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Dec. 20.

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA ..... PLAINTIFF;

AND

THE MISSISSIPPI AND DOMINION STEAMSHIP COMPANY (LIMITED) DEFENDANTS.

Navigation—Obstruction of—37 Vict. c. 29—43 Vict. c. 30—Pleading—Allegation of negligence—Demurrer.

Where a ship had become a wreck and, owing to her position, constituted an obstruction to navigation, the court held that it was not necessary in an information against the owners for the recovery of moneys paid out by the Crown, under the provisions of 37 Vict. c. 29 and 43 Vict. c. 30, for removing the obstruction, to allege negligence or wrong-doing against the owners in relation to the existence of such obstruction.

2. Under the Acts above mentioned it is only the owner of the ship or thing at the time of its removal by the Crown who is responsible for the payment of the expenses of such removal.

3. The right of the Crown to charge the owner with the expenses of lighting a wrecked ship during the time it constitutes an obstruction was first given by 49 Vict. c. 36, and such expenses could not be recovered under 37 Vict. c. 29 or 43 Vict. c. 30.

DEMURRER to an information for the recovery of moneys paid out by the Crown for the removal of an obstruction to navigation.

The grounds of the demurrer are stated in the reasons for judgment.

The demurrer was argued at Montreal before the Honourable Charles P. Davidson, judge *pro hâc vice*, on the 23rd June, 1893.

W. Cook, Q.C., in support of demurrer:

The information does not charge negligence in navigating the *Ottawa* which lead to the stranding, therefore it must be assumed that the loss was occasioned purely by inevitable accident or the act of God. This being

so, all the authorities are agreed that at common law no obligation lay upon the defendants to remove the obstruction, or to light the wreck, at least so far as the Crown is concerned, and no action would lie against them, on the part of the Crown, for expenses incurred for such objects. If the Crown has any claim at all, it must be a purely statutory one, and will have to be determined by the statutes in force in 1880 and 1881 when the wreck and sale took place, viz., 37 Vict. c. 29 as amended by 43 Vict. c. 30, no subsequent amendment of these Acts has, or was intended to have, any retroactive effect.

The sole question, then, to be determined here is: Who are intended by the word "owners" in the amending Act (43 Vict. c.30)? Are they to be held to be the owners when the vessel went ashore; or the owners when she was declared an obstruction by the Minister of Marine and the order in council was passed; or the owners when the Crown incurred the expenses claimed? It is clear from the law and the authorities that the "owners" who are responsible in such a case are not these defendants. Cites *Eglinton* v. *Norman* (1); *R.* v. *Watts* (2); *Hammond* v. *Pearson* (3); *Brown* v. *Mallet* (4); *White, et al* v. *Crisp* (5); *Arrow Shipping Co.* v. *The Tyne Improvement Commissioners* (6).

W. D. Hogg, Q.C., *contra*:

This action is properly brought against the defendants, as registered owners of the stranded ship, under 37 Vict. c. 29 and 43 Vict. c. 30. The latter Act was the first to give a right of action such as is relied on in this case. Under the last mentioned Act the action must be brought against the owner or owners of the vessel which caused the obstruction to navigation.

(1) 46 L. J. Exc. 557.
(2) 2 Esp. 675.
(3) 1 Camp. 515.
(4) 5 C. B. 617, 620.
(5) 10 Ex. 312.
(6) (1894) A.C. 508.

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Argument of Counsel.

The statute has reference to a vessel which causes an obstruction, and the right of action, while it is for the recovery of moneys expended in removing the obstruction, has reference back to the obstruction; and it is fair to say that the person who was the owner at the time the obstruction occurred is the person intended by the Act as being liable. The purchasers of the wreck could not be considered the owners of the vessel, because there is only one way to purchase a vessel, *i.e.*, by bill of sale under *The Merchant Shipping Act*, 1854, and amendments.

The statute has reference to an action which grows out of an obstruction, and to recover the outlay of the Government from the person who was the owner at the time of such obstruction. (He cites subsec. 52 of sec. 7 R.S.C., c. 1.)

