*Privy Council Appeal No.* 186 *of* 1924.

The City of Montreal - - - - - - - *Appellants*

*v.*

The Harbour Commissioners of Montreal - - - - *Respondents*

The Attorney-General of Quebec - - - - - *Appellant*

*v.*

The Attorney-General of Canada - - - - - *Respondent*

*Privy Council Appeal No.* 185 *of* 1924.

J. L. A. Tetreault and others - - - - - - *Appellants*

*v.*

The Harbour Commissioners of Montreal - - - - *Respondents*

The Attorney-General of Quebec - - - - - *Appellant*

*v.*

The Attorney-General of Canada - - - - - *Respondent*

(*Consolidated Appeals.*)

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC. (APPEAL SIDE.)

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH NOVEMBER, 1925.

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*Present at the Hearing:*

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD SHAW.
LORD CARSON.
MR. JUSTICE DUFF.

[*Delivered by* VISCOUNT HALDANE.]

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These appeals were heard together. There are questions of law which are common to both, as well as issues of fact which present some analogies. It will be convenient to deal with the appeal of the City of Montreal in the first place, in a judgment which will extend to both appeals, but will be based on certain considerations which are materially different in the two cases.

The appeal of the City of Montreal is brought from a judgment of the Court of King's Bench of the Province of Quebec, which dismissed an appeal by the City from a judgment of the Superior Court, refusing its claim for a sum of $110,086.50, with interest and costs. The question disposed of related to the right of the City to recover from the Harbour Commissioners the expense it had incurred in changing the outlet of a sewer into the River St. Lawrence, an expense said to have been caused by the unlawful action of the Commissioners in erecting certain works on the bed and foreshore of the river, and the further expenses incurred as extras, due to alterations insisted on in the construction of the sewer by the Commissioners during the progress of the work done.

The questions of law which arose related, in part at least, to the effect of certain Dominion statutes purporting to vest the control of the Harbour of Montreal, as it has grown to be, in the Commissioners, and to extend the limits of the harbour so as to include the site on which the works in question are built. It was the questions of law so raised that occasioned the intervention of the two Attorneys-General. The judgments affirmed the substantial operation of the legislation of the Dominion Parliament, but it was held that this did not have the effect of vesting the property in the *solum* in the Crown in right of the Dominion Government.

In 1898 one Viau built in its first form the sewer already referred to on his own land, in accordance with a general drainage scheme approved by the town of Maisonneuve, in which it was situated. The sewer was cylindrical and was made of brick with a diameter of about four feet. It ran along the line of a street called First Avenue into the deep water of the river. Maisonneuve was a town on the Island of Montreal adjoining the city in the downstream direction. After the present litigation was commenced this town was incorporated with the City of Montreal, which was thereupon substituted as plaintiff in this action.

The respondents are a corporation which at the time of Confederation had control of the Harbour of Montreal, and the harbour as it then stood became, under the provisions of the British North America Act, the property of the Crown in right of the Dominion. At the date of Confederation the harbour terminated on the north side of the river at the point where a stream called the Ruisseau Migeon discharges into the St. Lawrence, and did not include the land beyond and lower down in question in this litigation. By 1901 Viau had parted with his sewer and the site of the street called First Avenue, and they have become the property of the City. The sewer has since then been connected with other sewers and drains under the control of the City.

In 1873 a Dominion statute of that year purported to extend the limits of the harbour down the river from Ruisseau Migeon, to a point opposite the church of the parish of Longue Pointe,

following the river along the high water mark and including the beach. In 1894 a later Dominion statute confirmed the boundaries as already established, and purported to vest the land within them in the Commissioners. By a Dominion Act of 1909 the harbour was vested in the Commissioners as a corporation. In 1914 a further Dominion statute provided that notwithstanding previous statutes the harbour, with all that belonged to it, were, subject to the jurisdiction and powers of management of the Commissioners, the harbour authority, vested in the Crown in right of the Dominion.

