IN THE MATTER of the Petition of Right of

JOSEPH BARTHOLOMEW ROBERT....SUPPLIANT; 1904

Oct. 17.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Claim for possession of head-gates and waters of canal—Public work—Interruption of possession—Water-power—Public and private rights—Estoppel by admission of Crown's officer—Departmental report.

The suppliant's predecessor in title, the Seignior of Beauharnois, early in the last century had constructed a canal or feeder, with head-gates and appurtenances, through his own land for the purpose of conveying water from the River St. Lawrence to the River St. Louis, and so increase certain water-powers belonging to the seigniory. Later in the century, when the Beauharnois Canal was constructed by the Government of the Province of Canada, certain works near the head of that canal had the effect of raising the water along the shores of Hungry Bay, in Lake St. Francis, and flooding a considerable portion of the seigniory of Beauharnois. To overcome this the Government built a dyke through Hungry Bay, which crossed the feeder and had a flume with three sluice-gates at its entrance into the St. Louis river. The gates that the seignior had used up to that time were removed, and the three sluice-gates mentioned were constructed as part of the public work. It was not disputed that this dyke was part of the property of the province, and passed to the Dominion of Canada in 1867; but down to the year 1882 the seignior and his grantees remained in possession of the feeder and head-gates. In that year, however, a sum of $10,000 was voted by Parliament for the improvement of the River St. Louis, and a sum of $5,000 in each of the two years following. In connection with the work so provided for, the Crown took possession of the feeder, deepened and improved it, built a bridge over it, and took out and re-built the head-gates. It was not quite clear whether these works were undertaken by the Dominion Goverment at the request of the farmers who owned adjacent lands or of the mill owners, or at the request of both. It was clear, however, that none of the mill owners, of whom the suppli-

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ant was one, objected in any way to what was done. But after the work was completed, the Crown's officers continued in possession of both the feeder and the head-gates, and the suppliant complained to the Minister of Public Works that he was prevented, along with other mill owners, from exercising the control of the feeder and head-gates to which they were as such owners entitled. The result of this complaint was that the control and possession of the feeder and head-gates were handed over to the suppliant who retained possession until 1892, when the Government resumed possession against the will and consent of the suppliant, who gave up the keys of the gates without waiving any of his rights. Prior to the time when the Goverment in 1892 took possession of the feeder, the suppliant had acquired the rights therein of all the mill owners interested excepting one, the rights of the latter being acquired afterwards in the same year.

Held, that as the suppliant's *auteurs* were not in possession of the feeder and head-gates at the time of the deed of conveyance, they could not give him possession thereof as against the Crown; and that as the right of control and regulation of the head-gates had been in the Crown from the time the dyke was built, such right was not lost by the Crown ceasing to exercise it for the period above mentioned.

2. The suppliant while enjoying the right to have these works so regulated and controlled as to give him all the water he was entitled to, consistent with other public or private interest therein, had not the paramount or exclusive control and regulation of them, which, by the necessities of the case, were vested in the Crown.

3. The Crown is not estopped by any statement of facts or by any conclusions or opinions stated in any departmental report by any of its officers or servants.

PETITION OF RIGHT for the recovery of property in the hands of the Crown, and alleged to belong to the suppliant.

The facts of the case are stated in the reasons for judgment.

The trial of the case was begun at Montreal on the 8th October, 1902, and was continued on the following dates: June 23rd, 1903; September 2nd, 1903; October 27th, 1903; November 12th, 13th and 14th, 1903; December 10th and 11th, 1903.

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The case was now argued at Ottawa.

C. J. Fleet, K.C. for the suppliant.

The *Solicitor-General* (Honourable *R. Lemieux, K. C.*); *D. A. Lafortune, K.C.* and *L. J. Papineau, K.C.* for the respondent.

Mr. Fleet opened for the suppliant:

The petition in this case alleges that the suppliant is the owner of the feeder, in what is properly called the Seigniory of Beauharnois. The title to this feeder comes entirely from the seignior. The suppliant sets up his title as being founded on a deed from the late seignior, the Hon. Edward Ellice, in 1896, and asks for possession of the feeder, alleging that the Government had taken possession of the same and refuses to surrender it to him. Following on the defence, the suppliant made a motion asking the Crown to detail and specify the irregularities and informalities in the suppliant's deed, and to set up in detail the title under which the Government claims. Following on this motion the Government filed an admission. That refers to paragraph number 5 of the statement of defence which alleges that the Government owns the water, and that it therefore is owner of the feeder. Now, upon the issues raised under this admission and under the petition of right and the defence, we came before the court, and certain witnesses were examined on behalf of the suppliant, the Crown calling no witnesses at all. The witness W. H. Robert, speaks very fully about the question of the suppliant's ownership of the feeder. He said that his father was the owner and proprietor for many years, and in opposition to that we have the Government appearing, so Mr. Robert says, only in 1880, with a claim to be the owner of the feeder. Then we have the deed of

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1896, and I may say here that this deed is nothing more than confirmatory of the title that had been in Mr. Robert before the year 1896, and it was only taken to cover what were regarded as certain defects in the title, which were not substantial. After argument on this point Mr Lafortune, for the Crown, raised the point that had not been raised in the pleadings, viz.: that the deed of 1896 was the purchase of a litigious right, and consequently vested no right, and the Government declared its option of paying Mr. Robert one hundred dollars. Furthermore it was contended that the Crown was in possession in 1896, when the deed was given to Mr. Robert. Now, I say that this issue was not raised in any shape or form by the original pleadings, and I urge that the point should not be allowed to be raised in view of the admission of the Crown. I maintain that the admission establishes that the only defence was that relied on in that admission. But your lordship will remember that the court suggested that Mr. Robert set up his antecedent title, and further suggested that this might be done by affidavit; but I wish distinctly to say that there is nothing spread upon the record to show that this suggestion was made by your lordship or that the Crown raised this new point. When the court met again Mr. Robert produced an affidavit setting up his antecedent title, which my learned friend objected to because there was no opportunity of cross-examination upon the affidavit. The Crown also then asked for permission to file an amended plea, and your lordship granted that permission. This amended plea was admitted upon the record and the suppliant filed an amended claim, and certain documents. Then, by permission of your lordship, the affidavit was withdrawn, and is not in the record. Now, this practically constitutes the issue which is for your lordship's

consideration. But I might have stated before closing my narrative of the facts that at the time my learned friend put in his plea he also put in certain exhibits— the judgment of the Hon. Edward Ellice, and the specifications of this dyke. That is their title to the property. The only officer of the Government who was examined was Mr. Pariseau. Mr. Pariseau thinks that this judgment which was filed completes the title of the Government to the property, and is the only title which he knows by which the Government holds any rights in the property. Now this dyke was constructed early in the "fifties" of last century. After the canal was built it was found that there had been an engineering error committed by which there was insufficient water in the canal, and to cure this defect it was necessary to build a side dam out in the centre of the river to conduct more water into the canal. Now, while more water was conducted into the canal, at the same time the effect was to raise the water along Hungry Bay, and to cause considerable damage. Such being the case the Government proceeded, about 1856, to build this dyke which ran from Knight's Point a number of miles up the river, and bordered upon Hungry Bay. Now, as a result of these damages an action was begun by the Hon. Edward Ellice for damages, and a judgment was entered up on the claim by certain arbitrators appointed under the provisions of the 9th Vict. c. 37. The verdict of these arbitrators was subsequently awarded and judgment in the Court of Queen's Bench was entered thereon for the sum of $50,000 in favour of the Hon. Edward Ellice. Now that is the judgment filed in this case; and looking at that judgment your lordship will see that it is based entirely on the statute 9th Vict. c. 37. This statute appointed certain commissioners of public works.

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[BY THE COURT:—I think the provisions of our present *Public Works Act* are based upon that statute.]

