BRITISH COLUMBIA ADMIRALTY DISTRICT.

KENNEDY ..... PLAINTIFF; 1905 Dec. 29.

v.

THE *SURREY*.

Collision—Boom—Interference with navigation—Nuisance.

Nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance.

2. Where an interference with navigation is established it is a public nuisance which any one specially injured or damnified by it has a right to remove.

3. While no person has the right to continuously appropriate to himself any portion of the water, or bank or shore of navigable waters for the purpose of making up a boom of logs, the use thereof in a reasonable manner and for a reasonable period, having regard to local conditions, will not amount to an interference with navigation.

ACTION for damages arising out of the collision of a ferry-boat with a boom of logs.

The facts are stated in the reasons for judgment.

November 6th, 1905.

The case was heard at Vancouver before Mr. Justice Martin, Local Judge for the British Columbia Admiralty District.

E. P. Davis, K.C. and *W. Myers Gray* for plaintiff;

Joseph Martin, K.C. and *R. Cassidy, K.C.*, for the ship.

Mr. Cassidy for the ship, referred to R. S. C., 1886, cap. 92, as to the piles driven and boom constructed so as to interfere with navigation of a river. He cited *Wilson* v. *Coquitlam* (1), and *Queddy River Boom Co.* v. *Davidson* (2). The only question is whether this

(1) Unreported. (2) 10 S. C. R. 222.

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particular boom was, if it was one within navigable waters, within the meaning of the Act so as to interfere with navigation. The expression "interfere" does not mean a direct obstruction to the fairway, but something which would interfere with navigation at that point. A person placing an obstruction contrary to the Act is a trespasser and must take the consequences. The ship had a right of access to the landing place without obstruction, and nothing short of leave and licence of the most exact kind can take that boom out of the position of being there at owner's risk. While we might be condemned if guilty of gross negligence, yet there is no negligence proved here, and there is no "wilful collision" as charged in the statement of claim; the navigation was careful and the captain took all ordinary precautions. Evidence is not clear that the ship ever struck the boom rope, and if she did that would not constitute negligent navigation, for the proximate cause of the accident was the rope being where it had no business to be.

This is an action *in rem*, and should have been brought within a reasonable time in order to avoid any complications through a transfer of ownership. Here the writ was not issued until July 31, 1905, and the cause of action occurred in June, 1903. Here there has been a transfer.

Mr. Martin, on the same side, cited *The Kong Magnus* (1); *Abbott on Merchant Shipping* (2). As to laches; a municipal corporation cannot ordinarily be sued after a year. Here the corporation should have been sued and not the new owner of the ship. There is no explanation of this long delay. The claim is statute barred in the ordinary courts, and the Admiralty Court should not allow it to be brought in.

(1) [1891] P. 223. (2) 14th ed. 1040.

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Mr. Davis: A claim is not a stale one which in a little over two years is on trial; *Re Maddever* (1). The delay must be long and unconscionable and such as to make it a fraud or a hardship. There is no suggestion of that here, for it is admitted that the corporation of New Westminster is defending the action. It is true that there is a year's limitation to an action *in personam* against the city, but that is no answer to an action *in rem* here. *Wilson* v. *Coquitlam*, *supra*, does not apply here. It is not to be considered that it is necessary to obtain the approval of the Governor in Council for a boom of logs to be kept in a river for a night or two. R.S.C., cap. 92, applies only to permanent structures, such as a wharf or a boom across the river. It is clear that the boom rope in this case was broken by the ship.

As to negligence; even if the boom was an interference with navigation, defendant must shew that he collided without negligence. He cited *Bank Shipping Co.* v. *City of Seattle* (2) and the cases there cited; *The Uhla* (3); *The Zeta* (4). But if the boom was where it had a right to be, then the defendant should have kept away. Plaintiff had permission to tie up the boom, and later it was moved further down, after notice received. Defendant had no authority to run in and use for a wharf that which was a roadway.

As to skilful navigation, the captain admits that an ordinarily skilful navigator could have got out without striking the boom; he struck it and therefore must have been negligent.

MARTIN, L. J. now (December 29th, 1905), delivered judgment.

A question of general importance is raised in this action affecting the public right in navigable waters, and in particular the rights and obligations of persons

(1) 27 Ch. D. 523.
(2) 10 B. C. R. 513.
(3) 19 L. T. N. S. 89.
(4) [1893] A. C. 468.

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using such waters for the booming and transportation of logs.

