NEW BRUNSWICK ADMIRALTY DISTRICT

1925
Jan. 27.

HIS MAJESTY THE KING BY HIS ATTORNEY GENERAL FOR THE PROVINCE OF NEW BRUNSWICK.. } PLAINTIFF;

AGAINST

THE SHIP *WOLDINGHAM*.....DEFENDANT.

Shipping—Navigable river—Bridge—Authority to erect—Navigable Waters Protection Act—Interference with navigation—Damage to bridge by vessels—Burden of proof.

Held: That the right of navigation can only be extinguished by an Act of the Parliament of Canada, and without such authority no one can lawfully put into tidal waters or maintain there anything which is an obstruction or nuisance to the right of navigation.

2. That a bridge erected over a navigable river (the Miramichi), in violation of the provisions of the Navigable Waters Protection Act, and without legal authority, constitutes an interference with navigation and thereby becomes a public nuisance, and further that the owner of such bridge cannot recover the damages caused thereto by a person legally passing through the same in accordance with his rights as one entitled to the use of the river for navigation purposes.

3. That in any event, such owner could not recover unless a case of negligence and want of due seamanship was made out against the defendant.

4. That in view of the old and well established rule that the King neither gives nor takes costs, no costs ordered.

[*The Minnie Gordon,* [1885] Stockton (N.B. Adm. R.) 95 followed] (1).

ACTION by the Attorney General of New Brunswick to recover from the defendant ship the damages done to a bridge erected in 1913-14, by the province and its property, over the Miramichi river, a tidal river, by reason of the said ship coming into collision with the bridge whilst navigating down the river.

The province commenced to build this bridge without having complied with the provisions of the Navigable Waters Protection Act (R.S.C. 1906, c. 115). No plans were then filed with the Minister of Public Works or the Registrar of Deeds for the county. After certain excavations had been done and the caissons had been put in and pumped out and construction work was started, the attention of the Public Works Department of the Government

(1) *Note:* See Petition of Right Act, Expropriation Act, The Income War Tax Act where special provisions as to costs are made. See also Chitty, Prerogatives of the Crown, p. 310.

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of Canada was drawn to the fact that work was going on without authority of law. Thereupon application was made, and plans were filed with the said Public Works Department, and objection having been taken by certain parties interested in navigation on the river, a hearing was had before the then Minister of Public Works for the Dominion, but nothing final was done. No Order in Council was ever passed approving of the construction of the bridge as required by the provisions of the Navigable Waters Protection Act aforesaid.

St. John, N.B., December 16, 1924, and following days.

Action now heard before the Honourable Mr. Justice Sir J. Douglas Hazen L.J.A.

W. B. Wallace, K.C. and *Wm. Ryan* for plaintiff.

F. R. Taylor, K.C. and *C. F. Inches, K.C.* for the ship.

The facts are stated above, summarized from the reasons handed down by the judge, and also in the reasons themselves which follow.

HAZEN L.J.A., now this 27th day of January, 1925, delivered judgment.

(His Lordship first states the facts herein which are summarized above, refers to the pretentions of the parties and also to the above mentioned Act, R.S.C. 1906, c. 115, as amended by 9-10 Ed. VII, c. 44 and 8-9 Geo. V, c. 33, and then proceeds):

It is not alleged by the plaintiff that any such order ever was passed, and so far as the bridge is concerned it has been constructed without the site or plans being approved of, which are essential to its legal construction, and is therefore as it stands to-day in my opinion an unlawful structure.

Now I think it is beyond question that the bridge as erected constitutes an interference with navigation on the Miramichi River. Before its construction vessels could proceed up and down the river freely and wherever the depth of water would permit them to do so. Since the bridge has been constructed their passage is limited to the two comparatively small passageways in the vicinity of 100 feet wide, and this undoubtedly in the absence of legal authority for the construction of the bridge constitutes an

