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COURT OF APPEAL.

JUNE 28TH, 1912.

MAYBURY v. O'BRIEN.

3 O. W. N. 1546; O. L. R.

Vendor and Purchaser — Statute of Frauds — Receipt Sufficient Memorandum.

Action by plaintiff for specific performance of an alleged agreement for the sale of certain lands entered into with an agent presumably acting for defendant. Defendant denied the agency and pleaded the Statute of Frauds.

CLUTE, J., gave judgment for plaintiff, 20 O. W. R. 683; 25 O. L. R. 229; 3 O. W. N. 393, holding that the following receipt: "Sault Ste. Marie, June 16th, 1911. Received from Alfred W. Maybury Two hundred dollars account purchase 28½ ft. x 132, being pt. lot 19, N. Queen adjoining Sault Star Bldg. on East. Price 225.00 per front ft., terms 200.00 down, balance of $1,937.00 after approved title & documents, 500.00 in Sept. & March, balance of equity about $1,000.00 equally in Dec. 11 and June 12, remainder semi-annually about $500.00 in Sept. & March each year until paid. Interest 7%, purchase price $6,412.50, Wilcox and Pardee, by Mr. Jno. B. Pardee," who, at the same time wrote on the stub as follows: "Date June 16th, 1911. Name Alfred W. Maybury. Address a/c purchase from Wm. O'Brien property 28½ feet adjoining Star Building, $200 check," was a sufficient memorandum to satisfy the 4th section of the Statute of Frauds.

COURT OF APPEAL *held*, that there was no sufficient evidence that Pardee was defendant's agent for the sale of the property, and that if such an agency was to be inferred, it was for a sale in which one-third of the purchase-price was to be in cash, whereas the alleged sale provided for the payment of $200 in cash, the balance to be paid "on approval of title and documents," which constituted a distinct departure from the terms of the agency and rendered it void.

Appeal allowed and action dismissed, both with costs.

An appeal by the defendant from the judgment of HON. MR. JUSTICE CLUTE, without a jury, in favour of the plaintiff, 20 O. W. R. 683; 25 O. L. R. 229; 3 O. W. N. 393.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR.

JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE LENNOX.

W. M. Douglas, K.C., for the defendant.

A. W. Anglin, K.C., for the plaintiff.

HON. MR. JUSTICE GARROW:—The action was brought to enforce specific performance of an alleged agreement in writing by the defendant, to sell to the plaintiff certain lands in the town of Sault Ste. Marie. The agreement is thus pleaded and set out in the statement of claim:—

"2. On or about the 16th day of June, 1911, the defendant agreed to sell to the plaintiff, and the plaintiff agreed to buy from the defendant, part of lot nineteen (19) on the north side of Queen street in the said town of Sault Ste. Marie, being the westerly half of said lot, south of King street, in the said town, except the westerly twenty-six and one-half feet (26½), for the price of six thousand four hundred and twelve dollars and fifty cents ($6,412.50), payable as follows:

"Two hundred dollars ($200 down, balance of nineteen hundred and thirty-seven dollars and fifty cents ($1,937.50), after approval of title and documents. Ptn. of equity about one thousand dollars ($1,000), equally in December 11th and June 12th, remainder semi-annually, about five hundred dollars ($500), in September and March each year, until paid. Int. 7%. A note or memorandum of which agreement is in writing and signed by Wilcox and Pardee by John B. Pardee, who were thereunto, by the defendant, lawfully authorized."

The agreement referred to reads as follows:—

"Sault Ste. Marie, June 16th, 1911.

"Received from Alfred W. Maybury,

"Two hundred dollars, a/c. purchase 28½ ft. x 132, being pt. lot 19, N. Queen, adjoining Sault Star Buld. on East. Price, $225.00 per front ft. Terms, $200.00 down, blce. of $1,937.50 after approval title and documents. $500.00 in Sept. and March. Blce. of equity about $1,000, equally in Dec. 11th and June 12th. Remainder semi-annually, about $500.00 in Sept. and March each year until paid. Int. 7%. Purchase price, $6,412.50.

"Wilcox & Pardee, by Jno. B. Pardee."

The defendant denied making the agreement, denied that Wilcox and Pardee were, or that John B. Pardee was, his agents, or agent, or had his authority to make such an agreement, and pleaded the Statute of Frauds as a defence.

At the trial, an application to amend was made by the plaintiff by adding to the paragraph of the statement of claim, before set out, these words: "and a further note or memorandum of which is also in writing and signed by the defendant." Which note or memorandum, consisting of an entry made at the time by the defendant in his note-book, is as follows:—

"June 15. Sold 28½ feet, N. Queen, to J. B. Pardee, price, $225 00 per foot, one 3/1 cash.

Total purchase price $6,412 50

3/1 cash, $2,132.50.

Balance of O.B. equity payments, Dec. and June. Interest 7%. Keenan payments to be assumed as per agreement. Cost of property.. 4,788 00

$1,624 50

After some evidence had been given, the amendment was allowed. This memorandum was unsigned, but it is said the "O.B. Equity" means the defendants' equity in the lands, and that, therefore, this memorandum, written by himself, in which he uses the initials of his name, is a sufficient signature under the statute. The memo', however, was made in the course of the negotiations, and when made it is clear no agreement had then been arrived at.

The learned trial Judge was of the opinion: (1) that the defendant had appointed Mr. Pardee his agent, and had authorized him to make the agreement in question, and (2) that the agreement referred to, and set out in the statement of claim, was sufficient to satisfy the Statute of Frauds.

My difficulty is to accept the first proposition, which, with deference, I think was not proved. This proposition seems to divide itself into two questions: (1) was Mr. Pardee an agent for the defendants for any purpose? and (2) if he was, was he or his firm authorized to make the particular agreement sued on? And, I think, both should be answered in the negative. They are both, of course, questions of fact, and in dealing with them I am bound to regard

the learned trial Judge's statement that he prefers the evidence of Mr. Pardee to that of the defendant, when they differ.

The onus was upon the plaintiff to prove, by reasonable evidence, an agency in fact. There were and are no circumstances in the case to justify a finding that the alleged agency was an agency in law, or in other words, arose by estoppel, and, indeed, no such contention is advanced.

Now, what is the evidence? And I will take Mr. Pardee's own statement for it. He says he had frequently acted for the plaintiff in buying lands. He acted for him in making a re-sale of the same lands to Mr. Plummer at an advanced price. At the opening of the negotiations in question, he went to the defendant on behalf of the plaintiff. No claim is made that at or prior to that time, he was acting or had any authority to act, either personally, or for his firm, for the defendant. He did not inform the defendant for whom he was acting, but the conversation implied that he was acting for a principal. "I mentioned that my purchaser would like to have an answer at once."

"Q. He never said anything to you about two hundred dollars, did he? A. No. I do not think he did.

"Q. And he never said anything to you about signing any receipt, did he? A. No.

"Q. You and Mr. O'Brien were dealing at arms' length, were you not? A. We were dealing in the office there.

"Q. You know what I mean? A. No, I do not know what you mean by arms' length.

"Q. You were dealing as one man would with another in a business transaction? A. Exactly.

"Q. There was no association between you? A. No.

"Q. There was no common interest? A .No.

"Q. You were trying to get the best terms you could for your client? A. Yes.

"Q. And he was trying to get the best terms he could for himself? A. Yes.

"Q. You for Maybury, he for O'Brien? A. Exactly.

"Q. He told you he would not sell unless he had a third cash? A. Exactly.

"Q. Which was what you understood? A. Yes.

"Q. And you finally came down to the terms, one-third cash? A. Exactly.

"Q. What did you understand by that? A. A third of the total payment.

"Q. Cash down on the signing of the agreement? A. I presume so, yes.

"Q. And so far as you are concerned, is that all that you had to do with it? A. That is all.

"Q. Then you signed the receipt, exhibit 3, as you thought, in pursuance of some authority given you by Mr. O'Brien? A. No, I signed it as we do generally; we take a deposit when we sell property.

"Q. So that that was quite apart from any actual authority given you? A. Yes, I cannot recall any actual amount named as a deposit by Mr. O'Brien.

"Q. Nothing was said about a deposit, was there? A. Well, it went without saying, if we sold the property we would take a deposit.

"Q. That is your usual practice? A. Yes.

"Q. And there was no other mention of any terms or conditions in connection with the agreement than those which you have indicated? A. Exactly."

Then, after the personal interview, what took place was entirely over the telephone.

"Q. You got so far as stating that Mr. O'Brien rose from his desk and you took that as an intimation that the interview was over, and you left? A. I did.

"Q. And you stated that immediately before that you stated to Mr. O'Brien that the purchaser would consent to the increase in the cash payment? A. No, I did not.

"Q. What was said? A. Mr. O'Brien said to me, after rising from his desk, that he would call me up in the evening and let me know the best terms he would sell on—the best cash payment . . . .

"Q. Mr. O'Brien did not call you up? A. Mr. O'Brien did not call me up that evening. On the following morning I called Mr. O'Brien up at his hotel. I was informed that he was not in. I left word for him to call me up when he did come in. He did so, I should say, in the neighbourhood of ten or fifteen minutes afterwards. He stated to me that he would sell on the proposed terms of a third down, the

balance of his equity, about a thousand dollars, in December, 1911, and June, 1912, at 7 per cent. interest, and the purchaser assume Mr. Keenan's payments under Mr. Keenan's agreement. I informed Mr. O'Brien, over the telephone, that if I could sell on those terms I would do so without consulting him further. He said that was satisfactory. Mr. Maybury came into the office a few minutes afterwards, and I told him I was able to sell Mr. O'Brien's property at the price of $225 a foot under the terms as he stated to me. Mr. Maybury stated to me that he would take the property. I then called up Mr. O'Brien, got him on the 'phone in Mr. Maybury's presence, and told him that I had sold the property. Mr. O'Brien answered, 'All right.' I asked him who was looking after his interests in the matter, and he informed me that Boyce & Hayward—

"Q. What next? A. Mr. Maybury then gave me $200—a cheque for $200—to bind the bargain, and I gave him a receipt for it."

I am wholly unable, even without the defendant's denial, to see in this evidence, which is the whole story upon that branch of the case, any reasonable evidence that the defendant appointed or agreed to appoint Mr. Pardee or his firm his agents. A man is not to have an agent thrust upon him in that way. The appointment necessarily results from a contract, in which there must appear, in some shape, an offer upon the one hand and an acceptance upon the other, out of which there grew the mutual rights and responsibilities of the relation. Down to the conversation over the telephone, there is not the very slightest room to even pretend that either party contemplated the alleged agency. Mr. Pardee was there in the defendant's office as the representative of the plaintiff, and of him alone. He was the "purchaser" who wanted an immediate answer, and it was in his interests and not the defendant's that Mr. Pardee haggled over the down payment with the defendant, which he wished to have reduced. The defendant's impression of what occurred is set out in the memo. in his note-book before set out, put in by the plaintiff, which he says he read over to Mr. Pardee, who does not, so far as I see, deny the statement, in which the defendant states that the sale was to Mr. Pardee himself. This memo., fairly read, is utterly inconsistent with an agency such as that alleged, or of any other kind.

Then, in the conversation by telephone, the expressions "I informed Mr. O'Brien that if I could sell on these terms I would do so," and "I told him I had sold the property," and the defendant's reply, "all right," are to be read in conjunction with the earlier course of the negotiations, and are, I think, perfectly consistent with Mr. Pardee still being in the defendant's opinion, the agent only of the purchaser, and are wholly insufficient, in the light of all the evidence, to create in such an obscure and indirect manner the important relation now claimed for them of also making him the agent of the vendor.

Then, upon the second question as to the alleged authority to make the particular agreement which was made—the instruction on Mr. Pardee's own shewing was to make an agreement upon the term (among others) of one-third cash on signing the agreement, and he made no such agreement. What he did make was an agreement stipulating for $200 down, and the balance of the one-third cash payment when the title and documents were accepted. I cannot, with deference, agree that these mean the same thing. It is, however, not exactly that, but whether an explicit instruction has been followed. It is, in other words, a question of power and authority, pure and simple, and, in my opinion, there was no power or authority to substitute for one-third cash on signing the agreement, the term of $200 down and the balance when the title and documents were accepted. The latter doubtless had in Mr. Pardee's eyes the merit of giving him so much of the defendant's money in hand, in case there should subsequently be a dispute about his agency for the defendant, and its resulting commission, which if he did not claim he would be a very unusual agent.

Upon the whole, and without entering upon some of the other matters discussed before us, which in my opinion become unimportant in the view which I take of the facts, I think for the reasons I have given that the appeal should be allowed and the action dismissed with costs.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE and HON. MR. JUSTICE LENNOX agreed.

HON. MR. JUSTICE MEREDITH:—Accepting as accurate, as the learned trial Judge did, the testimony of the witness Pardee as to his conversation, by telephone, with the de-

fendant, referring to the sale in question, this witness was authorised by the defendant to sell the land in question for him, on the terms they had before discussed. It can mean that and cannot mean anything else.

But one of the terms was that one-third of the whole price was to be paid in cash. The agreement in question provides for payment of "$200 down, balance of $1,937.50 after approval, title and documents." It is contended that these terms are substantially the same; that "after approval title and documents" is the same as "cash"; and, if the whole of the one-third of the price were to be paid on approval of title and documents, there might be a good deal to be said in favour of the contention, whether enough to support it or not need not be considered, for if it be so then the agent has departed from the terms in accepting $200 down. If the cash payment were made on accepting title it would come into the hands of the vendor himself if he desired it; as the agreement is made it may never come to his hands; I can find in the evidence no authority for splitting the cash payment; and the objection to the agreement on that score is not altogether a fanciful one; or might not be in many cases. It is plain that the agent deliberately split the single cash payment into a "down" payment and a payment on completion of the sale, with the advantage to him of having $200 in hand, an advantage of some substantiality in case of disputation as to a right to commission upon the sale.

On this ground I would allow the appeal.

COURT OF APPEAL.

JUNE 28TH, 1912.

BATEMAN v. CO. OF MIDDLESEX.

3 O. W. N. 1541; O. L. R. .

Negligence—Physician Answering Hurry Call—Before Dawn—Rig Crashed into Obstruction on Highway — Dr. Hurled Out and Injured Internally — Absence of Warning—Liability of Municipality — Refusal to Submit to Operation — Reasonableness — Neurasthenia — Varied Expert Evidence — Finding of Fact by Judge—Duty of Appellate-tribunal—Quantum of Damages.

Plaintiff, a physician, was answering a hurry call before dawn when his buggy crashed into an obstruction which had been left on the highway by those engaged in repairing the same. Plaintiff was hurled out and was internally injured. He brought action to recover $25,000 damages, alleging negligence on the part of defendant municipality. Evidence shewed that no light was placed upon the obstruction as a warning.

