

1895
 *Oct. 9, 10.
 1896
 *Oct. 13.

IN THE MATTER OF

JURISDICTION OVER PROVINCIAL FISHERIES.

SPECIAL CASE REFERRED BY THE GOVERNOR GENERAL
 IN COUNCIL.

Canadian waters—Property in beds—Public harbours—Erections in navigable waters—Interference with navigation—Right of fishing—Power to grant—Riparian proprietors—Great lakes and navigable rivers—Operation of Magna Charta—Provincial legislation—R. S. O. [1887] c. 24, s. 47—55 Vict. c. 10, ss. 5 to 13, 19 and 21 (O)—R. S. Q. arts. 1375 to 1378.

The beds of public harbours not granted before confederation are the property of the Dominion of Canada. *Holman v. Green*, (6 Can. S. C. R. 707) followed. The beds of all other waters not so granted belong to the respective provinces in which they are situate, without any distinction between the various classes of waters.

Per Gwynne J.—The beds of all waters are subject to the jurisdiction and control of the Dominion Parliament so far as required for creating future harbours, erecting beacons or other public works for the benefit of Canada under British North America Act, s. 92, item 10, and for the administration of the fisheries.

R. S. C. c. 92, “An Act respecting certain works constructed in or over navigable rivers,” is *intra vires* of the Dominion Parliament.

The Dominion Parliament has power to declare what shall be deemed an interference with navigation and to require its sanction to any work in navigable waters. A province may grant land extending into a lake or river for the purpose of there being built thereon a wharf, warehouse or the like, and the grantee on obtaining the sanction of the Dominion may build thereon subject to compliance with R. S. C. c. 92.

Riparian proprietors before confederation had an exclusive right of fishing in non-navigable, and in navigable non-tidal, lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown. *Robertson v. The Queen*, (6 Can. S. C. R. 52) followed.

*PRESENT :—Sir Henry Strong C.J. and Taschereau, Gwynne, King and Girouard JJ.

The rule that riparian proprietors own *ad medium filum aquæ* does not apply to the great lakes or navigable rivers. Where beds of such waters have not been granted the right of fishing is public and not restricted to waters within the ebb and flow of the tide.

1895

*In Re*PROVINCIAL
FISHERIES.

Where the provisions of Magna Charta are not in force, as in the province of Quebec, the Crown in right of the province may grant exclusive rights of fishing in tidal waters, except in tidal public harbours in which, as in other public harbours, the Crown in right of the Dominion may grant the beds and fishing rights. Gwynne J. dissenting.

Per Strong C.J. and King and Girouard JJ.—The provisions of Magna Charta relating to tidal waters would be in force in the provinces in which such waters exist (except Quebec) unless repealed by legislation, but such legislation has probably been passed by the various provincial legislatures; and these provisions of the charter so far as they affect public harbours have been repealed by Dominion legislation.

The Dominion Parliament cannot authorize the giving by lease, license or otherwise the right of fishing in non-navigable waters, nor in navigable waters the beds and banks of which are assigned to the provinces under the British North America Act. The legislative authority of Parliament under section 91, item 12, is confined to the regulation and conservation of sea-coast and inland fisheries under which it may require that no person shall fish in public waters without a license from the Department of Marine and Fisheries, may impose fees for such license and prohibit all fishing without it, and may prohibit particular classes, such as foreigners, unconditionally from fishing. The license as required will, however, be merely personally conferring qualification, and will give no exclusive right to fish in a particular locality.

Section 4 and other portions of Revised Statutes of Canada, c. 95, so far as they attempt to confer exclusive rights of fishing in provincial waters, are *ultra vires*. Gwynne J. contra.

Per Gwynne J.—Provincial legislatures have no jurisdiction to deal with fisheries. Whatever comes within that term is given to the Dominion by the British North America Act, section 91, item 12, including the grant of leases or licenses for exclusive fishing.

Per Strong C. J. and Taschereau, King and Girouard JJ. R. S. O. c. 24, s. 47, and ss. 5 to 13 and 19 to 21 of the Ontario Act of 1892, are *intra vires* except as to public harbours, but may be superseded by Dominion legislation. R. S. Q. arts. 1375 to 1378 are also *intra vires*.

1895
In Re
 PROVINCIAL
 FISHERIES.

Per Gwynne J.—R. S. O. c. 24, s. 47 is *ultra vires* so far as it assumes to authorize the sale of land covered with water within public harbours. The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government for protection against interference with navigation. The Act of 1892 and R. S. Q. arts. 1375 to 1378 are valid if passed in aid of a Dominion Act for protection of fisheries. If not they are *ultra vires*.

SPECIAL CASE referred by the Governor General in Council to the Supreme Court of Canada for hearing and consideration pursuant to the provisions of Revised Statutes of Canada, chapter 135, "An Act respecting the Supreme and Exchequer Courts" as amended by 54 & 55 Victoria, chapter 25, section 4.

By Orders in Council passed respectively on the twenty-third day of February, 1894, and the twenty-third day of February, 1895, the following questions, seventeen in number, were referred to the Supreme Court.

1.—Did the beds of all lakes, rivers, public harbours, and other waters, or any and which of them, situate within the territorial limits of the several provinces and not granted before confederation, become under the British North America Act the property of the Dominion or the property of the province in which the same respectively are situate? And is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, &c., and other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, &c., and other rivers, or between waters directly and immediately connected with the sea-coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more provinces of the Dominion from

one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation ?

1895

*In Re*PROVINCIAL
FISHERIES.

2.—Is the Act of the Dominion Parliament, Revised Statutes of Canada, chapter 92, intituled “An Act respecting certain works constructed in or over navigable rivers,” an Act which the Dominion Parliament had jurisdiction to pass either in whole or in part ?

3.—If not, in case the bed and banks of a lake or navigable river belong to a province, and the province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river ?

4.—In case the bed of a public harbour, or any portion of the bed of a public harbour, at the time of confederation had not been granted by the Crown, has the province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament ?

5.—Had riparian proprietors before confederation an exclusive right of fishing in non-navigable lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown ?

6.—Has the Dominion Parliament jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them ?

7.—Has the Dominion Parliament exclusive jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the

1895

*In Re*PROVINCIAL
FISHERIES.

right of fishing in such waters as mentioned in the last question, or any and which of them ?

8.—Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters, the beds and banks of which are assigned to the provinces respectively under the British North America Act, if any such are so assigned ?

9.—If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a provincial legislature jurisdiction for the purpose of provincial revenue or otherwise to require the Dominion lessee, licensee or other grantee to take out a provincial license also ?

10.—Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chapter 95, intituled “An Act respecting Fisheries and Fishing,” or any other of the provisions of the said Act, or any and which of such several sections, or any and what parts thereof respectively ?

11.—Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chapter 95, intituled “An Act respecting Fisheries and Fishing,” or any other of the provisions of the said Act, so far as these respectively relate to fishing in waters, the beds of which do not belong to the Dominion and are not Indian lands ?

12.—If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid, or from the rights incident to the ownership by the provinces and others, but (subject to such property and rights) providing in the interests of the owners and the public, for the regulation, protection, improvement and preservation of fisheries, as, for example, by forbidding fish to be taken at improper seasons, prevent-

ing the undue destruction of fish by taking them in an improper manner, or with improper engines, prohibiting obstructions in ascending rivers and the like?

1895
In Re
 PROVINCIAL
 FISHERIES.
 —

13.—Had the legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chapter 24, intituled “An Act respecting the sale and management of Public Lands,” and sections 5 to 13, both inclusive, and sections 19 and 21, both inclusive, of the Ontario Act of 1892, intituled “An Act for the protection of the Provincial Fisheries,” or any and which of such several sections, or any and what parts thereof respectively?

14.—Had the legislature of Quebec jurisdiction to enact sections 1375 to 1378, inclusive, of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

15.—Has a province jurisdiction to legislate in regard to providing fishways in dams, slides and other constructions, and otherwise to regulate and protect fisheries within the province, subject to, and so far as may consist with, any laws passed by the Dominion Parliament within its constitutional competence?

16.—Has the Dominion Parliament power to declare what shall be deemed an interference with navigation and require its sanction to any work or erection in, or filling up of navigable waters?

17.—Had riparian proprietors before confederation an exclusive right of fishing in navigable non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown?

The following counsel appeared for the several governments interested:

Christopher Robinson Q.C. and *Mr. Lefroy* for the Dominion of Canada.

Emelius Irving Q.C., *S. H. Blake* Q.C. and *Mr. J. M. Clarke* for the province of Ontario.

1895

*In Re*PROVINCIAL
FISHERIES.

Hon. *T. C. Casgrain*, Attorney General, for the province of Quebec.

Hon. *J. W. Longley*, Attorney General, for the province of Nova Scotia.

Æmelius Irving Q.C. and Mr. *Clarke* for the province of British Columbia.

The provinces of Prince Edward Island and Manitoba took no part in the proceedings. A factum was filed on behalf of the province of New Brunswick, but no counsel appeared to support it on the hearing.

Robinson Q.C. I appear for the Dominion, with my learned friend Mr. Lefroy. The questions are submitted, as your Lordships are aware, by the Dominion Government, in order to be advised as to the respective rights of the Dominion and the provinces with regard to various questions bearing upon the water rights and harbours, and the question of fisheries which have arisen between the Dominion and the provinces at different times. As I understand, these questions (of which there are rather a large number) are submitted, many of them, I apprehend, with a view rather to their importance in the administrative aspect, that is to say, to guide the different governments in the exercise of their administrative powers, than with regard to any necessary material or pecuniary importance that they may be to the respective governments. As to some of them, I apprehend it is of probably more importance to get them settled than to settle them either one way or the other. As to others, they do involve important interests, and both the Dominion and the provinces are contending seriously and earnestly for different views.

Perhaps it may be as well in the beginning just to endeavour, without reference to the questions, to point out, as I understand it, what are the material questions arising between the two governments.

In the first place, I apprehend the discussion here will be very much shortened by the fact that, as regards the most important questions, this court, in the cases of *The Queen v. Robertson* (1), and *Holman v. Green* (2), has either expressed deliberate opinions, or has given deliberate decisions, which are conclusive on one side or the other if they are adhered to. Now, I apprehend that with regard to those questions which are actually decided, for example in *The Queen v. Robertson* (1), there is no object in re-discussing them here at all. There are, however, questions which are not actually decided in *The Queen v. Robertson* (1), I mean, which were not part of the discussion, but upon which, nevertheless, the various judges have expressed deliberate and considered opinions.

To take the question of fisheries first—perhaps that being the most important—I shall just put very shortly to your Lordships what are the difficulties which have arisen. There does not appear to be any substantial dispute that, under the power given to the Dominion over sea-coast and inland fisheries as one of the subjects entrusted to their legislative action, they have power to regulate fishing; that is to say, to prescribe close seasons, to prescribe the manner in which the fish shall be taken, and so on. Everything that may be said in popular language to consist of regulations, it seems to be admitted, belongs to them. The only question, as I understand, that there is a serious contest upon with regard to that arises on the position taken by some of the provinces, which they have acted upon in their legislation, that until the Dominion prescribes regulations they have power to prescribe them; in other words they say: “Admitting that when the Dominion chooses to come in and make fishery regulations they will supersede our regu-

1895

In Re

PROVINCIAL
FISHERIES.

(1) 6 Can. S. C. R. 52.

(2) 6 Can. S. C. R. 707.

1895

*In Re*PROVINCIAL
FISHERIES.
—

lations; in the meantime, until they do that, we have a right to make regulations." But I do not think it is seriously contested, with regard to what may be strictly regulations, that the Dominion is supreme when it chooses to act. However, the serious point is that the Dominion claims unlimited powers over the fisheries, just as the province has power over any other property; and they say: "We have a right to deal with that as you can deal with any property in your charge; we may give a person the exclusive right to fish on any land, no matter where, and we may charge him just such fee as we please." And the provinces say: "You can only regulate; the land is ours, the rights to be exercised over it, in so far as that consists of property, are ours also." The material importance of that rests in this, that it is then vain to say to the Dominion: "You will make regulations and prescribe times and manners in which fish are to be caught;" for all that involves enormous expense, the employment of fishery inspectors all over the country, and their pay, and so on. The provinces say: "You can do that and pay the expenses of it, but all the revenue to be derived from these fisheries belongs to us." Now that is a matter to be settled between them, and it may be that we have not only the power to regulate, but the power to license. A very curious result might arise, though it is perhaps not very important here, because it is not in the sense of taxation that this question comes up, but it would look as if—however this decision went—either of these parties could attain the same result under their taxing powers. The Dominion has power to raise money by any mode or system of taxation. I have never been able to satisfy myself, apart altogether from the further question as regards fishery, why they cannot say: "We will tax everyone who fishes \$100." That is raising money by

taxation; and the Dominion can do that if they please. On the other hand it is difficult to contend, in view of the later decisions, that the provinces, under their right to levy money for municipal purposes by direct taxation, cannot do the same thing; because your Lordships are aware the later decisions have gone in the direction—I might say it has been expressly decided in *The Bank of Toronto v. Lambe* (1)—that the requirement of a license is direct taxation.

1895

*In Re*PROVINCIAL
FISHERIES.

Then, the second question is as to the rights of the Dominion over navigable waters. We have passed a statute, the result of which is that no person can put up any erection in navigable waters without submitting the plans to the Dominion and obtaining their assent to it; that is to say, the Dominion claim is: "It is our province, in the exercise of our jurisdiction over navigation and shipping, and over navigable waters, and over trade and commerce, to say beforehand, as they can do in the United States, what we will allow to be put up in navigable waters." On the other hand the provinces say,—New Brunswick, at all events, asserts it very distinctly and emphatically while Nova Scotia does not take such strong ground—"No; your power over navigable waters is to proceed against us when we are obstructing you, and you must satisfy a court or jury that the particular obstruction is an impediment to navigation and make us remedy it, but you cannot prescribe beforehand what we shall put in navigable waters." The Dominion say that falls short of what is necessary to enable them to exercise their legislative power. Then that has an indirect and important effect on the question of granting water lots. The provinces say: "We can grant water lots in navigable waters." Take the Detroit River, or any river; it was the common practice before

(1) 12 App. Cas. 575.

1895
In Re
 PROVINCIAL
 FISHERIES.

confederation, and since then it has been the custom of the provinces, to grant water lots, to erect warehouses, and so on. The provinces say: "We may grant those water lots, and our grantee may do as he pleases with them, subject to your right to bring him before a court or jury, and shew that what he is doing is an impediment to navigation." And the Dominion say: "We have a far wider power; we can prescribe beforehand what shall or shall not be done in navigable waters; and if we choose to say, 'that lot shall not be filled up,' we have a right to do so, and we are to decide whether it will be an impediment to navigation or not." Your Lordships will see that has indirectly an important bearing on the right of the provinces to grant water lots. Then what does the grantee take under it? The provinces cannot authorize impediments to navigation; there is no question about that if we shew it is an impediment to navigation. But the question is, can we say beforehand: "You shall not erect it, because we say it will be an impediment to navigation." Can they say: "No, it will not; we will go and test that." They all admit that if it is an impediment to navigation we can have it removed by the ordinary process, just as we always could; but it is an important question as to our power of making regulations which will take effect by anticipation so to speak. They may say: "We propose to put up this, it will not be an impediment to navigation, and you can prosecute us if you like, but we will test that before a jury." We say: "No, we have a higher power than that, and we are to say whether it will or will not be an impediment to navigation." Now, that is a question of practical importance.

The first question is one relating entirely to the property in the beds, as apart from legislative powers altogether. It is: "In whom are the beds vested as

matters of property?" The beds of all waters, within the provinces, not granted before confederation to whom they do belong?

1895
In Re
 PROVINCIAL
 FISHERIES.
 —

In *Holman v. Green* (1) the court has said that public harbours go to the Dominion, so that as to that class of waters the question is answered by that case.

Then we go on to ask: And is there any difference between the respective waters? We ask that in order that your Lordships may not say, "No, all of them did not pass"; we want your Lordships to tell us which passed, and which did not pass, if you answer it in that way. That is the purview of that question.

As regards many of these things there can probably be little discussion, because we claim them either upon the ground of decided cases, or upon the ground of specific clauses of the British North America Act. For example, we claim, in the first place, all rivers, tidal or non-tidal, navigable or non-navigable, ungranted at the time of the passing of the British North America Act. Then that brings up a matter which has been a question, certainly, in the minds of the Dominion Government since confederation. The late Minister of Justice, as we all know, and as his reports show, has always taken the position, under the British North America Act, in connection with section 109, "The public works and property of each province enumerated in the third schedule to this Act shall be the property of Canada," that all rivers not granted at confederation passed to the Dominion. In the third schedule of the Act we find the words, item five, "Rivers and Lake Improvements." Sir John Thompson always held and took the position that "Rivers" meant "Rivers" and rivers are the property of the Dominion Government, that all rivers

(1) 6 Can. S. C. R. 707.

1895
In Re
 PROVINCIAL
 FISHERIES.

which had not been granted, and which at the time of confederation were the property of the respective provinces passed to the Dominion Government. This was not part of the decision in *The Queen v. Robertson* (1). But I am placing it as the distinct and earnest contention of the Dominion Government; it is not a point on which very much can be said; and there it stands. I may explain to your Lordships how it stood in the different drafts. It began in the "Quebec Resolutions" in 1864, which was the initiation of the matter, as "River and Lake Improvements." You find it in one or two out of six different drafts, "River" still; but you find it in the later drafts, and in the Parliamentary Roll as it stands at present "Rivers." It stood, I think, for the last two or three drafts and at all events now stands in the Imperial Roll, just as it was first adopted by the London Conference, "Rivers and Lake Improvements."

All that can be said is to draw your Lordships' attention to the well known rule in the construction of statutes, which was put strongly by Sir William Richards when he said that when the legislature changed their phraseology it was to be assumed they changed it intentionally, and for some reason, whatever the reason was, we have got the words "Rivers and Lake Improvements." If there had not been the words, "And Lake Improvements," there would not have been any question; that is beyond doubt. If it had just stood that the following shall be the property of the Dominion, "Rivers and Lakes," there would have been no possibility of raising a question. Then can you conceive any reason as to why rivers should be given to the Dominion? The Dominion suggests that rivers were intentionally given to them; that so far as navigable rivers go they have entire control

(1) 6 Can. S. C. R. 52.

over trade and commerce. In the United States the control over rivers to a most unlimited extent, so far as the navigable character of them is concerned, is given to the Federal Government by virtue of trade and commerce, which is entrusted to them, although in a much more limited sense than it is entrusted to our Parliament. The Dominion Government say that "Trade and Commerce," "Navigation and Shipping," and still more "Fisheries," having been entrusted to them, and rivers being intimately connected with every one of these subjects, they were intended to have the property in rivers; and it was reasonable that it should be so. They point out, that so far as navigable rivers are concerned, with regard to navigation, and so far as fisheries are concerned and rivers running from one province into the other, navigable in one part and non-navigable in another, they have legislative jurisdiction and that it was desirable that the whole subject of rivers should be vested in one power, and placed under one control; they say, therefore, that there are valid and good reasons why the intention should have been to give rivers to them. And your Lordships will see there is nothing by any means either improbable or inconsistent with that. The beds of rivers are practically of little value, except for the purpose of the water which runs over them. Well, as is said in several American cases and English cases, it is of no importance who owns the bed of Lake Ontario in the middle, but questions may arise in which the ownership may become of importance as regards the duty of legislative action, and we want to have it settled. Then we say rivers belong to us.

Then we find "All canals." Your Lordships will find in that same third schedule, "Canals with lands and water power connected therewith." We get

1895

*In Re*PROVINCIAL
FISHERIES.
—

1895
In Re
 PROVINCIAL
 FISHERIES.

under that, all canals which constituted a part of the public works and property of any province at the time of the coming into force of the British North America Act.

Then we claim so much of any waters, whether salt or fresh, tidal or non-tidal, navigable or non-navigable, as were occupied by lighthouses and piers, forming part of the public works of any of the provinces at the time of the coming into force of the British North America Act, or were or are appurtenant to or necessary for the use and maintenance thereof. I should have thought that under the same schedule which gives us lighthouses and piers, and Sable Island, that we should certainly be entitled to that. And likewise so much of the waters of lakes of every description as were occupied by improvements forming part of the public works and property of any of the provinces at the time of the coming into force of the British North America Act, or as were or are appurtenant to or necessary for the use and maintenance of such improvements.

Then we claim the large fresh water lakes, more particularly the chain of great lakes from Lake Superior to the St. Lawrence River and waters of any description which have been in any way set apart for general public purposes in any of the provinces, and formed part of the property of any of the provinces at the time of the coming into force of the British North America Act. That again depends on the express words of item 10 of the third schedule, "Lands set apart for general public purposes." They are expressly given to the Dominion.

Then we claim the sea-coast, subject to any transfer made of it under 54 & 55 Vic. ch. 7. That depends a good deal upon the same questions which govern the consideration of the right to the great lakes. So does

the question of territorial waters, meaning the three mile zone. With regard particularly to that, your Lordships will remember that the jurisdiction of the Crown over the three mile zone has been established by innumerable decisions, and recognized by Imperial legislation as the law of England, mainly for the purposes of defence; and we say the Dominion having been given, among other things, exclusive control over defence they should have,—and it was intended to give them—the ownership of that part of the territory which can only be used for those purposes. It can only be used for navigation, and shipping, or defence. Those being the only useful purposes for which it can be applied, and those being under the exclusive control of the Dominion, we say they are entitled to the ownership of the land, upon the same ground, and for the same reasons. I need not now go into any discussions about the difference between the American constitution and our own, all tending in our favour, on the principles on which their constitution is framed.

1895

*In Re*PROVINCIAL
FISHERIES.

Then we claim, —“Waters on land reserved for Indians,” in the same way. While the Indian title remains, and while the administration and control is vested in the Dominion Government, we say the property in Indian lands is vested in the Dominion Government.

Ordinance property is expressly given to the Dominion by item 9.

Then as to “Waters on any land or public property assumed by Canada for fortification or defence.” By section 117 Canada may assume “such lands as she may require for the purposes of public defence.” That of course would include land covered with water.

That is all I intend to say on the questions as to the right in the beds—that is to say, of the soil under the water—of the different waters of the Dominion.

1895

*In Re*PROVINCIAL
FISHERIES.

The next question is: "Is the Act of the Dominion Parliament, Revised Statutes of Canada, ch. 92, intitled 'An Act respecting certain works constructed in or over navigable waters,' an Act which the Dominion Parliament had jurisdiction to pass, either in whole or in part"? Now, on reading that statute it struck me that a doubt might well occur to any one whether it was really intended to relate to any works which did not themselves affect navigation, whether it was not essential to the jurisdiction which they assumed that the works should impede navigation, although I do not think that was the intention, because there are other clauses which require any person proposing to erect a work in any navigable water to submit the plan to the Dominion Government and get their assent before they proceed with the work. For example any bridge to which the Act applies, which is not approved by the Governor in Council, etc., may be lawfully removed under the authority of the Governor in Council. "No bridge, boom, etc., shall be constructed so as to interfere with navigation, unless the site thereof has been approved by the Governor in Council." See *Queddy River Driving Boom Co. v. Davidson* (1); *Pennsylvania v. The Wheeling Bridge Co.* (2); *South Carolina v. Georgia* (3); *Gibbons v. Ogden* (4); *Gilman v. Philadelphia* (5); Story on the Constitution (6), sums up the whole thing.

In *Gibbons v. Ogden* (4), it is said:

"Power to regulate commerce comprehends the control for that purpose and to the extent necessary of all the rivers navigable in the United States, etc. This includes necessarily the power to keep these rivers

(1) 10 Can. S. C. R. 222.

(2) 13 How. 519.

(3) 93 U. S. R. 4.

(4) 9 Wheat. 1.

(5) 3 Wall. 713.

(6) 5 ed. Vol. 2, pp. 16 and 17,
note (a).

open and free from any obstruction to their navigation, to remove obstructions where they exist, and to provide as they think proper against the occurrence of the evil, and the punishment of the offenders. For these reasons Congress possesses all the powers which existed in the States before the adoption of the national constitution, and which have always existed in the Parliament in England."

1895

*In Re*PROVINCIAL
FISHERIES.

It cannot be put more strongly than that. We claim precisely the same powers.

Question five must be answered in the affirmative. Six, seven and eight all practically concern the right given to the Dominion Parliament by virtue of their jurisdiction over sea-coast and inland fisheries; and the extent of that jurisdiction is perhaps the most important question to be determined. If I understand what was as really decided in *The Queen v. Robertson* (1), it was a necessary part of the decision, that the land had all been granted by the Crown to the particular company before confederation. It was thought when the case was brought before Mr. Justice Gwynne that there was a portion of the land which had not been granted, and therefore the question was asked, "What would have been the rights of the Federal Government if the land had not been granted and belonged to the provinces? What are the rights of the Federal Government over any of the lands which have been granted?"

What I propose to do I may say is to point out what has been decided in *The Queen v. Robertson* (1), what opinions have been indicated in that case on matters not decided and what is the position taken by the Dominion Government.

First, as to what *The Queen v. Robertson* (1), decided. As I have said when the case came before Mr.

(1) 6 Can. S. C. R. 52.

1895
In Re
 PROVINCIAL
 FISHERIES.

Justice Gwynne, it was thought a portion of the land had not been granted, and therefore the question was asked of him: "What would have been the rights of the Dominion Government to license if the land had not been granted, or on so much of it as was not granted?" He answered this question.

When the case came up in appeal Mr. Lash, who appeared for the Dominion, discovered that all the land had been granted, and he did not care to present that question again; nevertheless their Lordships expressed their opinions on that question, perhaps necessarily expressed them in order to explain clearly their views on other questions. It may have been necessary to express an opinion as to their rights on lands ungranted, in order to contrast with their opinions as to the rights on lands granted. But the real decision in *The Queen v. Robertson* (1), was simply no more than this: In the first place the lease was a lease of the land, and unless the Dominion Government owned the land they clearly had not the power to lease the land. In the next place, all the Dominion Government had assumed to do was to give their Minister power to grant fishing licenses where the exclusive right of fishing did not already exist by law. Whether they could have given him the right or power to grant a license for fishing over all lands, without reference to that, was not determined, and that is what we desire to have determined now. Then that being the only point really decided, which would not cover any question here, the courts did express their opinion, I think very plainly, to this extent, that where an individual had lands before confederation he had an exclusive right of fishing; therefore the Minister, under that clause of the statute, had no power to grant a license over that land.