interference with navigation. It is of course clear beyond question that the right of navigation can only be extinguished by an Act of Parliament, and without the authority of Parliament no one can lawfully put into tidal waters or maintain there anything which is an obstruction or a nuisance to the right of navigation and it has further been decided that it is no excuse that the obstruction only occurs at certain states of the tide. It has been held in England that neither the Board of Trade as representing the unit interested in navigation, nor a board of surveyors —can legally authorize any erection in navigable waters which is a nuisance unless acting under special powers granted by Parliament, and no right to obstruct can be acquired by any length of user. The nuisance to navigation may be an actual erection in the soil as in the present case or it may be the mooring of floating structures with which we have no concern at present. I think it may reasonably be concluded that it was the intention by the Navigable Waters Protection Act that the Dominion Government when it gives its consent to plans requiring a drawbridge, assumes that it will be available for traffic at all times of the tide, i.e. (as contended by counsel for defendant), that where a bridge is put across a navigable river the draw must be available to be opened at all times, not merely at certain times of the tide, and that the bridge will be designed and protected so that the ordinary navigation of the river should not be held up, and this was the intention of the *Navigable Waters Protection Act* in providing that plans of the bridge should be filed with and approved by the Governor in Council. It was I think as contended by him obviously intended that the parties should provide a construction that would not interfere with navigation, and through which vessels could pass without undue hazard at all times of the tide. The bridge, however, apparently was built without due consideration as to the effect it would have upon navigation. It was constructed at an angle with the current, rendering approach to it much more dangerous than if it had been at right angles and especially dangerous considering the physical nature of the river, as about a mile and a half above two large branches of the river join, the waters running towards the southern shore and then across at an angle of the river to the northern shore.

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causing a dangerous condition at the point where the draw-bridge was provided. Before the bridge was built no readings were made or gauges taken of the current at the point where it was proposed to locate the draw and there was no scientific investigation as to the effect the currents would have on vessels passing through, nor to the efficiency of the width of the draw having regard to the size of the steamers that use the river passing up and down to the lumber mills.

In the case of *James* v. *Hayward* (1), it was held that if a new gate be erected across a public highway it is a common nuisance although it be unfastened, and that any of the King's subjects passing that way might cut it down and destroy it. Now a river is a highway as a road is, and any person placing a structure without authority from the Crown that interferes with the right of passage that all the King's subjects have along that highway may have the nuisance abated by any person whose right is interfered with. I do not for a single moment wish it to be understood that I am suggesting that any person could go there for the purpose of destroying the bridge, but if a person's lawful right of passage is interfered with, he has the right to abate the nuisance, and the person whose nuisance is abated would have no right of action. In his judgment in *Liverpool & North Wales Steamship Company, Limited* v. *Mersey Trading Company* (2), Neville J., in delivering judgment, said

> I will assume that the defendants could not in a court of law recover anything from the plaintiffs for the use of that which in the eyes of the law was a public nuisance.

And in that case it was held that the pier in question, being an unauthorized structure was an obstruction to navigation and a public nuisance, and consequently no statutory rights arose in favour of either the defendants or the public. See also *Orr Ewing* v. *Colquhoun* (3). The case of *Wood* v. *Esson* (4) is in point and I think this case falls within its authority. In that case Ritchie C.J., p. 242, said in the course of his brief judgment:—

> There can be no doubt that all Her Majesty's liege subjects have a right to use the navigable waters of Halifax Harbour and no person has a legal right to place in said harbour below low water mark any obstruction

(1) 79 Eng. Rep. 761.
(2) [1908] 2 Ch. D. 460.
(3) [1876-7] 2 A.C. 839.
(4) [1883] 9 S.C.R. 239.

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 obstructions so placed by plaintiffs and specially damnified thereby would have a legal right to remove such construction to enable him to navigate the said waters by his vessels and steamers and bring them to his wharf.

Strong J. stated that the title to the soil did not authorize the plaintiffs to extend their wharves so as to be a public nuisance, which upon the evidence such an obstruction to the harbour amounted to, for the crown cannot grant the right to obstruct navigable waters. Nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance. The person may not have the right to abate a nuisance unless he has shown that he is actually injured by it, but in this case the plaintiff had a steamer above the bridge and he undoubtedly in my opinion sustained special injury as the bridge interfered with his course going down the river. According to the plaintiff's own contention in order to come down in safety he might have to wait for a whole tide before doing so and could not come down at all without going through the comparatively narrow space left as a draw, and if anything happened to the bridge in the act of a steamer going down the river and going through the draw it is not liable in any case unless it went with absolute negligence, running into it without any ordinary care at all.

Something was said with regard to the great benefit the bridge was to the public and that the obstruction might be justified on the ground that the public benefit to be derived from it outweighed the interference it causes. But in the case of the *Queen* v. *Moss* (1), it was held that an obstruction to navigation constitutes a public nuisance though a very great public benefit and the obstruction of the slightest possible degree.

