

1883 THE QUEDDY RIVER DRIVING
 BOOM CO. AND HUGH R. RO-
 *Feb'y, 26, 27, BERTSON AND LAMBTON L. L. } APPELLANTS;
 *May 1. BEEVAN..... }

AND

WILLIAM DAVIDSON.....RESPONDENT.

ON APPEAL FROM THE JUDGMENT OF THE JUDGE IN
 EQUITY OF THE PROVINCE OF NEW BRUNSWICK.

Obstructions in tidal and navigable rivers—45 *Vic. ch. 100 (N. B.)*
ultra vires—*B. N. A. Act, 1867, sec. 91.*

Professing to act under the powers contained in their act of incor-
 poration, 45 *Vic.*, ch. 100 (*N. B.*), the *Q. R. B. Co.* erected booms
 and piers in the *Queddy* river which impeded navigation—the
locus being in that part of the river which is tidal and navi-
 gable.

Held,—(Affirming the judgment of the court below,) that the Provin-
 cial Legislature might incorporate a boom company, but could
 not give it power to obstruct a tidal navigable river, and there-
 fore the Act 45, ch. 100, *N. B.*, so far as it authorizes the acts
 done by the Company in erecting booms and other works in the
Queddy river obstructing its navigation, was *ultra vires* of the
New Brunswick Legislature.

APPEAL from a judgment of *Palmer, J.*, the Judge in
 Equity of the Province of *New Brunswick*.

The plaintiff in this case filed a bill for an injunction
 to restrain the defendants from erecting and maintain-
 ing piers and booms in the *Queddy* river, and alleging
 that by erecting the said piers and booms and filling
 the stream with logs, the said plaintiff was prevented
 for a length of time from having access to the shore and
 using the stream for the purposes of navigation.

*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry,
 Taschereau and Gwynne, JJ.

This coming on for argument on demurrer, it was agreed that the only question that should be raised upon the argument should be the authority of the Provincial Legislature under the provisions of the *B. N. A. Act*, 1867, to pass the Act incorporating the said company, and to confer the powers contained therein, and that all other matters stand to the hearing; and for the purpose of raising the question relating to the said Act the following case was agreed upon between the counsel for the respective parties:—

“1. The plaintiff is the owner of certain lands situate at the outlet or mouth of the *Queddy* river, which empties into the *Bay of Fundy*. The said river is situate in the parish of *St. Martins*, county of *St. John*, in the province of *New Brunswick*.

“2. The *Queddy* river is a public navigable river; the tide ebbs and flows for about a mile and a half from the mouth or outlet; and schooners or boats can, at the proper time of tide, go up to the head of the tide. The stream above the flow of the tide is and can only be used for floating and driving logs when the water permits.

“3. The rise and fall of the tide is about thirty feet, and at low tide the water is very low in the stream, almost dry, and vessels can only ascend it under and at certain states of the tide.

“4. The said river flows through the plaintiffs land for the distance of a mile from its mouth, he owning the shore on either side.

“5. The defendants, *Robertson* and *Bevan*, own or control lands at the head waters of the river adjacent thereto, from which they cut logs and drive them down the stream—the only practicable mode of getting them to market.

“7. The defendants, the *Queddy River Driving Boom Company*, is a company incorporated by an act passed at the last session of the legislature of the province of

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New Brunswick, intituled 'An Act to incorporate the *Queddy River Driving Boom Company*' (1).

"8. In pursuance of and professing to act under the powers contained in the said Act, the said company have erected and placed piers and booms in the said river attached to the shores at the places on map annexed hereto at the points marked *A, B, C, D*.

"9. These booms as erected under the Act impede navigation, but at the times when the tides serve they are capable of being swung open to admit rafts passing down or craft up stream.

"10. The plaintiff has erected a steam saw mill on his land at the point marked.

"11. Without booms being placed in the river at some point in the tide-way near the mouth, logs driven down the stream or a great portion thereof, would escape into the bay, and be practically lost and swept out to sea.

