

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of the  
Canadian Pacific Railway Company, Appel-  
lants, v. Henry F. Parke and Robert Pinchard,  
Respondents, from the Supreme Court of  
British Columbia; delivered 17th June 1899.*

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Present:

THE LORD CHANCELLOR.

LORD WATSON.

LORD HOBHOUSE.

LORD MACNAGHTEN.

LORD MORRIS.

LORD SHAND.

LORD DAVEY.

[*Delivered by Lord Watson.*]

The Appellants are owners of the Dominion Railway, known as the Canadian Pacific Railway, which, in its course through the Yale District of British Columbia, passes near to the Thompson River, at the distance of about half a mile from the lands belonging to the Respondents, which lie to the eastward.

The Respondents ranch, which appears to be about 320 acres in extent, is situated—to use provincial phraseology—upon benches, or, in other words, upon a series of table lands, rising gradually to the eastward, above the level of the Thompson River. The land was originally acquired from the Crown, under a pre-emption title, by one William Rice Puckett, before the Province of Columbia had been admitted into the Union. Puckett, in the year 1872, transferred

his interest to James Robinson; and, in July 1884, Robinson transferred his interest to T. G. Kirkpatrick, who, in April 1894, sold and transferred his interest in the same to the Respondents, the transfer being duly recorded.

The British Columbian Land Ordinance of 1870, by Section 30, provided that "every person lawfully entitled to hold a pre-emption under this Ordinance, and lawfully occupying and *bonâ fide* cultivating, may divert any unrecorded and unappropriated water from the natural channel of any stream, lake, or river adjacent to or passing through such land, for agricultural and other purposes, upon obtaining the written authority of the Commissioner of the District to that effect, and a record of the same shall be made with him, after due notice as hereinafter mentioned, specifying the name of the applicant, the quantity sought to be diverted, the place of diversion, the object therefor, and all such other particulars as the Commissioner may require. For every such record the Commissioner shall charge a fee of two dollars, and no person shall have any exclusive right to the use of such water, whether the same flow naturally through or over his land, except such record shall have been made."

Section 33 of the Ordinance enacted that "the right of entry on or through the lands of others for any lawful purpose upon, over, or under the said land, may be claimed and taken by any person lawfully occupying and *bonâ fide* cultivating as aforesaid, and (previous to entry) upon paying or securing payment or compensation, as aforesaid, for the waste or damage so occasioned, to the person whose land may be wasted or damaged by such entry or carrying of water." Section 34 makes provision for the assessment of the amount of

compensation payable, in case of dispute, either summarily, or by a jury of five persons.

The 36th Section of the Ordinance enacts that  
“ All assignments, transfers, or conveyances of  
“ any pre-emption right heretofore or hereafter  
“ acquired shall be construed to have conveyed  
“ and transferred, and to convey and transfer,  
“ any and all recorded water privileges in any  
“ manner attached to or used in the working of  
“ the land pre-empted.”

The provisions already referred to of the Ordinance of 1870 were in substance re-enacted by No. 144 of the Laws of British Columbia consolidated in 1871, which is entitled “ An Ordinance to amend and consolidate the laws affecting Crown Lands in British Columbia.” Sections 39-50 of Chapter 66 of the Consolidated Statutes of British Columbia 1888, relate to the same subject. Section 41 provides that “ the owner of any water privilege, or right acquired by record, shall have no exclusive right to the privilege so recorded until he shall have constructed a ditch for carrying the water to the place where it is intended to be used; and, in case any such ditch shall not be of sufficient capacity to carry the quantity of water recorded by the owner of such ditch, then the exclusive right of such owner shall be limited to the quantity which such ditch may be capable of carrying, notwithstanding such record, until such ditch shall be enlarged so as to be capable of carrying the quantity of water recorded by such person.”

