1894
April 2.

MOSSOM BOYD & COMPANY.....PLAINTIFFS;

AND

EDWARD T. SMITH.....DEFENDANT.

Tort—Officer of the Crown acting without, or in excess of, authority—Damages—Personal liability.

For acting without authority of law, or in excess of the authority conferred upon him, or in breach of the duty imposed upon him, by law, an officer of the Crown is personally responsible to any one who sustains damage thereby.

THIS was an action brought to recover damages in respect of certain seizures of lumber by an officer of the Crown for tolls alleged to be due thereon.

The trial of the case took place at Peterborough on June 8th, 1893.

Lash, Q. C., and *Wickham* for the plaintiffs;

Hogg, Q. C., for the defendant.

The material facts of the case, taken from the reasons for judgment, are as follows:—

The plaintiffs are manufacturers of lumber, carrying on business at the village of Bobcaygeon, in the county of Victoria and province of Ontario. The defendant is an officer in the service of Her Majesty's Government of Canada, and is charged with the duty of collecting tolls and dues upon timber and logs passing through slides and other works mentioned in chapter 98 of *The Revised Statutes of Canada*. The action is brought to recover damages in respect of certain seizures of the plaintiffs' lumber made by the defendant to enforce the payment of tolls that were thought to have been payable in respect of the saw-logs from which such lumber was manufactured. The jurisdiction which the court is asked to exercise is defined in the 17th section of

1894

BOYD & COMPANY v. SMITH.

Statement of Facts.

The Exchequer Court Act (1), by which it is, amongst other things, provided that the court shall have and possess concurrent original jurisdiction in Canada in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer.

In 1874 there was at Fenelon Falls a slide through which saw-logs and timber were passed into the Fenelon River. The slide had been built in 1858, or 1859, at the expense of the lumbermen who had occasion to pass their logs over the falls, and it was maintained by them until the year 1872. In 1875 the local Government of Ontario made what are spoken of by the person who superintended the work as substantial repairs to the slide, and in 1882, and in subsequent years, such repairs as have been necessary have been made at the expense of the Government of Canada.

In 1874, in order to afford to steamboats plying on the Fenelon River a free passage, the Government of Canada constructed a boom dividing the river into two channels, one for the use of such steamboats, the other for the logs passing down the river. The head or upper pier of the boom was about half a mile from the Fenelon Falls Slide, and the boom extended down stream some 2,500 feet, the lower pier being in Sturgeon Lake. The main current of the river was west of the boom. To the east of it there were a number of eddies, the largest of which was described as working around and up the river. In the east channel there was apparently no current down stream except at, and for six or eight feet east of, the head of the boom. In some way it happened that in assigning one channel to steamboats and the other to the logs and timber com-

(1) 50-51 Vict. c. 16.

1894

BOYD & COMPANY v. SMITH.

Statement of Facts.

ing down the river, the west channel with the current was set apart for the former, and the east channel with its dead water and eddies for the latter. The result was that the lumbermen could not without great difficulty get their logs down the east channel, and after a few ineffectual efforts to use it, they appear to have abandoned the attempt and to have made use of the west or steamboat channel. In 1881, or 1882, Messrs. Ellis & Green, who had a mill on the west bank of the river opposite the boom, closed the lower end of the saw-log channel and used it until 1887 as a booming ground. Afterwards in that year or the next the boom which had, from year to year, been getting out of repair went away altogether.

On the 10th of August, 1874, His Excellency in Council, in addition to the general regulations respecting slides then in force, prescribed regulations for the running of timber of any description down the Fenelon River from Cameron's Lake to Sturgeon Lake, in the province of Ontario, by which it was provided: 1. That the owner or person in charge of any raft or parcel of timber, previous to entering the Fenelon River for the purpose of passing such raft or parcel of timber down the east channel allotted to the same, should attach a boom to the snubbing post on the west bank of the river, and to the up-stream pier of the boom, so as to prevent any of the timber entering the west channel set apart for vessels; 2. That no raft or parcel of timber of any description whatever should be permitted to enter the Fenelon River through the slide at the Falls, without the owner or person in charge thereof first giving notice to, and obtaining permission from, the superintendent or officer appointed to regulate the running of timber down the river; and, 3. That the timber should not be run through the slide at a faster rate or in greater quantities than that directed by the

1894

BOYD & COMPANY v. SMITH.