"12. The defendant company claim the right to erect the piers and booms as shown on the plan, and maintain the same under the powers contained in the said Act, and that the said booms are erected there in accordance with the powers given by the said Act."

The questions for the opinion of the court are:—

First, can the legislature of the province of *New Brunswick* give the powers claimed by the defendant company under which they have erected and maintain the said piers and booms?

Second, are the acts done by the company, as above set out, within the powers given by the said Act.

If these questions are answered in the affirmative, then judgment to be given for the defendants; but if in the negative, then the demurrer to be overruled.

"13. It is admitted that the plaintiff has sustained such special and particular damages by the operations

(1) 45 Vic., ch. 100, N.B.

of the company as would entitle him to an order of injunction restraining the proceedings of the company and the other defendants if the above powers conferred by the Act of the legislature of *New Brunswick* are *ultra vires*."

The Supreme Court of *New Brunswick* delivered judgment in favor of the plaintiff; and in reply to the first question declared that the powers conferred by the Act of the legislature of *New Brunswick* upon the defendants authorizing them to erect piers and booms and maintain the same as stated in the special case is *ultra vires* and beyond the powers of the legislature of the province of *New Brunswick*; and as to the second question in the said special case declared it was unnecessary to answer it in view of the decision upon the first question.

Mr. *Weldon*, Q.C., for appellants :

It is contended for the respondents that the legislation incorporating this company is *ultra vires* of the legislature of *New Brunswick*, as being legislation indirectly controlling navigation and shipping.

It cannot be disputed that at first sight it would so seem, but it is submitted that it is not, but an exercise of a power necessarily vested in the legislature to carry into effect the requisite legislation to incorporate this company, being a matter within the class over which it has legislation.

Legislation, whether of the Dominion or Provincial legislatures, over certain classes or subjects falling within the classes respectively assigned them, in order to be effective must, in many cases, not only apparently but actually trench or infringe upon matters exclusively assigned to the other legislature, and that the power to do this arises by necessary implication. The instance of bankruptcy and insolvency is perhaps the most familiar.

Applying the principle laid down by Sir *Montague*

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E. Smith in delivering judgment in the case of *Cushing v. Dupuy* (1) to the classes assigned to provincial legislation it would seem to be a necessary implication that when it is necessary to render the legislation effective and of value and benefit to the people of the province, or a portion of it, that it was intended to confer on it legislative power for that purpose, even if to some extent it apparently infringes upon classes of subjects exclusively assigned to the Dominion Parliament.

By the 10th sub-section of section 92, local works and undertakings, such as certain classes of railway, canal, telegraph and other works, are, upon the principle *inclusio unius exclusio alterius*, within the power of the local legislature.

Again, works of a local character, for instance, bridges to connect the great or bye-roads and to facilitate local communication through the province and to open it up for settlement, it must be conceded are within the legislation of the provincial legislature. Many of these bridges necessarily cross rivers within the flow of the tide below the head of navigation; in fact many do, as may be instanced upon the rivers flowing into the bay of *Fundy*, such as the *Musquash* in the county of *St. John*, the *Petitcodiac* and *Memramcook* in the county of *Westmoreland*—over the latter not less than three bridges below the head of navigation,—the bridges over the *Shediac*, *Cocagne*, *Buctouche*, *Richibucto* and *Miramichi* rivers, flowing into the Gulf of *St. Lawrence*, are all below the head of navigation, many of these erected since the union, and are constructed with draws to enable vessels to pass up and down, but necessarily to some extent interfere with the navigation. If the local legislature have no authority to authorize such an erection or bridge, then it would be “illegal and a nuisance.” *Hole v. Sittingbourne and Sheerness Railway Co.* (2).

(1) 5 App. Cases 409.

(2) 6 H. & N. 489.

Angell on Watercourses (1). "All hindrances to navigation, whether by bridges or in any other manner, without direct authority from the legislature, are public nuisances." See also *Original Hartlepool Collieries Co. v. Gibb* (2).

If in the course of navigation a vessel injured such bridge or boom, if illegal, no action would be maintainable. *Colchester (Mayor, &c.) v. Brooke* (3).

