Court Case

RAXWORTHY v. LUDLOW AND OTHERS

(Before Mr Sergeant Channell, and a Special Jury)

Mr M. Smith, Q.C., and Mr Hodges were counsel for the plaintiff, and Mr Slade, Q.C., Mr Arney, and Mr Kingdon for the defendant.

This was an action brought to try the right to fish in the river Wylye, in the parish of Upton Lovell, the plaintiff claiming to have the sole right to the exclusion of all others. It was an action of trespass. There were many pleas denying the right of the plaintiff to the river.

Mr M. Smith, in opening the case, said Mr Thomas Raxworthy, the plaintiff, complained that Mr Ludlow and his servants had trespassed upon the river Wily which ran between some land to which he was entitled. Mr Raxworthy was the owner as well as the occupier of a farm of about 480 acres situated at Upton Lovell, and the river, after passing through a portion of that land, entered the adjoining villages of Boyton and Sherrington, and passed thence to Salisbury. The lands on the north side of the river at Upton Lovell belonged to Mr Ingram and the plaintiff; and those on the west to Mr Joseph Everett, a gentleman who was well known in the county of Wilts, and whose property extended to the parish of Boyton. With the exception of a strip of land which lay between a stake fence and the river, the land on the other side belonged to the Rev. Arthur Fane, of Warminster, who was Lord of the Manor at Boyton. Near the fence, and between it and the river was a withy-bed, formerly called "the Island" belonging to the plaintiff, who also held the land on the opposite side of the stream. It was here that the trespass was alleged to have been committed. The land in question was taken by the plaintiff under an Enclosure Act many years ago, and he and his father had been in possession of it for at least 40 years; and he did not, therefore, apprehend that any question would be raised with regard to the ownership. The presumption was that a river belonged to the party whose land it was bounded on both sides; and if that were disputed, he should show that during the period he had named the plaintiff had exercised every possible act of ownership over the stream in question, and that when the trespass which was the subject of this action was committed, Mr Raxworthy was so utterly surprised by the claim which was put forward that he had recourse to the magistrates to afford him redress. The attorney of Mr Ludlow set up a right to fish in the stream, and it was not therefore in the power of the magistrates to adjudicate. An Action was accordingly brought in the present form. He would now direct their attention to the facts of the case. Mr Ludlow resided at Westbury, but was also the lessee of Boyton house, belonging to the Rev. Arthur Fane, Vicar of Warminster, who married a daughter of the late Mr Benett, the former proprietor of the property. On the 28th of July last year a rather premeditated attack was made upon the river flowing through Mr Raxworthy's land. A man named Dyer was sent for on the previous day, by Mr Ludlow's servants, to accompany them on the occasion. The party consisted of Giddings, Mr Ludlow's butler, Miles and Northeast, two of his keepers, and they were accompanied for some distance by Mr Ludlow himself, who did not, however, enter the lands belonging to Upton

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Lovell. The river was entered opposite the land of Mr Everett, and acting under the directions of Mr Ludlow, the party fished in that portion of it belonging to the plaintiff, notwithstanding the remonstrances of Dyer, who knew that former keepers from Boyton were not in the habit of going farther than a place called Mill Mead stile, where the parish of Boyton ends; and the defendant Giddings walked upon the plaintiff's land and received the fish. Mr Ludlow did not claim what was termed "a several fishery," but asserted that he had a right in common with the plaintiff to fish in the stream in question. To prove this, however, he must show that he had done so for a number of years openly and without interruption; but he believed the evidence would satisfy the jury that such had not been the case. The learned Counsel laid several plans, showing the *locus in quo*, before the Court.

Many old witnesses were called, whose evidence went to show that they had been in the habit of fishing at the places in question for the lords of the manor of Upton Lovell; they cut the weeds which were in the river. In 1816 there was an inclosure act, by which the lands in Upton Lovell were inclosed, and since that time no one had fished there but persons belonging to the plaintiff, who was the possessor of the land adjoining the river. The evidence also went to show divers acts of exclusive ownership on the river and island by the plaintiff and his father. Evidence was also given of a trespass in the river by the defendants.

