SIAN WAR
PREPARATIONS

h Nobleman Who Arrived
Here From Siberia Tells
of Plans.

BOROVSK IS THE NEW BASE

a Will Erect Fortress and
ablish Large Garrison---
China Threatening.

quis D'Aigneaux, who arrived
esterday morning by the steamer
agle after a tour in Siberia said
interview: Obviously Russia is
preparations in Siberia for an-
war. While troops are being sent
others are being transported from
over the Trans-Siberian line.
arrisons are being strengthened,
larly Harbin and Khaborovsk.
atter town, now a small Siberian
at the juncture of the Amur and
rivers and the seat of govern-
for the Amur district, will be
n future the Russian headquarters
Orient. Immense barracks will
ilt, construction having already
nced, and some heavy guns have
ent there, it being the intention
struct substantial fortifications to
nned by a garrison which some
n officers state will number 30,-
en. There are but 5,000 there
The defences of Vladivostok were
y strengthened by the addition of
heavy guns, and otherwise it is
ble that Russia is putting the
orders in order. While the gen-
lief is that a second war with
will occur within ten or fifteen
-and preparations are being
o this end—the situation with re-
o China is causing some excite-
A large force of foreign-drilled
e troops have been sent to the
n borders under General Ma, the
rominent of the Chinese generals
exceedingly anxious to attack the
ns since their defeat by the Jap-
It was said at Harbin that
l Ma had telegraphed to the
e government when the reports
current of Russian advances in
lia asking permission to attack
ssians. The attitude of the Chin-
noticeably more defiant than has
een known. Vladivostok shows the
of the riots of some months
considerable section being par-
ruined.
borovsk, which Marquis D'Aig-
says will be fortified and made
w Russian base in Asia, is the
n of the Ussuri branch and the
Siberian railway and is 477 miles
Vladivostok.
connection with the Chinese atti-
e Japan Advertiser says: "Late
from Harbin state that the
e troops are showing great ac-
in Southern Manchuria and that
l Ma and Yuan Shi Kai are in-
g the forces there.
an Shi Kai, viceroy of the prov-
f Chi-Li, is the man who has be-
e creation of a Chinese army
the modern fashion—that army
at recent maneuvers surprised old
critics by its discipline and the
rance and apparent efficiency of
en. Clearly, he does not fear to
e instrument that he has in his
and is prepared to assert the
macy of China in the province
was lately the theatre of a bloody
etween two foreign powers.
nwhile the Chinese have trouble
eir hands with a formidable body
els in Manchuria, without any in-
ence with the Russian forces. In
egard the writer of Notes on Na-
Affairs in the North China Daily
gives an account of a serious mil-
reverse sustained in Fengtien. He
Despatches received from Muk-
y the local mandarins report that
having been received by the Tar-
neral Cho Erh-sen, of the exis-
of a strong body of mounted ban-
a hamlet some thirty miles west
kden, his excellency at once sent
adron of mounted military police
perse the Hunghutze. This was
k or so ago. Arrived at the ham-
icated, it was discovered that the
s had made preparations for a
ermanent stay there, going so far
construct a battery of three quick-
on an elevated spot east of the
and guarding the defile which
the approaches of the place,
y strengthening exceedingly al-
strong natural fastnesses. Not
id the band do this, but it was
und that the Hunghutze chief had
collecting the government taxes
he inhabitants round about. In
of the strength of the place, the
commanding the mounted police
attempted to attack the bandits,
he result that he was utterly de-
losing many men, horses and am-
on. On hearing of the defeat, the
general ordered two regiments
eign modeled Chihli troops to
ce the Manchurian batalion on
y to the hamlet, but before the
troops arrived at the place, the
e guard of the Manchurian bat-
was driven back on the main
with some loss. In consequence
s the bandits are being almost
reinforced by other bands, and
aged by their victories over the
ment troops, they have been raid-
llages far and near west of Muk-
n consequence of which a great
of refugees from the raided vil-
is finding its way into Mukden to
ast and Chinchou to the south.
meantime the commanders of the
hihli regiments, in view of the
r numbers of the mounted ban-
d the strength of their position,
ecided to hold a hamlet some
miles to the east of the bandits
ere await reinforcements in the
of three brigades of foreign-mod-
hihli troops who have been or-
by the Tartar general from gar-
quarters in Chinchou to crush the
hutze who made no pretence of
ntention to start a rebellion should
succeed in defeating the fore
d troops in the coming battle
they are making strenuous pr
ns.
e friction is reported to ha
between Russian and Japan
ssioners in Manchuria with
o the settlement of the provisions
Portsmouth treaty. The Japan-
mmissioner, Major General Naka-
is making vigorous protests be-
of the great damage done to the
hun-Suping railway which was
ed to Japan. Nine bridges were
destroyed, and a large portion of
ilway wrecked and sleepers car-
way. The stations, numbering
rst class and 117 second class, are
in ruins.

CITY LOSES IN THE WATER SUIT

Has no Rights at Goldstream Except by Purchase or Otherwise.

