IN THE MATTER OF THE PETITION OF RIGHT OF

1916
Nov. 2

ALFRED BOUILLON....................SUPPLIANT;

AND

HIS MAJESTY THE KING............RESPONDENT.

Waters—Test of navigability—Fisheries—Grant—Crown domain—Action against Crown

A river is navigable and floatable *a trains et radeaux,* when, with the assistance of the tide, small craft or rafts of logs can be navigated for transportation purposes in a practical and profitable manner; it, therefore, forms part of the Crown domain.

2. A right of fishing in a navigable river is not to be construed as an exclusive right unless made so by specific words in the grant.

3. An action for having illegally occupied a fishing right, and for the revenues derived therefrom, is one in tort, and is not maintainable against the Crown except under special statutory authority.

PETITION OF RIGHT seeking recovery of revenues from fishing right in the River Matane, P.Q., of which the suppliant alleged he was deprived by the Dominion government.

Case tried at Matane, Que., July 4, 5, 1916, before the Honourable MR. JUSTICE AUDETTE.

Louis Tache, K.C., for suppliant; *G. G. Stuart,* K.C., for Crown.

AUDETTE, J. (November 2, 1916) delivered judgment.

The suppliant brought his petition of right to recover from the Crown, as representing the Dominion of Canada, the sum of $2,400, he having at trial abandoned his claim for the sum of $540 mentioned in paragraphs 15 and 16 of the petition.

By his petition of right, he sets forth, *inter alia*, that he is proprietor of a certain piece of land, at Matane, abutting on the River Matane, which he says is neither *navigable nor floatable*, and therefore claims his proprietary rights extend to the centre of the river, *usque ad medium filum*

1916
BOUILLON
v.
THE KING.
Reasons for Judgment.

aquae:—That the Federal Government, from the year 1884 to 1896, took hold of his fishing rights opposite his property and rented the same to different parties up to the date of the judgment of the Supreme Court in the *Fisheries Case*, in 1896,[1] which was followed by the decision of the Judicial Committe of the Privy Council in 1898,[2] and he concludes by asking by paragraph 13:—"Que le dit Gouver- "nement Fédéral a occupé *illégalement* le dit droit de pêche "et en a retiré des rançons pendant douze ans;" and by paragraph 14 he further claims: "Que le dit Gouvernement "Fédéral d'Ottawa a privé ainsi votre pétitionnaire d'un "revenu de deux cents piastres par année pendant douze "ans, formant une somme de $2,400.00 que votre péti- "tionnaire a droit de réclamer du Gouvernment Fédéral "d'Ottawa."

These two paragraphs are here recited in full with the object of enabling us in arriving at the true understanding of the nature of the present action. Indeed, counsel at bar, contends on behalf of the suppliant that the present action is in revendication of a real right (un droit réel, immobilier) consisting in a fishing right, of which the substance and the enjoyment are the object of a right. He adds that *the substance having disappeared* it cannot be claimed, and this action is the only course left to him; that is, to claim the value thereof by paragraph 14 above recited.

The respondent's plea alleges, among other things, that the River Matane opposite the suppliant's property is *navigable et flottable*, and that the latter's rights do not extend to the middle of the river, and therefore has no right of fishing in the same; and that while the Crown, in the right of the Dominion of Canada granted, without warranty, up to 1896, the right of fishing in the estuary of the River Matane as might belong to the Crown, if the suppliant had any rights to such fishing he was at all times at liberty to exercise them, and if such recourse exist it is against the lessees of such right; concluding that if he had such rights they are prescribed and that the cause of action is unfounded in fact and in law.

[1] 26 Can. S.C.R. 444.

[2] [1898] A.C. 700.

The issues involved in the present case may be said to be resolved in the solution of the three following questions, viz:

1st. Is the River Matane, opposite the suppliant's property, *navigable et flottable en trains ou radeux*? and did the *Seigneur* by his grant have the exclusive right of fishing in the same and so transferred such right to the suppliant?

2nd. Do the issues herein disclose an action in tort, and does it lie against the Crown?

