IN THE MATTER OF THE PETITION OF RIGHT OF 1915

Jan. 5.

SARAH ELIZABETH LEAMY AND CHARLES LEAMY.....SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Navigable river—Title to Bed—Crown Grant—Construction.

The bed of all navigable rivers is by law vested *primâ facie* in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any way so as to derogate from or interfere with such rights as belong by law to the subjects of the Crown. Hence, in a grant of part of the public domain from the Crown to a subject the bed of a navigable river will not pass unless an intention to convey the same is expressed in clear and unambiguous terms in the grant.

2. In the Province of Quebec all grants of the public domain made prior to the Union Act of 1840 are to be read as subject to the limitations, restrictions and reservations conserving the rights of the public as to navigation, and otherwise, contained in the instructions to Lord Dorchester as Governor of Lower Canada. Since the passage of the Union Act of 1840 grants of the public domain, in that province, have been made under the authority of the provincial legislature and subject to such statutory restrictions as have been from time to time imposed.

3. Under the decisions of the Seigneurial Court, constituted under the Seigneurial Act, 1854, together with the provisions of Art. 538 C. N. and of Art. 400 C. C. P. Q., navigable rivers are considered as being dependencies of the Crown domain and as such inalienable and imprescriptable. Hence all grants purporting to create rights in the bed of such rivers must be construed as subject to the exercise of the jus publicum at all times.

PETITION OF RIGHT seeking a declaration of title in certain lands covered by water being part of the bed of the Gatineau river in the Province of Quebec.

The facts of the case are stated in the reasons for judgment.

November 20th, 1914.

The case was heard at Ottawa before the Honourable Mr. Justice Audette.

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Argument of Counsel.

H. Aylen, K.C., for the suppliants, relied on *Malcaren* v. *Attorney-General of Quebec* (1); and *Attorney-General of Quebec* v. *Scott*, (2). As to this case he contended that the question of navigability was not pertinent because the suppliant, while claiming that they were the owners of the bed of the river, did not dispute that their ownership was not subject to the public right of navigation over the *locus in quo*. But the Crown was doing more than merely exercising the right of navigation here; it was trespassing by its booms and other works upon the property of the suppliants. It is, therefore, liable in damages. He cited *McPheters* v. *Moose River Log Driving Co.* (3); *Perry* v. *Wilson* (4).

F. H. Chrysler, K.C., for the respondent, contended that the *Maclaren* case supported the contention of the Crown here. The suppliants were not in possession of the bed of the river, and never were. On the other hand these booms and piers have been there since 1864. (Cites Arts, 2211, 2213 and 2242 C.C.P.Q.)

AUDETTE, J., now (January 5th, 1915) delivered judgment.

The suppliants brought their petition of right to have it declared, *inter alia*, that they are vested as proprietors with all of those portions of the bed of the Gatineau River, within the boundary lines of lots 2 and 3 in the 5th Range of the Township of Hull, Province of Quebec,—within the ambit of the Crown Grant of the 3rd January, 1806,—whereby the Township of Hull is created and a number of lots thereof are given in severalty to the parties in the said grant mentioned, and more especially to Philemon Wright, senior, their original *auteur*, under whom they claim.

(1) (1914) A. C. 258.
(2) 34 S. C. R. 615.
(3) 5 Atl. Rep. 270.
(4) 7 Mass. 393.

The suppliants further seek to have it declared that they are proprietors and owners of the sand and sand-bars on that portion of the river, and furthermore they ask that the respondent be ordered to remove the piers, works, booms and logs in the said river, and that a sum of $500 per year be paid them for the use of the bed of the river in the past since the respondent so took possession of part of that portion of the river by the erection of piers or otherwise, and that *possession* of the bed of the river be given them.

For the purposes of this case, it is, at the outset, found that the suppliants herein, by the divers mesne assignments and the evidence of record, have all the right, title and interest in the lots in question as those possessed by their original *auteur* Philemon Wright, senior, under the Crown grant in question.