FULL TEXT OF JUDGMENT

Masterly Analysis by Mr. Justice Duff of Legal Points Involved.

(From Thursday's Daily.)

JUDGMENT was given by Hon Mr. Justice Duff yesterday in the lawsuit of the Esquimalt Water Works Company against the Municipality of Victoria, in which the company opposed the right of the municipality to apply to the government for certain water records in connection with the waters of Goldstream and its tributaries.

The dispute is one of long standing, which culminated in a form in which the rights of the contending parties could be properly litigated when the city applied to the government for a grant of water from Goldstream. The trial of the case was fought out in a strong forum, consisting of Hon. Mr. Justice Duff and such able counsel as Mr. Bodwell, K. C., and Mr. W. J. Taylor, K. C., for the city, and Mr. F. Peters, K. C., and Mr. Luxton, K. C., for the company; Mr. A. E. McPhillips, K. C., on behalf of the Victoria Power Co., with Mr. R. T. Elliott.

The effect of the decision, in short, is that the city, by a grant made under a statute subsequent to the special statute giving the company its privileges and franchises, cannot, without acquiring those rights by purchase or otherwise, assume to interfere with or diminish them. Following is the

Full Text of the Judgment

The plaintiff company sues to restrain the defendant municipality from proceeding with applications to the lieutenant governor in council for a grant of water records authorizing the diversion of water from Goldstream river and its tributaries, under the Water Clauses Consolidation Act, 1897, for the purpose of supplying water to the inhabitants of the municipal area.

The company's case necessarily rests upon the contention that it has acquired rights in these waters which would be invaded by the grant of such records, and that there is no authority under the statute to make any grant having that effect.

It will be necessary to discuss fully the bearing of the Water Clauses Consolidation Act, and of the Water Privileges Act of 1892, upon the rights of the parties to this action; but I proceed first to consider the nature and extent of the rights acquired by the company in the streams in question as if those rights fell to be ascertained without regard to the provisions of either of these enactments.

The company was incorporated in 1885 by an act of the legislature of British Columbia. By that act it was, inter alia, provided in section 8:

"The company and their servants may, and shall have full power to design, construct, build, purchase, improve, hold and generally maintain, manage and conduct water works and all buildings, materials, machinery and appliances therewith connected in the town of Esquimalt, and the peninsula adjacent thereto, bounded by the Victoria arm and harbor, the Straits of Fuca and Esquimalt harbor and other parts as hereinafter provided."

In section 9:

"It shall be lawful for the company, their servants, agents and workmen, from time to time, and at all times hereafter, as they shall see fit, and they are hereby authorized and empowered to enter into and upon the land of any person or persons, bodies politic or corporate in the town of Esquimalt, or within ten miles of the said town, and to survey, set out and ascertain such parts thereof as they may require for the purposes of the said water works, and to divert and appropriate the waters of Thetis lake and Deadman's river and its tributaries as they shall judge suitable and proper, and to contract with the owners and occupiers of the said lands, and those having an interest or right in the said waters, for the purchase of the same respectively, or for any part thereof, or of any privilege that may be required for the purposes of the company, and for the right to take all or any timber, stone, gravel, sand and other materials from the aforesaid land or any lands adjacent thereto, for the use and construction of the said works, and in case of disagreement between the company and the owners and occupiers of the said lands or any person having an interest in the said waters or the natural flow thereof, or any such privilege or privileges, right or rights, as aforesaid, respecting the amount of purchase money or value thereof, or as to the damage such appropriation shall cause to them or otherwise, or as to the amount of damage arising through the construction of any dam, the same shall be decided by three arbitrators, to be appointed as hereinafter mentioned, namely, the company shall appoint one, the owner or owners shall appoint another and the two such arbitrators shall, within ten days after their appointment, appoint a third arbitrator; but in the event of two such arbitrators not appointing a third arbitrator within the time aforesaid, one of the judges of the supreme court of British Columbia shall, on application of either party, appoint such arbitrator. In case any such owner or occupant shall be an infant, married woman or insane, or absent from this province, or shall refuse to appoint an arbitrator on his behalf, then it shall be the duty of one of the judges of the supreme court of British Columbia, on application being made to him for that purpose by the company, to nominate and appoint three different persons as arbitrators."

