
HAVELOCK McC. HART (PLAINTIFF)...APPELLANT ;

1900

AND

*Feb. 20, 21.

*April 2.

THOMAS G. McMULLEN (DEFEND- } RESPONDENT.
ANT)

ON APPEAL FROM THE SUPREME COURT₂ OF NOVA SCOTIA.

Easement—Sale of land—Unity of possession—Severance—Continuous user.

When two properties belonging to the same owner are sold at the same time, and each purchaser has notice of the sale to the other, the right to any continuous easement passes with the sale as an absolute legal right. But the easement must have been enjoyed by the former owner at the time of the sale. Therefore, one purchaser could not claim the right to use a dam on his land in such a way as to cause the water to flow back on the other property, where such right, if it had ever been enjoyed by the former owner, had been abandoned years before the sale.

APPEAL from the judgment of the Supreme Court of Nova Scotia, *en banc* (1), reversing the judgment of Townshend J. at the trial in favour of the plaintiff and dismissing the counter-claim filed by the judgment.

A statement of the facts and of the questions at issue in the case appears in the judgment of His Lordship Mr. Justice Sedgewick, now reported.

*PRESENT :—Sir Henry Strong C. J. and Gwynne, Sedgewick, King and Girouard JJ.

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Borden Q.C. and *Harris Q.C.* for the appellant. The appellant relies on the reasons stated in the judgment of Mr. Justice Townshend (1).

The easement was apparent and continuous. The alteration in the premises during unity of ownership was permanent in its character, consisting of the dam strongly constructed of permanent material and having annexed thereto and connected therewith permanent abutments and a waste-way, cut through the solid rock at great expense, which would be utterly useless unless the dam was to be used with the slanting top as now in use by the plaintiff. We refer to *Watts v. Kelson* (2); *Atrill v. Platt* (3); *Polden v. Bastard* (4); *Hall v. Lund* (5); *Worthington v. Gimson* (6); *Nicholas v. Chamberlain* (7); *Brown v. Alabaster* (8); *Thomas v. Owen* (9); *Culverwell v. Lockington* (10); *Pearson v. Spencer* (11); *Wheeldon v. Burrows* (12); *Gale on Easements* (7 ed.), pp. 21 and 96-121; *Goddard on Easements* (5 ed.), pp. 174-186; *Leake on the Use and Profits of Land*, p. 269; *Jones on Easements*, secs. 139, 143, 145-150; *Kerr on Injunctions* (3 ed.) star page 197, and *Ewart v. Cochrane* (13), the leading case upon this branch of the law.

As to the result when the common owner conveys to different owners by simultaneous conveyances see *Elphinstone on Deeds*, rule 58, p. 202; *Goddard on Easements* (5 ed.), pp. 270 to 273, and *Gale on Easements*, pp. 100 to 104. See also *Compton v. Richards*

(1) 32 N. S. Rep. 340.

(2) 6 Ch. App. 166.

(3) 10 Can. S. C. R. 425.

(4) L. R. 1 Q. B. 156.

(5) 1 H. & C. 676.

(6) 2 E. & E. 618.

(7) Croke Jac. 121.

(8) 37 Ch. D. 490.

(9) 20 Q. B. D. 225.

(10) 24 U. C. C. P. 611.

(11) 1 B. & S. 571; 3 B. & S. 761.

(12) 12 Ch. D. 31.

(13) 7 Jur. N. S. 925; 4 Macq. H. L. 117.

(1); *Swansborough v. Coventry* (2); *Allen v. Taylor* (3); *Barnes v. Loach* (4); *Rigby v. Bennet* (5), at page 567; *Russell v. Watts* (6); and *Phillips v. Lowe* (7).

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The facts indicating intention to create a quasi-easement upon the property are (a) the construction of mills; (b) that the only power for operating those mills was created by this dam; (c) the construction of this dam of solid and permanent material; (d) the waste-way and (e) flumes, of no use except with the dam at its present height; (f) the construction and facing of abutments to a height only useful or necessary with the slanting-top.