It is further found that the Gatineau river, a river of considerable size, at the point in question, is navigable and *flottable en trains ou radeaux*, as practically conceded at trial by suppliants' counsel. Indeed, the river Gatineau, from its mouth, on the northern bank of the Ottawa river, is *navigable* and so *flottable* for a distance of about four miles, up to Ironsides, the head of navigation. Within these four miles there is a draw-bridge across the river, at about $\frac{1}{4}$ to $\frac{1}{2}$ a mile from the mouth of the river. The bed of the river claimed herein is about $\frac{1}{4}$ of a mile higher up from the draw-bridge and extends to almost the C.P.R. bridge, as more particularly shown on plan Exhibit No. 5. Moreover, from Ironsides down to the mouth of the river Gatineau, the vessels navigating the same have access to the Ottawa river which is also navigable and thereby allows of such vessels to travel, for trade and commerce, from Ironsides to Montreal and Quebec, etc. For a number of years a lumbering firm, carrying

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on a large business there was shipping lumber in barges 75 by 100 feet long and 18 feet beam, carrying from 300,000 to 350,000 feet of lumber, b.m., which were towed down to Montreal and Quebec. Rafts, (*trains et radeaux*) of 24 feet wide by 72 feet long and 36 inches deep were also, during a number of years, taken from Ironsides to the mouth of the river Gatineau. All of this goes to show that the river, at the place in question, is obviously navigable.

The Crown grant of the land in question to Philemon Wright is made out of *special grace, certain knowledge* and *mere motion*, and in free and common soccage

> " upon the terms and conditions, and subject to the " provisions, limitations, restrictions and reser- " vations prescribed by the statute in such case " made and provided, and by our Royal Instructions " in this behalf":

and the grant is absolutely silent as to any right on navigable rivers.

How should such a Crown grant be construed and interpreted? The trite maxim and rule of law for our guidance in such a construction is well and clearly defined and laid down in Chitty's *Prerogatives of the Crown* (1) in the following words:

> " In ordinary cases between subject and subject, " the principle is, that the grant shall be construed, " if the meaning be doubtful, most strongly against " the grantor, who is 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 favourably for the King*, " where a fair doubt exists as to the real meaning of

(1) p. 391-2,

"the instrument x x x x x. 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 comprehends things of a royal and "of a base nature, the base only shall pass."

Approaching the construction of the grant in question in this case with the help of the rule above laid down, it must be found that in the absence of a special grant, especially expressed and clearly formulated, of the bed of the Gatineau river, a navigable river at the point in question, which therefore belongs to the King by virtue of his prerogative, and which is held by him in trust as part of the public domain constituting the *jus publicum*, the land only passed and not the bed of the river.

Then the limitations, restrictions and reservations under which the grant was made as provided "by the statute and our Royal instructions," are to be found in the Royal instructions to Lord Dorchester as Governor of Lower Canada and in a Proclamation published in the Quebec Gazette on the 16th February, 1792. Both of these documents are to be found in the Public Archives and more especially in the publication of 1914, by Messrs. Doughty & McArthur, containing the "Documents relating to the Constitutional History of Canada from 1791 to 1818," at the respective pages 13 and 61 *et seq.* The same instructions are to be found also to Lord Dorchester as Governor of Upper Canada at page 40 of the same volume, but we are here concerned with Lower Canada only. At page 21, under sections 31, 32 and 33, will be found the instructions to the Governor as to the method of

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granting these lands, and the following excerpt will show how such lands are granted, viz.:—

"It is our will and pleasure that the lands to be "granted by you as aforesaid, shall be laid out in "Townships, and that each inland Township shall, "as nearly as circumstances shall admit, consist of "ten square miles; *and such as shall be situated upon* "*a navigable River* or *Water* shall have a *front* of nine "miles and be *twelve miles in depth*, and shall be "subdivided in such manner as may be found most "advisable for the accommodation of the Settlers, "and for making the several *Reservations* for *Public* "*Uses*, etc.

