

CANADA / JUDGMENT

The Queen v. Moss

(1896) 26 SCR 322

COURT

Supreme Court of Canada

DECIDED

18 May 1896

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Collection

Supreme Court Judgments

Date

1896-05-18

Report

(1896) 26 SCR 322

Judges

Strong, Samuel Henry; Taschereau, Henri-Elzéar; Sedgewick, Robert; King, George Edwin;
Girouard, Désiré

On appeal from

Federal Court of Appeal

Subjects

Constitutional law

Decision Content

Supreme Court of Canada

The Queen v. Moss (1896) 26 SCR 322

Date: 1896-05-18

Her Majesty The Queen (Plaintiff)

Appellant

And

Samuel Moss (Defendant)

Respondent

1896: Mar. 6, 7; 1896: May 18.

Present:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Constitutional law—Navigable waters—Title to soil in bed of—Crown—Dedication of public lands by—Presumption of dedication—User—Obstruction to navigation—Public nuisance—Balance of convenience.

The title to the soil in the beds of navigable rivers is in the Crown in right of the provinces, not in right of the Dominion. *Dixson v. Snetsinger* (23 U. C. C. P. 235) discussed.

The property of the Crown may be dedicated to the public, and a presumption of dedication will arise from facts sufficient to warrant such an inference in the case of a subject.

By 23 V. c. 2 s. 35 (P.C.) power was given to the Crown to dispose of and grant water lots in rivers and other navigable waters in Upper Canada, and the power to grant the soil carried with it the power to dedicate it to the public use.

The user of a bridge over a navigable river for thirty-five years is sufficient to raise a presumption of dedication.

If a province before confederation had so dedicated the bed of a navigable river for the purposes of a bridge that it could not have objected to it as an obstruction to navigation the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.

An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance though of very great public benefit and the obstruction of the slightest possible degree. Appeal from a decision of the Exchequer Court of Canada^[1] in favour of the defendant.

The proceedings in this case were taken by the Crown to expropriate certain lands in the township of Cornwall for the construction of a dam at Sheik's Island.

The facts are set out in the judgment of the Exchequer Court as follows:

"The defendant Samuel Moss is in possession of a farm situate on Sheik's Island in the township of Cornwall and county of Stormont. The fee in the land on Sheik's Island is in the Crown for the benefit of the Iroquois Indians of Saint Regis, and Moss, and other occupiers of lands thereon, hold their lands as assignees under a lease of such lands to their predecessors in title for a term of nine hundred and ninety-nine years. The farm that Moss is in possession of contained, in January, 1894, one hundred and thirteen and a half acres. On the 12th of that month the Crown through the Minister of Railways and Canals, for the use and enlargement of the Cornwall Canal,

a public work of Canada, expropriated ten acres and eighty-five one hundredths of an acre of the land theretofore forming part of this farm, and the parties have agreed upon the compensation to be paid for the land so taken by the Crown, and for damages occasioned by the severance, as well as upon the amount that is to be deducted therefrom and paid to the Superintendent General of Indian Affairs in respect of the Indian title. The only questions to be determined are:—Is the defendant Moss entitled also to compensation for the depreciation in value of his farm occasioned by the construction of the public work, and if so what is the amount of such compensation? The latter question presents under the evidence little or no difficulty. There can, I think, be no doubt that when the works that are now in progress and for which the lands mentioned were taken, are completed the defendant's farm will be lessened or depreciated in value by the amount claimed, namely one thousand dollars.

"Sheik's Island lies at the foot of the Longue Sault Rapids of the Saint Lawrence River. At this point the river divides itself into three channels or branches, Sheik's Island lying between the north channel and the middle channel.