Although a portion of the slanting-top was carried away and not replaced from 1876 until 1895 the dam itself remained permanent and apparent, and the jury found that the use and purpose of the slanting-top were also apparent in 1892. The non-existence of a portion of the slanting-top during this period is of no more importance than a hole in the dam or a break in the slanting-top. The apparent easement was the right to maintain the dam at the height indicated by its appearance and construction in 1892, when the old frames of the slanting-top still remained in position, and the flat logs and the mortices therein for the frames of the slanting-top were still visible. The right to light would not be lost because window panes were destroyed by accident. The existence of the window opening and of the dam indicates the extent of the easement. *Calhoun v. Rourke* (8); *Courtauld v. Legh* (9); *Collis v. Laugher* (10).

There was no abandonment of nor intention to abandon the use of the dam and the position of the

(1) 1 Pr. 27.

(2) 9 Bing. 305.

(3) 16 Ch. D. 355.

(4) 4 Q. B. D. 494.

(5) 21 Ch. D. 559.

(6) 25 Ch. D. 559.

(7) [1892] 1 Ch. 47.

(8) 19 N. B. Rep. 591.

(9) L. R. 4 Ex. 126.

(10) [1894] 3 Ch. 659.

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flumes and waste-way, which never altered, made it necessary to use the slanting-top. The structure of the dam on both sides was of a height which indicated that the slanting-top must be used. The rebuilding of the mills in 1876 indicated an intention not to abandon, but to use the dam and operate the mills. But even if the owner had ceased operation because his capital could be more profitably employed, that would not be sufficient evidence of abandonment. By reason merely of non-user, an intention cannot be presumed to take from the quasi dominant tenement the qualities previously attached thereto by the common owner. Such intention should not be presumed from evidence less than would be necessary to establish abandonment of an easement on properties in possession of different owners. See *Hale v. Oldroyd* (1); *Stokoe v. Singers* (2); *Ecclesiastical Commissioners v. Kino* (3); *Seaman v. Vawdrey* (4); *Bower v. Hill* (5); *James v. Stevenson* (6); *Ward v. Ward* (7); *Crossley & Sons v. Lightowler* (8); *Reg v. Chorley* (9).

It was an easement of necessity incident to the act of the owner of the dominant and servient tenements and without which the intention of the parties to the severance could not be carried into effect. *Morris v. Edgington* (10); *Dand v. Kingscote* (11); *Ewart v. Cochrane* (12); *Brown v. Alabaster* (13).

The conveyance expressly grants the quasi-easement in question. The words are:—"All dams, buildings, ways, waters, watercourses, easements, privileges, and appurtenances to the said lots of land belonging or in

(1) 14 M. & W. 789.

(2) 8 E. & B. 31.

(3) 14 Ch. D. 213.

(4) 16 Ves. 390.

(5) 1 Bing. N. C. 549.

(6) [1893] A. C. 162.

(7) 7 Ex. 838.

(8) L. R. 3 Eq. 279; 2 Ch. App. 478.

(9) 12 Q. B. 515.

(10) 3 Taunt. 24.

(11) 6 M. & W. 174.

(12) 4 Macq. H. L. 117.

(13) 37 Ch. D. 490.

any wise appertaining, etc. To have and to hold the said lands and premises, appurtenances and hereditaments, together with all and singular the easements hereby conveyed." The words "easements" and "dams" are sufficient to pass this quasi-easement or privilege or quality annexed to the property. See notes on *Pinnington v. Galland* and *Hall v. Lund* (1); Washburn on Easements, p. 58; *Rackley v. Sprague* (2), and cases there cited; *Hathorn v. Stinson* (3); *Baker v. Bessey* (4); *Richardson v. Bigelow* (5); *Lammott v. Ewers* (6); *Oakley v. Stanley* (7); *Bayley v. Great Western Railway Co.* (8); *Broomfield v. Williams* (9). The conveyance of the dam would be useless unless it included the right to use it effectively, and there could be no such user unless it were raised to its full apparent height as it existed in November, 1892.

The stringer on top of the dam had the effect of raising the water one foot above the block-dam both at the time of the plaintiff's purchase and up to the present time, and penned back the water from 1876 to the present time. The court below should not have granted an injunction in terms restraining the defendant from penning back water by the block-dam and stringer as the only question tried was with respect to the right to pen back water by the slanting-top. No question was raised at the trial as to the right to use the block-dam with its stringer to the fullest extent, and, as to this, there is not any pretence of abandonment. We refer also to *Birmingham, Dudley & District Banking Co. v. Ross* (10), at pages 312, 314

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(1) 10 Ruling Cases, 35, 46, notes pp. 54-60. (5) 15 Gray (Mass.) 154.

