JOHN TAYLOR WOOD.....APPELLANT; 1883

*Oct. 31.

AND

1884

WILLIAM ESSON *et al*.....RESPONDENTS. *Mar. 8.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Obstruction in navigable waters, below low water mark—Nuisance—Trespass.

E. et al. brought an action of tort against *W.* for having pulled up piles in the harbor of *Halifax* below low water mark, driven in by them as supports to an extension of their wharf, built on certain land covered with water in said Harbour of *Halifax*, of which they had obtained a grant from the Provincial Government of *Nova Scotia* in August, 1861. *W.* pleaded, *inter alia*, that "he was possessed of a wharf and premises in said harbour, in virtue of which he and his predecessors in title had enjoyed for twenty years and upwards before the action, and had now, the right of having free and uninterrupted access from and to *Halifax* harbour to and from the south side of said wharf, with steamers, &c., and because certain piles and timbers, placed by the plaintiffs in said waters, interfered with his rights, he (defendant) removed the same." At the trial there was evidence that the erections which *E. et al* were making for the extension of their wharf did obstruct access by steamers and other vessels to *W's* wharf. A verdict was rendered against *W.*, which the full court refused to set aside. On appeal to the Supreme Court of *Canada* it was

Held—(reversing the judgment of the Supreme Court of *Nova Scotia*) that, as the Crown could not, without legislative sanction, grant to *E. et al*, the right to place in said harbour below low water mark any obstruction or impediment so as to prevent the free and full enjoyment of the right of navigation, and as *W.* had shown special injury, he was justified in removing the piles which were the trespass complained of.

APPEAL from a decision of the Supreme Court of *Nova Scotia*, discharging with costs a rule *nisi* obtained

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

1883

WOOD v. ESSON.

by the appellant to set aside the verdict or finding of Mr. Justice *Weatherbe* in favor of the respondents.

The appellant and respondents are the owners of two wharves and water lots in the city of *Halifax*, that of the appellant lying immediately to the north of a public dock, and that of the respondents immediately to the south of said dock.

The appellant, and those under whom he claims, have, for upwards of twenty years, been in the habit of bringing vessels to the south side of his wharf adjoining the public dock, and there landing and discharging cargo.

In August, 1881, the respondents, who had obtained in 1861 a grant from the Provincial Government of *Nova Scotia* of certain land covered with water, being a part of the harbour of *Halifax*, extended their wharf to the northward and thereby prevented vessels and steamers from getting to the south side of appellant's wharf, as they had always done up to that period, and the appellant pulled up the piles and removed the obstructions so that the steamers could get in.

For this alleged trespass an action in tort was brought by the respondents against the appellant and one *John F. Mitchell.*

The declaration consisted of three counts and the defendants pleaded *inter alia :*

11th. "That at the time of the alleged trespasses defendant was possessed of a wharf and premises adjoining and to the north of said property, the owners and occupants of which had for the period of twenty years and afterwards before this action enjoyed at all times, as of right and without interruption, the easement, right and privilege of having free and uninterrupted access from and to the *Halifax* harbour to and from the south side of said wharf with steamers and vessels, and of mooring and fastening the same there

while they took in and discharged cargoes and for other purposes; and because certain piles and timbers wrongfully obstructed and interfered with said rights and easements, defendant removed said obstructions, doing no unnecessary damage, which are the alleged trespasses."

Upon the trial it was admitted that the respondents possessed the title to this property which *John Esson* had in his lifetime.

The respondents also put in evidence a grant from the Crown, dated 16th July, 1861, which was contended on the part of respondents covered the *locus*.

Mr. Justice *Weatherbe*, before whom the cause was tried, found a verdict in favor of defendant *Mitchell*, there being no evidence to connect him with the trespass; and the respondents acquiesced in this finding. A verdict, however, was rendered against the appellant *Wood* in the following terms: "I find that the alleged trespasses were committed by the defendant *Wood* within the limits of the property described in the grant from the Crown to *John Esson et al.*, dated 16th July, 1861, against whom a verdict on all the issues will be entered for $175, at which I assess the damages."

A rule *nisi* to set aside that verdict and judgment was obtained by *Wood* and discharged by the Supreme Court of *Nova Scotia*, and thereupon *Wood* appealed to the Supreme Court of *Canada*.

