Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of (1) *The Attorney General for the Dominion of Canada* v. *The Attorneys General for the Provinces of Ontario, Quebec, and Nova Scotia; and* (2) *The Attorney General for the Province of Ontario* v. *The Attorney General for the Dominion of Canada; and* (3) *The Attorneys General for the Provinces of Quebec and Nova Scotia* v. *The Attorney General for the Dominion of Canada, from the Supreme Court, Canada; delivered* 26*th May* 1898.

Present:

THE LORD CHANCELLOR
LORD HERSCHELL.
LORD WATSON.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.
LORD DAVEY.
SIR HENRY DE VILLIERS.

[*Delivered by Lord Herschell.*]

The Governor General of Canada by Order in Council referred to the Supreme Court of Canada for hearing and consideration various questions relating to the property, rights and legislative jurisdiction of the Dominion of Canada and the Provinces respectively in relation to rivers, lakes, harbours, fisheries, and other cognate subjects.

The Supreme Court having answered some of the questions submitted adversely to the

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Dominion and some adversely to the Provinces both parties have appealed.

Before approaching the particular questions submitted, their Lordships think it well to advert to certain general considerations which must be steadily kept in view and which appear to have been lost sight of in some of the arguments presented to their Lordships.

It is unnecessary to determine to what extent the rivers and lakes of Canada are vested in the Crown or what public rights exist in respect of them. Whether a lake or river be vested in the Crown as represented by the Dominion or as represented by the Province in which it is situate, it is equally Crown property, and the rights of the public in respect of it except in so far as they may be modified by legislation, are precisely the same. The answer therefore to such questions as those adverted to would not assist in determining whether in any particular case the property is vested in the Dominion or in the Province. It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject matter is conferred on the Dominion Legislature for example affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the Provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada.

With these preliminary observations their Lordships proceed to consider the questions submitted to them. The first of these is whether the beds of all lakes, rivers, public harbours and other waters, or any and which of them situate within the territorial limits of the several Provinces and not granted before confederation, became under the British North American Act the property of the Dominion.

It is necessary to deal with the several subject matters referred to separately, though the answer as to each of them depends mainly on the construction of the Third Schedule to the British North America Act. By the 108th Section of that Act it is provided that the public works and property of each Province enumerated in the Schedule shall be the property of Canada. That Schedule is headed "Pro- "vincial Public Works and Property to be "the property of Canada," and contains an enumeration of various subjects numbered 1 to 10. The 5th of these is "Rivers and Lake "improvements." The word "Rivers" obviously applies to nothing which was not vested in the Province. It is contended on behalf of the Dominion that under the words quoted, the whole of the rivers so vested were transferred from the Province to the Dominion. It is contended on the other hand that nothing more was transferred than the improvements of the Provincial rivers, that is to say only public works which had been effected and not the entire beds of the rivers. If the words used had been "River and Lake improvements" or if the word "Lake" had been in the plural "Lakes," there could have been no doubt that the improvements only were transferred. Cogent arguments were adduced in support of each of the rival constructions; upon the whole

their Lordships after careful consideration have arrived at the conclusion that the Court below was right and that the improvements only were transferred to the Dominion. There can be no doubt that the subjects comprised in the schedule are for the most part works or constructions which have resulted from the expenditure of public money though there are exceptions. It is to be observed that rivers and lake improvements are coupled together as one item. If the intention had been to transfer the entire bed of the rivers and only artificial works on lakes, one would not have expected to find them thus coupled together. Lake improvements might in that case more naturally have been found as a separate item or been coupled with canals. Moreover it is impossible not to be impressed by the inconvenience which would arise if the entire rivers were transferred and only the improvements of lakes. How would it be possible in that case to define the limits of the Dominion and Provincial rights respectively. Rivers flow into and out of lakes; it would often be difficult to determine where the river ended and the lake began. Reasons were adduced why the rivers should have been vested in the Dominion but every one of these reasons seems equally applicable to lakes. The construction of the words as applicable to the improvements of rivers only is not an impossible one. It does no violence to the language employed. Their Lordships feel justified therefore in putting upon the language used the construction which seems to them to be more probably in accordance with the intention of the Legislature.

With regard to public harbours their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the

Dominion of Canada. The words of the enactment in the Third Schedule are precise. It was contended on behalf of the Provinces that only those parts of what might ordinarily fall within the term "harbour," on which public works had been executed became vested in the Dominion, and that no part of the bed of the sea did so. Their Lordships are unable to adopt this view. The Supreme Court in arriving at the same conclusion founded their opinion on a previous decision in the same Court in the case of *Holman* v. *Green*, where it was held that the foreshore between high and low watermark on the margin of the harbour became the property of the Dominion as part of the harbour.

Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description "Public Harbour." They must decline to attempt an exhaustive definition of the term applicable to all cases. To do so would in their judgment be likely to prove misleading and dangerous. It must depend, to some extent at all events, upon the circumstances of each particular harbour, what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court in the case of *Holman* v. *Green* that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water mark being also Crown property, likewise passed to the Dominion.

Their Lordships are of opinion that it does not follow that because the foreshore on the margin of a harbour is Crown property it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If for example it had actually been used for harbour

purposes such as anchoring ships or landing goods, it would no doubt form part of the harbour but there are other cases in which, in their Lordships' opinion it would be equally clear that it did not form part of it.

Their Lordships pass now to the questions relating to fisheries and fishing rights.

Their Lordships are of opinion that the ninety-first section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading "Sea-Coast and Inland Fisheries" in section ninety-one. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent character and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in

relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected. If however the Legislature purports to confer upon others proprietary rights, where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by section ninety-one. If the contrary were held it would follow that the Dominion might practically transfer to itself property which has by the British North America Act been left to the Provinces and not vested in it.

