IN THE MATTER OF THE PETITION OF RIGHT OF CATHERINE McGEE.. } SUPPLIANT;

1902
Jan. 21.

AND

HIS MAJESTY THE KING.............RESPONDENT.

Right of way over Crown property—Easement—Prescription C. S. U. C. c. 88, 37, 40 and 44—Possession—Predecessors in title.

The provisions of chapter 88 of *The Consolidated Statutes of Upper Canada*, sections 37, 40 and 44, were in force at the time of Confederation and have not been repealed by the Parliament of Canada. Such provisions affect the right of the Crown as represented by the Government of Canada.

2. Under such provisions, where in Ontario one enjoys an easement as against the Crown and over Crown property, within the limits of some town or township, or other parcel or tract of land duly surveyed, and laid out by proper authority, for a period of twenty years he thereby establishes a right by prescription in such easement; and if the Crown interferes with the enjoyment of it by expropriation proceedings the owner is entitled to compensation.

3. To establish the easement by prescription it is not necessary to show that the present owner was in undisturbed possession for the full twenty years; but the undisturbed possession of his predecessors in title may be invoked in order to complete the term of prescription.

PETITION OF RIGHT for damages for the injurious affection of lands arising from the construction of certain works in the Iroquois Canal.

The facts of the case are stated in the reasons for judgment.

October 17th, 1901.

D. B. Maclennan, K.C., for the suppliant, cited the following cases: *Grassett* v. *Carter* (1); *Stevenson* v. *McHenry* (2); *Smith* v. *Millions* (3); *Harrison's Muni-*

(1) 10 S. C. R. 105.
(2) 16 Ont. R. 139.
(3) 15 Ont. R. 453.

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cipal Manual (1); *Consolidated Statute of Upper Canada*, chap. 88, sec. 37; *Great Western Railway Co.* v. *Rogers* (2); *Turnbull* v. *Merriam* (3); *Plumb* v. *McGannon* (4); *Harris* v. *Smith* (5); *Fielder* v. *Bannister* (6). 29 & 30 Vict. (Can.) c. 51, sec. 322; 36 Vict. (Ont.) c. 48, sec. 423; 55 Vict. (Ont.) c. 42, sec. 545.

A. Johnston, for the respondent, relied on *Roche* v. *Ryan* (7); *Gooderham* v. *Toronto* (8); *Nash* v. *Glover* (9); *Shea* v. *Choat* (10).

D. B. Maclennan, K.C. replied.

THE JUDGE OF THE EXCHEQUER COURT now (January 21st, 1902) delivered judgment.

The suppliant is seized in fee simple of part of village lot numbered 4, in block 8, in the Village of Iroquois, in the County of Dundas and Province of Ontario. By certain works done on and in respect of the Iroquois Canal, a public work of Canada, in the year 1899, this property was injuriously affected, and she brings her petition to recover compensation therefor.

In the deed by which she acquired title to the property, as well as in those by which her two immediate predecessors in title acquired title, the lot of land is described as bounded on the south by Water Street. This street although shown on the plans of the subdivision of the property of which it once formed part, and on the plan of the village, had never been opened or used as a street. Opposite the suppliant's property and adjoining Water Street to the south, and between it and a catch drain, was a narrow strip of land that formed part of that which the Crown had originally

(1) (Biggar's ed.) p. 818.
(2) 29 U. C. Q. B. 245.
(3) 14 U. C. Q. B. 265.
(4) 32 U. C. Q. B. 8.
(5) 40 U. C. Q. B. 33.
(6) 8 Grant 257.
(7) 22 Ont. R. 107.
(8) 19 Ont. A. R. 641.
(9) 24 Grant 219.
(10) 2 U. C. Q. B. at p. 221.

acquired for the purposes of the Iroquois Canal. Then going south you come to this catch drain or Government ditch, as it was called, and across that, and along the north side of the canal was a highway, which on two of the plans in evidence is named King Street, and on one is referred to as Dundas Street or the Queen's highway. When many years ago the canal was constructed, this highway was substituted for one that was closed up by the construction of the canal. Within the limits of the Village of Iroquois it has since been maintained by the village corporation. On the other hand, so far as there is any evidence, it would appear that the ditch or drain adjoining it to the north had been maintained by the Government as part of or incident to the canal.