I submit that the legislation complained of by the respondent is legislation affecting property and civil rights, and falls within that class. *L'Union St. Jacques de Montreal v. Belisle* (4).

The judgment of the judicial committee of the Privy Council in the case of *Queen Ins. Co. v. Parsons* (5) supports the principle I am now contending for, and applying the rule there laid down, to ascertain the intention of the framers of the Act of Union, legislation of the provinces prior to the union is to be looked to. The legislation of the province of *New Brunswick* on the subject will be found in the 3rd Vol. Public Statutes, under the head of boom companies, and all the subsequent statutes up to 1867.

While it may be contended that the relation of the dominion to the provinces is not in entire analogy to that of the *United States* with the respective states of the union, yet it is only in the decisions of their courts we can find the question of conflict of legislation discussed, and principles of constitutional law discussed and expounded, and considering that from the same source as ourselves the common law of our mother country, the federal courts, and as a general rule the state courts, derive their principles of jurisprudence, and also taking into consideration the similarity of circumstances in each federation, it may be fairly urged

(1) Sec. 555.

(2) 5 Ch. D. 712.

(3) 7 Q. B. 339.

(4) 7 App. Cases 96.

(5) L. R. 6 P. C. 31.

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that even if their decisions are not followed in their entirety, they may afford light and information upon these questions discussed before their courts.

In *Harrigan v. The Connecticut Navigation Company* (1), the court illustrates the regulation of rivers even navigable as in the analogous case of highways. (See judgment delivered by Lord, J.)

After the decision in *Gibbons v. Ogden* (2), the question arose before the same judges in the case of *Wilson v. The Blackbird Creek Marsh Co.* (3), where the doctrine of the several rights of the Congress and the State is discussed by that eminent jurist Chief Justice Marshall.

Subsequently in the Supreme Court of the United States in *State of Pennsylvania v. Wheeling Bridge Co.* (4), where Chief Justice Taney delivered a dissenting opinion. The following decisions of State Courts were also referred to: *Nelson v. Cheboygan Nav. Co.* (5); *County of Mobile v. Kimball* (6).

Dr. Barker, Q. C., and Dr. Tuck, Q. C., for respondent :

The question involved in this appeal is whether the act of the Legislature of *New Brunswick*, 45 Vic., ch. 100, intituled "An Act to incorporate certain persons to be known as *The Queddy River Driving and Boom Company*," is *ultra vires*, so far as it authorizes the acts done by the Company in erecting booms and other works in the *Queddy River*, obstructing its navigation and preventing the respondent from having access to his lands fronting on the river. The powers conferred upon the Company to which exception is taken will be found principally in the 3rd and 4th sections of the Act. The construction of the works thus authorized, we contend, must interfere with the public right of

(1) 129 Mass. 580.

(2) 9 Wheaton 1.

(3) 2 Peters 250.

(4) 13 Howard 518.

(5) 38 Mich. 204.

(6) 12 Otto 691.

navigation, and that in reference to a navigable river, such as the one in question, the local legislature has no power to confer the right professed to be given by this act.

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By section 91 of the *B. N. A.* Act, the right to legislate on the subject of navigation and shipping is given to the Dominion Parliament; and if the powers conferred belong to any of the classes of subjects in section 92 of that Act, or are included in any of them, the local legislature has, to that extent, exceeded its powers, even though the act may relate in other respects to some subject comprised within section 92. It is contended by the appellants that the act in question relates solely to a local work and undertaking, and to matters of a merely local or private nature, and as such it comes within section 92 of the *B. N. A.* Act. This contention cannot prevail. In the first place it cannot be said that the construction of works which in their intended use necessarily take away or abridge a right in the public, such as that of navigation, is in any sense a matter of a merely private nature; and in the second place, any work or undertaking local in its nature ceases to be such in the sense in which the term is used in section 92, when its use or the result of its operation, is to interfere with any right which is included in a subject-matter within the legislative authority of the Dominion Parliament. For while the latter Parliament has, by force of the concluding clause of section 91, in addition to its express powers, such an implied legislative authority over the subjects mentioned in section 92 as may be requisite for complete legislation in reference to the subjects mentioned in section 91, there is no such implied authority in the local legislature in reference to the classes of subjects mentioned in section 91. Any such implied authority would obviously lead to conflict, and it is contended that except in the cases provided for by

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sections 94 and 95 of the *B. N. A.* Act, there is no concurrent power of legislation in the two parliaments.

