

the petition are by statute vested in the Crown in trust for the public, and that Her Majesty is not liable for the negligent, unskilful or improper conduct of persons appointed by the Government to have charge of said works.

2. That the claim set forth in the petition is a tort pure and simple, and that a petition of right in respect of a wrong, in the legal sense of the term, shows no right to legal redress against the sovereign.

3. That the slide master, in receiving tolls which it was his statutory duty to receive, did not thereby enter into any contract either express or implied, on behalf of Her Majesty to carry safely the logs through the slide, and that the Crown was not, in respect to the logs in question passing through the slides, a common carrier.

Lash, Q.C., for the appellant.

Bethune, Q.C., and *McIntyre* for respondent.

THE QUEEN V. CHRISTIAN A. ROBERTSON.

Petition of Right—Fisheries Act, 32 Vict. ch. 60 (D.)—B. N. A. Act, 1867, secs. 91, 92 and 109—Fisheries—License to fish—Miramichi River—Rights of riparian proprietors in granted and ungranted lands—Right of passage and 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, 31 Vict., ch. 60, 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 Miramichi 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 his enjoyment of his fishing under the lease

granted to him, and put him to certain expenses in endeavoring 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 Court and the Exchequer Court 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 lease of the bed of the river, but that he could lawfully issue a license to fish as a franchise, apart from the ownership of the soil in that portion of the river.

The appellant thereupon appealed to the Supreme Court of Canada on the main question involved: whether or not an exclusive right of fishing did so exist in the *locus in quo*.

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, sec. 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 Miramichi River flows.

2nd.—That although the public in Canada 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, &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 pro-