(1) 6 Can. S. C. R. 52.

Question number nine is unnecessary if question number eight is answered in the negative.

Then question number 10: "Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chapter 95, intituled 'An Act respecting Fisheries and Fishing,' or any other of the provisions of the said Act, or any, and which of said several sections, or any and what parts thereof, respectively?"

That is rather a long statute, and it is a very wide question. All I desire to say with reference to the whole situation is that it deals practically with the entire question of fishing and there is no dispute as regards the regulation of fishing and everything connected with the time and manner of taking fish. Over that, it is conceded, we have the right of jurisdiction. If we have, then what are we doing under that Act that we have not the right to do, with the exception of this licensing question, which, guarded as it is, makes it difficult to say that it is not possible to pass it? We have taken a leaf out of the Ontario book in that respect, and have guarded ourselves in the same way.

Questions 10 and 11 may practically be bracketted together. Twelve is, I think, a question arising if our power is limited to regulations for the protection, improvement and preservation of fisheries, and so on; and according to *The Queen v. Robertson* (1) I suppose the court will answer that it is.

Then the next question is this: "Had the legislature of Ontario jurisdiction to enact section 47, of R. S. O. ch. 24 as to the sale and management of public lands?"

That is the section authorizing the legislature of Ontario to grant water lots. Your Lordships will

1895

*In Re*PROVINCIAL
FISHERIES.

1895
In Re
 PROVINCIAL
 FISHERIES.
 —

remember, as was stated in the original statute, 23 Vic. ch. 2 sec. 35, that there had been doubts as to the rights exercised by the province to grant water lots in navigable waters. That Act provided that it was lawful for them to do so, and always had been lawful for them to do it. It is in that respect that the question becomes important. It is quite possible—though I do not believe it would happen—that the Dominion and the various provincial governments might exercise their rights in antagonism to each other, or with a view to interfere with each other's rights; and the right to grant water lots may be more or less valuable, depending on the nature of the control.

The question as to the legislature of Quebec having the jurisdiction to enact certain sections will, I think, be decided by the extent of the general jurisdiction.

I think all those questions will be answered when your Lordships define the general jurisdiction over fisheries.

The next question brings up an important matter, not only a question of some importance as bearing on this particular subject, but a question of great general importance as bearing upon the question of our constitution. The question reads: "Has a province jurisdiction to legislate in regard to providing fishways in dams, slides and other constructions, and otherwise to regulate and protect fisheries within the province, subject to, and so far as they may consist with, any laws passed by the Dominion Parliament within its constitutional competence?"

They claim that until we legislate on this subject they can legislate upon it, as affecting property and civil rights. We say that is plainly not the case, and if we have the jurisdiction to regulate fisheries it must, under the terms of the British North America Act, be exclusive jurisdiction; that they cannot pass legislation

upon the subject of fisheries until we take it up, any more than we can pass legislation upon the general property and civil rights until they take it up. Our powers differ from the powers in the United States, where concurrent legislation is admissible. Speaking as a rule, the States may legislate until Congress sees fit to legislate in the exercise of its power, but where we get a grant of legislative power it is exclusive. The province could not pass a compulsory bankruptcy law, for instance or a bank Act because we have exclusive jurisdiction over those subjects. I quite admit that there are a great many subjects according to the last decision of the Privy Council upon the question of insolvency, which involve what may be called an intermediate or middle zone of subjects, which may belong to several large subject matters of legislation, and the provincial legislatures may make a great many regulations which, until the Dominion has legislated, may be quite within their power. Take, for instance, the regulations which the provincial government make with regard to voluntary assignments, and so on; it has been held that although, until the Dominion Parliament chooses to legislate upon bankruptcy, they may regulate those matters as an incident of bankruptcy, yet the moment the Dominion Parliament proceeds to deal with the matter the provincial legislation is superseded; but that principle cannot be applied here, inasmuch as this legislation cannot be attributed to anything but fisheries. Whatever legislation we have a right to enact with regard to fisheries they have no right to enact.

Lefroy follows for the Dominion Government.

There are two points arising in the case on which I would like to say a few words. The first point is with reference to its being reasonable that the beds of such rivers as the St. Lawrence—that is, the

1895
In Re
 PROVINCIAL
 FISHERIES.
 —

1895

*In Re*PROVINCIAL
FISHERIES.
—

Crown interest in them—should vest rather in the Crown as represented by the Dominion Government than in the Crown as represented by the provincial governments; and I would ask your Lordships if there is any other principle, or any view except that one, upon which the property in the beds of those rivers can be held, under our constitution; and if that is the only theory or principle on which it can be so held, whether after all that would not apply as well to the large lakes as to the large rivers, such as the St. Lawrence, or any other river forming the boundary between the two nations? The question is perhaps more clearly put in this way: We are dealing with one Crown; and the only question is whether the Crown interest in the beds of these waters is to be administered and is to be controlled by the Dominion Government and Parliament, or by the provincial government and legislature. In other words, is it reasonable and right under the general scheme of the British North America Act, to attribute the *jus regium* in the beds of navigable waters and rivers like the St. Lawrence, even above the ebb and flow of the tide, to the Crown as forming a constituent part of the Dominion Parliament, or to the Crown as forming a constituent part of the provincial legislature? I submit that the former is more reasonable; and that the decisions have, after all, led us up to a point where we can scarcely take any further step without reaching that conclusion; because the decisions certainly point to this, that the executive power is co-extensive with the legislative power. Mr. Justice Ramsay says, in the case which was afterwards called the *Bank of Toronto v. Lambe* (1), that it has never been doubted that the British North America Act attributes plenary govern-

(1) M. L. R. 1 Q. B. 188.

mental powers over certain matters to both the Dominion Parliament, and to the provincial legislatures.

And in the case of *The Queen v. St. Catharines Milling Company* (1), Mr. Justice Patterson says :

“ The administrative and legislative functions I take to be made co-extensive by the Act.”

1895

*In Re*PROVINCIAL
FISHERIES.

—

In the pardoning power case the principle is stated in the broadest way by the Chancellor of Ontario (2), that legislative power carries with it a corresponding executive power, though all executive powers may be of a prerogative character.

Mr. Justice Burton in the Court of Appeal also re-echoed these words (3). When it came before this court, the appeal was decided on another ground and the court did not pass on that point. Then, my Lords, if we have reached that point, we have the *jus regium* in those lands which are peculiarly pertinent, or which have peculiar relation, to certain legislative powers. The principle upon which the Crown interest in the bed of the St. Lawrence pertains to the Crown as represented by the Dominion Government, is that the legislative power over defence and responsibility for enforcing all international relations and international treaties, the control over navigation and shipping, and over trade and commerce are all within the Dominion.

It seems to be a most anomalous thing, if the Dominion Government and Parliament have exclusive jurisdiction over all these subjects to which the ownership of the bed is pertinent—and to none other legislative powers can it be said in the same sense to be pertinent—that it should not be held to attach to the Crown as a constituent part of the Dominion Parliament. But I may perhaps call in aid an Imperial

(1) 13 Ont. App. R. 171.

(2) 20 O. R. 249.

(3) 19 Ont. App. R. 38.

1895

*In Re*PROVINCIAL
FISHERIES.

enactment, so far as the argument is based upon trade and commerce, sec. 7, ch. 62 of 29 & 30 Vic. I call it in aid of the argument so far as it rests on the possession by the Dominion Parliament of the exclusive power to legislate in respect to trade and commerce; because by this enactment it is provided that, "All rights of the Crown in the shore and bed of the sea, and of every channel, creek, bay, estuary, and of every navigable river of the United Kingdom, as far up as the tide flows (and which are here for brevity called the foreshore), except as in the Act provided, are transferred to the management of the Board of Trade."

I call it in aid simply to this extent; that the Imperial Parliament has vested the beds of all those waters in the Board of Trade, because the Imperial Board of Trade is the Department of the Government in Great Britain which regulates trade and commerce, the manner of erections in navigable waters, and just the very subjects which my learned leader has argued come under the Dominion Parliament by virtue of its control over trade and commerce. There is nothing in the Act, I think, which can be said to conflict with this view. It is true that under section 109 lands which belong to the different provinces, at the union, continue to belong to the provinces. But limiting words come at the end of that section, that this assignment of these lands is "subject to any interest other than that of the province in the same;" and though it may well have been, as I submit, that the ownership of the beds, at any rate, of the great lakes, did not appear to be a matter of so much importance as to need specific mention, still if your Lordships conclude that it is reasonable to attribute the *jus regium* in regard to this matter to the Parliament rather than to the legislatures, then I say that such conclusion is warranted by that section, by the gift of the lands of

the province being subject to any interest other than that of the province in the same.

1895
In Re
 PROVINCIAL
 FISHERIES.
 —

The other point is that, in reference to the last three questions, the provincial legislatures have no jurisdiction to legislate upon the subject of inland fisheries in their own waters. The Act has given to the Dominion Parliament the exclusive power over sea-coast and inland fisheries, and the proposition of the provinces seem to amount to this. "This is very true, but we may legislate for our own inland fisheries." Now, I think that the concluding words of section 91 "Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces" may be said at last to have received an established construction, which is that the provinces may not legislate upon a subject coming within the enumeration of subjects in section 91, saying, "Oh, well, it is only a private matter, and we may legislate upon it." The dicta of the Privy Council have all pointed in this direction. In the case of *L'Union St. Jacques de Montréal v. Belisle* (1), their Lordships refer to that number 16 of sec. 92. They said the Act they were there considering was undoubtedly a local and private Act; and they added, "Now section 91 qualifies it, if it be within any of the classes therein enumerated, because of its concluding words."

They refer to it in *Citizen's Insurance Company v. Parsons* (2). There they said: "Though the paragraph applies in its grammatical construction only to number sixteen of section ninety-two, it would seem to have been inserted with the view of providing for cases of apparent conflict."

(1) L. R. 6 P. C. 35.

(2) 7 App. Cas. 108.

1895

In Re
PROVINCIAL
FISHERIES.

Then again in the same judgment they refer to it as, "This endeavour to give pre-eminence to the Dominion Parliament in cases of conflict of power."

In several of the arguments before their Lordships,—for example, in *Hodge v. The Queen* (1)—some discussion has taken place upon these concluding words; and it has appeared to be accepted by their Lordships that the meaning is just this, that the provinces may not say: "We can legislate upon this as a local and private matter, although it touches or affects some of the enumerated matters in section 91." And then, in the recent argument upon Prohibitory Liquor Laws, Lord Herschell, in the argument on the second day, at page 68, says of it: "That provision is that you cannot get under the words 'local and private nature,' anything which is in one of the enumerated classes of section 91."

Now, I submit that they are out of court, upon the decisions as they now exist. The question is: Do these words refer only to no. 16 of section 92? The Privy Council have said in the *Citizen's Insurance Company v. Parsons* (2) that, though they apply in their grammatical construction to number 16, they would seem to have been inserted with the object of preventing cases of apparent conflict. There is nothing to debar the argument, that when these concluding words of section 91 say "matters of a local or private nature," they are not referring only to matters merely "of a local or private nature."

I support the view taken by Mr. Justice Gwynne in the Prohibitory Liquor Laws case (3) and which I know has been taken by very many members of this court in different cases, that the reference is to all the subjects in section 92. The construction on the other

(1) 9 App. Cas. 117.

(2) 7 App. Cas. 96.

(3) 24 Can. S. C. R. 212.

point is clearly settled now, I take it, that it means that the provinces cannot defend a law as a matter of "local or private nature," if it comes within the enumerated subjects of section 91. They cannot defend it under number 16. Can they defend it under any other? The concluding words of section 91 are not that it shall not be deemed to come within matters of "a merely local and private nature;" but that it shall not come within "the local and private matters comprised in the class of enumerated subjects assigned to the provinces." I submit that it looks upon all the subjects in section 92 as comprising one big generic class. It seems to me to be perfectly good English to say there is one generic class of local and private matters comprised in the sixteen enumerated classes. You can say with perfect propriety that the sixteen enumerated classes comprise within their united boundaries one generic class; and then the construction would be that a province cannot legislate upon any subject in section 92—and those are the only subjects on which they can legislate—that affects or deals with a subject in section 91, on account of those concluding words, and also, I submit, on account of the words in the earlier part of section 91, which says "that notwithstanding anything in this Act," the exclusive legislative authority of the Dominion Parliament extends to all matters coming within the classes of subjects there enumerated, which must mean that notwithstanding all the powers given to the provincial legislatures, the Parliament of Canada shall exclusively legislate on these subjects. The importance of those words has not been dwelt upon as much as one might expect; but Mr. Justice Gwynne refers emphatically to them in the *City of Fredericton v. The Queen* (1):

"Notwithstanding anything, whether of a local or private nature, or any other character, the exclusive

(1) 3 Can. S. C. R. 566.

1895
 In Re
 PROVINCIAL
 FISHERIES.

1895

*In Re*PROVINCIAL
FISHERIES.

legislation of the Parliament of Canada extends to all matters mentioned in sec. 91."

The real meaning of the concluding words of section 91 is to repeat and make clearer than ever the effect of the words in the prior part of the section, "notwithstanding anything in this Act." The one states the same thing as the other conversely. The first says "Notwithstanding anything given to the provinces," Parliament shall exclusively legislate upon those subjects; and the other says to the same effect. The one says that the Dominion Parliament shall alone legislate upon those subjects, and the other says the provinces may not legislate on those subjects, notwithstanding anything that has been given to them. And therefore the provinces cannot legislate under any single head of section 92 upon subjects enumerated in section 91, and cannot claim the right to legislate for the regulation of their inland fisheries. The subject of the sea-coast and inland fisheries is of a different character from bankruptcy. Very great difficulty has been experienced in arriving at what was of the essence of legislation in reference to bankruptcy and insolvency, but there is not so much difficulty in arriving at what is the essence of legislation in respect of sea-coast and inland fisheries. At all events, there is no doubt that legislation on provincial inland fisheries is legislation on inland fisheries; and if that cannot be disputed, in view of the decisions, the last three questions must be decided in a way opposed to the constitutionality of the provincial Acts.

Longley, Attorney General, for the province of Nova Scotia.

Your Lordships will be good enough to bear in mind that, while the Dominion stands here as a unit, each province has the right of presenting its own views distinctly and that if any admission is made by one province it is not to bind another.

I have divided the points as I desire to submit them into four general heads. The first, as to the ownership of beds of non-navigable waters; second, as to the right of the Dominion Government to lease or license fishing privileges in non-navigable waters; third, as to the right of the Dominion and provincial governments respectively to license fishing privileges in navigable waters; and fourth, as to the ownership of the beds and shores of navigable waters, harbours, tidal rivers, and the foreshores of the sea, comprising everything that the word "foreshore" can mean,—that is the extension from high-water mark out,—and all classes of waters whatever. I think all the questions resolve themselves into these four heads.

In regard to the first question submitted *The Queen v. Robertson* (1) has determined it and that case seems to me to be founded so completely upon principles which do not depend entirely upon the British North America Act, or upon the application of the plain and simple principles of that Act, that I do not feel inclined to discuss it here at all.

The ownership of the beds of non-navigable streams, or the fishing privileges which go with it, cannot be pretended to be in the Dominion. *The Queen v. Robertson* (1) determined that the Dominion had had no right to license fishing privileges in non-navigable waters, because in respect to private owners it was vested in the owners and became an absolute piece of property, and a right which could only be affected by that legislature which has control over property and civil rights.

Now, as to the question of the right of the Dominion or the provinces respectively to license or lease privileges in waters that are navigable. I do not know that it would be sound to adopt the exact narrow rule

1895

*In Re*PROVINCIAL
FISHERIES.

(1) 6 Can. S. C. R. 52.

1895
In Re
 PROVINCIAL
 FISHERIES.

according to the common law of England that a navigable water means a tidal water and non-navigable water means one in which the tide does not flow. In the United States this rule has been considered inapplicable and we cannot find fault with that conclusion. In England this holding coincides with the fact, but it does not coincide here. It is not necessary for the purposes of this argument to limit the control of the Dominion over navigation.

The later decisions as to the British North America Act have adopted the safe principle of interpretation with relation to both powers, and of giving the Act that fair scope which, balancing the powers nicely, will work out in the main the safest and soundest principle, most in accordance with the spirit of the Act. "Property and Civil Rights" may be interfered with by legislation respecting "Trade and Commerce" and *vice versa*. The courts have been compelled to balance the respective rights and put them in certain categories giving in some cases the control to the provinces and in others to the Dominion. Using the words of the Judicial Committee of the Privy Council, they say that, for certain purposes and in certain aspects, the control is in one category, and for certain other purposes and aspects in the other.

With regard to "Fisheries" you can apply the same principle both in regard to navigable and non-navigable waters; and as the sea-coast and inland fisheries are in the Dominion, we must read that in the light of other powers which are given to the provinces, and limit the application in the same manner as courts have been compelled to limit the application of "Trade and Commerce" which now clearly means the general regulation of the trade of the country, whereas there are a thousand things pertaining to the minute features

of the trade of the country—say, whether liquor should be sold or not—which are vested in the provinces. The same method may be adopted in respect to protecting fishing generally, provided nothing shall be done to interfere with the proper development of our great fishing industry from a national point of view. We must not interpret in such a way as will give the Dominion any property in the fish. It is not necessary to interpret it in that way, which in fact would lead to the greatest confusion, because it is not necessary for the proper exercise of their functions that the fish should be vested in them. I take it, that the proper meaning of “Sea-coast and Inland Fisheries” is that the control of the fisheries is a public national control, similar in its scope to “Trade and Commerce,” but it does not touch “Property and Civil Rights”; and that in so far as any person has property or civil rights in the fishery, or the public have civil rights in respect to non-navigable waters, these rights cannot be affected by Dominion legislation. Then according to the common law of England in regard to fishing in navigable waters the courts have held that it is a common right which each individual member of the public has; and the judicial and fair interpretation in respect to this matter of the fisheries is that the national control of fisheries, the proper regulation of it, is vested in the central authority, but it does not necessarily involve property in the fish, or a right to say that a person shall not fish unless he gets their leave. Then the Dominion have nothing to do with licensing or leasing fisheries at all. They have a right to define seasons, or to lay down a close season, for certain purposes, but they have no right to say to any person who has a property in any public water, “you shall not exercise that right.” Then if it appears that the control over the property is not

1895

*In Re*PROVINCIAL
FISHERIES.

1895

*In Re*PROVINCIAL
FISHERIES.

vested in the Dominion, and that they have not the right to license, it also follows as a matter of course, that the licensing power is with the provinces; they may license generally for the purpose of revenue, and they can even license those things the control of which in general terms is vested in the Dominion. Control of a subject does not mean ownership. They have control over "Banks and Banking" as a system, but they do not own the banks. Neither does the fact that banks and the system of banking is vested in the Dominion prevent the provinces from licensing the bank itself in order to do business. That has been done. They have control over insurance, but the licensing of insurance companies, and also making certain regulations as to conducting insurance business, is also vested in the provincial legislatures. The contention of the province is that the Dominion cannot license or lease fisheries in any kind of waters whatever in the Dominion. They can control and develop fisheries from a national sense, but they do not own the fish or the right to fish, and consequently the provinces under the general power of licensing, have the right to issue those licenses for the purpose of revenue.

Now coming to the fourth and most important consideration, I must point out that *Holman v. Green* (1) only professes to take away a piece of the foreshore. I contend that the beds of the harbours did not vest in the Dominion, but only the works and such parts of the land as the works were on, and such as was necessary for the purposes of the harbour. We do not deny that the Dominion has control over harbours, those that exist now and those that they may create hereafter, and the right to their creation and preservation; everything that makes a harbour of value or necessarily pertains to proper management, manipu-

(1) 6 Can. S. C. R. 707.

lation, control and guidance of a harbour is with them without the slightest limitation whatever. But the ownership of the soil underneath the harbour is of no importance to them for the purpose of navigation and shipping, for which they have the harbour. Any undivided authority in regard to the land will lead to interminable difficulty. It is possible to get, under the British North America Act, an interpretation of the relative powers of the provincial and Dominion Governments in relation to foreshores and harbours and all waters bounding on land while will be simple and not in any conflict of authority, and I ask that principle to be applied as embodying justly and fairly the spirit of the Act.

There is no province taking advantage of 54 & 55 Vic. ch. 7, passed by the Dominion Parliament respecting the handing over of the harbour beds to the provinces. It is only an intimation that the Dominion recognized as a sound principle that the foreshores should be vested in the provinces. That is the only value of the Act itself. We claim that the beds belong to the provinces and to their grantees, although no grantee could drive a pile there that would interfere with navigation. The proper interpretation of the British North America Act is to give the provinces the land, and to give the Dominion the power of controlling navigation absolutely. If I want to build a wharf, I must get the land to build it on from the provincial authority and then go to the Dominion Government to get their approval of the structure I propose to erect. Any other interpretation would lead to serious results.

Now, as to the lands covered by water surrounding an entire province. Nova Scotia has such land all round it with the exception of a few miles on the Isthmus. Ordinary grants of land, and practically all lands granted on the coast, go to high-water mark. When

1895
In Re
 PROVINCIAL
 FISHERIES.

1895

*In Re*PROVINCIAL
FISHERIES.

the tide is out, there is of course a large section of land remaining between these lands and low-water mark. Undoubtedly that land must go to the province under section 109, unless something takes it away. I do not ask the court to overrule *Holman v. Green* (1), but I have a right to press the decision into the narrowest limits. Whatever public works, and property enumerated in the schedule of the Act, canals and lands and water powers connected therewith, belonged to the provinces, and whatever property the province had in them, passed, but that was all that passed; and the difficulty is in indicating where the line should be between the public harbours and the foreshores. For instance, if all land is vested in the provinces, unless expressly taken away by some form of words in the Act, then we still have the entire sea-shore round the provinces. In *Holman v. Green* (1), the question was as to an improved natural harbour. We are discussing powers, and whether the harbours vested in the provinces, or in commissioners, or in private companies, it would not change the position, because I concede to the Dominion the most absolute control of navigation; they can prevent obstructions in harbours, bridge them, deepen them, and for that purpose they have a right to go into the bed, that is not disputed. I am trying to get a fair broad scope of the British North America Act with regard to the powers of the two authorities respectively. The Dominion can have full control over the wharves, and can say what class can be built and what class not built, and how the approaches can be guarded, and levying tolls and so on, but all that can be done without their having of necessity any property in the land. In *Holman v. Green* (1), Fournier J. says:

(1) 6 Can. S. C. R. 707.

“It is also admitted that the ‘Queen’s Wharf’ is a public wharf, built by the local government with the public money voted when necessary, in the same manner as most other wharves on the island; and that this wharf was built about the year 1840, and has ever since been used as a public wharf by the numerous vessels which frequent Summerside Harbour. These admissions show conclusively that the harbour at Summerside is a public harbour.” He therefore held that, under sec. 108 of the British North America Act, it belonged to the Dominion.

1895
In Re
 PROVINCIAL
 FISHERIES.

The learned Chief Justice made a distinction between waters abutting on foreign countries and other waters. I do not think the ownership of the land under water is affected in the slightest degree by that consideration. The ownership of the beds affects nothing from a military point of view. In case of war any part of the water or the land or any part of the bed necessary for military purposes, could be taken without any question of affecting the British North America Act in any manner. The Dominion would of course have absolute control over the waters in respect to foreign countries, but the land goes to the provinces under section 109. It is not necessary that the ownership of the land should be vested in them for military purposes.

Irving Q. C. for the Province of Ontario. My learned friend the Attorney General for Nova Scotia was good enough to say that the views that might be put forward by any of the provinces would be only taken, or should only be taken, as the view of the province respectively as put forward by the counsel of the province. That must necessarily be so, because the point here is for your Lordships to determine what the law is under the British North America Act, not to be governed by what the particular view of any one

1895
In Re
 PROVINCIAL
 FISHERIES.
 —

province may or may not be. Your Lordships, no doubt, will determine what in your view is the proper construction to put upon the Act, however some of the provinces may differ from others. So my learned friends who presented the case on behalf of the Dominion in several instances based their arguments upon the reasonableness of the views they presented, but I need hardly say that no part of their argument can be listened to because of their view of what is reasonably convenient, or that if others were drawing the British North America Act it would be drawn in a different spirit or different view. Unreasonable as its provisions may be argued to be, that which I have no doubt will be enunciated by your Lordships will be the construction of the Act as enacted.

I shall make some brief references with regard to the view expressed that the Dominion, under its legislative powers, can draw to itself territorial rights in lands which I think have been invariably, and by all tribunals, accepted as vested in the provinces. Where there are exceptions these exceptions are defined, and I say your Lordships have never lost sight of the broad distinction between legislative jurisdiction on the one hand, as divided between the two legislating bodies, and the territorial rights as vested in either on the other hand; and that in both cases the subjects of grant have been expressed and are not to be implied. For instance, on the one hand we have section 109, in which it states "all lands, etc., shall belong to the several provinces," and section 117 specially declares that with the exception of the lands which have been transferred by section 108 to Canada, as public works and property enumerated in the third schedule of the British North America Act, the several provinces shall "retain all their respective public property not otherwise disposed of," etc. Your Lordships have recognized the value of

that word "retain" in the judgments in *Mercer v. The Attorney General of Ontario* (1); although perhaps some of the judgments were not supported in the Privy Council, the effect of the Act was discussed, and all united in giving the value to that particular section. We have all lands in the province, except such as there is right in Canada to assume under section 117, and that property which by force of section 108 is declared to be the property of Canada. We hear of the *jus regium* as supporting territorial right, an indefinite and somewhat, I think, inaccurate expression, standing by itself, as the books show that *jus regium* is often used to exemplify different classes of interests in some of which there is no property whatever, but counsel used the term as equivalent to property rights, and applicable to Crown lands in the bed of the rivers. The point is taken that by certain attributes of Dominion power, treaty obligations, or certain powers of legislation, the beds of rivers may pass to, and the titles thereof be vested in, the Dominion. To that I take exception and objection. The distribution of legislative power between the Dominion and the provinces may be compared very closely in the third schedule and the 117th clause, and I wish to point out that in the third schedule every item of property is specifically granted. Take them as we go along—military and naval services and defence, armouries, drill-sheds, and so forth, munitions of war, and lands set apart for general purposes—and we see that by the 117th section they are to take whatever they require. We see (sec. 91), beacons, buoys, lighthouses, and Sable Island. Then we see navigation and shipping and quarantine, and so on. We see with reference to those that the schedule conveys to them canals, with lands and water powers connected therewith, lighthouses and

1895

In Re

PROVINCIAL
FISHERIES.