The action is not brought to compel the owners to remove a wreck. The law applicable to the rights of the Crown is not invoked in this case The statutes governing this case do not necessarily contemplate a case arising out of the negligence or default of the owner. The clause referring to negligence or default has reference to persons other than the owner or managing owner. (He cites sec. 5 of 49 Vict. c. 36.) At common law, where a vessel is sunk in a navigable river by accident or misfortune, an indictment will not lie against the owner for not raising it. (He cites *R.* v. *Watts* (1), *Coulson and Forbes on Waters* (2), *River Wear Commissioners* v. *Adamson* (3), *The Piers and Harbours Act*, 1847 (4), *White* v. *Crisp* (5).)

A demurrer will only be sustained where, if the matter alleged be taken as true, the plaintiff has no title to relief. (*Piggott* v. *Williams* (6), *Utterson* v. *Mair* (7).)

(1) 2 Esp. 675.
(2) (Ed. 1880) p. 438.
(3) 2 App. Cas. 743.
(4) 10 Vic. (U.K.) cap. 27.
(5) 10 Ex. 312.
(6) 6 Madd. 95.
(7) 2 Ves. Jr. 95.

Mr. *Cook*, replied.

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DAVIDSON, J. now (December 20th, 1894) delivered judgment.

On the 21st of November, 1880, defendants' steamship *Ottawa* was wrecked and sunk at Cap à La Roche in the River St. Lawrence. The vessel, having been condemned, was, on the 6th of July, 1881, sold by the defendants. An order in council, dated the 13th of January, 1886, authorized the removal of the wreck, which is by the information charged to have been an obstruction to navigation and a source of danger to vessels plying on the river. By this and a second order in council, a sum of $13,000 was granted and afterwards paid to P. Fradette and Co. for the taking away of the wreck. It is alleged that until this removal, Her Majesty's Minister of Marine and Fisheries caused a light to be placed near the wreck as a warning to passing vessels, and thereby incurred expense to the amount of $5,158.29. Disbursements of $48.83 for advertizing for tenders and of $15.60 for an examination of the wreck are also charged.

Nothing was realized from the wreck. By virtue of the Canadian Statute, 37 Victoria, chapter 29, as amended by 43 Victoria, chapter 30, judgment is sought against the defendants for the several sums so expended, amounting to $18,223.72 with interest from the 28th November, 1889.

Issues of law and fact have been joined. It is upon the former that I have now to adjudge.

The demurrer prays that the information be held insufficient in law for these reasons :—

That, as well at common law as under the statutes cited, owners are only liable when they, or those in whose position they stand, occasioned the obstruction by their negligence or default, and neither is charged.

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That the wreck appears to have been declared an obstruction long after the defendants had ceased to have any property therein or control thereof, and it is not disclosed that the Crown had any rights, prior to the sale of the 6th of July, 1881.

That the statutes cited have been repealed; that the defendants were not liable by any law existing during their ownership, to maintain or be charged with the maintenance of a light on the vessel.

It is obvious that all the facts that may be invoked by the Crown, are stated in the information.

Were they to be fully admitted, would they suffice to justify the condemnation sought for?

An examination of the statutes is our first duty.

It is enacted by 37 Victoria (1874) cap. 29 sec. 1, as follows:

> Whenever in the opinion of the Minister of Marine and Fisheries, the navigation of any river, lake, bay, creek, harbour or other navigable water over which the jurisdiction of the Parliament of Canada extends, is obstructed, impeded or rendered more difficult or dangerous by reason of the wreck, sinking or lying ashore or grounding, of any vessel or craft whatever, or of any part thereof, or other thing, and whether the cause of such obstruction occurred before or after the passing of this Act, then if such obstruction continues for more than twenty-four hours, the said minister may, under the authority of an order of the Governor in Council, cause the same to be removed or destroyed in such manner and by such means as he may think fit, including the use of gunpowder or other explosive substance if he deems it advisable, and may cause such vessel, craft, or its cargo or the material or thing causing or forming part of such obstruction to be conveyed to such place as he may think proper, and to be there sold by auction or otherwise, as he may deem most advisable, and may apply the proceeds of such sale to make good the expenses incurred for the purposes aforesaid—paying over any surplus of such proceeds to the owner or owners of the things sold, or other parties entitled to such proceeds or any part thereof, respectively.