And in section 10:

"The lands, privileges and waters, which shall be ascertained, set out or appropriated by the company for the purposes thereof as aforesaid, shall thereupon and for ever after be vested in the company, and it shall be lawful for the company to construct, erect and maintain in and upon said land all such reservoirs, water works and machinery requisite for the said undertaking, and to convey the water thereto and therefrom in, upon and through any of the grounds and lands lying intermediate between the said reservoirs and water works and the springs, streams, rivers, bodies of water or lakes from which the said are supplied, and the town of Esquimalt and said peninsula as aforesaid, by one or more lines of pipes, as may from time to time be found necessary; and for better effecting the purposes aforesaid, the company and their servants are hereby empowered to enter and pass upon and over the said grounds or lands intermediate as aforesaid, and the same to cut and dig up if necessary, and to lay down the same pipes through the same, and in, upon, over, under and through the highways and roads in Highland and Esquimalt districts or any of them, and in, through, over and under the public ways, streets, lanes or other passages of the said town of Esquimalt, and in, upon, through, over and under the lands and premises of any person or persons, bodies corporate, politic or collegiate, whatsoever, and to set out, ascertain, use and occupy such part or parts thereof as they, the company, shall think necessary and proper for the making and maintaining of the said works, or for the opening of new streets required for the same, and for the purchasing of lands required for the protection of the said works, or for preserving the purity of the water supply, or for taking up, removing or altering the same, and for distributing water to the inhabitants of the town of Esquimalt and the said peninsula, or of the proprietors or occupiers of the land through or near which the same shall pass, and for this purpose to sink and lay down pipes, make reservoirs and other conveniences, and from time to time to alter all or any of the said works as well in the position as in the construction thereof, as to the company shall seem meet, doing as little damage as may be in the execution of the powers hereby granted to them, and making reasonable and adequate satisfaction to the proprietors to be ascertained in case of dispute by arbitration as aforesaid, and all such water works, pipes, erections and machinery, requisite for the said undertaking, shall likewise be vested in and be the property of the company."

This act was in 1892 amended by a statute which enacted in section 1:

"The 'Esquimalt Water Works Act, 1885,' shall be so construed as to give power to the Esquimalt Water Works Company to divert and appropriate so much of the waters of Goldstream river and tributaries as they may deem suitable and proper, subject, however, to any grant of rights, privileges or powers arising under the provisions of the 'Corporation of Victoria Water Works Act, 1873.'"

In section 3:

"All the rights, powers and privileges conferred on the said company by the 'Esquimalt Water Works Act, 1885,' shall extend and apply to the appropriation and diversion of the waters of the Goldstream river and its tributaries, and also to the conveying of such water from the place or places of diversion to the town of Esquimalt and the peninsula adjacent thereto, as defined by section 8 of the said act, in the same way and to the same extent as if such rights, powers and privileges had been originally conferred by the said Esquimalt Water Works Act."

And in section 10:

"The rights and privileges conferred by this act are subject to and have been conferred only upon the following conditions:

"(a.) Should the corporation of the city of Victoria at any time so desire, the council of the corporation may, by resolution, notify the Esquimalt Water Works Company to furnish them with a supply of water from the works of the Esquimalt Water Works Company, and it shall thereupon be obligatory upon such company, within fifteen months after the service of such notice on the company, to supply and deliver, at some point west of Victoria arm, within the limits of the city of Victoria, into the water mains of the city of Victoria, under a pressure (at sea level) of not less than one hundred and ten pounds to the square inch, such quantity of pure water up to the amount and for the period specified in such resolution, or any subsequent resolution of a similar nature, as will satisfy the corporation paying the company therefor at the rate of 6 cents per thousand gallons; and the company shall supply water to the corporation of the city of Victoria for the purpose of fire protection at the rate of $4 per month for each fire hydrant which the corporation may desire to connect with the company's pipes, and shall supply water for flushing and washing gutters, or for the filling of tanks for fire protection purposes, free of charge:

"(b.) Provided, however, that the company shall not be required to supply a quantity of water of less than five hundred thousand, nor more than five million, gallons per diem; and provided that the company shall not be required to furnish water for any period less than five years.

"(c.) It shall not be incumbent upon the corporation of the city of Victoria to avail itself of the right in sub-section (a) of this section declared, but in the event of the corporation availing itself of such right, then the notice thereunder referred to in sub-section (a), in conjunction with the necessary by-law, shall operate as a covenant on the part of the corporation to take the quantity of water mentioned in the resolution, and to pay for the same at the rate mentioned in said sub-section (a), and for the period specified in such notice."

Since the passing of the act of 1892, the company has purchased the lands (except some small areas still vested in the crown) traversed by the streams mentioned in the third section; the lands occupied by the lakes which are the head waters of these streams, and (except the areas mentioned) the whole of the watershed drained by them.

Shortly after the passing of the act of 1892, the company entered into a contract with the National Electric Railway Company, binding itself to supply the railway company at a point on Goldstream river, certain quantities of water at a fixed minimum head for the generation of electric energy; and partly to equip itself to carry out this contract, partly to provide for a possible advance in the demands of water to supply the district served by the company's system, partly to provide means to meet the inchoate obligation imposed by section 10 of the Companies Act, 1892, in the event of that obligation becoming operative, the company proceeded to establish a reservoir at the lower of a series of lakes which formed the head waters of Goldstream river proper, and this work was completed in the year 1893.