The cases decided by this and other courts in reference to the powers of the respective legislatures, so far as they bear on the subject under discussion, are as follows:—*City of Fredericton v. The Queen* (1); *Cushing v. Dupuy* (2); *Citizens' Ins. Co. v. Parsons* (3); *Russell v. The Queen* (4); See also *The Queen v. Burah* (5).

Admitting for the sake of argument that the Act in question *prima facie*, as Sir *Montague Smith*, in *The Citizens' Ins. Co. v. Parsons* (6), says, falls within one of the classes of subjects enumerated in section 92, does it not, or do not the powers conferred on the appellant company fall within the subject of navigation, inasmuch as they interfere with the public right in reference to it. If the Dominion parliament enacted a statute simply authorizing *A* to enter upon and occupy the land of *B*, to his entire exclusion, it could scarcely be contended that this was not legislation as to the civil rights and property of *B*, and therefore *ultra vires* of that parliament. Why? Not because it in words took away *B*'s right of enjoying his own premises, but because that was the natural and necessary result of acting on the authority conferred. So in this case, the prevention of the public in the enjoyment of their right of navigation and its incidents, is the natural and necessary result of the use of the powers conferred. The legislation therefore does fall within the subject of navigation, and by all the authorities is void on that account.

The Dominion Parliament in its legislation has acted on the principle contended for by the respondent, and though this fact could in no way confer a right not given by the constitution, it is a question which, in

(1) 3 Can. S. C. R. 505.

(4) 7 App. Cases 829.

(2) 5 App. Cases 415.

(5) 3 App. Cases 904.

(3) 7 App. Cases 108.

(6) 7 App. Cases 109.

such a case as the present, "may," as Sir *Montague Smith*, at page 116 of the case last cited, says, "properly be considered." These statutes are numerous and refer, as will be seen, to almost every description of work which might interfere in any way with the rights of the public in navigable rivers. These statutes are as follows:—32-33 *Vic.*, ch. 42; 35 *Vic.*, ch. 94; 36 *Vic.*, ch. 65; 37 *Vic.*, ch. 29; 39 *Vic.*, ch. 15; 42 *Vic.*, ch. 9; 43 *Vic.*, ch. 44; 43 *Vic.*, ch. 61; 43 *Vic.*, ch. 29, s. 2, art. 27; Sec. 71 of Railway Act—42 *Vic.*, ch. 9.

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The provision in the Act, section 22, that the works shall not unnecessarily interfere with navigation, admit that the right of navigation will necessarily be abridged, but beyond that it has no bearing on the case. Who is to judge of the necessity, or how is it to be determined? Is it by the quantity of logs to be taken care of? If so, then it follows that if the quantity of logs to be boomed requires the whole river to be occupied by the company's works, the right of navigation is taken away altogether and necessarily so.

Then, it was argued in the court below that at all events the legislation in question was good until some act conflicting with it had been passed by the Dominion parliament, and cases decided by courts in the *United States* were cited in support of this contention.

Under the *British North America Act* the only question that can arise is one simply of construction, and the power of either the Dominion Parliament or a provincial one to legislate on any subject is defined and limited by the act itself, and must be determined by the rules of construction applicable to any other case where the meaning of a statute is to be settled.

Mr. *Weldon*, Q.C., in reply.

RITCHIE, C. J. :—

Piers and booms may be very useful on the *Queddy*

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river, may, in fact, be almost essential for the preservation of logs driven down the river, to prevent their escaping into the bay and swept out to sea. But that cannot affect the legal question in this case, which is, to which legislative power, that of the Dominion Parliament or the Assembly of *New Brunswick*, belongs the right to authorize the obstruction by piers or booms of a public tidal and navigable river, and thereby injuriously interfere with and abridge the public right of navigation in such tidal navigable waters. It is not disputed that this legislation interfered with the navigation of the river, indeed this appears clearly from the language of the Act itself which says (1):

It shall be the duty of the said company to place and maintain all their works upon the said river in such a way as not to unnecessarily interfere with the navigation of the same.

