Privy Council Appeal No. 94 *of* 1936

St. Francis Hydro Electric Company, Limited, and others - *Appellants*

v.

The King and others - - - - - - - - - *Respondents*

FROM

THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH MARCH, 1937.

Present at the Hearing :

LORD BLANESBURGH.
LORD ATKIN.
LORD MAUGHAM.
LORD ROCHE.
SIR SIDNEY ROWLATT.

[*Delivered by* LORD MAUGHAM.]

This is an appeal from a majority judgment of the Court of King's Bench for the Province of Quebec (Appeal Side), dated the 29th May, 1936, confirming a judgment of the Superior Court for the District of Quebec, dated the 25th March, 1935. The appellants succeeded in maintaining their title to certain riparian lands on the St. Francis River at a point called Spicer Rapids, some 25 miles up the river from Lake St. Peter through which the St. Lawrence flows. With that question His Majesty the King, who is the first respondent, was not concerned and there has been no appeal with regard to it. Except incidentally it need not be further mentioned.

The appellants also claimed certain parts of the bed of the River St. Francis opposite their riparian property at Spicer Rapids. His Majesty and the second respondents, the Southern Canada Power Company, Limited, have disputed the appellants' claim. The Provincial Government had, in fact, granted to the respondent Company a lease, dated the 3rd August, 1917, for a period of 75 years, from the 29th October, 1912, which purported to include the stretch of the bed of the St. Francis river claimed by the appellants. The Provincial Government claimed and the respondent Company asserted that this part of the river including that opposite the appellants' property was part of the Crown domain. The Provincial Government accordingly refused to approve plans submitted for its approval by the appellants in 1927

for the establishment of a power plant of considerable magnitude at this site. In 1929 the respondent Company submitted plans of their own for the development of a power plant at Spicer Rapids. While the application of the respondent Company was pending in January, 1930, the appellants filed a petition of right and having obtained a fiat instituted an action against the Crown and against the respondent Company, asserting their ownership of the riparian property and of the river bed opposite to it and praying for a declaration that the lease of the 3rd August, 1917, was null and void and inoperative as regards that part of the bed and banks of the St. Francis river opposite and adjoining their property. These claims have failed in the Superior Court and in the Court of King's Bench for the Province of Quebec. Hence the present appeal.

The appellants claimed the bed of the river at the site in question on two grounds. Firstly, they alleged that the river was neither navigable nor floatable and, therefore, under Quebec law its bed belonged to the riparian proprietors. The portions of the river bed which were claimed were those which, under Quebec law would, if the river was not navigable or floatable, have belonged to the appellants as riparian proprietors. Secondly, they alleged that, even if the river or the material part was navigable or floatable, the riparian lands opposite and adjoining the portions of the bed of the river in dispute had ceased to be part of the Crown domain by reason of certain concessions by the Comte de Fontenac of *seigneuries* in the years 1678, 1683 and 1754; and further, that by letters patent granted by George III in the early years of the nineteenth century, the Crown had granted the properties in question to hold in free and common soccage, and according to their contention the English law and not the law of Quebec is therefore applicable in respect of ownership by riparian proprietors of the bed of the river. It may be explained that the river not being a tidal river, if English law applied, the bed would belong in the absence of any evidence of ownership to the contrary, by presumption of law, in equal moieties to the owners of the riparian lands, and this whether the river were navigable or not. As will be seen the law of the Province of Quebec is different in an important respect.

Thirdly, the appellants, who as stated were attacking the validity of the lease of the 3rd August, 1917, contended that even if the river had ever been navigable it had ceased to be such before the date of that lease and they claimed to have had the exclusive right to utilise it for power purposes under the provisions of 19 & 20 Vict. (Can.) chap. 104.

The case came on for trial in the first instance before Mr. Justice D'Auteuil, now deceased; he refused to admit certain evidence of a historical nature which their Lordships will have to mention later, and, basing his judgment exclusively upon the evidence given by living witnesses, he held that the river was neither navigable nor floatable. The conclusion, therefore, was that the river bed in question

usque ad medium filum belonged to the appellants as riparian owners, and the learned Judge maintained the petition of right and the suit.

On appeal this judgment was reversed by a majority on the ground that the historical evidence should have been admitted, and a new trial was accordingly directed. The Court also expressed the opinion that the second reason alleged in support of the petition of right and the suit, namely that the English law and not the Quebec law should apply was not well founded. An appeal to the Court of King's Bench on this point at this stage was not entertained on the ground that the judgment was interlocutory and not final.