Mr. *Sedgewick*, Q.C., and Mr. *Gormully* for appellant:

The obstruction complained of was in the harbour of *Halifax* and no grant could deprive the appellant of his right to approach by the navigable waters of the harbour a wharf of which he had a continuous user for over thirty years.

Mr. *Graham*, Q.C., for respondents:

The title of respondents to the property whereon the

1883

WOOD v. ESSON.

trespasses were committed was clearly proven upon the trial, and there is no evidence which can sustain the plea of user.

RITCHIE, C.J.:

The erection which the plaintiffs allege the defendant interfered with, and which is the alleged trespass for which they seek damages, consisted of piles driven with a view to the construction of a wharf below low water mark, in the navigable waters of the harbour of *Halifax*, and which obstructed and prevented the defendant's vessels and steamers from navigating in that part of the said harbour and from getting to the south side of his wharf, as he had been accustomed to do, and which piles or obstructions he pulled up and removed so that his steamers could get to his wharf. There can be no doubt that all Her Majesty's liege subjects have a right to use the navigable waters of the *Halifax* harbour, and no person has any legal right to place in said harbour, below low water mark, any obstruction or impediment so as to prevent the free and full enjoyment of such right of navigation, and defendant, having been deprived of that right by the obstruction so placed by plaintiffs and specially damnified thereby, had a legal right to remove the said obstruction to enable him to navigate the said waters with his vessels and steamers, and bring them to his wharf. On this short ground I think the appeal should be allowed.

It is not pretended that plaintiffs, in placing the piles in question, were doing so under any legislative authority, which alone could justify an interference with the navigable waters of the harbour.

STRONG, J.:

The 11th plea sufficiently sets up the defence upon which, in my opinion, the appellant is entitled to have this appeal allowed.

The defendant was in possession of a wharf in *Halifax* harbour, to which a line of steamers and other vessels were used to come.

The plaintiffs, in 1861, obtained a grant from the Provincial Government of *Nova Scotia* of certain land covered with water, being part of the harbour, and in August, 1881, they built upon this land an extension of a wharf, of which they were the proprietors, in such a way as to cause an obstruction to the passage of the vessels which had been used to resort to the defendant's wharf. The defendant pulled up the piles which had been driven as supports for this extension, so as to enable the steamers and other vessels to get in to his wharf. The court below have upheld a verdict found against him on this state of facts.

The defendant's possession of this wharf is *primâ facie* evidence of seisin in fee, and was sufficient to enable him to justify any acts which an owner seized in fee could justify.

The grant to the plaintiffs by the Provincial Government, in 1861, was valid and operative to pass the title to the soil of the harbour included in the grant, but, although the grant was effectual for this purpose, and the plaintiffs had a valid title under it, that did not justify any erection upon the land granted having the effect of obstructing the navigation of the harbour.

The title to the soil did not authorize the plaintiffs to, extend their wharf so as to be a public nuisance, which upon the evidence, such an obstruction of the harbour amounted to, for the Crown cannot grant the right so to obstruct navigable waters; nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance (1). That these piles did actually interfere with the approach to the defendant's wharf is proved, and this is sufficient to

(1) *Atty. Gen.* v. *Terry*, L. R. 9 Ch. App. 23.

1884

WOOD v. ESSON.

Strong, J.

bring it within the case of *Dimes* v. *Petley* (1), where Lord *Campbell* holds that a person is not justified in abating a public nuisance of this kind, unless he can show that he is actually injured by it. Here the defendant does show special injury and, therefore, he was justified in removing the piles, which are the trespasses complained of, and the verdict should have been found for him.

The judgment must be reversed with costs, and the rule for a new trial made absolute with costs.

FOURNIER, J. :

Les parties en cette cause sont propriétaires de quais et de terrains couverts par l'eau, situés de chaque côté d'un dock public dans la cité et le port d'*Halifax*. Le quai de l'appelant est au nord et celui de l'intimé au sud du dock qui les sépare

Depuis au-delà de vingt ans l'appelant était dans l'habitude d'amener des vaisseaux au côté sud de son quai, adjoignant le dock public, pour les y charger et décharger.

