J. P. BAILEY LTD. *v.* THE ATTORNEY-GENERAL.

[Civil Jurisdiction (Thomson J.) September 19, 1946.]

Rights in respect of stream beds—gravel removed by Crown from stream bed—Roads Ordinance, Cap. 208—s. 4—right to take gravel for repairing public roads—s. 22—compensation to be claimed from Director of Public Works—provision for arbitration as to amount of compensation—whether Supreme Court has any jurisdiction to award compensation—Rivers and Streams Ordinance, Cap. 123—s. 5—whether owner of land adjacent to a stream has any dominion over the stream bed—Rules of the Supreme Court—Order XXV r. 5—power of Court to grant a declaration as to ownership.

The Wainadoi Creek was a stream flowing through land owned in fee simple by J. P. Bailey Limited and used as a rubber plantation. The stream flowed over large deposits of gravel which it did not always cover, its course being within certain limits not fixed, and the gravel deposits being fully covered only when the stream was in flood. Gravel from these deposits was from time to time removed by the agents of the Director of Public Works and it was alleged by the plaintiff that some of the gravel was removed from areas which were not within the limits of the stream bed. As to this the defendant joined issue and evidence was called by both parties as to the locality from which the gravel was removed and as to the behaviour of the stream. The plaintiff admitted in the pleadings that " all streams and the beds thereof belong to the Crown " but averred that " those parts of the said land from which the said gravel has been removed as aforesaid do not form part of the bed of the said Wainadoi Creek ".

HELD*.—(1) That the remedy of a person claiming compensation for gravel removed from his property by the Public Works under s. 14 of the Roads Ordinance, Cap. 208, is confined to that provided by s. 22 of the Ordinance.

(2) The effect of s. 5 of the Rivers and Streams Ordinance, Cap. 123, is to divide the rights of ownership in any stream and its bed so as to vest in the Crown only such rights of dominion as are necessary to enable the Crown to maintain public enjoyment of the stream, the person who apart from the section would be the owner of the stream bed retaining so much of the estate in the stream and its bed as is not so vested in the Crown.

Semble.—So far as any gravel remains *in situ* as an integral part of a stream bed the Crown is entitled to such dominion over it as is necesary to enable the Crown to mantain public enjoyment of the stream and the Crown can so far as necessary for such purpose prevent anyone (including the person in whom the remaining estate in the stream is vested) from interfering with it and can itself deal with it.

Cases referred to:—

(1) *Bailey v. Bailey* [1884] 13 Q.B.D. 855 ; 53 L.J.Q.B. 583 ; 50 L.T. 722.

* *See, however, Privy Council Appeal No. 101 of 1946.*

(2) *Doe D. Murray, Lord Bishop of Rochester v. Bridges* [1831] 1 B. & Ad. 847 ; 109 E.R. 1001.

(3) *Pasmore v. Oswaldtwistle Urban Council* [1898] A.C. 387 ; 67 L.J.Q.B. 635 ; 78 L.T. 569 ; 62 J.P. 628 ; 14 T.L.R. 368 ; 42 Dig. 752.

(4) *Barrawclough v. Brown* [1897] A.C. 615.

(5) *Guaranty Trust Co. of New York v. Hannay* [1915] 2 K.B. 536 ; 84 L.J.K.B. 1465 ; 113 L.T. 98 ; 30 Dig. 147.

(6) *Barwick v. S.E. & Chatham Railway Company* [1921] 1 K.B. 187 ; 90 L.J.K.B. 377 ; 124 L.T. 71 ; 85 J.P. 65 ; 37 T.L.R. 4 ; 30 Dig. 146.

(7) *Commissioner of Public Works (Cape Colony) v. Logan* [1903] A.C. 355 ; 11 Dig. 109 (n) (S.AF.).

(8) *Norwich Corporation v. Norwich Electric Tramways Co. Ltd.* [1906] 2 K.B. 119 ; 75 L.J.K.B. 636 ; 95 L.T. 12 ; 70 J.P. 401 ; 22 T.L.R. 553 ; 38 Dig. 57.

CLAIM for compensation and damages for gravel removed and for a declaration that the deposits from which gravel had been removed were upon the plaintiff's land and not part of the bed of a stream.

G. F. Grahame with *D. M. N. McFarlane* for the plaintiff.

The Attorney-General, *J. H. Vaughan,* for the defendant.

