1917
Jan. 8

IN THE MATTER OF THE PETITION OF RIGHT OF

ALPHONSE NOEL ..... SUPPLIANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Waters—Navigable river—Erection of wharf without Crown's approval—Obstruction to navigation—Nuisance—Abatement.

The suppliant, without having obtained the Crown's approval as required by R.S.C. 1906, c. 115, (as amended by sec. 4, 9-10 Ed. VII, c. 44) erected a small wharf, partly on the foreshore and partly extending into deep water in a navigable and tidal river. He had no riparian rights, nor any grant of the *solum* upon which the wharf was erected. He had made no use of the wharf for about 2 years before the works complained of were undertaken by the Crown, and part of the wharf had been carried away by the sea. For the purpose of preventing serious erosion of the shore at the point where the wharf was built, and in the interest of navigation, the Crown built a retaining wall which had the effect of interfering with the suppliant's wharf.

Held, that the Crown had the right to construct the works in question without giving the suppliant any claim to damages, as the wharf built by him interfered with navigation, and by so doing amounted to a nuisance which might have been abated at any time if the Crown so desired.

PETITION OF RIGHT to recover the value of a wharf constructed in navigable and tidal waters at the mouth of the Bonaventure River, in the Province of Quebec.

The case was heard at Quebec, on November 14, 1916, before the Honourable Mr. JUSTICE AUDETTE.

F. O. Drouin, for suppliant; *W. LaRue*, for respondent.

AUDETTE, J. (January 8, 1917), delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $1,408.70, as representing the value with interest, of a wharf constructed by him at the mouth of the Bonaventure River, County of Bonaventure, and Province of Quebec.

He further contends that previous to starting work he went to Quebec and obtained from Mr. E. E. Tache, the Deputy Minister of the Crown Land and Forests Department, the verbal permission to erect his wharf,

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Mr. Tache saying to him: "Build on, and you will never be disturbed."

However, when he started to work upon this wharf, both Messrs. W. C. Edwards and R. N. LeBlanc complained to the Quebec Government of the building of same, and asked to have it stopped. (See Exhibits Nos. 31 and 32). Mr. E. E. Tache, the Deputy of the Lands Department, then wrote to Noel, on August 27, 1907, the letter marked Exhibit "C," calling his attention that he was neither riparian owner nor owner of the bed of the river where he was constructing his wharf, and requested him to stop immediately the works already started, and to remove everything from the land, and that Noel failing to do so the Department would take legal proceedings to protect itself. Noel contends he then went to Quebec a second time, saw Mr. Tache with respect to the letter, Exhibit "C," and that Mr. Tache again told him "*Laissez donc faire, continuez et ne dites rien.*" Mr. Tache is now dead, and there is no corroboration of Noel's evidence respecting what Mr. Tache might have said to him, although Mr. Vien is alleged to have been present on the occasion of Noel's second visit to Mr. Tache, but he was not called as a witness. In face of the letter, Exhibit "C" written by Mr. Tache, Noel's contention as to Mr. Tache's verbal utterance is indeed liable to make one more than perplexed on this branch of the evidence, but it has no bearing upon the merits of the case.

Now, to properly appreciate the merits of this case, it is well to state *in limine* that Noel was not a riparian owner, that is he did not own the land on the shore abutting the wharf. Further, he was not the owner of the portion of the river upon which he erected his wharf, the foreshore having been sold by the Quebec Government under the Crown Grant filed herein as Exhibit "D"; and further, he never obtained from the Federal Government leave to put up a wharf, as provided by ch. 115, R.S.C. 1906, as amended by 9–10 Ed. VII., ch. 44, the wharf being erected in navigable and tidal waters.

Then after the wharf had been out of use for about a couple of years, and had been partly swept away by the sea, the Government of Canada at the request of citizens

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of the locality, in the interests of navigation, and to protect the shore from serious erosion, built on each side of the wharf a retaining wall which would have almost enclosed the suppliant's wharf and for which he claims.

Now this is the case of a stranger, a trespasser taking possession of the foreshore, and part of the bed of the river navigable at low tide, and while perhaps a wrongdoer not in privity with Noel could not be heard to raise the question of Noel's right, it is otherwise with respect to the Crown holding for the public the paramount right of navigation and here to protect the *jus publicum*.

The suppliant, as already mentioned, never obtained leave from the Federal Government to put up the wharf, and had he applied, in view of the works done by the Crown, such application would, it must be inferred, have been refused, since it is clearly established that his wharf is an interference with navigation, and also interfered with the works the Federal Crown had thought necessary to undertake for the improvement of navigation in the Bonaventure River, a river both navigable and tidal at the place in question.

Therefore, the suppliant as a trespasser was maintaining a nuisance at the time the Crown started its works, and 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 char- "acter of a nuisance." This language is also quoted with approval by Mr. Justice Martin in the case of *Kennedy v. The "Surrey."*[2] There can be no interference with public rights without legislative authority. It was also held in the case of *The Queen v. Moss*,[3] "that an obstruction to navigation "cannot be justified on the ground that the public benefits "to be derived from it outweigh the inconvenience it causes . . . . It is a public nuisance though of very great public benefit and the obstruction of the slightest possible degree."

In the *Thames Conservators v. Smeed*,[4] 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

[1] 9 Can. S.C.R. 239 at 243.
[2] 10 Can. Ex. 29 at 40.
[3] 26 Can. S.C.R. 322.
[4] [1897] 2 Q.B. 334 at 338.

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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.

In the case of *Dimes v. Petley*,[1] it was held that the defendant could not maintain an action for damages against the owner of a ship which damaged his wharf, the 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 as to interfere with navigation, his own act was the *fons et origo malorum?* How can the court give damages to a suppliant who comes into court as a confessed 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.*[2]

Could it be contended that the Crown, in the right of the Dominion of Canada, would be liable as against a person having no riparian right, no right to the bed of the river which is in the hands of third parties, and further having no permission or authority to so erect a wharf in navigable waters, for interfering with such a wharf by the erection of works performed in the interest of navigation and to improve the same? The question must be answered in the negative.

There is the further contention that the Crown gave a subsidy towards the erection of Noel's wharf. But there was no subsidy. As explained by witnesses Belle-Isle and Amyot, on one occasion Noel met the latter and told him it would be advantageous to have a landing on the River Bonaventure. Amyot then wrote to the assistant chief engineer at Ottawa, who authorized him to spend $150 on such a landing, under the circumstances more especially detailed in the evidence with the understanding it would not be permanent work. And when Noel had

[1] 15 Q.B. 276.

[2] [1908] 2 Ch. D. 460 at 473.

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spent that amount, Amyot certified for work to the amount of $150 which were subsequently paid to Noel. In any event no subsidy could be properly paid without the authority of Parliament, and without order-in-council. And as above related, when the Government started its works the Noel wharf had been in disuse and abandoned for quite a while at that time, says witness Belle-Isle who was in charge of the Government works, and he says it was in a state of non-existence and consisted in a gathering of stones and could not be used as a wharf. And he adds the only benefit the Government could derive from it was the stones Noel placed in his wharf, and that stone was amply paid for by the $150 spent on his wharf.

This is a pure action of tort for which there is no statutory remedy, and moreover, the Crown had the right to abate the nuisance under the circumstances.

Therefore, the suppliant is not entitled to the relief sought by his petition of right.

Petition dismissed.

Solicitors for suppliant: *Messrs. Drouin, Sevigny & Amyot.*

Solicitor for respondent: *W. LaRue.*