This section neither created a statutory liability on the part of the owner, nor affected his responsibility at common law. It simply enabled the Minister of Marine

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and Fisheries, under the authority of an order in council, to keep the channels of navigable water clear of obstructions. To make these expenses specifically chargeable against not only the wreck but its owner, an amendment in the following terms was enacted by 43 Vict. (May, 1880) cap. 30, sec. 1:—

Whenever, under the provisions of the Act cited in the preamble, [37 Vict. Cap. 29], the Minister of Marine and Fisheries has, under the authority of an order of the Governor in Council, caused any obstruction or impediment to the navigation of any navigable water by the wreck, sinking or lying ashore or grounding of any vessel, craft or part thereof, or other thing to be removed or destroyed, and the cost of removing or destroying the same has been defrayed out of the public moneys of the Dominion—then if the net proceeds of the sale under the said Act of such vessel, craft or its cargo, or the material or thing which caused or formed part of such obstruction are not sufficient to make good the expenses incurred for the purposes aforesaid and the costs of sale, the amount by which such proceeds fall short of the expenses so defrayed, as aforesaid, and costs of sale or the whole amount of such expenses, if there is nothing which can be sold as aforesaid shall be recoverable with costs by the Crown from the owner or owners of the vessel, craft or other thing which caused such obstruction, or impediment; and the sum so recovered shall form part of the consolidated revenue fund of Canada.

Does this amendment make the defendants statutorily liable upon the statement of facts set forth in the declaration? What, too, is their position in regard to a common law liability?

The Imperial *Harbours, Docks and Piers Clauses Act* 1847, being 10 & 11 Vict. cap. 27, by its 74th section enacts that the owner of any vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel, or by any person employed about the same, to the harbour, dock or pier, or the quays or works connected therewith.

It was held in *Dennis* v. *Tovell* (1) that the owner of a vessel driven against a pier by stress of weather,

(1) L.R. 8 Q.B. 10.

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was liable whether the loss was caused by negligence or by inevitable accident. This case was overruled by *The River Wear Commissioners* v. *Adamson* (1). In this case the defendant's vessel was driven ashore in a storm. A rising tide dashed her against plaintiffs' pier, causing the damage complained of. The Court of Appeal held the owners not liable, and the House of Lords affirmed the decision.

Lord Cairns, L.C., considered section 74 to relate to procedure only, and to be solely intended to give an action against the owner of a ship whenever damage was caused by it, owing to the fault of the persons in charge, whether these were his servants or not, saving his resource against the persons really to blame.

Lords Hatherly and Blackburn were of opinion that the section covered even damages caused by the act of God, or inevitable accident, but considered the case one of such extraordinary hardship as to justify a secondary interpretation.

Lord O'Hagan agreed with the Court of Appeal that the wording of the section excluded damages for the act of God.

Lord Gordon dissented.

In the presence of such scattered opinions it is not easy to fix the precise value of this case, overruling though it did *Dennis* v. *Tovell* (*supra*).

Another section (56) of the *Harbours, Docks and Piers Clauses Act*, 1847, has greater pertinence. It reads as follows:—

The harbour master may remove any wreck or other obstruction to the harbour, dock or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck, obstruction or floating timber shall be repaid by the owner of the same, and the harbour master may detain any such wreck or floating timber for securing the expenses, and on non-payment of such expenses, on demand, may sell such wreck or

(1) 1 Q.B.D. 546; 2 App. Cas. 743.

floating timber and out of the proceeds of such sale pay such expenses, rendering the overplus, if any, to the owner on demand.

By our Act 43 Vict. c. 30 the expense "shall be recoverable with costs by the Crown from the owner or owners of the vessel, craft or other thing which caused such obstruction or impediment."

Interpreting this section of the Imperial Act, the Court of Appeal held in *Lord Eglington* v. *Norman* (1) that the owner "referred to was the owner at the time the thing became an obstruction."