The steamship *Surrey*, a double-ended ferry-boat, owned and operated by the Corporation of New Westminster across the Fraser River to a wharf bridge (or approach) and landing-place, also owned, as is admitted in the Statement of Defence, paragraph 10, by the same corporation, made, in the early morning of Tuesday, June 23rd, 1903, her first trip that day to said wharf; and in making her landing used for the first time a scow moored to the down stream (west) side of the approach to the wharf, which scow had been put into position the evening before. Before that time the landing had been made at a more convenient part of the wharf proper, much further into the stream and better situated for the purpose, but owing to the flooded condition of the rapidly rising river, which was running with a very swift current of some six miles an hour, the wharf had become so damaged and unsafe that the scow had to be brought to enable a landing to be effected. It was placed end on to the said approach to the wharf, which approach, or as it was sometimes spoken of as a bridge or pier, was of planks set on mud sills, the wharf structure proper, being on piles. It is admitted by the defence that this new landing place was closer to the bank than the old one, and the scow so placed projected its full length down stream and towards a boom of shingle bolts owned by the plaintiff. The steamer that morning made her landing parallel to the shore, as described by the witness Smith, and lay end on end to the scow so that the vehicles were driven straight on board; the other end of the steamer pointed in the direction of the boom; I say "end" because properly speaking she has neither bow nor stern, both ends being constructed so as to be used alternately for either

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purpose; she was about 120 feet long. At that time the boom was not attached to the wharf but was moored by two shore hawsers to two piles on the bank above high water mark. At a distance of 315 feet down stream from the outer corner of the lower end of the scow was another pile, standing in the stream some seventy feet from the shore line at ordinary high water. The current at the time was always down stream, the flood overcoming the flow of the tide. The boom was also fastened to said pile D, and to another similar pile E lower down and nearer the shore; and these five piles formed part of a set which was driven eighteen years ago at that point for the purpose of making booms fast, and have been so used ever since. The corporation, as well as the officers of the steamer, were aware of the position of the boom, because when the plaintiff began to make it up and fill it with shingle bolts he applied to, and got permission from, the Council to use the wharf for the purpose of unloading bolts therefrom, as set out in the City Clerk's letter of May 6th, 1903. On the 13th of June he had filled his boom and was waiting for the sawmill company to tow it away, but they did not do so as arranged; and though I am satisfied the plaintiff made every reasonable effort to obtain a tug for that purpose he was unable to do so, owing to the rapid rise of the water which rendered it dangerous to attempt to take the boom through the draw of Blue Island Bridge down the river. On the 18th the plaintiff received a notice from the City Clerk asking him to remove the ropes from the wharf owing to the danger from the increased strain caused by the swift current. On the following day he also received, through his brother, a letter from the chairman of the Board of Works as follows:

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"MR. G. KENNEDY:

"The City Council wished me to see you if you would be kind enough to see your brother about the boom of shingle bolts that is made fast to ferry landing on south side of river. Some of the piles have gone out of place already and the Council is afraid that the extra strain of the boom with so strong a current running might do some damage to the wharf. He could make the boom fast to the boom piles along the shore.

Please have your brother attend to this.

"Yours truly

(Sgd.) W. A. JOHNSON."

On the next day, Saturday, the 20th, he made the boom fast to the shore piles B and C, but left the rope to the wharf still in position. Next day, Sunday, the captain of the steamer cut this wharf rope after notifying the plaintiff to that effect, and the boom dropped a little down stream and nearer towards the shore and into the position it occupied at the time of the accident. In my opinion, in the unusual and uncontrollable circumstances, the captain was justified in cutting the rope on the principle of preservation of property in an emergency pointed out by Chancellor Boyd in *Langstaff* v. *McRae* (1). The top point of the boom was then some 120 feet from the nearest point of the scow and some 20 feet nearer to the shore. The boom was between 360 and 400 feet long, narrow at the upper end, but at the lower, where the current carried most of the bolts, it widened out into something like the shape of a pear. At a point about 300 feet below the scow the boom was a little further out in the stream than the scow.

A dispute arises as to what happened when the steamer left the scow to return across the river, and

(1) 22 Ont. R. 78, 86.