In 1905 the Commissioners commenced building an embankment along the foreshore of the river, in front of the land, to which the City derived title through Viau. The objects included the construction of a railway along the foreshore for the purpose of facilitating the use of the harbour. The Commissioners intimated to the Maisonneuve authority that if it wished to carry any drains or sewers through this embankment, it should apply at once to the Commissioners, so that arrangements might be made for the carrying out by it of the works required. The authority replied that it would be willing to extend the sewer in question in these proceedings to the line of the railway, but under reservation of all its rights to extend its sewers beyond that line if it required to do so. It was resolved that the Mayor of Maisonneuve should enter into a written agreement dealing with the matter. However, in the end no such agreement was come to, and no alteration or extension by the town was found necessary for the sewers at any time between 1908 and 1911.

In 1910 the Harbour Commissioners entered into a contract with Vickers Sons & Maxim, Ltd., for the construction in the locality in question of a floating dry dock and ship repairing plant. In pursuance of this contract, the harbour authority commenced operations within the limits assigned to them on the foreshore of the river, which included the laying down of lines of railway and the construction of quays. These were said to have resulted in the removal of gravel and soil from the bed, which were heaped up, with the consequence that the sewer became useless.

In 1910 the town of Maisonneuve commenced proceedings for an interlocutory injunction to restrain the harbour authorities from the further construction, within their territorial limits, of works on the foreshore and bed of the St. Lawrence opposite First Avenue (already referred to). The answer made by the harbour authorities was that what they were doing was within their powers, and that the town of Maisonneuve had no title to send its sewage into the navigable waters of the river, but that the harbour authorities had always been willing to let the town extend its sewers at its own expense, and that, without prejudice to their rights, the harbour authorities were willing to give facilities for the extension of the sewers through the harbour works, provided the plans were approved. The injunction was refused by the superior Court, and this refusal was confirmed by the Court of Appeal.

In 1911 the Legislature of the Province of Quebec passed a statute giving authority, so far as the rights of the Province in the river and its banks were concerned, for the extension of the sewer. The Municipal Council of Maisonneuve was thereby authorised to make any arrangements with the Harbour Commissioners respecting sewers emptying into the river which it might consider it to be in its interest, and to execute the necessary works. It was authorised to build or prolong the extension of the main sewer of First Avenue into the river through the jetty or graving dock which the Harbour Commissioners were building in front of First Avenue. To ensure the efficacy of the sewerage system, built by the town under the authority of its charter and the amendments of it, the town might, as in the past, empty its sewers into the river. The section conferring these powers was, however, not to affect the rights, privileges, and powers of the Harbour Commissioners.

There followed negotiations between the town and the Commissioners which did not result in any agreement. The town in particular refused to defray its own costs of the works required. Plans were, however, prepared by the town which, in their general features, the Commissioners expressed themselves as prepared to accept, but only if certain permissions were asked from them and a definite agreement come to. These things did not happen. In the end the town entered on its own account into a contract with the Harris Construction Company for the extension of the sewer for a sum of $64,290·00. Work was commenced under this contract. Before long the Harbour Commissioners objected that the sewer was being laid inside the harbour boundaries and insisted on its being removed outside.

In 1912 the town of Maisonneuve commenced an action against the Commissioners for $64,290·00 as damages caused by the Commissioners in wrongly depriving the town of its right of access to the river. The Commissioners answered, among other things, that the boundaries between the harbour and the property of Viau, the predecessor in title of the town, had been fixed in 1887, and that the town had no right to carry its drains into the river through the land of the harbour authorities. Before the action proceeded to judgment, the town was by a statute annexed to and incorporated with the City of Montreal.

The City adopted the action, and was substituted in it as plaintiff instead of the town. It claimed further damages, amounting to $45,196·50, for additional expenditure caused by the unlawful action of the harbour authority in interfering with the construction of the sewer. It denied that the Dominion statutes, relied on by the harbour authority as extending the limits of the harbour beyond those in existence at the passing of the British North America Act in 1867, and affecting property rights in the extended harbour, had the effect of vesting the *solum* in the harbour authority, and claimed that, so far as these statutes purported

to do so, they were invalid. Thereupon the Attorneys-General of the Province and of the Dominion intervened in the proceedings.

