1916
Dec. 23

IN THE MATTER OF THE PETITION OF RIGHT OF

JOHN ARSENAULT, OF ALDER POINT, IN THE COUNTY OF CAPE BRETON,

SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Waters—Navigable river—Damage to wharf—Obstruction to navigation—Nuisance—Public work.

Suppliant brought his petition to recover damages sustained in respect of a wharf built between high and low-water mark in navigable water, without authority from the Crown therefor.

Held, following *Piggott v. The King* (53 Can. S.C.R. 626, 32 D.L.R. 461), that the case was not one falling within the classes of cases cognizable under sub-sections "a" and "b" of sec. 20, of *The Exchequer Court Act*, which only deal with questions of compensation for land taken, and injurious affection resulting therefrom.

2. That the damages complained of did not occur on a public work, as provided by sub-sec. "c" of sec. 20 of *The Exchequer Court Act* (R.S.C. 1906, c. 140).

Semble, that where a small wharf, not costing more than $1,000, and built without the approval of the Governor-in-Council, interferes with navigation, it becomes a nuisance, and may be removed and destroyed under secs. 4 and 5 of ch. 115, R.S.C. 1906, as amended by 9-10 Ed. VII. c. 44.

PETITION OF RIGHT for damages alleged to have arisen out of the negligence of the Crown servants whilst engaged dredging the channel at Little Bras d'Or Gut, Cape Breton.

The case was heard at Sydney, C.B., May 30, 31, 1916.

N. A. Macmillan, K.C., for suppliant and *J. A. Gillies*, K.C., for respondent.

MR. MACMILLAN: The suppliant claims damages for the destruction of his wharf property at Alder Point in the County of Cape Breton, by reason of a dredge belonging to the Public Works Department excavating a channel so near his wharf, that the ballast of the wharf subsided into the channel, with the result that the superstructure was entirely carried away, leaving only portions of the upper tiers of timber suspended above the water. The bucket

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of the dredge came in contact with the structure and tore away some of the timber, thus making the work of destruction complete.

He submitted that the facts of the case came within the wording of sub-sec. (*b*) of sec. 20 of *The Exchequer Court Act*. *Létourneux v. The Queen*.[1]

In regard to the suppliant's title, he was in undisturbed and continuous possession of the locus for over 20 years and his predecessors in title, almost from time immemorial, and that *McGee v. The King*,[2] holds "That the possession of a predecessor in title may be invoked in order to complete the term of prescription."

He maintained that half of the wharf was on the foreshore, that is the space between ordinary high and ordinary low tides, and the other half was on dry land. The latter part is covered by the suppliant's title deed. The title to the foreshore is by the decisions of the Privy Council, vested solely and entirely in the Crown as represented by the Provincial Government. The Federal authorities could not oust the suppliant or deprive him of his possession, except through the representatives of the Local Government, and if the Department of Public Works required the land, it would be obliged to purchase it in the ordinary way from the Government of Nova Scotia.

The suppliant felt secure in his title, since a grant could issue to no other person than himself.

Sec. I, R.S.N.S. 1900, ch. 25, reads as follows:

"The Governor-in-Council, may, upon application there-
"for in writing to the Commissioner of Crown Lands:

"(*a*) Give a grant from the Crown to any persons of
"the ungranted.....beach or foreshore upon the
"coast of the Province."

and sec. 3 reads :

"No grant of water front shall be issued to any other
"persons than the owner of the land on which such water
"front abuts, without the consent in writing of such owner."

He maintained that the Crown, as represented by the Federal Parliament, has no property whatever in the locus

[1] 7 Can. Ex. 1; 33 Can. S.C.R. 335. [2] 7 Can. Ex. 309.

as it does not constitute navigable water, this structure barely skirting the shore and not being in any way in the track of shipping, the channel being also 20 feet distant.