Dans le mois d'août 1881, les intimés firent commencer la construction d'une addition à leur quai, du côté nord donnant sur le dock déjà mentionné. Cette construction ayant l'effet d'empêcher les steamers et autres vaisseaux d'arriver au côté sud du quai de l'appelant, celui-ci fit enlever la partie de ces travaux qui obstruaient l'accès à son quai. Telle est la cause de la présente poursuite pour voie de faits (*trespass*).—Un nommé *J. F. Mitchell* avait été compris dans la poursuite.

L'honorable juge qui a présidé au procès sans le concours d'un jury, a déclaré par son verdict que la voie de faits avait été commise par l'appelant dans les limites d'une concession (*grant*) faite par la Couronne à l'intimé en 1861. *Mitchell* fut mis hors de cause.

(1) 15 Q. B. 276.

1884

WOOD v. ESSON.

Fournier, J.

L'appelant a pris une règle *nisi* pour faire mettre le verdict de côté pour les raisons suivantes: 1o Parce que la ligne nord de la concession (*grant*) faite aux intimés n'était pas prouvée, et parce qu'il n'y avait pas de preuve que l'endroit où la voie de fait avait été commise était dans les limites de la concession.

2o Parce que l'appelant avait droit à un verdict fondé sur le 11e plaidoyer par lequel il réclame un droit d'usage (*easement*) ou servitude depuis au-delà de vingt ans pour arriver à son quai.

3o Enfin, le rejet d'un plan original de record dans le bureau des terres de la Couronne.

Cette règle fut renvoyée et c'est de ce jugement qu'il y a maintenant appel.

Les questions qui se présentent maintenant à la considération de cette cour, sont :

1o Les intimés ont-ils prouvé, par le titre qu'ils ont produit en date du 16 juillet 1861, un droit exclusif de propriété de l'endroit où la voie de fait a été commise ? Ce terrain est décrit comme suit :

"A water lot or lot of land covered with water, situate, lying and being in the County of *Halifax*, bounded as follows: *Beginning on the southern line of the public dock, at the eastern end of Slater street, and at the north-eastern angle of the wharf* property of the said *Esson, Boak & Co.*, at *Halifax* aforesaid; now running easterly by the course of *said line* two hundred and ten feet into the harbor, &c., &c."

Par la description contenue dans le titre aussi bien que par la preuve testimoniale, il est établi que le lot en question est entièrement couvert par l'eau, et se trouve situé même au-dessous de la ligne de la basse marée, dans le port d'*Halifax*.

L'honorable juge qui a présidé au procès a bien déclaré que la partie des travaux d'extension commencée par les Intimés et démolie par l'Appelant se trouvait dans les limites de leur concession, mais la question de savoir si le titre des Intimés leur conférait le droit

1884

WOOD v. ESSON.

Fournier J.

d'élever de pareilles constructions au détriment du public dans un endroit du port d'*Halifax*, toujours couvert par l'eau et servant à la navigation ne paraît pas avoir été soulevée devant lui. Le dossier ne contenant qu'un extrait du titre, il n'est guère possible de dire quels sont à part du droit au sol les privilèges conférés aux Intimés. Sont-ils autorisés à y faire des constructions qui puissent avoir l'effet d'obstruer la navigation ? La concession leur est-elle faite, au contraire, avec la réserve des droits du public dans les eaux navigables ? On doit présumer que le titre n'en fait aucune mention, car autrement les Intimés n'eussent pas manqué d'alléguer des conditions qui auraient justifié leur droit de faire les constructions commencées. Il faut donc en conclure que ce titre ne leur a été accordé que sujet au droit de navigation du public, la Couronne n'ayant pas le pouvoir de les aliéner dans les eaux navigables. En admettant même, ce qui me paraît assez douteux en point de fait, que les Intimés n'ont pas dépassé la ligne sud du dock public et qu'ils se soient strictement tenus dans les limites de leur concession, leur titre leur conférait-il le droit d'intervenir en aucune manière avec les droits de navigation ? Il est certain que non. De plus, ce titre ne pouvait conférer implicitement aux Intimés des droits que la Couronne ne peut aliéner. Lors même que le titre des Intimés leur eût conféré d'une manière spéciale le droit de faire les constructions qu'ils ont entrepris de faire, ce titre eut été absolument nul, la Couronne n'ayant pas, à moins d'une législation spéciale, le pouvoir d'aliéner les droits de navigation du public. On ne saurait mettre en doute ce principe trop bien établi par les autorités.