9th Victoria, chapter 37 is practically an expropriation Act. The powers of the commissioners are very expressly laid down, and, although, as a matter of law it would not seem to be necessary to make any such restriction expressly, their powers are expressed to be only those conferred by the Act. They have the supervision and direction of public works in course of construction, or those not yet taken over from contractors at the time of the passing of the Act. Then they are given power to acquire property for the Government for public works either by amicable arrangement with the proprietors or else by expropriation proceedings. In connection with any claim for damages arising out of any public work, they had power to award the amount of damages, and the finding of the arbitrators was made an order of court, and that is the way in which this judgment was arrived at. But it will be seen that the judgment in no way deals with the question of property at all, that is, so far as the property in this case is concerned. What it does refer to is an island out in the St. Lawrence, on which the fly dam was built. This claim of Ellice was not for land, except for Grande Ile taken for the dam; the burden of the judgment is an award to Ellice for $50,000 in connection with damages suffered by him from the waters of the Beauharnois Canal. There is nothing in this judgment to identify the land upon which the feeder is built in any shape or form. The feeder is not mentioned, and there is nothing to show that the land upon which the feeder is built is connected with the damages awarded against the Crown. Now, I think, we may assume that the Government paid $50,000 to the Hon. Edward Ellice for the damages sustained up to that time, and in order to protect them-

selves and him from future damage they built this dyke.

[BY THE COURT:—Is there anything to show when the dyke was constructed?]

What I was about to say is that the $50,000 were paid under this judgment for damages sustained by the Hon. Edward Ellice, and beyond that there is nothing more in the judgment so far as the issue between the parties in this case is concerned. And then, we are to assume that the Government having been condemned to pay $50,000, took steps to protect themselves against any future claim by reason of any damages which Ellice might suffer.

[BY THE COURT:—These claims were paid once for all under the statute, I think?]

Your lordship is to take this judgment just as you find it. Your lordship is not permitted to go back and presume what object or intention the Government had in the matter. We are confined to the record here, and so far as the record shows they paid the Hon. Edward Ellice $50,000 for the damages he sustained, and then they built the dyke to protect themselves from future claims for damages.

[BY THE COURT:—Is there anything in the judgment to show that the award was for past damages only?]

I admit that the dyke was built to prevent future damages. On referring to the specifications for the dyke your lordship will see that it must go without contradiction that the Hon. Edward Ellice was the owner of the whole seigniory of Beauharnois, and was the owner of these head-gates at the time of the construction of the dyke. At the time the Government built the dyke the feeder was in the possession of the Hon. Edward Ellice, and the object of the feeder and head-gates was to add water to the River St. Louis, to supply power to the mills at Beauharnois.

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[BY THE COURT:—This feeder enabled them to provide a water-power by drawing water from the St. Lawrence to the River St. Louis?]

Yes. But I wish to say to your lordship that you will not in any shape or form find in the judgment any reference to the feeder, and yet the feeder were a very important thing to the seignior. The feeder was built for the purpose of increasing the water-power at Beauharnois. There was no water-power at Beauharnois independently of this feeder, and you have to keep this fact in mind. Without the feeder Mr. Robert would be deprived of the whole control of the water. The feeder and the head-gates exist for the purposes of water-power at Beauharnois, and the water power cannot exist without the feeder and head-gates. So you see how important they were for the proprietor at the time the Government took possession of the head-gates. Your lordship will remember that the witness Pariseau, in answer to a question by your lordship as to whether the head-gates formed part of the dyke or the feeder, said that they formed part of the feeder and not of the dyke. When the Government obtained land for the dyke they found the feeder was in possession of Mr. Ellice, as it had been for fifty years before, serving water-power to Beauharnois. After they had paid the $50,000 to Mr. Ellice they took steps to protect themselves against future damages, and in their own specifications they provide for the erection of gates, and on their own showing these gates were of incalculable value to the seignior. And in order to protect him they take care to specify that he should be provided with gates equally as good. Taking the specifications and the judgment together it will be seen that the award under this judgment does not touch the feeder or head-gates; and this point of view is strengthened when we remember

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that Mr. Pariseau says that the head-gates are part of the feeder and not of the dyke. Now I say that it would not be proper for the court to presume any arrangement between the seignior and the Government whereby the seignior would in any way lose control of these gates. On the contrary there is a presumption of law against the owner losing his property and we must have an intention on the part of the Government unequivocally shown before we can say that it was their intention to take possession of the head-gates. It was not difficult for them to have acquired them had they so wished. Under the statute I have referred to, the Crown could have expropriated them or acquired them by amicable arrangement with the owner. But if it had been the intention of the seignior to let them go and submit to arbitration, that fact would have appeared by some documentary evidence. If the Government came in and built any works on the land of the suppliant's *auteur* it would acquire title to them as owner *du fonds*. Of course if the seignior stood by and let another put works upon his land, it might give the other person a right to payment, but the right of property is in the seignior, in the proprietor of the soil. Now, I think it will be admitted that the seignior was the owner of the feeder at the time the Government took possession. And I think it will equally be admitted that in 1880, when the Government took possession of the feeder, that Mr. Robert was the owner. Under Quebec law a man is presumed to hold as proprietor unless the contrary is proved; and a man is entitled to add to his holding the title by holding of his *auteurs*. Then, joining Mr. Robert's possession to the possession of the seignior, we find that Mr. Robert has been in possession for some seventy years. I think the right date to fix as the period when the Government came into possession

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is the year 1882. (Arts. 2193, 2194, 2196, 2199 C. C. L. C.) On the evidence of Mr. William Robert there is no question that his father was in possession up to 1882, and these articles apply. As to the right to add the possession of one's *auteur* in order to complete prescription, see Art. 2200 C. C. L. C.

The Crown is alleging that the whole purpose which the Government then had in view in building this dyke would have been defeated unless they had control of the head-gates; but the facts are that they built the dyke in such a way that flooding would not take place on the property of the seignior. It is in evidence here that all the property covered by the plans for this public work, plans which were then before the Crown, was property belonging to the seignior, that as a whole belonged at the time to the Hon. Edward Ellice. The Goverment of the day provides that the head-gates built by them should be equal to those already there, and the whole object of the public work was to prevent damages being suffered by the Hon. Edward Ellice, and nobody else.

[BY THE COURT:—But may it not have been the intention of the Government to retain control of the gates; but because that would be a matter of expense, and no one except Mr. Ellice was at the time interested, the Government allowed him to continue in control of such gates?

The only person the Government was dealing with was the Hon. Edward Ellice. He was the party in possession of the lands affected. And I would like to call the court's attention to this point that, as a matter of law, there was at this time a Watercourse Act whereby the Government regulated the positions of persons damaged by watercourses, and placed the damages directly on the owner of the watercourse.

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(See *Consolidated Statutes* L.C., c. 51, entitled *An Act respecting the improvement of Watercourses*, sec. 1.)

[BY THE COURT:—I do not understand that this feeder was a watercourse? Would the Act apply here?]

It gives the right to build dykes and dams, and unless the penalty which was provided by the Act was paid the works causing the damage might have been demolished. That is the position the seignior stood in as to the head-gates; and that is the way the Government found it and that is the way they left it. Now, for a moment, I wish to call your lordship's attention to a position taken by my learned friends in this case, namely, that the antecedent titles could not be set up. The Hon. Edward Ellice sold from time to time certain rights in the water-power. In other words, he provided a certain amount of water-power for various parties, leaving the residue in his own hands. The amount disposed of to these parties was determined by so may "runs of stone," and he gave them certain servitudes, and certain liabilities as to the up keep and maintenance of the head-gates. The water-power was continuous and could not be separated. The suppliant gathered up these rights from time to time, and in 1871 the Hon. Edward Ellice sold out to the suppliant the balance of his seigniorial rights. That being the case, Mr. Robert from 1871 stood absolutely in the rights of the seignior with reference to this property. Everything by way of obligation or privilege in the feeder, whatever property was destined in the feeder, was destined in Mr. Robert. I have said that there was an obligation attaching to each holder of water privileges with regard to the up keep of the of the head-gates. This would be inconsistent with the right of the Government to the possession of the head-gates. Mr. Robert acted as owner, kept up the

