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*Oct. 17.

THE ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC (INFORMANT) . . . . APPELLANT;

AND

KENNETH GORDON FRASER AND OTHERS (DEFENDANTS) . . . . RESPONDENTS.

THE ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC (INFORMANT) . . . . APPELLANT;

AND

IVERS WHITNEY ADAMS (DEFENDANT) . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Rivers and streams—Navigable and floatable waters—Obstructions to navigation—Crown lands—Letters patent of grant—Evidence — Collateral circumstances leading to grant — Limitation of terms of grant — Title to land — Riparian rights—Fisheries—Arts. 400, 414, 503 *C.C.*

A river is navigable when, with the assistance of the tide, it can be navigated in a practicable and profitable manner, notwithstanding that, at low tides, it may be impossible for vessels to enter the river on account of the shallowness of the water at its mouth. *Bell* v. *The Corporation of Quebec* (5 App. Cas. 84), followed.

Evidence of the circumstances and correspondence leading to grants by the Crown of lands on the banks of a navigable river cannot be admitted for the purpose of shewing an intention to enlarge

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*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

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the terms of letters patent of grant of the lands, subsequently issued, so as to include the bed of the river and the right of fishing therein.

The judgment appealed from (Q.R. 14 K.B. 115) was reversed and the judgment of the Superior Court (Q.R. 25 S.C. 104) was restored. *Steadman* v. *Robertson* (18 N.B. Rep. 580) and *The Queen* v. *Robertson* (6 Can. S.C.R. 52) referred to; *In re Provincial Fisheries* (26 Can. S.C.R. 444; (1898) A.C. 700) discussed.

APPEALS from judgments of the Court of King's Bench, appeal side(1), reversing two judgments of the Superior Court, District of Quebec(2), by which the informations of the appellant against the said respondents, respectively, were reversed.

Upon the hearing on the merits the judgment in the Superior Court (Larue J.) maintained the contentions of the Attorney-General, conformably to the informations, respectively, and declared that the River Moisie, opposite the riparian lots A, B, C, D and E, North, on the north bank of the river, in the Township of Moisie, in the County of Saguenay, and the riparian lots A, B, C, D and E, South, on the south bank of the river, in the Township of Letellier, in said county, was navigable and floatable, and that the right of fishing for salmon in the said river, opposite the said lots, was vested in the Crown, in the right of the Province of Quebec, and not in the respondents, and prohibited them from fishing for salmon opposite the said lots.

The material circumstances in respect of which the dispute arose are referred to in the judgment now reported and are more specially stated in the reports of the judgments in the courts below. The substance

(1) Q.R. 14 K.B. 115, *sub nom.* *Lefaivre* v. *Attorney-General of Quebec*.

(2) Q.R. 25 S.C. 104.

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of the decisions of the Court of King's Bench, in relation to the issues raised upon the present appeals, is summarized, as follows, in the judgment appealed from, as formally entered in the court below:—

"Considering that the defendant, Fraser, in support of his right to such fishing and against the claim of the Crown to the same, in addition to invoking the non-navigability and non-floatability of the said river and the letters patent issued by the Crown for the said lots, also invokes other documents and facts, already declared by this court relevant and admissible in the case, and particularly the written application of the 13th December, 1880, * * * made to the Crown, for the purchase and acquisition of said lots and right of fishing, by John Holliday, acting for the firm of Fraser & Holliday, in whose rights defendants * * * were and are, the assent to and acceptance by the Crown of the said application, as made and the action of the parties thereon and specially the possession and enjoyment of the said fishing right for twenty years by the said Fraser & Holliday and their representatives.

"Considering that it is established that the Crown and the said Fraser & Holliday, in January, 1882, concluded an agreement between them by the assent to and acceptance of and according by the Crown of the said application of the 13th December, 1880, as made, without change or modification except to fix by mutual consent the extent of the grant along said river and the price, and by the payment by said firm and acceptance by the Crown of the consideration for said agreement so entered in; whereby the said Fraser & Holliday acquired the right to have, own, possess and enjoy the said lots of land and the said right of

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fishing in the said river opposite to the same, and, in fact, the said firm and their representatives have for and during a period of twenty years before the filing of said informations publicly and peaceably possessed and enjoyed the said lands and right of fishing conformably to the said concluded agreement between said firm and the Crown.

"Considering that the subsequent issue of letters patent, in June, 1883, for the said lots to the said Fraser & Holliday and their *prête noms* ought not to and did not deprive the said Fraser & Holliday and their representatives of the said right of fishing acquired by the said firm by said agreement concluded between them and the Crown, as aforesaid, in January, 1882.

