ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY DISTRICT

1929

Oct. 2, 3.
Dec. 7.

THE S.S. *EURANA* (DEFENDANT) .... APPELLANT;

VS.

BURRARD INLET TUNNEL AND BRIDGE COMPANY (PLAINTIFF) .. } RESPONDENT.

Shipping—Crown—Navigable Waters Protection Act—Order in Council—Board of Railway Commissioners—Collision with bridge—Negligence—Public nuisance—Works done under legislative authority.

Plaintiff, under its Charter (9-10 Edward VII, Chapter 74) erected a railway bridge over the second Narrows of Burrard Inlet, B.C. By its Charter, the Railway Act was made applicable to the undertaking. The site and plans of the bridge, as originally projected, were first approved by the Governor in Council on June 10, 1913, on recommendation of the Minister of Public Works. No steps were taken for ten years, then in April, 1923, amended plans were approved by the Governor in Council. These amended plans were, in July, 1923, sanctioned by the Board of Railway Commissioners and the company was authorized to begin construction, plans of sub-structure and superstructure to be filed for approval of the Engineer of the Board. A Board of Consulting Engineers made certain recommendations in regard to the elevation of the piers. the number of spans, etc. Plans embodying these changes were submitted to the Governor in Council for approval by the Minister of Marine and Fisheries and the plans of the bridge, as finally completed, were approved by Order in Council in August, 1925. In March, 1925, the Railway Board had approved of the said plans. The Charter provided that the bridge be built "so as not to interfere with navigation." It was contended by defendant that the plaintiff had no title to the land on which the bridge was built and that it was a trespasser thereon; that approval should have been obtained as required under the Navigable Waters Protection

Act, and this not having been done the bridge was a public nuisance; that the approval of the amended plans having been approved by the Railway Board before approval by the Governor in Council, such latter approval was a nullity; that the plaintiff without justification had begun construction before final plans were approved; and that the plaintiff's Charter having enacted the limitation that the bridge should not be built so as to interfere with navigation, neither the Governor in Council nor the Board of Railway Commissioners had power to authorize a bridge which interfered with navigation, and that as it in fact so interfered, it was contrary to its Charter and constituted a public nuisance.

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Held (affirming the judgment appealed from), That plaintiff being in possession of the land in question, at least by licence of the owner, the defendant had no status to attack such occupancy.

2. That the Navigable Waters Protection Act not having been made applicable to the undertaking, and it having been enacted that the Railway Act should apply, and the undertaking being authorized by an Act of Parliament of Canada, the Navigable Waters Protection Act did not apply to the undertaking.
3. That even if there had been laxity on the part of those interested in the matter, in observing from time to time the precise directions of the statute, all such procedural defaults were waived in the final sanction of the plans of the bridge as completed. That the fact that the order of the Railway Board preceded the approval of the same plans by the Governor in Council was not of importance; their combined effect being a sanction, as required by Statute, of a bridge proposed to be built over a navigable water.
4. That the words, in the Company's Charter, "so as not to interfere with navigation," mean not reasonably calculated to interfere with navigation, and the Governor in Council and the Board of Railway Commissioners having approved the plans of the bridge under the authorization of Parliament, and having exercised the discretion resting in them, the bridge in question could not be said to be a public nuisance even though it might contribute some difficulties to navigation at the point in question.
5. That the consent of the Governor in Council, required under Sec. 248 (2) of the Railway Act, to deviations in the plans, need not be obtained upon the recommendation of any particular Minister.
6. That when a vessel passing through a bridge collides with it causing damage to the bridge, the owners of the bridge can only recover such damage upon proof that the vessel was negligently navigated.

APPEAL from judgment of the Honourable Mr. Justice Martin, L.J.A. (1)

The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Vancouver.

Martin Griffin, K.C., and *S. A. Smith* for appellant.

Dugald Donaghy, K.C., and *W. E. Burns* for respondent.

(1) The reasons for judgment of Martin L.J.A. are printed at page 52 following this report.

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The facts and the questions of law as well as the contentions of the parties are stated in the reasons for judgment.

THE PRESIDENT, now (December 7, 1929), delivered judgment.

This is an appeal from a judgment of Mr. Justice Martin, L.J.A., for the Admiralty District of British Columbia, in an action brought by the respondent against the appellant, for damages arising from a collision of the steamship *Eurana* with a railway and traffic bridge owned by the respondent company and crossing the Second Narrows of Burrard Inlet, a navigable water, in the province of British Columbia. The appellant counterclaimed for damages occurring to the *Eurana* in consequence of the same collision. The learned trial judge dismissed the respondent's action against the *Eurana,* holding that there was no negligence on the part of that ship, and that the collision was one of "inevitable accident"; he dismissed the counterclaim upon the ground that the bridge was lawfully authorized and erected and did not constitute a public nuisance as alleged. The shareholders of the respondent company, as I understand it, are, The District and City of North Vancouver, The District of West Vancouver, and The City of Vancouver. Money subventions in aid of the undertaking were granted by the Government of Canada, by the Government of British Columbia, and by the Corporation of the Vancouver Harbour Commissioners.

As stated by the learned Judge, the case is one of exceptional importance and difficulty. Inasmuch as I have reached the conclusion that the judgment appealed from should be maintained, it is not necessary that I should discuss at length all of the grounds upon which the learned trial Judge based his conclusions, all of which are, I think, very comprehensively and forcibly set forth in the judgment appealed from.

Broadly speaking, the appellant's case is, that the respondent company without lawful authority erected and now operates the railway bridge in question; that this bridge interferes with the public right of navigation over a navigable water and thus constitutes a public nuisance. If this contention is established, then I apprehend that the appellant should, in the absence of negligence, succeed generally. The appellant's position is sought to be main-

tained *inter alia,* upon the following grounds: that the respondent has not title to the lands upon which the bridge is built; that the plans of the bridge were not approved under the provisions of the Navigable Waters Protection Act which is claimed to be here applicable; that the bridge was constructed in violation of the respondent company's charter which required that the bridge should be so constructed as "not to interfere with navigation"; and that in any event the respondent company did not secure the necessary approval required by statute, of the plans of the bridge as constructed, by the Governor in Council and the Board of Railway Commissioners. I shall usually refer to the latter body as the Railroad Board. Alternatively, the appellant says the collision was not attributable to its negligence, but that the same was due to "inevitable accident," and it is not therefore liable in damages to the respondent upon the assumption that the bridge was lawfully erected and operated. From this, the substance of the respondent's case may be inferred; chiefly it is, that at the time material here, the ship *Eurana* collided with and damaged the bridge by reason of negligent navigation.

