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Mar. 18.

THE QUEEN, ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... PLAINTIFF;

AND

THE ST. JOHN GAS LIGHT COMPANY ..... DEFENDANTS.

Public Harbour—Ownership of by City under Royal Charter—B. N. A. Act secs. 91, 108 *and sched.* 3—*Interference with navigation and fisheries—Right to restrain—Federal rights.*

The harbour of the City of St. John is not one of the public harbours which by virtue of the 108th section and 3rd schedule of *The British North America Act*, 1867, became at the Union the property of Canada. It is vested in the Corporation of the City of St. John who are the conservators thereof, and who have certain rights of fishing therein for the benefit of the inhabitants of the city.

2. Notwithstanding such ownership of the harbour by the Corporation of the City of St. John and their rights therein, the Attorney-General of Canada may file an information in this court to restrain any interference with or injury to the public right of navigation or fishing in such harbour.

3. By the Act of Assembly of the Province of New Brunswick, 8 Vict. chap. 89, section 16, incorporating the defendants, they were prohibited from throwing or draining into the harbour of St. John any refuse of coal-tar or other noxious substance that might arise from their gas-works under a penalty of £20.

Held, that the remedy so provided was cumulative, and that while the repeal of the provision might relieve the defendants from the penalty prescribed by the Act, such repeal would not legalize any nuisance they might commit by throwing or permitting to drain into the harbour the refuse of coal-tar, or other noxious substance, that might result from the manufacture of gas at their works.

4. *Semble:* That while an exemption granted by the Minister of Marine and Fisheries under subsection 2 of 31 Vict. c. 60, s. 14, may be a good defence to a prosecution for the penalty therein prescribed, it would not afford a good answer to an information to restrain any one from throwing any poisonous or deleterious substance into waters frequented by fish if the act complained of constituted an

injury to, or interference with, some right of fishing existing in such waters.

5. By the Act of Assembly of the Province of New Brunswick 40 Vict. c. 38, authority was given to the defendants to construct a sewer, with the sanction of the Governor-General of Canada, (which was obtained) from their gas-works to the harbour for the purpose of carrying off the refuse water from such works; it was further provided by the Act that the drain should be laid under the supervision of the common council of the city, and that no discharge therefrom should take place or be made except upon the ebbing of the tide, and at such times during the ebbing of the tide, as the common council should direct. After the drain was constructed it appeared that at times tar had been suffered to escape with the refuse water through the drain into the harbour, but that the discharge of refuse water when separated from the tar had not been injurious to the fisheries carried on in the harbour.

Under these circumstances, the court granted an order restraining the discharge of tar and other noxious substances through the drain by the defendants, and further restraining them from allowing any discharge therefrom except at the ebbing of the tide and at such times during the ebbing of the tide as the common council of the City of St. John might direct.

6. *Held*, that whilst the Legislature of New Brunswick could not, at the time of the passing of the Act of Assembly 40 Vict. c. 38, legalize such an interference with or injury to the right of navigation or fishery as would amount to a nuisance, they could authorize the construction of a drain to carry the refuse water from the defendants' works to the harbour, and so long as the discharge of such refuse water through the drain did not amount to a nuisance there was no ground upon which to enjoin the defendant company to remove their sewer or to abandon the use of it.

INFORMATION for an injunction to restrain an alleged interference with navigation and fisheries in the harbour of St. John, New Brunswick.

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

The case was tried at St. John, N.B., on the 23rd, 25th and 26th days of May, 1893, and argued upon the evidence at Ottawa on the 30th day of April, 1894.

J. G. Forbes, Q.C. for the plaintiff: The statute of the New Brunswick legislature, which the defendants put

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forward as sanctioning the acts complained of, does not authorize them to discharge substances deleterious to fish life through their drain into the harbour. It merely mentions "refuse water." Then, again, they allow the discharge to take place at all hours of the day; while the statute only allows them to do it at ebb-tide.

The evidence shows that they have been guilty of an interference with the public rights of navigation and fishery, and they ought to be enjoined.

(He cites 40 Vict. (N.B.) c. 38; *The British North America Act*, 1867, sec. 91, subsec. 10.)

