Supreme Court of Canada

London & Canadian Loan Co. *v.* Warin (1886) 14 SCR 232

Date: 1886-04-09

The London and Canadian Loan and Agency Company (Limited) *et al*

Appellants

And

George Warin *et al*

Respondents

1885: Nov. 25; 1886: April 9.

Present—Sir W. J. Ritchie C. J. and Fournier, Henry, Taschereau and Gwynne JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Navigation—Interference with—Public navigable waters—Water lots—Crown grants—Easement—Trespass.

W. was the lessee, under lease from the City of Toronto, of certain water lots held by the said City under patent from the crown, granted in 1840, the lease to W. being given by authority of the said patent, and of certain public statutes respecting the construction of the Esplanade which formed the boundary of said water lots.

*Held*, affirming the judgment of the court below, that such lease gave to W. a right to build as he chose upon the said lots, subject to any regulations which the City had power to impose, and in doing so to interfere with the right of the public to navigate the water.

*Held* also, that the said waters being navigable parts of the Bay of Toronto, no private easement by prescription could be acquired therein while they remained open for navigation.

Appeal from a decision of the Court of Appeal for

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Ontario[[1]](#footnote-2) affirming the judgment of the Queen's Bench Division[[2]](#footnote-3) in favor of the plaintiffs.

The facts of the case are fully set out in the report in the Queen's Bench Division.

The action was for trespass by the defendants on a water lot of the plaintiffs in Toronto Harbor, the defence being that the defendants had acquired an easement by user, and that plaintiffs had no grant of the lot.

The jury gave a verdict with damages for the plaintiffs, and such verdict was sustained by the Queen's Bench Division, and by the Court of Appeal. From the judgment of the latter court the defendants appealed to the Supreme Court of Canada.

Arnoldi for the appellants.

We claim a right to the use of the water lot of the respondents in connection with vessels lying at the wharf on two grounds:—

First that we have acquired such right by an uninterrupted enjoyment of it for over twenty years.

And secondly, that these are public navigable waters over which we in Canada, with the rest of the public, have a right of navigation.

As to the first ground, the evidence is clear. It is impossible to regard the acts of Taylor as evincing anything except an intention to use the property under a claim of right.

It is claimed that interruption put an end to the possession. As to that see *Ladyman* v. *Grave[[3]](#footnote-4)*; *Flight* v. *Thomas[[4]](#footnote-5)*; Gale on Easements[[5]](#footnote-6).

These cases show that interruption must be by act of a party who had a right to claim the land.

As to the second ground of our claim, it is contended that the respondents had a grant of the lot from the

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crown, and it is private and not public property.

It is submitted that the conveyance granting water and land thereunder, is no more than a grant of so much land covered with water. Coke upon Littleton[[6]](#footnote-7). So that the estate in the water would only be in accordance with the estate in the lands.

Stat. 23 Vic. ch. 22, sec. 35, only validates the Order in Council, and not the patent. Wilberforce on Statutory Law[[7]](#footnote-8). Interpretation act provides that no patent right shall be interfered with. *Atty. Gen.* v. *Perry[[8]](#footnote-9)*.

The crown can give no rights to a party which would interfere with the public navigation of the harbor, and the grant was made subject to the public easements. Wharves could not be built to the water side as the sea is too heavy, and that no doubt was contemplated in making the grant. *Orr Ewing* v. *Colquhoun[[9]](#footnote-10)*. I submit too, that there should be a new trial on the ground of improper rejection of evidence and excessive damages.

Robinson Q.C. and Galt for respondents.

According to the contention of the appellants, we must practically abandon the use of our property.

The two arguments on the other side do not agree. If these are public navigable waters, anybody could go upon and over them, and they cannot claim any special right in regard to them. But under the prescription acts it must be property over which the party claiming title by user had no right to go.

Then are they public navigable waters? See *Hood* v. *Toronto Commrs.[[10]](#footnote-11)*; *Dyce* v. *Lady James Hay[[11]](#footnote-12)*—referred to in Gale on easements; *Sowerby* v. *Coleman[[12]](#footnote-13)*; *Att. Gen.* v. *Chambers[[13]](#footnote-14)*. To make an easement there

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must be a dominant and servient tenement which is not the case here. *Shuttleworth* v. *Le Fleming[[14]](#footnote-15)*.

