

The Ontario Weekly Notes

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No. 13

APPELLATE DIVISION.

SECOND DIVISIONAL COURT.

JUNE 4TH, 1920.

*KERRIGAN v. HARRISON.

*Covenant—Conveyance of Land—Grant of Right of Way over Road
—Covenant to Keep Road in Repair—Construction of Covenant
—Consideration of Attendant Circumstances—Excuse for Non-
performance—Impossibility of Performance—Change in Con-
dition—Action of Water upon Bank of Lake—Encroachment
—Soil Newly Covered by Water Vested in Crown—Enforcement
of Covenant to Perform Illegal Act—Damages for Non-per-
formance—Public Policy.*

Appeal by the defendant from the judgment of FALCONBRIDGE, C.J.K.B., 46 O.L.R. 227, 17 O.W.N. 141.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, and MASTEN, JJ.

J. M. McEvoy, for the appellant.

J. A. E. Braden, for the plaintiff, respondent.

MULOCK, C.J.Ex., in a written judgment, said, after setting out the facts, that the evidence shewed that the waters of Lake Erie had imperceptibly and gradually advanced upon and overflowed the land where the road once was. The legal effect of this encroachment had been to vest in the Crown the soil thus covered by water: *Rex v. Lord Yarborough* (1824), 3 B. & C. 91; *In re Hull and Selby Railway* (1839), 5 M. & W. 327; *Foster v. Wright* (1878), 4 C.P.D. 438, 446; *McCormick v. Township of Pelée* (1890), 20 O.R. 288, 290. Nevertheless the plaintiff contended that the defendant was still bound by her covenant.

*This case and all others so marked to be reported in the Ontario Law Reports.