The suppliant's possession is undisputed, and an action for trespass at common law would lie against any person unlawfully entering upon it—See *Topham v. Dent.*[1] *Halsbury's Laws of England.*[2]

The Crown, as represented by the Federal Government, has no property in the bed, and has only property in the part of the water that is navigable. But the matter is settled beyond question by ch. 44, Statutes of Canada, 1910, being an *Act to amend the Navigable Waters Protection Act*, which provides that any wharf, except small wharves, costing less than one thousand dollars, "may be removed and destroyed."—but only—"under the authority of the Governor in Council."

There was no evidence that this structure interfered with navigation, and it was not claimed at the trial that any order-in-council had been passed for its removal. Even if the suppliant was a trespasser, the respondent's servants could not wantonly destroy his property.[3]

The dredging was the primary cause of the accident, the district engineer having admitted that the natural slope would have extended within the wharf and caused the ballasting to empty into the channel.

The suppliant was not bound to put his property in repair upon discovering the damage.

Even if ice-floes were responsible for part of the injury, if it were not for the unlawful acts of the respondent, in deepening the space between the channel and the shore, it would have been impossible for ice of a size sufficient to injure the structure to reach it without grounding.

Mr. Gillies contended that as the King can do no wrong at common law, the suppliant had no conceivable action except by statute, and the subject of this action does not come within the provisions of Sec. 20 of *The Exchequer Court Act*, and therefore the court had no jurisdiction.

[1] (1830) 6 Bing. 515
[2] Vol. 27, p. 851.
[3] *Brochu v. The King*, 15 Can. Ex. 50

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He submitted that these dredging operations at Little Bras d'Or are not "public works." That *Paul v. The King*[1] is a case directly in point. See also *Hamburg American Packet Co. v. The King*,[2] which confirmed a judgment of the Exchequer Court, and which decided that the channel of the St. Lawrence River, although made a great commercial and navigable highway through being deepened by the Department of Public Works by dredging operations, is not a "public work". This was an analagous case. He cites *Piggott v. The King*;[3] *Paul v. The King*;[4] *Chamberlin v. The King*;[5] *King v. Le Francois*;[6] *LaRose v. The King*.[7]

Mr. Macmillan, in reply, referred to sec. 3 of ch. 39, R.S.C. 1906. He submitted that the damage in question was committed while a Government dredge, under the charge of Government officials, was performing a work for the public benefit and in the interests of the public under the control and direction of the minister.

See definition of "public work" in Audette's Practice.[8]

He maintained that in ascertaining the jurisdiction of the court in cases of this kind, sec. 20 of *the Exchequer Court Act* and the provisions of chapter 142 of the Act respecting proceedings against the Crown by petition of right must be read together.

In *Price v. The King*, 10 Can. Ex. 105, it was distinctly held that it is sufficient to bring a case within the statute if the cause of the injury is or arises on a public work.

See the case of *Cleland v. Berberick*,[9] also *Tweedie v. The King*.[10]

In regard to the suppliant's neglect to immediately make repairs after the injury to his wharf was discovered, he submitted that the process of sliding or subsiding of the bank into the channel was a slow and gradual one, and it was impossible to ascertain to what length the sliding or subsiding would reach, and it would be only a waste of

[1] 38 Can. S.C.R. 126.
[2] 33 Can. S.C.R. 252
[3] 38 Can. S.C.R. 501.
[4] 38 Can. S.C.R. 126
[5] 42 Can. S.C.R. 350.
[6] 40 Can. S.C.R. 431.
[7] 31 Can. S.C.R. 206.
[8] Pp. 124, 128, 131, 244.
[9] 36 O.L.R. 357, 29 D.L.R. 72.
[10] 27 D.L.R. 53, 52 Can. S.C.R. 197.

money to make repairs before the slope had become permanently formed.

AUDETTE, J. (December 23, 1916) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $1,900 as representing certain alleged damages to his wharf, at Alder Point, on the shore of Little Bras d'Or, Cape Breton, N.S.

He alleges that, in 1912, while the Government dredge "Cape Breton" was engaged dredging the channel at Little Bras d'Or Gut, in close proximity to his wharf, through the negligence of the respondent's servants and agents in charge of the dredge, his wharf was damaged, *inter alia*, by the bucket of the dredge coming into contact therewith and hooking some timber of the outer wall of the wharf, the whole resulting in his suffering damage to the amount claimed.

