, 891; *McBean* v. *Carlisle*(1), *per* Dorion C.J., at page 278; *Tanguay* v. *Price*(2).)

It is generally admitted by the text-writers that grants made under the old seigniorial system in France conveyed special rights to the grantee in the non-navigable rivers in the lands granted.

Fuzier-Herman, vbo. "Rivières," no. 128:

> Dès avant 1898 la propriété du lit des rivières non navigables, déniée en principe aux riverains par la majorité de la doctrine et de la jurisprudence antérieurs à 1898, (v. *supra* no. 99) leur était accordée dans des circonstances exceptionnelles; quand elle résultait de titres spéciaux constitués avant la mise en vigueur du code civil. Ainsi la propriété du lit d'un cours d'eau pouvait être valablement attribuée à un particulier par la concession d'un seigneur haut-justicier consentie avant 1789.

(And see Dalloz, 1866, 1, 391.)

I assume that if in this case it had been satisfactorily proved that the plaintiffs' lands were included within the limits of the Lauzon Seigniory, and had been conceded previous to 1854, as appears probable by the titles alleged, then there could be no doubt that the riparian proprietor by his grant would be owner of the bed of the stream; but although the well-known rule under the old French law *"nulle terre sans seigneur"* created a presumption that until a title to the contrary was produced, all lands were held under the seigniorial tenure, *Wilcox* v. *Wilcox*(3), at page 14, I do not in my view of the case deem it necessary to

(1) 19 L.C. Jur. 276. (2) 37 Can. S.C.R. 657.
(3) 2 L.C. Jur. 1.

do more than suggest this additional reason why we should not disturb the judgment of the court of appeal.

The "Seigniorial Act," 18 Vict. ch. 3, sec. 16, sub-sec. 9, enacts that the decision to be pronounced on each of the questions submitted to the court shall in any case thereafter to arise be held to have been a judgment in appeal *"en dernier ressort"* on the point raised on such question in a like case by other parties; and that court has, as has been pointed out, held that by the King's grant the property in the bed of a non-navigable and non-floatable stream passes to the seignior and by his concession to the *censitaire.* If, therefore, the River Chaudière, situate within what was formally called Seigniorial Canada, is not a navigable and floatable river within the meaning of article 400 C.C., and on this question of fact there are the concurrent findings of two courts, the bed of the river is declared by a final judgment, from which there is no appeal here, to have passed out of the Crown domain by the King's grant.

I would dismiss the appeal with costs.

GIROUARD J. (dissenting).—The question raised by this appeal has nothing to do with the improvements which a riparian proprietor can make on a river or water-course. It does not affect, either, the right which the public, in the Province of Quebec at least, has to use any river, whether navigable or floatable, or the banks thereof, for the floating and conveyance of all kinds of timber and for the passage of all boats, ferries and canoes, subject to certain obligations and restrictions enacted by competent authority. All these rights have been secured by several

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statutes to which we simply refer; 14 & 15 Vict. ch. 102; 20 Vict. ch. 40, sec. 23 (1860), c. 26, s. 2; Revised Statutes of Quebec (1888), arts. 5535, 5551; R.S.C., 1906, ch. 115.

Likewise, it is immaterial whether the appellant has encroached upon the Chaudière River and its banks by piers, booms or other constructions. The principal and the only question, in this cause, is whether that river is floatable within the meaning of article 400 of the Civil Code, and consequently forms part of the domain of the Crown. If it is plaintiff's action must be dismissed, as it has not been taken by the Attorney-General who alone can represent the Crown, and no claim is made for special damage. *Brown* v. *Gugy*(1); *Bell* v. *City of Quebec*(2). If it is not the respondent must succeed.

Article 400 C.C., corresponding to article 538 of the Code Napoléon, says:

> Roads and public ways maintained by the state, navigable and floatable rivers and streams and their banks, the seashore, lands reclaimed from the sea, ports, harbours, and roadsteads and generally all those portions of territory which do not constitute private property, are considered as being dependencies of the Crown domain.

Navigable and floatable rivers are also mentioned in articles 420, 425, 426, 427 and 567 C.C.

These rivers are called public rivers, because at common law they are subject to a servitude or easement in favour of the public to navigate or float over the same which can be interfered with only by the legislative authority. See *Re Provincial Fisheries* (3).

What is a floatable river within the meaning of

(1) 11 L.C.R. 401; P.C. 14 L.C.R. 213.

(2) 5 App. Cas. 84; 7 Q.L.R. 103.

(3) 26 Can. S.C.R. 444, at p. 549.

article 400 of the Code? That is the question involved in this appeal. Respondents rely upon the old French laws. But were they ever in force in Canada?

I agree with Mr. Justice Lavergne, who has dissented from the majority of the court, that the regulations which heretofore or now prevail in France to determine the character of a river are not suitable to this country. Mr. Justice Bossé in this case starts with the proposition that, as our Code is worded like the French Code,

> les sources du droit français, comme les commentateurs du Code Napoléon, doivent nous servir de guides.

