THE ATTORNEY-GENERAL FOR QUEBEC (INTERVENANT)..... .... } APPELLANT;

1904
*March 30.
*April 27.

AND

THE CITY OF HULL (PLAINTIFF)..... APPELLANT;

AND

JANET LOUISA SCOTT AND OTHERS (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE. PROVINCE OF QUEBEC.

Title to lands—Grant from Crown—Description—Navigable waters—Floatable streams—Inlet of navigable river—Implied reservation—Crown domain—Public law—Construction of deed—Evidence—Estoppel—Waiver.

By the law of the Province of Quebec, as well as by the law of England, no waters can be deemed navigable unless they are actually capable of being navigated.

An arm or inlet of a navigable river cannot be assumed to be either navigable or floatable, in consequence of its connection with the navigable stream, unless it be itself navigable or floatable as a matter of fact.

The land in dispute forms part of the bed of a stream, called the Brewery Creek, which was originally a narrow inlet from the Ottawa River (dry during the summer time in certain parts), the waters of which passed over certain lots shown on the survey of the Township of Hull and granted by description according to that survey to the defendants' *auteur*, in 1806, without any reservation by the Crown of those portions over which the waters of the creek flowed. Under that grant, the grantee and his representatives have, ever since, without interference on the part of the Crown, had possession of the lands on both sides fo the creek and of the creek itself. The erection, during recent years, of public works in the Ottawa River has caused its waters to overflow into the creek to a considerable extent at all seasons

*PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Davies, Nesbitt and Killam JJ.

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of the year. In 1902, the City of Hull obtained a grant by letters patent from the Province of Quebec of a portion of the bed of the creek, as constituting part of the Crown domain, and brought the present action, *au pétitoire*, for a declaration of title, the Attorney-General intervening for the province as warrantor.

Held, affirming the judgment appealed from, (see Q. R. 24 S. C. 59) :—

1. That, as the Brewery Creek was neither navigable nor floatable in its natural state, the subsequent overflow of the waters of the Ottawa River into it could not have the effect of altering the natural character of the creek.
2. That, as there was no reservation of the lands covered with water in the original grant by the Crown, in 1806, the bed of the creek passed to the grantee as part of the property therein described, whether the waters of the creek were floatable or not.
3. That the uninterrupted possession of the bed of the creek by the grantee and his representatives from the time of the grant with the assent of the Crown was evidence of the intention of the Crown to make an unqualified conveyance of all the lands and lands covered with water situated within the limits designated in the grant of 1806.

APPEALS by the plaintiff and the intervenant from a judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Ottawa, (Curran J.) (1) by which the action and the intervention were dismissed with costs.

The action was brought by the City of Hull to recover possession from the defendants of a portion of the bed of Brewery Creek, an arm or inlet of the Ottawa River, claimed under grant from the Crown in the right of the Province of Quebec, dated on the 2nd of April, 1902. The Attorney-General for the Province of Quebec intervened in the suit for the purpose of maintaining that this grant to the city had been validly made the lands granted forming part of the public domain as being a portion of the bed of a navigable or floatable stream.

The defendants claimed the bed of the creek under title from the late Philemon Wright to whom letters

(1) Q. R. 24 S. C. 59.

patent issued on the 3rd of January, 1806, granting to him, together with other lands, the lands on both sides of the creek, described by metes and bounds according to the original survey of the Township of Hull, reserving therefrom merely the mines of gold and silver therein and power to make and use roads, ways and passages over said lands and to take stop, divert, and use all such rivers, streams, ponds and bodies of water as might be necessary for working and improving said mines, the said defendants and their *auteurs* having been in possession of the property in dispute as owners, under such title, ever since the date of the last mentioned grant.