Section 47 of the Statute of 1888, empowers the proprietors or occupiers of any lands subject to irrigation, with the consent in writing of the Commissioner, by means of flumes, ditches, or drains through the adjacent lands, to run their surplus and waste water into any creek, gulch, or channel. The power thus given is qualified

by the condition that it shall be "subject to the provisions of the law for the time being in force respecting compensation for entry upon occupied lands for carrying water through or over them." Section 49 provides that all assignments, transfers, or conveyances of any pre-emption right, when the same are or were permitted by law, and all conveyances of land in fee, whether such assignments transfers or conveyances were or shall be made before or after the passing of the Act, shall be construed so as to carry any and all water privileges in any manner attached to, or used in the working of the land pre-empted or conveyed. Section 56 enacts and declares that, whereas, in times past, many records of water rights and privileges had been honestly but imperfectly made, in all cases where the validity of any water record, made before the sixth day of April 1886, might be called in question, and the Court or Judge before whom the case was pending should be of opinion that the record was made *boná fide*, the same should be held to be good and valid so far as the making and entry thereof is concerned, and effect should be given thereto according to the intent thereof.

In the valley of the Thompson River, and in other districts of British Columbia, irrigation is indispensably necessary in order to develop the fertility of the soil. Accordingly there have been a considerable number of Provincial Acts passed, from time to time, in order to the sanction and regulation of water privileges. Their Lordships have not thought it necessary to refer to these in detail, but have noticed all the statutory enactments to which their attention was directed in the argument upon this Appeal.

Puckett, the original pre-emptor of the lands now belonging to the Respondents, on the 21st

November 1868, acquired a record of 300 inches of water to be taken from McCallum's Creek, and, on 10th April 1871, he acquired a record of 300 inches of water to be taken from McCallum's and Pennie's Creek, for the purpose of irrigating the lands. The Respondents, as his successors have now right to the water privileges which were so acquired by him.

The Canadian Pacific Railway, as it passes the lands of the Respondents, was constructed by the Dominion Government, and was thereafter transferred to the Appellant Company, and opened for traffic in the year 1886. The railway, and the whole undertaking now carried on under the name of the Canadian Pacific Railway, were, by Patent of Her Majesty, under the Great Seal of Canada, dated the 25th May 1896, granted to the Appellant Company. The grant was made under the proviso that "should " our title to any portion or portions of the said " tract of land hereby granted be found to " be defective, neither the Company, nor its " successors or assigns, shall have any claim in " respect thereof by virtue of anything contained " in these presents." No question arises in this action as to any defect of the Crown title, the only question relating to the powers which the Respondents are entitled to exercise, by virtue of the water privileges attached to their lands.

The Appellant Company brought their Writ on the 20th July 1895 and an amended Statement of Claim was delivered on the 27th October 1896 before the Supreme Court of British Columbia. The amended statement sets forth that the Respondents brought large quantities of water upon their lands for the purposes of irrigation, that they did not carry off the surplus water by means of flumes, ditches or drains, but allowed it to mingle with the subsoil, with the result of causing a slide of the land in the direction of the

Thompson River, and thereby occasioning, from time to time, serious damage to the line of railway. The Appellant Company claimed:—"that the Defendants, their servants, agents, and workmen, be restrained, by the order of this Honourable Court, from continuing to bring water upon their lands, and to allow such water to escape to the Plaintiffs' line of railway, and to cause land slides thereon as mentioned."

The case went to trial, at Vancouver, before Mr. Justice Drake and a special jury. The learned Judge submitted these two questions to the jury:—" (1.) Is the water brought by the Defendants upon their land for the purpose of irrigation the sole cause of the damage done to the Plaintiffs' line of railway by the slide in question? (2.) Is the water brought by the Defendants on their land for the purpose of irrigation the substantial cause of the damage done to the Plaintiffs' line of railway by the slide in question?" The jury answered the first question in the negative, and the second in the affirmative.

The learned Judge who presided at the trial, having considered the verdict returned by the jury, refused the injunction craved, and dismissed the Appellants' action with costs. On appeal, the Full Court of British Columbia, consisting of Justices McCreight, Walkem, and McColl, affirmed, with costs, the judgment of Mr. Justice Drake.