RIDDELL, J., *held*, 19 O. W. R. 442; 24 O. L. R. 84; 2 O. W. N. 1328, upon the evidence, that the defendants, the county corporation, were liable in damages for the plaintiff's injuries.

The accident caused a falling of the right kidney, an injury to the right pleura, an infected gall bladder and a milder form of neurasthenia. The most serious matter was the prolapsed kidney, the plaintiff being over fifty-five years of age:—

Held, upon the evidence, that the plaintiff was not called upon to submit for an operation for the kidney.

If a patient refuses to submit to an operation which it is reasonable that he should submit to, the continuance of the malady or injury which such operation would cure is due to his refusal and not to the original cause. Whether such reufsal is reasonable or not is a question to be decided upon all the circumstances of the case. If the medical attendant be competent, and no attack be made upon his honesty, it is not unreasonable for the patient to refuse to submit to an operation against the advice of the attendant—which was this case.

Tutton v. *Owners of S. S. Majestic*, [1909] 2 K. B. 54, specially referred to.

The neurasthenia was as truly an injury as a broken bone.

Judgment for plaintiff for $12,500 damages and full costs of suit.

Divisional Court, 20 O. W. R. 567; 3 O. W. N. 307; 25 O. L. R. 137, dismissed with costs an appeal by the county, from above judgment.

COURT OF APPEAL reduced damages to $10,000, holding that it was not proven beyond a doubt that the prolapsed kidney was due to the accident in question.

Power of Court to review findings of fact by trial Judge discussed, and *Jones* v. *Hough*, 5 Exch. D. 115, at p. 122, referred to.

Phillips v. *London & S.-W. Rw. Co.*, 4 Q. B. D. 406; 5 Q. B. D. 78; 5 C. P. D. 280, and

Church v. *Ottawa*, 25 O. R. 298; 22 A. R. 348, referred to on question of *quantum* of damages.

Plaintiff given costs of trial, no costs of either appeal to either party.

[*See*, also, *Bradenburg* v. *Ottawa*, 14 O. W. R. 318; 19 O. L. R. 34, on question of *quantum* of damages.—*Ed.*]

An appeal by the defendant from a judgment of Divisional Court, 20 O. W. R. 567; 3 O. W. N. 307; 25 O. L. R. 137, affirming a judgment of HON. MR. JUSTICE RIDDELL, 19 O. W. R. 442; 24 O. L. R. 84; 2 O. W. N. 1328, in favour of the plaintiff.

The appeal to Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

Sir George C. Gibbons, K.C., and J. C. Elliott, for the defendants.

T. G. Meredith, K.C., and J. M. McEvoy, for the plaintiff.

HON. MR. JUSTICE GARROW:—The action was brought against the defendant to recover damages sustained in consequence of the want of repair of a highway under the charge and control of the defendant. The learned Judge awarded the sum of $12,500, as damages, and the only question really before us is whether or not such sum is excessive. The judgment of Riddell, J., is reported in 19 O. W. R. 442; 2 O. W. N. 1238; 24 O. L. R. 84. No written judgments were apparently delivered in the Divisional Court, so that we are pretty much in the dark as to the view there taken. See 20 O. W. R. 567; 3 O. W. N. 307; 25 O. L. R. 137.

In the reasons for appeal it is said, apparently without contradiction from the other side, that some members of the Court expressed the opinion that although the damages were much larger than they would have given, they would not interfere because the verdict is not so perverse and unreasonable that if it had been tried by a jury twelve intelligent men might not have arrived at the same conclusion. It is of course dangerous to trust in such a matter to the recollection of counsel, who may not remember accurately the whole statement. All, therefore, that I can say upon the subject is that if such a statement was made and was the foundation for the judgment, it does not express my view of what the law is upon the subject, because it apparently fails to discriminate between a trial by a Judge alone and a trial by a Judge with a jury.

The distinction is very clearly expressed by Bramwell, L.J., in *Jones* v. *Hough*, 5 Ex. D. 115, at p. 122, where he

is reported to have said: "If upon the materials before the learned Judge he has in giving judgment come to an erroneous conclusion upon certain questions of fact and we see that the conclusions are erroneous, we must come to a different conclusion, and act upon the conclusion that we come to, and not accept his finding. I have not the slightest doubt such is our power and duty. A great difference exists between a finding by the Judge and a finding by the jury. Where the jury finds the facts the Court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury, but where the Judge finds the facts there the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like. I have no doubt, therefore, that is our jurisdiction, our power and our duty."

This language has been quoted more than once with approval in Canadian Courts: see *North British, &c.* v. *Tourville,* 25 S. C. R. 177, at p. 193; *Prentice* v. *Consolidated Bank,* 13 A. R. 69, at p. 74; see also the remarks of James, L.J., in *Bigsley* v. *Dickinson,* 4 Ch. D. 24, at p. 29. And a finding as to damages can stand upon no other footing than any other finding made by a Judge trying the case without a jury.

What is a reasonable sum is always to me a difficult question, from answering which I would gladly escape if consistent with my duty. The principles deducible from the cases of authority upon the measure of damages do not in my experience go very far in helping one except along general lines. The real difficulty is that within these lines there is almost always so much reason for honest difference of opinion.

The question of the proper measure of damages in such cases as this was much discussed in the well-known case of *Phillips* v. *London & S. W. Rw. Co.,* 4 Q. B. D. 406, affirmed in 5 Q. B. D. 78. That was the case of a surgeon of middle age, with a very large professional income, said to have been about £5,000 net per annum. The injury of which he complained had rendered his condition absolutely helpless, with no hope that he would ever be able to resume practice. The charge of Field, J., to the jury at the first trial, was after much discussion, in the end upheld as a correct guide upon the law of the case. In it he said: "Perfect compensation is hardly possible and would be unjust. You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and

you must always recollect that this is the only occasion on which compensation can be given. Dr. Phillips can never sue again. You have, therefore, to give him compensation now, once for all. He has done no wrong. He has suffered a wrong at the hands of the defendants, and you must take care to give him full, fair compensation for that which he has suffered." And upon the subject of the loss of income, a question also involved in this case, he said: "You are not to give the value of an annuity of the same amount as the plaintiff's average income for the rest of the plaintiff's life. If you gave that you would be disregarding some of the contingencies. An accident might have taken the plaintiff off within a year. He might have lived, on the other hand, for the next twenty years, and yet many things might have happened to prevent his continuing his practice."

At the first trial a verdict was rendered by the jury for £7,000 damages, which was set aside at the instance of the plaintiff as too little, and a new trial directed. Upon the second trial the jury gave a verdict of £16,000, which was also moved against, this time, by the defendants, as excessive, but the Court refused to interfere: see 5 C. P. D. 280. And see also *Church* v. *Ottawa,* 25 O. R. 298, affirmed in this Court in 22 A. R. 348, which was also the case of an injury to a physician.

That the present plaintiff sustained a severe injury, from the effects of which it is improbable at his time of life that he will ever fully recover, is beyond question. But that he will so far recover as to be able to resume the practice of his profession in a somewhat modified form, perhaps within a comparatively short period, is, I think, the fair result of the evidence. The three items of injury which bulk the largest are thus summed up and commented upon by Riddell, J.: "The difficulty at the liver could probably be overcome by a surgical operation of a comparatively simple character; the neurasthenia may be expected to be fairly well overcome in about a year longer, but the prolapsed kidney is another story," the learned Judge evidently regarding the latter as the most serious of them all.

Prolapsed or movable kidney is, it appears from the evidence of the medical experts, a by no means uncommon condition, not always, nor I would infer, usually or necessarily, a very disabling defect, since patients may be so affected for very long periods, and even for life, without ever becoming aware of it. In the plaintiff's case it was not dis-

covered until some six weeks after the accident—after he had gone to the baths at Mount Clements, although before that he had been examined more than once by local physicians and was himself one of long experience. Dr. Primrose in his statement says that the prolapsed condition may or may not have been caused by the accident. And I am not able to find in the evidence of the other medical witnesses any more positive evidence or evidence which displacs this statement. And if the matter rests as put by Dr. Primrose, as in my opinion it does, the fact is not established for, of course, the burden of proof is upon the plaintiff, who must incline the balance in his direction, not by a mere scintilla, but by a reasonable amount of legal evidence. In this connection—that is, the condition of the plaintiff's kidneys before the accident—the evidence of Mr. Robertson, a wholly disinterested witness, also is of some importance, who said that several months before the accident the plaintiff told him that he was being troubled by his kidneys, and that his hard work and hard driving were using him up. The plaintiff denies this, and says there was never even a conversation, and that he was never troubled with his kidneys, but as between the two there is no reason why the usual rule as to crediting the disinterested witness should not be followed. But while for these reasons I incline to think that the evidence, as it stands, does not warrant the conclusion that it is established that the prolapsed condition of the kidney was caused by the accident, I think it highly probable that as the blow which the plaintiff received was in its vicinity, the kidney was injured to some extent in the accident, since there is evidence of blood and pus in the urine, which could not otherwise be reasonably accounted for.

The plaintiff was not able to point to any decided diminution in income as the result of the accident, although it would be natural to expect a falling off to some extent. And it is quite probable that although the plaintiff will resume practice, he may have to decline the more arduous work to which he has been accustomed, elements which, of course, very properly enter into a consideration of the amount of damages, and which I have I hope duly considered.

Upon the whole, after in the language of Field, J., applying to the circumstances such reasonable common sense as I possess, I have, with deference, come to the conclusion that the amount awarded at the trial is substantially too large, and should be reduced. And the amount I would

consider fair and just under all the circumstances would be $10,000, which if it errs at all, as it probably may seem to do, to the minds of the next appellate tribunal, errs, I think as I believe we all do, on the side of being generous to the plaintiff.

The plaintiff should have the costs up to and inclusive of the trial, and there should be no costs to either party of the motion in the Divisional Court or of this appeal.

COURT OF APPEAL.

JUNE 28TH, 1912.

MANN v. FITZGERALD.

3 O. W. N. 1529.

Ejectment—Action in—Peninsula in Lake—Survey—Road Allowance—Crown Patent—Paper Title.

An action of ejectment in which plaintiff sought to recover a parcel of land known as Deihl's point, a peninsula extending into Cameron Lake, physically connected with lot 26, con. 10, Fenelon, but lying in front of lot 25. There is an allowance for road between lots 25 and 26, and this, if extended across the bay behind the peninsula, would cross it at a narrow frontage. Plaintiff contended that the water line should be followed quite regardless of directions, and thus the whole peninsula would be included.

MIDDLETON, J., 20 O. W. R. 848; 3 O. W. N. 488; 1 D. L. R. 26, *held*, that the more natural thing to do was to follow the water's edge to where the road allowance extended across the bay intersects the shore of Cameron Lake at the western side of the peninsula and then turn easterly. The effect of this was that the peninsula situate in front of lot 25 and partly in con. 9 and partly in con. 10 is not patented. Taking that view as to what passed by the patent plaintiffs had no paper title to the lands in question, nor had defendants any title. Action dismissed with costs.

COURT OF APPEAL dismissed appeal from above judgment with costs.

An appeal from a judgment of HON. MR. JUSTICE MIDDLETON, 20 O. W. R. 848; 3 O. W. N. 488; 1 D. L. R. 26.

The appeal to Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

E. D. Armour, K.C., and A. D. Armour, for the plaintiffs.

R. J. McLaughlin, K.C., for the defendant.

HON. MR. JUSTICE MAGEE:—The land in question is the outer end of a peninsula projecting from the front of broken lot No. 26 in the 10th con. of Fenelon township,

southwesterly into Cameron lake. The peninsula is separated from the mainland by a bay running up north-easterly about 10 chains, into the southerly side of that lot, the total length of the bay or peninsula being over 40 chains, and the peninsula itself projects as far south as the middle of lot 25, which is south of lot 26, and separated from it only by a side road allowance. The question is whether the south boundary of lot 26 on the mainland should be extended across the bay and peninsula. The plaintiff claims it should not be so extended, but that the whole peninsula is part of lot 26, and was included in the Crown grant of that lot under which he deduces title. The defendant claims that the line should be so extended and that all south of it belongs to him as owner of lot 25.

The township was surveyed in 1824 by James Kirkpatrick, under written instructions from the Surveyor-General. Those instructions directed that the township should be laid out into concessions 66 chains and 67 links wide, and each concession into lots 30 chains wide, thus containing 200 acres each. No latitude was given the surveyor as to including in any lot any parcel beyond such boundaries which might more conveniently be occupied with it. Actually he was only to survey and mark the centre lines of the roads between the concessions and mark the side lines of each lot and side road, and should the waters of any lake come within the survey they were to be accurately traversed, the contents of each broken lot were to be calculated and stated on each, and a plan of the survey was to be made out and sent to the Surveyor-General's Department with the field notes.

Under these instructions the only way of ascertaining the length of these two lots would be from the traverse of the lake shore. If that is in existence it is not produced, and the field notes being only of the work on the concession road allowances, do not aid. There is some evidence that this peninsula extends so far west that the west part of it would be in the 9th concession, and that the concession road would run north and south across it. But according to the field notes of that concession road, the lake extended across it from lot 23 to lot 31. The plan sent in by the surveyor shews no peninsula or bay, but shews the lake shore of lot 26 as being wholly east of the centre line of the 10th concession, and the lot is marked as containing only 78 acres.

In the absence of any record of the traverse of the lake it is impossible even to guess whether it was the peninsula

or the bay, which the surveyor failed to see. He shews the northern boundary of lot 26, much shorter than the southern boundary, and in that respect his contour of the shore, wrong as it is, would roughly correspond with the actual lake frontage of the lot down to the disputed parcel. His line of shore trending to the east as it went north across lot 26, he may have got by inaccurate sighting from some point to the north or west, where the bay would not be seen, and thus he would be led into drawing the plan wrongly as he did.

If it were in truth the bay which was omitted, and he intended the line of shore upon his plan to represent the outer or western side of the peninsula, then the line between the lots should be carried to that side. No work on the ground along the side road or side lines was required to be done by the surveyor, and there is nothing but the plan to indicate the division line between these two lots, and according to it the line extends till there is nothing beyond it but the main body of the lake. It seems to me as reasonable to suppose that he omitted the bay as that he omitted the peninsula, and if he did then this land would belong to the defendant.

No argument can be drawn against that supposition from the fact that the length of the side road on the plan approximates the actual length measured to the bay, and is much short of the length to the peninsula, for it is evident the lengths were mere guess work, and there is in fact greater discrepancy at the northern boundary than at the southern.