3rd. Does an action lie against the Crown for the recovery or repetition of the monies received in good faith under an error of law and under the circumstances of the case. Is there privity between the suppliant and the respondent?

FIRST QUESTION.

It may be stated, as a general and recognized principle that if the river is *navigable ou flottable à trains et radeaux* opposite the suppliant's property that the action fails,—unless he has such rights as are derived from a Crown grant giving the *Seigneur* an *exclusive* right of fishing in the *locus in quo*.

The River Matane was, on two recent occasions, the subject of two distinct judicial pronouncements with respect to its navigability. One by the late Mr. Justice Larue in the case of *Irwin v. Bouillon* (unreported) in which the learned Judge pronounced the river navigable and floatable, and the other by Mr. Justice Lemieux (now Sir François) in the case of the Attorney-General of *Quebec v Bouillon*, in which he adjudged the river neither navigable nor floatable.

This question of navigability is obviously one of fact which has to be decided under the circumstances and the evidence submitted to the Court in each case.

Therefore having been made aware in the course of the trial of these two conflicting judgments or findings, I ordered *une descente sur les lieux* (the object of the litigation—Pigeau, Procédure Civile (2nd Ed.) p. 227) that is a visit to, and examination of the river, at high tide on the next day at five o'clock in the morning of the 5th July last, and directed both parties to be there represented. McKinnon, a witness heard on behalf of the suppliant stated that the

1916
BOUILLON
v.
THE KING.
Reasons for Judgment.

season at which the river is lowest is July and August. At the time so appointed for the visit, I crossed from north to south upon the bridge, which appears on the plan Exhibit 15, filed herein, walked to the suppliant's property, and in company of both the suppliant and respondent's counsel we walked down from the King's highway opposite the suppliant's place to his floating landing, where two boats sent by the Crown's counsel were in readiness for us. Before embarking I ascertained that between the highway and the river there was a small piece or parcel of land belonging to the suppliant which made him a riparian proprietor on the river, small as the piece might be. Accompanied by the suppliant and two men we started in a twenty-foot boat, travelled from this place to about the centre of the river, over the pass (or goulot) in the rapids and travelled west passed the bridge indicated on the plan. The whole of the river presented then the appearance of a large lake, without any indication whatever of any rapids below the bridge in question. In the river, slightly above the church, there was a schooner moored at a wharf, notwithstanding some evidence at the trial that it was impossible for a schooner to go up beyond the Price wharf at the mouth of the river

Now, the evidence adduced in this case discloses that the suppliant is and has been the owner for a number of years, of a gasoline launch, which up to two years ago was 25½ feet long, drawing 28 inches, and two stories high, as put by the suppliant, meaning, I suppose, an upper deck, and on which yacht he crosses over to the north shore. Two years ago he lengthened this launch by eight feet, making it 33½ feet long. Now, while this launch on the date of the trial was kept some short distance below the suppliant's property, it appears from the general evidence that the launch, while at times kept closer to the mouth of the river, was usually and for most of the time kept opposite the suppliant's property. That this launch was also seen, on several occasions, running up to, or within a few yards of the bridge.

That transatlantic vessels lying in the current in the St. Lawrence, opposite the estuary of the River Matane or thereabouts, are from time to time during the summer,

being loaded with lumber taken in *bateaux*, from Price's wharf at the mouth of the river; and that ever and anon, while these vessels were being loaded, boats of 20, 25 and 30 feet keel, drawing from 18 to 20 inches, manned by two, three and four men, came up the river with on some occasions two puncheons and one barrel, to fetch fresh water for the vessels; and that such water was procured at the rapid above the bridge, and that they would go up as far as the slab-wharf marked "D" on the plan. Some of the suppliant's witnesses say that the salt water runs up with the tide to the foot of the dam, beyond the bridge. Vaillancourt, a man on the river all the summer, says that in small tides the salt water runs up like 50 to 60 feet beyond the bridge, but does not cover the small rapid above the bridge.

Then a schooner on one occasion came up beyond Bouillon's property. The evidence is conflicting as to whether she went up to point "C" or "D," marked on plan Exhibit 15.