The case was then tried on a rehearing before Mr Justice Prevost, and the historical evidence was admitted. The learned Judge held that this evidence established that at the time when the riparian lots were originally granted by the Crown to the predecessors in title of the appellants, namely, in the years from 1800 to 1816 it was sufficiently established that the river St. Lawrence was navigable and floatable at least up to the first falls at Drummondville, known as Lord's Falls, that is to say to a distance six miles above the Spicer Rapids. It was admitted that the bed of the river, if part of the public domain at that time would not cease to be such merely because by obstructions or otherwise the river ceased to be navigable and floatable. Accordingly he held that the bed and banks of the river at this place remained a part of the Crown domain under article 400 of the Civil Code. He followed the opinion expressed in the Court of Appeal on the second point as to the effect of a grant in free and common soccage, and he apparently thought that there was no substance in the third point. Except therefore as regards the title to the riparian properties above referred to, he dismissed the action and the petition of right. There was an appeal (except as regards the riparian properties) to the Court of King's Bench which gave rise to differences of opinion on the question of fact, whether the river St. Francis was navigable and floatable at the material reach or reaches. The majority, consisting of Hall, Walsh and Galipeault, JJ. agreed with the decision of Prevost J. that the river had been navigable and floatable in the early days from Lake St. Peter at least up to Drummondville Falls, while Sir Mathias Tellier, C.J. and Bernier, J. held that the evidence did not establish that there had ever been such navigation on the river as would justify the view that it was navigable and floatable at the time of the early grants. The Court also held that the second and third points were ill-founded. In the result the appeal was dismissed with costs.

It will be convenient to deal with the three points in the order in which they have been stated above.

The law of the Province of Quebec, material on the question of the right of the Crown to the bed of navigable and floatable rivers (apart from special circumstances), is

contained in article 400 of the Civil Code which is as follows:—

> "400. Roads and public ways maintained by the State, navigable and floatable rivers and streams and their banks, the sea-shore, 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.
>
> "The same rule applies to all lakes and to all non-navigable and non-floatable rivers streams and their banks, bordering on lands alienated by the Crown after the 9th of February, 1918."

It is not in dispute that under the law of Quebec the bed of a river which is neither navigable nor floatable,—for the "and" between the two words is admitted to mean "or" in that place,—belongs by presumption of law in the absence of a grant or of some other special circumstance to the owners of the riparian lands each of whom is entitled *usque ad medium filum aquae.*

As regards the article it should be mentioned that the first paragraph of it is a statement of the old French law, which was the original law of Quebec. The second paragraph was first enacted in the year 1918 and has no relevance to the questions arising on this appeal.

The case of the Crown and of the respondent Company was that the river St. Francis was or could be proved to have been till recent times navigable and floatable for a considerable distance upstream from the Lake St. Peter and at any rate for a distance as high as Drummondville which, as stated, is above Spicer Rapids. In a country with the physical characteristics and history of Quebec the problem of navigability or floatability requires some special considerations. In the first place it has to be borne in mind that at the beginning of last century the country was very largely covered by forest. There were practically no roads available for the early settlers except the frozen surface of the rivers during the long winter months. On the melting of the snows and the breaking up of the ice the rivers rose to a height much above their normal level during the subsequent summer months; but until the thinning or the destruction of the forests it is said that the duration of this high level was considerably longer than it is now, since snows take longer to melt if protected by the trees from the rays of the sun. Thus there were many rivers down which not only loose logs (floated in the Quebec phrase *à bûches perdues*), but timber in cribs or rafts could be driven at the period of high water level, while this would be impracticable a little later. Navigation proper was largely conducted in birch bark canoes, which could easily be lifted out of a river and carried for a considerable distance over land and placed again in the river below any dangerous rapids or falls. This is the system of *portage* so well known in Quebec and other parts of Canada where the country is of mountainous or hilly nature, with the result that falls and rapids are often encountered.

It is apparent from this rapid summary of the prevailing conditions that the question of navigability or floatability in a particular case may be one of the utmost nicety. Nor can it be solved by evidence that in fact certain parts of the river have been or are used from time to time by the public for the purpose of driving or floating timber or other craft; for it has been the law of Quebec since 1891 that any person "may, during the spring, summer or autumn freshets, drive or float timber, rafts and craft down any river, lake, pond, stream or creek" in the Province, subject however to being liable for all damages caused by these operations. (See R.S.Q. 1925, chap. 46, sects. 31 and 42; 54 Vict. c. 25, s. 1.) This provision, it will be noted, applied to non-navigable waters; but there is here no paradox, for as has been remarked many non-navigable rivers in the legal sense are navigable or floatable when the waters are high.