This is a very different rule from that he laid down in *Hurdman* v. *Thompson*(1). He said in the latter case, and I quite agree with him:

> Notre ancienne législation sur cette matière est incomplète et assez incertaine.
>
> Toutes deux procédaient d'un état de choses entièrement différent de celui que nous avons en ce pays.
>
> Loisel nous dit que les grosses rivières ont, pour le moins, quatorze pieds de largeur; les petites, sept; et les ruisseaux, trois et demi. Inst. liv. 2, tit. 2, règle 8.
>
> Il nous serait difficile d'appliquer au Canada une règle de cette nature, et l'on voit comment, le point de départ étant différent, nous devons, à défaut d'une législation précise, donner relativement peu d'importance aux opinions d'auteurs qui ont écrit au sujet d'un état de choses autre que celui qui nous régit.

For the same reason, in the provinces governed by the English common law, and more particularly in Ontario, the judges have refused to apply the rules of that common law to several rivers and lakes of this country. *The Queen* v. *Robertson*(2), at p. 129; *Re Provincial Fisheries*(3), at pp. 520, 553, 555. In England, navigable or public rivers are only those where

(1) Q.R. 4 Q.B. 409, at p. 433. (2) 6 Can. S.C.R. 52.
(3) 26 Can. S.C.R. 444.

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the tide is felt, but this rule does not generally prevail on the continent of America.

The reasons and authorities quoted by the learned dissenting judge have so convinced me of the soundness of his conclusions that I could content myself with referring to his judgment, and in fact I had prepared in a few words merely my concurrence in it; but, as there is diversity of opinion in this court and the case is important, I think it is proper that I should express my views more fully. I will, therefore, offer a few observations upon the word "floatable" which is to be found in article 400 of the Civil Code, and also upon the jurisprudence of France and of Quebec upon the same subject, both before and since the Quebec Code (1866).

It is contended that, as article 400 does not define what floatability means, we should consult the laws and decisions in force before the Code, especially the old French commentators, statutes and ordinances.

The ordinance of 1669, tit. 27, art. 41, for the first time provided that only rivers

portant bateaux de leurs fonds, sans artifices et ouvrages de mains,

form part of the Crown domain. Mr. Justice Bossé, who disregarded this ordinance in the *Hurdman Case* (1), for want of registration, is now willing to apply the same, as, in his opinion, it merely embodies the common law existing at the time of the creation of the Superior Council. With due deference, I cannot agree to this historical proposition. On referring to Guenois, *Conférence des Ordonnances,* Vol. 3, p. 319, and following, and the collection of Isambert, *Anciennes lois françaises,* especially the ordinances of 1415, 1520, 1570, 1577 and 1583, relating to forests and

(1) Q.R. 4 Q.B. 409.

streams, it will be found that the distinctions of the ordinance of 1669, arts. 43 to 46 as to floatable rivers, had no existence whatever before that time, for the simple reason that *flottage* was almost unknown. As Daviel remarks, Vol. I. p. 35, *"le flottage des bois,"* the floating of wood is not very ancient; it was first practised in 1549 by one Jean Bouvet who, I have read elsewhere, conveyed to Paris fire wood, *"bois de chauffage,"* and undoubtedly for that reason was called *"flottage à bûches perdues,"* or loose stumps. The King's declaration of the 15th July, 1572, refers in its title to *"rivières navigables et flottables,"* but in the text only to the

grands fleuves et rivières et autres qui fluent et descendent en icelles. 14 Isambert, 252.

In several statutes we find what is meant by these grand rivers; they were La Seine, Loire, Garonne, Marne, Dordogne and others like them and their tributaries whether navigable or not. Edit of April, 1683; arrêt du conseil, 10th August, 1694; 19 Isambert, 425; 20 id. 226. If these laws—which were made applicable not only to the kingdom but also to every French possession—had been registered in Quebec, our task in this case would have been an easy one. The Chaudière and all the tributaries of the St. Lawrence would be part of the Crown domain like that great river, larger than all the navigable rivers of France put together.

The ordinance of 1669, like the Civil Code, used the expressions "navigable" and "floatable" as if they meant the same thing, and say nothing of *"flottage à bûches perdues."* But the ordinance of December, 1672, has done so, at least impliedly, by providing (ch. 1st. art. 1) and following, for the free naviga-

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tion and passage of *"bateaux et trains de bois,"* etc. Finally, Daviel, Vol. I., page 33, adds that an order of the Royal Council passed on the 9th November, 1694, with regard to the River Garonne *"aux lieux où elle est navigable par bateaux ou radeaux"* clearly indicates what the legislator meant by the words *"navigable et flottable."* This order in council is summarized by Isambert, Vol. 20, p. 232, in these words:

> Arrêt du conseil qui juge que ce n'est point par la force des bateaux que l'on doit juger si les rivières sont navigables, mais seulement par la navigation qui s'y fait, et en conséquence ordonne que les propriétaires des îles, îlots, dans l'étendue des rivières navigables, tant par bateaux que par radeaux, notamment des rivières de Garonne et de l'Aude, aux endroits où elles portent bateaux ou radeaux seront, * * * etc.

