

seizure was in an unlawful pursuit, then I think there should be a new trial, there being no pretence on the part of the plaintiff that any such sanction or written permission was ever given.

The first lease is executed by John McQuaig, Superintendent of Fisheries for Upper Canada, in favour of Thomas C. Stephens, dated 9th August, 1859, for three years from 1st February, 1859, at \$4 per annum payable half yearly, and is of property described as a certain fishing station situate in Owen Sound Bay, in Upper Canada, and commencing at the shore on the side line of lots 19 and 20 in the Township of Sarawak, thence easterly to Squaw Point in the Township of Sydenham, thence southerly along the coast past the mouth of the Sydenham River to the bottom of Owen Sound Bay, thence westerly along the coast to the place of beginning, embracing the southerly portion of Owen Sound Bay, together with the right of cutting timber for fishing purposes upon the enclosed reserved Crown Lands, together with the sole right of occupation for fishing purposes, and the exclusive privileges of fishery upon the same.

The second lease is executed by Andrew Russell, Assistant Commissioner of Crown Lands, in favor of the Mayor and Corporation of Owen Sound, in the person of the present Mayor, George Snider, thereto present and accepting for the Corporation, dated 4th September, 1860, for two years from 1st February, 1860, at a rent of \$4 per annum payable half yearly, and is of a certain fishing station described nearly as in the first lease except that the line runs from Squaw Point along the coast at high water mark, and includes the Sydenham river up to the foot of the first falls or dam, but excludes that portion of water near Boyd's wharf already patented. It is alleged, but not proved, that this lease was granted upon the forfeiture of the lease to Mr. Stephens for non-payment of rent. It was during the pendency of the lease to the Corporation that the seizure of this boat was made.

By the Fisheries Act, sec. 3, sub. sec. 1, all subjects of Her Majesty, but none other, may, for the purposes of trade and commerce (and a *fortiori* for private use), take bait and fish in any of the harbours, roadsteads, bays, creeks, or rivers of the Province. By section 1, the Governor in Council may grant special fishing leases and licenses on lands belonging to the Crown for any term not exceeding nine years, and may make all and every such regulation or regulations as may be necessary or expedient for the better management and regulation of the fisheries of the Province.

By section 2, "the Governor may, as occasion shall require, appoint two superintendents of fisheries, one for Upper and one for Lower Canada, whose powers and duties shall be defined by this Act and the regulations to be made under it."

By section 3, "the superintendent of fisheries may grant written permission to any person or persons who may be desirous of obtaining spawn for *bona fide* artificial or scientific purposes to fish for that purpose during the close season."

By subsequent sections power is given to the superintendent of fisheries to act as a magistrate on complaints of contravention of the Act, and certain duties are devolved upon him in reference to the bounties to be given in respect to certain fisheries, to consider which would be irrelevant to this enquiry.

By section 46, "the Governor in Council may from time to time make rules and regulations for preventing or regulating the fishing with nets," &c., &c., "in any harbour, river, or public water, within Upper Canada."

Regulations were adopted by the Governor in Council on the 16th May, 1860, of which the material portions are as follows:—

By-law No. 1. "The Crown having for the purposes of the Act 22 Vic., cap. 62, Consolidated Statutes of Canada, practically resumed and re-entered formally into possession of all fishing stations within the Province of Canada, it is pursuant to the said statute further provided, that the following regulations shall hereafter apply to the fisheries of Upper Canada, and any person or persons continuing to occupy or use directly or indirectly any such net fishing, without lease from the Crown, shall become liable to the pains and penalties imposed by the Fisheries Act, saving moreover all other recourse in like cases provided by law."

By-law No. 6. "No fishing shall be allowed in any water which may have been leased or set apart by the Crown for natural or artificial propagation of fish, except by express sanction of a fishing officer or officers."

By-law No. 7. "All other persons are forbidden to take fish for purposes of trade within the limits covered by leases from the Crown, except only by written permission of the lessees."

By-law No. 8. "The receipt, gift, purchase, sale or possession of any fish had in contravention of these regulations, shall be punishable according to law; and the article so had and all materials so unlawfully used therefor, shall become subject to forfeiture and disposed of as the law directs."

It may be observed *in limine*, that the leases put in do not appear on the face of them to have been granted by the Governor in Council, as required by the 1st section of the Act, and there is nothing in the Statute or Regulations made thereunder to enable the Superintendent of Fisheries, or the Assistant Commissioner of Crown Lands, to grant them. The leases are not under the Great Seal or the seal of the Governor, or in any way authenticated as having been granted by authority of the Governor in Council, and ought to be regarded as wanting in those *indicia* which can alone secure for such documents attention and authority as evidence in a court of justice. The lease or license to the Corporation is not under the seal of the Governor, and for that reason cannot convey to the Corporation any right to enter upon the lands described therein.

But independently of these objections to these leases, which appear to me fatal to their validity as evidence for the defence, it appears to me questionable whether by any lease or license, however formally drawn and executed, a right of fishing in any of the public waters of Upper Canada, can be conveyed to any one or more of Her Majesty's subjects to the exclusion of others.

By the common law of England, which is ours also by Con. St. U. C., cap. 9, fishing in navigable rivers or arms of the sea is common and public. *Carter v. Murcot*, 4 Burr. 2167, *Richardson v. Orford* (*Mayor of*), 2 H. Black 182, 1 Anst. 231, 4 T. R. 437, except where by grant or prescription a several fishery exists. "Grants of this description can no longer be made by the Crown—being prohibited by King John's Great Charter, and the second and third confirmations of it in the reign of his successor." Stephens' *New Commentaries*, 22, 23, Am. Ed., 1848. Our inland lakes and rivers are held to be subject, in respect to public rights, to the same rules as are applied to the seas and rivers of England. See the *Queen v. Meyers*, 3 U. C. C. P., 305, and cases cited. The *King jure coronæ* may grant the land upon the sea shore between high and low-water mark, and even probably below low-water mark, for the purpose of being reclaimed and converted to useful purposes of occupation, which occupation however must be carried into effect within a reasonable time. *Attorney Gen. v. Richards*, 2 Anstr. 614. But such grant is subject to the *jus publicum*, or public right, and if acted upon injuriously to such public right it is void, or it is a grant which does not divest the Crown or invest the grantee. *Attorney General v. Burridge*, 10 Price, 350, *Attorney General v. Parmeter*, 10 Price, 378; see also *Attorney General v. Chambers v. Rees*, 9 Eng. L. & E. Rep. 212, in Chancery.

The question is, Is this public common law right of fishery in the navigable waters of Upper Canada made liable by the Fisheries Act, or other statute, to be abridged by act of the Crown, and if so, how far?

The 3rd section of the Fisheries Act, sub-sec. 1, grants no new privilege, but is, as we have seen, only in affirmation of the common law, and was doubtless intended to rebut any misconstruction of the other parts of the Act to the prejudice of the public right recognized by it. The other sub-sections do indeed grant some privileges not before enjoyed except by intrusion on the Crown, but only by giving a limited use of Crown property, and thus enlarging and giving practical effect to the public rights upon such waters.

The first clause of the 1st section of the Act refers to lands of the Crown, and is no enlargement of the power of the Crown. It may well be questioned whether the term lands of the Crown be used at all in reference to lands under navigable waters. The term "Fisheries of the Province," in the following part of this section, is not in any way defined in the Act, or elsewhere, and must, I presume, mean generally the fisheries carried on by individuals in the public waters of the Province. But both this section and section 46 must receive a construction in harmony with the