

Privy Council Appeal No. 84 of 1913.

Donald Fraser, Senr., and others - - Appellants,
v.
Alphonse Dumont - - - Respondent.

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 27TH JULY 1914.

Present at the Hearing :

THE LORD CHANCELLOR.

LORD SUMNER.

LORD MOULTON.

SIR ARTHUR CHANNELL.

[*Delivered by* SIR ARTHUR CHANNELL.]

This was an appeal by special leave from a judgment of the Supreme Court of Canada reversing a judgment of the Court of King's Bench for the Province of Quebec, and restoring a judgment of the Superior Court for that Province whereby judgment was entered for the respondent against the appellants for \$2,500.00 damages.

The respondent is an owner of mills and land on each bank of the Cabano River in the Province of Quebec, and he brought his action to recover from the appellants the damage done to his property by timber which in April 1910 got adrift while being floated down the Cabano River in the actual charge of one Olivier Guérette. At the trial before Cimon, J., it was proved that extensive damage was done to the respondent's property, and that it was occasioned by the negligence of Olivier Guérette, contri-

buted to by negligence on the part of the respondent. These findings of negligence were not questioned before their Lordships. The learned Judge held that the appellants were responsible for the negligence of Guérette, and, acting on the law of Quebec as to damage resulting from the negligence of both parties (which law was admitted here), he divided the damages and gave judgment for the respondent against the appellants for the sum of \$2,500.00, being part of the damage actually done. The judgment was reversed by the Court of King's Bench of Quebec by a majority of three judges to two, and that judgment was again reversed by the Supreme Court of Canada by a majority also of three judges to two. There has, therefore, been a considerable difference of judicial opinion on the questions in the case.

The principal question is whether the appellants are responsible for the negligence of Olivier Guérette. If they are, no other question arises, but if they are not, then a question of great general importance arises, viz., whether on the true construction of certain Articles of the Revised Statutes of Quebec of 1909 persons using watercourses for the transmission of timber are liable for damage done to the property of riparian proprietors without proof of negligence. It was no doubt by reason of this point being supposed to arise that special leave to appeal was given. As however the Board, after hearing the arguments of the appellants' counsel, are of opinion that the appeal against the decision that the appellants are liable for Guérette's negligence fails, the question on the construction of the Statutes does not arise, and the Board, having heard arguments on one side only, gives no opinion upon it. It is only necessary to mention it in order to make it quite clear that the dismissal of this appeal involves no expression of

opinion on the construction of the Statutes, and this is perhaps the more necessary because, although on the facts there was a majority of the Judges below in favour of the respondent, there was on the question of law a majority in favour of the appellants, and the dismissal of the appeal if not clearly explained might lead to the inference that the Board had approved of the view of the Statutes taken by the minority.

Their Lordships pass now to the facts on which the liability of the appellants for the negligence of Olivier Guérette depends, and as the Board have come to the conclusion that there is no sufficient ground for interfering with the findings of fact of the Trial Judge on this point, they may be stated shortly.

The appellants are a firm carrying on the business of lumbering and the manufacturing of lumber at Cabano, and they were owners of a part, although a comparatively small part, of the timber which formed the "drive" by which the damage was caused. The rest of the timber was owned as to a part by a Mr. Hayes, and as to a part by a Mr. England. It was, however, all under the actual charge of Olivier Guérette, and it all broke adrift, blocked a bridge, and caused a flood, and it was of course impossible to distinguish between damage done by the timber of one owner, and that done by the timber of another owner, and the Court held that all the owners were liable "solidairement," or, as would be said in England, "jointly and severally," as joint tort-feasors, so that it was immaterial that the other owners were not joined with the appellants as defendants in the action, and on this point the Board see no reason to differ with the view of the Trial Judge. In fact, it was not seriously disputed by the appellants' counsel. The liability of the owners depends upon whether Olivier Guérette was an independent contractor