"Considering that the said right of fishing at all times, since January 21st, 1882, was and is vested in the said Fraser & Holliday and their representatives * * * and not in the Crown; and that the appeals herein taken are well founded and ought to be maintained * * *.

"**This Court,** without pronouncing on the navigability and floatability of the said river, doth declare that there is error in the judgment appealed from rendered by the Superior Court, at Quebec, on the 16th February, 1904, doth maintain the said appeals and annul and set aside the said judgment and, proceeding to render the judgment which the said Superior Court ought to have rendered, doth declare;

"That the right of fishing in the said Moisie River opposite the said lots (except the right of fishing reserved by the Crown in front of the small portion of lot A North, three chains wide and thirteen chains deep) to have belonged at all times since the 21st

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January, 1882, to the said Fraser & Holliday and their representatives and to now belong to the appellants (now respondents) and not to the Crown, and doth dismiss the informations herein filed and doth recommend that the Crown pay the costs, etc."

The application referred to was in the form of a letter addressed to the Commissioner of Crown Lands, as follows:

"Sir,—In view of the late decision of the Supreme Court of Canada to the effect that the right of angling for salmon in the fresh water portion of rivers above tidal waters belongs to the land on either side of the river when sold or patented to individuals, I beg to apply for a portion of land of each side of the River Moisie beginning at the foot of the first rapids and extending downwards for seven miles with such limited width on either side as the Government will consent to sell.

"I particularly desire to acquire this land and these fishing rights as I have establishments on the side of the main river on the land applied for for the artificial propagation of salmon, also as being the lessee from the Federal Government of the netting portion which I have held for the last twenty years."

Mr. Justice Hall, one of the judges of the Court of King's Bench, while concurring in the judgment appealed from, stated that, in his opinion, the River Moisie was not, in a legal sense, a navigable and floatable river.

The letters patent granted the lots, in free and common socage, describing them as having frontage on the River Moisie, and did not, in terms, mention any rights in the waters or bed of the river or as to fishing therein.

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Stuart K.C. and *Lafleur K.C.* for the appellant. The grant is of land only—bounded by the River Moisie; if that river be navigable and floatable the boundary is high water-mark; if non-navigable, it no doubt is the centre of the river.

Two principles of law have been violated by the judgment appealed from: 1st. That all the negotiations which precede the execution of a written contract are merged in that contract itself; and 2ndly. That, when a contract is clear and unambiguous, no evidence as to the negotiations which preceded the execution of the contract, whether oral or written, can be admitted to construe it. Art. 1234 C.C.; *Ulster Spinning Co.* v. *Foster* (1); *In re Mullarky* (2); *O'Mally* v. *Ryan* (3); 8 Aubry & Rau, Dr. Civ., p. 319 § 763; 16 Laurent, Nos. 501 & 502; 19 Laurent, Nos. 469, 470, 471, 479, 481.

A title given in pursuance of an agreement is the final expression of the agreement and overrides and controls all previous communications; *McBain* v. *Wallace & Co.* (4), at pages 602 and 614; *Leggott* v. *Barrett* (5). Moreover, the evidence does not justify the conclusion that there was any concluded agreement for the sale of fishing rights; the holding is, in fact, at variance with the evidence.

There can be no need for interpretation of a contract unambiguous in every respect; no estoppel runs against the Crown, and no laches of any officer of the Crown can in any way impair the Crown rights. Chitty, Prerogative of the Crown, p. 381; *The King* v. *The*

(1) M.L.R. 3 Q.B. 396.
(2) M.L.R. 4 S.C. 89.
(3) Q.R. 21 S.C. 566.
(4) 6 App. Cas. 588.
(5) 15 Ch. D. 306.

British American Bank Note Co.(1); *The Queen* v. *Black*(2); *Black* v. *The Queen*(3); *Humphrey* v. *The Queen*(4); *Burroughs* v. *The Queen* (5); *The Queen* v. *The Bank of Nova Scotia*(6); *City of Quebec* v. *The Queen*(7).

