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-1818-

Province of Lower Canada

Court of Appeals

In a cause between

Philemon Wright

(Defendant in the Court below)

appellant

and

Lucy Cavillier

(representant l'instance  
in the Court below)

Respondent

for William Hullett

(Plaintiff in the Court below)

appellant's Case

A Stuart,

for appellant

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Quebec

1818

In a cause, between

**PHILEMON WRIGHT,**

*(Defendant in the Court below,)*

Appellant,

AND

**LUCY CUVILLIER,**

*(reprenant l'instance in the Court below,)*

Respondent,

for

**WILLIAM HULLET,**

*(Plaintiff in the Court below.)*

APPELLANT'S CASE.

**T**HIS was an Action brought by the late William Hullet, in his lifetime, for the recovery "of five hundred pounds of current money of this Province, for ground rent of divers large quantities of staves, timber and plank, of and belonging to him the said Philemon Wright and kept for a long time on a certain *cove or beach*, of and belonging to the said William Hullet, situate and being at Silleri, in the parish of Ste. Foi," near the City of Quebec.

To this declaration the Appellant pleaded:—

1° A General Demurrer.

2° A plea of general issue non assumpsit.

3° A plea of Peremptory Exception.

In this last plea the Appellant states, that the cove or beach, mentioned in the declaration of the Plaintiff in the Court below, is part of the beach of the river St. Lawrence and an appendage thereof, which said river being a navigable river, he the said Appellant had and hath a right, in common with all other His Majesty's subjects, to navigate the same and make use of and place upon the beach thereof his timber, without paying for such use, and placing aforesaid to any person or persons whomsoever any rent of sum of money for the use of the said beach or cove, as in and by the said declaration is demanded.

2dly.—That the said William Hullet is not the owner, proprietor or lessee of the said beach or cove mentioned in the said declaration, and that he the said William Hullet hath not acquired any right or title thereto in any manner whatsoever to entitle him to demand, sue for and receive any rent or sum of money from the Defendant or from any person whomsoever, for any timber placed or laid on the said beach or cove.

3dly.—That by law the said beach or cove is inalienable and the property thereof together with the river St. Lawrence, of which the said cove or beach is an appendage, is vested in our Sovereign Lord the King and reserved for the free use of his subjects navigating the said river St. Lawrence.

4thly.—That the said William Hullet hath not any grant, lease or title of any description or kind whatsoever from our said Lord the King, or from any person or persons holding or deriving any title from our said Lord the King to entitle him to ask, demand, sue for or receive any rent or sum of money for timber laid or placed on the said beach or cove.

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Upon these several pleas issues were joined.

The parties were heard on the pleadings, and on the 19th. of February 1816, the Court below dismissed the Appellant's demurrer, with costs.

The cause was then inscribed upon the Roll of Enquêtes, and several witnesses were examined on the part of the Respondent.

The items, which the Respondent attempted to establish, were,—

1<sup>o</sup> Rent for timber shipped from the Appellant's Raft, whilst it was afloat opposite the Respondent's grounds, but tied to a tree upon or near them.

2<sup>o</sup> Rent for timber placed by the Appellant above high water mark, upon or opposite the Respondent's grounds.

Upon this evidence the parties went to trial and the Appellant maintained,

1st.—That the land lying between high and low water mark formed part of the bed of the river St. Lawrence, and that he the Appellant, in common with others the King's subjects, was entitled to use the same *as well* as the shore of the river. By the civil law the beach and shores of navigable rivers belonged to the proprietors of the adjoining lands, the use of them belonged to the public.—(Vinnius ad Inst. tit. de rer. div. §. 4.—Accurs. ad Inst. de rer. div. §. 4.—Cujac. Ib. pag. 11. litt. D. Acosta. ibid.)—The beach or the interval of land, between high and low water mark, was considered part of the bed of the river.—(Ins. lib. 2. tit. 1. §. 3.)

The shores and banks of navigable rivers (or the declivity adjoining to the high water mark, L. 1. §. 5. D. de flum.) were considered as accessories to the river. “*Usus riparum* (says Vinnius) *ita publicus est ut fluminis: quinimò ripæ usus nihil aliud est, quam ipsius fluminis, cùm per ripam flumine utamur. Ideòque quæcumque sunt interdicta ad tuendum usum publicum fluminis, eadem sunt et conjunctim ad tuendum usum riparum.—L. 1. et passim. tit. de flum. Ait (Justinus) jure gentium quasi dicat, hunc usum atque hanc servitutem ripis à naturâ impositam esse omnibus, quibus flumine uti jure gentium licet, etiam ripis ad eum usum uti liceat, cùm nec flumine aliter uti commodè possint.*”—Vinnius ad Inst. de rer. div. §. 4.

