Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Esquimalt Waterworks Company v. *The Corporation of the City of Victoria, from the Supreme Court of British Columbia; delivered the* 31*st July* 1907.

Present at the Hearing:

LORD ROBERTSON.
LORD COLLINS.
SIR ARTHUR WILSON.
SIR ALFRED WILLS.

[*Delivered by Sir Alfred Wills.*]

This action was brought to restrain the Respondents from entering upon certain lands of the Appellants and from posting thereon notices under the Act of British Columbia, intituled "The Water Clauses Consolidation Act, 1897," and the substantial question is whether the Respondents can appropriate for the purposes of the municipality certain waters flowing from two different sources, Goldstream River and Niagara Creek, which waters the Appellants claim to be theirs under the Esquimalt Waterworks Act, 1885, and the Esquimalt Waterworks Extension Act, 1892.

At the trial before Duff, J., judgment was given for the Appellants.

This judgment was reversed upon appeal to the Full Court, by Irving and Morrison, JJ., Hunter, C.J., dissenting. From that judgment the present Appeal is brought.

I (22)30147. [52.] 100.—8/07. Wt. 1199. E. & S. A

By the Esquimalt Waterworks Act, 1885, the Appellants were incorporated and empowered to construct waterworks and all appliances connected therewith in the town of Esquimalt and the adjacent Peninsula lying to the east of Esquimalt Harbour. By section 9 they were empowered to "divert and appropriate the "waters of Thetis Lake and Deadman's River "and its tributaries, . . . and to contract with the "owners and occupiers of" lands taken for the waterworks, "and those having an interest or "right in the said waters for the purchase of the "same respectively," with provisions of an ordinary character for compensation.

By section 10 "the lands privileges and "waters which shall be ascertained, set out or "appropriated by the Company for the purposes "thereof as aforesaid shall thereupon and for "ever afterwards be vested in the Company." It is then provided that it shall be "lawful for "the Company to construct, erect and maintain ". . . all such reservoirs" and works "requisite "for the said undertaking and to convey the "water thereto and therefrom, in, upon and "through" any land "intermediate between "the said reservoirs and waterworks and the "springs, streams, rivers, bodies of waters or "lakes from which the same are supplied and "the Town of Esquimalt and the said Peninsula ". . by one or more lines of pipes as may "from time to time be found necessary." Powers are further given to execute any works and occupy any land that may be necessary for distributing water to the inhabitants of the Town of Esquimalt and the Peninsula.

By section 12 "the Company shall regulate "the distribution and use of the water on all "places and for all purposes," and shall fix the price for the use of the water.

By section 27 certain sections of the Land Clauses Consolidation Act, 1845, are incorporated, but as they are not set out in the joint Appendix nor referred to in the judgments of the Courts below, their Lordships assume that they have no bearing upon the questions raised by the present Appeal.

By the Esquimalt Waterworks Extension Act, 1892, section 1, the Act of 1885 "shall be so "construed as to give power" to the Appellants "to divert and appropriate so much of the "waters of Goldstream River and its tributaries "as they may deem suitable and proper, "subject, however, to any grant of rights, pri- "vileges or powers arising under the provisions "of the Corporation of Victoria Waterworks "Act, 1873." By section 3 "all rights, powers "and privileges conferred on the said Company "by the" Act of 1885 shall extend and apply to "the appropriation and diversion of the waters "of the Goldstream River and its tributaries, "and also to the conveying of such water "from the place or places of diversion" to the Town of Esquimalt and the Peninsula aforesaid "in the same way and to the same extent as "if such rights, powers and privileges had "been originally conferred" by the Act of 1885.

The Corporation of Victoria Waterworks Act, 1873, gave powers to the Corporation of Victoria at any time thereafter to appropriate any lands or waters within 20 miles of Victoria which they might require for the purpose of establishing waterworks of their own, and provided machinery for ascertaining the compensation to be paid in such case to any person or body politic with whose rights they might interfere. They, however, have not proceeded under this Act for the obvious reason that, if they did so, they would have to pay for what

they contend they can get under a later general Act without paying for it, and it is mentioned only to clear it out of the way.

The Esquimalt Waterworks Extension Act, 1892, further provided by section 10 that the Corporation of Victoria might at any time require the Appellants to deliver into the water mains of the City of Victoria at a stated pressure and at prices fixed by the Act any quantity of water not being less than 500,000 and not more than 5,000,000 gallons per diem, together with water for fire protection at a fixed price, and water for flushing and washing gutters and for filling tanks for fire protection free of charge.

On the same day that this Act received the Royal Assent it was given also to the Water Privileges Act, 1892, by section 2 of which it is enacted that "the right to the use of all water " at any time in any river, watercourse, lake, or " stream, not being a navigable river or other- " wise under the exclusive jurisdiction of the " Parliament of Canada is hereby declared to " be vested in the Crown in the right of the " Province, and save in the exercise of any legal " right existing at the time of such diversion or " appropriation no person shall divert or appro- " priate any water from any river, &c. excepting " under the provisions of this Act or of some " other Act already or hereafter to be passed," and with some other exceptions not material to the present question.