The right of the Crown to the soil in arms of the sea and public navigable rivers is subject to the public right of passage, and any

grantee of the Crown must take subject to such right. *Mayor, &c., of Colchester* v. *Brooke* (1).

The public right in this respect includes all such rights as with relation to the circumstances of each river, are necessary for the convenient passage of vessels along the channel. Ib. 26.

The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is vested in the Crown, but subject to the right of navigation, which belongs, by law, to the subjects of the Realm, and of which the right to anchor forms a part; and every grant made by the Crown of the bed or soil of an estuary or a navigable river must be subject to such right of navigation (2).

The right of the public to navigate a public river is paramount to any right of property in the Crown, which never had power to grant a weir, so as to obstruct public navigation; and if a weir which was legally granted in such a river, caused obstruction at any subsequent time, it becoming a nuisance (3).

And in *Angell* on Tidal Waters (4):

The right of property in tide waters, and in the soil and shores thereof, is *primâ facie* vested in the King, to a great extent, at least, as the representative of the public. To such an extent, that to the rights of navigation and fishery, he has no other claim than such he has, as protector, guardian or trustee of the common and public rights. Hence, the King has no authority, and since *Magna Charta*, has never had, to obstruct navigation, or to grant an exclusive right of fishing in an arm of the sea.

The important doctrine, that public rights, and such things as are materially dependent upon them, cannot be alienated by the Crown, seems to have been established at a very early period. The rule, as laid down by *Bracton*, is, that these things which relate particularly to the public good cannot be given, sold or transferred, by the King, or separated from the Crown.

Hence, the people of *England* are not only, *primâ facie*, entitled to the use of the sea, &c., for the purposes hereafter to be considered, but their right in this respect cannot be restrained or counteracted by any royal grant, on the ground that the King is the legal and sole proprietor. In favor of this view of the subject, we have the treatise of Lord *Hale*, and also the opinion of one of the modern judges of the King's Bench (*Mr. J. Bailey*), who says, 'many of the King's rights are, to a certain extent, for the benefit of his subjects,

(1) 7 Q. B. 339.
(2) *Gann* v. *Free Fishers* of *Whitstable* Co., 11 H. L. Cas. 192.
(3) *Williams vs. Wilcox*, 8 A. & E., 314.
(4) P. 23.

1884

WOOD
v.
ESSON.

Fournier, J.

and that is the case as to the sea, in which all his subjects have the right of navigation and of fishing, and the King can make no modern grants in abrogation of those rights.' It is unquestionably true, as regards the authority of the Crown, as was asserted by one of the learned judges in *Browne vs. Kennedy*, in *Maryland*, that the subject has, *de commune jure*, an interest in a navigable stream, such as a right of fishery and navigation, which cannot always be restrained by any charter or grant of the soil, or fishery since *Magna Charta*, at least. The King may doubtless grant the *soil* covered by tide water to an individual, but the right of the grantee is always subservient to the public rights above mentioned. 'The soil, says *Mr. G. Best*, can only be transferred, subject to this public trust, and general usage shows, that the public right has been excepted out of the grant of the soil.'

D'après ces autorités, il est évident que la Couronne n'avait pas le pouvoir de conférer aux Intimés le droit d'ériger dans le port d'*Halifax* des constructions qui pouvaient intervenir avec la navigation. La construction commencée par les Intimés, doit donc être considérée comme une nuisance publique, si elle n'a pas été autorisée par la loi. Il n'en a été cité aucune à cet effet. En conséquence, les Intimés n'avaient aucun droit de porter leur présente action. Ils doivent succomber à cause de l'insuffisance de leur titre.

L'Appelant par son 11me plaidoyer a invoqué un droit de servitude (easement) exercé depuis plus de vingt ans sur l'endroit où la voie de fait a été commise, ainsi que dans le dock avoisinant son quai. La preuve qu'il a faite de l'examen de ce droit n'a pas été considérée comme suffisante pour le lui faire acquérir par prescription ; mais il n'est pas nécessaire d'entrer dans l'examen de cette question ; car l'endroit où il exerçait ce droit de servitude étant un dock public, soumis au droit de navigation du public, l'Appelant n'y pouvait pas acquérir par prescription un droit particulier, mais il avait en commun avec le public le droit d'en faire usage pour les fins de la navigation.

