
HIS MAJESTY THE KING.....PLAINTIFF;

VS.

BELL LUMBER COMPANY.....DEFENDANT.

1931

Sept. 30.
Dec. 24.

Waters and streams—Riparian properties—British Columbia law—Non-navigable stream—Right of owner to bridge on same—Floatation of logs—Right to recovery for damage to bridge—"Obstruction"—Water Act B.C., sec. 84.

Held, that where a person is the owner of land in the province of British Columbia through which a non-navigable stream flows, he may legally build a bridge across the stream from one part of his property to the other without the necessity of obtaining the permission or authority of the Provincial Government. That such a bridge, though built with a pier in the centre of the stream, leaving a passage of 50 feet and over on each side thereof, is not an "obstruction" within the meaning of the Water Act of British Columbia.

2. That anyone floating logs or poles down such a stream must take the necessary precautions to avoid causing damage to such a bridge by the floatation operations; and the Court in this case finding defendant negligent, condemned it to pay damages.

1931

THE KING v. BELL LUMBER CO.

INFORMATION by the Attorney-General for Canada to recover damages caused to certain lands belonging to plaintiff and to a bridge built across a stream flowing through it and caused by the floatation of poles down the stream in question.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Vernon, B.C.

T. Todrick for plaintiff.

Gordon Lindsay for defendant.

The facts and questions of law raised are stated in the Reasons for Judgment.

THE PRESIDENT, now (December 24, 1931), delivered the following judgment.

The Crown, in the right of the Dominion of Canada, represented by the Soldier Settlement Board, is the owner of certain lands in the Osoyoos Division of Yale District, British Columbia. One Sturn, a settler under the Soldier Settlement Act, is the occupant of the lands under an agreement of sale and purchase, made and entered into under the provisions of that Act. Through these lands flows the Shuswap River. The portion of such lands as are material in this proceeding, is an island, dividing the river into two channels known as the east and west channels respectively; the land comprising the island is partially cleared and cultivated, and there Sturn resides. Across the east channel, Sturn had constructed a bridge which afforded him the means of going on and off the island portion of the lands occupied by him. The bridge was of wooden construction, and besides the abutment piers on the land at either end, there was a central pier located near the centre of the stream, there being on one side of the pier a clear passage of about fifty feet between it and the shore line, and a clear passage of about sixty feet on the other side. The central pier was constructed of piles driven vertically into the bed of the river, or possibly just resting on the bed of the river, then boxed in, and filled with stone. This central pier was, I am inclined to think from the evidence, quite substantial and strong.

In May 1927, the respondents proposed driving logs down the river. It was in contemplation that the drive

would proceed down the west channel of the river, and with this in view that channel had been improved for driving purposes ,and a sheer was constructed some distance up the stream to divert the logs down the west channel, in order to prevent their going down the east channel. When the log drive came down the river the sheer broke, and the logs floated down the east channel, causing damage to the bridge, it is claimed, and also erosion of part of the plaintiff's lands along the west channel, some 400 yards in length and seventy yards in width. This damage to the bridge and the land, it is claimed, was due to a jam of logs at the bridge and extending up-stream for some distance. In September following a considerable quantity of cedar poles belonging to the defendant came down the river, and another jam occurred at the bridge, remaining there for a week, and further injuring it. This jam, it is claimed, caused an erosion of a portion of the land contiguous to the east channel, and altogether about three and a half acres were, it is alleged, washed away. The defendant alleges that it was not its intention to drive these poles down the river, but that owing to a freshet the poles escaped from a boom some distance up the river. The distinction between logs and poles as I understand it, is, that the latter are of much longer lengths than logs, and are liable to come down stream as a " sweeper," that is, broadside the stream, and thus more liable, particularly if striking any obstruction, to stop the forward movement of the drive and cause a jam.

It is conceded that the bridge was damaged in consequence of the jams of logs and poles at the bridge, and while it is not conceded by the defendant that a certain quantity of land contiguous to the east and west channel was washed away in consequence of flooding caused by these jams, still I have no difficulty in concluding that the alleged erosion did occur at the time alleged and as a consequence of the jams of logs and poles at the bridge. The bridge was very substantially damaged. A very large hole was formed in front of the central pier, and it was undermined, the base shifting about four feet down the stream thrusting the top of the pier upwards the stream, thus causing the bridge structure to sag and to be put out of alignment, and for a time it was out of use. The evidence

1931

THE KING v. BELL LUMBER CO.

Maclean J.

as to the estimated acreage of land washed away is necessarily based on the opinion of Sturn, who alone would have accurate knowledge of the shore line surrounding the island prior to the erosion. I think Sturn was a credible witness, not inclined to exaggerate the damage done, and I have no doubt his statement of the bounds of his lands in relation to the east and west channel before the erosion occurred, is to be relied upon. Furthermore, I accept the computation made by several of the plaintiff's witnesses as to the quantity of soil washed away. There is no evidence to displace the effect of the evidence given upon behalf of the plaintiff upon this point.

