1914
Sept. 10.

THE KING, ON THE INFORMATION OF THE TORNEY-GENERAL FOR THE DOMINION OF CANADA.....PLAINTIFF;

AND

LEMUEL J. TWEEDIE.....DEFENDANT..

Navigable River—Grant of part of Bed—Jus Publicum—Adverse Possession and Prescription distinguished—New Brunswick Statute Law considered—Right to maintain boom for logs—Disclaimer of Right of Province in Navigable River—Validity.

The right to use a navigable river as a public highway is enjoyed by all the subjects of the Crown, and cannot be defeated by a claim of adverse possession. In respect of this right the Crown stands in the position of trustee for the public; and any grant from the Crown must be taken to be subject to this right. *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339 and *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1914) A. C. 168 relied upon.

2. The distinction in English law between prescription and adverse possession is that prescription relates to an incorporeal hereditamnet, while adverse possession is in respect of a thing corporeal, and arises out of the physical possession of land which gives the fee.

3. The right to stretch a boom for logs, and to boom logs, in the waters of a river is quite distinct from a right to the bed of the river. The former amounts to a profit *à prendre in alieno solo*, and may arise by prescription.

4. So far as the Province of New Brunswick is concerned it was not until the year 1903 that a statute was passed (Consol. Stats. N.B. 1903, c. 156) enabling the subject to prescribe an easement as against the Crown.

5. *Quaere*: Whether, in the absence of statutory authority therefor, the Executive Council of the Province of New Brunswick can pass a valid order disclaiming any interest which the province may have in lands covered by water and forming part of the bed of a navigable river within the province?

THIS was an information filed by the Attorney-General of Canada for the assessment of compensation due to the owner of certain land taken for the Intercolonial railway under *The Expropriation Act.*

The facts are stated in the reasons for judgment.

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The case was heard before the Honourable Mr. Justice Audette at St. John, N.B.

J. B. M. Baxter, K.C., (with him *A. A. Davidson*, K.C., for the plaintiff) contended that on the facts the defendant had no title to the water-lot in dispute, as he never had undisputed possession of the bed of the river for the requisite period of sixty years, even if as a matter of law title to a portion of the bed of a navigable river could be so acquired. Secondly, the defendant could not claim a prescriptive right to stretch his booms across the surface of navigable water because it was not until the year 1903 that the legislature of the Province of New Brunswick saw fit to pass an Act enabling the subject to prescribe an easement as against the Crown.

M. G. Teed, K.C., for the defendant contended that the facts established title to the land below high-water mark in the defendant by adverse possession. Continuous use of the surface of the river at a given point for sixty years would be tantamount to use of the bed as well, as the bed at such point could not have been contemporaneously used by any one else. Adverse possession will give a good title against the Crown in the bed of navigable waters. He cited *Moore on the Foreshore* (1).

AUDETTE, J., now (September 10th, 1914) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia*, that the Crown, in the right of the Dominion of Canada, has taken and expropriated, under the provisions of *The Expropriation Act* (R.S. 1906, ch. 143) certain land and real property belonging to the said defendant for the purposes of a public work of Canada, to wit,

(1) p. 655.

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the Intercolonial Railway, as a right-of-way for the proposed track of the Chatham diversion of the said railway in the town and Parish of Chatham, N.B.

There are in this case two pieces or parcels of land expropriated which form the subject of contention, and which must be dealt with separately and which will hereafter be respectively called the *upland lot* and the *water-lot*.

By the original information filed in this court on the 19th February, 1914, it appears that the upland lot alone had been expropriated on the 21st September, 1910, by depositing of record, a plan and description of the same (Exhibits 1 and 2) in the office of the Registrar of Deeds for the County of Northumberland, in the Province of New Brunswick.

The Crown by its original information tendered the sum of $2,150 for the upland so taken and for all damages resulting from the said expropriation.

The defendant, by his plea to the said information, claimed that, at the time of such taking and expropriation, he was the owner and in possession of certain other lands which adjoined to the eastward of the said lands described in the second paragraph of the information, and which lands (hereinabove called the water-lot) were taken and expropriated for the purposes aforesaid, and taken and used for the right-of-way, and was and is the owner and in possession of other lands on either side of the said right-of-way, which were and are injuriously affected by such expropriation, and by the further extension of the said railway from the said land in an easterly direction from the said land, so described in the second paragraph of the information.