However, the most important point of the evidence bearing upon the subject in question, is that for a number of years the Price people, proprietors of the saw-mill above the bridge, took their lumber from the mill in rafts down the River Matane to Price's wharf at the mouth of the river. The rafts were made at the foot of the mill above the bridge and were 60 feet in length, 12 feet in width, with a depth varying from 18 to 27 inches. This lumber is now carted down from the mill to Price's wharf. The floating of rafts, as well as the taking of lumber in sluices at one time, were abandoned, not for the reason mentioned in the case of Mr. Justice Lemieux above referred to, but for the reasons in evidence in the present case, because the owners of the vessels refused to load wet lumber. And that is too obvious, because ships loaded with such lumber are liable to take a list. The floating by rafts was carried on for at least ten years, and it is in evidence that the river was in the same state then as it is today, therefore the River is obviously *flottable en trains ou radeaux*.

In *Bell v. Corporation of Quebec*,[1] it was held that "According to the French Law the test of navigability

[1] L.R. 5 A.C. 84.

1916
BOUILLON
v.
THE KING.
Reasons for Judgment.

"of a river is its possible use for transport in some practical "and profitable manner." And that decision is followed in the case of *Atty-General of Quebec v. Fraser* [1] by the Supreme Court of Canada, where it is held that: "A river "is navigable when, with the assistance of the tide, not- "withstanding that at low tides, it may be impossible for "vessels to enter the river on account of the shallowness of "the water at its mouth." See also *Wyatt v Atty-General of Quebec.*[2]

The distinction between rivers *flottable à trains et radeaux* and those *flottables à bûches perdues* is clearly stated by the Chief Justice of the Supreme Court, of Canada, Sir Charles Fitzpatrick, in the case of *Tanguay v. Canadian Electric Light Co.*[3] At page 8 thereof His Lordship says: "In "France, before the Code, there was a broad distinction "between streams that were floatable in the sense that they "could be used for the transport of boats, flats or rafts "(the words used are "*portant bateaux, trains ou radeaux*") "and those streams that were floatable for loose logs only; "and since the Code, as Laurent says, the distinction is uni- "versally admitted."

"Dalloz, Rep. Jur. Eaux, No. 61 :

"Il est vrai (dit-il), que le code civil n'a établi aucune "distinction entre les deux sortes de flottage; il a même "gardé un silence absolu à cet égard; mais la distinction se "trouve *dans toutes les anciennes lois*, comme dans *tous les* "*monuments de la jurisprudence.*"

Then further on he cites *Proudhon, Domaine Public* [4] where the difference of *flottage par trains ou radeaux* and *flottage à bûches perdues* is established, and where a description is given of what is meant by a *train* or *train de bois*.

And in Sirey[5] is found a reported case holding that: "Les rivières ne doivent être considérées comme dépendant "du domaine public que lorsqu'elles sont *flottables à trains* "*ou à radeaux.*"

"Beaudry-Lacantinerie[6] says: "*Les fleuves et les* "*rivières navigables ou flottables.* Ce sont des chemins qui "marchent dit Paschal. . . . Il n'y a que les rivières

[1] 37 Can. S.C.R. 577.
[2] [1911] A.C. 489.
[3] 40 Can. S.C.R. 1.
[4] Vol. 3, Nos. 857–860.
[5] (1823) L. 317.
[6] Des Biens, p. 134, No. 174.

"flottables avec trains ou radeaux qui fassent partie du "domaine public."

See also 2 Plocque, Législation des Eaux,[1] and Fuzier-Herman, vbo. "*Rivières.*"[2]

The judgment of Mr. Justice Girouard in *Tanguay v. Canadian Electric Light Co.* (supra) cites also a number of authorities in support of the same proposition—*inter alia*—Isambert,[3] where he says that : "Arrêt du conseil qui juge "que ce n'est point par la force des bateaux que l'on doit "juger si les rivières sont navigables, mais seulement par "la navigation qui s'y fait."

In *Bell v. Corporation of Quebec*[4] Chief Justice Dorion says : "It is not so much the volume of the water that "the river carries, as the fact that its course is devoted to "the public service, which gives it its legal character."