"The north channel forms part of the navigable waters of the Saint Lawrence, though it does not appear to have been used for the purposes of navigation, the normal depth of water therein being some five or six feet. Since 1833, and perhaps from a time anterior to that, the inhabitants of the island have had communication with the mainland by a bridge across this channel at or near the village of Moulinette, and in the construction at this point of the Cornwall Canal in 1833 or 1834 a way was provided by a tunnel under the canal by which the highway from the island across this bridge was carried to the north or Moulinette side of the canal. This bridge was carried away in 1851, and was then rebuilt upon a new site a short distance from that previously occupied. In rebuilding the bridge the inhabitants made use of what was called a dam that had been made for milling purposes, and which was built in the middle of the channel and part of the way across the same. In 1861 the Government of the Province of Canada paid to a number of the inhabitants of the island one thousand dollars to indemnify them for work and money expended on the bridge, and the municipal authorities have from time to time expended money in repairing the bridge and maintaining the highway which connect and form the only means of communication between the island and the mainland. This bridge and partial dam formed no doubt an obstruction to the navigation of the channel such as the navigation was, and there is nothing to show that there was ever any legislative authority to justify or legalize the obstruction, unless the clause in The Expropriation Act[2], to which I shall presently refer, is sufficient for that purpose. The channel was not used for the purposes of navigation. It was necessary and proper that the lessees of the island should have a way to the mainland, and everyone, including the Crown no doubt, acquiesced in the maintenance of the obstruction. In the execution of the present work of enlarging the Cornwall Canal two large dams have been constructed across the north channel, one at the west or upper and the other at the east or lower end of Sheik's Island, and when the works are completed the canal will be turned into and through this channel, which will then cease to be one of the channels of the St. Lawrence, and will become a part of the Cornwall Canal, the water level of which is at this point much higher than the level of the St. Lawrence River. The result of this will be that the highway from the island to the mainland will be

submerged and destroyed, and the inhabitants of the island will be deprived of the means of communication that they have had with the village of Moulinette, at which place they have been accustomed to attend church, to send their children to school, and to transact their business as farmers. To meet this difficulty the Minister of Railways and Canals proposes, and it is part of the work contemplated and in progress, to substitute a highway to the village of Mille Roches, some two or three miles east of Moulinette. This proposed highway will be carried over the lower dam and then across the canal by a bridge. This substituted highway will mitigate the inconveniences to which any person in the occupation of lands upon the island would otherwise be put, and will lessen the depreciation in the value of land on the island which would otherwise occur by reason of the construction of the public work.

The learned judge held that the defendant was entitled to compensation for the severance of communication between his farm and the mainland and the diversion of the highway. The Crown appealed.

Robinson Q.C. for the appellant. The title to the soil in the river is in the Crown; *Bixson v. Snetsinger*[3]; in the right of the Dominion. *The Queen v. Meyers*[4]; *Attorney General v. Perry*[5].

Parliament alone can authorize an obstruction to navigation. *Wood v. Esson*[6]; *Coulson and Forbes on Waters*[7].

The defendant could not acquire by user a right to maintain the communication as prescription does not run against the Crown. *Hardcastle on Statutes*[8]; *Perry v. Eames*[9].

Leitch Q.C. for the respondent. The respondent holds his farm virtually under the Crown and is entitled to have the bridge maintained as a way of necessity which he was allowed to select. See *Saylor v. Cooper*[10]; *Dixon v. Cross*[11]; *Lupton v. Rankin*[12].

The defendant and those through whom he claims have used the bridge for over sixty years and the Crown is barred by the Nullum Tempus Act, 9 Geo. 3 ch. 16 (Imp.) *Reg. v. McCormick*[13]; *Reg. v. Williams*[14]; *Attorney General v. The Midland Railway Co.*[15].

See also *Samson v. The Queen*[16].

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The facts, which are not in dispute, are fully stated in the judgment delivered by Mr. Justice Burbidge in the Exchequer Court.

The question raised by this appeal is purely one of law, involving the right of the respondent to compensation for the destruction of the bridge connecting Sheik's Island with the north bank of the River St. Lawrence, opposite the village of Moulinette. If the submerging of this bridge or embankment by the Crown for the purposes of the new St. Lawrence Canal is to be ascribed solely to an exercise of the powers conferred by "The Expropriation Act" (52 Vict. ch. 13), then the respondent's right to compensation cannot be, and indeed is not, disputed. If, on the other hand, the cutting off of this mode of communication between the island and the mainland is to be referred to the right of the Crown (the Dominion) to preserve navigation, then the respondent is

not entitled to compensation in respect to the injurious effect upon his property.

This information is. filed under the 25th section of the Expropriation Act, and by it the Crown submits the right of the respondent to the court.