(1) 5 Can. S. C. R. 538.

1895

*In Re*PROVINCIAL
FISHERIES.

piers, and Sable Island. If lighthouses and Sable Island were by the section conveyed absolutely, why was it thought necessary to put them here again? Then custom-houses are all appropriated; and we see that the Dominion has the equivalent, the regulation of trade and commerce, the raising of money by any mode or system of taxation. Wherever their legislative power necessarily required land to carry it out we find an absolute and express grant, either by the schedule, or by the schedule with section 108, or by section 117, whereby that was expressly secured. But we find no grant of land as connected with sea-coast and inland fisheries. Therefore it was never intended that anything in respect to that legislative right should carry any territorial right, or any territorial property; so also in respect to navigation and other matters that I have spoken of as cognate. No property is required to be vested in the Dominion except such as appears there by the schedule.

As to the item "5. Rivers and Lake Improvements" there is a discrepancy in the statute and in the Quebec resolutions to which I refer. The French version reads "*Améliorations sur les lacs et rivières*" The improvements govern the whole, and that is the way it is in the journals. Also see judgment per Gwynne J. in *The Queen v. Robertson* (1).

An American authority, Story, has been cited as holding the view that the fact of the legislative authority in Congress drew to the United States the territory over which that power was exercised. I find the contrary at sections 1274, 1275 (5th ed.):

"Congress may authorize the making of a canal, lighthouse" * * * "military roads" * * *
"but in this and the like cases the general jurisdiction

of the State over the soil subject only to the rights of the United States, is not excluded."

1895

*In Re*PROVINCIAL
FISHERIES.

—

The fact that Congress can legislate in respect to commerce on the rivers, and with reference to bridges, in no way gives the estate, or changes the title in the estate.

As to the first question, the argument is that the term "navigable" is to be applied to all rivers, lakes and waters which are navigable in fact, and that the test in England of the ebb and flow of the tide has no applicability. I, however, presume that the common law applies to our navigable waters in the same way that it is understood to apply to navigable waters in England within the ebb and flow of the tide. The points decided in *The Queen v. Robertson* (1) were confined to a private non-navigable river, in which the land was vested in the riparian proprietor. It left untouched the question of the beds of ungranted rivers. I think there can be no distinction as to any river bed, whether it is in the individual or in the Crown in the right of the province ungranted. My argument with reference to lands in the beds of streams, is carried to all lands covered with water anywhere within the limits of the provinces, and there is no outer fringe, there is not room for any Dominion territorial property outside of the provinces on any ground whatever, not taking public harbours into consideration. With reference to the international line, the boundary line of this country, and of many other countries, consists of dry land; and there is no difficulty that can be suggested, or no reason why it should be in any way different, because instead of land there is water. More effect than necessary has been given to the position of the Parliament and Government of Canada with reference

(1) 6 Can. S. C. R. 52.

1895
In Re
 PROVINCIAL
 FISHERIES.

to the treaty powers, because they have, as I understand, no power to make a treaty. All that is vested in them is the power to carry out a treaty which is made by the Imperial Government.

“The Parliament and Government of Canada shall have all powers necessary and proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries.” British North America Act, sec. 138.

The address on the subject of the “Quebec Resolutions” is to be found in the Journals of the House of Assembly of Canada, of 14th March, 1865, pp. 202-209, volume 24 of the first series of 1865. There are two paragraphs to be considered, the one the translation of Sea-coast and Inland Fisheries which there appears: “*Les Pêcheries des côtes de la mer et de l'intérieur* ;” and in the third schedule “*Améliorations sur les lacs et rivières.*” The English text is, on the 14th March, 1865, Journals of the House of Assembly, page 208, “5. River and Lake Improvements.”

The argument on the question of Public Harbours as presented by Ontario, recognizes the decision of this court and deals with it as a matter not open for us to argue, but respectfully questioned.

The objectionable passage in the Dominion statute, R.S.C. ch. 92, (subject of the second question and further questioned in the sixteenth,) is that no bridge, boom, dam or *aboiteau*, shall be constructed so as to interfere with navigation unless the site has been approved of. That is in section two. This is not legislation relating to “Navigation ;” it interferes with civil rights in the sense that property and civil rights are within the province.

The power of Parliament is limited to that which is "Navigation;" and it is by no means inconsistent with navigation that there should be some use of the bed of a navigable river by the riparian proprietor, who should be able to use all his river frontage, all the bank, so that he does not interfere with navigation. The right assumed by the Dominion to declare that any Act is an interference with navigation is an interference with a civil right. The condition of the law where it was all in the hands of one legislature, as in England, was that invariably the right for a public work had to be determined, and the right for any interference with the stream had to be determined, by issuing a writ of *ad quod damnum*; then upon that the Crown and parties were cited to see whether the work was an interference with navigation, or an interference with the highway or not; and if not, then the private right became perfected. Here two legislatures have the whole power; first, the power in respect to civil rights; then, the powers respecting navigation. The true exercise of the powers as to navigation is one thing, but this Act, because part of the territory may be applied or become subservient to navigation, has tied up the whole frontage of the rivers against riparian proprietors, and deprived them of their civil rights, without any defined tribunal dealing with the question of fact. The law is that any one can place any erection whatever, in a navigable river, at his own risk; and, after some cases overruled, the latest law recognized is *The Queen v. Betts* (1), the case of a bridge, subsequently commented upon by Malins V. C. in *Attorney General v. Lonsdale* (2). We deny the Dominion the right to say beforehand that there shall be no bridges because they interfere with navigation.

1895

In Re

PROVINCIAL
FISHERIES.

(1) 16 Q. B. 1022.

(2) L. R. 7 Eq. 377.

1895

*In Re*PROVINCIAL
FISHERIES.

We say that there cannot be any wrong unless it amounts to a public nuisance. There is a great power given to the Dominion, but the point is that this question is not determined at any place; the riparian bank of the whole country is, as it were, put under a ban; there is no freedom; every right is taken away from the riparian proprietor. I refer to remarks by Lord Justice Blackburn in *Orr Ewing v. Colquhoun* (1) respecting the law of England as to the rights of owners of land covered with water. As to the third question, I contend that the grantee of land extending into a lake or river has the right to build thereon, subject to the work not interfering with navigation.

All that is important in the 17th question is involved under the head as to where is the property. Riparian proprietors had no exclusive right before confederation because our argument is that with these navigable waters the title absolute was in the Crown.

I pass the 6th and 7th questions because they are both involved in the question of proprietary right of fishing in non-navigable waters, which at present seems to be conceded to be within the provincial power.

For the purposes of the argument of the 8th question, I assume to be admitted the position of the provinces, which is that the beds of all navigable waters were by the British North America Act vested in the provinces; and therefore the question arises on that "To whom passes the right of property in the fisheries, or what is the right of property, or what is fishery within this particular item 'Sea-coast and Inland Fisheries'?" My contention is that those being navigable waters, the right to the fish therein stands upon the same footing as the rights of fishing in navigable waters in England in places where the tide ebbs and flows; and that, if these are navigable waters in fact,

(1) 2 App. Cas. 839, pp. 861 and 862.

it must follow that the rule of law, as far as fisheries are concerned, should be the same as in tidal waters in England, which places those fisheries in the Crown only as in right of the public, who have the common right of fishing therein. Therefore, if my argument is valid so far as to say "here we have these large navigable waters, and they are the property of the province"—which, of course, is a subject of question—then it follows that, the beds being the property of the province, the right of fishery therein is in the public as of common right, and therefore within the provincial rights of legislation in so far as civil rights and property are concerned, and by force of section 109 within the territorial rights of the provinces. The provinces have entire power over the property, and the right of taking, provided they take subject to the laws enacted by the Dominion with reference to capture or close season, or any other legislative power within the Dominion, which does not and cannot affect the right of property in the provincial fisheries.

As to no. 9, a question with reference to licenses, I submit the decision in *The Queen v. Halliday* (1), and other cases mentioned in the Ontario factum, and the case of *Fortier v. Lambe* (2). The latter case concludes that the province has the right to require a license to be taken out, even if the Dominion has jurisdiction to grant license.

The 10th question is a recapitulation of the main question in different form, because two or three matters of principle govern the whole; and if the principles, for instance, which I endeavour to lay down, prevail, then practically the answer to no. 10 will be, that the Dominion had not jurisdiction to pass section 4 of "The Fisheries Act" because it is aimed at the pro-

1895

*In Re*PROVINCIAL
FISHERIES.
—

(1) 21 Ont. App. R. 42.

(2) 25 Can. S. C. R. 422.

1895

*In Re*PROVINCIAL
FISHERIES.

perty or right of fishing, this right in the navigable waters being a common public right of all the inhabitants of Ontario; and Ontario relies on the judgment in *The Queen v. Robertson* (1). I refer to the whole case, and I select the opinion of Mr. Justice Fournier who says (at p. 140):

“With regard to the right of property, neither the Federal Act nor the Fisheries Act have made any change in the state of things existing before confederation. The ownership remains where it was before. There is not, then, in this respect any encroachment on the side of the federal power. If the action of the Department of Marine and Fisheries has not been consonant with this principle as in the present case, such action is void.”

And further:

“While thoroughly respecting the right of fishing as property, could not the Federal Government exercise in the general interest of the Dominion the right of oversight and protection? I think it could, and that that is precisely the object of the powers of legislation which have been granted to it on this subject. There is in my opinion no incompatibility between the exercise of this power and the exercise of the right of fishing as a right of property in other things than those of the Government.”

Section 22 of R. S. C. ch. 95 challenges special question. It gives a right to use vacant public property for fishing purposes, and it is not within the power of the Dominion to pass such provisions except only as to property of the Dominion over which Parliament can legislate.

If my views as to the answer to the 10th question are admitted, then, *a fortiori*, the 11th question should be answered in the negative.

(1) 6 Can. S. C. R. 52.

The 12th question relates to the general issue, whether the Dominion has any other jurisdiction than to pass general laws. It certainly has jurisdiction to pass general laws, but none other.

1895
In Re
 PROVINCIAL
 FISHERIES.

Next comes the 13th question, as to whether the legislature of Ontario had jurisdiction to enact R. S. O. ch. 24, which is popularly spoken of as the Act that empowers the granting of water lots although it is capable of greater scope. Is it *intra vires*? The history of the Act is that it is a re-enactment of an Act passed before confederation and the point turns on where is the proper jurisdiction to repeal; whether the provincial legislature obtained the same right in respect to the matters there dealt with as Canada had before, under the previous Act. Then who has power to enact it since confederation? The language of the Act is:

“It has been heretofore, and it shall be hereafter, lawful for the Lieutenant-Governor to authorize sales or appropriations of land covered with water in the harbours of the rivers and other navigable waters in Ontario under such conditions as it has been or as it may be deemed requisite to impose.”

That is where the old Act terminated. This Act has added:

“But not so as to interfere with the use of any harbour, or with the navigation of any harbour, river or other navigable water.”

It was first re-enacted in the revision of 1877; that was before *Holman v. Green* (1), and was the re-enactment of the Act of 23 Vic. ch. 2. The Act referred to in the question is a mere re-enactment of the Ontario statute of 1877 where it appeared for the first time as an Ontario Act. The first point submitted to your Lordships is that these beds of rivers, lakes or waters are in the Crown in the right of the province. Then if it be

(1) 6 Can. S. C. R. 707.

1895
In Re
 PROVINCIAL
 FISHERIES.

that the provinces have the right to convey them so that navigation be not interfered with, that is all this Act purports to do. In *The Whitstable Free Fishers v. Gann* (1), Erle J. says :

“There is no rule of law which prevents the Crown from granting to a subject that which is vested in itself.”

Therefore, all these lands passed to the province, or remained in the province, and were retained, and it is in the power of the Crown to grant them, subject to non-interference with navigation.

The Act is meant to apply to Crown lands and provincial waters ; for instance, it provides,—

“No tourist or summer visitor shall take or catch or kill in any provincial waters, etc.” referring to waters over which the provincial legislature had power to legislate for the purposes of this Act. That is not unconstitutional.

In reference to the 15th question, the province can act in matters of police in these small fisheries ; it is an attempt to protect them in aid of and not inconsistent with the Dominion legislation.

S. H. Blake Q.C. follows for Ontario. In whom lies the land covered with water ? That lies at the very threshold of this inquiry. That is, therefore, question number one ; the next question seems to be in respect of the matter of fisheries ; and the third in respect of the matter of navigation. All the other questions are simply dealing with the variations of these matters as they may arise. The first and main question is as to whether in the Dominion or in the provinces we place the land which is covered with water. From that will arise the question of the position of the coast of the rivers and the streams and so on to the extent of many

thousand miles, and then will follow the question of navigation, and the question also of the fisheries.

The solution is by considering the British North America Act and really there is very little authority that aids one in the solution, excepting the cases decided by your Lordships and by other courts upon that Act itself. Only some two or three American cases would really assist us. Our own cases lead to the decision that we must solve the questions as they arise upon the best conclusion that can be come to as to the meaning of the Act. Now, my Lords, it seemed to me, that the first point for consideration was where were these rights before confederation? That seems to me the true starting point, in order to see whether they went to the Dominion or passed to the provinces. I am simply referring to the rights to land covered with water, or the land where it stood before the period of time spoken of in the British North America Act. Then next, where did these go? Unless we can certainly and distinctly trace these lands that were in the provinces prior to confederation to the Dominion, then they are still with the provinces. Prior to confederation it was not doubted that these lands were in the provinces with the fullest power of dealing with them, the lands, the land covered with water, the streams, rivers, lakes, navigable and non-navigable. If there was any question in Ontario it was distinctly settled by the decisions which dealt with the question. Prior to confederation all the rights that are the basis of the questions presented were in the provinces. It is for the Dominion to shew that they have been either taken from the provinces, or that they have been modified in favour of the Dominion, as against the province. I say that the province has, in regard to rivers and streams, large or small, navigable or non-navigable, the right to

1895

*In Re*PROVINCIAL
FISHERIES.

1895
In Re
 PROVINCIAL
 FISHERIES.

sell, to deal with, to regulate, and, as a matter of course, to legislate in respect of them. Secondly, what is the position of the Dominion as given to it under the same Act? Section 109 says, "all lands, etc., shall belong to the several provinces." The word "lands" means as much land covered by water as land not covered by water; we have therefore, clearly vested in each province all the lands that belonged to it at that date. The absolute control of the province has clearly not been interfered with; and each province has vested in it by virtue of this section all the lands, including the lands covered with water, including the banks of the streams, the banks of the lakes, the coastways, the three-mile limit; everything as possessed in 1866 passed to the provinces in 1867, unlimited, just as it stood, with all the rights that are given by section 109.

To pass from that position which was occupied by Upper and Lower Canada, in the more recent cases, at all events, attention is called to the fact that in the preamble of the legislation that deals with this matter, it is said to be that the provinces are to be federally united. There is a treaty of union, binding them together, but interfering only so far as may be absolutely necessary with property and civil rights in each. *Primâ facie* each province retains all that it has, the only interference being such as may be absolutely necessary in order to benefit the whole of the provinces thus united.

We must conclude that we have all these lands and rights contained in the provinces, except in so far as it may be necessary for the general benefit, by general regulations, for the whole of the community. Unless there is absolute necessity there is no interference with full and entire enjoyment after confederation, the same as prior thereto.

The only limitation is to be found in the section 109, which makes the vesting, the grant, subject to "any trusts existing in respect thereof and to any interest other than the province in the same." This is very material, because wherever it was proper to curtail what was going to the provinces there in express words we find it; and therefore, it is not by mere surmise, or by mere possibility, that the interest in the provinces is to be cut down. That very exception shows how completely it was intended that the lands, and every right, title and interest in connection therewith, passed to the provinces. The same subject-matter is dealt with by section 117: "The several provinces shall retain all their respective public property." It reiterates section 109. The property is to remain. There may be legislative power in respect to it, but the property itself is to remain. The word "property" covers land beyond a doubt, because of what follows in that same section, "subject to the right of Canada to assume any lands, etc." That clause would not have been inserted if the word "property" was not intended to cover "lands." The property remains in the provinces subject to the limited right of the Dominion to legislate with reference to it, the limit being only so far as the general interests of the whole Dominion may call for it. Our title is strengthened by the words "not otherwise disposed of," for all property is retained in the provinces unless there be some specific disposition of it in the Act; whenever there is to be anything interfered with at all it is put in so many words. If the large reading sought to be placed upon the terms "Militia, Military and Naval service and Defence" and so on, passed the land, there could have been no object in putting the limitation at the end of section 117.

1895
In Re
 PROVINCIAL
 FISHERIES.

1895

*In Re*PROVINCIAL
FISHERIES.

The Dominion has only a legislative right to take away land from the provinces for specific purposes. This all brings out very clearly the difference between the legislative authority or power and the proprietary or territorial right or power; the one in the provinces, the other to a certain extent in the Dominion. Even the lands needed for fortifications, defence and so forth went to the provinces, subject to the right of the Dominion.

That the provinces were to have the fullest control, subject to the exceptions dealt with, is clear also from section 92, which includes "local works and undertakings." That gives the exclusive right of dealing with property.

The language of the Act which deals with what is given to the Dominion, aids very much in this construction so far as the property given to the provinces is concerned. Section 91 declares the subjects over which the Dominion has exclusive legislative authority; it is not pretended that anything more was given than legislative authority. If it was intended by virtue of the legislative authority in respect to navigation and shipping, to give the sea-coasts, they would have stated in express terms that the three mile limit went to them, but they simply say in respect to the subjects mentioned, that is, for instance, in numbers 5, 7, 9, 10, that exclusive legislative authority is given. This cannot deprive the provinces of their proprietary rights, any more than naming a trustee to look after your estate could be said to give him the whole estate. No language is used strong enough to deprive the provinces of the proprietary rights which they clearly had. The difference is made clear between the legislative power and the proprietary rights, and that is, from what follows, made very distinct. In answer to the argument that if the Dominion has the right to legis-

1895

*In Re*PROVINCIAL
FISHERIES.
—

late as to navigation and shipping it must also have harbours, the coast-lines and all the property that is necessary, everything that may possibly in any shape or form be brought into contact with the subject, we say that where it was found necessary the property has been given in so many words, as for instance in section 108 and the third schedule. In section 91 is a list of subjects for legislative authority and where more than this was considered necessary it is given by the schedule. With the right to pass legislation as to shipping and as to fisheries, nothing more went than the general power of supervising in the interest of all, and all these large rivers and lakes did not go, because it would have been entirely unnecessary to have inserted in the schedule several of these matters if it all went. I will ask your Lordships to contrast section 91 with the third schedule. Compare item no. 10 with the items, 2, 3 and 5 in the schedule. No. 10 says that there is to be authority to legislate as to "Navigation and Shipping." Give all that the Dominion claims, and there is no necessity for item 2 in the schedule, "Public Harbours," nor item 3, "Lighthouses" and "Piers" and "Sable Island." How was it possible to manage the "Navigation and Shipping" without "Lighthouses" and "Piers"? The thing was impossible, but notwithstanding the lighthouses and piers did not go and it was necessary to specifically refer to them in order to take them away from the provinces. This is strengthened by section 108. Then take item 5 of the schedule, "Rivers and Lake Improvements"—if they had all the rivers and lakes and everything else, under the item "Navigation and Shipping," why was it necessary to mention specifically the river and lake improvements? According to the way in which the Act is prepared the fullest legislative authority is given without any

1895

*In Re*PROVINCIAL
FISHERIES.

property rights at all, and where it is intended to derogate from the proprietary rights of the province, it was necessary to do so in specific terms. Again the fullest power did not give the right to deal in any way with the lands, because that is specifically mentioned at the end of section 117 :

“Subject to the right of Canada to assume any lands or public property required for fortifications or for the defences of the country.”

The heading of the schedule shows that the property went generally to the provinces and it is only by exception that any goes to the Dominion. Therefore the control and management of the lands remained with the province where the lands are situated unless specifically taken from it, except so far as may be necessary for the general purposes of the Dominion, and then only so far as necessary for such purpose. I refer to the *St. Catharines Milling and Lumber Company v. The Queen* (1), at page 56, where it is said in reference to the public works and undertakings mentioned in the schedule :

“As specified in the schedule, these consist of public undertakings which might be fairly considered to exist for the benefit of all the provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion, or required for the purposes of national defence, and all lands set apart for general public purposes.”

There is the idea of the restriction needed and of everything otherwise going to the provinces. On page 57 their Lordships say :

“In connection with this clause it may be observed that by section 117 it is declared that the provinces shall retain their respective public property not otherwise disposed of in the Act, subject to the right of

Canada to assume any lands or public property required for fortification.”

Then they refer to section 109 on the same page :

“The enactments of section 109 are in the opinion of their Lordships sufficient to give to each province, subject to the administration and control of its own legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which, at the time of the union, were vested in the Crown, with the exception of such lands as the Dominion acquired right to under section 108 or might assume for the purposes specified in section 117.”

Of course that covers the lands covered with water as much as the lands that were not; and the effect of what was said in the giving generally to the provinces, and by exceptions to the Dominion, works out, as the Privy Council held, that result. And, lest there should be any questions upon that point, the court says further on, at page 58 quoting from the Mercer case :

“It was not disputed in the argument for the Dominion at the Bar, that all territorial revenues arising within each province from lands (in which term must be comprehended all estates in land,) were reserved to the provinces.”

Then in *Hodge v. The Queen*, (1) at page 131 :

“Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character, for the good government of taverns, etc., licensed for the sale of liquor by retail, and such as are calculated to preserve in the municipality peace and public decency, and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade

1895

*In Re*PROVINCIAL
FISHERIES.

1895

*In Re*PROVINCIAL
FISHERIES.

and commerce, which belongs to the Dominion Parliament.”

So that you have the right of the Dominion simply to make the general regulations, large supervisory powers, and it is not *ultra vires* of the provinces to have in respect of these matters of licensing or the like the fullest power to deal with their own property.

Then, in *The Citizens' Insurance Company v. Parsons* (1), at p. 107 we have these words :

“The scheme of this legislation, as expressed in the first branch of section 91, is to give the Dominion Parliament authority to make laws for the good government of Canada in all matters not coming within the classes of subjects assigned exclusively to the provincial legislatures.”

The same rule is laid down in *Russell v. The Queen* (2), a case under The Canada Temperance Act.

The question as to the beds of waters, includes all waters of every kind whatsoever. I deny entirely that all harbours, whether there are improvements there or not, go to the Dominion simply because mariners are in the habit of taking refuge there when the water is rough. The land, the land covered with water, the coast-ways, the foreshores and the three mile zone all belong to the provinces, and the only thing that could possibly go to the Dominion was the harbours then belonging to the provinces. I say this notwithstanding *Holman v. Green* (3). The provinces did not own the natural harbours ; they only had the right in respect to them of making regulations as to shipping and so on, the same rights that we say the Dominion has in regard to them. It is not necessary to have any property in them for the purpose of carrying out all such regulations. If all the beds were taken by the

(1) 7 App. Cas. 96.

(2) 7 App. Cas. 829.

(3) 6 Can. S. C. R. 707.

Dominion under the clauses in question, it would have been unnecessary to say, as is said in the first item of the schedule, "Canals with lands and water power connected therewith." The claim of the Dominion is too extensive as to "all waters, etc." And the same way with the fifth item, because the canals are fed with the rivers. The canals went under the head of "canals," and the river improvements feeding them they have under the fifth item. That is one of the arguments that this word "Rivers" is not to be taken alone, but should be read in connection with the word "improvement." The class of subjects dealt with in the schedule is "Public Works" and in such a schedule the principle *noscitur a sociis* might reasonably be said to control. You are dealing with public works, and this refers to improvements in lakes and rivers.

1895

*In Re*PROVINCIAL
FISHERIES.

Then it would not be necessary to give the right to inland and sea-coast fisheries if the bed of all the water had gone to the Dominion, because all the water passed, and the fisheries went with the water. But they mentioned inland and sea-coast fisheries which it would have been unnecessary to insert if all the water passed to the Dominion.

In reference to "Public Harbours," so far as Ontario is concerned, the only public harbours that we have to which the clause could refer are mentioned in the schedule "A" to chapter 28 of the Consolidated Statutes of Canada (1859); there are six on Lake Erie and three on Lake Ontario. We argue that it was only the harbours on which public money had been spent, or something otherwise done in order to make them public harbours, that were intended to be thus passed over to the Dominion. A harbour may belong to an individual and still remain open to the public. The harbours passed were only such as were identified

1895

*In Re*PROVINCIAL
FISHERIES.

by the province as such. I maintain that mere user as such for any number of years does not constitute a harbour a "public harbour." I also contend that *Holman v. Green* (1) does not extend beyond the circumstances that were found in that case, a harbour belonging to the province upon which money has been expended. It may be argued that there are three classes of public harbours, the public harbours of the province, public harbours of joint stock companies, and public harbours belonging to individuals; but here we are concerned with all "public harbours situate in the territorial limits of the provinces." The question, however, must not be answered generally, but limited to public harbours of the provinces. What passes is qualified by the word "public." We admit that the Governor in Council may proclaim a harbour, and then the rules affecting harbours shall apply, but that is another question. There is the power of originating harbours with the Dominion, but that does not interfere with the soil. The dictionaries define a harbour to be a shelter or recess, a port of haven for ships, natural or artificial, on the coast of the sea, lake, or other body of water where ships may find protection. The ordinary meaning is a place to shelter ships from the sea, where ships are brought to load and unload. I ask your Lordships to make that limitation in regard to the question of public harbours. I maintain that it is a place that has been proclaimed as a public harbour, where goods can be landed, and so forth. As to port, see Hall's "Essay on the Sea-shore" (2), citing Butler's notes to Co. Litt. (3), as follows:

"As to ports, there is a very material and important distinction between the franchise of a port and the property of its soil. As to the franchise, by the com-

(1) 6 Can. S. C. R. 707.

(2) 2 ed. pp. 29-30.