The learned Judges of the Supreme Court fully recognised the gravity of the legal issues which were raised, and their importance to the parties. Mr. Justice Drake said:—"The jury found, after a trial extending over many days, that the substantial cause of the injury done to the Plaintiffs' railway was the water brought on to

“ the lands of the Defendants for irrigation  
 “ purposes, and on that finding the Plaintiffs  
 “ move for judgment, asking that the Defendants  
 “ be restrained from further damaging the  
 “ Plaintiffs’ line by irrigating the lands in  
 “ question. The effect of such an order will be  
 “ to prevent the Defendants carrying on farming  
 “ operations upon the lands in question.”

Mr. Justice Drake, at the same time, clearly explained the origin and nature of the slide, or landslip which, during periods of irrigation, encroached upon and damaged the Appellants’ line of railway:—“ The Defendants irrigated  
 “ about 34 acres of land on the high bench above  
 “ the railway with water brought by a ditch  
 “ capable of carrying 160 inches of water. An  
 “ inch of water means 12,960 gallons in 24 hours,  
 “ or 1,728 eubic feet. - The soil which the De-  
 “ fendants irrigated was proved to be of a very  
 “ porous quality, consisting of many feet of  
 “ gravel underlying a slight deposit of sandy  
 “ loam, and below the gravel was a very large  
 “ bed of what is called silt, a mineral that  
 “ absorbs water rapidly, and when its saturation  
 “ reaches 78 degrees it is converted into liquid  
 “ mud. At a point on the banks of the  
 “ Thompson, above and below the Plaintiffs’ line,  
 “ a large slide has been formed by water per-  
 “ colating through the soil and causing the earth  
 “ to slip. This slide is continually moving  
 “ towards the river, forcing the rails out of  
 “ position, and frequently large masses of more  
 “ or less liquid silt carrying away the road bed  
 “ drop from under the line. This slide is now  
 “ about 66 acres in extent and continually  
 “ increasing.”

The damage done to the railway of the Appellant Company by the slide, and the constant repair and renewal which it necessitates, may be gathered from the uncontradicted evidence of Henry

John Cambie, the chief engineer, since its opening in 1886, of the Pacific Division of the Canadian Pacific Railway. Speaking of that portion of the railway which is affected by the slide in question, he says:—"We keep a resident watchman there living on the spot, and no train is allowed to pass over without his signal giving permission. In addition, we have been obliged to divide up the section, and put an extra section gang in order to have three or four men at all times. Besides that we must keep over a great part of the reach, we must keep 25 or 30 men working along for weeks together on this particular piece. They are not able to do it alone. We must put on working trains to bring material, in order to keep up the railway embankment. Notwithstanding all that, there is a very great danger to the trains passing over it."

In coming to the conclusion that the application of the Appellant Company ought to be dismissed, Mr. Justice Drake, and Mr. Justice McCreight, with whom Mr. Justice Walkem agreed, proceeded solely upon the ground that the British Columbian legislation which has been already referred to, gives to the holder of land under a pre-emption title, who has taken a supply of water for irrigation purposes, and has recorded his privilege in accordance with its provisions, an absolute right to use for irrigation the water so taken by him, no matter how injurious the use may be to neighbouring landowners, and that he was under no liability to compensate them for the injury done, unless it were shown that his use was negligent. In other words, they held that his irrigating the surface of his land, by bringing to, and pouring upon it foreign water, which immediately percolated to the substratum of silt, with which it mingled, and then escaped from his land as liquid mud, and seriously damaged the adjoining



land, was the necessary consequence of his exercising his statutory right, and did not constitute negligence, or afford the owner of the adjoining land any cause of action. Mr. Justice McColl, without expressing the same conclusion, proceeds to consider whether the Appellant Company would have been entitled to an injunction, if they had offered to make compensation to the Respondents, in ceasing to irrigate so as to cause a land slide, and the consequent destruction of the railway line. The learned Judge however, does not go so far as to solve the question, seeing it had not been argued, and his brethren had been able to come to the conclusion that the judgment should be affirmed. It may be added, that the Record in this Appeal contains no materials for raising the question which was discussed by the learned Judge.