These old laws were in force in France at the time of the promulgation of the Code Napoléon, and it was first thought that they had been repealed by the Code. By a decision of the 6th November, 1820, the French Minister of Finance declared that all floatable rivers without any distinction were part of the public domain and were capable of being licensed by the government for fishery purposes, but an order of the State Council, which was the competent authority to declare when a river was navigable or floatable, made on the 21st February, 1822, added that this was true only with regard to rivers floatable for rafts or *radeaux,* and that the rivers or *ruisseaux* floatable only *à bûches perdues* did not form part of the public domain. The same rule had already been adopted by the administration on the 38 *pluviose, an* XIII., and last by the legislature on the 15th April, 1829, when providing for river fisheries.

We can easily conceive that the jurisprudence of the French courts, commentators and text writers has been altogether influenced by the text of these enact-

ments, and I cannot conceive that they can be considered as safe guides in Lower Canada. Laurent, Vol. 6, n. 12, tells us that, were it not for the old laws, no distinction between floatable rivers would be made. After laying down the rule with regard to the floating of rafts, he says:

En est-il de même quand le flottage se fait à bûches perdues, c'est-à-dire lorsque les rivières flottent du bois bûche à bûche? Si l'on s'en tenait au texte du code, il faudrait répondre affirmativement; en effet, l'article 538 ne distingue pas les deux espèces de flottage; or, dès qu'une rivière flotte du bois, elle est flottable. L'administration a soutenu cette opinion en France, mais ses prétentions ont été rejetées par le conseil d'état, et la jurisprudence des tribunaux ainsi que la doctrine se sont prononcées dans le même sens. L'opinion générale se fonde sur la tradition.

Then Laurent speaks of the

chaos d'opinions et dans la doctrine et dans la jurisprudence

with regard to rivers which are neither navigable nor floatable. Sir L. H. LaFontaine, in his admirable opinion in the Seigniorial Court, page 332*b* of the report, has enumerated five different systems having each quite an array of supporters, to which many more can be added, who came to light since the learned judge delivered his judgment in 1856. This controversy does not interest us, for it is a well settled rule with us that under the Code those rivers are the property of the riparian proprietors to the middle of the stream. Laurent concludes by observing that more uniformity of opinion would exist

si l'on s'attachait au texte et à l'esprit de la loi au lieu de se laisser influencer par l'ancien droit.

If it be true that the modern French classification of rivers is founded merely upon tradition, what is to be said of the Quebec jurisprudence? Here we have no old laws. The ordinances passed before the crea-

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tion of the Superior Council, in 1663, speak only of navigable rivers, without defining what they were and without requiring that the floatable ones should be *"portant radeaux de leurs fonds"*; this was done only afterwards. Not a line, not even a word can be found in the *Edits et Ordonnances* in force in La Nouvelle France, after 1663, respecting rivers, either in the Royal Edits and Declarations or the *ordonnances et arrêts* of the Council or the decisions of the intendants, or in the *Jugements et Délibérations du Conseil Supérieur,* recently published, or in Perrault's *"Précédents."* Not one of the laws above mentioned was registered by the Council or is even alluded to anywhere. The enactment of the ordonnance of 1669 was in this respect new law which all the commentators invoke in support of their doctrine. In Canada, till the promulgation of the Civil Code in 1866, there was, therefore, no written law respecting the classification, ownership or regulation of rivers. Perhaps the policy of the then French Government was the same as today; for at least three-quarters of a century in all the French colonies, all rivers without distinction form part of the public domain.

Few cases came before the courts of Lower Canada, and it is curious to see how they were dealt with. For a period extending from the time of the cession until 1810, we have no report of the decisions of our courts. In 1811, Pyke's reports of one term of the King's Bench, during that year, were published and later on appeared the *Revue de Législation* by Lelièvre et Angers, in three volumes covering the years from 1845 to 1847, and also a digest of cases from 1807 to 1822; and it is a remarkable fact that not a single case concerning rivers is reported. It may safely be said

that the first river cases will be found in Stuart's Reports, in one volume, published in 1834-35 and were decided at different periods from 1810 to 1835.

The first is *Fournier* v. *Oliva*(1), decided in 1830. Held in appeal that the banks of navigable rivers belong to the riparian proprietor, subject to a servitude in favour of the public for all purposes of public utility. Reid C.J., said:

> By the Roman law, the banks of navigable rivers belonged to the proprietors of the lands adjoining such rivers; and previous to the ordinance of 1669, no statutory law in France, to the contrary, could be found.

