

CHARLES ANDERSON (DEFENDANT) APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF) RESPONDENT.

M. A. NICKERSON . . . . . THIRD PARTY.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA.

1919  
\*Nov. 5.  
\*Nov. 10.

*Navigation—Obstruction—Removal of wreck—Owner—Liability for cost—Statutory requirements—“Navigable Waters Protection Act” [1906] c. 115, ss. 17 and 18.*

By sec. 16 of the “Navigable Waters Protection Act,” if navigation is obstructed by a wreck the Minister of Marine may cause same to be destroyed; by sec. 17 he may convey it to a convenient place and sell it at public auction, paying the surplus of proceeds over expenses to the owner who shall be liable for any deficiency. A wreck obstructing navigation was sold by the owner on condition that it be removed. This was not done and the Minister advertised for public tenders, the material after removal to belong to the tenderer. In an action against the original owner for the cost:

*Held, per Davies C.J. Brodeur and Mignault JJ.* that the owner was liable; that he had received the benefit of the value of the material in the reduced amount of the tender; and that the Minister had exercised a wise discretion.

*Per Idington, Duff and Anglin JJ.* that as the Minister did not observe the statutory requirement of conveying away the vessel and selling it by public auction the Crown could not recover notwithstanding that the course pursued may have been equally beneficial to the owner.

Judgment of the Exchequer Court (18 Ex. C.R. 401; 46 D.L.R. 275), affirmed, the court being equally divided.

APPEAL from the judgment of the Exchequer Court of Canada (1), in favour of the Crown.

The necessary facts and the question raised for decision are stated in the above head-note.

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\*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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*J. McG. Stewart* for the appellant.

*R. V. Sinclair K.C.* for the respondent.

THE CHIEF JUSTICE.—I am of the opinion that the judgment of the Exchequer Court was right and that this appeal should be dismissed and such judgment confirmed.

As there is an equal division of opinion in this court, in accordance with our usual practice there will be no costs of the appeal.

The action was brought by the Crown under the "Navigable Waters Protection Act" to recover expenses incurred by the Crown in removing a wreck from Barrington Passage, Nova Scotia, on the ground that the passage was a public harbour of Canada and that the wreck constituted an obstruction to navigation.

The facts necessary for the decision of the appeal are clearly and concisely stated in the written reasons of Mr. Justice Brodeur with which I concur.

I base my judgment upon the fact that the evidence shews such a full and substantial compliance with section 17 of the "Navigable Waters Protection Act" (R.S.C. ch. 115) as entitles the Crown to maintain this action under section 18 of that Act.

No injustice whatever was, in my opinion, sustained by the appellant.

If a reservation of property rights in the debris of the vessel after being blown up had been made, the amount of the tender would have been necessarily increased by such a problematical value as the tenderer might put upon such debris and the owner obliged to pay the increased amount.

The circumstances of the case were such as called for the exercise by the Minister of a wise and prudent

discretion and I think in accepting the tender with the provision that the property in the debris of the wreck in question when blown up should belong to the tenderer, the Minister exercised, under the circumstances, such discretion and one in the interests of the owner Anderson.

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INDINGTON J.—This is an appeal in an action brought by the respondent in the Exchequer Court to recover the expenses of removing a wreck, under and by virtue of the “Navigable Waters Protection Act,” ch. 115 R.S.C. 1906. At common law there could be no such relief. The rights and remedies in question are entirely the creature of the said statute which has given a new remedy.

Section 16 provides that:—

The Minister may \* \* \* if, in his opinion:

(a) the navigation of any such navigable water is obstructed, impeded or rendered more difficult or dangerous by reason of the wreck \* \* \* cause such wreck, vessel or part thereof or other thing, if the same continues for more than twenty-four hours, to be removed or destroyed in such manner and by such means as he thinks fit, and may use gunpowder and other explosive substance for that purpose if he deems it advisable.

Section 17 is as follows:

17. The Minister may cause such vessel, or its cargo, or anything causing or forming part of any such obstruction or obstacle, to be conveyed to such place as he thinks proper, and to be there sold by auction or otherwise as he deems most advisable; and may apply the proceeds of such sale to make good the expenses incurred by him in placing and maintaining any signal or light to indicate the position of such obstruction or obstacle, or in the removal, destruction or sale of such vessel, cargo or thing.