See also *Lefaivre v. Attorney-General P.Q.*;[5] *Gouin v. McManamy*;[6] *The King v. Bradburn*;[7] and *The Fisheries Case*.[8]

There is also the case of *Hurdman v. Thompson*[9] wherein Bosse, J. at p. 434 says: "What is a navigable or "floatable river?" And he answers: "Les rivières por-"tant bateaux ou transportant des trains de bois étaient "navigables ou flottables, disent les anciennes ordon-"nances, de même que la jurisprudence constante de l'an-"cien et du nouveau droit." It was further held in the "same case that: "Une rivière est navigable et flottable "nonobstant que la navigation en soit en plusieurs en-"droits interrompue par des chutes et rapides."

As appears by Exhibit "E" and "F", on October 19, 1877, a Port has been created at Matane, under the provisions of 37 Vic. ch. 34, and the Acts amending the same, and the Port is declared to extend from the Parish Church situate in the village of Matane, a distance easterly of two miles and a similar distance westerly from the same point.

Flowing from the doctrine expounded in the numerous cases above cited, coupled with the fact that the tide backs from the River St. Lawrence some distance beyond the bridge in question, thus forming a large lake or river upon

[1] No. 174.
[2] Nos. 80 *et seq.*
[3] Vol. 20, p. 232.
[4] 7 Q.L.R. 103; 5 A.C. 84.
[5] 14 Que. K.B. 115.
[6] 32 Que. S.C. 19.
[7] 14 Can. Ex. 433.
[8] 26 Can. S.C.R. 444, [1898] A.C. 700.
[9] 4 Que. K.B. 409.

1916
BOUILLON
v.
THE KING.
Reasons for Judgment.

which boats and rafts of timbers have been for years transported for commercial purposes, the necessary conclusion is that the river is necessarily navigable and especially *flottable à trains ou radeaux.*

It was a moot question at one time, before the decision in *the Fisheries Case*, as to whether fishing rights on rivers which were Crown property belonged to the Crown in the right of the Dominion, or in the right of the Province. However, up to the time of the decision in the *Fisheries Case*, the Federal Government was considered as vested with the control of such waters, and did exercise it. After the decision in the latter case, the Crown in the right of the Province of Quebec, must have assumed, as the Federal powers had previously done, that the Matane River was part of the Crown domain as a navigable and floatable river, since both governments have at one time and the Quebec Government is now leasing the fishing right upon the same.

The suppliant himself must have shared that opinion after the decision of the *Fisheries Case*, since he filed with or handed to the Quebec Government, the following admission, filed herein by the Crown, as Exhibit "D" and which reads as follows:

"Je soussigné Alfred Bouillon, de la paroisse de St-"Jérome de Matane, médecin, reconnais que le club in-"corporé sous le nom de 'The Matane Fishing Club' a le "droit exclusif de faire la pêche dans la rivière de Matane en "vertu d'un bail consenti à ce club par le Commissaire des "Terres, Forêts et Pêcheries de la Province de Québec.

"Je reconnais la validité de ce bail à toutes fins et je "m'engage à ne pas pêcher dans la dite rivière et à ne pas "troubler les membres de ce Club dans l'exercise de leurs "droits de pêche et à n'intervenir en aucune façon à l'en-"contre de leurs droits de pêche au saumon dans la dite "rivière pendant la durée de leur bail. St-Jérome de "Matane, 19 juin, 1899.

A. BOUILLON, M.D.,
L. TACHÉ,
PROC. DE M. ALF. BOUILLON."

On the face of the admission, again the suppliant would be out of Court.

TITLE

The suppliant's property, acquired by him on September 5, 1893, originally formed part of a grant or concession of land made, on May 29, 1680, in the name of the King of France, by His Intendant Duchesnau, to Sieur Mathieu Damours.