(2) 17 Me. 281. (6) 55 Am. Rep. 746.

(3) 25 Am. Dec. 228. (7) 5 Wend. 523.

(4) 73 Me. 472. (8) 26 Ch. D. 434.

(9) [1897] 1 Ch. 602.

(10) 38 Ch. D. 295.

1900 and 315, and the cases collected in *Dunklee v. Wilton*
 HART *Railroad Co.* (1) at pages 500-501, and to *Pickering v.*
 v. *Stapler* (2); *Voorhees v. Burchard* (3); and *New-Ispswich*
 McMULLEN. *Factory v. Batchelder* (4).

Drysdale Q.C. and *Layton* for the respondent. We refer to the reasons for judgment by the learned Chief Justice and Mr. Justice Ritchie in the court below (5) shewing that there has been a failure to establish a quasi-easement of the requisite open, apparent and continuous nature, and there can be no implied grant of an easement. Neither at the time of the severances nor for upwards of seventeen years prior thereto had there been any structure upon appellant's lands capable of backing water upon respondent's lands. The doctrine of implied grant as applied to quasi-easements refers to easements in use *at the time of the severance*. The owner, before the severance, had not made or used any improvement in one part for the benefit of another nor used appellant's lands so as to back water upon those now held by respondent. There is no evidence that such a right is reasonably necessary to the beneficial enjoyment of the property, nor of severance of common property, but only a distinct sale of independent lands. *Hall v. Lund* (6) per Wilde B. at page 686; *Birmingham Dudley & Dist. Banking Co. v. Ross* (7) at page 309; *Wheeldon v. Burrows* (8) per Thesiger L. J. at page 49; *Ewart v. Cochrane* (9); *Brown v. Alabaster* (10); *Russell v. Watts* (11); *Attril v. Platt* (12); Jones on Easements, sec. 129; Godard on Easements, p. 174 to 186; Elphinstone on Deeds, r. 52, p. 189.

(1) 24 N. H. 489.

(2) 5 Serg. & R. (Pa.) 107.

(3) 55 N. Y. 98.

(4) 3 N. H. 190.

(5) 32 N. S. Rep. 340.

(6) 1 H. & C. 676.

(7) 38 Ch. D. 295.

(8) 12 Ch. D. 31.

(9) 4 Macq. H. L., 117.

(10) 37 Ch. D. 490.

(11) 25 Ch. D. 559.

(12) 10 Can. S. C. R. 425.

The words quoted in appellant's deed convey only legal easements. *Beddington v. Atlee* (1); *Polden v. Bastard* (2); *Birmingham Dudley & Dist. Banking Co. v. Ross* (3); *Elphinstone* [on Deeds, rr. 54, 55, 59. Specific quasi-easements and privileges are mentioned so no construction can be had leaving anything implied; *expressio unius exclusio alterius*.

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The judgment of the court was delivered by :

SEDGEWICK J.—The plaintiff is the owner of a mill on the St. Croix River, in Hants County, Nova Scotia. The defendant owns a mill further up the stream, which is mainly supplied with water power from a storage-dam still further up stream. This dam broke, and the waters rushing down stream broke away the plaintiff's dam, and it was for the damage thus occasioned that this action was brought. In the action, however, the defendant counterclaimed, alleging that he was damaged by reason of the plaintiff's dam penning back water upon his land and obstructing the operations of his mill. The main action has been settled, and the only question before this court is as to whether the defendant is entitled to succeed upon the counterclaim.

The properties, both of the plaintiff and the defendant, were, in the year 1873, owned by one Francis Ellershausen, who conveyed to the Nova Scotia Land & Manufacturing Co., Limited. While Mr. Ellershausen owned the property, he operated a paper mill, and for the purpose of creating water-power, he built a portion of the dam which is in question, a structure, as originally built, of about one hundred and eighty feet in length on the top, and thirty-eight feet in height from the bed of the river. The main

(1) 35 Ch. D. 317.

(2) L. R. 1 Q. B. 156.

(3) 38 Ch. D. 295.