If there is any doubt about the grant to us, it is set at rest by 23 Vic. ch. 32 sec. 35. See *Dixson* v. *Snetsinger[[15]](#footnote-16)*.

The use of our property was interfered with for nearly a year, so that the damages are by no means excessive.

The following additional authorities were referred to:—*Bright* v. *Walker[[16]](#footnote-17)*; *Livett* v. *Wilson[[17]](#footnote-18)*; *Mitchell* v. *Parks[[18]](#footnote-19)*.

Sir W. J. RITCHIE C.J.—In this case the judge directed the jury that the plaintiffs were entitled to recover because of the statute under which the Government has the power to make grants of water lots, and there is a patent from the crown granting the lots to the City of Toronto, and the City of Toronto granted the lots in controversy to Mr. Munson, and Mr. Munson leased it to the plaintiffs, and also because the defendants were guilty of a positive illegal act when they fastened their two boats to the side of their wharf, it having been admitted by Mr. Hamilton that they to a certain extent encroached on plaintiffs' lot. The learned judge then said:—

If the plaintiffs owned the lots, which I believe they did, the defendants were guilty of a positive trespass, because the use made by those two boats was neither for the purpose of trade nor navigation, but for the purpose of preventing the plaintiffs using their own property. Do not trouble yourself about the law, because my opinion is that the plaintiffs are entitled to recover. I shall ask you three questions.

Q. Did the defendants and those under whom they claimed exercise the approach over the plaintiffs' land under a claim of right? A. No.

Q. Did the defendants encroach on plaintiffs' property when the two vessels were fastened to the defendants' wharf? A. Yes.

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Q. Was the proposed erection made by the plaintiffs in a reasonable and proper use of their property? A. Yes.

The jury negatived the suppose easement claimed by the defendants. The Divisional Court sustained such finding, and the Court of Appeal found it impossible to say that the jury had erred. No good reason has been assigned in this court to justify our interference, for without the establishment of such an easement, and an interference therewith, it is clear defendants cannot succeed.

The combined effect of the crown grant and the subsequent legislation clearly gives a right to interfere with the navigation by building on or filling up the lots so granted. Until built on or filled up the public no doubt had the right to use the open waters for purposes of trade and navigation, and therefore it cannot be that such a user by any one individual would give him a prescriptive right against the owners, because it would not be a wrongful act against the owners.

In this case the lying of the vessels by defendants at their wharf was avowedly for the purpose of preventing plaintiffs using their property, defendants having built on their own property, and having as Chief Justice Wilson expresses it:—

Turned their own lot to its full advantage, they claim now they cannot get the benefit of it, unless they are allowed to use part of plaintiffs' lot, which claim the plaintiffs resist.

He adds:—

The verdict should strictly have been against the defendants in any event, according to the evidence, because they were making claim to the waters of the plaintiffs for the purpose of trade and commerce; but it was not for the purpose of trade and commerce that the defendants anchored the vessels "Annie Craig" and "Lillian" in the plaintiffs water. The general question of right was no doubt the principal question; but it was a little strange for the defendant to declaim against the plaintiffs for using their own waters not for the purpose of trade and commerce, in driving the piles for the support of the boat house they proposed to build upon them,

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while the defendants were blockading the plaintiffs in their own waters.

The verdict should be against the defendants upon all the issues, and against them upon their counter claim as well. It is a claim of a very unreasonable kind which is made by the defendants. It is that they are entitled to use all their own waters and erections as they please, and that they are at liberty to use all the plaintiffs' land and water too, without interference or question by the plaintiffs' because they find it convenient for the purposes of their wharf, elevator and warehouse, although they thereby render the plaintiffs' property practically useless to them, or greatly reduce it in value, and that the plaintiffs must suffer that loss for the aggrandizement of the defendants, who never paid a farthing for the benefits and advantages which they claim.