By this grant two pieces of land were granted to Damours, as appears in the recitals of the deed. First, in the middle of the first page of the deed, he asks for "une lieue de front "sur une lieue et demie de profondeur située sur le fleuve "St-Laurens, à prendre sur une demye' lieue de chaque "costé de la dite Rivière,"

And secondly, but further on at the foot of the second page of the deed: "et de luy donner et accorder par *aug- "mentation* de concession une lieue de terre sur le dit fleuve "à prendre joignant la demye lieue du costé de la rivière "Mitis sur pareille profondeur d'une lieue et demye comme "aussi le droit de pesche sur le dit fleuve,"

Then in the *habendum* clause of the deed we find the following: "Avons accordé et accordons au dit Sieur Damours "la ditte lieue et demye de terre de front, et une lieue de "profondeur, scavoir une demye lieue au deça, et une demye "lieue au delà de la rivière Matane."

"Et pour augmentation une autre lieue de terre de front "aussy sur une lieue et demye de profondeur y joignant, à "prendre du costé de la rivière Mitis, avec le droit de pesche "sur le dit fleuve St. Laurens, pour en jouir par luy, ses suc- "cesseurs ou ayant cause en titre de fief et seigneurie."

From the reading of these descriptions in the grant would it not clearly appear that two separate pieces of land are granted as described in the recitals, and as repeated in the habendum clause? Indeed, it appears, Damours asks first for a defined piece of land, and secondly, by augmentation for another piece of land, with the right of fishing upon the River St. Lawrence, and the habendum clause grants as asked. If that is the case, it is obvious the right of fishing, as described in the grant, only relates to the second piece of land which is not opposite the land in question herein but starts half a league up the St. Lawrence from the

1916
BOUILLON
v.
THE KING.
Reasons for Judgment.

western shore of the River Matane. *Expressio unius est exclusio alterius.*

Be that as it may, assuming the right of fishing as mentioned in the grant has been given for the whole area of the seigniory on the St. Lawrence, the right given is not an *exclusive* right, Therefore, under the decision of the case of *Cabot v. Attorney General of Quebec*,[1] affirmed on appeal by the Judicial Committee of the Privy Council[2], on the true construction of the grant, the claim flowing from the seigneur's title for exclusive fishing could not pass, and at page 513 of the report of that case, their Lordships, adopting the view of the court appealed from, cite the following passage from the judgment of the court below, and approve of it, viz:

"Le droit de pêche formait partie du fonds commun de la "colonie, mais sous la garde du roi, pour l'avantage de tous, "et ne pouvait devenir *exclusif* sans quelque concession "spéciale exprimée dans des termes plus formels que ceux "qui se trouvaient dans la simple formule mentionnée plus "haut," and the "simple formula," in that case, (as in the "present) was exactly that which is now under considera- "tion. While the question is thus discussed under some- "what abstract terms, it is always to be remembered that "the exclusive right claimed . . . implies a grant by "the Crown of the exclusive use of the foreshore so far as "fishing is concerned."

A specific grant, especially expressed and clearly formulated, was necessary to allow an exclusive right of fishing to pass: *Leamy v. The King.*[3]

I may also repeat here what I have said in that case (at p. 192): How should such a grant be construed and interpreted? The trite maxim and rule of law for our guidance in such a construction or interpretation is well and clearly defined and laid down in Chitty's Prerogatives of the Crown[4] in the following words:

"In ordinary cases between subject and subject, the prin- "ciple is, that the grant shall be construed, if the meaning "be doubtful, most strongly against the grantor, who is

[1] 15 Que. K.B. 124. [2] [1907] A.C. 511.

[3] 15 Can. Ex. 189, 196, 200, 23 D.L.R. 249, affirmed in 54 Can. S.C.R. 143, 33 D.L.R. 237.

[4] p. 391–2.

"presumed to use the most cautious words for his own "advantage and security, but in the case of the King, whose "grants chiefly flow from his royal bounty and grace, the "rule is otherwise, and Crown grants have at all times been "*construed most favorably for the King*, where a fair doubt "exists as to the real meaning of the instrument . . . .
"Because general words in the King's grant never extend "to a grant of things which belong to the King by virtue of "his prerogative, for such ought to be expressly mentioned. "In other words, if under a general name a grant com-"prehends things of a royal and of a base nature, the base "only shall pass."