But assuming that it was the peninsula which the surveyor failed to see or to survey or to note on his plan, I agree with the learned trial Judge, that it cannot be said this land was granted by the Crown as part of lot 26. Neither according to the surveyor's instructions nor to any actual work by him on the ground, nor according to his plan or field notes, nor according to the description by metes and bounds in the letters patent, did it form any part of that lot. The Crown never knew of any land called lot 26, extending beyond the northerly and southerly width of 30 chains and the easterly and westerly length of 66 chains and 67 links. In giving instructions for running the lines in that way it reserved to itself the discretion as to joining in a grant, parcels which could more conveniently be held or worked together. No discretion was given to the surveyor, and there is nothing to shew that he attempted to exercise

any such discretion or so depart from his instructions. No land outside the prescribed dimensions is anywhere shewn as constituting part of this lot, and the absence of any marks of division on the peninsula is accounted for by the fact that no division anywhere along the line was called for or made, except at its eastern end.

The description in the letters patent does not strengthen the case for the plaintiff. It runs westerly along the northern boundary to Cameron lake and "then southerly, westerly, and southerly to the southern limit of said broken lot No. 26, in said 10th concession, otherwise to the allowance for road between broken lots Nos. 26 and 25," and then easterly. This southerly, westerly, and southerly course does not even affect to follow the lake shore and more nearly agrees with the defendants' contention than with the plaintiff's, in fact, as the plaintiff would have to interpolate also an easterly and a northerly course. The reference to the side road accords with either contention, and the distances from the township line given for the northerly and southerly courses, though far astray, correspond relatively rather with the line claimed by the defendant. So far as the letters patent are concerned, we are, therefore, left to the meaning to be attributed, "Broken Lot No. 26," and the Crown having never consented to name any land as lot No. 26, which would cover the land in dispute, cannot, I think, be held to have granted it, and the judgment of the learned trial Judge should be sustained.

The evidence shews that ever since 1868 the land in dispute has been recognized by the resident owners of each lot as belonging to lot 25. The owners of lot 25 have sold timber upon it, and trespasses upon it have been reported to them by the neighbouring owner of lot 26. The line of side road across the peninsula was surveyed and marked by a surveyor at the instance of the owner of lot 26, in 1868, and was afterwards pointed out between successive owners of lot 26, as their boundary, and the land in question has been known as Diehl's point, called after Peter Diehl, who owned lot 25 from 1833 to 1853. Continuously since 1882, excepting a few years, the owner of lot 25 has been receiving rentals from lumber firms for the right of "snubbing" timber along the shore. In every way, so far as acts of ownership of land of such character and so situate could

be expected, have the owners of lot 25 been acting as owners. Until these plaintiffs in 1909 obtained by discreet wording, a conveyance from J. J. Eades, who did not pretend to own the land, and did not think he was conveying it, it was never questioned between the owners of the two lots that it formed part of lot 25. Although there is no fence between the two lots at the peninsula, there is low swampy ground, and it is not shewn that even cattle from lot 26 crossed more than a very few times. There has been no attempt at shewing any act of ownership by the proprietors of lot 26, and there was in fact, I think, upon the evidence, clearly a discontinuance of possession by them for more than 40 years, if any possession by any of them could be said to have been had.

The appeal should be dismissed with costs.

COURT OF APPEAL.

JUNE 28TH, 1912.

LEFEBVRE v. TRETHEWEY SILVER COBALT MINE LIMITED.

3 O. W. N. 1535.

Negligence—Master and Servant—Fatal Accidents Act—Contributory Negligence—Damages—Findings of Jury.

Action by widow and children of one Alfred Lefebvre, under the Fatal Accidents Act, to recover damages for his death through the alleged negligence of defendants. At the time of the deceased's death he was employed by defendants as a painter, and in the course of his duty, was killed by high voltage electric wires which passed a short distance from the scaffold where he was painting. There was nothing to shew the exact mode of the deceased's death, his body being found on the wires. The jury found defendants negligent, in that they did not sufficiently warn deceased of, nor protect him from, the danger, and negatived the existence of contributory negligence.

FALCONBRIDGE, C.J.K.B., gave judgment for plaintiffs for damages on the findings of the jury.

DIVISIONAL COURT dismissed appeal therefrom, with costs.

COURT OF APPEAL dismissed appeal therefrom, with costs.

Per GARROW, J.A.:—"It is not necessary to prove by a demonstration how a death by actionable negligence occurred."

Evans v. *Astley*, [1911] A. C. 674, followed.

An appeal by the defendant from a judgment of Divisional Court, 30th November, 1911, dismissing an appeal from a judgment of HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B., and a jury, in favour of the plaintiffs.

The appeal to Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON.

MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

M. K. Cowan, K.C., for the defendants.

McGregor Young, K.C., for the plaintiffs.

HON. MR. JUSTICE GARROW:—The action was brought by the widow and children of the late Alfred Lefebvre under the Fatal Accidents Act, to recover damages caused by his death while a workman in the employment of the defendant as a painter, under circumstances of alleged negligence on the part of the defendant.

The deceased was engaged upon a scaffold in painting a building owned by the defendant in the immediate vicinity of certain wires carrying a high voltage of electricity, with which he came in contact and was killed. No one actually saw the accident. When first seen immediately afterwards the deceased was lying upon the wire apparently lifeless. He had evidently commenced work and had painted so far upon one side that it was necessary for him to descend by the ladder by means of which the scaffold was reached and remove the ladder in order to pass to the other side. He had apparently just accomplished this and got again upon the scaffold when he met with the accident.

The scaffold was about 20 inches wide and consisted of two loose planks. The board which was to be painted was immediately over the wires.

The deceased had been warned by the master carpenter, Mr. Henderson, about the danger of going near the electric wires. "Don't go within two feet of them," Mr. Henderson says he told him. The warning certainly seems sufficiently definite and emphatic. And that the deceased understood seems probable, for he replied, "that is all right, I understand, I painted all the O'Brien wires or fixtures."

Then on the morning of the accident, the 24th of August, 1910, it is clear that something occurred between Lefebvre and McNaughton, the defendant's manager. McNaughton says Lefebvre met him near the building and pointing up to the fascia board, said, "Will I paint that?" and I said, "No." He says "No." I said, "No—you keep on to the machine shop where you were painting," and that was all that passed. They were seen talking apparently about the board by two other witnesses, Stocker and Dempster, but they could not hear what was said. The evidence, however, leaves no room for doubt that within half an hour from the time when Lefebvre had been thus warned by McNaughton

not to paint he had brought his paint pot and brush and had painted part of the board, and been killed by the wires.

The very fair, clear and careful charge of the learned Chief Justice left nothing to be desired in that direction, and no objection to it was taken by counsel for the defendant.

The jury answered the questions submitted as follows: The death of Lefebvre was caused by the negligence of the defendant. Such negligence consisted—if any instructions were given by McNaughton same were not properly given so as to be understood by Lefebvre: scaffolding was such as to render the position of Lefebvre while at work over dangerous high voltage wires unsafe. No notices warning the public or workmen of the danger were posted up. Wires were not properly protected or insulated for a sufficient distance from the building—no contributory negligence. Lefebvre was not directed by McNaughton on the morning of the accident not to work at the transformer, but to keep on at the machine shop. Henderson had probably previously warned Lefebvre in a general way, but the warning would be overridden by subsequent instructions given by McNaughton. And they assessed the damages at $4,000, the apportionment to be made by the Court. Counsel for the defendant now contends, as he contended at the trial, that there was no evidence proper for the jury, that the deceased was acting contrary to orders and in spite of express warnings and that in any event there is no reasonable evidence as to how the contact with the wires occurred. I am, however, unable to accede to these contentions or any of them. There was, it seems to me, evidence of negligence on the part of the defendant causing the death which could not have been withheld from the jury. It is not necessary to prove by a demonstration how a death by actionable negligence occurred. See *Evans* v. *Astley*, 1911, A. C. 674, at p. 678. There must of course be something more than mere conjecture, in other words some reasonable evidence from which the necessary inference may be drawn. And such evidence is found it seems to me in the conditions under which the deceased was here required to work. Suicide is not suggested. The deceased is said to have been both a careful and an experienced man. Intentional contact is therefore quite out of the question, and there remains only the probability of accidental contact arising from the cramped and insecure position upon the scaffold in which he required to be to do the work.

This, of course, assumes that he was properly there at the time. And it appears to me that the jury have dealt fairly and intelligently with that as well as with the other questions. They evidently did not believe McNaughton, which they were quite at liberty to do, and indeed at which I am not astonished, for his story seems highly improbable in the light of what occurred immediately afterwards. What seems much more probable is that he pointed out the board to Lefebvre that morning and told him to paint it while the scaffold was there, which the unfortunate man at once proceeded to do, and in doing so met his death.

I would dismiss the appeal with costs.

COURT OF APPEAL.

JUNE 28TH, 1912.

KING v. NORTHERN NAVIGATION COMPANY.

3 O. W. N. 1538; O. L. R. .

Negligence—Engineer on Steamer—Killed by Falling through Open Hatchway—Action for Damages by Widow—No Implied License to Enter upon Steamer—Evidence—Action Failed.

Action by Annie Law King, widow of William King, alleged to have been employed by defendants as chief engineer on their steamer Ionic, for $1,000 damages for his death caused by falling through an open hatchway of defendants' steamer Huronic on March 6th, 1911, while crossing over its deck to get access to the Ionic.

On 7th March, the dead body of plaintiff's husband was found in the hold of the steamer, laid up at a dock for the winter. Deceased had been employed during the previous season and had been engaged for the next season as engineer of another steamer laid up alongside the one in which his body was found, which he would have to cross to reach the other. He had, apparently, in attempting to cross, fallen from the main deck through the hatch, which had been left open and unprotected. No one saw him fall; and the exact cause of death was not proved; but no suggestion of any cause other than a fall was made.

CLUTE, J., entered judgment for plaintiff for $3,900, apportioned between herself and children, and costs.

DIVISIONAL COURT *held*, 20 O. W. R. 220; 3 O. W. N. 172; 24 O. L. R. 543, that the jury were justified in finding that it was due to the fall.

McArthur v. *Dominion Cartridge Co.*, [1905] A. C. 72, followed.

But, *held*, upon the evidence, that the deceased was not upon the steamer in the course of his employment, nor was he to be regarded as a licensee; and he was, therefore, a trespasser, and the defendants owed him no duty, and were not liable to the plaintiff for negligence in leaving the hatch open and unprotected.

Lowery v. *Walker*, [1911] A. C. 10, distinguished.

Grand Trunk Rw. Co. v. *Barnett*, C. R., [1911] A. C. 345, followed.

Appeal allowed, action and cross-appeal dismissed with costs.

COURT OF APPEAL dismissed appeal from judgment of Divisional Court with costs, holding, however, that deceased was not a trespasser, but a bare licensee, which did not alter his legal position, as there was no evidence of active negligence on the part of defendants.

Perdue v. *Can. Pac. Rw. Co.*, 15 O. W. R. 836, referred to.

An appeal by the plaintiff from a judgment of Divisional Court, 20 O. W. R. 220; 3 O. W. N. 172; 24 O. L. R. 643, reversing a judgment of HON. MR. JUSTICE CLUTE, in favour of the plaintiff, at the trial.

The appeal to Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, and HON. MR. JUSTICE MAGEE.

A. Weir, for the plaintiff.

R. J. Tower, for the defendants.

HON. MR. JUSTICE GARROW:—The action was brought under the provisions of the Fatal Accidents Act, by the plaintiff on behalf of herself and her infant children, to recover damages caused by the death of her late husband William King on March 6th, 1911, under circumstances of alleged negligence on the part of the defendant.

The deceased had been in the employment of the defendant as chief engineer on the steamship Ionic during the sailing season of 1910. The ship was laid up for the winter with other ships of the defendant, at the Port of Sarnia, and it was, it is said, in an attempt to go on board that the deceased lost his life by falling down an open hatchway on the ship Huronic.

The statement of claim alleges that the deceased was in his lifetime and at the time of his death employed by the defendant as chief engineer of the steamboat Ionic, and that on the 6th of March, he had occasion on the business of the defendant, in their employ and for their benefit, to go to the steamboat Ionic, and in order to do so had to cross the Saronic and the Huronic, that he went as aforesaid with the leave and license of the defendant and upon its invitation, that he went to the Ionic properly and lawfully upon business which entitled him to go and be upon the Ionic, that the defendant had in pursuance of a system which was defective and grossly negligent left a hatchway open and unguarded on the main deck of the Huronic upon the route which persons going from the dock to the steamboat Ionic would naturally take, thereby placing a dangerous trap in the pathway across the Huronic, which was only dimly lighted, and the main deck of the Huronic had been recently oiled, and that the open and unguarded hatchway

was a defect in the condition or arrangement of the ways, plant or premises connected with or intended to be used in the business of the defendant, and the leaving it open and unguarded constituted negligence on the part of the defendant's employees, who had superintendence entrusted to them while in the exercise of such superintendence within the meaning of the Workmen's Compensation for Injuries Act.

It is not very easy from this kind of pleading to quite understand or arrive at the exact ground upon which the plaintiff intends to rely, since practically every ground at common law or under the statute is apparently invoked. The deceased is said to have been an employee, also an invitee and a licensee, and the victim of a system. But if there is mystery in the pleading there is really none in the facts, which in their essential features are absolutely simple and uncontradicted. And at the risk of repeating in my own way what is already very fully reported, of the case in the Divisional Court, in 24 O. L. R. 643, I propose as briefly as possible to restate them here.

The deceased had been in the employment of the defendant during the previous season, and had been engaged for the following season, to begin on April 1st. On December 12th, Mr. Gildersleeve, the defendant's manager, sent him the following letter upon which much stress was laid at the trial:—

"Northern Navigation Company, Limited,
Manager's Office.

H. H. Gildersleeve, manager.

Sarnia, Canada, Dec. 12th, 1910.

To the engineers of the steamers Harmonic, Huronic, Saronic, and Ionic:—

Outfitting of steamers.

Dear Sir:—

You will please take notice that it is the intention of the company this year to outfit the engine on your steamer as soon as the vessels are laid up.

With the close of your contract for this year, you will be allowed regular wages until such time as your boat is outfitted.

It will be necessary for you to practise the strictest economy, and no supplies are to be purchased nor are you to take any of your machinery to a shop without an order

from the company's chief engineer, Mr. Samuel Brisbin, who will have charge of all the steamers at this port."

Yours truly,

H. H. Gildersleeve,

Manager."

Mr. Brisbane named in the letter is in summer chief engineer on the steamboat Huronic, but in winter has general superintendence over all the defendant's ships at Sarnia.