And as Burton J. says:—

But assuming the right now claimed to have been established, upon the clearest evidence and upon a charge which was perfectly unexceptionable, I fail to see any evidence that the acts which are now complained of were done in the exercise of that right. The vessels were not crossing the plaintiffs lot in the exercise of the right claimed, but were deliberately moored and fastened to the wharves, and were encumbering the plaintiffs' lot. They were not there for the purpose of trade and commerce, but the defendants were taking the law into their own hands and adopted this rather high handed and arbitrary mode of doing so. This is the view taken of it by the jury, and they have, I think, not unreasonably, marked their sense of such a mode of proceeding by giving substantial damages.

I can see no reasonable ground for our interfering as an Appellate Court, with the decision of the court below, and am of opinion that the appeal should be dismissed with costs.

I see still less reason why this court should do it.

FOURNIER, HENRY and TASCHEREAU JJ.—Concurred.

GWYNNE J.—The position taken by 'the defendants by way of defence to this action is utterly untenable. The defendants, the Loan Company, are owners in fee and the other defendants are in possession under them, of a piece of land covered with water, known as the east half of a certain water lot called water lot No. 17, situate on the south side of the Esplanade in the City of Toronto, by title derived

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from one Greorge Munro deceased, and the plaintiffs are tenants of the west half of the same water lot under J. M. Warin who is the devisee thereof in fee under the will of the said Greorge Munro; the southerly limit of this water lot, that is its limit on the water side, is a line drawn across the Bay of Toronto from a point near the site of the French Fort west of Toronto Grarrison to Groderhams mills, as described in letters patent under the great seal of the late Province of Upper Canada, granted in the year 1840, which letters patent and the title to the lands covered with water thereby granted, including this water lot No. 17, were confirmed by two acts of parliament of the late Province of Canada, namely, 16 Vic. ch 289 and 23 Vic. ch. 2 sec. 35.

Now, to an action of trespass brought by the plaintiffs against the defendants for forcibly and wrongfully entering upon the plaintiffs' half of the said water lot, and breaking down certain fences of the plaintiffs thereon, and with vessels trespassing on the same, and forcibly preventing the plaintiffs from filling up the said water lot and enjoying the same, the defendants plead that at the time of the alleged trespasses complained of the defendants Hamilton were in possession of the said east half of the said water lot No. 17, under a contract for the purchase of the same made with the defendants, the company, who were the owners thereof in fee simple, and that the occupiers of the said east half of the said water lot for 20 years before this suit enjoyed as of right, without interruption, for the more convenient use, occupation and enjoyment of the said land of the defendants, a way for, in, and with, ships, vessels, schooners, tugs, and boats, from a public highway on the waters of the bay in front of the City of Toronto over the said land in the statement of claim claimed by the plaintiffs to the said water lot of the

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defendants, and from the said last mentioned water lot over the said land so claimed by the plaintiffs to the said public highway at all times of the year, together with the right to anchor all such ships, vessels, schooners, tugs and boats, and allow them to remain upon the lands so claimed by the plaintiffs during the time navigation is closed in each year, and also at other times for shelter or repairs or other cause of detention, as well as for the purpose of loading and unloading at all times of the year; and the plaintiffs on the occasion of the trespasses alleged in their statement of claim, and at other times, drove piles in the land claimed by the plaintiffs, and in that way and by other means and devices interfered with and obstructed the defendants in the use and enjoyment of the said way and the said rights, and the plaintiffs threaten, and intend to, and they will unless restrained from so doing, continue to interfere with and obstruct the defendants in the use and enjoyment of the said way and rights. What, in effect, the defendants assert by this plea is, that as appurtenant to the east half of this water lot No. 17, and the erections thereon, the defendants have acquired by prescription a perpetual easement and right of way from the waters of the bay in front of the City of Toronto, lying outside of the line known as the windmill line, across those waters of the bay, inside of that line, which cover the west half of the said water lot No. 17 to a wharf erected in the waters of the same bay situate on the east half of the same water lot, and have so made the west half of the said water lot No. 17 and the waters of the bay which cover it servient to the east half of the same water lot, but if the waters covering the west half of the said water lot be, as they in evidence appear to be, situate in the navigable portion of the Bay of Toronto, they are, although inside the windmill line, so long as the