A portion of the respondent's lands having been taken he is entitled to claim in respect of the lands he retains being injuriously affected by the works for which the expropriation was made, beyond any injury caused by the mere severance of the land expropriated from that retained by him, and this is so even if the words "injuriously affected" in the Expropriation Act are to receive the same strict construction as that which has been placed upon the same words in the English Land Claims Act.

The bed of the River St. Lawrence at the date of confederation was vested in the Crown in right of the late province of Canada. It therefore formed part of the lands "belonging to that province" which the 109th section of the British North America Act declared should upon confederation belong to the province of Ontario, within the limits of which it was "situate."

It was argued by the learned counsel for the Crown that the title to the soil in the bed of the river, including that of the channel between Sheik's Island and the north bank, was in the Dominion. It is, however, impossible to find any provision of the British North America Act which would have the effect of vesting the title to the beds of navigable rivers in the Crown otherwise than as representing the provinces.

If, in the case of *Dixson v. Snetsinger*[17], it was intended to decide that the title to the bed of the river was in the Dominion, I do not so far agree with that case. I find, however, in examining the report that the court expresses the opinion that the title was in the Crown, without distinguishing between the Dominion and the province. It was not indeed necessary to make any such distinction in that case, the question before the court being as to the extent of the land granted by the Crown. The boundary, as the land was described in the plaintiff's patent, having been the river, it was contended on his behalf that this entitled him to the bed of the river to the middle of the channel, a claim which was rejected by the court. This being the only point in controversy, the court in *Dixson v. Snetsinger*[18] was not called upon to decide whether the title to the alveus was in the Dominion or in the province. The only possible pretense which the Dominion Government can have, therefore, to destroy the bridge in question must be derived either from some legislation by Parliament under the power relating to navigation and shipping, contained in the 91st section of the Dominion Act, or under the provisions of the Expropriation Act.

Without examining the legislation of Parliament relating to the removal of obstructions to navigation, I will assume for the purposes of this appeal that it is sufficient to authorize the officers of the Dominion to remove all unlawful obstructions to navigation.

This gives rise to two subordinate inquiries: First, was this bridge an unlawful hindrance to the navigation of the channel between Sheik's Island and the north bank of the river, and secondly, was the Dominion Government acting in execution of its statutory powers to protect the navigation in constructing the dams and other works which will have the effect of destroying the Moulinette bridge by submerging it?

In *Dixson v. Snetsinger* (1) it was held, and rightly held, that the natural channel between the island and the mainland was originally navigable at least for boats, and that, at all events in law, it formed part of a navigable river. Although this was in part a conclusion from the evidence before the court in that case, and in so far as it was so it ought not to affect the present case which as regards the facts must of course be decided on the evidence contained in the record, yet it may be assumed that the evidence before us is sufficient to support the same proposition as one of mere fact. It does, however, certainly appear that this channel had not been used for purposes of navigation for at least sixty years prior to the execution of the works now complained of, by which the Crown by constructing a dam or embankment at each end of this northern channel between Sheik's Island and the mainland on the north bank, itself destroyed the navigation. The bridge in question appears to have been in existence since 1833. It was formed by a dam or embankment running from north to south transversely across the channel which, however, did not extend to its full width, openings having been left at each end. This embankment was originally erected by riparian owners for the purpose of thereby obtaining water-power. The gaps at the ends were subsequently filled up by the local public authorities, and upon this filling in and the original embankment a road was made connecting the island with the north bank, and this road was used as a public highway until 1851, when the bridge so formed was swept away by freshets in the river. Subsequently the bridge was re-constructed, I presume in the same manner, and towards this purpose the Provincial Government contributed the sum of one thousand dollars (\$1,000), the residue of the expenditure having been borne by the local authorities or the inhabitants of the island. The learned judge finds as a fact that this grant was made. He says:

In 1861 the Government of the Province of Canada paid to a number of the inhabitants of the island one thousand dollars to indemnify them for work and money expended on the bridge, and the municipal authorities have from time to time expended money in repairing the bridge and maintaining the highway which connect, and form the only means of communication between, the island and the mainland.