See also *Wyatt v. Attorney-General of Quebec*[1] and *Fraser v. Fraser*,[2] and Arts. 1019 et seq. C.C.P.Q.

It is also well to bear in mind that the right of fishing mentioned in the grant is in the *St. Lawrence*, and not in the *River Matane*.

Before leaving this question of title, it may be said that on perusing the chain of the suppliant's titles, filed by him at trial, I came across Exhibit No. 8, which is a deed by Jane McGibbon, then proprietress of the Seigniory of Matane, whereby she grants and *concedes* to Mme Widow John Grant, (sic) on June 22, 1824, a tract of land, covering the lands in question herein, together *with the right unto the said grantee her heirs and assigns of fishing and hunting in front thereof*. The grant is made free from all annual and seignorial rents during the grantee's life time and the lifetime of her then living children and as long as the said tract of land shall remain her property and her children's property. The deed also provides, as follows: "It is further agreed between "the said parties that she the said grantee and her said "children shall not sell, exchange or bargain the said tract "of land without giving to the said seignioress the privilege "of the same previous to sign any deed of sale or exchange "and that in case the said property should in any manner "or form fall into stranger's possession, the purchaser, or "then the owner of the same, shall and will be bound and "obliged to exhibit his title to the said seignioress or her "representative and then take a deed of concession for the

[1] [1911] A.C. 489.
[2] 2 Que. S.C. 61; 2 Que. K.B. 215.

1916

BOUILLON v. THE KING.

Reasons for Judgment.

"said land the same as the other tenants in the said Seig-"niory of Matane, *otherwise all and every title or deeds trans-"ferring the property aforesaid shall be null and void*, with the "right unto the said seignioress to take full possession of the "same without any form of justice and without compensa-"tion on her part for whatever improvements that shall "then have been made on the said land."

From the date of this deed, the property changed hands several times before it came into the suppliant's possession on September 5, 1893, without any evidence of the compliance with the conditions, restrictions and reserve mentioned in this deed of June 22, 1824.

One feature of this deed of June 1824, which should not be passed without some notice, is that the suppliant's counsel seems to attach some importance to it, and he relies upon it as transferring to the suppliant this right of fishing in the river. This is the only deed, between 1824 and the present day, in which the question of fishing and hunting is mentioned. This fishing privilege is not repeated in the chain of titles from that date (1824) down to the date of the suppliant's title (1893).

Can the suppliant now on the one hand invoke and rely upon that deed (which is part of the chain of his title) for this alleged right of fishing, and on the other hand derogate from it? *Qui approbat non reprobat.* And a person is said to "approbate and reprobate" when he endeavours to take advantage of one part of a document and rejects the other. This rests on no artificial rule but on plain fair dealing. Therefore, is there then a flaw in the suppliant's title? In view of the case of *Labrador Company v. The Queen*[1] deciding that inasmuch as a claimant had disclosed *the true root of his title*, he could not hold his land by prescription and immemorial possession, and that the law of prescription did not apply. Can the suppliant now set up interversion or prescription? Are the several deeds, subsequent to that of June 22, 1824, with the above conditions, restrictions and reserve absolutely ignored, good or bad, and have they transferred any proprietary rights? *Quod initio vitiosum est lapsu temporis convalescere non potest. Mignault, Droit Civil Canadien.*[2]

[1] [1893] A.C. 104.

[2] Vol. 9. p. 388.

However, in view of the important questions raised in the present issues it is unnecessary to consider what is the effect of such documentary evidence adduced by the suppliant himself upon his own title.

SECOND QUESTION.

CAUSE OF ACTION.

Do the issues herein disclose an action in tort and does it lie against the Crown?