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head-gates, and assessed upon the other owners their share of the maintenance of the head-gates. Prior to 1871 he had acquired from the other parties their rights, and in that year he got all the seignior's rights; and from that minute he exercised all the privileges, and was bound by all the obligations, of the owner of the head-gates. Mr. W. H. Robert says that nobody else has exercised the rights of ownership, or claimed any title, except the Government. With reference to the recent work that has been said to have been done by the Government upon the feeder, the witnesses on behalf of the Government say that certain employees of the Government did work there, but they do not say that they were paid by the Government, and it is in evidence that these men were actually in the employ and payment of Mr. Robert himself. There was a succession of guardians of these gates who were the employees of the seignior and afterwards of Mr. Robert. These witnesses constantly speak of the guardianship of the feeder being farmers in the employ of the seignior, right down to the time of Mr. Robert becoming possessed of all the rights in the feeder. The holding of the farm was part of the remuneration for looking after the feeder. The Government have brought no witnesses from the Department in this matter; they did not produce the superintendent of the Canal; they did not produce anyone who might be supposed to have a knowledge of the matter. We asked them to produce receipts, etc., and we got nothing from them. It was only in 1882 that the Government came upon the scene for the first time. But the Government gave up possession to Mr. Robert in the year 1888, and Mr, Robert remained in possession down to 1896. I have no doubt it will be contended that the acts of the Government officers will not bind the Government; that

the acts of the officers are not the acts of the Government *per se*. But if they were the owners—if the Government owned the head-gates and feeder—how do they explain the fact that they gave into Mr. Robert's possession the keys for four years? As to the reports, the evidence of Mr. William Robert explaining them is objected to, and his evidence taken subject to objection. We find in the report of Mr. Perley, C.E. a corroboration of the statements of W. Robert, McMartin and others. This statement by Mr. Perley, a Government officer, is confirmed by Mr. W. Robert and by the notice of one of the engineers to Leduc, who was guardian at one time, and who afterwards became an employee of Mr. Robert.

[BY THE COURT:—When did the Crown expend money on it?]

In the year 1882 the Crown appears on the scene for the purpose of spending money. Mr. Robert all through has taken the position that the property is his.

[BY THE COURT:—During the time this money was being spent by the Government?]

Yes. At the time Mr. Curran represented them, there is a protest by Mr. Robert as to the surrender of the keys.

[*By the Solicitor General*:—Mr. Curran was not acting for the Crown.]

No; and more than that, under our law the presumption of ownership is always in favour of the *status quo*. The mere fact that the Government having built on the land of the seignior gave them thereby no rights unless there was an agreement as to the *fonds*. As to the dyke I hear that the Government officers claim that they have acquired a prescriptive right; but be that as it may, Mr. Robert is in title from the time he took possession, and the reports of the officers of the Government show that he was in possession.

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[BY THE COURT:—What about the Public Works Accounts, do they not show the expenditure of the monies for the Government ?]

I recognize fully the difficulties with reference to this matter. Your lordship has suggested that the effect of what was done under *The Public Works Act* was to vest the property in the Crown, by the spending of money on it for repairs. But I say that as the record stands there is no jot or tittle of evidence to show that the Government has spent money on the property claimed by the suppliant.

[BY THE COURT:—Is there not some evidence on the record of some money having been spent ?]

There is the fact that the Government worked there, but there is no evidence that money was spent. I call your lordship's attention to the fact as it appears in the admission filed. I submit that the admission has all the force in the record as if there had been no amendment after it was made (Art. 1245 C.C. L.C.) This deals with the question of judicial admissions and their effect between the parties. There is a judicial admission filed in this case. These admissions rest the Goverment's case on the title and ownership in the water (Art. 1583 C.C. L.C). This deals with the question of the alleged rights of the Crown.

I submit that the rights acquired by Mr. Robert in virtue of the deed of 1896 are in no sense litigious rights. There is no question of right as between the seignior and Mr. Robert at the time of the deed. There is nothing which constituted a question between them, and under the circumstances Mr. Robert was justified in getting all the rights which his *auteur* could give him. We may also be perfectly sure that there was no dispute between the Government and the seignior. All these facts being so, it is in no sense a conveyance of litigious rights. The Government

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appears in 1882, and continues in possession until 1888. The court has suggested that it would be well to examine the law in force at the time, which so far as I can see would be *The Public Works Act* of 1867, which would govern and control the rights of parties (1). Bearing in mind that the Government appeared in 1882 and disappeared in 1888, then after 1888 it ceases to be a public work for any purpose. The Government then handed over to us the keys and recognized us as the owner. I refer to the report of Mr. Perley, where he declares that there was an abandonment to us. And it must further be remembered that after the Government resumed possession in 1896 the protest of Mr. Robert is spread out on this record. All through the record it will be found that Mr. Robert takes issue with the Government as to the right of possession. More than that, even before the Government gave us possession Mr. Robert was making a protest. Before the surrender of possession to us Mr. Robert was insisting that he was entitled to the head-gates. As to the spending of the money upon the feeder, it was an expenditure made for the farmers, and not for the seignior or Mr. Robert. The necessity for the expenditure was the result of the farmers digging out the soil for ditches, and the silt filtered down to the dam and caused the water to flow back, so it was worse than before.

This is, I think, all that is necessary in the facts of the case to direct your lordship's attention to.

The Solicitor General:—I appear at this late stage of this case, as my learned friends Messrs. Lafortune and Papineau were agents for the Department in the matter. As they are familiar with the facts they will present them more fully to your lordship.

(1) Sections 2 and 10.

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Now as the question of the admissions by the Government of what is called the suppliant's title to the property in question here, your lordship will see that the reports present only the views, or the opinions, of these special officers. What they say amounts to nothing more than an opinion, and it cannot bind the Crown. Nor can they be taken as admissions of Mr. Robert's title. As to the two formidable arguments which your lordship has suggested as to the Crown's rights to this feeder, and as to the position the Crown occupies in this property, I cannot add to them with any benefit to the Crown. The suppliant in his petition has based his rights on a certain deed passed in 1896. Again, counsel for the suppliant has said that Mr. Lafortune, acting for the Department, has made certain admissions of great importance to the suppliant's case. Mr. Lafortune made these admissions at a time when he could make them without prejudicing the rights of the Crown, because at that time the suppliant had not registered his titles. Without registration he could not dispute the title of the Crown.

[*Mr. Fleet*:—It was only the copy served on the sollcitors for the Crown that was defective. The deed itself was registered before.]

[BY THE COURT:—The argument, as I understand it, is that the admissions must be read in view of the state of the pleadings when the admissions were made. They relate to the position of the cause at that time.]

The Solicitor General:—Certainly.

[BY THE COURT:—But the suppliant has been allowed to go back and show an earlier title.]

Yes, he does pretend that he had an earlier title; but the title upon which is based this petition of right was acquired by Mr. Robert solely from the Hon. Edward Ellice. He acquired this for the sum of

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twenty pounds. Then we have it that he acquired all the rights he claims to exercise over this feeder for twenty pounds. Now this deed under which he claims, in Quebec law, is the conveyance of a litigious right, and that being so, the suppliant is entitled to receive from the Crown only the amount which he paid his *auteur* for it, that is the sum of twenty pounds which he paid to the estate of the Hon. Edward Ellice. (Arts. 1582, 1583 and 1584 C.C.L.C.) It was under these articles that Mr. Lafortune made the admissions he did, knowing that the suppliant could not obtain from the estate of Ellice any more rights than they, as his *auteurs*, had in the property. Counsel for the suppliant said that Mr. Robert was in possession in 1882, but it appears by the evidence which is before your lordship that since the time the dyke or embankment was built the Crown has practically held control of the head-gates. The Crown has paid persons as its agents, residing near the head-gates to open or close the gates. Since the time they were built by the Government Mr. Robert, or some other person, has been occasionally allowed to have control, under the Government, of the head-gates; but during all that time the Crown has not made any abandonment of its rights. It has simply employed some third persons to look after the head-gates for it. This is clear from the evidence. The Crown since the time the dyke was built has had the practical control of the head-gates and in order to placate the owners of water privileges the Crown gave the keys to Mr. Robert; but this was in no sense a permanent surrender of the Crown's rights. Mr. Ellice was the seignior of Beauharnois when the Government built the Beauharnois Canal. An error having been committed by the engineer in the construction of the Canal, they had to build a dam between two islands in order to give a larger

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quantity of water in the canal, and the building of this dam caused some flooding on the shores of the seigniory. That being so, the Hon. Edward Ellice took action under 9th Vict., c. 37, for damages suffered by him at that time. An award was made, and that award went before the Superior Court. The Crown paid $50,000 under that award as damages for the flooding. Now, there has been some doubt cast upon the particular property affected by this judgment, or mentioned in it. But upon the facts of this case it is shown that the flooding did not take place on Grande Ile, but in the village of Catherinesville. The Government paid the $50,000 and then built the dyke. Would it be equitable then for Mr. Robert, who is *au droit* of Mr. Ellice, many years after the full receipt was given by the suppliant's *auteur* and no protest was filed, the dyke being in existence at the time the award was paid, would it be equitable for Mr. Robert to be allowed to dispute the title of the Crown at this day? Clearly, neither Mr. Ellice nor his heirs have any claim to the head-gates. Surely it could not be contended that the Crown deepened or widened the feeder merely to please Mr. Ellice or his heirs, or Mr. Robert, who succeeded them. To say that the expenditure of money was for this purpose is preposterous. Counsel for the suppliant contends that clause 10 of the *The Public Works Act*, 1867 applies, but reading carefully the clause and the exceptions he refers to, I say that the suppliant is not within the exceptions. The interpretation he seeks to put upon this clause cannot be substantiated, so far as his client is concerned. One Simmons at a certain time claimed the feeder as his own property; therefore in his long chain of titles the suppliant has not been able to establish possession which has been uninterrupted. On the contrary it has been interrupted, and has been equi-

vocal. I ask has there been any lease or sale of the head-gates by the Crown to Mr. Robert or to his *auteur*? I claim that there has not been.