Alluding now, briefly, to the contention that the respondent does not possess a valid title to the lands upon which the bridge was erected, because though a grant therefor issued from the Crown in the right of the Dominion, yet, as required, no Order in Council authorizing the issuance of such grant was ever passed by the Governor-in-Council, and that in consequence thereof the grant is void and the respondent is a mere trespasser. In respect of this point, it seems to me that the conclusion reached by the learned trial Judge is the correct one, and I agree with the reasons advanced by the learned Judge in reaching such a conclusion; there is very little, if anything, I can usefully add. Presumably, the respondent company is in possession of the land in question, at least by licence of the owner, and the appellant has not, in my opinion, any status to attack such occupancy. Further, if the bridge constitutes a public nuisance, it is because it interferes with navigation, and not because the validity of the respondent company's title is perhaps open to question as alleged.

Then it is urged that the plans of the bridge required approval under the provisions of the Navigable Waters

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Protection Act, cap. 115, R.S.C. 1906, which was not done, and that therefore the bridge was unlawfully erected and is in law a public nuisance. Upon the argument, I was impressed by this contention of appellant's counsel, but upon a more careful consideration of the matter I have reached the same conclusion as the learned trial Judge, but, as he dealt very briefly with the point, and as it was strongly urged upon the hearing of the appeal by Mr. Griffin on behalf of the appellant, it might be appropriate to make a more extended reference to this phase of the case. The question is whether a company authorized by statute to construct a bridge over a navigable water, should, prior to construction, have its plans approved under the provisions of the Navigable Waters Protection Act. Upon a careful perusal of sec. 3 of that Act, it would seem clear, that its provisions do not apply "to any work constructed under the authority of any Act of the Parliament of Canada". If a special Act of the Parliament of Canada, authorized the erection of a public work over a navigable water, such as in this case, and that Act stipulated that the work was to be subject to the terms of the Navigable Waters Protection Act, then the latter Act would of course apply; but that is not this case. Here the respondent company's charter authorizing the work, cap. 74, Statutes of Canada, 1910, expressly provided by sec. 16 thereof, that the Railway Act should apply to the company and its undertaking. Therefore, the Navigable Waters Protection Act not having been made applicable to the undertaking, and it having been enacted that the Railway Act should apply to the undertaking which itself was authorized by an Act of the Parliament of Canada, there can, I think, be only one conclusion, and that is, that the Navigable Waters Protection Act does not apply and was not so intended. The fact that the undertaking was primarily to be a railway bridge, at once suggests the appropriateness of subjecting the undertaking to the provisions of the Railway Act, so far as approval of plans was concerned; further, the work when completed was to be subject to the jurisdiction of the Railway Board. It would therefore seem clear that Parliament intended that the Railway Act, and nothing else should apply to the undertaking. To obtain approval of the plans of a work under the Navigable Waters Pro-

tection Act, involves practically the same procedure as is necessary under the Railway Act, that is, there must be secured the approval of the Governor-in-Council upon the recommendation of the Minister of Public Works; there is just this distinction, that under the Navigable Waters Protection Act, public advertisement of the proposed work is required, whereas when the Railway Act is applicable to the work, as here, no public advertisement is necessary; a formal order of approval of the detail plans and profiles by the Board of Railway Commissioners is required, following approval by the Governor-in-Council of a plan and description of the proposed site and a general plan of the work to be constructed. It therefore appears manifest to me, that it was not the intention of Parliament that the Navigable Waters Protection Act was to be applicable to the work in question.

Before entering upon a discussion of another important point in the appellant's case, it might first be convenient and useful to state chronologically, the steps taken by the respondent company, in securing from time to time the approval of the plans of the work by the Governor-in-Council, and by the Board of Railway Commissioners. The appellant claims that the bridge as actually constructed, was unauthorized and not approved of by the authorities. designated by the Railway Act, and was therefore erected contrary to the terms of the statute made and provided for in such cases; I shall indicate, as I proceed, the several grounds upon which this contention is based. The site and plans of the bridge, as originally projected, were first approved by the Governor-in-Council on June 10, 1913, upon the recommendation of the Minister of Public Works. No further step was apparently taken in respect of the undertaking for nearly ten years; the reasons for this prolonged delay need not be enquired into. On April 25, 1923, amended plans (exhibit 2) were approved of by the Governor-in-Council upon the submission and recommendation of the Minister of Public Works; the principal departure from the original plans was that the amended plans contemplated a bascule lift span with 150 feet horizontal clearance and 15 feet clearance above high tide, instead of another type of opening span shown in the first plans of 1913. The recommendation of the Minister was made with

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the concurrence of the Vancouver Harbour Commissioners and the Acting Chief Engineer and Deputy Minister of the Department of Public Works. On the 31st of July, 1923, the Railway Board by Order sanctioned, under section 248 of the Railway Act, the amended plans of the bridge (exhibit 34), and on the same day authorized the company to proceed to construction of the bridge according to such amended plans, but directed that detail plans of the substructure and super-structure be filed for the approval of the engineer of the Board. It is to be mentioned here that the appellant contends that the plans just mentioned as being approved of by the Railway Board, differed from the plans (exhibit 2) approved previously by the Governor-in-Council, in the following respects: the latter provided for two spans and four piers, the former for three spans and five piers; the piers in each case were to be composed of a different number of cylinders; the length of the bridge varied in the two plans; and that the grade at the south end of the bridge was different in the two plans. By reason of the variations, in the plans approved by the Railway Board from those approved by the Governor-in-Council, the appellant urges that the Order of the Railway Board was made without jurisdiction and is a nullity. Subsequently it appears, fears were expressed by the interested public, that if the bridge was constructed as contemplated, it would increase the rapidity of the current of water passing under the bridge, and a Board of Consulting Engineers was set up, I think, at the instance of the Government of Canada, to consider, *inter alia,* the best means of altering the structural plan of the bridge so as to diminish the rapidity of the current of the waters of the harbour passing under the bridge. The Board of Consulting Engineers eventually recommended that the spans of the bridge be raised five feet and also the Lynn Creek approach; that two additional spans be constructed and that certain changes be made in the piers; that certain of the framed trestle super-structure be dismantled and reconstructed. These changes were apparently suggested with a view to reducing the structural impediments to the free flow of the current at this point. Plans embodying these several changes were submitted to the Governor-in-Council for approval, on the recommendation of the Minister of