The evidence establishes the fact that the depth of water in this channel was only some five or six feet, and that the rapid current would have made it useless for purposes of navigation without great labour in towing up the rapids. At all events the channel could not have been used for purposes of navigation since the solid bridge formed by the embankment was first erected in 1883; and this caused no public inconvenience, not only for the reason already stated but also because for upwards of fifty years the Cornwall Canal, constructed parallel to the channel, afforded an easy and convenient navigation for vessels ascending the river, whilst vessels descending, which did not make use of the canal, passed down the middle channel to the south of Sheik's Island. I quite concede, however, that assuming this northerly channel to be navigable

water the erection in the river of a dam, by means of which the bridge was formed, would have been a public nuisance, unless it was in some way legalized by the action or acquiescence of the Crown. It is not sufficient to justify the placing of an obstruction in a public river or harbour that upon a balance of convenience the structure causing an obstruction to navigation should be of great public utility, far outweighing any inconvenience caused by it as a hindrance to navigation. The case of *Rex v. Russell*[19], was an indictment for obstructing the navigation of the River Tyne, by erecting "coal staiths" in the bed of the river which, being tidal water, belonged to the Crown. Bayley J. who presided at the trial left to the jury the following questions:

Were the "staiths" erected in a reasonable place? Was there a reasonable space left for the public navigating in the Tyne? Were the staiths a public benefit? Did the public benefit countervail the prejudice done to individuals?

The jury having under this direction found for the defendant the Court of King's Bench refused to disturb the verdict. Lord Tenterden, however, dissented from the judgment. In *Rex v. Ward*[20], Lord Denman held that *Rex v. Russell*[21] was not well decided and refused to follow it. In the *Attorney General v. Terry*[22], Jessel M.R. in an elaborate judgment strongly dissents from *Rex v. Russell* (2), demonstrates its unsoundness and treats it as an overruled case not to be followed. This last decision I take to settle the law as we ought to apply it in the case now before us. I hold, therefore, that even if the bridge now in question was of very great public benefit, whilst the prejudice it caused to the public as an obstruction to navigation was of the slightest possible degree, it nevertheless would have been an illegal structure amounting to a public nuisance, which, as such, the Crown might cause to be removed unless for other reasons it was not to be treated as a nuisance.

My proposition is, however, that the bridge or causeway was a legal work being, in short, a lawful highway by the dedication of the Crown. That there may be a presumption of dedication by the Crown arising from facts sufficient to warrant such an inference in the case of a subject has been decided in several cases. In *Turner v. Walsh*[23], an appeal from New South Wales, the Privy Council had this question before them. In delivering judgment Sir Montague Smith says:

The presumption of dedication may be made where the land belongs to the Crown, as it may be where the land belongs to a private person. From long continued user of a way by the public, whether the land belongs to the Crown or to a private owner, dedication from the Crown or the private owner, as the case may be, in the absence of anything to rebut the presumption may and indeed ought to be presumed.

In *The Queen v. East Mark*[24], the point was determined in the same way. Lord Denman C.J. there says: The Crown certainly may dedicate a road to the public and be bound by long acquiescence in public user.

Patteson J. in the same case says:

There may be a dedication by the Crown; and I think in these cases we ought not to inquire very nicely into the ownership of the soil or into the evidence of any precise intention to dedicate.

Harper v. Charlesworth[25], a case sometimes supposed to have established a contrary doctrine, is plainly distinguishable. What was there decided was that in the case of the Crown, just as in that of a private owner, no presumption of dedication arose from the acts or acquiescence of its lessee.

That the Crown was the owner of the bed of the river in the channel between Sheik's Island and the mainland has already been shown.

Then, it is well established that an open user as of right by the public raises a presumptive inference of dedication, and when such user is proved the onus lies on the person denying that inference to rebut it, e.g. by showing that owing to the state of the title there was no valid dedication[26].