If this decision truly states the old law of Lower Canada, it is evident that our Code, article 400, has not adopted it.

In *Oliva* v. *Boissonnault*(2), decided in appeal in 1833, at page 564, Chief Justice Reid says:

> The waters of all rivers, whether navigable or not navigable, being matters of public benefit and public interest, are vested in the Crown.

In the case of *St. Louis* v. *St. Louis*(3), decided in 1834, and in 1841 by the Privy Council(4), the question of *flottage* is not even alluded to and for that reason it is of no value for the determination of this appeal.

In *Oliva* v. *Boissonnault*(2), in 1834, at page 525, Sewell C.J. said:

> It may, I think, be received as a general principle, that the public have a right to all the advantages, suited to public purposes, which the *natural state of a river* affords, and that no change can be effected in the state and condition of a river, which does afford such advantages, unless some greater degree of convenience is thereby obtained for the public.

(1) Stu. K.B. 427.
(2) Stu. K.B. 524.
(3) Stu. K.B. 575.
(4) 3 Moo. P.C. 398.

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Here the learned judge relies upon an English case, that of Lord Grosvenor reported in Starkie, Vol. 2(1). Then the learned Chief Justice continues:

> Accordingly, in the law of France, navigable rivers have always been regarded as public highways and as such dependencies of the public domain; and floatable rivers (*rivières flottables*, as they are there termed) have been viewed in the same light. In every river which is navigable for boats or larger vessels, and in every river which is floatable, that is capable of floating logs or rafts, the public, as in England and in America, have an easement or legal servitude. * * * The evidence in this case may not be sufficient to shew that the River St. Thomas is a *rivière navigable*. But the fact that the logs floated down the stream from the plaintiff's land to the defendant's and were there stopped in their progress towards the St. Lawrence by the boom which the latter has constructed, proves it to be a *rivière flottable*, and judgment, therefore, must be entered up for the plaintiff.

Here the learned judge refers to *l'ordonnance* of 1669. This decision shews that before the Code the highest court of Lower Canada gave to the word "floatable" its widest sense.

Next comes the decision of the Seigniorial Court rendered in 1856, which by the Seigniorial Act, 18 Vict. ch. 3, sec. 9, was declared to be final and binding. At pages 71*a* and 131*a*, the court held that "*rivières, ruisseaux et autres eaux courants*," not navigable or floatable, are the property of the seigniors and not part of the public domain. But nowhere does the court undertake to define what is navigable or what is floatable. Likewise, Chief Justice LaFontaine, who seems to have been the leading spirit of that court, says that those rivers are private property, without, however, giving any definition whatever (p. 331*b*).

I am not aware of any decision supporting the distinction between floatable *à bûches perdues* or by rafts, except *Boswell* v. *Denis*(2), decided in 1859 by

(1) *Rex* v. *Lord Grosvenor*, 2 Stark. 511.

(2) 10 L.C.R. 294.

LaFontaine C.J., Aylwin, Duval, Meredith and Mondelet JJ. The report is very meagre, the opinion of the Chief Justice covering only six or seven lines. He refers us to the decision of the Seigniorial Court. But that court never defined what floatable means. None of the judges even mentioned that the Jacques Cartier River, in question in the case, was only floatable *à bûches perdues*. In this respect, we have only the word of the reporter, who says that Mr. Justice Chabot, who had rendered the judgment in the court below, had clearly found that that river was in that condition. Mr. Justice Aylwin, one of the ablest judges that adorned the bench of Lower Canada, dissented, observing that

> the judgment of the court below is an exceedingly dangerous one by declaring such a river as the Jacques Cartier *non flottable* and vesting the property of it in the seignior or riparian proprietor.

These decisions form the whole jurisprudence of Quebec before the Code, with the exception of a few which were rendered by a single judge in the Superior Court, and are all in the sense of *Oliva* v. *Boissonnault*(1). See *Chapman* v. *Clark*(2), in 1858, *per* Short J; *Joly* v. *Gagnon*(3), in 1859, Chabot J.; and I cannot understand that it can be said that it is favourable to the respondents' contention.

The decisions under the Code are numerous and generally do not agree with *Boswell* v. *Denis*(4). They have been pronounced in every court, from the Superior Court to the court of review and the court of appeal. I will merely indicate those rendered by a single judge in the Superior Court. First, *Béliveau* v. *Levasseur*(5), in 1863, Pollette J.; *Laurin* v. *Char-*

(1) Stu. K.B. 524.
(2) 8 L.C.R. 147.
(3) 9 L.C.R. 166.
(4) 10 L.C.R. 294.
(5) 1 R.L. 720.