Their Lordships think that the Judges of the Supreme Court were right in considering the crucial question in this case to be, whether, the Columbian legislation which they had to construe, was, as between the person using the powers hereby conferred and the owners of adjacent lands, imperative or merely permissive. They examined the leading authorities bearing upon the point, and their conclusion, as expressed by Mr. Justice Drake, was:—"The difference in the present case is that  
 " there is no direction that irrigation waters  
 " should be used, but only a permission to use  
 " them; *but the permission to use implies a*  
 " *legal right of use which will bar an action for*  
 " *damages when the use has been non-negligent.*"  
 The proposition is somewhat too broadly stated. Wherever, according to the sound construction of a statute, the Legislature has authorised a proprietor to make a particular use of his land, and the authority given is, in the strict sense of law,

permissive merely, and not imperative, the Legislature must be held to have intended, that the use sanctioned is not to be in prejudice of the common law right of others.

The leading authorities in the law of England upon this question, which though not numerous are of considerable weight, are "Managers of Metropolitan Asylums District *v.* Hill" (L.R. 6, Ap. Ca. 193), and "London, Brighton, and South Coast Railway Company *v.* Truman" (L. R. 11 Ap. Ca. 45). In the first of these cases, the Managers were authorised by a public statute 30 & 31 Vict. cap. 6, no locality being specified, to erect hospitals for the reception of the sick poor of the metropolis. In virtue of these statutory powers, they commenced the erection of a small-pox hospital at Hampstead, when an injunction was applied for by the Respondents who were the proprietors of houses in the vicinity. At the trial, it was found by a jury that the hospital was, or would be, to the nuisance of the Respondents. The House of Lords decided in favour of the Respondents, upon the express ground that the statute was permissive, and gave the Managers no authority to erect an hospital which was injurious to neighbouring proprietors. The Lord Chancellor (Selborne) said (L. R. 6 Ap. Ca. p. 202):—"I am clearly of opinion that the Poor Law Board and the Managers had no statutory authority to do anything which might be a nuisance to the Plaintiffs, without their consent."

In the same case (L. R. 6 Ap. Ca. 208) Lord Blackburn said:—"It is clear that the burthen lies on those who seek to establish that the Legislature intended to take away the private right of individuals, to show that by express words, or by necessary implication, such an

“intention appears.” The noble and learned Lord also observed (L. R. 6 Ap. Ca. 203) “the Legislature has very often interfered with the rights of private persons, but in modern times it has generally given compensation to those injured; and, if no compensation is given, it affords a reason, though not a conclusive one, for thinking that the intention of the Legislature was, not that the thing should be done at all events, but only that it should be done, if it could be done, without injury to others.”

In the second case, a railway company were empowered, by a local and personal Act, passed after due enquiry, to purchase additional lands not exceeding fifty acres, for the purposes *inter alia* of receiving, depositing, or keeping any cattle, or any goods conveyed or intended to be conveyed on the railway. They were required by the Act to sell superfluous lands within ten years from its passing. Under that power, they purchased between two and three acres of ground adjacent to one of their stations. For nearly ten years the ground was used as a market garden, when the company devoted the land to the purposes of their cattle traffic, and constructed a yard or dock for the cattle carried by them. Certain occupiers of houses in the neighbourhood of the yard, who complained of it as constituting a nuisance, but did not allege negligence on the part of the Company in using it, applied for an injunction, which was granted by Mr. Justice North, and his decision was affirmed by the Court of Appeal. Their decisions were reversed by the House of Lords, who held that the provisions of the Act which related to the acquisition and use of the yard were intended by the Legislature to be imperative in the same sense as its provisions relating to the use of the railway, and that, no negligence having been shown on the part of the Company, the injunction ought to be refused.

