

HER MAJESTY THE QUEEN, ON THE }
 INFORMATION OF THE ATTORNEY-GEN- } PLAINTIFF; 1891
 ERAL FOR THE DOMINION OF CANADA, } Sept. 21.

AND

HENRY K. FISHER.....DEFENDANT.

Interference with public right of navigation—Injunction to restrain—Jurisdiction of Exchequer Court—Right to authorize such interference since the union of the Provinces—Position of Provincial legislatures with respect thereto—Right of Federal authorities to exercise powers created prior to the Union.

An information at the suit of the Attorney-General to obtain an injunction to restrain defendant from doing acts that interfere with and tend to destroy the navigation of a public harbor is a civil and not a criminal proceeding, and the Exchequer Court has concurrent original jurisdiction over the same under 50-51 Vic. c. 16, s. 17 (*d.*)

2. A grant from the crown which derogates from a public right of navigation is to that extent void unless the interference with such navigation is authorized by Act of Parliament.
3. The Provincial legislatures, since the union of the Provinces, cannot authorize such an interference.
4. Wherever by an Act of a Provincial legislature passed before the Union authority is given to the crown to permit an interference with the public right of navigation, such authority is exercisable by the Governor-General and not by the Lieutenant-Governor of the Province.

THIS was an information filed by the Attorney-General for the Dominion of Canada, for an injunction to restrain the defendant from obstructing the navigation of a portion of Isaac's Harbor, in the County of Guysborough, N.S.

The allegations contained in the information were as follows :—

1. " That the public harbors in the Province of Nova Scotia are now, and have been since the 1st day of July, A. D. 1867, the property of Her Majesty The Queen, represented in that behalf by the Govern

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ment of the Dominion of Canada, and Isaac's Harbor in the County of Guysborough, and Province of Nova Scotia, aforesaid, is now and has been since the first day of July, A. D. 1867, a public and navigable harbor and common highway, the property of Her Majesty the Queen, represented as aforesaid, and ought to be preserved for the use of the ships and vessels, boats and other crafts of all Her Majesty's subjects and others to pass, repass and navigate at their free will and pleasure ; and Her Majesty The Queen, represented as aforesaid, hath the right of superintendence and prerogative over the same for the benefit of commerce and for the common use and enjoyment of all persons resorting thereto, and to protect and preserve the same from all nuisances and obstructions whatsoever.

2. " That the placing, depositing, casting, and throwing in and upon the bed and soil of the said public and navigable harbor and common highway of large quantities of gravel, sand, tailings and other materials and rubbish is, and will be, a great prejudice to the said public and navigable harbor and common highway, and greatly obstruct, impede, and render less safe and commodious, and in process of time may entirely destroy, the said navigable harbor and common highway, and so far prejudice and annoy the same that the ships and vessels, boats, and other crafts of Her Majesty's subjects and others will not be able to come into or go out of the same.
3. " That on the 18th day of July, in the year of our Lord one thousand eight hundred and eighty eight, and divers other days from the said date until the day of taking inquisition in a certain part of the said public and navigable harbor and common

highway called Webb's Cove, in and upon the bed and soil of the same, the defendant did place, deposit, cast, and throw, and cause and procure to be placed, deposited, cast and thrown divers large quantities of gravel, sand, tailings and other material and rubbish, from a crusher owned or operated by him at said Isaac's Harbor, whereby and by means whereof the said public and navigable harbor and common highway was and still is greatly obstructed, impeded, and rendered less safe and commodious to the subjects of Her Majesty The Queen, and others, there passing, repassing and navigating with their ships and vessels, boats and other craft, than the same would have been and of right ought to have been and to be.

4. "The Attorney-General on behalf of Her Majesty The Queen claims as follows:—

(a.) "An injunction to restrain the defendant, his servants and agents, from the continuance or repetition of the said injury to the said public and navigable harbor and common highway, or the committal of any injury of a like kind in respect of the same.

(b.) "Such further and other relief as to this Honourable Court shall seem meet."

By his answer to the information the defendant pleaded as follows:—

"The defendant admits the allegations contained in the first and second paragraphs of plaintiff's information.

2. "As to the third paragraph of the plaintiff's information the defendant says he denies that on the 18th day of July, A. D. 1888, or on divers other days from said date, in the part of the harbor called Webb's Cove, or in any part of said harbor, that he, in and upon the bed and soil thereof, did place, de-

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posit, cast and throw, or did cause or procure to be placed, deposited, cast or thrown, large quantities or any quantity, of gravel, sand, tailings and other material and rubbish from a certain or any crusher operated by the defendant at said Isaac's Harbor.