The railway company having passed into liquidation, the arrangements with that company lapsed; but in 1897 the company entered into a contract with the British Columbia Electric Company, binding itself to provide water for the same purposes, in increasing quantities up to 15,000,000 gallons daily, as the electric company should require it, at that company's powerhouse at Goldstream river, having a fixed minimum head. In consequence of that contract the company has spent large sums of money in establishing reservoirs at the remainder of the series of lakes mentioned, and providing for works necessary to enable the company to fulfil the requirements of the contract. Down to the present time no part of the waters of Goldstream river, and its tributaries, have been applied by the company for the purpose of supplying the inhabitants of the district referred to in the act of 1885 with water for consumption; and in point of fact, with the exception of the application to the purposes of the contract mentioned, these waters are not actually applied by the company to any beneficial purpose.

Before discussing the question as to the rights in respect of these streams acquired by the company under these acts, it is necessary to deal with a point raised by Mr. Bodwell, which bears generally upon the questions arising in this case.

It is argued that the English law relating to riparian rights never became a part of the law of the province. The first imperial statute relating to Vancouver island appears to be 12 7 13 Vic., cap. 48, which is reprinted in the Revised Statutes of British Columbia of 1897. The act does not, nor does there appear to have been passed before the union of the colonies of British Columbia and Vancouver Island in 1866, by parliament or other law-making authority, any enactment containing any express provision for the establishment of the law of England as the law of the last mentioned colony. In these circumstances, we must apply the rule relating to the introduction of English law into colonies acquired by settlement. That rule is authoritatively stated by the privy council in Cooper v. Stuart (1889) 14 App. Cas., at 291 and 292, as follows:

"The extent to which English law is introduced into a British colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a colony acquired by conquest or cession, in which there is an established system of law, and that of a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The colony of New South Wales belongs to the latter class. In the case of such a colony the crown may by ordinance, and the Imperial parliament, or its own legislature, when it comes to possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits. But, when that is not done, the law of England must (subject to well established exceptions) become from the outset the law of the colony, and be administered by its tribunals. Insofar as it is reasonably applicable to the circumstances of the colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute. The often quoted observations of Sir William Blackstone (1 Comm. 107) appear to their lordships to have a direct bearing upon the present case. He says:

"'It has been held that, if an uninhabited country be discovered and planted by British subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force (Salk. 411, 666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant colony; such, for instance, as the general rules of inheritance and protection from personal injuries. The artificial requirements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance of the established church, the jurisdiction of spiritual courts, and a multitude of other provisions are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the decision and control of the King in council, the whole of their constitution being also liable to be new modeled and reformed by the general superintendency power of the legislature in the mother country.'

"Blackstone, in that passage, was setting right an opinion attributed to Lord Holt, that all laws in force in England must apply to an infant colony of that kind. If the learned author had written at a later date he would probably have added that, as the population, wealth and commerce of the colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it; and that the power of remodeling its laws belongs also to the colonial legislature."

Now, the rule of law which regulates the rights of riparian owners insofar as we are concerned with it, may be stated in the language of Lord Wensleydale in Cashmore v. Richards (1859), 7 H. L. C., at page 382, as follows:

"The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface, ex jure naturae, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbor's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbor."

This rule, founded as pointed out by Farwell, J., in Bradford Corporation v. Furand (1902), 2 Ch., at page 661 in the jus naturae, and worked out on the principle of aequum et bonum, in my opinion cannot be said to be less inapplicable to the circumstances of the colony of Vancouver Island in 1849 than the circumstances of other colonies into which it has never been doubted it was carried by the settlers who established those colonies. By the operation of the common law rule it was carried into the Australian settlements: Lord v. Commrs. of Sydney, 12 Moore P. C.; into the American settlements: Tyler v. Wilkinson, 4 Mason, 397; Lux v. Haggin, 69 Cal. 255; and by the act of 1792, which but enacts the common law rule in express terms, it was introduced into Upper Canada: Booth v. Ratte, 15 A. C. 188. So far as I can ascertain, it seems never to have been doubted that with the general body of English law it was introduced into all the colonies forming the Dominion of Canada except Quebec. The ordinance of 1867 enacted as follows:

English Law Introduced

"From and after the passing of this ordinance, the civil and criminal laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the colony of British Columbia."

I see no reason for thinking—even supposing the municipality's contention can, as regards the mainland of the province be supported—that this ordinance made inapplicable to Vancouver's Island any part of the body of English law which theretofore was the law in this colony; indeed, if not from local circumstances inapplicable to that colony, it must, in my opinion, be treated as coming within the ordinance. I am unable, moreover, to agree with Mr. Bodwell that even as regards the mainland the rule in question comes within the language of the exception. I do not find that the point has been the subject of express decision, although in a dissenting judgment (the majority of the court expressing on this point no opinion) Martin, J. states his view to be that the rules of English law on this point have been the law of the whole colony of British Columbia; and the judgment of Drake, J. in Columbia Co. vs. Yule (   ) 2 B. C., 237, proceeds upon that view, although the point was not argued. The judgment of Gwynne, J., in Martley vs. Carson (   ) 20 S. C. R. at 658 and 659 is addressed to the construction of the Land Act all together, and does not touch the point. Mr. Bodwell, indeed, relied upon certain provisions of the Land Act first appearing in the B. C. ordinance of 1865 authorizing the diversion of natural streams and lakes for specified purposes in support of his contention.