The action came on for hearing in the Superior Court of the Province. Evidence was called on both sides, and in December, 1921, Lafontaine J. gave judgment. The judgment of the Superior Court dismissed the whole of the claims of the City of Montreal with costs, as also the claim of the Attorney-General of the Province of Quebec. The intervention of the Attorney-General of the Dominion was allowed with costs. The reasons for his judgment given by Lafontaine J. were (1) that the boundaries fixed by the Provincial Legislature for the City as a Municipal Corporation gave it no proprietary rights, and in particular did not vest in the City any property in the bed or foreshore of the river; (2) that power was given to the Dominion Parliament by the British North America Act to legislate as to harbours and navigation, and that the only part of the Dominion statutes which could be challenged was the vesting of the land of the Province in the Dominion Government when the harbour was extended, but that as against the City the Harbour Commissioners had been in possession for many years before the City; (3) that the banks and bed of the river at the place in controversy were within the harbour, and were public property, and that it was no concern of the City whether the title was in the Dominion or the Province; (4) that the City had no right to carry its sewers into the harbour quite apart from the question of property; (5) that the material part of the river bank was, at the time when the sewers were carried through it, in the lawful possession of the Commissioners with the implied assent of the Province, and the works complained of were made within the boundaries fixed between the Commissioners and the town of Maisonneuve, so that the Commissioners were within their rights in requiring the City to modify its plans; (6) without pronouncing on the legality of the Dominion statutes extending the harbour, the intervention of the Attorney-General of the Province was not justified, as the City failed on the other points.

The City and the Attorney-General for the Province then appealed to the Court of King's Bench of Quebec. Judgment was given in this appeal on 14th May, 1924, by Flynn, Tellier, Bernier, Letourneau and Hall, JJ. The appeal of the City of Montreal was dismissed. As regards the appeal of the Attorney-General of the Province the Court allowed the appeal to the extent of holding that the bed of the river and the foreshore at the place in question were vested in the Province, but that the Dominion statutes relating to the harbour were not *ultra vires*, because on their true construction they did not of necessity imply any vesting of the property in the Crown in right of the Dominion, but only controlled its use for the purposes of a harbour, which control included the right to erect all necessary structures. Flynn J., however, went further and thought that the statutes in question were in part *ultra vires*. The Attorney-General of the Dominion

was ordered to pay the costs of the Attorney-General of the Province.

In the " considerants " on which these judgments are founded, it is laid down that the works in controversy have been made on the banks and bed of the river, that they are part of the harbour, and that all that was done in executing them was done by the authority of the Government of the Dominion or under laws passed by its Parliament. The considerants go on to state the extension of the harbour beyond the Ruisseau Migeon down to the church of Longue-Pointe, so that the extended harbour comprised the whole of the bank adjoining the town of Maisonneuve. They state, further, that the banks and bed of the river belong to the Province of Quebec, but that the Dominion Government has the right, when it is constituting or extending a harbour, to make use of the banks and bed without the consent of the Province, and to execute the works which it thinks necessary. Against the harbour authority, which had got these rights, the town of Maisonneuve could not expect to enter on its own works without being interfered with by the authority as the harbour progressed, and the town could certainly acquire no rights inconsistent with those of the authority. The considerants went on to advert to the Provincial Act of 1911, already referred to, and to say that the only authority granted to the town by the Legislature of the Province was in terms subordinated to the rights of the harbour authority. This was a reason why the authority could not be held responsible for the expenses incurred by the City. It was quite true that the Attorney-General of the Province was justified in claiming the property of the banks and bed, and if the Dominion had really set up a title under its statutes to the property in these, the Court would have been unanimously adverse to the validity of the statutes, but, with the exception of Flynn J., the members of the Court were of opinion that no such claim was made in the legislation in question. Although Flynn J. took a different view from his colleagues on the question of *ultra vires*, he concurred in the result of the judgment. In his opinion, the City had the right to drain into the river if it could do so without commiting a nuisance, but if, owing to works lawfully constructed, it could not avoid committing a nuisance, it must seek access to the river elsewhere. When the City applied to the harbour authority in 1911 and altered the projected course of its proposed sewer in response to the objection of the latter, he thought that it had waived any rights it had. Nor was it clear that even if its rights remained there was any ground, either in contract or in tort, on which it could claim the expenses incurred. His view as to *ultra vires* did not affect these questions, which depended on the regulative power of the Commissioners.

