THE FRANCIS KERR COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

ROBERT SEELY (PLAINTIFF) ..... RESPONDENT.

1911

*May 5, 6.
*June 1.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Lease—Water lots—Status of lessee—Riparian ownership—Access to lot—Injunction.

S. is a lessee under lease from the City of St. John of a water lot in the harbour, the F. K. Co. are lessees of the next lot to the south and there are other lots to the south between that of S. and the foreshore of the harbour. By his lease S. has a right of access to and from his lot on the east and west sides.

Held, that S. was not a riparian owner and had no rights in respect to the water lot other than those given him by his lease. Hence, he could not restrain the F. K. Co. from erecting a wharf on the adjoining lot which would prevent access to his from the south, a right of access not provided for in his lease.

Judgment of the Supreme Court of New Brunswick (40 N.B. Rep. 8) maintaining the decree of the judge in equity (4 N.B. Eq. 184, 261) reversed, Idington J., dissenting.

APPEAL from a decision of the Supreme Court of New Brunswick(1), affirming the decree of the judge in equity(2), enjoining the defendant company from erecting a wharf on their water lot in the harbour of St. John so as to cut off access from the south to the plaintiff's adjoining lot.

The question in issue on this appeal was whether or not the plaintiff, as lessee of water lot No. 2 in block "A" on the plan inserted below of lots on Sidney slip in the St. John harbour could restrain the defendant company, lessees of the adjoining lot No. 3, from erecting a wharf thereon in such a manner as to deprive the plaintiff of access to and egress from his lot on the southern side, not given him by his lease.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 40 N.B. Rep. 8. (2) 4 N.B. Eq. 184, 261.

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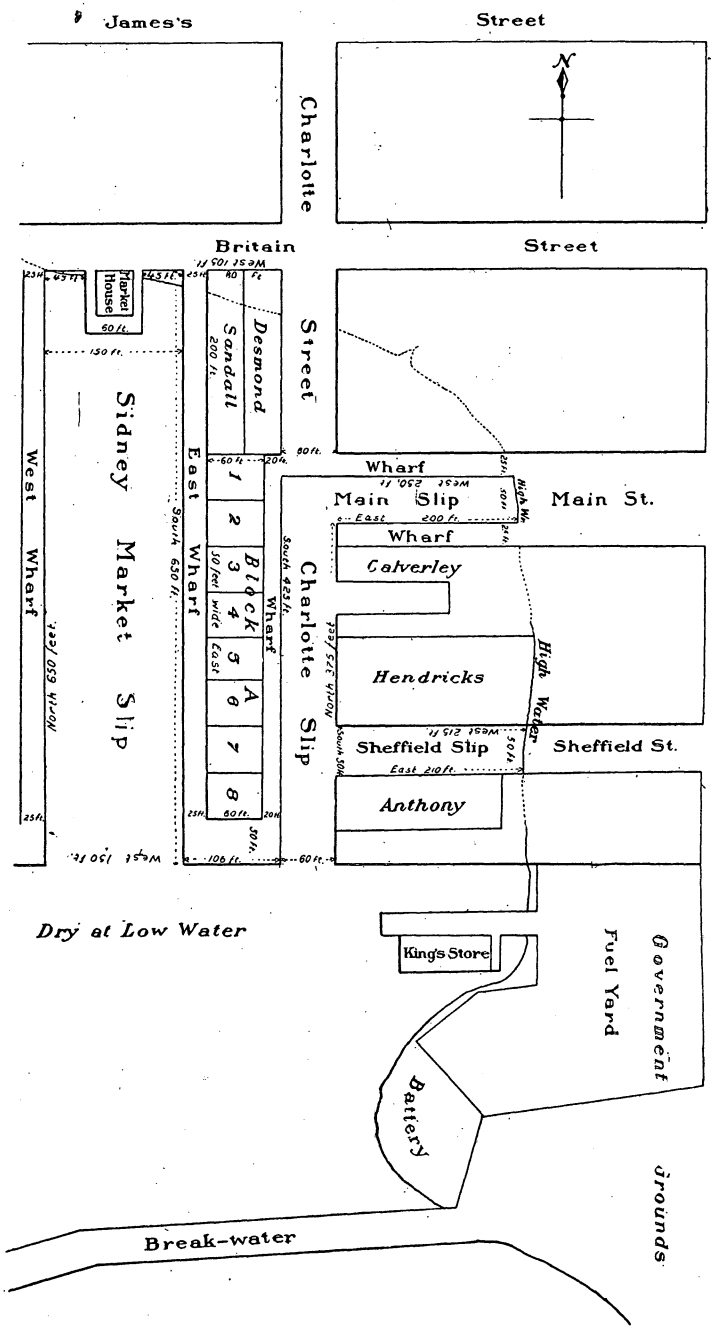
The plan referred to here follows.



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The judge in equity held that the plaintiff was entitled to an injunction, which he accordingly granted. His decision was upheld by the full court, and the defendant company appealed to the Supreme Court of Canada.

Hazen K.C. and *J. B. M. Baxter K.C.* for the appellants.

Teed K.C. and *A. A. Wilson K.C.* for the respondent.

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Anglin.

DAVIES J.—The underlying error pervading the judgment appealed from is, I venture respectfully to say, that of assuming the plaintiff, respondent, to stand in the position of a riparian proprietor and as such entitled to a right of uninterrupted access to his water lot along its southern boundary from the waters of St. John harbour.