I think there can be no doubt that the legislative control of navigable waters, such as are in question in this case, belongs exclusively to the Dominion Parliament. Everything connected with navigation and shipping seems to have been carefully confided to the Dominion Parliament, by the B. N. A. Act. Thus, in addition to "Navigation and Shipping," generally, we have "beacons, buoys, lighthouses, and *Sable Island*;" then we have quarantine, and the establishment and maintenance of marine hospitals; and lastly we have in the list of provincial public works and properties which are to become the property of *Canada*, canals with lands and water power connected therewith, public harbors, lighthouses and piers, and *Sable Island*, steamboats, dredges and public vessels and rivers and lakes improvements. All this seems to me to indicate very clearly that the words "navigation and shipping" are to be read in no restricted sense. The question of the interference with the navigation of public tidal waters is by no means matter of

(1) 45 Vic., ch. 100, sec. 22 (N.B.).

purely local or private concern, it affects the shipping of the Dominion generally, as indeed also foreign as well as domestic; and, therefore, in view of the general scope of the Act, legitimately belongs to the Dominion Parliament rather than the local legislatures.

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The objects of incorporation of companies with power to interrupt, impede, or abridge the rights of foreign or domestic shipping in the navigation of any of the tidal navigable waters of the Dominion cannot be said to be provincial any more than the works and undertakings under such powers can be called local; on the contrary, though the corporation may be private, the object to be accomplished affects the public as well within as without the province.

But if the objects of the incorporation could strictly speaking be called provincial, or the works and undertakings local if thereby navigation and shipping, and the legislative powers conferred on the Dominion Parliament are interfered with, then by virtue of the latter clause of section 91, they are not to be matters coming within the class of matters of a local or private nature, comprised in the enumeration of the classes of subjects assigned exclusively to the Legislatures of the Provinces.

If the Provincial Legislature can authorize the obstruction of the navigable tidal waters at the mouth of the *Queddy* River, why may they not do the same at the mouth of the other large rivers of the Dominion, as in *New Brunswick* the mouth of the *St. John*, at the head of the *St. John* harbor, and so prevent or impede the free navigation of that great river by the numerous steamboats, wood boats and seagoing craft that daily navigate from the sea to *St. John* and from *St. John* and *Indian Town* to *Fredricton*, or that large and important river *Miramichi*, navigated for miles from its mouth by sea-going ships to the towns of *Chatham* and



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*Newcastle?* And if they have the right to interfere with and abridge the rights of navigation, why should they not be able to authorize total obstructions? for, if they can authorize partial obstructions, I can see no reason why they might not authorize obstructions which would render any navigation impossible, the question not being one of degree, but whether they can or cannot interfere at all.

And these views are, in my opinion, strictly in accordance with the principles heretofore enunciated in this court, and sustained by the Judicial Committee of the Privy Council.

I think, therefore, this appeal must be dismissed with costs.

STRONG, J. :—

There cannot, in my judgment, be any doubt as to the correctness of the decision of the court below, and I should have been prepared to have dismissed the appeal without hearing counsel for the respondent. The *Queddy* river is shewn to be a navigable tidal river, and the appellants have obstructed the navigation and thus committed an act which is *prima facie* a public nuisance, and which the respondent shows to be specially injurious to him as a riparian proprietor. The respondent was therefore entitled to an injunction to restrain the continuance of the obstruction, unless the appellants were able to show some legal justification for the interference with the navigation of the river, caused by the construction and maintenance of these booms. They, however, show nothing but an act of the Provincial Legislature of *New Brunswick* incorporating them as a boom company (which so far was entirely within the powers of that legislature), and which also assumed to confer power upon the company so incorporated to obstruct

