SIMPSON SAND COMPANY LIMITED AND WELLS CHARLES SIMPSON (*Defendants*) ..... APPELLANTS;

AND

BLACK DOUGLAS CONTRACTORS LIMITED (*Plaintiff*) ..... RESPONDENT.

1964

*Mar. 5
Mar. 23

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Waters and watercourses—Creation of bay in shore lot result of sand-removing operations—Obstructions to navigation placed in bay by lot owner—Injunction—Whether navigable waters—Right to navigation of third parties.

The defendants' excavation operations in the course of removing sand from lot 3 on Grenadier Island in the St. Lawrence River resulted in the formation of a bay some 600 feet in depth and about 545 feet in width at its mouth. Similar operations on the part of the defendants created a bay into the adjacent lot 4 the mouth of which opened into the bay already created in lot 3. The plaintiff company subsequently obtained the rights to remove sand from the said lot 4, the defendants' rights to do so having lapsed, and permission was requested to cross the bay of lot 3 so as to gain access to lot 4. The defendants refused this permission. However, the plaintiffs later commenced sailing through the bay of lot 3 into the bay of lot 4 with sand-removing equipment and barges. The defendants then placed obstructions to navigation in the bay of lot 3 and the plaintiff brought action for an injunction. An injunction was granted by the trial judge and his judgment was affirmed, on appeal, by the Court of Appeal. A further appeal was brought to this Court.

Held: The appeal should be dismissed.

*PRESENT: Cartwright, Fauteux, Judson, Hall and Spence JJ.

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The bay into lot 3 was navigable water and the defendants had no right to prevent navigation in that bay by either the plaintiffs or anyone else. This conclusion was reached without making any finding as to the ownership of the lands now under water but which originally formed part of lot 3, although the Court presumed that such lands were still the property of the defendants.

It was, of course, to be understood that the Court did not imply that the plaintiffs had any rights in the waters of the bay in lot 3 except the right of navigation.

Cram v. Ryan et al. (1894), 24 O.R. 500 and 25 O.R. 524, approved; *Sim E. Bak et al. v. Ang Yong Huat,* [1923] A.C. 429, distinguished.

Defendant—Individual defendant properly enjoined from continuance of illegal acts.

The individual defendant had conveyed his interests in lot 3 to the corporate defendant long before the circumstances which were the subject of the present litigation arose. His submission that the evidence did not support a judgment against him, and that his refusal to permit the passage of the plaintiffs' vessels, and any obstruction which the defendants put to the plaintiffs' navigation, was only the act of the corporate defendant for whom he merely acted as the officer and agent, was rejected.

APPEAL from a judgment of the Court of Appeal of Ontario, affirming a judgment of Stewart J. Appeal dismissed.

Adrian T. Hewitt, Q.C., for the defendants, appellants.

A. B. R. Lawrence, Q.C., for the plaintiff, respondent.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Court of Appeal of Ontario affirming the judgment at trial of Stewart J. In that latter judgment, the learned trial judge granted the injunction as prayed for in the statement of claim and referred the question of damages to the Master at Ottawa.

The appellants (defendants) had from 1929 or 1930 taken sand from lot 3 on Grenadier Island in the St. Lawrence River some miles above the City of Brockville. They had previously taken sand from the river bed in front of the said lot 3 and then purchased lot 3 on the island itself and proceeded to remove sand therefrom, using a ship with sand-sucking equipment known as the *S. M. Douglas.* Prior to 1950, this work was done by the individual defendant but in that year he sold all his interest in the enterprise to the corporate defendant. In the course of removing the sand

from the said lot 3, the appellants cut northerly into the lands on the foreshore of the said lot 3 resulting in the formation of a bay now in places about 600 feet in depth and about 545 feet in width at the mouth. This bay had a sufficient depth of water to admit the appellants' ship the *S. M. Douglas* and various scows and other equipment.