My learned friend has cited several articles of the *Civil Code* under the title of "Prescription." But there are certain elementary principles which cannot be ignored by the court. One of these principles is the fundamental one that there is no prescription against the Crown, and neither Mr. Robert nor his *auteur* could prescribe against the Crown. Mr. Ellice being the seignior, was entitled to certain rights, as proprietor *du fonds*, but that does not give him any right to the improvements which were not done to improve the property of the seigniory. More than that the seigniorial rights were abolished by statute and his *censitaires* could redeem, and so it was not only for the seignior but for the *censitaires* that these improvements were made, and the titles filed by the Crown show that they had been redeemed. The rights which the seigniors lost under the statute were the rights in non-navigable waters, and if it were shown that such a right belonged to the seignior it became vested in the Crown by the abolition of the seigniorial rights. By reading the answer to the added plea filed by Mr. Lafortune I find that there was a lease of the water lots, but the suppliant got this lease subsequent to the filing of the petition of right, therefore it should not be considered at all in this case.

Mr. Papineau followed for the respondent, explaining to the court the position of the farmers of the district with respect to the feeder. Since the dyke was built the property has always been regarded as Government property. There is a highway passing along the feeder. This highway has been used by the public as the front road to the farms along the feeder, the feeder going from Lake St. Francis to the St. Louis

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River. Under the contract of 1854 the feeder was required to be twelve feet wide. It was built as part of the Government works, and the suppliant now claims a part of the dyke itself. Furthermore the lot claimed by the suppliant in his petition of right would not give him possession of the head-gates because they are on another and a distinct lot. The suppliant claims lot No. 341 on the cadastre, while the head-gates and part of the dyke claimed are within lot No 340. The plans show that this dyke is a separate property from the feeder.

Mr. Lafortune followed for the respondent. In connection with the last objection raised by Mr. Papineau as to the location of the head-gates on the lot claimed, I refer to paragraph 5 of the amended defence. The burden of proving the allegation as to the location of the head-gates was upon the suppliant. It was necessary for him to show that the head-gates are on the lot that he claims. It was not for us to prove his case, and he was not taken by surprise by the issue raised as to this point.

Since 1882 the Government has refused to admit that the suppliant was the owner of this part of the land claimed, and so he got the deed of 1896 for the purpose, as he says, of suing the Government. He got this deed purposely to sue the Government, and if this is not a litigious right, I do not know what a litigious right is. It was to enable him to bring this suit. The only deed he alleges is the deed of the 3rd of August, 1896, and it was not to correct any error in the preceding deeds. He did not get permission to add to his title until after the evidence was taken and the argument commenced. I had given my admission under the first plea, and then it was correct, because he had no right against the Crown with a deed absolutely null. In that view of the case I made

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the admission, and I do not regret it now; but after the pleas were amended, and the position of the parties was changed, he says: "Now I will hold you to your admissions." I submit this is impossible.

The suppliant has not produced a single deed to show that the property in question was bought by him. He filed deeds showing that the seignior had sold to certain parties and they had conveyed their rights to Mr. Robert, but they could give him no more rights than he had himself, and so we come down to the fact that he claims under the deed of the 3rd of August, 1896. The Government knew that he claimed his title under the deed of 1896, and they knew that his title was no good. The date of registration is the date of transfer. When Robert got his petition of right granted he was not the proprietor of the land, because he registered his deed after that, and the registration could not be given a retroactive effect.

There is nothing in the titles filed showing that he had bought the land mentioned in the deed of 1896.

As to the judgment rendered in 1854, it was then and there agreed between the parties that the dyke should be built—that must be presumed. It must be presumed, because the seignior was residing near the dyke and he was aware of what was going on, and so I say that it is right that we should assume that he had agreed that the Government should take the land.

The damages were paid once for all, and after that the dyke was constructed and approved by everyone. The suppliant knows that the Government has spent thousands of dollars upon the improvements there. He stood by and allowed the Government to spend thousands of dollars, and he never pretended that he was the owner. Without that dyke the feeder would be worthless. The suppliant has admitted that. Then I say that since 1854 we have had possession of this

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property. Now counsel for the suppliant says that if we had been owner then it would have been impossible for us to give the keys over to Mr. Robert; but I say that the argument works both ways, and I say to him how does it come that you give us back the keys if you are the owner? Mr. Robert recognized the right of the Government by surrendering the keys to the Government. Since 1884 several bridges were built across the feeder at certain points by the farmers. There was no protest from Mr. Robert. If he were the owner, would he not have objected to this? The bridges there connected with the public road. Can we imagine that Mr. Robert would see the fences along the feeder and not order them down if he owned the property?

[BY THE COURT:—Is there any land there that is useful for any purpose not connected with the feeder?]

[*Mr. Fleet*:—No, there is not. The land there is only useful as accessory to the feeder.]

We are both agreed as to that. Mr. Robert has acquiesced in the Government works and cannot claim the land on which they are situated. The works were there to protect the Government, so that it would not be exposed to future damages. They were to be controlled by the Government. If Mr. Robert gets possession of the feeder he may close the water from the other millers. He has no public interest in it, and therefore the head-gates should be in the hands of the Government. We object to Robert being declared sole and only proprietor of the feeder. Counsel for suppliant said that the object of the feeder was to serve the mills at Beauharnois. That is correct.

[BY THE COURT:—I understand that the Crown intends to assert its right to the ownership of the head-gates and feeder in perpetuity.]

[*The Solicitor General*:—Yes.]

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[BY THE COURT:—Could not all questions then be settled by expropriation proceedings?]

[*Mr. Fleet*:—I ask for judgment on the case as it is now presented to the court.]

[*The Solicitor General*:—There is no question that the Government intend taking the feeder and the gates, and I think that the suggestion made by your lordship would be acceptable to the Crown.]

[*Mr. Fleet*:—I want to force the Crown's hand in this matter, and I would ask your lordship to give judgment as soon as possible, because the position of affairs is simply unbearable.]

[*The Solicitor General*:—For my own part I may say that I helped my learned friend to get his petition of right, because I thought the suppliant had no good rights in the land, and the matter might as well be determined by the courts. This was before I became Solicitor General.]

[BY THE COURT:—Even suppose my judgment went as you contend it should, Mr. Fleet, the Crown could by appropriate proceedings retain its possession.]

Mr. Lafortune:—As to the official reports by the Government officers, they are not binding on the Government. No one is presumed to renounce his rights, and more particularly the Crown. The Crown is in possession for everyone. I have the right to give my property to anyone I please, but the Crown holds its property for the public. The Crown cannot give away the public interests. Therefore I submit that extrajudicial declarations made by officials are not binding on the Crown. My learned friend says that Mr. Robert would have nothing if the feeder were taken away from him for the money he has spent in the feeder; but Mr. Robert might have a claim against the Government for whatever he had spent if he were not liable to keep up the head-gates. The Govern-

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ment is the proprietor of the feeder and if the Government were to close the gates it would do so with respect to the interests of everyone; it would not respect Mr. Robert any more than any other member of the public.