It only remains to add that in the early days many obstructions were placed in navigable rivers in the Province without any lawful authority, so that rivers once navigable are in fact so no longer. It was not till the year 1883 that there was an express statutory prohibition against the placing of any work (with certain minor exceptions) upon or across any navigable water unless the site and the work had been approved by the Governor in Council. (See the Navigable Waters Protection Act, R.S. Can. 1927, chap. 140, s. 4, re-enacting 46 Vict. (Can.) chap. 43.) In view of all the circumstances it is not surprising that, even with Canadian Judges well-acquainted both with the law and the local conditions, there has been so striking a difference of opinion on the question whether the river St. Francis or the thirty mile stretch of it above Lake St. Peter is or is not to be regarded as a navigable or floatable river.

Their Lordships have had the advantage of able arguments in the course of which all the relevant evidence was discussed; but the respondents have taken the point that they have the benefit of concurrent findings of fact on the question of navigability, and they rely on the well-known rule that their Lordships, in such a case, unless there are special circumstances, should decline to advise His Majesty to interfere. The rule certainly has a *primâ facie* application notwithstanding the considerable difference of opinion among the Judges. It was, however, argued for the appellants that as the evidence which led to the findings consisted mainly, if not entirely, of documentary or historical evidence, in other words of writings, the true effect of which might well be discussed in an Appellate Court, the ordinary rule ought not to be applied. Their Lordships cannot accept this distinction. If the question were that of the construction of deeds or other documents, it would be one of law; but in this case the question is as to the effect to be given as evidence to certain historical writings as referring to the state and the use of the river in the past,—matters which have to be considered in relation to the facts proved as to the present state of the river and other circumstances. Their Lordships

must hold that in such a case the ordinary rule applies, and they may observe that the same view was taken in the case of *Luchman Lal Chowdry* v. *Kanhya Lal Mowar* (L.R. (1894) 22 Ind. App. 51).

It is important to note in this connexion that there has been no dispute as to the legal significance of the words "navigable and floatable rivers and streams" in Art. 400 of the Civil Code. Mr. Justice Prevost in his reasons for his judgment laid down the leading principles to be followed, substantially on the same lines as those previously stated by Mr. Justice Letourneau on the first appeal, in these words:—

> La jurisprudence a établi les principales conditions requises pour qu'une rivière soit navigable ou flottable, de manière à donner effet à l'article 400 C. civ.
>
> 1°. Il ne suffit pas qu'elle soit flottable à *bûches perdues;* il faut qu'elle soit capable de porter des *trains* ou *radeaux*. (*Tanguay* v. *Canadian Electric Light Co.*, 40 Sup. C. Rep. 1; et *MacLaren* v. *Att. Gen. for the Province of Quebec*, 1914, A. C. 258);
>
> 2°. Il n'est pas nécessaire que cette condition de fait soit constante; mais il ne suffit pas non plus qu'elle soit le résultat de circonstances exceptionnelles, comme des marées excessives, ou des crûes fortuites;
>
> 3°. Une rivière peut être navigable sur une partie de son cours, depuis son embouchure, et cesser de l'être dès les premiers obstacles naturels qui la rendent définitivement impropre à une navigation continue, lors même que son cours en amont présenterait quelques étendues favorables à une navigation locale restreinte; (*Leamy* v. *Le Roi*, 54 S. C. R. 143);
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> 4°. Cependant, l'existence de rapides dans le cours d'une rivière, jusque là navigable, ne lui fait pas perdre son caractère, si la navigation ou le flottage peuvent s'y continuer de façon utile et pratique;
>
> 5°. Encore faut-il que la navigation ou le flottage n'y soit pas seulement possible d'une manière empirique, mais que leur opération soit réalisable de façon utile et profitable au public. (*Bell* v. *Corp. de Québec*, 5 A. C. 84; *Att. Gen.* v. *Fraser*, 37 Sup. C. Rep. 577).

In the Court of Appeal the correctness of these propositions was not in dispute, nor was it before their Lordships.