3. "The defendant repeats paragraph two of his defence and denies that he committed the alleged trespasses or any of them, or that any act committed by him has caused the said public harbor to be obstructed, impeded or rendered less safe and commodious to the subjects of Her Majesty the Queen, or others, navigating, or intending to navigate, the said harbor."

Issue joined.

The court, under the evidence, found for the plaintiff on the issues of fact raised by the third paragraph of the information and the second and third paragraphs of the answer.

August 18th and 19th, 1891.

Harrington, Q.C. for the defendant :

1st. The court has no jurisdiction in this case. The court is the creature of the statute 50-51 Vic. c. 16, and by sections 15, 16 and 17 of that statute we find that the jurisdiction is confined to cases of a strictly civil nature. The subject matter of this suit, as indicated in the information, is essentially a criminal one. The acts complained of here constitute an offence which would sustain an indictment. This is not a case wherein any question arises as to a matter of private right, but it is rather a matter affecting the proprietary rights of the crown considered as a trustee for the public interest.

2ndly. The evidence does not show that the acts complained of constitute an obstruction to navigation. It is merely established that the accumulation of sand from the crusher has made an enlargement or extension

of the shore. The harbor may be narrowed, but it does not follow that navigation has been obstructed.

3rdly. The acts complained of were done under the authority of a lease from the crown, represented by the Commissioner of Public Works and Mines for the Province of Nova Scotia. This lease was issued under the provisions of *The Revised Statutes of Nova Scotia*, 5th series, chapter 7, which is merely a re-enactment of a statute passed by the Legislature of Nova Scotia prior to Confederation.

4thly. There are no sufficient grounds shown in the information upon which the court might grant an injunction. It is not alleged that the acts complained of are being continued by the defendant, nor that the injury is irreparable or insusceptible of being compensated for by damages in an action of trespass.

5thly. The place where the sand has accumulated is not a public highway. The cove beyond it is only used for the purpose of mooring vessels. Only so much of a river can be called a highway as is used for the purpose of communication between one place and another. Cites *Bourke v. Davis* (1).

Ritchie for plaintiff:

This is undoubtedly a civil proceeding. In England such actions have always been brought on the Equity side of the Exchequer Court.

Any obstruction, however slight, is sufficient to found the remedy sought in the information. (Cites *Moore on the Foreshore* (2); *Attorney-General v. Burridge* (3); *Attorney-General v. Palmeter* (4); *Attorney-General v. Earl Lonsdale* (5); *Attorney-General v. Terry* (6); *Wood's Law of Nuisances* (7); *Attorney-General v. Harris* (8); *Attorney-General v. International Bridge*

(1) 44 Ch. D. 110.

(2) P. 614, et seq.

(3) 10 Price 350.

(4) 10 Price 378.

(5) L.R. 7 Eq. 377.

(6) 9 Ch. Ap. 423.

(7) P. 574.

(8) 33 U.C. Q. B. 94.

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 THE *Act*, sec. 108).
 QUEEN The lease relied on by the defendant is void in so
 v. far as it seeks to empower him to interfere with
 FISHER. the public right of navigation. It was made since
 Argument the public right of navigation. It was made since
 of Counsel. Confederation in virtue of an Act of the Legislature
 of Nova Scotia which is *ultra vires*.

BURBIDGE, J. now (September 21st, 1891) delivered judgment.

The information in this case is exhibited to obtain an injunction to restrain the defendant, his servants and agents, from permitting the sand and tailings from a mill for crushing quartz-rock, alleged to be operated by him, to be carried into and deposited upon the bed and soil of Webb's Cove, which is a part of the public and navigable harbor known as Isaac's Harbor in the County of Guysborough and Province of Nova Scotia. The mill in question is situated a short distance from the shore of the harbor upon a small stream, the water of which is used to wash the crushed quartz and is then returned to the stream,—carrying with it the tailings from the mill. This has been going on for a number of years, and a bank of such sand or tailings has been formed in the harbor, at and near the mouth of the stream. There has been, and so long as the mill is operated as it has been operated there will be, a gradual encroachment upon the waters of the harbor. There is no direct evidence altogether satisfactory that the defendant is the person who is operating the mill, but that is the only inference to be drawn from his letters which are in evidence ; and being present in court he did not go upon the stand to rebut that inference. On the issues taken upon the third paragraph of the information and the second and

(1) 6 Ont. App. 537.