The court of appeal did not expressly deal with the question whether the Moisie River is a navigable river or not, but Mr. Justice Hall denies the navigable and floatable character of the river. The question of navigability was fully discussed by Mr. Justice Larue, who decided, upon the testimony of a number of witnesses heard by him at the trial, that the river was navigable, at least to the place in dispute opposite the defendants' land. It is true the defendants adduced evidence as to the difficulties of navigation in the estuary at low tide, the difficulty of getting over the bar at the mouth of the river at low tide and in certain conditions of wind and weather, and further, as to the nature of the upper part of the river, starting from the rapids above the American Camp northwards. This evidence appears to be wholly irrelevant; the navigability of the river cannot be decided by its condition at low tide, nor can the question whether or not it is navigable opposite the defendants' lands be decided by the difficulties of navigation further north. The evidence which relates to the river opposite the lands in question, admits the navigability of the river below, when the tide has flowed to some extent. The whole evidence not only justified the finding of the trial judge, that the river from the foot of the rapid near the Grand Portage to

(1) 7 Ex. C.R. 119.
(2) 6 Ex. C.R. 236.
(3) 29 Can. S.C.R. 693.
(4) 2 Ex. C.R. 386.
(5) 2 Ex. C.R. 293.
(6) 11 Can. S.C.R. 1.
(7) 2 Ex. C.R. 252.

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its mouth is navigable and floatable, and, in consequence, a dependency of the Crown Domain, but rendered such finding imperative.

This fact being established, the propositions of law applicable to the case and the principal authorities in support of them may be summarized as follows:—The right of fishing in navigable waters is exclusively vested in the Crown, unless specially granted. Arts. 400, 414 C.C.; Answer of the Seigniorial Court to Questions 26, 27, 29 and 30(1), opinion of Sir L. H. Lafontaine, at p. 345*a*, opinion of Judge R. E. Caron(2); 18 Vict. ch. 3, sec. 16, sub-sec. 9 (Can.); 63 Vict. ch. 23 (Q.), amending R.S.Q. arts. 1374, 1376, 1379. 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. *In re, Provincial Fisheries*(3), *per* Girouard J. at pp. 542 and 549; *Lavoie* v. *Lepage*(4); *Hurdman* v. *Thompson* (5); 2 Duparc-Poullain, p. 398, No. 577; 10 Laurent, Nos. 8, 9, 12.

A river is navigable when boats susceptible of use for commercial purposes can be moved up and down for at least a part of the year and it is floatable when rafts can be brought down it. *Hurdman* v. *Thompson*(5), at pp. 434 and 445; Daviel, Cours d'Eaux, No. 35; 1 Gaudry, Traité du Domaine, No. 118; 2 Polcque, Cours Eaux, No. 4; Dalloz Répertoire, "Eaux," Nos. 39, 42, 43, 52, 58; *Oliva* v. *Boissonnault*(6).

A river is deemed navigable when it is actually

(1) L.C. Dec. Vol. A., 68*a*, 71*a*, 72*a*.
(2) L.C. Dec. Vol. B, 43*d*.
(3) 26 Can. S.C.R. 444.
(4) 12 Q.L.R. 104.
(5) Q.R. 4 Q.B. 409.
(6) Stu. K.B. 524.

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capable of navigation. *Attorney-General* v. *Scott*(1); *City of Hull* v. *Scott*(2), at p. 171; *Bell* v. *Corporation of Quebec*(3).*

Flynn K.C. for the respondents. We contend, 1st. That the fishing rights in question were conceded by the Crown to Fraser and his associate, and Fraser became and was the sole owner thereof; and 2ndly. That the river is neither, as a whole nor as regards the part opposite the lots in question, navigable, floatable or tidal.

The statutes, orders in council, regulations, correspondence and proof of record clearly shew that it was the intention of the Crown to grant, and the object of the grantees to secure, the exclusive rights of fishery in that part of the river which has its course between the riparian lots conveyed by the letters patent. The contract was completed quite irrespectively of the letters patent, which are merely a convenient method of supplying evidence of the grant of the riparian lands necessary to be used in connection with and for the protection of the fishing rights bargained for. We refer to the judgments of their Lordships Justices Hall and Trenholme, in the court below, in this connection.

The instructions for the survey and examination of the lands were merely for the purpose of having a report as to their unfitness for agricultural purposes in order to permit of their be-

(1) 34 Can. S.C.R. 603.
(2) Q.R. 13 K.B. 164.
(3) 2 Q.L.R. 305; 7 Q.L.R. 103; 5 App. Cas. 84.

* The arguments in respect to making the respondent Adams a party are not mentioned as the question is not discussed in the judgment now reported.