Mr Slade then addressed the jury for defence. The real defendant, he said, was the Rev. Arthur Fane, of Warminster, who was the owner in fee simple of the manor of Boyton. The question for the jury was not whether there had been an unintentional trespass upon the land of the plaintiff by the butler Giddings, because a right thereto had never been claimed; and he looked upon the proceeding of the plaintiff in including that act in the declaration as an attempt to snap a verdict. Not a word was said about it when Mr Ludlow's servants were summoned before the magistrates under the obnoxious term of "poachers." It was a dirty after-thought, and nothing else, and unless he was very much deceived, the jury would ultimately be of the opinion that Mr Ludlow was entitled to a verdict upon all the substantial points at issue. Even if they were satisfied that Giddings was upon the bank of the river on the day in question, the smallest coin in the realm would afford sufficient compensation for the injury committed. The right claimed by Me Fane was one which had been asserted for a period of 60 years without the slightest interruption. Mr Fane inherited, through his wife, the property of Boyton, which was formerly held by the late Mr Benett, of Pyt House, and Mr Aylmer Lambert; and he should be able to prove such acts on the part of those gentlemen and their tenants as would give a complete answer to the case of his learned friend. Nothing was more true in point of law, than that a party owning land on both sides of a river was presumed to be entitled to the bed of that river; and where the ownership was only on one side the same rule applied to half the stream.- The presumption was right until it was rebutted. His learned friend should not have thrown upon him the task of informing them how Mr Raxworthy became possessed of the land in question. To use a school-boy phrase, he might say that bits of land were sometimes "smugg'd" by occupiers, and occasionally even a whole parish came over the water. In 1815 various inhabitants of the parish of Upton Lovell had small strips of land, without divisions, in the open fields; and the right was also vested in them of pasturing cattle, without giving them any claim to the soil. This was an unbearable state of things, and just as the long war which had then prevailed was brightening into peace, Enclosure Acts came in upon the Legislature in innumerable quantities. An act of that description was applied for in reference to Upton Lovell, and seven claims were sent in. Nobody claimed the Island, or withy-bed, then known by the name of Upton Marsh, and it was allotted to the plaintiff. Up to the making of the award, therefore, the presumption was that the bed of the river was vested in the Lord of the Manor; and from the fact of the award only stating that the land allotted was bounded by the river, he thought the jury would be satisfied that the plaintiff did not then acquire a right thereto. When, then, did it come into his possession? His learned friend sought to bolster up his case by introducing what he termed "acts of ownership," such as the cutting of weeds, and passing over the river for his own convenience. What! For a man to do such acts as those, behind the back of the Lord of the Manor, and then to say that they transferred the soil to him – surely it was neither law nor justice. The second plea of the defendant, then, went to the root of the action. He should shew that Cheater, whilst keeper to Mr Lambert, had repeatedly fished in the stream in question without let or hindrance; and if Cheater had not been dead, in all probability they would have heard nothing of this action. The witness called by his learned friend, only swore that they had not seen this fishing. What, however, was negative evidence of that kind worth, when respectable people would come forward and state that they had fished up and down the river

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whenever they pleased? The defendant had no desire to establish a monopoly; he simply asserted the right of fishing in the stream in common with others, and he should prove, he hoped to their satisfaction, that the right had been exercised in broad and open daylight for years.

Evidence was then given of Cheater's fishing many times in the river from Boyton to Codford through the many manors of Boyton, Sherrington and Corton. Some witnesses proved that they had fished whenever they pleased, and with nets, for a term of 35 years; but admitted, on cross-examination, that it was not in the presence of Mr Raxworthy.

The Rev. A. Fane swore positively to having fished on the particular spot in 1833.

Mr Slade having summed up his evidence.

Mr M, Smith addressed the jury in reply for the plaintiff.