Marine and Fisheries. It is probable, as suggested by counsel for the appellant, that this recommendation emanated from the Minister of Marine and Fisheries, because the Board of Harbour Commissioners for the Port of Vancouver were proposing to assist the company financially in carrying out certain of the proposed alterations in the structural plans of the bridge, and this board was under the administration of the Department of Marine and Fisheries. At any rate, the plans of the bridge as finally completed were approved by this Order in Council. No explanation was given as to why the recommendation to the Governor-in-Council for the approval of the last amended plans was not made by the Minister of Public Works, but I shall later refer to this. The amended plans were approved by the Governor-in-Council on August 20, 1925. The Board of Railway Commissioners had apparently given its approval to the amended plans on March 6, 1925, prior to the approval by the Governor-in-Council. The appellant contends that the changes made by the amended plans were " deviations ", which under the Railway Act, required the approval of the Governor-in-Council, and before any Order of approval of the same was made by the Railway Board, and that therefore, the Order of the Railway Board was a nullity because it preceded the approval of the " deviations " by the Governor-in-Council. The changes involved in the amended plans were doubtless of a very substantial character. The appellant also contends that the Order in Council of August 20, 1925, was not one such as contemplated by the Railway Act, but rather an approval of the advance of public funds to the Vancouver Board of Harbour Commissioners, to assist financially the respondent company in elevating the spans of the bridge and one of the approaches. It is also alleged that the respondent company, without justification proceeded with the construction of the bridge prior to the approval of the last amended plans, by either the Governor-in-Council or the Board of Railway Commissioners. The bridge was completed under the plans approved of in 1925 as just stated. An Order of the Railway Board permitting the use and operation of the bridge was passed on October 21, 1925; the bridge was formally opened for traffic on

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November 7, 1925, and has been continuously in operation since that date.

It is appropriate next to refer to the provisions of the Railway Act which are applicable to the work in question. First, it should be stated that the respondent company was incorporated in 1910, cap. 74, Statutes of Canada, 1910, and, *inter alia,* was authorized to construct and operate a bridge over the Second Narrows of Burrard Inlet, for railway and other purposes, but "so as not to interfere with navigation". Sec. 16 enacted that "The Railway Act shall apply to the company and its undertaking". The company was also empowered by sec. 14 of the Act, to construct one or more lines of railway to connect the bridge with the lines of other railway companies, operating in that locality. The undertaking was also declared to be a work for the general advantage of Canada. The provisions of the Railway Act, cap. 68, Statutes of Canada, 1919, which are relevant here, might be quoted at length; they are as follows:—

245. No company shall cause any obstruction, in or impede the free navigation of any river, water, stream or canal, to, upon, along, over, under, through or across, which its railway is carried.

* * * * *

247 (1). Whenever the railway is, or is proposed to be carried over any navigable water or canal by means of a bridge the Board may by order in any case, or by regulations, direct that such bridge shall be constructed with such span or spans of such headway and waterway, and with such opening span or spans, if any, as to the Board may seem expedient for the proper protection of navigation.

* * * * *

248. When the company is desirous of constructing any wharf, bridge, tunnel, pier or other structure or work, in, upon, over, under, through or across any navigable water or canal, or upon the beach, bed or lands covered with the waters thereof, the company shall, before the commencement of any such work,

(*a*) in the case of navigable water, . . . submit to the Minister of Public Works . . . for approval by the Governor-in-Council, a plan and description of the proposed site for such work, and a general plan of the work to be constructed, to the satisfaction of such Minister; and

(*b*) Upon approval by the Governor-in-Council of such site and plans, apply to the Board for an order authorizing the construction of the work and with such application, transmit to the Board a certified copy of the Order in Council and of the plans and description approved thereby, and also detail plans and profiles of the proposed work, and such other plans, drawings and specifications as the Board may, in any such case, or by regulation, require.

(2) No deviation from the site or plans approved by the Governor-in-Council shall be made without the consent of the Governor-in-Council.

(3) Upon any such application, the Board may,—

(*a*) Make such order in regard to the construction of such work upon such terms and conditions as it may deem expedient;

(*b*) make alterations in the detail plans, profiles, drawings and specifications so submitted.

(4) Upon such order being granted, the company shall be authorized to construct such work in accordance therewith.

(5) Upon the completion of any such work the company shall, before using or operating the same, apply to the Board for an order authorizing such use or operation, and if the Board is satisfied that its orders and directions have been carried out, and that such work may be used or operated without danger to the public, and that the provisions of this section have been complied with, the Board may grant such order.