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ing made the subject of a special grant in connection with the fisheries. They can have no other effect in regard to the dealings between the Crown and the respondents; the lands are shewn to be valueless, save in so far as they were to be utilized in connection with the fisheries. The Crown is shewn to have been dealing with this river upon the view that it was, by its nature, neither navigable nor floatable; as a matter of fact, it is not so at any point opposite the lands granted, and, as a consequence, the bed of the river is included in the grants *usque ad medium filum aquæ.* We are owners of both banks, consequently of the whole of the bed of the river flowing between them; arts. 414 *et seq.*, 503 C.C. The mouth of the river is shewn to be so obstructed by reefs and sandbars that it is impossible for even very small craft or light boats to enter it, except at high tides and with favourable conditions of the wind. There are but a few inches of water on the shallows at low tides, and, even at high tides, with a contrary wind, the channel cannot be safely or profitably navigated. The fact that a few vessels have been able, with much difficulty and at great risks, to enter the river, does not affect the general non-navigability of its character. Navigation is, moreover, rendered absolutely impossible from the lowest point opposite our lands by the condition of the channel and rapids; see report of the case in the court below, at pages 130-131, *per* Hall J., and cases collected in Bouvier's Law Dict.(1), p. 471; Coulson & Forbes on Waters, pp. 9, 12, 13, 14, 62, 94, 96, 360-1, 479; Angel on Watercourses, p. 731, No. 544; *Reece* v. *Miller*(2); 1 Fuzier-Herman, Nos. 122-124; Beaudry-Lacantinerie, "Rivières Flottables," p. 174; 2

(1) Ed. 1897.

(2) 8 Q.B.D. 626.

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Plocque, Nos. 4 and 5; 1 Gaudry, Traité du Domaine (1), No. 121; 14 Bequet, "Eaux," Nos. 567, 574, 575; 2 Beaudrillart, "Eaux et Forêts," p. 739; 2 Daviel, p. 23; 3 Proudhon, pp. 726, 727; 3 Proudhon, Nos. 857, 859, 860; *Bell* v. *Corporation of Quebec*(2); *Thompson* v. *Hurdman*(3), pp. 59-69; *Attorney-General* v. *Scott*(4), at p. 615; *Leboutillier* v. *Hogan*(5).

The letters patent can be explained and interpreted with the aid of the contemporaneous dealings and writings which passed between the parties, and by the manner in which the contract was executed: 16 Laurent, Nos. 503, 504, 508; 7 Huc, No. 176; 25 Demolorube, Nos. 7-10 and 36; 5 Marcadé & Pont, p. 116; Beaudry-Lacantinerie, Nos. 558, 559; Fusier-Herman, art. 1341 C.N., Nos. 207, 208; *Chad* v. *Tilsed*(6); 1 Greenleaf on Evidence, No. 243.

The judgment of the court was delivered by

GIROUARD J.—This appeal involves important questions of law, although not entirely new. They have been considered by this court on several occasions, and were it not for their practical consequences, it would be sufficient to refer to *Re Provincial Fisheries*(7), and the elaborate opinion of Mr. Justice Larue in this case, where all the authorities are collected. Although mere opinions, not binding, have been expressed in the *Provincial Fisheries Case* (7), on a reference by the Governor-General-in-Council, the questions with regard to fisheries and the right of fishing, navigable and floatable rivers, have been so

(1) Ed. 1862.
(2) 5 App. Cas. 84; 7 Q.L.R. 103.
(3) Q.R. 4 S.C. 219.
(4) 34 Can. S.C.R. 603.
(5) 17 R.L. 463.
(6) 2 Brod. & Bing. 403.
(7) 26 Can. S.C.R. 444.

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carefully considered that they are entitled to very great weight, more especially in view of the fact that these opinions, at least with regard to the subject matter under consideration, were confirmed on appeal to the Judicial Committee of the Privy Council (1), and that in the present case the parties have not alleged any reason why they should not prevail.

The substantial facts, free from irrelevant details and extrinsic matters, which form at least three-fourths of the immense volume (700 pages) of the case, are simple enough. By information of the Attorney-General for Quebec, His Majesty the King claims fishing grounds and the right of fishing opposite certain lots of land granted to the respondent, Alexander Fraser, and his associates, on both sides of the Moisie River, in the County of Saguenay, alleging that the said river is "a public, navigable and floatable river." The respondent met this action by pleading that he was a riparian proprietor of the said lots of land by virtue of letters patent from the Crown, in right of the Province of Quebec, and, as such, had the

exclusive right of fishing in the said River Moisie opposite or appertaining to the lots.