L. A. Currey followed:—Statutory authority to do what the defendants have done, obtained from the legislature of New Brunswick, is no defence to this action; such authority could only come from the Parliament of Canada. The ownership of the soil and bed of the harbour, and the right to deal with all matters connected with navigation and fisheries are vested in the Crown in right of the Dominion by *The British North America Act*, 1867. (He cites *The Queen* v. *Fisher* (1); *Holman* v. *Green* (2).

As to the exemption from the operation of subsection 2 of sec. 15 of *The Fisheries Act* (3) by the Minister of Marine and Fisheries, relied upon in the defence, I submit that while such exemption may be made in the case of "streams," it cannot be made to apply to "harbours." The exemption is only intended to apply to running waters containing fish, such as rivers and brooks, but not to public harbours. To determine this fact one has only to turn to the clauses of section 15. The first clause deals with "rivers" and "harbours," and the second clause refers simply to "streams."

(1) 2 Ex. C. R. 365. (2) 6 Can. S. C. R. 718.
(3) R. S. C. c. 94.

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The company did not do what was required of them under the local Act, 40 Vict. c. 38, s. 8. They contravened its provisions and discharged substances from their pipe not only at ebb-tide but at all times of the tide.

The amount of damage done by the defendants need not necessarily be considerable when the action is at the suit of the Attorney-General. (He cites *Attorney-General* v. *Earl Lonsdale* (1), *The Queen* v. *Fisher* (2), *Wood on Nuisance* (3).)

Anything that interferes with the free exercise of the right of navigation is an interference with the right itself.

J. D. Hazen for the defendants:—By virtue of the royal charter and the local Act of 1785 the City claims to own the soil, waters and bed of the harbour and all the rights incidental thereto. It was never the property of the Government of New Brunswick, but of the City of St. John; and at the time of the Union of the provinces in 1867 the City of St. John had the same rights therein as a riparian proprietor would have in a river. (He cites *Ex parte Wilson*) (4). Under the 3rd schedule of *The British North America Act*, 1867, all "public harbours," of course, passed to the Federal Government; but the term "public harbour" meant public harbours that were the property of the several provinces. The harbour of St. John never passed to the Federal Government, it was absolutely the property of the mayor and corporation of the City of St. John. Under the 108th section of *The British North America Act*, 1867, and the 3rd schedule thereof the provincial public works and property to be the property of Canada are defined, but this does not include St. John harbour. That is the view held by the late Chief Justice

(1) L. R. 7 Eq. 377.
(2) 2 Ex. C.R. 365.
(3) Pp. 510, 574.
(4) 26 N.B. 209.

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Ritchie in the case of *Robertson* v. *The Queen* (1). In *Holman* v. *Green* it was decided that the harbour in question there was a public harbour in the sense that the soil was vested in the Crown (2). In *Brown* v. *Reed* (3) Ritchie, C.J. says, in clear terms, that the Crown's rights as conservator of the harbour of St. John had been conceded to the corporation. Therefore it is the City of St. John, and not the Dominion Government, that has the right to come into the proper court and get an injunction if the navigation of the harbour is being interfered with. This case was decided in 1874. I also call your lordship's attention to the Act of Parliament 45 Vict. c. 51. In the preamble it is recited that the harbour of St. John "within the limits of the said city" is vested in the city corporation of St. John. I do not think there can be the slightest question at all that as far as the harbour of St. John is concerned it has not been dealt with as an ordinary harbour which passed to the Federal Government at the time of the Union of the provinces. Then I submit that the property in the soil of the harbour, and the rights of conservation of navigation being granted to and vested in the city corporation, the Attorney-General of Canada has no *locus standi* in this court in respect of the remedy he seeks. How could the Attorney-General of Canada file an information for relief where the Queen, whom he represents, has no property in the soil or any kind of property in the harbour. I do not dispute the fact that if the City of St. John went to work and filled the harbour up with stone that the Crown could compel them to remove the obstruction, but I do contend that where the Dominion Government has no property rights at all in the harbour, they, as against the defendants here, have no right to obtain an injunction from this court.

(1) 6 Can. S. C. R. p. 121. (2) 6 Can. S. C. R. 711.
(3) 2 Pugs. 206.

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I submit with great confidence to the court this proposition that the Attorney-General of Canada cannot interfere by injunction where neither the soil nor any proprietary rights in the harbour are vested in Her Majesty the Queen.