It remains therefore only to consider whether there was evidence on which the Courts might come to the judicial conclusion at which they arrived. It must be taken that the parole evidence taken alone was insufficient to prove that in the memory of the living witnesses the River St. Francis had been used at such periods of the year and in such a manner as to justify the conclusion that the river was "navigable and floatable" in the legal sense. There was an express finding to that effect in the formal judgment of Prevost J. It was the historical evidence on which he and the majority on appeal relied. Far the most important evidence of that character was the Description Topographic of Lower Canada by Joseph Bouchette, His Majesty's Surveyor-General of Lower Canada, first published in French in 1815 and also

published with additions in English in the year 1832. This work has been regarded in Canada as an accredited public historical document and the contrary was not contended for on the present appeal. The relevant passage taken from the English edition was as follows:—

> The River St. Francis is one of the communications by which a considerable and increasing traffic is carried on between the S. of St. François and the southern townships, and also the United States. The navigation is difficult and exceedingly laborious, owing to the great number of rapids and falls; but as the river presents a direct route for sending the produce of these districts to a certain market, these obstacles are resolutely overcome by the industrious settlers on each side of the boundaries, and large quantities of pot and pearl ashes, and various other commodities, are every summer brought down by it into the St. Lawrence for Quebec. Great quantities of British manufactured goods are also sent upwards to the United States. The navigation from Lake Memphramagog to the St. Lawrence is opposed by many and powerful natural obstructions. From the outlet of the lake to the place where the stream joins the St. Francis is about 19 miles, in which distance there is a singular alternation of violent rapids and still water where the current is most tediously slow; about ¾ of a mile before it enters the river there is what is termed a *fall*—not indeed from a perpendicular height, but the bed of the river being very much contracted, and the current broken by high ledges of rock, it it impossible for boats to pass it; even single sticks of timber are seldom sent down it, as experience has proved that they never escape without being much bruised, if not absolutely shivered to pieces: in this short distance the whole descent is from 170 to 180 feet. At this place the scows and boats are unloaded, their contents carried to the end of the fall, and there re-embarked in other craft ready to receive them; hence they are borne down by a gentle current about six miles to the Great Brompton Falls, about two miles in length: as empty boats can run down them on the west side only, the cargoes are again taken out and conveyed to the foot of the falls, where the boats are reladen and proceed about seven miles farther to the Little Brompton Falls; a repetition of the former labours must again take place, as they can be passed by nothing but light craft: at this point the portage is no more than 250 yards. A mile or two farther on is Dutchman's Shoot, where the river is narrowed by a ledge of rocks and two small islands forming a rapid, through which, with much care and some difficulty, loaded boats can pass. After this a current, rapid and slow in succession, continues, without impediment, for 15 miles to Kingsey Portage; this is a confined part of the river, with a large rock in the middle of it, which is covered when the water is very high, and at which time only the loaded boats are able to pass it; the current rushes through the channel with great impetuosity and retains its violence for more than a mile beyond it. Hence no material obstacles present themselves until arriving at Menue Falls, about 20 miles; these are ¾ of a mile long and only practicable for empty boats. Lord's Falls, about 2 miles farther down, and about the same length as those of Menue, are subject to the same inconvenience or even greater, for unless the water be very high they cannot be passed by the light boats. At 6 miles below this fall is the commencement of a very rapid current that continues for 15 miles, and when passed all difficulties are overcome and the river is free into Lake St. Peter. From the upper part to the lower part of the river it varies in breadth from 100 yards to nearly a mile, and about 16 miles from its mouth it is only about 30 feet wide and very shallow. Notwithstanding this troublesome medley of land and water carriage, the trade now carried on is very considerable, as more than 1,500 barrels of ashes only have been brought down in one summer.

It is to be observed that only the last few lines apply to the river below Drummondville, where Lord's Falls are to be found; but it has been thought desirable to give the whole passage relating to the river from a point many miles above Lord's Falls, inasmuch as the many difficulties above that spot are carefully detailed,—falls, rocks, rapids and so forth, involving portages and emptying of boats,—whilst Spicer's Rapids are only described as being situated in "a very rapid current that continues for 15 miles"; and below that "all difficulties are overcome". It was open to both Courts, taking this evidence in conjunction with other documentary evidence and parol evidence as to the physical conditions at Spicer's Rapids, to hold that below Drummondville down to the lake the river was in the early part of the nineteenth century navigable or floatable. Their Lordships therefore think it unnecessary further to discuss the evidence on this point, or to express any opinion upon the question of fact beyond that already stated. They may perhaps add that in a matter as regards which public general knowledge as to local conditions may be very important they would naturally be loath to interfere.