He adds that for years before and after said grant, and at the time it was issued, the Government of Quebec, by the acts, letters and writings of its ministers and officials, always considered and represented the said lots as

including fishing rights in the said River Moisie, opposite said respective lots *usque ad medium filum equæ.*

and finally, that the said river was not navigable nor floatable.

(1) (1898) A.C. 700.

The Attorney-General demurred to that part of the respondent's pleas, paragraphs 14-20, in which facts are alleged tending to explain, contradict, vary, supplement or add to the letters patent. The demurrer was maintained by Chief Justice Casault, but in appeal that judgment was reversed. The court has left no notes of this judgment, but from the *considérants,* it is based upon the following ground:

Considerant que ces paragraphs sont pertinents et contiennent des faits qui tendent à supporter la prétention de l'appelant que la concession que lui a faite la couronne inclut le droit de pêche dans la rivière Moisie, en face des lots concédés, etc.

In consequence of this decision, the parties were sent back to the first court, and had to go through a very voluminous *enquête,* as there was no further appeal to this court or any other tribunal, the judgment being only interlocutory. But as we decided quite recently in the case of *Willson* v. *Shawinigan Carbide Co.*(1), it is now open to the appellant to shew that the judgment of the first court was right. At all events, we hold that the evidence adduced under this branch of the case is illegal.

The trial judge, on the merits, found: 1st. That the evidence outside the letters patent did not contradict, and was, moreover, insufficient to override their clear language; and 2ndly, that the river was navigable and floatable. The action of the Crown was, therefore, maintained with costs. In appeal, this judgment was reversed as to the first ground only, the question of the navigability remaining undecided. From this final judgment the Crown appeals to this court.

We entirely agree with Chief Justice Casault

(1) 37 Can. S.C.R. 535.

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that the matters struck off by him are no answer to the information. In the Revised Statutes of Quebec respecting Crown lands, the commissioner is vested with very large powers; he may cancel a grant of land under certain circumstances. Art. 1283 R.S.Q. He may even cancel letters patent which have been surrendered, and order correct ones to be issued in their stead; art. 1299; but he cannot supplement or add to the same. I do not mean to say that ambiguous letters patents cannot be explained like any other contract. I mean that letters patents, clear in their terms, cannot be varied; *Massawippi Valley Railway Co.* v. *Reed*(1); except by the same parties who caused them to be issued, that is, the Lieutenant Governor in Council, by supplementary letters patent, or fresh letters patent, or, at least, orders in council delivered to and accepted by the grantee; and here I cannot do better than quote the language of Chief Justice Strong in the case of *Bulmer* v. *The Queen*(2):

The orders in council authorizing the Minister of the Interior to grant the licenses to cut timber on the timber berths in question, did not, on any principle which has been established by authority, or which I can discover, constitute contracts between the Crown and the proposed licensees. These orders-in-council, as similar administrative orders in the case of sales of Crown lands in the Provinces of Ontario and Quebec have always been held to be, were revocable by the Crown until acted upon by the granting of licenses under them.

In this case the respondent cannot even produce an order in council. Art. 1207, of the Civil Code, says that letters patent, issued by the Government of Quebec, are authentic writings, and art 1210 adds that

an authentic writing makes complete proof between the parties to it,

of the obligation expressed in it, etc. Under these

(1) 33 Can. S.C.R. 457, at p. 470.

(2) 23 Can. S.C.R. 488, at p. 491.

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articles I cannot see how any evidence of the nature allowed by the court of appeal can be legal. But there is more in the case.

Whatever may have been the correspondence and other acts of certain officials, the substantial documents (outside the letters patent) support the appellant's contention. In the application for a patent, dated 13th December, 1880, to the Commissioner of Crown Lands, Mr. Flynn, a demand is made only

> for a portion of land on each side of the River Moisie, beginning at the foot of the first rapids and extending downwards for seven miles, with such limited width on either side as the Government will consent to sell.

True, a reference is made to fishing rights opposite that land, but it is only with regard to his desire or motive for the application. Finally, on the 20th January, 1882, the assistant commissioner recommends that a sale of 200 acres of land be made to the respondent and his associates, and that letters patent be issued accordingly. The report was approved by the commissioner, Mr. Flynn, on the 21st February following. The respondent contends that these documents complete the agreement and the court of appeal agrees with him.