The creek in question, as it existed at the time of the grant, in 1806 and for many years afterwards, was a narrow inlet from the Ottawa River which ran dry, in many parts, during the summer, but during recent years the erection of dams and other improvements in the Ottawa River has caused an overflow of its waters into the creek to a considerable extent at all seasons of the year. By the judgment of the Superior Court, (Curran J.) (1) the plaintiff's action and the intervention of the Attorney-General were both dismissed with costs. The present appeals are asserted against the judgments of the Court of King's Bench, appeal side, on appeals taken respectively, by the plaintiff and the intervenant, unanimously affirming the judgments rendered in the trial court.

Cannon K. C. Assistant-Attorney-General for the Province of Quebec, for the intervenant, appellant. The creek in question retains the character of the navigable stream of which it forms a part. Consequently, its bed never passed to Philemon Wright or his representatives in the absence of specific conveyance by apt words in the grant of 1806. The bed of

(1) Q. R. 24 S. C. 59.

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the creek continued to form part of the Crown domain up to the date of the grant in 1902. The Crown was, at that date, still seized of the bed of Brewery Creek, in the right of the Province of Quebec, (art. 400 C.C.,) and the grant then made was valid and effectual to pass the title to the City of Hull. The adverse possession of the defendants and their *auteurs* cannot avail against the Crown. Art. 2213 C.C. The Crown was not a party to any of the deeds, suits or proceedings heretofore made or taken in regard to the titles under which the defendants claim; therefore, there can be neither *chose jugée*, waiver nor estoppel to operate as against the Crown. Art. 1241 C.C.; Pothier "Obligations" No. 895; Fuzier-Herman, Code Civ. Ann. art. 1351, nos. 1164-1173.

The Ottawa River has been declared navigable on many occasions, notably in the recent case of *Hurdman* v. *Thompson* (1) which affected that stream at the very point where its waters flow into Brewery Creek. We refer to the authorities cited in that case and also to 1 Daviel, "Cours d'Eau" (ed. 1845) nos. 40, 41; 3 Proudhon, "Domaine Public" no. 758; 1 Gaudry, "Domaine" p. 119; Troplong "Vente" No. 332; Pothier "Vente" No. 251; Duranton "Vente" No. 235; Dalloz Rep. *vo.* Vente, Nos. 720, 723; Lafontaine, "Questions Seigneuriales", 358*b*, No. 307.

Crown grants must be construed strictly and against the grantees; 6 Encyc. Laws of England, *vo.* "Grant," pp. 88, 89; 1 Stephen's Commentaries (13 ed.) p. 358.

Foran K.C., for the plaintiff, appellant, referred to 21 Am. & Eng. Encycl. of Law (2 ed.) *vo.* "Navigable Waters;" 6 Dalloz, Rep Supp. *vo.* "Eaux." Nos. 52, 60; Merlin, *vo.* "Rivière, sec. I No. III.; 1 Garnier, "Régime des Eaux," No. 65; 2 Daviel, No. 554; 3 Proudhon, pp. 53-60; Fuzier-Herman, Code Civ. Ann.

(1) Q. R. 4 Q. B. 409.

art. 538, nos. 167, 168; id. Supp. art. 538, nos. 243 *et seq.*, 258 *et seq.*; 22 Pand. Fr. "Cours d'Eau," nos. 37, 38, 39; 18 Fuzier-Herman, Rep. *vo.* "Domaine Public et de l'Etat," nos. 136, 324; 3 Aubry & Rau, p. 76 note.

It should not be forgotten that this Brewery Creek is not a despicable stream of water, and that it would put to shame many historical rivers. Several scientific witnesses tell us that its waters would develop over 860 horse-power besides supplying about 700,000 gallons of water daily to the 14,000 inhabitants of Hull City. Its width varies from 130 feet to 600 feet; its surface velocity is 155 feet per minute. Men and horses have been drowned in it. Several bridges, each several hundred feet long, span its bosom. Except for these bridges citizens dwelling on opposite banks could not communicate with each other unless they used boats.