This Act, however, was repealed by section 154 of the Water Clauses Consolidation Act, 1897, by section 4 of which the right to the use of all "unrecorded water"—a term to be explained presently—at any time in any river, lake, or stream is declared to be vested in the Crown "in the right of the Province." The rest of the section is a re-enactment in the same words of

the portion of section 2 of the Water Privileges Act, 1892, beginning "and save"—already set out, with similar exceptions with which this case is not concerned.

Under this Act, persons desirous of using water in excess of ordinary riparian rights, may by a procedure which it is unnecessary to detail, obtain from the Commissioner appointed under the Act a "record," or entry in an official book kept for the purpose, of the water which he seeks to appropriate—of its sources, extent and other necessary particulars, and upon obtaining such record may divert and appropriate the water described in the record. By section 40 "any municipality may from time to time obtain "one or more records of the unrecorded water "in any streams or lakes as a source or sources "of supply for a projected waterworks system."

It is under this provision that the Respondents are seeking to proceed, treating the waters of Goldstream River below a certain point and the waters of Niagara Creek as "unrecorded water" within the meaning of the Act. But before discussing the interpretation of "unrecorded water" given by the interpretation section of the Act, it will be convenient to state the facts relating to the waters in question, and to what the Appellants have done under their statutory powers.

Goldstream River took its origin, in 1885, and before any works were executed by the Appellants, in a series of swamps rather than lakes. In winter it was a stream, apparently of considerable dimensions. In summer it dwindled to a thread, or died out altogether. Its origin lay to the west or north-west of Esquimalt and Victoria, but as it approached Esquimalt Harbour (though at a considerable distance from it) near a point where it was joined by one of its tributaries, called Waugh

Creek, it took a turn to the north and finally entered an arm or inlet of the sea called Finlayson Arm or Saanich Inlet. Near its embouchure it was joined by a tributary called Niagara Creek, which has its origin in a small lake to the west of Saanich Inlet called Niagara Lake.

The Appellants have constructed dams and other works upon the upper waters of the Goldstream River, the effect of which is to add several hundred acres to the natural storage capacity. They have also bought the land on both sides of the river forming the watershed, have constructed an artificial channel more than a mile long, and laid down a pipe about half a mile long to carry the waters to a reservoir which they have made. From this reservoir they have laid down another pipe about a mile long, and have expended upon these works several hundred thousand dollars.

These works would appear to have been necessary in some considerable measure in consequence of the obligation imposed upon them by section 10 of their Act of 1892 to supply within 15 months after notice, if required, 5,000,000 gallons per day to the City of Victoria. No doubt the Appellants hoped also to have an increasing demand for water in Esquimalt itself and the Peninsula, but these expectations, if they existed, have not been realised, and at present the only use that has been made of the water and of the artificial works for its collection and distribution has been to supply a large quantity to the power-house of the British Columbia Electric Railway Company, Limited, situated on the Goldstream River about a mile and a half before it turns to the north and some miles from the City of Victoria. From the power-house it is discharged into the Goldstream River, and if the City of Victoria required

a supply under section 10 of the Act of 1892, it would be necessary to construct at the point of discharge another reservoir and to lay down far larger pipes than would be wanted for Esquimalt, at a cost of about 300,000 dollars. No demand for any supply has been made by the Respondents, and as the supply from Thetis Lake and Deadman's River is at present adequate to the demands of Esquimalt and the Peninsula, the Appellants have not yet made this reservoir or laid down any pipe, and the discharged water simply runs down into the old bed of the river and is so carried away to the sea.

In respect of the water from Niagara Creek the Appellants have made surveys to ascertain the nature and extent of the supply and have had plans prepared to carry the water—storage in Niagara Creek being impossible—in a ditch to the Goldstream River, and across it to Waugh Creek whence it would fall into and become part of the general supply. They have also canalized Waugh Creek for about a mile.

The Respondents claim that the waters from the Goldstream reservoirs and river after its discharge below the power-house, and also the whole of the waters of Niagara Creek are "unrecorded water" and can be "recorded" in their favour under the Act of 1897.

The first question is whether that Act has any application to the Appellants. In their Lordships' opinion, it has none.

The Esquimalt Waterworks Act of 1892 has imposed upon the Appellants a perpetual obligation of very serious extent, and it would seem natural that the means granted them to comply with that obligation should be correspondingly perpetual. It is clear from section 3 of their Extension Act of 1892 that their rights are exactly the same, provided the conditions of

section 10 be observed, as if they had been conferred by the Act of 1885. We have therefore, from the passing of the Act of 1892, a private Act dating back to 1885 by which the Appellants are placed under obligations as to which the natural inference from the Acts themselves and from the history of the case is that they could not be certain of being able to perform them without the two sources of supply in question.