Omitting for the present the consideration of the legislation of 1892 and 1897 as to these enactments, it is sufficient to say in this connection that whatever modification of the rights of riparian proprietors they should be held to have effected, they clearly do not amount to a declaration of the non-existence of such rights, and in my opinion they cannot fairly be regarded as affording any indication that the view of the legislative authority accorded with that now advanced.

What the Company Acquired

By these transactions the company acquired in the streams in question the riparian rights incident to the ownership of the lands purchased, subject, as to some of the parcels of land, to certain reservations in the grants from the crown, which I shall refer to more particularly later. These rights, subject to the reservations mentioned, are best stated in the language of Lord Wensleydale in Chasemore vs. Richards, (1859), 7 H. L. C., at 380:

"The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has been now settled that the right to the enjoyment of a natural stream of water on the surface, ex jure naturae, belongs to the proprietor of the adjoining lands, as a natural incident to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity and quality, and to go from him without obstruction; upon the same principle that he is entitled to the support of his neighbor's soil for his own in its natural state. His right in no way depends upon prescription, or the presumed grant of his neighbor."

But I do not think that as regards its rights in respect of the streams in question, the company can be treated as a riparian proprietor simply. The Act, in my judgment, treats Goldstream river and its tributaries as entities which are the subjects of proprietary rights. It provides for the purchase by the company of the rights and interests of persons having rights and interests in these streams as streams. In other words, it provides for that which, at common law, would be a legal impossibility; the severance of the right of an owner of land traversed by a natural stream in the stream itself from his proprietary interest in the land. This interest, once acquired by the company for the purposes of its statutory undertaking, either by contract or by compulsory appropriation under the provisions of the Act, becomes, in my opinion, vested in the company, and is thence-forward held under a statutory title, the nature and extent of which must be ascertained from the provisions of the statute itself. The statute in short, to use the language of Brett, L. J., becomes "the charter of the company's rights." The legislature, in other words, for the purpose of enabling an undertaking of public interest to be carried out effectually carried on, conferred upon the company the power to acquire for the purposes of that undertaking, rights which, as separate from the ownership of land, are unknown to the common law, namely, the whole sum of the rights of a riparian proprietor in, or in respect of a natural stream of water flowing through or past his land, and gave to the company in respect of the rights so acquired, a parliamentary title. In the language of the Act itself, the waters so appropriated by the company for the purposes thereof, were thereupon and forever, to be vested in the company.

I was, at first, strongly impressed with the force of Mr. Bodwell's contention that to effect an appropriation within the language of the statute there must be a severance of some definite portion of water from the stream itself, or that, at all events, an appropriation can take effect under the provisions of section 10, from which I have just quoted, only to the extent to which it is accompanied by a reduction into possession of a definite quantity of water. This contention harmonizes fully with the use of the word "appropriate" in the earlier cases, which proceed upon the principle that running water is entirely publici juris, and subject to be made the property of the first occupant who reduces it into possession by abstraction from the stream; and with the principles governing the acquisition of water rights in natural streams in many of the Pacific states of the United States of America. But the contention, I have come to the conclusion, is not well founded. It is true that exclusive property in water in a running stream as so many pints or so many globules of fluid can only be acquired by the abstraction of the fluid from the stream. In Embrey vs. Owen (   ) 6 Ex., 353, Parke, B. uses this language:

"The right to have a stream flow in its natural state, without diminution or alteration, is an incident of property in the land through which it passes; but flowing water is publici juris, not in the sense that it is bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself, except in the particular portion that he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor has the right to the usufruct of the stream which flows through his land."

And in Lyon vs. Fishmongers' Company (   ), 1 App. Cas. at p. 683, Lord Selbourne says:

"The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it."

And see White vs. White (1906.) A. C. at p. 80.

But there is a sense in which a stream as a stream may properly be spoken of as the subject of ownership. In Williams vs. Morland (1824), 2 Bar. & C. at 914, Holroyd, J. said:

"Running water is not in its nature private property. At least it is private property no longer than it remains on the soil of the person claiming it."

In Bush vs. Trowbridge Water Works company, (   ), L. R. 19 Eq., 293, Sir George Jessel, referring to the language of the 6th section of the Water Works Clauses Act, says:

"Meaning, as it appears to me, the owners or occupiers of the portion of the stream with which the company are interfering."

In the same case on appeal, 10 Ch. App. 462, James, L.J., says:

"They entered upon the channel or bed of a stream somewhere above the plaintiff's land, and there they took, by way of diversion, water for the purpose of their waterworks, which water, to put the case in the highest for the plaintiff, would in due course, if they had not so diverted it, have got down to her land, and would then, and so long as it was over her land be water of which she was the owner and occupier in the sense in which a person is owner or occupier of a stream running through his land. That is to say, the water then would have become within the ownership and, to some extent, within the occupancy of the plaintiff."