Then, the user here was not only shown to have been open and notorious for upwards of sixty years, but the acquiescence and express assent of the Crown is shown by the fact that in 1861 it granted money to indemnify the persons who had rebuilt the bridge after it had been partially destroyed by freshets. Therefore, so far as the Crown had power to dedicate, the circumstances are very strong to show that it must be presumed to have done so. If it is said, however, that the Crown had not at common law power to divest itself of the title to the land covered with water, forming the bed of the channel. The answer is that by a statute[27] passed in 1860, express power was given to the Crown to dispose of and grant water lots in the rivers and other navigable waters in Upper Canada. Therefore, from the passing of this statute down to the disturbance complained of by the respondent, the Crown could have granted to a private individual or to a municipal corporation so much of the alveus of the river as was occupied by the dam or causeway forming the bridge, and such grantee could of course have put the land so granted to just such uses as it has actually been put to. Then, if the Crown could thus have granted the soil it could a fortiori dedicate it to the public for the uses to which it has been put. The user for the thirty-five years and upwards since the passing of the Act would be amply sufficient to raise a presumption of dedication.

That a bridge may be a highway is, if any authority need be cited for such a plain proposition, shown by the case of *Beaver v. The Mayor of Manchester*[28].

Up to the date of confederation the conservancy of navigation was vested in the province, and if the province had so dedicated the bed of the channel for the purposes of a bridge that at that date it could not have objected to the embankment as an obstruction to navigation, it follows that when by the British North America Act the control of the navigation was transferred to the Dominion, the Crown as representing the latter government continued to be bound to permit the maintenance of the bridge.

Lastly, it does not appear that any actual public inconvenience was caused by the dam, and although, as I have already shown, we are not, in deciding the question of nuisance, to balance the convenience of the bridge against any inconvenience caused to those using the channel for the purposes of navigation, yet it must, before the bridge can be held to be a nuisance and abated as such, be shown to constitute some obstruction to the public. So far, however, from there being

any such evidence, it rather appears that for a long series of years the channel has been altogether abandoned as useless for navigation. I therefore conclude that the bridge was not an unlawful hindrance to the navigation of the river.

But, even granting that the proper conclusion had been in this respect against the respondent, I should still have been of opinion that the judgment of the Exchequer Court ought to be maintained inasmuch as the Dominion Government cannot be said to have been acting in execution of their statutory powers to protect the navigation of the river in its natural state, when, by constructing dams and other works for the purposes of the new canal, it permanently destroyed the navigation. It would indeed be nothing less than absurd to attribute acts which must for ever render the channel useless as a navigable passage to an intention to exercise the power of preserving the same channel for the public benefit for purposes of navigation.

The result is that the works in question must be held to have been constructed under the Expropriation Act[29], and the respondent is entitled to compensation as provided for by the 22nd section of that Act in respect of the injurious effect of these works on the land which he retains. The amount of this compensation has already been fixed by agreement at the sum of one thousand dollars and interest, the amount awarded by the judgment appealed against.

The appeal is therefore dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: O'Connor & Hogg.

Solicitors for the respondent: Leitch & Pringle.

[1] 5 Ex. C. R. 30.

[2] 52 Vict. c. 13 s. 34.

[3] 23 U. C. C. P. 235.

[4] 3 U C. C. P. 350.

[5] 15 U. C. C. P. 329.

[6] 9 Can. S. C. R. 239.

[7] P. 43.

[8] 2 ed. pp. 405, 411.

[9] [1891] 1 Ch. 658.

[10] 2 O. R. 398; 8 Ont. App. R. 707.

[11] 4 O. R. 465.

[12] 17 O. R. 599.

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- [13] 18 U. C. Q. B. 131.
- [14] 39 U. C. Q. B. 397.
- [15] 3 O. R. 511.
- [16] 2 Ex. C. R. 31.
- [17] 23 U.C.C.P. 235.
- [18] 23 U. C. C. P. 235.
- [19] 6 B..& C. 566.
- [20] 4 A. & E. 384.
- [21] 6 B. & C. 566.
- [22] 9 Ch. App. 423.
- [23] 6 App. Cas. 636.
- [24] 11 Q. B. 877.
- [25] 4 B. & C. 574.
- [26] 2 Smith's l. C. 10th ed. p. 167; Beg. v. Petrie 4 E. & B. 737.
- [27] 23 V. c. 2 s. 35.
- [28] 8 E. & B. 44.
- [29] 52 V. c. 13.
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Prepared on 29 October 2026 · Esheria