I am of opinion that the bridge was constructed without legal authority, that it undoubtedly constitutes an interference with navigation and thereby becomes a public nuisance and that that being the case the plaintiff cannot recover where the defendant was legally passing through the draw in accordance with his rights as one entitled to the use of the river for navigation purposes. However, whether

(1) [1896] 26 S.C.R. 322.

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this is the case or not, the plaintiff cannot possibly recover without showing that there was negligence on the part of the defendant.

Counsel for the plaintiff, rested his case largely on the authority of the *Harbour Commissioners of Montreal* v. *The Ship Albert M. Marshall* (1). This was a case brought against the *Albert M. Marshall* for colliding with a dredge that was lying at anchor in the harbour of Montreal and the judgment referred to was that of the local judge in Admiralty. This case confirmed the general rule that a vessel under way is *prima facie* in fault for a collision with a ship at anchor. But I think there are very obvious differences between a ship at anchor and a bridge permanently constructed for a long distance across a navigable river. In the case of the Marshall there was 600 feet of clear space on one side of the dredge and 300 feet on the other. The colliding vessel seeing the dredge's lights might easily have passed to one side or the other, and it seems to me there is no analogy between a case of this sort and the one under consideration, and I cannot, acting on the presumption that a vessel under way is *prima facie* in fault for the collision with a ship at anchor, hold that the *Woldingham* was liable in this case without negligence on its part being proved.

In the case of the *Minnie Gordon* (2) that vessel under command of a pilot was entering the Miramichi and came into collision with a lightship that was placed there for the safety of navigation. It was held on the evidence that no fault was attributable to the *Minnie Gordon,* that it was a case of inevitable accident and the case was dismissed. In the case of the *Bolina* (3) Dr. Lushington says

> With regard to inevitable accident the onus lies on those who bring a complaint against the vessel and who seek to be indemnified. On them is the onus of proving that the blame does attach upon the vessel proceeded against.

In the *Marpesia* (4) it was held that where in the case of collision the defence is inevitable accident the onus of proof lies in the first instance on those who bring the suit against the vessel and seek to be indemnified for damage sustained, and does not attach to the vessel proceeded against until a

(1) [1908] 12 Ex. C.R. 178.
(2) [1885] Stockton (N.B. Adm. Rep.) 95.
(3) [1844] 3 Note of Cas. 208.
(4) [1872] L.R. 4 P.C. 212.

prima facie case of negligence and want of due seamanship is shown.

I therefore hold that under the circumstances of this case, apart from the legal question which I have previously discussed, the plaintiff could not recover unless a case of negligence and want of due seamanship was made out against the defendant.

Now having heard the evidence and considered it, I am of opinion that there was no evidence of negligence on the part of the defendant.

(His Lordship here gives his reasons for so finding and proceeds.)

It will be seen therefore that in bringing the vessel down from Sullivan's Wharf the pilot pursued the practice that might almost be regarded as the established practice on the river, since the bridge was put in. I cannot find where he was negligent in any respect. After turning the vessel bow on, he headed straight for the opening, and would have succeeded in passing without danger had not the yaw against which I cannot see how he could guard, taken place. He states in his evidence that the vessel was going as straight as an arrow until it came to the bridge, and that he could not put her in the draw, which is very narrow, any better. I am not satisfied myself that the draw opening having regard to the size of the vessels that go up and down the Miramichi River, is sufficiently wide for the purpose, but that is a point which I do not propose to determine in the present case.

To my mind, having regard to the way in which the bridge was constructed, to the manner in which the current ran angling across it, the accident was inevitable and that the negligence of the plaintiff in constructing a fender that was not sufficiently substantial or well fitted for the purpose for which it was intended contributed very largely to the damage which occurred. Had it been substantial enough to resist the impact of the side of the steamer, no harm would have occurred to the bridge.

There is an old and well established rule that the King neither gives nor takes costs. I would, if the case were one between two subjects, dismiss it with costs to be paid by the plaintiff but there is no purpose in my doing so, for payment could not be enforced. In the case of the *Minnie*

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Gordon, ubi supra, Judge Watters suggested that upon the matter being properly represented no doubt the defendant's costs would be paid by the Crown, and I commend this suggestion to the counsel in the present case. The same remarks are intended to apply to the defendant's counter-claim.

Judgment accordingly.