The alleged defaults of the respondent, in complying with the provisions of the Railway Act in respect of the securing of approval of the bridge plans have already been stated. Now, starting with the plans approved of by the Governor-in-Council in 1923, and assuming even that the plans approved of by the Railway Board in July of the same year, deviated, as alleged, in substantial particulars from the plans approved of by the Governor-in-Council. Sec. 248 (2) of the Railway Act enacts that " no deviation from the site or plans approved by the Governor-in-Council shall be made without the consent of the Governor-in-Council ". Any deviation from the plans approved of by the Governor-in-Council in 1923, was however sanctioned by the Order in Council made in August, 1925, approving of the final plans. The fact is, that the plans of the bridge as completed and put into use and operation were approved of by the Governor-in-Council and by the Railway Board; when all is said and done, the fact remains, that the bridge as constructed had such approval. If the respondent company proceeded, as alleged, with construction, according to the deviations to be recommended by the Board of Consulting Engineers,—and it is not unreasonable to assume that it had knowledge in advance of what such recommendations were to be—and chose to take the risk of securing subsequently the formal approval of such deviation by the Governor-in-Council; if the plans approved by the Railway Board in 1923 in fact constituted " a deviation " from the general plan approved of by the Governor

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in-Council in the same year, or, if such approval was prematurely obtained, that is, prior to the approval by the Governor-in-Council; still, I do not agree with the contention, that therefore the approval made by the Governor-in-Council and the Railway Board in 1925 of the ultimate plans of the bridge as actually constructed is a nullity, and not a compliance with the spirit of the statutory conditions. It seems to me that all the requirements and conditions which the Legislature sought to impose for the purpose of protecting public rights in navigable waters, was in the end observed. There may have been laxity on the part of all having to do with the matter, in observing from time to time the precise directions of the statute, but all such procedural defaults, if any, were, in my opinion, waived in the final sanction of the plans of the bridge as completed. The fact that the Order of the Railway Board made in 1925, preceded the approval of the same plans by the Governor-in-Council, is not, I think, of importance; their combined effect was a sanction, as required by statute, of a bridge proposed to be carried over a navigable water. Neither does sec. 248 (2) of the Railway Act make it imperative that consent to such deviations by the Governor-in-Council should be made upon the recommendation of one particular Minister; the consent of the Governor-in-Council is all that is required, and the statute does not say that this consent must be obtained upon the recommendation of any one Minister. The changes effected by the plans approved of in 1925 were evidently designed for the further assurance of the protection of navigation; it is to be assumed that the protests made against the plans approved in 1923, were, that the bridge had not sufficient height above high tide, and that the sub-structure of the bridge offered too many obstructions to the normal flow of the water at the Second Narrows. Probably, it was with the Department of Marine that public protests were registered against the plans approved in 1923, and which brought about the enquiry made by the Board of Consulting Engineers. Particularly would it be the function of the Department of Marine to safeguard the public rights in navigable waters, in Canada. That possibly was one reason why the recommendation to the Governor-in-Council was, in this instance, made by the Minister of that Depart-

ment of Government, in addition to the other reason I have already assigned. I do not therefore think there is substance in the contention, that the approval of or consent to the deviations of August, 1925, made by the Governor-in-Council, was a nullity because it was not made on the recommendation of the Minister of Public Works; in fact, I think, it matters little by what Minister that recommendation was made so long as the approval was made by the Governor-in-Council. Further, I think, it is to be presumed that the recommendation in question to the Governor-in-Council carried the approval of the Minister of Public Works. I therefore reach the same conclusion as the learned trial Judge, that the statutory conditions relating to the approval of the site, the general plans and the detail plans, of the bridge, were complied with, within the spirit and intent of the Railway Act.

There remains to consider, upon this aspect of the appeal, the effect of the words "so as not to interfere with navigation", as found in the Act of Incorporation of the respondent company. It is contended, that Parliament having enacted this limitation in respect of the power of the company to construct and operate the undertaking in question, that neither the Governor-in-Council nor the Railway Board, had power to authorize the construction of a bridge which interfered with navigation; that the Act falls short of authorizing a nuisance; and that if the bridge as constructed does in fact interfere with navigation, it is a work erected contrary to the statute and constitutes a public nuisance. Upon this point, I agree with the reasoning and conclusion of the learned trial Judge, and there is little further that I need say. The Legislature committed to the Governor-in-Council and to the Board of Railway Commissioners, the power to determine the plan of bridge that might be constructed. Having exercised the discretion resting in them, and having approved of the site, and the general and detail plans of the work, as one not reasonably calculated to interfere with navigation,—and they must have meant that,—I think it is now too late to say, that the bridge was one erected contrary to the provisions of the respondent company's Act of Incorporation. Possibly, an error in judgment was made in approving the

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structural plans of the bridge; it may be that the bridge has left navigation at the Second Narrows more difficult and dangerous than theretofore; yet, the site, and the general and detail plans of the bridge having been approved by those to whom such power was specially delegated by Act of Parliament, the work having been in good faith completed according to such plans, and the completed work having been put into operation by leave of the Railway Board, I do not think the same can now be declared to be an unlawful work and a public nuisance, even if it does, in fact, in some degree, render navigation at this point more hazardous than prior to its construction. Fundamental errors in constructed public works, inimical to public interests, are frequently discovered after completion, but if the statutory authority and conditions applicable to the work were complied with, I hardly think it practical to say, that if damages result from the construction of the work, the party using it is responsible for any such damages, if occurring without negligence. In this case, I think, as the learned trial Judge held, that the words "so as not to interfere with navigation", mean not more interference than is reasonably necessary to carry out the undertaking as authorized, and as approved by the Governor-in-Council and the Board of Railway Commissioners. What the Governor-in-Council and the Board of Railway Commissioners did, was the equivalent of a positive legislative act authorizing the erection of the bridge, according to the plans under which it was in fact erected. If I am correct in this view, then the appellant fails because the work as constructed was one authorized by the Legislature. Thus, Blackburn J., in the course of his judgment in *Hammersmith Railway Co.* v. *Brand* (1) says:—

> I think it is agreed on all hands that if the Legislature authorizes the doing of an Act (which if unauthorized, would be a wrong and a cause of action), no action can be maintained for that act, on the plain ground that no Court can treat that as a wrong which the Legislature has authorized, and consequently the person who has sustained a loss by the doing of that act is without remedy unless in so far as the Legislature has thought it proper to provide for compensation to him.

The learned trial Judge has discussed this point in his reasons for judgment, at great length and with clearness,

(1) (1869) L.R. 4 H.L. 171, at p. 196 (E. & I. App.)

and his finding which I adopt, should not in my opinion be disturbed.

It was also contended that a rock fill, on the south shore, was greater in extent than authorized and was responsible for definite difficulties in navigating the bascule span. I do not propose discussing this point as I fully concur in the disposition of the same made by the learned trial Judge, and his reasons therefor.

