HENRY YARWOOD ATTRILL (DEFENDANT) ..... } APPELLANT;

AND

SAMUEL PLATT (PLAINTIFF) ..... RESPONDENT.

1883
*March 16.
1884
*Jan. 5.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Easements—Grant of servient tenement—Implied reservation—Implied grant—Plan—Evidence—Boundaries—Description—Riparian proprietor—Diversion of water.

One piece of land cannot be said to be burdenedby an easement in favor of another piece when both belong absolutely to the same owner, who has, in the exercise of his own unrestricted right of enjoyment, the power of using both as he thinks fit and of making the use of one parcel subservient to that of the other, if he chooses so to do,—and if the title to different parcels comes to be vested in the same owner, there is an extinguishment of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were in separate hands, legal easements, cease to be so, and become mere easements in fact—*quasi* easements.

If the *quasi* servient tenement is subsequently first conveyed without expressly providing for the continuance of the easements, there is no implied reservation for the benefit of the land retained by the grantor, except of easements of necessity, and no distinction is to be made for this purpose between easements which are apparent and those which are non-apparent.

If the dominant tenement is first granted, all *quasi* easements which have been enjoyed as appendant to it over a *quasi* servient tenement retained by the grantor, pass by implication.

Besides the lands the title to which was derived from their common grantor, the appellant was proprietor of another piece of land, called Block A, situated on the opposite side of the River *Maitland*, the boundary of said Block on the river side being high water-mark.

Held,—That the lateral or riparian contact of the land with the

*PRESENT.—Sir W. J. Ritchie, C. J., and Strong, Fournier, Henry and Gwynne, JJ.

1883

ATTRILL v. PLATT.

water would suffice to entitle the appellant to object to any unauthorized interference with the flow of the river in its natural state.

In 1859 the then owners of part of the lands in question had a plan prepared and registered, and in 1871 they conveyed a parcel which they described as Block F.

Held,—That it must be presumed they intended to convey the same parcel of land shown on said plan as Block F with the same natural boundaries as those thereon indicated.

The evidence of professional draughtsmen was properly admitted to show what, according to the general practice and usage of draughtsmen in preparing plans, certain shadings and marks on said plan were intended to indicate.

When a close or parcel of land is granted by a specific name, and it can be shown what are the boundaries of such close or parcel, the governing part of the description is the specific name, and the whole parcel will pass, even though to the general description there is superadded a particular description by metes and bounds, or by a plan which does not show the whole contents of the land as included in the designation by which it is known.

APPEAL by the above named appellant (defendant) from a judgment of the Court of Appeal for *Ontario*, dated the 29th June, A D. 1882, affirming a decree pronounced in the Court of Chancery for *Ontario*, in favour of the respondent (plaintiff), on the 8th day of April, A.D. 1880, at the examination of witnesses and hearing at *Goderich*, before His Lordship Vice-Chancellor *Proudfoot*.

The substance of the plaintiff's bill of complaint is, that upon the 4th day of July, 1859, the *Buffalo & Lake Huron Railway Company*, being the owners of certain lands upon both sides of the river *Maitland*, demised a part thereof to the plaintiff by an indenture of lease of that date, whereby it was witnessed that for the several considerations therein expressed, the said company did demise to the plaintiff, and did agree to sell to him the lands and premises following, situate in the town of *Goderich*:

A mill site on the river *Maitland*, also the easement and privilege

of constructing and maintaining a dam upon and across the said river so high as to take up eight feet of the fall of the said river, but no more, also the easement and privilege of constructing and maintaining a sufficient head race from the said intended dam to the said mill site, also the easement and privilege of a roadway leading through the lands of the said company from the said mill site to the boundary of the lands of the said company in the direction of *North* street, also the easement and privilege of constructing a switch from the said mill site to the main line of the said railway of the company near *Goderich Harbour*, in so far as the same shall run on, over, or through the lands of the said company, which said lands, &c., are more particularly described and pointed out on a plan thereof to be annexed, and in the following description, that is to say—Description of mill-race: Commencing at a point on the southerly edge of the channel, known as the Blind Channel, and forming part of the river *Maitland*, the aforesaid point being due West 295 feet from a point in the centre line of *North* street, produced at the distance of 2,314 feet from the flagstaff on the centre of the court house; thence due north 9° 50', 199 feet to an angle; thence due north 50° 7' east, 279 feet 5 inches to an angle; thence due north 32' minutes east, 291 feet 2 inches to an angle; thence due north 34° 46' east, 259 feet 6 inches to an angle; thence due north 13° 31' east, 495 feet 4 inches to an angle; thence due north 49° 25' east, 103 feet 7 inches to an angle; thence due north 60° 2' east 110 feet 8 inches to an angle; thence due north 79° 18' 30" east 319 feet 3 inches, more or less, to the head gates of the race; thence easterly across the head gates 107 feet, more or less, to the high water-mark caused by a dam giving a head of 8 feet of water at the mill; thence westerly and southerly along that high water-mark on the easterly side of the mill-race following the various windings of the high-water mark aforesaid on the natural bank adjoining the said race to the northerly limit of the railway embankment; thence south westerly along that limit to its intersection with the blind channel of the river *Maitland;* thence north easterly along the southerly edge of the blind channel aforesaid, following its several windings to the place of beginning.

Then follows a description of the mill site as follows:—

Commencing at a point on the easterly edge of the mill race, which point is 320 feet on a course due north 50° 7' east from a point in the production of the centre line of *North* street northerly 2,559 feet from the flag staff on the centre of the court house in the town of *Goderich;* thence due north 50° 7' east 260 feet to an angle; thence due north 39° 53' west 333 feet to an angle on the edge of the

1883

ATTRILL v. PLATT.

mill race in a southerly direction, following the various windings thereof to the place of beginning, the whole containing an area of one acre: To have and to hold the said demised lands, &c, and premises unto the plaintiff, his executors, administrators and assigns for and during and unto the full end and term of seven years to commence and be computed from the day the flouring mill intended to be erected on the said mill site shall have commenced working, but in any event from the 1st day of May next ensuing the date of the said indenture of lease. Yielding and paying therefor yearly and every year of the said term of seven years, the clear yearly rent or sum of $100 by equal half yearly payments of $50 each, to fall due and be payable at the beginning and middle of each year.

And it was by the said indenture declared and agreed that the plaintiff, his heirs, executors or assigns should, between the day of the date of the said indenture and the 1st day of May next ensuing, at his or their own proper cost, charge and expense, put up, erect, build and construct a flouring mill on the said mill site with all necessary works, easements, and appurtenances, and during the said term thereby granted at his or their own proper costs and charges, construct, build and maintain the said dam, mill and all and singular other the works, easements and appurtenances without any charge whatever to the said company; and that notwithstanding anything in the said indenture contained, the said company should retain and possess absolute and unconditional power and control over the said river and the waters thereof above the backwater caused by the said dam so to be erected by the plaintiff as aforesaid, and also below the said mill site, and should also have the right of using the said river and the waters thereof for machinery or water purposes, or otherwise, as the said company should think fit, however not wasting the water of the said river below the said head race, but having the right of operating such water in the dam or head race of the said plaintiff as to the said company should seem fit: Provided further that the said plaintiff, his heirs, &c.,

should have the right to purchase the said demised premises at and for the sum of $5,000, at any time during the continuance of the said term, upon giving to the said company six months' notice thereof in writing to end before or at the time of the expiration of the term thereby granted; and that if he or they should not elect so to purchase, he or they should, at the expiration of the said term, have the privilege of re-renting the same demised premises for a further term of three years by giving six months notice thereof to end before or along with the said term of seven years at and for the annual rent which would be equivalent to the interest at six per cent. per annum on the said $5,000 to be paid half-yearly at the times thereinbefore provided for payment of rent during the said term of seven years, with liberty to him or them to purchase the said redemised premises during the said second term on the same terms and conditions as above provided, with respect to purchasing during the said first term, but that in case the said plaintiff, his heirs, etc., should not at the expiration of the term or terms aforesaid, purchase the said demised premises, all the erections, improvements and fixtures thereon erected, put and placed during the continuance of the said terms, should belong to, and form part of the said lands and freehold, and at the expiration of the said term or terms, as the case might be, or sooner determination of the term by the said indenture granted, revert to and become the absolute property of the said company.

The bill then avers that the plaintiff was let into possession of the said premises by the said company, and that he and his assigns have ever since been in uninterrupted possession and enjoyment of the said lands and of the said easements and privileges, including the easement and privilege of erecting and maintaining a dam across the said river so high as to take up

1883

ATTRILL v. PLATT.

8 feet of the fall of the said river, but no more, also of the easement and privilege of constructing and maintaining a sufficient head-race from the said intended dam to the mill site, and that soon after the plaintiff had acquired the said property, he commenced in the year 1859 making extensive improvements thereon, and built a large flour and grist mill and salt manufactory thereon, and that he and the successive owners thereof spent large sums of money in order to render them available for the purposes for which they were purchased, and in constructing and maintaining the head of eight feet of water for the said mills and works, and that at the time the plaintiff procured the said lease of the said lands and easements with the right of purchase from the *Buffalo & Lake Huron Railway Company*, and for a long time prior thereto, and ever since the waters of the said river reached the plaintiff's mill-race and dam by a channel which branched off from the main channel of the river within a short distance of the bridge across the said river; and that in the year 1861 the plaintiff cleared out the said channel at considerable expense and built a dam near the said bridge and thereby caused the water to flow through the said channel in a sufficient volume to produce the head of eight feet to which he was entitled. And the bill charged that the plaintiff was entitled to maintain that dam, and to have the said channel kept in its accustomed condition, and to have the water to flow therein to the plaintiff's mill And the bill alleged further, that the plaintiff expended the sum of $12,000, or thereabouts, in improving, constructing and perfecting a race-way from the said channel to his mill; and that the plaintiff and the successive owners have been in uninterrupted possession and enjoyment of the said channel and raceway for the purposes of the said mills and other works since the year 1861, and until destroyed on the

11th day of February, 1880, when the defendant, with a number of men and horses employed by him, commenced, without any right or authority, and in violation of the plaintiff's rights, to fill up with timber, planks, earth, and stones, the mouth of the said channel, through which the waters of the said river flowed to the plaintiff's said mill, and on the 12th day of February, 1880, the said laborers of the defendant, acting under his instructions, unlawfully and in violation of the plaintiff's rights, pulled down the dam so erected by the plaintiff for the purpose aforesaid, and used the stone and gravel from the said dam in blocking up the said channel, therewith forming a permanent impediment to the flow of the water through the said channel.

The bill further alleged that while the plaintiff was in possession as aforesaid, he, with the concurrence of the *Buffalo & Lake Huron Railway Co.*, by an indenture dated the 9th of November, 1866, assigned the said lands and premises to one *Alex. T. Paterson*, and that afterwards, by an indenture of bargain and sale, bearing date the 3rd day of February, 1873, the said lands in pursuance of the said contract were conveyed to the said *Paterson* in fee simple by the *G. T. Ry. Co.* of *Canada*, who had acquired all the property and rights of the *Buffalo & Lake Huron Railway Co.*, and that *Paterson*, by an indenture dated the 22nd of August, 1873, conveyed to one *Tew*, who, by an indenture of the 4th of December, 1875, conveyed the same to the plaintiff together with said easements and privileges; and that the successive owners, under the said respective deeds, respectively entered into the actual possession of the said lands, easements and privileges, and actually enjoyed the same; and that the said several deeds are all registered in the registry office of the county of *Huron*, in which

1883

ATTRILL v. PLATT.

said lands are situate. And the bill prayed that the defendant might be perpetually restrained by the order and injunction of the Court of Chancery from keeping the said channel blocked up and from in any way interfering with the flow of water therein, and for an account of the damage sustained by the plaintiff by reason of the said conduct of the defendant.

To this bill the defendant filed a long answer, in which he sets up his right to do the acts complained of at the places stated in the bill; and therein he denies the plaintiff's right to the easement as claimed by him. The short material substance of his answer is, that the defendant, is seised in fee of a piece of land situate on one side of the river *Maitland*, and abutting thereon, and known as part of block F, in the northerly part of the town of *Goderich*, and of a piece of land opposite thereto, on the other side of the river *Maitland*, called the Great Meadow, situate in the township of *Colborne*, and that in virtue of such seisin he is seised of the bed of the river at the place where the said dam was situate; and that in virtue of such seisin he did the acts complained of, as he insists he lawfully might, for the reason that, as he alleges, the said dam was wrongfully erected on lands whereof he was seised in fee, and wrongfully obstructed the flow of the waters of the river in their natural course past the defendant's said land and another piece of land lower down the said river, called block A, whereof the defendant is also seised in fee; and the defendant alleges and insists that the acts and conduct of the plaintiff in erecting the said dam and in excavating the channel, which is situate on land whereof the defendant alleges that he is seised in fee, being part of the piece of land called block F, and in drawing off the waters of the river through the said channel from above the said dam, were unauthorized acts of trespass committed by the plaintiff without the

authority of the then owners of the soil where the same were committed, and that in fact the plaintiff had no right whatever to the easement and privilege as claimed by him of maintaining the said dam and the channel leading therefrom as excavated by him, either by grant or prescription, although title by the latter mode is not asserted in the bill, but title by grant only is. The defendant closes his answer by praying by way of cross relief against the plaintiff that he may be ordered to remove the said dam near the said bridge as an unlawful obstruction in the said river, and that he may be restrained from continuing the use of the said artificial channel through the portion of block F, whereof the defendant is seised in fee, and from otherwise diverting or interfering with the natural flow of the river in its proper and natural channel past and along the lands on the north and south banks of the said river, whereof the defendant is seised in fee.

The following description of the *locus* will be better understood with the aid of the sketch on the next page.

The river *Maitland* flows westward into *Lake Huron*, into which it empties about half a mile to the west of respondent's mill. *Maitland* bridge is situated about half a mile to the eastward of the mill. The river is not navigable. Its north bank, from the bridge to the lake, is composed of the parcel of land called "The Great Meadow," which begins at the bridge and runs westerly along the river until it meets block "A," which forms the remainder of the bank to the lake. Beginning again at the bridge, and running westerly along the south bank, it is comprised of blocks "F" and "E," which carries us below or to the westward of the lands and easements in dispute.

The river forms the boundary between the township of *Colborne*, on the north, and the town of *Goderich* on the south.

1883

ATTRILL v. PLATT.

The respondent's mill and the so-called channel in dispute are upon the south bank in the town of *Goderich*. The dam is across the main channel of the river, near the bridge. In the river, but nearest the *Colborne* shore, is an island called "C." The appellant, at the time the alleged wrongful acts complained of were committed, was the owner, in fee simple, of said block "A," "The Great Meadow" and island "C," in the township of *Colborne*, and of blocks "E" and "F" in the town of *Goderich*, except such portions thereof as the respondent was entitled to.

The town of *Goderich* is built upon a plateau, about 100 feet above the river. Descending towards the river, a second plateau, some 30 or 40 feet above the river, is reached. This is block "F." To the westward, and on a lower level by several feet, is block "E." Between blocks "E" and "F" there was originally a dry or blind channel of the river, forming a natural boundary. This has been enlarged and deepened, and in the accompanying sketch is called "Mill Pond." In the description by metes and bounds, in respondent's title, it is called "Mill Race." The banks of block "F" are precipitous towards the river. Towards its easterly end and down stream for about 100 yards after descending to nearly the level of the river, there is a small shoal or flat before the actual waters of the river, in the main channel, are reached. This shoal or flat is of varying width, but not exceeding at any point 100 feet. To the westward, after passing this shoal or flat, the waters of the river formerly washed the high and almost precipitous banks of the upper table-land composing block "F" down to the limits of block "E."

In 1859, when the respondent's title began, the south bank of the river was a forest. No mill had ever been built, nor dam nor race-way constructed, but the whole was in a state of nature. The respondent's lessors, the

railway company, then owned blocks "E" and "F," and island "C," and "The Great Meadow," and the bed of the river, but they never owned block "A," nor did they ever own the land forming the north bank of the river above the bridge, although they owned block "D," upon the south bank.

The material portions of the titles of the plaintiff and defendant to the various properties may be briefly set out.

The plaintiff's title is as follows:—

1. The lease of the 4th July, 1859, from the *Buffalo & Lake Huron Railway Company* hereinbefore fully set out.

2. Deed, dated the 11th July, 1864, executed by plaintiff *Platt*, authorizing *Alexander Thomas Patterson* to receive a deed from the *Buffalo & Lake Huron Railway Company*.