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lemagne & Lake Ouareau Lumber Co.(1), in 1899, de Lorimier J., both in favour of the appellant's contention; and *Geoffray* v. *Beausoleil*(2), in 1886, Papineau J., against it.

I find three decisions in review, one, and the first, of no value, and the other two in favour of the appellant. The first is *Kerr* v. *Laberge*(3), decided by Routhier J. in 1886, and confirmed in review by Caron, Andrews and Larue JJ. The report is very short; in fact we have only the head-notes, one of them being that the banks of navigable rivers belong to the riparian proprietors, subject to a certain servitude of passage, as was decided in the case of *Fournier* v. *Oliva* (4), which is quoted as an authority. This decision is clearly against article 400 of the Civil Code and *Morin* v. *Lefèvre*(5).

The two decisions in favour of the appellant are *Bourque* v. *Farwell*(6), in 1871, Berthelot, Mackay and Beaudry JJ., and *Atkinson* v. *Couture*(7), in 1892, Casault, Routhier and Caron JJ. In the first case, Short J. had decided in the first court, at Sherbrooke, that a branch of the River Nicolet was a floatable river for logs, *à bûches perdues*, "and, therefore, a highway appertaining to the public domain." In review this judgment was confirmed, the court holding

that a river floatable only at a certain season of the year comes *under* the general rule.

We are now coming to the jurisprudence of the

(1) 6 Rev. de Jur. 49.
(2) 9 Leg. News 402.
(3) 14 Leg. News 26.
(4) Stu. K.B. 427.
(5) 1 Rev. de Leg. 354.
(6) 3 R.L. 700.
(7) Q.R. 2 S.C. 46.

court of appeal. The first case is *King* v. *Ouellet*(1), in 1885, Dorion C.J., Monk, Tessier, Cross and Baby JJ., in which the question of ownership of a floatable river for loose logs was not discussed, not even raised. The whole decision turned upon a question of negligence. However, there is a *dictum* of the court that such a river is a private river, which is referred to in *Ward* v. *Township of Grenville*(2), another case where the question was not involved.

In the cases of *Pierce* v. *McConville*(3), Mr. Justice deLorimier has decided that floatable rivers at all times, or at certain periods only, were part of the public domain, and this decision was unanimously confirmed by the Court of Review, in 1899, and is quoted with approbation by Mr. Justice Ouimet, speaking for the court of appeal(4). It was remarkable that the river in this case was one floatable only for loose logs.

Finally, there is the case of *Hurdman* v. *Thompson*(5), which is not of much importance here, except on one point, namely, that a river may be navigable or floatable notwithstanding that its course is interrupted in many places by falls or rapids. It may not be without interest to note that the learned judges were of opinion that the enactment of the ordinance of 1669, quoted above, declaring navigable rivers only those

portant bateaux de leurs fonds, sans artifices ni ouvrages des mains,

was new law.

It cannot be asserted that the jurisprudence in

(1) 14 R.L. 331.
(2) 32 Can. S.C.R. 510.
(3) 5 Rev. de Jur. 534.
(4) Q.R. 12 K.B. 163, at p. 168.
(5) Q.R. 4 Q.B. 409.

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Quebec is so uniformly in favour of the respondent that it is almost binding upon us, according to the rules laid down by Rivière, *Jurisprudence de la Cour de Cassation,* p. 64 and following, where the whole subject of the authority of *arrêts* is discussed. I believe it is quite the other way. But suppose there was any doubt as to that point, which I do not entertain, I think that article 400 of the Civil Code contains rules on the subject complete in themselves which are binding upon us, and cannot be controlled by the pre-existing laws. This is the principle laid down by the Privy Council in *Abbott* v. *Fraser*(1), in 1874. That article makes no distinction whatever between the two kinds of floatable rivers, and I do not see why we should make any. If that was the old law, it has evidently been repealed by implication. I wish to base my conclusion upon that article of the Code and nothing else.

Floatable must mean something different from navigable, for if it means the same thing, then one of the two words is unnecessary. Navigable is intended to refer to craft that require the direction of man and carry a crew. It comprises rafts as well as vessels, because rafts need the management of men on board. They float, it is true, but every vessel does. The words "floatable" and "navigable" are coupled together to provide for two distinct situations, first the floating of vessels and rafts, which is navigation; and second the floating of loose logs and pieces of timber, which is *flottage,* and is generally done in this country by gangs of men called "drivers"; otherwise the word "floatable" would have no sense. Daviel, Vol. I., p. 32, says:

(1) L.R. 6 P.C. 96.

Dans l'acceptation la plus étendue du mot, on comprend parmi les rivières navigables celles qui sont flottables en trains, parce que c'est là une espèce de navigation. Les trains se meuvent à l'aide de moyens analogues à ceux qu'emploient les bateaux, le halage, la voile, la rame, le gouvernail, et c'est ainsi que s'exprimaient les anciennes ordonnances.