In addition however to the legislative power conferred by the twelfth item of section ninety-one, the fourth item of that section confers upon the Parliament of Canada the power of raising money by any mode or system of taxation. Their Lordships think it is impossible to exclude as not within this power the provision imposing a tax by way of license as a condition of the right to fish.

It is true that by virtue of Section 92 the Provincial Legislature may impose the obligation to obtain a license, in order to raise a revenue for provincial purposes, but this cannot in their Lordships' opinion derogate from the taxing power of the Dominion Parliament to which they have already called attention.

Their Lordships are quite sensible of the possible inconveniences, to which attention was called in the course of the arguments, which might arise from the exercise of the right of imposing taxation in respect of the same subject-matter and within the same area by different authorities. They have no doubt however that these would be obviated in practice by the good sense of the legislatures concerned.

It follows from what has been said that in so far as Section 4 of the Revised Statutes of Canada

Chapter 95 empowers the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to the Provinces it was not within the jurisdiction of the Dominion Parliament to pass it. This was the only Section of the Act which was impeached in the course of the argument, but the subsidiary provisions in so far as they are intended to enforce a right which it was not competent for the Dominion to confer would of course fall with the principal enactment.

Their Lordships think that the Legislature of Ontario had jurisdiction to enact the 47th Section of the Revised Statutes of Ontario Chapter 24 except in so far as it relates to land in the harbours and canals if any of the latter be included in the words "other navigable waters of Ontario." The reasons for this opinion have been already stated when dealing with the questions in whom the beds of harbours rivers and lakes were vested.

The sections of the Ontario Act of 1892, entitled "An Act for the protection of the "Provincial Fisheries," which are in question consist almost exclusively of provisions relating to the manner of fishing in provincial waters. Regulations controlling the manner of fishing are undoubtedly within the competence of the Dominion Parliament. The question is whether they can be the subject of Provincial legislation also in so far as it is not inconsistent with the Dominion legislation.

By section 91 of the British North America Act, the Parliament of the Dominion of Canada is empowered to make laws for the peace order and good government of Canada in relation to all matters not coming within the classes of subjects by that Act assigned exclusively to the legislatures of the provinces "and for greater "certainty but not so as to restrict the generality

"of the foregoing terms of this section" it is declared that (notwithstanding anything in the Act) "the exclusive legislative authority of the "Parliament of Canada extends to all matters "coming within the classes of subjects next "thereinafter enumerated." The 12th of them is "Sea Coast and Inland Fisheries."

The earlier part of this section read in connection with the words beginning "and for "greater certainty" appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in section 91 is not within the legislative competence of the provincial legislatures under section 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in section 91 are within the "exclusive" legislative authority of the Dominion Parliament. Whenever therefore a matter is within one of these specified classes legislation in relation to it by a provincial legislature is in their Lordships' opinion incompetent. It has been suggested, and this view has been adopted by some of the Judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of section 91 and in particular to the word "exclusively." It would authorise for example the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with those subjects. Their Lordships do not think this is consistent with the language and manifest intention of the British North America Act.

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It is true that this Board held in the case of *The Attorney-General of Canada* v. *The Attorney General of Ontario* that a law passed by a provincial legislature which affected the assignments and property of insolvent persons was valid as falling within the heading "Property and civil rights" although it was of such a nature that it would be a suitable ancillary provision to a bankruptcy law. But the ground of this decision was that the law in question did not fall within the class "Bankruptcy and Insolvency" in the sense in which those words were used in section 91.

For these reasons their Lordships feel constrained to hold that the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion legislature and is not within the legislative powers of provincial legislatures.

But whilst in their Lordships' opinion all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only, it does not follow that the legislation of provincial legislatures is incompetent merely because it may have relation to fisheries. For example provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of and the rights of succession in respect of it would be properly treated as falling under the heading "Property and Civil rights" within section 92 and not as in the class "Fisheries" within the meaning of section 91. So, too, the terms and conditions upon which the fisheries which are the property of the Province may be granted leased or otherwise disposed of and the rights which consistently with any general regulations respecting fisheries enacted by the Dominion Parliament may be con-

ferred therein appear proper subjects for provincial legislation, either under class 5 of section 92." "The management and sale of public lands" or under the class "Property and civil rights." Such legislation deals directly with property, its disposal and the rights to be enjoyed in respect of it, and was not in their Lordships' opinion intended to be within the scope of the class "Fisheries" as that word is used in section 91.

The various provisions of the Ontario Act of 1892 were not minutely discussed before their Lordships nor have they the information before them which would enable them to give a definite and certain answer as to every one of the sections in question. The views however which they have expressed and the dividing line they have indicated will they apprehend afford the means of determining upon the validity of any particular provision or the limits within which its operation may be upheld, for it is to be observed that section 1 of the Act limits its operation to "fishing in waters and to waters over or in "respect of which the legislature of this Province "has authority to legislate for the purposes of "this Act."

Sections 1375, 1376, and the 1st subsection of section 1377 of the Revised Statutes of Quebec afford good illustrations of legislation such as their Lordships regard as within the functions of a provincial legislature.

Their Lordships entertain no doubt that the Dominion Parliament had jurisdiction to pass the Act intituled "An Act respecting certain "works constructed in or over navigable waters." It is in their opinion clearly legislation relating to "navigation."

Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not

parties to this litigation or represented before their Lordships and accordingly their Lordships do not think it proper when determining the respective rights and jurisdictions of the Dominion and Provincial Legislatures to express an opinion upon the extent of the rights possessed by riparian proprietors.

The parties will of course bear their own costs of these proceedings.