In 1957, the corporate appellant made arrangements with the owner of lot 4, the lot immediately adjacent to the east of lot 3, to remove sand from the said lot 4, and in the course of such excavation operations by the similar process of sand-sucking created a bay into lot 4 the mouth of which opened into the bay already created in lot 3. Both of these bays may be observed clearly in a photograph filed at trial as exhibit 2, and are shown on a large plan produced by one K. M. Wiseman, a surveyor, and marked exhibit 1 at the trial. In the year 1958, the respondent, through one Douglas McIntosh, obtained the rights to remove sand from the said lot 4, the appellants' rights to do so having lapsed, and in June 1959, the said Douglas McIntosh requested from the individual appellant (defendant) permission to cross the bay of lot 3 with barge and tug to gain access to lot 4 for the purpose of removing sand. This permission was refused. The respondent company then attempted to excavate a channel from the main waters of the St. Lawrence River northerly across the point between the bay of lot 4 and such main channel so that its equipment could enter the bay of lot 4 without crossing the appellants' lands. Due to the existence of a rock spur, this effort proved economically unfeasible and the respondents then commenced sailing through the bay of lot 3 into the bay of lot 4 with their sand-sucking equipment and barges.

The learned trial judge found, as a fact:

> During this time they experienced great difficulty in that the defendants blocked their activities as much as possible, placing hawsers across the mouth of the channel into the bay and building barricades of screenings, earth and sand, slightly to the west of the lot line, blocking the entrance to it from Lot 3.

As a result, the respondent brought these proceedings.

It is implicit in the findings of the learned trial judge, and it is stated in the reasons for judgment of Porter C.J.O. in the Court of Appeal, that the bay of lot 3 was created not for any use which the appellants should make of it but resulted incidentally from the removal of sand. In argument

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in this Court, counsel for the appellants stressed also that the bay was dug to a sufficient depth to permit the entry of its crane the *S. M. Douglas* but such procedure was only incidental to the removal of the sand, first from the waters below the foreshore and then from the actual foreshore, and later the main body of the island itself.

I think it is proper to summarize the reasons for judgment of the learned trial judge as being an acceptance of an application of the decision in *Cram v. Ryan et al.*[1] It is also I think a brief summary of the argument made by the appellant in this Court that he relied most strongly on the decision of the Privy Council in *Sim E. Bak et al. v. Ang Yong Huat*[2], although counsel for the appellant cited many other cases. The facts in *Cram v. Ryan* bear considerable resemblance to those in the present case. There, a purchaser of lands along the shore of the St. Mary's River near Sault Ste. Marie held the same under a grant from the Crown which grant contained two reservations:

> Reserving free access to the shore of the lands hereby granted for all vessels, boats and persons,
> and
>
> Reserving nevertheless unto Us, our Heirs and Successors the free use, passage, and enjoyment of, in, over and upon all navigable waters that shall or may hereinafter be found on or under, or be flowing through or upon, any part of the said parcel or tract of land hereby granted as aforesaid.

In the present case, the grant to the appellants' predecessor in title dated October 8, 1877, and produced at trial as exhibit 21, contained this provision:

> saving, excepting and reserving nevertheless unto Us, Our Heirs and Successors, the free use, passage and enjoyment of, in, over and upon all navigable waters that shall or may be hereafter found on or under, or be flowing through or upon any part of the said Parcel or Tract of land hereby granted as aforesaid.

It will be seen this is exactly the second reservation recited above from the deed considered in *Cram v. Ryan*.

The defendants in *Cram v. Ryan* had a licence to remove sand from the said lands and in the course of such removal had created a bay which extended about 150 feet back from the original shore line. The bay had a mouth of about 60 feet and was about twice that width back of the mouth.

[1] (1894), 24 O.R. 500, and on appeal 25 O.R. 524.
[2] [1923] A.C. 429.

In this bay, thus created, the plaintiff moored its boarding scow and when the defendant proceeded to operate its sand-removing equipment sparks from the stack thereof ignited the plaintiff's scow and it was destroyed. It was held on appeal that the plaintiff was not a trespasser as the plaintiff was moored on navigable waters and not in any private waters. At p. 528 of 25 O.R., Armour C.J. said:

> It is unnecessary to discuss the question whether the removal of the shore line back from its natural line, by the license of Fitzsimmons and Moran, had the effect of removing the boundary of their land back to the new shore line, and of making the land covered with water, by reason of such removal, the property of the Crown.
>
> But it is plain, I think, that the effect of such removal was that the water so let in was as much *publici juris* as any other part of the water of the river, and the removal of the shore line back from its natural line did not take away the free access to the shore so removed for all vessels, boats and persons.

