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*June 14,
*Oct. 11.

EDYTHE KERRIGAN (PLAINTIFF) .APPELLANT;

AND

EMMA M. HARRISON (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Covenant—Conveyance of right of way—Defined road—Maintenance—Subsequent destruction of road—Impossibility of performance.

Where, in a deed of land bordering on Lake Erie, the vendor grants to the vendee a right of way over a defined road with a covenant to maintain said road and keep it in repair the destruction of the road by encroachment of the waters of the lake excuses him from restoring it or providing a substituted right of way when there is nothing to show that the parties intended to agree therefor.

APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario (1), reversing the judgment at the trial (2), in favour of the plaintiff (appellant).

A deed from the respondent to one Graham, of land bordering on Lake Erie contained the following clause:—

"PROVIDED and it is further agreed by and between the party of the first part, her heirs and assigns, and the party of the second part, his heirs and assigns that the party of the second part shall have a right of way to his said lands over a certain road shown upon the said plan as Harrison Place, running north-easterly

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 47 Ont. L. R. 548. (2) 46 Ont. L. R. 227.

and south-westerly as shown upon the said plan and the party of the first part agrees to maintain the said road and bridges thereon in as good condition as the same are now, and the party of the second part, his heirs and assigns, agree with the party of the first part, her heirs and assigns, to close the gates across the said roadway whenever he or they may have occasion to use said gates."

Said Graham conveyed to appellant the property, consisting of two lots, described in said deed except half of one lot.

The lake took by erosion all the road called Harrison Place and respondent laid out a new road in its place. Appellant, however, claimed that she was obliged to maintain the former road as it existed when the deed was given to Graham and brought an action to compel her to do so. The trial judge gave judgment in her favour directing the respondent to restore the road to its original condition or to furnish a road and bridges in all respects as suitable. The Appellate Division reversed his judgment holding that by the erosion the title to the road had reverted to the Crown and performance of the covenant would be illegal.

Lafleur K.C. and *Braden* for the appellant. If the vendor wished to guard himself against the contingency which happened he should have made provision therefor in the deed. See *Brecknock and Abergavenny Canal Navigation* v. *Pritchard* (1); *Jacobs* v. *Crédit Lyonnais* (2).

Impossibility of performance is no excuse in this case. The loss of the road was not caused by the act of God but by failure of respondent to protect it. See *Pandorf* v. *Hamilton* (3), at page 675; *Nugent* v. *Smith* (4).

(1) 6 T. R. 750.
(2) [1884] 12 Q.B.D. 589.
(3) [1886] 17 Q.B.D. 670.
(4) [1876] 1 C.P.D. 423.

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H. J. Scott K.C. and *McEvoy* for the respondent, cited *Haywood* v. *Brunswick Permanent Building Soc.* (1); *Andrew* v. *Aitken* (2); *Austerberry* v. *Oldham* (3).

IDINGTON J.—The covenant upon which the appellant sued herein, given by respondent in a deed by which she granted to one Graham two town lots of land of which he afterwards assigned the smaller one to appellant, does not seem to me to be clearly one that runs with the land.

It was a covenant to maintain a road and bridges thereon (by which access could be had to the land so granted) in as good condition as same were at the time of the grant.

The proviso containing said covenant began by stating that it was agreed by and between the grantor, her heirs and assigns, and the grantee, his heirs and assigns, that the grantee should have a right of way over a certain road shewn on a plan, and ended by a covenant of the grantee binding him, his heirs and assigns to close the gates across said roadway.

From this it clearly was a private right of way and was of some considerable length and seems to have served a number of places before reaching the point of approach to the land conveyed.

Even if the covenant would run with the land so conveyed, I doubt if, having regard to the surrounding circumstances as well as the language used, it could be held to do so in a sense that any assignee, as appellant is, of a small part only of the land granted should enjoy the benefit of same.

(1) [1881] 8 Q.B.D. 403. (2) [1882] 22 Ch. D. 218.
(3) [1885] 29 Ch. D. 750.

The law is to be found in *Spencer's Case* (1) and the notes thereto in Vol. I of Smith's Leading Cases (12 ed.) page 62.

The grantor can hardly have contemplated keeping up such a road for a colony and forever.