I cannot see how a complete agreement can be found in face of the very terms of the letters patent and of the memorandum of commissioner Flynn. I must confess I cannot conceive how a "concluded agreement" can be presumed from the above documents. First, the report of Mr. Lemoine, of the 20th January, 1882, purports to grant only lots of land; 2ndly, no right of fishing is mentioned; 3rdly, if the latter was only contemplated, why order in 1881 a survey "as to the nature of the soil"? In 1882, Mr.

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Lemoine again orders a regular survey. And finally letters patent are to be issued.

Now let us look at the terms of the letters patent which were issued more than one year after, in 1883. They do not purport to transfer fishing grounds or fishing rights, but only tracts of land situate on both sides of the River Moisie. It cannot be doubted that the Crown never expressly intended to grant by these letters patent the right of fishing in front of the said lands. It is now well settled law that, without such special grant, the fisheries in public or navigable rivers do not pass from the Crown. The authorities are all collected in *Re Provincial Fisheries*(1). We therefore reverse the judgment of the court of appeal which, quite irrespective of the navigability of the River Moisie, construed the negotiations and correspondence leading up to the granting of the letters patent as, in themselves, constituting a collateral or independent contract establishing the patentees' right to a fishing grant, although at variance with the plain and unambiguous language of the letters patent themselves.

Undoubtedly the respondent, under the belief that the river was not navigable, expected to acquire the fishing grounds and the right of fishing on both sides of the river. He says so in the application of the 13th December, 1880, and some of the representatives or officials of the Crown, if not all, seem to have been under the same impression. In his application the respondent says:

In view of the late decision of the Supreme (he meant the Exchequer) Court of Canada to the effect that the right of angling for salmon in the fresh water portion of rivers above tidal waters

(1) 26 Can. S.C.R. 444; [1898] A.C. 700.

belongs to the land on either side of the river when sold or patented to individuals, etc.

The applicant evidently had in mind the recent decisions in *Robertson* v. *Steadman*(1), by the New Brunswick court, in 1879, and *The Queen* v. *Robertson*(2), decided in 1880 by Mr. Justice Gwynne, one of the judges of the Supreme Court, sitting in the Exchequer Court, both reviewed by this court in 1882, in *The Queen* v. *Robertson*(2). The courts held that the *locus* in question in the Miramichi River, where no tide was felt, was not a public or navigable river, and that, therefore, the grant of the land on each side of the river carried with it, *ipso facto*, the fisheries in the river, and the right to fish from shore to shore, although for many miles lower down the river is tidal and navigable.

The law of the Province of Quebec with regard to navigable rivers is very clear. No attention is paid to the tide element. Art. 400 of the Civil Code says that

all the roads and public ways maintained by the state, navigable and floatable rivers and streams and their banks, etc., are considered as being dependencies of the Crown domain.

The respondent, the Commissioner of Crown Lands, and all the officials, may possibly have been acting under an erroneous impression of the law; there is evidence that, at that time, the Crown in right of the Dominion of Canada claimed the fisheries of all navigable rivers; it was not until 1896 that the question was settled in favour of the provinces by this court, and in 1898 by the Judicial Committee of the Privy Council. If there be an error on either side, or

(1) 18 N.B. Rep. 580. (2) 6 Can. S.C.R. 52.

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on both sides, as to the law or the fact of the navigability of the River Moisie, the respondent may find a remedy in art. 1299, or, at least, 1303, of the Revised Statutes of Quebec, and C.P.Q., art. 1007. All we are called upon to establish is that the clear terms of the letters patent he produces do not establish any grant of the fisheries he claims, and that these fisheries are located in a navigable or floatable river.

As to the navigability, we intimated to the appellant's counsel that it was not necessary to hear him in reply. We considered that we were relieved from the duty of reading the whole evidence upon this branch of the case. The counsel for the respondent had read enough of it to this court during his lengthy argument to satisfy us that the River Moisie is not only floatable—that is, for rafts, but navigable for canoes, boats, scows, barges, schooners, and even steamers. If we understood him correctly, he admitted that it is capable of navigation, although always difficult at a low tide, which in this instance rises to 7 or 8 feet, and this twice a day. In his factum, the respondent further says:

> The River Moisie has some 400 miles in length, and in all the plans produced by the Crown, and by the defence, and by the description given by witnesses, it is a series of rapids, falls, cascades, rocks, sand-banks, and reefs (battures), with a velocity of current equal to 4, 5, and 6 miles an hour. There never has been any regular navigation, traffic or commerce on this river.
>
> The only exception to this, if it can be so considered, is the salmon net fishing in the estuary of the river by Messrs. Holliday and Fraser, and now Messrs. Holliday Bros., and the fly fishing in the fluvial part of the river.
>
> There is no cultivation on either side of the river, all the timber has disappeared, at least, up to that part of the river where the lots in question are situate. * * As to the species of boats which have been in use on this river, those mentioned by the witnesses are the following: Bark and wooden canoes, drawing a few inches of water; small "flats," as the word indicates, flat bottomed, and drawing less