Counsel for the suppliant contends that the property, being once in the possession of Mr. Robert, it must be regarded as his when the Government gave him possession and the keys for a limited period. True, it was for a time in the Government's hands and for three or four years in Robert's hands; but what does it amount to, this intermediate possession, for the purpose of showing who is the real owner? I might hand you the keys of my property and ask you to go and take possession for me, but that would not mean that you were to consider yourself as owner. The mere taking of the keys was nothing in itself. Robert was to have possession under the Government to use the head-gates for the purposes for which the Government maintained them. Then again, there is another fact, the Government put a dredge into the feeder. Mr. Robert never objected to the dredge being there. No one can force me to keep my individual property in repair, and the Government would not have attempted to force Mr Robert if it were his private property; but this was not private property, and the Government made these repairs for the protection of the public. Up to 1882 the Government had possession. From that date down to the time Mr. Robert got the keys the Government was in possession. The feeder was intended to be for the advantage of the mill owners. If Mr. Robert were declared sole proprietor, the mill owners would be disappointed. Then my learned friend says that Mr. Robert bought certain rights. Well these rights do not advance him against the Government. Mr. W. Robert's verbal testimony

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of proprietorship is ineffectual. It must be founded on a deed. As to Mr. Robert's contributing to the keeping up of the head-gates, keeping them in repair, he was working in common with others for the general good of those interested. The expense was borne in common by the proprietors interested for years.

Mr. Robert brings his own book of entries to prove his case against the Crown. That is no proof; he cannot make evidence against us in that way. It was easy for Mr. Robert to bring witnesses to prove that he was reputed to be the proprietor. But the fact is that it was regarded as Government property. Can we sever the possession of the feeder from the possession of the dyke? If you close the one the other is useless. The head-gates are no good without the feeder, and the feeder is no good without the water. (He cites the case of *Meloche* v. *Déguire* (1). This case bears upon the question of the sale of litigious rights. It is against public policy to allow such right to be assigned. He also refers to the case of *Phillips* v. *Baxter* (2).

Mr. Fleet, in reply: The Government paid the $50,000 as compensation for damages; they did not pay it for any land expropriated. The Crown continued to recognize the seigniorial rights after the payment of this money.

It is the rear end of the farm that abuts on the feeder and a certain number of farmers have removed their fences, and taken in this property, and it is only since 1882 that the Government appears on the scene.

With regard to the various parties interested in this particular feeder your lordship knows that the water-power at Beauharnois was the object for which the feeder was built. Now Ellice owned the water-power at Beauharnois, and he built the feeder to increase the water-power. The president of the Dominion Woollen

(1) 34 S. C. R. 24. (2) 23 S. C. R. 317.

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Mills says that their water-power and Mr. Robert's water-power, and an additional ten horse-power, are the only rights affected, and the owner of the ten horse-power is not complaining. As to the ten horse-power they get their power after Mr. Robert gets his, and the Dominion Woollen Mills get their power from Mr. Ellice. Ellice got title to the Bourgier property, and that is between where the feeder strikes the St. Louis River and Beauharnois. I state this as an incontestable fact.

The court has simply to do with what is on the record. The suppliant wishes to be out of the agony of these proceedings, and obtain a judgment on the record as it stands.

THE JUDGE OF THE EXCHEQUER COURT now (October 17, 1904) delivered judgment.

The suppliant, alleging that he is the owner and proprietor of a certain feeder or canal in Catherinestown, in the Seigniory and District of Beauharnois, constructed by the late Edward Ellice, in his life-time the seignior of Beauharnois, for the purpose of conveying water from the River St. Lawrence to the River St. Louis, together with about half an arpent of land in depth on the easterly side and one arpent in depth on the westerly side of the said canal along its whole length, together with the head-gates and other gates, works or lands in connection therewith, and that the Crown's agents and servants have unlawfully entered into possession of the property mentioned, and more particularly of such head-gates and other gates connected therewith,—asks that judgment be rendered declaring him to be the sole owner and proprietor of the said feeder, the lands attached thereto, and more particularly of the said head-gates and other gates, and alone entitled to the possession, control and dispo-

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sition of the same; and that His Majesty be declared to be without any right or title therein.

During the progress of the proceedings the respondent had leave to amend the statement in defence. The terms of the amendment were, I think, mentioned and discussed when the motion to amend was made, but no formal amendment appears to have been filed with the Registrar.

The substance of the defence, however, is that the suppliant is not the sole proprietor of the feeder or canal, and of the head-gates, lands and works connected therewith, and entitled to the exclusive possession thereof; but that the Crown is entitled to such possession. The main controversy in the case turns upon the right to the possession of the head-gates by which the admission of water from Lake St. Francis to the feeder is controlled. It is conceded that the feeder and the lands that have been set apart and reserved as appurtenant thereto are not of any considerable value or importance, except as they afford the means of conducting the water so admitted from lake St. Francis to the River St. Louis, upon which are situated the mills that are in part dependent upon such water for the power that they use. While the head-gates mentioned are from the standpoint of one interested in the transmission of water from Lake St. Francis to the River St. Louis the means of admitting and controlling such water, and so, from that point of view, a part of such feeder, they are also a part of a dyke extending for some miles from Knights' Point westerly to a point near the boundary line between the seigniory of Beauharnois and the township of Godmanchester; and by means of which the waters of the lake are held back and kept from overflowing and flooding the adjacent lands. This dyke, as will be seen later, is a public work of Canada, and from that point of view the head-

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gates in question constitute a part of a public work. They serve in fact a double purpose, and this incident has, I think, given occasion for the present controversy. But before referring to the course of events that has led up to it, some reference ought perhaps to be made to the provisions of the statutes that have from time to time been in force in the late Province of Canada, and in the Dominion of Canada, respecting public works.

By the Act of the late Province of Canada, 9th Victoria, chapter 37, provision was made for the appointment of Commissioners of Public Works, who were given certain prescribed powers with respect to the construction of the public works of the Province, and the acquisition of lands required for such purpose. Provision was also made for the appointment of Arbitrators, to whom the Governor in Council might refer for their decision (among other claims) any unsettled claim or claims for property taken, or for alleged direct or consequent damages to property arising from the construction or connected with the execution of any public work in any part of the Province. By the provisions of the twenty-third section of the Act cited, and of the schedule thereto, the following, among other public works, were declared to be vested in the Crown, namely:—"All such portions of "the Saint Lawrence navigation, from Kingston to the "Port of Montreal, as have been or shall be improved "at the expense of the Province," and at the conclusion of the enumeration of a number of public works was added in general terms:—"And all other canals "locks, dams, slides, bridges, roads or other public "work of a like nature, constructed or to be constructed "repaired or improved at the expense of the Province." These descriptions cover and include the improvements made and the public works constructed at Lake St. Francis. The provisions mentioned, or similar pro-

visions, are to be found in later statutes of the Province of Canada relating to public works (22 Vict. c. 3, ss. 10 and 37, and schedule "A"; C.S.C. Chapter 28, ss. 10 and 37, and schedule, "A.")

By *The British North America Act*, 1867, s. 108, and the third schedule to that Act, the following, among other Provincial Public Works, became the property of Canada:—namely, "Canals, with lands and water-power connected therewith," and "Rivers and Lake improvements." Then in the tenth section of the Act, passed in the first session of the first Parliament of Canada, 31st Victoria, Chapter 12, entitled *An Act respecting the Public Works of Canada*, we have a general description of the public works which are thereby declared to be vested in the Crown, and to be under the control and management of the Minister of Public Works. In this description, with some exceptions that need not at present be noted, are included: "the "canals, locks, dams, hydraulic works, harbours, piers "and other works for improving the navigation of "any water.....and all other property heretofore "acquired, constructed, repaired, maintained or im-"proved at the expense either of the late province of "Canada, or of New Brunswick or Nova Scotia, and "also the works and properties acquired or to be "acquired, constructed or to be constructed, repaired "or improved at the expense of Canada."

In 1872 an Act was passed "to remove doubts under" *The Public Works Act* 1867 (1), by which it was provided that "every canal, lock, dam, hydraulic work, harbour, "pier, public building, or other work or property of "the nature of any of those mentioned in the tenth "section of the Act cited (2); acquired or to be ac-"quired, constructed or to be constructed, extended, "enlarged, repaired or improved, at the expense of the

(1) 35 Vict., c. 24, s. 1. (2) 31 Vict., c. 12.