The defendant therefore claimed for all such lands and damages the sum of $25,000.

It having appeared to this Court, in the course of the trial, that if the defendant claimed the lands east of

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those described in the information, upon which the railway was actually constructed, it would be more satisfactory and less expensive to try the whole matter once for all and suggested the amendment of the information by inserting the lands actually taken by the Crown, giving at the same time leave to amend accordingly.

Under such leave, granted in these circumstances, it was unnecessary to provide beyond the granting of it,—that is without giving the defendant leave to answer such amended information, because the reason for the amendment allowed was raised and prompted by the allegations of the defendant's plea already recited above.

Subsequently thereto the information was amended in pursuance of such suggestion and leave, and an amended information was filed in the month of May last, (1914) whereby it appears that a further plan and description were deposited in the said Registry, on the 29th day of May, 1914, whereby the water-lot above referred to, was expropriated as set forth and described in the said amended information. The Attorney-General further adds in the said amended information that he does not admit any claim in the said defendant to lands and premises therein described and is not willing to pay him any sum in respect thereof; but claims that if the defendant is entitled to any interest in such lands, the compensation offered in paragraph 4 of the original information, namely the sum of $2,150, is sufficient to cover the same in addition to the interest of the said defendant referred to in the said paragraph 4.

At the opening of the trial the Crown admitted the title of the defendant to the upland lot, but denied his title to the water-lot.

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The upland lot left the hands of the Crown under a grant of the 4th of May, 1798, and is filed herein as Exhibit "A."

The defendant claims the ownership of this water-lot by virtue of this grant, and further that the acts of possession in evidence would show it was intended to extend beyond ordinary high-water mark. That is to say, that the acts, claims and user of the defendant and his predecessors in title in respect thereto are cogent evidence to read with the grant to show that the title extended beyond ordinary high-water mark.

It must be found that under the plain language of the grant itself the defendant cannot derive any title to the water-lot. Indeed, under this grant whereby several lots are given, in severalty, to the parties therein mentioned it appears that lot 37 is given to Thomas Loban, the predecessor in title of the said defendant, but is bounded "by the northerly bank or shore of the Miramichi River." With such unequivocal language and the description it appears to the court beyond controversy and ambiguity that the grant did not contemplate parting with the foreshore.—If even the ordinary rules of law to construe a doubtful grant were to be applied, such contention as that propounded by the defendant could not either be maintained. True, in ordinary cases between subject and subject, the principle is that a grant shall be construed, if the *meaning is doubtful*, most strongly against the grantor, who is presumed to use the most cautious words for his own advantage and security. But in the case of the King, whose grants chiefly flow from the royal bounty and grace, the rule is otherwise; and Crown grants have at all times been construed most favourably for the King, where a fair doubt exists as to the real meaning of the instrument, as well in the instance of

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grants from His Majesty, as in the case of transfers to him. (1).

This Crown grant, Exhibit "A," clearly conveyed the upland, and the upland alone, the bed of the river remaining in the Crown, in the right of the Province, the Crown holding it for the benefit of its subjects, for the purpose of navigation and fishery.

Now remains the question,—how, if ever, did the water-lot come out of the hands of the Crown? It must be found it never left the hands of the Crown.

The defendant contends that if it did not come to him by virtue of the grant, that he owns it by possession and prescription as against the Crown.

True, at the opening of his case, the defendant filed a number of titles, leases, as would originate from Loban; but of what avail can such titles or deeds be if the vendor, lessor or grantor is not possessed of the ownership. These titles, however, may tend to show an open and apparent manifestation of the contention of proprietorship, which might be of some help in establishing, in an ordinary case, proof by possession or otherwise. But by themselves, they are of no avail under the conditions above related.

Let us now approach the question of possession and prescription, under the laws of the Province of New Brunswick. (R.S.C. ch. 140, sec. 33).

The distinction in English law between prescription and adverse possession is that prescription is for an incorporeal hereditament, while adverse possession is in respect of a thing corporeal, such as the physical possession of land which gives the fee.