2. He shall pay over any surplus of such proceeds or portion thereof to the owner of the vessel, cargo or thing sold, or to such other persons as shall be entitled to the same respectively.

The Minister did not direct anything to be conveyed to any place, or to be sold by auction. What happened was that he advertised for tenders for the

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execution of the work and in the advertisement expressly provided as follows:—

the materials in the obstruction, when the removal is satisfactorily completed, but not before, to become the property of the contractor.

The contract for removal was let to the firm which made the lowest tender based on specifications thus providing for the disposition of the property. Upon the execution of the work the contractors took the property as their own and afterwards, it is said, sold a part for some \$129, and had still some more left. It is quite evident, I think, that there was not sufficient value in the wreck or the material of which it was composed to leave any balance in favour of the appellant. And inasmuch as he had sold to one Nickerson his rights in the wreck for \$5 on the terms of removal, there would not be any greivous wrong done to the appellant by what transpired. That, however, is not the question.

Even if we could find that there was a very trifling sum realized out of the property after its removal, I do not see how that would affect the question involved.

That question is reduced solely to the one question of whether or not in this new remedy given the Crown to recover from the unfortunate owners of a wreck the cost of removing it, the steps laid down in the statute giving the remedy, as a condition precedent thereto, have been observed. I have come to the conclusion that they have not been observed.

So clear a departure from the terms of the Act should not, I submit, be maintained, no matter how well intentioned the modification made by the Minister or his deputy in carrying into effect the provisions of the Act may have been.

I think the appeal should be allowed with costs.

DUFF J.—The decision of this appeal turns upon the construction to be given to sections 13, 14, 16, 17 and 18 and particularly section 18 of the “Navigable Waters Protection Act,” ch. 115, R.S.C. 1906. By the combined operations of sections 13 to 16 inclusive the Minister is authorized in certain circumstances where the navigation of navigable waters is obstructed, impeded or rendered more difficult or dangerous by reason of the wreck, sinking or grounding or any part thereof to

cause such wreck, vessel or part thereof or other thing, if the same continues for more than 24 hours, to be removed or destroyed in such manner and by such means as he thinks fit, and may use gunpowder or other explosive substance for that purpose, if he deems it advisable.

By section 17

the Minister may cause such vessel, or its cargo, or anything causing or forming part of any such obstruction or obstacle, to be conveyed to such place as he thinks proper, and to be there sold by auction or otherwise as he deems most advisable; and may apply the proceeds of such sale to make good the expenses incurred by him in placing and maintaining any signal or light to indicate the position of such obstruction or obstacle, or in the removal, destruction or sale of such vessel, cargo or thing.

Section 18 provides that where the Minister

has caused to be removed or destroyed any wreck, vessel or part thereof, or any other thing by reason whereof the navigation of any such navigable waters was or was likely to become obstructed, impeded or rendered more difficult or dangerous \* \* \* and the cost of removing or destroying such vessel or part thereof, wreck or other thing has been defrayed out of the public moneys of Canada; and the net proceeds of the sale under this part of such vessel or its cargo, or the thing which caused or formed part of such obstruction are not sufficient to make good the cost so defrayed out of the public moneys of Canada, the amount by which such net proceeds falls short of the costs so defrayed as aforesaid, or of the whole amount of such cost, if there is nothing which can be sold as aforesaid, shall be recoverable with costs, (a) from the owner of such vessel or other thing, or from the managing owner or from the master or person in charge thereof at the time such obstruction or obstacle was occasioned \* \* \*

The dispute arises in this way: The schooner “Empress” was burned to the water’s edge in Barrington

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Passage, a public harbour, and was abandoned to the underwriters as a total loss. By them it was sold at auction for \$5.00 to one Nickerson who, after several ineffectual efforts, abandoned the attempt to remove the wreck. The Minister advertised by tender for the execution of the work of removal and in the contract which was let for \$750.00, it was stipulated that

the materials in the obstruction when the removal was satisfactorily completed, but not before,

were to "become the property of the contractor."

By the contractor the wreck was blown up and the pieces were removed to the adjacent shore and eight iron knees weighing over a ton, and about 150 lbs. of copper were taken by the contractors to Yarmouth and sold by them for their own benefit.