In England, no stream is navigable which does not feel the effects of the tide. There, the Ottawa, the St. Maurice, the Ohio, the Missouri, would not be deemed navigable. This expains such decisions as *Earl of Ilchester* v. *Raishleigh* (1). The decision in *The Queen* v. *Robertson* (2), (at p. 119) has little weight, because the stream in question there was, undoubtedly, neither navigable nor floatable and its bed belonged to the riparian proprietors. There, also, the grant was of an immense stretch of territory, while, in this case, the metes and bounds of the land granted as lot three in the third range of Hull are particularly described. The remarks of Cockburn C.J. in *Marshall* v. *Ulleswater Steam Navigation Co.* (3) quoted at page 119 of the *Robertson Case* (2), refer to private streams, and not to public, navigable waters. The remarks of Strong C.J. at pages 517, 519 and 521 of the *Fisheries Case* (4), refer to non-navigable waters; and the ques-

(1) 61 L. T. 477.
(2) 6 Can. S. C. R. 52.
(3) 3 B. & S. 732; 6 B. & S. 570.
(4) 26 Can. S. C. R. 444.

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tion treated at pages 562 and 563 by Girouard J. is whether or not the Dominion or the province is the owner of the beds of our rivers. This also was the question raised in *The Queen* v. *Moss* (1), and there is not one word in the judgment of the Privy Council in the *Fisheries Case* (3) which is at all germane to the issues here.

The long possession invoked by the respondents can have no effect as against the Crown.

Our codifiers refer to none but French authorities under art. 2213 C. C. In fact our writers call the imprescriptibility of Crown lands a privilege enjoyed by the lands and governed, of course, by the same law as governs the ownership of the latter. Against the decision of *Chad* v. *Tilsed* (3), we would quote *L'Etat* v. *Cie. des Forges d'Audincaut*, a decision of the Court of Appeal at Besançon, reported in Dalloz, Rec. Per. (1890), part 2, p. 29; Fuzier-Herman, Code Civ. Ann. Supp. art. 538, no. 258.

As to the use of the word "rivers," in the grant of 1806, where a reserve for the purpose of working gold or silver mines is expressed, we answer that associated words take their colour from each other, that is, the more general is restricted to a sense analagous to the less general. See Merlin, Rep. *vo.* "Majorat" sec. v.; *Barthel* v. *Scotten* (4). The use of the word in such a vague and general manner cannot be held to refer to navigable and floatable streams, but should be confined to such bodies of inland waters as are neither floatable nor navigable. Moreover, if Brewery Creek is included, the Gatineau River likewise formed part of that grant, for we find that the waters of that mighty stream, which flows diagonally through the township, divides

(1) 26 Can. S. C. R. 322.
(2) 26 Can. S. C. R. 444.
(3) 2 Brod. & B. 403.
(4) 24 Can. S. C. R. 367.

many of the lots, leaving a part on either shore—lot one in the fourth range, for instance. It may, moreover, be remarked, that the word "rivers" is not to be found in the granting clauses of the letters-patent of 1806.

Aylen K.C. for the respondents. "Brigham" or "Brewery Creek," the subject of dispute appears to have been, when the Township of Hull was erected and the grant made to the late Philemon Wright, in 1806, a very small stream. Starting from the Ottawa River on lot 3 in the third range of the Township of Hull, it flowed through lot 3 in the third range and again reached the Ottawa River at lot one (1) in the fourth range. Before the dams and improvements were constructed, some 25 years ago, in the Ottawa River east of the mouth of the creek, there was in this creek, in ordinary high water, about six inches, or somewhat more, of water. At the mouth of the creek, in those days, there was a bed of boulders which were higher than the ordinary high water, but which were flooded to a considerable extent in extreme high water. A stone bridge on the road leading from Hull to Aylmer crossed this creek a short distance north of the north shore of the Ottawa River, and the boulders seem to have extended south of this bridge pretty much over all the eastern portion of lot 316 of ward one, and the western portion of lot 323 of ward two, as shown on the official plan of the City of Hull, filed of record. Previous to the construction of the improvements in the Ottawa River, that part of the creek north of this bridge was supplied with water by two or three small rivulets which flowed through the boulders, to which reference has just been made. The evidence shews that, until the erection of the improvements in question in the Ottawa River this area, so covered with