Before the opening of plaintiff's case there was discussion as to the questions of fact and law which would be particularly in issue, and it was agreed that the following matters were involved:—

1. Ascertainment of the places from which the Public Works Department had taken gravel.
2. Whether such places constituted in law the bed of the stream.
3. If gravel had been taken unlawfully is the plaintiff entitled to damages, and if so, how much ?

After completing the hearing of evidence and argument directed to these matters, on August 16, 1945, decision was reserved. On August 30, at the request of the Court, counsel appeared to argue the following questions:—

" 1. Does s. 5 of the Rivers and Streams Ordinance (or any other " statutory provision outside the Roads Ordinance) give the Crown " the right to remove portions of the bed of a stream *ex situ* for " purposes not connected with the stream ?

" 2. Has the plaintiff any claim to compensation other than under " the provisions of the Rivers and Streams Ordinance ? And, if " not, to what extent are procedure for and time of setting up a " claim governed by s. 22 of the Ordinance."

G. F. Grahame, for the plaintiff: Under s. 14 of the Roads Ordinance the Crown is not entitled to remove gravel from the bed of a stream. The power is to take gravel from " any land ", and " land " does not include the bed of a stream (irrespective of the position under the Rivers and Streams Ordinance). There is no relevant statutory provision other than the Roads Ordinance and the Rivers and Streams Ordinance. The nature of the ownership vested in the Crown by s. 5 of the Rivers and Streams Ordinance is not clear. According to its title it is an Ordinance to define publc rights. S. 9 makes it clear that the primary object is to secure the public enjoyment of streams and rivers.

At Common Law the Crown has no right to the bed of a stream. The right it has under s. 5 of the Rivers and Streams Ordinance is not absolute—it is not a right to take anything away from the stream bed. The Crown is made a trustee for the public at large—to maintain the river for the benefit of the public. In any case the Director of Public Works is not the Crown and is not empowered to go on Crown land. If he takes gravel from a stream which is on private land he is trespassing.

The plaintiff is not restricted to the remedy of s. 22 of the Roads Ordinance. S. 22 says what will happen if the claim is disallowed. Disallowed by whom ? Disallowance of a claim by the Director of Public Works cannot disentitle a claimant to take his claim to the Courts. The plaintiff is not claiming under s. 22 and the Attorney-General has not pleaded s. 22. In any case s. 22 does not extinguish the legal right to claim damages.

The Attorney-General, *J. H. Vaughan*: The right of the Crown to remove the gravel is founded in s. 5 of the Rivers and Streams Ordinance which vests ownership in the Crown without any words of limitation. I agree however that such ownership is fiduciary to the extent indicated by the words of s. 5. The Crown must not prevent the public from having perpetual enjoyment of the stream but subject only to this " trust " it has the full rights of ownership (24 Halsbury page 43). S. 14 of the Roads Ordinance applies to gravel irrespective of whether it is owned by the Crown or by a private owner. The Director of Public Works was acting as a servant of the Crown when he went on plaintiff's land to get at the gravel, this he was authorised to do by s. 14 of the Roads Ordinance, and he has done nothing to interfere with the rights of the public under the Rivers and Streams Ordinance. There is a difference in wording between s. 2 and s. 5 of the Rivers and Streams Ordinance but this is not sufficiently marked to indicate a difference in the essential nature of the title vested in the Crown. I agree however that in this case we are concerned with a stream rather than a river. It is submitted that the Crown has the right to take its own property so long as it maintains the stream and its bed so as to be open to the public.

As to the effect of the Roads Ordinance on the plaintiff's claim—the plaintiff has no action at Common Law and can claim compensation only under s. 22 (*Norwich Corporation v. Norwich Electric Tramways* [1906] 2 K.B. 119). I agree that the Ordinance says " may " and not " shall " but it nevertheless clearly excludes any common law remedy. The plaintiff did not raise this issue and the onus was not on the defendant. Even if s. 22 is omitted from consideration it is submitted that s. 14 gives no right of action so long as the power thereby conferred on the Director of Public Works is exercised lawfully.

G. F. Grahame, for the plaintiff, in reply: Plaintiff's right to compensation arises *quasi ex contractu*. S. 22 of the Roads Ordinance does not extinguish the right to compensation. These proceedings by the plaintiff are the equivalent of a petition of right.

THOMSON, J.—The plaintiff in this case is the owner of certain freehold land through which passes a watercourse known as the Wainadoi Creek which for the purpose of this action is admitted to be a stream.