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than 1 foot of water; and boats (barges). Amongst the latter, is what the witnesses call "the long-boat," used by the Messrs. Holliday to carry down their salmon nets in the estuary of the river. * *

This long-boat goes up the river during the fishing season daily, as far as the one before the last fishing camp, and once every week, to the uppermost camp. This boat, as Captain Mercier says himself, has the shape of a "chaloupe." The stern is square and not sharp, as the witnesses say. Its draught of water is two feet, perhaps a little more when completely laden. * *

Vessels are frequently stranded at the mouth of the river, the channel there is extremely narrow, and at low water contains scarcely four or five feet in depth. Vessels drawing 7 or 8 feet have to await the rising tide to enter the bay of the river and reach the wharves there. * * *

The "Pointe à Mercier" is of extremely difficult access; there is only at the most one foot and a half of water in the channel at low tide, and it becomes necessary to await the rising tide, as we have seen, in order to pass by. A glance at some of the maps, produced by the Crown and by the defence, gives an idea of the general physiognomy of that part of the river. Mr. Neilson, who is an old explorer, having a thorough knowledge of our rivers and forests, and who has gone up this river for a considerable distance (250 to 260 miles on eastern branch), says that the only means of navigating it is by the bark canoe and by taking advantage of the many portages. In truth, evidence of record shews that such is the general rule, and that it is exceptionally, or in favourable conditions of the river, that other boats have made use of, as we have seen. Advantage has to be taken of the high waters of the river, in the spring or after heavy rains or of the rising tide. * * *

Now, if we take the river below the American Camp, which is the part more particularly in question, we can divide it as follows: 1. The bay, that is, from the mouth of the river to "Pointe à Mercier." The bay is very large and the sand being continually driven down by the waters of the river, it is very shallow. 2. From "Pointe à Mercier up to the "Coude"; there are very serious obstacles in the way as regards the channel, even for the Messrs. Holliday Brothers' "long-boat." 3. Beyond the "Coude" the ordinary means of navigation used by the gentlemen, who go fly-fishing, is the canoe. Nevertheless, during the fishing season, to bring up their provisions and luggage, and to take their luggage down, they make use of a boat, which draws about two feet of water, some witnesses say two and one-half feet; but even in doing so, they must take certain precautions to avail themselves of the elevation of the water in the river, of the rising tide, etc.

And if we add to the above admissions, the facts as stated by Mr. Justice Larue, that steamers like the

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"King Edward," the "Lord Stanley," the "Beaver," the "Gypsy," drawing from nine to eleven feet of water, have been able to make regular commerce with Moisie, and on the River Moisie to very near the first rapids and in front of the lots granted to the respondent. I cannot see how it can be contended that the Moisie is not navigable up to and including the *locus* in question. Mr. Justice Larue has quoted the testimony of quite a number of witnesses, and we must not forget that he saw these witnesses and was in a better position than we are to judge of their intelligence, competency and truthfulness.

If we were to hold that rivers navigable only by the assistance of the tide, are not navigable within the meaning of the law, we would simply put out of the public domain a considerable number of large rivers, which in every country have been considered navigable and are used for transportation of commercial commodities. What is navigability of a river is a question of fact. I do not think the size of the boat has much to do with it. Until a little over one hundred years ago all the great rivers of Canada, including the Saguenay, the Ottawa and the St. Lawrence, above Montreal, were navigated by canoes and flat-bottomed boats. These were the kind of craft that the Hudson Bay Company, the North-West Company, the Government, and the traders of the West used to carry their furs, goods and merchandise to and from Montreal for hundreds of miles along the above rivers, and others connecting with them. Before the construction of the canals, for at least fifty years, steamers were navigating different parts of the St. Lawrence, but were prevented from ascending above Montreal by huge rapids and falls, and yet can it be said seriously that these rivers were not at all times navig-

able? Therefore, it is not necessary that navigation should be continuous, as contended for by the respondent. A river may not be capable of navigation in parts, like the St. Lawrence at the Lachine Rapids, at the Cascades, Coteau and Long Sault rapids, the Ottawa at Carillon, the Chaudière and the Chats rapids, and yet be a navigable river, if, in fact, it is navigated for purposes of trade and commerce. The test of navigability is its utility for commercial purposes. Every river is not equally useful. The Moisie, which is in the wilderness, with few fishing and mineral establishments for 15 or 17 miles from its mouth, cannot be compared with the River St. Lawrence, where the state has spent millions to improve its navigation possibilities. No public money has been spent on the River Moisie; it may never be spent if the volume of trade does not justify expenditure of public money; the Government is not bound to improve rivers, and it cannot be expected that it will do so without regard to the requirements of the shipping trade. For the moment, the Moisie is sufficient for the wants of its inhabitants and the public dealing with them.

