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*Feb'y. 21.
*April 23.

THE QUEEN.....APPELLANT;

AND

CHRISTIAN A. ROBERTSON.....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

Petition of Right—Fisheries Act, 31 *Vic. ch.* 60 (*D*)—*British North America Act*, 1867, *secs.* 91, 92 and 109—*Fisheries, regulation and protection of—License to fish in that part of the Miramichi River above Price's Bend—Rights of riparian proprietors in granted and ungranted lands—Right of passage and right of fishing.*

On January 1st, 1874, the Minister of Marine and Fisheries of *Canada*, purporting to act under the powers conferred upon him by sec. 2, ch. 60, 31 Vic., executed on behalf of Her Majesty to the suppliant an instrument called a lease of fishery, whereby Her Majesty purported to lease to the suppliant for nine years a certain portion of the *South West Miramichi* River in *New Brunswick* for the purpose of fly-fishing for salmon therein. The *locus in quo* being thus described in the special case agreed to by the parties :—

"*Price's Bend* is about 40 or 45 miles above the ebb and flow of the tide. The stream for the greater part from this point upward, is navigable for canoes, small boats, flat bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow."

Certain persons who had received conveyances of a portion of the river and who, under such conveyances, claimed the exclusive right of fishing in such portion, interrupted the suppliant in the enjoyment of his fishing under the lease granted to him, and put him to certain expenses in endeavoring to assert and defend his claim to the ownership of the fishing of that portion of the river included in his lease. The Supreme Court of *New Brunswick* having decided adverse'y to his exclusive right to fish in virtue

* PRESENT—Sir W. J. Ritchie, Knight, C. J.; and Strong, Fournier, Henry and Taschereau, J.J.

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of said lease, the suppliant presented a petition of right and claimed compensation from Her Majesty for the loss of his fishing privileges and for the expenses he had incurred.

By special case certain questions (which are given below) were submitted for the decision of the court, and the Exchequer Court held *inter alia* that an exclusive right of fishing existed in the parties who had received the conveyances, and that the Minister of Marine and Fisheries consequently had no power to grant a lease or license under sec. 2 of the Fisheries Act of the portion of the river in question, and in answer to the 8th question, viz.: "where the lands (above tidal water) through which the said river passes are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river?" held, that the Minister could not lawfully issue a lease of the bed of the river, but that he could lawfully issue a license to fish as a franchise apart from the ownership of the soil in that portion of the river.

The appellant thereupon appealed to the Supreme Court of *Canada* on the main question: whether or not an exclusive right of fishing did so exist.

Held,—(affirming the judgment of the Exchequer Court) 1st, that the general power of regulating and protecting the Fisheries, under the *British North America Act*, 1867, sec. 91, is in the Parliament of *Canada*, but that the license granted by the Minister of Marine and Fisheries of the *locus in quo* was void because said act only authorizes the granting of leases "where the exclusive right of fishing does not already exist by law," and in this case the exclusive right of fishing belonged to the owners of the land through which that portion of the *Miramichi* River flows.

2nd,—That altho' the public may have in a river, such as the one in question, an easement or right to float rafts or logs down and a right of passage up and down in *Canada*, &c., wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing or with the right of the owners of property opposite their respective lands *ad medium filum aquæ*.

3rd. That the rights of fishing in a river, such as is that part of the *Miramichi* from *Price's Bend* to its source, are an incident to the grant of the land through which such river flows, and where such grants have been made there is no authority given by the *B. N. A. Act*, 1867, to grant a right to fish, and the Dominion Parliament has no right to give such authority.

4th. Per *Ritchie*, C. J., and *Strong*, *Fournier* and *Henry*, J. J.—(reversing the judgment of the Exchequer Court on the 8th

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

APPEAL from a judgment rendered by Mr. Justice *Gwynne* in the Exchequer Court of *Canada*, in the matter of the petition of right of *Christian A. Robertson*, the above named respondent.

The following special case was agreed to by the parties:

"The *Miramichi* river at *Price's Bend* is about forty or forty-five miles above the ebb and flow of the tide. The stream for the greater part from this point, upward, is navigable for canoes, small boats, flat bottom scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow. In the salmon fishing season, say June, July and August, canoes have to be hauled over the very shallow bars by hand.

"On the 5th November, A. D. 1835, a grant issued to the *Nova Scotia* and *New Brunswick Land Company* of 580,000 acres, which included within its limits that portion of the *Miramichi* river which is in question, and the said grant contained, together with the usual granting clauses, the following clause:—'Excepting also out of the said tract of land, described within the said bounds, all and every lot, piece and parcel of land which have been heretofore by us or our predecessors given or granted to any person or persons whatsoever, or to any body corporate by any grant or conveyance under the Great Seal of the Province of *New Brunswick*, or the Great Seal of the Province of *Nova Scotia* during the period when the said hereby granted tract of land was part and parcel of our said Province of *Nova Scotia*,

together with all privileges, &c., and also further excepting the bed and waters of the *Miramichi* river, and the beds and waters of all the rivers and streams which empty themselves either into the river *St. John* or the river *Nashwaak*, so far up the said rivers or streams respectively as the same respectively pass through, or over any of the said heretofore previously granted tracts, pieces or parcels of land hereinbefore excepted.' (Copy of grant may be referred to.)

"Copies of grants, made prior to the grant to the *Nova Scotia* and *New Brunswick Land Company*, of same lots within and some immediately adjoining and outside of the boundaries of the company's tract, to *Steven Hovey*, *Peter Hayes*, *Thomas Hunter* and *James Young*, and twelve other copies of letters patent are herewith and may be referred to. The other grants to the others within the company's tract are in similar form; copy of map annexed to the grant to the company is also filed herewith; and all are made part of this case.

"On the first day of January, A. D. 1874, the Honorable *Peter Mitchell*, then being the Minister of Marine and Fisheries in and for the Dominion of *Canada*, did, in pursuance of the powers purporting to be vested in him by the Act of the parliament of *Canada*, intituled "An Act for the regulation of fishing and protection of the fisheries," lease to suppliant as follows:—

LEASE OF FISHERY.

"Dominion of *Canada*, to wit:

"Lease between Her Majesty, acting by and through the Minister of Marine and Fisheries for the Dominion of *Canada*, of the one part, and *Christian A. Robertson*, esquire, of the city of *St. John*, *New Brunswick*, of the other part.

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"Her Majesty hereby leases, for the purpose of fly fishing for salmon, unto the said *Christian A. Robertson*, hereto present and accepting for himself, his heirs, executors, administrators and assigns, for and during the period hereinafter mentioned, and under the conditions hereinbelow stipulated, a certain fishing station situated on the south-west *Miramichi* river, in the province of *New Brunswick*, and described as follows, that is to say: the fluvial or angling division of the south-west *Miramichi* river from *Price's Bend* to its source.

"The present lease is hereby made for and during the space and term of nine years, to be computed and reckoned from the first day of January, one thousand eight hundred and seventy-four until the thirty-first day of December, which will be in the year of our Lord one thousand eight hundred and eighty-two, and on the following conditions:—

"1st. That the said lessee shall pay to Her Majesty, into the hands of the Minister of Marine and Fisheries for the time being, or such other person or persons duly authorized to receive the same, an annual rent of fifty dollars currency, the said rent payable annually in advance.

"2nd. That the said lessee shall, in the use and occupation of the fishery station and privileges hereby leased, and the working of the same, in every respect conform to all and every the provisions, enactments and requirements of the fishery laws now, or which may hereafter be in force, and comply with all rules and regulations adopted or to be passed by the Governor General in Council relative thereto.

"3rd. That the lessee shall neither concede nor transfer any interest in the present grant, nor sub-let to any one without first duly notifying the Department of Marine and Fisheries, and receiving the written consent of the Minister thereof, or some other person or persons

authorized to that effect. Provided always that actual settlers shall enjoy the privilege of fishing with a rod and line in the manner known as fly surface-fishing in front of their own properties.

"4th. That the said lessee shall not have any right, claim or pretension to any indemnity or abatement of rent by reason of a decrease or failure in the fishery by these presents leased.

"5th. That in default of payment by the said lessee of the rent as hereinbefore stipulated, or by his neglect, default or evasion, failure or refusal to fulfil any of the other clauses and conditions of this lease, the same may, at the option of the lessor, be at any time determined and put an end to upon notice thereof to the said lessee by letter posted to him to the post office nearest to the said premises, or by personal notice through any overseer of fisheries for the province of *New Brunswick*, or other person by the Minister of Marine and Fisheries deputed for the purpose, and the said lease shall become absolutely void and the crown may thereupon enter into possession and enjoyment of the said station and privileges without any indemnification for improvements or recourse to law, and relet the same; the said lessee being moreover held bound and liable for all loss or damage which might accrue or arise to the crown by reason of receiving a lower rent, or being unable to release the premises and privileges appertaining thereto or otherwise.

"6th. That the said lessee binds himself to establish and maintain efficient private guardianship upon the said stream throughout each season, to the satisfaction of the lessor, who reserves the right of four rods.

"This said lease (in duplicate) made and passed on the thirty-first day of October, in the year of Our Lord

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one thousand eight hundred and seventy-three in presence of the undersigned witnesses.

P. MITCHELL,
Minister of Marine and Fisheries.

Witness: *S. P. Bauset.*

Countersigned—*W. F. Whitcher*,
Commissioner of Fisheries.

C. A. Robertson.

Witness: *W. H. Venning.*

"It is admitted for the purpose of this case:

"1. That the Government of *Canada* did not own the lands adjoining the said river within the limits of the said lease.

"2. That the said lease includes all that portion of the South-west *Miramichi* River included in the lands of the aforesaid grant to the *Nova Scotia and New Brunswick Land Company*; and also the remainder of the river above the said grant up to its source, which last portion of the river passes through ungranted land, and is of comparatively little value for the purpose of salmon fishing. That the said river for several miles up the stream and above and below the lots and parcels of land previously granted to the said *New Brunswick and Nova Scotia Land Company*, and excepted in the said grant, is within the boundaries of the land described in the said grant. That under the said lease the suppliant entered upon the said fluvial division so leased to him, and paid the annual rent, and fulfilled and performed all the conditions and agreements and provisions in the said lease contained on his part and behalf to be kept fulfilled and performed.

"3. That although the suppliant under the said lease claimed to be in occupation of the said fishery station described in aforesaid lease, and to have the exclusive right of fishing therein, and that subject to the reservations in the said lease he had the right of preventing all

persons from fishing for salmon within the bounds of the said fishery station, *James Steadman* and *Edgar Hanson*, who were not actual settlers, and who did not have or claim to have any lease, license or permission so to do from the Minister of Marine and Fisheries, or from the suppliant, did (with the permission and consent of and under and by virtue of conveyances from the said *Nova Scotia and New Brunswick Land Company* of land, including a portion of the said river above the aforesaid grants so excepted and reserved in said grant to the Company), during the year 1875, and during the season when fly fishing was lawful, enter upon the said portion of the river, being a part of the river so leased as aforesaid, and fished for and caught salmon by fly fishing against the will of suppliant and against his consent.

"4. That in order to maintain his rights and privileges, and the right of fishing purporting to be granted and demised to the suppliant by the said lease, the suppliant prevented the said *James Steadman* and *Edgar Hanson* from fly fishing.

"5. That the said *James Steadman* and *Edgar Hanson*, respectively, brought actions against the suppliant and his servants for and by reason of such prevention from fishing, as above stated, and such proceedings were thereupon had that the said *James Steadman* and *Edgar Hanson* recovered against the suppliant damages and costs, which the suppliant has been obliged to pay, and that the Supreme Court of *New Brunswick* on appeal (see *Steadman* v. *Robertson et al.*, and *Hanson* v. *Robertson et al.* (1), held that the Minister of Marine and Fisheries had no right or power to issue the said fishery lease, and that the same was null and void.

"6. That in and about the defence of the said actions the suppliant also incurred costs and expenses.

(1) 2 Pugs. & Bur. 573.

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"7. That also by reason of the premises the suppliant has sustained other loss and damage.

"8. That in establishing and maintaining efficient private guardianship upon the said stream through the season, required by the said lease, the suppliant has also expended money.

"9. That the suppliant therefore prays that her Majesty will be pleased to do what is right and just in the premises, and cause the suppliant to be re-imbursed and compensated for the moneys so expended by him as aforesaid, and for the losses, damages and injuries sustained by him as aforesaid.

"10. It is agreed that the statements above set out are admitted for the purpose of this special case, and are to be used for the purpose of enabling the court to decide the questions of law raised hereby.

"11. It is also agreed that either party may appeal from the judgment to be pronounced in the above case as upon a demurrer.

"The following questions are therefore submitted for the decision of the court:—

"1. Had the Parliament of *Canada* power to pass the 2nd section of the said Act entitled "An Act for the regulation of fishing and the protection of the Fisheries?"

"2 Had the Minister of Marine and Fisheries the right to issue the fishery lease in question?

"3. Was the bed of the *S. W. Miramichi* within the limits of grant to the *Nova Scotia* and *New Brunswick* Land Company, and above the grants mentioned and reserved therein, granted to the said company?

"4. If so, did the exclusive right of fishing in said river thereby pass to the said company?

"5. If the bed of the river did not pass, had the company, as riparian proprietor, the right of fishing *ad filum aquæ*; and if so, was that right exclusive?

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"6. Have the grantees in grants of lots bounded by srid river, or by any part thereof, and excepted from the said company's grant, any exclusive or other right of fishing in said river opposite their respective grants?

"7. If an exclusive right of fishing in a portion of the *Miramichi* river passed to said company, or to the grantees in the excepted grants, or any of them, could the Minister of Marine and Fisheries issue a valid fishery lease of such portion of the river?

"8. Where the lands (above tidal water) through which the said river passes are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river?

"9. It is understood and agreed, that if upon the final determination of the case it be held that the Government had no power to make the lease in question to Mr. *Robertson*, an order shall be made referring it to the proper officer of the court to take an account of the expenses actually and properly incurred by Mr. *Robertson*, in connection with the suits in the courts of *New Brunswick*, and such other actual expenses as he may have been put to on account of the action of the parties who intercepted the rights claimed by him under the lease; and it is further understood and agreed that the government shall pay to Mr. *Robertson* such of these expenses as the court may think him entitled to, in case the parties to this suit may differ upon the matter."

The case was argued in the Exchequer Court for the Suppliant by Mr. *Haliburton*, Q.C., and for the Crown by Mr. *Lash*, Q.C.

On the 7th October, 1881, the following judgment was delivered by GWYNNE, J.:—

"This special case came before me in the month of February, but upon the argument appearing to be imperfect was withdrawn, and amended, and as so

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amended was argued in the month of May. After this argument there appeared to me to be still wanting information as to some facts which should be introduced by way of further amendment. These facts have been supplied during the vacation and are now made part of the case.

"The question is as to the right to the Salmon Fishery in the *Miramichi* River in the Province of *New Brunswick*, and as to the validity of an instrument purporting to be a lease or license under the provisions of the Fisheries Act of 1868, issued by the Minister of Marine and Fisheries, bearing date 31st of October 1873. The questions submitted by the special case which has been agreed upon are as follows:

"1st. Had the Parliament of Canada power to pass the 2nd section of the Act of 1868 entitled, 'An Act for the regulation of Fishing and the Protection of the Fisheries'?

"2nd. Had the Minister of Marine and Fisheries the right to issue the Fishery Lease in question?

"3rd. Was the bed of S. W. *Miramichi* River within the limits of the grant to the *Nova Scotia* and *New Brunswick* Land Company, and above the grants mentioned and reserved therein, granted to the said Company?

"4. If so, did the exclusive right of fishing in said River thereby pass to the said Company?