Statement of Facts.

officer in charge of running timber down the river. For any violation of these regulations the offender was liable to a penalty of not less than fifty, or more than two hundred dollars. On the 10th of September in the same year a schedule of tolls was, by order in council, established in respect of the Newcastle District Works in lieu of that prescribed by the order in council of the 10th of August preceding. The schedule has reference to the Fenelon River, and authorizes the collection of tolls on saw-logs and other timber passing down the saw-log channel, then in course of construction. There is no toll prescribed for passing the slide at Fenelon Falls, and there is no evidence that any such toll or due was ever imposed.

From 1875 to 1881 the plaintiffs and other lumbermen paid the tolls levied under the order in council of Sept. 10th, 1874, upon logs passing down the Fenelon River. After that no tolls were paid, and none demanded, until in January, 1891, when the defendant made a demand upon the plaintiffs for "slidage at the Fenelon Falls" on logs and timber passing through the slide there during the years 1882 to 1890, inclusive, amounting to $1,869.36. This sum the plaintiffs declined to pay, and on the 20th of July, 1892, the defendant, as collector of slide and boom dues, to secure payment thereof and of tolls that were thought to have accrued due in the meantime (the whole amounting to $2,245.81) seized fifty piles of sawn lumber, containing about 400,000 feet, lying in the lumber yard adjacent to the plaintiffs' mill. On the 27th of the same month he served a notice upon the Grand Trunk Railway Company of Canada, by which the company were forbidden to remove any lumber from the plaintiffs' piling grounds or yard on the Scugog River at the town of Lindsay, from which point the plaintiffs were accustomed to ship the same. On the 4th of August this

1894

BOYD & COMPANY v. SMITH.

Statement of Facts.

notice was withdrawn for a few days. At that time none of the plaintiffs' lumber there was under seizure, but subsequently, on the 11th of August, the defendant, to secure payment of the amount mentioned, made a further seizure of 130,000 feet of lumber belonging to the plaintiffs and loaded on cars and a scow at Lindsay. In each case, in the notice of seizure, it was stated that the sum of $2,245.81, for which it was made, was due from the plaintiffs to Her Majesty "for slide and boom tolls or dues for the transmission of timber and saw-logs through the Fenelon Falls Slide."

On the 18th of August the plaintiffs brought this action against the defendant for an injunction to restrain him from selling the lumber he had seized, and from further interfering with their business, by seizing any more lumber or by giving any more notices to the Grand Trunk Railway Company forbidding them to transport the plaintiffs' lumber, and also to recover damages for the losses they had sustained by reason of such seizures and notice. Thereupon the plaintiffs paid into court to the credit of this cause the sum of $2,245.81, and it was agreed that the seizures should be released and that that amount should remain in court until the final disposition of this action and should be applied on any judgment which the Government might obtain for such dues.

At the conclusion of the evidence it was agreed between counsel that their arguments should be submitted to the court in writing.

On the 25th of January, 1894, the plaintiffs filed their argument, in which they contended as follows:

The main question involved in this action was as to the right of the defendant to make the seizures. The law is clear that if the defendant's acts are unlawful he is personally responsible and is not protected from such personal responsibility by his position as a

1894

BOYD & COMPANY v. SMITH.

Argument of Counsel.

Government officer; and it is equally clear that for the unlawful acts of its servants the Crown cannot be made responsible unless some statute so provides, and there is no such statute applicable to this case.

The questions to be decided are first, whether the defendant was justified in seizing any lumber of the plaintiffs; secondly, whether he was justified in seizing a second time in order to enforce payment of the tolls alleged to have been due; thirdly, whether he was justified in interfering between the plaintiffs and the Grand Trunk Railway Company; and, fourthly, what damages the plaintiffs are entitled to. If the first question be decided in the plaintiffs' favour, the second and third will be material only in aggravation of damages.

If the plaintiffs' logs were not liable for dues under the order in council of 1874, the defendant clearly had no right to make the seizure.