There is no evidence that the deceased replied to the letter. About New Year's he saw Mr. Brisbane, who asked him if he wanted to come back, and he said he did—that is, for the following season. Mr. Brisbane then told him "to lay the boat up and then start to fit her out at the same rate per day as you are getting per month." The deceased accordingly after laying the boat up commenced the work of fitting out and continued at it until the 17th of February following, when Mr. Brisbane again spoke to him, and said: "I think you are about done now . . . You will start on the first of April again to fit out—to do the rest of the work." The deceased accordingly quit work and was entirely idle from then until his death on the 6th of March. He had working with him in the work of fitting, the second engineer, Mr. Duff, an oiler, and one or two firemen, over whom he had oversight. All these quit work by his direction at the same time as he did, and the second engineer was told by the deceased to return on April 1st to resume work. There is no evidence of any direction or communication of any kind between the deceased and the defendant or anyone on its behalf, after the 17th of February. Some time before that date the new agreement for the season of 1911 was entered into between the deceased and the defendant, the service to begin on the 1st of April following. When he quit work on February 17th, he left his tools on the ship in the engineers' room, which he had occupied during the previous season, of which he carried a key. On the morning of his death he asked his wife, the plaintiff, for a little tin in which to bring back from the boat a little white lead, wanted for painting purposes at his house, which he was to ask "Mike" for, and said to her either then or a day or two earlier that he was going to the boat to see how the boiler makers were getting on. This was the last thing actually known of him until his dead body was found in the hold of the Huronic the next day, although a sailor

said he saw him on the street apparently going towards where the boats were.

The gangway across the Huronic to the Ionic was opened for the first time on the morning of the 6th of March to enable lumber to be carried in to the Ionic for the purpose of repairs then being made. When the deceased had last been there, there was no such access through the Huronic. There was some, but not perfect, light along the gangway on the Huronic, and it when opened formed the most direct and convenient mode of access to the Ionic. The hatchway had been opened for purposes of necessary ventilation. It lay in the line of the gangway across the Huronic, and a person using the gangway would be very apt, if not observing it, to fall into it.

There was evidence that on the 6th of March, there were carpenters and other workmen engaged at work upon the Ionic, but there was no evidence that the deceased had any charge or superintendence over them, or any of them, or that in going upon or towards the boat on the occasion in question, he did so at the request, express or implied, of the defendant or in the discharge of any duty which he owed to the defendant, or that such act was otherwise than wholly voluntary on his part.

At the trial Clute, J., appeared to be of the opinion that there was some discrepancy, to be solved by the jury, between Mr. Gildersleeve's letter, obviously only a circular letter, addressed not to the deceased alone, and the subsequent somewhat limiting orders and directions given by Mr. Brisbane. I am with deference quite unable to adopt that view. It is, I think, quite immaterial to determine whether or not the deceased's employment at the work of fitting was, as the letter says, to be until that work was completed, for at the utmost it was quite open to the defendant to direct suspension of the work at any time. The real engagement clearly was that subsequently made with Mr. Brisbane, under which the deceased went to work, was paid, and also quite willingly apparently, quitted work as directed.

The law, both at common law and under the statute, has wisely surrounded the servant with certain safeguards for his safety and protection. He may for instance claim a safe place to work in, safe tools, materials, and appliances with which to carry on his master's operations, care in the selection of competent overseers and foremen, etc., but all

these only when and so far as may be necessary for his protection while actually working. It is for the master to say when he shall work. And if the master provides no work but continues to pay, the servant cannot complain. All he need do is to be ready and willing when called on. When the servant is not engaged in work for the master, he has no more right to complain of the defective conditions of his master's premises than has any other stranger.

It is clear, therefore, upon the admitted facts that in so far as the action is based upon the relation of master and servant, it utterly fails.

The Divisional Court was apparently of the opinion that the deceased was under the circumstances in the position of a trespasser. I do not, with deference, consider it necessary to go quite so far. My inclination, rather, is to regard the unfortunate man upon the evidence, as in the position of a bare licensee, although the result so far as the action is concerned would not, I think, in law, be different. His past and future employment on the boat, the key which he carried, and all the other circumstances might not unreasonably lead him at least to think that he was at liberty to go upon the boat upon the occasion in question without special leave of the owners. This, however, would not place him in the position of an invitee, or indeed in any higher position than the one which I have indicated. And the only duty which an owner of premises owes to such a person is not to deceive him by means of a trap, or to be guilty of any act of active negligence, of which on the occasion in question there is no reasonable evidence. See *Perdue* v. *Canadian Pacific Rw. Co.*, 15 O. W. R. 836. The licensee must otherwise take the premises as he finds them.

The plaintiff's action, therefore, seems to me upon the undisputed facts to wholly fail.

I would, for these reasons, dismiss the appeal with costs.

COURT OF APPEAL.

JUNE 28TH, 1912.

IMPERIAL PAPER MILLS CO. v. QUEBEC BANK.

3 O. W. N. 1544; O. L. R. .

Banks and Banking — Advances by Bank to Milling Company — Security Taken on Timber under Promise in Writing to Give Security—Validity of Security under s. 90 of the Bank Act—Company in Liquidation—Issues to be Determined—Forum for—Right of Bank to Defend Action without Leave and Press Claim to Timber—Description of Property—What is Necessary to Identify?—Lien of Bank for Payment of Government Dues—Rights of Liquidator — Receiver—Action for Injunction—Damages—Costs.

Action by plaintiff company and one Clarkson, receiver for the bond holders of the company, against defendant bank, for an injunction, and for the recovery of certain spruce and balsam logs claimed by defendant under certain securities taken from the company for advances under s. 90 of the Bank Act. The bond mortgages under which plaintiff Clarkson claimed, expressly excepted from their operation "logs on the way to the mill." The advances made from time to time by defendant bank were made on the strength of letters from plaintiff company to defendant bank, promising that security would be given, and plaintiffs urged that they were not sufficiently precise and definite to meet the requirements of the statute.

BRITTON, J., *held*, 19 O. W. R. 908; 2 O. W. N. 1503, that the logs in question were, in part, those covered by the securities given to the defendant bank, and that the advances were made to plaintiff company on the strength of the promises that such securities would be given.

That plaintiff company, having admitted all along that the logs belonged to defendant bank, the liquidator was in no higher position than plaintiff company, and was not in a position to dispute the validity of defendant bank's claim.

Rolland v. *L'Caisse d'Economic*, 24 S. C. R. 405, followed.

That the letters promising to give the securities in question, were sufficiently definite to satisfy the statute, as was also the description of the property covered by such securities.

Rules as to description of property as set out in Falconbridge on Banking, pp. 188-9, approved of and adopted.

Judgment for defendant, with costs.

COURT OF APPEAL dismissed appeal from above judgment, with costs.

Per MACLAREN, J.A.:—Section 90 of the Bank Act should not be construed so strictly as to require a precise and technical promise or agreement to give security where the transactions are honestly conducted and above-board.

Per MEREDITH, J.A.:—"Logs on the way to the mill" embrace all logs from the time they are cut in the forest until they reach the mill, notwithstanding they are delayed in transit.

An appeal by the plaintiffs from a judgment of HON. MR. JUSTICE BRITTON, 19 O. W. R. 908; 2 O. W. N. 1,500.

The appeal to Court of Appeal was heard by HON. SIR CHAS. MOSS, C.J.O., HON. MR. JUSTICE GARROW, HON.

MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH and HON. MR. JUSTICE MAGEE.

H. W. Anglin, K.C., and J. H. Moss, K.C., for the plaintiffs.

F. E. Hodgins, K.C., and D. T. Symons, K.C., for the defendants.

HON. MR. JUSTICE MACLAREN:—The plaintiffs, the Imperial Paper Mills Co., and Clarkson, as receiver for the bondholders of the company and as liquidator of the company, appeal from the judgment of Britton, J., dismissing their action for an injunction and for the recovery of certain spruce and balsam logs which the Quebec Bank claimed under certain securities purporting to be executed by the company under section 88 of the Bank Act.

Counsel on both sides spent some time in the discussion of certain minor and technical points as to the effect of the winding-up order, the conduct and intentions of the parties, the constitution of the action, etc., but these were not very strongly pressed and may be properly passed over and the contest decided upon the merits.

On the 6th October, 1898, and the 15th December, 1901, the Sturgeon Falls Pulp Co. in consideration of the expenditure of large sums for the erection of pulp mills, the payment of Government dues, etc., acquired from the Provincial Government the exclusive right for 21 years to cut spruce and other timber on a large area of Crown lands. These rights were subsequently assigned to the plaintiff company on the 7th May, 1903.

On the 22nd September, 1903, this company executed a mortgage deed of trust in favour of the trustees, executors and Securities Insurance Corporation for £100,000 upon "the whole property, assets, rights, privileges and undertaking of the company present and future (excepting logs on the way to the mill)" to secure bonds of the company to that amount.

On the 18th November, 1903, it executed another debenture mortgage in favour of Messrs. Carritt & Sinclair for £200,000 "upon the whole property, assets, franchises and undertakings of the company present and future (excepting logs on the way to the mill)" to rank after the mortgage deed of the 22nd September, 1903.

Counsel for the plaintiffs argued that the above exceptions applied only to logs on the way to the mill at the re-

spective dates of the mortgages. I cannot accede to this argument, as I do not consider it the natural meaning of the document and think it was properly construed by the trial Judge. The words are in my opinion used in their normal and natural sense. In each instance they immediately follow the words "present and future," and if they were intended to have the restrictive meaning suggested I think the phrase would have read "logs now on the way to the mill or some equivalent expression would have been used. Besides the whole tenor of the instruments shews that these mortgages were to be mere "floating securities," and that it was the general intention that the company while meeting its obligations under these instruments was to be allowed to carry on its business in the usual manner. It is common knowledge that the carrying on of such operations as the cutting of these logs in the bush and drawing them to the banks of the streams in the winter, and floating them down the streams to the mills in the spring necessitated very large expenditures within a very limited time during these seasons, and that the ordinary way of financing these is to secure advances from banks on the security of the logs under the exceptional provisions of the Bank Act, which overrides the ordinary laws of the provinces in this regard, in order to enable those carrying on these lumbering operations to raise such moneys as were obtained from the bank by this company on this very security. To my mind there can be no doubt that this is what all the parties had in contemplation when the exception in question was inserted in these agreements.

It is not necessary for us to determine in this case precisely when these logs were on their way to the mill. It may be argued that when they were severed from the land and became logs that the exception applied and continued so long as the mill was their destination, but it is not necessary for the defendants to go so far. It is sufficient that the words of this exception properly applied to them when the bank made its advances and took the securities in question, and continued to be applicable up to the institution of the present action. Their being delayed on the way either on account of the want of water to float them or for any other reason did not alter their character or prevent them from coming within the terms of the exception.

The appellants further claim that the securities of the bank are invalid on account of the requirements of the

Bank Act not having been complied with. The transactions in question were prior to the coming into force of the Revised Statutes, but as the trial Judge and the parties have referred to the various sections by the numbers they now bear it will be convenient to continue this method as no changes have been made in the sections themselves.

By section 76 of the Act it is enacted, (2) "Except as authorised by this Act the bank shall not either directly or indirectly (c) Lend money or make advances . . . upon the security of any goods, wares or merchandise." One of the exceptions is found in section 88 which provides, (3) "The bank may lend money to any person engaged in business as a wholesale manufacturer of any goods, wares and merchandise manufactured by him or procured by such manufacture." The security is to be in the form set forth in schedule C., or to the like effect, and the bank is to acquire the same rights and powers in respect to the goods, etc., covered thereby as if it had acquired them by virtue of a warehouse receipt.

Section 90 provides that the bank shall not acquire or hold any such security to secure the payment of any bill, note, debt or liability unless such bill, note, etc., is negotiated or contracted, (a) At the time of the acquisition thereof by the bank, or (b) Upon the written promise or agreement that such security would be given to the bank.

Counsel for the appellants contended before us that the letters of the company promising that such securities would be given were not sufficiently precise and definite to meet the requirements of the Act. Most of the cases that have been before our Courts have been under the Act of 1871 where the word used was "understanding," or under the Act of 1886 where the word used was simply "promise." The present language "written promise or agreement" was introduced in 1890, but so far does not appear to have been judicially construed. See *Royal Canadian Bank* v. *Ross*, 40 U. C. R. 466; *Macrae* v. *Molsons Bank*, 25 Grant, 519; *Re Central Bank*, 21 O. R. 515; *Suter* v. *Merchants Bank*, 24 Grant, 365, and *Tennant* v. *Union Bank*, 19 A. R. 1, where a liberal construction was given to the language.

The language of the Act is very similar to the corresponding provision regarding chattel mortgages in this province which has long been in force and is now to be found in 10 Edw. VII. ch. 65, sec. 16, which provides that: "Every covenant, promise or agreement to make, execute

or give a mortgage of goods and chattels shall be in writing," and has often been construed by our Courts. See *Allan* v. *Clarkson*, 17 Grant 570; *McRoberts* v. *Steinoff*, 11 O. R. 369; *Clarkson* v. *Sterling*, 15 A. R. 234; *Embury* v. *West*, *ibid.* 357; *Lawson* v. *McGeoch*, 20 A. R. 464. In none of these was a critical or strict construction of the language favoured. In the last named case Maclennan, J., at p. 475, says: "It is said that the agreement was too vague and uncertain to be attended to, as it is not shewn that any particular goods were mentioned which were to be mortgaged. I am not impressed with this objection. The debtor was a farmer, and the mortgage was to be a chattel mortgage. I think that means a mortgage of the debtor's chattels and that the defendant could have selected a sufficient quantity of the debtor's goods and have required a mortgage upon them. See also the language of Proudfoot, V.-C., in *Suter* v. *Merchants Bank*, *supra*, at p. 374, et seq. to the same effect.

I do not think that such commercial documents as these should be scrutinised with the same particularity as those expected to be prepared and examined by solicitors and only executed after having been carefully settled. The goods were sufficiently marked and could be readily identified as found by the trial Judge; and the officers and servants of the company appear to have spoken of them as the logs of the bank.

All the logs in question appear to be fully covered by the securities in the form prescribed by the Bank Act and given contemporaneously with the contraction of the debt and the negotiation of the promissory notes of the company to which they are respectively annexed.

In addition to this, as pointed out by the trial Judge, the bank has paid to the Ontario Government large sums due by the company for the logs cut by them, and has been subrogated in the rights of the Government with respect to the same, and would have a lien in the nature of salvage for the moneys advanced to float the logs from McCarthy Creek to Sturgeon Falls.

I am of opinion that the appeal should be dismissed.

HON. MR. JUSTICE GARROW:—I agree.

HON. MR. JUSTICE MEREDITH:—The real question in this action is, which of the parties is entitled to the proceeds of the logs in question.

Originally they were the property of the paper company, being cut by them under a lease from the province.

The defendants claim title under certain charges made upon the property by the company in their favour.

The reply is that the charges are invalid in law; and that, if not, they are subsequent to charges in favour of the bondholders, who are represented in this action by their receiver, the plaintiff Clarkson.