"5. If the bed of the River did not pass, had the Company as riparian proprietor the right of fishing *ad filum aquæ*, and if so, was that right exclusive?

"6. Have the Grantees in grants of lots bounded by said River or by any part thereof, and excepted from the said Company's grant, any exclusive, or other right of fishing in said River opposite to their respective grants?

"7. If an exclusive right of fishing in a portion of

the *Miramichi* River passed to the said Company or to the grantees in the excepted grants or any of them, could the Minister of Marine and Fisheries issue a valid fishery lease of such portion of the River?

"8. Where the lands, above tidal water, through which the said River passes are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a Lease of that a portion of the River?

"It is agreed by the case, that if, upon the final determination of it, it be held that the Government had no power to make the lease in question to the Suppliant, an order shall be made referring it to the proper officer of the Court to take an account of the expenses actually and properly incurred in connection with certain suits in the Courts in *New Brunswick* and such other actual expenses as he may have been put to on account of the action of parties who intercepted the rights claimed by him under the lease, and it was further agreed that the Government should pay to the Suppliant such of those expenses as the Court may think him entitled to, in case the Suppliant and the Government should differ upon the matter.

"The clause of the Act referred to in the first of the above questions is the 2nd section of the Dominion Act 31st Vic., ch. 60, and is as follows:—'The Minister of Marine and Fisheries may, where 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, wherever situate and carried on, but leases or licenses for any term exceeding nine years, shall be issued only under authority of an order of the Governor in Council.'

"The Act in which this section is contained was passed by the Dominion Parliament 'for the regulation of fishing and the protection of Fisheries' and it was passed under the authority of the *British North America*

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Act, the 91st section of which places, among other matters, under the exclusive authority of the Parliament of *Canada*, 'Sea Coast and Inland Fisheries.'

"To secure an uniformly consistent construction of this our Constitutional Charter it is necessary that some certain and sufficient canon of construction should be laid down and adopted, by which all Acts passed as well by the Parliament as by the Local Legislatures may be effectually tested upon a question arising as to their being or not being *intra vires* of the legislating body passing them. Such a canon appeared to me to be that formulated by me in the *City of Fredericton* vs. *The Queen* (1), and it still appears to me to be a good and sufficient rule for the required purpose, namely,—'All subjects of legislation of every description whatever are within the jurisdiction and control of the Dominion Parliament to legislate upon, except such as are placed by the *British North America* Act under the exclusive control of the Local Legislatures, and nothing is placed under the exclusive control of the Local Legislatures unless it comes within some or one of the subjects specially enumerated in the 92nd section, and is at the same time outside of the several items enumerated in the 91st section, that is to say, does not involve any interference with any of those items.' The effect of the closing paragraph of the 91st section, namely: 'and any matter coming within any of the classes of subjects enumerated in the 91st 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' in my opinion clearly is to exclude from the jurisdiction of the Local Legislatures the several subjects enumerated in the 92nd section, in so far as they relate to or affect any of the matters enumerated in the 91st section.

(1) 3 Can. S. C. R. 505.

"Now, among the items enumerated in section 92 there is nothing which could give to the Local Legislatures any jurisdiction whatever over Sea Coast and Inland Fisheries, unless it be the item 'Property and Civil Rights in the Province,' but inasmuch as 'Sea Coast and Inland Fisheries' are enumerated specially in the 91st section as placed under the exclusive control of Parliament, this enumeration carries with it exclusive jurisdiction over property and civil rights in every province in so far as whatever is comprehended under the term 'Sea Coast and Inland Fisheries' is concerned, and the Local Legislatures have no jurisdiction whatever over this subject; the jurisdiction therefore which is given to the Local Legislatures over 'property and civil rights in the Province' is not an absolute, but only a qualified jurisdiction, and must be held to be limited to the residuum of such jurisdiction not absorbed by the exclusive control given to the Dominion Parliament over every one of the subjects enumerated in the 91st section: while the jurisdiction of Parliament over every subject placed under *its* control is as absolute and supreme as the jurisdiction of the Imperial Parliament over the like subject in the United Kingdom would be; the design of the *British North America* Act being to give to the Dominion of *Canada* a constitution similar in principle to that of the United Kingdom. It is of course, in every case, necessary to form an accurate judgment upon what is the particular subject matter in each case as to which the question arises, for the extent of the control of parliament over the subject-matter, may possibly be limited by the nature of the subject; for example, the first item enumerated in the 91st section as placed under the exclusive control of the Parliament is 'the Public debt and property,' and by section 108 the Provincial Public Works and property are declared to be the property of *Canada*. The

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jurisdiction of Parliament over such property is in virtue of the subject-matter being the property of *Canada*, but if Parliament should so legislate as to dispose absolutely by sale of portions of this property from time to time, it may well be that the property so sold, when it should become the property of individuals, should be no longer subject to the control of the Dominion Parliament any more than any other property of an individual should be; but over most of the subjects enumerated in the 91st section, the right of the Dominion Parliament to legislate is wholly irrespective of there being any property in the several subjects *vested* in the Dominion of *Canada*, and over those subjects the right of legislation continues forever, no matter who may have 'property or civil rights' therein. There is nothing strange in this provision; on the contrary, it is in perfect character with the whole scheme of the Act, that the jurisdiction of the Dominion Parliament should be supreme over all subjects which are of general public interest to the whole Dominion in whomsoever the property in such subject may be vested.

"It cannot be questioned that all the inhabitants of this Dominion, in whatever Province they may reside, have an interest in the regulation and protection of the Fisheries, whether they be Sea Coast or Inland, not only as affording a large supply of food for the inhabitants of the Dominion, but a very extensive traffic also between the several Provinces and with *England* as well as with Foreign States, thus extending the trade and commerce external and internal of the Dominion, and this interest of the public in the Fisheries is not the less because in our Inland waters, consisting of Rivers and Lakes teeming with the finest fish, private persons may have property therein. Now, what is to be comprehended under the term 'Fisheries' as used in

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the 12th item of the 91st section of the *British North America* Act? In *Abbot's* Law Dictionary, the term is defined to be, "the right to take fish at a certain place or upon particular waters."

"Chancellor *Kent*, in his commentaries, defines common of Piscary to be 'a liberty or right of fishing in water covering the soil of another or in a river running through another man's lands'—'it is not,' he says, 'an exclusive right, but one enjoyed in common with certain other persons.' Lord *Holt*, in 2 Salk. 637, said that it was to be resembled to the case of other commons.

"In the *Mayor of Carlisle* v. *Graham* (1) 'Common of Fishery' is distinguished from 'Common Fishery,' the former being defined to be a right enjoyed by several persons, but not the whole public, in a particular stream, and the latter, a right enjoyed by all the public as on the sea, or to the ebb and flow of the tide: 'Free Fishery,' is there defined to be a franchise in the hands of a subject existing by grant or prescription distinguished from an ownership in the soil; and 'Several Fishery' to be a private exclusive right of fishing in a navigable river or arm of the sea, but whether it must be accompanied with ownership in the soil, in that the authorities differ.

"Mr. *Hargrave* in his jurisconsult consultations on the distinction of Fisheries differs from *Blackstone*, who was of opinion that the ownership of the soil was essential to a several fishery; after quoting Lord *Coke's* argument, Mr. *Hargrave* says: 'At the utmost, they only prove that a several Piscary is presumed to comprehend the soil until the contrary appears, which is perfectly consistent with Lord *Coke's* position that they may be in different persons, and this indeed appears to be the true doctrine on the subject; and Chancellor *Kent* in his commentaries (2) says: 'The more

(1) L. R. 4 Ex. 361. (2) P. 412.

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easy and intelligible arrangement of the subject would seem to be to divide the right of fishing into a right common to all and right vested exclusively in one or more persons.' In fresh water rivers, he says, 'that is, above the ebb and flow of the tide, the owners of the soil on each side had the interest and the right of fishery, and it was an exclusive right extending to the centre of the stream opposite their respective lands unless a special grant or prescription be shown.'

"In Lord *Fitz Walters* case (1), *Hale*, C.J., ruled that in the case of a private river the Lord having the soil, is good evidence to prove he has the right of fishing, and it put the proof on them that claim *liberam Piscariam*, i. e. a right of fishing distinct from ownership of the soil.

"The right of fishing, then, in rivers above the ebb and flow of the tide, may exist as a right incident upon the ownership of the soil or bed of the river, or as a right wholly distinct from such ownership, and so the ownership of the bed of a river may be in one person, and the right of fishing in the waters covering that bed may be wholly in another or others.

"Now, that the *British North America* Act did not contemplate placing the title or ownership of the beds of fresh water rivers under the control of the Dominion Parliament so as to enable that Parliament to affect the title to the beds of such rivers sufficiently appears, I think, from the 109th section, by which 'all *lands* mines, minerals and royalties belonging to the several Provinces of *Canada*, *Nova Scotia* and *New Brunwick* at the Union' are declared to belong to the several Provinces of *Ontario*, *Quebec*, *Nova Scotia* and *New Brunswick* in which the same are situate, and this term '*lands*' in this section is sufficient to comprehend the beds of all rivers in those ungranted lands. We

(1) 1 Mod. 105.

must, however, in order to give a consistent construction to the whole Act, read this 109th section in connection with and subject to the provisions of the 91st section, which places 'all Fisheries' both sea, coast and inland under the exclusive Legislative control of the Dominion Parliament. Full effect can be given to the whole Act by construing it (and this appears to me to be its true construction) as placing the fisheries or right of fishing in all rivers running through ungranted lands in the several Provinces, as well as in all rivers running through lands then already granted, *as distinct and severed from the property in, or title to, the soil or beds of these rivers*, under the exclusive Legislative control of the Dominion Parliament. So construing the term 'Fisheries,' the control of the Dominion Parliament may be, and is, exclusive and supreme without its having any jurisdiction to legislate so as to alter in any respect the *title or ownership* of the beds of the rivers in which the Fisheries may exist. That title may be and is in the Grantees of the Crown where the title has passed, or may pass hereafter, by grants to be made under the seal of the several Provinces in which the lands may lie, but the exclusive right to control the 'Fisheries,' as a property or right of fishing distinct from ownership of the soil, is vested in the Dominion Parliament.

"So construing the term, it must be held to comprehend the right to control, in such manner as to Parliament in its discretion shall seem expedient, all deep sea fishing and the right to take all fish ordinarily caught either on the sea coast or in the great lakes or in the rivers of the Dominion, and which are valuable for food, within the Dominion, or for exportation for that purpose, or for any other purpose of trade and commerce, and must include as well the right to catch fish as the designation and control of the places where the fish

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may be caught and the times and manner of catching; it must also, as it appears to me, be construed to comprehend all such rights of fishing and other matters relating to the 'Fisheries,' *as distinct from ownership of the bed of the streams*, and relating to the protection of the fish, as had been provided by legislation within any of the old Provinces, as the same were constituted before the passing of *British North America* Act. Now, many Acts had been passed by the legislature of the old Province of *New Brunswick* for the regulation and protection of the fisheries in that Province between the 33rd *Geo.* 3rd, ch. 9, and 26 *Vic.* ch. 6, prohibiting, among other things, the use of drift nets, the erection of any hedge, weir, fishgarth, or other incumbrance, or the placing any seine or net across any river, cove or creek in the Province in such manner as to obstruct or injure the natural course of the fish in any river where they usually go—regulating the construction of Mill dams—prohibiting also the fishing for Salmon and other fish at certain periods of the year, and giving to the Justices in General Sessions in each County power to establish such other rules and regulations as to them should seem fit for the better production and preservation of the fish within their respective counties, provided that such regulations should not be contrary to, and should not interfere with, the general regulations and restrictions contained in any Act of Assembly or private right. By chapter 101, of the Revised Statutes, the Governor in Council was authorized to appoint two wardens of Fisheries in any County, who should watch over and protect the fisheries, enforce the provisions of that Act, the rules of the Justices in Sessions, or of municipal authorities, and the regulations of the Governor in Council in relation to such fisheries.

Section 5 authorized the Governor in Council to grant leases or licenses of occupation, for a term not

exceeding five years, for fishing stations on ungranted shores, beaches or islands, which should terminate when such stations should cease to be used for such purpose, and that such leases or licenses should be sold at public auction, but that the right in lands and privileges already granted should not be affected thereby. This provision as to leases or licenses would seem to apply only to fishing in tidal waters, but 26 *Vic.* ch. 6, which was in fact an amendment and consolidation of all previous Acts from ch. 101 of the Revised Statutes, enacted that the Governor in Council might grant leases or licenses for fishing purposes in rivers and streams above the tidal waters of such streams or rivers when the same belong to the Crown, or the lands are ungranted, that such leases or licenses should be sold by public auction after 30 days notice in the Royal Gazette, the upset price being determined by the Governor in Council, but that the rights of parties in lands and privileges already grant d should not be affected thereby, and that the rents and profits arising from such leases or licenses should be paid into the Provincial Treasury to a separate account to be kept, called 'The Fishery protection account.'

"In *Nova Scotia* also there were statutes of a somewhat similar character. Ch. 94 of Title 25 revised Stat. (2nd series) regulated the Sea Coast Fisheries, and ch. 95 the River Fisheries. The first section of this latter Act empowered the Sessions from time to time to make orders for regulating the River Fisheries, and subjected every person who should transgress such orders to a fine not exceeding £10 for each offence, and by section 6 it was enacted that the Sessions should annually appoint such and so many places on the rivers and streams as might be attended with the least inconvenience to the owners of the soil or the rivers as resorts for the purpose of taking fish, but that the

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same and the enactments in the Act contained should not extend to any species of fish from the sea, except Salmon, Bass, Shad, Alewives and Gaspereaux.

"The 10th section regulated the Salmon fishing. So likewise in *Canada* an Act was passed, entituled 'An Act respecting fisheries and fishing,' Consolidated Statutes of *Canada*, 22 *Vic.*, ch. 62, containing many like provisions, the first section of which authorized the Governor in Council to grant special fishing leases and licenses on lands belonging to the Crown for any term not exceeding nine years, and to make all and every such regulations as might be found necessary or expedient for the better management and regulation of the Fisheries of the Province. This Act was amended by the 29 *Vic.*, ch. 11, the 3rd section of which (and from which the 2nd section of 31 *Vic.*, ch. 60 would seem to be taken) purported to give the Commissioner of Crown Lands the authority which the latter Act and section purports to give to the Minister of Marine and Fisheries, and is as follows: 'The Commissioner of Crown Lands may, where the exclusive right of fishing does not already exist by law in favor of private persons, issue fishing leases and licenses for fisheries and fishing wheresoever situated or carried on, and grant licenses of occupation for public lands in connection with fisheries, but leases or licenses for any term exceeding nine years shall be issued only under authority of the Governor General in Council.'

"At the time of the passing of the *British North America* Act, the above recited Acts were in force in *New Brunswick*, *Nova Scotia* and *Canada* respectively, and by force of the 129th section continued so to be, after the passing of the Act, until the same should be repealed, abolished or altered by Parliament, and the effect was in fact the same as if the *British North America* Act had, for the protection and preservation of

the fisheries, in precise terms, repealed those enactments and declared that the Dominion Executive should have full power to carry them into effect until the Parliament should repeal, abolish or alter those enactments or any of them, or make additional or other provisions in their stead—unlimited power is thus vested in the Parliament, either to maintain the then existing provisions or such of them as it should think fit, or in its wisdom to repeal, abolish or alter those provisions and to make such further and other, or the like provisions and enactments upon the subject, as to it should seem expedient. Now the Act under consideration, viz: 31 *Vic.*, ch. 60, maintains the like scrupulous respect for *private* rights as the old acts which it repealed had done; for by the 2nd section the power given to the Minister of Marine and Fisheries to issue fishery leases and licenses is confined expressly to those places 'where the exclusive right of fishing does not already exist by law,' following the provision of the *Canada* Statute 29 *Vic*, ch. 11, section 3.