On the second question, it would seem that the Appeal Court, except Mr. Justice Bernier, were not impressed by the suggestion that the grants of seigneuries by the Comte de Frontenac in the reign of Louis XIV of France had the effect of passing the beds of navigable rivers part of the domaine publique since the grants do not purport expressly to grant such beds. It would seem that the learned Judges, with the exception of Mr. Justice Bernier, took the view that the argument was untenable, and that in the days before the Treaty of Paris the beds of navigable rivers were always treated as *inalienables et imprescriptibles*. (See *Maclaren* v. *The Attorney-General for Quebec* [1914] A.C. 258 at pp. 276, 7, where Lord Moulton expresses that opinion.) Their Lordships see no ground for coming to a different opinion. The validity and effect of the seigneuriale concessions either before or after the Treaty of Paris was not discussed in any of the judgments; and it would seem that the appellants preferred to rely on the later grants by George III, which do not seem to be consistent with the validity of the earlier concessions. These later grants were no doubt "in free and common soccage", but they contained no express grant of any part of the bed of the river. Such a grant would, it is true, have been lawful as the result of the Quebec Statute 6 Geo. V, chap. 17, sect. 11 (now R.S.Q. 1926, chap. 6, sec. 3) by which it is declared that it has always been lawful "for the authority which has had the control and administration of public lands in the province of Quebec . . . to alienate or lease to such extent as was deemed advisable the beds and banks of navigable rivers and lakes . . . forming part of the public domain."

This statute, however, throws little light on the question whether the letters patent in question ought to be held as a matter of construction to have granted the river bed. Their

Lordships, however, have found in the judgment of Mr. Justice Letourneau on the first appeal an elaborate statement of the constitutional and the legal position of lands in Lower Canada granted in free and common soccage, and they do not think it necessary to repeat what is stated on this point in that judgment. It is undeniable that the decisions in Quebec including the decisions on appeal to His Majesty in Council have uniformly regarded lands granted in free and common soccage as subject to the French law except as regards tenure. (See for example *Leamy* v. *The King* 54 S.C.R. 143 at pp. 147, 148.) The position may be summarized as follows:—The original law was the old French law. After the Treaty of Paris in 1763, the English common law was introduced by Murray's Ordinance of the 17th September, 1764, and the Courts were directed to determine cases agreeably "to equity, having regard nevertheless to the laws of England, as far as the circumstances and present situation of things will admit, until such time as proper Ordinances . . . can be established by the Governor and Council, agreeable to the laws of England". This introduction of the English law was repealed by the Quebec Act of 1774, with an exception, however, as to lands granted in free and common soccage. The Constitutional Act of 1791, section 43, provided that in Lower Canada lands should be thereafter granted in free and common soccage when the grantee should so desire, but "subject nevertheless to such alterations with respect to the nature and consequences of such tenure of free and common soccage, as may be established by any law or laws which may be made by His Majesty, His heirs or successors, by and with the advice and consent of the Legislative Council and Assembly of the Province." At this date there might well have been doubts as to the legal position but in the Act 20 Vict. chap. 45 of the Legislature of the United Canadas, a declaration is to be found in the following terms:—

> 5. The laws which have governed lands held in free and common soccage in Lower Canada, in matters other than alienation, descent and rights depending upon marriage, are hereby declared to have always been the same with those which governed lands held in franc aleu roturier, except in so far only as it may have been otherwise provided by any Act of the Legislature of Lower Canada or of this Province. . . ."

Moreover, if there had been any doubt as to the effect of this section in relation to the bed of navigable and floatable rivers and streams, it was in the opinion of their Lordships removed by article 400 of the Civil Code of Quebec which makes no exception in favour of riparian owners who acquired their lands in free and common soccage. It will be remembered that this Code came into force on the 1st August, 1866, that is, some years after the last mentioned Act.

On this point therefore their Lordships see no reason to doubt the correctness of the decision under appeal.

The third point is capable of being very shortly dealt with. The lease of the 3rd August, 1917, is expressly stated "to be subject to all Provincial and Federal laws concerning navigation, floating of lumber, control of waters, mines and fisheries", and, further, as regards the right demised to the lessees to make use of the full slope of the River St. Francis at the rapids in question, this right is expressly stated to be "subject, however, to such rights and privileges as the riparian owners and others may have of the premises hereinabove described."