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portion of the dam, called the block-dam, was a strong structure built of logs from the bed of the river, and that part of the dam remains to the present day. Upon the block-dam, however, Ellershausen constructed a small structure about eight feet in height, called a false-top, or slanting-top. The mill for the purposes of which this dam was constructed, was operated from the summer of 1873, to December, 1875, and from then was never operated until some time after the plaintiff purchased in 1892.

That portion of the dam called the false-top was swept away, and during the whole of the seventeen years following the original dam remained practically as if there had never been any structure on top of it, and not until 1895 was it rebuilt. During the time that Mr. Ellershausen operated this mill he also operated the mill up stream now owned by the defendant. In 1895 the plaintiff erected a new false-top upon the old structure, this false-top being no greater in height and no different in any way from the original structure. The result of this, however, was to flood back the water so that the wheel of the plaintiff's mill above was prevented from doing its proper work.

In 1892, all of these properties, then being still owned by the same parties, were put up for sale at public auction, the plaintiff buying his mill and the defendant buying his, thus severing the pre-existing unity of ownership. At this time, the block-dam existed and there were indications showing that some time before there had been a false-top built upon it.

The plaintiff's claim is that inasmuch as the owner of this property many years before had erected this dam with the false-top, and had used it for a few years, and he having purchased it, knowing the uses to which the previous owner had put it, had a right, notwithstanding that the false-top had been swept

away and had not been operated or used for seventeen years, to replace it by a structure of the same character, creating no greater burden upon the upper property than the original dam had done, and the whole question turns upon that contention.

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We are all of opinion that, under the circumstances of this case, the plaintiff's claim cannot be entertained. It is not disputed that if at the time of the plaintiff's purchase, a dam of the character originally there, or of the character now there had been in existence, the plaintiff upon acquiring title, would acquire a title also to an easement upon the upper land, inasmuch as it is clearly settled that where two properties belonging to the same owner are sold at the same time, and each purchaser has notice of the sale to the other, the right to any continuous and apparent quasi-easement passes with the sale. What was only a quasi-easement or user before, becomes after severance, an absolute legal right.

But the question here is: Must not the user of the original owner, which it is claimed becomes converted into a right by the purchaser, substantially exist at the time of the severance of the title? Can the purchaser after he has purchased, subject his neighbour, or can he, years after a particular user has ceased, after such a dam as is in question here has been destroyed, claim the right to re-erect the dam and impose upon a neighbour a servitude of which, when he purchased he had no notice except what might be afforded by a few planks and other decaying remains of what had once been there?

I think the authorities shew that the quasi-easement must exist and be enjoyed at the time of the severance and that it is not sufficient if that use had ceased many years before.

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In the case of *Suffield v. Brown* (1), Lord Westbury's observations are to the effect that on a grant by an owner of an entire heritage, of part of that heritage as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements which have been *and are at the time of the grant used by the owner of the entirety for the benefit of the parcel granted*. In the well known case of *Wheeldon v. Burrows* (2), Thesiger L. J. says that on the grant by the owner of a tenement, of part of that tenement as it is then used and enjoyed there will pass to the grantee all those apparent and continuous easements, or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are *at the time of the grant* used by the owner of the entirety for the benefit of the part granted.

In this case, at the time of the grant, or at the time of the severance, there was in fact no existing user, or no means of using the property to the detriment of the alleged servient tenement. There was only some indication that many years previously there had been such a user.

I am of opinion, under the circumstances, that no easement such as is now claimed passed, and that the subsequent construction of the dam complained of, in so far as it in any way affected the operation of the defendant's mill up-stream, has no legal sanction.

This is not a case where there has been an accidental or temporary stoppage of an easement, as where a drain is blocked, or a way impeded, or a light obstructed. Accidental and temporary circumstances of this kind may not destroy the right to the easement, but where a way is absolutely destroyed, or a window boarded up

(1) 33 L. J. Ch. 249.

(2) 12 Ch. D. 31.

for many years, we think, in that case, the right is gone.

The appeal should be dismissed with costs, but there should be a variation of the decree restraining the plaintiff only from penning back the water otherwise than by the dam as existing at the time he purchased his mill.

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Appeal dismissed with costs.

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

Solicitor for the respondent : *Norman J. Layton.*