The Learned Serjeant then summed up the case to the jury. He said, although the enquiry had occupied a considerable time, yet he must claim a share of their attention, whilst he explained certain points which he hoped would assist them in arriving at a decision. The declaration was framed "in trespass," and set forth that "the defendants broke and entered certain land of the plaintiff in the parish of Upton Lovell, being part of the bed of the River Wyley, and the banks thereof, and that they did then and there take and carry away the fish of the plaintiff." Those allegations were divisible, the first being the trespass upon the land. To prove that point it was not necessary to show that the parties actually took away fish; and they must bear in mind that no claim as made for injury to the fishery.- A man might be entitled to a sole and several fishery without having a right to the soil, and could bring an action for an invasion of it. In the present case, the declaration was in substance the same as though it charged the defendants with a trespass upon the land, The soil of navigable rivers was presumed to be vested in the Crown, and the public had a general right of fishing as well as navigation in such rivers. If parties, however, entered them for the purpose of taking gravel or ballast, it was a trespass. So in this case – the land might be the property of the plaintiff, although it was covered with water. In answer to the case, the defendants had put in nine several pleas. He did not mean to apply that observation as a reproach, but to shew them that they could not be disposed of without each being treated as separate and distinct, and being looked upon as the only one upon the record. The first plea was not guilty, and by it it was not sought to deny the plaintiff's possession. If therefore they were satisfied as to the trespass, they could find a verdict against all or any of the defendants. With regard to Mr Ludlow, it was not pretended that he was on the plaintiff's land on the day in question; but if any other person was there by his direction and sanction, he would still be trespasser, and , as such, liable to the consequences. Assuming the testimony of the plaintiff's witnesses to be true, Giddings was upon the bank, and they were of opinion that he was not acting under the directions of Mr Ludlow, the safer course would be to confine their attention only to so much of the trespass as related to the bed of the river. If the parties were in the river by the authority of Mr Ludlow, he would be equally responsible with them. With these observations he would leave them to deal with the first plea, merely requesting them to bear in mind that it involved no question of title. Then came the second issue. The plea was that that part of the bed and channel of the river upon which the defendants were charged with trespassing, was not the property of the plaintiff. The ordinary rule of law with regard to private rivers was this – that where they intersected land which on both sides belonged to the same person, he was presumed to be the owner of the beds thereof. If he owned land only on one side, he was presumed to be the owner of half the bed of the stream. That presumption, however, did not apply to navigable rivers. Mr Montague Smith, had put forward the claims of the plaintiff on two grounds – one being the presumption of law he had named; the other the exercise of acts of ownership – namely the exercise of acts of ownership for thirty or forty years. That was termed an adverse possession. Here the case was not altogether free from difficulty. Land that was built upon or enclosed by a fence or wall admitted of no doubt 0 that act of occupation was unequivocal. They must look at the kind of land; this was covered with water, and there might be rights in the water quite independent of the soil. Such was the case here, the water being used for the purposes of irrigation. Notwithstanding this, the soil might or might not be vested in Mr Raxworthy. They had heard the acts of ownership described, and it would be for them to say whether they were of such a nature as would enable them to find a verdict in favour of the plaintiff. The third issue was that the fish were not the property of the plaintiff. If they found that

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no fish were taken, it would be their duty to find a verdict for the defendant upon that part of the declaration. The other six pleas of the defendants were that if they trespassed upon the soil as described – if that soil and the fish were the property of the plaintiff – they had a right of fishery in the stream. That claim was put in first with respect to Boyton house, and then with respect to Boyton manor. Various periods of user were set forth – 30 years, 60 years, and "for all time." The acts necessary to substantiate these claims must be exercised without interruption and as of right; if they were done by stealth they conferred no right.

The Judge retired for about half an hour. On their return into Court, they announced a verdict of not guilty as regarded the trespass of Giddings upon the bank, and guilty against Mr Ludlow, Miles and Northeast, with respect to the trespass in the bed of the river. On all the other issues they found a verdict for the plaintiff, with two guineas damages.

This case, which lasted a day and a-half, terminated the assizes. The Court rose at seven o'clock.

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