I do not mean to say that every floatable river is a public river and part of the Crown domain. I would put a limit, and that limit would be where public utility ceases. Any floatable river to which the public cannot have and has not any access is a private river. As Chief Justice Dorion properly remarks in the case of *Bell* v. *Corporation of Quebec*(1), it is not so much the volume of water that the river carries as the fact that its course is devoted to the public service, which gives it its legal character. This rule was also adopted by the Privy Council in the case of *Bell* v. *Corporation of Quebec*(2), and by our court in *Attorney-General of Quebec* v. *Fraser & Adams*(3). The Privy Council adds:

The French authorities evidently point to the possibility, at least, of the use of the river for transport in some practical and profitable way as the test of navigability.

This principle is also to be found in the *arrêt* of the State Council of France of the 9th November, 1694, quoted above, that it is not by reason of the force of the boats that we must decide whether a river is navigable or not, but only by the navigation which is therein carried on. I think the same principle should be applied to floatable rivers.

Whether a river is floatable or not is now a question of law and fact, but when the law will be settled, it will only be a question of fact.

(1) 7 Q.L.R. 103. (2) 5 App. Cas. 84.
(3) 37 Can. S.C.R. 577.

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The Chaudière River is admittedly one which the public can make use of, and has done so from time immemorial, running through a thickly populated country. It is more than 100 miles long, at many places several *arpents* wide, and during months, and at different seasons, is used to take down thousands, and it may be said millions, of logs and pieces of timber floating loosely, belonging to a large number of inhabitants, which supply a quantity of saw mills and others built along the shores of that river, some of the logs reaching even the River St. Lawrence below the property of the respondent, as Mr. H. M. Price testifies. Bouchette, in his Topography of Lower Canada, calls it a river of "considerable magnitude." The evidence shews that it is the grand artery of the lumber trade in that vast region of the country.

I have only one word to add, and that is with regard to the opinion of Canadian text-writers, or what is called *"la doctrine."* It can hardly be said that authors are numerous enough in this country to form what may be called public legal opinion, by writing books or articles in reviews. Leading lawyers seldom find the time necessary to write a law book. I have had the advantage of reading the judgment of our Chief Justice, and I have noticed that he relies upon the opinion of two of our Quebec text-writers. I am happy to say that, together with Mr. Beauchamp, they are recognized by all to have rendered great service to both the bench and the bar, but text-books of Canadian authors have rarely, if ever, received such a distinction in this court. I have seen several Chief Justices refuse to take any note of them, although for my part—and I am very glad to have this opportunity to put my views on record—I do not see why they should

not be cited, especially in Quebec cases, just as we quote the French commentators, dead or living. I have always expressed the view that we ought to get light wherever we can find it, either in the decisions of the courts or in the text-books, or reports of the framers of the Code, or even Parliamentary debates, a course which was denied during this and previous terms. This ruling is strictly in accordance with the practice prevailing in England, and to a limited extent in the United States, although in some cases we see quoted such standard books as those of Bacon, Coke, Hale, Story, Kent, and other jurists of equal eminence. Under the English system, decisions of courts alone constitute the authorities and a counsel or judge is expected to rely upon them alone, if they are of sufficient weight and can be supported by reason. In France and Quebec, on the contrary, a series of uniform decisions, approved by the commentators or *la doctrine,* forms what may be termed the jurisprudence of France, and on this subject I refer to an interesting dissertation by Rivière already alluded to. I thought, therefore, it was my duty to read what these Canadian law-writers said on the point under consideration, although in view of the decisions of the Quebec courts it can hardly be expected that their doctrine will be of much assistance.

Mr. Langelier (now Chief Justice of the Superior Court), who wrote his commentaries many years ago, as he tells us, for the students at Laval University, supports the case presented by the respondents. He does not cite, much less review, the decisions, observing in his preface that they are to be found in Beauchamp. And when we read the following passage as to what constitutes a navigable river, I do not

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think it is necessary to trouble ourselves about his opinion as to *flottage à bûches perdues:*

> Il ne suffit pas, pour qu'une rivière soit navigable, qu'on puisse y naviguer avec n'importe quelle sorte d'embarcation, par exemple, avec un canot ou une chaloupe, car alors toutes les rivières, à peu près, seraient navigables. Mais il faut qu'on puisse y naviguer avec des bateaux suffisamment grands pour qu'ils puissent servir au transport des passagers ou des marchandises.

Mr. Mignault, K.C., of Montreal, has expressed no opinion. The passage cited is not his own, but that of Mourlon, a French commentator, influenced, like all French jurists, by the old and the new French ordonnances and regulations. Mr. Mignault is only the Canadian annotator of Mourlon, and a foot note at the same page (458) gives us some idea of his opinion on the subject. Referring to the distinction between floatable rivers for rafts and loose logs, he says that it is based upon the order of the State Council of the 21st February, 1822, and the law of the 15th April, 1829, art. 1. He merely adds to that:

> Nous trouvons un arrêt conforme à cette doctrine dans le jugement de la cour d'appel dans la cause de *Boswell* v. *Denis* (1).