In Stone vs. Yeovil, (1876), 2 C. P. D., at 108, Cockburn, C. J. expresses this view upon the Water Clauses Act:

"Now when the whole of a stream or other water is taken, both the special Act and the general Act treat the right or interest in the water as a substantive right or interest which may be transferred and taken, and the value of which may be assigned, and compensated for, and not as something merely subordinate to the land, and the loss of which must be looked at only as it injuriously affected the land. The 6th section of the Waterworks Clauses Act expressly says that compensation is to be made 'for the value of streams so taken,' as distinguished from 'damage to land or streams' occasioned by the exercise of the statutory powers given to take the water."

In Girdwood vs. The Belfast Water Commissioners, (1877), 1 L. R. Ir., 28, Chatterton, V. C. discusses the subject fully, pointing out the distinction to which I have adverted in this language:

"It was contended for the plaintiffs that water in its essence is incapable of being treated as property, and that, therefore, no property in it can be permanently acquired unless it has been actually abstracted from the stream. The fallacy of this argument consists in confounding water as so much fluid, with water in the legal sense of the right to the flow of water in a particular manner. The right to water which riparian proprietors possess is a natural and common right. It is that right which pertains to every person who possesses property, by which, or through which, any stream flows, and the entire body of water coming from a higher portion of the course of the stream should be transmitted so as to pass by or through his lands without any sensible or material diminution. There is another right of water of an opposite nature, namely, the right to divert the flow of the water from its ordinary channel, or to diminish the quantity of water flowing in such channel. These rights are undoubtedly the subject of permanent property capable of passing by grants. In the present case, the persons under whom the plaintiffs claim had the right—no matter whether acquired as an easement, or whether it was the common right of a lower riparian proprietor—to the flow of the waters of these streams in undiminished quantities. That right it became necessary for the defendants to interfere with for the purposes of their Act, and they were empowered thereby to acquire the absolute right to divert the whole, or any quantity they might think proper, of the water, which would otherwise flow to the premises of the plaintiffs—either purchasing it, if the water were taken in its entirety, or making compensation for any less quantity diverted. By the incorporation of the Lands Clauses Consolidation Act, and the Water Works Clauses Act, with the Commissiiners Special Act, the means of acquiring streams and water, and not merely lands, were provided. By the 24th section compensation to persons from whose property the water was not wholly diverted, but the flow only diminished, or in any way interfered with, was provided. I am of opinion that the language of the 29th section, where it speaks of lands, streams, and waters, is large enough to enable the commissioners to acquire any water rights to or in any of these streams, either by purchase of rights to the flow of each stream in its own channel, or divert it. It was plainly contemplated that the acquisition of such rights might be absolute and for ever.

I am, therefore, of opinion that the commissioners were empowered to acquire entirely, and out and out, the waters of these several streams. I interpret the word 'waters' in that section, not merely as the water flowing, which it would be impossible to acquire without abstracting it, but as including the water rights I have specified."

In that part of the 10th section which I have quoted, the statute seems to me to be dealing with the appropriation of the streams themselves. It is to be observed that the legislature speaks of the appropriation of waters and of interests in waters, not an appropriation of water. I agree with the view expressed by Chatterton, V. C. in the case I have just quoted, p. 40, that the word "waters" in the plural would mean something different from the actual water passing through the streams.

But aside from this, that part of section 10 seems to me to be merely the complement of those parts of section 9 which provide for the acquisition by the company of rights in land and in the streams in question. The Act first authorizes the company to acquire these rights, and provides means by which in the absence of an agreement they may be acquired compulsorily; and then proceeds to declare in section 10 expressly that these rights, purchased by agreement, or compulsorily taken, shall be vested in the company forever. The word "appropriate" itself, in its natural meaning, signifies to make one's own, that is, to take to oneself to the exclusion of others. (Imperial Dictionary). One does not readily see why an interest or right in a stream taken under section 9 is not an appropriation of that right or interest. The company takes it to itself to the exclusion of the former proprietor; in the fullest sense appropriates it.

A flood of light has been thrown upon the construction of this statute by a decision of the Judicial Committee of the privy council, reported since the argument—Saunby vs. London Water Commissioners, (1906), App. Cas., 110. The Act which the court had to construe in that case is, in terms, almost identical with that now under consideration, that is cap. 102 of the statutes of Ontario, (1873.) The plaintiff in the action, who was a mill owner, complained that the water power of his mill was interfered with by the water commissiiners, who, at a point on the River Thames, below his millsite, had penned back the river for purposes authorized by their enabling Act. The commissioners sought to justify under their Act, contending that the plaintiff's only remedy was to invoke the compensation clauses. Lord Davey, in delivering the judgment of the Judicial Committee, said, p. 114:

"Their lordships agree with the opinion expressed by the majority of the judges in the supreme court that, assuming this to be so, the water is nevertheless required for the purpose of the waterworks within the meaning of the Act, and the commissioners would be acting within their powers in appropriating the appellant's land and water rights, provided they had taken the necessary steps for that purpose. The question is whether they have done so.

