HIGH COURT DIVISION.

MASTEN, J. NOVEMBER 5TH, 1918.

MEMBERY v. SMITH.

Highway—Unopened Road Allowance—Obstruction by Fences—Substantial Injury to Plaintiff—Deprivation of Access to Land—Right to Maintain Action—Surveys Act, R.S.O. 1914 ch. 166, sec. 19—Mandatory Injunction—Trivial Dispute—Costs.

Action for a mandatory injunction requiring the defendant to remove an obstruction across an alleged highway.

The action was tried without a jury at Napanee.

D. Urquhart, for the plaintiff.

J. L. Whiting, K.C., for the defendant.

MASTEN, J., in a written judgment, said that the plaintiff was the owner of lots 19 and 20 on the south side of First street according to a plan of Adolphustown. The defendant was the owner of a number of adjoining lots. Upon a plan of the village made in 1825 there was shewn, running easterly and westerly through the lands of the plaintiff and defendant, an allowance for a highway. It was admitted that this allowance had never been opened, taken over, or improved by the municipal authorities. The defendant had been accustomed to use his lands for purposes of pasture; and, in order to keep his cattle from straying into the village, had placed fences across the whole peninsula at the extremity of which the plaintiff's lands were situated. The lands of the defendant intervened between the lands of the plaintiff and the principal portions of the village. The plaintiff's access by land to his lots was thus obstructed; but at First street the defendant had arranged an entrance through his fence by means of bars. The defendant did not assume to prevent the plaintiff from travelling along First street to his lots, but declined to remove the fences or bars where they were on the unopened highway.

The case raised one point only, whether the plaintiff had sustained such substantial injury beyond that suffered by the rest of the public as enabled him to maintain this action.

Notwithstanding that the plaintiff's lands were of small extent, producing only wild and marsh grass and fit only for a little