In the case of *Bell* v. *Corporation of Quebec*, decided by the Privy Council(1), their Lordships, after citing Dalloz and Daviel, said:

> These general definitions of Daviel and Dalloz shew that the question to be decided is, as from its nature it must be, one of the fact in the particular case, namely, whether and how far the river can be practically employed for purposes of traffic. The French authorities evidently point to the possibility, at least, of the use of the river for transport in some practical and profitable way as being the test of navigability.

(1) 7 Q.L.R. 103, at p. 114; 5 App. Cas. 84, at p. 93.

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And, in the same case, Chief Justice Dorion said, in the court of appeal:

D'après cela, tcute rivière qui, sans travaux artificiels, peut pcrter bateaux serait une rivière navigable. Cette définition laisse cependant beaucoup à désirer. En effet, une rivière comme la rivière Saint-Charles, qui une fois ou deux pendant l'année ,dans les plus hautes marées lorsque le volume de ses eaux sera considérablement augmenté par la fonte des neiges du printemps ou les pluies abondantes de l'automne, permettra à un bateau de se rendre jusqu'au pont de Scott, devra-t-elle être considerée comme navigable, lorsque pendant tout le reste de l'année il sera impossible d'y aller, même avec une chaloupe ne tirant qu'un ou deux pieds d'eau? Il semple qu'il faut admettre avec Championnière (Traité des eaux courantes, *n* 428), que la division des cours d'eaux est tout à fait arbitraire, et que ce n'est pas tant le volume de l'eau que la circonstance que son cours est ou n'est pas consacré au service public, qui lui donne son caractère légal.

The trial judge has found the River Moisie from the foot of the rapid near the Grand Portage to its mouth on the River St. Lawrence is navigable an floatable, not only when the tide is rising, but even at low water. I must confess that the evidence is conflicting as to this; but his findings as to navigability have not been reversed in appeal. Mr. Justice Hall did not agree with him that the river was navigable under any circumstances, while Mr. Justice Trenholme took a different view of the case. The majority of the court declined to express any opinion on this point, and so we have only the finding of one court as to the navigability of the Moisie at low water. Are we justified in overlooking such a finding? I would hesitate to do so, especially in face of our ruling in *Massawippi Valley Railway Co.* v. *Reed*(1).

However, we do not base our judgment upon this finding, but upon the fact, not controverted, and ad-

(1) 33 Can. S.C.R. 471.

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mitted by the respondent, and upon the evidence, that the river is navigable, and is navigated by the assistance of the tide, in a practical and profitable way, and for the purposes of traffic, at least from its mouth up to and including the part in dispute. Beyond that we are not called upon to say anything, and we decide nothing.

Summarized, therefore, our holdings are:

1st. That the patent issued by the Crown is plain and unambiguous in its language, that the rights of the parties must be determined by it, and cannot be added to, altered or diminished by any previous negotiations, written or oral, leading up to its issue. That, therefore, the application of the patentee and subsequent correspondence between him and the Crown officials should not have been received in evidence for the purpose of explaining the patent, and, if looked at, for the purpose of establishing an independent or collateral contract conferring additional rights upon the patentee, entirely fail to do so. That the legal effect of the language of the patent with respect to the bed of the river, and the fishing rights therein, depends upon the determination of the question whether the Moisie at and in the four or five of its miles covered by the patent is navigable or floatable within the meaning of the law of Quebec, and that, adopting the test of navigability laid down by the Privy Council and hereinbefore quoted, we concur with the findings of the trial judge, and which findings are not questioned in the judgment of the court of appeal, that such river at such locality and from thence to its mouth, is so navigable and floatable.

For these reasons, the appeal is allowed with costs, and the judgment of the Superior Court restored.

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As admitted by the parties, these reasons of judgment apply to the appeal of the *King* v. *Adams*.

Appeals allowed with costs.

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