

HANSON v. THE GRASSY GULLY GOLD-MINING CO.

1900.

Water Rights Act (60 Vic. No. 20)—Construction of—Rights of riparian owners— November 20.
Pleading.

Stephen J.
and
Cohen J.

The Water Rights Act (60 Vic. No. 20) vests in the Crown the common law rights of the riparian owners as to the use and flow of water, and no action will lie against an owner for penning back the water in the channel and obstructing the flow through the plaintiff's land.

DEMURRER.

Declaration. 2. For that the plaintiff was possessed of certain land and was engaged in mining thereon for gold and that there was a certain creek flowing past through and away from his land and the defendants by themselves their agents and servants penned back the waters of the creek and obstructed and placed a dam across the same so that it would not flow past through and away from the plaintiff's land whereby, etc. 3. The same, with the exception that the "creek" is called a channel or "watercourse,"

The defendants to the second and third counts pleaded that there was adjoining the land of the plaintiff certain other land of which the defendants were possessed and in actual occupation and on which they were mining for gold under a lease duly issued in accordance with the Mining Act 1874 and that there was a natural channel in which flowed through and past the land of the plaintiff and of the defendants a certain intermittent stream and for certain purposes they made and constructed upon their land across the stream in the channel a dam and thereby obstructed a part of the water of the stream so that a small quantity of water was penned back for a short time in the channel upon a part of the plaintiff's land between the banks and upon the bed of the stream and within the said channel and not otherwise and was thereby prevented from flowing through past and away from the plaintiff's land which are the grievances complained of.

Demurrer to this plea on the grounds: 1. That it confesses but does not avoid the causes of action pleaded to. 2. That it admits

1900.
 HANSON
 v.
 THE GRASSY
 GULLY
 GOLD MINING
 Co.

that by reason of the grievance complained of, (1) the water was penned back, (2) the water flowed into the mines and shafts of the plaintiff which otherwise it would not have done, (3) that the plaintiff was damaged thereby. 3. That the various matters alleged in it are immaterial to the causes of action pleaded to. 4. That it is a plea to damages only. 5. That it admits that the waters were prevented from flowing as freely as they were wont to do through the plaintiff's land. 6. That it admits that the plaintiff was damaged. 7. That nothing in the Mining Act 1874 justifies the wrongs admitted by the plea. 8. That the defendants were bound so to construct the dam that it should not pen the waters back and so as not to interfere with the flow of the water through past and away from the plaintiff's land.

The defendants joined issue and gave notice that on the argument of the demurrer they intended to object to the 2nd and 3rd counts of the plaintiff's declaration upon the following amongst other grounds: 1. That they disclose no cause of action. 2. That no facts are shewn which would entitle the plaintiff to the right to have the water flow or carried off as alleged. 3. That no such right is conferred by the Mining Act. 4. No allegation of any interference with the plaintiff's rights.

Sly and *Curlewis*, in support of demurrer. Under the Water Rights Act (60 Vic. No. 20), which is the Act on which the defendants rely, the Crown are entitled to take the water that flowed through our land for irrigation purposes, but not to dam it back on our land; nor can the defendants dam it back. He referred to *Angel on Watercourses* 219, par. 340.

Pilcher, Q.C., and *Ferguson* for the defendants to oppose. This is an action based on a common law right. Our plea shews the plaintiff has not the right that he claims to have with regard to the flow of the water through his land.

At common law the plaintiff, as riparian owner, had a right to: 1. Use of water practically without limit. 2. Natural stream of water to run in its natural course in its natural way, and the riparian owner could have brought an action for any interference, no matter how trifling the injury. Doubt is expressed as to whether this right applies to intermittent streams.

Lomax v. Jarvis (6 N.S.W.L.R. 237) and *Howell v. Prince* (8 S.C.R. 316). 1900.

HANSON
v.
THE GRASSY
GULLY
GOLD MINING
Co.

The law is now altered by 60 Vic. No. 20. This Act has taken the rights over the use and flow of water from the riparian owner and vested them in the Crown. The plaintiff could have gone to the Crown and had the obstruction removed, if it was a nuisance. This is not an action for a nuisance. All we have done is that by making a dam we put more water in the proper channel, and prevented the water from flowing from the plaintiff's land. As the water did not overflow, there is no nuisance. This is not a plea of justification. The only rights of the riparian owner are those given by 60 Vic. No. 20, s. 2.