It is somewhat difficult to take actual possession of the *solum*, the bed of the river. It would not be sufficient to use the surface of the water, but it would

(1) Chitty's Prerog. 391-2,

of necessity involve the actual seizing or possession of the soil of the bed of the river.

The right of stretching a boom and booming logs in the waters of a river is quite distinct from a right to the bed of the river. Standing by itself the former would be a profit *à prendre in alieno solo*, an incorporeal hereditament subject to prescription.

The Miramichi River is a tidal and navigable river opposite the upland in question and where the ownership of the water-lot is claimed.

Dealing first with the question of possession, it must be said that in tidal waters (whether on the foreshore or in estuaries or tidal rivers) the exclusive character of the title is qualified by another and paramount title which prima facie is in the public. (1). The subjects of the Crown are entitled as of right to navigate in tidal waters. The legal character of this right is not easy to define. It is properly a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean, if, indeed, it did not in fact first take rise in them. The right into which the practice has chrystalized resembles in some respects the right to navigate the seas, or the right to use a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation. Finding the subjects exercising this right as from immemorial antiquity, the Crown as *parens patriae* no doubt regarded itself bound to protect the subject in exercising it, and the origin and extent of the right as legally cognizable are probably attributable to that protection, a protection which gradually came to be

(1) Atty-Gen. B.C. v. Atty-Gen. Can., (1914.) A.C. 168.

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recognized as establishing a legal right enforceable in the courts. (1).

It would, therefore, appear that the Crown, as trustee for the public, is the guardian of such right held by the public to use navigable and tidal rivers as a public highway and it thus rests with the Crown to protect its subjects against any right which might arise by adverse possession, in violation of such *jus publicum*. The defendant's grant is subject to the *jus publicum* or public right of the King and people, to the easement of passing and repassing both over the water and the land. (2).

Under sec. 33 of *The Exchequer Court Act*, the laws relating to prescription and the limitation of actions in force in any province apply to proceedings in respect of any cause of action arising in such province.

Under the laws of the Province of New Brunswick, Consolidated S. 1903, ch. 139, sec. 1, "No claim *for lands or rent* shall be made, or action brought by His Majesty, after *a continuous adverse possession* of sixty years." (6 Wm. IV, ch. LXXIV N.B.)

The defendant having failed to prove, as a question of fact, actual continuous possession for sixty years, it becomes unnecessary to decide whether or not a subject can acquire ownership in a foreshore on tidal and navigable water by such possession, assuming that the word "land" in the statute would be wide enough to embody the meaning of foreshore. On the question of possession the defendant fails.

Even if the boom in question had been stretched for the period required by the statute, it could not be construed as a possession of the *solum*, as an actual seizin or possession of the soil of the bed of the river.

(1) *Ibid.* at p. 169.

(2) Mayor of Colchester v. Brooke, 7 Q.B. 339.

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Coming now to the question of prescription as distinguished from that of possession, it may be said that assuming the defendant could prescribe, as against the Crown, an easement over these waters, giving him the right to so stretch that boom and use it for collecting logs, he would in such a case, fall under ch. 156, of the Consolidated Statutes of N.B., which for the first time enacted such law only in 1903. Before 1903, there existed no laws in New Brunswick whereby a subject could prescribe an easement as against the Crown. Therefore, from 1903, there did not elapse such delay as would under that statute acquire the right to so prescribe.

Having found on the question of fact, as disclosed by the evidence, that the defendant cannot succeed in his contentions of ownership or easement with respect to the water lot, it becomes unnecessary to decide whether or not a subject can acquire by possession or prescription the foreshore on tidal and navigable waters,—a moot question upon which decisions are found both ways.

The Crown at the trial, under the provisions of sec. 30 of *The Expropriation Act*, (R.S. 1906, ch. 143) filed an undertaking whereby it granted to the defendant a right-of-way across the line of the Intercolonial Railway at the Russell Wharf, and further undertook to efficiently maintain the same. Under the evidence, the privileges and material advantages derived from such undertaking, coupled with the offer of $2,150 made by the information, constitutes, in the opinion of the court, a just and liberal compensation for the upland expropriated herein and for all damages resulting therefrom, including such rights held by the defendant, a riparian owner, as are distinguishable from those held by the public at large as mentioned in the case of

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Lyons v. *The Fishmongers*, (1)—covering all rights whatsoever the defendant may have in respect of both the upland and the water lots.