[Cites *The Attorney-General* v. *Niagara Falls International Bridge Co.* (1); *Attorney-General* v. *Axford* (2); *Attorney-General* v. *O'Rielly* (3); *Attorney-General* v. *International Bridge Co.* (4).]

The Parliament of Canada has the right to legislate upon and make regulations with reference to the protection of fish life, and they have legislated on that subject. By R.S.C. c. 95 s. 15 subsec. 2, any one is prohibited from putting any deleterious matter into a harbour, and a penalty therefor is provided; and my contention is that where a statute prohibits a certain thing and provides a penalty for its infraction, that the penalty is the proper punishment for the wrong committed against the public. The general principle is that the penalty is the punishment for the public wrong, and as in *The Fisheries Act* the penalty for depositing deleterious matter in the harbour is clearly defined. I submit that no other remedy is open to the Crown. If there were no penalty provided it would be a misdemeanour and indictable, but as there is a penalty, to be enforced on summary conviction, provided for, the matter is not indictable.

We have an absolute right to the fish in this harbour. My contention is that the Attorney-General has no right to have an injunction in this case for any injury done to the fisheries because *The Fisheries Act* provides a penalty; and, further, because the Queen has no such right to the fish in this harbour as would entitle her to an injunction. (He cites *Couch* v. *Steele* (5), *Stevens* v. *Jeacooke*) (6).

(1) 20 Grant 34.
(2) 13 Can. S. C. R. 294.
(3) 6 Ont. App. 576.
(4) 6 Ont. App. 537.
(5) 3 El. & Bl 411, 412.
(6) 11 Q.B. 741.

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I submit, further, that under the permission given to the defendants by the Minister of Marine and Fisheries, and it has not yet been cancelled, no one in behalf of the Crown can come here and ask for an injunction to restrain what they have the Crown's permission to do.

Counsel for the Crown say this local Act was *ultra vires*. All the legislature pretended to do was to give authority to build a sewer. Surely they had a perfect right to do that. I do not see how the question of *ultra vires* affects this matter at all. We have the proper authority of the provincial legislature to build the sewer. We have the approval and sanction of the Governor-General in Council, and we have the approval of the common council of the city, as well as the permission of the Minister of Marine and Fisheries (which has never been cancelled), and how can the Queen come in here now and restrain us from doing what she gave us permission to do. What I speak of as a "permission" by the Minister of Marine and Fisheries, is the exemption provided in subsec. 2 of sec. 15 of *The Fisheries Act.*

Now it is contended that the exemption can only be applied to "streams" not harbours; but we all know that a stream means water of any sort that flows. The harbour of St. John is a stream in this sense in that for twelve hours out of the twenty-four it flows up and for twelve hours it flows down. Stream is a word in common use, in common parlance, amongst shipping men as indicating a harbour or part of a harbour.

I do not think your lordship would be justified in granting an injunction because once or twice the water flowed from this pipe when the tide was not ebbing. Before a court will grant an injunction there must be some damage of a substantial character, and there must be a constant and continuous nuisance. (He cites

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Attorney-General v. *Sheffield Gas Co.* (1), *Attorney-General* v. *Cambridge Gas Co.* (2), *Attorney-General* v. *Gee* (3).

Mr. *Currey*, in reply: Counsel for the defendants has cited a case (*Brown* v. *Reed*) (4), in support of the right of the city to interfere in such a case as this. But that case only goes so far as to say that the City as conservators of the harbour under their charter impliedly had the right to interfere with private rights so far as to remove an obstruction to navigation.

Then it is contended that because the Dominion Government have only a right to regulate the fisheries they have on that account no *locus standi* here. We maintain they have. Counsel for the defendants cited against us the case of the *Attorney-General* v. *Axford* (5) but that case is one arising out of a charitable trust merely and in no possible way in point. Then *ex parte Wilson* (6), establishes a proposition the other way from my learned friend's contention. The *Attorney-General* v. *O'Reilly* and *Attorney-General* v. *Niagara Falls Bridge Co.* are not in point. I submit that if we have made out our case at all we have a right to have an injunction.