What is a tort? "Tort is an act or omission giving rise, "in virtue of the common law jurisdiction of the Court, to a "civil remedy which is not an action of contract.[1]

"The very essence of a tort is that it is *an unlawful act, "done in violation of the legal rights of some one.* Per *Miller, J. in Langford v. United States.*[2]

"A tort in its legal sense is a wrong independent of contract." *Milledgeville Water Co. v. Fowler* [3]

Pothier,[4] says: "On appelle *délits* et *quasi-délits* les faits "illicites qui ont causé quelque tort à quelqu'un . . . . "Si ce fait procède de malice et d'une volonté de causer ce "tort, c'est un *délit* proprement dit. . . s'il ne procède "que d'imprudence, c'est un *quasi-délit.*

And at page 57:[5] "On appelle *délit*, le fait par lequel une "personne, par dol ou malignité, cause du dommage ou "quelque tort à un autre. Le *quasi-délit* est le fait par "lequel une personne, sans malignité, mais par une impru- "dence qui n'est pas excusable, cause quelque tort à un "autre."[6]

By paragraphs 13 and 14 of the petition of right, recited above, the suppliant claims that the Crown has *illegally occupied* (occupé) the fishing right and had drawn therefrom revenues during 12 years, and that by so doing the suppliant has been deprived of yearly revenue of $200 during that period, making in all the sum of $2,400. And by the prayer of his petition of right, he asks that the Crown be condemned to pay him the sum of $2,400 and costs.

[1] Pollock on Torts (6 Ed.) p. 5.
[2] 101 U.S. 341 at 345.
[3] 58 S.E. 643.
[4] Bugnet, 2nd Ed. Vol. 1 p. 43.
[5] Vol. 11, No. 116 (Idem.).
[6] Laurent, Vol. 20. p. 384.

1916
BOUILLON
v.
THE KING.
Reasons for Judgment.

This is not an action claiming a real right against the Crown in any sense of the word. It is of the essence of a real right that it should be referable to immovables, a right recognizable in face of the world, and as against every one. This action does not claim the substantive right of fishing as against the Crown in the right of the Dominion, but it claims the loss of revenues through the *illegal* deprivation of the same by the Dominion Crown during a certain period. It is not *une action réelle* asking the Crown to recognize a real right; but it is a personal action arising in damages against the Crown for having interfered with his alleged right of fishing, a pure action in tort. In other words he does not claim any fishing right, as against the Crown, but he assumes he has that right, and his action is against the Crown for trespassing upon such right by collecting rents for the same, and for such trespass he concludes in condemnation against the Crown for $2,400 damages. The petition of right asks for a condemnation in money founded upon an alleged illegality by the Crown.

The suppliant does not either claim the amount which the Crown collected under its leases, but a larger amount, assuming he would have collected as much as he claims, and his damages are reckoned by him on that basis. He does not claim the rents actually collected by the Federal Government, but an amount which in his estimation would represent the damages he suffered.

This case is not a disguised claim of damages, but it is clearly a claim sounding in tort, and an action in tort will not lie against the Crown, except under special statutory authority. This doctrine is too well known and accepted to necessitate the citing of authorities in support thereof.

Therefore whether the River Matane be navigable or *flottable à trains ou radeaux* or not, the action as instituted cannot lie against the Crown.

There are a number of other questions raised both by the pleadings and by the oral argument. For instance, can it be said there is any privity as between the Crown and the suppliant with respect to the amount of these rents paid by the tenants up to 1896? Is not the recourse of the suppliant, if he has any, against the tenants; and is not such recourse extinguished by prescription? Further-

1916

BOUILLON v. THE KING.

Reasons for Judgment

more, under the English law, the doctrine is, says Mr. Justice Middleton in *O'Grady v. City of Toronto*[1] that "Equity has never yet gone so far as to afford relief by "maintaining an action brought, directly or indirectly, to "recover money paid under mistake of law," citing a number of authorities in support of the same. Does the same doctrine obtain in the Province of Quebec, under the 2nd paragraph of Art. 1047 of the Civil Code?

However, these are all questions upon which it is unnecessary to pass in view of the decision arrived at in answering question number one, and especially number two above referred to.

Under the circumstances, I have come to the conclusion that the suppliant is not entitled to any portion of the relief sought by his petition of right.

Petition dismissed.

Solicitor for suppliant: *L. Taché.*

Solicitors for respondent: *Pentland, Stuart, Gravel & Thompson.*

[1] 10 Ont. W.N. 249. 37 O.L.R. 139, 31 D.L.R. 632.