Their Lordships think that it will be convenient to advert in the first place to the relevant powers of the Dominion Parliament and Executive under the British North America Act. S. 109

enacts, among other things, that all lands belonging to the old Province of Canada at the Union are to belong to the Provinces of Ontario and Quebec in which the same are situated. But this section is qualified by the immediately preceding s. 108, which provides that the public works and property of such Province enumerated in the Third Schedule to the Act are to be the property of Canada. The Third Schedule includes public harbours, piers and river improvements. It has been settled by decisions of this Board that the words "public harbours" include only public harbours as they existed and stood at the date of Confederation, unless in the case of new Provinces incorporated subsequently, a case which does not arise here. These sections are concerned with proprietary rights, and while treating all property as vested in the Crown, determine whether it is so vested in right of the Province or of the Dominion; but there are other provisions in the British North America Act which deal, not with the ownership of property, but with the power to regulate by legislation the user of property, and these are important in the consideration of the present case. Under s. 91 exclusive legislative authority is given to the Dominion Parliament in the matters of navigation and shipping. Under s. 92 (10) lines of steam or other ships, railways, canals, telegraphs and other works and undertakings connecting a Province with any other Province, or extending beyond the limits of a Province, lines of steamships between a Province and any British or foreign country, and such works as although wholly within a Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more Provinces, are all taken out of the legislative authority of the Provinces and placed (by s. 91 (29)) exclusively under that of the Dominion Parliament.

It is not open to the Attorney-General for the Dominion in the case before their Lordships to invoke the authority given by section 92 (10) to the Dominion Parliament to declare any works to be for the general advantage of Canada, for no such declaration has been made as to the works now in question; and the decision must depend on the other sections quoted and on the facts of the case. In their Lordships' opinion the effect of sections 108 and 109 of the Act of 1867 was to vest Montreal Harbour as it then existed in the Crown in right of the Dominion, but except in that respect to vest the bed and foreshore of the St. Lawrence in front of Montreal and Maisonneuve in the Crown in right of the Province of Quebec. The Dominion Statute of 1873, while it was effective to extend the harbour as a harbour and to vest in the Dominion Parliament and in the Harbour Commissioners the right to make due provision for the control and protection of shipping in the harbour as extended, did not enlarge the property rights of the Dominion or enable the Dominion Parliament to take land for harbour purposes without compensation; and if and so far as the Dominion Statutes of 1894, 1909

and 1914 purported to vest in the Commissioners or in the Crown in right of the Dominion the *solum* of the extended harbour, those statutes were in excess of the powers of the Dominion Parliament.

But the question remains whether section 91 (10) of the Act, which empowered the Dominion Parliament to legislate as to navigation and shipping, empowered that Parliament to authorise the extensive works undertaken by the Commissioners on the banks and foreshore and in the bed of the river. In considering this question it is necessary to bear in mind the nature of those works. They include, not only dredging operations, but an embankment and railway on the shore of the river, quays, a dry dock and ship repairing plant; and it would appear to be impossible that works of this character and extent could be constructed and used without an exclusive occupation of the soil equivalent to possession. Now there is no doubt that the power to control navigation and shipping conferred on the Dominion by section 91 is to be widely construed. As was pointed out by Lord Herschell in the judgment which he delivered on behalf of the Board in the first of the three *Fisheries* cases (L.R. 1898, A.C. 700 at p. 713), the terms on which those powers are given are so wide as to be capable of allowing the Dominion Parliament to restrict very seriously the exercise of proprietary rights in a fashion which, to a great extent, depends on the discretion of that Parliament. What was said in that case about the enactment of regulations and restrictions in matters relating to fisheries being excluded from the competence of the Provincial legislatures applies not less to matters relating to navigation and shipping. But while this is so, it does not appear to their Lordships that the right of the Dominion extends so as to authorise them to vest in a body like the Commissioners an exclusive right to occupy property of the Province without compensation and to erect upon it permanent works, such as quays, docks and railways. It may well be that when the interests of navigation require it the Dominion Parliament has authority to authorise the compulsory acquisition of lands on the terms of paying compensation; and it is to be noticed that the Acts of 1873 and 1894 contain provisions of that nature. Their Lordships do not desire to throw any doubt upon the validity of those provisions. But in the present case no attempt to apply them was made by the Commissioners, who took possession of and occupied the foreshore and bed without following the procedure laid down by the Railway Act; and in their Lordships' view the provisions of section 91 (10) standing alone did not justify their proceedings.