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boulders and through which the rivulets flowed, could be crossed on foot without difficulty in ordinary high water. The rivulets were not of sufficient extent to prevent a person crossing this area on foot. The evidence further establishes that before the time of such improvements, on more than one occasion within the memory of the witnesses that were examined, this creek was entirely dry, and that any part of that portion claimed by the present action could be crossed on foot without difficulty. The evidence also shews that, before the construction of the improvements, the creek was chiefly used by farmers for the purpose of watering their horses while going to and coming from market and that, after the spring freshets had passed, a man could jump in most places across the creek where so used.

Some 25 years ago, extensive improvements were made in the Ottawa River in connection with the mills at "Chaudiere Falls" and the lumbermen and riparian proprietors, east of Brewery Creek, extended dams from the north shore of the Ottawa River to the south shore and by this means raised the level of the water in the Ottawa River, and, as a consequence, in Brewery Creek, to the extent of between 4 and 4½ feet. The result of such improvements, as far as Brewery Creek is concerned, is that there is presently, in ordinary stages of the water, about 4 feet 6 inches of water more than there was before the improvements in question were made. This increase of water has, of course, greatly widened the bed of the creek immediately north of the bridge on the Aylmer Road and, to secure water to operate an axe factory, the creek was dammed at Brewery Bridge (close to the *locus* in dispute) with stop-logs to regulate the depth of water on the south side of Brewery Bridge and between Brewery Bridge and the Ottawa River. By this means suffi-

cient water-power was maintained for the operation of the axe factory on the property purchased by the City of Hull. This channel has been, during the last 25 years, greatly enlarged and deepened enabling a larger volume of water to enter Brewery Creek. It will be necessary to bear in mind this change in the depth of water in Brewery Creek secured in the manner above explained.

It must be conceded that, in 1806, His late Majesty, George III, had as much right to grant the bed of Brewery Creek to the late Philemon Wright, as His Majesty, Edward VII., had to grant similar properties, in 1902, to the City of Hull. The respondents further submit that the bed of Brewery Creek was granted in more express terms to the late Philemon Wright in 1806, than the Province of Quebec assumed to grant it to the City of Hull, in 1902.

The decision of Mr. Justice Malhiot in *Thompson* v. *Hurdman* (1) at pages 246 and 248, properly construed, is in favour of the contention of the respondents. In the present case, moreover, it has been found as a fact by the judgments under appeal that the Crown had acquiesced for nearly a century in the construction given to the grant of 1806 by the late Philemon Wright, his heirs and those holding from and through them, and in their possession in conformity therewith during such period. In addition to this acquiescence the numerous unconditional and unrestricted admissions of the Crown contained in the public records and in subsequent grants further establish that such interpretation of the grant of 1806 was correct.

This little creek flowing from the navigable river and returning to it again can not be properly referred to as an arm or branch of the river. To be properly

(1) Q. R. 4 S. C. 219.

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described as an arm or branch of a navigable river such a stream must in the first place be included within the extreme banks of the river as generally recognized, and it must, in the second place, be of considerable dimensions and either navigable or floatable itself, as a matter fact. *Glover* v. *Powell* (1); *The King* v. *Montague* (2) per Bayley J. at page 602; *Mayor of Lynn* v. *Turner* (3) per Mansfield C. J.; *Rowe* v. *Granite Bridge Corporation* (4) per Shaw, C. J. at page 347; 2 Am. & Eng. Encycl. of Law, p. 827, *vo.* "Arm of the Sea"; 21 Am. & Eng. Encycl. p. 428, *vo* "Navigable Waters." See also Dalloz *vo.* "Eaux" No. 61; *Bell* v. *The Corporation of Quebec* (5), per Dorion C. J. at pages 108 and 109; and at pages 91-94 of the report in the Privy Council (6).