From time to time (the exact dates are not material) the Crown by its servants has removed substantial quantities of gravel from portions of the earth's surface which are within the outer geographic limits of plaintiff's land and it is in respect of that removal that plaintiff now asks for relief. In particular he asks (and it is to so much of his claim that I propose to confine my attention) for :—

(*a*) Compensation in respect of the gravel removed and damages ;
(*b*) A declaration that he is entitled to such compensation ;
(*c*) A declaration that the deposits of gravel from which gravel was removed does not form part of the bed of the Wainadoi Creek.

As regards the claim for compensation and damages the question arises *in limine* as to whether the jurisdiction of this Court is not ousted by the provisions of the Roads Ordinance (Cap. 208) in view of the admitted fact that all the gravel removed by the Crown which is in issue in the case was used on the roads of the Colony adjacent to plaintiff's land.

By s. 14 of the Roads Ordinance :—

" 14. The Director (i.e. of Public Works) . . . may dig " . . . take and carry away any . . . gravel . . . for " the purpose of . . . repairing . . . any public road " . . . in and from any land adjacent or near to any such " public road and may carry away the same through the ground " of any person without being deemed a trespasser . . . Pro- " vided . . . that reasonable compensation for all materials so " taken and for the damage done by the getting and carrying away " the same shall be made to the owner thereof."

That is to say the Ordinance gives certain servants of the Crown a right to take gravel for the purposes of maintaining roads and to go through private land to take it and at the same time imposes on the Crown an obligation to pay compensation for materials taken and damage done in the taking of them to the owner of the materials.

The question of compensation is dealt with in s. 22 of the Ordinance the material portions of which read as follows :—

" 22.—(1) Every person who sustains any loss or damage by " reason of the exercise of any of the powers and authorities " conferred by this Ordinance upon the Director shall be entitled to " receive compensation for the same provided he makes application " in writing in that behalf to the Director (i.e. of Public Works) " . . .

" (2) The amount of compensation, if the same cannot be agreed " to, may be decided by arbitration . . . ."

No proceedings have been taken by the present plaintiff under s. 22 (and it is doubtful whether by reason of effluxion of time it is any longer open to him to take such proceedings) but on his behalf it was argued with much ability and persuasion that the terms of the section are merely permissive and not to be read as debarring him from asking for relief in the ordinary way through the Courts. For the Crown it was argued, with no less ability and persuasiveness, that the terms of the section are mandatory and exclude any recourse to the Courts.

On consideration I do not think there is any room for doubt. There is a considerable body of authority on the point, for the subject has always shown a touching desire to have his rights adjudicated upon by the ordinary Courts of the land particularly when he is in dispute with

the Crown in any of its modern protean manifestations. And so far as I have been able to advise myself the voice of authority is unanimous. In the case of *Bailey v. Bailey* (13 Q.B.D. 855) Brett, M.R., said (at p. 859) " It is an old and well known rule of construing statutes that when a special remedy is given for the failure to comply with directions of a statute that remedy must be followed and no other can be supposed to exist." Again it was said by Lord Tenterden, C.J., in *Doe v. Bridges* (1B & Ad. 847 at p. 859). " When an act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner ". These words of Lord Tenterden were quoted with approval by the Earl of Halsbury, L.C., in *Pasmore v. Oswaldtwistle Urban Council* [1898] A.C. 387). That was a case where the appellant had sought to compel a local authority to discharge certain duties laid down upon it by the Public Health Act, 1875, by seeking a mandamus rather than by exercising his right under s. 299 of the Act to make a complaint to the Local Government Board (as it then was). His Lordship went on to say (at p. 394): " The words which the learned judge, Lord Tenterden, uses there appear to be strictly applicable to this case. The obligation which is created by this statute is an obligation which is created by the statute and by the statute alone. It is nothing to the purpose to say that there were other statutes which created similar obligations, because all those statutes are repealed ; you must take your stand upon the statute in question, and the statute which creates the obligation is the statute to which one must look to see if there is a specified remedy contained in it."

