

The action was for the recovery of land and an injunction and damages in respect of an obstruction to the flow of the waters of a creek.

The judgment appealed against awarded the plaintiff \$300 damages and costs in respect of the creek, but dismissed the claim for the land without costs, and ordered the defendants to keep their culverts in good repair.

The appeal and cross-appeal were heard by MEREDITH, C.J. C.P., RIDDELL, LENNOX, and ROSE, JJ.

E. D. Armour, K.C., for the defendants.

D. O'Connell and J. Wearing, for the plaintiff.

MEREDITH, C.J.C.P., in a written judgment, said that the land of which the plaintiff sought to recover possession was the westerly half of a travelled highway, his contention being that the true easterly boundary of his land ran along the middle of the travelled part of the highway, the whole length of his land. His lot was the north half of 4; the next lot to the east was 5. More than 20 years ago, the owners of the north half of 5 sold to some of their neighbours, for the purposes of a highway, 45 feet in width of lot 5 all along its westerly limit. A provincial land surveyor was employed to run the line between 4 and 5; he ran that line accordingly; and the road was at once made along that line; and it had ever since been a highway, 45 feet in width, intended and supposed to be upon the strip of land purchased for that purpose. The road was said to be now a gravelled road. As the case was not one of a mere right of way over land, but of the purchase and actual possession by the purchasers of land, cutting trees, digging ditches, making line-fences, etc., the plaintiff's right to recover seemed to be barred by the Limitations Act; the possession by the purchasers was sufficient for that purpose. The onus of proof of the true easterly limit of his land was on the plaintiff. He endeavoured to prove that the road was upon his land to some extent; but the trial Judge was quite right in finding that the plaintiff had not satisfied the onus.

On this branch of the case the judgment of the trial Judge should be affirmed, with a variation: that part of it intended to permit further litigation of the question of recovery of possession by the plaintiff of the highway, or any part of it, should be struck out.

Upon the original allowance for road, and at the north-east corner of the plaintiff's land, the creek makes an abrupt turn, forming an elbow, thence running away from the plaintiff's land