or whether the owners, or the appellants, who through their managing partner, Mr. Archibald Fraser, took the more active part in the matter, had such control over Guérette as to make them liable for his negligence. The timber owners in this district appear to have been in the habit of joining together in many of their operations. They or most of them had joined together to form a company which was duly incorporated under the name of the "Cabano Log Driving Association." The certificate of incorporation of this Company stated that it was formed for constructing works in the river and improving the river for log driving purposes. This was done under Article 4921 of the Revised Statutes of Quebec of 1888, and the Association as such had statutory rights, and in fact executed certain works on the river. Their business was all done in the offices of the appellants, they had no clerks or servants other than those of the appellants, and no books other than those kept at the appellants' office, and they had no funds other than such as were contributed by the various members from time to time in respect of any joint work in which they were interested. In fact all joint operations of the timber merchants who were members of the Association seem to have been conducted through the machinery of the Association without any regard to whether the particular operations were within or not within the powers of the Association, and it seems clear that many of the operations carried on in the name of the Association were *ultra vires*. On 15th March 1910 a meeting of the directors of the Association was held at the offices of the appellants (their usual place of meeting) at which it was resolved:—

"That driving of logs on Cabano River "be sold," and the minutes then state that the driving of logs was sold to Archibald Fraser for

No. 44, page 183 of Record.

the base price of 80 cents per thousand feet run of timber.

It had previously been resolved to hold a meeting on the 15th March "for the sale of the driving of logs on Cabano River," and this appears to have been advertised or to have in some way come to the knowledge of Olivier Guérette. There was evidence that he, being unable to be present on 15th March, had requested Archibald Fraser to bid for the drive on his behalf, and it was shortly afterwards agreed between him and Archibald Fraser, that he (Guérette) should conduct the drive and receive as his remuneration the 80 cents per thousand feet of timber. It is on the terms of this agreement, which are by no means clear, that the whole case turns. There was considerable discussion in the Courts below as to whether this transaction was not *ultra vires* of the Cabano Log Driving Association, and as to the consequence of its being so, if it was, but this does not appear to the Board to be material. It is clear that the owners of the logs which were to be the subject of the drive did intrust them to the conduct of Olivier Guérette on the terms, whatever they were, of the arrangement or agreement made between him and Archibald Fraser, and it is of no importance whether the acts done in bringing about that result by the officers of the Log Driving Association are to be considered as the acts of the Corporation or the acts of individuals. Olivier Guérette was a man of experience in log driving, but he was a man of no means whatever. The money required to pay the men who worked under him was found by the appellants. It was said that this would have ultimately been set against the 80 cents, but although the risk of damage to the property of other people in the course of the drive was no doubt greater than the risk to the logs them-