And in Section 33, the following is also to be found, viz.:—

"as likewise that the breadth of each tract of land "to be hereafter granted be one-third of the length of "such tract, and *that the length of such tract do not* "extend along the Banks of any River, *but into the* "*main land*, that thereby the said Grantees may "have each a convenient share of what accommoda-"tion the said River *may afford for navigation or* "*otherwise.*"

From these instructions it will therefore appear that the lands so granted, *as nearly as circumstances shall admit*, should have their breadth on the front of navigable rivers, and the length extending in the mainland; but in no case to embody the bed of the river. And under section 32, due regard is given in making these grants subject to the several Reservations for *Public Uses*; which, in other words, would protect the paramount title in the bed of the river which *primâ facie* is in the Crown for the public. The bed of all navigable rivers is by law vested *primâ facie* in the Crown. But the ownership by the Crown is for the

benefit of the subject and cannot be used in any way so as to derogate from or interfere with such rights which belong by law to the subjects of the Crown. Hence in a grant of part of the public domain from the Crown to a subject, the bed of a navigable river will not pass unless an intention to convey the same is expressed in clear and unambiguous terms in the grant.

This right to use a navigable river as a highway, is part of the *jus publicum*.

> "Finding its subjects exercising this right as from "immemorial antiquity the Crown as *parens patriae* "no doubt regarded itself bound to protect the "subject in exercising it, and the origin and extent "of the right as legally cognizable are probably "attributable to that protection, a protection which "gradually came to be recognized as establishing a "legal right enforceable in the Courts." (1)

It would, therefore, appear that the Crown, as trustee for the public, is the guardian of such right held by the public to use navigable rivers as a public highway, and it thus rests with the Crown to protect its subjects against encroachments in violation of such *jus publicum*. The public, all of His Majesty's liege subjects, have a right to use navigable waters which form part of the public domain and which are *inalienables and imprescriptibles*. The suppliants' grant is subject to this *jus publicum* and to the paramount title in the bed of the river which *prima facie* is in the Crown for the public. Truly, it would be a singular irony of law if this right of the Crown, held in trust for the public, could thus be taken away by such a Crown Grant, which is absolutely silent in respect thereto.

(1) Per Haldane, L.C., in the case of the Atty-Gen. B.C., v. Atty-Gen. for Canada (1914) A.C. p. 169. See also Coulson & Forbes, The Law of Waters, 3rd Ed. pp. 28, 29, 36.

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Coming now to the *Maclaren* case (1), a case relied upon by both parties, it must be said that the judgment of the eminent Judge in that case will be of great assistance here in arriving at a proper conclusion—the law affecting the present controversy having been so clearly discussed in the course of his pronouncement. In the *Maclaren* case neither party set up title in the public as in the present case. The scope of the decision of the Privy Council in that case is clearly defined at page 274, in the following words:—

> "So far as the river Gatineau is concerned, the "decision of this case will do no more than decide "whether or not the language of certain existing "grants was sufficient to pass particular portions of "the bed, or whether, after such grants were made, "they still remained in the *hands of the Crown* so that "it had power to grant them by a later grant."

And their Lordships having found that the Gatineau River, at the point in question in that case, was only *flottable a buches perdues* and that the claimant was owner of the land on each bank, that ownership went *ad medium filum aquae.*

In the present case it having been found that the Gatineau River opposite the lands in question, is both navigable and flottable *en trains ou radeaux* and that the bed of the river claimed is on such a navigable river, the logical corollary of the holding in the *Maclaren* case is, therefore, necessarily that the bed of the river in the *locus in quo*, did not pass with the grant of the land on each side, without any specific grant of the same.

It must, however, be said that the *Maclaren* case did not decide the question of law involved in the present

(2) (1914) A. C. 264.

case. It is true, at p. 276, the following statement is to be found, viz.:

"There is no trace in Canadian law of any exception to the rule that the bed of a stream presumably belongs to the riparian owner *except in the cases where that bed is in its nature public property*, and therefore such *presumption of ownership cannot exist.* A perusal of the seignorial decisions and the judgments of those who took part in them makes it clear that the exclusion of the beds of navigable and floatable rivers from the grants to seigniors was not by *reason of express words* in the grants nor of any special rule of law formulated ad hoc, but was a consequence flowing from the jurisprudence then existing derived from French sources under which the beds of such rivers were held to form part of the *domaine public* and thus to be incapable of becoming private property. But it followed that they were inalienable and this was fully recognized. They are always spoken of as *inalienables et imprescriptibles.* So much of that jurisprudence as remains is to be found in Art. 400 of the Civil Code, and on the construction to be given to that section must depend the status of the beds of these rivers from the point of view of property."