The rights under the Mining Act are subject to the rights of the riparian owners: *Howell v. Prince* and *Lomax v. Jarvis*. The Crown can enter and remove the obstruction.

This is an action brought on a common law right which we shew does not exist. He referred to *The National Telephone Co. Ltd. v. The Constables of St. Peter Port* ([1900] App. Cas. 317).

Sly in reply. The right claimed in our 2nd count is not denied and has not been taken from us. The defendants cannot now come under 60 Vic. No. 20, not having referred to it in their plea. I submit the plea is not clear and explicit, and is therefore bad: *Lomax v. Jarvis* (6 N.S.W.L.R., at page 244). Our right to flow past is not denied at all. It must be traversed in terms: *Bullen & Leake*, 807. The plea does not allege that the right is now vested in the Crown.

We have a certain right to the water under our mining lease under 37 Vic. No. 13, s. 51, and by 60 Vic. No. 20, s. 1, sub-s. 2a., the right of the Crown shall not be exercised in contravention of any right conferred by any Mining Act.

STEPHEN, J. Your declaration is formed on a common law right to the flow of the water. The question is: Have you that right now?

Sly. At common law we have a right to the flow of the water, and 60 Vic. No. 20 does not take this right away. Under the Act

1900.
 HANSON
 v.
 THE GRASSY
 GULLY
 GOLD MINING
 Co.

the riparian owner has a passive right to have the water flow past his land and an active right to use it for certain purposes. The proprietary right in the water is vested in the Crown. To deprive us of our common law right, the words in the Act must be clear. There are no words in the Act taking away our right of action where damage is done.

There is no distinction between running water and intermittent streams. The Crown has no right whatever to put more water on our land than was there before. They cannot dam it back: *Angel on Water Courses*, 340, 342. It is immaterial whether the water is made higher in the natural channel or over the banks. No person can pen the water back.

On the 21st Nov., 1900, judgment was delivered by

November 21.

STEPHEN, J. I am about to deliver my own judgment, and I regret that I have not had time to write it, as the case is of great importance, although the point is a simple one.

The action was brought by one John Hanson against The Grassy Gully Gold-Mining Co., and I have to deal with the 2nd and 3rd counts of the plaintiff's declaration, to both of which the defendants' 6th plea is pleaded. The 1st of these counts alleges that the plaintiff is entitled to have the waters of a certain creek flow past, through and away from his land, and that the defendants penned back the waters of the creek so that it could not flow past, through and away, and that certain damage was done. The 2nd of these counts is in much the same terms, except that it describes the creek as a channel or water-course. The defendants' 6th plea alleges that there was adjoining the land of the plaintiff certain other land, of which the defendants were possessed, and that the defendants were engaged in mining thereon for gold, under and by virtue of the Mining Act of 1874 and the regulations made thereunder. I do not think that the allegations of the defendants as to their working under the Mining Act is material, but I mention it now as I may refer to it later in my judgment. The plea goes on to say that there was an intermittent stream of water flowing through the plaintiff's and the defendants' lands, and it alleges that the defendants obstructed a part of the water of the stream and penned it back on to the plaintiff's land between the bed of the creek and within

the channel, and not otherwise. The plaintiff has demurred to this plea.

What we have to consider is the interpretation of the Water Rights Act (60 Vic. No. 20). It is plain that the plaintiff in this case relies upon his right to have the water flow past his land, and on this his claim to damages entirely depends. The question is not what the general liability of the defendants may be, but are they liable to the plaintiff in this action. Has the plaintiff, since the passing of the Water Rights Act any right to bring this action? It cannot be denied that for years and years past the question of the rights of riparian owners in this country, where the conditions are so totally different from the condition of things in England, has been a source of almost insuperable difficulty. There has been a great deal of expensive litigation, and I suppose, for that reason, the Legislature passed this Act, in order to prevent riparian owners above and below from bringing actions against one another. If this Act does not aim to take the old common law rights from the riparian owners and vest them in the Crown, then I do not know what it was passed for nor what it means. It was passed in the public interest to prevent litigation and to determine rights which up to the time of the passing of the Act it was almost impossible for the best lawyers to determine.