Now, the evidence establishes that the logs under seizure did not pass through the channel referred to in this order in council. This is proved not only by the general evidence as to the condition of the boom and the impossibility of using the channel for logs, and as to the boom placed across to prevent stray logs from going down, but also by the evidence of the plaintiffs' foremen, who spoke specifically for each year from 1882 to 1887, in which latter year the few remaining parts of the boom were removed by the Government officer. Instead of there being any channel through which logs could pass, it was used by some parties as a storing place for their logs for some years before 1887. It is therefore clear that no dues became payable by the plaintiffs since 1881 in respect of logs passing through this channel, and unless the defendant can support the claim for dues on some other ground, he must fail in this action.

1894

BOYD & COMPANY v. SMITH.

Argument of Counsel.

The only other ground set up is, that because the regulations provided that a glance boom should be placed across the steamboat channel (so as to send the logs down the log channel) and because the plaintiffs did not comply with this provision, their logs became subject to dues just as if they had passed through the log channel. This contention is unsound, because the result of a breach of the regulations is provided for, viz., a personal penalty is imposed, and no attempt has been made under the regulations to charge the logs with tolls as well, and no remedy for a breach, other than that provided by the regulations, exists. The tolls were imposed upon logs passing through the saw-log channel, and unless the logs do so pass, they are not within the provision of the order so far as tolls are concerned. [He cites *Wilson* v. *Robertson* (1).]

Placing a boom on the river, and calling it a public work, did not make it one within the statute, and did not warrant the attempted interference with the public rights of navigation, which cannot be interfered with by merely executive authority not founded on a statute.

The fact that the plaintiffs paid tolls in prior years, does not establish the legality of the tolls exacted, or justify the seizure. It is submitted that the action of the defendant in seizing the lumber was illegal, and that the plaintiffs are entitled to damages therefor. The defendant's action in this matter was unlawful and unreasonable, and not in good faith. His conduct, in preventing the Grand Trunk Railway from shipping plaintiffs' lumber, has aggravated the damages to which plaintiffs are entitled.

On the 5th of September, 1893, the defendant filed his argument, which comprised the following contentions:—

(1) 4 El. & Bl. 932.

1894

BOYD & COMPANY v. SMITH.

Argument of Counsel.

There can be no doubt, under section 5 (1), that in a proper case the collector of tolls and dues has the right to seize and detain all the lumber in respect of which the tolls and dues payable for the use of the slide or "work" have been incurred, and he may also detain and hold the same until the dues are paid or otherwise secured. There is no question in this case that for the years mentioned in the notice of seizure dues and tolls were not paid by the plaintiffs upon the logs which passed over the slide at Fenelon Falls, so that at the time of the seizure in July and August, 1892, all the lumber which was in the yard of the plaintiffs at Bobcaygeon was subject to the payment of the dues and tolls, provided the orders in council and the regulations and tariff made the lumber liable.

By the order in council of the 10th August, 1874, the slide and "works" at Fenelon Falls, including the boom which was then in course of construction, were made subject to the jurisdiction of the Dominion Government; and by the regulations attached to that order in council not only was it pointed out how the slide should be used, but also how the boom should be dealt with by the persons passing logs over those "works."

Now the question is whether, under the circumstances, where a public work has been established and regulations made with reference to the use of it, and where the duty is cast upon the lumbermen of bringing his logs into a certain channel in which case he is to pay certain tolls, he can, by adopting another course, that is by using the glance boom so as to secure to himself that which he may consider a better channel and better use of the public work, escape the payment of the tolls and dues which are imposed by the tariff of 1874.

(1) R. S. C. c. 98.

1894

BOYD & COMPANY v. SMITH.

Argument of Counsel.

It is submitted, that in view of the fact that it was the duty of the plaintiffs to pass their logs through the log channel and so place the glance boom that the navigation channel would be left free and open, and having used or mis-used the glance boom so as to allow the logs to run in the navigation channel, they cannot now be heard to say that by reason of the breach of duty which was imposed upon themselves, they are to escape the payment of the dues for the use of the public works there.

[He cited R.S.C. c. 98 sec. 5.]

Under this section of the statute the defendant would be quite justified in seizing for the tolls and dues unpaid during the years from 1888 to 1892, and that the question of excessive seizure cannot arise under the provisions of this statute. In other words, the statute takes the case out of the ordinary rules of law which imposes the burden upon the person seizing to seize only what would be reasonably certain to cover and secure the amount for which the seizure is made. And the fact that the defendant intended to seize and did not notify the plaintiffs that he was seizing for a larger amount than would be due upon the lumber then in the yard, would not affect the validity of the seizure or make him liable for an action of excessive distress.