(3) 261, a.n. 205.

mon law, a port is the only place where a subject is permitted to unload customable goods. This privilege constitutes what is called the franchise of a port. To create the franchise of a port is part of the royal prerogative. But this does not in any wise affect the property of the soil."

I insist that *Holman v. Green* (1) should not be carried beyond that and extended to harbours that were not the property of the province or that never had been opened or declared. The Act refers to the time of confederation. The question must be answered entirely in the negative, that they did not pass to the Dominion and that they were lands of the province and remained so. Otherwise the province could not have water-works, ice cutting, public baths, lumber driving, boat-houses, yacht clubs, dry-docks or anything of that kind. They would not have power to enter the coast lines for the purpose of damming the streams, backing up the water, draining the lands, building aqueducts, erection of breakwaters to prevent encroachments, preservation of boundaries, the cleaning of streams, regulating the shooting of game over the flats, straightening water-courses, increasing land area by means of dredging and pumps. If answered in the affirmative all these would go to the Dominion, and though peculiarly matters for the provinces would be taken away from them.

Now as to the question: "Has the Dominion Parliament power to declare what shall be an interference with navigation"? I say that while the Dominion may have a perfect right to deal with navigation and shipping they have no right to declare what shall be embraced within navigation and shipping. If they have they might introduce into the terms a number of matters that were never intended, and if they are to be supreme in respect to that what is the recourse

1895

*In Re*PROVINCIAL
FISHERIES.

1895

*In Re*PROVINCIAL
FISHERIES.

of the provinces? Therefore it seems material to me to consider their Acts, chapters 92 and 93 in connection with this 16th question. It may be that "Z" represents "Navigation and Shipping," and they have the right to interfere with it; but they may have to declare that "Y" has to do with it; and they may say "We shall have to legislate in respect to Z and Y, because we introduce our legislation "Y" into this legislation, which is fully covered by "Z";—therefore I say, there should not be permission to the Dominion to declare what is covered and what is not covered. The right of navigation is the right of way simply, and this statute goes beyond what is laid down in *The Citizens' Insurance Company v. Parsons* (1), and the other case to which I have referred.

It seems to me also that following the whole argument, "Fisheries" must mean, not the minor question of individual fishing, but must embrace generally the fishing industry of the country; it is simply the large matter which is given as the common fishery, the right of fishing in the sea and public waters, open to all the public, where the Dominion are given the right of making regulations, but no right whatever beyond that. Smaller matters, the matter of the individual fishing in our thousand of streams and lakes, has been entirely eliminated from the Dominion jurisdiction; they are not concerned with the rivulets, but what concerns the management of the whole of this national concern. No better exposition can be given than by the late Chief Justice Ritchie, in *The Queen v. Robertson* (2):

"I am of opinion that the legislation in regard to inland and sea fisheries contemplated by the British North America Act was not in reference to 'property and civil rights'—that is to say, not as to ownership

(1) 7 App. Cas. 96.

(2) 6 Can. S. C. R. 120.

of the beds of the rivers, or of the "fisheries," or of the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public."

1895

*In Re*PROVINCIAL
FISHERIES:

We exclusively have the right to license, to deal with our property, to say who shall and who shall not take it and the quantities in which they may take it, with the one exception of those general laws which may be passed, stating, that with certain engines, they shall not be taken and the like. Just for the reasons in *The Queen v. Robertson* (1) the legislature of Ontario had jurisdiction to enact the 47th section of chapter 24, Revised Statutes of Ontario. And as to the providing of fishways, dams, slides and other constructions, it follows from *The Queen v. Robertson* (1), that we have the right to do that in the streams. It may be that should the Dominion regulations go farther than those of the province they may then constitute the law of the land in regard to extra protection; but as it stands we have always had regulations as to fishways, aprons, the running up of fish and so forth without interference, all that is necessary as dealing with a class of matters not within the Dominion powers, such as our little streams, and trout fishing and the like. Question 17 must be answered that the riparian owners have the exclusive right of fishing in navigable non-tidal waters the beds of which are granted to them.

Casgrain, Attorney General, for the Province of Quebec.

I take it that the fundamental principles on which the questions have to be answered have been laid down to the fullest extent by the learned counsel who have preceded me, but I wish to present a few con-

(1) 6 Can. S. C. R. 52.

1895

*In Re*PROVINCIAL
FISHERIES.

siderations upon the particular position of the province of Quebec on account of the peculiar jurisprudence, which is given to the province by the Civil Code and French law. There as in other parts of Canada rivers are classed as navigable and non-navigable, but it is not the Common Law, as distinguished from the Civil Law, which regulates the proprietorship of these rivers. Under the Civil Law, all rivers which are *de facto* navigable belong to the public domain, whilst rivers which are not navigable or floatable belong to the riparian proprietors *ad medium filum aquæ*. These principles are mentioned in *Bell v. The Corporation of Quebec* (1); 2 *Daviel* (2). Rivers *de facto* navigable belong to the Crown domain, and the beds are in the Crown but in the case of non-floatable and non-navigable rivers to the riparian proprietors. C. C. arts. 399 to 405. These articles are under the title of "Property in its relations with those to whom it belongs or who possess it."

As to the right to fish, art. 587 C. C. provides that it is governed by particular laws of public policy, subject to legally acquired rights of individuals. Where the Seigniorial tenure prevailed the King had the ownership of all waters, so long as the lands bordering upon them had not been conceded to the Seignior, who might grant it to the *censitaire*. But the King had the exclusive right of fishing in all public waters and could grant rights of fishing, and it is thus that all along the River St. Lawrence, almost from the city of Montreal to the gulf, rights of fishing have been given and water-lots conceded. *Loiseau* (3); *Proudhon* (4); 9 *Pothier* (5).

(1) 5 App. Cas. 84.

(4) *Du domaine de propriété*, 274,(2) *Des cours d'eau*, secs. 530, 540. no. 888.(3) *Traité des Seigneurs*, ch. 12.

(5) Ed. Bugnet, nos. 50 to 54.

The Civil Code clearly means in speaking of "public domain" or "Crown domain" the Crown as represented by the province of Quebec, the sovereign power vested beneficially in and represented by the province of Quebec. If there be any doubt it seems to me that the Seigniorial Tenure Act in 1854 settled it. The Seigniorial Court determined that the reserve made in certain seigniories by the seigneurs of the right of the rivers was illegal. Therefore the *censitaires* had the right of fishing in non-navigable rivers.

If your Lordships will refer to section 39 of this Act you will find this provision :

"So much of the constituted *lods et ventes* and other casual rights as will not be appropriated out of the fund appropriated for the relief of the *censitaires* by sections 36 and 37 shall be assumed by the province and paid by the Receiver General, out of the consolidated revenue fund, to the *Seigneurs* or parties respectively entitled to such rent half yearly on the 1st January and 1st of July, and the *censitaires* shall be discharged from the payment thereof."

In the rights abolished by the Act were rights which belonged to the Crown as *Seigneur dominant* , for instance, *le droit de Quint* , sections 7 and 11. Then referring to sections 87 and 88 your Lordships will find that the Eastern Townships of the province of Quebec were compensated for this expenditure resulting from the purchase of these rights ; so that, I take it, the province of Quebec purchased all the rights which belonged to the Crown from the Seigniors and paid for them out of its own funds ; therefore, I think, so far as concerns the province of Quebec, there can be no doubt whatever that it represents the Crown *quoad* all the rights in the land, in the waters and in the fisheries which existed in the Crown at the time. So that, applying what has been

1895
In Re
 PROVINCIAL
 FISHERIES.
 —

1895
In Re
 PROVINCIAL
 FISHERIES.

said in relation to sections 109, 117 and the 13th enumeration of section 92 of the British North America Act, when the British North America Act was passed, there cannot be the least doubt, so far as the province of Quebec is concerned, that these lands, with all the incidents and accessories to lands, remained in the province of Quebec, or in the Crown for the benefit of that province. I think that the argument that the provinces have been deprived of these proprietary rights has been fully disposed of by the learned counsel who have preceded me.

As to questions 2 and 17, taken together, respecting the jurisdiction of the Dominion to pass R. S. C. ch. 92, "An Act respecting certain works constructed in or over navigable waters," I simply quote the Civil Code, art. 414:

"Ownership of the soil carries with it ownership of what is above and below it. The proprietor may make upon the soil any buildings or plantations he thinks proper saving the exceptions established in the title of 'Real Servitudes.'"

Then art. 407 C. C. declares that no one can be compelled to give up his property, except for public utility, and in consideration of a just indemnity previously paid. These articles of the Civil Code confer upon the owner of a beach lot the right to build wharves; and it would not be in the power of the Dominion Parliament to say, before any judicial decision has been arrived at on the question, that they had the right to prevent him building on the lot, thereby taking away one of the elements of ownership, without expropriation and payment of the indemnity proved by the Code; they cannot legislate away the proprietary right held under the Civil Law.

The province of Quebec answers all the other questions, except 14, with the same answers as have been

given by the province of Ontario and the other provinces.

As to question 14, affecting the jurisdiction of Quebec to pass sections 1375 to 1378, inclusively, of the Revised Statutes of Quebec, or any of them or any parts thereof, the Dominion concedes the right to pass the provisions of section 1375, respecting the right of a reserve in grants of provincial lands, of three chains around rivers and lakes for fishing purposes. But as all these provisions are shown, by their intitulation, to regulate only such rights of fishing as existed in "non-navigable rivers and lakes," the province has the right to pass the whole statute. It does not come in conflict with, nor is it repugnant to, Dominion legislation. The case of *The Queen v. Robertson* (1) covers every article in this section of the statute. In the province of Quebec I consider that it is immaterial as to fishing rights and the ownership of the beds of lakes whether they be navigable or not, for as the seignior succeeded the king as the *seigneur dominant*, then he has dominion over and ownership of the lakes, whether they are navigable or non-navigable. I do not think there are any lakes in France which should be treated as our lakes are treated in this country. Our Act applies to all lakes whether they are navigable or not. The Quebec law from its history shews on our behalf a case stronger in this respect than that of any other of the provinces. Our rights cannot be infringed upon by a construction placed upon the British North America Act, which suits all the other provinces. The title derived under the Act does not change the tenure of lands in Quebec, so as to make it according to title and tenure of lands in other provinces. I cannot conceive

1895
In Re
 PROVINCIAL
 FISHERIES.
 —

(1) 6 Can. S. C. R. 52.

1895
In Re
 PROVINCIAL
 FISHERIES.
 —

that the British North America Act could take away any of the rights which existed in the province of Quebec, and I maintain that it does not take them away.

Irving Q.C. and *Clarke*, for the province of British Columbia. We desire, on the authority of Lord Watson, to point out to your Lordships, that similarly to the province of Quebec, the law in British Columbia was also in some respects different in reference to the ownership of the beds of lakes, rivers and other waters, in this sense; by the Act there called "The English Law Ordinance Act of 1867," the words are expressly inserted "so far as the same are not from local circumstances inapplicable." That is, the law of England was adopted in British Columbia so far as not inapplicable, by the express words of the Act. Lord Watson's comment will be found in the case of *The Attorney General of British Columbia v. The Attorney General of Canada* (1). That is the Precious Metals case. Therefore in the case of British Columbia the question is not embarrassed with the difficulties which are contended with in the judgments which have been discussed in the Upper Canada authorities. The Dominion base their claim to the beds, not upon any grant of "lands" in the British North America Act, but upon what they allege as the *jus regium* in the foreshores, in the beds of navigable waters and in other respects, and they say that by virtue of the grant of legislative powers to the Dominion that *jus regium* was vested in the Dominion. I submit that any such regal rights as the Dominion claims would exist in the beds were clearly, as it is expressed, *jura regalia*, and that they passed to the provinces under the word "royalties" in the 10th section of the British North America Act. That word "royalties" is associated, of course, with

(1) 14 App. Cas. 295.

the words "lands, mines and minerals"; and not only is the word "situate" used in section 109 in regard to these words, but also the word "arise," so that there is the fullest grant possible of *jura regalia*, of all royalties to each province by that section. In *Attorney General v. Mercer* (1), the whole question of the construction and effect of the word "royalties" is fully discussed by Lord Selborne at page 778. Your Lordships will find there a number of definitions which are very material. As to one of the references, *Dyke v. Walford* (2), Lord Selborne refers to the part at pages 480-481, and approves of the statement of the law there, which is that the foreshore is expressly included as a *jus regale*; he held therefore that the foreshore passed by virtue of section 109 to the province. Therefore I submit that in the case of the foreshore which the Dominion claims by virtue of the *jus regium*, the Privy Council have expressly stated that it is among the "royalties" which passed to the provinces. The reasoning of Lord Watson, in *Attorney General of British Columbia v. The Attorney General of Canada* (3), commencing at page 299, clearly goes the length of showing that the matters now claimed were, if not land, at any rate "royalties" under section 109, which went to the provinces. The contention of the province is further borne out by the definition of "Regalia" under the word in Sweet's Law Dictionary. In *The Lord Advocate v. Hamilton* (4), the law on this subject is stated to be the same in England as in Scotland. The question is referred to in *Den v. The Jersey Company* (5), a case as to beds of navigable waters. Chief Justice Taney states that the soil under public and navigable rivers are part of *jura regalia*. See also Gould on Waters (6),

1895
In Re
 PROVINCIAL
 FISHERIES.

(1) 8 App. Cas. 767.

(2) 5 Moo. P. C. 434.

(3) 14 App. Cas. 295.

(4) 1 Macq. H. L. 46.

(5) 15 How. 426.

(6) 2 ed. s. 17.

1895
In Re
 PROVINCIAL
 FISHERIES.

and Broom & Hadley Commentaries on the Laws of England (1), "Prerogative." These authorities show that not only the foreshores but these other matters, in so far as they are not covered by the word "land," are expressly covered by the word "royalties." The extension of that opinion is found in *Sutherland v. Watson* (2); *Gammell v. Commissioners of Woods & Forests* (3); see the statements of Lord Chancellor Chelmsford, p. 457, and of Lord Cranworth at p. 465. These rights cannot in any event be held to have gone to the Dominion by virtue of their jurisdiction over "navigation." Those cases discuss fully the question of the private right, *jus privatum* in navigable waters, the foreshore and so on, and what is the *jus publicum*, subject to which any private grantee can take the *jus privatum*. That is the position of the matter as well after the union as before. The question is discussed in Coulson & Forbes on Waters (4), and in Moore on the Foreshore and the Sea-shore (5), and in Hall's Essay, before referred to, on the Rights of the Crown in the Sea-shore (6), particularly in the note to page 712. In many cases these rights were granted in England by the Crown and held by private individuals, subject, of course, to the public right of navigation and so on, which was held to be inalienable. The construction to be given to the British North America Act must be that which would occasion least possible interference with the private rights of individuals, and the provincial rights are within the same protection. The cases affecting the interpretation of this section 108 are referred to in *The Western Counties Railway Company v. The Windsor and Annapolis Railway Company* (7); Lord Watson's judgment at pages

- | | |
|---|---------------------------|
| (1) Vol. 1, pp. 314-315. | (4) P. 33. |
| (2) 6 Court of Sessions cases,
3 ser. 212-213. | (5) 3 ed. pp. 638, 654. |
| (3) 13 Court of Sessions cases,
2 ser. 854; 3 Macq. H. L. 419. | (6) P. 667 <i>et seq.</i> |
| | (7) 7 App. Cas. 178. |

188, 189. I refer your Lordships also to Hardcastle on Statutes (1), and to what Lord Westbury has said in *Walsh v. The Secretary of State for India* (2), at page 386.

1895

*In Re*PROVINCIAL
FISH RIES.

Robinson Q.C., in reply.—There may be difficulty in stating what may be a public harbour, and what might be the limits of such a harbour. I do not see that the questions here can require the court to decide what is a public harbour. Your Lordships are only asked in whom public harbours are vested and when that is answered the respective governments have to determine for themselves what is a public harbour. In *Holman v. Green* (3), Strong J. said :

“I can, however, conceive no other meaning to be attached to the words ‘Public Harbours’ standing alone, than that of harbours which the public have a right to use.”

It does not seem to me that there is much difficulty in getting at what is meant by “Public Harbour” in a general sense. I think any place so sheltered by surroundings as to form a place of shelter, where the public have a right to go, which is part of the public land of the province, forms a public harbour. This question is confined to lands ungranted before confederation; therefore in such lands any part of those navigable waters which form a harbour is a public harbour. The question is about the beds. In the case decided by Thompson J., *Fader v. Smith* (4), he held a sort of inlet, a place called St. Margaret’s Bay, a public harbour, because ships went and lay there.

The Dominion is given lake improvements. I should say dredging was a lake improvement; dredging channels and so forth. A breakwater might also be an improvement; we can do nothing now but conjecture, it

(1) 2 ed. p. 134.

(2) 10 H. L. Cas. 367.

(3) 6 Can. S. C. R. 707.

(4) 6 R. & G. (N.S.) 433.

1895

*In Re*PROVINCIAL
FISHERIES.

is impossible to say how much is meant, we can only determine it in each case as it comes up. Harbours and rivers may all have improvements, but these items are mentioned simply as "Harbours" and "Rivers" which would include the improvements as well, and then they gave us "Lake Improvements" as another property. The subject of navigation was so intimately connected with harbours that they gave the Dominion the "Harbours"; and in the same way as well as for fishing, spawning and so on, they gave them the "Rivers." These matters are of practical importance when you come to work them out. Must we be prevented building a pier or some sort of harbour protection by having the province come to us and say, "That is our property, you must expropriate the bed before you can construct your improvements"?

Then in regard to fisheries, they may have the right to legislate in aid of our regulations, but if we required a fishway to be built and imposed a penalty for not building it, and if the province followed our example and imposed another penalty for not building it, the province is going beyond its powers. No one could be proceeded against for this same thing by both the Dominion and the province. Suppose their legislation in aid of ours was as to the kind of fishway, I am certain no one could be punished by the penalty imposed by the Dominion and the province as well. The penalty of the province would be *ultra vires*, because they have nothing to do with the subject matter. It is argued that the legislature never intended to take away property by using the word "Fisheries." I submit that it is not taking away rights because you confine it to one legislature instead of another. We claim no property in fisheries, we never did claim it, but we claim we have legislative power to deal with it just as we like, just as the province can take away

property. In case it became necessary for the prevention of the extermination of fish, for their protection in some cases, I should say that the Dominion has the power to prevent a person taking fish even upon his own land.

The case of "Navigation and Shipping" forms a fair instance of the argument we advance. In *Steadman v. Robertson* (1), Fisher J. says:

"If the authority to legislate upon sea-coast and inland fisheries empowered the Parliament to interfere with private rights, and deal with the property in the fish, upon the same principle, by the authority to legislate upon 'Navigation and Shipping,' it would be enabled to the same extent to deal with the property in the ships of ship-owner." My only answer to that is, that it is so enabled. "The right in the ship is no higher or more sacred to the ship-owner than the right in the fish to the riparian proprietor." "Shipping" being given to the Dominion, they can take a ship from A. and give it to B. They have dealt with it as a separate subject, and they can legislate how they can be loaded, and as to everything else.

As to those items 13, 14 and 15, under which the provinces claim the right of concurrent jurisdiction, and claim their right to regulate fisheries as local and private matters, we say it is impossible; nothing can be of a local and private nature which comes within any of the subjects entrusted to Parliament by section 91.

THE CHIEF JUSTICE.—By an order of His Excellency the Governor General in Council bearing date the 23rd day of February, 1894, certain questions, being those hereafter numbered from one to fifteen, were referred to this court for hearing and consideration; and by a subsequent order in council dated the 23rd day

1896
In Re
 PROVINCIAL
 FISHERIES.

—
 The Chief
 Justice.
 —

of February, 1895, two additional questions, being those hereafter numbered sixteen and seventeen, were also so referred.

On the ninth and tenth days of October, 1895, counsel appeared and were heard for the Dominion and for the provinces of Ontario, Quebec, Nova Scotia and British Columbia respectively; the remaining provinces, upon whom notice of hearing had been duly served, did not appear by counsel; a factum was, however, submitted on behalf of the province of New Brunswick.

I now proceed to state my opinion in answer to the case so referred.

Question 1.—Did the beds of all lakes, rivers, public harbours, and other waters, or any and which of them, situate within the territorial limits of the several provinces and not granted before confederation, become under the British North America Act the property of the Dominion or the property of the province in which the same respectively are situate? And is there in that respect any and what distinction between the various classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, &c., and other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, &c., and other rivers, or between waters directly and immediately connected with the sea-coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation?

Answer.—At the time of confederation the beds of all lakes, rivers, public harbours and other waters within the territorial limits of the several provinces which had not been granted by the Crown were vested in the Crown as representing the provinces respectively, and there was no distinction in this respect between any of the waters specifically mentioned in the first question propounded by the order in council. The un-

granted beds of all such streams and waters were therefore lands belonging to the several provinces in which the same were situated, and under section 109 of the British North America Act became upon confederation vested in the Crown in right of the several provinces, subject only to the exception respecting existing trusts and interests mentioned in that section, and excepting the beds of public harbours, which, by the operation of section 108, were vested in the Dominion. What harbours are to be deemed "public harbours" within the meaning of those words in the third schedule to the Act has been already determined in the case of *Holman v. Green* (1), a decision which is binding on this court.

1896
In Re
 PROVINCIAL
 FISHERIES.
 —
 The Chief
 Justice.
 —

Question 2.—Is the Act of the Dominion Parliament, Revised Statutes of Canada, chapter 92, intituled "An Act respecting certain works constructed in or over navigable rivers," an Act which the Dominion Parliament had jurisdiction to pass either in whole or in part?

Answer.—By section 91 of the British North America Act, enumeration 10, exclusive authority is conferred on the Parliament of Canada to legislate respecting "navigation and shipping." In the case of *The Queddy River Boom Company v. Davidson* (2), this court determined that a provincial legislature had no authority to legalize an obstruction to navigation, for the reason that the exclusive right so to legislate was under section 91 vested in the Parliament of the Dominion. This case is an authority binding on the court. The Act, chapter 92 Revised Statutes (Canada), does not, as it appears to me, in any respect exceed the powers of Parliament. It makes provisions for the conservancy of the navigation which were reasonable and proper, and within the competence of Parliament. I am therefore of opinion that this question must be answered in the affirmative as to the whole of the Act in question.

(1) 6 Can. S. C. R. 707.

(2) 10 Can. S. C. R. 222.

1896

In Re
 PROVINCIAL
 FISHERIES.
 ———
 The Chief
 Justice.
 ———

Question 3.—If not, in case the bed and banks of a lake or navigable river belong to a province, and the province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river?

Answer.—This question as propounded is contingent on a negative answer being given to question number 2, and it might therefore be passed over. I may, however, say that in the case of a provincial grant such as the question supposes the grantee would have a right to build upon the land so granted, subject only to his compliance with the requirements of the statute referred to in the preceding question, and to his obtaining an order in council authorizing the same, and provided the work did not interfere with the navigation of the lake or river. In such a case the land granted would be the private property of the grantee, which, on ordinary principles of the law of property, he is at liberty to use as he thinks fit, provided he does not thereby prejudice any right of the public, and that he has complied with all statutory requirements.

Question 4.—In case the bed of a public harbour, or any portion of the bed of a public harbour, at the time of confederation had not been granted by the Crown, has the province a like jurisdiction in regard to the making a grant as and for the purpose in the preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

Answer.—As already stated, it has been determined in the case of *Holman v. Green* (1) that the beds of public harbours are by section 108 of the British North America Act, and the third schedule, vested in the Crown in the right of the Dominion. A province cannot therefore grant any portion of the bed of such a harbour.

(1) 6 Can. S. C. R. 707.

Question 5.—Had riparian proprietors before confederation an exclusive right of fishing in non-navigable lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown?

1896

In Re
PROVINCIAL
FISHERIES.

The Chief
Justice.

Answer.—According to the common law of England, which applies in all the provinces constituting the Dominion except the province of Quebec, riparian proprietors undoubtedly have an exclusive right of fishing in non-navigable lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown. This is a proprietary right, the fishery in such a case being denominated a territorial fishery; in other words, it is an incident of the property in the soil. The case of *The Queen v. Robertson* (1), was virtually a decision to this effect, though the precise question there in controversy related to the right of fishing in non-navigable waters the beds of which had not been granted by, but still remained vested in, the Crown in right of the province. It was there held, upon authorities which equally apply to the case of private proprietors of the beds of non-navigable streams and waters, that the provinces could confer an exclusive right of fishing upon their licensees. I extract a portion of my judgment in the case to which I adhere in every respect :

It results from the proprietorship of the riparian owner of the soil in the bed of the river that he has the exclusive right of fishing in so much of the bed of the river as belongs to him, and this is not a riparian right in the nature of an easement, but is strictly a right of property. To sustain these propositions of law authorities without number might be cited ; it is sufficient for the present purpose to refer to two or three of the most weighty and apposite. Sir Matthew Hale says in the *Treatise de jure maris* : “ Fresh rivers of what kind soever do of common right belong to the owners of the soil adjacent, so that the owners of one side have of common right the property of the soil, and consequently the right of fishing *usque filum aquæ*, and the owners on the other side the right of soil or ownership and fishing unto the *filum aquæ* on their side. And if a man be owner of the land of

(1) 6 Can. S. C. R. 52.

1896
In Re
 PROVINCIAL
 FISHERIES.

The Chief
 Justice.

both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length ; with this agrees common experience.”

* * * * *
 To the authority on this head already quoted may be added that of Lord O’Hagan, lately Lord Chancellor of Ireland, who when a judge of the Irish Court of Common Pleas, in giving judgment in the case of *Murphy v. Ryan*, already referred to, thus distinctly affirms the doctrine of Sir Matthew Hale ; he says :

“ According to the well established principles of the common law the proprietors on either side of the river are presumed to be possessed of the bed and soil of it moiety to a supposed line in the middle, constituting the legal boundary, and being so possessed have an exclusive right to the fishery in the water which flows along their respective territories.”

From a treatise on the law of waters lately published by Messrs. Coulson & Forbes, I extract the following passage :

“ In all rivers and streams above the flow and re-flow of the tide, whether such rivers are navigable or not, the proprietors of the lands abutting on the streams are *prima facie* the owners of the soil of the *alveus* or channel *ad medium filum aquæ*, and as such have *prima facie* the right of fishing in front of their own lands. This right is a right of property, one of the profits of the land, and has been called a *territorial fishery*. It is not, strictly speaking, a riparian right arising from the right of access to the water, but is a profit of the land over which the water flows, and as such may be transferred or appropriated, either with or without the property in the bed or banks, to another person, whether he has land or not on the borders of or adjacent to the stream.”