I have therefore come to the conclusion that the appeal should be allowed and the action and injunction dismissed with costs before all the courts.

DAVIES J.—The substantial question to be determined in this case was whether the rivers of Quebec which are floatable for loose logs only, in manner as used by lumbermen of the province in their business but not otherwise navigable, are "dependencies of the Crown domain" within the meaning of article 400 of the Civil Code of Quebec.

(1) 10 L.C.R. 294.

The words used in the article are "navigable and floatable rivers and streams and their banks" and the question came down to this:—Whether the use of the word "floatable" following the word "navigable" and conjoined with it extended the meaning and applicability of the word "navigable" to rivers and streams which were not navigable in the sense in which that word had been and is judicially interpreted; or whether the term "floatable" should be refused any distinctive meaning, and construed as synonymous with navigable.

Upon the determination of this question, depended the legal question of the ownership of the beds of the rivers which were not navigable but were floatable for loose logs.

If the word "floatable" was given the broader construction, namely, that it covered and included rivers and streams which were floatable only for loose logs in the manner used for the purpose of their business by lumbermen, then the river must be considered as being a dependency of the Crown domain. If, on the contrary, the jurisprudence of the Province of Quebec at the time of the enactment of the Civil Code had determined that this was not the true construction of the word, but that it meant when used in conjunction with rivers and streams, those rivers and streams only which were floatable for rafts of logs, or, in other words, rivers that were "navigable for commercial purposes" only and did not include rivers capable of floating loose logs only, though capable of doing that for lumbering and commercial purposes, then the beds and banks of these latter rivers were the property of the river proprietors on each side *ad medium filum aquæ*.

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There is much diversity of opinion upon the point in this court, and the Court of King's Bench itself was not unanimous.

But, after giving the different opinions and arguments my best consideration, I have concluded with some hesitation to concur with the Chief Justice and not to allow the appeal.

IDINGTON J. (dissenting).—For the reasons assigned in Mr. Justice Lavergne's dissenting judgment in the court below, I think this appeal should be allowed. I may be permitted to adopt it entirely, as I do, and yet to add a few words, in line with the reasoning it contains.

Inasmuch as the report of the case of *Boswell* v. *Denis*(1) shews, in its statement of facts, that the stream there in question had never been till then but once tested as to its floatability and that proving financially unsuccessful further trial was abandoned, and the learned trial judge having found it, notwithstanding this, floatable *à bûches perdues,* we are left to conjecture whether the majority of the court proceeded on the actual facts; or the trial judge's finding by way of legal interpretation of facts; or disagreed with his law on these facts.

Measuring floatability by its general public utility, I should have said, and I think it possible the learned judges whose opinions prevailed meant, that on the facts as there presented the stream was not floatable in any legal sense; and, therefore, I treat that case as quite consistent with the earlier cases and the view of many learned judges in later cases.

(1) 10 L.C.R. 294.

Nor can the adjudication of the special court passing on the rights of the seigniors in regard to navigable or non-navigable or non-floatable streams help us here.

The title here is not shewn by direct evidence to be derived from any such *seigneurial* right as these judgments upheld.

And, as my brother Girouard remarks, the judgments and the opinions of the learned judges referred only to the test of floatability, without saying or in any way indicating what the quality of that floatability was which they so sparingly refer to.

Were we to go beyond the direct evidence and rely on history, as one of the learned judges below does, and respondents' factum does, it would appear that respondents' title to the bed of the stream was doubly uncertain. The *seigneurie,* including the river, having become vested in the Crown about sixty years ago, there is nothing to shew that the Crown again parted with the river or its bed.

All we are shewn is that respondents presented a title that shews later conveyances (subsequent to such re-vesting) to it, of land on each side of the river by somebody, and that, after receiving the same, it presumed to erect a dam across the river, more than a year and a day before this action.

The conveyances are of lots set out by their boundary descriptions, of which the river appears, in part, to be a boundary, and by their lot number, on a cadastral plan referred to. Whether the conveyance includes more or not depends on the meaning of a clause that needs to be explained or joined to something not apparent.

This sort of description is not as satisfactory, as

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one would like to have to rely upon, for the application of the *ad filum aquæ* rule that carries a riparian title to the middle thread of the stream. Unless respondents can rest upon this rule they have no title.

Then the assertion of title by a possession, affected only by raising the water by a dam somewhere below, is a possession for a year and a day, which does not help as clearly as one might like.