This ruling was followed in *The Edith* (2), but both cases were, on the 2nd of June, 1894, overruled by the House of Lords in the *Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (3).

Respondents had obtained judgment both in the Admiralty Division and in the Court of Appeal. The vessel *Crystal*, belonging to the appellants, sank at the mouth of the River Tyne, as the result of a collision.

There was no evidence how this was caused or that any blame was attributed to the owners or their servants. The wreck was abandoned as a derelict on the high seas. The commissioners gave notice that they purposed to remove it and in the meanwhile would buoy and light it. Action was brought to recover the difference between the expenses incurred and the amount produced by the sale of the materials. The Lord Chancellor first distinguished the *River Wear Commissioners* v. *Adamson* (*supra*) as resting on another section and in the course of his judgment spoke, as well on the extent of the responsibility which the statute created, as of the persons on whom the responsibility fell. On the first point he said (p. 516) :—

> Although I am of opinion that, in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at

(1) 46 L. J. Ex. 557 (1877). (2) 11 L. R. Ir. 270.
(3) [1894] A. C. 508.

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common law for damage caused by the obstruction or for the expenses incurred in removing it, yet I am unable to find any valid ground on which the operation of section 56 which casts upon the owner the liability to pay for the expenses of removing the obstruction, can be limited to cases in which such liability would exist at common law. I am fully alive to the force of the argument, and feel much impressed by it, that the obstruction is removed for the benefit of the public at large, and that where the owner of the vessel which has met with a disaster has not been to blame it is hard that the loss of his vessel should entail on him the furthur burden of bearing expenses incurred not for his benefit but for that of the public. But a sense of tbe possible injustice of legislation ought not to induce your Lordships to do violence to well settled rules of construction, though it may possibly lead to the selection of one rather than the other of two possible interpretations of the enactment. In the present case, however, I am unable to see that there are two alternative constructions.

Lord Ashbourne showed strong reluctance, indeed refused, to make the owner responsible under every conceivable cause of accident. He approved the *River Wear Commissioners* v. *Adamson* (*supra*) and considered it in point.

These cases founded on Imperial statutes of somewhat like tenor to our own, disclose serious diversities of judicial opinion, and an unusual expression of hesitancy and doubt as to the true construction of the sections referred to.

In the domain of common law, all difficulty disappears.

In *Rex* v. *Watts* (1) an indictment was preferred against the defendant for that he

> being the owner of a certain ship which had been sunk in tbe River Thames suffered and permitted the said ship to remain and continue there to the obstruction of the navigation, &c.

Lord Kenyon was of the opinion that the offence charged was not of a description to support an indictment as it was not asserted that there was any default or wilful misconduct on the part of the accused. In

(1) 2 Esp. 675 (1798).

Brown v. *Mallet* (1) Mr. Justice Maule said "no such wrong being alleged, none is to be presumed." (2)

From these analyses of enactment and precedent, must it be held that an allegation of negligence or default in connection with the disaster ought to appear?

The common law does not reach them, indeed it is not seriously disputed on the part of the Crown that the defendants must be held liable under our statute, if at all.

The rule is that if a vessel is sunk by accident, and without any default of the owner or his servant no duty is ordinarily cast upon him to remove it or use any precaution by placing a buoy or light to prevent other vessels from striking against it, except for so long as he remains in possession and control of it. The liability ceases when the control ceases.

I regard the statute as superseding the common law to the extent expressed in its provisions or fairly implied in them, in order to give them full operation (3). It makes no exception as to the acts of God or *vis major*, and I cannot therefore see why either should be alleged. I am not called upon to decide if these would be lawful grounds of defence; but it may be said that the House of Lords in the *Arrow Shipping Company's case* (*supra*) adopted a rigid and far reaching interpretation to the effect that they would not. I have, therefore, to hold that under the statute it is not necessary to allege more than its provisions call for and that the information did not need to affirm wrong-doing on the part of the owner or his servants.

With reference to the question of ownership, the Lord Chancellor said (p. 519):—

(1) 5 C.B. 618.

