1906
Oct. 29.

IN THE MATTER of the Petition of Right of

RANDOLPH MACDONALD.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public Work—Negligence—Canals—Natural channels of rivers—Distinction between public property and public works.

The natural channels of the St. Lawrence River, which lie between the canals, are not public works unless made so by statute, or unless something has been done to give them the character of public works.

2. By the 1st clause of the 3rd Schedule of *The British North America Act, 1867*, "Canals with land and water power connected therewith" (of which the Cornwall Canal is one) are enumerated as part of the "Provincial Public Works and Property," that in virtue of the 108th section of the Act became "the property of Canada."

Held, that this does not give the Dominion any proprietary rights in the River St. Lawrence from which the water is taken for the Cornwall Canal, beyond the right to take the water, nor make the river itself a public work of Canada.

3. By an Order of His Excellency in Council of the 22nd March, 1870, the St. Lawrence River to the head of Lake Superior, the Ottawa River, the St. Croix River, the Restigouche River, the St. John River and Lake Champlain are declared to be under the control of the Dominion Government.

Held, that this Order in Council did not have the effect of altering in any way the proprietary rights, if any, that the Government of Canada then had in the rivers and lakes mentioned, or of making them or any parts of them public works of Canada.

PETITION OF RIGHT for damages arising from alleged negligence of the servants of the Crown on a public work.

The facts are stated in the reasons for judgment.

March 19th, 1906.

The case was heard at Ottawa.

N. A. Belcourt, K.C. and *J. A. Ritchie* for the suppliant, contended that there was negligence on the part

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of the Crown's servants in charge of the channel in not removing the buoys in the autumn, or in not discovering missing buoys in the spring. The *locus in quo* was part of the canal system above Montreal, which must be held to include the river channels or reaches. The development of the water power makes the channel a public work, if the channel was not so otherwise. (Citing 31 Vict. c. 12, secs. 10, 24, 65; R. S. C. c. 37 s. 2 (c); 3 and 4 Vict. (Imp.) c. 35; 4 and 5 Vict. (P. Can.) c. 28; 8 Vict. (P. Can.) c. 30; 9 Vict. (P. Can.) c. 37; 13 and 14 Vict. (P. Can.) c. 14; 22 Vict. (P. Can.) c. 3 (1859); 33 Vict. c. 24; *Mersey Docks v. Gibbs* (1); *The Queen v. Williams* (2); *McKays Sons v. The Queen* (3).

F. R. Latchford (with whom was *E. J. Daly*) contended that the case of *McKays Sons v. The Queen* (*supra*) supported the case of the respondent here. If the *locus in quo* was not a public work, the case falls whether there was negligence or not. *Leprohon v. The Queen* (4).

THE JUDGE OF THE EXCHEQUER COURT now (October 29th, 1906) delivered judgment.

The suppliant brings his petition to recover damages for injuries occasioned to a dredge which struck a submerged spar buoy near Maxwell's Shoal in the River St. Lawrence. His contention is that the case is within the terms of clause (c) of the sixteenth section of *The Exchequer Court Act*, it being conceded that apart from the provisions of that section the petition cannot be sustained. That raises two questions :—

First: Did the injury complained of result from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment? and

(1) 11 H. L. C. 686.
(2) 9 App. Cas. 418.
(3) 6 Ex. C. R. 1.
(4) 4 Ex. C. R. 100.

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Secondly: Did such injury occur on a "public work" within the meaning of that expression as used in the clause referred to?

To sustain the petition, both of these questions must be answered in the affirmative. If either is answered in the negative the suppliant is not entitled to any portion of the relief sought by his petition. The second question should, it seems to me, be answered in the negative, and that renders it unnecessary in the present disposition of the case to express any opinion as to the first of the two questions mentioned. If it were necessary to answer that question I should on the evidence before me, answer it in the affirmative.

The subject was in Canada first given relief against the Crown, in a judicial proceeding, for damages arising out of any death or any injury to person or property on a public work under the control and management of the Government of Canada by the Act 33rd Victoria, chapter 23. That Act provided for the recovery of such damages in a proceeding before the Official Arbitrators, and this Court has succeeded to the jurisdiction given to them by that Act and by subsequent Acts. The Act mentioned provided, among other things, for a reference to the Official Arbitrators of a claim for damages "arising out of any death or any injury to person or "property on any railway, canal or public work under "the control and management of the Government of "Canada." *The Public Works Act* in force at that time (1) made a distinction between public works and public property. The former were no doubt public property; but all public property did not fall within the meaning of the expression "public works" as then used. That is clear, I think, from the provisions of the tenth and fifty-eighth sections of the Act. By the latter section it was provided that the Governor in Council might,

(1) 31 Vict. c. 12, ss. 10 and 58.