It must be noted that in *Cram v. Ryan* and in the present case, the bays or indentations cut into the foreshore by the owner of the foreshore terrain were cut for the purpose of removing sand and not so that the water could be allowed over the land to be used for any such purpose as the operation of machinery, channels, canals, boat harbours, etc., and it should further be noted that in both cases the waters flowing into these bays were a recognized navigable water resulting in the increase of the channel.

Sim E. Bak et al. v. Ang Yong Huat, supra, was concerned with the following circumstances. The Kalang River was evidently a shallow river which, in the course of nature, moved from place to place. At p. 432, Lord Wrenbury said:

> The Kalang River must have shifted its bed between 1843 and the present time, a matter which is highly probable in a place which obviously is more like a mango swamp than a public navigable river.

Two parcels of land lay alongside of what appeared to be a 10 foot reservation which had run at one time along the course of the said Kalang River. These parcels of land both contained brick clay and the owners of the plots had, from time to time, dug out the clay leaving large and deep holes. More than thirty years before, there had come into existence a bridge through which the waters of the Kalang River had been admitted and these waters filled the holes made by the excavation of the brick clay so that the lands in question and many adjacent plots had become ponds or

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lagoons. The defendants' land had as well been excavated to remove brick clay with the result that there was one of these ponds on his land, and he cut through the bank so that the tidal water could obtain access to this pond, his purpose being to allow prawns and fish to come up with the tide, flow into the pond on his land and there be intercepted by a sluice which he had erected. The plaintiff thereafter erected on the soil of his land and extending across the mouth of the defendants' sluice, a fence with the result that the prawns and fish were intercepted and could not get into the defendants' pond. The defendants tore down this fence and the plaintiff took action. The Judicial Committee held that the waters in these ponds were not navigable waters and that the defendants could not object to any erection such as the fence made by the plaintiff on his own lands despite the fact that those lands were from time to time covered by tidal waters. At p. 433, Lord Wrenbury said:

> The learned judge of first instance was of opinion that the creek formed part of a tidal navigable river. That it is tidal in the sense that the water in all the ponds or excavations which formed the creek rises and falls with the tide there is no doubt. That it is navigable in the sense that boats within limits of size could and did pass through the bridge and up the waterway and could and did bring away brick, earth or bricks burnt in kilns which have been erected there there is also no doubt. But from these facts it does not follow that the creek is a tidal navigable river. The question is one of degree, to be determined by reference to all the facts. "The flowing and re-flowing of the tide does not make it so", i.e., a navigable river; "for there are many places into which the tide flows which are not navigable rivers; and the place in question may be a creek in their own private estate": per Lord Mansfield in *Mayor of Lynn v. Turner*, 1 Cowp. 86. An instance of this might be a boathouse or boat harbour which an owner might create on his own land. "It does not necessarily follow, because the tide flows and re-flows in any particular place, that it is therefore a public navigation although of sufficient size": per Bayley J., in *Rex v. Montague*, 4 B. & C. 598, 601. The flowing of the tide is strong prima facie evidence of the existence of a public navigable river, but whether it is one or not depends upon the situation and nature of the channel. Not every ditch or cutting which is reached by the tide forms part of the public navigable river, even though it be large enough to admit of the passage of a boat. The question is one of degree, and is for the jury, having regard to all the facts.
>
> The evidence as to user is that "boats come in and go out over 100 times a month", say, four a day. There is no evidence at all that these are not boats used by the owners of the plots to bring out their bricks—and presumably they are. There is absolutely nothing to induce any member of the public to take a boat up this creek, and there is no evidence that any member of the public did so. On the other hand, it is the convenient and obvious way of bringing out the bricks.

I am of the opinion that even the paramount authority of this decision in the Privy Council does not govern the present case and cannot be seen as over-riding the decision in *Cram v. Ryan,* which has stood as the law of the Province of Ontario for 70 years. I am of the view that there the learned Lordships were dealing with quite different circumstances. These so-called ponds were not on the Kalang River but they were some little distance away from the then flow of the river and they only received the tidal flow of water by means of channels constructed to bring the water into them. Such channels evidently passed under a bridge so that in fact the ponds were artificially created holes first and only became ponds when the tidal waters were introduced into them through the channels. This is a very different situation from the mere broadening of the St. Lawrence River by digging a bay into its banks or to be more accurate the bank of an island in this navigable river.

