Privy Council Appeal No. 116 *of* 1913.

David Cook - - - - *Appellant,*

v.

The City of Vancouver - - - *Respondent.*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD JUNE 1914.

Present at the Hearing:
LORD MOULTON.
LORD PARKER OF WADDINGTON.
LORD SUMNER.

[*Delivered by* LORD MOULTON.]

In this case the appellant (the plaintiff in the action) claims an injunction against the defendants, who are the Corporation of the City of Vancouver, restraining them from diverting water from a stream flowing through certain lands of which he is the owner. The defence is that the defendants are entitled to do the acts complained of by reason of their being the proprietors of a certain water record granted to them, dated 28th September 1906, under and pursuant to the Water Clauses Consolidation Act, 1897, and the Acts amending the same. The plaintiff replies by putting in issue the facts stated in the defence, and the validity and effect of the alleged water grant. In the first instance he also alleged that the Acts under which the alleged water record was granted

[55] J. 348. 100.—6/1914. E. & S. A

were *ultra vires* of the Provincial Legislature, but this issue has not been persevered in.

The facts of the case are very simple, and are not in controversy. The plaintiff derives his unquestioned title to the lands through which the stream flows, under and by virtue of a Crown grant dated 9th December 1892. The stream passes through the land in a deep canyon which is from 250 to 300 feet below the general level of the ground, but although this may have a substantial effect on the utility of the stream to the lands of the plaintiff, it does not alter the fact that he is riparian proprietor, and therefore possessor of such riparian rights as exist in British Columbia under present legislation.

The defendants are the holders of a grant of water right, dated 28th September 1906, permitting 1,400 inches of water to be diverted from Seymour Creek above the plaintiff's lands for the use of the water works supplying the City of Vancouver with water and other purposes. This grant was made in respect of an application dated the 12th December 1905, of which notice was given on the 10th November 1905. At the hearing of the enquiry in respect of that application the plaintiff appeared and opposed the grant, but was unsuccessful. He did not appeal against the decision of the Commissioner nor did he take any steps by way of *certiorari* or otherwise to set aside the grant. In the present proceedings he has however taken objection to the validity of the grant on the ground that it was not in accordance with the notice inasmuch as in the grant the diversion is described to be :—

" At a point eleven miles or thereabouts from " Burrard Inlet,"

whereas in the notice it is described as being :—

" about ten miles from " Burrard Inlet."

This objection is in their Lordships' opinion

frivolous. In the first place neither of the descriptions is intended to be anything more than an approximate description of the point of diversion sufficient for practical purposes of notice, and viewed in this light there is no ground for supposing that there is any inconsistency between the two descriptions. In the next place the notice must have been posted at the point of the proposed diversion so that all difficulty of identification would disappear. And thirdly, Section 15 of the Water Clauses Consolidation Act, 1897, which deals with the Record to be granted upon such an application, indicates clearly that the Commissioner may modify the particulars of the grant—a practical provision very necessary in such a case inasmuch as the enquiry might show that public and private convenience would be better cared for by modification of the details of the application preserving of course substantial identity.

There exists therefore in this case a valid water record in favour of the defendants, and it is not suggested that they have done anything which is not covered by this record. Whatever rights the plaintiff may have as riparian proprietor are not of record, and the sole question in the case is whether as riparian owner the plaintiff has under existing legislation in British Columbia any rights superior to or over-riding the defendants' rights of record. The learned Judge at the trial decided that he has not, and dismissed his action with costs. On appeal to the Court of Appeal of British Columbia that decision was supported.

In their Lordships' opinion the decisions of the Supreme Court of British Columbia and the Court of Appeal of British Columbia were right. The grant under which the plaintiff holds his land is subsequent in date to the coming into force of the Water

Privileges Act, 1892, so that it unquestionably must be read as subject to the provisions of that Act. The effect of that Act is for all the purposes of this case accurately summed up in the recital of the Water Clauses Consolidation Act, 1897, which reads as follows :—

"Whereas by the 'Water Privileges Act, 1892,' all "water and water-power in the Province, not under the "exclusive jurisdiction of the Parliament of Canada, re-"maining unrecorded and unappropriated on the 23rd day "of April 1892, were declared to be vested in the Crown in "right of the Province, and it was by the said Act enacted "that no right to the permanent diversion or exclusive "use of any water or water-power so vested in the Crown "should after the said date be acquired or conferred save "under privilege or power in that behalf granted or con-"ferred by Act of the Legislative Assembly theretofore "passed, or thereafter to be passed."

It is beyond dispute that the water of Seymour Creek as it passes through the plaintiff's lands was at the date of the Water Clauses Consolidation Act, 1897, "unrecorded water." It was therefore vested in the Crown, and no right to the permanent diversion or to the exclusive use of it could be acquired by any riparian owner by length of use or otherwise than as the same might be acquired or conferred under Act of Parliament. It follows that water rights can only be acquired either by obtaining a record under the Acts which provide for the grant of such rights by the Crown or by a special statutory title. There is no exception in favour of proprietors of lands, and they cannot acquire such rights in any other way. The defendants' rights are of record. They are therefore valid legal rights, and the fact that the plaintiff is a riparian owner lower down the stream who is affected thereby gives him no right to object to the exercise of those rights.

Their Lordships pronounce no opinion as to the right of a riparian proprietor to make use of the water flowing by his land in a way which

does not interfere with recorded water rights of other parties. Riparian rights under English law are of two kinds. First, there is the right to make use in certain specified ways of the water flowing by the land, and, secondly, there is the right to the continuance of that flow undiminished. The second of these classes of rights is clearly taken away by the legislation of British Columbia, but this case does not raise the question whether rights of the first class still remain, and their Lordships do not desire to express any opinion thereon.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs.

In the Privy Council.

DAVID COOK

v.

THE CITY OF VANCOUVER.

DELIVERED BY LORD MOULTON.

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