As has been stated Water Street had never been opened or used. Those whose property was bounded by it occupied it in the same way that they did the lots that they were entitled to; and they obtained access to King Street, the highway along the north bank of the canal, by bridges thrown over the Government ditch. That was the way in which the suppliant, before the execution by the Crown of the works complained of, had access to and from her property. The works complained of consisted in part of the raising of the north bank of the canal, including King Street where it was opposite to the suppliant's property; and the deepening of the Government ditch. In doing that work the bridges that the suppliant and others used to cross the ditch were removed by authority of the Crown, and the raising of King Street makes it practically impossible to get access to that street from the suppliant's property even if she were permitted to construct another bridge, which she is not permitted to do. To remove or mitigate the inconvenience occasioned to the suppliant and her neighbours by destroying the

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access by bridges from their properties to King Street' the Crown proposed to open up and grade Water Street, and has done that for a short distance from John Street with which it communicates. Water Street is only twenty-five feet wide, and adding the strip of land that belonged to the Crown north of the Government ditch, it would only be about thirty-three feet wide. But narrow as it is, it would be a convenience to the owners of property abutting on it to have it opened up and graded. And it would give access to these properties There is, however, some question as to the right of the village council to open up a street as narrow as Water Street is, and the suppliants, and perhaps others, taking advantage of that question have hitherto been able to prevent it being opened up except for the short distance mentioned. They do not, I infer, wish any amelioration of the inconvenience to which, as owners of land abutting on Water Street, they are subjected, not at least until after the question of compensation has been settled.

One difficulty that the case presents is to determine how far and to what extent the Crown has dedicated King Street to the public use as a highway. That the Crown may, in the Province of Ontario, dedicate public property to public use as a highway is clear from the instructive judgment in *The Queen* v. *Moss* (1); and that there has been some such dedication of King Street in the present case admits, I think, of little doubt. The evidence is very meagre and it is not perhaps possible to say whether the street and all to the north of it, including the ditch or drain and the narrow strip of land adjoining the ditch, has been so dedicated, or only the travelled portion which has been maintained by the village council. If the former inference is the proper one it would follow, I think, that the

(1) 26 S. C. R. at p. 332.

suppliant had, as an incident of the ownership of the land in question, a right of access across the unopened street to King Street, which right of access has been interfered with in a manner that would support this petition and sustain a claim to compensation. But if on the other hand the true inference to be drawn from the facts is that the Crown retained the possession of the Government ditch and the strip of land adjoining it to the north, as part of the public work, and that there was no dedication thereof to the use of the public, then the question to be determined is whether at the time the access by a bridge from the suppliant's property to King Street was destroyed, she had acquired any such right of access by prescription. If she had, it has undoubtedly been interfered with and the petition will lie. If she had not acquired any access in that way, then the petition would fail.

The suppliant had two bridges over the Government ditch, one for carriages, the other a foot bridge. It is not clear when the latter was constructed; but the former was, it appears, built in the spring or summer of 1878. From that time until the summer of 1899, when it was removed, it had been used without interruption by the occupiers of the land now claimed to be injuriously affected. One Harvey Roberts built the bridge and used it until 1887, when he conveyed the land and premises, in connection with which it was so used, to Annie Lavis. Annie Lavis used it until 1896 when she conveyed to the suppliant, who continued to use it until it was removed by the authority of the Government. The user of the bridge was open and so far as appears as a matter of right and without any authority from the Crown.

By the Act of the Province of Canada 10th and 11th Victoria, chapter 5, section 2, it was, among other things, provided that no claim which might lawfully

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be made at common law by custom, prescription or grant to any way, or other easement, to be enjoyed or derived upon, over, or from any land or water of our Lady the Queen, Her heirs or successors, or being the property of any ecclesiastical or lay person or body corporate, when such way or other matter as therein last before mentioned had been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, should be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to the period of twenty years; but nevertheless such claim might be defeated in any other way by which the same was then liable to be defeated. And where such way or other matter as therein last before mentioned should have been enjoyed as aforesaid for the full period of forty years the right thereto should be deemed absolute and indefeasible, unless it should appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. By the fifth section of the Act it was, among other things, provided that in all pleadings to actions of trespass, and in all other pleadings wherein it would formerly have been necessary to allege the right to have existed from time immemorial, it should be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in the Act as might be applicable to the case, and without claiming in the name or right of the owner of the fee as was usually done. By the eighth section of the Act it was, among other things, further provided that nothing in the Act should extend to support or maintain or be construed to support or maintain any claim to any way or other easement or to any watercourse, or the use of any water to be enjoyed