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the fact that she was the cause of the boom breaking is denied; but I am satisfied beyond doubt on the evidence of the disinterested witness that she was, and that it happened by her backing into it, or the main hauser which held it. The question then arises, assuming that the plaintiff was justified in leaving the boom in that position, was the steamer guilty of negligence in the premises? On a consideration of all the facts and circumstances, and having regard particularly to the flood in the river, the state of the current, the undermining of the wharf, and the changing of the landing place, and the use of the scow for that purpose, thus bringing the steamer for the first time much nearer the shore and boom, I can only come to the conclusion that she was not handled with that "ordinary care, caution and maritime skill" which is the duty of a prudent mariner to exercise. If he had not sufficient appliances to get his vessel away from the scow and out of that position without running the risk of injuring the boom he should not have attempted it; it would admittedly have been a safe manœuvre if a line had been attached to the old piles called the "Three Dolphins." But the captain's contention in the witness box was that a skilful mariner ought to have been able to get his vessel away without resorting to such a manœuvre, and without striking the boom, and he contends he did so. But the facts are against him; and I am afraid that he was more concerned in an effort to "make a schedule trip," as the witness Card calls it, than to loose time on taking the extra precautions that the dangerous state of the locality required.

And further, and in addition, there is much to be said in favour of the contention of the plaintiff's counsel that, in the circumstances, it was the duty of the captain to have notified the plaintiff of the danger, if such there were, of the boom interfering with the new

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landing. In its former position it had not proved to be any obstruction to the steamer, and even when the landing was changed and moved in closer to the alleged dangerous area, the captain seems to have been satisfied after he took matters into his own hands and cut the rope, and so allowed the boom to drop further down the stream as mentioned. It would have been a simple matter if he still thought the boom was too close, because of the scow and the new landing at a place not theretofore used for that purpose, to have notified the plaintiff and explained the situation to him, and at least given him the opportunity to move his boom still further down to meet the changed conditions. The truth is, in my opinion, that the captain was satisfied that there was no danger from the scow if the steamer were properly handled.

So far, it has been assumed that the boom was lawfully moored along the bank, but the defence is also raised that the plaintiff must be regarded as being a trespasser because he admittedly has not complied with sec. 2 of the *Act respecting Certain Works constructed on or over Navigable Waters*, R. S. C. cap. 92, sec. 2:—

"2. No bridge, boom, dam or aboiteau shall be constructed so as to interfere with navigation, unless the site thereof has been approved by the Governor in Council, and unless such bridge, boom, dam or aboiteau is built and maintained in accordance with plans approved by the Governor in Council."

There is unfortunately no definition of the word "boom" in the Act, but manifestly from the context it is for the purposes of the Act assumed to be a work of a more or less fixed or permanent nature, like the other class of works dealt with, and the words "constructed" "site" and "built" and "maintained in accordance with plans approved by the Governor in

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Council" exemplify this. There are various kinds of booms in use in different parts of Canada ranging from costly fixed, or permanent structures of great strength and solidity, sometimes miles in length, used in connection with extensive lumbering operations, down to the small and temporary affair frequently made up by the settler in this province out of timber cut in clearing his land, and filled, *e. g.* as here, with shingle bolts, from some convenient point on the river bank preparatory to its being towed away like a raft by the purchaser thereof. In the many cases I have consulted I find some of these classes of booms mentioned—thus in *Bruce* v. *Union Forwarding Co.* (1), there were Government booms, a permanent toll boom of a Boom Company, and a "pocket boom"; in *Queddy River Driving Boom Co.* v. *Davidson* (2); and in *Drake* v. *Sault Ste. Marie Pulp Co.* (3), the booms were of a more or less permanent and extensive nature; while in *Crandell* v. *Mooney* (4); and *Langstaff* v. *M'Rae* (5), they were temporary, and in the latter case "side booms" are spoken of. The definition of "boom" in Murray's Oxford Dictionary is manifestly not an exhaustive one. The expression "to boom a river" is a common and well understood term, and undoubtedly within the scope of the statute; but that is a very different thing from "making up a boom" of logs or bolts on the banks of so great, broad and deep a river as is the Fraser at the place in question. What is or is not the reasonable use of a navigable river depends upon circumstances, and the river may be used in a great variety of ways. Timber, for instance, may be transported on it, in rafts, booms, scows, or vessels, and in the case of scows and ships they may be and

(1) 32 U. C. Q. B. 43.
(2) 10 S. C. R. 222.
(3) 25 Ont. A. R. 251.
(4) 23 U. C. C. P. 212.
(5) 22 Ont. R. at p. 85.