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by order in Council, to be issued and published as there inafter provided, impose and authorize the collection of tolls and dues upon any canal, railway, harbour, road, bridge, ferry, slide, or other public work vested in Her Majesty and under the control or management of the Minister of Public Works. And if at the time when the Act 33 Victoria, chapter 23, came into force, the question had been asked as to what was included in the expression "public works" as used in that Act, the fair and reasonable answer would have been, it seems to me, that in addition to canals and railways were included works of the class mentioned in the fifty-eighth section of *The Public Works Act* (1). But in 1872 by the Act 37th Victoria, chapter 24 *The Public Works Act* (2) was further amended, and the term "public work" extended to include in a general way all property vested in the Crown in the right of the Dominion of Canada. This Act, with some additions and enlargements, constitutes the basis of the definition of a public work to be found in several statutes now in force. (R. S. C. c. 36; 52 Vict. c. 13). So far, however, the expression "public work" occurring in clause (c) of the sixteenth section of *The Exchequer Court Act* (3) has not been held to include all property vested in the Crown, and through a Minister, under the control and management of the Government of Canada. In the case of *The City of Quebec v. The Queen* (4). Mr. Justice Taschereau expressed the opinion that the rock on which the citadel of Quebec rests is not a public work, or a work at all within the meaning of the statute, though it was undoubtedly at the time public property vested in the Crown in the right of the Dominion. And in the case of *Larose v. The Queen* (5) it was held both in

(1) 31 Vict. c. 12, s. 58.
(2) 31 Vict. c. 12.
(3) 50-51 Vict. c. 16, s. 16 (c).
(4) 24 S. C. R. at p. 448.
(5) 6 Ex. C. R. at p. 429, and 31 S. C. R. at p. 208.

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this court and on appeal in the Supreme Court of Canada that a rifle range, though the property of the Crown, is not a "public work" within the meaning of that expression as used in the provision now under discussion. The fact that certain property is vested in the Crown in the right of the Dominion is not, it appears, conclusive of the question as to whether such property is a public work or not within the meaning of the statute. It constitutes, however, in each case an important consideration and a matter always to be borne in mind.

Maxwell's Shoal, near which the accident complained of happened, is situated in the St. Lawrence River between Farran's Point and the Cornwall Canal, and about one and a half miles west of the upper entrance to that canal. As the channel at that place is a natural one, neither it nor the river, nor the bed thereof at that point, can be deemed a public work of Canada, unless something has been done there, or in respect thereof, or some statute has been passed, to make it a public work.

In the statutes of the old Province of Canada respecting public works in a schedule of "public works "vested in the Crown" and under the words "navi- "gations, canals and slides" we find the following: "All those portions of the St. Lawrence navigation, "from Kingston to the Port of Montreal improved "at the expense of Canada" (1). By the one hundred and eighth section of *The British North America Act*, 1867, it is provided that "the public works "and property of each province enumerated in the "third schedule to this Act shall be the property "of Canada," and among those so enumerated we find in the fifth clause of the schedule "Rivers and Lake "Improvements." The case of *The Attorney-General for the Dominion of Canada* v. *The Attorneys-General for*

(1) 9 Vict. c. 37, Schedule A; 22 Vict. c. 3, Schedule A. and C. S. C. c. 28, Schedule A.

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the Provinces of Ontario, Quebec and Nova Scotia (1), shows that under the section and clauses cited only the improvements on rivers and lakes, and not the entire rivers passed to the Dominion; and that whatever proprietary rights were at the time of the passing of the Act last mentioned possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada.