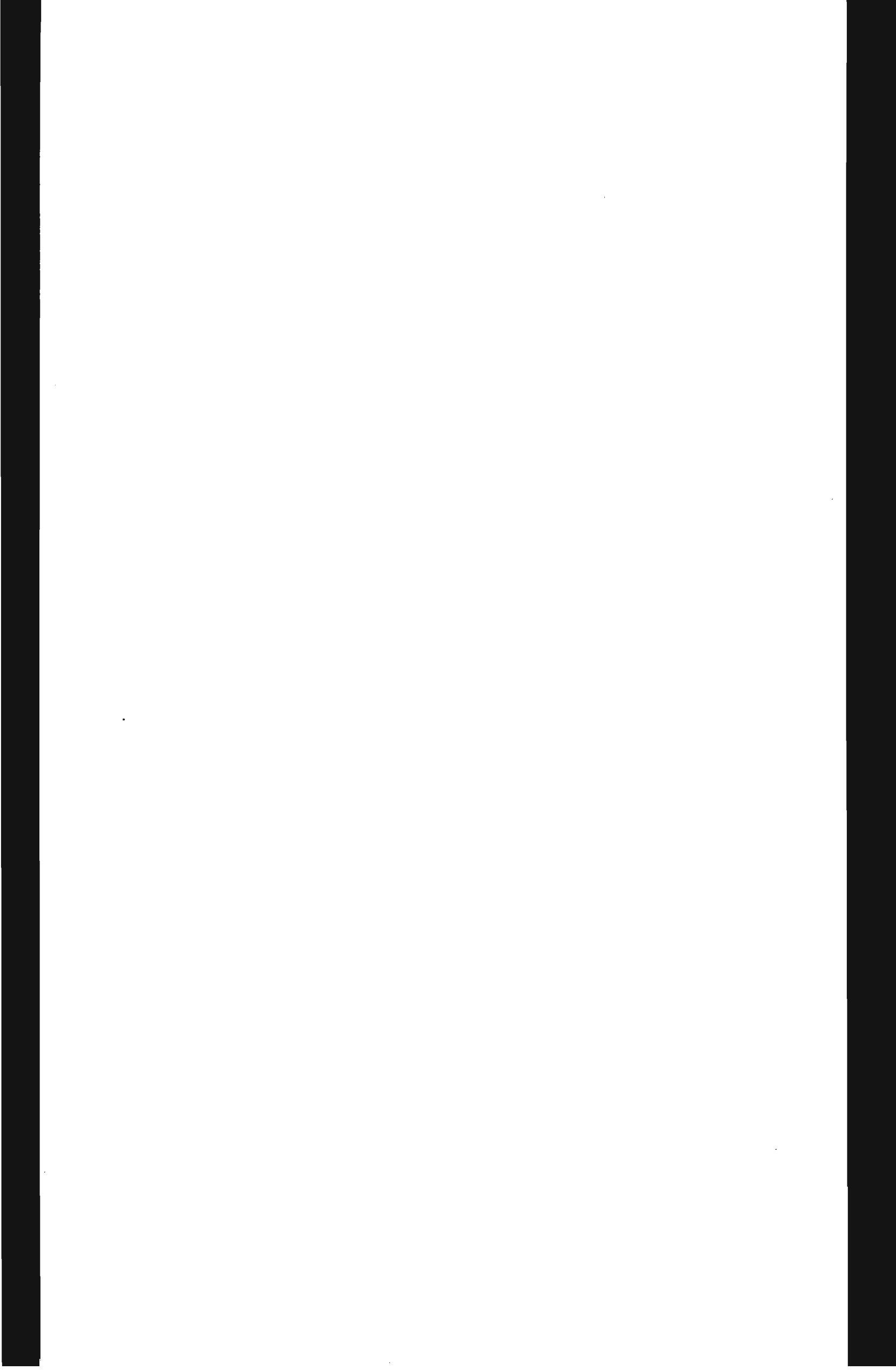
ssives, still there clearly was risk to the logs, and if this was a contract, the solvency of the contractor would appear to be very material to the owners, while if Guérette was a servant only it would not be. The facts as to this part of the case are stated in the judgment delivered by Mr. Justice Cross who dissented from the judgment of the majority in the Court of King's Bench. He states nine reasons, tending to show that there was no *bonâ fide* contract such as would relieve the owners, and that Olivier Guérette remained under the control of the owners, or of Archibald Fraser, acting for the owners.

Pages 208 to 211 of the Record.

The Board, agreeing as they do in substance with the way Mr. Justice Cross deals with the facts, think it clear that there was ample evidence to justify the conclusions of the Trial Judge. Even on paper, the evidence of Olivier Guérette as recorded in pages 127 to 144 of the record is extremely unsatisfactory and the view of the Judge who heard him and the other witnesses should not be disturbed except on some strong ground. If a jury had on this evidence found as the learned Judge did, it would be clear that the verdict must stand, and although Courts of Appeal, both in this country and in Canada do not treat the findings of a judge of fact (who gives his reasons which can of course be criticised) quite as a verdict of a jury, the Board are of opinion that there is nothing in the evidence on the record in this case to justify a Court of Appeal in arriving at a conclusion different from that of the Judge who tried the case and heard the witnesses.

The Board will therefore humbly advise His Majesty that the appeal should be dismissed with costs here and below.

The costs of the appeal will be as between solicitor and client in accordance with the terms of the Order granting special leave to appeal.



In the Privy Council.

DONALD FRASER, SENR., AND
OTHERS

v.

ALPHONSE DUMONT.

DELIVERED BY
SIR ARTHUR CHANNELL.

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