"In all matters placed under the control of Parliament, all private interests, whether Provincial or personal, must yield to the public interest and to the public will, in relation to the subject-matter, as expressed in an Act of Parliament. Constituted as the Dominion Parliament is after the pattern of the Imperial Parliament, and consisting as it does of Her Majesty, a Senate and a House of Commons, as separate branches, the latter elected by the people as their representatives, the rights and interests of private persons, it must be presumed, will always be duly considered, and the principles of the British Constitution, which forbids that any man should be wantonly deprived of his property under pretence of the public benefit or without due compensation, be always respected.

"It is, however, in Parliament, upon the occasion of

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the passing of any Act which may effect injuriously private rights, that those rights are to be asserted, for once an Act is passed by the Parliament in respect of any matter over which it has jurisdiction to legislate, it is not competent for this or any Court to pronounce the Act to be invalid because it may affect injuriously private rights, any more than it would be competent for the Courts in *England*, for the like reason, to refuse to give effect to a like Act of the Parliament of the United Kingdom. If the subject be within the legislative jurisdiction of the Parliament and the terms of the Act be explicit, so long as it remains in force effect must be given to it in all Courts of the Dominion, however private rights may be affected. There is no evil to be apprehended from giving, in our constitution, full effect to this principle, which is inherent in the British Constitution, nor would the transfer of jurisdiction to the Local Legislatures be any improvement, for experience does not warrant the belief that the interests of private persons in relation to any subject would be more respected, or the Public interest be better protected, if such subject were placed under the control of the Local Legislatures instead of under that of Parliament.

"The Imperial Parliament, having supreme control over the title to, or ownership of, the beds and soil of the inland waters of the Dominion, and also over the franchise or right of fishing therein as a distinct property, has, at the request of the old Provinces of *Canada*, *Nova Scotia* and *New Brunswick* as the same were constituted before the passing of the *British North America* Act, so dealt with those subjects as, while leaving the title to the beds and soil of all rivers and streams passing through or by the side of lands already granted in the grantees of such respective lands, to place the franchise or right to fish as a separate pro-

perty distinct from the ownership of the soil under the sole, exclusive and supreme control of the Dominion Parliament. Construing then the term 'Fisheries' as used in the *British North America* Act, as this franchise or incorporeal hereditament apart from and irrespective of the title to the land covered with water in which the Fisheries exist, it seems to me to be free from all doubt, that the jurisdiction of Parliament over all fisheries, whether sea, coast or inland, and whether in Lakes or Rivers, is exclusive and supreme, notwithstanding that in the rivers and other waters wherein such fisheries exist, until Parliament should legislate upon the subject, private persons may be seised and possessed of the fishing in such waters, either as a right incident to ownership of the beds and soil covered by such waters, or otherwise; and that therefore, the first question in the special case must be answered in the affirmative.

"The special case raises no question as to the terms of the particular instrument which has been used, nor whether it gives to the party named therein, assuming the Minister signing it to have the right to give, an exclusive franchise or privilege of fishing in the waters named during the period named; or only a right in common with others to whom a like privilege might be given as in *Bloomfield* vs. *Johnson* (1), but for the reasons already stated it will be seen that, while by force of the statute, the form of the instrument (although it is not issued under the great seal of the Dominion, under which alone such a franchise could, by the course of the Common Law, be granted) may be sufficient to pass the franchise as distinct from the ownership of the bed or soil of the river, it cannot operate as a demise or transfer of the legal estate in the bed of the river to the donee or Grantee or Licensee

(1) Ir. L. R. 8 C. L. 68.

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(which latter term seems to me to be the most appropriate) of the franchise. As to the residue of the questions submitted in the special case, it will be convenient to review the nature, condition and title to the particular property in question, namely:—the right of fishing in the *Miramichi* River prior to and at the time of the passing of the *British North America* Act, and to consider what the law as affecting such property then was.

"The special case states that the portion of the *Miramichi* River which is covered by the Fishery Lease to the Suppliant is above tidal waters and is navigable for canoes and boats and has been used from the earliest settlement of the Country as a highway for the same and for the purpose of floating down timber and log to market. After the *St. John*, the largest river in *New Brunswick* is the *Miramichi*, flowing northward into an extensive Bay of its own name. It is 225 miles in length and seven miles wide at its mouth. It is navigable for large vessels 25 miles from the Gulf, and for schooners 20 miles further to the head of the tide, above which for sixty miles it is navigable for tow boats. It has many large tributaries spreading over a great extent of Country.—*Price's Bend* is about 40 or 50 miles above the ebb and flow of the tide. The stream for the greater part from this point upwards is navigable for canoes, small boats, flat bottomed scows, logs and timber; logs are usually driven down the River in highwater in the Spring and Fall. The stream is rapid: during summer, it is in some places on the bars very shallow. In the salmon fishing season, say June, July and August, canoes have to be hauled over the very shallow bars by hand.

"On the 5th November, 1835, a Grant issued to the *Nova Scotia* and *New Brunswick* Land Comyany of 580,000 acres, which included within its limits that

portion of the *Miramichi* River which is in question, and the said Grant contained with the usual granting clauses the following clause, 'excepting also out of the said tract of land described within the said bounds, all and every lot, piece or parcel of land which have been heretofore by us or our predecessors given or granted to any person or persons whatsoever, or to any body corporate by any grant or conveyance under the Great Seal of the Province of *New Brunswick*, or the Great Seal of the Province of *Nova Scotia*, during the period when the said hereby granted tract of land was part and parcel of our said Province of *Nova Scotia*, together with all privileges, &c., and also further excepting the bed and waters of the *Miramichi* river and the beds and waters of all the rivers and streams which empty themselves into the *St. John* or the river *Nashwaak* so far up the said rivers and streams respectively as the same respectively pass through or over any of the said heretofore previously granted pieces or parcels of land hereinbefore excepted.'

"The contention of Mr. *Lash* upon the part of the Crown as representing the Dominion Government is, that the admissions in the case establish the *River Miramichi*, at the *locus in quo*, to be a navigable river, and that, as such, the public at large had a common right of fishing therein, and that therefore there could be no exclusive right of fishing therein, even if the bed of the River had passed by the Grant to the *Nova Scotia* and *New Brunswick* Land Company, a point which however he disputes, contending that the bed of the river *Miramichi* is wholly excepted from the grant; and if the river be, as he contends it is, a public river, he contends that *Magna Charta* prevents any exclusive right of fishing therein. That the *St. Lawrence* and other great rivers of Old *Canada* and the great Lakes formed by them are public waters open to the public at

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large, who have the right not only of navigation but of fishing also therein, unless in places which are covered by special grants, is too well established now to admit of a doubt. If the principle upon which *Dixon* vs. *Scnetsinger* (1) was decided be the correct principle, that right is established upon a firm basis in all those waters, wholly irrespective of the Common Law principle that such right is by the Common Law of *England* confined to tidal waters; but the same reasoning as in *Dixon* vs. *Scnetsinger* was applied to the rivers of Old *Canada* will not apply to the rivers of *New Brunswick*, the right of fishing in which must be considered with reference to the Common Law of *England*. I find some difficulty in determining what is precisely meant by the expression in the special case, wherein it is admitted that the portion of the *Miramichi* river which is covered by the fishery lease to the Suppliant, 'has been used from the earliest settlement of the country as a highway for the same and for the purpose of floating down timber and logs to market'—for, by the plan which accompanies the grant to the *Nova Scotia* and *New Brunswick* Land Company, it would seem that for some 20 or 30 miles up the *Miramichi* river, within the limits of the Company's grant and above the highest prior grant of any land upon the river above *Price's Bend*, the country was a dense forest without any settlement whatever, and higher up than the company's grant there is not said to have been any settlement, nor is it said that there had been any licenses to cut timber granted by the Crown in any part of the tract upon the river above the remotest land which had been granted. I find it difficult therefore to understand, if this is what is meant to be admitted, how from the earliest settlement in *New Brunswick* that part of the river which runs through wild ungranted forest

(1) 23 U. C. C. P. 235.

land in which there never had been any settlement whatever, nor, so far as appears by the case stated, any licenses granted to cut timber, could have been used as stated in the case 'as a highway and for the purpose of floating down timber and logs to market.' However, the case sufficiently establishes the character of the river, for it admits that the part in question is above *Price's Bend*, which is situate 40 or 50 miles above the ebb and flow of the tide, and that from this point upwards the river is navigable only for canoes, small boats, flat bottom scows, logs and timber, which latter are driven down the river in high water, in the spring and fall, and that in the months of June, July and August, which is the Salmon fishing season, the water is so low that canoes have to be carried over the bars which are very shallow, and that consequently, during this period of the year, the river is not, at the part in question, navigable for flat bottomed boats, logs or timber. *Lloyd* vs *Jones* (1) is an authority that there is no connection between a right of fishing and a right of passage on a fresh water river—that is, above the ebb and flow of the tide, and that the existence of the latter right does not carry with it the former. *Creswell*, J., at page 81, puts the point thus 'what answer is it to plaintiff's complaint that the defendant unlawfully fished in his stream for the latter to say that he had a right of way over the *locus in quo*?' So from *Ewing* vs. *Colquhoun* (2) it appears that a right of navigation in the public with boats, barges, rafts, &c., &c., on an inland river, involves no right of property in the river or its bed. The public have merely the right to use the river for passing to and fro upon it, in the same manner as they have a right of passage along a public road or foot path through a private estate, but the right of fishing in such a river

(1) 6 C. B. 81. (2) 2 App. Cases 839.

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by the riparian proprietors, is a right of property vested in such proprietors, in virtue of their being seized of the *alveus* of the stream *ad medium filum aquae*, which *primâ facie* all proprietors of land adjoining an inland river are; but if the *primâ facie* ownership is rebutted by shewing the *alveus* of the river to be in another, then the right of fishing in that river follows the proprietorship of the *alveus*, until it be shewn that a right to fish has been acquired either by grant or prescription by a person not seised of the *alveus*. 'Riparian proprietors' is a term applied by the civilians to the owners of water courses, and the use of the same significant and convenient term is now fully introduced into the Common Law: the soil of the bed itself and consequently the water may be, and most often is, divided between two opposite riparian owners, that is, the land on one side may be owned by one person and the land on the opposite side by another. When such is the case each proprietor owns to the middle, or, what is called the thread of the river: there is but one difference between a stream running through a man's land, and one which runs by the side of it, in the former case he owns the whole and in the latter but half (1). And in sec. 61 of his work on waters and watercourses *Angell* says 'It will be seen by reference to the first chapter that where a person owns the whole of the soil over which a watercourse runs in its natural course, he alone is entitled to the use and profits of the water, and that where a person owns only the land upon one side of a water course, his interest in the soil and his right to the water extends to the middle of the stream: concomitant with this interest in the soil of the bed of watercourses is an exclusive right of fishing, so that the riparian proprietor, and he alone, is autho-

(1) Ang. Wat. sec. 10

rized to take fish from any part of the stream included within his territorial limits.' And *Hale, Jure maris*, p. 5 of *Hargrave's* tracts, says: 'Fresh water 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 *propriety*, that is, the property of the soil, and consequently the right of fishing *usque ad filum aquae*, and the owners of the other side the right of soil or ownership and *fishing* unto the *filum aquae* on their side: and if a man be owner of the land on 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.' When we speak then of the riparian proprietor or proprietors having the exclusive right of fishing in the river passing through or by the side of his or their lands, what is meant by the term " riparian proprietor " is the owner of the whole bed of the stream as well as of the land through which the stream passes, *or* the owners of the land on either side and of the bed of the stream, each on his own side *ad medium filum aquae*, which every owner of land upon either side of a stream is presumed to be until the contrary is shewn.

" Chancellor Kent, in his commentaries says: 'It was a settled principle of the Common Law that the owners of lands on the banks of fresh water rivers, above the ebbing and flowing of the tide, had the exclusive right of fishing, as well as the right of property opposite their respective lands, *ad medium filum aquae*, and where the lands on each side of the river belonged to the same person, he had the same exclusive right of fishing in the whole river, so far as his land extended along the same. The right exists in the rivers of that description, though they be of the first magnitude, and navigable for rafts or boats, but they are subjected to the *jus publicum* as a common

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highway or easement. In rivers not navigable (and in the Common Law sense of the term, they were only deemed to be navigable as far as the flux and reflux of the tide,) the owners of the soil on each side had the interest and the right of fishery, and it was an exclusive right extending to the centre of the stream opposite their respective lands. This private right of fishing is confined to fresh water rivers, that is to rivers above the ebb and flow of the tide, unless a special grant or prescription be shewn, but the right of fishing in the sea and in the bays and arms of the sea and in navigable tide water rivers belongs to the general public, and any person asserting an exclusive privilege there must shew it strictly by grant or prescription.'—

"In *Murphy* vs. *Ryan* (1) it was held that the public cannot acquire, by immemorial usage, any right of fishing in a river, in which, though it be navigable, in fact the tide does not ebb and flow, and that the term 'Navigable' used in a legal sense, as applied to a river in which the soil *primâ facie* belongs to the Crown and the fishing to the public, imports that the river is one in which the tide ebbs and flows.

"This case is one of great authority, not only for the learning of the learned Judges who decided it, but because it is cited with approbation by the Court of Exchequer in *England*, in the *Mayor of Carlisle* vs. *Graham* (2). In pronouncing the judgment of the Court *O'Hagan*, J, afterwards and now again, Lord Chancellor of *Ireland*, says: 'According to the well established principles of the Common Law, the proprietors on either side of a river are presumed to be possessed of the bed and soil of it moietively to a supposed line in the middle constituting their legal boundary, and, being so possessed, have an exclusive right to the fishery in the water which flows above their respective territories, though the law

(1) Ir. L. R. 2 C. L. 143. (2) L. R. 4 Ex. 361.

secures to the public the right of navigation upon the surface of that water, as a public highway which individuals are forbidden to obstruct, and precludes the riparian proprietors from preventing the progress of the fish through the river. But, whilst the right of fishing in fresh water rivers in which the soil belongs to the riparian proprietors is thus exclusive, the right of fishing in the sea, and in its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the Common Law to be *publici juris*, and to belong to all the subjects of the Crown, the soil of the sea and its arms and estuaries and tidal waters being vested in the Sovereign as a trustee for the public.'

He proceeds then to demonstrate by reference to authorities that a navigable river, in the sense of the public having a common right to fish in it, must be a tidal river, and that the right to fish therein '*publici juris*,' is confined to the ebb and flow of the tide. 'There are,' (he says) 'two kinds of rivers, navigable and not navigable. Every navigable river, so high as the sea ebbs and flows in it, is a royal river, and the fishing of it is a royal fishery and belongs to the King by his prerogative, but *in every other river* not navigable and in the fishery of such river the terretenants on each side have an interest of common right.' Quoting then *Hale* (1), he says, 'upon a full consideration of all the cases it will, I think, appear, that no river has been ever held navigable, so as to vest in the crown its bed and soil and in the public the right of fishing, merely because it has been used as a general highway for the purpose of navigation, and that beyond the point to which the sea ebbs and flows, even in a river so used for public purposes, the soil is *primâ facie* in the riparian owners, and the right of fishing *private*.' —And so he concludes that the public can maintain no claim of right to fish in a river the soil of which is not *publici juris* but private property.

(1) De Jure maris, p. 11.

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"In *Bloomfield* vs. *Johnson* (1), where the Crown had granted lands adjoining to *Lough Erne* and islands in the lake, it was held that although the lake was a public navigable highway, yet that being above the flux and reflux of the tide, and although it was held that the ordinary presumption that the bed and soil of a stream opposite their lands belongs to the riparian proprietors, did not extend to a large lake like *Lough Erne*, the public had not any right of fishing therein of common right.