Accordingly the public had a right to attach fastenings to trees growing upon the shores, (Inst. d. t. §. 4.) to discharge load upon the shores, (Ibid.) to build huts thereon, (§. 5.) as fully and freely as they had to navigate the river itself.—Sicut per ipsum flumen navigare, (Inst. ib.)

The only difference between the law of France and the civil law upon this head, is that in France the King was vested with the property of the beds, beaches and shores of navigable rivers and held them in trust for the public. (Ferr. Inst. Vol. II. pp. 8. 9. 12. 13.—Poth. droit de propriété, no. 161.—Rep. de Jur. verbo Rivière.—Coll. de Jur. verbo Atterrissement.—Ferriere D. Dt. verbo Rivage.—Domat, Bacquet, Tr. des droit de Justice, p. 406 —Ord. de la Marine, liv. 4. tit. 7. act. 1. and Ordces. there cited.) And such is too the Law of England.—(Com. Dig. Navigation A.—Prerogative D. 61.—Viner. Soil A.—Davis Reports 154.—Hale de Jure Maris apud Bacon's abridgt. Prerogative B. 3. in notis.)—If it were necessary it might be shewn that it was the law of the whole of continental Europe—of Germany, (Heinece: Elem. Jur. Germ. lib. II. Tit. 1. §. 8.)—Of Spain, (Maymó et Ribes Instit. Jur. Rom. et Hispani. lib. II. tit. 1. §. 13.)—And of the United Provinces, (Voët ad Pand. lib. 41. tit. 1. §. 18.—Huber de Jure Civit. lib. 2. s. 4. cap. 4. §. 13.)

Consistently with these principles an Ordonnance was, on the 13 May 1665, issued by the Superior Council, to secure to the subjects of the French King, the free navigation of the St. Lawrence and the use of its shores.—Le Conseil a ordonné à toutes personnes qui ont et auront des clôtures à faire sur le bord du fleuve, de les mettre en sorte qu'il reste deux perches libres au-dessus des plus hautes marées pour la liberté tant du passage des charretes et bestiaux que de la navigation, &c.—Edits et Ordces. t. II. p. 126.

The Appellant relying upon these authorities, trusted that he had shewn that the Respondent could not recover from him the rent of the beach nor the rent of the shore.

As to the remaining rent claimed by the Respondent, it could only be recovered, as rent of ground, other than the beach. But,

1° There was no evidence of any specific quantity of timber having been put higher up than two perches from high water mark.

2° The declaration is for ground rent of a beach. To award rent for ground, which was not a beach, would be to award that which was not asked by the Respondent.

Yet the Court below, on the 19th. day of April 1817, gave the following Interlocutory Judgment:—" La Cour ayant entendu les Avocats des parties, ordonne, avant faire droit, que des Experts, dont les parties conviendront, le dix de Mai prochain, Cour tenante, sinon seront alors nommés d'office, il sera par eux constaté, parties présentes, ou duement appelées, qu'elle est la juste valeur du loyer ou occupation des diverses quantités de bois désignés dans la déclaration et dans le compte produit et filé en cette cause, le dix du présent mois d'Avril, sous les items ou numeros depuis deux jusqu'à huit inclusivement, et le temps où les dits bois ont occupé partie de la ferme de Sillery louée au Défendeur, lesquels Experts seront autorisés d'entendre les témoins des parties et de choisir un tiers en cas d'avis contraire, dont et du tout ils feront leur rapport avant ou le premier jour du terme de Juin prochain, dépens réservés."

In this Judgment the Appellant did not acquiesce.

After several interlocutory orders, all of which the Appellant has appealed from, Messrs. Marett and Woolsey Experts irregularly, as the Appellant contends, named on the part of the Court and of the Respondent, filed an informal Report, in which they state the sum due by the Appellant to the Respondent, for ground rent during the years 18 & 18 at

This Report the Court however confirmed, and adjudged to the Respondent the sum of

with interest and costs.

QUEBEC, 1st November, 1818.

COURT OF APPEALS.

PHILEMON WRIGHT,

Appellant,

AND

LUCY CUVILLIER,

Respondent.

APPELLANT'S CASE.

A. STUART,

for Appellant.