If then the appellants had, as they contend, at the date of the lease any exclusive right to use the water power opposite their property under the Canadian statute, 19-20 Vict. chap. 104—a matter as to which their Lordships express no opinion—this right is preserved to them by the terms of the lease. In the view of their Lordships this is a sufficient answer to the claim to have the lease declared null and void on the ground stated as regards that part of the bed and banks of the river opposite and adjoining the appellants' lands.

For the above reasons their Lordships are of opinion that the appeal should be dismissed with separate sets of costs to the respondents, and they will humbly advise His Majesty accordingly.

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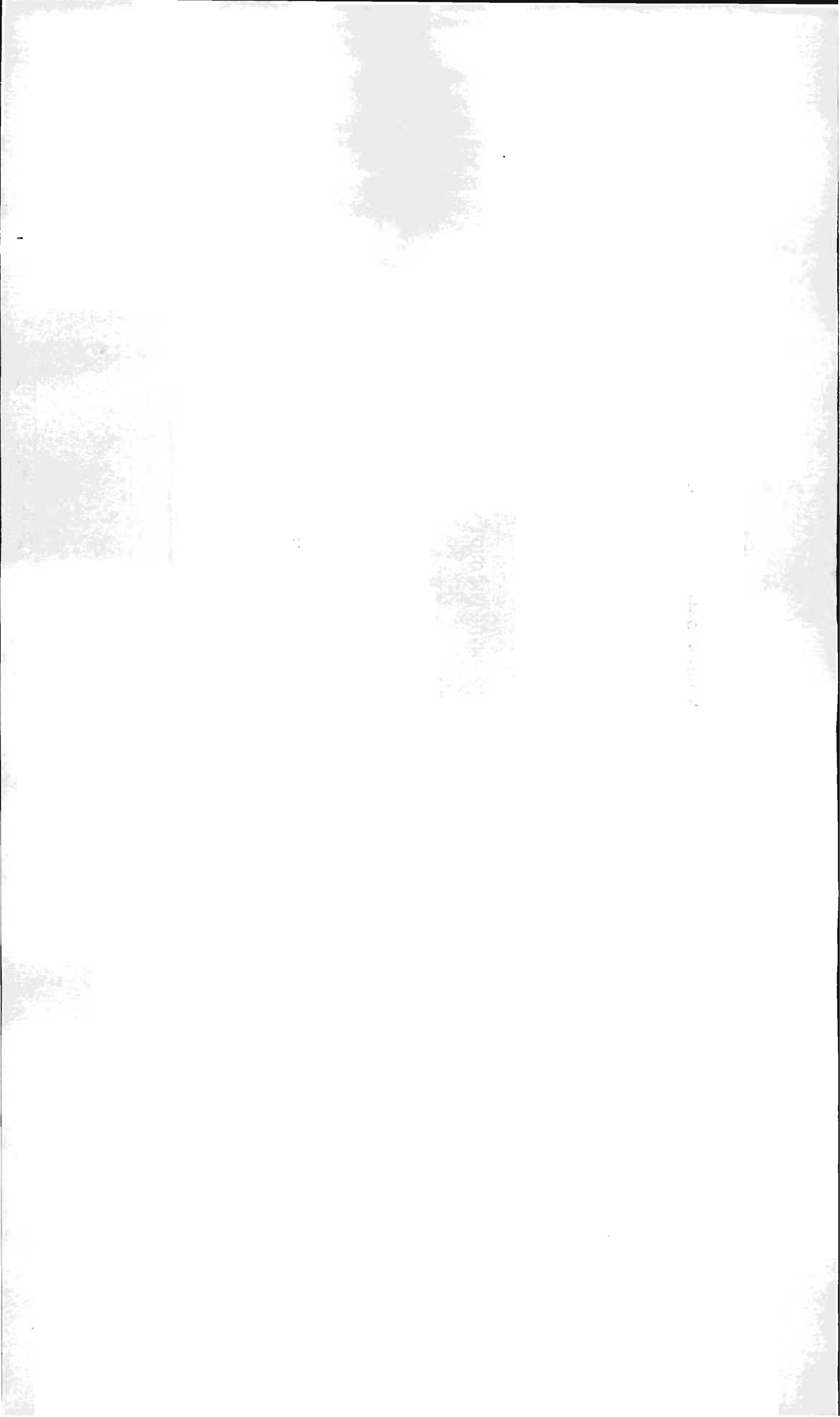

In the Privy Council.

ST. FRANCIS HYDRO ELECTRIC COMPANY, LIMITED, AND OTHERS

v.

THE KING AND OTHERS

DELIVERED BY LORD MAUGHAM.

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