IN THE MATTER OF THE PETITION OF RIGHT OF

THE LAURENTIDE PAPER CO., LIMITED, 1915 May 8.

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Public work—Injury alleged to arise from construction of Railway Bridge—Driving of logs—Damages where work authorized by Statute—Servitude—Title.

Where any right of property is injuriously affected by a railway company in the exercise of powers conferred upon it by Act of Parliament, the company is not liable in damages for such injury unless Parliament has made provision therefor.

2. The suppliants alleged that their business of driving logs on the La Croche river was interfered with by the piers of a bridge constructed across the river by the National Transcontinental Railway, and they asked to be reimbursed a sum which they claimed they had been obliged to pay to break a jamb of logs caused by the alleged faulty construction of the piers as regards using the river for driving logs.

The court having found that the railway had statutory authority for the construction of the bridge,

Held, that the suppliants were not entitled to compensation.

3. While, under the provisions of sec. 7298 of R.S.P.Q., 1909, any person, firm or company has the privilege of floating and driving timber down rivers, such privilege is not a predial servitude, as it is shared in common with the rest of the public, and is not derived from any title or fee in the land. *Price Bros. & Co.* v. *Tanguay*, 42 S.C.R. 133 referred to.

PETITION of Right for damages alleged to have been caused by the construction of a public work. The facts are stated in the reasons for judgment.

April 6th, 1915.

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The case came on for argument on questions of law arising on pleadings and directed to be heard and disposed of before trial.

G. H. Montgomery, K.C., and *P. N. Martel*, K.C., for the suppliants.

E. L. Newcombe, K.C., for the respondent.

AUDETTE, J. now (May 8th, 1915) delivered judgment.

This matter comes before the court, under the provision of Rule 126, pursuant to an order directing the hearing and disposal before trial of the points of law raised by the pleadings herein.

The suppliants allege in their pleading they hold timber limits in the Township of Langelier, and that during the winter of 1912–13, in the course of the operation of the said limits, while driving a certain quantity of logs, on river "La Croche," the bridge erected by the National Transcontinental Railway, across the said river, interfered with the drive, created a jamb and that they expended $1,411.16 to break the jamb and that they now seek the recovery of that sum from the Crown. They further allege that the piers of the bridge, which cross the river diagonally, constitute an obstruction which is a constant menace to the driving of logs in the river.

The river "La Croche" is a watercourse only *flottable à buches perdues* and the Transcontinental Railway, or the Crown, is the owner of the adjoining land on each bank, upon which the bridge is erected and that ownership extends on each side *ad medium filum aquæ—MacLaren* case.(1)

(1) (1914) A. C., 274.

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In the Province of Quebec the privilege of floating and driving timber down rivers is given to any person, firm or company under the provisions of sec. 7298 of the R.S.P.Q. 1909; but that privilege enjoyed by the suppliants, in common with others of the public, is not a predial servitude, because they have no title or fee in the land.(1)

By the Dominion Statute 3 Ed. VII, ch. 71, and the several acts amending the same, the construction and operation of the National Transcontinental Railway were duly authorized.

In the construction of the terms of the Constitution of Canada the courts have encountered many doubtful questions, but the subject matter now before us has been clearly defined in a long catena of cases.

There may be a constitutional domain, as in the present case, in which Provincial and Dominion legislation overlap, in which case neither legislation will be *ultra vires* if the field is clear. But if the field be not clear and in such domain the two legislatures meet, the Dominion legislation is paramount and must prevail.(2) Moreover under the authority of the case of the *Attorney-General of Ontario v. Attorney General of the Dominion*(3) and in the due exercise of the enumerated powers conferred by sec. 91 of the B.N.A. Act, the Parliament of Canada may incidentally legislate upon matters which are *primâ facie* committed exclusively to the provincial legislatures by sec. 92 thereof.

Under the decision of the case of *C. P. Railway Co. v. Corporation of Notre Dame de Bonsecours*,(4) it must be held that under the B.N.A. Act, the legislative control of the Transcontinental is vested in the

(1) *Price v. Tanguay*, 42 S.C.R., 133. A.C. *65*.
(2) *The Grand Trunk Railway Co.a. Attorney General of Canada* (1907)
(3) (1899) A.C. 367.
(4) (1896) A.C. 359.

