



Dispute Over Farmer's Cattles' Right To Drink At Pond At Melksham

Nisi Prius Court, Wednesday

(before Mr Justice Willes and a Special Jury.)

Cottle v. Barnwell. – Mr Cole, Q.C. and Mr Bowen were for the plaintiff; and Mr Lopes, Q.C., and Mr Ridsden Bennett represented the defendant

Mr Cole, in opening the case, said he did so with some regret, because he feared the present action would hardly settle the real rights of the parties. He trusted, however, that it would lead to arrangements which would prevent further litigation. The plaintiff claimed the right to water his cattle at a pond which was now claimed as the property of the defendant. Mr Cottle, in whose name the action was brought, was the occupier of a considerable dairy farm at Melksham, the proprietor being a lady named Foskett. The defendant was a clergyman who had become possessed of a house and about three acres of land adjoining the defendant's farm. In 1830, both the farms and the house belonged to the Rev. William Boucher Ray, and was mortgaged by that gentleman and his son. In 1841, the mortgagees were anxious to sell the whole of the property, which was divided into 23 lots with that view. The sale took place in 1842, and the house and three acres of land, which included the pond in question, were purchased by Mr Kenrick, a surgeon. The property was sold by Mr Kenrick to the defendant in 1866, and at that time it was bounded by a wall, on one side of which there was a hah-hah. The adjoining field, which was in the occupation of the plaintiff, was a large and valuable grazing field, called the Conigre field, and on the west and south side it bordered the defendant's property. The pond opened on to the Conigre field, and for many years the plaintiff's cattle drank all round it. At the time of the sale, an old wall ran along one side of the defendant's property, and terminated at the pond. In 1857 Mr Kenrick, with the view of improving the watering place, erected a low wall in front of the western end of the pond for the purpose of preventing the treading in of the ground, the bank at that point being steep. That wall being objected to by Miss Foskett's solicitor, it was removed. On the property passing into the hands of the defendant, he pulled down the greater portion of the old wall, and erected a new one, half way into the hah-hah, thereby enclosing some 4 ½ to 6 feet of land, which the learned counsel said, never belonged to him at all. Ten or eleven feet of the Conigre field were taken in, and the water left for the plaintiff's cattle was not sufficient to wet the tail of a Newfoundland dog. The consequence was that the plaintiff had since had to

drive his cattle a long distance to the river Avon; for if even a single bullock went to drink at the pond, it would be in danger of injury from the iron railing which had been erected.

Mr Manning, surveyor, of Corsham, was called to prove the accuracy of certain plans of the locus in quo, and in reply to Mr Bowen he said that assuming the plaintiff to have been deprived of access to the pond it would be productive of considerable damage to him as a farmer. The space left for watering was sufficient only for two cattle, and they would not be able to turn round, but would have to back out. In cross-examination he said that when water was plentiful there would be room for three. Part of the wall erected by the defendant was a retaining wall, built up from the pond to support the bank. It appeared, however, to have been erected to prevent access to the pond.

Mr W. Cottle, the plaintiff, said he had rented Miss Foskett's farm for 35 years. His cattle grazing in Conigre field, which was a rich pasture of 40 acres, had always, until lately, had free access to the pond for drinking purposes. He believed the pond was supplied from a spring, for he had never seen it dry. The cattle had access to the whole of the south-west side until the defendant erected a wall and railings there. He had seen a dozen beasts drinking at the pond at once. In 1857 Mr Kenrick built a wall to stop the drinking, but the wall was subsequently taken down. That was not the point where the defendant had lately built. The drinking place let by the defendant was most inconvenient and dangerous. Two or three beasts could push in, but even two could not turn round to get out. There were two other ponds in the Conigre field, but there was rarely water in them, excepting in very wet seasons. They were not convenient for drinking, even when there was water in them. He was now obliged to let his cattle go for water to the river Avon, which ran through another field. If he was about to retake his farm, he would not give so much for it by £50 a year, as he would have done before the defendant enclosed the pond. – In cross-examination, Mr Cottle said there were good watering places in the river Avon, in the field adjoining Conigre field. The gate between the two fields was occasionally left open during the day. He had never had occasion to drive his cattle to the Avon. Never heard of two of his cattle being nearly drowned on the south-west side of the pond. When he first knew the pond, the banks on that side were not steep and "glassy". Cows could easily walk up and down them. No wall was put there in 1854 or 1855 – not before 1857. The defendant had cleared out the pond, but witness did not know that he had deepened it. He had not observed that the bottom of the pond had been so altered by the defendant as to conduct the water up to the drinking place. He had not observed gates in the railings which the defendant had put up. He believed that openings were left at the onset. Re-examined: Had never used the other ponds in the Conigre field as drinking ponds.