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are frequently loaded from the bank direct, especially in the case of shallow draft, stern wheel steamers. In this relation I draw attention to a leading authority on the point of navigable waters, *Crandell* v. *Mooney* (1), and particularly to this passage at p. 221, which Mr. Justice Galt says, p. 222, "contains a full and reasonable exposition of the law":—

"The general doctrine to be deduced from the authorities we have collated in reference to the use of navigable rivers, or public streams, as public highways, is that each person has an equal right to their reasonable use. What constitutes reasonable use depends upon the circumstances of each particular case; and no positive rule of law can be laid down to define and regulate such use, with entire precision, so various are the subjects and occasions for it, and so diversified the relations of parties therein interested. In determining the question of reasonable use, regard must be had to the subject-matter of the use, the occasion and manner of its application, its object, extent, necessity, and duration, and the established usage of the country. The size of the stream, also, the fall of water, its volume, velocity, and prospective rise or fall, are important elements to be taken into the account. The same promptness and efficiency would not be expected of the owner of logs thrown promiscuously into the stream, in respect to their management, as would be required of a shipmaster in navigating his ship. Every person has an undoubted right to use a public highway, whether upon the land or water, for all legitimate purposes of travel and transportation; and if, in so doing, while in the exercise of ordinary care, he necessarily and unavoidably impede or obstruct another temporarily, he does not thereby become a

(1) 23 U. C. C. P. 212.

wrong-doer, his acts are not illegal, and he creates no nuisance for which an action can be maintained."

This extract was in answer to the contention of the plaintiff's counsel that "as the Fenelon was a navigable river and public highway, it was the absolute "duty of the defendant not to obstruct it, or to do anything which in its consequences might prevent "steamboats and other vessels from using it at all "times." Mr. Justice Gwynne, says (1).

"All persons have an equal right to navigate this river with logs or steamboats, which right must be exercised, however, in such a manner as not unreasonably to impede or delay another in the exercise of his right."

The passage above cited has been approved in *Rolston* v. *Red River Bridge Co.* (2), and in *Drake* v. *Sault Ste Marie Pulp Co.* (3); and in the latter case the point is succinctly put by Mr. Justice Osler, p. 257, wherein he says, "when the obstruction of the river by the "logs ceased to be reasonable it ceased to be lawful." In any event the obstruction must be one to prejudicially affect the complainant, for as stated in *Langstaff* v. *M'Rae* (4), by Chancellor Boyd:

"*Quoad* the plaintiff, it appears to me the defendants were not doing a wrongful act in stretching the boom, nor did any particle of damage arise to him from this act."

In *Bruce* v. *Union Forwarding Co.* (5), the plaintiff's boom blocked up the whole width of the stream (p. 53) and he did not open it wide enough to permit a steamer to pass, and therefore was held guilty of contributory negligence, but it was laid down that:

"The defendants would not be justified in destroying or injuring the boom, merely because it was in the

(1) p. 224.
(2) 1 Man. R., 235; affirmed on appeal, 12 May, 1885; Cassels Digest Supreme Court, p. 564.
(3) 25 Ont. A.R., 251.
(4) 22 Ont. R. at p. 85.
(5) 32 U. C. Q. B. 43.

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river, if they could by reasonable care on their part have avoided doing so. In abating a nuisance of that description, a private person can interfere with it only to the extent to which it is an injury to him, and obstructing his passage." *Dimes* v. *Petley* (1).

As might be supposed, no attempt has been made by any court, at least that I have been able to find after a careful search, to define the meaning of the term "interfere with navigation," which as has been seen, depends upon so many and varied local circumstances. But several cases, in addition to those on booms already cited, have been decided, showing what that expression includes. Thus it has been held on the facts to extend to crib work and piers in a navigable lake, *Atty.-Gen.* v. *Perry* (2); piles driven in a navigable river, *Brownlow* v. *Metropolitan Board of Works* (3); to piles driven in a public harbour *Wood* v. *Esson* (4); to deposit of saw-dust in a navigable river *Atty.-Gen.* v. *Harrison* (5), and *Booth* v. *Ratté* (6); to tailings from a quartz mill deposited in a public harbour, *The Queen* v. *Fisher* (7); to a bridge over a navigable river, *Queen* v. *Moss* (8). On the other hand, for cases where it was held there was no obstruction see the cases cited below. *Rolston* v. *Red River Bridge Co.*, (*supra*); *London & Canadian Loan &c. Co*, v. *Warin* (9); and *Reg.* v. *The Port Perry &c. Ry. Co.* (10).