Then with reference to the meaning of the word "stream" as used in *The Fisheries Act* subsec. 2 of sec. 15, counsel for defendants says it is broad enough to include the harbour; but in order to establish the meaning of a word used in a particular part of a statute we ought to look at the whole statute.

There might be something in that if the word was used by the Act generally to include "harbours," but notwithstanding what is said about that and the local use of the word "stream," I contend that in *The Fisheries Act* the word "stream" has reference to a

(1) 3 DeG. M. & G. 304.
(2) L.R. 4 Ch. 86.
(3) L.R. 10 Eq. 131.
(4) 2 Pugs. 206.
(5) 13 Can. S. C. R. 294.
(6) 25 N. B. 209.

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stream of fresh water flowing down into the sea or into a river. Now we find in the first subsection of section 15 of *The Fisheries Act* the words "river, harbour, or roadstead, or any water where fishing is carried on" and there is a penalty prescribed in respect of polluting such waters in that subsection.

Now in the second subsection is contained a proviso for the exemption of "any stream or streams" from the operation of the Act. I submit that the exemption can only apply to the second subsection where it is found, and that refers to "streams." And there is reason for this, because there are some streams that run into a mud lake or a bog, and in the case of such streams fisheries would not be interfered with and the Minister might very properly exercise his discretion and allow it. These would be streams where no harm would be done to the fisheries by putting deleterious or noxious matters into them because there are no fish in them to be hurt.

It is contended there is no interference with navigation because the vessels go right through the stuff discharged from the defendants' works, but any one knows that the rate of speed of a steamer or sailing vessel is diminished by dirt adhering to her by 40 or 50 per cent. It is not necessary to show that a ship was absolutely stopped by a rock or sand-bar to constitute an obstruction to or interference with navigation.

Then it is said that because some fish are seen going up the harbour every year, therefore the fisheries are not interfered with by such discharge. But, the evidence shows that some kinds of fish that used to go there do not go there at all now.

I submit that we have made out two general propositions, first, that the defendants are committing an illegal act in discharging the substances complained of into the harbour. We say for this they had no warrant

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of law; we say the exemption from the operation of *The Fisheries Act* which they got was illegal; we say the Provincial Act is *ultra vires*, and we further say that they have not complied with its requirements.

Secondly, we have shown an injury to the harbour by filling it up. We have shown the defendants to be guilty of an injurious act in interfering with the navigation of the harbour and the trade carried on there—an interference with trade and commerce. We have shown an interference with the fisheries. We say that an interference with navigation, no matter how slight, is a proper matter for an injunction at the suit of the Attorney-General of Canada. We claim this discharge interferes with fish life. It also interferes with the fish by keeping them from using the harbour, and further, we say it gets on the nets. It causes the net to attach to itself drift-wood and other floating substances in the harbour.

I submit we are entitled to an injunction—at all events to one directing the defendants to comply with the provisions of the Act of the local legislature.

THE JUDGE OF THE EXCHEQUER COURT now (March 18, 1895) delivered judgment.

The information in this case is exhibited to obtain an order to restrain the defendants from depositing in the harbour of St. John, tar, pitch, ammoniacal water and other noxious refuse from their works at the City of St. John, or from allowing the same to drain into any public sewer of the city, and to compel them to remove a sewer which they have constructed from their works to the said harbour.

As it is argued that the rights which the corporation of the City of St. John have in the harbour of St. John and the fisheries carried on there distinguish this case from like cases occurring in other public harbours of

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Canada, it is necessary to state at some length what these rights are and how they arise.

By the charter of the City of St. John, granted on the 18th day of May, 1785 (1), and ratified and confirmed by an Act of the Legislature of the Province of New Brunswick, 26th George III., chapter 46 (2), all the "land covered with water, bays, inlets and harbours" and the "fishing" within the limit and boundaries of the City were among other things vested in the mayor, aldermen and commonalty of the city (3). It was also thereby provided:

> That the fisheries between high and low water-mark along the east side of the bay, river and harbour of the city should be and for ever remain to and for the sole use, profit and advantage of the freemen and inhabitants of the said city on the east side of the said harbour, who should by virtue thereof have and enjoy the sole fishing, hauling the seine, erecting weirs and taking the fish between high and low water on the east side of the harbour to the total exclusion of all and every the freemen and inhabitants of the west side of the harbour and all others under any pretence whatsoever.