The passage just quoted states what I consider to be the proper legal conclusion from the decided cases. The cases of *Marshall v. Ulleswater Co.* (1) and *Bristow v. Cormican* (2), are authorities to this effect.

As regards the province of Quebec, the law in that province depends on the old law of France which is thus stated by Pothier (3) :

A l’égard des rivières non navigables, elles appartiennent aux différens particuliers qui sont fondés en titre ou en possession pour s’en

(1) 7 B. & S. 232.

(2) 3 App. Cas. 641.

(3) *Traité du droit de propriété* vol. 9, ed. Bugnet no. 53 ; see Civil Code of Quebec, Art 567.

dire propriétaires dans l'étendue portée par leurs titres ou leur possession. Celles qui n'appartiennent point à des particuliers propriétaires appartiennent aux seigneurs hauts justiciers dans le territoire desquels elles coulent. Loiseau, Traité des Seigneurs, chap. 12 no. 120. Il n'est pas permis de pêcher dans les dites rivières sans le consentement de celui à qui elles appartiennent.

1896
In Re
 PROVINCIAL
 FISHERIES.
 —
 The Chief
 Justice.
 —

Question 6.—Has the Dominion Parliament jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

Answer.—Certainly not, for the reason that the right of fishing in such non-navigable waters belongs exclusively to the owners of the beds of such waters and because the Dominion Parliament has no power to interfere by legislation with this right, notwithstanding the grant by section 91 of the British North America Act, subsection 12, of the right to legislate as regards sea-coast and inland fisheries. The exclusive power to legislate as regards "property" in a province is by section 92, subsection 13, conferred on the provincial legislatures, and the legislative authority of Parliament under section 91, subsection 12, is confined to the conservation of the fisheries by what may conveniently be designated as police regulations. As this has already been decided by the case of *The Queen v. Robertson* (1), which is binding upon me, I consider the decision in that case as settling the existing law. In stating my opinion in answer to the questions propounded by the order in council, I conceive it to be my duty to state the law to be as I find it judicially established in cases which would be binding on this court in the exercise of its ordinary jurisdiction in contentious cases. Therefore, even if I had any reason for differing from the principles laid down in *The Queen v. Robertson* (1), which however I have not, I should still consider myself bound to follow the authority of that case.

(1) 6 Can. S. C. R. 52.

1896
In Re
 PROVINCIAL
 FISHERIES.

The Chief
 Justice.

Question 7.—Has the Dominion Parliament exclusive jurisdiction to authorize the giving by lease, license, or otherwise, to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

Answer.—No, for the reasons already given in the answers to preceding questions.

Question 8.—Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters, the beds and banks of which are assigned to the provinces respectively under the British North America Act, if any such are so assigned?

Answer.—As regards non-navigable waters this question has been already answered. As regards navigable waters such as the great lakes and large navigable rivers within the boundaries of a province, the beds of which have not been granted but remain in the Crown in right of the province, I am of opinion that the right of fishing is public, and that such public right of fishing is not restricted to waters within the ebb and flow of the tide. So to confine the public common right of fishing is no doubt the rule of the common law as applied in England and Ireland, but this rule does not appear to me to apply to the great lakes of Canada, such as Lakes Superior, Huron, Erie, Ontario and Winnipeg. Nor do I think the rule in question applies even to such rivers as are specifically mentioned in the first question propounded to us, or other non-tidal rivers which are *de facto* navigable. It appears from several cases decided in the courts of the province of Ontario that such lakes and rivers are to be considered navigable waters and that the rule of the English law as to navigable tidal waters applies to them. I refer particularly to the cases of *Parker v. Elliott* (1); *The Queen v. Meyers* (2); *The Queen v. Albert Sharp* (3); *Gage v. Bates* (4); *Dixson v. Snetsinger* (5).

(1) 1 U. C. C. P. 470.

(3) 5 Ont. P. R. 140.

(2) 3 U. C. C. P. 305.

(4) 23 U. C. C. P. 116.

(5) 23 U. C. C. P. 235.

It is true that the right of fishing was not in question in any of these cases, the point in controversy in each of them having been the right of the riparian owner claiming under a grant from the Crown to the property in the bed of the river or lake opposite their land frontage. It follows, however, from the reasoning of the courts that such navigable waters were to be likened in all respects to rivers which, according to the common law, came within the definition of navigable rivers.

Where, however, the Crown in right of the provinces has granted any part of the bed of such navigable rivers, the right of fishing is in such cases, as an incident of property, vested in the grantee. In the case of non-navigable waters riparian proprietors on one side whose grants are bounded by the stream are entitled to the property in the bed of the river to its middle thread. This rule, however, is not applicable to the great lakes of Canada, and to rivers which are *de facto* navigable, for the reasons given in the Ontario cases before cited. Indeed, as regards lakes, Lord Blackburn doubted the applicability of this rule to a comparatively small Irish lake such as Lough Neagh, for in the case of *Bristow v. Cormican* (1), he says :

Whether the rule that each adjoining proprietor, where there are several, is entitled *usque ad medium filum aque* should apply to a lake is a different question. It does not seem convenient that each proprietor of a few acres fronting on Lough Neagh should have a piece of the soil of the lough, many miles in length, tacked on to his frontage.

In answering this question I have, in order to clearness, gone beyond what it was strictly necessary to state in response to the inquiry made of us, for it would have sufficed to say that the Dominion Parliament has

1896

*In Re*PROVINCIAL
FISHERIES.The Chief
Justice.

1896

*In Re*PROVINCIAL
FISHERIES.The Chief
Justice.

no jurisdiction to enact laws conferring on the lessees or licensees of the Dominion a right of fishing in any waters, whether navigable or non-navigable, "the beds and banks of which are assigned to the provinces respectively under the British North America Act."

Question 9.—If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a provincial legislature jurisdiction for the purpose of provincial revenue or otherwise to require the Dominion lessee, licensee or other grantee to take out a provincial license also ?

Answer.—It has been already shown that the Dominion Parliament has not "such jurisdiction as is mentioned in the preceding three questions;" no further answer to this question is therefore required.

Question 10.—Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chapter 95, intituled "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act, or any and which of such several sections, or any and what parts thereof respectively ?

Answer.—In the case of non-tidal waters which are in fact non-navigable, whether the title to the bed of the stream remains in the Crown, or has become vested in its grantees, the answers to the preceding questions have already stated what I consider to be the law, which is, as laid down in *The Queen v. Robertson* (1), that in the case of such waters the Dominion Parliament cannot authorize the minister to confer upon licensees and lessees exclusive rights of fishing. The case referred to does not, however, directly apply to navigable waters the beds of which have not been granted by the province. In such waters, although above the ebb and flow of the tide, where the title to the bed of the river remains vested in the Crown, it has already been stated that of common right the public are entitled to fish. The case of *The Queen v. Robertson* (1) does not touch the ques-

(1) 6 Can. S. C. R. 52.

tion as to the right of the Parliament of the Dominion so to legislate as to confer exclusive rights of fishing in such waters. In the judgment I there delivered I expressly distinguish this point as one not dealt with by the decision in that case. It is true, however, that although *The Queen v. Robertson* (1) called for no expression of opinion on this point, I did in my judgment allude to it in considering the meaning of the words "inland fisheries" in section 91 of the British North America Act. In that judgment, at page 134 of the report, occurs the following passage :

I am of opinion, therefore, that the thirteenth enumeration of section 91, by the single expression "inland fisheries" conferred upon Parliament no power of taking away exclusive rights of fishery vested in the private proprietors of non-navigable rivers, and that such exclusive rights, being in every sense of the word "property," can only be interfered with by the provincial legislatures in exercise of the powers given them by the provision of section 92 before referred to. This does not by any means leave the sub-clause referred to in section 91 without effect, for it may well be considered as authorizing Parliament to pass laws for the regulation and conservation of all fisheries, inland as well as sea-coast, by enacting, for instance, that fish shall not be taken during particular seasons, in order that protection may be afforded whilst breeding ; prohibiting obstructions in ascending rivers from the sea ; preventing the undue destruction of fish by taking them in a particular manner, or with forbidden engines ; and in many other ways providing for what may be called the police of the fisheries. Again, under this provision Parliament may enact laws for regulating and restricting the right of fishing in the waters belonging to the Dominion, such as public harbours, the beds of which have been lately determined by this court to be vested in the Crown in right of the Dominion, and also for regulating the public inland fisheries of the Dominion, such as those of the great lakes and possibly also those of navigable non-tidal rivers.

And from the same judgment I make the following extract as showing that it was not intended to deal with the question now under consideration. It is there said :

1896
In Re
 PROVINCIAL
 FISHERIES.
 —
 The Chief
 Justice.
 —

(1) 6 Can. S. C. R. 52.

1896
 ~~~~~  
*In Re*  
 PROVINCIAL  
 FISHERIES.  
 ~~~~~  
 The Chief
 Justice.
 ~~~~~

There are of course fisheries of a very different character from those in non-navigable waters to be found within the limits of all the provinces—public fisheries, such as those in tidal rivers and in the great lakes of the western provinces. A question may arise whether the provisions contained in section 91 authorize Parliament to empower the Crown to grant exclusive rights in respect of such fisheries. Upon this point it would not be proper now to express any opinion since none has been raised for adjudication. The same may also be said of an important question which may hereafter be presented for decision as to the right to legislate so as to authorize exclusive rights in respect of fisheries in what have been called by Chancellor Kent the “great rivers,” meaning large navigable non-tidal rivers, a question the solution of which must depend on whether the beds of such rivers are vested in the Crown in right of the Dominion, not as part of its domain, but as trustees for the public, or in the owners of the adjacent lands, inasmuch as the right of fishing would in the first case be in the public as of common right, but in the second vested in the riparian proprietors.

These are questions the discussion of which would not be appropriate in the present case, and I refer to them only to point out that what I have said as to the rivers of the class to which the portion of the Miramichi now in question belongs, has no reference either to navigable fresh water rivers or to the great lakes.

In the judgment delivered in *The Queen v. Robertson* (1) by the late Chief Justice, the words “inland fisheries” in section 91 were held to authorize legislation respecting regulation and protection of the fisheries, not legislation which would derogate from rights of property either of the provinces or of private persons in respect of the right of fishing beyond what might be necessary for the regulation and preservation of the fisheries. My brother Fournier also interprets these words in the same way; the portion of his judgment which bears on this question is contained in the following passage :

La section 91, sous-section 12 de l'Acte de l'Amérique Britannique du Nord, en donnant au gouvernement fédéral le pouvoir de légiférer sur les pêcheries, ne lui en attribue pas le droit de propriété. Il ne les enlève pas des propriétaires ou possesseurs d'alors pour se les

approprié. Ce n'est pas ainsi non plus que cette section a été interprétée par l'acte 31 Vic. ch. 60, passé très peu de temps après l'acte de Confédération. La section 2 déclare expressément que le "Ministre de la Marine et des Pêcheries pourra, lorsque le droit exclusif de pêcher n'existe pas déjà en vertu de la loi, émettre ou autoriser l'émission de baux ou licences de pêche pour pêcher en tout endroit où se fait la pêche." Comme on le voit les droits de tous ceux qui avaient un intérêt ou une propriété dans les pêcheries sont respectés. Sous le rapport du droit de propriété l'acte fédéral, ni l'acte des pêcheries n'ont fait de changement à l'état de choses existant avant la Confédération. La propriété est demeurée où elle était auparavant. Il n'y a donc sous ce rapport, aucun empiétement de la part du pouvoir fédéral. Si l'action du département de la Marine n'a pas été conforme à ce principe, comme dans le cas actuel, cette action est nulle. Tout en respectant le droit de pêche comme propriété, le gouvernement fédéral ne peut-il pas y exercer, dans l'intérêt général de la Puissance, un droit de surveillance et de protection? Je crois que oui, et que c'est là précisément le but des pouvoirs législatifs qui lui ont été conférés à ce sujet. Il n'y a, suivant moi, aucune incompatibilité entre l'exercice de ce pouvoir avec l'exercice du droit de pêche, comme droit de propriété en d'autres mains que ceux du gouvernement. Le gouvernement fédéral peut, suivant moi, dire au propriétaire: "Vous ne pêcherez qu'en certaines saisons et qu'avec certains instruments ou engins de pêche autorisés." Cette restriction n'est pas une atteinte mais bien plutôt une restriction accordée à ce genre de propriété. C'est une réglementation, je dirai, de police et de contrôle sur un genre de propriété qu'il est important de développer et de conserver pour l'avantage général. On sait ce que deviendrait en peu de temps les pêcheries, s'il était libre aux particuliers de les exploiter comme bon leur semblerait. En peu d'années leur aveugle avidité aurait bientôt ruiné ces sources de richesses et nos pêcheries, au lieu de revenir aussi riches et aussi fécondes qu'autrefois, retourneraient bientôt à l'état de dépérisement, sinon de ruine, où elles étaient avant d'avoir été l'objet d'une législation protectrice. Ce pouvoir de réglementation, de surveillance et de protection a été, avant la Confédération, exercé par chaque province dans l'intérêt public. C'est le même pouvoir qu'exerce aujourd'hui le gouvernement fédéral. Pas plus que les provinces ne l'ont fait, il n'a le pouvoir de toucher au droit de propriété dans les pêcheries, son pouvoir se borne à en régler l'exercice.

Mr. Justice Henry also agrees in the construction placed by the Chief Justice and other judges on the British North America Act; he says:

1896  
*In Re*  
 PROVINCIAL  
 FISHERIES.  
 ———  
 The Chief  
 Justice.  
 ———

1896

*In Re*  
PROVINCIAL  
FISHERIES.

The Chief  
Justice.

In fact, in my opinion, the power under the Act is but to regulate the fisheries and to sustain and protect them by grants of money and otherwise as might be considered expedient.

Although *The Queen v. Robertson* (1), did not directly deal with this question as to the right of the Dominion Parliament to confer exclusive rights of fishing in lakes and navigable rivers above tide-water, yet it is a necessary inference from the construction placed on subsection 12 of section 91, by which the power of legislation is restricted to the regulation of the fisheries, that no power to control fishing rights, so far as they were vested in the provinces or their grantees, was intended to be thereby conferred. That the right of fishing in lakes and non-tidal navigable rivers in which the title to the bed is vested in the provinces or private owners is an incident of such ownership of the soil in the bed of the rivers is, in my opinion, a consequence to be deduced from the Upper Canada cases already referred to and is also a just inference from the cases of the *Mayor of Carlisle v. Graham* (2) and *Murphy v. Ryan* (3), the latter cases attributing the public right of fishing in tidal rivers to the ownership of the beds by the Crown. In the case of *The Queen v. Burrow* (4), which concerned the public right to fish in Ullswater, an English lake, Cockburn C. J. says :

If it had been clearly settled that the public could not have any right to fish in a navigable river above the ebb and flow of the tide it might be different, but I for one am not prepared to assent to that proposition without further argument.

In *Bristow v. Cormican* (5), the House of Lords held that the Crown has no *prima facie* right to the soil or fishery of non-tidal waters. The right of the public to fish in such waters was not *sub judice*. This case is, however, by no means conclusive of the present ques-

(1) 6 Can. S. C. R. 52.

(3) Ir. Rep. 2 C.L. 143.

(2) L.R. 4 Ex. 361.

(4) 34 J. P. 53.

(5) 3 App. Cas. 641 ; see Coulson &amp; Forbes p. 347.

tion. Assuming that the Upper Canada cases before cited of *Parker v. Elliott* (1); *The Queen v. Meyers* (2); *The Queen v. Sharp* (3) and *Dixson v. Snetsinger* (4); were well decided, as I hold they were, the soil of all non-tidal navigable rivers, so far as it has not been expressly granted by the Crown, was, at the date of confederation, vested in the provinces, and was reserved to them by section 109 of the Confederation Act. Therefore, if the right of fishing is an adjunct of the property in the soil, the public, through its trustee the Crown, must be held to be entitled to the enjoyment of this right in so far as the beds of the rivers and lakes had not been expressly granted. That the Crown in right of the provinces could grant either the beds of such non-tidal navigable waters or an exclusive right of fishing is, I think, clear. Before Magna Charta the Crown could grant to a private individual the soil in tidal waters with the fishery as an incident to it, or the exclusive right of fishing alone as distinct from the soil. Then, as the restraint imposed by Magna Charta does not apply to any but tidal waters, there is no reason why the prerogative of the Crown to make such grants in the class of waters now under consideration, large navigable lakes and non-tidal navigable rivers, should not be exercised now as freely as it could have been with reference to tidal waters before Magna Charta. The Upper Canada cases do not, it is true, involve any decision as to fishing rights, but are confined to the determination of the question as to the title to the soil in the beds of navigable non-tidal rivers, but it follows that if the right of fishing is an incident of the right of property in the bed of the stream, these cases are conclusive authorities, shewing that the right of fishing in such waters is in

1896

*In Re*  
PROVINCIAL  
FISHERIES.

—  
The Chief  
Justice.  
—

(1) 1 U. C. C. P. 470.

(3) Ont. P. R. 140.

(2) 3 U. C. C. P. 305.

(4) 23 U. C. C. P. 235.

1896

*In Re*PROVINCIAL  
FISHERIES.The Chief  
Justice.

the public subject to the right of the provinces to grant, either separately from, or as incidental to, the title to the soil, exclusive rights to individual grantees. A strong argument in favour of this view of the law is to be found in the invariable practice, which has prevailed in Canada from the earliest times since the settlement of the country, to treat the right of fishing in navigable waters above the flow of the tide as public, and in the injustice and impolicy of a contrary rule and the hardship and inconvenience which would result therefrom to the pioneers of settlement in a new country, who have to some extent to rely on the products of the forests and streams for their food supply. It is said that the common law of England applies to new settled colonies only so far as it is adapted to the circumstances and requirements of the colonists. I cannot bring myself to think, this being the condition upon which the law of England applies in settled colonies, that we are required, in the case of ceded colonies which have adopted that law as the rule of decision, to apply it in a manner which would be entirely unsuitable to the circumstances and conditions of the people.

What has been so far said has reference only to the provinces other than the province of Quebec. With regard to that province the right of fishing in waters which are in fact navigable or floatable depends altogether on the old law of France, the ancient law of the province. By that law all waters of this class belonged to the domain of the Crown, and the public enjoyed the right of fishing therein subject to the prerogative of the Crown to grant, at its pleasure, exclusive rights of fishing to individuals. This prerogative is now vested in and can only be exercised by the Crown in right of the province. I refer on

this head to Pothier (Bugnet edition) *Traité de la propriété* (1).

1896

~  
*In Re*

PROVINCIAL  
 FISHERIES.

—  
 The Chief  
 Justice.  
 —

In the case of *Dixson v. Snetsinger* (2), the Ontario Court of Common Pleas had before it a question of title as to a part of the bed of the River St. Lawrence. The plaintiff, a riparian owner, there claimed title to the bed of the river *ad medium filum aquæ* under a grant from the Crown which described the land granted as bounded by the river. The court held that the Crown of Great Britain having acquired by cession the rights and prerogatives which had previously belonged to the French king, those rights remained unaffected by the division by Imperial legislation (31 Geo. 3, ch. 31) of the ceded territory into the two provinces of Upper and Lower Canada, and by the subsequent enactment by the legislature of Upper Canada of an Act declaring that thenceforth, in all matters of controversy relative to property and civil rights, resort should be had to the law of England as the rule for the decision of the same, and therefore that, as under the French law the Crown had been invested with the title to the bed of the river for public purposes, the Crown of Great Britain had a title in all respects co-extensive, and that the ordinary presumption by which a grant of land bounded by a water-course extended to the middle thread of the stream did not apply. Whilst the actual decision in *Dixson v. Snetsinger* (2) was limited to this, and in this respect followed previous cases before cited, it may be said that this judgment contains some very weighty arguments in favour of the view contended for by the provinces in the present case, and is authority for the proposition that the common law of England did not apply to the non-tidal navigable rivers of Canada, as explained in the following extract from it:

(1) Nos. 50, 51, 52.

(2) 23 U. C. C. P. 235.

1896

*In Re*PROVINCIAL  
FISHERIES.The Chief  
Justice.

By the Imperial statute, 14 Geo. 3, ch. 83, "for making more effectual provision for the government of the province of Quebec, in North America," it was enacted "that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada, as the rule for the decision of the same." Now, whether the rule of the civil law or that of the common law of England as to what constitutes navigable streams applies, whether the soil is in the Crown, or in the riparian proprietor *ad medium filum aquæ*, is a question relating to property and civil rights, and by this Act, therefore, the law of Canada as it was at the time of the passing of the Act was declared to be the law of the province of Quebec, and not the common law of England in that particular. Now, from the case of *Boissonnault v. Oliva* (1), decided in 1833, there is no doubt that the River St. Lawrence was a river, the bed and waters of which were vested in the Crown for the benefit of the public, according to the law of Canada; that, in effect, the rule of the civil law, and not that of the common law of England, which is limited to the extent of the flux and reflux of the tide, prevailed.

Prior then to the conquest of Canada from France, and since the conquest by virtue of this statute, 14 Geo. 3, ch. 83, the River St. Lawrence was within the rule of the civil law, and not of the common law of England, as to navigable rivers. In this condition, that is, free from the limitations and restrictions of the common law of England as to the flux and reflux of the tide, the River St. Lawrence continued after Canada, or what was then called the province of Quebec, became British territory; it did not come within the operation of the common law of England by the fact of being a British territory; it did not come within the operation of the common law of England by the fact of becoming a British province.

If the doctrine of this case of *Dixson v. Snetsinger* (2) is correct, and I do not question its soundness, it would seem to apply not only to lakes and rivers in the present provinces of Ontario and Quebec, in the boundaries of which are now comprised so much of the territory of the old province of Quebec, established by the Act of 1774, as yet remains part of the dominions of the Crown, but also to the provinces of Nova Scotia, New Brunswick, and Prince Edward Island as well, inasmuch as all these were originally territories ceded by France to Great Britain. Further, it might also

(1) Stuart L. C. R. 564.

(2) 23 U. C. C. P. 235.

apply to the province of Manitoba and the North-West, so far at least as those portions of the territory of the Dominion were acquired to the British Crown under the 10th article of the Treaty of Utrecht by the description of "the bay and streights of Hudson, together with all lands, seas, sea-coasts, rivers and places situate in the said bay and streights, and what belong thereunto." With regard to the province of British Columbia, however, the principle of the decision in *Dixson v. Snettinger* (1) can have no application.

On the whole I arrive at the following conclusions as to the right of fishing in the class of waters under consideration, namely: navigable lakes and non-tidal navigable rivers, and the limitation of the power of the Parliament of the Dominion to legislate respecting the fisheries in these waters.

First.—The beds of all such waters which remained ungranted at the date of confederation were public lands belonging to the provinces within the limits of which the same were situated, and as such were, by section 109 of the Confederation Act, vested in the provinces respectively.

Secondly.—So long as the property in the beds of this class of rivers remains ungranted the right of fishing in such waters belongs to the public as of common right.

Thirdly.—The Crown in right of the provinces can, however, grant the beds of such waters and streams, in which case the exclusive right of fishing, unless expressly reserved, passes to the grantee as an incident of the ownership of the soil in the bed, and the provinces can also grant an exclusive right of fishing in the same waters, distinct from and without any grant of the bed.

Fourthly.—The Parliament of the Dominion cannot by its legislation in any way affect or interfere

1896  
*In Re*  
 PROVINCIAL  
 FISHERIES.  
 —  
 The Chief  
 Justice.  
 —

1896

*In Re*PROVINCIAL  
FISHERIES.The Chief  
Justice.

with the rights of fishing in the waters before mentioned, nor with the title and rights of the provinces in respect of such waters and the fisheries therein save as hereafter mentioned.

Fifthly.—Neither the provinces (except in the case of the province of Quebec) nor the Dominion can, without legislative authority, grant exclusive rights of fishing in tidal waters, but the legislatures of the provinces may authorize such grants as regards all tidal waters within the limits and jurisdiction of the provinces respectively.

Sixthly.—The power of legislation conferred upon Parliament by section 91, subsection 12, is to be limited in the manner defined in the case of *The Queen v. Robertson* (1), to the conservancy and regulation of the fisheries and other matters there specified.

Having thus ascertained, as far as I have been able to do so, the property rights of the provinces, and the rights of the public, with regard to fisheries in navigable fresh water, as well as the constitutional powers of Parliament to legislate upon such subjects, a task from which I was not relieved by the case of *The Queen v. Robertson* (1), that decision having been confined to non-navigable waters, I proceed to examine the 4th section of the Revised Statutes of Canada, chapter 95, and to answer explicitly the inquiry contained in the 10th question as to the jurisdiction of the Dominion Parliament to pass that section and the other provisions of the Act.

Section 4 is as follows :

The Minister of Marine and Fisheries may, wherever the exclusive right of fishing does not already exist by law, issue, or authorize to be issued, fishery leases and licenses for fisheries and fishing wheresoever situated or carried on, but leases or licenses for any term exceeding nine years shall be issued only under the authority of the Governor in Council.

I do not doubt that it is within the power of the Dominion Parliament, in the exercise of its authority to

(1) 6 Can. S. C. R. 52.

superintend, regulate and conserve the fisheries, to require that no person shall fish in any public waters within the Dominion without having first obtained a license from the Minister of Marine and Fisheries or other officer of the Dominion Government, and to require for such personal license the payment of such fees or duties as may be imposed by Parliament, and to prohibit all persons who may not have taken out such licenses from fishing in any way; and also to prohibit particular classes of persons, such for instance as foreigners, unconditionally from fishing. Such licenses must, however, be purely personal licenses conferring qualification, and any legislation going beyond this and assuming to confer exclusive rights of fishing is (subject to exception as to waters belonging to the Dominion and waters within the confines of unsurrendered Indian Reserves) unconstitutional and void.

Therefore, so far as this section 4 attempts to confer exclusive rights to fish in provincial waters, whether navigable or unnavigable, it was not within the competence of Parliament.

Whether it does attempt to do this is of course a question of construction, but one which there can be but little difficulty in determining. The licenses and leases contemplated are to be for particular localities, that is, they are to be "for fisheries and fishing where-soever situated or carried on;" they are to be granted only "wherever the exclusive right of fishing does not already exist by law;" and they are to be "leases" as well as licenses; language which indicates an intention to authorize the Minister to confer by means of such licenses exclusive rights of fishing. This I hold to have been beyond the jurisdiction of Parliament to enact so far as provincial waters are concerned, and within the expression "provincial waters" I include

1896

*In Re*PROVINCIAL  
FISHERIES.The Chief  
Justice.

1896  
*In Re*  
 PROVINCIAL  
 FISHERIES.  
 ———  
 The Chief  
 Justice.  
 ———

all navigable waters within the boundaries of a province whether tidal or non-tidal, excepting only such waters as belong to the Dominion, that is to say, waters the beds or soil of which are vested in the Dominion, and all streams in unsundered Indian lands. The power of Parliament to legislate so as to confer exclusive rights in Dominion waters is of course to be attributed to the 1st subsection of section 91, authorizing legislation respecting the public property of the Dominion. The 24th subsection of section 91 giving the right to legislate as to lands reserved for the Indians comprehends the right to legislate respecting waters in unsundered Indian territory. Over these two latter descriptions of waters Parliament has, I concede, exclusive jurisdiction. With reference to unnavigable waters I need say nothing, as *The Queen v. Robertson* (1) has, as regards these, established a rule of law by which I am bound so long as that case stands unreversed.

It follows that all the remaining provisions of chapter 95 which attempt to confer exclusive rights of fishing in either private or public waters belonging to the provinces, or which are designed to carry out provisions assuming to confer exclusive rights and which can have no other object or application, are void. I do not feel called upon to make a minute critical examination of every subsection of this long Act of Parliament. I consider it to be sufficient, in the absence of any more specific questions, to indicate the principle by which I consider the constitutional validity of its numerous detailed provisions are to be tested. I may say, however, that it appears to me that, in addition to section 4, portions of section 14, subsections 1 and 11 are *ultra vires*, as are also subsections 1, 3 and 4 of section 21. Section 22 so far as

(1) 6 Can. S. C. R. 52.

it assumes to authorize interference with the public property of the provinces is also excessive.

The beds of public harbours, non-tidal as well as tidal, according to the case of *Holman v. Green* (1), which, as I have said, is binding upon me, are vested in the Dominion.

Whether the Dominion has, notwithstanding the provisions of Magna Charta, authority to grant exclusive rights of fishing in tidal harbours, is a question which has not been specifically addressed to us, though it is perhaps involved in the inquiry as to the validity of the legislation contained in section 4 of chapter 95 as applicable to tidal harbours. I have no doubt that Parliament has the power to authorize exclusive rights of fishing in such harbours notwithstanding Magna Charta. As regards non-tidal harbours the prohibition of the charter, as before mentioned, is not applicable. Therefore, assuming *Holman v. Green* (1), assigning the beds of all public harbours to the Dominion, to be a sound decision and binding upon me, I am of opinion that such harbours, being thus public property of the Dominion for which Parliament has the exclusive and undoubted right to legislate, section 4 of chapter 95, Revised Statutes of Canada, and the other provisions of that Act consequent upon it, are as applicable to all public harbours *intra vires* of Parliament, and the restriction of Magna Charta is as to tidal harbours to be considered as thereby repealed.

*Question 11.*—Had the Dominion Parliament jurisdiction to pass section 4 of the Revised Statutes of Canada, chapter 95, intituled "An Act respecting Fisheries and Fishing," or any other provisions of the said Act, so far as these respectively relate to fishing in waters, the beds of which do not belong to the Dominion and are not Indian lands?

*Answer.*—An answer to this is included in the answer to the preceding question.

(1) 6 Can. S. C. R. 707.

1896  
*In Re*  
 PROVINCIAL  
 FISHERIES.  
 ———  
 The Chief  
 Justice.  
 ———

1896

*In Re*PROVINCIAL  
FISHERIES.The Chief  
Justice.

*Question 12.*—If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid, or from the rights incident to the ownership by the provinces and others, but (subject to such property and rights) providing, in the interest of the owners and the public, for the regulation, protection, improvement and preservation of fisheries, as, for example, by forbidding fish to be taken at improper seasons, preventing the undue destruction of fish by taking them in an improper manner, or with improper engines, prohibiting obstructions in ascending rivers and the like?

*Answer.*—The Dominion Parliament has no jurisdiction in respect of fisheries (other than fisheries in what have already been described as Dominion waters and the waters in unsurrendered Indian lands) except to pass general laws such as those specified in this question, and such as are pointed out as *intra vires* of Parliament in the case of *The Queen v. Robertson* (1).

*Question 13.*—Had the legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, chapter 24, intituled “An Act respecting the sale and management of Public Lands,” and sections 5 to 13, both inclusive, and sections 19 and 21, both inclusive, of the Ontario Act of 1892, intituled “An Act for the protection of the Provincial Fisheries,” or any and which of such several sections, or any and what parts thereof respectively?

*Answer.*—So far as the provincial legislation mentioned in this question was not inconsistent with previous laws of the Dominion Parliament on the same subjects and has not been superseded by subsequent legislation of the Dominion, I am of opinion that the provisions mentioned in this question were within the power of the provincial legislature, under the authority conferred upon it by section 92 of the British North America Act to make laws respecting property in the province, and to legislate respecting all matters of a local and private nature in the province. So far as these enactments in any way conflict with prior

Dominion legislation they were void *ab initio*, and so far as the Dominion has since legislated in any manner inconsistent with these provisions they became upon such subsequent legislation, *ipso jure*, void. In a judgment delivered in a case now before the Judicial Committee of the Privy Council, I enunciated the principle that for the purpose of executing distinct legislative powers, one conferred upon Parliament by section 91, and a different power conferred upon provincial legislatures by section 92, of the British North America Act, the same measures of legislation might be open to both legislatures. That in such a case, so long as the Dominion had not legislated a provincial legislature, in the exercise of its own distinct authority, might legislate, but that the federal legislation being necessarily paramount, so soon as Parliament enacted a law in any way inconsistent with the prior provincial legislation the latter would be thereby superseded and become void. My answer to the present question is based on the same principle.

1896

*In Re*PROVINCIAL  
FISHERIES.—  
The Chief  
Justice.  
—

*Question 14.*—Had the legislature of Quebec jurisdiction to enact sections 1375 to 1378, inclusive, of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

*Answer.*—Clearly section 1375, which is a provision confined to non-navigable rivers and lakes which form part of the domain of the province, requiring certain reservations to be made on the sale of Crown lands covered by such waters, is within the competence of the provincial legislature, which must have the right to regulate the sale and use of the property of the province.

The provisions for leasing lands thus reserved for fishing purposes are also entirely within the competence of the province, as has been virtually decided by *The Queen v. Robertson* (1). The provisions of the other

1896

*In Re*

PROVINCIAL  
FISHERIES.

The Chief  
Justice.

sections, all relating to non-navigable waters, are also *intra vires* according to the same authority.

*Question 15.*—Has a province jurisdiction to legislate in regard to providing fishways in dams, slides and other constructions, and other wise to regulate and protect fisheries within the province, subject to, and so far as may consist with, any laws passed by the Dominion Parliament within its constitutional competence?

*Answer.*—An answer to this is contained in the answer to question no. 13.

*Question 16.*—Has the Dominion Parliament power to declare what shall be deemed an interference with navigation and require its sanction to any work or erection in, or filling up of navigable waters?

*Answer.*—The Dominion Parliament which has authority to legislate for the conservancy of navigation has, beyond doubt, a right to declare what shall be deemed an interference with navigation, and to control all works erected in navigable waters. No other answer could be given without disregarding the authority of *The Queddy River Boom Co. v. Davidson* (1).

It is a universal rule of the highest courts called upon to decide on constitutional questions arising as to the limited powers of legislation, that an argument drawn from the possibility of a power of this kind being abused ought not to prevail. The presumption is that there will be no such abuse. In many cases the Supreme Court of the United States has enunciated this as a rule of constitutional construction.

*Question 17.*—Had the riparian proprietors before confederation an exclusive right of fishing in navigable non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown?

*Answer.*—Certainly they had, for the reasons already stated in answer to foregoing questions.

TASCHEREAU J.—First Question—As to public harbours (are there any private harbours?) I am bound by the decision in *Holman v. Green* (2) to say that the

(1) 10 Can. S. C. R. 222.

(2) 6 Can. S. C. R. 707.

beds thereof belong to the Dominion. If the question was not concluded by that case I would say that the beds of public harbours belong to the provinces. As to all other waters, without distinction, the beds thereof likewise belong to the provinces wherein they are situate. The factum filed on the part of British Columbia, and the authorities therein cited under this question, leave no alternative for us but to so hold, in the position we occupy under a reference of this nature. Our answers are merely advisory, and we have to say what is the law as heretofore judicially expounded, not what is the law according to our opinion. We determine nothing. We are mere advisers, and the answers we give bind no one, not even ourselves. The questions are of the nature of those upon which the Privy Council in the recent case made remarks that will, I hope, restrict in the future references such as the present one by the Department of Justice.

1896  
 ~~~~~  
In Re
 PROVINCIAL
 FISHERIES.
 ———
 Taschereau
 J.
 ———