(2) 6 Can. S. C. R. 707.

third paragraphs of the statement in defence, I find, therefore, for the plaintiff.

The finding upon the issues of fact would dispose of the case but for an exception to the jurisdiction of the court, and a matter of defence, which, though not raised by the pleadings, was discussed at the hearing.

By *The Exchequer Court Act* (1), the court is given concurrent original jurisdiction in Canada in certain specified cases, and

In all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner.

It is said that the information in this case is not of a civil nature. It is to be admitted that the facts shewn would have supported proceedings by way of indictment in the Supreme Court of Nova Scotia; but there can, I think, be as little doubt that the Attorney-General of Canada might have proceeded in that court as he has in this by way of an information for an injunction, and that such a proceeding would have been of a civil nature. The fact that the acts complained of constitute an offence, and would have sustained an indictment, is not conclusive of the question. For many such acts the law affords a civil remedy as well. The question is as to whether the action or suit, the proceeding, is or is not of a civil nature. In the *Attorney-General v. Bradlaugh* (2), the Court of Appeal (Brett, M. R. and Lindley, L. J., Cotton, L. J. doubting) held that an information exhibited by the Attorney-General to recover penalties under *The Parliamentary Oaths Act, 1866*, was not a criminal cause or matter. In that case it will be observed the majority of the court followed the opinion of Platt and Martin, BB. in the *Attorney-General v. Radloff* (3), in which Pollock, C.B. and Parke, B. took a different view. But, however that may be, I enter-

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(1) 50-51 Vict. c. 16, s. 17 (d). (2) 14 Q.B. D. 667.

(3) 10 Ex. 84.

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tain no doubt that an information wherein the remedy sought is an injunction to restrain a defendant from doing certain acts that interfere with, and tend to the destruction of, the navigation of a public harbor, is a civil and not a criminal proceeding (1).

The defendant also contends that he has a right to commit the acts complained of under and by virtue of a certain indenture of lease from Her Majesty, represented in that behalf by the Commissioner of Public Works and Mines of Nova Scotia, bearing date the 26th day of February, 1880, whereby there was demised to his predecessor in title certain mining areas, with the right to erect thereon works, mills and machinery for crushing quartz, and to draw off from the stream or brook to which reference has been made so much of the water thereof as might be necessary or expedient to drive such works, mills and machinery, or to carry on such operations as are necessary in the business of quartz crushing mills. This lease was, it was said, issued under the authority of chapter 9 of *The Revised Statutes of Nova Scotia* (1873) (2), which was a re-enactment of a statute passed prior to the union of the Provinces. Assuming for the moment that this grant or lease is to be construed as giving the defendant a right to allow the tailings from his mill to be carried into Isaac's Harbor to the injury of the public right of navigation, it is clear, I think, that to that extent it is void, unless the interference with navigation is authorized by an Act of Parliament. It was not contended that the Legislature of Nova Scotia could, since the Union, legalize such an interference. That of course is very clear, as the Parliament of Canada has exclusive legislative authority over the subject of

(1) See *Attorney-General v. Bur-*  
*ridge*, 10 Price 350, on which the  
 information in this case was drawn.

(2) For the Act now in force see  
 R. S. N. S. 5th S. c. 7, s. 46.



navigation (1). It was argued, however, that chapter 9 of the Revised Statutes of 1873 should be read as having all the force and validity of the pre-Confederation Act, of which it was a re-enactment. I am not prepared to concede that point, but at present I express no opinion in respect to it; for I have no doubt that if by any Act of the Legislature of Nova Scotia passed before the Union authority has been given to the crown by its grant to derogate from, or interfere with, the public right of navigation, that authority is, since the Union, exercisable by the Governor-General in Council and not by the Lieutenant-Governor in Council of the Province of Nova Scotia (2).

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I am of opinion that judgment should be entered for the plaintiff with costs, and that the injunction claimed should be granted.

*Judgment accordingly.*

Solicitor for Plaintiff: *W. F. Parker.*

Solicitor for Defendant: *J. A. Jennison.*

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(1) See *The British North America Act*, 1867, s. 91 (10.)

(2) *Ibid.*, s. 12.