3. Assignment of lease, dated 1st October, 1864, by *Platt* to *Patterson*, assigning lease of 4th July, 1859.

4. Lease dated 9th November, 1866, between the *Buffalo & Lake Huron Railway Company*, of the first part, *Platt*, of the second part, and *Patterson* of the third part. After reciting that the original lease had been assigned by *Platt* to *Patterson* in trust by way of collateral security, the railway company demised the premises described in the original lease to *Patterson* for a new term of three years from the 1st day of May, 1867, and it was thereby agreed that "the demise thereby granted and the rights and liabilities of the party of the third part thereunder, should in all respects be subject and according to all the provisions, promises, covenants, stipulations, conditions, limitations and agreements contained in the original lease, including the right to purchase the demised premises within the term of three years (as in the lease mentioned) excepting the right of renewal."

1883

ATTRILL v. PLATT.

5. Deed dated the 3rd February, 1873, *The Grand Trunk Railway Company* of *Canada* to *Alexander T. Patterson*. This recites that "whereas the *Buffalo & Lake Huron Railway Company* did sell to one *Samuel Platt*, etc., certain lands hereinafter described, and whereas the said *Platt* did transfer all his rights in and to said lands to the party of the second part, who is now at the execution hereof to pay the purchase money and interest now unpaid, and who desires the conveyance for the said lands to be made to him, and whereas by the statute 33 *Vic.* ch. 49, of the Parliament of *Canada*, and the agreement therein referred to, the title to the said lands is now vested in the *Grand Trunk Railway Company of Canada*," and then proceeds to grant to the party of the second part, his heirs and assigns, in consideration of the sum of $5,700, the same lands as in the original lease, by the same description, as far as the description of the mill site. Thereafter the description proceeds as follows:—

"Also commencing at a point on the easterly edge of the mill race, where the westerly limit of *North* street produced intersects the same, thence north fifty-four degrees fifteen minutes east six hundred and sixty-eight feet to an angle, thence north thirty-five degrees forty-five minutes west three hundred and ninety-six feet, more or less, to the edge of the mill race, thence along the high water mark of the mill race in a southerly direction, following the various windings thereof to the place of beginning; this last piece containing one acre and twenty-five one hundredth parts of an acre, be the same more or less, and all of which property covered by this indenture is shown on the plan annexed hereto, reserving, however, to *A. M. Ross*, of the said town of *Goderich*, Esq., his heirs and assigns, and all persons owning or occupying the part of block F, or any part thereof heretofore conveyed by the *Grand Trunk Rail-*

way Company of Canada and the *Buffalo & Lake Huron Railway Company*, to the said *Ross*, and which is shown in pink on the map attached to said conveyance, a right of way on foot and for carriages and animals, and all other purposes, from off and along the eastern boundary of the lands hereby conveyed, so as to give access to the road now passing under the railway embankment on the south side of the property hereby conveyed, such right of way to be of a width taking in the whole outlet of the said bridge or culvert which carries the railway over the existing road, of forty feet, and keeping that width from said outlet to and along the said easterly boundary of the lands hereby conveyed, to the water's edge of the pond, and no further, to have and to hold the said lands, hereditaments, and other the premises above mentioned and described, unto the said party of the second part, his heirs and assigns, to the use of the said party of the second part, his heirs and assigns forever; subject, nevertheless, to the reservations, limitations, provisos and conditions expressed in the original grant thereof from the Crown, and also subject to easement above reserved."

The deed contains the following provisoes which were also in the original lease of the 4th July, 1859:—

"Provided always, and in accordance with the provisions of the agreement for the sale of said lands, the said party of the first part, their successors and assigns, shall, notwithstanding any matter or thing in these presents contained, retain and possess absolute and unconditional power and control over the said river *Maitland*, and the waters thereof above the backwater caused by the said dam so to be erected, and also below the said mill site, and shall also have the privilege and right of using the said river and the waters thereof for machinery and water power purposes or otherwise, as they, the said party of the first part, shall see fit; how-

1883

ATTRILL v. PLATT.

ever, not wasting the water of the said river below the head-race of the said party of the second part, but having the right and privilege of wasting such water in the dam or head-race of the said party of the second part as to the said party of the first part shall see fit.

"Provided further, that the said party of the second part, his heirs and assigns, shall have the right and privilege of deepening, and in common with other persons of using the blind channel below the said mill site, for the purpose of navigation, and also the easement and right of using, for the purposes of erecting buildings for manufacturing purposes, the space between the said intended tail-race and switch."

6. Deed, *Alexander T. Patterson* and wife, to *Arthur Tew*, dated 27th August, 1873, consideration $4,000. Conveys the same property as described in preceding deed, and contains the same reservations.

7. Deed, *Tew* to *Platt*, dated 4th December, 1875. Conveys the same property as described in the deed last mentioned, in consideration of $4,000.

The defendant *Attrill's* title to Block F is as follows:

1. Conveyance, dated 17th February, 1865, by the *Canada Company* to the *Buffalo and Lake Huron Rwy. Company* of the whole block.

In this conveyance reference is made to a plan prepared in 1859, and registered at the instance of the railway company, who, at that time, had agreed with the *Canada Company* for the purchase of this and other lands. This plan is hereafter mentioned in the judgments.

2. Deed, dated 3rd June, 1871, by the *Grand Trunk Railway Company* and *Buffalo & Lake Huron Rwy. Co.* to *Alexander M. Ross*, conveying, in consideration of $1,520, part of Block F, described as follows:—

"All that part of said block F shown on the plan annexed hereto, and colored pink, that is, to say: This

conveyance covers all of said block F, excepting the part thereof shown on the said plan annexed hereto in green color, and which part colored green is described thus: Commencing at a point on the easterly edge of the mill race where the west limit of *North* street produced intersects the same there, north fifty-four degrees fifteen minutes east (N. 54° 15' E.) six hundred and sixty-eight feet (668) to an angle; thence north thirty-five degrees and forty-five minutes west (N. 35° 45' W.), three hundred and ninety-six feet, more or less, to the edge of the mill race; thence along the high water mark of the mill race in a southerly direction, following the various windings thereof to the place of beginning; also excepting and reserving from said block F the mill race described thus:—

"Commencing at a point on the easterly edge of the channel known as the Blind Channel and forming part of the River *Maitland*, the aforesaid point being due west two hundred and ninety-five (295) feet from a point on the centre line of *North* street produced northerly at a distance of two thousand three hundred and fourteen feet from the flagstaff on the centre of the Court House; thence due north nine degrees and fifty minutes (9° 50'), east one hundred and ninety-nine feet, to an angle; thence due north fifty degrees and seven minutes (50° 7'), east two hundred and seventy-nine feet and five inches (279 ft. 5 in.) to an angle; thence due north thirty-four degrees and forty-six minutes (34° 46'), east two hundred and fifty-nine feet and six inches (259 ft. 6 in.) to an angle; thence due north thirteen degrees and thirty-one minutes (13° 31'), east four hundred and ninety-five feet and four inches (495 ft. 4 in) to an angle; thence due north forty-nine degrees and twenty-five minutes (49° 25'), east one hundred and three feet and seven inches (103 ft. 7 in.) to an angle; thence due north sixty degrees and two minutes (60° 2'), east one

1883

ATTRILL v. PLATT.

hundred and ten feet and eight inches (110 ft. 8 in.) to an angle ; thence due north seventy-nine degrees eighteen minutes and thirty seconds (79° 18' 30"), east three hundred and nineteen feet and three inches (319 ft. 3 in.) more or less, to the head-gates of the race ; thence easterly across the head-gates one hundred and seven feet (107 ft.) more or less, to the high water mark caused by a dam giving a head of eight (8) feet of water at the mills ; thence westerly and southerly along that high water mark, on the easterly side of the mill race, following the various windings of the high water mark aforesaid on the natural bank adjoining the said race to the westerly limit of the railway embankment ; thence southerly along that limit to its intersection with the blind channel of the river *Maitland* ; thence northeasterly along the southerly edge of the blind channel aforesaid, following its several windings to the place of beginning, and which said two excepted parcels above described form no part of the part of block F, colored pink, or of the lands conveyed by this indenture or intended thereby to be conveyed."

3. The land described in the last mentioned conveyance was afterwards by deed dated the 7th December, 1876, conveyed to the defendant.

The defendant acquired title to block E, as follows :

1. By conveyance dated 3rd June, 1871, by which the *Grand Trunk Railway Company* and *Buffalo & Lake Huron Railway Company*, in consideration of $400 conveyed to one *Ince*. The description is as follows :—

"All and singular that certain parcel or tract of land and premises situate, lying and being in the town of *Goderich*, in the county of *Huron*, and province of *Ontario*, and known as block E, that is to say, all that parcel and tract of land shown on the plan annexed hereto, and marked "Plan of block E, town of *Goderich*," and colored pink ; the intention being that no

part of the mills, mill-dam, mill-pond, mill-race, or works connected with said mills, mill dam, mill pond, and mill race, situate east and south of the easterly line of said lands colored pink, as said line is marked and shown on said plan, shall be covered by this conveyance, it being clearly intended and understood that all, and each, and every part of said mills, mill-dam, mill-pond and mill-race and works connected therewith, and all land whatsoever situate east and south of said easterly line of said lands shown on said plan in pink, as marked on said plan annexed hereto, is and are excepted and reserved in this indenture, and no land except that colored pink, on said plan annexed hereto and which is situate west and north of said mill, mill-dam, mill-pond, and mill-race and works shown on said plan, shall pass under this conveyance."

2. Deed from *Ince* and wife to *Alexander McLagan Ross*, dated 27th April, 1875.

4. Deed *Alexander McLagan Ross* and wife to *Francis Jordan*, dated 26th May, 1875.

4. Deed, *Francis Jordan* to defendant, dated 26th October, 1875.

The appellant's title to Island C and the Great Meadow is derived under conveyances from *The Buffalo & Lake Huron Co.* and *The Grand Trunk Railway Co.*, dated the 3rd June, 1871, Island C being sold and conveyed in fee to one *Abraham Smith* and the Great Meadow to one *John Macdonald*. The appellant purchased from *Smith*, and from the devisee under the will of *Macdonald*, the Great Meadow, in August, 1876, and Island C on the 15th December, 1879.

Block A appellant holds under a different title from that which he makes to the other lands. Part of the block was sold and conveyed by Sir *Alexander Tilloch Galt* and wife to appellant on the 27th September, 1873, another part on the same day by *Lucy Bennet Widder*

1883

ATTRILL v. PLATT.

and *John Davidson*, trustees of the late *John Widder*. The railway company were never seized of any part of this land.

The description of the Great Meadow in the deed to *John Macdonald* is as follows:—

"All and singular that certain parcel or tract of land and premises situate, lying and being in the township of *Colborne*, in the county of *Huron* and Province of *Ontario*, on the north side of the river *Maitland*, known as 'The Big Meadow,' estimated as containing sixty-one acres of land, be the same more or less."

In the deed to the appellant made in August, 1876, the description is as follows:—

"All that tract or parcel of land known as the 'Big' or 'Great Meadow,' situate between blocks A, B and the original road allowance on the westerly side of block C, in the said township and the river *Maitland*, containing sixty-one acres of land, more or less. * * *

"Also the original road allowance along the southerly side of said block C, as particularly described by metes and bounds in a deed from the municipal council of the township of *Colborne* to *John Macdonald*, dated 26th December, 1860, and registered, &c., containing 4 acres and 22 perches, more or less.

"Also so much of said block C as is situated westerly of the northern gravel road running through the said township.

"Excepting portions of the said road allowance and block C (otherwise included in this description), which have been heretofore disposed of by the late *John Macdonald*, as appears from the records of the registry office of the county of *Huron*, namely:—Lots numbers 1, 2, 25, 26 and 27, as shewn on the registered plan of bridge plan, and lots called 91, 92, 97 and 98, but not shown on such registered plan, and an acre conveyed to *Deltor* and *Kirkptrick* for the *Maitlandville Salt Com-*

pany, and three acres and 12 perches conveyed to one *Thomas Hussey*, also one quarter of an acre conveyed to the school trustees, lying immediately to the rear of said lot 25, of the same width and depth as said lot number 25."

The description in the deed to *Smith*, of Block C, is as follows :

" All and singular that certain parcel or tract of land and premises situate, lying and being in the township of *Colborne*, in the county of *Huron* and Province of *Ontario*, known as block C, and described on the plan annexed hereto, colored red."

And in the deed from *Smith* to appellant, the description is :—

All, &c., known as block C, and described on the plan annexed to a certain deed from the *G. T. Ry. Co.* of *Canada* and the *Buff. & L. H. Ry. Co* to the party of the first part, dated 3rd June, 1871.

The description of the part of block A conveyed by Sir *Alexander Tillock Galt* and wife, is as follows :—

'All and singular that certain parcel or tract of land and premises situate, lying and being in the township of *Colborne*, in the county of *Huron* and Province of *Ontario*, containing by admeasurement 31 acres and seven-tenths of an acre, be the same more or less, being composed of part of the southerly part of lot or block A, in the western division of the said township of *Colborne*, and may be more particularly known and described as follows ; that is to say :—Commencing at a point on the southerly side of road allowance between blocks A and B, said point being a distance of 56 chains and 70 links, measured south-westerly, along the southerly side of the aforesaid road allowance, from the angle formed in the road (said angle being at the limit between blocks A and B, as shown on the registered plan of *Colborne*) ; thence due S. 39½ degrees W., along

1883

ATTRILL v. PLATT.

the S. limit of road, 13 chains and 11 links; thence S. 20 degrees E., 2 chains and 58 links; thence S. 14¼ degrees W., 77 links; thence S. 44 degrees W., 1 chain and 70 links; thence S. 55¾ degrees W., 1 chain and 33 links; thence S. 49 degrees W., 4 chains and 7 links; thence N. 67 degrees, 50 minutes E., 22 chains and 92 links; thence S. 22 degrees and 10 minutes E., 5 chains and 60 links, more or less, to high water mark of river *Maitland;* thence N. 62¾ degrees E., 4 chains and 25 links, measured up stream along said high water mark; thence due N. 15 chains and 70 links; thence due W. 13 chains and 40 links, more or less, to the place of beginning."

And in the deed from the trustees of the late *John Widder*, the description of the part of block A conveyed is as follows:—

"All and singular those certain parcels or tracts of land and premises situate, lying and being in the township of *Colborne*, in the county of *Huron* and Province of *Ontario*, containing by admeasurement nine acres three roods and one perch, be the same more or less, being composed of lots numbers 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39, according to a plan or survey of the southerly part of lot 2, block A, in the said township of *Colborne*, made by *Charles L. Davis*, Esquire, provincial land surveyor, for *William Warren Street* and others, as an addition to the said town of *Goderich*, and as shown on the map or plan hereunto annexed, and which said parcels or tracts of land and premises may be more particularly known and described as follows; that is to say:—Commencing at a point on the easterly limit of "Saw Mill Road," said point being due S. 19 degrees W., 1 chain and 35 links from the south-westerly angle of the property known as the late *John Galt's;* thence due N. 67 degrees and 50 minutes

E., 23 chains and 75 links, more or less, to the easterly limit of said lot number 39, and up to the property known as the said late *John Galt's;* thence due south 22 degrees and 10 minutes E., 4 chains and 60 links, more or less, to the high water mark of the river *Maitland,* thence southwesterly, following the high water mark of the river *Maitland,* a distance of 27 chains, more or less, to its intersection with the easterly limit of "Saw Mill Road;" thence northeasterly along said limit of road, 5 chains, more or less, to the place of beginning. The whole containing an area of 9 acres, 3 roods, 1 perch, be the same more or less, as before stated."

On the 8th day of April, A.D. 1880, the case was heard before *Proudfoot,* V. C.

At the trial, the title of appellant to the lands comprising the north bank of the river was proved, and in fact not disputed. His title to blocks E and F, subject to the exceptions and reservations before mentioned, was also proved.

As the appellant, in his answer, admitted the commission of the alleged trespasses, he was called upon to begin; he did so, and after putting in his title deeds and the several maps in evidence, and calling two Provincial Land Surveyors to identify and locate upon the grounds the several parcels, the learned Vice-Chancellor held that he had established a *primâ facie* title, and the respondent was then called upon to prove his title.

This he proceeded to do, by putting in the original lease to him, the renewal lease, the conveyance to *Patterson,* and the several mesne conveyances to him.

Under these he claimed title by express grant, or failing that, then by implication.

He also set up a title to the use of the easements in question by prescription, upon which evidence was given by a number of witnesses, and a further title by

1883

ATTRILL v. PLATT.

license from and acquiescence by the railway company, the common grantor.

