FOURTH SUPPLEMENT TO THE
GIBRALTAR GAZETTE L.R. 4/79

No. 1,844 of 22nd NOVEMBER, 1979.

LAW REPORTS

Note: These Reports are cited thus —
(1979) Gib. L.R.

ATTORNEY GENERAL v. LOMBARD

Supreme Court
Spry, C. J.
4 September, 1979

Foreshore — whether there is a general public right of passage to the sea
Constitutional law — fundamental rights — freedom of movement — The Constitution, s. 13.

The defendant applied for permission to operate a canoe-hiring service at Catalan Bay but it was refused. Nevertheless, he continued to carry on the business. When the Attorney General applied for an injunction to restrain him, he claimed that he was exercising a common law right or, alternatively, a fundamental right under the Constitution.

HELD: (i) The Crown has beneficial ownership of the foreshore and a person using it is a trespasser unless he is exercising a specific right or has been given permission.

(ii) The foreshore cannot be equated to a highway and the public enjoy no general rights of passage over it.

(iii) The common law right of access to the sea for fishing and navigation is the same in Gibraltar as in England.

(iv) Canoing for recreation, returning to the place from which one starts, does not constitute navigation.

Cases referred to in the judgment

Brinckman v. Matley [1904] 2 Ch. 313
Brinckman v. Matley [1904-7] All E.R. Rep. 941

Action

This was an action for an injunction brought by the Attorney General to restrain the defendant from using the beach and foreshore at Catalan Bay for his business of hiring out canoes.

F. E. Pizzarello for the Attorney General
D. J. Faria for the defendant

14 September 1979: The following judgment was read—

This is an action in which the Attorney General is seeking an injunction to restrain the defendant

> "from continuing to enter or use Catalan Bay its beach and the seashore or foreshore for the hire or otherwise of canoes."

The background to the action is as follows. By a Government Notice tenders were invited from persons interested in providing "boat hiring facilities" from one or more of three beaches, Eastern Beach, Sandy Bay and Camp Bay. The defendant tendered for the right to operate 10 canoes from Camp Bay. His tender was accepted. According to his evidence, which was somewhat confused, he began operating his canoe service from Rosia Bay. It was not successful, so he tried Sandy Bay and Eastern Beach, again without much success. He then begin hiring out his canoes from Catalan Bay. On 4 June 1979, Mr Faria wrote, on behalf of the defendant, to the Surveyor and Planning Secretary to the Government, asking that the permission granted to the defendant to operate from Camp Bay be extended to allow him to operate from Catalan Bay. This was refused. Notwithstanding the refusal, the defendant continued to hire out canoes from Catalan Bay. The Attorney General then took out a writ for an injunction.

The case for the Attorney General, as presented by Mr. Pizzarello, is quite simply that the beach and foreshore are Crown property and that the defendant in going across them with his canoes for the purposes of his business is a trespasser. So far as the defence alleged an exercise of the common law right of access for navigation, Mr. Pizzarello submitted that there is no such right in Gibraltar. He argued that the right that undoubtedly exists in England is a customary one, which cannot apply here because Gibraltar was acquired by conquest and because after the conquest there was an interval when Spanish law applied. He also submitted that if there was any right of navigation being exercised, it was by the hirers of the canoes and not by the defendant.

Mr. Faria, for the defendant, submitted that the right of access to the sea for navigation is a common law right, not one based on custom. For this proposition, which I accept, he relied largely on *Brinckman v. Matley* (1). He also argued that just as the owner of a fishing boat might exercise his rights through agents or employees, so the defendant might invoke the right of access for navigation even though he himself never went in his own canoes.

I think, with respect, that the right of access to the sea for fishing and navigation exists in Gibraltar as it does in England. I think the history of conquest is irrelevant. It is unnecessary to go back further than 1962, when the Application of English Law Ordinance was enacted. By s. 2 of that Ordinance

> "The common law and the rules of equity from time to time in force in England shall be in force in Gibraltar, so far as they may be applicable to the circumstances of Gibraltar and subject to such modifications thereto as such circumstances may require..."

I know of nothing that makes the common law rules relating to the foreshore inappropriate to Gibraltar or to require any modification of them. The section goes on to refer to legislative modification or exclusion but in this context I am aware of none. I hold that the common law rights concerning the foreshore are the same in Gibraltar as in England.

The weakness of Mr. Faria's argument, as I see it, is that it assumes that paddling in a canoe for recreation, returning to the point from which one started, amounts to navigation. With respect, I cannot accept that. To navigate, according to the Shorter Oxford English Dictionary is primarily to go from one place to another in a ship and navigation is commonly used for the art or science of finding a course across the ocean or through rivers or canals. It has been extended to finding a course through the air. In my opinion, the element of going from one place to another is essential to navigation, using the word in its ordinary meaning. On that basis, the recreational canoing for which the defendant caters is not navigation.

---

(1) [1904] 2 Ch. 313,

Mr Faria did not contend that there was any other common law right on which he could rely. He did, however, put forward a separate argument based on the Constitution of Gibraltar. He invoked s.13, which protects freedom of movement. That section begins

> "No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Gibraltar..."

The section is not creating a new right: it is intended to prevent interference with existing rights. Obviously, it is not conferring freedom to wander at will over Crown land or private property and to make it relevant, Mr. Faria was forced to equate the foreshore to the public highways. There is, however, clear authority for saying that the foreshore is not to be equated to a highway. Such a proposition was advanced when *Brinckman v. Matley* went to the Court of Appeal (1), and it was rejected by all three judges of a strong Bench. In particular, Romer, L. J., held that a defence argument that "there is a general right on the part of the public of passing and re-passing for all lawful purposes along every part of the foreshore. In other words,..... that the foreshore is to be regarded as a species of public highway" was contrary to authority. Cozens-Hardy, L. J., found no authority to "support the right of the public to go on the foreshore for the purpose of bathing or for the purpose of recreation." Finally, Vaughan Williams, L. J., at the end his judgment, said

> "It is sufficient to say that it is true that the Crown holds the foreshore upon such terms that it has to recognise the jus publicum, whatever it is, over the foreshore, and to do nothing which is inconsistent with that jus. The jus, so far as the right of navigation and the right of fishing are concerned, to use the foreshore for those purposes is a right which has a great deal of authority to support it. But except for those rights, the Crown has beneficial ownership of the foreshore..."

---

(1) [1904-7] All E.R. Rep. 941.

I am satisfied that the defendant has no right either at common law or under the Constitution to use the beach or foreshore at Catalan Bay for the purpose of his business and that in using them he is at law a trespasser. That the business itself is not unlawful is irrelevant. It may be that the public or a section of the public have by custom acquired certain rights to use the beach and foreshore at Catalan Bay but customary rights have to be proved by evidence and no evidence was called to prove, nor was it even argued, that any customary right exists relating to canoes or the hiring of canoes. There will be an injunction in terms as prayed.