The first question for consideration is, therefore, whether the charges in favour of the defendants, the bank, are invalid because not made in accordance with the provisions of the Bank Act, sec. 90. But in all things substantial they seem to me to have been so made. They were made under and in accordance with the antecedent agreements, in writing, to give such security—one of them expressly so. The contention that the precise amount of the debt to be secured must be stated in the antecedent promise in writing, is not well founded; the enactment does not require it, nor does the case of *In re Toronto Cr. B. Co.*, 16 O. W. R. 419, give reasonable encouragement to the contention. In that case, the security was not shewn to have been given upon a previous promise to give it. The promise in this case was of security for the amount to be advanced to enable the company to get out a quantity of pulp-wood logs, estimated at 15,000 cords, in the first transaction, and in like manner as to the other transactions, a promise which, in my opinion, comes within the provisions of sec. 90. Nor are the securities invalid for want of compliance with the provisions of the Act in regard to the description of the goods. I see no reason why a certain number or quantity of pulp-wood logs out of a greater quantity may not be so charged without severance, just as, I think, would be the case in regard to wheat and other things in which all parts are alike, and so greater certainty is not required for any purpose so far as anyone affected, or who might be affected, is substantially concerned. No creditor, or subsequent transferee of the property, would be a whit better off if each particular log had been ear marked.

Then, are the logs in question excepted from the general security given in favour of bondholders? The exception, as expressed in the first mortgage, is in these words: "Logs on the way to the mill," the mortgage being a "floating security," covering everything presently owned as well as to be acquired, by the mortgagors. It is said that the excep-

tion does not apply to the future, that it must be confined to logs then on the way to the mill; but I am quite unable to agree in that contention; indeed, it seems to me to be quite plain that such was not the intention of the parties; and that neither strict grammatical construction, nor ordinary understanding, of such words favours it. The business was to be carried on; that is fully provided for in the mortgages; it could not be carried on without pulp-wood; pulp-wood could not be obtained without payment of transportation charges, charges which are, in the case of common carriers, a lien upon the goods carried; pulp-wood would be needed in future years quite as much as at the time when the mortgages were given. I cannot think that among business men anyone would have thought of raising such a contention.

There was power, therefore, to charge logs on the way to the mill; but the further contention is made that the logs in question were not on their way to the mill when charged, but again I am quite unable to see anything in the point. From the time the logs were cut in the forest until they reached the mill, they were on their way to the mill; the purpose of cutting them was that they should go to the mill and there be converted into paper-pulp. Every step taken towards that destination was a step on the way to the mill, whenever taken; it was part of the necessary transportation.

It was suggested that the later mortgage might be wider in its scope that the earlier; but the contrary is so; there is in it the words "excepting logs on the way to the mill," and, in addition, the plainest liberty to mortgage or charge for the purpose of carrying on the business; the subsequent covenant not to mortgage or charge without the consent of the bondholders, does not affect the preceding exception or liberty; it comprises mortgages and charges for other purposes.

Needless technical obstruction ought not to be put in the way of honest mercantile transactions such as those here in question. Such enactments as that in question are best interpreted when given the meaning which business men generally would attach to them.

JUNE 28TH, 1912.

MERRITT v. THE CITY OF TORONTO.

3 O. W. N. 1550; O. L. R. .

Water and Water Courses—Riparian Rights—Marsh Lands—Rights of One Owner against Adjoining Owner—Obstruction of Access to Shore—Mandamus to Compel Removal.

Plaintiff, the owner of certain lots covered by water on Ashbridge's Bay, brought action for a mandamus to compel defendants to amend a plan of theirs shewing certain works they intended to perform and which, in pursuance of said plan, they had carried out and performed, and had placed obstructions, it was alleged, which had deprived plaintiff of his riparian rights and to compel defendants to remove the obstructions placed in front of plaintiff's said lands and an injunction to restrain defendants from performing the work in such a way as to interfere with plaintiff's riparian rights.

MAGEE, J., dismissed plaintiff's action with costs.

DIVISIONAL COURT *held*, 18 O. W. R. 613; 23 O. L. R. 365; 2 O. W. N. 817, that plaintiff's property was land and not water, and that he was not in any sense a riparian proprietor; that plaintiff's case failed in fact and in law, and the appeal should be dismissed with costs.

Beatty v. *Davis*, 20 O. R. 373, distinguished.

Ross v. *Portsmouth*, 17 C. P. 195, 202, approved.

Review of Michigan authorities, History of Toronto Harbour, and Ashbridge's Bay.

COURT OF APPEAL (Maclaren, J.A., and Clute, J., dissenting), dismissed appeal from judgment of Divisional Court, with costs.

Per MEREDITH, J.A.:—The fact that the Divisional Court in giving judgment based their reasons upon local private publications not put in in evidence, vitiates the judgment of that Court.

Per CLUTE, J.:—Plaintiff's ownership is not confined to land or marsh, in which case he would have no riparian rights, but extends to the land and water in front of his lot between high and low water marks. This gives him certain well-defined rights as riparian proprietor wholly apart from the question whether or not the water in front of his lot is navigable, and enables him to maintain this action.

Keewatin v. *Kenora*, 11 O. W. R. 266; 16 O. L. R. 184, and *Minor* v. *Gilmore*, C. R. [3] A. C. 230, referred to, and long and exhaustive review of cases defining riparian rights.

An appeal by the plaintiff from a judgment of Divisional Court, 18 O. W. R. 613; 23 O. L. R. 365; 2 O. W. N. 817, affirming a judgment of HON. MR. JUSTICE MAGEE, after trial, without a jury, dismissing the action.

The appeal to Court of Appeal was heard by HON. SIR CHARLES MOSS, C.J.O., HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MEREDITH, HON. MR. JUSTICE CLUTE, and HON. MR. JUSTICE SUTHERLAND.

H. M. Mowat, for the plaintiff.

H. L. Drayton, K.C., and G. A. Urquhart, for the defendants.

HON. SIR CHARLES MOSS, C.J.O.:—So far as the facts of the case are concerned it is unfortunate that owing to the accidental destruction of the stenographer's notes of the testimony on behalf of the defendants, there is no complete transcript of the evidence in the case, and the only record of that part of the testimony is furnished by the notes of the learned trial Judge. However, the testimony bearing on the question of the nature of the plaintiff's property and the navigability or supposed navigability of the waters of Ashbridge's bay has been noted with very considerable fullness and detail.

And it is proper to assume that in determining the issues the learned Judge gave due and proper weight to that evidence, so far as it is opposed to the evidence adduced on behalf of the plaintiff.

The plaintiff rests, and can only rest, his case against the defendants upon such rights as he has under the grant to him of what is designated the lot covered with water extending south to the property granted to the defendants by the two several patents in the case. And it was incumbent upon him to shew, not only that the waters of Ashbridge's bay were navigable in the sense in which that quality is to be found in order to confer riparian rights of the kind claimed, but also that his property did in fact border upon the waters. If that which intervenes between his dry land fronting on Eastern avenue, and the north limit of the defendants' property has always been marshy, boggy land, and the defendants' property for some distance south of the north limit has always been of the same nature, there is nothing in the respective grants and conveyances to turn them into water lots.

Upon the best consideration I have been able to give to the testimony and without the aid of what is recorded in the publications referred to by Middleton, J., I come to the same conclusion as the Chancellor, viz., that the plaintiff's property comprised within the conveyances and grants under which he claims is now and always has been marsh, and nothing but marsh, and that between it and the artificial channel through which he seeks access as riparian owner, there is land of a like character.

Present appearances after so much has been done by by means of dredging and channelling to create a condition of open water afford no index to the condition in early days of the waters of the Ashbridge's bay marsh, and of

the lands bordering upon them. But whatever the conditidns may have been at the easterly part, the testimony makes it plain that there always was bog and marsh to the west in front of the property now claimed by the plaintiff, and that its character has undergone but slight change, though liable, of course, to some changes in appearance and wetness, according as the year or season was a wet or dry one.

Upon the whole, I am unable to say that the conclusion of the Divisional Court is erroneous, and I would, therefore, dismiss the appeal..

HON. MR. JUSTICE SUTHERLAND:—I agree.

HON. MR. JUSTICE MEREDITH:—The only right which the appellant contends for here, is a right of navigation; no other rights, riparian or otherwise, are set up. The question, and the only question, therefore, is whether the waters, in front or at the back, whichever anyone may choose to call it, were at the time of the acts of the defendants complained of, navigable; entirely a question of fact.

The trial Judge adjudged that they were not; but, unfortunately, he gave no reasons for his conclusion, and we are, therefore, without any assistance from him in now considering the question. A Divisional Court, upon an appeal from him to them, affirmed his judgment; but, unfortunately did so, largely, upon statements contained in local private publications, which were not evidence, and which were not attempted to be put in as evidence by either party, or indeed even mentioned, upon the trial, or upon the argument before it; so that the judgment is vitiated and cannot stand, nor can it afford much assistance upon this appeal.

But upon the whole evidence adduced at the trial, it is quite impossible for me to find that the waters to which the plaintiff's land extended were navigable, and the onus of proof, that they were is, of course, upon the plaintiff. It may very well be that at no very great cost a channel, sufficient for small boats, might have been made, giving access from the plaintiff's land to navigable waters of the bay—through shallows, reeds, and other obstructions—but no such right appertained to the land. Those who are familiar with the marshes along the great lakes, and connecting rivers, which bound this province to a great extent, can have no great difficulty in understanding the evidence and reaching the conclusion that the plaintiff's land did not extend to navig-

able marsh waters: see *Niles* v. *Cedar Point Club*, 175 N. J. 300, and *Ross* v. *Portsmouth*, 17 U. C. C. P. 195.

It cannot make much, if any, difference what causes the obstruction to navigation, or whether or not it is in any sense a floating obstruction, so long as it destroys navigability and is permanent, or there be no right, in the land owner, to compel its removal, or to a way through it.

I would dismiss the appeal.

HON. MR. JUSTICE CLUTE (*dissenting*):—The plaintiff is the owner of certain land in the city of Toronto, having a frontage of 166 feet 3 inches on Eastern avenue, with a depth of 265 feet, which is claimed to extend to the water's edge, hereafter referred to as the "land lot."

He also owns a strip of land covered with water of the same width to the south of the land lot and extending on the westerly side 596 feet 7 inches, and on the easterly side 546 feet 6 inches, and containing 2-17/100 acres to the northerly limit of lands owned by the city of Toronto, hereafter referred to as the "water lot."

The plaintiff claims riparian rights in respect of the land lot and charges that the defendant has interfered with those rights by digging a canal through their property, and throwing the earth excavated therefrom on the north side of the canal adjoining the plaintiff's property, and thereby shutting him off from access to the navigable waters of Ashbridge's bay. This he claims to be contrary to the distinct understanding between the city, himself, and the other owners of land fronting on Ashbridge's bay, and that in violation of such understanding between the parties they registered a plan of the proposed work without recognising the riparian rights of the plaintiff. The plaintiff asks for a mandamus to compel the defendant to amend the plan by reserving the riparian rights of the plaintiff and to compel the defendant to remove the obstructions placed in front of the plaintiff's land, and an injunction to restrain the defendant from interfering with the rights of the plaintiff, and for damages and other relief.

The defence denies plaintiff's title or that he ever had any riparian rights in respect of his lands, claims a binding agreement which debars the plaintiff of all claim or right to cross defendants' land, and claims under grant from the province of Ontario up to the line so settled, and in the alternative under Dominion grant, and that plaintiff's

claim, if any existed, was by arbitration under sec. 437 of the Act, and is barred by sec. 438 of same Act, more than a year having elapsed since damages were sustained, and that defendants' work was for public benefit.

The trial Judge, Magee, J., gave no written opinion, but endorsed on the record a simple dismissal of the action. An appeal was taken to the Divisional Court. The Chancellor there states, 23 O. L. R. 267, that the action was dismissed by the trial Judge on the ground that the plaintiff's property was land and not water, and that he was not, in any sense, a riparian proprietor. The Chancellor in his judgment says: "That the plaintiff's land is now, and always has been, within historical memory, marsh, and nothing but marsh, and that the law of the case is that law which pertains to ownership of marsh land."

Middleton, J., was of opinion that the rights of the parties are rights of adjoining proprietors, and that no question of riparian or water rights arises. "Each owner may reclaim or may ditch as he sees fit, but either has no right over the lands of the other. This swamp was not such a body of water as either has the right to have maintained. It is, in truth, no more than a wet parcel of land where reeds and brushes grow, upon which marsh hay is cut, and this must be regarded as land and not water." The appeal was dismissed, Riddell, J., agreeing in the result.

The plaintiff claims ownership to the "land lot" by a certificate of ownership under the Land Titles Act, dated the 26th of November, 1890. This description on the east is to the water's edge. It does not follow the water's edge, however, but proceeds westerly parallel with Eastern avenue. The water line (or swamp, whichever it be), encroaches on the south-westerly portion of the lot so that the whole front of the land lot touches the water (or marsh) on its southerly boundary.

The plainiff's title to the "water lot" is by grant from the Crown, dated the 3rd December, 1889, and is described as 2-7/100 acres of land covered with water, and may be known as follows: The description then is:

"Commencing at a point on the water's edge of Ashbridge's bay" the point being the south-western corner of the "land lot." "Thence south 16 degrees east, 596' 6" more or less to the northern limit of the property of the Corporation of the City of Toronto as patented to them on the 18th May, 1880; thence north 56 degrees, 40 minutes, 15

seconds east along said limit to a point where a line drawn parallel to the limit between "township lots Nos. 11 and 12 and distant 297′ measured westerly thereupon and at right angles thereto, will intersect the said lot; thence north 16 degrees west 546′ 7″ more or less to the water's edge." (That is, to the south-east corner of the "land lot"), "thence south 74 degrees west parallel to Eastern avenue, and along said water's edge 160′ 3″ to the place of beginning." The grant is made upon the condition and undertaking that should any claim be made in respect of the premises by the Government of Canada, the grantee shall not be entitled to claim compensation from the Ontario Government. The Crown also reserves "the free use, passage and enjoyment of, in, over and upon any navigable waters that shall or may be hereafter found under or be flowing through or upon any part of the said parcel or tract of land covered with water hereby granted as aforesaid."

The grant to the city of Toronto referred to in the plaintiff's patent, describes the land as that certain parcel or tract of marsh land and land covered by water containing by computation 1,385 acres, more or less, reserving the right of passage over all navigable waters "that shall or may hereafter be found on or under or be flowing through or upon any part of the said premises hereby granted," and also reserving all rights of fishery and free access to the shores of lake Ontario and the bay of Toronto.

The defendants also claim by grant from the Dominion Government dated the 10th October, 1903. The consideration mentioned is $20. The patent recites "that whereas the lands hereinafter described form part of a public harbour vested in his Majesty as represented by the Government of Canada" and the lands are described as "all and singular that parcel of marsh land and land covered by water in the city of Toronto reserving the free use and passage and enjoyment over all navigable waters that shall or may be found on or under or by flowing through or upon any part of the lands thereby granted."