"In *Bristow* vs. *Corcoran* (2) it was held by the House of Lords that *de jure* the Crown had not *primâ facie* a right to the soil or fisheries in a lake like *Lough Neagh*, and that therefore the plaintiff, who claimed a right of fishing in the lake under a grant from *Charles* II, had to prove that the King at the time of such grant had an estate to grant; that it was not to be presumed. Lord *Cairns* there says: 'The lake contains nearly 100,000 acres, but, although it is so large, I am not aware of any rule which could *primâ facie* connect the soil and fisheries with the Crown, or *disconnect them from the private ownership of riparian proprietors or other persons*' and Lord *Blackburn* says: 'It is clearly and uniformly laid down in our books that where the soil is covered by water, forming a river in which the tide does not flow, the soil of *common right* belongs to the adjoining lands, and there is no case or book of authority to shew that the Crown, of common right, is entitled to land covered with water where water is not running water, but still water forming a lake.'

"In *Malcolmson* vs. *O'Dea* (3), *Willes*, J., delivering to the House of Lords the opinion of the Judges says: "The soil of navigable tidal rivers, like the *Shannon*, so far as the tide ebbs and flows, is *primâ facie* in the

(1) Ir. L. R. 8 C. L. 68. (2) 3 App. Cases 641.
(3) 10 H. L. 618.

Crown and the right of fishing *primâ facie* in the public, but for *Magna Charta* the Crown could, by its prerogative, exclude the public from such *primâ facie* right, and grant the exclusive right of fishing to a private individual, either together with or distinct from the soil.'

"*Rolle* v. *Whyte* (1) and *Leconfield* vs. *Lonsdale* (2) decide that the provisions of *Magna Charta* and of the early statutes regulating fisheries, including 17 *Ric.* 2, ch. 9, and 12 *Ed.* 4, ch. 7 apply only to rivers navigable in the Common Law sense of the term, *i.e.* to the flux and reflux of the tide. *Rowe* vs. *Titus* (3) and *Esson* vs. *McMaster* (4) bear wholly upon a question as to the right of the public to the easement of passage along certain rivers in *New Brunswick* with boats, rafts and other property, and the rivers were held not to be navigable, but to be of common right public highways upon which the public had a right of passage, to which right the title of the owners of the soil and of the rivers was subservient. No reference is made in these cases to the right of fishing.

"The great weight of authority in the *United States of America* accords with the decisions of the British Courts. In *Palmer* vs. *Mulligan* (5) it was held in the Supreme Court of the State of *New York*, *Kent* being C.J., in 1805, that the river *Hudson* at Stillwater, which is above the flux and reflux of the tide, was not navigable in the Common Law sense of the term, citing the River *Bar* case (6), *Carter* vs. *Murcot* (7), and *Hale*, *de Jure Maris* from *Hargrave* (8).

Kent, C.J., says: 'The *Hudson* river is capable of being held and enjoyed as private property, but is notwithstanding to be deemed a public highway for public

(1) L. R. 3 Q. B. 286.
(2) L. R. 5 C. P. 657.
(3) 6 New. Bruns.. R. 332.
(4) 3 New. Bruns. R. 501.
(5) 3 Cai. 318.
(6) Davies 152.
(7) 4 Burr· 2162.
(8) Pp. 5, 8, 9.

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uses, such as that of rafting timber, to which purpose it has heretofore been and still is beneficially subservient.'

"In *Carson* vs. *Blazer* (1), it was held in the State of *Pennsylvania* in 1810, that the Patent, under which the proprietors of land abutting on the River *Connecticut* held under *William Penn*, did not pass to them the bed of the river above tide water, or any right of Fishery therein, and that the river and the fisheries therein, above tide water, belonged to the State; the Court in this case held that the Common Law of *England* rule as to the flux and reflux of the tide determining the character of a navigable river did not apply to a river like the *Connecticut*: however, in *Adams* vs. *Pease* (2) the Supreme Court of the State of *Connecticut*, in 1818, held that the owners of land adjoining the *Connecticut* river, above the flow and ebb of the tide, have an exclusive right of fishing opposite to their land to the middle of the stream, but that the public have an easement in the river as a highway for passing and repassing with any kind of water craft; the Chief Justice pronouncing the judgment of the Court says: 'By the Common Law, in the sea, in navigable rivers and in navigable arms of the sea, the right of fishing is common to all. In rivers not navigable, the adjoining proprietors have the exclusive right. Rivers are considered to be navigable in the Common Law sense as far as the sea flows and reflows, and thus far the common right of fishing extends; above the ebbing and flowing of the tide the fishery belongs exclusively to the adjoining proprietors, and the public have a right or easement in such rivers as common highways for passing and repassing with vessels, boats, or any water craft – a more perfect system of regulations on the subject could not be devised. It secures common rights so far as the public interest requires and furnishes a

(1) 2 Binn. 475. (2) 2 Conn. 481.

proper line of demarcation between them and private rights.'

"In the *People* vs. *Platt* (1), it was held by the Supreme Court of the State of *New York*, in 1818, that the right to take fish in the *Saranac*, a river falling into Lake *Champlain*, could not be a public right, for if the river had been granted, the right to take the fish was a private and individual right, and if it had not been granted, yet the right has not become public so as to authorize the entry of any one who might see fit to enter, for the right would belong to the State; and citing *Hale*, Lord *Fitzwalter's* case, and *Carter* vs. *Murcott* (2) the Court says 'these authorities have never been denied or over-ruled and are of unquestionable authority.' Referring to this case the same Court in 1822, in *Hooker* vs. *Cummings* (3), says: 'In the *People* vs. *Platt* we recognized the principles of the Common Law to be that in the case of a private river (that is where it is a fresh water river in which tide does not ebb or flow, and is not therefore an arm of the sea) he who owns the soil has *primâ facie* the right of fishing, and if the soil on both sides be owned by one individual he has the sole and exclusive right, but if there be different proprietors on each side they own on their respective sides *ad medium filum aquae*. We considered in the case referred to, that it was not inconsistent with this right that the river was liable and subject to the public servitude for the passage of boats. The private rights of the owners of the adjacent soil were not otherwise affected than by the river being subject to public use, this is recognised as having been decided in *Palmer* vs. *Mulligan* (4), and *Adams* vs. *Pease* (5).' And referring to *Carson* vs. *Blazer* (6),

(1) 17 Johns. 211.
(2) 4 Burr. 2162.
(3) 20 Johns. 97.
(4) 3 Cai. 318.
(5) 2 Conn. 481.
(6) 2 Binn. 475.

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Spencer, C. J., delivering judgment, says: 'I do not feel myself authorized to reject the principles of the English Common Law by saying that they are not suited to our condition, when I can find no trace of any judicial decision to that effect, nor any legislative declaration or provision leading to such conclusion,' and he adopts the encomium passed upon the Common Law of *England* by the Chief Justice of the Supreme Court of the State of *Connecticut* in *Adams* vs. *Pease*. The principles to be deduced from all these cases seem to be, that in the estimation of the Common Law all rivers are either navigable or not navigable, and rivers are only said to be navigable so far as the ebb and flow of the tide extends. Rivers may be navigable *in fact*, that is, capable of being navigated with ships, boats, rafts, &c., &c., yet be classed among the rivers not navigable in the Common Law sense of the term, which is confined to the ebb and flow of the tide. Rivers which are navigable in this sense are also called public, because they are open to public use and enjoyment freely by the whole community, not only for the purposes of passage, but also for fishing, the Crown being restrained by *Magna Charta* from the exercise of the prerogative of granting a several fishery in that part of any river. Non-navigable rivers, in contrast with navigable or public, are also called private, because although they may be navigable in fact, that is, capable of being traversed with ships, boats, rafts, &c., &c., more or less according to their size and depth, and so subject to a servitude to the public for purposes of passage, yet they are not open to the public for purposes of fishing, but may be owned by private persons, and in common presumption are owned by the proprietors of the adjacent land on either side, who, in right of ownership of the bed of the river, are exclusive owners of the fisheries therein

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opposite their respective lands on either side to the centre line of the river. *Magna Charta* does not affect the right of the Crown, nor restrain it in the exercise of its prerogative of granting the bed and soil of any river above the ebb and flow of the tide, or of granting exclusive or partial rights of fishing therein as distinct from any title in the bed or soil, and in fact Crown grants of land adjacent to rivers above the ebb and flow of the tide, notwithstanding that such rivers are of the first magnitude, are presumed to convey to the Grantee of such lands the bed or soil of the river, and so to convey the exclusive right of fishing therein to the middle thread of the river opposite to the adjacent land so granted. This presumption may be rebutted, and if, by exception in the grant of the adjacent lands, the bed of the river be reserved, still such reservation does not give to the public any common right of fishing in the river, but the property and ownership of the river, its bed and fisheries remain in the Crown, and the bed of the river may be granted by the Crown, and the grant thereof will carry the exclusive right of fishing therein; or the right of fishing, exclusive or partial, may be granted by the Crown to whomsoever it pleases, just as any private person seized of the bed of the river might dispose thereof. This right extends to all large inland Lakes also, for although in their case the same presumption may not arise as does in the case of rivers, namely, that a grant of the adjacent lands conveys *primâ facie* the bed of the river, (as was decided in *Bloomfield* vs. *Johnson*) still, the prerogative right of the Crown to grant the bed of rivers above the ebb and flow of the tide, not being affected by the restraints imposed by *Magna Charta*, cannot be questioned, for all title of the subject is derived from the Crown, and so if a bed of a river, or the right of fishing therein, be reserved by the Crown from a grant of adjacent lands,

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the right and title so reserved remains in the Crown, in the same manner as it would have vested in the grantee if not reserved, and is not subject to any common right of fishing in the public; for, as was said by Lord *Abinger*, C. J., in *Hull* vs. *Selby Ry. Co.* (1),' as all title of the subject is derived from the Crown, the Crown holds by the same rights and with the same limitations as its grantee.' So in *Bloomfield* vs. *Johnson* above cited, it was held that a grant by the Crown of a free fishery in the waters of *Lough Erne* did not pass a several or exclusive right of fishery therein, but only a license to fish on the property of the grantor, and that the several fishery remained in the Crown subject to such grants or licenses to fish as it might grant. In old *Canada* the right of the Crown to make such grants of the bed of the great lakes is recognized by Act of Parliament.

"Although the exercise of the prerogative of the Crown to grant a several fishery in waters where the tide ebbs and flows is restrained by *Magna Charta*, still the right of Parliament in its wisdom (in the exercise of its paramount control in the interests of the public, and as the exponent of the voice of the nation as regards all property,) to authorize such grants there, equally as in waters above the ebb and flow of the tide, is undoubted.

"I speak here of the Parliament of the United Kingdom, and the like power, over all subjects placed by the *British North America* Act under the control of the Parliament of *Canada*, is vested in that Parliament.

"As regards then the particular river in question, at the place in question, above *Price's Bend*, notwithstanding that it may be true that it is subject to a servitude to the public for a common right of passage over its waters, as to which I express no opinion, inas-

(1) 5 M. & W. 327.

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much as the determination of that point is unnecessary in the case before me, but assuming the river to be subject to such servitude, still, the river there partakes not of a character of a navigable or public, but of non-navigable or private river, in the sense in which these terms are used in law, and the public have no common right of fishing therein.

"The *primâ facie* presumption being that the owners of the adjacent lands are owners of the bed of the river, which presumption may be rebutted, it is necessary now to consider the point, which is urged upon behalf of the Crown as representing the Dominion Government in this case, namely that the presumption is rebutted by matter appearing upon the grant to the *Nova Scotia* and *New Brunswick* Land Company, which is made part of the case and has been produced in evidence, for, if not rebutted, the exclusive right of fishing passed by that grant to the Company, and the Act of Parliament, 31 *Vic*, c. 60, does not affect, or in its 2nd section profess to deal with, any fisheries in which an exclusive right of fishing had been conveyed by the Crown and was vested in any persons at the time of the passing of the Act.

"The clause in the letters patent conveying the land to the land company which is relied upon in support of this contention is the latter part of the exception above extracted, namely: 'And also further excepting the bed and waters of the *Miramichi* River, and the beds and waters of all the rivers and streams which empty themselves either into the River *St. John* or the River *Nashwaak*, so far up the said rivers and streams respectively as the same respectively pass through, or over any of the said heretofore previously granted tracts, pieces or parcels of land hereinbefore excepted.'

"This exception, it is urged, is open to two constructions, the one that insisted upon by Mr. *Lash*, upon

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behalf of the Dominion Government, namely: that the bed of the *Miramichi* River is excepted absolutely throughout its whole length, and the beds of the other rivers and streams flowing into the River *St. John* and *Nashwaak* qualifiedly, that is to say, "so far up those rivers and streams respectively, &c., &c.", and the other that insisted on by Mr. *Haliburton*, upon behalf of the Suppliants, namely: that the qualification involved in the words 'So far up the river and streams respectively, &c., &c.,' is to be attached to the exception as to the bed of the *Miramichi* River as well as to the beds of the other rivers and streams mentioned in the same sentence.

"Which of these two constructions is the correct one depends upon the determination of the question—what should be held to have been the intention of the Crown in making the grant of the lands mentioned in the letters patent containing the exception? 'It is always' (says Sir *John Coleridge*, delivering the judgment of the Privy Council in *Lord* vs. *City of Sidney* (1) upon a question as to the construction of a Crown grant) 'a question of intention to be collected from the language used with reference to the surrounding circumstances. Words in an instrument of grant, as elsewhere, are to be taken in the sense in which the common usage of mankind has applied to them in reference to the context in which they are found.' And the same construction, I may add, is to be put upon words in a grant of land by the Crown which has been established by the decisions of the Courts to be the proper construction to be put upon the same words in a grant between subject and subject. Now, for the purpose of assisting in arriving at the intention of the Crown as to the use of the above words in the letters patent to the *Nova Scotia* and *New Brunswick* Land Company, as well as for the purposes

(1) 12 Moo. P. C. 473.

of the 6th Question in the special case, namely: '6thly have the grantees in grants of lots bounded by the said rivers or by any part thereof and excepted from the said company's grant any exclusive or other right of fishing in said river opposite their respective grants?' copies of 16 letters patent have been produced, 5 of which grant lands situate upon the *Miramichi*, and 9 lands situate upon the other rivers and streams mentioned in the letters patent to the *Nova Scotia* and *New Brunswick* Land Company running through the tract of land granted to that Company, falling into the rivers *St. John* and *Nashwaak*, and it is admitted that all other grants to others within the lines constituting the boundaries of the tract described in the letters patent to the company are in similar form to those of which the copies have been supplied. Copies also of two letters patent granting large tracts of land amounting to about 25,000 acres, immediately outside of and abutting upon the limits of tract described in the letters patent to the *Nova Scotia* and *New Brunswick* Land Company, have been produced.

"From a perusal of these several letters patent, it appears that, as regards the title to the soil and beds of the said several rivers alike, the language of all the letters patent is the same, the practice of the Crown was uniform throughout. Now, the established rule of law is that *primâ facie* the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, and that a description which extends 'to the water's edge,' or 'to a river' or 'to the river's bank,' or which begins at a stake, tree, or other monument 'by the side of a river' or 'in a river's bank,' and which runs 'up' or 'down the river,' or 'its bank,' or 'by the side of the river,' or 'following its courses,' or to a stake, tree, or monument 'by the side of the river,' or 'on the river's bank,' or the like, carries the

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grant to the thread of the stream. In all such cases, the grant covers the bed of the stream, unless there be some expression in the terms of the grant, or something in the terms of the grant taken in connection with the situation and condition of the land granted, which clearly indicates an intention that the grant should stop at the edge or margin of the river, and should exclude the river from its operation. There must be a reservation or restriction, expressed or necessarily implied, to control the general presumption of law and to make the particular grant an exception from the general rule. This is the established doctrine, not only in *England*, but in the Courts of the *United States of America* also, as will sufficiently appear from the cases already cited and from *Wright* vs. *Howard* (1), *Kairns* vs. *Turville* (2), *Tyler* vs. *Wilkinson* (3), *Robertson* vs. *Whyte* (4), *Lowell* vs. *Robinson* (5), *Child* vs. *Starr* (6), *Luce* vs. *Carley* (7), *Howard* vs. *Ingersoll* (8), and Chancellor *Kent's* Comm vol. 3, p. 427.