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"Dominion of Canada, or for the acquisition, construc-
"tion, repairing, extending, enlarging or improving of
"which any public money has been or shall hereafter
"be voted and appropriated by Parliament, and every
"work required for any such purpose is and shall be
"a public work under the control and management of
"the Minister of Public Works" The section concludes with a proviso that the Act shall not apply to any work for which money is appropriated as a subsidy only. Similar provisions occur in the chapters of *The Revised Statutes of Canada* respecting Public Works, the Expropriation of Lands and the Official Arbitrators (1); and are to be found in *The Expropriation Act* now in force (2). Before concluding this general reference to the statutes relating to the public works of Canada, it may be observed that the tenth section of the Act last cited, following in that respect the Act thereby repealed (3), provides that a plan and description of any land at any time in the occupation or possession of Her Majesty and used for the purpose of any public work may be deposited at any time in the manner provided in the Act and with the effect of vesting the property in the Crown, saving always the lawful claims to compensation of any person interested therein. And whenever the Crown desires or intends to acquire or retain a limited estate or interest only in property, that may be done by indicating such intention in appropriate words written or printed upon the plan and description so to be filed (4). These powers if exercised would enable the Crown, whatever the result of the present litigation may be, to retain its possession of the property in question here, without of necessity interfering with the suppliant's rights to the

(1) R.S.C., c. 36, ss. 2, (c) and 7; c. 39, s. 2 (d) and 5; c. 40 s. 1 (c).

(2) 52 Vict. c. 13 s. 2 (d).

(3) R.S.C., c. 37, s. 5 (4).

(4) 3 Edw. VII., c. 22, s. 1.

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use of the water supplied by the feeder mentioned. But these powers have not been exercised, and the questions in issue come up for decision as though no such powers existed or were vested in the Crown.

The canal or feeder, for the recovery of which, with its headgates and lands appurtenant, the petition is filed, was constructed early in the last century by the then seignior of Beauharnois through his own lands; and for the purpose, as has been stated, of increasing certain water-powers on the River St. Louis. And from that time to the present he and his grantees have continued to use the water supplied by the feeder for the purpose mentioned. That the feeder, with its gates and appurtenances, was originally the private property of the seignior, there is no question. Later in the century, when the Beauharnois Canal came to be constructed by the Government of the Province of Canada, it happened that certain works, constructed at or near the head of the canal to increase the depth of water therein, had the effect of raising the water along the shores of Hungry Bay, on Lake St. Francis, and thereby caused a considerable portion of the seigniory of Beauharnois to be overflowed. To overcome this difficulty a dyke was constructed by the Province from Knights' Point through Hungry Bay to the township of Godmanchester. The contract for the construction of this dyke bears date of the first day of March 1855 (Exhibit B). The dyke was, as will be seen by reference to the specification attached to the contract (Exhibit A), a substantial work, "fourteen feet wide at the top and "raised two feet above the guard lock coping, except "where otherwise described, with side ditches gene-"rally and culverts at certain places connecting with "off-take drains leading either to Marcheterre's culvert, "the feeder, or main trunk of the River St. Louis." The land to be occupied by the dyke was to be cleared

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for at least eighty feet in width, that is to say, forty feet on each side of the centre line. This dyke crossed the feeder and it was provided that at the entrance thereof to the River St. Louis a flume should be constructed twelve feet wide on the clear; and that at the upper side of this flume there should be three sluice-gates to be constructed and to work in the manner described in the specification. The gates that the seignior had up to that time used were removed, and the sluice-gates mentioned were then constructed as part of the public work.

These transactions took place a long time ago, and naturally the evidence of what occurred between the Commissioner of Public Works of the time and the then seignior, with respect to the flooding of the latter's lands and the construction of this dyke, is meagre and incomplete. It is clear, however, that it was built on what prior thereto were the seignior's lands; and there can, I think, be no doubt that it was constructed to mitigate or diminish the damages that he suffered. No formal conveyance or surrender from the seignior to the Crown of the lands on which the dyke is built has been produced; but that title was acquired by the Crown in some way, by surrender, or dedication, or prescription, is not in dispute. This dyke was no doubt the property of the late Province of Canada; and since the union of the provinces in 1867 it has been the property of the Dominion of Canada.

It also appears that all the damages the seignior suffered by the flooding of his land and otherwise were not obviated by the construction of this dyke; for we find that in 1859 he was prosecuting a claim for such damages before the arbitrators appointed under the Act 9th Victoria, chapter 37, to which reference has been made. The arbitrators, by their award in that proceeding, made on the 4th of June, 1859, "having

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"considered the advantages as well as the disadvan-
"tages of the Public Works in question as respects the
"land or real estate of the said claimant, through which
"the said works pass and to which they are contig-
"uous," found "that any disadvantage or damage
"arising to the claimant from the said Public Works
"was fully compensated by the advantages accrued or
"likely to accrue from the said works," and in consequence awarded him nothing. On appeal to the Superior Court of Lower Canada that award was set aside and judgment entered for the claimant for £8575-0-0 currency, and for his costs. A further appeal being prosecuted to the Court of Queen's Bench, the judgment of the Superior Court was affirmed, and interest thereon allowed. The judgment of the Superior Court was rendered in 1861, and that of the Queen's Bench in 1866. In May, 1868, the Bank of Montreal, as attorney for the person then entitled thereto, was paid by the Receiver General of Canada the sum of $56,185.75 in full of the said judgment, interest and costs.

After the construction of the dyke the seignior remained in possession of the feeder; and in disposing from time to time of mill properties on the St. Louis River, of which he was the owner, he granted to the purchasers a right to the use of the water supplied by the feeder, with a corresponding obligation on the part of the grantees to contribute proportionally to the expense of keeping the feeder in repair. In December, 1866, certain mill owners, lessees and others interested in the water-powers on the River St. Louis, at a meeting held in the seigniory office at Beauharnois, formed themselves into an association "for the purpose of
"making all necessary works, and keeping the said
"river St. Louis and Feeder between the River St.
"Lawrence and River St. Louis clear of all obstruc-

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" tion, making all necessary repairs and alterations " to dams, gates, etc. in connection with the said " River St. Louis and Feeder or small canal; also " to have all obstructions removed from opposite " the mouth or upper end of the Feeder whether " caused by ice or any other material". The question as to whether the man who was at this time, and for a number of years afterwards, in charge of the head-gates of the feeder was appointed and paid by the mill owners, is in dispute. That he was paid by the mill owners for services rendered in this connection has been satisfactorily proved. There is no evidence that he was paid anything by the Crown; and no satisfactory evidence that he was appointed by it. And I think the fair conclusion to be arrived at is, that after the construction of the dyke and down to the year 1882 or 1883, the seignior and his grantees remained in possession not only of the feeder but of the head-gates in question. In the year 1883 a sum of ten thousand dollars was appropriated by Parliament for the improvement of the River St. Louis, and a sum of five thousand dollars in each of the two years following. There is no reference in the appropriation Acts of these years to the feeder itself; but in connection with the work then provided for the Crown took possession of the feeder, deepened and improved it, constructed a bridge over it, and took out and rebuilt the head-gates. In a report made by the late Mr. Henry F. Perley, then Chief Engineer of Public Works, under date of April 13th, 1888, with reference to a complaint made by Alex. Clark and others that their lands were flooded by water from the feeder, Mr. Perley stated that the work mentioned was undertaken by the Department of Public Works at the request of the mill owners at Beauharnois; while in a letter from the suppliant to the Minister of Public Works, dated at

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Beauharnois the 20th of February, 1888, it is stated that the work of deepening the feeder was undertaken by the Government at the request of the farmers who owned lands along the River St. Louis. And from another letter or report of Mr. Perley's, under date of the 28th of September, 1888, it may, I think, be inferred that both the mill owners and the farmers interested were asking to have the work done. It is perhaps not a matter of great importance at whose instance the work was undertaken, or upon what grounds the Minister of Public Works was led to the conclusion that the work was one on which the public money of Canada could with propriety be expended. The money was voted and expended and the work executed. So far what was done met, I think, with the approval of both the farmers and the mill owners interested; at least there is nothing to show that anyone objected to what the Minister or Public Works then did. But after the work was completed, the Crown's officers continued in possession of both the feeder and the head-gates. This was not satisfactory to the suppliant, who was one of the mill owners. In his letter to the Minister of the 20th of February, 1888, already referred to, he complained that the Government instead of leaving the works, once the same were finished, without any right assumed control of the feeder and of the head-gates thereto, and prevented him and others exercising the control of the feeder to which they were as owners entitled; and that the Government, by the action of its employees entrusted with the control and management of the gates at the head of the canal, had seriously interfered with the feeder and assumed to regulate the supply of water, without any regard to the mill owners, and to their great loss and damage. And he asked that the Government would recognize his rights, and so use any they might

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claim upon the River St. Louis and feeder as not to interfere with the acquired rights of himself and others acquiring from him, and that they should have the control of the supply of water necessary for the prosecution of their business; that is, that they should have the exclusive possession and control of the head-gates of the feeder. The suppliant's application at that time to the Minister of Public Works was successful. Later in that year, (about the end of October or the beginning of November) the Minister dispensed with the services of the person who, under him, was in charge of the head-gates, and handed over the control and possession thereof to the suppliant, who retained possession until the year 1892. In February of that year the Government resumed its possession of the feeder and the control of the head-gates, and has since retained such possession and control. This was done against the will and consent of the suppliant who gave up the keys of the gates for the purpose of avoiding difficulties, and without waiving any of his rights.

