A judgment was read by HODGINS, J.A., who said that the judgment appealed against was mainly in favour of the plaintiffs, who, however, contended that it did not go far enough, as only $200 was allowed for damages for trespass, and complained that the deed to them had been construed as if it had been subject to a reservation which enabled the defendants to insist on the uninterrupted flow of the water through the raceway as it existed when the deed to the plaintiffs was given.

The right granted or reserved must be determined by the use actually adopted before the grant is made. The use, when the grant to the plaintiffs was made, was the flow of the water down to and for the purposes of the mill; and, in view of the accepted findings of the trial Judge, the question was narrowed to this: Was the use reserved by the grantor when the deed to the plaintiffs was given, or did that deed carry with it the right to an easement over the remaining lands, which the plaintiffs put an end to when they voluntarily filled in the raceway at both ends.

At the time the defendants' deed was given, the lands in it were subject either to an easement in favour of the lands already granted, which the grantee in that deed might at any time abandon and which he could not be compelled to continue, or no such easement existed, and both parcels were conveyed merely as so much land then covered as to part by water. If the former was the true situation, there was nothing for the words of the Act (R.S.O. 1914 ch. 109, sec. 15) to cover in favour of the defendants. If the latter, it was impossible to include in the deed to the defendants any easement or right in relation to the watercourse. The actual use was for mill purposes; and the enjoyment of the flow of water in the raceway was for that alone, and not for the benefit of the flats, to which it was not an appurtenance; while the suggested public right was negatived by the findings of the trial Judge.

To give any other construction to these two deeds would present the anomaly of rendering the land in the earlier one the servient tenement, while it was in fact dominant, for that fact must be determined by the use to which the raceway was actually put at the time of the severance.

The appeal should be allowed, and the judgment varied by striking out paras. 4, 5, and 6, and all the words after "of this action" in para. 7. The damages allowed should not be interfered with. The defendants should pay the costs of the appeal.

Reference, among other cases, to Wheeldon v. Burrows (1879), 12 Ch.D. 31; Burrows v. Lang, [1901] 2 Ch. 502; and Union