Dans le but de s'assurer davantage le droit qu'il

exerçait de faire usage de ce dock pour l'exploitation de son quai, l'Appelant en obtint, le 20 novembre 1879, une concession du gouvernement de la *Nouvelle-Ecosse* avec la condition de n'y faire aucune construction, et avec de plus la réserve du droit de passage en faveur des sujets de Sa Majesté. Ce dock étant une partie du port d'*Halifax*, il n'appartenait qu'au gouvernement fédéral et non au gouvernement local d'en disposer. C'est ce que cette Cour a déjà décidé dans la cause de *Holman* et *Green* (1). Ainsi cette concession est nulle ; et l'Appelant n'a dans ce dock que des droits qu'il partage en commun avec le public, au lieu de la servitude qu'il a invoquée. Toutefois cette position est suffisante pour lui donner le droit d'exiger que l'entrée du dock, et le dock lui-même, qui avoisine son quai soit libre de toute obstruction.

La preuve a établi que la construction commencée par les Intimés et dont une partie a été enlevée par l'Appelant avait diminué la largeur du dock et de son entrée. L'appelant, dans son témoignage, dit : que des poteaux avaient été posés à une distance seulement de 15 à 16 pieds vis-à-vis de son quai. L'espace entre les deux quais à la ligne de basse marée était de 22 pieds 8 pouces. Au haut des quais la distance était plus considérable, mais elle avait été tellement réduite par les nouveaux ouvrages que l'Appelant ne pouvait plus faire arriver ses bâtiments à son quai. *Phalen*, le locataire du quai des Intimés dont le témoignage ne saurait être suspect, dit :

Steamers that had been in the habit of coming into that dock were prevented by *Mosher's* work.

Mosher était le contracteur des travaux qui avaient l'effet d'obstruer l'entrée du dock et d'en diminuer la largeur. Ces témoignages ne laissent pas de doute sur le fait de l'existence d'une obstruction à la navigation et à l'usage

(1) 6 Can. S. C. R. 707.

1884

WOOD v. ESSON.

Fournier, J.

du dock, causant une nuisance publique. L'Appelant ayant droit de faire usage de ce dock pour arriver à son quai, n'avait-il pas le droit de faire disparaître cette nuisance ? C'est ce qu'il a fait dans le seul but d'exercer ses droits de navigation et en faisant le moins de dommage possible aux ouvrages des Intimés. En cela, il n'a fait qu'exercer le droit que lui conférait la loi de faire disparaître une nuisance qui faisait obstacle au passage des vaisseaux allant à son quai. Ce principe est bien établi par toutes les autorités. Il suffit d'en citer quelques-unes :

A fourth remedy by the mere act of the party injured, is the *abatement*, or removal, of nuisances. * * * * And the reason why the law allows this private and summary method of doing one's self justice, is because injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice (1).

Les constructions de l'Intimé étaient à n'en pas douter une nuisance :

All obstructions to navigation, whether by bridges, or in any other manner, without direct authority from the Legislature, are public nuisances. Lord *Hale*, in his treatise *de Portibus Maris*, notices the several nuisances which may be committed in ports as follows: Building new wharves or enhancing old; the straightening of the port by building too far into the water, &c. * * * *

All obstructions to navigation which are not occasioned by misfortune or inevitable accident, and without any fault on the part of the owner, and which are not authorized by the Legislature, are, of course, public nuisances, and as such, subject the authors of them to indictment. It is very well known to be settled law also, that all public nuisances are likewise liable to be *abated;* and the remedy by abatement is in all respects concurrent with that by indictment (2).

Tomlins' Law Dictionary :

It is said, both of a common and private nuisance, that they may be abated, or by those who are prejudiced by them, and they need not stay to prosecute for their removal; *Wood's* Inst.,

(1) Blackstone,3 vol., p. 5.

(2) Angell on Tide Waters, pp. 111 and 115.