In this present case the obligation to pay compensation to the owner of gravel taken by the Crown is created by the Ordinance and it is useless to say that such an obligation existed at Common Law because such an obligation could only exist at Common Law if the taking were unlawful and by making it lawful the Ordinance itself has swept away any Common Law obligation to pay for it. That being so I am bound to say that the principle of law as enounced by Lord Tenterden applies and that the plaintiff must confine himself to the remedy given by the Ordinance, that is to proceed in accordance with s. 22. So much of his claim as is for compensation and damages must fail. It is in vain that he has brought his votive offering to the altar of Themis, he should have taken it to another, and, to a lawyer, alien god.

And it seems to me, too, that plaintiff's claim to a declaration that he is entitled to recover compensation under the Roads Ordinance must also fail. In *Barraclough v. Brown* (1897 A.C. 615) it was said by Lord Watson (at p. 622). " In the absence of authority, I am not prepared to hold that the High Court of Justice has any power to make declarations of right with respect to any matter from which its jurisdiction is excluded by an Act of the Legislature " and again by Lord Herschell (at p. 620). " It would be very mischievous to hold that when a party is compelled by statute to resort to an inferior Court he can come first to the High Court to have his right to recover—the very matter relegated to the inferior Court—determined. Such a proposition was not supported by authority, and is, I think, unsound in principle."

But while the plaintiff is clearly precluded from obtaining a declaration that he is entitled to compensation it does not necessary follow that he is precluded from asking for a declaration as to the ownership of the

land on which was the gravel which was in fact taken by the Crown. The law relating to the making of declarations under the rules of the Supreme Court, Order XXV, r. 5 was discussed by the Court of Appeal in *Guaranty Trust Co. of New York v. Hannay* (1915 2 K.B. 536) in which it was said by the Master of the Rolls (Pickford, L.J.): "The effect of the rule is to give a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration." In this present case both the plaintiff and defendant are interested in the subject matter of the declaration asked for and I do not see that what was decided in *Barraclough v. Brown* (supra) stands in the way. The question was considered by the Court of Appeal in *Barwick v. S.E. & C. Railway Company* (1921 K.B. 187). In that case the Earl of Reading C.J., referred to the decision of the House of Lords in *Barraclough v. Brown* and went on to say (at p. 196): "If I thought that the effect of this declaration was to exercise the functions of the rating tribunals which are excluded from the jurisdiction of this Court, I should refuse the declaration; but I do not. The Court is not by this declaration exercising the jurisdiction exclusively given to the assessment committee and quarter sessions of enforcing payment of rates. Even in that case (i.e. *Barraclough v. Brown*) be it observed that Lord Watson says it is possible that their Lordships might make such a declaration if it were necessary in order to do justice. It is sufficient in the present case to say that the Court is not precluded by this decision of the House of Lords from making the declaration."

As has been said, in the present case both parties have an interest in the question of the ownership of the land and I fail to see that that question is one so exclusively within the scope of s. 22 of the Roads Ordinance as to preclude the Court from making a declaration on the point one way or the other.

At this stage it becomes necessary to revert for a moment to the facts. Up to a point they are not in dispute. It is admitted that so much of the Wainadoi Creek as is concerned in the case lies wholly within the plaintiff's land and that a considerable portion of the gravel came from the bed of that creek. As to the balance of the gravel there is a dispute between the parties, the plaintiff alleging that it came from portions of his land outside the bed of the creek and the Crown alleging that it also came from the bed of the creek.

As regards the gravel that came from the bed of the creek (and it is common ground that at least some of it came from there), in the absence of anything to the contrary the bed of the creek clearly belongs to the plaintiff. The position is, however, affected by the provisions of the Rivers and Streams Ordinance (Cap. 123). The material parts of s. 5 of that Ordinance read as follows:—

> "5. All streams . . . with the bed thereof belong to the "Crown to be perpetually open to the public for all purposes for "which streams may be enjoyed."

There are two possible constructions which can be put on that section. On the one hand it can be read to say that all right, title and interest in the bed of the stream are vested in the Crown and that the enjoyment by the Crown of what is so given to it is only limited (the word is used in its non-technical sense) to the extent that it can do nothing that would

prevent the stream being perpetually open to the public for all purposes for which streams may be enjoyed. On that reading it would be a necessary corollary that any right, title or interest in the owner of the circumjacent land would be completely and finally extinguished. On the other hand the section can be read as vesting in the Crown only so much of the estate in the land constituting the bed of the stream as is necessary to ensure that the stream and its bed may be perpetually open to the public but leaving so much of the estate as does not fall within that description in the owner of the freehold.