The action is in its very essence one in tort, and such an action does not lie against the Crown, except under special statutory authority; and, the suppliant, to succeed, must bring his case within the ambit of either sub-sec. (*b*) or sub-sec. (*c*) of sec. 20 of the Exchequer Court Act.

If the suppliant seeks to rest his case under sub-sec. (*b*) of sec. 20, I must answer his contention by the decision in the case of *Piggott v. The King*,[1] wherein His Lordship the Chief Justice of Canada, says : "Paragraphs (*a*) and "(*b*) of sec. 20 are dealing with questions of compensation "not of damages."

"Compensation is the indemnity which the statute "provides to the owner of lands which are compulsorily "taken under, or injuriously affected by, the exercise of "statutory powers."

Therefore, it obviously follows that the case does not come under sub-sec. (*b*) of sec. 20.

Does the case come under sub-sec. (*c*) repeatedly passed upon by this Court and the Supreme Court of Canada ?

To bring this case within the provisions of sub-sec. (*c*) of sec. 20, the injury to property must be : 1st, On a public work; 2nd, There must be some negligence of an officer or

[1] 53 Can. S.C.R. 626, 32 D.L.R. 461.

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servant of the Crown acting within the scope of his duties or employment; and 3rd, The injury must be the result of such negligence.

The wharf in question, taking the measurement from the suppliant's written argument, is given at 126 feet long, with a width of 40 feet, half of which is built on the foreshore, the suppliant's title taking him to the high water mark only.

The damaged part of the suppliant's wharf is erected on the foreshore between high and low water mark. He has no grant from the Provincial Government for the bed of the foreshore, and he has no permission to build a wharf, or to put up erections of any kind between high and low water mark; and that right, the property being in tidal and navigable waters, can only be obtained from the Federal Crown under the provisions of ch. 115, R.S.C. 1906, as amended by 9-10 Ed. VII, ch. 44.

The question of prescription or of the Statute of Limitations does not arise, the suppliant not having been in possession long enough as against the Crown.

Furthermore, the suppliant who by his petition of right claims damages to his wharf to the amount of $1,900 cannot contend as he does, that his case is "*settled*" by the last paragraph of sec. 4, of 9-10 Ed. VII, ch. 44, (above cited as amending ch. 115, R.S.C. 1906) which reads as follows:

"The foregoing provision of this section shall not apply "to small wharves not costing *more than $1,000*, or groynes "or other bank or beach protection works, or boat houses, "*which do not interfere with navigation.*"

This is mere irony. It is not in the mouth of the suppliant who has been heard as a witness, and adduced evidence by other witnesses, to prove on the one hand that he suffered damages to his wharf in the sum of $1,900, and on the other hand say I do not come within the ambit of ch. 115, R.S.C. 1906, as amended by 9-10 Ed. VII, because my wharf did not cost more than $1,000. *Qui approbat non reprobat.*

However, this last objection is also unfounded in view of the words of the statute in respect of these small wharves, "*which do not interfere with navigation*". And assuming the Crown did damage this wharf in the course of enlarging

the channel opposite the suppliant's property, on the space between high and low water mark, these works and such damage, if any, would establish beyond question that the wharf is an interference with navigation, which is a right paramount and superior to all on navigable waters.

It is well said by Mr. Justice Strong, in the case of *Wood v. Esson*,[1] "that nothing short of legislative sanction can "take from anything which hinders navigation the charac- "ter of a nuisance." This language is quoted with approval by Mr. Justice Martin in the case of *Kennedy v. Surrey*.[2]

Is the Crown liable as against a person having no permission or authority from the Federal Government, to erect a wharf in navigable and tidal waters between high and low water, for undermining, by work done in the interests of navigation, such wharf, an unauthorized erection on the foreshore?