443; but no man can justify the doing more damage than is necessary, or removing the materials further than requisite, 1 *Hawk.* P. C., c. 75-76; Tha., 680 (1).

1884
WOOD
v.
ESSON.
Fournier, J.

En résumé, l'action des Intimés ne peut pas être maintenue, 1o parce que leur titre même en supposant qu'il couvre l'endroit de la voie de fait (*tresspass*) ne leur a conféré aucun droit de faire des constructions qui puissent intervenir avec l'exercice du droit de navigation du public, et qu'une telle concession si elle leur eût été faite, serait illégale. Le terrain en question étant au-dessous de la basse marée, la Couronne n'a point dans ce cas, à moins d'autorité législative, le pouvoir d'aliéner les droits de navigation du public. 2o Parce que la preuve a établi que les travaux en question étaient une obstruction qui empêchait les steamers d'arriver au quai de l'Appelant; que cette obstruction constituait une nuisance publique que dans dans les circonstances de cette cause l'Appelant avait le droit de faire disparaître. Ces deux questions étant résolues en faveur de l'Appelant, il devient tout à fait inutile de s'occuper du rejet du plan dont il se plaint dans la règle *nisi*. En conséquence de ce qui précède je suis d'avis que l'appel doit être accordé avec dépens.

HENRY, J.:

The appellant is shown to have been, by himself and others, through whom he claims title, for over twenty years previous to the action in this case, in possession of a wharf property in the city of *Halifax, Nova Scotia*, which extends into the navigable waters of the harbour to which vessels, large and small, resorted to load and unload cargoes. The respondent is also shown to have title to another wharf property, situated to the south of that of the appellant and distant therefrom a sufficient distance to permit the vessels using both wharves to

(1) Voir Fisher's Digest—"Nuisance, Abatement of."

1884

WOOD
v.
ESSON.

Henry, J.

enter the dock between them, and lie as well on the south side of the appellant's wharf as on the north side of the respondent's.

Previous to the confederation of the British North American Provinces by the operation of the Imperial Act passed to effect that object, the respondent obtained a grant from the Local Government of a portion of the dock to the northward of his wharf, by which the fee simple in the land covered by the water of the dock was conveyed to him, and since the going into operation of that Act, the appellant obtained a grant of a part of the dock south of his wharf, but on condition that he should not erect any wharf or in any way interfere, by any erection on the granted land, with navigation. Disputes as to the true lines of the grants, and legal questions as to the construction of the descriptions in them existed and were considered on the trial, but it is not, in my opinion, necessary here to refer to them. The respondent, believing he was legally authorized to do so, commenced to build an extension of his wharf by causing piles to be driven in the dock on or within the northern line, as claimed by him, of the land granted to him. By the driving of the piles, and whilst they remained as driven, the dock, south of the appellant's wharf, became so narrowed and straitened that vessels could no longer enter it, or get to the south side of the appellant's wharf, as they had before done, and he caused the removal of the piles. For that act the present action was brought. Was the appellent justified in removing the piles in question as he did? He had, without doubt, the right of easement over the navigable waters of the harbour, for the ingress or egress of vessels to and from his wharf. He had no more. He could not exclude the public from the proper use of the dock for navigable purposes. From the fact that his wharf adjoined the dock, he had, how-

ever, special rights of easement, different from those of the general public, in the same way as a man residing in his house adjoining a highway, has the right of ingress and egress from and to the highway. If another should interfere with that right by an erection which deprived him of it, he would sustain special damages while others would only suffer as part of the general public, and would have to depend for redress on a prosecution against the offending party as for a public nuisance; unless, indeed, the nuisance was such as to create an impediment to the use of the highway by any one requiring such use. If a highway be fenced across and a party using it requires to go beyond the fence, he could legally remove it so as to pass through it. So with the occupier of the dwelling house—he would be justified in removing the obstruction to his common law right of using the highway; and so, I think, with regard to the obstruction to the wharf of the appellant, created by the piles driven and placed by the defendant, unless, indeed, he derived title to the land in which they were driven through the grant under which he claims such title.