The rights in the feeder which the suppliant and other mill owners had up to this time acquired were, as has been observed, acquired in connection with certain mill properties on the River St Louis, and consisted of a right to the use of the water supplied by the feeder with a corresponding obligation to contribute to the expense of its maintenance and repair. The property in the feeder remained in the grantor, who created servitudes therein in favour of the respective grantees of such mill properties, reserving to himself the right to call upon them for contribution to such expense. In 1871, Mr. Edward Ellice, in whom the property in the feeder and the lands appurtenant thereto then was, abandoned in favour of the suppliant and transferred to him all rights he might

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have to make or call upon any of the proprietors of the water-powers at Beauharnois to make repairs to the dam or canal in connection with such water-powers; but without being in any way responsible for any expenses, damages or trouble that the latter might incur in using or enforcing any such rights; and he also transferred to the latter, his heirs and assigns, all rights that he might have to improve the feeder, so as to bring more water into it, which water if brought in by the suppliant, or his representatives, should, it was agreed, belong to him and them. When the Crown took possession of the feeder to deepen it, the mill owners interested in the supply of water therefrom appear to have been the suppliant and two other persons named, respectively, Viau and Browning. The latter's rights therein were acquired by the suppliant in 1884, while the work of deepening was going on, and Viau's rights in April, 1892, after the Government had taken possession of the feeder for the second time. On the 31st of August, 1896, Mr. Edward Ellice's legal representatives, in consideration of the sum of twenty pounds sterling, and a covenant to indemnify them against any claims arising out of or connected with the feeder, its construction, conservation, maintenance, repair and use, but without any warranty of any kind or description, or any liability to refund the purchase money, or any part thereof under any circumstances whatever, conveyed to the suppliant the feeder, with the lands, head-gates and other works appertaining thereto, and subrogated him to all their rights therein. As Edward Ellice's representatives were not, in 1896, in possession of the feeder they could not of course give the suppliant possession thereof, and to obtain that possession, and more especially to obtain control of the head-gates, he brings this petition, and he rests his right to maintain it upon the

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deed or conveyance of August 31st. 1896, referred to, and upon the possession that he and other mill owners entitled to use the water supplied by the feeder had for the purpose of keeping it in repair; and upon the action of the Minister of Public Works in giving up possession to him in 1888. This action was taken upon advice given upon a statement or report of the facts made by Mr. Perley, the Chief Engineer of the Department. As the suppliant relies very strongly upon this report, and upon another report made by Mr. Perley earlier in the same year, to both of which reference has already been made, it seems proper even at the risk of some repetition to give the reports in full.

On the 13th of April, 1888, Mr. Perley wrote as follows to the Secretary of the Department of Public Works :—

"OTTAWA, 13th April, 1888.

"SIR,—With reference to the complaint made by Alex. Clarke and others (see Nos. 85818 and 86294) that their lands along the 'feeder' between the St. Lawrence at Valleyfield and the River St. Louis are flooded by water from the feeder, I have to state that this 'feeder' was opened over eighty years ago by the seigneur of the property for the purpose of supplementing the supply of water to his mills on the St. Louis, and that he opened the feeder through his own property, and for purposes in connection therewith, reserved on the western side a strip of land an arpent in width and on the eastern side half an arpent in width for the whole length of the feeder, a distance of about four miles.

"This 'feeder' was opened through what is known as a cariboo bog or swamp.

"Some years ago a request was made by the mill owners at Beauharnois to have their water supplemented by increasing the dimensions of the feeder, and this work was undertaken by the Department.

"Before a commencement was made, an enquiry was instituted as to the ownership of the 'feeder' and the reservation, which it was found remained with the seigneur, who had left the country, and so far as the Department could learn without having made any provision relative to the 'feeder.'

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"The Department had the reservation laid out by metes and bounds and proper boundary marks placed, and when the work of deepening was commenced, the swamp on either side was unsettled.

"As soon as it was found that the deepening was draining the bog and rendering it fit for habitation it was taken up and houses were built, and the land placed under cultivation.

"For the purposes of drainage the occupants of the different lots themselves opened drains without leave or permission across the reservation on either side of the 'feeder,' and the damage which they complained of, viz., the flooding of the lands, is simply due to the fact that the water when high in the 'feeder' flows up these drains, and it is in my opinion from no fault or act of the Department that this flooding takes place. The occupants of farms on either side of the feeder have trespassed on the feeder reservation, have opened drains through it without permission, and the simplest plan for them to avoid being flooded is that they shall fill their drains up again, for I cannot see that it is the duty of the Government to provide a remedy.

I am, sir,

A. GOBEIL, Esq.,
Secretary,
Department Public Works.

Your obedient servant,
(Sgd.) HENRY F. PERLEY,
Chief Engineer."

And then on the 29th of September, 1888, in reply to a request by the Minister of Justice to be advised as to the facts of Mr. Robert's case, he wrote as follows:—

OTTAWA, 29th September, 1888.

"SIR,—The Minister of Justice asks, in file No. 91366, to be advised of the facts of the case in connection with the draft agreement submitted by J. B. Robert about certain water privileges on the River St. Louis, Quebec.

"So far as this Department is concerned the following are the facts:—

"Some years ago a complaint was made that a very large quantity of land, situate at the head of the St. Louis, was flooded each spring, and it was asked that steps be taken to remedy the evil, and the cause was stated to be a dam across the river owned by one Symons. Pending the negotiations for the removal of this dam, a scheme for the establishment of manufactories at Beauharnois, at the mouth of the St. Louis, was propounded, and, with the view of increasing the volume of water in the river to meet the wants of the new industries, the question of enlarging the cut or channel which carried the water of the St. Lawrence into the St. Louis, thus supplementing the flow of that river, was considered.

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"On enquiring as to the origin of this channel, locally known as the "feeder," it was ascertained that over 80 years ago the seigneur of that time found that the St. Louis did not furnish water enough to operate the banal mill, and at his own expense and through his own property, opened the "feeder," with its mouth at Hungry Bay in the St. Lawrence, to the westward of the village of Valleyfield, and placed gates for the purpose of regulating the supply of water, and cutting it off entirely when required. He also for the purposes of the "feeder" reserved a strip of land on each side thereof, of an arpent, and half an arpent in width respectively.

"As the years passed by the banal mill fell out of use, privileges to erect and operate mills on the St. Louis were obtained by others from the seigneur, and then followed the departure of the seigneur himself and all his rights and privileges; and at the time the enquiry was made by the department, it was found that the head-gates on the feeder and the regulation of the supply of water through it were controlled by persons in Beauharnois, and that other persons objected to such control.

"It having been decided to enlarge the "feeder," and nothing certain as to the ownership thereof having transpired, except that it and the reserve were vested in the seigneur, the Department had the reserve marked out and placed boundary posts, took possession on behalf of the owner, whoever he or they might be, and not on behalf of the Crown—which has not any right, title or interest in the property in question—and proceeded to, and did, deepen and widen the feeder over its whole length of four miles, and reconstructed the head-gates; and exercised a control over their movement until Mr. Robert preferred his claim and produced his title thereto, when the whole was surrendered to him; the department having exercised supervision, in the interests of all parties concerned, only so long as the owner—supposed to be the seigneur, who did not appear, until Mr. Robert claimed the property, when that supervision was abandoned, to be assumed by Mr. Robert.