"Their lordships are of opinion that, before the commissioners can expropriate a landowner, they must first set out and ascertain what parts of his land they require and must endeavor to contract with the owner for the purchase thereof. In other words, they must give to the landowner notice to treat for some definite subject matter. And a similar procedure seems to be necessary where the commissioners desire to appropriate a person's water rights, or to acquire some easement over his property. The arbitration clauses only come into operation on disagreement as to the amount of purchase-money, value, or damages, which, in itself, implies some previous treaty or tender involving notice of what is required. Their lordships therefore are of opinion that the commissioners have not put themselves into a position to compel the appellant to go to arbitration. Provisions for that purpose, such as are found in the present Act, are only applicable to acts done under the sanction of the legislature, and in the mode prescribed by the legislature. In this instance the commissioners have not proceeded in accordance with the directions of their Act; and consequently the appellant has not lost his ordinary right of action for the trespass on his property."

This opinion manifestly proceeds upon the view that under the statute in question, the commissioners were not authorized to deal with the streams in question in such a manner as to invade the legal rights of others. This is the view expressed by Sedgewick and Killiam, JJ. who dissented from the judgment of the majority in the supreme court of Canada, founded largely upon the fact, it would seem, that the statute makes no provision for the compensation of persons whose property is merely injuriously affected as distinguished from persons whose property is taken. At p. 657 of 34 S. C. R., Sedgwick, J. says:

"Expropriating statutes the world over generally make provision for two things, first, the taking of property, and secondly, the injurious affection of property.

"In the present case this ordinary and necessary principle has been most signally departed from. There is no provision authorizing the injurious affection of land, a thing which is absolutely necessary in order to make that injurious affection other than tortious, nor is there any provision authorizing compensation to be paid to persons whose hands are not appropriated but only injuriously affected."

In short, before doing anything which will injuriously affect the rights of others in land, or in the waters in question, the company must acquire these rights. The Act does not authorize the company to divert these waters, or sensibly to diminish their flow until it has first acquired the rights of the riparian proprietors, of which, apart from the statute, such acts would be an invasion. The company, that is to say, does not acquire the right to divert as against the lower riparian until it has first appropriated that riparian's right to the flow if the stream, and no abstraction or diversion of the water of the stream in itself can, under the statute, effect an appropriation of anybody's rights. It is, in the sense I have mentioned, namely, the acquiring of rights in the streams and waters referred to under the statute for the purpose of the company's undertaking, that the word "appropriated" is used in the passage I have just quoted from Lord Davey's judgment; and I quote from Sedgwick, J. at pp. 656, 657 and 658, of the report of his judgment in the supreme court of Canada, in further confirmation of my view:

"The only verbs in this quotation which can possibly refer to the case before us are 'enter' and 'appropriation' and the contention of the appellants is, and always has been, that although they did not either intentionally or otherwise pen back the waters of the river upon the respondent's land, yet it, as a matter of fact, they had done so, then that was an 'appropriation' by them under the statute, and that, therefore, the remedy was not by action but by means of the arbitration provided for in the section. I am strongly of the opinion that this occasional and intermittent injury not intended or contemplated by the commissioners when they erected the dam in question, cannot in any sense be considered as an appropriation of the property injured or of any water privilege which the respondent had. The very idea of appropriation, it seems to me, must be something done in pursuance of a plan formed for the authority appropriating. There must be a mental process resulting in a determination to do a positive act. There must be an exercise of volition and that volition completed by an act of appropriation. In other words, one cannot appropriate a thing involuntarily. Then the idea of 'appropriate' involves in it the idea of the taking away from one his property or his right in property so that he thereafter ceases to have it, and the person so appropriating succeeds him in the exclusive enjoyment of that particular property and right.

"'Appropriation, as I have suggested, means the taking of dominion over, or the conversion to one's own use the property of another.'"

In this case, it is true, the compulsory powers of the company were not brought into play in respect of any of the lands traversed by these streams; but in my opinion the transactions by which they were acquired must, for the purposes of this case, be treated as transactions taking effect under the special statutory powers of the company, and entered into for the purpose of enabling the company to carry out the purposes of its undertaking.