The law in *England* as to navigable tidal waters has been long settled; and it is not now disputed that a grant of navigable waters, particularly those used in navigation, unless authorized by an Act of Parliament, is void and conveys no right or title. A patent from the Crown, say of a navigable part of the *Thames*, would in *England*, be adjudged void. The same doctrine and principles have always been applicable to this country and are founded upon a proper appreciation of, I may say, public common law rights, which are not to be affected, except by the consent of the public, by means of parliamentary action. I am not insensible to the injury that may result from this decision of the matter before us, to many who hold valuable properties in *Halifax* and elsewhere,

1884

WOOD v. ESSON.

Henry, J.

solely by the title given them by grants similar to that of the respondent, but sincerely regretting such results, I feel bound to declare the law as I consider it. Courts are only to administer the law as they find it in each case, without regard to expediency or consequences. Parliaments and Legislatures alone can change it.

For the reasons given, I am of opinion that the verdict and judgment below, as between the appellant and respondent, should be set aside and reversed, and a new trial granted, with the costs of the appeal to this court to the appellant.

GWYNNE, J.:

This action is one in tort brought against the above appellant and one *Mitchell*. At the trial whichtook place before a judge without a jury, a verdict was rendered in favor of the defendant *Mitchell* and against the defendant *Wood;* a rule *nisi* to set aside that verdict and judgment against the defendant *Wood* having been obtained by him and discharged by the Supreme Court of *Nova Scotia*, this appeal is from the rule and judgment of that court discharging the rule *nisi*.

One of the grounds stated in the rule *nisi* as entitling him to have the said verdict against him set aside and a new trial granted, was that he was entitled to a verdict under his eleventh plea, on the evidence given at the trial. *Wood* had pleaded to the action separately from the defendant *Mitchell*. The declaration consists of three counts.

In my opinion, the case may be disposed of wholly upon the defendant *Wood's* eleventh plea, which is pleaded to all the counts of the declaration, as well to the first, which is framed in trover, as to the other two counts, which are quite inappropriate, as it seems to me, to the facts appearing in the case. The short material substance of the eleventh plea, which, as I have said, is

pleaded to all the counts of the declaration, is that the defendant *Wood* was possessed of a wharf and premises situate in the harbour of *Halifax*, in virtue of which he and his predecessors in title had enjoyed for 20 years and upwards before this action, and had the right of having free and uninterrupted access from and to *Halifax* harbour, to and from the south side of said wharf with steamers and vessels, and of mooring and fastening the same while they took in and discharged cargoes, and for other purposes; and because certain piles and timbers placed by the plaintiffs in the waters of the harbor wrongfully obstructed and interfered with said rights, the defendant removed said obstructions, doing no unnecessary damage in that behalf, which are the alleged trespasses. Issue having been joined on this plea as the only answer offered thereto, the only question which arises thereunder was one of fact, namely, was it proved; for if it was, then the plea showed a justification in law of the alleged wrongs complained of by the plaintiffs.

That it was proved appears very clear, and it is not disputed that the defendant *Wood*, the now appellant, was possessed of a wharf as the plea alleges, which wharf is situate in the harbour of *Halifax*, adjoining a wharf of which the plaintiffs were possessed, and that the plaintiffs, by certain erections which they were causing to be erected for the extension of their wharf out further into the harbour in the navigable waters thereof, over which steamers and vessels navigating the harbor to and from the defendant's wharf were accustomed to pass, did in a very material manner obstruct access to the defendant's wharf, by driving down piles in the navigable waters of the harbour, in such a manner as to do special damage and injury to the defendant, by interfering with and preventing the access to his wharf, over the navigable waters of the

1884

WOOD v. ESSON.

Gwynne, J.

harbour, which he was entitled to have and enjoy. That under these circumstances the defendant had a right to do the acts relied upon in his 11th plea as justification of the acts complained of by the plaintiffs in their declaration, cannot, I think, admit of a doubt. This appeal, therefore, in my opinion, must be allowed with costs, and it is not necessary to express any opinion upon the other matters which were discussed, and a rule absolute for a new trial, with costs, to be paid to the defendant *Wood*, should be ordered to issue in the court below, such new trial to be between the plaintiffs and *Wood* alone; the verdict in favor of the defendant *Mitchell* not being interfered with thereby.

Appeal allowed with costs.

Solicitor for appellant: *L. H. Harrison.*

Solicitor for respondents: *J. Henry Phair.*