Now as to the cross-appeal, in respect of the respondent's claim against the ship *Eurana* for damages caused to the bridge in consequence of the collision. In his reasons for judgment, the learned trial Judge discussed with great care the effect of the construction of the bridge upon navigation at the Second Narrows, the natural difficulties of navigation at this point, the peculiar sub-surface tidal currents obtaining at the time material here, the effect of dredging operations at the First Narrows upon the Second Narrows tidal currents, the navigation of the *Eurana,* and other alleged facts relevant to the respondent's claim that the damages caused to the bridge was by reason of the negligent navigation of the *Eurana.* He concluded, that upon the evidence, he could not find that the allegations of negligence against the *Eurana,* as to the time of making the attempt to pass through the bridge or the manner in which the attempt was carried out, had been sustained, and that it was a case of inevitable accident. After a careful perusal of the evidence, and upon a consideration of the reasons given by the learned Judge, I cannot see any grounds for disturbing the conclusion which he reached, and I think the same was justified by the evidence. I do not think that negligence has been established against the *Eurana.* At the time and place in question, conditions prevailed that undoubtedly made navigation through the bascule span extremely difficult, and I think with the learned Judge, that the *Eurana* attempted to navigate the open span with reasonable care, caution and maritime skill, and left undone nothing that could have been done to avoid the accident.

Accordingly I am of the opinion that the appeal and cross-appeal should both be dismissed, and with costs in each case.

Judgment accordingly.

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Judgment of the Honourable Mr. Justice Martin L.J.A. delivered the 20th of April, 1929.

This is an action by the plaintiff company (incorporated by Can. Stat. 1910, Cap. 74 against the SS. *Eurana,* length 339·7 feet,. beam 56·21, gross tonnage 5,688, regtd. 3,516, draught as then loaded 25 ft. aft 23·5 for'd. single screw. h.p. 2,500, Nels Svane, master), to recover $7,887 damages done to its bridge across the Second Narrows of Burrard Inlet on the 10th March, 1927, shortly after 6 p.m. by said ship, owing to the alleged negligent navigation thereof, in colliding with the E. side of the bridge while attempting to go through its 150 feet bascule span with a full cargo of 4,200,000 feet of lumber when the tide, a fairly big one, was apparently at the last of low water slack, outward bound from Barnet. Several charges of faulty navigation are set up but those substantially relied upon are that the ship did not set and keep a course true for the centre of the span opening, and that she made the attempt to go through it at a wrong stage of the tide, i.e., on the ebb, instead of at slack or slight flood, and failed to observe the unfavourable set of the same, and delayed in taking proper manoeuvres.

The defendant ship disputes the title of the plaintiff to the bridge and the land it is built upon and its right to construct and maintain the same, and alternatively alleges that the plaintiff has not obtained the approval of the Governor General in Council, under the Navigable Waters Protection Act for its undertaking, and that in consequence the bridge is an unlawful obstruction to navigation; and also that even if the statutory power to build a bridge which impedes navigation has been duly conferred yet the plaintiff—

"negligently and wrongfully constructed a badly designed bridge which impedes and interferes with the navigation of said Second Narrows to a greater extent than is necessary for the proper exercise of the plaintiff's said statutory powers and the defendant says that the collision between the SS. *Eurana* and the said bridge was occasioned by the fact that the said bridge was badly designed and constructed and impedes and interferes with the navigation of said Second Narrows to a greater extent than is necessary to enable the plaintiff to exercise its said statutory powers and that therefore the plaintiff is not entitled to recover damages in respect of said collision."

The defendant ship also, on the facts of the collision, denies any bad navigation and alleges alternatively, par. 14, that it was caused by

"circumstances of wind and current over which those in control of the *Eurana* had no control and which they could not anticipate or guard against and the collision was an inevitable accident for which the defendant is not responsible."

And it further alleges that at the time in question the tide turned and began to flood earlier than the hour fixed by the tide table, and the northerly set of the tide was of abnormal force, and that the span opening is not in the middle of the channel, and is too narrow, and that the unnecessary number of short spans and a rock fill on the South shore create strong and varying currents which make navigation unusually difficult even at the most favourable times.

The defendant ship further sets up a counterclaim against the company for $77,064 as and for damages to her caused by the said collision based upon the allegation that the plaintiff wrongfully and illegally erected the said bridge and maintains it as a public nuisance as being an "obstruction" which "impedes the free and convenient navigation of the said Second Narrows by ships having lawful occasion to navigate said waters," and which "obstruction" was the cause of the damage to the ship while she was endeavouring to proceed past or through (it) without colliding with it."

To this the plaintiff replies that the bridge has been duly constructed in accordance with powers con-

ferred by the said Statute and the Railway Act and certain recited orders of the Governor in Council and the Board of Railway Commissioners, and, in general, joins issue with the other said allegations of undue interference with navigation and nuisance by obstructions and wrongful or negligent construction in any respect, and denies that the same were the cause of the collision, and that it was due to abnormal conditions which could not have been anticipated and guarded against.

Upon these issues forty-two witnesses were called and a vast amount of evidence taken upon all aspects of the claim and counterclaim, much of which evidence is applicable to both distinct causes of action though not all of it, and it would be easy to confuse the issues were not their distinct nature kept in mind because the relevant facts are largely interwoven.

Taking up then the Plaintiff's claim first, and assuming in its favour all questions of title and that the bridge has been only constructed in accordance with statutory powers and plans authorized by the proper authority, it is nevertheless necessary to consider the effect of this authorized obstruction upon the navigation of the channel when an action is brought against a vessel for damaging the bridge in passing thruugh it. In other words, if the effect of its construction is to make navigation even at proper times more difficult than theretofore it would not be reasonable to expect that mariners so using the channel could avoid injury to themselves or to the bridge as easily as they could if the channel had been left in a state of nature, even though they use all the skill and caution that should be required of a prudent and skilful navigator. It must follow that the more difficult the passage is made the more must accidents be expected, just as the easier it is the fewer should there be. Obviously it would not be reasonable to expect the same results in such very different circumstances, because though the standard of the mariner's navigation is always the same, yet as his task is rendered more difficult the more must it be expected that reasonable human effort and precaution cannot always guard against accident when the margin of safety is substantially reduced in what at the best of times is, now at least, a channel which presents increased difficulties in navigation for larger deep sea vessels, over 300 feet in length, to navigate.