He further contended that block F did not extend to the river, or that if it did the appellant's title was limited to that part colored pink, attached to the conveyance to *Ross*, appellant's predecessor in title, and that such part colored pink did not include the land covered by the raceway or channel in question.

He further claimed that with repect to the appellant's ownership of the parcels called The Great Meadow and Island C on the north bank, that the easements in question having been open, apparent and continuous, when the conveyance by the common grantor was made in 1871, were impliedly reserved, and that the Registry Act had no application.

As against block A he claimed title by prescription.

The learned Vice-Chancellor delivered his judgment, finding that block F extended to the river; that appellant was the owner of it to the river; that the channel in question was therefore upon appellant's lands; that such channel was artificial; that there was no title by prescription made out, but that respondent had acquired a right under the several leases and conveyances to him, "and under the subsequent dealings between him and the railway company," to the easements in question as against the appellant. He made no mention in his judgment of the appellant's rights as owner of the lands on the north bank.

From the learned Vice-Chancellor's decision the appellant appealed to the Court of Appeal, and that court, after two arguments, unanimously dismissed his appeal with costs.

The judgment of the court was delivered by their Lordships Mr. Justice *Burton* and Mr. Justice *Patterson*.

From the judgment of the Court of Appeal the defendant appealed to the Supreme Court of *Canada*.

Mr. *Garrow* for appellant :—

The appellant claims to be the owner of the *locus in quo*, the soil of the raceway in question, by virtue of his ownership of block F.

The respondent makes no claim to the land. He only claims an easement. It, of course, is not decisive of his right to the easement of this raceway for the appellant to establish his ownership of the soil.

The title to the easement may remain untouched. Their lordships in appeal apparently overlooked this in their consideration of the boundaries on the river side of block F. The original lease only demised easements; the grant to *Patterson* is of easements (so far as the *locus in quo* is concerned), and respondent, in his bill of complaint, only claims easements.

But the appellant's right to put the respondent to proof of his title to these easements, in so far as his ownership of block F is concerned, depends upon his establishing that that block extends to the river, and thus embraces the soil of the raceway.

The appellant's rights as owner of the north bank stand upon a different footing. The easements claimed are a dam and race, by means of which the waters are diverted from the north bank as well as from the south bank.

As against the north bank, therefore, the respondent would in any event be bound to prove his title to these easements.

If, however, block F extends to the river, and the appellant is entitled to it to the river, and the respondent has not made out his title, there is an end of the case, and a consideration of the questions arising from the ownership by appellant of the north bank becomes unnecessary.

1883

ATTRILL v. PLATT.

The first question, therefore, is: What, as a matter of fact, is the northerly limit of block F ?

The learned counsel went very fully into the evidence and submitted that block F was, at the time of the conveyance to *Ross*, a perfectly defined parcel, having for its northerly limit, from block E to the *Maitland* bridge, the main channel of the river *Maitland*, and that the finding of the Court of Appeal to the contrary is erroneous.

Assuming that the previous proposition is established, the next question is: Did the conveyance to *Ross* grant to him block F to its northerly limit, the river? Again, without reference to the title to the easements claimed by respondent, it is submitted that this must be answered in the affirmative.

The learned counsel went fully into the evidence on this point.

The river, as a natural boundary of block F, should be preferred if any doubt:—*Angell* on Watercourses (1); *Juson* v. *Reynolds* (2).

The intention of the parties expressed in the conveyance must govern. *White* v. *Bass* (3); *Dodd* v. *Burchell* (4); *Taylor* v. *Corporation of St. Helens* (5); *Gillen* v. *Hayes* (6).

The right of the respondent to purchase was to have been exercised during the term, and time was of the essence, and until the right was exercised, the relationship of vendor and vendee did not exist. *Ball* v. *Canada Co.* (7).

If conveyance executed in pursuance and fulfilment of original contract, it must be construed as giving only the same rights as the original contract. *Wood* v *Saunders* (8).

(1) 7 Ed. ss. 22 & 36,
(2) 34 U. C. Q. R. 199.
(3) 7 H. & N. 722.
(4) 1 H. & C. 113.
(5) 6 Ch. D. 270, 271.
(6) 33 U. C. Q. R. 516.
(7) 24 Gr. 281.
(8) L. R. 10 Ch. 582.

There having been no express reservation, the only ground upon which a reservation can rest is by implication. *Goddard* on Easements (1).

Here the conveyance to *Ross*, was of the *quasi* servient tenement, the grantors retaining the *quasi* dominant tenement, and there was no reservation of the easements now claimed. *Edinburgh Life Ass. Co.* v. *Barnhart* (2); *Suffield* v. *Brown* (3); *Wheeldon* v. *Burrows* (4); *Allen* v. *Taylor* (5)

The cases of *Young* v. *Wilson* (6), and *Watts* v. *Kelson* (7) are relied upon by respondent, as being at variance with the law as laid down in *Suffield* v. *Brown*, above cited.

In the former case Vice-Chancellor *Proudfoot* declined to follow the judgment of Lord *Westbury* in *Suffield* v. *Brown*, because the easement in question in that case was not apparent and continuous, as in *Young* v. *Wilson* (8). On rehearing the Chancellor dissented from the the judgment of the court Vice-Chancellor *Blake* evidently felt himself constrained by, as he says, the weight of authority, to refuse to follow *Suffield* v. *Brown*, but he upheld the original judgment upon other grounds as well, in which also Vice-Chancellor *Proudfoot* concurred. *Wheeldon* v. *Burrows* had not then been decided, affirming, as it does, the judgment of Lord *Westbury*, not only so far as applicable to the class of easements in question in *Suffield* v. *Brown*, but as applicable to apparent and continuous easements, as in the present case, and as in the case itself of *Wheeldon* v. *Burrows*.

It is true that in *Watts* v. *Kelson* the Lords Justices, in the course of the argument, express themselves as

(1) 2 Ed. 41.
(2) 17 C. P. 76.
(3) 10 Jur. N. S. 111.
(4) 12 Ch. D. 31.
(5) 16 Ch. D. 358.
(6) 21 Gr. 144, 611.
(7) L. R. 6 Ch. 166.
(8) 21 Gr. 611.

1883

ATTRILL v. PLATT.

satisfied with the case of *Pyer* v. *Carter* (1), but, as pointed out by the judges of the same court when considering these remarks in the latter case of *Wheeldon* v. *Burrows*, there is nothing in the considered judgment in *Watts* v. *Kelson* affecting or weakening Lord *Westbury's* judgment in *Suffield* v. *Brown*.

Moreover, *Watts* v. *Kelson* was a case of implied grant, not, as here and in *Wheeldon* v. *Burrows*, implied reservation, and quite different principles were therefore involved.

It is submitted, therefore, that the law must be taken to be as laid down in *Wheeldon* v. *Burrows*, and that, if so, it is conclusive against the implied reservation by the *Grand Trunk Railway Co.* of the easements in question on the sale and conveyance to *Ross* in June, 1871, of block F.

Again, assuming that the easements in question were reserved in the conveyance to *Ross* it is clear that they did not pass to *Patterson* by the subsequent conveyance in 1873, and in law they were thereby extinguished. After the conveyance to *Ross* they existed, if at all, not as *quasi* but as real legal easements, with the usual legal incidents, one of which was, that it was essential to their maintenance that they should be appurtenant to a dominant tenement. *Goddard* on Easements (2).

After June, 1871, the only land owned by the railway company in the vicinity of the easements in question was the respondent's mill site. When that was finally granted to *Patterson*, without these easements being included, the servient tenement was relieved of their burden and they ceased to exist.

The appellant further contends that even if the court should be of opinion that there was a reservation of the easements in question, as against block "F," that there

(1) 1 H. & N. 916. (2) 2nd Ed. 10.

is clearly no room for such a conclusion in considering the several conveyances of the parcels on the north bank, viz., Island C, and The Great Meadow. Such conveyances are absolute in form and contain no reservation or exception whatever, and the foregoing argument against implied reservation applies with additional force in considering the title to these parcels.

By means of the dam and race claimed by respondent there was a diversion of the water of the rivers from the main channel which affected Island C, The Great Meadow and Block A upon the north bank.

The appellant submits that there is no room upon the facts for the application of the principle of "reasonable user," as suggested by Mr. Justice *Burton* in his judgment, and for which he cited *Embry* v. *Owen* (1).

That was a case of the extent of the right of a person having an undoubted title in respect of which the right was exercised, a right to abstract running water for the purposes of irrigation.

Here we say the respondent has no title whatever, upon which to base his alleged right to use the water as he does, and where he does.

Even if he has the right as against the south bank that is insufficient. He must possess a title as against both banks, otherwise he has no right to maintain the dam to divert the water, or even to maintain the artificial race, constructed in the bed of the river, without the dam, such a construction, even if it did not, as it does, divert the waters out of their ordinary channel is an unlawful encroachment upon the *alveus* and actionable, without showing special damages.

Bickett v. *Morris* (2); *Lord Norbury* v. *Kitchen* (3); *Kirchoffer* v. *Stanbury* (4); *McArthur* v. *Gilles* (5); *Penn-*

(1) 6 Exch. 353.
(2) L. R. 1 Scotch App. 47.
(3) 15 L. T. N. S. 501.
(4) 25 Gr. 413.
(5) 29 Gr. 223.

1883

ATTRILL v. PLATT.

ington v. *Brinsop Hall Coal Co.*(1); *Holker* v. *Poritt* (2); *Clowes* v. *Staffordshire Potteries Co.* (3); *Angell* on Watercourses (4); *Goddard* on Easements (5).

The question is, has the respondent a right to divert at all. If he has such right we do not claim that he has used it excessively. Our contention is, that he has no right or title to the easements he claims, and therefore no right to divert at all.

This confines the question to whether he has proved his alleged title as he was bound to do, a question evidently not considered, but assumed in the Court of Appeal.

There is equally little support for the supposed dilemma into which Mr. Justice *Patterson* suggests the appellant may be forced, *i. e.*, that of contesting the respondent's title, under his title deeds, at the peril, if it should be found that they do not cover the *locus in quo*, of its being held that respondent's trespass, in constructing the race and dam in question, amounted to a taking possession of the land itself, and that he had therefore acquired a title by prescription, the limit being ten years in that case, while in the case of easements it is twenty.

It ought to be sufficient answer to this to say that the respondent in his bill only claims easements.

But further, until the conveyance to *Patterson* in 1873, he was only a tenant to the R. R. Co., and therefore by his encroachments for the benefit of the demised premises was acquiring no title as against them. *Earl of Lisburn* v. *Davies* (6); *Whitmore* v. *Humphries* (7).

Until June, 1871, the R. R. Co owned the whole.

The bill of complaint was filed on the 26th February,

(1) 5 Ch. D. 769.
(2) L. R. 10 Exch. 59.
(3) L. R. 8 Ch. 125.
(4) Sec. 100 (7th Ed.)
(5) P. 335.
(6) L. R. 1 C. P. 259.
(7) L. R. 7 C. P. 1.

1880. So that in no possible view of the matter could any title by prescription to the *locus in quo* be sustained, even if the date of its origin would be taken to be when the several tenements were severed

Then, has respondent acquired a prescriptive right to divert the water, as against block A, owned by appellant?

The title to this block was not derived from the railway company, and the respondent's only title therefore must be by prescription.

In the judgments of their lordships in the Court of Appeal it is apparently taken for granted that respondent has such title, or, at least it is stated briefly that the evidence clearly shows that he has such a title.

The first answer to this alleged right is that it is no part of the case made by the respondent in his bill of complaint. The appellant, in his answer, sets up his rights as owner of block A. The respondent did not amend his bill claiming a prescriptive right as against that block. He simply joined issue. The appellant was therefore only bound to prove his title, which he did.

The second answer is, that the evidence does not show that the respondent has such prescriptive right, but shows the contrary.

If, on the pleadings, the point was open to respondent, the burden of proof was, of course, clearly upon him.

He was bound to prove and has failed to prove that he had, for a period of twenty years prior to the interruption by appellant, enjoyed, as of right, easements the same in extent and character as those with which appellant interfered. *Bealey* v. *Shaw* (1); *Ruttan* v. *Winans* (2); *Hunt* v. *Hespeler* (3); *McKechnie* v. *McKeyes* (4).

(1) 6 East 209.
(2) 5 C. P. 379.
(3) 6 C. P. 269.
(4) 9 U. C. Q. B. 563; 10 U. C. Q. B. 37.

1883

ATTRILL v. PLATT.

The learned counsel went fully into the facts bearing on this point.

Mr. *Maclennan*, Q.C., and Mr. *M. G. Cameron*, for respondent:

In answer to the first contention, viz., that the channel in dispute is upon appellant's land, the respondent contends that such is not the case.

Counsel for respondent went fully into the maps, descriptions and evidence on this point.

In answer to the second contention of the appellant, viz., that as owner of the lands on the north side of the river, called the Big Meadow, Island C and block A, his riparian rights are injuriously affected by the diversion of the water into the raceway of the respondent near the *Maitland* bridge, the respondent contends: That there is no evidence of diversion, and that the evidence is the other way. As to the Big Meadow and Island C, the appellant's title comes through persons who purchased from the railway company on the 3rd of June, 1871, and block F and the respondent's lands and easements were also purchased from the same company; the Big Meadow and Island C, having been purchased at a date subsequent to the grant by the railway company to respondent, of the right to the easement to use the water, as he is now using it, the appellant cannot stand in any better position than the railway company, who owning, as they did, the lands on both sides of the river, and the bed of the stream, had a right to divert the water from the Big Meadow and Island C.

As to block A the appellant's deed carries his land only to high water mark, so that it is only when the river is at its highest point that he has any riparian rights whatever, and the evidence shows that when the water is high there is no diversion at all by the plaintiff, and no occasion for it; the plaintiff's dam and

raceway are then overflowing, and there is no evidence of diversion affecting block A at any time.

If there is any diversion, which we deny, it is quite clear from the evidence that respondent has established a prescriptive right so to divert it.

The evidence is undisputed, that whatever diversion there was began in 1859 and continued for more than 20 years, up to the time of the obstruction by the appellant.

It is also clear from the evidence that about Christmas, 1859, the respondent made the dam of loose stones across the river, near the bridge thrown down by the appellant, and that he had maintained that dam there ever since, and from that time the water has flowed through the channel in dispute to his mills, and they were driven thereby, and have been driven thereby, without interruption, up to the date of the obstruction by the appellant.

The respondent admits that the embankment as it exists at present, and within which the raceway is confined, was not completed throughout its whole extent until within 20 years, but we say that that cannot and does not impair respondent's title by prescription, because early in 1859 the respondent had dammed the river to its full breadth, including the present raceway, and by letting the old dam go, and, instead thereof using the raceway within the embankment, and at the same time keeping the river dammed to its full breadth, as the respondent did, he merely narrowed the limit over which he exercised his easement, and the respondent would not lose his prescriptive right because the dam was carried away, and rebuilt in the same or another place, if it was not altered or increased to the detriment of the owner of the servient tenement, the right claimed by respondent being to raise a dam so high as to take up eight feet of the fall of the river

1883

ATTRILL v. PLATT.

There is no evidence to show that a greater burthen was thrown on the servient tenement by the alteration within 20 years. It was diminished, and the right by prescription is still good, though only to the extent to which it was reduced by the alteration. *Harvey* v. *Walters* (1); *Thomas* v. *Thomas* (2); *Rex.* v. *Tippett* (3).

The right to a water course is not destroyed by an owner's altering the course of the stream. *Hall* v. *Swift* (4).

The alteration here was made long before the appellant or his grantor acquired any right whatever.

Alteration in the condition or character of a dominant tenement, to extinguish an easement, must be of a nature and of a character which will inflict serious injury on the servient tenement, by increasing the burthen of the easement; and if the burthen is enlarged, and the user of the right totally changed from that originally contemplated by the grantor of the privilege, the easement will be extinguished. *Goddard* on Easements (5).

The respondent is in possession of the raceway in dispute in one of two ways: either by express grant from the railway company, or as a trespasser. If the has shown a clear title by prescription; if the latter, the appellant must also fail, because the respondent has been in possession, even according to appellant, who says he finished building the channel in 1865, over ten years, and has thus acquired a title as owner of the soil by the Statute of Limitations.

The respondent also claims the easement of constructing a dam in the river *Maitland*, so that he may obtain a head of 8 feet of water at his mills, by express grant, and the appellant, who claims under the railway company, is precluded from asserting a right inconsis-

(1) L. R. 8 C. P. 162.
(2) 2 C. M. & R. 34.
(3) 3 B & A. 193 and 5 E.C.L.R. 258.
(4) 4 Bing. N. C. 381.
(5) P. 360.

tent with the existence and maintenance of the said dam and raceway. *Hendry* v. *English* (1); *The Rochdale Canal Co.* v. *King* (2); *Goddard* on Easements (3); *Edinburgh Life Assurance* v. *Barnhart* (4); *Brewster* v. *The Canada Co.* (5).