"Tried acording to the principle laid down in the above cases, it cannot admit of a doubt that the description of boundaries in every one of the letters patent which have been produced and above referred to include and convey to the several grantees of the land therein respectively described the soil and bed, not only of all the streams and rivers which flow into the rivers *St. John* and *Nashwaak*, but also of the river *Miramichi*, and in truth of the *Nashwaak* itself, where the rivers pass through or abut upon the lands described, and as it is part of the admissions in the case, that all other grants of land situate within the outside limits of the tracts described in the letters patent of

(1) 1 Sim. & St. 263.
(2) 32 U. C. Q. B. 17.
(3) 4 Mason 400.
(4) 42 Me. 200.
(5) 4 Shep. 357.
(6) 4 Hill 319.
(7) 24 Wend. 451.
(8) 13 How. 416.

the 5th November 1835, to the *Nova Scotia* and *New Brunswick* Land Company, are in like form with those above recited, it must be concluded as not admitting of a doubt, that every grant which had been made, prior to the 5th November, 1835, of land lying within the limits of the description of the tract described in the letters patent of that date, passed and conveyed to the several grantees of such lands without exception the bed and soil of the river *Miramichi*, as well as the bed and soil of all the rivers and streams flowing into the *St. John* and *Nashwaak*, in accordance with the general presumption and rule of law when the lands granted abutted upon any of the said rivers.

"This being established, it only remains to be considered whether the terms of the grant contained in the letters patent of the 5th November, 1835, are so explicit as to reverse the general presumption of law, and to indicate clearly the intention of the Crown to be to make the grant to the *Nova Scotia* and *New Brunswick* Land Company an exceptional grant and different in this particular from all prior grants made by the Crown in that locality, and which, within the limits mentioned in the letters patent of the 5th November 1835, comprised 206,000 acres of the 795,000 acres constituting the gross contents of the tract, the outside limits of which are given in those letters patent.

"We must reasonably conclude that the object of the grant to the Company was to use the company as an instrument for facilitating the settlement of the Province of *New Brunswick*, in like manner as in the case of a similar grant, which had been made some years previously in *Canada*, to the *Canada* Company. It was necessary to the full enjoyment of the grant and to ensure success to the undertaking of the Company by the settlement of the Country, that the settlers should have the right and power to erect mills and to use the

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power of the rivers by dams across them for the purpose of driving the mills; this they could not do in those rivers or streams, if any there were, whose beds and soil were excepted from the grant to the Company.

"No possible reason has been suggested or can be assigned why the Crown should make the grant to this Company an exception from all previous grants made in the same locality, and so obstruct what must have been the object of the grant, namely, the settlement of the Province; or why the River *Miramichi* should be made an exception from all the other rivers and streams; or why the River *Miramichi* itself, where in its course it abutted upon lands granted to the Company, should be excluded from the grant, while the soil and bed of the same river, where it abutted upon land granted to other persons, had been included in those grants and passed to the respective grantees of the adjoining lands; —or, in the language of the Judgment of the Privy Council in *Lord* vs. *the Commissioners of the City of Sidney* (1), 'why the Crown should have reserved what might be directly and immediately useful to the grantees, and could not have been contemplated to be of any use to the Crown, and this too in an infant Colony where it was the manifest and avowed policy to encourage settlement and the cultivation of lands by grant on the easiest and most favorable terms.'

"We must then give to the letters patent of the 5th November, 1835, such a construction as shall be consistent with the previous uniform practice of the Crown and with the general presumption of law, and so as to make the grant valuable in view of the purpose which it must have had in view, and not so as to derogate from that value, unless the terms and expressions in the grant are so peremptory and clear as to place beyond doubt that the intention of the Crown was to exclude

(1) 12 Moo. P. C. 473.

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from the grant to the Company the bed of the *Miramichi* River, where it abuts upon lands granted to the Company. The only construction, which, in accordance with the above principles, can, in my judgment, be properly given to the letters patent of the 5th November, 1835 is, that the exception therein affects the *Miramichi* only in the same manner, and to the same extent, as it affects the other rivers and streams therein mentioned, namely: all those falling into the rivers *St. John* and *Nashwaak*, and consequently that the exception is limited to the bed and soil of the *Miramichi* river, as it is to the bed and soil of the said other rivers and streams, namely, opposite to the lands which had previously been granted on the banks of the rivers.

"The form of the description in the letters patent of the 5th November, which the draftsman has made to comprehend within the limit of the tract described 206,000 acres which had already been granted, much of which was situate upon the banks of the said several rivers, made it necessary to except from the grant to the company whatever had been previously granted and the bed and soil of the rivers opposite the lands so granted. This affords a rational cause, and indeed the only apparent rational cause for the exception being inserted at all, and consequently the letters patent must be so construed as to limit the application of the exception to this rational purpose. It was suggested that if the bed and soil of the rivers opposite to the lands previously granted had passed to the grantees of such lands, the exception of those lands, which is also expressed in the letters patent of the 5th November, would have been sufficient to comprehend also the beds of the rivers; but, granting this to be so, it is plain that whether the beds of the rivers had or not passed by the previous grants of lands situate on their banks, the draftsman of the letters patent of the 5th Novembe,

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has, *ex majori cautelâ*, inserted an express exception of the beds of the rivers and streams flowing into the *St. John* and *Nashwaak*, where such rivers and streams abutted on lands already granted. This is not disputed, but the contention is, that in the case of the *Miramichi*, the exception is not to be construed as being so limited, but is absolute. But for this distinction, no reason whatever is suggested, and I have shewn that in the previous grants the *Miramichi* river was precisely in the same position as all the other rivers, and that in the case of all alike the beds of rivers abutting on lands granted had been granted and had passed to the grantees of lands.

"The letters patent are capable of the construction, that the exception shall be limited in the case of the *Miramichi*, equally as in the case of the other rivers and streams, and as that construction is most consistent with the uniform practice of the Crown, and with what must have been the object of the company, in acquiring the lands granted, with the general presumption of law, and with reason and common sense, that is the construction which must be given to the letters patent. It follows that the *Miramichi* river, where the lands granted to the *Nova Scotia* and *New Brunswick* Land Company abut upon it, is excluded from the operation of the Fisheries Act 31 *Vic.* c. 60, for there an exclusive right of fishing had passed to the company, their successors and assigns, by the letters patent of the 5th November 1835.

"It was urged, it is true, but scarcely I think seriously, that by force of the 108 sec. of the *British North America* Act, and of the 5th item of the 3rd schedule annexed to the Act, namely: 'Rivers and Lake improvements,' the bed and soil of the *Miramichi*, as well as the beds and soil of every river in the Dominion, is declared to be 'the property of *Canada*.'

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The sole ground for this contention is that the word 'Rivers' as printed in the schedule is plural, while the word 'Lake' is singular, and that if it had been intended that the word 'improvements' should be read in connection with the former as with the latter it would have been printed 'River' in the singular as in the word 'Lake.' To this it was replied, that the absence of a comma after the word 'Rivers' afforded as good an argument, that the word 'Improvements' was intended to be read in connection with the word 'Rivers' as with 'Lake,' notwithstanding the affix of a final 'S' to the former. I confess I think both arguments are of about equal weight, and I do not think it profitable to enquire whether the affix of the letter 'S' or the omission of a comma is the act of the printer or of Parliament, for by 108 section of the Act, it is clear that the things which are by that section, made the property of *Canada* are 'the public works and property of each Province' enumerated in the 3rd schedule. Whether, therefore, the word be printed 'River' or 'Rivers' in the 3rd schedule the result is the same, and the word 'Improvements' must be read with it, to indicate the 'Public Work' which having been the property of the Province in which it had been situate is made the property of *Canada*.

"I have thus substantially answered all or most of the questions submitted in this special case, but it may be convenient briefly to give my answers thus:

"The first, third, fourth and sixth questions must be answered in the affirmative, and the second and seventh in the negative.

"To the 5th it is unnecessary to give any special answer, as I am of opinion that the bed of the river did pass to the Company. However, it may be said, that if it had not so passed, the case offers no evidence of any exclusive right of fishing therein having passed

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to the Company, which right in such case could only be by grant or prescription. I have in my judment explained at length my views upon the rights of riparian proprietors and of what is meant by that term.

"To the 8th it may be answered, that if what is meant by this question as framed is, whether the Minister of Marine and Fisheries could lawfully issue a lease of the bed of the River, where it passes through ungranted lands, I am of opinion that he could not, but that the Act does authorize him to issue, and therefore he could lawfully issue, a license to fish, as a franchise apart from the ownership of the soil in that portion of the River.

"The 109 sec. of the *British North America* Act already quoted declares that 'all *lands*, mines, minerals and royalties belonging to the several provinces of *Canada*, *Nova Scotia* and *New Brunswick* at the Union, shall belong to the several Provinces of *Onturio*, *Quebec*, *Nova Scotia* and *New Brunswick* in which the same are situate.' Now, whether this section is to be regarded as sufficient to transfer the *legal estate* in those lands to the several Provinces as corporations, or as a declaration merely that they shall be held by the Crown in trust for, and as part of the public *demesne* of, the respective Provinces, matters not, as it appears to me, in so far as the question under consideration is concerned, for what is declared shall belong to the newly created Provinces is that which at the Union belong to the provinces as formerly constituted, and those lands which had not yet been granted were already subject to a like provision in virtue of Acts of Parliament relating to the Fisheries in existence before the Union, which Acts, the 129 section of the *British North America* Act declares shall continue in existence after the Union until repealed, abolished or altered by Act of the Dominion Parliament. The effect then of the 109th sec-

tion must be to make the lands part of the public Domain of the respective Provinces, subject to the provisions of the several Acts in force relating to the fisheries at the time of the Union, and to such other or the like provisions as the Parliament of *Canada* should enact upon the subject of the Fisheries, treating that term as relating to the incorporeal hereditament or *libera piscaria* as already explained, which subject was placed under the exclusive control of the Parliament, and the expression in the 2nd section of the Dominion Act, 31 *Vic.*, ch. 60, namely, 'where the exclusive right of fishing does not already exist by law' must, I think, be construed to include that part of the public domain in the respective provinces consisting of ungranted lands, over which, not having been converted into private property, no exclusive right of fishing could be legally established by any person.

"Over those ungranted lands the Dominion Parliament had, in my judgment, for the reasons already given above, the undoubted right to legislate in the manner provided by the 2nd section of the 31 *Vic.*, c. 60, and that section does, I think, sufficiently cover those lands which, prior to the passing of 31 *Vic.*, c. 60, were, as I have shewn, subject to a like provision, and the frame of the 2nd section of that Act, when compared with the corresponding sections in the Acts which were in force until repealed by 31 *Vic.*, c. 60, leads to the conclusion that the same lands were referred to in the latter Act as in the like connection were referred to in the former, namely, ungranted public lands.

"I have entered into the subject as fully as I could, in order that I might make my judgment upon all the points as clear as I am capable of doing, for the reason that in the event of an appeal I shall not sit upon the case in appeal. The Court of Exchequer being composed of the same Judges as are the judges of the Supreme

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Court, an appeal from the judgment of a single judge of the Court of Exchequer to the Supreme Court is in substance and effect simply an appeal from one of the Judges to the full Court. To avoid the possible anomaly of the full Court being divided, and the judgment nevertheless of one of the Judges of the divided Court remaining of record as a judgment of the Court, it is a point worthy of Parliamentary consideration, whether it may not be expedient to enact that an appeal from a single Judge of the Exchequer Court should be heard only by the other Judges, so that in every case of appeal from the Exchequer Court in order to sustain any judgment, as the judgment of the Court, there should be a *majority* of all the Judges constituting the Court in favor of it.

"The constitution of the Court of Exchequer makes a marked difference between the case of an appeal from that Court, when the Appellate Court is divided, and the case of an appeal from an independent Court consisting of other Judges than those constituting the appellate tribunal when the latter is divided.

"The Judgment of the Court therefore is that a rule shall issue in the terms of the provisions of the special case, referring it to the Registrar to take an account as agreed upon by the concluding paragraph of the case."

The following rule was taken out:

"The special case stated by the parties for the opinion of this court having come on to be heard and debated before this court in the presence of counsel for the suppliant and for her Majesty. Upon debate of the matter and hearing what was alleged by counsel on each side and upon reading the documents and papers filed, this court did order that the said case should stand over for judgment, and the same coming on this day for judgment this court doth order and declare that the first, third, fourth and sixth questions submitted in

said special case should be answered in the affirmative and the second and seventh questions in the negative. This court doth further declare that it is unnecessary to give any special answer to the fifth question as this court is of opinion that the bed of the south west *Miramichi* river within the limits of the grant to the *Nova Scotia* and *New Brunswick* Land Company and above the grants mentioned and reserved therein did pass to the said company.

"This court doth further declare with reference to the eighth question that, if what is meant by this question be whether the Minister of Marine and Fisheries could lawfully issue a lease of the bed of the river where it passes through ungranted lands, this court is of opinion that the said minister could not lawfully issue such lease, but this court is of opinion that the said minister could lawfully issue a license to fish as a franchise apart from the ownership of the soil in that portion of the river."

Mr. *Lash*, Q. C,, for the Crown, moved, pursuant to rule No. 231 of the Exchequer Court rules, for an order *nisi* calling upon the suppliant to shew cause why the judgment rendered by the court upon the special case in this matter should not be reviewed and judgment given thereon for the Crown, upon the grounds, that the second question submitted in said special case should have been answered in the affirmative, and that the third, fourth, fifth and sixth questions should have been answered in the negative. This motion was refused.

From this decision the Crown appealed.

Mr. *Lash*, Q. C., for the Crown:

In this appeal the appellant will raise only the main question involved, viz: whether or not an exclusive right of fishing, at the time the fishing lease was granted to the respondent, previously existed by law in the leased

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portion of the river. The reason the 8th question was submitted for the decision of the Exchequer Court was that we thought part of the *locus in quo* was through ungranted land, and it has since been ascertained that no part of the *locus in quo* is through ungranted land.

Had the Minister of Marine and Fisheries power to issue the lease in question?

This depends upon there being no exclusive right of fishing, at the time the lease was made, in the leased portion of the river.

An exclusive right of fishing may exist, 1st in a private river, 2nd in a public river.

The first paragraph of the special case shows what the nature of that portion of the *Miramichi* River is: "It is above tidal waters, and is navigable for canoes and boats, and has been used from the earliest settlement of the country as a highway for the same and for the purpose of floating down timber and logs to market." My contention is shortly this, that in this country the absence of the ebb and flow of the tide does not make a river a private one,—if the contrary is held, then all the great fresh water rivers in *Canada* are private—and that this river, being admitted to be navigable for the purposes of passage and being used as a highway, is a public river, and no exclusive right of fishing exists in it, as no grant or prescription thereof is shewn.

2 *Broom & Hadley's*, Com. (Edition of 1869) page 107; 2 *Stephens* Com. (1874) pages 670-1-2; 2 *Kerr's* Blackstone (1857) page 39; *Warren* vs. *Matthews* (1).

If the *Miramichi* be a private river, it may be admitted that the owner would have the exclusive right of fishing.