It is not necessary, on this branch of the case, to consider to the fullest extent what the effect of the construction of the bridge has been upon such navigation by ships of the class now in question, but it is sufficient to say that in three respects the natural difficulty has been substantially increased thereby, viz., in contracting the space in which it is necessary for such ships to line up in passing through the bascule span outwards, and in manoeuvring after passing through inwards; in addition to the naturally very uncertain conditions of tidal currents in the immediate vicinity of the bridge; and in increasing the force of the current through it at said span in particular. Though a great mass of evidence was given upon these main points it would be practically impossible to review it adequately in these reasons, and the subject is further complicated by the important unquestioned fact that the extensive operations which for a long time have been carried on (and still are in progress) in deepening, widening and straightening the outlet channel at the First Narrows have had an appreciable effect upon the currents at the Second Narrows, which indeed is obvious from the mere inspection of the charts of Burrard Inlet, because the contracted run-in of a great volume of water to the lower basin (between the bridge and Brockton Point) through the Second Narrows must inevitably be affected by the facilities of run-off to sea through the First Narrows, and *vice versa* with incoming tides which bring the water back through the First and Second Narrows to the much larger upper basin above the bridge. But upon the extent of the undoubted substantial effect of these First Narrows operations upon conditions at the Second there is no evidence of any weight, which is

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not indeed to be wondered at, because to obtain any reliable information upon the point a series of long and doubtless very expensive observations, and also researches into prior conditions, would have to be undertaken, which the parties hereto have not attempted and could not reasonably be expected to do so. Nevertheless the absence of exact information upon substantial changes in navigation which are not due to the bridge at all (and yet which will continue to increase as the First Narrows channel continues to be widened) renders it impossible to determine satisfactorily the extent of the degree to which the bridge alone has added to the natural difficulty of navigation, and it is not necessary on the present point to say more than that the bridge has, apart from the said First Narrows operations, increased in the said three ways the said natural difficulty to a substantial extent, though undefinable upon the insufficient evidence before me. At the same time, however, the increase is not as great as many witnesses deposed to and it is very probable that one of the reasons why there was so much conflict between apparently credible witnesses (as I am pleased to say most of them appeared to be) as to the difference between former and present conditions at the Second Narrows is that they failed to appreciate the far-reaching effect of the First Narrows operations upon present conditions of the tide and current at the Second and merely regarded the latter in the light of what they see now at that spot.

It is further alleged that the difficulty of navigating larger vessels through the bridge has been increased by the fact that the bascule span is not placed at right angles to the centre of the main current, and that it is appreciably to the South thereof. That such is the case to some, and an appreciable extent, there is little if any doubt because the presence of a shoal on the South shore of the channel extending Eastward from the bridge for about 700 feet to a protuberance called The Knuckle tends to cramp such vessels in their passage inwards and outwards. It is not, in strictness, for this Court to suggest a remedy for this condition but in a case of this exceptionally wide public importance I cannot shut my eyes to the fact that the evidence suggests that it would be well for the proper authority to cause careful observation and investigation of the shoal to be made to ascertain if it would not be possible to reduce, materially at least, the obstruction it causes, by dredging operations, as in the First Narrows.

These questions of the proper construction of bridges and their proper position as regards the current are always difficult and there have been several of them before this Court, the last being *The Attorney General of British Columbia* v. *The Pacific Foam* (1), but they all depend upon the particular and always varying circumstances of each case. The present one, in view of its exceptional importance and difficulty has caused me long and anxious reflection, with the result, that bearing in mind the conditions the defendant ship was confronted with in attempting to pass through the span at the time in question, I can only reach the conclusion that the said allegations of negligence against her are not sustained by evidence, either with respect to the time of making the attempt or of the manner in which that attempt was carried out, despite the able manner in which Mr. Burns presented his argument to the contrary. The accident, was, I can only conclude from the evidence, caused by a very strong incoming sub-surface current setting northeasterly across the bridge and not visible on the surface, which continued to indicate slack water, and which under-current at a distance of 500-600 feet from the bridge suddenly and unexpectedly greatly increased in strength and took control of the ship causing her to sheer suddenly from the proper course she had been on and was still holding at a proper speed, and which in ordinary circumstances would have taken

(1) (1928) 40, B.C.R. 100.

her safely through the bascule span. No fault is to be found in the measures taken by the ship to extricate herself, though ineffectually, from the imminent danger in which she suddenly found herself and which she had no reason to anticipate. It is true that those in charge of her expected, and were in fact prepared to meet ordinary changes in the undercurrent there (caused largely by the fact that the change of the tide as the bascule span is very quick, almost instantaneous at times, and slack water usually is only for a few minutes) but not one at all approaching the abnormal strength encountered on this occasion, which her pilot, Wingate, describes as "tremendously stronger" than he had ever experienced there, and his evidence is confirmed in essentials by that of the Master, Svane, and also largely by Captain Harrison of the *Pacific Foam* and Captain Payne of the *Farquhar,* and W. Tambourino, independent eyewitnesses.

Being then of opinion that this collision "could not possibly have been prevented by the exercise of ordinary care, caution and maritime skill" on the part of the ship, the case becomes one of "inevitable accident" as so defined by the Privy Council in *The Marpesia* (1), wherein it is also said:—

"Here we have to satisfy ourselves that something was done or omitted to be done, which a person exercising ordinary care, caution and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be."

This definition was also adopted by the English Court of Appeal in The Schwan (2), and lately applied by this Court in its New Brunswick District in the similar case of *The King* v. *The Woldingham* (3), to include a sudden "yaw" in passing through a narrow bridge; cf., also *Marsden's Collisions at Sea (1922)* 18, and Bevan on Negligence (1928) 1291.