In like manner the freemen and inhabitants of the City on the west side of the harbour were given the sole right of fishing between high and low water-mark on that side to the exclusion of their fellow-citizens on the east side and all others, with the exception of the fisheries "on and surrounding Navy Island" which were to remain to all the inhabitants of the City in common.

Prior to the year 1862 the right of fishing between high and low water-mark in the harbour of St. John was disposed of by lottery to the freemen and inhabitants of the City entitled by the terms of the charter in part recited. In that year the fishing draft was abolished and provision made, which has continued to this time, for the annual sale by public auction of the

(1) L. & P.S.N.B. pp. 981 to 1030. (2) Id. p. 3.
(3) Id. 1010.

fishing lots in the harbour. The moneys arising from such sales were to be appropriated respectively to the construction of a public building on the west side of the harbour and a city hall on the east side (1).

At the date of the union of the provinces of Canada, Nova Scotia, New Brunswick, the coast and river fisheries of the latter province were protected and regulated by an Act of the legislature of that province directed against foreign vessels fishing within three marine miles off the coast or off any harbour (2); and by the Act 26th Victoria, chapter 6, relating to the coast and river fisheries, which however did not "in any wise apply to or interfere with the fisheries of the harbour of the City of St. John, or with the rights, powers, duties, authorities or privileges of the mayor, aldermen and commonalty of the City of St. John" (S. 30).

By the 91st section of *The British North America Act*, 1867, by which the union was consummated, the Parliament of Canada was given exclusive authority "to make laws for the peace, order and good government of Canada in relation to 'the sea coast and inland fisheries'" (3). In the exercise of this legislative authority the Parliament of Canada in 1868 enacted, among other regulations, the following provision, to which it will be necessary to refer later on:

> Lime, chemical substances or drugs, poisonous matter (liquid or solid) dead or decaying fish or any other deleterious substance shall not be *drawn* [a misprint, as will be seen by reference to the French version, for "thrown"] into or allowed to pass into, be left, or remain in any water frequented by any of the kinds of fish mentioned in the Act; and saw-dust or mill rubbish shall not be drifted or thrown into any stream frequented by fish under a penalty not exceeding one hundred dollars: Provided always that the Minister shall have power to exempt from the operation of this subsection wholly or

(1) 25 Vict. c. 50, amended by 28 Vict. c. 30 and 39 Vict. c. 27; and 25 Vict. c. 51, amended by 27 Vict. c. 19 and 30 Vic. c. 72.

(2) 16 Vict. c. 69, 2 P. S. p. 157.

(3) 30 and 31 Vict. (U.K. c. 31, s. 91 (12).

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from any portion of the same, any stream or streams in which he considers that its enforcement is not requisite for the public interest (1).

The same provision occurs in the *Revised Statutes of Canada* (2), and was in force when this information was filed. It was amended at the last session of Parliament in respect of the amount of the penalties to be recovered in the case of a first, second or subsequent offence, and by omitting the proviso that empowered the Minister of Marine and fisheries to except certain waters from the operation of the enactment (3).

We have seen that by the charter of the City of St. John, all the

land covered with water, bays, inlets and harbours within the limits and boundaries of the city were among other things vested in the mayor, aldermen and commonalty of the city (4).

It was also by this charter provided that the latter and their successors should

be the conservators of the water of the river, harbour and bay of the said city, and should have the sole power of amending and improving the said river, bay and harbour for the more convenient, safe and easy navigating, anchoring, riding and fastening the shipping resorting to the said city, and for the better regulating and ordering the same, and that they, the said mayor, aldermen and commonalty and their successors should and might, as they should see proper, erect and build such and so many piers and wharves into the said river, as well for the better securing the said harbour and for the lading and unlading of goods, as for the making docks and steps for the purpose aforesaid; and that they should and might have, receive and take reasonable anchorage, wharfage and dockage for the same without any account thereof to be rendered to His Majesty, His heirs or successors (5).