Second and sixteenth Questions.—To these two questions, which it seems to me should be answered together, I would say yes. The authorities referred to in the factum for the Dominion under this question seem to me conclusive.

Third Question.—No answer is required, as no. 2 is answered in the affirmative.

Fourth Question.—My answer to the first question determines this fourth question.

Sixth, seventh and eighth Questions.—No, it has not such power. I refer to the authorities cited in the Ontario factum under these questions.

Ninth Question.—The answer to the preceding three questions render this one unnecessary.

Tenth and eleventh Questions—Yes, it had the power to pass the said section 4 because it, in terms, applies only wherever the exclusive right of fishing

1896
In Re
 PROVINCIAL
 FISHERIES.
 —
 Taschereau
 J.
 —

does not already exist. As to the other portions of the said Act none have been pointed to us as *ultra vires*.

Twelfth Question.—The answer to the preceding question being in the affirmative renders an answer to this one not required.

Thirteenth Question.—Yes; as to said section 47 it is a mere re-enactment of the statute that was in force before confederation. As to the Act of 1892, it has no application by its own terms to fishing and to waters over which the legislature of Ontario has no jurisdiction. The case of *The Attorney General for Canada v. The Attorney General of Ontario* (1) is in that sense.

Fourteenth Question.—Yes. The factum for the Dominion seems to concede it as to section 1375. As to sections 1376, 1377 and 1378, as only applicable to non-navigable rivers and lakes, I would also answer yes.

Fifteenth Question.—Yes. That is conceded by the Dominion factum.

Fifth and seventeenth Questions.—These two questions, I submit with deference, are not authorized by the statute. The words "important questions of law or fact touching provincial legislation" in sec. 4 of 54 & 55 Vict. ch. 25, mean, in my opinion, touching provincial legislation enacted since confederation, and the words "touching any other matter" mean any other matter of the same nature, that is to say, on the law, either federal or provincial, since confederation. But I do not think that under the intent of that enactment we are called upon to determine what was the law in any of the provinces before confederation.

In *Re The London & Westminster Bank* (1), the judges declined answering a question put by the House of

(1) 23 Can. S. C. R. 458.

(2) 2 Cl. & F. 191.

Lords which was not confined to the strict legal construction of existing laws.

1896

*In Re*PROVINCIAL
FISHERIES.Gwynne J.
—

GWYNNE J.—In answer to the first question submitted by the above order, I am of opinion,

1st. That the expression “Public Harbours” in the second item of schedule no. 3 of the British North America Act does, by force of sec. 108 of that Act, comprehend the soil and beds of all such harbours whether they be in salt or in fresh water, and that therefore the effect of the statute is to declare Her Majesty to be seised of the soil and beds of all such harbours as the property of Canada.

2nd. That the beds of all the great lakes and of the rivers through which runs the boundary line between the United States and the Dominion of Canada, or the boundary line between two or more provinces of the Dominion and the beds of all rivers navigable above tide-waters, as also the beds of the sea-coasts of the Dominion and of all rivers to the extent to which tide-waters reach are, as also the beds of all other lakes and rivers within the limits of the several provinces not granted before confederation are, vested in Her Majesty subject to the jurisdiction and control of the Dominion Parliament in so far as may be deemed necessary by that Parliament or required for creating future harbours or for the erection of beacons, piers or lighthouses, or other public works hereafter to be constructed for the benefit of the Dominion and within the jurisdiction of the Dominion Parliament, as for example bridges over navigable waters, railways, or the termini of railways and the like, and in short all other works placed under the jurisdiction of the Dominion Parliament by virtue of the exception to item 10 of sec. 92 or otherwise; and also specially as regards the administration of the fisheries as herein-

1896

*In Re*PROVINCIAL
FISHERIES.

Gwynne J.

after mentioned. In support of my view in answering this question, I refer to *Parker v. Elliott* (1); *The Queen v. Meyers* (2); *Attorney General v. Perry* (3); *Boissonnault v. Oliva* (4); and *Dixson v. Snetsinger* (5).

In answer to the 2nd and 3rd questions, I am of opinion that the Dominion Parliament had jurisdiction to pass the Act, chapter 92 of the Revised Statutes of Canada.

My answer to the 4th question is in the negative for reason already given in answer to question no. 1.

In answer to the 5th question, I am of opinion that riparian proprietors before confederation had the right there made the subject of inquiry, subject of course to the control of the legislature of the province within which such lakes, rivers, streams and waters were situate.

My answer to the 6th, 7th, 8th, 9th and 12th questions is as follows:—

The British North America Act by the term “Sea-coast and Inland Fisheries,” as used in item 12 of section 91, gives to the Dominion Parliament precisely the same jurisdiction, in my opinion, over inland fisheries and over sea-coast fisheries.

No jurisdiction is given to the provincial legislatures or any of them over anything whatever under the term “Fisheries”; whatever comes within that term is given exclusively to the Dominion Parliament, and that term as used in item 12 of section 91 comprehends, in my opinion, not merely regulations for the protection of the fish and prescribing the times and seasons and modes of fishing, but also provisions for the cultivation and raising of fish, and, a most important

(1) 1 U. C. C. P. 470, p. 488 *et seq.* (3) 15 U. C. C. P. 329.

(4) Stuart's L. C. R. 564.

(2) 3 U. C. C. P. 305, p. 350 *et seq.* (5) 23 U. C. C. P. 238 *et seq.**seq.*

matter, for filling the several lakes and rivers within the Dominion with young fish so raised, and also for regulating the business of catching fish, and also for granting leases or licenses to take fish at certain places, or in certain waters, to as full an extent in short as the Parliament of the late province of Canada, or of the several other provinces prior to confederation, could have done within their respective provinces. "Fisheries" being provided for specially in section 91, none of the powers conferred on provincial legislatures by the items enumerated in section 92 can in any manner detract from, qualify or affect the power vested in the Dominion Parliament over whatever comes within the term "Sea-coast and Inland Fisheries." This is the plain result of the last clause of section 91, which was introduced, as it appears to me, to express the clear intent of the framers of the scheme of confederation to be to distribute between the Dominion and the several provinces the jurisdiction formerly exercised by the respective provinces, and to make the jurisdiction upon the matters distributed to each an exclusive jurisdiction, except where otherwise expressly provided; and consequently no provincial legislature can qualify or restrict the jurisdiction of the Dominion Parliament over "Fisheries" by requiring lessees or licensees under the authority of the Dominion Parliament to take a license from a provincial government before exercising and enjoying within the limits of a province rights purported to be granted under the authority of the Dominion Parliament, or by issuing licenses to catch fish in derogation of the authority of Parliament over the subject which is placed *exclusively* under the jurisdiction of the Dominion Parliament.

1896

*In Re*PROVINCIAL
FISHERIES.

Gwynne J.

There is no difficulty whatever that I can see in holding the "fisheries" in inland waters to be placed *exclusively* under the jurisdiction of the Dominion,

1896

*In Re*PROVINCIAL
FISHERIES.

Gwynne J.

even though the beds of those waters may be the property of the provinces, and I can see no principle whatever upon which the term "Sea-coast and Inland Fisheries" should be given a limited construction or upon which language used in prescribing the limits of the jurisdiction of the Dominion Parliament should be construed in the narrowest and most limited sense while the language used in prescribing the limits of the jurisdiction of the provincial legislatures should be construed in the most unlimited sense. As bearing upon this subject, I refer to my judgment in the Exchequer Court in *The Queen v. Robertson* (1).

In answer to the questions nos. 10 and 11, as submitted by the order in council, I am of opinion that sec. 4 of ch. 95 of the Revised Statutes of Canada, which is identical with sec. 2 of 31 Vict. ch. 60 of the Dominion Parliament, was and is, as also were and are all the other provisions of said chapter 95, within the jurisdiction of the Dominion Parliament.

In answer to the 13th question: Being of opinion as already expressed that Her Majesty is seized of the soil and beds of all public harbours as the property of the Dominion, I am of opinion that the 47th section of ch. 24 of the Revised Statutes of Ontario, in so far as it assumes to confer upon the Lieutenant-Governor of the province power to authorize the sale of land covered with water within such harbours, has assumed to deal with a subject not within the jurisdiction of the provincial legislature. As regards land covered with the waters of any navigable river or lake, there are doubtless very many places along the margin of such rivers and lakes where no reasonable objection could be made to provincial legislatures authorizing the sale of pieces of land covered with the waters of such river or lake, but in any such case, for the reasons already

(1) 6 Can. S. C. R. 53

given, provision should, I think, be made, not only against any such sale interfering with the navigation of the lake or river, but also against its prejudicing or in any manner interfering with the full enjoyment and exercise by the Dominion Parliament of all its rights and powers as regards "Sea-coast and Inland Fisheries," and as regards the construction and maintenance of all public works of the character referred to in my answer to question no. 1, and, to avoid all conflict of interest and all litigation in respect thereof, it would seem to be desirable that, as a condition precedent, an understanding should be reached with the Dominion Government upon the subject under the sanction of Parliament. Such an understanding could no doubt be readily arrived at.

1896

*In Re*PROVINCIAL
FISHERIES.

Gwynne J.

As to sections 5 to 13, both inclusive, and sections 19 to 21, also both inclusive,—none others are mentioned,—of the Act of the Ontario Legislature of 1892 in the 13th question referred to, viz.: 55 Vict. ch. 10, I do not think that any Act or part of an Act of the provincial legislature passed for the purpose of aiding in the protection of fisheries as provided by an Act of the Dominion Parliament, would be held to be *ultra vires* as being legislation upon a subject, namely, the "Fisheries," which is exclusively within the jurisdiction of the Dominion Parliament, however inoperative and unnecessary such provincial legislation might be, but except as so in aid of the legislation of the Dominion Parliament, I am of opinion that the subject is not within the jurisdiction of the provincial legislatures.

As to questions 14 and 15, I refer for my answer to these questions to my opinion as herein already expressed especially in my answer to question no. 13.

KING J.—I concur in the opinion of the Chief Justice.

1896

*In Re*PROVINCIAL
FISHERIES.

Girouard J.

GIROUARD J.—The numerous questions submitted for our opinion may be reduced to two principal heads, namely: What are the respective powers and rights of the Dominion and of the provinces, under the British North America Act, 1st, over navigable and non-navigable waters in respect of “Sea-coast and Inland Fisheries and 2nd, over navigable waters in respect of “Shipping and Navigation”?

1st. In respect of “Sea-coast and Inland Fisheries.” At all times in England and in France before the Revolution, the ownership of fisheries and the right of fishing were considered as part of the ownership of the soil in the beds of the waters and an incident to the grant of that soil. For this reason, the riparian proprietors of private or non-navigable rivers, lakes and waters, the beds of which had been granted to them, or at least not reserved by the Crown or its grantee, had an exclusive right of fishing to the middle of those waters, and this is undoubtedly the law of all the provinces; *Lord v. Commissioners of Sydney* (1); *Devonshire v. Pattinson* (2); *Loyseau, Des Seigneuries* (3); 5 *Duranton* (4); 9 *Pothier, Bugnet’s ed.* (5); *Gilbert sur Sirey, C. N.* (6); *Championnière Eaux Courantes* (7); *Robertson v. Steadman* (8) over-ruled in *Steadman v. Robertson* and *Hanson v. Robertson* (9), and by *The Queen v. Robertson* (10); *Minor v. Gilmour* (11); *Boswell v. Denis* (12); *Lebouthillier v. Hogan* (13); *North Shore Railway Co. v. Pion* (14); *Thompson and Hurdman v. Attorney General of Quebec* (15); *Beatty v. Davis* (16).

(1) [1859] 12 Moo. P. C. 473.

(2) [1887] 20 Q. B. D. 263.

(3) Ch. 12, p. 120.

(4) N. 223.

(5) P. 121.

(6) Art. 538.

(7) Pp. 16-18; C.C. 424-427, 503.

(8) [1876] 3 Pugs. 621.

(9) [1879] 2 P. & B. 580.

(10) [1882] 6 Can. S. C. R. 52.

(11) [1858] 12 Moo. P. C. 131.

(12) [1859] 10 L. C. R. 294.

(13) [1888] 17 R. L. 463.

(14) [1889] 14 App. Cas. 612.

(15) [1895] Q. R. 4 Q. B. 409.

(16) [1891] 20 O. R. 373.

The right of fishing and of making fishing grants in the ungranted beds of such waters is vested in the Crown without any restriction, and it may be added that the same principle applies to non-tidal navigable waters; but according to the old law of France, the right of the riparian proprietor does not extend to the banks and bed of a navigable or floatable river, without a special grant from the Crown; and according to both the English and French law, navigable waters are subject to a right of servitude or an easement in favour of the public to navigate on the same, which right cannot be granted away except by Parliament (1); *Colchester v. Brooke* (2); *Gann v. Free Fishers of Whitstable* (3); *Lyon v. Fishmongers' Co.* (4); *North Shore Railway v. Pion* (5); *Hale de Jure Maris* (6); *Championnière, Eaux Courantes* (7); *Stein v. Seath* (); *Fournier v. Oliva*, 1830, and *Boissonnault v. Oliva* (9); *Brown v. Gugy* (10); *Béliveau v. Levasseur* (11); *Pierreville Steam Mills Co. v. Martineau* (12); *Bell v. The Corporation of Quebec* (13); *Normand v. La Cie de Navigation du St. Laurent* (14); *Thomson and Hurdman v. Attorney General of Quebec* (15); *Brown v. Reed* (16); *Wood v. Esson* (17); *Gardiner v. Chapman* (18); *Clendinning v. Turner* (19); *Warin v. London Loan Co.* (20); *Ratté v. Booth* (21); *Beatty v. Davis* (22).

1896

*In Re*PROVINCIAL
FISHERIES.Girouard J.
—

- | | |
|--------------------------------------|--|
| (1) Anon. [1808] 1 Camp. 517n. | (12) [1875] 20 L. C. Jur. 225. |
| (2) [1845] 7 Q. B. 339. | (13) [1879] 2 Q. L. R. 305; 7 Q. L. R. 103; 5 App. Cas. 84. |
| (3) [1865] 11 H. L. Cas. 192. | (14) [1879] 5 Q. L. R. 215. |
| (4) [1876] 1 App. Cas. 662. | (15) Q. R. 4 Q. B. 409. |
| (5) 14 App. Cas. 612. | (16) [1874] 2 Pugs. 206. |
| (6) Ch. 2. | (17) [1884] 9 Can. S. C. R. 239. |
| (7) Pp. 16-18, 642, 704. | (18) [1884] 6 O. R. 272. |
| (8) [1830] 3 R. L. 457. | (19) [1885] 9 O. R. 34. |
| (9) [1833] Stuart L.C.R. 427,524; | (20) [1886] 7 O. R. 706; 12 Ont. Con. St. L. C. 1860, ch. 26, s. 2. |
| (10) [1864] 2 Moo. P. C. (N.S.) 341. | (21) [1890] 11 O. R. 491; 14 Ont. App. R. 327; 14 Can. S. C. R. 232. |
| (11) [1869] 1 R. L. 720. | (22) [1890] 11 O. R. 491; 14 Ont. App. R. 419; 15 App. Cas. 188. |
- (22) 20 O. R. 373.

1896

*In Re*PROVINCIAL
FISHERIES.

Girouard J.

According to the English law the public cannot acquire any right of fishing in fresh navigable waters, because the word "navigable" imports that the river or lake is one in which the tide ebbs and flows. The fishing right of the public is therefore limited to what is called the foreshore and arms of the sea and tidal navigable rivers and lakes; but, wherever no special grant had been made by the Crown before Magna Charta, or can be presumed from prescription, the Crown holds the same for the public; for, by Magna Charta and other statutes, the Crown is expressly precluded from making fresh fishing grants in those waters; *Warren v. Mathews* (1); *Ward v. Creswell* (2); *Carter v. Murcot* (3); *Bagott v. Orr* (4); *Malcomson v. O'Dea* (5); *Edgar v. Commissioner for English Fisheries* (6); *Bristow v. Cormican* (7); *Pearce v. Scotcher* (8); *Black*. (9); *Chitty, Prer.* (10); *Hale, De Jure Maris* (11); *Coke, First Institute, Thomas'* (12); see also *Angell on Tide Waters*; *Gould on Waters and Moore, Law of the Foreshore* (13), where other cases are collected.

The old French law, followed in La Nouvelle France, never made the distinctions of the English common law as to tidal and fresh navigable waters, and laid no restriction upon the power of the King to make fishing grants, except with regard to navigation. At the time of the treaty of cession the law of France had been changed in some respects; the sea-coast fisheries had been declared free to the French people by the "Ordonnance de la Marine" of 1681, but this ordonnance as well as the ordonnance "des Eaux et Forêts"

(1) [1702] 6 Mod. 73.

(2) [1741] Willes's Rep. 265.

(3) [1768] 4 Burr. 2163.

(4) [1801] 2 B. & P. 3 ed. 472.

(5) [1862] 10 H. L. Cas. 593.

(6) [1871] 23 L. T. 732.

(7) [1878] 3 App. Cas. 641.

(8) [1882] 9 Q. B. D. 162.

(9) Vol. 2 p. 39.

(10) P. 143.

(11) CC. IV. & V.