A large number of witnesses were examined as to the extent the lands of the plaintiff and the city were covered with water, and whether the waters covering such lands were navigable. What is known as Ashbridge's bay is made up of portions of open water and land covered or partly covered with water through which have grown reeds and marsh grass. A portion of this so-called land covered with water

is a floating vegetable mass, with clear water between it and the solid ground. Large portions of this floating mass would, from time to time, under strong winds, drift away, and one old resident, Mr. Leslie, stated that he remembered on one occasion when the whole floating mass had drifted off to the south of the bay, leaving the shore line from this place to the east of the plaintiff's "land lot" and so along the west shore to Carlaw avenue, entirely free from marsh grass and the water clear. This, probably, was an innocent exaggeration, although the evidence does clearly establish that sometimes very large portions of this floating mass of vegetable matter would move across the bay under heavy winds. It does not follow that if the lands referred to are not navigable for large or small craft or at all, that the plaintiff has no riparian rights. If it be "land and nothing but land" doubtless the plaintiff has no claim, but if it be land between high and low water mark, different considerations arise.

After much negotiation, the city and the owners of lands along the water's edge, including the plaintiff's predecessor in title, agreed upon a conventional line known as the "Unwin line." It was, no doubt, expected and intended, at the time, that the various owners should be recognized as owners down to the boundary line of the property conveyed to the city; but the Ontario Government claiming for the Crown the land between the water's edge and open water granted to the city, the part south of the conventional line and to the plaintiff and others the land north thereof; and it is a matter worthy of note, that the plaintiff's patent describes the "water lot," as covered with water, referring to it "as being composed of water lot in front of part of lot No. 12, broken front concession from the bay." It recognizes the southern limit of the plaintiff's "land lot," as being "a point on the water's edge of Ashbridge's bay," and the reservations contained in the grant in respect of the free use "of all navigable waters," leads one, I think, fairly to the conclusion that both the Government and the purchaser considered the "water lot" in question land covered with water and not simply land.

The evidence clearly shews that immediately in front of the "land lot," there is even in comparatively low water, open water, which at times varies from 16 inches in low water to 2, 3, and even 4 feet deep in high water.

This depth of water extends at all events from the "land lot" 30 to 40 feet, where it would appear for some distance, the water is not so open and not so deep.

Hay has been cut over the lands immediately to the east for many years, and probably to a certain extent over the "water lot" in question, but this is not so clear.

In cutting the hay the men waded through the water varying in depth in the different seasons, and that beneath this "crust," formed of rotted vegetable matter there was clear water, that, in some places in breaking through would take a man up to his neck.

In high water over a large part, if not all of this area, a boat could pass, and did pass, the fishers and hunters passed over it in that way in fishing and hunting, but it was not navigable for boats of any considerable size over this "water lot" except in high water.

In making the soundings for the works of the defendant, complained of, the engineer found clear water beneath the "crust," along the boundary line of the city property, and for 30 to 50 feet to the north, as far as they sounded it.

I think, therefore, that the lands included in the plaintiff's "water lot," and in the similar lands to the south of the defendants' line to the open water of the bay, may be properly described as lands between high and low water mark. With this further fact that beneath this vegetable "crust" formed by decayed vegetable matter, there was clear water beneath the crust. This space between the crust and the bottom proper, was taken into account by the defendants' engineers in ascertaining the amount of the excavations to be allowed the contractors.

In order to ascertain whether the plaintiff is a riparian proprietor, and if so what are his rights, it will be necessary to consider the erect of the grant of which his land forms a part, and also in what way, if any, his rights were affected by the conventional line now separating the property of the plaintiff and the defendant.

The township lot is described as being composed of lot No. 12, in the first concession with broken front east of the river Don, in the township of York, with all the woods and waters thereon lying, beginning at a post in front marked 12/13; thence north 16 degrees, west 125 chains; thence north 74 degrees, east 20 chains; thence south 16 east to the front; thence westerly along the front to the place of beginning with allowance for roads. What does the front

in this description mean? It was clearly established by the evidence that there was open water at the south-east corner of lot 12, and a wharf, known as Leslie's Wharf, was built on lot 11, at that place, and used for many years for deceiving and shipping wood and other freight, and that there was open navigable water from the wharf both into Toronto bay and lake Ontario. I think the word "front," therefore, means the water's edge and the line follows along the front or water's edge, from the point between 11 and 12 westerly to the place of beginning. If the water's edge of Ashbridge's bay were not navigable, this description would carry the ownership to the middle line of the waters which form one of the outlets of the Don river. But from the evidence I think there can be no doubt whatever, that Ashbridge's bay is navigable for small craft, and, therefore, the ownership extended only to the water's edge. This would give the owner of lot 12 riparian rights, and the plaintiff as the owner of a part of the township lot 12, and which is described as coming down to the water's edge, had the same riparian rights as his predecessor in title had, unless lost by consent given to the conventional line forming the boundary between the property of the plaintiff and that of the defendant.

With great respect I am unable to agree with the view expressed in the Divisional Court by the Chancellor and Middleton, J., that the portion of the land in question below the water's edge must be treated simply as land without riparian rights. I think it established by the witnesses of the defence as well as by the witnesses of the plaintiff that the land south of the line forming the southerly boundary of township lot 12, and the open water is land between high and low water mark. It rises and falls with the rising and falling of the water in the lake and bay. In high water, small boats may pass over it. Fish in great numbers are found there. Clear water is found beneath the floating mass of vegetation, and notwithstanding the rank growth of aquatic grass it is quite distinct from what may be called solid land proper. The greater portion of it for the greater part of the year is covered with water. Even when hay is being cut on the land east of the plaintiff's land, it is overflown with water several inches deep, and the floating mass sinks under the tread, as the growth of grass is being cut.

If I am right as to the water line, then following the English rule of law applied to navigable and non-navi-

gable waters alike, excepting only navigable tide waters, there is the *prima facie* presumption that the grant from the Crown to the plaintiff's predecessor in title carried his ownership to the middle thread of the bay (the decision in this case by the trial Judge having been given prior to and so not affected by 1 George V., ch. 6), Ontario; *Keewatin* v. *Kenora,* 16 O. L. R. 184.

It was probably this view of the case that led to the agreement in regard to the conventional boundary line. But I think there exist circumstances and conditions in this case sufficiently to repel such presumption. The description of the lot by metes and bounds beginning at a post and giving the acreage—the fact that it fronts on a bay, which is a part of lake Ontario and connected with it and only separated from it by sands thrown up by the waves, the uniform action of the Crown in claiming ownership of the lands below high water mark, by granting to private parties the bed of navigable waters below high water mark render it quite impossible to apply the English rule of law in favour of the owners of lot 12, fronting on the bay, so as to extend their ownership to the land covered with water. I am, therefore, of opinion that in the present case the *prima facie* presumption is rebutted, and that the grant by the Crown of lot 12 is limited to high water mark. Prior to the *Keewatin Case* the English rule seems not to have been applied in this country to navigable waters, and there is much dicta to the contrary. See the cases collected by Anglin, J., in the *Keewatin Case,* 13 O. L. R., pp. 252, 253. It was recently held in the House of Lords, the House being equally divided, and so affirming the decision of the Irish Court, that no right can exist in the public to fish in the waters of a navigable inland, non-tidal lake no matter how large; *Johnston* v. *O'Neil,* [1911] A. C. 552.

The British North America Act and special legislation would seem to govern such a case. This, however has only an indirect bearing on the present case, as subject to public regulations the plaintiff is entitled to fish there, either as riparian owner or owner of the water lot.

Prior to the grants the land between high and low water mark, belonged to the Crown as represented by the province of Ontario, except such portions as the Dominion might claim under the British North America Act in respect of harbours. See Lord Herschel's judgment in the stated case, [1898] A. C. 700, quoted below.

The right of the riparian owner to use the water does not depend upon the ownership of the soil under the water, and whether owned by the Crown, as represented by the Dominion or province, or private person, cannot affect the plaintiff's riparian rights.

Then what were the riparian rights of the grantee of lot 12, and other lots fronting on Ashbridge's bay? Much emphasis was laid upon the right of navigation in the discussion at bar, but that right of a riparian proprietor is common with the right of the public, and it does not follow that because the land between high and low water mark in front of the plaintiff's lot is not navigable, that, therefore, he has no riparian rights, or that he would not be affected by the obstruction placed in front of his water lot by the defendants. This depends upon other consideration, to which I will refer presently.

Many questions affecting the present case were submitted in the special case referred by the Governor-General in Council for decision to the Supreme Court, 26 S. C. R. 444. The case was carried to the Privy Council, [1898] A. C. 700. Lord Herschell, in giving judgment, pointed out the distinction between proprietary rights and legislative jurisdiction under the British North America Act, that whether a lake or river be vested in the Crown as represented by the Dominion or as represented by the province, in which it is situate, it is equally Crown property, and the rights of the public in respect of it, except in so far as they are modified by legislation, are precisely the same. There is no presumption that because a legislative jurisdiction is vested in the Dominion Parliament proprietary rights shall be transferred to it. All the proprietary rights that were at the time of the passing of that Act possessed by the province remain vested in them, except such as are by any of its express enactments transferred to the Dominion. It was held that the transfer of "public harbours" operates on whatever is properly comprised in that term, having regard to the circumstances of each case, and is not limited merely to those portions on which public work has been executed. His Lordship expressed the opinion that it does not follow that because the foreshore on the margin of the harbour is Crown property it necessarily forms part of the harbour. It may or may not do so according to the circumstances. If, for example, it had actually been used for harbour purposes such as anchoring ships or landing goods, it would,

no doubt, form part of the harbour, but there are other cases in which in their Lordships' opinion it would be equally clear that it did not form part of it. With regard to fisheries and fishing rights, it was held that sec. 91 of B. N. A. Act did not convey to the Dominion any proprietary rights therein although the legislative jurisdiction conferred by the section enabled it to affect those rights to an unlimited extent, short of transferring them to others. It was held in this case by the Supreme Court that the owner having riparian rights before Confederation had an exclusive right of fishing in non-navigable and in navigable non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown, following *Robertson* v. *The Queen*, 6 S. C. R. 52. Their Lordships declined to answer this question as the riparian proprietors were not parties to the litigation, or represented before their Lordships. It was held in *Pion* v. *North Shore Rw. Co.*, 14 S. C. R. 677, that a riparian owner on a navigable river was entitled to damages against a railway company although no land is taken from him, for the obstruction and interrupted access between his property and the navigable waters of the river, for the injury and diminution in value thereby occasioned to his property. This was affirmed in the Privy Council, 14 Appeal Cases 612. Lord Selbourne gave a very full judgment commenting upon a number of cases. He points out that in *Minor* v. *Gilmore*, C. R. [3] A. C. 230, that tribunal determined after two arguments that with respect to riparian rights in that case, the river not tidal or navigable, there was no material distinction between the law of lower Canada and the law of England. He quotes from Lord Kingsdown, who delivered the judgment of the Committee in that case, where he said: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for domestic purposes and for his cattle; but, further, he has a right to the use of it for any purposes or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors either above or below him. He then points out that this general law was decided in *Lyon* v. *Fishmonger*, 1 Appeal Cases, 683, to be applicable to navigable and tidal rivers: "The only ground of distinction suggested between a non-navigable river, such as that in *Minor* v. *Gilmore*, and

a navigable or tidal river, forming at high water the boundary of riparian land, was that in the case of a non-navigable river the riparian owner is proprietor of the bed of the river *ad medium filum aquae*, which, in the case of a navigable river such as the St. Charles, belongs to the Crown. The same distinction was contended for in *Lyon* v. *Fishmonger*; but the House of Lords, on grounds with which their Lordships concur, thought it immaterial. Lord Cairns rejected the proposition that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream; he adopted the words of Lord Wensleydale in *Chasemore* v. *Richards*, 7 H. L. C. 349: "The subject of right to streams of water flowing on the surface has been of late years fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has now been settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturæ*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state." "Their Lordships have considered the authorities referred to in support of this part of the appellant's argument and they are of opinion that none of them tend to establish the non-existence of riparian rights upon navigable or tidal rivers in lower Canada, or to shew that the obstruction of such rights without Parliamentary authority would not be an actionable wrong, or that if in a case like the present the riparian owner would be entitled to indemnity under a statute authorising the works on condition of indemnity, the substituted access by openings such as those which the appellants in this case have left would be an answer to the claim for indemnity."

In *Minor* v. *Gilmore*, C. R. [3] A. C. 230, it was held that in respect of riparian rights (in that case the river was not tidal or navigable) there was "no material distinction between the law of lower Canada and the law of England." Lord Kingsdown, delivering the judgment of the Committee, said: "By the general law applicable to running streams, every riparian proprietor has a right to what may

be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes, and for his cattle; but, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him." And this general law was, in England, held applicable to navigable and tidal rivers, (with the qualification only that the public right of navigability must not be obstructed or interfered with) by the House of Lords in *Lyon* v. *Fishmonger*, 1 A. C. 683.

In this case the head-note reads: "By the Thames Conservancy Act, (20 & 21 Vict. ch. 143), sec. 53, the conservators appointed under that Act have a power to grant a license to a riparian proprietor to make an embankment in front of his own land abutting on the river, but though such license might be the owner's justification so far as the public right of navigation was concerned, it would not authorise a licensee, being a riparian owner, to embank in front of his own land so as injuriously to affect the land of another riparian owner."

The Lord Chancellor (Lord Cairns) says: "With much deference for the Lords Justices, I should have thought that some authority should be produced to shew that the natural rights possessed by a riparian proprietor, as such, on a non-navigable river, are not possesesd by a riparian proprietor on a navigable river. The difference in the rights must be between rivers which are navigable and those which are not; and not betwen tidal and non-tidal rivers; for, as Lord Hale observes the rivers which are *publici juris*, and common highways for man or goods, may be fresh or salt, and may flow and reflow or not; and he remarks that the Wey, the Severn, and the Thames, 'and divers others as well above the bridges as below, as well above the flowings of the sea as below, and as well where they are become to be the private propriety, as in what parts they are of the King's propriety, are public rivers *juris publici*.' A riparian owner on a navigable river has, of course, superadded to his riparian rights, the right of navigation over every part of the river, and on the other hand his riparian rights must be controlled in this respect, that whereas, in a non-navigable river, all the riparian owners might combine to divert, pollute, or diminish the stream, in a navigable river the public right of navigation would intervene, and would prevent

this being done. But the doctrine would be a serious and alarming one, that a riparian owner on a public river, and even on a tidal public river, had none of the ordinary rights of a riparian owner, as such, to preserve the stream in its natural condition for all the usual purposes of the land; but that he must stand upon his right as one of the public to complain only of a nuisance or an interruption to the navigation. The Lord Justice suggests that the right of a riparian owner in a non-navigable river arises from his being the owner of the land to the centre of the stream, whereas in a navigable river the soil is in the Crown. As to this, it may be observed that the soil of a navigable river may, as Lord Hale observes, be private property. But putting this aside, I cannot admit that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream."

He then quotes from Lord Wensleydale in *Chasemore* v. *Richards*, and proceeds, "My Lords, I cannot entertain any doubt that the riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights, as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation."