The license, although verbal, is sufficient, and is irrevocable, if coupled with a grant; or if the licensee, acting upon the permission granted, has executed a work of a permanent character, and has incurred expense in its execution. *Nichol* v. *Tackabery* (6); *Winter* v. *Brockwell* (7); *Woods* v. *Leadbetter* (8).

The evidence also clearly shows that at and long before the appellant, or those under whom he claims, purchased, the respondent openly and continuously used the dam and raceway in dispute, and, therefore, that he purchased subject to the easement of respondent.

The authorities show that when there is a continuous and apparent user, it is immaterial whether the dominant or servient tenement be first sold, and that a grant of the easement must be implied in favor of the dominant tenement. *Young* v. *Wilson* (9); *Richards* v. *Rose* (10); *Pennington* v. *Galland* (11); *Ewart* v. *Cochrane* (12); *Watts* v. *Kelson* (13); *Shory* v. *Piggott* (14); *Pyer* v. *Carter* (15); *Dodd* v. *Burchell* (16); *Wadsworth* v. *McDougall* (17); *Diamond* v. *Reddick* (18); *Hickman* v. *Lawson* (19); *Watson* v. *Traughton* (20).

(1) 18 Gr. 119.
(2) 2 Sim. N. R. 78.
(3) P. 85 *et seq.*
(4) 17 U. C. C. P. 63.
(5) 4 Gr. 443.
(6) 10 Gr. 109.
(7) 4 Gr. 443.
(8) 13 M. & W. 844.
(9) 21 Gr. 607 & 144.
(10) 9 Exch. 218.
(11) 9 Exch. 1.
(12) 7 Jur. N.S. 925, 4 McQueen, 117
(13) L. R. 6 Chy. 166.
(14) Palmer 444, cited Gale, 102.
(15) 1 H. & N. 916.
(16) 1 H. & C. 123; 31 L. J. Exch. 364.
(17) 30 U. C. Q. B. 369.
(18) 36 U. C. Q. B. 391.
(19) 7 Gr. 494.
(20) App. Cases, 1st Dec., 82.

1883

ATTRILL v. PLATT.

The easement to which the respondent claims to be entitled is, in its nature, continuous. There is this clear distinction between easements, such as rights of way, or easements used from time to time, and easements of necessity, or continuous easements. The former do not pass unless the owner, by appropriate language, shows an intention that they should pass, but the latter will pass by implication of law without any words of grant. *Polden* v. *Bastard* (1).

But whatever might have been the result between the appellant and the railway company, if the matter had been between them, it is clear that the railway company could not sell, or the appellant acquire, the servient lands otherwise than subject to respondent's easements.

It is no answer to the respondent's claim to say that if the supply of water running through the race-way in question to the respondent's mill was cut off, possibly some other supply might be obtained. It is clear here that no supply of water equally convenient could have been obtained, and it is sufficient to show that. *Watts* v. *Kelson* (2); *Morris* v. *Edgington* (3).

The case of *Wheeldon* v. *Burrows* is not an authority against respondent's contention, nor does it alter the law as laid down in *Young* v. *Wilson*. In the former case, the easement was not necessary to the reasonable enjoyment of the property granted, but one respecting lights, where no easement by implication would arise on the severance of the tenements.

It makes no difference whether the easement had a legal existence before the severance of the tenements. *Gale* on Easements (4); *Dart* on Vendors and Purchasers (5); *Davies* v. *Sear* (6).

(1) L. R. 1 Q. B. 156, 161.
(2) L. R. 6 Chy. 175.
(3) 3 Taunt. 31.
(4) 5th Ed. pp. 95 et seq.
(5) P. 537.
(6) L. R. 7 Eq. 427.

1883

ATTRILL v. PLATT.

Suffield v. *Brown* and *Crossley & Sons* v. *Lightowler* do not affect this case, as the easement there was neither apparent nor continuous, and not one of which the purchaser would necessarily have notice.

The rule under which a man is prevented from derogating from his own grant has no application to this case, except in favor of the respondent

RITCHIE, C. J.: delivered judgment, stating in substance that he had come to the conclusion the plaintiff had failed to show title to the strip of land on which the head-race was made or to the easements in question; that in his opinion block F came to the river; and that, even if block F did not come to the river, the plaintiff had no right to maintain the obstruction at the stone dam, and so divert the water of the *Maitland* river from the Great Meadow, Island C, and block A.

STRONG, J.:—

In considering this case it will be convenient in the first place to ascertain what (if any), on the 3rd June, 1871, the date of the several conveyances to *Ross, McDonald & Smith*, was the title of the respondent to the mill, lands and easements, now claimed by him, for it is manifest that the respondent can have no more extensive rights against the appellant deriving title from the railway company, through *Ross* and the other grantees mentioned, than he had against the railway company at the date referred to, except in so far as such rights were either expressly or by implication of law reserved to the railway company in the deeds mentioned, and were subsequently vested in *Patterson* under the deed of the 3rd February, 1873. By following this order it will be possible to disembarrass the case of several questions, relating to equitable acquiescence, prescription, and the Statute of Limitations, which have given rise to much

1884

ATTRILL v. PLATT.

Strong, J.

controversy in the court below, but which are, as will be shown (with the exception of the single point of prescription, so far as it relates to one parcel of the appellants' land on the north bank of the river—block A,) irrelevant to the decision of the present appeal.

By the original lease of the 4th of July, 1859, the mill site, lands and easements appendant to them were demised by the *Buffalo and Lake Huron Railway Company* to the respondent for the term of seven years from the 1st of May, 1860.

The lease contained a provision giving the lessee an option to purchase the fee in the demised premises, at any time during the currency of the lease, upon giving the lessors six months notice in writing to end before or at the expiration of the term, and also a covenant for renewal for the further term of three years, with liberty to the lessee, or his assigns, to purchase the re-demised premises during the second term, on the same terms and conditions as had been provided with respect to the purchase during the first term of seven years; and it also contained a clause in these words :—

> In case the said party of the secnd part shall not, at the expiration of the term or terms aforesaid, or sooner determination of these presents, purchase the said demised premises, all the erections, buildings, improvements and fixtures thereon erected, built, put and placed during the currency of the said term or terms, shall belong to and form part of the said lands and freehold, and at the expiration of the said term or terms, as the case may be, or sooner determination of these presents, revert to and become the absolute property of the said party of the first part.

By an indenture dated the 9th day of November, 1866, made between the *Buffalo and Lake Huron Railway Company*, of the first part, the respondent, of the second part, and *A. T. Patterson*, of the third part, after reciting that the original lease had been assigned by the respondent to *Patterson*, in trust by way of collateral security, the Railway Company demised the

premises to *Patterson* for a new term of three years from the 1st day of May, 1867, and it was thereby agreed that "the demise thereby granted, and the rights and lia- "bilities of the party of the third part thereunder should "in all respects be subject and according to all the provi- "sions, promises, covenants, stipulations, conditions, "limitations and agreements contained in the original "lease, including the right to purchase the demised "premises within the term of three years (as in the lease "mentioned) excepting the right of renewal." The renewed term expired on the 1st of May, 1870. There is no evidence to show that the option of purchasing was exercised before the expiration of the term, or that the time for exercising it had been in any way extended. The respondent, it is true, remained in possession, but the mere fact of possession cannot be sufficient to shew that he ever elected to purchase, so as to create a contract between himself and the railway company. The right of purchase expired with the term, for it is clear, both upon principle and authority, that, in the case of all such unilateral stipulations, time is strictly regarded (1); moreover, by the terms of the provision for purchase contained in the lease, time was made essential, for the right was conditional upon giving notice six months at least before the end of the term, so that, if the general law were not as it undoubtedly is, the parties must be held to have made time of the essence by the terms in which their agreement is expressed. It cannot, therefore, be open to doubt or question, that from the 1st May, 1870, when the term expired, until the 3rd June, 1871, when the several parcels, blocks E and F, Island C, and the Great Meadow, were respectively sold and conveyed by the *Grand Trunk Railway Company* (who had purchased from and acquired all the rights of the *Buffalo and Lake Huron Railway Co.*)

(1) Fry on Specific Performance, Ed. 2, pp. 471 & 475.

1884

ATTRILL v. PLATT.

Strong, J.

to the parties under whom the appellant claims, the respondent was in possession as a mere tenant at sufferance, having no other right or title either at law or in equity. Upon the evidence this conclusion is inevitable, unless indeed we are, without proof, to make conjectures in favor of the respondent's case. It is out of the question to say that any presumption of an exercise of the option of purchase, or of its extension in point of time, or of the making of a new agreement for the purchase of the property, can, in the absence of all other proof, be inferred from the mere fact of the holding over after the time had expired; such possession can, I repeat, be attributed only to a mere tenancy at sufferance. No doubt if it had been sufficiently proved that the railway company were bound by a contract of purchase, either under the terms of the lease, or by an agreement made independently of the lease, the fact of possession would have been sufficient constructive notice of the equitable rights of the respondent, to all persons who subsequently purchased from the railway company, but this is the utmost effect which could be attributed to that fact. Therefore on the 3rd June, 1871, the date of the conveyance of the several parcels of which the appellant is now the owner in fee (with the exception of block A on the north bank of the river, which was not derived from the railway company, but was acquired by the respondent under a different title) the respondent had no title whatever, either as a lessee or as a purchaser, to this mill property, he was merely a person in possession, who had been a tenant, but whose title had expired, and who held over by the sufferance of his landlords. It is impossible, therefore, to ascribe the respondent's present title to any earlier date than that of the conveyance to his trustee, *Patterson*, on the 3rd February, 1873, and, as the appellant's title is derived under conveyances executed in June, 1871, the case

must be considered as if the questions now in litigation had arisen between the appellant, or his immediate predecessors in title, and the railway company immediately after the latter date and before the conveyance to *Patterson*. In thus viewing the case it will at once become apparent that the questions of prescription, the statute of limitations, and the supposed equitable title arising from the acquiescence of the *Buffalo and Lake Huron Railway Company* in the enlargement of the easement as originally granted, to which some importance was attached in the court below, are immaterial to the decision of the present appeal. On the 1st of May, 1870, when the renewal term expired, the railway company became the absolute owners in fee in possession, or with the right of immediate possession, of all the lands now in question, as well of the mill property and its appurtenant easements, as of the lands on both sides of the river, now the property of the appellant, excepting only block A on the north bank. There was therefore, with the exception mentioned, from this date, until the ownership was again separated, on the execution of the conveyances under which the appellant's title is derived, entire unity of ownership by the railway company of all the tenements, as well of those which are now alleged to be servient, as of those which are said to be dominant, and there could have been, during this period, no easements in the strict sense of the term. It is manifest that one piece of land cannot be said to be burdened by a servitude in favor of another piece when both belong absolutely to the same owner, who has, in the exercise of his own unrestricted right of enjoyment, the power of using both as he thinks fit and of making the use of one parcel subservient to that of the other, if he chooses so to do. There was therefore, when the title to all these lands came to be vested in the same owner, an

1884

ATTRILL v. PLATT.

Strong, J.

extinguishment of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were in separate hands, legal easements, ceased to be so, and became mere easements in fact—*quasi*-easements, as they are sometimes called. Then what possible difference can it make in the rights of parties claiming under the railway company, that there had been, during the term which had expired, a possession in the tenant beyond the rights which his lease conferred—a possession which was an encroachment upon other lands of his landlord not comprised in the lease, of such a character that if it had been a possession of the lands of a stranger it would have ripened into a title under the statute of limitations; or that the tenant had, during the term, enjoyed an easement over lands of his landlord other than those demised to him, and which would, in like manner, have given him an easement by prescription, if the burden of it had been imposed upon the lands of a third person; or that such easement had even been enjoyed with the direct and express acquiescence and license of the landlord, who had encouraged the tenant in an expenditure for the purposes of making the easement available? It is impossible to see how any such acts could have had the slightest legal effect upon the rights of the parties claiming under the railway company the owner of the whole, dominant and servient tenements alike. They would, it is true, have some effect as evidence to show that the easements claimed existed as easements in fact, quasi-easements, whilst the several tenements were in the hands of the same owner, but no other and no legal consequence whatever could be attached to such acts in the event which has happened of the ownership of all the lands having become consolidated in the hands of the railway company. Supposing the railway

company had not originally owned the mill property at all, and that the easements claimed had actually been acquired in favor of that property and against the other properties now owned by the appellant by a user for the full statutory period of twenty years, and that then the dominant tenements had been acquired by the railway company by purchase, there must in that case have been an extinguishment of the easements. The same principle would also apply in the case of easements to which an equitable title had been acquired by the license and acquiescence of the railway company followed by an expenditure, on the faith of such a sanction, by the owner of the mill property. Again, if in the case supposed of the title to the two properties being absolutely vested in fee in different owners, a title to the land itself on which the race-way is constructed had been actually acquired by a possession for the required period under the statute of limitations, this would, of course, have been immaterial if the railway company had subsequently acquired a title to the mill property by purchase. Then, when the term came to an end and the mill property reverted to the lessors, it was at least as strong a case as that supposed. It is well settled law that all additions to the demised premises, acquired by a lessee by encroachments on the land of a stranger and possession for the statutory period, enure on the determination of the tenancy to the benefit of the reversioner, as also do easements acquired under the Prescription Act, and an easement acquired by a tenant by acquiescence and license of his landlord over other lands of the latter must be presumed to be so acquired as incidental to the enjoyment of the demised premises, and not as an easement in gross, if indeed such a right as an easement in gross is recognised at all by the law, and therefore to be limited to the continuance of the term and to be determined upon the expiration

1884

ATTRILL v. PLATT.

Strong, J.

of the lease. The result is that all these questions of the statutes of limitations, prescription, and license can have nothing to do with the decision of the case, if we determine, as I think we must, on the evidence contained in the record, that the respondent up to the date of the conveyance of 3rd June, 1871, never had any interest, legal or equitable, in the mill property and its appurtenant easements, except as a lessee for the original and renewed terms, the latter of which came to an end on the 1st of May, 1870, and that there is no foundation in fact for the assumption that the respondent has now any title which he can carry back to the option of purchase, or in any way ascribe to the stipulations contained in the lease or to any other origin legal or equitable earlier in date than the conveyance to *Patterson* on the 3rd February, 1873.

We have, therefore, in order to determine what are now the rights of the appellant in respect of block F, to ascertain what were the rights of the railway company immediately after the execution of the conveyances to *Ross*, *Smith* and *McDonald* of the 3rd June, 1871, for it is plain that the respondent, claiming under a subsequent conveyance to *Patterson* executed on the 3rd February, 1873, can claim no more extensive rights than his grantors had.

The appellant seeks in the first place to justify the acts which the bill was filed to restrain, the partial removal of the dam and the embankment of the raceway, upon the ground that as the riparian proprietor of block F, he was also the owner of the bed of the river to its middle thread, and that he, therefore, shows the embankment on the stream and a part of the dam to be erected on land which belongs to himself, and in which he had the absolute and unrestricted right of property. The respondent, on the other hand, insists that the descriptions in the conveyance to *Ross* of the 3rd June,

1884

ATTRILL v. PLATT.

Strong, J.

1871, does not carry the northerly limit of block F to the water's edge, and that consequently the appellant is neither the owner of the land in the bed of the river on which the dam and race-way are placed, nor even a riparian proprietor. I am of opinion that the conclusion arrived at by Mr. Justice *Proudfoot*, before whom the cause was originally heard, that block F did extend to the waters of the river *Maitland*, was a correct inference from the plan of 1859 as explained by the witnesses who gave evidence as experts, and from the descriptions contained in the conveyance to *Ross*.

The learned judges of the Court of Appeal were of opinion that the plan of 1859 was not entitled to any weight for the purpose of identifying block F as a piece of land extending to the water's edge, inasmuch as it did not appear that "the plan was made by a person having authority to bind the owner". But it is proved that the fact was otherwise; that the plan was made for the owners of the land, the railway company, and was actually registered by them, as appears by the memorandum to that effect on its face.

It was, therefore, in June, 1871, when the railway company conveyed to *Ross*, a plan binding on them, to this extent at least, that when they conveyed a parcel of land, which they described as block F, it must be presumed that they intended to convey the same parcel of land as is shown by that denomination in this plan of 1859 and with the same natural boundaries on the north and north east as are there indicated.