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Parliament of the Dominion to the exclusion of any provincial legislation. This being conceded, it would appear that neither the Provincial Legislature nor the suppliants have any right or power to regulate the structure of the bridge forming part of the authorized works of the Transcontinental Railway. And it might be said, *en passant*, that the fact of the piers being diagonally situate is indeed preferable of itself than if placed at right angles with the current and stream.

In the case of *Toronto Corporation v. Bell Telephone Co. of Canada*,(1) which related to a telephone company whose operations were not limited to one province, and which depended on the same principle, full effect was given to Dominion legislation as against Provincial legislation, when the respective powers overlapped. And in the case of the *Attorney-General for British Columbia v. The Canadian Pacific Railway*,(2) the Judicial Committee held that the power given to the defendant company to appropriate the foreshore for the purposes of that railway, of necessity included the right to obstruct any rights of passage previously existing across the foreshore. If, indeed, such a principle obtains with respect to navigable and tidal waters, *a fortiori*, will it obtain in the case of a water course floatable only (à buches perdues) for loose logs. The federal Crown by means of expropriation has acquired proprietary rights both in the bed of the river and in the riparian land where the bridge is constructed, and in the exercise of such rights that Crown is not answerable except in cases provided by Dominion statute.(3)

(1) (1905) A.C. 52.
(2) (1906) A.C. 212.
(3) See *Burrard Power Co. v. The King*, (1911) A.C. 87; *"S.S. Scotia"* (1903) A.C. 504; The Interpretation Act, R.S.C. 1906, c. 1, sec. 16, also R.S.Q. 1909, c. 1, sec. 14 & C.C.P.Q. Art. 9.

The Parliament of Canada has for instance the power to legislate upon the subject matter of railways, banks and bankruptcy, and such power extends to civil rights arising from or relating to the class of subject matter coming within its jurisdiction.(1)Indeed, in the case of *Bourgoin v. Montreal, Ottawa & Railway Co.*(2) it was held in effect that the provinces were incompetent to legislate as to civil rights relating to a railway subject to the jurisdiction of the Dominion when inconsistent with its legislation.(3) Common Law rights of riparian owners as well as civil rights existing under provincial statutes, can, in certain cases, be taken away by legislation.(4) Primarily the rights in the river "La Croche" is in the riparian owner. If a provincial statute gives to the public special rights with respect to the driving of loose logs (buches perdues) in that watercourse, those rights must be held to be subject to any statute passed by the Parliament of Canada which holds the paramount right to legislate in respect of the Transcontinental Railway.

Railway companies authorized and empowered by federal statutes to construct and operate a railway, are as a necessary incident thereto, also authorized to construct bridges across watercourses, and they are not liable if, in the proper exercise of their power of doing so, without negligence, they create a nuisance.(5)

No right could accrue in favour of the suppliants herein under *The Expropriation Act*, as they are

(1) *Cushing v. Dupuy*, L.R. 5 A.C. 409; *Tennant v. Union Bank* (1894) A.C. 31.

(2) 49 L.J. P.C. 68.

(3) See also *G. T. Ry. v. Attorney-General of Canada*, (1907) A.C. 65.

(4) *Cook v. Corporation City of Vancouver* (1914) A.C. 1077.

(5) *Bennett v. Grand Trunk Railway Co.* (1901) 2 Ont. L.R. 425. See also *The London, Brighton & South Coast Railway Co. v. Truman et. al.* (1885) 11 A.C. 45.

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without any predial rights and no part of their lands is taken or alleged to be injuriously affected.(1)

At p. 723, Vol. 23 of Halsbury's *Laws of England*, the following principle is enunciated, viz.:

"1494.—Where a person suffers injury through the "injurious affection of his land or otherwise, by the "exercise by a railway company of the powers conferred "on it by Act of Parliament, no compensation is pay- "able by the company in respect of such injury unless 'Parliament has given the injured person the right to "such compensation."