Lord Chelmsford, in the same case, page 678, says: "Why a riparian proprietor on a tidal river should not possess all the peculiar advantages which the position of his property with relation to the river affords him, provided they occasion no obstruction to the navigation, I am at a loss to comprehend. If there were an unauthorised interference with his enjoyment of the rights upon the river connected with his property, there can, I think, be no doubt that he might maintain an action for the private injury."

Lord Selborne, p. 683, says, "The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it. It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good, *jure naturæ*, as vertical; and not only the word 'riparian,' but the best authorities, such as *Minor* v. *Gilmore*, and the passage which one of your Lordships has read from Lord Wensleydale's judgment in *Chasemore* v. *Richards*, state the doctrine in

terms which point to lateral contact rather than vertical. It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right."

In *Stockport* v. *Potter*, 3 H. & C., N. S. 300, it was held that: "A riparian proprietor derives his rights in respect of the water from possession of land abutting on the stream, and if, by a deed which conveys only land not abutting on the stream, he affects to grant water rights, the grant, though valid as against the grantor, can create no rights for an interruption of which the grantee can sue a third party in his own name."

In the *Attorney-General* v. *Burridge*, 10 Price 367, 24 R. R. 705, it was held that the Crown might grant by letters patent, all the lands between high and low water mark, but this subject matter of grant, as being *jus privatum* in the King, must be subject to the *jus publicum* or public right of the King and people, to the easement of passing and repassing, both over the water and the land.

See also the *Attorney-General* v. *Parmeter*, 10 Price 378, 24 R. R. 723, the right to the sea-shore was very fully considered, the case afterwards going to the House of Lords.

In *Attrill* v. *Platt*, 10 S. C. R. 425, it was held that the lateral or riparian contact of the land with the water, was sufficient to entitle the riparian owner to object to the flow of the water in its natural state being interfered with.

Bragaowett v. *North Shore Rw. Co.*, 17 S. C. R. 363. A riparian proprietor on a navigable river is entitled to damages against a railway company for any obstruction to his rights of access *et sortie*, and such obstruction without parliamentary authority is an actionable wrong, following *Pion* v. *N. S. R. Co.*, 14 A. C. 612.

Many of the American cases in regard to lands similar to those in the present case are governed by special statutes, and especially in respect of large areas of submerged or partly submerged lands along the great lakes.

Under special Act of 1850, the Federal Government in certain cases conveyed to the State, which was then enabled to make grants as land freed from riparian rights, all which

presupposes such rights to exist were not so affected by statute, see *Brown* v. *Parker*, 1901, 127 Mich. 391; *Baldwin* v. *Erie Shooting Club*, 127 Mich. 659. In the case of the *State* v. *Lake St. Clair Fishing and Shooting Club*, 127 Mich. 58, the majority of the Court held, that certain land which in its natural state, was in some places a few inches above and in others slightly below the ordinary water level and was at times entirely submerged, did not constitute a part of the bed of the lake, but was swamp and overflowed land, within the meaning of the Swamp-land Act of 1850, so as to pass to the State thereunder." Hooker, J., in this case, dissenting held that the lands did not come within the Acts relied upon by the majority of the Court, and that, therefore, they had to be dealt with as at common law, and he reviews the American cases very fully upon the subject. His description of the land in question is very like the present: "After passing the hard land of the island, the banks of the respective channels are submerged to a great extent, if not altogether, and are marked by a rank growth of aquatic plants, which not only border the open water of the channels, but cover a vast area of submerged land, which, time out of mind, has been called the 'St. Clair Flats.'"

The American authorities in regard to riparian and littoral rights are collected in 29 Cyc. 333, 337. At p. 336, it is said: "The owner of land bounded by navigable waters has a right to free communication between his premises and the navigable channel of the river. This riparian right to access is strictly the right of access to the front of the property, and does not include the right of access to the side of piers. The right of access does not depend upon the ownership of the lands between low water mark and the line of navigability, and is the same whether the land abuts on tidal or non-tidal water. This right of access is property, and while the right does not prevent the state from assuming jurisdiction and control over the bed and banks between high and low water marks, yet any act which makes the front of his land less accessible to the water is an injury for which an action for damages may be brought, except where the right has been obtained by eminent domain or the interference is the improvement of the navigation of the river by the state or regulation of commerce by Congress. Where the riparian owner is deprived of such right of access, he may also enjoin the obstruction."

Applying the law as indicated in the foregoing cases to the facts here I am of opinion that the grantee of the broken front of lot 12 had riparian rights quite independently of the right in common with the public of navigation, and that the plaintiff by virtue of his ownership of the "land lot," which is bounded by the water, and is so recognized in the grant to him of the "water lot," has the same riparian rights. He has the right to use the waters unobstructed; to fish in them; to boat over them, and at all times to reach the open water in front.

I am further of opinion that the obstruction caused by piling earth from the cut on the bank, between his land and the cut, was an actionable interference with these rights. There was no necessity for their so doing. The cut could have been made without affecting prejudicially the plaintiff's rights by either removing the earth or piling it on the south side, as was done further to the east in front of Leslie's property.

The defendant having made a channel, the plaintiff has the right to reach this channel over the submerged land without obstruction, and to utilize it for navigation, and this none the less because the depth of water has been thereby increased. See *Diamond* v. *Reddick*, 36 U. C. R. 391 and *Beatty* v. *Davis*, 20 O. R. 379; Hale *de jure Maris*.

I do not think the plaintiff is entitled to that part of the relief, asking for the reformation of the plan registered for the reason that in my opinion that does not affect his rights. It was not the registration of the plan or the making of the cut, by which he is injured; it was the unnecessarily raising of the obstruction, shutting him out from the open water.

The defences raised other than that of the denial of the plaintiff's property and riparian rights, I will now consider. The defendants contend that the plaintiff is bound by the agreement of his predecessor in title, who as one of the owners of the broken front accepted a convenient boundary whereby were lost to him any riparian rights, if such ever existed. The recital in this agreement shews that what was in dispute was the boundary representing the high water mark, and it was this boundary they agreed to settle and abide by. Had the Crown been a party to this agreement it would have given the owners the land down to this line, and that line by consent would have represented high water mark, and all lands which came down to that line

would have been riparian proprietors'. This agreement was acted upon by the city obtaining a grant of land south of this line. Of course, the Crown was not bound by this agreement, and to perfect his title the plaintiff got a grant of what was considered land covered by water, stretching between the "land lot," and the conventional boundary line. The plaintiff, therefore, has the right to rest upon this agreement upon which the defendants acted and obtained their grants, both from the Ontario and the Dominion Government, and to say that by consent and by virtue of that agreement the conventional line as between the plaintiff and defendants must be considered the water's edge or high water mark.

This view as to the intention of the parties and the meaning of the agreement is borne out by reference to what was done by the parties, and is perfectly good evidence, not to vary the terms of the patent for which it is inadmissible *Watts* v. *Attorney-General,* [1911] A. C. 489, but to shew that the patent was issued in pursuance of the agreement.

To understand the full effect of what was done it is necessary to go back to the license of occupation granted by the then province of Canada to the city of Toronto on the 12th January, 1847. Leaving out the formalities of the document it is a license to the city to occupy "the marsh lying to the eastward of the city, and the peninsula which forms the harbour of the city, reserving free access to the beach for vessels, boats, and persons." The city claimed to be entitled to a patent under this license, and by order of council of October 1st, 1866, the issue of the patent for these lands was authorized. In January, 1873, a plan and report was prepared at the instance of the city shewing the northern boundary of the marsh to be high water mark, and this is clearly defined on the map, and so stated by their engineer. (See his letter to the Mayor, of the 18th January, 1873, Ex. 15).

On the 6th March, 1873, the city solicitors transmitted the plan and other papers to the Commissioner of Crown Lands, and asked for a patent for the lands as shewn on the plan. It thus clearly appears that what they claim was the land to high water mark. In a subsequent letter of the 20th April, 1874, reference is made to what had already been done, and asking if anything further was required. It appears to have been at this stage that the property owners along the bay raised the question of their rights, and an

agreement in July was come to which was succeeded by the agreement of the 23rd October, above referred to.

In the final petition for the patent the plan of survey, the description of lands, the first agreement and the agreement of the 23rd October, Unwin's report, and the report of the council were all included with the petition as the necessary documents upon which the patent was asked.

In Unwin's report, which forms part of the material used in asking for the grant, he says: "The construction to be put upon these terms 'marsh' and 'front' must be a matter of opinion. From the harbour master's official records it is clear that what may be termed 'marsh' at a certain season of one year, would be covered deep with water at the same season in some other year." He further points out: "That the old surveys of record in the registry office and in your own private keeping, shew the high water mark and marsh limit in a position altogether removed from the limits of high water and marsh as seen at the present time."

He then suggested the advisability of adopting for a boundary such straight lines as would, while giving the owners all they were entitled to receive, be satisfactory to the corporation. Here again it is quite plain that what the city was striving to obtain was not land in the proper sense of the term, but land between high and low water mark, and therefore, at certain seasons of the year admittedly covered with water.

Mr. Unwin further refers to the circular inviting the owners to be present, and the difficulty of obtaining a final agreement, which, however, was finally settled upon. There was some difficulty about the final agreement being signed because of the opening of certain streets which had not been mentioned in the first agreement.

The grant to the city was finally made in pursuance of the agreement and consent recognizing the boundary line as high water mark. In a letter to the Commissioner of Crown Lands, dated 31st August, 1880, by Mr. Williams, who had formerly been the city solicitor, on behalf of the land owners, points out that had his clients not believed that the Government admitted their right to all lands lying to the north of those to which the city was entitled, they would never have entered into the agreement for establishing the boundary which led to the issue of the patent to the city.

The Government seems to have recognized the righteousness of the owners' claim by making a grant to the

plaintiff of the land between his "land lot" and the boundary line as land covered with water, and at what must be considered a nominal sum, nor did the city take a different view.

In the report of the city engineer on the reclamation of Ashbridge's bay, dated 21st December, 1891, exhibit 7, he says, after referring to the expenditure necessary to cleanse the bay: "This it is that the city, it seems to me, desires to see done, and the main obstacle that stands in the way of doing it is the great expense coupled with the difficulty and probable further expense of dealing with riparian proprietors on the north shore of the bay, whose property will be affected by the works in question. It is this obstacle of expense that has hitherto been a bar to the city's undertaking the work," etc.

As late as 1895 the executive committee submitted their report respecting Ashbridge's bay improvements, in which they said: "Your committee beg to recommend the adoption of the following report of the city engineer, re the above, and that a copy of the plan referred to be filed by the city surveyor in the registry office for East Toronto, but no work shall be done on the north shore between Blong street and the eastern terminus until satisfactory arrangements have been made with the property owners, as regards riparian rights and filling."

After a perusal of the admitted documents bearing upon this branch of the case, I find it impossible to come to any other conclusion than that the city, down to the commencement of the improvements, recognized that the property owners had certain riparian rights, which such improvements might prejudicially affect. The agreement fixing the boundary line, so far from being an answer to the plaintiff's claim, is, in my judgment, the strongest kind of recognition on the part of the defendants of the existence of such claim and of the settlement upon that basis, and of their recognition of the owners' rights by receiving a patent from the Crown based upon their consent, and in this action, setting up that patent as their title to the land south of the conventional boundary. In my opinion they are estopped by their conduct in obtaining the agreement, acting upon it and in availing themselves of it from now denying the existence of those riparian rights which such agreement recognizes.

The foregoing affords, in my opinion, distinct ground upon which the plaintiff is entitled to succeed in this action.

It was a reliance of the plaintiff on the action of the council in pursuance of this clear understanding that delayed the plaintiff in bringing his action.

There was no intention and no agreement by the owners to abandon their riparian rights. The conventional boundary having been agreed to, the Government was enabled to grant to the city, lands to the south of what was recognized by both parties as the water line. Even had no patent been granted between the south of the "land lot," to the plaintiff, the defendants would, I think, have been estopped from denying that the plaintiff's title came down to the conventional boundary, but whether that be so or not the grant from the Crown of the "water lot," puts the plaintiff's right, in my opinion, beyond question. The plaintiff has now the same rights that he would have had if there had been no grant to the defendants or to himself of the land covered with water, except that the water line by consent is shifted further south. The effect of the conventional line simply settles the boundary of their lands both of which are lands between high and low water mark, and subject to the law affecting such lands.

I have this further to say as to the way the case strikes me. The city as early as 1847 accepted a license of occupation from the Government of Canada which as representing the Crown could only own the land as representing the bed of navigable waters below high water mark. The land having passed at Confederation either to the Dominion as having control of harbours or to the province as the owner of the bed of navigable waters not theretofore conveyed to a private owner, and having taken a grant from both, the defendants now seek to have it declared that the land was neither one nor the other, but land free from all rights which attach by virtue of that character under which alone they claim the right to have the grants from the Crown made to them. This, in my opinion, they have no right to do, but are bound by the nature and character of the land as represented in their grants whether from the province or the Dominion. This view is not based only upon the principle of estoppel but upon the broader ground of public policy that an individual receiving a grant from the Crown cannot be permitted under that grant to claim something different in character from that asked for and granted. This

point is very well put in *Parker* v. *Brown*, 127 Mich. Rep. 390, and a quotation from *Beards* v. *Federy*, 3 Wall. 492. The following observations may be referred to: "If parties asserting intersts in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognised in one suit and rejected in another, and, if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest." And again, "We are of the opinion that the survey by the Government, and transfer to and sale by the State to the meander lines, as State swamp land, conclusively establish the boundaries of the lake, and that title of abutting proprietors extend to them upon the presumption that must be conclusive, i.e., that when the meander lines were run they followed the true shore of the lake." If one puts here the conventional boundary in the present case as representing the authorised surveyed land and both parties requested the Government to so treat it by applying for their grants recognising it, the words quoted are directly apposite, I think, to the present case.

The action taken by the Dominion Government in erecting a breakwater to protect the harbour cannot affect the plaintiff's rights in this action; the plaintiff is not complaining here of that act whether right or wrnog.

Nor can effect be given, in my opinion, to the defence set up under the patent from the Dominion Government. If they rely upon that grant they are bound by its terms and it declares that the lands conveyed form part of the public harbour. If this be so, the plaintiff's lands abut on this harbour, to which he has a right of access to navigable waters.

It is, however, contended for the defence that an action does not lie and that the plaintiff whatever his rights may be must proceed under sec. 437 of the Municipal Act by arbitration, and that more than a year having elapsed any claim that he may have had is barred.