Then the road at the point in question seems rather remote from the land in question and it may only be one of the many collateral things that have been held not to be of the nature of that which must be the foundation for a covenant running with the land.

The points of objection resting upon the right of appellant to sue were taken here for the first time. And in deference to the argument so presented as well as curiosity I have considered the cases cited and much in *Spencer's Case* (1) and notes thereto cited above, withcout coming to any other definite conclusion than that, if there had been any doubt in my mind as to part of the ground upon which the judgment appealed from is rested in the court below, I should have desired a reargument on this phase of the case. The suggestion I make, as to the appellant not being the assignee of the whole, is my own and if resorted to needs an argument devoted thereto.

I have considered very fully the grounds taken in the argument in the court below, and have come to the conclusion that the reasons assigned by the learned Chief Justice of the Exchequer Division presiding in the second Appellate Division of the Supreme Court of Ontario are, in the main, correct but that it is not necessary to go quite so far as to hold that the mere periodical covering of an eroded part by a few inches of lake water, inevitably leads to a reversion of that part of the land in question to the Crown.

(1) 5 Co. 16.

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But assuredly herein, if the pretensions set up by the appellant are correct, much more than operating on a small part to counteract that which seems inevitable would have to be done by the respondent, or should have been done by her, to protect, by works such as witnesses speak of, the base of the road in question. That would involve what is contemplated by the reasons of the Chief Justice which would be applicable in the sense of interfering with navigation or the right of the Dominion to assert dominion over the space involved.

I do not think we need go further than the observance of the rule as to what could be held to have been possibly within the contemplation of the parties as I suggested during the argument herein.

I find justification therefor in the judgment of Lord Kenyon C. J., in the case, cited by counsel for respondent, of *The Company of Proprietors of The Brecknock and Abergavenny Canal Navigation* v. *Pritchard & Others* (1), wherein a somewhat similar covenant to that in question herein was involved.

In disposing of it he said:—

> This sort of loss must have been in the contemplation of all the parties in this case; the bridge was to be built in such a manner as to resist any body of water.

Such was the nature of the contract there in question. Such is not the nature of the contract here in question.

The pretension that such a contract as involved herein (merely in respect of and for the sale of two village lots worth together twelve hundred dollars), necessarily involves the possibilities of expending a fortune for discharging the obligation, is, to my mind, quite unthinkable.

(1) 6 T. R. 750.

If any one has pretended to say that such was involved in fact I beg leave to doubt his recollection and would feel inclined to doubt that the statement had ever reached the mind of respondent.

Let us apply our common sense to such pretensions and there is an end of such stories.

In my view it never was within the contemplation of either of the parties that in the event of that happening, which has happened, the respondent was bound by such a covenant as this to restore the road in question. If such a case had been presented to either as within the possibilities contemplated we never would have been troubled with this covenant or this case.

I rely, of course, on the cases cited and other reasons based thereon in said judgment of the Chief Justice, to which I have not specifically referred.

The appeal should be dismissed with costs.

DUFF J.—The proviso in the grant from the defendant to Graham upon which the decision of this appeal turns is in these words:—

> Provided and it is further agreed by and between the party of the first part, her heirs and assigns, and the party of the second part, his heirs and assigns, that the party of the second part shall have a right of way to his said lands over a certain road shewn upon the said plan as Harrison Place, running north-easterly and south-westerly as shewn upon the said plan, and the party of the first part agrees to maintain the said road and bridges thereon in as good condition as the same are now, and the party of the second part, his heirs and assigns, agrees with the party of the first part, her heirs and assigns, to close the gates across the said roadway whenever he or they may have occasion to use said gates.

The right of way reserved is therefore a right of way on a defined road and it is that defined road which the defendant covenanted to maintain. The Appellate Division was, I think, entirely right in holding that the covenant did not contemplate the case of the

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destruction of the substratum of the road by the inroads of the lake. The case is within the broad principle upon which the rule in *Taylor* v. *Caldwell* (1) rests, if not embraced within the terms of the rule itself. The parties clearly contracted on the footing that the site of the road should continue to exist. I say they clearly did so because, having regard to all the circumstances, one cannot suppose that reasonable persons, having clearly in view the contingency which happened, would on the one hand have exacted or on the other hand agreed to enter into an unqualified covenant to protect the site of the road from the invasion of the lake.

The appeal should be dismissed with costs.