But this by no means disposes of the case. It was undoubtedly within the power of the Province of Quebec, with a view to the improvement of the harbour of Montreal, to waive her strict legal rights and expressly or by inference to sanction the works undertaken for that purpose, and it must be considered whether such a sanction is to be inferred in the present case. In their Lordships' opinion it is. The Commissioners commenced to build their

embankment in the year 1905, and the contract for the dry dock and ship repairing plant was entered into in 1910; but the Province took no part in the proceedings for an injunction, and in 1911 the Provincial Legislature passed the Quebec statute of that year, which referred to and impliedly sanctioned the operations of the Harbour Commissioners. It was not until the year 1919, when the works were far advanced, that the Attorney-General of Quebec intervened; and although at the time of his intervention he claimed to have the Commissioners excluded from possession of their works, he has at no time insisted on that claim, and is content to have the legal rights in the bed and foreshore of the river determined. Having regard to all these facts, their Lordships are satisfied that the provincial authorities have waived any claim to interfere with the existing works, and that, so far as they are concerned, they are bound by what has been done.

The position of the City of Montreal is different, as the rights (if any) of the City authorities have at no time been waived; but in their Lordships' opinion no right of the City has been infringed. The claim put forward on their behalf that, as owners of the soil of First Avenue, they have a common law right to discharge through the end of that street where it abuts on the St. Lawrence the sewage of the City involves an extension of riparian rights which their Lordships cannot accept. The only right of the City to discharge their sewage into the river rests on the licence of the provincial authorities, which was itself (as the statute of 1911 shows) made subsidiary to the proceedings of the Harbour Commissioners. The appeal of the City therefore fails.

In the result their Lordships are of opinion that the judgment of the Court of King's Bench should be affirmed so far as it dismissed the appeal of the City of Montreal, and so far as it declared that His Majesty, representing the Province of Quebec, was the sole owner of the foreshore and bed of the St. Lawrence at the place where the Commissioners constructed their works; but that the remainder of the judgment should be dissolved, and in lieu thereof it should be declared that the statutes of the Dominion did not authorise the respondents the Harbour Commissioners to enter upon and take possession of the lands of the Province without compensation, but that, in view of the undertaking of the Attorney-General for the Province of Quebec not to interfere with the existing works, no order shall issue which would affect the present possession and use of the works of the Harbour Commissioners. As to costs, their Lordships will humbly recommend that the City of Montreal should pay the costs, as directed by the Court below, and also of this appeal, but that neither of the Attorneys-General should pay or receive costs, either here or in the Courts below.

## THE TETREAULT APPEAL.

Their Lordships having now disposed of the appeal of the City of Montreal turn to that of Tetreault. This appeal, as they have already observed, involves considerations of a different order from those in the former appeal, which turned, among other things, on acquiescence. In the Tetreault case there has been no such acquiescence, and the question is purely one of legal title. The action was a possessory one based on Article 1064 of the Civil Code of Procedure of the Province of Quebec, which enacts that " the possessor of any immovable or real right, other than a farmer on shares or a holder by sufferance, who is disturbed in his possession, may bring an action on disturbance against the person who prevents his enjoyment, in order to put an end to the disturbance and be maintained in his possession."

The Article goes on to say that " the action may be brought by any person who has had possession of an immovable or real right for a year and a day against any person who has forcibly dispossessed him."