It is contended however by the respondent that these limits of block F are shown by the irregular line of shading on the plan of 1859. This the appellant answers by producing as witnesses experienced draughtsmen and surveyors, who state their opinions to be that this shading is not intended as a boundary line, but is meant to represent the configuration of the land

1884

ATTRILL v. PLATT.

Strong, J.

in question and to mark where the table land comes to an end, and to show the declivity and slope towards the river, which are found upon the ground. That it is, what Mr. *Miles*, one of the witnesses, says is technically called by draughtsmen, a "contour line," showing the brow of the hill.

This evidence is objected to by the learned judges of the Court of Appeal for the alleged reason that the question is not a proper one to be decided by the evidence of experts, but one for the court itself. From this conclusion I am compelled to differ. The question submitted to these experts is not the general one, what is the actual boundary of this block F, but what is intended to be shown by this shading on a plan prepared by a professional draughtsman a provincial land surveyor, and adopted by the railway company. Upon such a point it appears to me beyond doubt that the evidence of other professional draughtsmen may be admitted, not, it is true, to give their opinion upon the question of fact submitted to the court, but to show what, according to the general practice and usage of draughtsmen in preparing plans, similar marks and shadings are intended to indicate. And this is what Mr. *Passmore* does in the following passages of his deposition. He is asked, "What is the meaning of the "shading all round? A. It is the shading of the hill "ide. Q. Would this shading, according to the proper "drawing, belong to block F or not? A. Certainly; "that is just the shading of the hill side. Q. Then it is "intended to designate a flat? A. Just the slope of the "shore from the top of the head line." This testimony is entirely confirmed by that of Mr. *Miles*, the other professional draughtsman called by the appellant. I am of opinion that this evidence is free from the objections which have been made to it; that it was properly admissible, and that it and the plan together entirely

1884

ATTRILL v. PLATT.

Strong, J.

warrant the conclusion come to by Mr. Justice *Proudfoot* at the trial. If this shaded line is not meant to show the boundary of block F, it is not to be presumed that there was any boundary on the north and north-east sides but the river. The descent to the river as described by one of the witnesses, was so abrupt as almost to be perpendicular, and the river originally, and before the construction of the race-way washed the foot of the declivity. There is always a strong presumption in favor of natural boundaries when there are not well defined surveyed lines laid down either upon the ground or upon maps or plans, and if it is once established that the shading upon the map of 1859 is not meant to show a boundary line that presumption applies here, and we must determine, as the primary judge did, that block F is a piece of land extending to the water's edge. There is, however, in addition to the plan and the evidence of the surveyors who show that the shading cannot be relied on as a limit, a piece of evidence which establishes that fact conclusively. The deed of the 3rd June, 1871, by which the railway company conveyed block F to *Ross*, of which more will have to be said when I come to consider another part of the case, has a plan annexed to it to which reference is made in the description contained in the deed. This plan, on which is depicted, coloured in pink, certain parts of block F, which, whatever disputes there may be as to other land which the appellant contends and the respondent denies was intended to pass by this deed, were indisputably intended to be conveyed, shows, at the eastern extremity of the block, a piece of land covered by the pink coloring which, upon a comparison of this plan annexed to the deed with the plan of 1859, is seen at a glance to be beyond the shaded line, to the eastward or north eastward of it. This in a deed executed by the railway company, the common

1884

ATTRILL v. PLATT.

Strong, J

grantor, under whom both the appellant and respondent claim, is therefore a positive admission made at a date anterior to the conveyance under which the respondent claims that block F is not a piece of land contained within limits described by the shading on the plan of 1859. No answer has been given to this either in the factum filed by the respondent or in the argument at the bar, and I am at a loss to conceive how it could be answered. But this plan annexed to the deed, not only entirely destroys the theory of the respondent that the boundary is shown by the shaded line, thus confirming the argument of the appellant that there being no other boundary which can be suggested the natural boundary of the river must be presumed to be the limit, but it does more, for it shows block F at the particular point already referred to, the eastern extremity of the block, as actually touching the river and for some distance at this point the railway company, by the plan accompanying their deed, give the river as a boundary. Then, if the river is the boundary of the block at this point, it surely creates an almost irresistible inference that the river was intended to be the boundary throughout. But indeed it is difficult to say how it can be urged, when we suppose the shaded line on the plan of 1859 to be obliterated, as we must consider it to be, for all purposes of a boundary, that the plan annexed to the deed of 1871 does not actually give the river as the boundary throughout.

I have, therefore, no hesitation in accepting the judgment of the learned judge at the trial on this part of the case, and in determining that the portions of block F conveyed to *Ross* by the deed of June, 1871, did extend to the river.

It follows that the appellant, as the proprietor of the bank to the water's edge, is presumably the owner also

of the bed of the river to the middle thread of the stream, and the race-way which the bill seeks to have the appellant restrained from interfering with and so much of the dam, also, as is to the south of the middle line of the river were therefore erections upon the appellants land.

Then it is further contended for the respondent that according to the deed of June, 1871, the appellant is only entitled to such parts of block F as appear to be coloured in pink on the plan annexed to that instrument. Having once ascertained of what block F consists there can be little difficulty on this head. The only piece of block F actually excepted is that coloured green upon the plan. By the very terms of the description the whole of block F beyond this excepted parcel must be held to have passed by the deed, even assuming that the parts coloured pink on the plan do not show the whole of this residue. The words of the description are :—

> All that part of said block F shown on the plan annexed hereto and coloured pink, that is to say this conveyance covers all of said block F excepting the part thereof shown in the said plan annexed hereto in green colour, and which part coloured green is described thus.

And then follows a particular description of the excepted parcel. Now, assuming that "block F" was a description of a definite piece of land extending to the river, a conclusion already arrived at, and also assuming that the respondent is right in saying that the pink colouring does not show the whole of the residue of the block beyond the excepted parcel, I should still be of the opinion that the whole of the remainder of the block passed. Mr. Justice *Patterson* in his judgment refers to the case of *Iler* v. *Nolan et al* (1), as applicable to this point, and I am willing to abide by that case

(1) 2 U. C. Q. B. 319.

1884

ATTRILL v. PLATT.

Strong, J.

as containing a correct exposition of the law and as being a governing authority to be applied here. Then what does *Iler* v. *Nolan*, which is only one among a great number of cases both here and in *England*, decide? It determines that where a close or parcel of land is granted by a specific name, and it can be shown what are the boundaries of such close or parcel, the governing part of the description is the specific name, and the whole parcel will pass, even though to the general description there is superadded a particular description by metes and bounds, or by a plan which does not show the whole contents of the land as included in the designation by which it is generally known. Applying this principle here, it is beyond controversy that the whole of block F passed under the deed. But no such question really arises here, for the parts colored pink in the plan in the deed of 1871 do extend to the river, and therefore include the whole of the block except the reserved portion. The reasons for this conclusion already given are greatly strengthened by an argument which, as applicable to another part of the case, the respondent himself has strongly insisted on. The respondent has himself contended, and the surveyors called called by him support his contention, that the black lines on this plan are designed to show the present race-way as it actually existed at the date of the deed, and has existed since 1865. Taking this to be as the respondent insists, it also shows that block F is bounded by the river, for we are told by the witnesses that the inner bank of the raceway, which is represented in the plan by the inner black line, to which the pink colouring extends, is the natural bank of the river. The consequence is that the description in the deed, as I have construed it, is entirely consistent both in itself and as applied to the plan, and that the parts colored pink do show all of block F save the excepted part

colored green, and *that* as a parcel of land having the river for one of its boundaries. In other words when the description in the deed says, "All that part of block "F shown in the plan annexed hereto and colored pink; "that is to say, this conveyance covers all of said block "F except the reserved parts," it correctly and emphatically says that the parts colored pink do show the whole of block F ascertained as a piece of land having the river for its boundary, excepting such parts as are expressly reserved.

It is said, however, that even if the appellant is the owner of the land itself that the respondent is entitled, in respect of the mill and lands conveyed by the deed of the 3rd February, 1873, by which the railway company conveyed to *Patterson* the premises which have since become vested in the respondent, to an easement giving him the right to maintain the dam and raceway, and this is rested upon two distinct grounds. First, it is claimed under the express reservation in the deed to *Ross* of the 3rd June, 1871, under which the appellant derives his title, and secondly, it is asserted that by operation of law there was an implied reservation of these easements. On both these points it appears to me that the decision must be adverse to the respondent. Any easements to which the respondent is entitled against the appellant as the proprietor of block F must, so far as his title depends on express grant, be necessarily found in the deed to *Ross* of 3rd June, 1871. It has already been shown that the renewed lease came to an end and the stipulation giving a right to purchase the mill property thereby became inoperative on the 1st May, 1870, from which date the railway company were seized in fee in possession, or with a right to the immediate possession, of the mill property and were also seized in fee of so much of block F as had not been included in the lease,

1884

ATTRILL v. PLATT,

Strong, J.

and that consequently from that date all easements were extinguished by unity of ownership. This is incontrovertible, unless we are to ascribe the deed to *Patterson* of the 3rd February, 1873, to some equitable title earlier in point of time than the date of the 3rd June, 1871, either under the right of purchase conceded by the lease, or under some other agreement binding in equity, but this, as already demonstrated, is impossible, unless we can proceed, to the entire disregard of evidence, upon pure hypothesis and conjecture. Then as on the one hand a title to the easements claimed by the respondent by express grant cannot have relation back to any title earlier than the reservations contained in the deed of 1871, so on the other hand it is clear that nothing done by the railway company subsequently to the execution of that deed, can in any way burden the lands, so as to affect them in the hands of the appellant as claiming under *Ross*. Therefore the recital in the deed of 1873 that it was granted in pursuance of the contract of purchase, and the description of the easements contained in that deed, and the reference therein to the lease, can have no effect against the appellant with regard to whom they were *res inter alios acta*. It follows that the respondent, in seeking to make out a title by express grant, must be restricted to the deed of 1871, and can have no other or larger easements than such as are expressly reserved by it in favour of the grantors, the railway company, or, as it may be put, are re-granted to them by *Ross*, their grantee of the land. Then turning to the deed of 1871, we find that it makes no reference to the expired leases, or to any right of the respondent, or of those claiming under him, or in his right, that there is no reference to these prior instruments in extension or aid of the description; but that it purports to reserve just what is specifically described within the four corners of the deed itself, and nothing

1884

ATTRILL v. PLATT.

Strong, J.

more. After the description of the land intended to be conveyed to the grantee, *Ross*, already extracted, and being, as I construe it, all of block F, except the reserved portions, the deed proceeds to describe very fully, giving courses and distances, two parcels of land, the first being described as a piece coloured green on the map, and the second as what is called the mill-race. The latter, it is to be observed, is not the mill-race now in dispute, but a piece of land so fully and accurately described that there can be no question as to its size or locality, and which is entirely distinct from the mill-race for the whole length of the river, from the dam near the bridge downwards, as now claimed by the respondent. This mill-race is not reserved by way of easement, but the land itself is excepted from the conveyance to the grantee in the deed. The deed does not in terms purport to convey any easement over the lands conveyed to *Ross*, or to except from the operation of the conveyance anything but the two pieces of land which are described as before stated It is, therefore, out of the question to say that the right to maintain a race-way such as the respondent now claims, was acquired under the reservation. A piece of land to be used as a race-way and designated as a race-way, was, it is true, reserved, but this was not in any way, identical with the race-way formed by the embankment erected int he bed of the river, and extending in the river for three-quarters of a mile as far east as the dam near the bridge, as now used and claimed, for the purposes of the mill by the respondent. The easements which the respondent, by his bill, seeks to have established and protected, are in respect of this race-way and also of the dam which he has placed obliquely across the river, near the head of the race-way. As regards the first—the race-way—he has entirely failed to shew any title by express grant under the reservation in the deed. He, also, in my opinion,

1884

ATTRILL v. PLATT.

Strong, J.

fails to show any grant or reservation which entitles him to maintain such a dam as he has erected, and the appellant's partial removal of which led to the institution of this litigation. Part of the description of the race-way contained in the deed of June, 1871, is as follows:—

> Thence due North 79 degrees, 18 minutes and 30 seconds, East 319 feet 3 inches, more or less to the head gates of the race, thence easterly across the head gates 107 feet, more or less, to the high water mark, caused by a dam giving a head of 8 feet of water at the mill.

Save this there is no mention of a dam any where in the deed. The question is, therefore, narrowed to this, did this incidental reference to the high water mark caused by a dam giving eight feet of water at the mill authorize the respondent to continue to maintain the dam or obstruction in the bed of the river near the bridge which he had placed there whilst he held under the lease? The respondent insists that this reference to a dam was an informal reservation by the grantees, the railway company, of a right to construct or maintain a dam anywhere they might choose to place it for the purpose of getting a fall of eight feet of water at the mill without restriction to any particular locality, and that, therefore, it authorises the maintenance of the present dam. I am not able to assent to this proposition. In the first place, it seems to be very clear that this mention of a dam in the description was not intended to operate as the reservation of an easement to maintain a dam, but was a mere matter of local description. But, be this as it may, it seems clear that the appellant is right when he contends that the dam referred to was, or was intended to be, below the head gates mentioned in the description. The head gates were intended to let the water confined or ponded back by the dam, into the mill race, and it therefore

follows that the dam, to cause this elevation of the water, must have been westerly of or below the head gates, the locality of which is precisely fixed by the deed. Again such a dam as the present never could have been intended, for the reason that it would not have been effective for the purpose of giving the required head of water at the mill without the adjunct of the longitudinal embankment in the bed of the stream forming the race way, and there is no pretence for saying that any right to maintain this embankment was conferred by the deed of 1871. The respondent endeavours to meet this argument by calling the race-way itself a dam, but the answer to this is easy, "race-way" is certainly the more accurate description of the channel through which the water is conveyed from the dam, across the river, in the direction of the mill, and we have the race-way intended particularly described in the reservations of the deed. I have already said that I think that we ought not to look out of the deed itself in order to ascertain the locality of the dam, but if we are to look at the lease, the only other instrument which can be referred to for the purpose, so far from helping the respondent's case, the description of the dam there referred to makes the case stronger against him, for the dam authorised by the lease is "a dam across the river *Maitland* so high as to take up eight feet of the fall of the said river, and no more." Again, the *Buffalo & Lake Huron Railway Company* by the lease reserved the right to the use of the water of the river above the back water to be caused by the dam. These references to a dam in the lease, therefore, plainly show that what was contemplated was a dam across the river (not one placed longitudinally in it) obstructing the natural flow of the water and so low down that the lands of the railway company to the east of it (which land did not extend eastward beyond the eastern extremity of block

1884

ATTRILL v. PLATT.

Strong, J.

F) would be above the back water, a description which would be entirely inapplicable to the existing dam. Then the evidence of one of the surveyors, *Miles*, the appellant's witness and *Wetherall*, called for the respondent, both of whom know the premises, puts this question of the locality of the dam beyond dispute. *Miles* gives the following evidence:—

Q. If the dam were to be maintained where it is, or in other words if the dam is not to be brought down to where it originally was, would the words in the description be sensible or have any meaning at all, that is, the course which carries you to the head gates, and thence across the head gates to the high water mark of the dam, giving so many feet of water, could these words have any sense unless the dam was erected there? A. According to that the dam would be immediately below the head gates.

Q. To give effect to that part of the description of the plaintiff's land there must be a dam at these head gates? A. Yes.

Q. Could you, by any possibility, reach the high water of the present dam in this description? A. No.

Q. Looking at this old map of *Wetherall's* to which Mr. *Passmore* referred, and to which you referred also, would the dam, as laid down in that map, give effect to the language of this description: a dam located as that dam was? A. The dam must be at the old head gates.

Q. If the dam was at the old head gates, would there be any sense in having this long channel running up along the front of lot F? A. If the dam is high enough; I think not.

Q. Is there anything to prevent its being made high enough? A. A mere matter of expense.

Being cross-examined, the witness says:

Q. What do you say about the position of the dam? A. If the dam is below the head gates, where it is shown on the *Wetherall* old map the description of the mill privilege can be understood, and then the dams dam back the water to the head gates, and the description shows 107 feet going east along the head gates to the high water mark, caused by a dam; well, if the dam were in its present position, this 107 feet would not touch it, it says 107 feet, more or less, but does not mean 1000 feet, more or less.

Q. I understood you to state to Mr. *Garrow* where the dam ought to be? A. Below the head gates.

Q. That is lower down the river, you mean? A. Below the head gates.

Q. Well, the head gates are the head gates of the pond? A. Exactly, you go to that by description, by metes and bounds.

Q. Whereabouts should the dam be? A. According to the old head-gates it was attached to the head gates; that is, according to the old plan.