(12) Thomas' ed. vol. 1, p. 47, n. 2, p. 230, n. 9.

(13) 3 ed. pp. 436-591.

of 1669 and other subsequent statutes on the same subject, which will be found collected in Guyot, Vo. Pêche, were never in force in Canada for want of registration by the Superior Council of Quebec, as being unsuitable to the condition of the colony. Before the cession to Great Britain in 1763 the King was therefore the sole owner of the foreshore and the beds and banks of all navigable and floatable rivers, and of the fisheries therein, subject to the public right of navigation and of fishing wherever no exclusive grant had been made. This public right of navigation was a statutory law right which could be interfered with only by the legislative authority. See ordonnances of February 1415, art. 679; May 1520, art. 1, 2, 3; January 1583, art. 18; Isambert, Vol. 8, p. 427, Vol. 12, p. 173, Vol. 14, p. 526. The public right of fishing was a mere royal grace or favour which could be ended by the Crown. The *Edits et Ordonnances* contain many decisions of the Canadian Intendants of Justice where this right of the Crown is fully recognized. Vol. 2 pp. 21, 294, 297, 428, 536, 542, 590; Vol. 3, pp. 203, 244, 253, 263, 269, 321, 382, 390, 428, 456. Puffendorf, quoting Grotius, in his *Treatise De Jure Naturæ et Gentium*, tells us that this right was even recognized by the law of nations. He says:

De là il paroît que le droit qu'ont les particuliers, dans un Etat, de ramasser ou de prendre des choses mobilières dont personne ne s'est encore emparé, d'aller à la grande ou à la petite chasse, de pêcher, et autres choses semblables; que ce droit, dis-je, dépend uniquement de la volonté du Souverain, et non d'aucune loi naturelle. (1)

Can it be said that, under the treaty of cession, the King of England has smaller rights than the King of France had, especially as the Imperial Parliament has declared in 1774, by a statute known as the Quebec

1896
In Re
 PROVINCIAL
 FISHERIES.
 Girouard J.

(1) Barbeyrac [ed. 1706] vol. 1, p. 524.

1896
 In Re
 PROVINCIAL
 FISHERIES.
 ———
 Girouard J.
 ———

Act (1), that, "in all matters of controversy relative to property and civil rights," the old laws and customs shall remain in force in Canada until amended or repealed by competent authority? Courts of justice in Quebec have often answered in the negative with regard to both water lots and fishing grants,—*Droits de Pêche et Lots de grève*. As early as 1816, the Court of King's Bench, quoting French authorities, was saying :

Les rivières navigables et leurs grèves sont choses publiques. Or un individu ne peut avoir la possession de choses publiques sans un titre de la Couronne. *Morin v. Lefebvre* (2),

Later on, in 1854, the Superior Court of Quebec, composed of Chief Justice Reid and Meredith J., held, in *Regina v. Baird* (3), that riparian proprietors, in this case along tidal waters, namely at Anse des Mères, near Quebec, are not entitled, as a matter of right, to obtain a grant of beach lots in the River St. Lawrence, fronting their property, in preference to any other, and that in particular cases the Crown will grant such beach lots to persons not riparian proprietors. Meredith J. observed :

To this important question I have given the most careful consideration, and am of opinion, that, although under ordinary circumstances, a riparian proprietor has a strong equitable claim to a grant of the beach in front of his property in preference to any other person, yet that as a matter of law, a grant may be legally made of such beach, against the will of the riparian proprietor and to such other person as the Sovereign and Her advisers, taking into consideration the particular circumstances of each case, may in their discretion think most deserving of such grant, and most likely to render it conducive to the public good.

It is beyond doubt that under the old law of France, the Crown could, with the view of promoting industrial enterprises, make grants of such portions of any navigable river as were not required for navigation ; such grants were then required for mill sites more frequently

(1) 14 Geo. 3 ch. 83, s. 8.

(2) 1 R. de L. 354 ; 3 R. de L. 303.

(3) 4 L. C. R. 331.

than for any other purpose, and it is generally with reference to property of that kind that the right of the Crown in this respect is spoken of.

Guyot, in his *Trait des Fiefs* (1), says : “ Nous ne parlerons point des rivières navigables. Tout le monde sait que ces grandes rivières sont au Roi, qu’elles sont du domaine du Roi, et que si quelques seigneurs y ont droit de pêche, de moulins ou autres plus grands droits, c’est qu’ils sont fondés sur des titres confirmés par nos Rois.”

Chief Justice LaFontaine, in the admirable opinion which he delivered as president of the Seigniorial Court in 1856, after reviewing all the authorities and the provincial statutes from 1807, comes to this conclusion :

De ce qui précède, je conclus que les seigneurs, comme tous autres particuliers, ont pu acquérir des droits dans les rivières navigables, mais non par de plein droit comme seigneurs des fiefs adjacents à ces rivières à la différence des rivières non navigables ni flottables dont la propriété leur était dévolue à ce seul titre. Pour acquérir ces droits dans une rivière navigable, il leur fallait une concession expresse de la part du souverain ; et encore fallait-il que ces droits, pour être valablement concédés, ne fussent pas contraires à l’usage public de ces rivières pour la navigation et le commerce, lequel usage est inaliénable et imprescriptible.

Il faut dire la même chose de la propriété des rivières non-navigables ni flottables, soit qu’elle soit restée aux mains du seigneur, soit qu’elle soit passée en celles de ses censitaires, ce qui est une question de titre ou de possession. Le seigneur, ou le censitaire riverain, est obligé de souffrir les servitudes auxquelles le droit naturel et le droit civil, de même que des règlements de police faits par une autorité compétente, ont put assujétir ces rivières.

And in a recent case in 1886 *Lavoie v. Lepage* (2), the Court of Review, composed of Casault, Caron and Andrews JJ., said :

Il n’y a aucun doute que, sans concession spéciale de la Couronne, les propriétaires riverains n’ont pas le droit d’établir des pêches fixes dans les rivières navigables qui bordent leurs propriétés, et que les seigneurs n’ont pu accorder ce droit aux censitaires que lorsqu’ils l’avaient obtenu eux-mêmes de la Couronne.

At the time of the cession to Great Britain in 1763, these principles applied not only to the province of

1896

~
In Re

PROVINCIAL
 FISHERIES.

—
 Girouard J.
 —

(1) Vol. 6, p. 663.

(2) 12 Q. L. R. 104.

1896

*In Re*PROVINCIAL
FISHERIES.

Girouard J.

Quebec, but to the whole country known as Canada, or La Nouvelle France, including Upper Canada; they also applied to Acadia, Cape Breton and Prince Edward Island, and part of New Brunswick of to-day, when these colonies were in possession of the French. La Collection de Manuscrits, recently published by the government of Quebec, gives a most remarkable instance of an important sea-coast and inland fishery grant made in 1682 to one Berger by the French king, on the coast of Acadia, without the authority of his parliament, and in spite of the protest of the colonial authorities. Vol. 1, 298, 304, 329.

True, the laws of England as to property and civil rights were introduced into the province of Upper Canada (1), and also in the Maritime Provinces, without the intervention of the Imperial Parliament; see Houston, Const. Documents of Canada (2); Congdon, Nova Scotia Digest (3); but it seems to me very questionable if the prerogatives and proprietary rights of the Crown were thereby altered with regard to navigable waters; and in several cases the courts of Ontario have decided that they were not with regard to that part of the River St. Lawrence which is situated in the province of Ontario.

In *Gage v. Bates* (4), Richards J. said:

The opinion expressed by the learned Judges of the Common Pleas in *Parker v. Elliott* (5), although not expressly deciding this point, seems to me to lead to the conclusion at which we have arrived, that the rule of the common law as to the flux and reflux of the tide being necessary to constitute a body of water a navigable river, does not apply to a case like the present.

And in *Dixon v. Snetsinger* (6), Mr. Justice Gwynne, delivering the judgment of the court, said:

(1) U. C. 32 Geo. III, ch. 1, 1792. (4) [1858] 7 U. C. C. P. 116.

(2) Pp. 3-22.

(5) 1 U. C. C. P. 470.

(3) Pp. 1336, 1374.

(6) [1872] 23 U. C. C. P. 235.

Prior to the passing of this Act (1), the bed of the River St. Lawrence was vested in the Crown for the public use and benefit, as a navigable river within the meaning of that term as understood by the civil law, and not affected by the rule of the common law of England; and a grant by the Crown wherein land should be described as being bounded by the water's edge, or the bank of the river, or such like expressions, would not pass *ad medium filum aquæ*, as it would in rivers above the flux and reflux of the tide by the common law of England. The question then is: Can and does the provincial statute so alter the character in which the bed of the River St. Lawrence is held by the Crown since the passing of that Act in Upper Canada, as that a grant by the Crown of lands bordering on the river by the words "along the water's edge," or "the bank of the river," or "along the river," or such like, should convey the bed of the river *ad medium filum aquæ*, subject to an easement in the public of navigating on the waters, but divesting the Crown of its estate in the bed of the river?

1896

In Re
PROVINCIAL
FISHERIES.

—
Girouard J.
—

Is the language of this provincial statute sufficient, and is its object to introduce this rule of the common law as to navigable rivers, which when applied to the rivers in an insular country such as England may be perfectly consistent with reason and common sense, but which is neither conformable to reason or common sense when applied to such a river as the St. Lawrence, which is not only a highway dividing the territories of different nations for the greater part of its extent, but which traverses more than half a continent, and with a little assistance from art is navigable for vessels navigating the ocean for more than 1,500 miles above tide-waters, and which in its course forms lakes more than 100 miles in width?

See also *The Queen v. Meyers* (2).

It is very doubtful that the distinctions of the English common law and the restrictions of Magna Charta were ever in force outside of England and Ireland, and some of the British colonies in North America; they have not been accepted by Scotland (3); they do not apply to colonies where a different system of law prevails, for instance, in the Cape of Good Hope, where rivers both navigable and non-navigable are held according to the principle of the Dutch Roman law (4). So far as the British colonies

(1) 32 Geo. III, ch. 1.

(2) [1853] 3 U. C. C. P. 305.

(3) 1 Bell Principles 9th ed. pp. 456-461.

(4) *Van Heerden v. Weise*, 1 Buchanan App. R. 5; *Beaufort West v. Mernicle*, 2 Juta App. R. 36; *French Hoek Municipality v. Hugo*, 3 Juta App. R. 346.

1896
 ~~~~~  
*In Re*  
 PROVINCIAL  
 FISHERIES.  
 ———  
 Girouard J.  
 ———

governed by the English law are concerned, several at least seem to have refused to admit them. Many instances of royal grants in North America and in India may be quoted where the restrictions of Magna Charta were entirely ignored by the Crown, e.g. the charters to the East India Company, and to the Hudson Bay Company and other grantees in the New England colonies. Cases are not wanted either to establish that long before the intervention of legislatures the colonial authorities would not follow the distinctions of the English common law, and the decisions in this respect are most interesting.

In *Attorney General v. Perry* (1), Richards C. J., delivering the judgment of the court, said :

In this country, the practice has obtained in towns and cities for the Crown to grant land covered with water, and generally to the owner of the bank, when adjacent to a navigable stream, and grants so made have never been cancelled for want of power in the Crown to make the grant.

In *Warin v. London Loan Co.* (2), affirmed on appeal (3), Wilson C. J. said :

It cannot therefore be disputed that the Crown had and has the right to grant water lots, that is, as I understand it, the *soil* which the Crown holds as its own special property ; Hale's *De Jure Maris* ; *Parmeter v. Attorney General* (4) ; and the Crown right of the *jus publicum* for navigation and the like ; that is, the Crown can transfer the whole of its rights, private and public, to a grantee, subject, as the statute says, that the grantee shall not interfere with the use of the harbour as a harbour, or with the navigable rights of the public.

But as to tidal waters, the Supreme Court of Nova Scotia, Hill J., adopted the principles of the English law and held in *Meisner v. Fanning* (5) that the Crown cannot grant the waters of a navigable arm of the sea, so as to give a right of exclusive fishing therein.

(1) [1865] 15 U. C. C. P. 331.

(4) 10 Ont. P. R. at p. 431.

(2) [1885] 7 O. R. 724.

(5) 3 N. S. Rep. (Thomson) 97.

(3) 12 Ont. App. R. 327; 14 Can. S. C. R. 232.

In *Rose v. Belyea* (1), the Supreme Court of New Brunswick held that

the soil of a public navigable river (in this case the St. John River, within the ebb and flow of the tide) is in the Crown, and the right of fishing belongs to the public. Since Magna Charta the Crown cannot grant the exclusive right of fishing in a public navigable river to a private individual.

And in *The Queen v. Lord* (2), Peters J., delivering the judgment of the Supreme Court of Prince Edward Island, said :

With respect to these public rights, viz., navigation and fishery, the King is, in fact, nothing more than a trustee of the public, and has no authority to obstruct, or grant to others any right to obstruct or abridge the public in the free enjoyment of them. But subject to these public rights, the King may grant the soil of the shore and all the private rights of the Crown with it. Yet, until he does so, he holds the soil clothed with the *jus publicum*, and while the soil thus remains the King's no unnecessary or injurious restraint upon the public, in the use of the shore, would be imposed by the King, the *parens patrie*.

In the United States it is well settled law that the title to all tidal waters and their beds and the fisheries therein is vested, not in the United States, but in the several States of the Union, subject to the regulations of Congress wherever connected with interstate or foreign commerce. Likewise in many of the States, inland rivers and lakes navigable are, like tide-waters, state public property. Gould on Waters (3); American and English Encyclopedia of Law (4); Story Const. (5).

Whether the restrictions and distinctions of the English law were in force or not in the English colonies I consider that they are of no importance for the determination of the questions submitted to us, as they have been removed by colonial legislation before confederation in most, if not all, the provinces, as being

1896

*In Re*PROVINCIAL  
FISHERIES.

Girouard J.

(1) [1867] 1 Hannay 109.

(2) [1864] 1 P. E. I. 257.

(3) Pp. 72-78.

(4) Vos. Navigable Waters and Fisheries.

(5) Ed. 1891, par. 1075.

1896

*In Re*PROVINCIAL  
FISHERIES.

Girouard J.

unsuitable to their condition on this continent. In Quebec several statutes have been passed bearing more or less upon the subject of fisheries. The earliest one is 47 Geo. III, ch. 12, s. 1, (1807), which enacts :

That all and every his Majesty's subjects shall peaceably have, use and enjoy the freedom of taking bait and of fishing in any river, creek, harbour or road, with liberty to go on shore on any part within the inferior district of Gaspé, between Cap Cat on the south side of the River St. Lawrence and the first rapid of the River Restigouche within the said district, and on the Island of Bonaventure opposite to Percé, for the purpose of salting, curing and drying their fish, to cut wood for making and repairing stages, flakes, hurdles, cook-rooms and other purposes necessary for preparing their fish for exportation, or that may be useful to their fishing trade, without hindrance, interruption, denial or molestation from any person or persons whomsoever. *Provided such river, creek, harbour or road, or the land upon which such wood may be cut doth not lie within the bounds of any private property by grant from his Majesty or other title proceeding from such grant by his Majesty, or by grant made prior to the year one thousand seven hundred and sixty, or held under and by virtue of any location certificate or title derived from any such location certificate.*

See also L. C. Stat. 1824, ch. 1; 1827, ch. 11; 1831, ch. 38; 1836, ch. 55; Can. 1851, ch. 102; 1853, ch. 92.

By the Seigniorial Acts, Cons. St. L. C. ch. 4, s. 62, par. 3, the legislature of the late province of Canada enacted :

*All unconceded lands and waters in the said Seigniories (in Lower Canada) shall be held by the Crown in absolute property, and may be sold or otherwise disposed of accordingly, and when granted, shall be granted in franc alevu roturier.*

On the 1st August, 1866, the Civil Code of Lower Canada came into force and article 400 declares the law to be and to have been that "navigable and floatable rivers and streams and their banks, the sea-shore, lands reclaimed from the sea, ports, harbours and roadsteads" are to be "considered as being dependencies of the Crown domain." See *Rex v. Laporte* (1); *Samson v.*

*McCauley* (1); *Regina v. Baird* (2); *Béliveau v. Levasseur* (3); *Normand v. Cie de Navigation* (4); *Thomson & Hurdman v. Atty. Gen. of Quebec* (5). Then comes article 414 which declares that the "ownership of the soil carries with it ownership of what is above and what is below it;" and art. 587: "The right of hunting and fishing is governed by particular laws of public policy, subject to the legally acquired rights of individuals." It is clear that before confederation, in Quebec, the proprietary right of the Crown (in right of the province) in the ungranted public and private fisheries was not subject to any restriction, and that the right of the Crown to issue fishing grants by lease, license or otherwise, in all ungranted navigable and non-navigable waters, whether tidal or not, remained unrestricted as in old France and in England before Magna Charta, except with regard to navigation (6). A few years before the promulgation of the Quebec Code the legislature of the late province of Canada had practically adopted the same principle by enacting first in 1858, that "the Governor in Council may grant fishing leases and licenses on lands belonging to the Crown," meaning evidently lands covered by water, without any restriction as to tidal or non-tidal, navigable or non-navigable waters; 22 Vic. ch. 86, s. 4; Can. Con. St. (1859), ch. 62, s. 1, amended in 1865 by 29 Vic. ch. 11, s. 3; and second, in 1860 by declaring (7):

Whereas doubts have been entertained as to the power vested in the Crown to dispose of and grant water lots in the harbours, rivers and other navigable waters in Upper Canada [there was no doubt as to Lower Canada] and it is desirable to set at rest any question which might arise in reference thereto, it is declared and enacted, that it has been heretofore and that it shall be hereafter lawful for the Governor in Council to authorize sales, or appropriations, of such

(1) de Bellefeuille's Code, p. 85.

(2) 4 L. C. R. 325.

(3) 1 R. L. 720.

(4) 5 Q. L. R. 215.

(5) Q. R. 4 Q. B. 409.

(6) Con. St. L. C. [1860] ch. 26, s. 2.

(7) 23 Vic. ch. 2, s. 35.

1896

*In Re*PROVINCIAL  
FISHERIES.

Girouard J.

water lots under such conditions as it has been or it may be deemed requisite to impose.

No reservation was made of the public right of navigation, but when the provision was re-enacted in 1877 and 1887 by the legislature of Ontario, the following proviso was added to the clause :—

But not so as to interfere with the use of any harbour as a harbour, or with the navigation of any harbour, river or other navigable water (1).

Likewise, chapter 101 of the Revised Statutes of New Brunswick, 1854, tit. 22, s. 5, permits the granting of licenses “for fishing stations on ungranted shores, beaches or islands;” and this provision applied to tidal and non-tidal waters. In Prince Edward Island a statute was passed in 1862 (2) authorizing the Governor General in Council to issue

any grant in fee \* \* \* \* or any lease for any term of years \* \* \* of any part or parts of the hitherto ungranted portion of the sea-shore of this island, or of the shores of the bays and rivers thereof,

provided the consent of the riparian proprietors be first obtained. Similar statutes may have been passed by other provinces before confederation, although I am not in a position to say. With regard to the provinces where they have not been adopted I should think that the restrictions of Magna Charta, if ever in force, would continue to apply until removed by subsequent legislation of the legislatures of the provinces interested, as representing the public for whose benefit they exist.

The Dominion undoubtedly felt the weakness of its position when it invited the provinces to a compromise by 54 & 55 Vict., c. 7, (1891), which they refused to accept and so far their action, at least with regard to

(1) R. S. O. [1877] ch. 23, s. 47 ; R. S. O. [1887] ch. 24, s. 47. (2) 26 Vict., ch. 6, ss. 1 & 2.

fresh navigable rivers, has been sanctioned by high judicial authority (1).

In *Steadman v. Robertson* and *Hanson v. Robertson* (2), overruling *Robertson v. Steadman* (3), Mr. Justice Fisher, in delivering the judgment of the Supreme Court of New Brunswick, said at page 599 :

1896

*In Re*PROVINCIAL  
FISHERIES.

Girouard J.

I have come to the following conclusions : that any lease granted by the Minister of Marine and Fisheries to fish in fresh water rivers which are not the property of the Dominion, or in which the soil is not in the Dominion, is illegal ; that where the exclusive right to fish has been acquired by grant of the land through which such river flows there is no authority given by the Canadian Act to grant a right to fish ; and also that the ungranted land being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and in such case is in the Crown as trustee for the people of the province, and a license to fish in such stream is illegal.

When the case came up before the Supreme Court of Canada in 1882 on the petition of right of *The Queen v. Robertson* (4), the majority of that court, composed of Ritchie C.J., Strong, Fournier and Henry J.J. likewise held :

That the ungranted lands in the province of New Brunswick being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the province, and therefore a

(1) Early in 1871, when the treaty of Washington was being discussed by the British and American Commissioners, one of them being no less a constitutional authority than Sir John A. Macdonald, Canada was told in unequivocal words that the inshore fisheries were the property of the provinces. The 36th protocol records that "the American Commissioners inquired whether it would be necessary to refer any arrangement for purchase (of the use of

these fisheries) to the Colonial or Provincial Parliaments. The British Commissioners explained that the fisheries, within the limits of maritime jurisdiction, were the property of the several British colonies, and it would be necessary to refer any arrangement which might affect colonial property or rights to the Colonial or Provincial Parliaments." (1 *Revue Critique* 324).

(2) 2 P. &amp; B. 580.

(3) 3 Pugs. 621.

(4) 6 Can. S. C. R. 52.

1896 license by the Minister of Marine and Fisheries to fish in streams running through provincial property would be illegal.

*In Re*

PROVINCIAL  
FISHERIES.

Girouard J.

In *Normand v. La Cie de Navigation du St. Laurent* (1), decided by the Court of Appeals of Quebec, composed of Dorion C.J., Monk, Ramsay, Tessier and Cross JJ., in 1879, it was held :

Que les lettres patentes pour lots de grève et à eaux profondes dans la rivière Saint-Maurice, rivière navigable, ont été légalement émises par le gouvernement de la province de Québec et qu'elles ne sont pas *ultra vires* de ce gouvernement.

And in the more recent case of *Thompson and Hurdman v. Attorney General of Quebec* (2), the same Court of Appeals composed of Baby, Bossé, Blanchet, Hall and Wurtele JJ., reaffirmed in 1895 the principle laid down in *Normand v La Cie du Navigation du St. Laurent* (1), and held that the Ottawa, although not navigable in its entire course, was a floatable river, and the property of the province of Quebec to the middle of the stream, Hall and Wurtele dissenting only upon the ground that the river was not floatable at the particular spot in question, namely the Chaudière Falls. Mr. Justice Blanchet said :

Ce principe ne peut être contesté et nos tribunaux l'ont reconnu dès 1854 dans la cause *Régina v. Baird* (3), et assez récemment dans la cause de *Normand et la Compagnie de Navigation du Saint Laurent* (1) dans laquelle cette cour, renversant le jugement du juge Polette à Trois-Rivières, a formellement déclaré que, parmi les attributions des différentes provinces par la section 92 de l'Acte de la Confédération de 1867, sont comprises celles d'administrer et de vendre les terres publiques et que ce droit renferme celui de vendre et de disposer des droits de grève ou des lots de grève formant partie du domaine territorial de la province, à condition toutefois de ne pas diminuer les avantages qu'offrent les rivières pour les fins de la navigation, dont le contrôle exclusif appartient à la Puissance du Canada.

Mr. Justice Bossé, delivering the judgment of the court, said :

(1) 5 Q. L. R. 215.

(2) Q. R. 4 Q. B. 409.

(3) 4 L. C. R. 325.

De ce qui précède, il résulte que, lors des Lettres Patentes octroyées à Rowe et Hurdman, l'Etat, représenté par le gouvernement de la Province de Québec, était propriétaire des terrains et lots et pouvoirs d'eau qu'il a concédés par ces Lettres Patentes, et que s'il ne l'était pas, il l'est devenu par la construction des glissoires qui ont rendu l'Ottawa flottable et en ont permis l'exploitation en fait pour la descente des trains de bois.

1896  
*In Re*  
 PROVINCIAL  
 FISHERIES.  
 ———  
 Girouard J.  
 ———

The case of *Niagara Falls Park v. Howard* (1), just decided by the courts of Ontario, is almost as explicit. Chancellor Boyd, in a very elaborate judgment, held in the court below that a certain chain reserve along the banks of the Niagara River and the slope between the top of the bank and the water's edge formed part of the ungranted lands of the Crown, and as such belonged first to Upper Canada, then to the province of Canada, and on confederation became part of the public domain of the province of Ontario. This judgment was affirmed in appeal on the 10th of March, 1896, by Hagarty C. J., Burton, Osler and Maclellan JJ (2). Chief Justice Hagarty said :

I find that in 1871 Sir John A. Macdonald, then Minister of Justice, than whom few public men were better versed in the relations between the Dominion and the provinces and in the course of legislation preceding confederation, gives his official opinion that this chain reserve along the top of the river bank formed part of the Crown lands of the late province of Canada, and passed under the British North America Act, as lands belonging to the province of Canada at the union, to the province of Ontario.

It does not appear that this point were seriously contested. The whole subject of contention seems to have been as to whether the lands in question were Ordnance property or simply Crown lands. Mr. Justice Maclellan concludes :

I am of opinion, therefore, that the appellants have not made out that the land in question is land which answers the description in the 9th subsection of the 3rd schedule of the British North America Act, which it was necessary for them to do in order to sustain their appeal.

(1) 23 O. R. 1.

(2) 23 Ont. App. R. 356.

1896

*In Re*PROVINCIAL  
FISHERIES.

Girouard J.

And finally in the case of *The Queen v. Moss* (1), our own court has very recently, 18th May, 1896, held unanimously that the title to the soil in the beds of navigable rivers is in the Crown in right of the province, and not in right of the Dominion (1). The learned Chief Justice, in delivering the judgment of the court, said :

The bed of the River St. Lawrence at the date of confederation was vested in the Crown in right of the late province of Canada. It therefore formed part of the lands "belonging to that province" which the 109th section of the British North America Act declared should upon confederation belong to the province of Ontario, within the limits of which it was "situate."

It was argued by the learned counsel for the Crown that the title to the soil in the bed of the river, including that of the channel between Sheik's Island and the north bank, was in the Dominion. It is, however, impossible to find any provision of the British North America Act which would have the effect of vesting the title to the beds of navigable rivers in the Crown otherwise than as representing the provinces.

If in the case of *Dixson v. Snetsinger* (2), it was intended to decide that the title to the bed of the river was in the Dominion, I do not so far agree with that case. I find, however, in examining the report that the court expresses the opinion that the title was in the Crown, without distinguishing between the Dominion and the province.

If the proposition that the ownership of the fisheries and the exclusive right of fishing are to be considered as part of the ownership of the soil in the beds of the waters be correct, and I believe it cannot be disputed, it seems to me that according to the above decisions the title to the beds of fresh navigable rivers, and the right of fishing and of granting fishing licenses and leases in the same, is vested in the Crown in right of the provinces and not in right of the Dominion. On several occasions the provinces have claimed this right of ownership to the exclusion of the Dominion. They have granted beach lots and fishing licenses and leases

(1) 26 Can. S. C. R. 322.

(2) 23 U. C. C. P. 235.

in navigable waters situate within their respective boundaries. Ontario and Quebec have passed special legislation to that effect; R. S. O. [1877], ch. 2, s. 35; R. S. O. [1887], ch. 24, s. 47; R. S. Q. [1888], art. 1375-1378; and this right, whatever it may be, whether governed by the principles of the English law or the French law, or any other law, must continue to exist, and be recognized unless taken away and transferred to the Dominion of Canada by the British North America Act. Has it been taken away? That seems to me the whole question. In my opinion, the British North America Act is not silent; it is not even open to any doubt; it is most explicit and fully supports the contention of the provinces.

1896

*In Re*PROVINCIAL  
FISHERIES.

Girouard J.

Section 109 says :

All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick at the union and all sums due or payable for such lands, mines, minerals or royalties shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same.

Section 117 :

The several provinces shall retain all their respective public property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country.

The "public property not otherwise disposed of by this Act," is mentioned in section 108 :

The public works and property of each province, enumerated in the third schedule to this Act, shall be the property of Canada.

#### THIRD SCHEDULE.

PROVINCIAL PUBLIC WORKS AND PROPERTY TO BE THE PROPERTY  
OF CANADA.

1. Canals with lands and water power connected therewith.
2. Public harbours.
3. Lighthouses and piers, and Sable Island.
4. Steamboats, dredges and public vessels.

- 1896  
 ~~~~~  
In Re
 PROVINCIAL railway companies.
 FISHERIES. 7. Military roads.
 Girouard J. 8. Custom-houses, post offices, and all other public buildings, except
 such as the Government of Canada appropriate for the use of the
 provincial legislatures and governments.
 9. Property transferred by the Imperial Government, and known
 as Ordnance property.
 10. Armouries, drill sheds, military clothing and munitions of war,
 and lands set apart for general public purposes.