This charter was, in 1874, in *Brown* v. *Reed* (6), upheld by the Supreme Court of New Brunswick as a royal grant confirmed by Parliament; and in 1882, by the Act 45 Vict., chap. 51, the Parliament of Canada, to which was assigned by *The British North America*

(1) 31 Vict. c. 60, s. 14, ss. 2.
(2) R. S. C. c. 95 s. 15 ss. 2.
(3) 57-58 Vict. c. 51 s. 6.
(4) L. & P. S. N. B., p. 1010.
(5) L. & P. S. N. B. 998, 999.
(6) 2 Pugs. 212.

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Act, 1867, the exclusive legislative authority over "navigation and shipping" (1), in terms recognized the ownership of the harbour by the city corporation, and their rights therein. And perhaps with reference to a question that was the subject of some debate in this case, it will be convenient here to add that in my opinion the harbour of St. John was not one of the "public harbours" which by virtue of the 108th section and 3rd schedule of the Act last mentioned became at the union the property of Canada. The provisions of that section and schedule vested in Canada "the public works and property of each province enumerated" in the schedule. But St. John harbour was not at the date of the Act the property of the province of New Brunswick, but of the City of St. John.

The defendant company were incorporated in 1845, by an Act of the Assembly of the province of New Brunswick, 8th Vict., chap. 89, by the 16th section of which it was provided that neither the company nor any person who might in any way be employed by them should throw or drain into any part of the harbour of the City of St. John, or into any bay, cove, creek or stream falling into the harbour, any refuse of coal-tar or other noxious substance that might arise from their gas-works, under a penalty of twenty pounds for each and every offence. This section was in 1877 repealed by the 6th section of an Act of the Assembly of the province, 40 Vict., c. 38, but subject to the "fulfilment of the conditions imposed" by the 3rd section of the Act, which were that the power thereby given to lay a drain from the company's works into the harbour of the City of St. John for the purpose of carrying off the refuse water arising from their gas-works

should not be exercised unless with the consent and approval of the common council of the city of St. John first had and obtained, and

(1) 30-31 Vict. [U.K.] c. 3 s. 91 (10).

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signified by a vote of at least ten members of the common council exclusive of the mayor, and unless upon the sanction of the Governor-General of Canada first had and obtained that the drain should be laid under the supervision of the common council, and that no discharge therefrom should take place or be made except upon the ebbing of the tide, and at such times during the ebb of the tide as the common council should direct.

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The sanction of His Excellency the Governor-General to the exercise by the company of the powers conferred by the statute subject to the conditions thereof, was given by an order in council dated the 31st of March, 1877. On the 29th day of the same month the Minister of Marine and Fisheries, on the application of the company, exempted it in respect of the discharge of ammoniacal water from their gas-works into the harbour of St. John, from the operation of the provision of *The Fisheries Act* that has been cited (31 Vict., c. 60, s. 14, ss. 2), the Minister being of opinion that the enforcement of that clause of the Act in the case in question was not "requisite for the public interest." In March, 1882, the common council of the City of St. John by resolution, passed by the necessary majority, approved of the grade and course of sewer, which the company proposed to construct, and which was shown on plans submitted to the council for the purpose of obtaining its consent and approval under the Act. This sewer was afterwards constructed under the supervision of Mr. William Murdoch, an engineer employed by the City as assistant to the engineer for the City water-works. In respect to this sewer he was however acting for the defendant company and not for the City. But what was done was done openly, and later we find an extension of the sewer made by the company under the direction of the director of public works for the City, and so I think we may take it that the common council has exercised such supervision in the laying of the drain as it thought necessary, and that in that re-

spect there has been a substantial compliance with the Act of the Assembly.

In support of the information it is alleged (1st), that the refuse water from the defendants' works for the manufacture of gas, and the substance that such water holds in solution or suspension are inimical to the life of the fish that resort to St. John harbour and river, and destructive of the valuable fisheries carried on there; and (2ndly), that the deposit of tar or pitch which such refuse water occasions tends to and does interfere with the navigation of the harbour and with the convenience of ships using the harbour The defendants do not claim the right to carry into the harbour any tar or pitch but only the refuse water from their works. The tar, they say, is a valuable product which it is their interest to save and sell, and that they have appliances and take care to separate it from such refuse water before the latter is allowed to pass into the drain they have constructed, and that if there has at any time been any discharge of tar through their drains into the harbour, it has been accidental and exceptional. They express also their willingness to comply with the provision of the Act of Assembly and not to allow any discharge from the drain to take place except upon the ebbing of the tide, and at such time during the ebb of the tide as the common council may direct. With reference to the refuse water from their works, they justify, under the Act of Assembly to which I have referred; and they say that such water being discharged on the ebb of the tide into a harbour where the rise and ebb and flow of the tide is so great, there is in fact no injury to or interference with any public right; and they also say that even if it were found that there was an interference with any right of navigation or fisheries, any proceeding to restrain such interference should be taken by the corporation of the

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City of St. John, and not by the Attorney-General of Canada.