Then Mr. *Wetherall*, who is called by respondent, and who prepared the description contained in the original lease after a survey of the ground made for the purpose, agrees with the appellant's witness; his statement is as follows:

Q. Now the head gates must have been there when you made the survey for the description? A. Yes.

Q. And have you gone over the matter? A. Yes.

Q. And that same description is continued down to the very latest title deeds that he has? A. Yes.

Q. The same description throughout? A. Yes.

Q. And the description of his property is simply the exceptions from F? A. Yes.

Q. Then you say the head gates must have been there? A. Yes.

Q. Now, was the dam not there at the time? A. I can't remember.

Q. Did you know where the dam was to be at the time? A. By the head gates being there, I should say that the dam was to be as shown on my map.

Q. This is your own map, the map of 1864, and was prepared by yourself? A. Yes.

This map of 1864 is produced and is one of the exhibits in the cause, and it distinctly shows the dam situated below the head gates. We have, therefore, the locality of the dam referred to in the deed of 1871 ascertained not precisely, it is true, but sufficiently for the appellant's purpose of showing that it meant a dam placed in the river below the head gates, and did not mean a dam and embankment, such as the respondent now claims.

This concludes the question of any easements by express grant, against the respondent, unless there is any force in an argument derived from the black lines drawn on the plan annexed to the deed of the 3rd June, 1871, which have been already referred to. It was a

1884

ATTRILL v. PLATT.

Strong, J.

matter of controversy at the trial whether or not these black lines were intended as a delineation of the race-way now claimed. The respondent's witnesses, who were called to give evidence as experts, thought they were meant to show the race-way, and I think they were right. But granting this to be so, I am at a loss to see how that fact shows that this raceway, or an easement in respect of it, was reserved by the railway company. No reference is made in the deed itself to the raceway, or to these lines as representing it, and consequently their only effect can be to show that at the date of the execution of the deed the raceway existed in fact, and was as a fact brought to the notice of *Ross* at the time he took his conveyance. If we were now considering the effect of these lines in connection with other evidence showing an agreement to reserve this race-way or the right to maintain it in an action to rectify the deed, I can understand how these lines might have an important bearing, but in an action like the present, when we are only called upon to construe the deeds and to give them their strict legal effect, the appearance of these lines in the plan must be considered immaterial and can have no other or greater significance than the fact of the actual existence of the race-way itself at the date of the deed can have. The respondent has therefore wholly failed to make out a title to any easement by express reservation.

Then we have to consider whether, as a matter of law there was any implied reservation of rights by way of easements to maintain the dam and raceway arising upon the conveyance of the railway company to *Ross*. Both the dam and race-way had been enjoyed by the respondent, not only as quasi-easements which were continuous and apparent in the interval between the expiration of the leasehold term and the deed of the 3rd of June, 1871, but they had also existed by the suffer-

ance of the railway company as easements *de facto* during the continuance of the lease, when the several tenements were in different hands. Were they then reserved as legal easements when the ownership in fee of the two properties was again severed by this conveyance to *Ross*? In a strict technical sense there is no such thing as a reservation or exception of an easement upon a conveyance of land, for a reservation or exception means something reserved or excepted out of the land itself, and an easement in favor of other lands is not within this definition (1); a reservation or exception of an easement is therefore construed and held to operate as an inartificially expressed grant by the grantee in favor of the grantor. Can it therefore be said that there was any such grant by *Ross*, the grantee, in favor of his grantors the railway company, not as has been shown, contained in the deed, but arising from implication of law from the state of facts existing at the time of the execution of the conveyances? It appears to me that upon the later authorities this question must be answered adversely to the respondent.

Three modern cases of the highest authority have settled the law upon this much controverted point. The decisions to which I refer are those of *Suffield* v. *Brown*, *Crossley* v. *Lightowler* and *Wheeldon* v. *Burrowes*, the two first mentioned decided respectively by Lords *Westbury* and *Chelmsford* and the last by the English Court of Appeal. In *Suffield* v. *Brown* (2), Lord *Westbury* determined that when the *quasi servient* tenement was first conveyed without expressly providing for the continuance of the easement there was no implied reservation for the benefit of the land retained by the grantor. In this case of *Suffield* v. *Brown* the easement

(1) Goddard on Easements, p. 100 (Ed. 2).

(2) 4 DeG. J. & S. 155.

1883

ATTRILL v. PLATT.

Strong, J.

was one of a class which has been called non-apparent and discontinuous, that is the enjoyment of it was of an occasional or intermittent character, and this was at first supposed to have afforded ground for a distinction between the principle of *Suffield* v. *Brown*, and that involved in the case of *Pyer* v. *Carter* (1). Later, however, Lord *Chelmsford* in deciding *Crossley* v. *Lightowler* (2), applied the same rule to the case of an easement apparent and continuous, and finally in the case of *Wheeldon* v. *Burrows* (3) the Court of Appeal expressly over ruled *Pyer* v. *Carter*, so far as it is to be regarded as an authority for a contrary doctrine, holding that no distinction was to be made for this purpose between easements which are apparent and those which are non-apparent. In all these cases it was recognised as a well settled rule of the law of property, that if the dominant tenement is first granted, all *quasi* easements which had been enjoyed as appendant to it over a *quasi servient* tenement retained by the grantor, pass by implication. The *ratio decidendi* of these decisions against the doctrine of implied reservation in the case of the servient tenement being first sold, is that where land is granted uncharged with any easement, it would be to authorize the grantor to derogate from his own grant, and so to set up a presumption against a rule of law, if he were to be permitted to subject the granted land to a user for the benefit of the land retained, to which it had been in fact subservient, whilst he was the owner of both tenements. This being the reason of the rule, it is plain that any distinction between easements apparent and those non-apparent, would be entirely arbitrary.

No argument against the application of these authorities to the facts of the present case can therefore be found-

(1) 1 H. & N. 922.

(2) L. R. 2 Ch. App. 478.

(3) 12 Ch. D. 31.

ed on the circumstance that the existence of the dam and raceway must have been known to the grantee under the deed of June, 1871. It may be said, however, that here the easements claimed did not consist merely in special modes of user and enjoyment, to which the first granted tenement had been subjected for the first time during the unity of ownership, but that the dam and race-way had both been previously enjoyed during the temporary severance of title which had been occasioned by the lease. But although it is true that this circumstance is not to be found in any of the decided cases, it appears very clear that it can make no difference when it is considered that the principle upon which they were decided is, that a grantor cannot claim rights in derogation of his grant, since a vendor, claiming an easement which had had a legal existence previous to the unity of ownership and which had been extinguished by it would be manifestly acting quite as much in derogation of his grant of the servient tenement as would a vendor who had himself been the original author of the *quasi*-easement, whilst the titles were united. The only notice I find of this point in any of the text books is contained in the following passage, extracted from the work of Mr. *Goddard* on the law of easements (1) :

If the quasi-easements had legal existence as easements before the unity of ownership, and the quasi-dominant tenement is sold, the purchaser, as in the other case, will become entitled to the easements, but what would be the result if the quasi-servient tenement is sold, is apparently an open question. Now, the authority of *Pyer* v. *Carter* is so much shaken, for Lord *Westbury* did not extend his judgment in *Suffield* v. *Brown* to this point, but in all probability it would be said that the grantor could not derogate from his own grant, that as he sold the quasi-servient tenement without making any stipulation for the reservation of the extinguished easement—it would be in derogation of his grant if he could claim them; it might also be said that as the vendor made no mention of the easements

(1) Goddard on Easements, Ed. 2, p. 112.

1883

ATTRILL v. PLATT.

Strong, J.

in his deed he must be presumed to have intended not to reserve them. Should this be so decided it would make no difference whether the quasi-easements were first used during the unity of ownership or legally existed as easements before the ownership was united.

It is to be remarked that this was written before *Wheeldon* v. *Burrows* was decided, and as this case has now settled the law as proceeding upon the principle that a grantor cannot derogate from his grant, it can make no difference that the easements had once had a strictly legal existence which had been terminated by merger.

Then it is urged that these were easements of necessity, and so within the exception pointed out by Lord Justice *Thesiger* in his judgment in *Wheeldon* v. *Burrows* with reference to ways of necessity. There is not the slightest foundation for such a proposition. It is shown by the evidence that the dam and race-way in question are not indispensably necessary to the use of the mill, but that the same head of water might be obtained by erecting a dam below the old head gates, and that the preference of using the water in one mode rather than the other, is only on the ground of expense. It is not sufficient, to bring a case within the exception recognized by Lord Justice *Thesiger*, to show merely that, as the premises were constructed and used at the time of the grant of the servient tenement, the tenement retained by the grantor was dependent for a continuance of the user by means of the same contrivances and arrangements, upon an easement over the granted property. It must be shown, in order to make out an implied reservation upon this ground, that the easement was absolutely necessary to any user at all by the grantor of the land retained by him. If the argument could prevail in the present case it would have been sufficient also to have brought the case of *Crossley* v. *Lightowler* within the principle of the same exception,

and also to have exempted the case of *Pyer* v. *Carter* from the criticism and disapproval to which it has been subjected. For these reasons I am of opinion that there was no implied reservation of these easements arising from the fact of their apparent and continuous existence and use, to the knowledge of the grantee, entitling the railway company to them as easements appendant to the mill and other tenements which were retained by the company at the date of the deed of June, 1871, and of which property the respondent is now seized.

Had it been found impossible to reach the conclusions already indicated, either for the reason that the appellant was not a riparian proprietor in respect of block F, or because, though seized of that parcel of land with a boundary on the river, it was subject in his hands to the easements claimed, I should still have been compelled to dissent from the courts below, and to hold that the appellant was entitled to have the decree reversed as having shown a sufficient justification of the acts complained of in respect of his ownership of the three parcels of land on the north side of the river, Island C, the Great Meadow, and Block A. The rights of the appellant in respect of the first two parcels appear to me to depend on propositions so plain and simple that very little is required to be said to show that he ought not to have been enjoined as he has been by the decree now complained of. The appellant's title to these lands is derived under conveyances from the railway company. Island C was sold and conveyed by the railway company in fee to *Smith*, on the 3rd June, 1871, and by a deed of the same date, the Great Meadow was sold and conveyed by the same grantors in fee to *McDonald*. The appellant acquired his title to these lands by purchase from *Smith* and from the devisee under the will of *McDonald*, by whom the lands were respectively conveyed to him in December, 1879. As

1883

ATTRILL v. PLATT.

Strong, J.

regards Island C, the very description of the land itself, as an island, imports *primâ facie* that it extends to the edge of the waters by which it is surrounded, and, moreover, the registered plan of 1859, or rather the certified copy of it from the *Canada Company's* office, which was put in to supply the piece torn off in the registered plan, shows the island as having the water for a boundary. Again the same plan shows the great meadow as extending on the south to the waters of the river. There is not the slightest ground for questioning the correctness of either of these descriptions. The fact that, by means of the dam and raceway, the water is unduly diverted from the appellant's lands on the north bank of the river, would seem a necessary result of the dam and embanked channel forming the raceway, from the mere descriptions which we have of them in the evidence, and I should have thought no further proof would have been requisite to establish the appellant's case in this respect. The Court of Appeal, however, was of a different opinion, though the learned judge before whom the case was tried seems to have had no difficulty in finding for the appellant on this point. A reference, however, to the depositions of the witnesses examined at the trial, conclusively establishes that there is a diversion not only to an appreciable extent, but to an extent sufficient to be injurious to the appellant's rights as a riparian owner.

Wetherall, a surveyor and a witness called by the respondent, says:

> By reason of this dam and race-way the waters of the river are diverted for about three-fourths of a mile; namely, from the head of the head race at the bridge to the foot of the tail race below the mill. In low water the race takes the greater part of the river, takes it all except what percolates through the dam. The water which is diverted by the race would, if left to itself, go down the main channel past island C, the great meadow and block A, and as it is diverted it does not go past these properties.

1883

ATTRILL v. PLATT.

Strong, J.

Miles, a witness called by the appellant, also a surveyor, says:

> The water is diverted from the main channel by means of the plaintiff's dam and the raceway that he is claiming, it is made to flow out of the main channel of the river until it reaches the lower end of block E, and it diverts it from both A & C, and the Great Meadow.

This testimony is not in the least degree contradicted, and in face of it I find it impossible to agree with the learned judges of the Court of Appeal in holding that the fact of the diversion of the waters from these lands on the north side of the river is not proved. The appellant's riparian ownership of these last mentioned lands and the fact of injury to the appellant's right as such owner being thus established, he has made out a *primâ facie* case justifying the acts which the respondent complains of as having been done for the purpose of abating the nuisance caused by the dam. The onus is thus thrown upon the respondent to show some title to the right claimed to maintain the dam and race-way, and thus to divert the waters of the river from the appellant's property on the north side. Then what shadow of title to such a privilege has the respondent shown? I have not seen the two deeds of the 3rd June, 1871, by which these north side lands were conveyed to *Smith* and *McDonald* respectively, as they are not printed in the case, but it has not been suggested that they contained any reservations or exceptions which would operate as a grant of an easement in favour of the railway company giving the right to divert the natural flow of the water or in any way to interfere with the ordinary common law rights of the grantees in these deeds as riparian proprietors of the lands conveyed. There is not then in the case of these lands on the north bank any such difficulty as was founded on the reference to the dam in the exception contained in

1884

ATTRILL v. PLATT.

Strong, J.

the conveyance of block F, and there is nothing therefore on which to rest any claim of title by express grant or reservation. Then, as has already been stated, when considering the appellant's rights in respect of block F, the law as finally settled by the decision in *Wheeldon* v. *Burrows* precludes the possibility of implying any reservation of easements in favour of the lands retained by the railway company over those conveyed by them to *Smith* and *McDonald*.

There only remains to be considered the appellant's rights as the proprietor of block A, which he holds under a different title from that which he makes to the other lands on the north bank of the river. The railway company were never seised of this land, and consequently the appellant's title to it is not, as in the case of the other parties, acquired from a grantor who was also originally the owner of the respondent's mill and other property. There can, therefore, in respect of this piece of land, be no question of easements by reservation, and the only points which have been or could be made against the appellant's justification of his acts in removing the dam and race-way, as owner of this property, are, first, that his title did not give him the right of a riparian proprietor in respect of it; and secondly, that an easement has been acquired against this block A by prescription. The deed by which this land was conveyed to the appellant has not been printed in the record, but it is said in the judgment of Mr. Justice *Burton*, and the fact has not been disputed by the appellant, either in his factum or in the argument at the bar, that the boundary of this land on the river side is high water mark, and thence along high water mark to a point on the bank. Assuming this to be so, I fail to see that there can be any doubt that the appellant is a riparian

proprietor entitled to object to any unauthorized interference with the flow of the river in its natural state.

A title to the bed of the river is clearly not requisite to entitle a proprietor of the bank to the use of the water; the case of *Lyon* v. *The Fishmongers' Company* (1) expressly decides that the lateral or riparian contact of the land with the water is sufficient to entitle the landowner to his right though he may own no part of the bed of the stream. That there was a diversion of the water from block A sufficiently injurious, in fact, to have entitled the appellant to maintain an action is clear from the evidence of the witnesses from whose depositions extracts have been already given. It thus appears that the effect of the dam and race-way is to divert the water from the north side as well when the river is at the height of ordinary high water as at other times when it is at a lower stage; and that this must be the result is apparent from the very nature of these obstructions which the respondent has placed in the river.

The acquisition of an easement by prescription against block A is not raised by the pleadings, but I should be very unwilling now to conclude the respondent on that ground. The twenty years user requisite to make out a title of prescription is however not proved. The dam and race-way, which are to be considered as parts of the same structure, were not completed until 1865 and the date of the acts of disturbance which the respondent complains of were in February, 1880. The respondent himself, in the evidence which he gave at the trial, admits distinctly that the works constructed by him for the purpose of turning the water to the south side of the river were not completed until 1865. He says:—

I built another embankment there in 1865, on the dam from the

(1) L. R. 1 H. L. C. 662.

1884

ATTRILL v. PLATT.

Strong, J

middle gates up to the upper gates, and I completed that in 1865. Q. Is that the present dam? A. The long dam? Yes.

In the face of this admission by the respondent it is impossible to contend that there was for twenty years prior to February, 1880, a user of the water in the manner in which the respondent now uses and claims the right to use it by means of the present dam and race-way.

In my judgment, therefore, the respondent has failed to show that he is entitled to the relief which the court below has given him, and the appeal must, therefore, be allowed, the decree reversed, and the bill dismissed, with costs to the appellant in this court, and in both the courts below.

FOURNIER, J.:

In this case I agree with the views expressed by His Lordship the Chief Justice, and the appeal should be allowed.