Tetreault alleged that he was and had been for a number of years possessor as proprietor by valid titles of three contiguous immovable properties in the parish of Longue Pointe on the Island of Montreal, of a width of about four arpents and a half, bounded by the River St. Lawrence, and that since he purchased these immovables he had always peacefully enjoyed them with the advantages and servitudes that belong to riparian proprietors *ex jure naturae*, including the use of the water in front of his properties and access to and egress from the river; that the Harbour Commissioners were executing works opposite these properties which have encroached on them and have deprived him of his access to the river and of the privileges mentioned; that the harbour authorities had no right to carry on these works without previous expropriation, and that no Federal legislation could be operative to take away his property. He claimed damages to a total of $133,020, and declarations as to his title and right to peaceful possession. The Harbour Commissioners asserted in answer a superior title and denied responsibility for what they had done. As the question of the validity of the Dominion statutes vesting his property in the bed and beach in the Crown in right of the Dominion arose, the Attorney-General of Quebec intervened in this appeal also, as well as the Attorney-General of the Dominion. The former maintained that the title to the beach and bed was vested in the Province, the latter that it was vested in the Dominion.

The land to which Tetreault laid claim is situated at some distance further down the river than that in the last appeal. It is in the parish of Longue Pointe, and their Lordships think that Tetreault has established his title to it. The Courts below did not declare that the works executed by the Commissioners (within whose present limits the property lies) had not encroached on Tetreault's property, but they thought that there was doubt as to the line of the high water mark of the river, and that as

Tetreault had not established the line by a preliminary action of "bornage," the Court could not order the reinstallation of Tetreault. Into this question their Lordships do not deem it necessary to enter. They think, with Letourneau J., that there is a "bornage" in the high water line of the river sufficiently established to enable Tetreault at least to say that if he had rights of access to the river at all, these rights have been interfered with by the Commissioners.

Before entering on this question reference must be made to the course taken by the proceedings. The action was tried by Lafontaine J. in the Superior Court. He dismissed it with costs. A large amount of evidence had been taken, but the learned Judge thought that Tetreault had failed in his proof. He rejected the claims of both the Attorneys-General, saying that the Attorney-General of the Province had not brought a proceeding of a kind appropriate to the circumstances, and should, if his case was to be dealt with, have instituted a proper petitory action. This being so, there was no necessity for pronouncing a judgment in favour of the claims of the Attorney-General of Canada against him.

Tetreault and the Attorney-General for Quebec both appealed, and the appeal was disposed of by the Court of King's Bench (consisting of Flynn, Tellier, Bernier, Letourneau and Hall, JJ.) on 14th May, 1924. A majority of four affirmed the judgment of the Superior Court; Letourneau J. dissenting. The majority agreed with the Trial Judge that the evidence was insufficient for the establishment of encroachment on the property of Tetreault in the absence of a decree of "bornage," and that, therefore, in this merely possessory action the right of access could not be established. Letourneau, J., on the other hand, considered that there was a sufficient "bornage," for the line of high water mark was the natural and legal boundary of Tetreault's land, and no further proof of it than had been given was necessary. He would have approved interference with Tetreault's title to the land taking place, if the question arose, only on the footing of expropriation with compensation, which the harbour authorities had not offered. The majority were, however, adverse on this point to Tetreault because he had not claimed on this footing, though they considered, notwithstanding this, that there might be a right in him as a riparian proprietor to access to the river. Such a right of access or servitude could not be established in a merely possessory action, for it might turn out to be subject to public rights of user.

Their Lordships would be unwilling, were the question really one of the exact boundary between the land, the property of Tetreault and the land where the works of the Commissioners were situated, to interfere with the concurrent findings on the evidence of the two Courts below. But they are of opinion that this question is not the real one. The boundary of the property possessed by Tetreault seems beyond doubt to have extended

to high water mark whatever the line of high water mark might be established as being. If this be so, the question at once arises whether he was entitled, not by prescriptive servitude, but *ex jure naturae*, to rights of access to the river.

This question came under consideration by this Board in the case of *North Shore Railway Company* v. *Pion* (14 A.C. 612). The railway company had made a railway on the foreshore of a tidal and navigable river, along the frontage of the landowner's property, and had substantially interfered with his access to the river. It was held that by the French law prevailing in Quebec the landowner as riparian owner had the same rights of "accès et sortie" as he would have had if the river had not been navigable; and that the obstruction of these rights without Parliamentary authority was an actionable wrong. In the present case the St. Lawrence opposite the neighbourhood of Montreal is not tidal like the river St. Charles in *Pion's* case. It is only navigable. But their Lordships think that this makes no difference, for the case of a river which is non-tidal, although navigable, is one to which the principles laid down by Lord Selborne in *Pion's* case must apply *a fortiori*.