The title to the bed of the creek actually passed to the late Philemon Wright under the grant of 1806, even if the said creek were proved to have been then navigable or regarded as part of a public river. No more express grant could possibly be made of it than that contained in the description of lot 3 and the other terms of the grant of 1806, which must be construed according to the usual meaning of the words therein contained, and, no reservation being made, the grantor must be presumed to grant all that he could grant within the area described. *Lord* v. *Commissioners for the City of Sydney* (7) at pages 497, 498 and 499; *The Queen* v. *Robertson* (8), at pages 95, 96, 97, 98, 127, 128; Broom's Legal Maxims (7 ed.) p. 401.

It is submitted that where rivers are navigable in parts and non-navigable in parts, only those portions thereof which are actually and profitably navigable should be regarded and treated as navigable rivers,

(1) 10 N. J. Eq. 211.
(2) 4 B. & C. 598.
(3) 1 Cowp. 86.
(4) 21 Pick. 344.
(5) 7 Q. L. R. 103.
(6) 5 App Cas. 84.
(7) 12 Moo. P. C. 473.
(8) 6 Can. S. C. R. 52.

especially as regards the riparian owners. *The Queen* v. *Robertson* (1), per Strong J. at page 130; *United States* v. *The Rio Grande Dam & Irrigation Co.* (2). Even in navigable parts of rivers and lakes, the riparian rights of a person owning lands bounded by such rivers or lakes, extend to the point of practical navigation. *Illinois Central Railway Co.* v. *The State of Illinois* (3), at pages 436 and 445–447.

At any rate, the right to use the water flowing over the bed of Brewery Creek passed to the late Philemon Wright as an accessory of the lands over which it flowed. The rights of the riparian proprietor either to the use of the water or of the land over which it flows cannot depend on the place from which the water comes. Art. 414 C. C.; remarks by Cockburn C.J. as cited in *Robertson Case* (1), at page 119; *The Fisheries Case* (4); *The Queen* v. *Moss* (5).

The City of Hull, in 1901, instituted an action against respondents' immediate *auteur*, Nancy Louisa Wright, claiming one-half of Brewery Creek within the area in question in this case, under a title which was traced back to the grant of 1806. Three courts decided against the City of Hull in that case and ordered a *bornage* according to the respective rights of the City of Hull and respondents' *auteur* and, this being a real action, the judgments referred to are conclusive and binding upon the Crown as well as the City of Hull, and constitute *res judicata* both as to what constitutes Brewery Creek and as to the extent of the rights of the parties therein. Art. 1241 C. C.; Pothier "Obligations," Nos. 894, 895 and 896; Dalloz, Supp. art. 1351; Nos. 9180, 9184, 9185. The City of Hull in electing to prosecute that suit, after it obtained

(1) 6 Can. S. C. R. 52.
(2) 174 U. S. R. 690.
(3) 146 U. S. R. 387.
(4) 26 Can. S. C. R. 444; [1898] A. C. 700.
(5) 26 Can. S. C. R. 322.

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the grant of 1902, is now barred and estopped from invoking the benefit of the grant of 1902.

The judgment of the court was delivered by

THE CHIEF JUSTICE.—It could not but be conceded by the appellants that if, as found by the two courts below, Brewery Creek, the watercourse in question, is neither navigable nor floatable, they are out of court. For, in that case, it unquestionably formed part of the grant to Philemon Wright, in 1806, and, consequently, the letters patent of 1902 conveyed no title to the City of Hull. *The Massawippi Valley Railway Co.* v. *Reed* (1).