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water lot remains unreclaimed or unimproved, equally open to all members of the public navigating the same, and no private easement therein can be acquired by any particular person by reason of his being the owner of an improved unreclaimed water lot or otherwise. To meet this view the defendants, by way of alternative defence, have pleaded that the lands claimed by the plaintiffs, that is to say the west half of the said water lot No. 17, are, and were at the time of the trespasses alleged in the statement of claim, covered by the waters of Lake Ontario or of the harbor of the City of Toronto, which is an inlet of said Lake Ontario, which were then, and had always theretofore been, and now are, public navigable waters flowing and being over and upon the said lands, and such waters were not at any time, and are not now, the property of the plaintiffs, and the defendants at the time of the alleged trespass, and before and since were entitled equally with the plaintiffs in exercise of the right as part of the public of Canada to the full and uninterrupted use and enjoyment of the said public waters flowing and being over and upon the lands claimed by the plaintiffs, and the plaintiffs wrongfully on the occasion of the alleged trespasses in the statement of claim mentioned, and at other times by the means stated in the statement of claim, and by driving piles in the lands claimed by the plaintiffs, so that the same stood up through the said public waters, and by other means and devices, interfered with and obstructed the navigation of the said waters, and the defendants in the enjoyment of the same, and if the defendants did any of the acts complained of, which they deny, they did so for the purpose of abating a public nuisance existing in the said waters and obstructing the navigation thereof, and which acts of the plaintiffs were also a nuisance and injury to the defendants, and hindered them from

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the free enjoyment and use of the said public right of navigation. Neither of these contradictory defences is at all tenable; not the first, because the waters covering the water lots as long as they remain unreclaimed being navigable waters of the Bay of Toronto no private easement can be acquired in such waters which are equally open to all Her Majestys subjects to navigate upon; and not the second, because, although until reclaimed or enclosed the waters covering the water lots as granted are open to the public to navigate upon, still the right to reclaim them and to appropriate them to their own private purposes and uses by the grantees in the terms of the grants, which was the right which the plaintiffs were exercising and with which the defendants interfered, belongs to the grantees of the respective water lots and their heirs and assigns. The effect of the letters patent granting the water lots, as confirmed by the acts of Parliament, is to pass to the grantees, their heirs and assigns in fee simple, the land covered with water together with the right of reclaiming the water lots by filling them up wholly and making dry land of them up to the windmill line, or by erecting wharves, warehouses or other structures thereon at their will and pleasure within the terms and provisions of the letters patent and the confirming acts of Parliament. In view of the high handed and vexatious way in which the defendants interfered with the plaintiffs in the exercise of their undoubted rights, the damages awarded by the jury, although large, cannot be said to be excessive. The appeal must therefore, in my opinion, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for Appellant: Howland, Arnoldi & Ryerson.

Solicitors for Respondents: Beatty, Chadwick Blackstock & Galt.

1. 12 Ont. App. R. 327. [↑](#footnote-ref-2)
2. 7 O. R. 706. [↑](#footnote-ref-3)
3. 6 Ch. App. 763. [↑](#footnote-ref-4)
4. 11 A. & E. 699; affirmed 8 C. *&* F. 231. [↑](#footnote-ref-5)
5. Page 31. [↑](#footnote-ref-6)
6. P. 46. [↑](#footnote-ref-7)
7. Pp. 46 to 49. [↑](#footnote-ref-8)
8. 15 U. C. C. P. 329. [↑](#footnote-ref-9)
9. 2 App. Cas. 839. [↑](#footnote-ref-10)
10. 34 U. C. R. 87. [↑](#footnote-ref-11)
11. 1 Macq. H. L. Cas. 305. [↑](#footnote-ref-12)
12. L. R. 2 Ex. 96. [↑](#footnote-ref-13)
13. 4 De G. & J. 55; 5 Jur. N. S. 745. [↑](#footnote-ref-14)
14. 19 C. B. N. S. 687. [↑](#footnote-ref-15)
15. 23 U. C. C. P. 235. [↑](#footnote-ref-16)
16. 1 C. M. & R. 211. [↑](#footnote-ref-17)
17. 3 Bing. 115. [↑](#footnote-ref-18)
18. 26 Ind. 354. [↑](#footnote-ref-19)