

common law and the intent of the Act itself, as expressed in its whole contents, and cannot I think be intended to empower the Crown to abridge the *jus publicum* of free fishery in public waters enjoyed by all Her Majesty's subjects in common, but, on the contrary, only to regulate this right and to make its exercise more productive of results to those actively engaged in it—thus increasing the aggregate wealth and resources of the country. Under section 46 net fishing in any public water in Upper Canada might no doubt be prevented altogether by the Governor in Council under circumstances rendering such step advisable for the protection of the public interests, that is, to prevent damage to the fisheries or to increase its extent and value. This would be in analogy to sections 20, 27, 28, 30 and 31, under which fishing for certain kinds of fish is made unlawful or prevented during certain periods of the year, (called in section 34 the close season,) and so under section 46 the Governor in Council may in certain cases extend these provisions of the Act by closing entirely, or for limited periods, any public water in Upper Canada against net fishing. So under section 6, the Governor in Council may cause to be set apart any river or other water for the natural or artificial propagation of salmon, trout, or other fish, thus closing such waters entirely against fishing in any manner. And during the close season fishing can only be allowed under section 34 by written permission of the superintendent, and for the particular object pointed out in that section. But to attempt to exercise the powers granted under the 1st and 46th sections by preventing net fishing as regards some of Her Majesty's subjects and permitting it as regards others, or by regulating such net fishing with a view of such enjoyment of it by some of Her Majesty's subjects to the exclusion of others, is, I think, contrary to the spirit of the Act and beyond its meaning and intent. No power but that of Parliament can grant to any individual or corporation any privilege which may operate as a monopoly of trade or of industrial pursuit of any description, and the power of Parliament has not I think been put forth in the Fisheries Act for any such purpose. It was passed not to deter and discourage fishing by the granting of invidious monopolies to individuals, nor even principally to create a source of revenue for the Province, but to protect the fisheries as a great Provincial interest from injury and deterioration, and to encourage the proper prosecution of the fishings by all who could under the beneficial provisions of the Act find it their interest to engage in this pursuit in Provincial waters. See the heading of sections 1 to 46 inclusive. "Protection of Fisheries," and the provisions of sections 3, 13, 14, 15, 16 and 31, granting special privileges to fishermen who might engage in fishing on these waters, privileges not confined to lessees but applicable to all alike. The whole tenor of the Act is to the like effect. It is true that section 67 contemplates that a revenue may arise under its provisions from the leases or licenses of salmon or other fisheries. But this must have reference to leases and licenses on lands belonging to the Crown mentioned in section 1, including the public lands and beaches mentioned in sections 3 and 4, and cannot of itself suffice to extend the scope of the initial clause of section 1, over the great public navigable bays and other waters of the Province.

The first clause of the first section of the Act then must I think be taken by itself, and is confined to Crown fishings or fishings on Crown Lands, and has no reference to fishing carried on in public waters in bays at a distance from the shore, and where the shore or beach is not made use of for the purpose of landing the nets in drawing them in with fish, or in cutting or preparing the fish for market. The power to lease or license includes the power to impose rules and regulations as conditions upon the lessee or licensers, and in reference to Crown property capable of being thus leased, it was unnecessary to empower the Governor to make rules and regulations for its management. The second clause therefore of the first section and the 46th section do not properly apply to such Crown fisheries, but to the fisheries of the Province open and common to all Her Majesty's subjects. After granting certain privileges upon Crown Lands to the public the Act in the 4th section expressly reserves the right of the Crown to dispose or take possession of any public land or beach occupied under its provisions for fishing purposes. Such public land and beaches therefore could be resumed at any time; and by-law No. 1 of the Fisheries Regulations declares them to have been practically

resumed and again formally taken possession of; and the subsequent use of these same public lands and beaches was of course subject to any conditions which might be imposed and mentioned in any lease or license of them thereafter to be granted, not so much by virtue of this Act as of the rights of the Crown as Lord of the sea.

By-law No. 1 then, I consider, declares the resumption of the lands belonging to the Crown, up to and including beaches (if any) in front of such lands, occupied for fishing purposes but not going beyond the beach, or taking in any of the permanently submerged bottom of any public water; and from the time of this resumption the Crown was in possession of all such lands and beaches for all purposes not inconsistent with the *jus publicum*, and including the purposes mentioned in the first clause of the first section of the Act.

By-laws Nos. 2, 3, 4, 5, 8 and 10 have effect only as regulations made under the latter clause of the 1st and the 46th sections.

By-laws Nos. 6 and 7 refer to two distinct classes of waters:—

1. Waters leased by the Crown.

2. Waters set apart by the Crown for the natural or artificial propagation of fish.

To take fish in the first class of waters these By-laws require:—

1. The express sanction of a fishing officer or officers; or,
2. The written permission of the lessees.

In the second class of waters:—

1. The express sanction of a fishing officer or officers.

We have seen that the first class of waters—those leased by the Crown—cannot include the public navigable waters of the Province in which there exists at common law, as well as by virtue of the 3rd section of this Act, a public right to take fish common to all Her Majesty's subjects.

The second class of waters are not made either by the Act or by the Regulations subject to lease, but are closed against all persons except such as have the express sanction of a fishing officer.

I think, therefore, that notwithstanding any leases or grants of the Crown to the contrary (of the existence of which however no sufficient evidence is given), all Her Majesty's subjects have, both at common law and by this statute, a right freely to take bait or fish in any harbour, river or public water in Upper Canada not duly set apart by the Governor General for the natural or artificial propagation of fish, so that in so doing they trespass not on Crown lands or beaches, or by their place, time or mode of fishing, contravene any provision of the Act or any regulations made by the Governor in Council under its provisions; and applicable not merely to individuals or classes, but equally to all Her Majesty's subjects.

I have found it unnecessary to consider the effect the document put in purporting to be a lease to "the Mayor and Corporation of Owen Sound in the person of the present Mayor, George Snider," would have, if in due form, and valid and admissible as a conveyance. I may say here, however, that even were the waters of the harbours subject to lease by the Crown, it does not appear to me that the lease produced would affect injuriously the case of the plaintiff. A Municipal Corporation in Upper Canada cannot, under the municipal law as it at present stands, take a lease of a fishery at an annual rent payable out of the corporation funds, that being beyond or aside from the scope of the powers conferred on such a body by the Legislature. If the lease were at all effectual as such it would be so as a lease to the inhabitants of the town individually, and would operate in favour of the present plaintiff as one of those inhabitants, having a right under it in common with the other corporators.

The plaintiff's boat then was lawfully used by him in fishing in Owen Sound Bay, and as such was exempt from seizure under this execution, and I see therefore no reason for disturbing the verdict.

New trial refused.