"A railway company which is given power by statute "to do an act which would otherwise amount to an "interference with the rights of the public is not liable "to indictment for a public nuisance nor does an action "lie against a railway company for doing an act which "is authorized by statute, but which would be a "nuisance if not so authorized."

And Sir Frederick Pollock, in the 9th Ed. of his treatise on the law of Torts, p. 132 et seq. says: "Parliament has constantly thought fit to direct and "authorize the doing of things which but for that "direction and authorization might be actionable "wrongs. . . . In other words no action will lie "for doing that which the legislature has authorized, "if it be done without negligence, although it does "occasion damage to any one. . . . The remedy "of the party who suffers the loss is confined to recov- "ering such compensation, if any, as the legislature "has thought fit to give him.

"An Act of Parliament may authorize a nuisance "and if it does so, then the nuisance which it author-

(1) *Hammersmith v. Brand*, (1868) L.R. 4 H.L. 171. See also *Cracknell v. Mayor of Thetford*, L.R. 4 C.P. 629; *Leighton v. B.C. Electric Railway Co.*, 6 W.W.R. 1472; *Robinson v. The King*, 4 Ex. C.R. 439 and 25 S.C.R. 692; *Archibald v. The Queen*, 3 Ex. C.R. 251 and 23 S.C.R. 147; *The King v. McArthur*, 34 S.C.R. 577.

"izes may be lawfully committed. But the authority "given by the Act may be an authority which falls "short of authorizing a nuisance. It may be an authority "to do certain works provided that they can be done "without causing a nuisance, and whether the authority "falls within the category is again a question of "construction. Again the authority given by Parlia- "ment may be to carry out the works without a "nuisance if they can be so carried out, but in the "last resort to authorize a nuisance if it is necessary "for the construction of the works." P. 137.

Therefore it must be found that the Parliament of Canada has the full and paramount power to authorize the construction and operation of the National Transcontinental railway, and that such power must prevail over any Provincial legislation which might clash with any rights, powers and authority that the franchise carried with it. And paraphrasing the language of their Lordships of the Judicial Committee of His Majesty's Privy Council, in the case of *The Attorney-General of British Columbia v. The Canadian Pacific Railway Co.*,(1) it must be found that the power given to the railway to appropriate the riparian lands of the watercourse in question and the bed of the said watercourse in the manner above set forth, for the purposes of their railway, of necessity includes the right to obstruct or interfere with any right of passage previously existing across or upon the watercourse—it also includes the right to interfere with the flow of water and to impede with immunity, the passage and floating of loose logs (buches perdues) in the said river or watercourse.

Having arrived at this conclusion, it must be found that the suppliants have no right of action and that

(1) (1906) A.C. 212.

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no action will lie in the present case as against the Crown, in respect of the allegation mentioned in the pleadings herein, and that as a necessary sequence the action must be dismissed.

I have been asked to further decide whether or not the present action should have been brought or would lie as against the Commissioners of the Transcontinental Railway, but to do this would be to answer an abstract question, the impolicy of which has been commented on by the Courts from the earliest times. "I cannot properly give advice to anybody," says Bayley, J.(1) "It is very often supposed Judges can "give advice; and I therefore take this opportunity "of saying that a Judge cannot do it."

And Lord Mansfield, in *The King v. Inhabitants of the West Riding of Yorkshire*(2) also said: "if we give "an opinion, we can't give a judgment. You cannot "come here for an opinion to us."

It is not thought proper for this court to decide a point of law with the only object to forestall proceedings against persons who are not even parties to the present proceedings.(3)

There will be judgment maintaining the points of law raised by the Crown's defence and declaring that the suppliants are not entitled to the relief sought by their Petition of Right, and with costs in favour of the Crown.

Judgment accordingly.

Solicitor for suppliants: *P. N. Martel.*

Solicitor for respondent: *E. L. Newcombe.*

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(1) *Trial of Dewhurst* (1820) 1 St. Tr. N.S. 607.

(2) (1773) Lofft. 238.

(3) Dyson v. Attorney-General, 1911, 1 K.B. 410.