the navigation of the *Queddy* river. The powers so conferred are, in my opinion, in excess of the authority given to local legislatures by the *British North America Act*. This is a conclusion which requires no elaboration of argumentation for its demonstration, for no one can deny that by sub-sec. 10 of sec. 91 of the *British North America Act*, exclusive power to legislate respecting navigation is conferred on the Parliament of *Canada*, and as little is it open to any one to dispute that this power respecting navigation includes the exclusive right to legislate so as to authorise an obstruction in a navigable public river where the tide ebbs and flows. A much less distinct power given by the *United States Constitution* to Congress to legislate respecting inter-state commerce, has, as is well known, been held to include the power to control the use of navigable waters on which inter-state commerce is carried on. And the powerful reasoning of the great judges who decided these cases, would, if there could be any doubt upon the point now presented, be conclusive in the present case.

Even if the provision in sub-sec. 10 of sec. 91 had been omitted, I should have thought that the authority of the *Wheeling & Bridge Company* case (1) would have been sufficient to show that under sub-sec. 2, giving Parliament power to regulate trade and commerce, the Act of the *New Brunswick Legislature* in question here would have been an encroachment on these exclusive powers of the Dominion, and so void.

For these reasons, which are substantially the same as those assigned by the Chief Justice for the same conclusion, I concur in the deposition of this appeal which has been proposed.

FOURNIER, J., concurred.

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I entirely concur in the views expressed by the Chief Justice and my learned brother *Strong*. The legislature of *New Brunswick*, of course, had the power to incorporate the company for a local object, but the question is raised here whether they had the right to confer on the company so incorporated the right to place obstructions in tidal navigable waters. My opinion is, that under the constitution they have no such right. If a local legislature could interfere to the extent of one quarter of a mile in tidal water, they might interfere to the extent of a mile, and there would be no limit. The maritime provinces are so situated that the inhabitants on one side of the bay of *Fundy* are entitled to navigate the other side, and *vice versa*. If one province, therefore, had the right to interfere with navigable tidal waters they would interfere with the rights of the other province. I do not undertake to say whether that power is inherent in the Dominion Parliament either. There may be cases even in which the Dominion Parliament could be restrained. There are certain rights of fisheries which are common, not only to the province in which they are, but to all the British public and some foreigners, and if the right is conceded to a province to interfere with navigable waters by allowing companies to place obstructions in them, they might largely interfere with rights outside of the province altogether. I have no doubt the local legislature does not possess that power, it has only the power given to it under the Confederation Act, which gives them no power to interfere with tidal waters. The whole power of the local legislature is shown to be restricted. They have the power of organizing companies for local objects alone, but it must be taken into consideration that these local objects shall not interfere with public rights outside. I consider, therefore, under

all the circumstances of the case, that the Boom Co. had no authority by the act to place obstructions in the place they did on this navigable river where the tide ebbed and flowed, and where parties were in the habit of taking vessels up and down. My judgment is to dismiss the appeal with costs, and to confirm the judgment that was given by the court below.

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TASCHEREAU, J.:—

I will not dissent from the judgment of the majority of the Court, but I have great doubts on the question submitted. There are very strong grounds, it seems to me, in support of the contention that this boom is a local work or undertaking in the Province of *New Brunswick*. Navigation and shipping are left under the control of the Federal authority, it is true, but this, under sub-sec. 10 of sec. 92 of the *B. N. A.* Act does not extend to, for instance, a line of steamers or other ships entirely within the province, that is to say, plying from one part of the province to another part of the same province. That would, I presume, be a local undertaking under the control of the local legislature. May it not be said that the boom in question is also a local undertaking?

Can it be said that the incorporation of this company was for federal objects? If it was for Provincial objects was it not legally incorporated by the *New Brunswick* Legislature?

GWYNNE, J., concurred with the Chief Justice.

*Appeal dismissed with costs.*

Solicitors for appellants—*The Queddy River Driving and Boom Co.*: Charles H. Skinner.

Solicitors for appellants—*Hugh Robertson et al.*:  
*Weldon, McLean and Devlin,*

Solicitors for respondent: *Allen & Chandler,*