Now let us see what the Act is. The first section is as follows: "The right to the use and flow and to the control of the water in all rivers and lakes which flow through or past or are situate within the land of two or more occupiers, and of the water contained in or conserved by any works to which this Act extends, shall, subject only to the restrictions hereinafter mentioned, vest in the Crown." Although there are no words saying the riparian owners' rights are "*divested*," the section says these rights "*vest*" in the Crown. I do not think the language of the Act could be clearer, and plainly the rights of the riparian owners were divested and vested in the Crown. The same section goes on to say: "And in the exercise of that right the Crown by its officers and servants may enter any land, and take such measures as may be thought fit or may be prescribed for the conservation and supply of such water as aforesaid, and its more equal distribution

1900.

HANSON
v.
THE GRASSY
GULLY
GOLD MINING
Co.

Stephen J.

1900. and beneficial use, and its protection from pollution and for preventing the unauthorised obstruction of rivers.”

HANSON
v.
THE GRASSY
GULLY
GOLD MINING
Co.

Stephen J. It was argued that the Crown could not do what the defendants have done, and therefore the defendants could not do it. It is not for me to say what the Crown may or may not do. All I have to decide is whether the plaintiff has a right to bring this action. The right of the Crown is subject to certain restrictions hereinafter mentioned in sec. 1, sub-s. 2, which deals with the rights of occupiers of land on the river banks.

As to the rights of the riparian owners, the 2nd section provides for that. It is as follows :—“The occupier of land on the bank of a river or lake shall have the right to use the water then being in the river or lake for domestic purposes and for watering cattle or other stock or for gardens not exceeding 5 acres in extent used in connection with a dwelling-house, and it shall not be necessary for the occupier to apply for or obtain a license for any work used solely in respect of that right.” It is clear that it was the intention of the Legislature to do away with the old rights of the riparian owners and thus with all the litigation.

I also refer to s. 4, which, *inter alia*, enables the Governor to notify by proclamation in the *Gazette* proposals for dams, locks, weirs, channels or drainage works to be constructed by the Crown, together with an estimate of the cost of the same.

Can anyone doubt, after reference to these sections, that the rights of private persons are taken away and vested in the Crown?

For these reasons, I hold that the plea correctly shewed a state of things existed which deprived the plaintiff of his right of action.

COHEN, J. I agree with his Honour, and simply desire to add a few words.

The plaintiff's cause of action is based on a common law right to the flow of water either past, through or away from the land of which he alleges he is in possession. If that common law right does not exist, then his case must entirely fail.

If we are to give a fair and common-sense interpretation to the Water Rights Act, the only conclusion that can be arrived at is, that this statute takes from a member of the public the common law rights which he previously held as far as the water

is concerned, and transfers those rights to the Crown subject to certain restrictions. The first section of the Act says [His Honour read sec. 1]. In this case the water flows through the land of two occupiers, and the water, the obstruction of which is complained of, is within the river, and if the right to the use and flow and to the control of the water vests in the Crown, I am unable to see how that right can possibly remain in the private individual. This right is absolutely vested in the Crown subject to certain restrictions, and in the exercise of that right the Crown may enter upon the land for the purpose of the more equal distribution and beneficial use of the water. So that if the Crown, upon entering the land, finds that one riparian owner has got an advantage over another riparian owner, it can intervene and see that both get an equal and beneficial use of the water. The Crown can also interfere for the purpose of protecting streams from pollution and unauthorised obstruction.

1900.
HANSON
v.
THE GRASSY
GULLY
GOLD MINING
Co.
Cohen J.

Now, what are the restrictions to the rights of the Crown? They are set out in s. 1, sub-s. 2, a, b and c. Sub-sec. 2a says: "It shall not be exercised in contravention of any right conferred on and lawfully exercisable by any person, company, corporation or board by or under the authority of any Act dealing with mining, or of any public or private statute or of any license granted by the Crown," and Dr. *Sly* contended that there was a right vested in the plaintiff by virtue of some mining lease which would enable him to sue. I am not aware of any right vested in the plaintiff by reason of the mining laws which would enable him to get rid of the difficulty we are now considering.

The 2nd section of the Act clearly limits the rights of the riparian owners to the use of the water running through their land, and as the Act fixes the limitation upon their rights, the plaintiff cannot have the right set up in his declaration.

Giving the best consideration I can to the Act, and seeing what its objects and purposes are, I am of opinion that the defendants' plea is a good plea. As to whether the plaintiff can bring an action in a different form which can be maintained, I express no opinion.

Judgment for defendants on demurrer.

Attorney for plaintiff: *W. P. Blackmore.*

Attorneys for defendants: *McDonnell & Moffit.*