I do not try to solve the questions arising out of either of these features of weakness in the respondents' title to the bed of the river. They were stoutly relied on by the appellant and claimed by him to be fatal to the respondents' case. Solution is needless from my point of view. I merely note them and pass on to say that this rule of ownership of land on either side of a stream carrying title *ad filum aquæ* will not in any case apply to any conveyance of land on either side of a stream which is either navigable or floatable and, hence, one of the dependencies of the Crown domain, unless that domain has been expressly granted by the Crown.

We are thus face to face with the question of whether or not this river is of either kind.

In other words, I feel I am, after much reading of authorities and the consideration of innumerable references, on the part of counsel and courts below, as well as of the learned Chief Justice here, and my brother Girouard here (all of which I have found most interesting), driven to and thus bound to find the meaning of the three words "navigable and floatable" in article 400 of the Code.

I have not found anything that requires me, as a matter of law, resting on canonical rules of construction or otherwise, to put upon these words, used as

they are in the connection in which they appear and in relation to the past history of the rights and duties they are designed to confirm and declare, anything but their plain and ordinary meaning.

That meaning includes a capacity to float logs *"à bûches perdues"* in a way to be serviceable as a public utility by the well known methods this river has served so long.

The absolute ownership of a private river that the alternative construction we are asked to place on those words implies, might deprive many of the right to float logs in a way so highly conducive to the public good.

We are told in argument, and I have observed it assumed in reported cases as a matter of course (and apparently assumed to exist quite independently of existing statutory provisions therefor), that the ownership of a private river was subject to such a public right of floatage. On what does it rest?

Is it supposed that the law *creating such a modern right* and imposing it on what had long before become private property in streams in France, had such an origin and such a character as to be as of course transferred to every French colony?

I am not concerned here to solve the problems thus suggested. I present them merely for consideration and to introduce what I am quite unable to understand in regard to respondents' view; that is this: Why, if it existed at the time of the codification and rested on some well known fundamental law that governed the whole of Quebec, was it not (if a servitude in favour of timbered estates, up-stream, for example) declared in the Code that so carefully and minutely provides for so very many servitudes of minor

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import? Why is it not defined and set forth anywhere else and traced to a source of custom or concession?

Why is it, even if not an ordinary servitude, but borrowed as some have said from the Roman law, left undefined?

Again, when providing for the many conditions and rights springing out of the action of rivers, such as accession in one way or another, or avulsion, was this condition of things left so completely unprovided for? So much ignored?

Can these questions be answered in any way but one? And is that one not simply this; that the word "floatable" in the many places used in the Code meant and was intended by the codifiers to mean either by rafts or loose logs. Practically every ordinary right of men to use, and ordinary use, of a river is thereby and by other provisions, covered or protected. In the converse way of dealing with the matter, I doubt it.

MACLENNAN J.—The only arguable question in this appeal appears to me to arise upon article 400 of the Civil Code, and that is, whether the River Chaudière, where it flows past the respondents' property, is floatable within the meaning of that article, and so is, with its banks, the property of the Crown, and not of the respondents as riparian proprietors.

The language of the article is that *"navigable and floatable rivers and streams and their banks"* are considered as being dependencies of the Crown.

It is admitted that the Chaudière is not navigable within the meaning of the article, and the contention is that it is floatable, because, during times of high water, saw-logs in very great quantities are floated

down to be converted into lumber at different mills along its course.

If the word "floatable" is construed in an absolute unqualified sense, it must be admitted that this is a floatable river. But, if so construed, then every river and stream, no matter how insignificant or turbulent, would be within the article, and the defining words would be unnecessary. This extreme construction of this article was not contended for, but it was insisted for the appellant that the river was within the article because of its capability of floating loose logs, as above mentioned.

The respondents, on the other hand, contend that the judgment is right in holding that the floatability intended by the article is of a much higher quality, and that a stream is floatable within the meaning of the article only when it is capable of floating logs in rafts or cribs, and not merely loose logs.

It is agreed that mere floatability will not do. Some line must be drawn, and the question is, where it is to be.

If this article were a new law, and to be construed for the first time, different minds might construe it in different ways, and some might well construe it as contended for by the appellant. But it is not a new law, and was not a new law when the Code was framed and confirmed by the legislature. It was inserted in the Code as an expression of what had always been the law of Lower Canada, derived from France, and it is identical with the article in the Code Napoléon.

This being so, we may not give to the words used the construction which it may seem to us, at the present time, they ought to receive, but must endeavour

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to ascertain what was the settled law of Quebec, before the enactment of the Code, and which the article was intended to express.

That being so, the reasoning of the learned Chief Justice, in his notes, and the authorities cited by him have convinced me that the line is properly drawn in the judgment appealed from so as to exclude rivers and streams floatable only for loose logs from being dependencies of the Crown.

I am, therefore, of opinion that the appeal should be dismissed.

DUFF J. concurred with the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Lane & Cantin.*

Solicitors for the respondents: *Drouin, Pelletier, Baillargeon & St. Laurent.*