This court decided in 1881 that the soil and bed of the foreshore in the Harbour of Summerside, Prince Edward Island, is a "public harbour" within the meaning of section 108, and of the third schedule of the Act, and is the exclusive property of the Dominion, and to that extent that decision is binding upon me. Relying therefore upon the authority of *Holman v. Green* (1), I am of opinion that "public harbours" (whatever may be the meaning of the term within section 108 and the third schedule of the British North America Act, for I am not called upon to express any opinion upon that point under the Order of Reference), being the property of the provinces at the time of confederation, became the property of the Dominion, and that, as such proprietor, the Dominion became the owner of the soil and of the fisheries therein. The same rule should be applied to canals, lighthouses, piers, Sable Island, Ordnance property, lands set apart for general public purposes, and other public works enumerated in the third schedule, and also lands or public property assumed by the Dominion for fortifications or for the defence of the country under section 117. The Federal Act has made no other exception, and I am not prepared, for reasons of public policy, to extend its provisions. It might have been more

(1) 6 Can. S. C. R. 707.

politic and in the interest of the people of this Dominion, that the Constitutional Act should have placed the foreshore of the rivers and great lakes and all navigable waters upon the footing of public harbours; in fact, it is difficult to understand why a different rule should prevail in respect of these matters; but courts of justice cannot correct or amend the constitution or any other statute; they are bound by its terms and its plain meaning; and as I understand sections 109 and 117 of the British North America Act, they clearly mean that the provinces do retain all the ungranted beds of navigable and non-navigable waters within their respective limits, whether tidal or not, and consequently the ungranted fisheries therein, including the foreshore, subject only to the exceptions mentioned in sections 108 and 117 of the Act.

A contention has been advanced by the Dominion that the words "Rivers and Lake Improvements" mean "Rivers," and "Lake Improvements." This interpretation would lead to the absurd conclusion that the ungranted beds of non-navigable rivers are the property of the Dominion, while the "great lakes" would remain the property of the provinces, the word "Rivers" not being large enough to comprehend such lakes. The text has no punctuation. The *s.* thrown in at the end of the word "river" is, to my mind, a clerical error or misprint. It is not to be found in the Quebec Conference resolutions, nor in the address of the provinces to the Queen praying for the Confederation Act, which read "River and Lake Improvements." When the Act was first published in the two official languages in Canada, the Dominion authorities adopted as correct the following translation: "Améliorations sur les lacs et rivières" (1), which is also to be found in the address of the provinces to the Imperial Parliament.

1896
In Re
 PROVINCIAL
 FISHERIES.
 Girouard J.

(1) Can. St. 1867-68; Can. 31. V. ch. 1, s. 10.

1896

*In Re*PROVINCIAL
FISHERIES.

Girouard J.

It was also urged by the Dominion that as the Dominion can exclusively make laws respecting "Sea-coast and Inland Fisheries," under section 91, par. 12 of the British North America Act, it can grant fishing leases or licenses purporting to convey the right of fishing, as it intends to do by section 4 of the Fisheries Act. It cannot thus exercise the right of the owners, the provinces. To hold otherwise would be to confound the ownership of, with the police jurisdiction over, navigable waters. Championnière, in his learned treatise "Eaux Courantes" n. 360, says :

Le droit de pêche ne doit pas être confondu avec les règlements de police relatifs à l'exercice de ce droit et d'en surveiller l'exécution.

The Dominion may regulate the fisheries, for instance, the propagation and protection of the fish, the mode and season of fishing. I believe it may also exclude or admit foreigners, and declare as the Parliament of the late province of Canada did to a certain extent in 1858, by 22 Vict., ch. 86, s. 6, Consolidated Statutes of Canada, 1859, ch. 62, s. 3, that all subjects of Her Majesty, or only the inhabitants of Canada, may fish in the public fisheries of this country; it may also provide for a license or permit to fish and demand a reasonable fee for the same, before any one can exercise the right of fishing under a special grant from the province; but in making such regulations and provisions the Dominion must be careful not to destroy or injure the proprietary rights of the provinces. *Cushing v. Dupuy* (1); *Parsons v. The Citizens' Insurance Co.* (2). The Dominion cannot exercise the rights of the owner of the fisheries, as is intended by section 4 of the Canada Fisheries Act, and issue "fishery leases and licenses for fisheries wheresoever situated or carried on." Section 91 of the British North America Act does not grant any right of owner-

(1) [1880] 5 App. Cas. 409.

(2) [1881] 7 App. Cas. 96.

ship in the fisheries ; the Dominion does not own the fisheries any more than it owns the banks, railways, telegraphs or ships which it may regulate. I may here quote the language of the Privy Council in *St. Catharines Milling and Lumber Co. v. The Queen* (1). Lord Watson said :

1896
 In Re
 PROVINCIAL
 FISHERIES.
 Girouard J.

The fact that the power of legislating for Indians and for lands which are reserved to their use has been entrusted to the Parliament of the Dominion, is not in the least degree inconsistent with the right of the provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.

It was also contended that section 4 of the Fisheries Act comes within the power of the Dominion to raise money "by any mode or system of taxation." British North America Act, s. 91, par. 3. No doubt the Dominion can tax the fishermen as it may tax any other occupation or any other class of the community ; it can also impose a tax upon the fish caught by them ; but it must do so by another enactment than section 4 of the Fisheries Act. Its law must be a provision for a "tax," and not for the price of a "lease or license" of the right of fishing, which it does not possess.

The counsel for the Dominion has cited an Imperial statute (2) to show that the power to regulate trade and commerce must include the power to dispose of the fisheries, in fact the right of ownership. But that statute seems to lead to the very opposite conclusion. Section 7 says that :

All such parts and right and interests as then belong to Her Majesty in right of the Crown of and in the shore and bed of the sea and of every channel, creek, bay, estuary and of every navigable river of the United Kingdom, so far up the same as the tide flows (and which are hereinafter for brevity called the foreshore) except as in this Act provided, shall, subject to the provisions of this Act, and subject also to such public and other rights as by law exist in, over or affecting the foreshore or any part thereof, be and the same are hereby transferred

(1) [1888] 14 App. Cas. 59.

(2) 29 & 30 Vict. ch. 62.

1896
 ~~~~~  
*In Re*  
 PROVINCIAL  
 FISHERIES.  
 \_\_\_\_\_  
 Girouard J.

from the management of the Commissioners of Woods to, and thenceforth the same shall be, under the management of the Board of Trade.

Sections 14 and 15 provide for the mode of compensation to be paid to the Land Revenue of the Crown "for the transfer effected by this Act of the rights and interests of the Crown in the foreshore." We have no such statute in Canada, and if in England it was deemed necessary to have legislative enactment to vest the property rights of the Crown in the public fisheries of Great Britain in a special department of the public service, it seems to me conclusive that similar rights in Canada cannot be transferred to the Dominion or any one else without legislative action. The Imperial Parliament has not done so by the British North America Act, and the provinces, who, as owners of the fisheries, might perhaps do so, have on the contrary asserted in most emphatic terms that they intend to keep this part of their public property. The Dominion, therefore, has only a power to regulate the fisheries and to pass general laws to that effect, except as to public harbours and other Dominion property where it may act as proprietor and regulator.

Some allusion has been made to what is termed the *jus publicum* in tidal waters, which, it is claimed, should be held by the Dominion under the general power conferred on the Dominion by section 91 of the British North America Act, "to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces." But is the ownership of the inshore fisheries one of the "matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces"? Can it be disputed that the provinces have not exclusive jurisdiction over the management

and sale of their public lands and property and civil rights in the province; sec. 92, pars. 5 and 13? Can it be denied that under sections 109 and 117 of the British North America Act, all ungranted lands, and generally all public property (with a few exceptions enumerated) continue to belong to the provinces? The Dominion may make laws concerning sea-coast and inland fisheries and shipping and navigation, and to that extent it is vested with the *jus publicum* in tidal and navigable waters, but in my humble opinion nothing more.

Finally, it is suggested that the ownership of the lands covered by sea, within the three miles limit, generally known as the foreshore, and of all lands covered by tidal waters, is subject, under section 109 of the British North America Act, to a "trust" or "interest" created by Magna Charta in favour of the public, which, since confederation, is held and represented by the Dominion for the benefit of the people of the Dominion at large, and is under the control of the Dominion Parliament. It is admitted that this suggestion, if well founded, would not apply to Ontario, where no tidal waters are to be found. In the face of the Civil Code and of the statutes in force in Quebec at the time of the union, it cannot be considered as applicable to that province. For reasons already advanced, nearly all the Maritime Provinces are free from the restrictions imposed by Magna Charta, if ever in force there.

But even if they were in force in all the provinces at the time of the union, can it be said that they constituted a "trust or interest" within the meaning of section 109 of the British North America Act? Was this "trust" or "interest" distinct from the province for whose benefit it was held by the Crown? It cannot be denied that this "trust" or "interest," whatever it was,

1896

*In Re*PROVINCIAL  
FISHERIES.

Girouard J.

1896

*In Re*PROVINCIAL  
FISHERIES.

Girouard J.

existed before confederation, and was held down to the union, not by the Dominion which had no existence, but by the provinces. The "public" interested in the foreshore fisheries before confederation, was, therefore, the "public" of the province which held the same for its benefit only, and unless the "trust" or "interest" of this provincial public has been transferred to the Dominion by competent legislative authority, every province continues to hold the same for the benefit of its people, subject to the regulations of the Dominion. I have already endeavoured to show that no such transfer was made.

I have not been able to find any authority in point, although the reasoning in *The Queen v. Robertson* (1); *The Queen v. Moss* (2) and also *St. Catharines Milling and Lumber Co. v. The Queen* (3), and in other cases, seems conclusive both as to navigable and non-navigable waters, tidal or not. It is not surprising, therefore, to find decided expressions of opinion upon the point now under consideration on the part of some of the learned judges. In *The Queen v. Robertson* (1), Chief Justice Ritchie said:

I am of opinion that the legislation in regard to inland and sea fisheries, contemplated by the British North America Act, was not in reference to "property and civil rights," that is to say not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern, and important to the public, such as the forbidding fish to be taken at improper seasons, in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national and provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously

(1) 6 Can. S. C. R. 102.

(2) 26 Can. S. C. R. 322.

(3) 14 App. Cas. 46.

to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection, with which the property in the fish or the right to take the fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the province or the individual as the dry land or the land covered with water. I cannot discover the slightest trace of an intention on the part of the Imperial Parliament to convey to the Dominion Government any property in the beds of streams or in the fisheries incident to the ownership thereof, whether belonging, at the date of confederation, either to the provinces or individuals, or to confer on the Dominion Parliament the right to appropriate or dispose of them, and receive therefor large rentals which most unequivocally proceed from property, or from the incidents of property in or to which the Dominion has no shadow of claim ; but on the contrary, I find all the property it was intended to vest in the Dominion specifically set forth. Nor can I discover the most remote indication of an intent to deprive either the provinces or the individuals of their proprietary rights in their respective properties ; or in other words, that it was intended that the lands and their incidents should be separated, and the lands continue to belong to the provinces and the Crown grantees, and the incidental right of fishing should belong to the Dominion, or be at its disposal. I am at a loss to understand how the Dominion, which never owned the land, and therefore never had any right to the fishing as incidental to such ownership, without any grant, statutory or otherwise, without a word in the statute indicating the slightest intention to vest the rights of property or of fishing in the Dominion, without a word qualifying or limiting the right of property of the provinces in the public lands, can now successfully claim to have a beneficial interest in those fisheries, and authority to deal with such rights of fishing as the property of the Dominion, and claim to rent or license the same at large yearly rents, and appropriate the proceeds to Dominion purposes.

Mr. Justice Fournier said in the same case, page 138 :

La section 91, sous-section 12 de l'acte de l'Amérique Britannique du Nord, en donnant au gouvernement fédérale le pouvoir de légiférer sur les pêcheries, ne lui en attribue pas le droit de propriété. Il ne les enlève pas des propriétaires ou possesseurs d'alors pour se les approprier. Ce n'est pas ainsi non plus que cette section a été interprétée par l'acte 31 Vic. ch. 60, passé très peu de temps après l'acte de Confédération. La section 2 déclare expressément que le Ministre de la Marine et des Pêcheries pourra, lorsque le droit exclusif de pêcher n'existe pas déjà en vertu de la loi, émettre ou autoriser l'émission de

1896

*In Re*  
PROVINCIAL  
FISHERIES.

Girouard J.

1896

*In Re*  
 PROVINCIAL  
 FISHERIES.  
 ———  
 Girouard J.  
 ———

baux ou licences de pêche pour pêcher en tout endroit où se fait la pêche. Comme on le voit les droits de tous ceux qui avaient un intérêt ou une propriété dans les pêcheries sont respectés. Sous le rapport du droit de propriété, l'acte fédéral, ni l'acte des pêcheries n'ont fait de changement à l'état de choses existant avant la Confédération. La propriété est demeurée où elle était auparavant. Il n'y a donc, sous ce rapport, aucun empiètement de la part du pouvoir fédéral. Si l'action du département de la Marine n'a pas été conforme à ce principe, comme dans le cas actuel, cette action est nulle. Tout en respectant le droit de pêche comme propriété, le gouvernement fédéral ne peut-il pas y exercer, dans l'intérêt général de la Puissance, un droit de surveillance et de protection ? Je crois que oui, et que c'est là précisément le but des pouvoirs législatifs qui lui ont été conférés à ce sujet. Il n'y a, suivant moi, aucune incompatibilité entre l'exercice de ce pouvoir et l'exercice du droit de pêche, comme droit de propriété en d'autres mains que ceux du gouvernement. Le gouvernement fédéral peut, suivant moi, dire au propriétaire : " Vous ne pêcherez qu'en certaines saisons et qu'avec certains instruments ou engins de pêche autorisés." Cette restriction n'est pas une atteinte mais bien plutôt une restriction accordée à ce genre de propriété. C'est une réglementation, je dirai, de police et de contrôle sur un genre de propriété qu'il est important de développer et de conserver pour l'avantage général. On sait ce que deviendrait en peu de temps les pêcheries, s'il était libre aux particuliers de les exploiter comme bon leur semblerait. En peu d'années, leur aveugle avidité aurait bientôt ruiné ces sources de richesses et nos pêcheries, au lieu de revenir aussi riches et aussi fécondes qu'autrefois, retourneraient bientôt à l'état de déperissement, sinon de ruine, où elles étaient avant d'avoir été l'objet d'une législation protectrice. Ce pouvoir de réglementation, de surveillance et de protection a été, avant la Confédération, exercé par chaque province dans l'intérêt public. C'est le même pouvoir qu'exerce aujourd'hui le gouvernement fédéral. Pas plus que les provinces ne l'ont fait, il n'a le pouvoir de toucher au droit de propriété dans les pêcheries, son pouvoir se borne à en régler l'exercice.

### Mr. Justice Henry :

After a full consideration of the issues before us I think the appeal in this case should be dismissed. The British North America Act of 1867 conveys to the Dominion no property in the sites of the sea-coast or inland fisheries, as I construe it. In section 91, which defines the powers of the Dominion Parliament, we find included "Sea-coast and inland fisheries." That provision in the enumeration of the powers enables the Parliament of the Dominion to legislate on the subject, as it does in respect to matters such as "Shipping and navi-

gation," "Ferries," "Bills of exchange and promissory notes" and many others, without passing any right of property in the several subject matters. In fact, in my opinion the power under the Act is but to regulate the fisheries and to sustain and protect them by grants of money and otherwise as might be considered expedient.

1896  
*In Re*  
 PROVINCIAL  
 FISHERIES.  
 Girouard J.

In *St. Catharines Milling and Lumber Company v. The Queen* in 1888 (1), Lord Watson, speaking for the Judicial Committee of the Privy Council, at page 55 and following, said :

By an Imperial statute passed in the year 1840 (2) the provinces of Ontario and Quebec, then known as Upper and Lower Canada, were united under the name of the province of Canada, and it was, *inter alia*, enacted that, in consideration of certain annual payments which Her Majesty had agreed to accept by way of civil list, the produce of all territorial and other revenues at the disposal of the Crown arising in either of the united provinces should be paid into the consolidated fund of the new province. There was no transfer to the province of any legal estate in the Crown lands, which continued to be vested in the sovereign, but all moneys realized by sales or in any other manner became the property of the province. In other words, all beneficial interest in such lands within the provincial boundaries belonging to the Queen, and either producing or capable of producing revenue, passed to the province, the title still remaining in the Crown. That continued to be the right of the province until the passing of the British North America Act, 1867. . . .

The Act of 1867, which created the Federal Government, repealed the Act of 1840, and restored the Upper and Lower Canadas to the condition of separate provinces, under the titles of Ontario and Quebec, due provision being made (section 142) for the division between them of the property and assets of the united province, with the exception of certain items specified in the fourth schedule, which are still held by them jointly. The Act also contains careful provisions for the distribution of legislative powers and of revenues and assets between the respective provinces included in the union, on the one hand, and the Dominion on the other. The conflicting claims to the ceded territory maintained by the Dominion and the province of Ontario are wholly dependent upon those statutory provisions. In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as "the property of" or as "belonging to" the Dominion or a province, these expressions merely import that the right to its beneficial use, or to its pro-

(1) 14 App. Cas. 46.

(2) 3 & 4 Vict., c. 35.

1896  
*In Re*  
 PROVINCIAL  
 FISHERIES.  
 Girouard J.

ceeds, has been appropriated to the Dominion or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown:

Section 108 enacts that the public works and undertakings enumerated in schedule 3 shall be the property of Canada. As specified in the schedule, these consist of public undertakings which might be fairly considered to exist for the benefit of all the provinces federally united, of lands and buildings necessary for carrying on the customs or postal service of the Dominion, or required for the purpose of national defence, and of "lands set apart for general public purposes." \* \* \*

\* \* \* Section 109 provides that "all lands, mines, minerals and royalties belonging to the several provinces of Canada, Nova Scotia and New Brunswick, at the union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same." In connection with this clause it may be observed that, by section 117 it is declared that the provinces shall retain their respective public property not otherwise disposed of in the Act, subject to the right of Canada to assume any lands or public property required for fortifications or for the defence of the country. A different form of expression is used to define the subject-matter of the first exception, and the property which is directly appropriated to the provinces; but it hardly admits of doubt that the interests in land, mines, minerals and royalties, which by section 109 are declared to belong to the provinces, include, if they are not identical with, the "duties and revenues" first excepted in section 102.

The enactments of section 109 are, in the opinion of their Lordships, sufficient to give to each province, subject to the administration and control of its own legislature, *the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under section 108, or might assume for the purposes specified in section 117.* Its legal effect is to exclude from the "duties and revenues appropriated to the Dominion, all the ordinary territorial revenues of the Crown arising within the provinces. That construction of the statute was accepted by this Board in deciding *Attorney General of Ontario v. Mercer*" (1).

See also *Attorney General of British Columbia v. Attorney General of Canada* (2).

(1) 8 App. Cas. 767.

(2) [1889] 14 App. Cas. 295.

Now, one word with regard to the power of the provincial legislatures to pass provincial fishery laws, and I will conclude this branch of the reference. In passing these laws, I consider that the provinces have exercised a local power conferred upon them by section 92 of the British North America Act, which gives them jurisdiction over "the management and sale of public lands belonging to the province," par. 5, and "property and civil rights of the province," par. 13. The Privy Council has recognized that in several matters exclusively assigned to the Dominion, the provinces have a contingent jurisdiction, especially in a remarkable recent case relating to "bankruptcy and insolvency." *Attorney General of Canada v. Attorney General of Ontario* (1). Of course the provincial legislation must not be inconsistent with the Dominion regulations respecting "sea-coast and inland fisheries."

2. In respect of *Shipping and Navigation*.

I am of opinion that the grant by the province of ungranted water lots in navigable waters, outside the public harbours and other Dominion property, conveys to the grantee the right to build a wharf, warehouse, or other work, without the previous approval of the Dominion, provided that the work so constructed does not interfere with shipping and navigation, a question which, if disputed, should be left to judicial determination. As I read the Revised Statutes of Canada, chapter 92, I consider that they are not opposed to the erection of such work, for it seems to me that the Act is limited to cases where the work interferes with navigation. Sect. 2. See *Normand v. Cie de Navigation St. Laurent* (2); *The Queddy River Driving Boom Co. v. Davidson* (3); *Booth v. Ratté* (4).

1896  
*In Re*  
 PROVINCIAL  
 FISHERIES.  
 ———  
 Girouard J.  
 ———

(1) [1894] A. C. 189.

(2) 5 Q. L. R. 215.

(3) [1883] 10 Can. S. C. R. 222.

(4) 15 App. Cas. 188.

1896

*In Re*PROVINCIAL  
FISHERIES.

Girouard J.

I believe, moreover, that the Dominion has power to declare what shall be deemed an interference with navigation, and to require its previous sanction to any work in navigable waters. This power seems to come within section 91 of the British North America Act, which gives to the Parliament of Canada exclusive jurisdiction to make laws concerning "trade and commerce," and "shipping and navigation." *Pennsylvania v. Wheeling and Belmont Co.* (1). It also appears to me to be necessary to enable the Dominion, under section 132 of the Act, to carry out the treaties of the Empire securing to foreign nations the free navigation of the St. Lawrence and other rivers.

As to public harbours and other lands being the property of the Dominion, the Dominion alone can grant water lots in the same under sections 108 and 117 of the British North America Act.

## ANSWERS TO QUESTIONS.

Having thus expressed my views upon the questions of law involved in the Order of Reference, I will now proceed to give seriatim my answers to the several questions submitted to this court.

To the 1st Question : The beds of the waters referred to in this question did not become the property of the Dominion, but, "subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same," and subject also to the regulations of the Parliament of Canada respecting "sea-coast and inland fisheries," "trade and commerce," and "shipping and navigation," remain the property of the province in which the same are situate, without any distinction between the various classes of waters, and without any exception whatever, save the

(1) [1855] 18 How. 421.

exceptions contained in sections 108 and 117 of the British North America Act.

To the 2nd Question: Yes, with the exception, perhaps, of the last part of section 9.

To the 3rd Question: Yes.

To the 4th Question: No.

To the 5th Question: Yes.

To the 6th Question: No.

To the 7th Question: Same answer.

To the 8th Question: Same answer.

To the 9th Question: The Dominion has no such jurisdiction, as already stated.

To the 10th Question: No. Section 4 of the Fisheries Act, when enforced outside public harbours and other Dominion property, is *ultra vires*. The other provisions of the Act appear to me to be *intra vires* as being mere regulations of the fisheries, with the exception of clause 22, which confers the right to use provincial vacant public property for fishing purposes, and with the exception also of certain clauses or parts of clauses, connected with section 4, or purporting to convey rights of fishing by lease, license or otherwise, for instance sections 8, par. 6; 14, par. 1; 16, par. 1; 21, pars. 1, 3 and 4.

To the 11th Question: Same answer.

To the 12th Question: The jurisdiction of the Dominion is limited to the passing of such general laws.

To the 13th Question: Clause 47 of R. S. O. ch. 24 is *intra vires*; and likewise the sections referred to of the Ontario Fisheries Act of 1892, except with regard to public harbours and other Dominion property within sections 108 and 117 of the British North America Act, and also when inconsistent with Dominion regulations on "Inland Fisheries."

1896  
*In Re*  
 PROVINCIAL  
 FISHERIES.  
 Girouard J.

1896 To the 14th Question: Yes, except when inconsis-  
*In Re* ent with Dominion regulations on "Sea-coast and  
 PROVINCIAL Inland Fisheries."  
 FISHERIES.  
 ——— To the 15th Question: Yes.  
 Girouard J. To the 16th Question: Yes.  
 ——— To the 17th Question: Yes.

---