Is it a private river? Ebb and flow of the tide is not the proper test: *Lyon* vs. *Fishmongers Co.* (2); *Mayor*,

(1) 6 Mod. 73. (2) L. R. 1 H. L. 673.

&c. vs. *Brooke* (1); *Carter* vs. *Murcot* (2), confirming *Warren* vs. *Matthews*; *Genesee Chief* vs. *Fitzhugh* (3), confirmed by The *Magnolia* (4), also the reference to *Broom & Hadley & Stephen & Kerr*, above mentioned; *Mayor*, &c. vs. *Turner* (5); *Miles* vs. *Rose* (6).

The navigable capacity need not continue throughout the whole year: *Olson* vs. *Merril* (7).

I do not argue that the bed of the river did not pass, and I can only argue on the assumption that the terms of the special case make the *Miramichi* a highway and a public river, and if so no exclusive right of fishing exists in it: *Thomson's* essay on *Magna Charta* (8); *Mayor*, &c., vs. *Brooke* (9); Duke of *Somerset* vs. *Fogwell* (10); also references to *Broom & Hadley*, *Stephen & Kerr* above mentioned.

In *England* it is well settled that in a navigable river there can be no exclusive right of fishing unless such right existed prior to *Magna Charta*.

But it is contended by respondent that a navigable river is in law navigable only so far as the tide ebbs and flows, and that though navigable in fact above tide water, it is not navigable in law, and that therefore the incidents attaching to a river navigable in law, do not attach to one navigable only in fact.

The appellant denies this contention, but even if such be law in *England* it is not law in *Canada*, as the size and situation of the two countries are so different.

In *New Brunswick* only so much of the law of *England* as was applicable to the circumstances of the Province when it was first created is in force.

In *England*, where navigation was practically confined to the tidal portion of a river—where in fact navigable

(1) 7 Q. B. 373.
(2) 4 Burr. 2163.
(3) 19 Curt. 233.
(4) 20 How. 296.
(5) 1 Cowp. 86.
(6) 5. Taunt. 705.
(7) 42 Wisc. 203.
(8) Page 203.
(9) 7 Q. B. 382.
(10) 5 B. & C. 884.

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water and tide water were synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers as contra-distinguished from private ones—it was reasonable enough that the ebb and flow of the tide should have been taken as the test of the navigability of a river, as it was the most convenient test, but such a test was and is inapplicable to this country, and was not imported here as part of the Common Law.

Waters here navigable in fact are so regarded in law, without reference to the ebb and flow of the tide, and if a river be navigable in law all the incidents of navigability attach to it, and one of those incidents is the right of the public to fish therein: see *Atty. Gen.* vs. *Harrison* (1); *Carson* vs. *Blazer* (2); *McManus* vs. *Carmichael* (3).

[THE CHIEF JUSTICE:—Is there any objection in holding that a river may be public for certain purposes and private for all other purposes?]

So far as this river is concerned there is none, and where there is no exclusive right to fish, then Parliament can take away the public right by statute, as was done by the Fisheries Act.

The learned counsel also referred to *Robinson & Joseph's Digest, (Ont.) Vo.* "Water;" *People* vs. *Canal Appraisers* (4); *Ball* vs. *Herbert* (5); *Dixon* vs. *Scnetsinger* (6).

Mr. *Weldon*, Q. C., for respondent:

It has to be admitted that according to the English cases the decision of Mr. Justice *Gwynne* must be affirmed. This is practically an appeal from the judgment of the Supreme Court of *New Brunswick*, which has held that this was a private river, and that the

(1) 12 Grant 470;
(2) 2 Binn. 475;
(3) 3 Iowa 52.
(4) 33 Tiff. 461.
(5) 3 Taunt. 267.
(6) 23 U. C. C. P. 235.

license issued by the Minister of Marine and Fisheries of the *locus in quo* is void.

Rivers may be divided into three classes:

I. When they are altogether private, such as shallow streams, not capable to be put to any particular use.

II. When they are private property, but capable of, and subject to, the public use. The case of non-tidal waters.

III. Where the use and property are public, where the tide ebbs and flows.

By the 3rd section of 31 *Victoria*, cap. 60, sec. 2, the power to grant leases is given only where the exclusive right does not already exist by law. It is submitted that the exclusive right did exist in the *New Brunswick* and *Nova Scotia* Land Company, under the grant. The river is clearly within its boundaries, and the exception shows the intention of the Crown to include it in the grant, except where already granted.

In non-tidal rivers, the right of the riparian proprietors extends to the middle of the stream, and where both banks are the property of the same owner, the whole right of property in the stream belongs to him: *Beckett* vs. *Morris* (1).

On page 58, Lord *Cranworth* says: "By the Laws of *Scotland*, as by the Law of *England*, when the lands of two continuous properties are separated from each other by a running stream of water, each proprietor is *primâ facie* owner of the soil of the shores or bed of the river *ad medium filum aquæ*."

In navigable rivers or arms of the sea, fishing is common and public. In private rivers, not navigable, it belongs to the lords of the soil on each side: *Carter* vs. *Murcott* (2); *Malcolmson* vs. *O'Dea* (3); *Marshall* vs. *Ulleswater Steam Navigation Company* (4).

(1) L. R. 1 H. L. Sc. 47.
(2) 4 Burr. 2163.
(3) 10 H. L. 593.
(4) 3 B. & S. 732.

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The rights of riparian proprietors are very fully discussed in the case of *Lyons* vs. *Fishmongers* Co. (1) and *Byron* vs. *Stimpson* (2).

The petitioners also rely upon the judgments of the Supreme Court of *New Brunswick* in *Robertson* vs. *Steadman* (3), and the cases therein cited.

As to the construction of sea coast and fisheries, see remarks of Lord *Selborne* in *L'Union St. Jacques de Montreal* vs. *Belisle* (4).

Even assuming that the land in these rivers is vested in the Crown, it is contended that the Crown only held it in trust for the people of *New Brunswick*.

By the *British North America* Act, secs. 109 and 117, the Crown Lands of the Province of *New Brunswick* are the property, so to speak, of the Province, and therefore the incidents of right appurtenant to the property belong to the Province, otherwise this anomaly would exist, that while the lands were ungranted, the Dominion of *Canada* would have the right to dispose or lease the fishery, but so soon as a grant was made under the great seal of the Province of *New Brunswick*, then it would belong to the grantee.

This point is put forcibly by his Honor Mr. Justice *Fisher*, in the case of *Robertson* vs. *Steadman* (5) in his dissenting opinion.

It is submitted, then, that by law, within the limits of the fluvial or angling division described in the lease to the petitioner, the exclusive right of fishing existed and therefore that the Dominion of *Canada* had not, under the Act of Union, nor under the Act of the Parliament of *Canada* 31 *Vict.* cap. 60, power to grant such lease, and therefore the same became null and void, and the petitioner being damnified has a claim upon the Government for the damage sustained.

(1) 1 App. Cases 562.
(2) 17 New Bruns. R. 697.
(3) 18 New Bruns. R. 530.
(4) L. R. 6 P. C. 37.
(5) 18 New. Bruns. R. 621.

Mr. *Lash*, *Q.C.*, in reply.

RITCHIE, C. J. [After reading the statement of the case, proceeded as follows]:

As the lease in question professes to deal only with the right of fishing in that part of the *Miramichi* River described as "the fluvial or angling division of the South-West *Miramichi* River from *Price's Bend* to its source," we are relieved from the necessity of considering in whom the rights of fishing are in the *Miramichi* River from or below *Price's Bend* to its mouth, it being described in the case as being—

After the *St. John* the largest river in *New Brunswick* is the *Miramichi*, flowing northward into an extensive bay of its own name. It is 225 miles in length and seven miles wide at its mouth. It is navigable for large vessels twenty-five miles from the gulf, and for schooners twenty-five miles further to the head of the tide, above which for sixty miles it is navigable for tow-boats. The river has many large tributaries spreading over a great extent of country.

From *Price's Bend* to its source the river is thus described:—

Price's Bend is about forty or forty-five miles above the ebb and flow of the tide. The stream for the greater part from this point, upward, is navigable for canoes, small boats, flat bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow. In the salmon fishing season, say June, July and August, canoes have to be hauled over the very shallow bars by hand.

The questions involved in the case submitted, resolve themselves substantially into these:

What are the rights of fishing in a river or a portion of a river such as is that part of the *Miramichi* from *Price's Bend* to its source? Do the rights of property therein belong to the Provincial Government, or their grantees, or to the Dominion Government, or their licensees, or have the Dominion Government, or the Provincial Government, legislative control over such proprieta-

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ry rights? And is there any distinction between the rights of the grantees from the Provincial Government before confederation or after, and of the Provincial Government itself? that is, assuming the Dominion Government cannot deal with or take away the rights of the grantees of the crown before confederation, can they do so in respect to the ungranted lands of the provinces granted since confederation? In other words, can the Dominion Parliament authorize the Minister of Marine and Fisheries to issue licenses to parties to fish in rivers such as that described where the lands are ungranted, or where the Provincial Government has before or after confederation granted lands that are bounded on or that extend across such rivers?

It is difficult, if not impossible, satisfactorily to deal with this case and ignore any of these questions, the principles applicable to and governing all being the same, and therefore their determination will consequently answer all the questions submitted and settle this appeal.

The observations I am about to make are designedly confined to rivers such as the *Miramichi* from *Price's Bend* to its source.

In construing the *British North America Act*, I think no hard and fast canon or rule of construction can be laid down and adopted by which all acts passed as well by the Parliament of *Canada* as by the local legislatures upon all and every question that may arise can be effectually tested as to their being or not being *intra vires* of the legislature passing them. The nearest approach to a rule of general application that has occurred to me for reconciling the apparently conflicting legislative powers under the *British North America Act*, is what I suggested in the cases of *Valin* v. *Langlois* (1) and *The Citizen's Insurance Co.* v. *Parsons* (2), with respect

(1) 3 Can. Sup. C. R. 15. (2) 4 Can. Sup. C. R.. 242.

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to property and civil rights, over which exclusive legislative authority is given to the local legislatures: that, as there are many matters involving property and civil rights expressly reserved to the Dominion Parliament, the power of the local legislatures must, to a certain extent, be subject to the general and special legislative powers of the Dominion Parliament. But while the legislative rights of the local legislatures are in this sense subordinate to the rights of the Dominion Parliament, I think such latter rights must be exercised so far as may be consistently with the rights of the local legislatures, and therefore the Dominion Parliament would only have the right to interfere with property and civil rights in so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of *Canada*. And this view I think was clearly in the mind of the Privy Council when in *Cushing* v. *Dupuy* (1), in speaking of the powers of the dominion and provincial legislatures, it is said in the judgment of the Privy Council by Sir *M. E. Smith*:—

> It is therefore to be presumed, indeed it is a necessary implication, that the Imperial statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights and procedure within the provinces, *so far as a general law relating to those subjects might affect them.*

And this view is, I venture to think, substantially indorsed by the Privy Council in the case of *Parsons* v. *The Citizen's Insurance Co.*, decided in November last. There the Privy Council say as to the provisions of the *British North America Act*, 1867, relating to the distribution of legislative powers between the Parliament of *Canada* and the legislatures of the provinces, that owing to the very general language in which

(1) 5 App. Cases, 415.

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some of these powers are described, the question is one of considerable difficulty; and after referring to the first branch of section 91, the Privy Council say:

> An endeavour appears to have been made to provide for cases of apparent conflict; and it would seem that with this object it was declared in the second branch of the 91st section, for greater certainty, but not so as to restrict the generality of the foregoing terms of the section, that (notwithstanding anything in the Act) the exclusive legislative authority of the Parliament of *Canada* should extend to all matters coming within the classes of subjects enumerated in that section. With the same object, apparently, the paragraph at the end of sec. 91 was introduced, though it may be observed that this paragraph applies in its grammatical construction only to No. 16 of sec. 92. Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, *it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion Parliament.*

And then we find language which I humbly think sanctions to its fullest extent the principle I have heretofore ventured to promulgate as applicable to the interpretation of the *British North America Act* in this admittedly most difficult question:

> With regard to certain classes of subjects, therefore, generally described in sec. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, the language of the two sections must be read together, and that of one interpreted, and, where necessary, modified by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown to decide each case which arises as best they can, without entering

more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

And saying they find no sufficient reason in the language itself, nor in the other parts of the act, for giving so narrow an interpretation to the words "civil rights," and that the words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in any of the enumerated classes of subjects in section 91, they add this important proposition bearing on the case in hand as applicable to "Property and Civil Rights":

It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sections 91 and 92 are described, that both sections and the other parts of the Act must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited.

After referring to the 14 *Geo.* III, ch. 83, which made provision for the government of the Province of *Quebec*, and by section 8 of which it was enacted, that His Majesty's Canadian subjects within the Province of *Quebec* should enjoy their property, usages and other civil rights as they had before done, and that in all matters of controversy relative to property and civil rights resort should be had to the laws of *Canada*, and be determined agreeably to the said laws, they say:

In this statute the words "property" and "civil rights" are plainly used in their largest sense, and there is no reason for holding that in the statute under discussion they are used in a different and narrower one.

And after instancing the subject of marriage and divorce in section 91 and observing "it is evident that the solemnization of marriage would have come within this general description yet 'solemnization of marriage in the Province' is enumerated among the classes of subjects in section 92," the Privy Council say:—

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No one can doubt, notwithstanding the general language of section 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So "the raising of money by any mode or system of taxation" is enumerated among the classes of subjects in section 91, but though the description is sufficiently large and general to include direct taxation within the province, in order to the raising of a revenue for provincial purposes," assigned to the provincial legislatures by section 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one.

Let us now refer to the sections of the *British North America* Act bearing on the present case, and guided by considerations such as these, I think the act can be so read as to avoid all conflict and give to each legislative body the full legislative and proprietary rights intended to be conferred by the Imperial Parliament.

By section 91, sub-section 12, is confided to the legislative authority of the Dominion Parliament, "Sea coast and Inland Fisheries;" to the exclusive power of the provincial legislatures by section 92, sub-section 13, "Property and civil rights in the provinces;" and, by sub-section 16, "Generally all matters of a merely local or private nature in the provinces;" and by section 108 certain public works and property specified in schedule 3 are declared to be the property of *Canada*; and by section 109, "All lands, mines, minerals and royalties belonging to the several provinces shall belong to the several provinces in which they are situate, subject to any trusts existing in respect thereof and to any interest other than that of the province in the same;" and by section 92, sub-section 5, the exclusive power of legislation is conferred on the provincial legislatures in relation to "the management and sale of the public lands belonging to the province and of the timber and wood thereon."

I am of opinion that the *Miramichi*, from *Price's Bend* to its source, is not a public river on which the

public have a right to fish, and though the public may have an easement or right to float rafts or logs down, and a right of passage up and down in canoes, &c., in times of freshet in the spring and autumn, or whenever the water is sufficiently high to enable the river to be so used, I am equally of opinion that such a right is not in the slighest degree inconsistent with an exclusive right of fishing, or with the rights of the owners of property opposite their respective lands *ad medium filum aquæ*; or, when the lands on each side of the river belong to the same person, the same exclusive right of fishing in the whole river so far as his land extends along the same. There is no connection whatever between a right of passage and a right of fishing. A right of passage is an easement, that is to say, a privilege without profit, as in a common highway. A right to catch fish is a profit *à prendre*, subject no doubt to the free use of the river as a highway and to the private rights of others. This right of private property in rivers such as that portion of the *Miramichi* we are dealing with has always been recognized at common law.

In *Hudson vs. MacRae* (1), an information before two justices for unlawfully and wilfully attempting to take fish in water where another person had a right of private fishing, the accused justified under a supposed right on the part of the public to fish in that water.