One of the reasons for executing the extensive works on the Goldstream River must have been that it was necessary for them at once to be in a position, with the help of such minor works as could be constructed at any time within 15 months, to supply the maximum quantity of water which the Respondents could demand. The necessary works in connection with Niagara Creek were very much simpler, and when the necessary surveys and plans had been made there was no reason why the Appellants should not wait, as to them, till the need actually arose.

It is true that by section 10 of the Appellants' Act of 1885, in order to vest in them the waters they were entitled to appropriate, it was necessary that these waters should be "ascertained, set "out, *or* appropriated." In the case of the Goldstream River every act was done by which not only one but each of the three of these conditions was fulfilled, and it is difficult to see what more they could have done to vest these waters in the Company "for ever," according to the terms of section 10.

As to the waters of Niagara Creek, there is in their Lordships' opinion abundant evidence to show that the "privileges and waters" now in question were ascertained and set out by the Appellants, which is quite sufficient to satisfy the section. The vesting is not made subject to

ascertainment or *payment* of compensation, and as in respect of Niagara Creek no person's enjoyment, whether rightful or not, has at present been interfered with, it is not surprising that the provisions for compensation have not been resorted to by any one.

Nor can their Lordships agree that because the water below the power works on the Goldstream River is not yet used by the Appellants that it has ceased to be theirs. The Act of 1885 is not ambiguous. It vests in them such waters as have been ascertained, set out or appropriated, and their Lordships fail to see how the waters which have been collected by the Appellants cease to be their waters at any point within the limits of ascertainment. The deeds put in evidence show that the lands on each side of the whole course of the Goldstream River were bought by the Appellants, and there can be no doubt that the waters of Goldstream River from their source to the discharge into Saanich Inlet are comprehended under the vesting enactment.

It is equally clear that the waters of Niagara Creek became under the same enactment vested in the Appellants and they must remain so unless they can be dealt with by the Respondents under the Act of 1897.

It is a sufficient answer to any such contention to say that the Appellants' Acts of 1885 and 1892 are private Acts, in the sense that they confer special rights and impose special obligations upon a particular company for special purposes; and to hold that a subsequent general statute, the application of which might seriously interfere with the rights granted by special legislation to the Appellants and might prevent them from fulfilling statutory obligations, can have been intended to override the special legislation would be contrary to sound and well

established principles; and if ever there was a case in which these principles ought to be observed, the present is such an instance, for the result of the Respondents' contention might be that the Appellants could not perform the obligations of section 10, and in that case, the condition being violated, the rights and privileges which had involved the costly outlay above mentioned would be gone.

Their Lordships are further of opinion that the waters in question do not fall within the definition of unrecorded water in section 2 of the general Act of 1897.

The definition runs as follows:—"Unrecorded "water shall mean all water which for the time "being is not held under and used in accordance "with a record under this Act, or under the "Acts repealed hereby, or under special grant "by public or private Act, and shall include "all water for the time being unappropriated "or unoccupied or not used for a beneficial "purpose."

The term "record" was not new. It appears first in the Land Act, 1888 (repealed by the Act of 1897) and the procedure by which it was obtained and the nature of the rights secured thereby were practically the same in three of the Acts repealed by section 154 of the Act of 1897 as under that Act.

The first part of this definition is clear enough. It can have no other meaning than,—"unrecorded water" shall mean all water which is not held under and used in accordance with a record under this Act, or [*with a record*] under the Acts repealed hereby, or [*is not held*] under a special grant by public or private Act; for the words "under special grant," &c., if supposed to be attached to "a record" would be hardly intelligible and they must therefore be read as connected with the earlier words "is not held."

Such water as that now in question is held under special grant by what is called in the clause a "private" Act, and is therefore not within the meaning of "unrecorded water" at all, and the subsequent expression "and shall include "all water . . . unappropriated or unoccupied or "not used for any beneficial purpose," whatever its application may be, cannot in their Lordships' opinion be intended to refer to water already declared to be outside the definition of "unrecorded water." This view is borne out by section 4 of the same Act, which is clearly meant to preserve any right of diversion or appropriation existing under the provisions of any Act already passed.

The Respondents raised yet another point, which was but feebly pressed in argument—that under the Act of 1897 all such questions as the present were intended to be decided, subject to certain rights of appeal, by the Commissioner to be appointed under the Act. Their Lordships, however, can see in the Act no ground for saying that the Appellants, who contend that they are outside the Act altogether, should not be entitled to apply to a Court having jurisdiction to give effect to that contention, *in limine*, if well founded.

Their Lordships will therefore humbly advise His Majesty that this Appeal should be allowed and the judgment of the Full Court reversed with costs, and the judgment of the trial Judge restored. The Respondents must pay the costs of this Appeal.