

IN RE ARBITRATION BETWEEN THE CANADA SOUTHERN RY. CO. AND Z. B. LEWIS.

If such a claim had been made at the common law under a lost grant, it could have been defeated by shewing that the owner of the servient tenement was not capable of making a grant on the principle that when a good consent be expressly made none can be implied or presumed, and in the case of *Rochdale Canal Company v. Radcliffe*, 18 Q. B. 287, it was held that a plea under the Prescription Act of user for twenty years, although the user was proved, would not avail against the plaintiffs, who could not consistently with the enactments establishing and regulating their canal have granted the water for the purpose for which it was used by the defendant; that if they had attempted to do so such a grant would have been *ultra vires* and bad, and would not have bound them, and that consequently the twenty years' user would establish no right.

In the case of the proprietors of the *Staffordshire and Worcestershire Canal Nav. v. Birmingham Canal Navigation*, L. R. 1 E. & I. A. 254, it was held that there was in that case no existing stream of water the use of which could be claimed by the appellants, but if there had been such a stream the Prescription Act would not help them for the reason given by Lord Westbury at page 278, as follows:—

"But if the Prescription Act had been at all applicable it would be incumbent on the appellants to prove that the right founded on the claim by user might at the beginning of or during that user have been lawfully granted to them by the respondents' company. No such proposition can be maintained. Had any grant been made at any time by the respondents' company of the right now alleged by the appellants to have been acquired against them by user, such grant would have been *ultra vires* and void, as amounting to a contract by the respondents not to perform their duty by improving the navigation and conducting their undertaking with economy and prudence."

In the *National Guarantee Manure Co. v. Donald*, 4 H. & N. 8, the principle governing the *Rochdale Canal Company v. Radcliffe* above referred to, was recognized and adopted by Pollock, C. B., in his judgment on p. 16.

In *Mason v. Shrewsbury and Hereford Ry. Co.*, L. R. 6 Q. B. 578, the case last cited is referred to but no positive opinion is expressed on the point now under consideration, the case being decided on other grounds.

In Washburn on Easements, 3rd ed., at p. 120, it is said:—"It may be added, though already implied if not expressly stated, that in order to establish a prescriptive right, it must be claimed under and through some one who had a right to grant or create the easement claimed."

In Gale on Easements, 5th edition, page 202, note "M.," it is said:—"In respect of statutory disabilities to grant, a distinction appears to exist between those cases where there is simply no power to grant and those where there is an absolute prohibition; in the latter case it would seem that an enjoyment even for the longer period would confer no right, although in the former it might. In neither case can any right be gained under the statute by enjoyment for the shorter period."

As to the power of the Erie and Ontario Railroad Company, or any of the railroad companies which subsequently acquired the rights of that company and continued its railway to make a grant of a right to carry a water course through its land, or of anything else which would have the effect of lessening its control over its own land for railway purposes, it was not contended that such power existed, and I do not think it could be so contended.

This railway company had no doubt power to take the land belonging to individuals for the purposes of its railway, and it ought not to be allowed to apply those lands to other purposes foreign to the railway.

I am therefore of opinion that the claimant has not by the use of the company's land since 1853, for the purposes of conveying water through pipes to the (present) town of Niagara Falls, acquired any absolute and indefeasible right or easement to have the pipes maintained in their present position so as to prevent, limit, or in any way interfere with the use by the railway company of its land for the purposes of its railway.

If the Canada Southern Railway Company carry out the offer made by them in their notice to Mr. Lewis under the Consolidated Railway Act 1879 already referred to, in a proper manner, in my opinion Mr. Lewis will certainly get all he has a legal right to. It will remain for the arbitrators to consider (under the agreement signed by the counsel) whether the mode of carrying this out suggested by the company's engineer, will satisfactorily restore the pipes to their former state of usefulness.

Concurred in by the other arbitrators.

[The arbitrators subsequently made an award directing the company to do the work within thirty days in the manner and at the places proposed in their notice, the diameter of the pipes to be similar to old pipes except at the reservoirs, the pipes there being increased from 6 inches to 8 inches, also permitting the company to use the old pipes where that could be properly done.]