And taking in consideration the advantages derived from the undertaking are material and substantial, because without them, the defendant would have been deprived of access by land to the northern part of his property, the defendant will be entitled to the costs of this action.

With respect to the water lot, the defendant has failed to establish any title to the same either under his grant for the upland or by adverse possession or prescription. This water lot before the expropriation was vested in the Crown as represented by the Province of New Brunswick, subject to such rights by the Dominion as are resting on sections 91 and 92 of the B. N. A. Act.

Having said so much, it becomes unnecessary to decide whether the small block to which the boom in question had at times been attached, is or is not a *nuisance*, because of it being an apparent obstruction in navigable waters impeding or likely to impede navigation,—the evidence being silent as to whether leave to so erect this block had been obtained (2).

The defendant has filed as Exhibit "L" an order of the Executive Council of the province of New Brunswick, dated the 16th July, 1910, whereby it appears, in the recital part thereof, that the Agent of the Minister of Justice of Canada applied for a disclaimer of damages on account of taking for use of the Intercolonial Railway, certain lands covered with water situate below highwater mark on the Miramichi River,

(1) L.R. 1 App. Cas. 662.

(2) Ratté v. Booth, 11 Ont. R. 491; 14 A. R. 419; 15 App. Cas. 188; Eagles v. Merritt, 7 N.B.R. 550; Blundell, v. Catterall, 5 B. & Ald. 268; by Holroyd, J.; Brinckman v. Matley, L. R. 2 C. D. p. 313; Mayor of Colchester v. Brooke 7 Q. B. 339; Gann v. Free Fishers of Whitstable, 11 H. L. Cas. 192; Ross v. Belyea, N. B. R. 1 Han. 109.

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at a point in question in this case. Then the order in council concludes with a disclaimer in favour of the Crown in the right of the Dominion, in the following words:—

> The Attorney-General "is therefore of opinion "that whatever rights the Province may have "formerly had in the said lands covered by water, "that said rights have become extinguished and that "it would be inadvisable to set up any claim to the "same. He therefore recommends that upon His "Honour, the Lieutenant Governor, approving of "this minute that the Minister of Justice be informed "that the said Province of New Brunswick lays no "claim to the said lands covered by water and "situate below high-water mark and that the "Department of Railways must deal with the parties "claiming said lands covered by water."

This order in council was passed on the 16th July, 1910, and recommends that the Attorney-General of Canada be informed that the Province of New Brunswick lays no claim to the said water-lot and that the Department of Railways must deal with the parties claiming the same.

As already stated the defendant has failed to make title to the water-lot as between himself and the Crown in the present action. It becomes unnecessary to decide here whether or not such a disclaimer of public domain can be of any legal effect without any statutory authority or without competent legislation. No such legislation has been cited and this court is not aware of any.

However, the rights to this water-lot as between the Crown represented by the Province, and the Crown represented by the Dominion, cannot in the present case be considered, because the Province of New

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Brunswick is not a party to this action, and all rights in respect thereto are hereby reserved. Maybe, however, that for all purposes this order in council adjusts the rights of the two Crowns, in their respective capacity.—Indeed, it would appear that if the Crown, in the right of the Province renounced its rights in favour of the Dominion for the public work in question, that it is the citizens of the Province who get the benefits derivable from such public work.

It may be added that the Dominion of Canada is possessed of statutory powers to expropriate Crown lands belonging to the Government of a Province, under sec. 14 of *The Expropriation Act*, and under the decision of the Judicial Committee of His Majesty's Privy Council in the case of the *Attorney-General of B.C.* v. *The Canadian Pacific Railway Co.* (1).

There will be judgment in favour of the defendant for the sum of $2,150 together with a declaration that he is entitled to the crossing mentioned in the said undertaking. The whole with costs.

Judgment accordingly.

Solicitor for the plaintiff: *A. A. Davidson.*

Solicitors for the defendant: *M. & J. Teed.*

(1) 1906, A. C. 204.