It is not open to dispute since the decision in Saunby vs. London Water Commissioners, that without the consent of riparian proprietors, the company could not, under its statutory powers, divert any of the waters in question for the purpose of supplying the district of Esquimalt, or for the purposes of carrying out any obligation to supply the city of Victoria, which might arise under section 10 of the Act of 1892, without first acquiring the rights of the riparian proprietors below the point of diversion; and indeed, it is equally apparent that as against non-assenting riparian owners below its reservoirs, the use of the waters of Goldstream river in the manner in which they have been used since 1897, for the purpose of supplying water for conversion into electric energy to the B. C. Electric Co.—involving the impounding of the sources of supply, the checking of the flow at some seasons, and the augmenting of the flow at others—would be a wrongful interference with the rights of such proprietors. It is not, I think, material for our present purposes whether the statutory powers of interference with the flow of Goldstream river authorize such interference for the purpose of carrying out an arrangement like that made between the railway company and the B. C. Electric company. It is not open to dispute that since 1898 the company has, in the bona fide belief that in so doing it was acting within the limits of its powers, controlled and altered the flow of the river from time to time, to suit the necessities imposed by these arrangements. In the absence of evidence it may be assumed in respect to the lands acquired since 1898, that the company acted with the assent of the proprietors; but with respect to all of the lands, the legitimate inference, in my opinion, is that they were purchased by the company in order to give it such control of the streams in question as will enable it to carry out its statutory undertaking. We are not, I think, to suppose that the company was not aware the nature of its rights, or of the conditions upon which alone it could legally exercise its powers.

Finding that it has taken the steps necessary to satisfy these conditions, we must, I think, assume that the steps were taken with that end in view. Indeed, I have heard no suggestion, and one does not occur to me, other than the desire to obtain control of the flow of the streams, in order to apply them to the purposes authorized by its Acts which would account for the purchase by the company of these lands.

Are the company's rights in the waters then affected by the circumstances, first, that the rights of the riparian proprietors were acquired by contract, and not by the exercise of their compulsory powers; and secondly, that they were acquired as incidents to the ownership of the lands themselves, and not in the process of appropriation severed from that ownership? The Act requires that before the compulsory powers of the company may be put into exercise with respect to any rights in waters or land, the company must first endeavor to contract for the purchase of those rights with their owner; and I do not stop to argue the question whether if an agreement is arrived at, the provisions of the Act apply to the rights of purchase in any less degree than if the prices were settled by arbitration.

The second branch of the question at first sight presents greater difficulty. But on consideration, I have come to the conclusion that a similar answer must be given to it. I repeat that the company as a condition to putting its power to divert into operation, must acquire the rights of the lower proprietors. It is quite obvious that in many cases the value of the riparian rights themselves, apart from the land, severed from the land, might be difficult of ascertainment. In some cases these riparian rights might constitute the sole value of the land, and altogether one could readily conceive that it would be less costly to purchase the proprietor's holding complete, than to proceed to arbitration with respect to the value of his water rights.

Now, under the Act of 1885, the company had no power to deal with real estate generally, but if for the purpose of enabling it to control the flow of Deadman's river, the company deemed it advisable to purchase the land traversed by that river, rather than confine itself to the purchase of the rights of the riparian proprietors in respect of it, it cannot be maintained that the provisions of the statute apply in no less degree to rights so acquired as incident to the ownership of the land than to rights acquired by severance from the ownership of the land. Let us apply one test. The power to dispose of its property is, in the case of a quasi public corporation created by special act of parliament, such as the plaintiff company (see Staffordshire Canal Co. vs. Birmingham Canal Co., L. R. 1 H. L. 254; and Reg. v. South Wales Ry. Co., 14 Q. B. (02); a limited power. It is limited by this rule, namely, that apart from given express authority or appearing by necessary implication from its Act such a corporation may not dispose of the property if by such disposition it should disable itself from carrying out its objects (in which the public have a interest), for which its special powers were conferred upon it. The introductory words of section 10, which I have quoted, constitute, in my opinion, an express legislative application of that principle as applied to the undertaking of this company. The lands appropriated by the company under its statutory powers for the purpose of its undertaking, the waters so appropriated, are declared to be vested in the company forever. I am unable to bring myself to think that under the Act of 1885, riparian rights, acquired by the purchase of the land to which they were incident, in order to enable the company, in the lawful exercise of its powers, to divert the waters of Thetis lake for the purpose of carrying out the object of its undertaking, could legally be alienated by the company in such a way as to put it in the power of any individual to stop the operation of its works. Section 4 of the Act of 1892 confers upon the company certain express powers with reference to the disposition of its real estate, but that does not, I think, materially affect the point before us. I conclude, therefore, that the several interests of the proprietors of the lands traversed by Goldstream river and its tributaries in the waters of these streams, became vested in the company by its purchase of those lands under section 10 of the Companies Act, 1885.

It falls now to consider the effect of the legislation dealing with water rights. From the earliest times the law-making authorities of the province reserved to the government the power to grant, through specified officials, rights to divert waters of natural streams to be used in agriculture and in mining; and I think on the true construction of the acts, subject to the payment of compensation, to be used for other lawful purposes. It is not very clear whether these grants (called "records") empowered the grantees to interfere with the common law rights of riparian proprietors except in the case of grants made for use in mining or agriculture. With regard to persons holding lands under grants from the crown, the circumstance that the form of grant prescribed by the Land Act reserves to the crown, the right to take water privileges for mining and agricultural purposes only, affords strong support for the contention that except for these purposes the grant of a water record conferred no power to interfere with such rights. It is not necessary, however, in my view to deter-

(Continued on Page Six.)