In delivering the judgment of the Judicial Committee, consisting of Lord Watson, Lord Bramwell, Lord Hobhouse and Sir Richard Couch besides himself, Lord Selborne said that the view of the Court of Queen's Bench could not be maintained, that, inasmuch as the beach of the river was public property, the landowner had no individual right but only one to use it in common with other inhabitants of the country, and that the Supreme Court of Canada was right in taking a contrary attitude. He adopted, as applicable as much in Quebec as in England, the principle laid down by Lord Cairns in *Lyon* v. *Fishmongers' Company* (1 A.C. 662 at p. 671), that the right belonging to the owner of riparian land is different from the mere public right of navigation.

> "When this right of navigation," said Lord Cairns, "is connected with an exclusive access to and from a particular wharf it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place, and it becomes a form of enjoyment of the land and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction."

Lord Selborne went on to point out that although the bank of a tidal river of which the foreshore is laid bare at low water is not always in contact with the flow of the stream, it is in such contact for a great part of every day in the ordinary and regular course of nature. This is an amply sufficient foundation for a natural riparian right. Moreover, although the *solum* of the river is in some one else than the riparian owner, that can make no difference. Lateral contact with the riparian land is sufficient.

Their Lordships have had their attention directed to the reservation, inserted in the grant to Tetreault's predecessors in title, in which the grantors, the Company of New France, in 1640,

declared that the concession should not cause any prejudice to the freedom of the navigation, which is to be common to all the inhabitants of New France, and throughout all the places therein above conceded, and for this purpose that there should be left a royal highway of twenty toises in width all round the island of Montreal, from the river to the granted lands, and a similar distance on the River St. Lawrence from the brink of the same to the granted lands, the whole for the use of the said navigation and of passage by land. This was a mere reservation of a right of highway which, in the view their Lordships take of the case, cannot affect Tetreault's right of access, even if it extended beyond the foreshore to his land.

Their Lordships, therefore, base their judgment not on any determination of the precise boundaries of Tetreault's proprietary title, but on the view that he, as the owner of the three contiguous immovables in the Parish of Longue-Pointe on the Island of Montreal, referred to in his declaration, the boundary of which extended to high water mark, had been disturbed without legal justification in his right of " accès et sortie " to the river. They think that the doctrine laid down in the case of *Pion* (*ubi supra*) applies not less to Tetreault's case. That doctrine seems to them to be in harmony with many of the Quebec authorities cited to them, such as *Chauret* v. *Pilon* (31 Q.O.S.C. 165); Questions Seignoriales, Vol. A, p. 69a, Réponse à la 27me Question ; *Hardy* v. *Lemay* (60 Q.O.S.C. 67), and *Gagnon* v. *Marquis* (35 Q.O.S.C. 406).

They are of opinion that Tetreault was entitled to bring a possessory action claiming damages for disturbance of his rights of " accès et sortie." The judgment of the Court of King's Bench should therefore be reversed. But as their Lordships are not in a position to estimate the amount of those damages, the case must go back to the Superior Court to have the amount ascertained. It may be that the Commissioners could have expropriated him in respect of their rights under s. 34 of their statute of 1894, or possibly by making use of the Railway Act of 1888, s. 144, or otherwise, and, if so, this will have to be taken into consideration in estimating his real loss. No such attempt appears to have been made, and their Lordships will therefore humbly advise His Majesty in the sense just indicated.

The Harbour Commissioners must pay Tetreault's costs here and below. The two Attorneys-General will neither have nor pay costs at any stage in the litigation.

In the Privy Council.

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THE CITY OF MONTREAL

*v.*

THE HARBOUR COMMISSIONERS OF MONTREAL

THE ATTORNEY-GENERAL OF QUEBEC

*v.*

THE ATTORNEY-GENERAL OF CANADA

J. L. A. TETREAULT AND OTHERS

*v.*

THE HARBOUR COMMISSIONERS OF MONTREAL

THE ATTORNEY-GENERAL OF QUEBEC

*v.*

THE ATTORNEY-GENERAL OF CANADA

(*Consolidated Appeals.*)

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