ANGLIN J.—Two questions arise in this case—one as to the construction of the grant by the defendant to the plaintiff's assignor of a right of way

over a certain road shewn * * * as Harrison Place

and her covenant

to maintain the said road and bridges thereon in as good a condition as the same are now,

and the other as to the plaintiff's right to claim the benefit of this covenant. In the view I take of the first question it will be unnecessary to deal with the second.

The learned trial judge (Falconbridge C. J.) held the plaintiff entitled to recover and ordered the defendant to furnish, construct and maintain over her lands a road and bridges as suitable, sufficient and convenient for the plaintiff as the road known as Harrison Place was at the date of the defendant's conveyance to the plaintiff's assignor. Damages were also awarded for breach of the covenant. (2).

(1) 3 B. & S. 826. (2) 46 Ont. L.R. 227.

The Appellate Divisional Court reversed this judgment, holding that the erosion of the site of Harrison Place by encroachment of the waters of Lake Erie had relieved the defendant from all liability under her covenant. (1). The fact of the erosion is common ground.

With very great respect, I fail to find anything in the agreement for the right of way or in the covenant to maintain it which would entitle the plaintiff or her assignor, were he suing, to such a substituted right of way as the judgment of the lamented Chief Justice of the King's Bench awarded. The grant is of a right of way over Harrison Place; the covenant is to maintain said road and bridges thereon.

Harrison Place having ceased to exist without any default of the defendant, I agree in the view of the learned judges of the Appellate Divisional Court that her obligation under the covenant sued upon thereupon lapsed. I cannot usefully add anything to the reasons for this conclusion stated by the learned Chief Justice of the Exchequer Division.

The question is purely one of construction of the terms of the covenant, which must, of course, be read in the light of the circumstances under which it was made. But I do not find either in the language of the agreement and covenant *per se* or in the circumstances under which they were entered into, as disclosed by the evidence, anything that would warrant imposing upon the defendant an obligation—almost certainly impossible of performance—to protect the road in question against invasion by the waters of Lake Erie. That cannot reasonably be supposed to have been within the contemplation of the parties.

(1) 47 Ont. L.R. 548

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The case in my opinion falls within the principle of the line of authorities of which *Taylor* v. *Caldwell* (1), is the best known and *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2), is a modern instance, rather than within that of *Paradine* v. *Jane* (3), and *Atkinson* v. *Ritchie* (4), relied on by the late learned Chief Justice of the King's Bench. The law seems to be well stated in paragraphs 717 and 718 of Vol. 13 of Corpus Juris, which the learned Chief Justice cited but thought not applicable. The case at bar I think falls within the exception noted in par. 713 rather than under the general rule stated in the passage from par. 711 quoted by the learned Chief Justice. The language of Hannen J. in *Baily* v. *De Crespigny* (5), at page 185, appears to be in point.

BRODEUR J.—The obligation incurred by the respondent under her contract with the appellant's auteurs was to *maintain* a certain road therein described. This road having been destroyed by the act of God, her obligation is at an end.

The parties contracted on the basis of the continued existence of the road its subsequent perishing excuses the performance (Corpus Juris, vol. 13, p. 642, sect. 717). There is an implied condition that the impossibility of performing the obligation puts an end to the obligation of keeping the road in repair. The word "maintain" could not cover the obligation of re-establishing the road if it were washed away by the action of the waves. It means to keep in repair the

(1) 3 B. & S. 826.
(2) [1916] 2 A. C. 397.
(3) Aleyn 27.
(4) 10 East 530.
(5) L. R. 4 Q. B. 180.

road in question. It could not be construed in the circumstances as an obligation of reconstructing works which by their high cost could never have been contemplated by the parties.

This contract should be read as containing an implied condition that the respondent should be excused if the breach became impossible from the perishing of the thing without default of the contractor. *Taylor* v. *Caldwell* (1); *Appleby* v. *Myers* (2).

No reasonable suggestion can be offered that the destruction of the road was due to the negligence or the fault of Harrison.

The appeal fails and should be dismissed with costs.

MIGNAULT J.—I concur with my brother Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Gibbons, Harper & Brodeur.*

Solicitor for the respondent: *J. M. McEvoy.*

(1) 3 B. & S. 826. (2) [1867] L.R. 2 C.P. 651.