In this action the Crown sought to charge the appellant under section 18 with the whole cost of removing the wreck and Mr. Justice Cassels, the judge of the Exchequer Court, has held that the appellant is liable. The appellant contends that the conditions of liability under section 18 have not come into existence.

At common law the owner of a vessel becoming an obstruction to navigation in the absence of negligence or wilful default of the owner or persons in control of her, is not responsible for the consequences of the obstruction, or chargeable with the cost of removing it, and the "Navigable Waters Protection Act" imposes a new liability upon the owners of ships, which comes into existence in certain defined conditions; a liability which it would be difficult in many cases to describe as just or fair or reasonable.

On well-known principles the party who asserts in a particular case that the conditions of a new statu-

tory liability have come into existence, must establish that proposition strictly and in ascertaining whether that is so or not, the inquiry is: Do the facts established clearly fall within the statutory description of those conditions?

Now when section 18 is read in connection with section 17, it becomes apparent that "sale under this part" in section 18 refers to the sale authorized by section 17, and section 18 provides, if not in explicit terms, at least by plain implication, that if there is anything which can be sold, it is only the difference between the net proceeds of the sale of it and the amount of the costs which can be recovered.

It is quite clear that there was something of appreciable value which could be sold; the parts of the vessel, that is to say, which were taken away by the contractors and sold for their own account. And the appellant is entitled to succeed unless the condition of the statute is satisfied that there was a sale of these parts within the meaning of the statute.

On behalf of the Crown it is contended that the provision of the contract transferring the ownership of the materials to the contractor upon the completion of the work of removal, constituted a sale within the meaning of the Act. The consideration for this term of the contract would be found, it is argued, in an appropriate allowance made in the stipulated compensation which would be reduced in consequence of the supposed value of the stipulation in the eyes of the tenderers. The cost of removal being thus diminished and the burden upon the owner correspondingly lightened, the owner, it is argued, would in this way get the equivalent in value of the materials just as if they had been sold as the statute contemplates.

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The answer to this contention is, and I think it is a complete answer, that the statute provides for no such thing. Neither in form nor in substance does this stipulation in this contract fulfil the statutory condition. The statute provides for a sale at auction and section 18 makes it quite plain that what is contemplated is a sale in the ordinary sense, that is to say a sale for an ascertained price which, if less than the cost, can be deducted therefrom in order to determine the amount of the liability under that section.

Moreover, it would be rash to assume that the procedure under consideration would in all cases operate as favourably to the owner as that prescribed by the statute. Under this procedure the competitive bidders are limited to persons who are prepared to tender for the execution of the work of removal. Under the statutory procedure the bidders would include all persons naturally desirous of buying the articles for sale.

The appeal should be allowed and the action dismissed with costs.

ANGLIN J—I was at first inclined to think that there had been substantial compliance with section 17 of the “Navigable Waters Protection Act” (R.S.C. ch. 115) sufficient to entitle the Crown to maintain this action under section 18. But further consideration has led me to the conclusion that this view cannot be sustained—somewhat reluctantly because I incline to think the course adopted may have been quite as beneficial to the appellant as a strict compliance with section 17 would have been.

Tenders were called for by an advertisement for the removal or destruction, under section 16, of the



wreck of the defendant's vessel on the footing that the property in it after removal or destruction should belong to the contractor. It may be surmised that in this case something approximating their saleable value after the ship was blown up had already been allowed to the Crown by the contractor in reduction of the amount of his tender for the destruction of the vessel and that the defendant, therefore, received the benefit of such saleable value. But if that be the fact, and if proof of it would entitle the Crown to maintain this action, such proof is entirely lacking; and in many other cases—perhaps the great majority—little or nothing would be allowed by a tenderer for the value of possible salvage from a submerged wreck to be removed or destroyed by him. On the other hand, after removal to the shore or to some other accessible place portions of the same vessel or cargo might have a very substantial value and be readily saleable.