To deal first with the objection last mentioned, I must say that I cannot accede to the proposition contended for. The jurisdiction of the court to grant relief in such a case as this, depends upon clause (*d*) of the 17th section of *The Exchequer Court Act*, 50-51 Vict. c. 16, which gives the court concurrent original jurisdiction in Canada in "all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner." Whatever question may arise in provincial courts in particular cases as to whether the Crown should be represented by the Attorney-General of Canada or the Attorney-General of the province, there can, I think, be no doubt that in the Exchequer Court of Canada, in any matter within the legislative authority of Canada, the Crown is properly represented by the Attorney-General of Canada. Then, so far as this contention is based upon the ownership by the corporation of the City of St. John of the harbour of St. John, and on their rights and interests therein, the objection is, I think, equally untenable. Admitting such ownership and rights to be as large as claimed for the City by the defendants, yet such ownership and rights must be held and exercised, subject to the public rights of navigation and of fishery; and there can, it seems to me, be no doubt that in respect of any interference with any such right which would amount to a nuisance, the Attorney-General of Canada may come into this court and file an information and obtain an order to restrain such nuisance. While the corporation of the City of St. John own the harbour and are the conservators thereof, yet the general public have the right of navigation therein, which is subject to regulation by the Parliament of Canada. If that right is so invaded as

to entitle the public to a remedy, can there be any doubt that the Crown, represented by the Attorney-General of Canada, may take steps to protect the public interest?

So, too, in respect of the right of fishery, while it is true that the corporation of the City of St. John have, for the benefit of the inhabitants of the City, certain rights of fishery in the harbour of St. John, which may be exercised subject to such regulations as Parliament may prescribe, yet they are not the only persons interested in the protection and preservation of the fish that are found there. It is well known that the principal fisheries in St. John harbour are the shad, alewive and salmon fisheries, and these fish, at the season when the fishing is carried on, are on their way to their spawning-beds in the St. John River and its tributaries, so that not only are the inhabitants of the City interested in their protection but the people who live along the river and its tributaries, and also those who may seek to take such fish in the waters or on the shores of the Bay of Fundy and its arms to which such fish also resort.

It has not been contended in this case that the authority to enact regulations for the preservation of the fisheries in the harbour of St. John, and to prevent them from being exhausted, is not now vested in the Parliament of Canada. If there was ever any doubt about the matter it was settled in *ex parte Wilson* (1), where it was held that although the charter of the City of St. John grants the right of fishery in the harbour to the corporation, for the benefit of the inhabitants, the Dominion Parliament has the right under *The British North America Act*, 1867, sec. 91, to make laws for the regulation of such fisheries, and that power was impliedly given thereby to Parliament to interfere with civil rights in the provinces so far as may be necessary

(1) 25 N.B.R. 209.

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to give effect to such regulations. It follows equally, I think, that if any nuisance has been committed in respect of such fisheries, the Attorney-General of Canada may come into this court and seek to restrain the same by injunction.

It is also to be observed, I think, that the right of the Attorney-General to an injunction does not depend on any of the statutes to which I have referred. The remedies therein given are, I think, cumulative. For instance, apart altogether from the 16th section of 8 Vict., c. 89, it would not have been lawful for the defendants to have thrown into the harbour of St. John any refuse of coal-tar or other noxious substance, if by doing so they would have committed a nuisance. The effect of the statute was, of course, to prohibit the throwing of such refuse of coal-tar into the harbour under the penalty therein prescribed and to make the company liable, without any proof of any injury to or interference with any public right. And so I take it that admitting that the conditions of the 3rd section of the Acts of Assembly 40 Vict., c. 38, have been complied with and that the 16th section of the Act 8th Vict., c. 89, has been repealed, yet the effect is only to relieve the defendants from the penalty prescribed in that Act, and not to legalize any nuisance they may commit by throwing, or permitting to drain into the harbour the refuse of coal-tar or other noxious substances that may result from the manufacture of gas at their works.