It is to be noted that in certain aspects there is also a similarity between this case and the very recent one of *The Vectis* (4), wherein a collision "bumping" took place between two barges in a narrow creek owing to "a sudden swell of the incoming tide," as Lord Merivale describes it. A new trial was ordered in the circumstances, but speaking of the expectation of "bumps" in narrow places Mr. Justice Hill said, p. 387:

"Apart from knowledge of the dangerous position of the anchor, I can see no reason for saying that there is negligence in not preventing a harmless bump between barges, such bumps are frequent in the ordinary working of barges, and in this narrow creek were probably incidental to the ordinary use of the creek. They involve neither *damnum* or *injuria.*"

Seeing that the case is one of inevitable accident the Plaintiff's claim must be dismissed, and formerly it was the practice to make no order as to costs in such circumstances, but the present practice as laid down by this Court in "*The Jessie Mack*" v. *The* "*Sea Lion*" (5), is that costs should follow the event in the absence of special circumstances requiring a departure from that rule; to the cases there cited I add *The Cardiff Hall* (6), and as the defence of inevitable accident was pleaded herein and there are no special circumstances which would justify a departure from said general rule the disposition of the costs will be in accordance therewith.

Then as to the counterclaim of the ship against the bridge. This depends largely on different considerations because if the bridge has been duly built in accordance with the permission given by the proper authority, the fact that it does actually obstruct navigation more or less imposes no liability upon it for damage to vessels caused by the increased difficulty in navigating the natural narrow channel, which it

(1) (1872) L.R. 4 P.C. 212.
(2) (1892) P. 419.
(3) (1925) Ex. C.R. 85.
(4) (1929) 45, T.L.R. 384.
(5) (1919) 27 B.C.R. 444.
(6) (1918) P. 56.

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has restricted and impeded substantially as already indicated; it is beyond reasonable doubt that if the bridge had not been there on the day in question the ship would not have suffered any damage. The right, therefore, of the Plaintiff company to build and maintain the bridge in its present state and position is what is really in question on this branch of the case.

It is first objected that the Plaintiff has no title to the lands upon which the bridge is built and therefore cannot maintain this action and that its National Crown Grant (dated May 9, 1924) of the lands " as part of a public harbour " is invalid in that no Order in Council authorizing it has been put in evidence though the Grant recites " that it is made under and by virtue of the statutes in that behalf and pursuant to authority duly granted by our Governor in Council." This objection, in my opinion, is not one of weight in the case of a Grant made under the great seal of Canada, even assuming that an order in council is necessary, because, in brief, a recital in such an instrument of the greatest solemnity and duly recorded, i.e., enrolled (on 31st May, 1924) is sufficient to establish a *prima facie* case of the existence of such an order if necessary, or at least to bring into operation the maxim *omnia praesumuntur rite esse acta,* nor on long-established and well-known principles has a stranger any status to rely upon the effect of the non-performance of any conditions which might. e.g., result in a forfeiture to the Crown—*Canadian Co.* v. *Grouse Creek Flume Co. Ltd.* (1), and cases noted at p. 8.

Then as to the application of the Navigable Waters Protection Act, cap 115, R.S.C. 1906, and amendment, cap. 33 of 118, now cap. 140 R.S.C. 1927; it is in my opinion excluded by the 3rd section thereof in and for the present circumstances and purposes, not being " rebuilding or repairing," as will later appear.

The Plaintiff company by its said act of incorporation (cap. 74 of 1910) is authorized by secs. 8 and 9 thereof not only to build a bridge but also to operate (and does in fact operate) " one or more lines of railway " across said bridge and into adjacent territory as part of its undertaking as a connecting line with certain of the other railways specified in sec. 14, and by sec. 2 that whole undertaking is " declared to be a work for the general advantage of Canada " and sec. 16 declares that " the Railway Act shall apply to the company and its undertaking." The effect of these provisions is to read into the Act of Incorporation, which is a public Act (Interpretation Act, R.S.C., cap. 1, s. 13), all apt provisions of the Railway Act and the two acts must be read as one so as to carry out the intention of Parliament to legislate for the " public good " (advantage of Canada) and, as the said Interpretation Act, sec. 15, declares it—

" shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act. . . . according to its true intent, meaning and spirit."

Approached in this light no real difficulty is to be experienced from the words much relied upon by the ship in sec. 8, that said undertaking may be constructed, operated and maintained " from some convenient points on the South shore in or near the City of Vancouver to points on the opposite shore of Burrard Inlet so as not to interfere with navigation. That the general location of the bridge is at the most " convenient points " of the Second Narrows is not disputed; in fact it is unquestionably at the best points, and except in its immediate neighbourhood the construction of a bridge across them (the Narrows) would not in reason be contemplated, and even where it is located the evidence is clear that for many reasons its construction presented several problems of exceptional difficulty to overcome. It would be impossible in the present stage of human effort to build a bridge there which would not in some substantial degree interfere with navigation within the decisions which are con-

(1) (1867) 1 M.M. C. 3.

veniently collected in a leading case in this Court. *Kennedy* v. *The Surrey* (1), to which may be added *Attorney-General* v. *Terry* (2), and *The King* v. *The Woldingham, supra.*

To escape the literal consequences of those decisions and to allow unimpeded navigation for the whole of the space at all stages of this tide it would, as one example only, be necessary to have a span of at least one thousand feet without supporting piers and that fact alone shows that Parliament, which must be assumed to be informed upon the subject of the public harbour with which it was dealing, could never have contemplated anything of the kind, and to hold that Parliament intended to grant a charter which ostensibly conferred powers to be exercised to the "general advantage of Canada" and yet at the same time rendered them incapable of execution is a conclusion which a Court of Justice should be intractably driven to before accepting because it would "lead to a manifest absurdity." The Privy Council in *City of Victoria* v. *Bishop of Vancouver Island* (3), thus laid down the principles which should govern the construction of the act in question:

"There is another principle in the construction of statutes especially applicable to this section. It is thus stated by Lord Esher in *Reg.* v. *Judge of the City of London Court* (4), 'If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity.
In my opinion, the rule has always been this:—if the words of an Act admit of two interpretations, then they are not clear; and if the one interpretation leads to an absurdity, and the other case does not, the Court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation.' *And Lord Halsbury in Cooke* v. *Charles A. Vogeler Co.* (5), said: 'But a court of law has nothing to do with the reasonableness or unreasonableness of a provision, except so far as it may help them in interpreting what the legislature has said.' Which necessarily means that for this latter purpose it is legitimate to take into consideration the reasonableness or unreasonableness of any provision of a statute. Again, a section of a statute should, if possible, be construed so that there may be no repugnancy or inconsistency between its different portions or members?"