[He cited *Jacobson* v. *Blake* (1); *Smith on Master and Servant* (2); *McLaughlin* v. *Prior* (3); *Lyons* v. *Martin* (4); *McManus* v. *Crickett* (5); *Buron* v. *Denman* (6); *Tobin* v. *The Queen* (7); *Ferguson* v. *Kinnoul* (8); *Pedley* v. *Davis* (9); *Brayser* v. *McLean* (10).]

(1) 6 M. & G. 919.
(2) P. 110.
(3) 4 M. & G. 58.
(4) 8 A. & E. 512.
(5) 1 East 106.
(6) 2 Ex. 167.
(7) 16 C.B.N.S. 310.
(8) 9 Cl. & F. 290.
(9) 10 C.B.N.S. 492.
(10) L.R. 6 P.C. 398.

1894

BOYD & COMPANY v. SMITH.

Reasons for Judgment.

BURBIDGE, J. now (April 2nd, 1894) delivered judgment.

After stating the facts of the case he continued: The first question that arises in this case is, were the plaintiffs at the time of the seizures mentioned indebted to the Crown for the dues which the defendant attempted to collect? And it seems to me very clear that they were not. No toll or due had ever been imposed in respect of the Fenelon Falls Slide, and during the years in which the dues in question were alleged to have become due, there was no saw-log channel on the Fenelon River open for the passage of logs, and no logs or timber belonging to the plaintiffs or other persons were in fact passed through such channel. If there had been any such channel that could have been used by lumbermen and they had not used it, but, contrary to the regulations prescribed, had passed their logs down the west or steamboat channel, it might well be that they could not in that way have escaped the payment of the tolls imposed by the order in council of the 10th of September, 1874. But, as we have seen, the persons in charge of the Government works at and near Fenelon Falls permitted the saw-log channel to be closed up and for five or six years to be used as a booming ground, and afterwards the boom was allowed to go away altogether. It would have been oppressive under such circumstances to compel persons floating their logs down the Fenelon River to pay the tolls imposed for the use of the saw-log channel. That probably was so obvious that no attempt was made after 1881 to enforce payment of any such tolls, and there is, as we have seen, no authority for their collection in respect of the transmission of timber or logs through the Fenelon Falls slide. That such tolls were paid without protest for several years prior to 1881 cannot,

1894

BOYD & COMPANY v. SMITH.

Reasons for Judgment.

I think, alter the question or affect it in any manner. Not in that way, but by the order of His Excellency in Council, do such tolls become payable. By the fifth section of *The Revised Statutes of Canada*, chapter 98, respecting tolls on Government works for the transmission of timber, the collector of tolls and dues is authorized to seize and detain any timber or lumber on which any tolls or dues are chargeable for transmission through or over any slide, boom, or other work mentioned in the Act. But where, as in this case, there are no tolls or dues chargeable against the lumber seized, there is no authority for the seizure and it cannot be justified.

It is argued, however, that as the defendant acted under instructions from his superior officers he is not liable for his acts. In my opinion that will not avail him. I have no doubt that he was a ministerial officer having in respect of the collection of tolls and dues on slides and other river improvements a duty to perform, and that for the manner in which he performed that duty he must himself answer. Others may or may not have made themselves liable for his acts. We need not enquire as to that now. He took upon himself to make the seizures in question, and if there was no authority therefor he must answer to the plaintiffs for the damages they have sustained. There is no occasion to cite authorities. The law is well settled (1).

The case of *Buron* v. *Denman* (2) in which the acts of the defendant in firing the barracoons of the plaintiff and carrying away his slaves and destroying his goods were ratified by the Crown and became acts of state,

(1) *Lane* v. *Cotton*, Ld. Raym. 647 ; 1 Salk. 17 ; *Rowning* v. *Goodchild*, 2 Wm. Bl. 906 ; *Whitefeld* v. *Lord Le Despencer*, 2 Cowp. 754 ; *Barry* v. *Arnaud*, 10 Ad. & E. 646, 2 P. & D. 633 ; *Barrow* v. *Arnaud*, 8 Q. B. 595 ; *Tobin* v. *The Queen*, 16 C. B. N. S. 310.