or derived upon, over or from any land or water of our Lady the Queen, Her heirs and successors, unless such land, way, easement or watercourse, or other matter, should lie and be situate within the limits of some town or township or other parcel or tract of land duly surveyed and laid out by proper authority. Sections two and five of the statute mentioned were taken from, and correspond to, sections two and five of the Act of the Parliament of the United Kingdom, 2nd & 3rd Wm. 4, c. 71. *Gale on Easements* (1). The provision of section eight occurs in the Canadian but not in the English statute. The Act 10th & 11th Victoria, chapter 5 applied to Upper Canada only. It was re-enacted in the Consolidated Statutes of that Province (2), and was in force there at the time of the union of the provinces. The provisions of this statute were by the 129th section of *The British North America Act*, 1867, continued in force until repealed, abolished, or altered by the Parliament of Canada or the Legislature of the Province of Ontario, according to the authority of the parliament or of that legislature. It will not, I think, be disputed that so far as these provisions affected the rights of the Crown, as represented by the Government of the Dominion, the authority to repeal, abolish, or alter the law was vested in the Parliament of Canada. They were repealed by the Legislature of Ontario in 1877, and re-enacted as part of the Revised Statutes of Ontario, chapter 108 (3). Such repeal was not, however, to be construed to extend to any provision of the Act thereby repealed that related to subjects in regard to which the Parliament of Canada had exclusive powers of legislation (4). Chap-

(1) 7th ed. pp. 180, 184.

(2) C.S.U.C. c. 88, ss. 37, 40 & 44.

(3) 40 Vict. (Ont.) c. 6, s. 6; R. S. O. (1877) pp. LIII and 1045; See also R. S. O. (1887) c. 111, and R. S. O. (1897) c. 133.

(4) 40 Vict. (Ont.) c. 6, s. 7; R. S. O. (1877) p. LIII.

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ter 88 of *The Consolidated Statutes of Upper Canada*, in which the provisions mentioned occur, has been treated by the Parliament of Canada as being within the authority of the Legislature of Ontario, and it has not been in any way affected by any legislation of that parliament (1). No part of it is re-enacted or repealed (2).

With respect to the rights of the Crown, as represented by the Government of Canada, it is in force, and will remain in force until repealed, abolished, or altered by the Parliament of Canada.

Then the question as to whether one who against the Crown has enjoyed an easement for twenty years may claim the protection of the statute is not in the Province of Ontario a new one. It was in *Bowlby* v. *Woodley* (3) decided that he could; and that case should, I think, be followed in the present case. It will of course have been observed that no one of the persons who were in occupation and possession of the land in question occupied it and used the right of way by the bridge to King Street as incident to such occupation and possession for a period of twenty years. It is only by taking the occupation and possession of the suppliant and her two immediate predecessors in title that an enjoyment for a period of twenty years of an easement on the Crown's property can be made out. But the provision as to pleading which has been referred to and which affords, it has been said, a key to the construction of the Act, (*Shuttleworth* v. *LeFleming* (4); *Mounsey* v. *Ismay* (5)) goes, I think, to show that the person who claims the easement may rely upon its enjoyment by previous occupiers, so long as there has been no interruption of the enjoyment. It is sufficient, it appears, "to allege the enjoyment" of the

(1) R. S. C. Appendix No. 1, p. 2325.
(2) R. S. C. Schedule A, p. 2249.
(3) 8 U. C. Q. B. 318.
(4) 19 C. B. N. S. at p. 711.
(5) 3 H. & C. at p. 498.

easement "as of right by the occupiers of the tenement in respect whereof the same is claimed." In *Bowlby's* case (1), to which reference has been made, the defendant justified by a plea alleging enjoyment of the easement by himself and others as occupiers of the premises to which it was annexed for the full period of twenty years before the commencement of the action. If, then, to an information by the Crown the suppliant could, as it appears she could, have pleaded the enjoyment for a period of twenty years of the easement as a matter of right by her and others, the occupiers of the premises in question, she had acquired a right thereto, an interference with which would sustain her petition in this case.

With reference to compensation the amount claimed is out of the question. It is as much, if not more than the whole property was worth before any works were constructed by the Crown. I have no intention either of allowing the suppliant damages for anything that she would not, but for her own acts, have suffered. In estimating the depreciation in value of her property by reason of what had been done, one must see what reasonable people could do or permit to be done to prevent or mitigate the effects of the acts complained of. I think a sum of three hundred dollars will fully compensate the suppliant for any permanent depreciation in the value of her land, and for all damages to which she is entitled. On the sum of three hundred dollars interest will be allowed from the first of August, 1899, and the suppliant will have the costs of her petition.

Judgment accordingly.

Solicitors for the suppliant: *Maclennan, Cline & Maclennan.*

Solicitors for the respondent: *Johnston & Bradfield.*

(1) 8 U. C. Q. B. 318.