In the *Thames Conservators v. Smeed*,[3] A. L. Smith, L.J., expressed the opinion that *prima facie* the words "the 'bed of the Thames,' denote that portion of the river which in the ordinary and regular course of nature is covered by the waters of the river". And see per Chitty, L. J., at p. 353. If that definition is adopted here, the suppliant is in no better position than an encroacher upon a highway whose right has not ripened into adverse possession under the statute and whose erections are therefore nuisances which can be abated. Lord Justice Smith at p. 343 of the case last mentioned says that dredging powers were given to the Thames Conservators for navigation purposes without compensation to private owners for having their rights interfered with. *A fortiori* would it not appear that if *lawful owners* cannot claim compensation for damage done under an act not giving them compensation, one whose asserted right has not ripened into possession cannot? In short, can one who is still in the category of a trespasser or maintainer of nuisance claim damages for the removal of the nuisance?

In the case of *Dimes v. Petley*,[4] it was held that the defendant could not maintain an action for damages against the owner of a ship which damaged his wharf, the

[1] 9 Can. S.C.R. 239 at 243.
[2] (1905) 10 Can. Ex. 29 at 40.
[3] [1897] 2 Q.B. 334 at 338.
[4] 15 Q.B. 276.

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wharf being an obstruction to navigation, although it was held that the plaintiff could not abate the nuisance unless it did him a special injury. Applying the first principle to the suppliant's case, can it not be said that if the suppliant built out his wharf so near the channel as to make it liable to injury whenever the channel required to be dredged, his own act was the *fons et origo malorum*? How can the court give damages to a suppliant who comes into court as a trespasser whose grievance arises from his own original wrong in encroaching upon the rights of the public? See on this point the later case of *Liverpool, &c. S.S.Co. v. Mersey Trading Co.*[1]

In the result it must be found that the wharf in question suffered from toredo worms, from the large clampers of ice hitting it, as shown in the evidence, and also that the dredging made by the Crown, for the want of a longer slope, has provoked sliding of earth which has undermined the front of the wharf, that part erected between high and low water.

This injury caused by undermining is a damage that is recoverable against the Crown only if it can be brought within the provisions of sub-sec. (*c*) of sec. 20 of the Exchequer Court Act, as above mentioned.

The injury complained of did not happen *on* a public work, and following the decisions in *Chamberlin v. The King*;[2] *Paul v. The King*;[3] *The Hamburg American Packet Co. v. The King*;[4] and *Olmstead v. The King*[5] I must find that the suppliant is therefore not entitled to recover.

The case of *Letourneux v. The King*[6] and *Price v. The King*[7] relied upon by the suppliant's counsel have since been overruled by the decisions of the Supreme Court of Canada cited above.

For judicial observations upon the merits of sec. 20 of the Exchequer Court Act, see comments by Mr. Justice Idington, Mr. Justice Brodeur, and Mr. Justice Sir Louis Davies in *Piggott v. The King*;[7] and *Chamberlin v. The King*.[8]

[1] [1908] 2 Ch. D. 460 at 473 affirmed in [1909] 1 Ch. 209.
[2] 42 Can. S.C.R. 350.
[3] 38 Can. S.C.R. 126.
[4] 33 Can. S.C.R. 252.
[5] 53 Can. S.C.R. 450, 30 D.L.R. 345.
[6] 33 Can. S.C.R. 335.
[7] 10 Can. Ex. 105.
[8] 53 Can. S.C.R. 626, 32 D.L.R. 461.
[9] 42 Can. S.C.R. 350 at 353 & 354.

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This narrow construction of sub-sec. (*c*) of sec. 20 of the Exchequer Court Act is now finally accepted, and may be the whole trouble arose in the confusion and error of the draughtsman who undertook the drawing of the section. Should not the words "on any public work", in sub-sec. (*c*) of sec. 20, have been placed at the end of paragraph c. instead of where they are? In the result the Crown would in such a case have been liable in a rational manner for damages resulting from the negligence of its servants acting within the scope of the duties and employment *on* a public work, and it would not be necessary that the injury be suffered *on* the public work.

Under the circumstances, following the decisions above cited, the damages claimed not having been suffered *on* a public work, it must be found the suppliant is not entitled to the relief sought by his petition of right.

Petition dismissed.

Solicitor for suppliant, *N. A. Macmillan.*

Solicitor for respondent, *J. A. Gillies.*