We are required to place a construction on sections 17 and 18. The latter section confers on the Crown a right which it did not theretofore enjoy. *Arrow Shipping Co. v. Tyne Improvement Commissioners* (1), at pp. 527-8. It subjects the owner of a vessel which founders in a place where it constitutes an obstruction to navigation, who may be entirely free from blame, to what may be a very serious burden. It is only fair to him that any conditions which Parliament has attached to the imposition of that burden should be fulfilled. Section 17 imposes such a condition. If after the removal or destruction of a vessel by or at the instance of the Crown under section 16 there should be anything left "which can be sold," it must then be "sold by auction or otherwise" under section 17

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before the Minister may invoke the remedy created by section 18 of maintaining an action for the balance of the expenses incurred by the Crown after crediting the proceeds of a sale under section 17. Disposing of what may prove to be of saleable value after removal or destruction by inviting tenders for the removal or destruction on the basis that it shall belong to the contractor may be a convenient, possibly the most convenient, method of dealing with such a situation as was presented in the case at bar. It may under some circumstances even be more advantageous to the owner than the course prescribed by section 17. But it is not that course; nor can it be said that it has been shewn in the present case to have been its substantial equivalent, if that would suffice.

I am for these reasons, with great respect, of the opinion that the appeal must be allowed and the action dismissed.

BRODEUR J.—This is a case where we are called upon to construe certain provisions of the “Navigable Waters Protection Act,” ch. 115, R.S.C., concerning the sale, the removal or destruction of the wrecks in navigable waters.

The appellant, Anderson, was the owner of a schooner called *Emprèss*; and on the 10th November, 1915, while lying at anchor in Barrington Passage, the vessel was burnt to the water’s edge and became an obstruction to navigation.

The owner was notified by the Department of Marine and Fisheries that it was his duty, under the provisions of the Act, to remove the schooner and, on the 18th November, Anderson caused the vessel to be sold at public auction to the highest bidder, and he stipulated that the purchaser should assume

all responsibility for its removal. A person offered and paid five dollars (\$5) for the vessel, stripped her of everything of value and abandoned the remains after having unsuccessfully tried to remove the vessel.

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The Department then advertised for tenders for the removal of the wreck; and, in view of what had happened, stated in the notice calling for tenders that the materials of the vessel, when the removal has been satisfactorily completed, should become the property of the contractor. The successful tenderer, as requested by the notice calling for tenders, stated that he intended to blow the hull into pieces and agreed to do the work for seven hundred and fifty dollars (\$750.00). The present action has been instituted by the King to recover the sum of \$750 and cost of advertisements, and some other incidental expenses.

The point raised by the appellant is that the sale of the vessel is a condition precedent to the right to recover the expenses of removal and that the Minister did not properly exercise his discretion as to whether the wreck is an obstruction to navigation and as to the manner of its removal.

By the provisions of section 16 of the Act the Minister

may cause any wreck to be removed or destroyed in such manner and by such means as he thinks fit and may use gunpowder and other explosive substance for that purpose if he deems it advisable.

In the present case, the Minister called for tenders and in the notice the tenderers were asked to state how they would do the work. Different modes were suggested by the different tenderers; and the Minister having decided to accept a tender which provided that the vessel would be destroyed shews that the discretion has been properly exercised by the Minister and that in his view the hull should be destroyed.

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It is rather evident in this case that the vessel could not easily be removed in view of the condition in which she had been left after the fire, and in view of the efforts made by the first purchaser. Besides, the Minister was not bound to remove her. It was absolutely within his discretion to remove or to destroy her.

The Minister could then have purely and simply asked for tenders for her destruction. But in this case, in order that the owner could get from the vessel as much benefit as possible, he provided that the successful tenderer should become the owner of the wreck and should consider in his tender the value of such wreck. As I said, it was not necessary for the Minister to provide for that. He could have simply called for tenders for the destruction of the ship without providing at all for setting any value upon the hull. That condition was put in for the benefit of the owner; and he should certainly not now be entitled to complain and say the Minister had no right to do that.

I consider that the Minister substantially complied with the provisions of the law; and if he failed in something, it was in conveying to the owner certain benefits which otherwise the latter could not get.

For these reasons I consider that the action which was maintained by the court below was well founded and the appeal from its judgment should be dismissed with costs.

MIGNAULT J.—The only question that merits serious discussion here is whether the appellant is right in his construction of sections 13, 14, 15, 16, 17 and 18 of the “Navigable Waters Protection Act” (R.S.C. 1906, ch. 115), as amended, so that the wreck not having been sold by auction by the Crown for the

recovery of the cost of its destruction, the respondent cannot recover from the appellant the amount necessarily paid for the removal of the wreck. Otherwise it is obvious that the claim of the Crown is one which the appellant should pay.