Their Lordships, however, under the circumstances of the *Maclaren* case, as presented to them, felt that the question of law, as to whether or not *the beds* of navigable and floatable rivers are public property incapable of being alienated, was of such importance (p. 277) that it should only be decided in some case in which the parties would be respectively interested in the one and the other of the two rival interpretations so that an opportunity would be given for full argument thereon.

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Long prior to the compilation (*Ibid.* p. 279) of the *Code Napoleon*, it was abundantly clear under the law then extant that the beds of navigable and floatable rivers belonged to the *domaine public*. Accordingly when the Code Napoleon was published this very law found its way into it and is expressed in Art. 538 thereof in language identical with that which is now to be found in Art. 400 of the Civil Code, P.Q., which reads as follows:—

> " 400. Roads and public ways maintained by the " State, navigable and floatable rivers and streams " and their banks, the sea-shore, lands reclaimed " from the sea, ports, harbours and roadsteads and " generally all those portions of territory which do " not constitute private property, are considered as " being dependencies of the Crown domain."

Now this legal doctrine, consecrated by both codes, obtained in Canada before and since the Cession. It obtained at the time of the Cession and since, and the British subjects who purchased lands in the Colony had to conform themselves to the local rules then followed with respect to property in Canada. (1)

The civil laws in existence at the time of the Cession were taken to remain and be in force, as long as they were not changed by a declaration of the Sovereign power, whose silence in such cases was interpreted as a tacit confirmation of such existing laws. (Idem p. 295). And indeed it was only by the Union Act of 1840, sec. 54 (3-4 Vict., Ch. 35, Sec. 54, Imp.) that the control of the sale of, and the administration of lands in Canada were completely abandoned to us by the Imperial Government.

Under the Roman Law navigable waters were not susceptible of individual appropriation, as they were

(1) Documents Constitutionels 1759-1791. French version, p. 151, and Vol. A, Seignorial Questions, p. 61 A.

considered as belonging to all men. (Instit. I, liv. 11, tit. 1; L. 5, ff De Divis. Rer. Inst. 2 cod. tit.)

"L'usage des grandes rivières est essentiellement "public, et les intérêts généraux de la société le "réclament libre et sans entraves. Le pouvoir "social devait donc les prendre sous sa garde pour "maintenir dans leur intégrité les facultés communes "à tous. Ce ne sont pas des droits de propriété "qui lui ont été attribués sur ces choses, car on a "précisément voulu les soustraire à l'exercise de "tous droits qui pourraient nuire au service public. "Mises hors du commerce, elles ne peuvent plus "recevoir l'empreinte de la propriété, et c'est "comme conservateur des intérêts généraux, comme "administrateur des choses dont l'usage est commun "à tous, que le souverain en a reçu le dépôt et la "surintendance.

"Tels étaient aussi les principes du droit romain "sur cette matière. x x x x x x x Les "rivières publiques sont spécialement rangées parmi "les dépendances du domaine public. (1)

"Les rivières navigables ou flottables ont tou-"jours fait partie du domaine public. (2).

Proudhon (3) also lays down the well known principle that navigable rivers are *inalienables et imprescriptibles*, as all other things destined to and for the public usage, and that they are therefore dependencies of the Crown domain within the meaning of Art. 400 C.C. And a grant of navigable waters unless authorized by an Act of Parliament, would be void and convey no right or title. (4).

(1) *Daviel*, Des Cours d'Eau, Vol. I, p. 27 et seq.

(2) *Garnier*, Régime des Eaux, Vol. I, p. 44.

(3) Domaine Public, Vol. 3, No. 680 et seq.

(4) See also Delsol, Civil Code, Vol. I, pp. 431, 435.