Where an interference is established it is a public nuisance which any one specially damnified has a right to remove, and "nothing short of legislative "sanction can take from anything which hinders nav- "igation the character of a nuisance:" *Wood* v. *Esson*,

(1) 15 Q.B., 276, 283.
(2) 15 U. C. C. P. 329.
(3) 13 C. B. N. S. p. 768.
(4) 9 S. C. R. 239.
(5) 12 Grant 466.
(6) 21 S. C. R. 637.
(7) 2 Ex. C. R. 365.
(8) 26 S. C. R. 322.
(9) 14 S. C. R. 232.
(10) 38 U. C. B. 431.

(1); *Queddy River Driving Boom Co.* v. *Davidson* (2); and it is none the less so even if the "obstruction "is of the slightest possible degree and of very great "public benefit," *The Queen* v. *Moss* (3); And see *Attorney General* v. *Harrison*, (4); wherein it is also laid down (p. 472), that "no length of time will "legitimize a public nuisance, the soil being in "the Crown, and the user the common inheritance "of the public at large." That the question of long and notorious user may, however, become an important factor in certain circumstances is shown by the cases of *Langstaff* v. *M'Rae*, (5) and *Queen* v. *Moss* (6). Nor is a vessel which becomes helpless by accident strictly confined to the channel generally used in due course of navigation, and if she is forced to leave it and in taking the ground at a place which would have been safe but for an obstruction placed there, and is thereby injured, an action will lie, *Brownlow* v. *Board of Works*, (7).

It does not follow that all portions of a navigable water are used for purposes of navigation, and in rivers especially the nature of a particular locality may change, *Queen* v. *Moss* (6); and see *Attorney-General* v. *Harrison* (4); *Gage* v. *Bates* (8), and *Ross* v. *Corporation of Portsmouth* (9).

Applying all the foregoing principles to the circumstances of the case at bar, I am of the opinion that there has not been an interference with navigation by the plaintiff in the true sense of that term. In so holding I do not wish it to be understood that any person has the right continuously to appropriate to himself any portion of the water or bank or shore of navigable waters for the purpose of making up a boom of logs,

(1) 9 S. C. R. at p. 243.
(2) 10 S. C. R. 222.
(3) 26 S. C. R. 322.
(4) 12 Gr. at p. 472.
(5) 22 Ont. R. 78.
(6) 26 S. C. R. 332.
(7) 13 C. B. N. S. 768.
(8) 7 U. C. C. P. 116.
(9) 7 U. C. C. P. 195.

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but simply that he may, as hereinbefore set out, in a reasonable manner and for a reasonable period, having regard to local conditions, make use of such waters for that purpose.

So far, then, the defence has failed, but it is pleaded and argued that there have been such unreasonable laches and delay by the plaintiff in enforcing his claim that in the meantime the present owners purchased the ship from the corporation of New Westminster in good faith and without notice, and that consequently this action *in rem* should not be entertained in this court. The accident happened on June 23, 1903, the action was begun on July 31, 1905, and the sale to the present owners was made on February 20th, 1905. The authorities on the point are collected in *Abbott on Shipping* (1). Mr. Davis refers to *In re Maddever* (2), on the general question of mere delay in enforcing legal rights. There is nothing before me to show what is an important element, viz.: that the owners, in any way whatever, have been or will be prejudiced by this not very long delay, and it is not suggested that the Corporation is not in a position to indemnify them against any claim the plaintiff has against the ship; indeed, one of the witnesses for the defence, who had been employed by the corporation in keeping the wharf and approach in repair, stated the corporation was defending the action, though no counsel appears for them; and while too much weight should not be attached to the statement yet it is only what would be expected in the circumstances. Assuming it to be correct that in another Court the municipal corporation could not, owing to a statutory limitation, have been sued after the expiration of a year, I cannot agree that that of itself disentitles the plaintiff to relief here. This defence also fails.

(1) 14th ed., 1901, at pp. 1039-42 *et seq.* (2) 27 Ch. D. 523.

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Judgment, therefore, will be entered in favour of the plaintiff, and there will be a reference to the Registrar, assisted by one merchant, to assess damages.

I should add, since it was referred to by counsel, that the case of *Wilson* v. *The Coquitlam*, decided by me on the 4th April, 1902, affords no assistance in the determination of this action, because it was determined simply on the facts; and I had no difficulty in coming to the conclusion that there had been an interference with navigation by the boom of logs there in question.

Judgment accordingly.

Solicitor for plaintiff: *W. Myers Gray.*

Solicitor for ship: *Martin, Cassidy, Weart & McQuarrie.*