There is little room for doubt as to which of these two interpretations is to be preferred. The effect of either is to take away *pro tanto* a part of the property of the owner of the freehold and, when read with the Ordinance as a whole, to take it away without compensation. It is a well established principle of construction that " such an intention should not be imputed to the Legislature unless it be expressed in unequivocal terms " (*Commissioner of Public Works (Cape Colony) v. Logan* 1903 A.C. 355 at p. 364) and it follows that where, as here, there are two equally available interpretations each of which takes something away without compensation that is to be adopted which takes away the less, that is to say that which leaves to the owner of the freehold so much of his estate in the stream and its bed as it is not necessary to vest in the Crown for the assurance of public rights.

The effect of the section, then, is to divide so much of any land as forms the bed of a stream notionally but not physically, that is to say certain of the rights of ownership are vested in the Crown and all that is left remains vested in the party who, apart from the section, would be the owner of the whole, in this present case the plaintiff. The rights in any piece of land which are vested in the owner of the freehold are, of course, many and varied and it is not necessary to enumerate them here. Nor would it be necessary, if they were enumerated, to attempt a precise and exhaustive classifiation on the one hand of the rights given to the Crown by the Ordinance and on the other hand of those remaining to the plaintiff. All that interests the parties here is a declaration of ownership in so far as it affects the gravel which forms part of the bed of the stream.

So long as that gravel remains *in situ* as an integral part of the bed the Crown is clearly entitled to dominion over it to this extent that so far as necessary to maintain public enjoyment of the stream it can prevent anyone (including the plaintiff) from interfering with it and can itself deal with it. Subject to the ownership of that right of dominion on the part of the Crown all the remaining right title and interest in the land belong to plaintiff as owner of the freehold.

The plaintiff, then, will have a declaration in the following terms: " That all deposits of gravel forming part of the land described and comprised in certificate of title volume IX/05 folio 226 are upon the land of the plaintiff subject to this that the ownership of the plaintiff of so much of the land as forms the bed of the Wainadoi Creek is subject to the right of the Crown to exercise such rights over the bed of the said creek as are necessary to ensure that the said creek shall be perpetually open to the public for all purposes for which streams may be enjoyed."

Having reached that conclusion it becomes unnecessary to consider in these proceedings plaintiff's claim for a declaration that certain portions of the land in question do not form part of the bed of the Wainadoi

Creek and there remains only the question of costs. The action was substantially one for compensation and on that the plaintiff has failed. The defendant therefore must have the costs of the action generally. With regard, however, to certain of the issues which were not seriously contested in the early stages of the trial but were later argued at length at the request of the Court each side has to a cetrain extent succeeded and so in respect of the proceedings subsequent and consequent to the Court's request for further argument each side will pay its own costs.

KAMPTA PRASAD *v.* VITHAL BHAI PATEL.

[Civil Jurisdiction (Seton, C.J.) October 10, 1946.]

False information given to police officer resulting in arrest of person named—charge laid by police—whether malicious prosecution or false imprisonment by person giving false information.

Patel's store was robbed by a party of persons none of whom he recognised but who were in due course convicted of the offence.

In the early stages of the police investigation Patel falsely informed the police that he recognised the robbers and stated that they were three persons, including Kampta Prasad, whom he named. The three persons named were arrested by the police and were in custody for a week—at the end of which time they were released as the investigations had discovered the real culprits.

HELD.—(1) A person who gives false information to a police officer as a result of which the police arrest a person named in such information does not thereby falsely imprison the person named in the false information.

(2) If a criminal charge is made as a result of false information given to the police the person who gave the false information is not thereby liable in proceedings for malicious prosecution of the person so charged.

Cases referred to:—

Pandit Gaya Parshad Tewari v. Sardar Bhagat Singh and or [1908] 24 T.L.R. 884 ; 33 Dig. 472.

ACTION for damages for false imprisonment and malicious prosecution. The facts are fully set out in the judgment.

N. S. Chalmers, for the plaintiff.

S. B. Patel, with *A. D. Patel,* for the defendant.

SETON, C.J.—The plaintiff claims from the defendant damages for false imprisonment and for malicious prosecution. On the night of 8/9th November, 1944, about 11 p.m., the defendant, who has a small store at Semo, Nadroga, was lying in bed in his store, but not asleep, when a number of shots were fired at the building, some of which penetrated it. The defendant got up, went into the shop and turned up the lamp ; then someone began to bang on the door and wall of the