It was conceded such a right of fishing by the public in a non-navigable river could not exist in law, and that accused, justifying himself under the *bonâ fide*, though mistaken notion, of such a right, did not make such a claim of right as ousted the jurisdiction of the justices.

Blackburn, J., says:—

It appears that the appellant was fishing in a private river with every circumstance necessary to warrant conviction, but he showed

(1) 4 B. & S. 585.

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in his defence that for many years the public at large fished there under the notion of a right. The justices have found that he acted under the *bonâ fide* belief in that right, *but then in point of law* such a right could not be obtained in a non-navigable river.

If the title to property comes in question, the justices must hold their hands.

Blackburn, J., says:—

But when the claim set up is of a right which could by no possibility exist, it cannot be said that the right of property comes in question; there is then nothing more than this, that the man has got in his head an unfounded notion of a right impossible in law. * * * Here is a non-navigable river where the public could not possibly have a right of fishing.

Race v. *Ward* (1), declaration for breaking and entering plaintiff's close and committing trespass. Defendant justified under an immemorial custom for all inhabitants for the time being of said township to have liberty and privilege to have and take water from certain spring in said close, &c.

Lord *Campbell*, C. J., says:—

In *Wickham* v. *Hawker* (2) the Court of Exchequer held that "a liberty, with servants or otherwise, to come into and upon lands, and there to hawk, hunt, fish and fowl," is a profit *à prendre* within the prescription Act (3).

* * * * *

We held, last term, that to a declaration for breaking and entering the plaintiff's close and taking his fish, a custom pleaded for all the parish to angle and catch fish in the *locus in quo*, was bad, as this was a profit *à prendre*, and might lead to the destruction of the subject-matter to which the alleged custom applied.

Case referred to was *Bland* v. *Lipscombe*, 4 E. & B. 713 note.

Lord *Campbell*, C. J.:—

We must act upon that salutary law which distinguishes between a mere easement and the right to take a profit.

* * * * * *

It is clear to me that the custom claimed in this plea is to angle for, catch, and carry away the fish; but, supposing it were limited,

(1) 4 E. & B. 702.

(2) 7 M. & W. 63.

(3) 2 & 3 Wm. 4, 71.

as Mr. *Brown* argues, to a claim to angle for and catch the fish without claiming a right to carry them away, I think it would be equally destructive of the subject-matter, and bad.

Mussett v. *Burch* (1) decides that the right of the public to fish in a non-tidal river which is made navigable by locks cannot exist in law.

Cleaseby, B., says :

Now it appears to me that the case in the Irish reports (*Murphy* v. *Ryan*) is decisive on the point before us. It expressly decides that "the public cannot acquire by immemorial usage any right of fishing in a river in which, though it be navigable, the tide does not ebb and flow."

Grove, J. :—

Mr. *Graham* has not shown us any case in which the public have been held to have a right of fishing in a river merely because it is navigable or navigated by boats.

In *Wishart* vs. *Wyllie* (2), the Lord Chancellor laid it down that the law on this subject admitted of no doubt.

If, said his lordship, a stream separates properties A and B, *primâ facie*, the owner of the land A, as to *his* land, on one side, and the owner of the land B, as to *his* land, on the other, are each entitled to the soil of the stream, *usque ad mediam aquæ*, that is *primâ facie* so. It may be rebutted, but, generally speaking, an imaginary line running through the middle of the stream is the boundary; just as if a road separates two properties, the ownership of the road belongs half-way to one and half-way to the other. It may be rebutted by circumstances, but if not rebutted, that is the legal presumption. Then if two properties are divided by a river, the boundary is an imaginary line in the middle of that river; but to say that the whole of the river is a sort of common property, which belongs to no one, is not a correct view of the case.

In *Murphy* vs. *Ryan* (3), *O'Hagan*, C. J, said :—

According to the well established principles of the common law, the proprietors on either side of a river are presumed to be possessed of the bed and soil of it moietively, to a supposed line in the middle, constituting their legal boundary; and, being so possessed, have an

(1) 35 L. T. N. S. 486. (2) 1 Macq. H. L. Cas. 389.
(3) Ir. R. 2. C. L. 143.

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exclusive right to the fishery in the water which flows above their respective territories, though the law secures to the community the right of navigation upon the surface of that water as a public highway, which individuals are forbidden to obstruct, and precludes the riparian proprietors from preventing the progress of the fish through the river, or dealing with the water to the injury of their neighbours.

* * * * * * * * * * *

But, whilst the rights of fishing in fresh water rivers, in which the soil belongs to the riparian owners, is thus exclusive, the right of fishing in the sea, and in its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be *publici juris*, and to belong to all the subjects of the crown—the soil of the sea and its arms and estuaries and tidal waters being vested in the sovereign as a trustee for the public. The exclusive right of fishing in the one case and the public right of fishing in the other depend upon the existence of a proprietorship in the soil of the private river by the private owner, and by the sovereign in the public river respectively.

* * * * * * * * * * *

Upon a full consideration of all the cases, it will, I think, appear that no river has been ever held navigable, so as to vest in the Crown its bed and soil, and in the public the right of fishing, merely because it has been used as a general highway for the purpose of navigation; and that, beyond the point to which the sea ebbs and flows, even in a river so used for public purposes, the soil is *primâ facie* in the riparian owners, and the right of fishing private.

* * * * * * * * * * *

But no usage can establish a right to take a profit in another's soil, which might involve the destruction of his property; and such a profit would be the taking of fish. The precise point is decided both as to the general law and the particular case of profit by fishing in *Bland* v. *Lipscombe* (1); and the principle of that case, in affirmation of the ancient doctrine, is sustained by the judgments in *Lloyd* v. *Jones* (2); *Race* v. *Ward* (3); *Hudson* v. *MacRea* (4); and other recent decisions. That principle is beyond controversy; and, therefore, the usage relied on in this defence cannot sustain the claim of the right in the public to fish in a river, the soil of which is not *publici juris*, but private property.

In *Lyon* v. *Fishmonger Co.* (5) Lord *Cairns* says:

The late Lord *Wensleydale* observed, in this House, in the case of *Chasemore* v. *Richards* (6) "The subject of right to streams of water

(1) 4 E. & B. 713, note.
(2) 6 C. B. 81.
(3) 4 E. & B. 702.
(4) 4 B. & S. 585.
(5) 1 App. Cases 673.
(6) 7 H. L. C. 382.

flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing."

And he then cites the language of the late Lord *Wensleydale* as quoted by *O'Hagan*.

In *Marshall* v. *Ulleswater Steam Navigation Co.* (1), it was held that "the allegation of a several fishery, *primâ facie*, imports ownership of the soil"; per *Wightman* and *Mellor*, J. J., *Cochrane*, C. J., dissenting, but not holding the court (Q. B.) bound by the authorities to that effect.

Wightman, J., delivering judgment, referring to *Holford* v. *Bailey* (2), says:—

These decisions are in conformity with the rule stated in the late editions of *Blackstone's* Commentaries, vol. 2 p. 39. He that has a several fishery must also be (or at least derive his right from) the owner of the soil.

Cockburn, C. J., says:—

The use of water for the purpose of fishing is, when the fishery is united with the ownership of the soil, a right incidental and accessory to the latter. On a grant of the land, the water and the incidental and accessory right of fishing would necessarily pass with it.

Previous to confederation many enactments were passed by the legislature of *New Brunswick* for the general regulation and protection of the fisheries in that province, but no act, I will undertake with confidence to assert, can be found in the statute books of *New Brunswick*, from the date of the erection of the province to the day of confederation, taking away or interfering with (except as such general regulations might interfere with) the private rights of the individual proprietors of lands through which such rivers run, still less to take from them the enjoyment of their rights of fishing and to authorize the leasing of the same to others to the exclusion of the owner. But the legislature did authorize the Governor-in-Council to

(1) 3 B. & S. 732; affirmed 6 B. & S. 570.

(2) 13 Jur. 278; 13 Q. B. 426; 18 L. J. Q. B. 109.

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grant leases or licenses for fishing purposes in rivers and streams above the tidal waters of such streams or rivers when the same belonged to the crown or the lands were ungranted, but the provincial legislature, having a just regard for private rights, specially provided that the rights of parties in lands and privileges already granted should not be affected thereby, recognizing the rights of individuals in the fisheries in rivers above tidal waters and the right of the province to the fisheries in rivers through the ungranted lands of the province. The reason why there was any legislation on this matter of leasing (for the executive government might have granted such leases without legislative authority) is to be found on the face of the act, viz., to regulate the sale and provide for the disposal of the proceeds, by enacting that such leases or licenses to be issued by the Governor in Council should be sold by public auction after 30 days' notice in the *Royal Gazette*, an upset price being determined by the Governor in Council, and that the rents and profits accruing from such leases or licenses should be paid into the provincial treasury to a separate account to be kept, called "The Fishery Protection Account."

Such being the state of matters at the time of confederation, 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 or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously 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.

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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. I had formerly occasion to point out that the public works and property of each province which it was intended should be the property of *Canada* were enumerated in the 3rd schedule, and that neither by express words nor by the most forced construction, could the slightest inference be drawn that the public lands of the provinces, or their incidents, were intended to be vested in the Dominion, and that the express words of section 117 as clearly and unequivocally established that the provinces were to retain all their respective public property not otherwise disposed of by the act, and that, as if to place the question beyond a peradventure, section 109 provided that all lands, mines, &c., belonging to the several provinces of &c., and all sums then due and payable for such lands, mines, &c., should belong to the several provinces 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.

I reiterate what I on a former occasion intimated, that at the time of the union the entire control, management and disposition of the crown lands, and the proceeds of

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the public domain, were confided to the executive administration of the provincial governments as representing the crown for the benefit of the provinces respectively, and to the legislative actions of the provincial legislatures, so that the crown lands, though standing in the name of the Queen, were, with their accessories and incidents, to all intents and purposes the public property of the respective provinces in which they were situate; and this property, the Imperial Act, by clear unambiguous language, has, as we have seen, declared shall after confederation continue to be the property of the provinces; and I cannot discover any intention to take from provincial legislatures all legislative power over property and civil rights in fisheries, such as we are now dealing with, and so give to the parliament of *Canada* the right to deprive the province or individuals of their right of property therein, and to transfer the same or the enjoyment thereof to others, as the license in question affects to do.

To all general laws passed by the Dominion of *Canada* regulating "sea coast and inland fisheries" all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the local legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the province, inasmuch as such laws need have no connection or interference with the right of the Dominion

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parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property in the fisheries. By which means the general jurisdiction over the fisheries is secured to the parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preserved to the provincial legislatures, thus satisfactorily, to my mind, reconciling the powers of both legislatures without infringing on either.

As a necessary consequence of what I have said the Minister of Marine and Fisheries has no authority to issue a lease of the bed of such a river as this where it passes either through ungranted or granted lands, and I have an equally strong opinion that the Dominion parliament has no legislative power or authority to authorize him to issue, as against the owner, a license to fish as a franchise or right apart from the ownership of the soil, whether owned by the province or an individual. I am at a loss to conceive how it is possible for the minister to have that power over lands owned by the province and not have the same power over lands owned by private individuals; the franchise or right is in the private individual by virtue of his property in the bed of the stream, and this he obtains by virtue of the grant from the general government, why then should the province not have the same franchise or right by virtue of its property in the soil, bank and bed of the river?

Unquestionably the right of fishing may be in one person and the property in the bank and soil of a river

in another, but can there be a doubt that if a man owning land on the bank of a river, with right to the bed of the river extending to the centre of a stream opposite such land, conveys without reservation or exception the land bounded by the stream, that the right of fishing goes with it? But what is there in the *British North America Act* to give the slightest countenance to the idea that any such separation of the right to lands and to the fishery incidental to the land was contemplated, and that while the public lands were retained to the provinces, rights of fishing connected therewith and incident thereto were to become separate and distinct, the one from the other, and the fishing taken from the provinces and transferred to the Dominion?

Can it be disputed that, under the 109th section, the banks and beds of all such ungranted rivers and streams belong to the several provinces? Where then do we get any language severing the right to the fisheries from the property or title to the soil or bed of these rivers, or altering in any way the title or ownership of the lands, including the banks and beds of rivers passing through them, or any of the rights incident to the same?

I think Mr. Justice *Fisher* in *Steadman* v. *Robertson* (1), took a correct view of the law. I have arrived at like conclusions, viz: that it was not the intention of the *The British North America Act*, 1867, to give the parliament of *Canada* any greater power than had been previously exercised by the separate legislatures of the provinces; that is the general power for the regulation and protection of the fisheries; that the act of the parliament of *Canada*, 31 *Vic.*, c. 60, recognises that view, and while it provides for the regulation and protection of the fisheries, it does not interfere with existing exclusive rights of fishing, whether provincial

(1) 2 Pugs. & Bur. 599.

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or private, but only authorizes the granting of leases where the property and therefore the right of fishing thereto belongs to the Dominion, or where such rights do not already exist by law; that the exclusive right of fishing in rivers such as the *Miramichi* at *Price's Bend* and from thence to its source, as described in the case, exist by law in the provincial government of *New Brunswick* or its grantees; that any lease granted by the Minister of Marine and Fisheries, to fish in such fresh water non-tidal 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 as incident to a 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 the Dominion parliament has no right to give such authority; and also 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, exclusively, and therefore a license by the Minister of Marine and Fisheries to fish in streams running through provincial property or private lands is illegal, and consequently the lease or license issued to the suppliant is null and void.

STRONG, J.:—

The fishery license granted to the respondent contains no covenant for title or warranty on the part of the Crown, and, therefore, upon no principle of law which has been suggested, or that I can discover, could the Crown be made liable to indemnify the respondent in the case of eviction. In my opinion the appeal ought to be decided upon this ground, for I do not think the court ought to entertain the special case upon the sub-

mission of the Attorney General for the Crown to indemnify the respondent, if the Court should be of opinion against the Crown on what, so far as the interest of the respondent is concerned, is a purely speculative question stated for the opinion of the Court. In the case of private suitors, if a special case appears to be framed for the purpose of eliciting an opinion upon a question, the decision of which is not essential to determine the rights of the parties, the court will refuse to entertain it (1), and I see no reason why the same rule should not be applied to a case in which the Crown is a party. As the case is presented to the court it appears that the officers of the Crown have arranged to pay the suppliant, not damages, but a gratuity, in the event of the court being of the opinion that the Crown had no authority to grant the license in question. This is to invoke an advisory not a contentious jurisdiction, and such a jurisdiction ought not to be exercised unless conferred by statute, which has not been done.

As, however, the other members of the court take a different view on this point, I yield to their judgment, and proceed to express the opinion at which I have arrived on the points which have been argued.

Thus dealing with the case, I think the appeal should be dismissed, but although I arrive at this conclusion, I am not prepared to coincide in all the reasons stated in the judgment delivered in the court below.

I have no difficulty in agreeing in the judgment of Mr. Justice *Gwynne*, so far as it determines that by the true construction of the exception contained in the letters patent of the 5th November, 1835, by which the Crown granted the lands bordering on the river *Miramichi*, including the limits to which the respondents licence extended, that exception did not comprise the

(1) Doe *v.* Duntze, 6 C. B. 100.

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whole bed of the river *Miramichi*, but only so much of it as adjoined lands which the Crown had previously granted, and which lands are also excepted from the operation of the grant.

The exception in question is thus expressed:

> And also further excepting the bed and waters of the *Miramichi* river and the beds and waters of all the rivers and streams which empty themselves into the *St. John* or the river *Nashwaack* so far up the said rivers and streams respectively as the same respectively pass through or over any of the said heretofore previously granted pieces or parcels of land hereinbefore excepted.