Counsel for the defendant submitted that the bridge was an unlawful obstruction under the statute law of British Columbia, or alternatively a nuisance at common law, and that the defendant consequently would not be liable for damages thereto; and the defendant in part relies on s. 84 of the Water Act being Chap. 271, R.S.B.C. (1924). The plaintiff contended that the banks and the bed of the stream belonged to the plaintiff,—but not the water, by virtue of a provision of the Water Act—and that therefore the bridge was lawfully erected.

It is agreed that the civil and criminal law of England, as the same existed on November 19, 1858, became the law of British Columbia (R.S.B.C. 1924, Chap. 80), and is still the law of British Columbia, save as affected by statutory enactment.

By the law of England, as of 1858, riparian owners, whose lands bordered upon non-tidal streams, whether navigable or not, owned the bed and the banks of such stream and the waters thereof "ad medium filum aquae". Whatever judicial doubt may have been expressed in Canada as to the application of this doctrine to navigable waters, it seems to be an accepted doctrine in respect of unnavigable waters, in all the provinces of Canada, except where restricted by statute. It is conceded that the Shuswap river is not navigable. There is no statute of British Columbia which restricts the application of the doctrine, which I have just mentioned, except that the right to the use of the water of any stream is declared by the Water Act, to be vested in the Crown in the right of the Province. Therefore it would follow, I think, as con-

tended by plaintiff's counsel, that in respect to non-navigable waters at least, the banks and the bed of the stream belong to the person through whose land the stream flows, or if the stream divides two properties, then to the riparian proprietors, the right of each extending to the centre of the stream; and were it not for the Water Act, the waters of such streams would belong to the proprietary owners. As I understand it, the case turns, as a matter of law, upon the right of the settler—a tenant at will of the Crown—to erect the bridge, without obtaining any authority or permission therefor from the Provincial Government. The stream is non-navigable under the common law of England and the Canadian cases in the Courts of last resort. In this country non-navigable waters are affected by the common law right of the owner in possession of the land on both sides of the body of water; he has the right to erect structures thereon or over for the convenient use of his property subject to any statutory limitation of the common law rule, and subject to any statutory enactment by the provincial legislature in respect of the use of the water as a means of transportation of logs, etc. It would seem therefore, that the bridge was lawfully constructed unless there be some statutory enactment to the contrary.

The bridge apparently was constructed without obtaining any authority from any provincial authority; the plaintiff contended that there was no provincial statute requiring governmental authority before erecting the bridge, and my attention was not directed to any specific statutory enactment requiring such authorization, except it be S. 84 of the Water Act, which enacts that no person shall obstruct any stream without lawful authority. In the absence of any statute specifically requiring authority or permission to erect a bridge over any stream, it seems to me that Sec. 84 of the Water Act, was intended to mean just what it says, that no person shall obstruct any stream, and that it is always a question of fact, whether or not there is an "obstruction". In a sense any bridge pier in a stream is an obstruction, but the statutory "obstruction" must I think be reasonably construed. Here, there was a clear passage of water of about 50 feet on one side of the central pier, and 60 feet on the other side. It was possible of course to construct a bridge across the stream without a

1931

THE KING v. BELL LUMBER CO.

Maclean J.

central pier, but this would be more expensive and hardly to be expected of one in Sturn's position, who had to have a bridge, and who probably had to build it himself. It is true, I believe, that a bridge on the same site had been previously destroyed by a drive of logs, but I was not informed as to the circumstances of the occurrence. It seems to me that this pier was not an obstruction in the contemplation of the statute. There was sufficient room to drive logs on either side of the pier, entailing of course more care and supervision than if the pier had not been there at all, but still affording sufficient room for the passage of logs. There doubtless were many points on the stream in question where the passage of logs would be held up, and their continued passage would only be ensured by their being released by men engaged for that purpose; it is possible also—although I recall no evidence on the point—that at many points the stream was not more than fifty or sixty feet wide. Drives of logs had gone under the bridge before, and also there was the alternative route down the west channel of the stream. I think therefore that the stream pier did not constitute an "obstruction" within the statute. So far as the case turns upon fact established by the evidence, the bridge did not constitute an obstruction to the floating of logs and poles over the water.

The plaintiff contended that the defendant had no right to use the stream for driving logs and poles, and was therefore a trespasser and liable for damages caused thereby, without proof of negligence. Section 4 of Chap. 271, R.S. B.C. (1924), of the Water Act, vests in the Crown, in the right of the Province, the unrecorded water in any stream, and it enacts that no person shall divert or appropriate any water except under the provisions of the Water Act. By the interpretation clause "Divert or diversion" means any taking or removing of water from any stream and shall include a retardation or acceleration of the flow thereof. A licence is apparently required before one can use the water, and one of the purposes for which licences may issue is for "clearing-streams purpose"; this is defined as meaning "clearing and improving of the bed and banks of streams for the better driving and booming of logs, and other timber products, and the use of the water of the streams for such driving and booming." Section 122 enacts that a licensee

1931

THE KING v. BELL LUMBER CO.