With respect to the clause in *The Fisheries Act*, under which the Minister of Marine and Fisheries in 1877 exempted the harbour of St. John from the operation of such clause so far as regards ammoniacal water discharged from the defendants' gas-works, two views may possibly be taken—first, that such exemption had the effect of a legislative sanction of the act of discharging the ammoniacal water into the harbour

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and of, therefore, legalizing that act although it may have occasioned such an interference with the fisheries there carried on as would be a nuisance; secondly, that the exemption had no greater effect than to prevent the successful prosecution of the defendants for the penalty prescribed by the Act for allowing such ammoniacal water to drain from their works into water frequented by such fish as are mentioned in *The Fisheries Act*.

As, on the facts of the case, I have come to the conclusion that it has not been established that the discharge of "refuse water" from the defendants' gas-works, and I think that term must in this connection include "ammoniacal water," has caused any such interference with the fisheries in St. John Harbour as to justify the granting of an injunction, it is unnecessary for me to come to any conclusion as to which is the true construction of the clause in question though I may perhaps add that I am inclined to think that the provision must be taken as providing a cumulative remedy for the offence therein described, and that while the exemption mentioned might be a good defence to a prosecution for the penalty prescribed, it would not be a good answer to an information to restrain the act complained of in case it clearly appeared that the throwing of such poisonous or deleterious substances into waters frequented by fish was an injury to or interference with some right of fishery existing therein.

Then with reference to the sanction of the Governor-General given to the construction of the sewer under the 3rd section of the Act of 1877, I agree with Mr. Currey that it could not have the effect of legalizing any such interference by the defendant company with any public right of navigation or fishery as would amount to a nuisance unless the Governor-General had otherwise, by authority of Parliament, the right so to legalize

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such nuisance, and I may add that no such authority was cited and that I am not aware of any.

It is, of course, to be admitted that the Legislature of New Brunswick had power to authorize the construction of the drain, and if it saw fit to make the obtaining of the sanction of the Governor-General of Canada a condition precedent to exercising that power; but it had at that time no authority to legalize any such interference with any right of navigation or of fishery as would amount to a nuisance.

Coming then to consider more in detail the relief prayed for in the information filed in this case, it is clear, I think, that there is no good ground upon which the defendants could be enjoined to remove the drain connecting their works with the harbour of St. John. Neither is there any reason to restrain them from allowing any of the refuse water from the drain to pass into the public sewers of the city, because there is no evidence that they have at any time done any such thing. With reference to the tar, it is, I think, clear that at times there must have been a considerable discharge thereof from the drain in question. For that the company have not and do not claim to have any authority. They are, I think, now doing what they can to prevent it, and I see no reason why they should not with their present appliances succeed. Then as to the refuse water from the defendants' works, there is not, it seems to me, any good reason to suppose that this of itself has occasioned any interference with navigation, or so far been the cause of any injury to any right of fishing in the harbour. Of course it will always be open to the Crown to renew its application on a new state of facts and to come again to the court for an order to restrain the discharge of such water into the harbour if it can be made to appear that it has occasioned such an interference with any right of fishery as would amount to

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a nuisance. But at present I do not think a case for an injunction has, on this ground, been made out.

The order of the court will be that the defendant company be restrained from allowing any tar or pitch, or other noxious substances, other than refuse water, arising from their gas-works, to be discharged through the drain from their works at the City of St. John into the harbour of St. John, and that they be restrained from allowing any discharge therefrom except at the ebbing of the tide, and at such time during the ebb of the tide as the common council of the City of St. John may direct.

There will be no costs to either party. The defendants have not, I understand, from the first objected to an order in the terms in which it has been given. At the same time, by their evident failure at times to exercise proper care to separate the tar from the refuse water before allowing the latter to flow into the drain, they have to that extent given occasion for this proceeding, and under all the circumstances I am disposed to leave each party to pay its own costs.

Judgment accordingly.

Solicitor for plaintiff: *J. G. Forbes.*

Solicitors for defendants: *Barker & Belyea.*