

was impossible for the plaintiff to have access by waggon or other conveyance to her land. The plaintiff had built upon the land purchased by her and used it as a place of residence in summer.

The defendant, admitting the conveyances, pleaded that if any part of the road or bridges had been at any time not in as good condition as at the time of the conveyance to Graham, the condition was caused by the act of God and not by the defendant's fault or negligence.

It was clear upon the evidence that for years prior to the making of the covenant there had been a constant erosion of the lake-shore—this was known to every one who was familiar with that part of the country; and it was the continuance of this erosion which, according to the defendant, caused the condition of the road of which the plaintiff complained. The defendant contended that performance of the covenant was thus excused: *Corpus Juris*, vol. 13, pp. 642, 643, secs. 717, 718.

But, where a subsequent impossibility of performance might have been foreseen by the promisor and he chooses to bind himself absolutely, he is not excused: *op. cit.*, p. 639, sec. 711; *Paradine v. Jane* (1648), *Aleyn* 27; *Atkinson v. Ritchie* (1809), 10 East 530, 533, 534; *Halsbury's Laws of England*, vol. 7, para. 877, p. 427.

In view of the history of the washing away by the waters of the lake, the covenant must be taken to have been obtained as a guaranty on the part of the grantor so to protect the road that the waters would not wash away the bank of the lake so as to render the road impassable and leave the grantee or his assigns without any means of access to the lands conveyed. The grantee knew that what had happened might happen again, and insisted upon and obtained the covenant, which was to be regarded as an absolute covenant, not merely to keep the road in repair so long as it should exist, but to indemnify the grantee against the impossibility of repairing on account of the washing away of the banks.

The plaintiff was, therefore, entitled to a judgment requiring the defendant to put the road in as good condition as it was at the time of the conveyance to Graham and to replace the bridges thereon and to maintain the same in such good condition—or alternatively to furnish and maintain a road and bridges sufficient to give the plaintiff access to her land over land of the defendant still remaining—with \$5 damages and costs of the action.

If the plaintiff chooses to claim substantial damages, there should be a reference to the Master at London to assess the same.