Maclean J.

shall not have the exclusive right to the use of that portion of the stream to which his licence extends, but that all persons shall have the right to float and transmit sawlogs, and other timber down the stream, subject however to the payment of tolls to the licensee, and the section provides how the tolls are to be ascertained. It appears from this, that if a licensee cleared and improved the bed and the banks of a stream for the better driving and booming of logs, he was permitted by the statute in consideration of such work, to exact tolls from other users of that same portion of the stream. Section 120 provides that the licensee shall not interfere with any bridge already lawfully erected over any stream. The defendant it seems was unlicensed. Subsequent to the hearing and on motion I allowed the defendant to put in evidence a licence issued to the Spallumchen Development Company Limited, dated March, 1922, for clearing-stream purposes, and to cover the period of twenty years from July, 1921, and this licence is referable to that portion of the Shuswap river here in question. It is my interpretation of the statutory clauses to which I have referred that the defendant was at liberty to drive logs down the stream, but whether it paid tolls or tolls were exacted of it, to or by the licensee, is of no importance here; neither is it of importance that the licence was voidable but not voided. I think therefore the defendant had a right by statute to drive logs down the stream, and in the area to which the licence mentioned was appurtenant.

Further, I am inclined to think that if the bridge was constructed by Sturn—the tenant of the Crown—in excess of his right and really constituted a nuisance at common law, it sounds in tort, and the Crown can only be held liable for tort under Dominion legislation. The Provincial legislature would not have authority to take away the prerogative of the Crown in the right of the Dominion to immunity in an action of such a nature, and the Dominion statute creating a liability against the Crown for torts in respect of public works is not applicable here. At the present time, it would appear that the Dominion Crown is only liable for the acts of its officers on or about a public work, and of course the bridge in question is not a public work within the Public Works Act, R.S.C. Chap. 166.

1931

THE KING v. BELL LUMBER CO.

Maclean J.

I think there is sufficient evidence to establish negligence on the part of the defendant. We may start with the fact that it was admitted by Livland, the defendant's foreman, that had the sheer been constructed with sufficient strength it would not have broken, and the log drive would have gone down the western channel. Logs were permitted to pile against the bridge sometimes six or more logs high, sometimes right across the stream, and extending up the stream a considerable distance, this lasting sometimes four or five days or more. In the western channel there was a log jam some sixteen or eighteen feet high and which had to be removed by blasting. It seems to me no serious effort was made to prevent these jams, and the defendant did not assign sufficient man-power to prevent the jams, or minimize their effect upon the bridge and the normal flow of water. There never was more than one man at the bridge to prevent jams forming. Some of the defendant's own witnesses testified that it was possible to prevent such jams. I am inclined to believe the evidence of Mrs. Sturn who stated that in September, the pole drive was allowed to collect at the bridge and there remain for a week, and that Livland took away men who had been trying to break the jam, remarking that the bridge would go anyway and he would have to repair it; this Livland did not deny. I cannot escape the conviction that the defendant might have avoided the jams of logs or poles at the bridge by employment of sufficient men, thus ensuring a normal flow of the logs down the stream and thus also avoiding any flooding. The defendant's employees seem to have acted in a casual and indifferent manner, contrasting greatly with the conduct of Sturn who with other men worked strenuously in attempting to break the jams, and thus avoid damage to the property he occupied. I would refer to the case of *Ward* v. *Grenville* (1). The defendant knew of the effect of the central bridge pier upon the width of the waterway for transporting logs, before using the water on the occasion in question. He therefore took his chances and must be held liable for any damage occasioned to the bridge and the land.

(1) (1902) 32 S.C.R. 510.

1931

THE KING v. BELL LUMBER CO.

Maclean J.

There remains for consideration the quantum of damage. The plaintiff, at the trial, claimed that the cost of restoring the bridge was $377.50; that the value of the three and a half acres of land washed away on the east side of the island was $50 per acre; and that $15 per acre was the value of the seven acres of land contiguous to the west channel that was washed away. The defendant paid into Court $125 in respect of damages and $75 in respect of costs, which it pleads is sufficient to cover any damages suffered by the plaintiff.

Upon the evidence I think I must find the plaintiff entitled to damages in the amount claimed in his Information $600. The reconstruction of the bridge might have been accomplished more cheaply by others than by Sturn, but there is no evidence upon which I might safely proceed to reduce the amount which Sturn says it cost to restore the bridge. The defendant's estimate of the cost of reconstruction is not, in my opinion, at all reasonable or sufficient. Respecting the matter of the amount of damage done to the land, the evidence tendered on behalf of the defendant, does not afford sufficient grounds for declining to give effect to the plaintiff's evidence upon this point. Altogether I allow the plaintiff damages in the amount of $600; and costs will follow the event.

Judgment accordingly.