

[E. C.], 1880

ROBERTSON *v.* THE QUEEN.

Oct. 7. *Fisheries Act, 31 Vic., c. 60 (D)—British North America Act, 1867, ss. 91, 92 and 109—Fisheries, regulation and protection of—Licenses to fish—Rights of riparian proprietors in granted and ungranted lands—*
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 April 28. *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, c. 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 Miramachi 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 endeavouring 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 adversely to his exclusive right to fish in virtue 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 were submitted for the decision of the Exchequer Court, and the court (Gwynne, J.) 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 license to fish as a franchise apart from the ownership of the soil in that portion of the river.

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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, s. 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 Miramachi river flows.
- 2nd. That although 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 Miramachi 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, JJ.), reversing the judgment of the Exchequer Court on the 8th 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. See Can. S.C.R., vol. VI., p. 52.