Counsel for the appellants argued that the bay on lot 3 on Grenadier Island could not be considered navigable water despite the fact that it was admittedly navigable in fact because there was no evidence of commercial utility and cited, *inter alia,* (1) *Attorney-General of Quebec v. Fraser*[1], per Girouard J. at p. 597:

> The test of navigability is its utility for commercial purposes. Every river is not equally useful. The Moisie, which is in the wilderness, with few fishing and mineral establishments for 15 or 17 miles from its mouth, cannot be compared with the River St. Lawrence, where the state has spent millions to improve its navigation possibilities.

(2) *Keewatin Power Co. v. Town of Kenora*[2], at p. 243, where Anglin J. adopted the statement of Davis J. in *The Montello*[3] where, delivering the opinion of the Supreme Court of the United States, he said:

> The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted nor the difficulties attending navigation. . . . It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.

(3) *Ratte v. Booth*[4].

[1] (1906), 37 S.C.R. 577.
[2] (1907), 13 O.L.R. 237.
[3] (1874), 20 Wallace 430.
[4] (1886), 11 O.R. 491 at 498.

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(4) *Gordon v. Hall and Hall*[1], where McRuer C.J.H.C. said at p. 382:

> In the first place, to be regarded as a navigable water, it must have something of the characteristics of a highway, that is, it must afford a means of transportation between terminal points to which the members of the public have a right to go as distinct from a means of transportation between one private terminus and another.

It is sufficient to say that if these are tests which must be passed before waters can be considered navigable, then the bay into lot 3 on Grenadier Island complies with such tests. The respondent certainly operated the bay for commerce and was concerned with access thereto only for the purpose of carrying on its business. The bay was used not only by the respondent itself but by the respondent's customers who resorted to the bay for the purpose of taking delivery of sand and also by others both for personal and for business reasons. Douglas McIntosh, president of the respondent company, swore:

> We had five boats, the dredge which had a draught of approximately four feet, the tug which had a draught of four feet, six inches, the four scows the draught was ten feet.
>
> I have seen quite a few boats some of which I knew and some of which I did not know. I have seen people—I do not know how many small boats in the bay along the beach and I have seen boats from Andrews and Huckmarine bringing people up there and I have seen most of the people that live around about with small boats coming in from time to time.
>
> They have come in sometimes fishing and sometimes bathing and sometimes on business errands to see us or see Simpson Sand.

Certainly, the travel is not between one private terminus and another. One terminus is undoubtedly the respondent's bay but the other terminus may be any place to which the sand recovered from the bay in lot 4 is hauled by the respondent or its customers.

For these reasons, I am of the opinion that the bay into lot 3 on Grenadier Island is navigable water as was the bay formed into the land along the St. Mary's River in *Cram v. Ryan*, and the appellants have no right to prevent navigation in that bay by either the respondents or anyone else. I have come to this conclusion without making any finding as to the ownership of the lands now under water but which

[1] (1959), 16 D.L.R. (2d) 379.

originally formed part of lot 3, and have presumed for the purpose of these reasons, that such lands under water are still the property of the appellants. This was the course taken by the Divisional Court in *Cram v. Ryan.*

It must, of course, be understood that I do not imply that the respondents have any rights in the waters of the bay in lot 3 except the right of navigation.

There remains to be disposed of the appeal of the personal appellant Wells Charles Simpson. Counsel submits that the evidence does not support a judgment against the individual appellant who had conveyed his interest in lot 3 to the corporate appellant in 1950, long before the circumstances which are the subject of this litigation arose, and that his refusal to permit the passage of the respondents' vessels, and any obstruction which the appellants put to the respondents' navigation, was only the act of the corporate appellant for whom the individual appellant merely acted as the officer and agent. I am of the opinion that there is no merit in this contention. If the refusal to permit navigation and the obstruction of that navigation are illegal acts and I have so found, then the carrying out of such illegal acts by the individual appellant results in his liability therefor whether or not he was instructed to do so by the corporate defendant, and he is properly enjoined from the continuance of such illegal acts.

For these reasons, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Hewitt, Hewitt & Nesbitt, Ottawa.

Solicitors for the plaintiff, respondent: Honeywell, Baker, Gibson, Wotherspoon, Lawrence & Diplock, Ottawa.