(2) 2 Ex. 167.

1894

BOYD & COMPANY v. SMITH.

Reasons for Judgment.

and that of *Irwin* v. *Grey* (1) in which the plaintiff sought to recover damages from the defendant for having, in breach of his duty as Secretary of State, neglected to submit to Her Majesty a petition of right presented by the plaintiff, are obviously distinguishable. The Crown is not liable for the wrongs committed by its officers except in cases in which such a liability has been expressly created by statute, and if the officer himself were in such a case not liable the subject would be without remedy. That fortunately is not the law. For acting without authority of law, or in excess of the authority conferred upon him, or in breach of the duty imposed upon him, by law, a public officer is personally responsible to any person who sustains damage thereby. The officer may also, it seems, be liable though there be no excess of authority or breach of duty if in the exercise of his powers he is guilty of harsh and oppressive conduct.

In the case of some public or ministerial officers, such as officers of the Customs (2) and of the Inland Revenue, (3) the statute law affords protection for anything done in the exercise of their duties as such officers, by requiring notice of action to be given to them, so that they may tender amends, and by limiting in certain circumstances the amount of damages that may be recovered against them. Prior to 1889, the collector of tolls, such as came in question in this action, was an officer of the Inland Revenue, and in a position to invoke the protection to which I have referred. But by the passing of the Act 52 Vict. c. 19, the duty of collecting such tolls was transferred to the Minister of Public Works, and is now performed by the officers of his department. For the protection of the latter in like circumstances the legislature does not appear to have

(1) L. R. 1 C. P. 171.
(2) R. S. C. c. 32 secs. 145-148.
(3) R. S. C. c. 34 secs. 77-81.

1894

BOYD & COMPANY v. SMITH.

Reasons for Judgment.

made any similar provision. At least no such provision has been pleaded or called to the attention of the court.

With reference to the damages, I cannot but feel that the amount for which I am about to enter up judgment for the plaintiffs is in all probability much less than a jury would have given them. But for the release of the seizure, the damages must in any case have been very large. One can hardly understand why the defendant should have taken such risks when the Act under which the tolls were imposed provided that such tolls could be recovered, with costs, in any court of competent jurisdiction by the collector or person appointed to receive the same, in his own name or in the name of Her Majesty (1). The plaintiffs were men of means and able to give security for, or to answer any judgment for, tolls that might go against them. The tolls which the defendant sought to collect had been allowed to accumulate for some ten years; and there was a question and dispute as to whether or not the plaintiffs were liable for the same. No doubt, assuming that the tolls were due and payable, the collector was not bound to adopt the milder means that have been suggested. In taking the more extreme measures, he would in such a case have been within his right; and I am not prepared to say that under such circumstances it would not have been his duty to make the second seizure when he became convinced that a sale of the lumber first seized, because of the place where it was and the difficulty of moving it, would not have realized the amount for which the seizure was made. But for the notice to the Grand Trunk Railway Company, given at the time and in the terms in which it was given, I can find no justification. The defendant had a right,

(1) 31 Vict. c. 12 s. 61. See also C.S.C. c. 28 s. 90, and R.S.C. c. 36 s. 21 (2).

1894

BOYD & COMPANY v. SMITH.

Reasons for Judgment.

of course, to see that none of the lumber he had seized was removed, but he had no right to forbid the railway company to move any lumber that was not under seizure. On the other hand, the amount of actual damages proved cannot be considerable. There were, no doubt, interferences with the course of the plaintiffs' business that must have been very annoying to them. They ask for a reference as to damages, but that is not, I think, necessary. I am disposed to save both parties any further costs in that respect. There will be judgment for the plaintiffs for three hundred dollars, and costs to be taxed without any deduction, because the amount recovered is less than four hundred dollars.

With reference to the sum of $2,245.81 paid into court to be applied on any judgment that the Crown may obtain for the dues for which the seizures in question in this case were made, it does not appear that any action has been brought for such dues. The money may, however, remain in court for thirty days, and shall then be paid out to the plaintiffs, if no such action is commenced in the meantime. If such an action is brought within that time, the question as to the disposition to be made of the money may be brought before the court by the plaintiffs or by the Crown.

Judgment accordingly.

Solicitors for plaintiffs: *Wickham & Thompson.*

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