(2) *See* also *White* v. *Crisp* 10 Ex. 312; The *Columbus*, 3 W. Rob. 158; The *Swan*, 3 Blatch. at p. 288; The *Franconia*, 16 Fed. Rep. 149; Coulson and Forbes's law of Waters, 438; Gould on Waters, sec. 98.

(3) *Endlich on stats.* sec. 127.

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My Lords, when I examine the language of the section, it appears to me to point not to ownership at the time the obstruction is created, but to ownership at the time the expense of removing it is incurred.

Lord Watson said (pp. 521, 522) :—

I agree with the Lord Chancellor in thinking that their abandonment of a sunken ship in the open sea, *sine animo recuperandi*, had divested the appellants of all proprietary interest in the wreck before the respondents commenced operations with a view to its removal.**** It is clear to my mind that, *primâ facie*, the owner of the wreck must be the person to whom the wreck belongs during the time when the harbour master chooses to exercise his statutory powers.

Lord Ashbourne said (p. 527) :—

I agree with my noble and learned friends who have preceded me, that the owner referred to in the section is the owner at the time the harbour master incurred the expense, and concurring as I do generally in the arguments they have expressed in support of this conclusion, I see no good purpose in repeating or attempting to add to them.

Contrasting the sections of the Imperial with those of the Canadian statute, we find that the former, by its section 74, provides that the

owner of any vessel.....shall be answerable,

and by its section 56, that the

expense of removing any such wreck.....shall be repaid..... by the owner of the same ;

while the Canadian Act provides for responsibility on the part of

the owners of the vessel, craft or other thing, which caused such obstruction or impediment.

It is argued on behalf of the Crown that the difference between the words "wreck" and "vessel" emphasizes the purpose of our statute, to make the original owner liable. I am unable to hold with this contention. There had to be a sale of the salvage. Its proceeds went in deduction of the amount for which the owner was liable. This cannot mean that the owner, at the time of the disaster, was to benefit by the net value of what he had sold to another, or could

the pretension prevail that he would be entitled to a surplus, if surplus there were. It must refer to the person whose wreck was disposed of and removed. Moreover, the dates set forth in the information are of striking importance. The *Ottawa* foundered in November, 1880, and was condemned and sold in July, 1881, while the order in council relied upon was only passed in January, 1886. Now, under the English statute, an immediate right accrues to the harbour master, and an equally immediate obligation is imposed upon the owner. In this respect our statute offers a marked contrast. The mere existence and continuance of an obstruction or impediment to navigation does not of itself vest the Crown with the right to remove it, or impose upon the owner a correlative obligation to pay the net expenses. The opinion of the Minister of Marine and Fisheries needs executive expression in an order in council, before either the one or the other exists. If, then, under the Imperial Harbours and Piers statutes it can be held that only the actual owner at the time of removal may be charged, by much more are the present defendants free from responsibility, for it is an undeniable rule of construction that a statute has prospective operation only, unless the intention to have it operate retroactively is expressed in precise terms.

As regards the legal sufficiency of the charge for lighting the wreck, the defendants occupy an even stronger position. It was only by 49 Victoria chapter 36 that authority was given to maintain a light, and charge its maintenance to the owner. This statute repealed 37 Vict. chap. 29 (except section 4) as amended by 43 Vict. chap. 30, and, re-enacting the sections in question, put the expense of maintaining lights on the same footing as that of removing the wreck.

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The repeal in itself, did not affect any right which may have accrued to plaintiff during the existence of the previous statute, R. S. C. cap. 1, sec. 2, subsecs. 49, 50, 51, 52, 53.

But the new law only covered such expense as might be incurred "under the provisions of this Act," and the reasons already given in connection with the question of ownership apply to this issue, with the added fact of law that at the time defendants admittedly sold their vessel, the Act 49 Vict., c. 36, was not yet in existence.

I think, therefore, that judgment on the demurrer ought to be entered for the defendants, and that costs ought to follow.

Demurrer allowed, with costs.

Solicitors for plaintiff: *O'Connor & Hogg.*

Solicitors for defendants: *W. & A. H. Cook.*