

for their sole and only use forever, subject, nevertheless, to the following conditions: The first condition was that the defendants should fence and keep fenced at their own expense the land conveyed to them, and place an entrance and gate on the right of way at the north and south limits of the land conveyed for the use of the plaintiff, his heirs and assigns, and all persons claiming under him or them, whenever he or they may require the same. The second condition was that the defendants should put and maintain the right of way in a reasonable state of repair until the happening of a certain event, and thereafter that the plaintiff and defendants should each bear a proportionate part of the repairs necessary, according to their respective requirements. Certain other conditions were also made. There was a covenant for quiet possession for the purposes aforesaid, and subject to the conditions aforesaid. The plaintiff released to the defendants all his claims upon the land, save as aforesaid, and for the purposes aforesaid. The conveyance contained no provision that the lands should not be put to any other use, and no condition making the grant void upon the happening of any event subsequent to the grant.

*Held*, (1) that under the terms of the conveyance the defendants acquired an absolute estate in fee simple, free from any condition of defeasance, and unincumbered by any trust restricting the use to which they should put it; and that under s. 9 of the Municipal Waterworks Act, R.S.O., c. 192, they had the right to dispose of the land when no longer required for waterworks purposes.

(2) That the grant of the right of way gave to the defendants and their employees footway, carriage-way, and way for horses, but conferred no right of way upon persons to whom the defendants might sell or lease land.

*Hoyle, Q.C.*, and *James A. McLean* for the plaintiff.

*Doherty* for the defendants.

#### MCNAMARA v. SKAIN.

*Building contract—Action by contractor for price—Drawback of twenty per cent.—Action brought before drawback due—Counterclaim for liquidated damages for delay—Reply of matters arising since action—Amendment—Construction of contract—Extension of time—Necessity of application for—Enforcement of provision for liquidated damages.*

In an action by a contractor to recover the balance due under a building contract, the defendants sought to take the benefit of a provision in the contract which entitled them to retain twenty per cent. of the full amount of the contract price and extras till thirty days after the completion of the work. The trial judge allowed this defence to be set up, though it was not pleaded; and he found that the work had not been completed for thirty days when the action was begun. The defendants, however, pleaded a counterclaim for liquidated damages under the contract for delay in the completion of the work; and the trial judge allowed the plaintiff to amend his reply by setting up as an answer to the counterclaim that the twenty per cent. had accrued due since the action was begun.

*Held*, that the trial judge had dealt properly with the pleadings and the questions depending on them; and that the plaintiff might reply matters of defence arising after action as an answer to the counterclaim.