HENRY, J.:

Understanding some time ago that other members of the court were preparing exhaustive judgments embracing all the points in this case, I considered it unnecessary that I should prepare a written judgment. It is sufficient, therefore, for me to say that I concur in the views expressed by my learned brothers who have read their judgments, and also in the judgment which I have had the pleasure of reading, prepared by brother *Gwynne*. I have considered the case fully and I have arrived at the same conclusion that they have. The fact is, in the first place, that the cases and title did not go beyond the head gate, and that the dam referred to in these conveyances meant a dam of sufficient height to give eight feet of a head at the mill, and that dam placed and erected at the head gate. The descrip-

tion in the leases and in the deed that subsequently followed, clearly point that out as the true construction of the document, and that when *Ross* got the deed the other parties and the respondent had no title whatever to the property. They had made no application either for a renewal of the lease or to purchase under the clause of the lease which gave them the right to do so. The property belonged, therefore, unrestrictedly to the parties who gave the deed to *Ross*. *Ross* took that as a conveyance of the property, being block "F," without being encumbered by any reservation of an easement in the respondent other than that which is described in the lease. A question was raised as to the extent of block "F," and I have no hesitation in saying from all the evidence that that block extended to the water, and as a necessary consequence took in the rights of the proprietors to half the stream, and that the excavations for the mill below the dam, that was subsequently erected by the respondent, were made on the soil of block "F." But we have here evidence also that the appellant owned land on the other side of the river, to which no reservation is applicable. He also owned block "A," deriving his title from a totally different source. Under any one or other of those titles, then, I think he was entitled to abate the nuisance by which his property was injured. I can see no right whatever in the respondent to erect the upper dam. It would have been of no service there without the excavation that followed it, to direct the water towards the head gates, and if he had the right to make a dam, he had not the right, certainly, to make the excavations that were necessary in order that that dam would be of any service. Looking at the whole case, with the evidence, and considering the law applicable to it, I have no difficulty in arriving at the conclusion that the appeal in this case ought to be

1884

ATTRILL v. PLATT.

allowed, and the original decree of the Vice Chancellor reversed, with costs.

GWYNNE, J.:

[After reading a statement of the case proceeded as follows:]

The solution of the questions arising in this case depends wholly, as it appears to me, upon the construction of the instruments under which the plaintiff and defendant respectively claim. What the plaintiff claims by his bill is not any estate in the land covered with the waters of the river *Maitland* at the place where the dam spoken of in the bill and therein alleged to have been erected in 1861, is situate, or in the channel leading therefrom, to the plaintiff's mill, but only the easement, right and privilege of maintaining the dam so alleged to have been erected, and of using the channel constructed and dug, as in the bill alleged, for conveying the waters of the river *Maitland* from above the said dam, which easements, rights and privileges the plaintiff asserts no title unto by prescription, but wholly as granted to and vested in him, under and by virtue of the terms and express provisions of the several indentures mentioned in the bill. The plaintiff's whole claim is founded upon the grant of the easements as described in the original lease, which lease as he contends granted the easement, right and privilege of erecting the dam therein referred to, at the sites of the dam alleged in the bill to have been constructed in 1861, near the bridge across the river. The plaintiff's whole claim rests upon the right to the easement as granted by that lease. He asserts no other title.

Now, the plaintiff not claiming any estate in the bed of the river where the dam was erected, nor in the land covered with the water flowing through the channel, alleged to have been dug by the plaintiff on the south

side of the river leading from the said dam, but only the easement, right and privilege of maintaining such dam for the purpose of conducting the waters of the river therefrom, through the said channel to the plaintiff's mill, whether the contention of the defendant that he is seised in fee of the land where the acts complained of were done be or be not well founded, the plaintiff cannot succeed upon this bill unless he establishes his right to the easement as alleged in his bill, to whomsoever the fee in the land over which such easement is claimed may belong; so likewise the defendant, having by his answer set up a case in respect of which he claims cross relief, unless he establishes, not only that the plaintiff is not entitled to the easement, right and privilege of maintaining the dam at the place where it was erected, and of conducting therefrom the waters of the river through the said channel to the plaintiff's mill, but also that the defendant is seised in fee of the soil and bed of the river where the dam was erected, or of some other land abutting on the river in virtue of which he had a right to remove the dam as a wrongful obstruction in the bed of the river to the flow of the waters of the river in their natural course to and past such his land. If the defendant fail to establish *his* title as set up in his answer, and the plaintiff fail to establish *his* title to the easement as claimed in his title, the plaintiff's bill must be simply dismissed.

It is, I think, very plain that the indenture of lease, dated the 4th July, 1859, executed by the *Buffalo & Lake Huron Railway Co.*, did not grant to the plaintiff the easement, right and privilege of constructing a dam across the river from the great meadow on the north side of the river at the place where the stone dam mentioned in the plaintiff's bill was erected, nor any right to dig the channel in the bill mentioned to have

1884

ATTRILL v. PLATT.

Gwynne.

been dug by the plaintiff for the purpose of conducting thereby the waters of the river from the said dam to his mill. True it is that this indenture does not define any precise limits for the site of the dam thereby authorized to be constructed, but its approximate site as contemplated by the parties to that indenture can be ascertained from the evidence of *William Robinson*, who superintended the work done by the plaintiff from October, 1859, to 1865, the latter year inclusive. He says that the plaintiff came to the place in June, 1859, and the witness himself, in October of that year, at which latter date "all the surveying, to lay down the site of the mill and the race, had been completed and part of the dam was built." The dam here spoken of was situate about half a mile lower down the river than the stone structure near the bridge, which is alleged in the bill to have been constructed in 1861, but which the evidence I think shows, and Mr. *Proudfoot*, V.C, has found as a fact, to have been constructed at a much later period; and that this dam, constructed in 1859 and not the stone structure near the bridge, comes within the limits and the terms and contemplation of the grant of July, 1859, sufficiently appears from the terms of the indenture of the 4th of that month, which clearly establish that the dam authorized thereby must be so situate as to have in it the head gates of the race, the precise situs of which is specifically defined by metes and bounds, and so must be, as the dam of 1859 in fact was, about half a mile lower down the river than the stone structure, the removal of which by the defendant is complained of in this suit The construction, therefore, of this stone dam near the bridge, whenever constructed, whether in 1861, as alleged in the bill, or later, as the learned Vice-Chancellor has found the fact to be, and the digging by the plaintiff of the channel leading therefrom to his mill cannot be justified

as acts done in pursuance of any power or grant of easement contained in the indenture of 4th day of July, 1859.

It appears that the indenture of the 9th November, 1866, which in the bill is alleged to have been an assignment by the plaintiff, with the concurrence of the *Buffalo & Lake Huron Railway Company* of the lands, premises and easements granted by the indenture of the 4th of July, 1859, was, in fact, an indenture of demise, executed by the *Buffalo & Lake Huron Railway Company*, the plaintiff being made a party thereto, and concurring therein to *Patterson*, who is therein recited to have been made assignee of all the plaintiff's rights and interests under the indenture of the 4th of July, 1864 ; and the indenture of the 9th of November, 1866, is, in fact, a grant and demise executed in pursuance of the provisions o the indenture of the 4th July, 1859, for granting a further term of three years to *Patterson* of the identical premises and easements granted and demised by the indenture of the 4th July, 1859, by the same precise description as the same are described in that indenture, for the term of three years, to commence and be computed from the 1st day of May, 1867, and containing a clause as to the purchase of the same premises within the said term of three years under the conditions and subject to the provisions in that behalf contained in the indenture of the 4th July, 1859. The indenture of the 9th November, 1866, being in express terms limited and confined to the identical lands, premises and easements granted by the indenture of the 4th July, 1859, cannot operate as a grant of any easement different from or more extensive than that which had been granted by the last named indenture.

Up to this period, then, the plaintiff had acquired no right whatever derived from the *Buffalo & Lake Huron* Railway Co., authorizing the construction across the

1883

ATTRILL v. PLATT.

Gwynne, J.

river *Maitland* of the stone structure mentioned in the bill as being near the bridge across the river, the removal of which by the defendant constitutes the gist of the plaintiff's bill of complaint.

In this state of facts and in this condition of things, the *Buffalo & Lake Huron Railway Co.*, and the *Grand Trunk Railway Co.* upon the 2nd of February, 1870, entered into an agreement under their respective common seals whereby, subject to the approval of parliament, it was among other things agreed that the railway and works, stores, rolling stock and surplus lands, and all other the property and rights of the *Buffalo* company should vest absolutely in the *Grand Trunk* company as from the 1st July, 1869, and be deemed part of their undertaking subject to all existing mortgages and encumbrances thereon, and that subject thereto and to other matters not important to the consideration of the question before us, the railway, works, surplus lands, property and rights of the *Buffalo* company should be held by the *Grand Trunk Co.*, free from all debts, liabilities and obligations of the *Buffalo* company; and that the *Buffalo* company should forthwith, or when and as the same from time to time should become due, pay and discharge all sums due from them as purchase money for land sold to them and for rights of way; and that the *Grand Trunk Co.* should, within twelve months' from that confirmation of the said agreement by the Canadian Parliament, sell or retain, at a valuation to be ascertained by a valuer to be named by each company (the valuers to name an umpire to decide between them in case of difference), the said surplus lands, and should forthwith apply the proceeds of such sales or the amount of such valuation in extinction, as far as the same would go, of the sums due for right of way; and all other debts and obligations whatever except those by the agreement expressly assumed by the

Grand Trunk Co., and except mortgage and debenture debts and certain arrears which, under the agreement, might be capitalised, but including the interest not so capitalised; and that whether such obligations were or were not a charge upon the line and property of the *Buffalo Co.*, or upon any part thereof, and that the said *Buffalo & Lake Huron Co.* should for ever indemnify the said *Grand Trunk Co.* against all the debts, liabilities and obligations of the *Buffalo Co.*, except those thereby expressly adopted by the *Grand Trunk Co.*, and against any interference with the railway, the works, the surplus lands or other the property of the *Buffalo Co.*, vested by the agreement in the *Grand Trunk Co.*, and any demand by or on behalf of any creditor or claimant against the *Buffalo Co.*, except as aforesaid.

By an Act of Parliament which received the royal assent upon the 12th May, 1870, in 35 *Vic.* ch 49, this agreement was ratified and confirmed and all its provisions, stipulations and agreements were declared to be valid and binding, and should have in all respects the same force and effect as if the same and every of them were expressly embodied in the Act. Now, the term created by the indenture of the 9th November, 1866, terminated on the 1st May, 1870, and there is no allegation or pretence that during the currency of that term the lessee *Patterson* had elected to become purchaser of the premises demised, under the provisions in that behalf contained in the lease. If he had not, the effect of the 33rd *Vic.* ch. 49 was to make the *Grand Trunk Railway Company*, the absolute proprietors of the premises demised by the indenture of the 9th November, 1866, freed and released from the said indenture and from every thing contained therein as part of the surplus lands of the *Buffalo & Lake Huron Railway Company* under and subject to the provisions

1884

ATTRILL v. PLATT.

Gwynne, J.

of the Act relating to surplus lands; and if *Patterson* had given notice to the *Buffalo* company declaring his election to become purchaser of the demised premises under the provision in that behalf in the indenture of lease contained, then upon the passing of the statute 33rd *Vic.* ch. 49, the *Grand Trunk* company became seized of the premises, subject only to the obligation created by the express terms of the indenture of the 9th November, 1866, as to the extent of the property and the rights to be conveyed to *Patterson*, and subject to no other claim or demand whatsoever to be made by or on his behalf.

We next find that the *Grand Trunk Railway Company*, being obliged by the terms of the Act 33rd *Vic.*, ch. 49, to sell or to retain at a valuation the surplus lands so acquired by them, by an indenture bearing date the 3rd day of June, 1871, and made between the *Grand Trunk Railway Company* and the *Buffalo and Lake Huron Railway Company*, of the first part, and one *John Macdonald*, of the second part, in consideration of the sum of $950, by him paid to the parties of the first part, they, the said parties of the first part, did grant unto the said *Macdonald*, his heirs and assigns, forever "the lot on the north side of the river *Maitland* known as *The Big Meadow*," to have and to hold to him, his heirs and assigns forever, and the said parties of the first part thereby covenanted with the said party of the second part that they had the right to convey the said lands to the said party of the second part notwithstanding any act of theirs, and that the said party of the second part should have quiet possession of the said lands free from all incumbrances, and that the parties of the first part had done no act to incumber the said lands. Now *The Big Meadow*, so granted, abutting as it plainly appears to abut upon the river *Maitland* on its north side, the bed of that river contiguous to and along

1884

ATTRILL v. PLATT

Gwynne, J.

the extent of the piece of land, called *The Big Meadow* so granted, *ad medium filum aquæ* passed by the above deed to the grantee *Macdonald*, his heirs and assigns in fee simple, unaffected by anything contained in the indentures of the 4th July, 1859, or of the 9th of November, 1866, to alter, defeat or prejudice such grant. This deed was duly registered on the 18th of July, 1871, in the registry office of the county of *Huron*, in which county the land called *The Big Meadow* is situate. Now, the stone structure across the river, which the plaintiff claims the right to maintain, and the defendant the right to remove, and which he has removed, is partly—that is to say, to the middle thread of the river—situate upon land which became vested in fee in the said *Macdonald* by the indenture which conveyed to him the big meadow; and the property so vested in *Macdonald* became, and was, by mesne conveyances from him, vested in the defendant at the time that he did the acts which are complained of. In so far, therefore, as regards one half of the dam across the river, which the plaintiff insists that he has a right to maintain as it was before it was removed by the defendant, namely, that half situate on the bed of the river on the side abutting on the big meadow, it appears to have been situate upon land whereof the defendant was seised in fee, and over which the plaintiff has not shown any grant of any easement affecting such land, his right, therefore, if any he has, to the easement, right and privilege of maintaining a dam upon that part of the river, can be sustained only by his showing title by prescription to the enjoyment of such easement, and that as already pointed out he does not by his bill profess to do.

It appears also by the evidence that upon the same 3rd day of June, 1871, by an indenture of that date executed by and between the *Grand Trunk Railway Co.*

1884

ATTRILL v. PLATT.

Gwynne, J.

and the *Buffalo & Lake Huron Railway Co.* of the first part, and one *Alexander M. Ross* of the second part, the said parties of the first part in consideration of the sum of $1,520, paid to them by the said party of the second part, did grant unto the said party of the second part, his heirs and assigns for ever—

All that parcel or tract of land and premises situate, lying and being in the town of *Goderich* and known as part of block F in the said town, and which parcel or tract of land may be more particularly described thus: All that part of the said block F shown on the plan annexed hereto and colored pink; that is to say, this conveyance covers all of said block F, excepting the part thereof shown on the said plan annexed hereto in green color, and which part colored green is described thus: Commencing at a point on the easterly edge of the mill race where the west limit of *North* street (produced) intersects the same there; thence north fifty-four degrees fifteen minutes east six hundred and sixty-eight feet to an angle; thence north thirty-five degrees and forty-five minutes west 396 feet, more or less, to the edge of the mill race; thence along the high water mark of the mill race in a southerly direction, following the various windings thereof to the place of beginning; also excepting and reserving from said block F the mill-race described thus: (here follows a description identical with the description of the mill-race, as contained in the above indentures of lease of the 4th July, 1859, and of the 9th November, 1866.)

The deed then proceeds as follows:

Which said two excepted parcels above described form no part of block F, colored in pink, or of the lands conveyed by this indenture, or intended thereby to be conveyed. To have and to hold unto the said party of the second part, his heirs and assigns to and for his and their sole and only use forever, subject, nevertheless to the reservations, limitations, provisoes and conditions expressed in the original grant thereof from the Crown.

By this indenture, the parties of the first part covenanted that they had the right to convey the said lands to the party of the second part, notwithstanding any act of the said party of the first part, and that the said party of the second part should have quiet possession of the said lands free from all incumbrances; and that the

said parties of the first part had done no act to incumber the said lands.