Now it does not appear that any improvements had, before the Union of the Provinces, been made in the bed or channel of the St. Lawrence River at or near Maxwell's Shoal. It is clear therefore that the Dominion acquired no proprietary rights in that part of the river, and that the same did not become a public work of Canada by virtue of the statutes of the old Province of Canada or of *The British North America Act*, 1867. It appears further that up to the time of the accident complained of no public money had been expended by the Dominion in the improvement of the channel of the river at or near Maxwell's Shoal. Since the accident some work has been done there at the public expense in dredging the shoal and in deepening the channel of the river at this point. That of course has no bearing upon this case. The fact is that there is no ground for any contention that the place where the accident happened was a public work within the meaning of the statute because public money had been there expended in deepening and improving the channel of the river. In that respect this case is not so strong a one as that of the *Hamburg American Packet Company* v. *The King* (2), where it was held that the channel of the River St. Lawrence near Cap à La Roche, between Montreal and Quebec, was not a public work after the deepening of the channel was finished.

(1) [1898] App. Cas. 700. (2) 7 Ex. C. R. 150; 33 S. C. R. 252.

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At the time of the accident the Minister of Public Works had buoys placed in the stretch of water between the Cornwall Canal and Farran's Point, and from time to time the channel of the river was swept to see if there were any obstructions to navigation. Both of these things were done in aid of the navigation of this part of the river; but they did not in my view make it a public work.

Some stress was in argument laid on the fact that the River St. Lawrence and the several canals by which the navigation of the river is improved form one system of navigation. That is true, but it is also true, as was pointed out, of Lake Ontario and the other great lakes that form part of Canada's inland waters. And anyway it does not follow that because the several canals are public works that the portions of the St. Lawrence River which lie between such canals are also public works. As has been stated, the natural channels of the river are not public works unless some statute has declared them to be so, or something has been done to make them public works. Some reliance was in this connection placed on the provision of the fourth paragraph of the thirteenth section of Chapter 37 of the Revised Statutes of Canada, whereby it is provided that the same tolls shall be payable on steamboats and vessels of any kind, and passengers taken down the River St. Lawrence past any of the canals between Montreal and Kingston as would be payable on such steamboats, vessels or passengers if the same had been taken through the canal or canals past which they are so taken down. But that does not affect this case, as there is no canal opposite to the stretch of water between Farran's Point and the upper entrance to the Cornwall canal. And in any event the toll is not really imposed for the use of the river; but to prevent persons from avoiding payment of the toll on the canal.

It was also argued that because the Cornwall Canal,

which undoubtedly is a public work, is operated by water drawn from the St. Lawrence River, and that the water is there used not only for the purposes of navigation but also for the development of power from which a revenue is derived, that the whole, including the portion of the river from which the water is taken becomes a public work. By the first clause of the third schedule of *The British North America Act*, 1867, "canals with lands and water "power connected therewith" (of which the Cornwall Canal was one) are enumerated as part of the "Provin- "cial Public Works and Property" that by virtue of the one hundred and eighth section of the Act became "the "property of Canada." But there is nothing in that I think to give the Dominion any proprietary rights in the river from which the water is taken, beyond the right to take the water; or to make the river itself a public work of Canada.

By an order of His Excellency in Council of the 22nd of March, 1870, the St. Lawrence River to the head of Lake Superior, the Ottawa River, the St. Croix River, the Restigouche River, the St. John River and Lake Champlain were declared to be under the control of the Dominion Government. And it was argued, perhaps not very strongly, that this made the rivers and lakes mentioned public works of Canada. But it does not appear to me that this order could have any such effect, or that it was so intended. As pointed out in the case referred to of *The Attorney-General for the Dominion of Canada v. The Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (1) there is a broad distinction between proprietary rights and legislative jurisdiction. The Parliament of Canada has within Canada exclusive legislative authority in respect, among other things, of "navi- "gation and shipping" and also of "ferries between a "Province and any British or Foreign Country or

(1) (1898) App. Cas. 709.

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"between two Provinces" (1). And in those subjects we find space and room for the exercise by the Government of Canada of such control over the waters mentioned as Parliament had conferred or might confer upon it. There is no occasion to put any strained construction upon the order in council. It could not have the effect of altering in any way the proprietary rights (if any) that the Government of Canada then had in the rivers and lakes mentioned, or of making them or any parts of them, public works of Canada.

There will be judgment for the respondent, and a declaration that the suppliant is not entitled to any portion of the relief sought by his petition. The costs, as usual, will follow the event.

Judgment accordingly.

Solicitors for Suppliant : *Belcourt & Ritchie.*

Solicitors for Respondent : *Latchford & Daly.*

(1) *The British North America Act*, 1867, s. 91, clauses (10) and (13).