"The only interest the Crown has in or on the River St. Louis is in the site of the seigneur's dam, which cannot be rebuilt, and such general interest as it may possess in a right to deepen the bed of the river for the purpose of increasing its carrying capacity, the carrying capacity of the "feeder" having been quadrupled.

I am, Sir,

A. GOBEIL, Esq.,
Secretary,
Department Public Works.

Your obedient servant,

(Sgd.) HENRY F. PERLEY,
Chief Engineer."

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For the Crown it is contended that it is not bound by Mr. Perley's statement of the facts, nor by his conclusions or opinions; and that it is not concluded by the fact that in consequence thereof the possession of the feeder and head-gates was given up to the suppliant. With that contention I agree.

The question to be decided is whether the suppliant is now entitled to the possession that he claims; that is to the exclusive possession of the feeder, and the exclusive control of the head-gates. Unless one is prepared to go that far the petition, I think, fails. That the suppliant has important rights in the feeder and the water thereby supplied to his mills cannot be doubted. These rights have been recognized by the Crown in the most formal manner possible. If when the dyke that has been mentioned was built the seignior had no right to take and use, as he was taking and using, the water from Lake St. Francis, the Crown need not in constructing the dyke have made any provision for continuing the supply of water. But his right was not disputed and appropriate means were taken not to interfere with that right, any further at least than the necessities of the case demanded. And from that time to this whatever disputes or differences may from time to time have occured with respect to the amount of water supplied by the feeder, the right of the seignior and his grantees to the water has never in fact been called in question. But it is one thing to have a right to the water and another thing to have the right to control the gates by which it is admitted to the feeder. That the seignior had such a right with respect to the head-gates of the feeder as they existed before the dyke was built must, I think, be conceded. But after the construction of the dyke the question assumed a different aspect. The seignior and his grantees still had a right to the use of the water; but the Crown

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was entitled to see that the object for which the dyke was constructed was not defeated, that the head-gates were not so used as to flood the lands for the protection of which the dyke was built. It had a right, too, it seems to me, to see that these gates were not so used as to lower the head of water that had been created for the Beauharnois Canal. The Crown pleads that it is the proprietor of the water of Lake St. Francis, and for that reason entitled to control the gates and feeder in question. If the case turned upon that contention, there might be some difficulty in supporting it. But in so far as the Crown has, by the construction of the works connected with the Beauharnois Canal, raised the level of the lake it is undoubtedly interested in seeing that that level is maintained. There has, so far as appears, never been any complaint on that score. It is in another direction that a conflict of interest appears to have arisen. As long as the seignior owned the lands protected by the dyke he could well be left in exclusive control of the feeder and head gates. If he let in water enough to flood his lands that was his own business. But when the lands fell into the hands of other persons, and the mill owners exercised the right of regulating the supply of water, a conflict of interest arose. As the Crown had built the dyke and was maintaining it, the farmers naturally looked to it for indemnity when their lands were flooded by the water that was permitted to pass through the gates in the dyke. And unless the Crown has the control of these gates it cannot, it seems to me, make sure that the dyke serves the purpose for which it was built. Having by the construction of certain dams or works connected with the Beauharnois Canal raised the level of the waters of Lake St. Francis, so that the lands adjacent were flooded, and then having constructed a dyke to hold

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back such water and prevent such flooding, and being under an obligation to maintain this dyke as a public work, the Crown is, I think, entitled to the possession and control of every part of the dyke, including the gates by means of which the waters of the lake are admitted to the feeder. That right of control and regulation the Crown had from the time the dyke was built, and I do not think it lost the right by not at all times exercising it. On the other hand the suppliant has, it seems to me, a right to have these gates so regulated and controlled as to give to him all the water he is entitled to, consistent with other public or private interests concerned. But if there is any question of the right to the paramount or exclusive control and regulation of these gates, then I should think such control and regulation were by the necessities of the case vested in the Crown. Nor do I see any difficulty in giving effect to that view, or that it would of necessity entail any hardship on the suppliant. In the construction of the public works of Canada, a great many water-powers have been developed and rights in these have in a great many cases been granted to divers persons. But the right to control the gates or other means used to regulate the supply of water always, so far as I know, remains in the Crown. It is true that the suppliant here is not claiming under any grant or lease from the Crown; his rights exist independently of any such grant or lease; but I do not see that he would have any greater difficulty in enforcing his rights, if they were denied to him, than if he held under a Crown grant or lease. The exclusive possession and control of these head-gates are not necessary, it seems to me, to the enjoyment of the rights that the suppliant has in the feeder. Such possession and control may, I think, be taken to be a necessary incident to the ownership and maintenance of the dyke by the Crown. But

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it is not necessary to go that far. The petition fails in that respect unless the suppliant is entitled to the exclusive control of the gates ; and I do not see how some control of these gates which the Crown has built and rebuilt, and which constitute a part of a public work, as well as a part of the feeder, can properly be denied to it.

What has been stated refers to the head-gates, not to the feeder. The former are, and the latter is not, part of the dyke. Possibly by what was done when the dyke was built the Crown acquired a right to discharge into the feeder the off-take ditches that were then provided for, but that did not make the feeder a part of the public work. The Crown's right to the possession it has of the feeder depends, it seems to me, on the fact that, without any objection, on the part of anyone, possibly with the consent of all parties interested therein, it took possession of the feeder and expended public money on it in deepening and improving it in connection with the River St. Louis improvements. That brought it within the terms of the statutes respecting public works that have been referred to, and I do not well see how the person who at the time owned the feeder, or those who were then interested in it, can now be heard to say that it is not a public work. And if it is to be taken or deemed to be a public work, or part of a public work, then it is clear that the suppliant, whatever other rights he may have in it, is not entitled to the exclusive possession thereof.

That question, however, as has been stated, is one of minor importance. The suppliant frankly admits that the possession of the feeder, without the control of the head-gates, would be of no considerable advantage to him.

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Then there is another ground of defence set up. In February, 1892, when the Crown, the second time, took possession of the feeder, the suppliant was not entitled to the exclusive possession of it even upon his own showing. And that of course was true also in 1882, when the Crown first took possession, as well as in 1888, when the possession was handed over to him. He was not at any time during the periods mentioned the owner of the property, the title to which remained in Edward Ellice during his lifetime, subject to the servitudes referred to, and after his death went to his legal representatives. It was not until April, 1892, that the suppliant got a grant of Viau's interests (to which reference has been made) in the water-power and feeder, and the conveyance from Edward Ellice's representatives to him of the feeder itself was not made until 1896. For the respondent it is argued that the rights which he acquired under the deed last mentioned are litigious rights and within the provisions of Articles 1582 and 1583 of the Civil Code of Lower Canada, and the Crown offers to pay the suppliant the price and incidental expenses of the purchase of such rights, with interest on the price. That the rights sold in 1896 by Edward Ellice's legal representatives to the suppliant were litigious does not, I think, admit of any doubt. The only use that the latter has ever made of them, or could expect to make of them, was to support the present petition. But it is perhaps not so clear or well settled that the Articles relied upon apply to such a case as this

On the main issue, however, the question as to the suppliant's right to the exclusive possession of the head-gates to the feeder, my view is against him on the grounds that I have stated and upon which I rest my judgment. With respect to the possession of the feeder itself, except that portion of it which is within

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the limits of the dyke or public work mentioned, I have not been able to see what public interest of Canada is served by retaining possession of it, or why it might not without any injury to any such public interest be handed over to the suppliant. But that is not the question here, or a matter for the consideration of the court. The question to be decided is whether the suppliant is entitled to the exclusive possession of this feeder, and to a declaration that he is so entitled, and under all the circumstances of the case I have not been able to come to the conclusion that he is so entitled.

The judgment and declaration of the court will be that the suppliant is not entitled to the relief prayed for, and against any costs to which the respondent may be entitled will be set off the costs incident to the motion made to amend the statement in defence and of such amendment.

Judgment accordingly.

Solicitors for the suppliant: *Fleet, Falconer, Cook & McMaster.*

Solicitor for the respondent: *D. A. Lafortune.*