Applying both these most appropriate principles to the present case, Parliament, in my opinion, intended that the said two acts must be read together and practically applied in such a way as to arrive at the only possible reasonable result in the circumstances, viz., that the words "not to interfere with navigation" mean not more than is necessary to carry out the undertaking in the manner authorized by the special tribunal created by Parliament in the incorporated Railway Act to determine that very question, i.e., the Board of Railway Commissioners for Canada. And it must not be overlooked that, since the granting of the charter and the construction of the bridge thereunder, the National Government itself has materially increased the difficulty of navigation at this bridge by its large operations at the First Narrows already noted.

In the Railway Act (cap. 68 of 1919) itself there is a much more pronounced "repugnancy or inconsistency" than in the Plaintiff's Act (sec. 8) because the group of sections, 245-8, entitled "Respecting Navigable Waters," begins by a general prohibition s. 244 against "any obstruction in. . . . the free navigation" of such waters, but nevertheless proceeds immediately and necessarily to provide for inevitable obstruction by bridges and "other structures" to be constructed (under secs. 247-8) as to the said "Board may seem expedient for the proper

(1) (1905) 11 B.C.R. 499.
(2) (1874) 9 Ch. App. 423.
(3) (1921) 2 A.C. 384.
(4) (1892) 1 Q.B. 273, 290.
(5) (1901) A.C. 102, 107.

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protection of navigation" by proper openings in spans and due provision for draws and swings where necessary. What is the "proper protection of navigation" in the particular circumstances is for the Board to decide before granting an order in accordance with the specified procedure, for construction, and subsec. (5) of 248 finally provides that: "Upon the completion of any such work, the company shall, before using or operating the same, apply to the Board for an order authorizing such use or operation, and if the Board is satisfied that its orders and directions have been carried out, and that such work may be used or operated without danger to the public and that the provisions of this section have been complied with, the Board may grant such order."

This brings the case to a question of fact as to whether the Plaintiff has procured the necessary orders from the Board under said sections, as to which a long contest arose but no useful purpose would be served by here considering it in detail. It is sufficient to say, therefore, that in my opinion all statutory conditions were fulfilled which are necessary to support the validity of the various orders of the Board that the Plaintiff relies upon, and that it has in fact and without negligence constructed the bridge at the site and in accordance with the plans and specifications duly authorized originally and later by alterations in certain particulars validly approved. Such being the case no liability attaches to the Plaintiff for the consequences of the proper "construction, operation and maintenance" of its undertaking under its act of Parliament. *Can. Pac. Ry.* v. *Roy* (1); and *Quebec Railway, etc. Co.* v. *Vandry* (2).

The final point requiring particular consideration is that the bridge is in fact not constructed in accordance with the said statutory authorization but has substantially departed therefrom in a way that has materially increased the difficulty of navigation even beyond the degree of obstruction that the said authorization permitted, and on this question a large amount of evidence was given but with the result that such allegation has not been established in proof. The only feature of it that created any doubt in my mind was in regard to the rock fill on the S. shore, the extent of which was not as clearly defined as I should wish by either party, doubtless owing to its nature and the unavoidable obliteration of the original contour of the land and tidal marks at that point. But I have no doubt that even if it could be clearly proved that the said fill is greater in extent that authorized nevertheless that excess in size is "an encroachment of so trifling a nature that this Court would not interfere" as was said by Lord Chancellor Cairns in *Attorney-General* v. *Terry, supra,* p. 431. That case has been unanimously adopted by our National Supreme Court in *The Queen* v. *Moss* (3), as "settling the law," and it approves the judgment below of Jessel M. R. The Court said, per Chief Justice Strong:—

"Even if the bridge now in question was of very great public benefit, whilst the prejudice it caused to the public as an obstruction to navigation was of the slightest possible degree, it nevertheless would have been an illegal structure amounting to a public nuisance, which, as such, the Crown might cause to be removed unless for other reasons it was not to be treated as a nuisance." In the case at bar there is no evidence to justify a finding that any "prejudice" has been occasioned to the navigation of the bridge by the excess in size (if such there be) of the rock fill beyond what was lawfully authorized as aforesaid.

In conclusion the following illustration given by the Master of the Rolls (in the course of his valuable remarks upon the way obstructions in public harbours should be regarded in the light of changing conditions) in Terry's case may appropriately be cited as some indication of how the difficult situation at the Narrows was doubtless viewed by

(1) (1902) A.C. 220.

(2) (1920) A.C. 662, at 681.

(3) (1896) 26 S.C.R. 322 at p. 332.

the Board of Railway Commissioners in their attempt to deal with conflicting public interests in a practical way which would best secure the greatest benefit to the public as a whole:

"Suppose you have a navigable river, and it is necessary to cross it by a bridge, and the river is too wide to allow of a bridge of a single span, you must then put one or more piers into the middle of the river. and, of course, according to the extent you introduce bridge piers or bridge arches into a navigable river, you to some extent diminish the waterway, and to some extent, perhaps to a more or less material extent, obstruct the navigation. But it is for the public benefit at that spot that a public road should be carried over the river by the bridge, and that benefit may so far exceed the trifling injury, if injury it be, to the navigation, that on the whole a Court of Justice may fairly come to the conclusion that a public benefit of a much greater amount has been conferred on the public than the trifling injury occasioned by the insertion of the piers into the bed of the river. In that case also it would be a public benefit that would counterbalance the public injury."

It follows that upon the whole of this branch of the case the counterclaim must be dismissed and with costs in accordance with the general rule.

I feel that I should not leave this case of exceptional importance and difficulty without adding a few words in appreciation of the highly creditable manner in which it was handled by the counsel concerned therein; their able work has been of great assistance to the Court.