In the present case, the Legislation of British Columbia is perfectly general, and applies to all lands within the Province which had been, or at any future time might be acquired by a subject, under a pre-emption title from the Crown. It provides that the proprietor of land held under that title, with consent of the Commissioner, and upon making payment of compensation, may compulsorily divert water from any stream, lake, or river adjacent, and may convey it to his own land for the purpose of irrigation; and he has also the right, if lawfully occupying and cultivating his own land, to convey the water through or over land which does not belong to him, upon paying due compensation for waste or damage. Then the statute of 1882 empowers him, after the water has been used for irrigation, to run the surplus or waste water through the adjacent lands, by means of flumes, ditches, or drains, subject to the same provisions as to compensation.

The legislation in question, in so far as its provisions relate to the use of the water by the irrigator, after it has been conveyed to his own land, is undoubtedly conceived in language which is permissive. He is allowed to use it for the ordinary purposes of irrigation, which *prima facie* imply that the water is to be distributed over, and absorbed by the soil; and it is a circumstance not to be overlooked in construing these statutory provisions that the Legislature has contemplated, and has provided compulsory means of carrying off surplus water, which has not been absorbed by the soil, by flumes, ditches or drains through the adjacent lands of other owners. The real question therefore, in this case, comes to be, whether these provisions ought to be construed, as being in their substance, as well as in their form, permissive merely, and, subject to the obligation, which, in that case, is implied at common law, that the irrigator must

use his water supply so as not to do damage to adjacent lands; or, whether they are to be construed as imperative, and therefore as empowering the irrigator, so long as he is not convicted of negligence, to inflict any amount of injury upon his neighbour without incurring responsibility. The Respondents contended for the second of these alternatives, which has been adopted by the Courts below, but, in order to justify their contention, it is incumbent upon them to show, that the Legislature deliberately intended to take away the rights of individuals to protect their property against invasion. The Respondents maintain that, so long as they are not negligent, the Legislature has given them the absolute privilege, for the consequences of which they are not responsible, of causing, by means of their irrigation, a landslip which will have the ultimate effect of carrying the lands situated at a lower level than their own, together with all erections upon them, whether consisting of houses or railways, into the Thompson River.

Their Lordships have been unable to discover, in the statutory provisions submitted to them, any sufficient ground for holding that the privilege of irrigating his own soil with foreign water was meant by the Legislature to be imperative, and was intended to exclude all right of action by neighbouring proprietors for injury done to their lands, save in the case where such injury was occasioned by the negligence of the irrigator. It is evident that no such circumstances occur in this case as led to the decision of the House of Lords in "London, Brighton, and South Coast Railway Company v. Truman" (L. R. 11 Ap. Ca. 45). The Company could not, under the power conferred upon them, acquire and use additional land for the enlargement of one of their stations, without incurring a statutory obligation to the public, to

use that additional land as part of their railway, so long as their line was open, for the accommodation and conveyance of traffic. The land added was, in these circumstances, just part of the railway, and within the principle of "Hammersmith and City Railway Company v. Brand" (L. R. 4 E. & I. 171). In the present case, the irrigator is at liberty, subject only to the consent of a Commissioner, who is not charged with the duty of seeing that no injury results to lands adjacent to those which are to be irrigated, to determine the quantity of water he desires to appropriate, the means by which it is to be conveyed to his land, and the means by which surplus or waste water is to be discharged. When the water has been conveyed to his land, he is authorised to use it for purposes of irrigation; but it is left to his discretion to determine whether, as circumstances permit, he will use in irrigation, the whole, or part, or none of it. These provisions are certainly consistent with the view that no part of it was meant to be employed to the injury of neighbouring lands.

Their Lordships will humbly advise Her Majesty to reverse the judgment appealed from; to grant an injunction restraining the Respondents, their servants, agents, and workmen, from so irrigating the Respondents' lands, as to cause a land slide or slip, and thereby to injure the Appellant Company's line of railway; and to order that the Respondents do pay to the Appellant Company their costs of action in both Courts below. The Respondents must pay to the Appellant Company their costs of this Appeal.

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