Mr Kennaway, formerly a solicitor at Exeter, acted as solicitor for Miss Foskett when she bought the plaintiff's farm in 1857. He inspected it frequently. He was there in May 1859, and his attention was called to an erection across the watering place used by the cattle in the Conigre field. There was no wall across the footpath end. It was arranged that the obstruction of which the complaint had been made should be removed. He visited the place afterwards, and found that the watering place had been restored to its original state. He claimed it as a right, and received a distinct and mission of the right.

Charles Fregard, a labourer in the employ of Mr Cottle, deposed that for 30 years his master's cattle had "open drinking" in the pond in question. An obstruction was put up by Mr Kenrick, but afterwards removed. After that the cattle continued to have free access to the pond until rails were put up by Mr Barnwell.

A builder from Melksham, named Townsend, was called to prove the removal of the wall placed across the drinking place by Mr Kenrick. In cross-examination, he said the wall might have been up for a year or so.

Mr James Rawlings, solicitor, of Melksham, said that when he first knew the drinking pond, 17 years ago, it was not enclosed on any side bordering the Conigre field. There was then no obstruction to cattle going in. Cross-examined: He never observed a retaining wall on the footpath side.

This was the plaintiff's case. Mr Lopes in addressing the jury for the defence, submitted that the plaintiff had never enjoyed the right he had attempted to set up, and that if his cattle entered the pond by the west-end bank or over the retaining wall, an act of trespass was committed. There might be a right to water at a particular point, but the defendant's contention was that right had in no way been interfered with. The plaintiff had as ample and beneficial a right as he had ever exercised during the occupation of his farm. The plaintiff's cattle might have a right to drink from the pond, but not to wander about and loiter in the water. The defendant had deepened and cleansed the pond through out, and he had so constructed and arranged the bottom to the drinking lace that the plaintiff had a better supply of water than was the case before. Another point of contention was that within 20 years there had been a year's interruption of the user, and that year's interruption was acquiesced in.

The first witness was Mark Townsend, a son of one of the witnesses called by the plaintiff, who stated that in 1854 he assisted his father in building three walls at the pond. One of them was across the "drinking place", which he believed remained standing for two or three years. The wall at the footpath end remained until last year. That was a retaining wall to keep up the bank. The foundation of the other wall, across the hah-hah, was built upon by Mr Barnwell in the present year. Cross-examined; the wall across the narrow end of the pond was removed last year. The wall was built in January 1854, when the pond was frozen over. It was a dry wall.

The Rev. Barnwell spoke as to the purchase of the property in 1866. He had expended about £3000 in improvements. The pond was a receptacle of filth. The bottom was muddy, and there was only one bank – the south west bank, - which was very steep and broken away in parts. He should say that cattle were not able to descend it. There was a low wall and steps on the footpath side. There was a third wall across the hah-hah. He cleaned the pond out, and built a retaining wall from the bottom on the south west side. He gave notice to Mr Kennaway, that Mr Cottle's surveyor might attend his surveyor. Mr Cottle's surveyor did not attend. The watering place was dirty broken place. In wet weather it was a mass of mud and very inaccessible. He ordered it to be made more convenient than before for the cattle. He sent and asked Mr Cottle to superintend the work of restoration so that he might have the watering place constructed as he wished. He did not attend. He (the defendant) had the entrance properly pitched, and piles were driven in to keep the stones in their proper place. The watering hole was now far superior to what it was. He had seen two beasts drinking there at once. Since the alteration had been made the water had been deepened and the quality of the water improved. The present drinking place was of exactly the same breadth as the old one.

Cross-examined: Mr Cottle told him that he was trespassing on Miss Foskett's land, when he was putting up the hah-hah-wall.

Re-examined: If the water were to rise to its usual height, cows might get up to their middle at the present drinking place.

The further hearing of the case was adjourned.

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