I cannot conceive what language could have been adopted more plainly expressing an intention to except the portions of the bed adjacent to lands already granted and such portions only. The object of the Crown clearly was to protect the rights of its earlier grantees, an object which would be equally applicable to grantees of lands lying on the *Miramichi*, as to those of lands on the other rivers named. Therefore whilst, on the one hand, neither the words of the instrument itself, nor the plain reason of thus restricting its operation, call for the construction contended for by the Crown, that the whole bed of the *Miramichi* was reserved, on the other hand, there is nothing to give the slightest colour to the argument said to have been advanced in the court below on behalf of the respondent, that the exception itself did not apply to the *Miramichi* but only to the other rivers. Indeed, before this court, neither of the learned counsel who argued the case for the Crown and the respondent urged these contentions.

Then, it does not appear, from the statements of the case, that any portion of the bed of the river comprised in the fishery limits granted by the license, viz.: from *Price's Bend* to its source, had been granted at a date earlier than that of the letters patent to the *Nova Scotia* and *New Brunswick* Land Company. The ques-

tion next arises what, upon this construction and the state of facts just mentioned, was the effect of the grant upon the property in the bed of the river, did it pass under the grant to the land company, or was it reserved to the Crown ?

The river *Miramichi*, between the two points indicated, *Price's Bend* and the source, is, upon the facts admitted in the case, beyond all question not a navigable or public river.

The navigable capacity of this portion of the river is thus described in the case :

That portion of the *Miramichi* river which is covered by fishery lease to suppliant is above tidal waters, and is navigable for canoes and boats, and has been used from the earliest settlement of the country as a highway for the same, and for the purpose of floating down timber and logs to market. After the *St. John*, the largest river in *New Brunswick* is the *Miramichi*, flowing northward into an extensive bay of its own name. It is 225 miles in length and seven miles wide at its mouth. It is navigable for large vessels 25 miles from the gulf, and for schooners 25 miles further to the head of the tide, above which, for 60 miles, it is navigable for row boats. The river has many large tributaries extending over a great extent of country. *Price's Bend* is about 40 or 45 miles above the ebb and flow of the tide. The stream for the greater part from this point upward is navigable for canoes, small boats, flat-bottomed scows, logs and timber. Logs are usually floated down the river in high water, in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow. In the salmon fishing, say June, July and August, canoes have to be hauled over the very shallow bars by hand.

This description is that of a river non navigable, and consequently what is called a private river as regards that portion of it above *Price's Bend.* Whilst I do not hesitate to say that the rule which appears to have been adopted as a principle of the common law as administered in *England*, that no rivers are to be considered in law as public and navigable above the ebb and flow of the tide, is not applicable to the great rivers of this continent, as has

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been determined by the Supreme Court of the *United States* and by the courts of most of the States, and whilst I think that with us the sole test of the navigable and public character of such streams is their capacity for such uses, I am still not prepared to accede to the argument of Mr. *Lash* that a river navigable in any part of its course is to be considered in law as navigable from its source. No authority can be produced for such a proposition, and the books are full of instances in which rivers navigable and public in their lower course have been held to be private and non-navigable in the upper part of the stream In the case of *Murphy* v. *Ryan* (1), we have indeed an instance in which this was expressly determined to be the case. Then, the admitted statement contained in the case shews beyond all ground of cavil that in point of fact the portion of the river *Miramichi* in question is not in fact navigable, for, to say that a stream in which the most lightly constructed vessels used upon our waters require to be hauled over shallows and bars is a navigable river, would be a contradiction in terms and calls for no observation.

Then, no principle of law can be better established both in *England* and *America* than the rule which ascribes the ownership of the soil and bed of a non-navigable river *primâ facie* to riparian proprietors of the opposite banks, each to the middle thread of the stream. To cite authorities for this universally recognized principle would be a useless waste of time. It is true that this is but a *primâ facie* presumption, but, this being so, in the present case there is not only nothing to rebut the presumption, but, on the contrary, it is greatly strengthened and made almost conclusive by the exception before adverted to, contained in the letters patent, reserving the soil or bed appurtenant to the lands of

(1) Ir. R. 2. C. L. 143.

riparian owners holding under former grants from the Crown.

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 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.

Chancellor *Kent* in his commentaries (1) states the law as follows :

> But grants of land bounded on rivers or upon the margins of the same, or along the same above tide-water, carry the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river; and the public, in the case where the river is navigable for boats and rafts, have an easement thereon or a right of passage subject to the *jus publicum* as a common public highway.

I may say in passing that, although Chancellor *Kent* undoubtedly states the law as determined both by the older and more recent authorities applicable to private rivers such as the present, it may be doubted whether his doctrine is equally applicable to large navigable fresh water rivers, above the flow of the tide, not only where such rivers form international boundaries, as in

(1) Vol. 3, p. 427, ed. 12.

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the instance of the *St. Lawrence*, but in cases where their whole course is comprised within the same State or Province. Recent decisions in the learned Chancellor's own State (*New York*) seem to indicate that the beds of such large navigable rivers are, by the common law, vested in the State as a trustee for the public, and are inalienable without legislative authority, and do not therefore pass *ad medium filum aquae* to the riparian owners, and that the right of fishing in such rivers is public, as in the sea and the other large inland lakes of this continent. It is unnecessary for the purpose of the present case to decide this question, and I have only alluded to it to prevent any misapprehension hereafter, should the point itself arise for decision. It is sufficient for the present purpose that the passage from the commentaries applies to non-navigable rivers, and gives us the law governing such streams as those we are now dealing with. To the authorities 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 moietively 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 land abutting on the streams are *primâ facie* the owners of the soil of the alveus or channel *ad medium filum aquæ*, and as such have *primâ*

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 (1).

Applying the law as thus stated to the facts stated in the special case submitted for the opinion of the court, we must determine that at the time of the passing of the *British North America Act*, the soil or bed of the river *Miramichi* between *Price's Bend* and its source was vested in the *New Brunswick* and *Nova Scotia* land company, or its grantees, to whom consequently also belonged, and that as a right of property, and not as an easement or franchise, the absolute and exclusive right of fishing within the same limits.

The question next presents itself, did the *British North America Act* either directly affect these vested rights of property, or did it authorize Parliament to interfere with them by legislation? There is no pretence for saying that the Act contains anything in the slightest degree derogating from the rights of fishing belonging to the proprietors of the beds of non-navigable rivers. By the 13th enumeration of the 92nd section the exclusive right to legislate concerning property is conferred upon the Local Legislatures, to whom also by the 16th sub-sec. are granted similar powers concerning matters of a local and private nature. Thse provisions must necessarily exclude the right of the Parliament of the Dominion to legislate to the prejudice of the rights of fishing vested in the proprietors of beds of rivers and streams, unless we can find in section 91, defining the powers of Parliament, some exception to the general effect of the

(1) See also *Marshall* v. *Ulleswater Co.*, 3 B. & S. 732; *Bristow* v. *Cormican*, 3 App. Cases 641.

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word "property" as including such a proprietary right. The only words in the last mentioned section which it can be suggested may have such an operation are those of the 12th enumeration "Sea coast and inland fisheries." It is a sound and well recognized maxim of construction that in the interpretation of statutes we are to assume nothing calculated to impair private rights of ownership, unless compelled to do so by express words or necessary implication. This principle has within the last few months been applied with much approval by the Privy Council, in the case of the *Western Counties Railway Co.* v. *The Windsor & Annapolis Railway Co*, and is too well fixed as a canon of construction to be open to the least doubt or question. As observed in the judgment of the Privy Council in the case just mentioned, the only difficulty which ever arises respecting it is in its application to particular enactments. I think there is room for applying an analogous principle in the present case. Although the provision in question does not in itself make any disposition of the fisheries mentioned, but is merely facultative, empowering Parliament to make laws respecting the subjects named, we are not to assume, without express words or unavoidable implication, that it was the intention of the Imperial legislature to confer upon parliament the power to encroach upon private and local rights of property which by other sections of the Act have been especially confided to the protection and disposition of another legislature. 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 harbors, 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. There is therefore no unreasonable restriction of the power of parliament in construing the twelfth sub-section as I do, as not including a power to legislate concerning the right of property in private fisheries.

I am so far of accord with the learned judge whose judgment is the subject of appeal. I am compelled, however, to differ from him when he makes a difference between the rights of private owners which had been acquired by grant from the Crown before Confederation and the rights of the provincial governments in respect of fisheries in non-navigable rivers, the beds of which, not having been granted, were vested in the provinces at that date. I can see no reason for such a distinction. By the *British North America Act*, the Crown Lands are vested in the respective provinces.

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This of course includes the beds of all non-navigable rivers and the consequent right to the fish in such waters, for there can be no doubt that the right of taking fish in rivers of this class, so long as they remain ungranted, is vested in the Provinces as an incident of the ownership of the public domain, just as the timber and all the other profits of the land are so vested. These fisheries, although often in practice not conserved by the Provinces, are certainly not public fisheries open of common right to all who may choose to avail themselves of them, as is the case with regard to the fisheries in tidal waters and the great lakes, but the provincial governments may, without special legislation and in exercise of their right of property, restrict their use in any manner which may seem expedient just as freely as private owners might do. In short, the public have no more right in law to take fish in non-navigable rivers belonging to the provinces than they have to fell and carry away trees growing on the public lands; in the one instance, as in the other, such interferences with provincial rights of property are neither more nor less than illegal acts of trespass.

This being so, it seems very clear to me that no well-founded distinction, as regards the power of legislation by parliament, can be made between fisheries in rivers which, at the date of Confederation, were the property of private owners under grants from the Crown and those which remain the property of the provinces as part of the public domain. In both cases the right of fishing is a profit of the land, an incident of the proprietary right in the soil, and is as much property in the hands of the province as in that of a private owner. Then, if the *British North America Act* contains nothing warranting federal legislative interference with this right of property in the case of a private owner,

how can it be asserted that it does so when the ownership is vested in the province? The Crown lands are expressly assured to the provinces, and these include the beds of all such streams as that now in question. Where it was intended to make an exception to the general terms of the 109th sec. of the Act, as in the case of property reserved to *Canada* by the 108th sec., and the power to assume lands or public property for the purposes of defence, conferred by the 117th sec., we find such exceptions expressed in clear and distinct enactments. How, then, can it be presumed, in view, not only of the 109th sec., but also of the 5th enumeration of sec. 92, giving the provinces exclusive legislative powers respecting the public lands, and that as to property generally in sub-sec. 13 of sec. 92, that the Dominion has the power to legislate respecting these fisheries incidental to the ownership of the provincial lands, or respecting any other dismemberment of the right of property in such lands, if it is not conferred by the clause in sec. 91 respecting sea coast and inland fisheries? Not a single provision of the *British North America Act* can be pointed to as conferring such powers of legislation, except that just mentioned, which, for the reasons already given in considering the case of private owners, must be held inapplicable.

I therefore come to a different conclusion in this respect from that arrived at in the judgment of the Exchequer Court.

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 sec. 91 authorizes parliament to empower the Crown to grant exclusive rights in respect of such fisheries. Upon this point it would not

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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 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.

I consider that I shall sufficiently answer the different questions propounded for the decision of this court by stating my opinion that the Crown had no power to grant the license in question, and that the same is absolutely void; and further, that the Crown has no power under the statute of 1868 to grant an exclusive right of fishing in any non-navigable river, whether the bed or soil of such river be vested in the Crown in right of the Province, or in a private owner deriving title under a grant from the Crown made either before or since the passing of the *British North America Act*.

FOURNIER, J.:—

Après les savantes dissertations que l'on vient d'entendre sur l'importante question soumise à la considération de cette cour, il serait inutile pour moi de revenir

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sur les faits de la cause, et de discuter longuement de nouveau les questions de droit qu'elle présente. Mais comme la question de juridiction, entre le pouvoir local et le pouvoir fédéral, soulève encore ici la question de savoir jusqu'à quel point le pouvoir fédéral exerçant son pouvoir législatif sur un sujet de sa compétence peut affecter les droits particulièrement réservés aux provinces, et plus spécialement les droits civils, je crois devoir réitérer l'expression de mon opinion à ce sujet. Me fondant sur l'opinion des plus hautes autorités judiciaires des *Etats-Unis*, qui ont été appelées à décider des questions analogues, sur la juridiction et les droits respectifs des *Etats* et du gouvernement fédéral de l'Union américaine, j'ai adopté, dès le début, leur opinion qu'il n'était pas possible d'établir une règle uniforme d'interprétation pouvant servir à la décision de toutes les questions de conflit de ce genre. Cette opinion a été aussi exprimée plusieurs fois depuis par le Conseil Privé de Sa Majesté. *Cushing* v. *Dupuy* (1) *Parsons* v. *The Citizen's Ins. Co.* (2) décidée en novembre dernier.

Dans une cause assez récente, j'ai eu occasion de dire, et je le répète, 'que le gouvernement fédéral a, sans doute, le pouvoir de toucher incidemment à des matières qui sont de la juridiction des provinces. Mais dans mon opinion, ce pouvoir ne s'étend pas au-delà de ce qui est raisonnable et nécessaire à une législation ayant uniquement pour but le légitime exercice d'un pouvoir conféré au gouvernement fédéral. Cette règle, pas plus qu'aucune autre, ne peut être d'une application générale. Toutefois, appliquée à la question actuelle, je crois qu'il est facile de concilier les intérêts respectifs des deux gouvernements. 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.

(1) 5 App. Cas. 415. (2) 45 L. T. N. S. 721.

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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 sec. 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 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 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 dépérissement, 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.

A l'endroit particulier auquel s'appliquent le bail et la licence, dont la validité est attaquée, la rivière *Miramichi* n'est pas navigable ; elle n'est que flottable d'après l'admission de faits qui tient lieu de preuve en cette cause. C'est pour cette raison que je m'abstiendrai de faire aucune observation sur plusieurs autres questions importantes, savamment discutées dans le jugement de l'honorable juge *Gwynne*, concernant le droit de pêche dans les eaux navigables. Il me suffit de déclarer, pour les fins de cette cause, que je suis d'avis avec l'honorable juge en chef que le droit de pêche dans les eaux non-navigables est un attribut de la propriété riveraine,—que ce soit une province ou un particulier qui soit propriétaire,—sujet, toutefois, au droit du public de faire usage de ces rivières non navigables comme voies de communication, autant que leur nature le permet. Je suis encore d'opinion avec l'honorable juge en chef, que l'exercice du droit de pêche dans ces mêmes rivières est soumis au pouvoir réglémentaire du gouvernement fédéral au sujet des pêcheries.

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HENRY, J.:—

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 navigation," "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.

Independently of the Imperial statute the Dominion Parliament has no power to legislate in respect of property or civil rights in the Province, and could not otherwise by enactment affect the tenure of or title to real property. By the common law the owner of the soil has the right of fishery in unnavigable streams and water courses. That right, to be taken away, restrained, or transferred must be by a Parliament having jurisdiction over the subject-matter, and to possess and exercise the power to interfere with and control private property and interests there must have been an express grant of that power in the Imperial Act. I have searched in vain for such, or even anything that would suggest the conclusion that such was intended. I am therefore of the opinion that the leases granted by the several Ministers of Marine and Fisheries, so far as they cover private property or affect private rights, are wholly irregular and void.

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The same principles are applicable where lands are under the control of and owned by the Local Governments in trust for the use of the people of the several Provinces.

I think, therefore, that by force of the agreement under which this case is prosecuted the Respondent is entitled to our judgment. As the learned Chief Justice had prepared a judgment which embraces my views upon the leading points in the case, I have not thought it necessary to put my judgment in writing.

TASCHEREAU, J. :—

I am of opinion to dismiss this appeal on the ground that, as an exclusive right of fishing existed in the part of the *Miramichi* River in question, the Minister of Marine and Fisheries could not legally grant a license to fish for that portion of the said river.

Appeal dismissed with costs.

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