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The schooner *Empress*, while anchored at Barrington Passage, a public harbour, was burnt to the water's edge, and was abandoned to the underwriters as a total loss and by them, on their account and on account of the owner, sold by auction for \$5.00 to one Nickerson, the purchaser obliging himself to remove the wreck. Nickerson swears that he twice tried to remove the remains of the schooner to the shore and failed and so abandoned it where it was, after taking away what could be stripped off. The Minister, after notifying the owner to remove the wreck and this not being done, advertised for tenders to remove it, the materials to belong to the tenderer, and received several tenders, the lowest being \$750, and the highest \$2,700. The lowest tender was accepted, the wreck blown up with dynamite, and some of the materials were sold by the contractor. The Crown sued the appellant and the latter served a third party notice on Nickerson, but the issue was tried between the Crown and Anderson, and it was agreed that if the plaintiff succeeded against Anderson, the trial between Anderson and Nickerson would come on at a subsequent date.

As I have said, the claim of the Crown is one which Anderson should pay unless, adopting his construction of the "Navigable Waters Protection Act," it be held that the sale of the wreck under section 17 is a condition precedent to the right of the Crown to claim from the owner the cost of removal.

That this question of construction is not free from difficulty is shewn by the division of opinion

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among the members of this court. Section 17 deals with the sale of the obstruction or wreck. In form it is permissive and says that the Minister may cause such vessel, or its cargo, or anything causing or forming part of any such obstruction or obstacle, to be conveyed to such place as he thinks proper, and to be there sold by auction or otherwise as he deems most advisable. The evidence here is that the wreck could not be removed from the place where it formed an obstruction, while certain materials, such as the chains, anchors, etc., could be and were taken away by Nickerson to whom the whole wreck had been sold, on account of the owner and underwriters, with obligation to remove the wreck, before the appellant received the letter from the Government ordering him to remove it. That the appellant bid \$3.00 and did not judge it wise to go higher than \$5.00, the amount of Nickerson's bid, shews that he considered the game was not worth the candle on account of the obligation incumbent on the purchaser to remove the wreck.

It is true that the contractor was allowed to dispose of the remains of the wreck after blowing it up: But if all these remains had to be brought by him to shore and then sold so as to defray in part the cost of removal, the contractor would no doubt have charged more, so that the appellant gets the benefit of the value of anything remaining after the wreck was blown up.

Coming back now to sections 17 and 18, a not unreasonable construction of section 17 would be that where the wreck or obstruction, or a material part thereof, cannot be conveyed to the shore and sold, there is no obligation (and I think that the word "obligation" is too strong for a provision such as section 17 which is as I have said permissive in form) to sell it by auction, and if in such a case there is

no direction in the statute to sell the wreck, the sale cannot be a condition precedent to the right of the Crown to recover the cost of removal.

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Moreover, if the Minister had caused the wreck to be sold where it stood, owing to the impossibility of removing it, there is no reason to suppose that a larger sum would have been realized than that paid by Nickerson for, obviously, if the Minister sold the wreck, a necessary condition would have been that the purchaser should remove it.

Mignault J.

But the appellant contends that after the wreck was blown up the remains should have been sold and credited to him. I have already answered that in that event the contractor would no doubt have charged more for removal.

I may add that section 18 contemplates the case where there is *nothing that can be sold* and in that event nothing is to be credited to the owner in deduction of the cost of removal. Here of course there were some iron knees and copper, but the sale of this stuff would not have benefitted Anderson, as I have observed, if the contractor, deprived of these materials, had charged more for removal, and the whole of it is to my mind so insignificant that the maxim *de minimis non curat lex* may be usefully applied.

On the whole, I consider that the appellant has suffered no prejudice, and to allow his technical objection to prevail would deprive the Crown of the right to ever recover what is due by him.

I would dismiss the appeal with costs.

*Appeal dismissed without costs.*

Solicitor for the appellant: *W. A. Henry.*

Solicitor for the respondent: *F. C. Blanchard.*

Solicitor for third party: *C. J. Burchell.*