Upon this deed two contentions upon the part of the plaintiff have been based: 1st. That the land covered with the waters of the river running to the head gates mentioned in the lease of the 4th July, 1859, from above the stone dam near the bridge across the river along the foot of the high bank, on the south side of the river, and between that bank and a gravel bed which the plaintiff constructed on the bed of the river, formed no part of the land by this deed conveyed to the defendant; and 2nd, that even if the land covered with such water did pass to the defendant, it only passed subject to the right and easement reserved by the grantors to have the waters of the river run uninterruptedly along the channel so created. The most favorable light for the plaintiff in which the evidence, as to this mode of conducting the water of the river from the bridge can be viewed, as it appears to me, is, that in the year 1865 the plaintiff completed and almost wholly in that year constructed a gravel bank in the bed of the river, from what the plaintiff calls an island therein, near the bridge, down the river to the head gates mentioned in the lease of July, 1859, which was situate in the remains of a dam which he had in that year constructed within the limits authorized by that lease, and which had subsequently been washed away. By the construction of this gravel bank and of the stone structure or dam in the river near the bridge, which was also completed in the same year, 1865, the channel was first formed in the river for conducting its waters to the plaintiff's head gates, the situs of which is defined in his lease. The view taken by some of the learned judges in the court of appeal for *Ontario* differing in this point from the view taken by the learned V. C. *Proudfoot*, viz., that there was a strip of land not being part of block

1884

ATTRILL v. PLATT.

Gwynne, J.

F, but lying between it and the river, makes it necessary to trace the condition of the piece of land called block F and the adjacent lands known as block E from a period antecedent to their acquiring such designations.

These blocks constituted part of the lands in what was called the *Huron* tract originally granted to the *Canada Company*. What other designation was ever given to them by the *Canada Company*, if any ever was, does not appear unless it be that they formed part of the town plot of the town of *Goderich*. As early as 1844 on a map filed by the *Canada Company* and registered in the registry office of the county of *Huron*, showing part of the town plot of the town of *Goderich* and its harbor, these blocks E and F are shown upon what appears to be a part of the unsurveyed portion of the town of *Goderich*, E being situate lower down the river and F adjacent thereto higher up. Now, although this map does not define with accuracy the line separating those blocks, yet there is nothing upon it which supports or countenances the idea that block E extended up the river between block F and the river, so as to separate that block from the river or *vice versâ*, that block F extended down the river and between the river and the parcel on which the designation E appears, or that a parcel not designated by any letter or number lay between the high bluff or bank above which the designation block F appears and the edge of the river. On the contrary, although the designated block F appears on the plan above the high bank which is very distinctly laid down on the plan, I should, without hesitation, conclude from the plan itself taken alone that it plainly enough exhibits the intention that the piece called block F should be regarded as extending down the steep bank to the water's edge of the river, which runs along its entire length. But in 1859 that

intention appears to me to be put beyond all doubt. In the month of June of that year the *Buffalo & Lake Huron Railway Company* appear to have made an arrangement with the *Canada Company* for the acquisition by the former Company of the title to certain lands of the *Canada Company*, in virtue of which arrangement they executed the lease of May, 1859, before their title was perfected by deed, which was executed upon and bears date the 17th of February, 1865. As part of such arrangement a plan was prepared under the direction of the *Canada Company*, of "*Goderich* harbour and part of the river *Maitland* with certain lands and premises sold by the *Canada Company* to the *Buffalo & Lake Huron Railway Company*," which was signed by *Frederick Widder*, Commissioner of the *Canada Company*, upon behalf of that company and by *R. J. Carter*, Director and General Manager of the *Buffalo & Lake Huron Railway Company*, on the 3rd of June, 1859, and registered in the registry office of the county of *Huron* on the 6th of that month. Upon this map are laid down blocks "E and F" and a dotted line, which plainly, as I think, is intended to define the boundary line between these blocks extending down to the water's edge of the river. Block F is also thereon shewn, plainly, as I think, to extend to the river along its entire length, from the *Maitland* bridge to the dotted line, between blocks E and F, which is situated a long way down the river below the bridge. That such was the plain intention is confirmed by reference to the terms of the deed of the 17th February, 1865, although the designations blocks E and F do not appear in that deed. The description in that deed, which comprises those pieces of land, is as follows:

The northern unsubdivided portion of the *Goderich* town plot in the said town of *Goderich*, butted and bounded as follows:—Commencing at the water's edge of the river *Maitland*, at the last limit

1884

ATTRILL v. PLATT.

Gwynne, J.

of *Wellington* street produced; thence following the several courses of the river *Maitland* against the stream to within forty-nine and one-half feet of the centre of the approach to the bridge over the river *Maitland* produced; thence up and parallel with the centre line of that approach, and always distant forty-nine and one-half feet therefrom to the northern limit of *Gloucester Terrace* and the intersection of the west limit of *Cambria* street produced; thence due west along *Gloucester Terrace*, and divers other courses to the place of beginning.

After describing other lands, the deed then proceeds:

Also the Big Meadow on the north side of the river *Maitland*, in the township of *Colborne*, in the county of *Huron*, estimated as containing sixty-one acres of land, be the same more or less.

Then, after describing other lands, the deed proceeds:

Also, all the right, title and interest which the *Canada Company* may now have in and to those certain parcels or tracts of land covered by water, lying between the townships of *Goderich* and *Colborne*, that is to say, by the river *Maitland* from its confluence with *Lake Huron*, for a distance up stream of one mile and seven-eighths of a mile.

Then, after describing other lands situate between the town plot and *Lake Huron*, the deed proceeds:

All the lands and tenements hereinbefore mentioned, and also all the lands and waters and all the rights, titles, privileges and interests in the same, such as the *Canada Company* may have, are described and laid down on the copy of a map made by *Thomas Nepean Molesworth*, Deputy Provincial Surveyor, dated third day of June, in the year of our Lord, one thousand eight hundred and fifty-nine, and signed by *Frederick Widder* and *Robert Stuart Carter*, on behalf of the respective parties to these presents.

Now, there cannot, I think, be a doubt that at this time and thence continually until and at the time of the execution by the *Buffalo & Lake Huron Railway Co.* and the *Grand Trunk Railway Co.* of the deed of the 3rd of June, 1871, to *Ross*, the block F extended to the water's edge of the river *Maitland*. It is said, however, that the contents of that deed indicate an intention of the proprietors to alter the boundary of the block on the river side and show that what was thereby con-

veyed did not extend to the river. The contrary, I think, appears both by the express terms of the deed and by reference to the plan annexed thereto.

The deed in terms professes to grant to *Ross*, his heirs, and assigns for ever, the whole of a piece of land said to be known as block F, excepting certain specially described excepted parts thereof. Now, when we bear in mind that the *Canada Co.* gave to the block its designation and its bounds, and conveyed it to the *Buffalo & Lake Huron Railway Co.*, from whom the *Grand Trunk Co.* acquired it as surplus lands, which they were under an obligation to sell and to apply the proceeds to a particular purpose if they should not pay the *Buffalo & Lake Huron Railway Co.* for them at a valuation, there can, I think, be no doubt that when the piece of land is spoken of in this deed as "known as block F," what is meant must be that block as shown on the plan registered on the occasion of the contract of purchase made between the *Buffalo & Lake Huron Railway Co.* and the *Canada Co.* The deed, however, goes on to define more particularly the land intended to be sold and conveyed to *Ross*, as follows:

> All that parcel of block F shown on the plan annexed hereto colored pink; that is to say, this conveyance covers all of the said block F, excepting the part shown on the plan annexed hereto in green color (which is particularly described) and also excepting and reserving from the said block F the mill race described thus.

Then follows a minute verbatim description by metes and bounds of the mill race as granted by the lease of July, 1859. This plainly, as it appears to me, expresses the intention of the grantors, the *Buffalo & Lake Huron Railway Co.*, and the *Grand Trunk Railway Co.*, to convey to *Ross* the whole of block F except the piece colored green and except also so much of the mill race as granted and described in the lease of the 4th July, 1859, as was situate upon block F.

1884

ATTRILL v. PLATT.

Gwynne, J.

Referring, then, to the plan, the part colored pink very plainly, as it appears to me, is shown to reach to the water's edge of the river, for by far the greater part of the extent of the piece of land It shows, as part of the river, what the plaintiff in his evidence describes as the channel completed by him in 1865 by the construction of a gravel bank in the bed of the river.

The plan seems to indicate this channel composing the space between the line shewing such gravel bank, and the piece shaded pink as part of the river *Maitland*. It may be that, and no doubt is, the fact, that the conformation of the south bank of the river along block F was different from what it was in 1859, when the plan by which the *Canada Company* sold to the *Buffalo & Lake Huron Railway Company* was registered.

Now, it is very plain that no part of this channel above the old head gates in the dam as authorized by the lease of July, 1859, and constructed in that year, comes within the description of the piece colored green, or of the mill-race, as described in that part of the deed to *Ross*, of the 3rd June, 1871, defining the mill-race which is excepted from the operation of that deed. If then this space between the gravel bank constructed by the plaintiff in the bed of the river and the piece of land shaded pink on the plan, is situate upon and forms part of block F, it passed to *Ross* by the express terms of the deed, and if it is not part of block F, it is part of the river *Maitland*, and if it constituted (as there is no doubt upon the evidence it always did for the greater part of the extent immediately above the plaintiff's old head gates) part of the river *Maitland*, then the piece shaded pink extending down to this water, the bed of the river *ad medium filum aquæ* would pass to *Ross*. So that, unless specially reserved the land covered with water flowing down between the gravel bank in the bed of the river and the piece shaded pink, and to the middle

thread of the river, would and did pass by the deed to *Ross*. Close up to the bridge for some little distance the river is plainly shewn to wash along the piece of land shaded pink, without any line whatever, similar to that lower down, indicating the gravel bank, and there is no indication whatever on the plan of there being any obstruction whatever across the river, where the stone structure or dam which the plaintiff claims the right of maintaining, was situtate, from which any argument in support of the contention that the right of maintaining such structure was intended to be reserved can be drawn. The plan rather shows the waters of the river as if they flowed in their natural course, save as they are confined by the gravel bank constructed in the bed of the river to the plaintiff's old head gates as described in the lease of the 4th July, 1859, and as constructed originally in the dam by that deed authorized.

Independently of the case of *Wheeldon* v. *Burrows* (1), relied upon by the learned counsel for the appellant as establishing that there can be no implied reservation from the deed to *Ross* of June, 1871, of the easements claimed by the plaintiff, it appears to me to be impossible to contend that that there can be any implied reservation of an easement of a water course as a race-way to a mill over a particular piece of land, when the deed in virtue of which the implied reservation is claimed contains, in very explicit and express terms, a reservation from the grant contained in the deed of a race-way to the same mill site in a wholly different place from that over which the race-way by implication is claimed to be reserved. The principle that *expressum facit cessare tacitum* seems to me to put that point beyond all question.

The effect then of the deed to *Ross* of June, 1871, was, as it appears to me, to convey to him the land down to the

(1) 12 Ch. D. 31.

1884

ATTRILL v. PLATT.

Gwynne, J.

waters of the river *Maitland*, as of a piece of land abutting on the river free from any reservation of a right of maintaining the stone structure or dam across the river at the place where the stone structure or dam, which the plaintiff claims the right of maintaining, was situate, and free also from any right of easement in the race-way as claimed by the plaintiff; and from any right to affect the waters of the river above a dam constructed within the limits as prescribed or authorized by the leases of July, 1859, and November, 1866, other than in such manner as a dam constructed as thereby authorized would affect the river above it. But it was contended for the respondent that the race-way which the plaintiff now claims the right to enjoy for the purpose of conducting the waters of the river to this mill site, for the mill itself appears to have been burned down in 1872 and not since rebuilt, is the identical one which is described in the indentures of lease of July, 1859, and of November, 1866; that contention must be determined upon the true construction of those instruments, and, in my opinion, cannot be sustained. In support of this contention, the plaintiff was permitted to give evidence of conversations which he alleged that he had had with Mr. *Carler*, Managing Director of the *Buffalo & Lake Huron Railway Company*. This evidence was objected to on the part of the defendant, and, in my opinion, should not have been received as the effect, if effect should be given to such conversations, would be, upon oral statements of what had been said by a servant of the company, to put a construction upon indentures executed under the corporate seal of the company, which, in my opinion, would not be authorized by, but would be at variance with, what the deliberately prepared terms of those indentures express. But, even if admissible, the evidence of the plaintiff as to those conversations with Mr. *Carter*, if they ever did take place,

which appears to me to be more than doubtful, is not of such a nature that it would be at all safe to rely upon it or to attach any weight whatever to it.

They took place as alleged by the plaintiff in his examination in chief after the completion by him of the works executed in 1865, and after, as the plaintiff alleges, Mr. *Carter* was aware that the plaintiff had completed such work, but upon cross-examination he is obliged to admit that Mr. *Carter* left this country and went to *England* in 1864, when he ceased to be manager of the *Buffalo & Lake Huron Railway Company.* He then says that it was after Mr. *Carter* ceased to be manager of the company, that the plaintiff had the conversations spoken of with him; but he was in *England* in 1865, and, in so far as appears, he does not appear to have had any connection with the company since he left this country for *England* in 1864 when the lease of November, 1866, was executed to *Patterson.* The seal of the company was set thereto by the company's secretary, and that Mr. *Carter* was ever in this country after 1864 does not appear. If any part of the conversations alluded to did ever take place it can safely be said that they did not take place in or subsequent to 1864, and plaintiff can claim nothing which cannot be claimed under the indenture of lease of November, 1866, to *Patterson.* It is not necessary to criticise closely the plaintiff's evidence in relation to this matter, for upon no principle could the company or their assigns, the *Grand Trunk Railway Company*, be affected by any verbal statements of Mr. *Carter* to the plaintiff, even when he was the railway company's manager, in respect of a matter provided for in the indenture of lease to an extent not authorized by the terms of that indenture, but it appears to me that if Mr. *Carter* ever made any statement of the nature alleged by the plaintiff, it must have been prior to the erection of the dam, which was erected

1884

ATTRILL v. PLATT.

Gwynne, J

in 1859, at which time it would naturally relate to a dam to be constructed within the limits prescribed and authorized by the lease of July, 1859. It only remains to be observed that in February, 1873, nearly two years after the *Grand Trunk Railway Company* conjointly with the *Buffalo & Lake Huron Railway Company* had by the indentures of June, 1871, conveyed *The Big Meadow* to *Macdonald*, and that part of block F described in the deed to *Ross*, under both of whom the defendant now claims, it was not competent for the *Grand Trunk Railway Company*, even if so minded, to convey to *Patterson*, through whom the plaintiff claims, any easement, right or privilege, prejudicially affecting the lands so conveyed, not specially reserved in the deeds whereby such lands were respectively granted. Moreover the very precise manner in which the *Grand Trunk Railway Company* in the deed of February, 1873, describe the race-way thereby intended to be granted according to the identical metes and bounds stated in the indentures of lease of July, 1859, and November, 1866, plainly shows that they entertained no idea of granting any other or different race-way or easement than that mentioned in those indentures, and excepted from the grant to *Ross* contained in the indenture of 3rd June, 1871. This is also apparent from the plan annexed to the deed to *Patterson* of February, 1873, and which is therein referred to in the following terms: "all of which property covered by this indenture is shown on the plan annexed hereto." This plan shows no part of the race-way from near the bridge as claimed by the plaintiff, but does exhibit the race-way as described in the lease of July, 1859. The deed to *Patterson* of February, 1873, after the words "this indenture made the third day of February, in the year of our Lord, one thousand eight hundred and seventy ," has a blank left in which it is plain that by mistake the word "three" was

1884

ATTRILL v. PLATT.

Gwynne, J.

omitted to be inserted, for the plaintiff alleges in his bill, and it is admitted, that it was in fact executed in 1873 ; that it was executed after the deed to *Ross* of the 3rd June, 1871, appears from the deed itself, wherein the deed to *Ross*, granting to him that portion of block F conveyed to him by the deed of 3rd June, 1871, is referred to as having been previously executed.

Upon the whole, then, it appears to me that the plaintiff fails to show any title by grant of the easement as now claimed by him, and that the defendant has shown title, as well to the bed of the river abutting on one side thereof on the big meadow, and on the other on the part of block F, whereof the defendant is seised in fee, which title authorized him to remove the stone structure or dam across the river near the bridge, across the *Maitland*, the right of the plaintiff to maintain which constitutes the gist and substance of this suit. The plaintiff does not claim any title by prescription to maintain this obstruction in the river as a burthen upon the lands of which the defendant is so seised in fee, and if such a claim had been made, the evidence, in my opinion, wholly fails to support it; and of this opinion also was the learned Vice Chancellor. However, no such claim is made by the plaintiff.

For the reasons already given, I am of opinion that this appeal should be allowed, with costs, and that the plaintiff's bill should be ordered to be dismissed out of the Court of Chancery for *Ontario* with costs. It is unnecessary to grant to the defendant any thing as prayed by him by way of cross relief, beyond the relief which he obtains by dismissal of plaintiff's bill.

Appeal allowed with costs.

Solicitors for appellant: *Garrow & Proudfoot.*

Solicitors for respondent: *Cameron, Holt & Cameron.*