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Dalloz (1) states that rivers *navigables* or *flottables a trains ou a radeaux* are considered dependencies of the Crown domain. And the very instructive judgment in *Tanguay* vs. *The Canadian Electric Light Company* (2) upon almost a similar point, relies practically on the same principle of law. A long catena of decisions in that direction, as well as text-books, could be here cited in support of this doctrine, but in view of the decision in the *McLaren* case, the *Tanguay* case, and the decisions of he Seiginorial Court, it becomes unnecessary to mention them here, excepting, however, the decisions of the Seiginorial Court in view of their great weight and authority, to which an almost authoritative sanction has been given by statute, and which, apart from statute, naturally command the highest respect by reason of the composition of the tribunal which pronounced them. (2).

> "Before the passing of 'The Seigniorial Act of "1854', Seigniors had no other rights over navigable "rivers and streams, than those specially conveyed "to them by their grants *provided these rights were "not inconsistent with the public use of the water of "those rivers and streams which is inalienable and "imprescriptible.*" (3).

In order to acquire ownership in navigable rivers it is necessary to have an *express* conveyance from the Crown, and it is further necessary, to give validity to such rights, that they should not be contrary to the public usage of these rivers in regard to *navigation and commerce*, which usage is *inalienable and imprescriptible.* (4).

While certain rights may be specifically acquired in navigable waters, no *de plano jure* rights would pass

(1) (1823) I, 371.

(2) 40 S.C.R. 1. See *Maclaren* case, 1914, A. C. 2 81, and sub-sec. 9 of the Act of 1854.

(3) Seigniorial Questions, Vol. A, pp. 68, 130 A, 131 A. and 132 A.

(4) *Idem* Vol. A, p. 374 A.

with a conveyance of land which are contrary to the general law in force. Without a special grant of such navigable rivers, no such right or title as that claimed by the suppliants passed in respect of the navigable part of the Gatineau river, which by reason of its navigability becomes part of the Crown domain and is *inalienable and imprescriptible.* Even in certain cases a specific grant over navigable waters might be void. (1).

Great stress is laid by suppliants' counsel upon the case of *The Attorney-General of Quebec* vs. *Scott* (2). What was decided in that case, under the very land patent in question in this case, is that Brewery Creek passed with the land mentioned in the patent. But it was there overwhelmingly established that Brewery Creek was neither navigable, nor *flottable a trains ou radeaux.* The judgment in that case states that no one, before the appellant, has ever seriously contended that such a small stream as Brewery Creek, across which a child could throw a stone and which could be crossed on foot and was even dry in certain places during part of the summer was, as a matter of fact, a navigable or floatable river. Therefore, all is said in that judgment must be taken to apply to this creek, and not to apply to a case of a navigable river; and were there any doubt as to the meaning of any general observation on the law found in the judgment, it would stand corrected or rather made clear by the statement at the end of the second paragraph of page 615 of the Report where it is stated: "For if it is floatable, its banks are part of the public domain—Art. 400, C.C." In other words, if it is a navigable and floatable river,

(1) Oliva v. Boissonnault, Stu. K. B. 524; Reg. vs. Patton, 11 R. Jud. Rev. 394; Tanguay vs. Canadian Electric Light Company, 40 S. C. R. 17; and Coulson & Forbes, The Law of Waters, 3rd Ed. pp. 98, 99, 100, 491 and 494.

(2) 34 S. C. R. 614.

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it comes within the ambit of the legal doctrine to be found in Art. 400, C.C. This case of *The Attorney-General of Quebec vs. Scott*, only decided what was decided in the *McLaren* case and that is on a river neither navigable nor floatable *a trains ou radeaux*, the owner of the land on each bank extends his ownership *ad medium filum aquae*.

It might seem unnecessary to have considered in the present case the broad question as to whether or not navigable rivers can be alienated; because alone from the above rule of interpretation referred to, found in Chitty's *Prerogatives* the absence of a specific grant of the river, and the Instructions to Lord Dorchester with respect to the restrictions and reservations under which Crown grants for land were then issued, the question seems absolutely concluded that such navigable rivers could not pass, under the present circumstances, with the grant as worded.

There will be judgment in favour of the respondent, with costs, and the suppliants are adjudged not entitled to the relief sought by their petition of right.

Judgment accordingly.

Solicitors for suppliants: *Aylen & Duclos.*

Solicitors for respondent: *Chrysler & Bethune.*