Now the evidence is overwhelmingly in support of the findings appealed from. No one, before the appellants, has ever seriously contended that such a small stream, across which a child could throw a stone, and which, before the works that have been erected in the Ottawa River in the interest of the lumber trade, could have been crossed on foot and was even dry in certain places during part of the summer, is, as a matter of fact, a navigable or floatable river.

The appellants' alternative contention, rejected by all the judges in the courts below, that though not navigable in fact this creek, being an arm of the Ottawa River itself a navigable river, it is therefore to be considered, in law, as being a navigable stream, cannot prevail. By the law of the Province of Quebec, as well as by the law of England, a river is not deemed to be navigable unless it is actually capable of navigation. *The King* v. *Montague* (2); *Mayor of Lynn* v. *Turner* (3); *Bell* v. *City of Quebec*, (4) affirmed in the Privy Council (5); *Rowe* v. *Granite Bridge Corporation*

(1) 33 Can. S. C. R. 457.
(2) 4 B. & C. 598.
(3) 1 Cowp. 86.
(4) 7 Q. L. R. 103.
(5) 5 App. Cas. 84.

(1) ; *Adams* v. *Pease* (2) ; *Glover* v. *Powell* (3) ; *Hubbard* v. *Hubbard* (4) ; *Healy* v. *Joliette and Chicago Railroad Co.* (5) ; *The Robert W. Parsons* (6).

This is a question of public law (7) and the opinions of the modern text writers, upon whom the appellants rely on this part of their case, are based upon ordinances and decrees of the executive authority which are not in force in the Province of Quebec. Daviel, Vol. 1, Nos. 40-41 Plocque, Législ. des Eaux, Vol. 2, No. 7 ; S. V. 1850, 2,617 ; Guyot, Rep. v. Rivière.

I would further be of opinion, with the Superior Court and the majority of the Court of Appeal, that whether this creek is floatable or not the letters patent of 1806 included the bed of it as part of the land within the limits of the lot granted to Wright. To read out of these letters patent the bed of this creek is to find therein a reservation thereof which the Crown did not make and must be held not to have intended to make by the very fact that it did not make it, and left Wright and his representatives in possession for nearly one hundred years, under the authority of these letters patent. The grant to Wright without reservation, is an express grant of every inch contained in the lots granted, covered with water or not. If it had been intended to exclude out of it this Brewery Creek, the land granted would have been described as bounded by the banks of the said creek on each side of it, For, if it is floatable, its banks are part of the public domain ; art. 400 C. C.

The appellants' quotations from Troplong and Pothier in support of the proposition that

dans la mesure de la contenance il ne faut pas confondre les chemins publics et les rivières navigables qui traversent ou bordent le

(1) 21 Pick. 344.
(2) 2 Conn. 481.
(3) 10 N. J. Eq. 211 at p. 223.
(4) 8 N. Y. 196.
(5) 116 U. S. R. 191.
(6) 191 U. S. R. 17.
(7) Domat. dr. public, liv. 1er., tit. 3. secs. 1 *et seq.*; art. 399 C.C.

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fonds vendu, ni les bords de la mer qui viennent les joindre ; car toutes ces choses faisant partie du domaine public, sont évidemment placées en dehors des stipulations des parties à moins de conventions contraires,

have no application whatever. Of course if A sells to B say 100 acres of land to be taken out of a larger extent of territory belonging to A, B is intitled to 100 acres of land that previously belonged to A and A must be held to have sold only what belonged to him. That is all that these commentators say. But they do not say, and could not have said, that if A sells to B all the land he owns within described limits, every inch of the land that belongs to A within these limits does not pass to B.

I would dismiss the two appeals with costs.

Appeals dismissed with costs.

Solicitors for the appellant, the Attorney-General for Quebec : *L. J. Cannon.*

Solicitors for the appellant, The City of Hull : *Foran & Champagne.*

Solicitors for the respondents : *Aylen & Duclos.*