I think there are several answers to this objection. The first answer is, that the improvements made were not taken under the Municipal Act but under special Statutes, 54 Vict. ch. 82, sec. 6, and 56 Vict. ch. 85, sec. 9. A further answer is that the defendants have by their pleadings taken the position that the plaintiff does not own the lands claimed by him, that he has no riparian rights in respect thereof, and that his patent from the Crown is void. These are issues raised by the defence which cannot be tried, I think, by an arbitrator appointed under the Municipal Act. But on referring to the Act it will be seen that the injury complained of does not "necessarily result" from the exercise of such powers. Indeed, as before indicated, any injury to the plaintiff would not necessarily follow from the making of the cut. It was their negligent and wrongful act in depositing the earth taken from the cut to form a northern barrier against the plaintiff. This was wholly unnecessary and in such case the Act does not apply. Damages under the Act must be the legal and necessary results of the act complained of. *Reg.* v. *Poulter*, 20 Q. B. D. 132. It is only as to damages thus necessarily resulting from the exercise of statutory powers that the land owner is compelled to seek compensation under the statute. *Town of Raleigh* v. *Williams*, [1893] A. C. 540, at p. 550. See *Byran* v. *T. W. Rw. Co.*, 31 L. J. Q. B. 101; *Foster* v. *Municipality of Lansdowne*, 12 Man. Rep. 616.

It may be further noticed that the council may file plans and give notice under sec. 439, and that claims for damages must be filed within 60 days and in default the claim is barred. Here no notice was served upon the plaintiff, but on the contrary the defence takes the position that he has no title. Section 440 declares that the claim shall be barred within one year. Section 443 provides that the claim shall not be barred where the plans do not disclose the damages that may be sustained, and in the present case the plans do not shew that it is the intention to pile the excavated earth as a bank on the north side of the cut, and so do not disclose the damage that the plaintiff may sustain. For these reasons I think the plaintiff is entitled to bring his action instead of seeking relief which could not be adequate by arbitration.

The judgment appealed from should be set aside, and the defendants having denied the plaintiff's title and riparian rights he is entitled to have a declaration confirming the

same and also an injunction restraining the defendants from continuing the obstructions complained of.

Counsel stated, as I understood, at the bar, that the plaintiff was willing to forego his right to have the obstruction entirely removed if he was permitted access to the open cut along his water front. If the defendants so elect, the order may be so worded in lieu of the injunction.

The plaintiff is entitled to the costs below and of this appeal.

HON. MR. JUSTICE MACLAREN:—I agree.

COURT OF APPEAL. JUNE 28TH, 1912.

STRONG v. CROWN FIRE INS. CO. ET AL.

(AND THREE OTHER CASES.)

3 O. W. N. 1534.

Insurance—Fire—Notice of Loss in Writing—Misrepresentation of Value of Goods Insured—Previous Fire in Other Premises—Materiality of Question—Sufficiency of Particulars and Proofs of Loss—Further Proofs Required—Action Brought Within 60 Days After Latest Proofs Supplied — Relief against Imperfect Compliance with Statutory Conditions — New Action Brought and Consolidated with Premature Action—Amendments.

Actions by assignee of a firm of general merchants upon certain policies of insurance against fire issued by defendants. Pending these actions, which were tried at length, plaintiff anticipating objections that the actions were premature, brought other actions on the same causes of action, and, before any pleadings in the latter actions were delivered, applied to the trial Judge for consolidation with the former actions. Defendants claimed they would be debarred, if consolidation were granted, from setting up new defences and tendering new evidence in support thereof.

SUTHERLAND, J., 20 O. W. R. 901; 3 O. W. N. 481; 1 D. L. R. 111, permitted consolidation, and gave judgment for plaintiffs for their full claim and costs, giving them the benefit of Insurance Act, s. 172.

COURT OF APPEAL remitted actions to Sutherland, J., for trial upon evidence already in, and any further evidence, if any. Costs of all proceedings, including former trial and appeal, to be in discretion of trial Judge.

See 22 O. W. R. 309; 3 O. W. N. 1377.

An appeal by the defendant from a judgment of HON. MR. JUSTICE SUTHERLAND, 20 O. W. R. 901; 3 O. W. N. 48; 1 D. L. R. 111, at the trial, wthout a jury, in favour of the plaintiffs in the several actions which were all tried together.

See report of motion before HON. MR. JUSTICE SUTHERLAND, 22 O. W. R. 309; 3 O. W. N. 1377.

The appeal to Court of Appeal was heard by HON. MR. JUSTICE GARROW, HON. MR. JUSTICE MACLAREN, HON. MR.

JUSTICE MEREDITH, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE LENNOX.

F. E. Hodgins, K.C., and A. H. F. Lefroy, K.C., for the defendants.

N. W. Rowell, K.C., and G. Kerr, for the plaintiffs.

HON. MR. JUSTICE GARROW:—The actions were brought upon insurance policies against loss by fire upon the property of the firm of Wright & Hughes, at the town of Dresden. There were several defences set up in the statements of defence, the one which involved the most evidence and the greatest difficulty, being as to the value of the stock in trade which was destroyed, upon which a large number of witnesses were examined. It appears that while the actions were pending, the plaintiffs in two of the actions, in anticipation of an objection that their actions had been prematurely brought, caused other actions upon the same cause of action to be commenced, which actions had, apparently, not proceeded the length of pleadings when the judgment now in appeal was delivered. In that judgment, Sutherland, J., ordered the consolidation of these new actions with the older ones, and found in favour of the plaintiffs in all the actions. Objection is now taken to the consolidation, among other reasons, because, by the course adopted, the defendants were prevented from pleading and setting up defences to the new actions, and giving further evidence in support of such defences.

On the other hand, it is alleged that the defendants were given the opportunity to do what they now claim they were prevented from doing, and that they waived the right to do so and cannot now complain.

It is not easy to determine exactly what occurred. What seems clear is that there is not upon the record, where it should be, any proper evidence of such waiver. The effect of what occurred is plainly to put the defendants at a disadvantage, from which in some way they are entitled to be relieved. And the reasonable and fair way, in my opinion, is, without expressing any opinion upon the merits, which I think would be premature, to vacate the present judgment, including the consolidation, permit the parties to plead and to offer such further evidence in the new actions as they may be advised, and to direct the cases to be reheard or tried before Sutherland, J., upon the evidence already given and

such further evidence, if any. This to be, of course, without prejudice to any order which the learned Judge may make as to consolidation, under sec. 158 of the Ontario Insurance Act, 1912, upon the completion of the pleadings in the new actions.

The costs of this appeal, and of the former trial, and of the further proceedings before Sutherland, J., may all, I think not unfairly, be made costs in the cause, and, as such, subject to the order of the trial Judge. The misunderstanding is one for which no one is particularly to blame, although it is rather apparent that if Mr. Rose, acting for the defendants, had attended, as he at first intended to do, the meeting for the settlement of the minutes of the judgment, of which he was duly notified, the situation which I have been dealing with would, probably, not have been created. I do not say this to blame him at all, for his diversion from his original intention, while unfortunate in the result, is, I think, sufficiently accounted for.

The appeal will, therefore, to the extent I have indicated, be allowed, and the cases remitted for further trial before Sutherland, J.

COURT OF APPEAL.

JUNE 28TH, 1912.

MUNN v. VIGEON.

3 O. W. N. 1532.

Timber—Contract of Sale of Timber Limits and Assets of Company—Option or Offer — Construction—Reformation — "Not Completed"—Right of Vendor to Forfeit of Deposit Paid by Purhaser—Parties—Form of Action—Declaration—Costs.

Action for recovery of $5,000, alleged to have been furnished by plaintiff to defendant Vigeon, who deposited it in the Imperial Bank to secure an option for the purchase of certain timber limits and assets of defendant company. Plaintiff alleged that it was agreed that if the option was not exercised, the money was to be returned to him.

BRITTON, J., *held*, 21 O. W. R. 660; 3 O. W. N. 811, that judgment should be entered for defendant Vigeon dismissing action as against him with costs, and that judgment should be entered for plaintiff against defendant company for $5,000, with interest at 5%, from November 28th, 1911, with costs. That there should be a declaration that the $5,000 received by the Imperial Bank as the proceeds of plaintiff's cheque and interest thereon, if any, was the property of plaintiff. If that money, or any part of it, is paid to plaintiff, it will be in satisfaction *pro tanto* of plaintiff's judgment herein. If the defendant company pays and satisfies this judgment outside of and apart from the said money on deposit in the bank, then this money will belong to the defendant company.

COURT OF APPEAL dismissed appeal of defendant company from above judgment, with costs.

An appeal by the defendants, the Ontario Lumber Co., from a judgment of Hon. Mr. Justice Britton, 21 O. W. R. 660; 3 O. W. N. 811.

The appeal to Court of Appeal was heard by Hon. Mr. Justice Garrow, Hon. Mr. Justice Maclaren, Hon. Mr. Justice Meredith, Hon. Mr. Justice Magee, and Hon. Mr. Justice Lennox.

J. Bicknell, K.C., for the appellants.

Leighton McCarthy, K.C., for the plaintiffs.

Hon. Mr. Justice Meredith:—The appellants have failed to convince me that the appeal should be allowed.

The writing in question was an "offer to purchase," and the acceptance in writing at the foot of it is of "the above offer;" the most material term of the offer is that the cash payment of $5,000, to be made when the agreement was effected, was "to be returned without interest if contract not completed."

Ordinarily these words should not give an absolute right on the purchaser's part to rescind; if that right had been intended to be reserved, there would have been no difficulty to find words well fitted to give expression to it. On the other hand the whole of the testimony shews that this term was inserted at the purchaser's instance, and for his benefit; and it is hard to see how it would be beneficial to the purchaser, except in the way of a right to rescind.

The words are ambiguous; the case is not one in which to give the relief sought, would be to disregard words of but one meaning; and putting one's self as nearly as one can in the position of the parties at the time of the making of the agreement, I am not prepared to say that the interpretation of the words in question by the learned trial Judge is wrong.

It is not an uncommon thing for a vendor to provide that he may in certain events—but not at will—rescind on returning the deposit of purchase money; but it is at least quite unusual for a purchaser to provide for rescission at his will. If it be held a right to rescind vested in the vendor alone, and at will, it would be unusual, and rather hard upon the purchaser; whilst if it give each such a right it would be substantially no agreement. It may, of course, be

that the parties were really never at one; and in that case the result would be the same.

If the case were one of words of unquestionable meaning, I cannot think that a case for reformation would have been made at the trial.

Under the circumstances the action might very well have been dismissed without costs; the lack of any sort of reasonable care in signing the very doubtful "offer to purchase," has really brought about this litigation. As the plaintiff was given his costs at the trial I would make no order as to costs here.

HON. MR. JUSTICE BRITTON. JULY 2ND, 1912.

CORNWALL SINGLE COURT.

RE SNETSINGER.

3 O. W. N. 1569.

Will — Construction — Devise of Real Estate — Land Subject to Contract of Sale.

BRITTON, J., *held*, that a devise of the whole of a testator's real estate does not include lands sold under an agreement for purchase, even if some instalments of purchase-money are overdue, the testator's interest being an interest in the unpaid purchase-money.

Motion by Allan Snetsinger, upon an originating notice of motion under Consolidated Rule 938, for an order of the Court, construing that clause in the will of John G. Snetsinger, which dealt with the real estate in the township of Cornwall—which belonged to the testator. The motion was heard at Cornwall.

George A. Stiles, for A. M. Snetsinger.

C. H. Cline, for the executors.

HON. MR. JUSTICE BRITTON:—The testator made his will on the 19th day of November, 1906. On that day he owned several farms in the township of Cornwall. On the 15th day of March, 1899, the testator entered into an agreement with one W. H. Conliff for the sale to Conliff of part of the east half of lot 22 in the 4th concession, 5th range of the township of Cornwall, for the price or sum of $2,500

payable in yearly payments—the 1st of $50 and the second to 14th inclusive of $100 each, and the balance at expiration of the 15th year. The time for payment in full will not expire until the 15th March, 1914. The purchaser went into possession, was at time of making the will, at time of death of testator, and is now in possession. The executors recognize the agreement with Conliff—as in force, and although there has been default in paying, as much on account of principal as the agreement calls for, and although the agreement permits in case of default, the vendor to re-sell—there has been no re-entry or attempt to sell, by either the testator or the executors. The principal money of the purchase-price has been reduced. The vendee could during the testator's life—according to the terms of agreement have made his payment on principal up to $1,000, and could have demanded and got a conveyance to him—giving to the testator a mortgage for the balance. The testator died on the 9th December, 1909. The vendee has his right to retain the land—and get a conveyance from the executors.

The clauses of the will requiring consideration are: (1) "I give, devise and bequeath to my son Allan M. Snetsigner my entire stock of goods in my store at Moulinette aforesaid, my carriages, harness, farm implements of all kinds, horses, and all kinds of live stock, and generally the contents of the stables, carriage houses, and outbuildings at my residence and upon my farms in the township of Cornwall, and one half of my household furniture and household effects and furnishings of all kinds, including plate glass ware, pictures, books, and the entire contents of my dwelling, and all my real estate in the township of Cornwall" . . .

The testator had farms—real estate—in the township of Cornwall—not in any way connected with the farm under agreement with Conliff. No part of the chattel property, bequeathed to Allan was upon the Conliff farm. Nothing in the will refers directly to the Conliff farm.

The devise of all the rest and residue of testator's property is upon trust "(1) forthwith to convey, assure, assign and set over to my son Allan M. Snetsinger, the real and personal estate hereinbefore devised and bequeathed to him." This clause does not in any way enlarge the devise, or assist Allan in his claim to the Conliff farm.

The sole question is, do the words "my real estate in the township of Cornwall," include the real estate sold to Conliff?

I am of opinion that they do not. This farm was not at the time of making the will, or at time of testator's death, his real estate within the meaning of these words. The words real estate do not as a general thing include leasehold—nor do they include the beneficial interest which a mortgagee has. In this case the testator had his interest limited to the unpaid purchase-money—what the testator intended to indicate as the real estate he devised to his son is shewn by mentioning the chattels upon the farms, and mentioning by description one parcel. The distinction between purchase-money for land and the land itself is clearly maintained in all cases of ademption. See *In re Clowez*, L. R. 1 Ch. D. 1893; *Re Dods*, 1 O. L. R. 7; *Ross* v. *Ross*, 20 Grant 203.

It was held in *Leach* v. *Jay*, 6 Ch. D. 496, that the words "real estate, of which I may die seized, did not pass lands, which at the time of the testator's death, were in the wrongful possession of a stranger."

The fair inference from the reasoning in that case is that the words "real estate" would not pass lands, which at the time of the testator's death were in the rightful possession of a purchaser, even if all the purchase-money not paid.

The order will go construing the will of the said John Goodall Snetsinger—in this that the clause devising all the real estate of the deceased in the township of Cornwall did not pass that portion of the east half of lot No. 22 in the 4th concession, 5th range, of the township of Cornwall in the county of Stormont, lying north of the Ottawa and New York railway crossing, said east half of said lot.

Costs of all parties out of the estate—costs of executors between solicitor and client.