In my opinion the plaintiff never was a riparian proprietor in any sense of the word. He was the lessee of the water lot No. 2 forming part of the "flats" so called in St. John harbour lying between high and low-water mark. No part of the *ripa* or bank of the shore was included within or touched the boundaries of his lease. All the lands leased to him were away below high-water mark, and between his land and the *ripa* or bank of the river there intervened other water lots. I lay much emphasis upon this because the judgment of Chief Justice Barker proceeds upon the assumption that the plaintiff, respondent, as lessee of water lot No. 2 possessed the

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rights of a riparian proprietor or rights analogous to them including uninterrupted access from the harbour to and along the *southern boundary of his lot.* The argument at bar for the respondent, plaintiff, proceeded and I think necessarily so upon the same lines.

In my judgment the respondent was not a riparian owner at all and possessed none of the special rights of a riparian proprietor as such. He was simply the lessee of a water-lot lying in the harbour of St. John, between high and low-water mark, and had just such rights and those only as were conferred by his lease or necessarily arose out of it. The appellant took that ground very properly and treated as entirely irrelevant to the controversy between the litigants in this case the mass of learning contained in the cases defining and establishing the rights of a riparian proprietor.

That being so what were the rights of the plaintiff, respondent, under his lease ? It is necessary in order to understand the contentions of the parties that the locations and boundaries of the plaintiff's lot should be clearly understood.

Both litigants are lessees from the City of St. John of water lots in the harbour of St. John. The defendants' lot lies immediately to the south of the plaintiff's. The south side-line of the plaintiff's lot No. 2 is the north side-line of defendants' lot No. 3. Originally these water-lots were laid off according to a plan approved of by the common council of the City of St. John, on the 26th October, 1836. This plan shews the *ripa* or bank of the shore, the streets running north and south to and from the shore, and those running east and west. The shore line north of the lots in question was a little south of Britain street.

The plan shewed two water-lots running south into the harbour a distance of two hundred feet from Britain street. To the east of these two lots ran Charlotte street into what was called Charlotte slip, and lying between Charlotte slip and Sidney-Market slip to the east, the plan shewed eight water-lots comprising what was called "Block A," and numbered from 1 to 8. The plan also shewed a contemplated wharf as running from Britain street into the harbour along the west boundary of all the water-lots, across the southern boundary of water lot No. 8 and then back northerly to Charlotte street. Thus the east and west ends of the two lots abutted on the contemplated wharf, which wharf would be bounded by the Sidney-Market slip and Charlotte slip respectively.

The scheme contemplated all the lots being bounded and enclosed by this wharf on the east, south and west sides, and except over and across this wharf there would be no access from any of these water-lots to the waters of the harbour. From this wharf there would be access to the waters of Charlotte slip on the east side and Sidney-Market slip on the west side.

In the year 1850 the city leased to one Sandall water-lots 1 and 2 of these water-lots shewn on the plan, for the term of twenty-one years. The lease described them as

> those two several lots known and distinguished on the plan of water-lots laid out by the city on the 26th October, 1836, as numbers 1 and 2 in the block of lots distinguished by the letter A, the said lots having each fifty feet front on a vacant space reserved for a wharf and highway of twenty-five feet wide on the east side of Sydney-Market slip, and extending back eastwardly continuing the same breadth, 60 feet, as exhibited on the said plan.

That is, the lots fronted on Sidney-Market slip on the vacant space reserved for a wharf, and extended back

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to a vacant space reserved for a wharf on west side of Charlotte slip. This lease contained a covenant from Sandall, the lessee, binding him to erect a strong wharf of the dimensions given

> along the whole front of the said lots on Charlotte slip and also another wharf along the eastwardly side of the said lots on Charlotte slip as exhibited on the plan,

and provided that both wharves were to be used as streets and public highways, and were for that purpose to be delivered up to the City of St. John for public accommodation reserving right to the lessee to demand and take all wharfage which might become payable for any ships or vessels lying, loading or discharging at the part of the wharf so built by the lessee on Charlotte slip aforesaid.

Some eight years afterwards Sandall having assigned his leasehold interest in water-lot one (1) to one McAvity, and having fulfilled apparently his covenant for the construction of the two public wharves on the east and west boundaries of both lots, and Charlotte street having been extended out into the waters of the harbour as far at least as the southern line of lot 2, a new arrangement was come to between the city on the one hand and the lessee Sandall and his assignee McAvity on the other. The old lease was surrendered up to the city and separate leases were given of the two lots. Lot No. 1 to McAvity and lot No. 2 to Sandall for the unexpired term of the old lease, namely, till 1871, or for a term of twelve years. The descriptions were modified to conform to the then existing conditions, and as Charlotte slip had been filled in and made part of Charlotte street, the lots were fronted and bounded on that street, and the twenty feet originally reserved for a

public wharf being no longer of any use as such was included in the new leases to McAvity and Sandall. Their lots were thus made eighty feet in depth fronting each fifty feet on Charlotte street and extending back to the east side-line of the wharf erected as a public highway on the east side of Sidney-Market slip. The description, however, carefully referred to the plans of the water-lots of the 26th October, 1836, in the same terms as used in the original lease.

As these leases expired new leases were given the lessees or their assignees or representatives for short terms, but in each and all of them the same reference was made to the plan of 1836, which continued to be as it was at the first incorporated in and made by reference a part of the leases.

In the year 1909, the appellants obtained their lease of water-lots 3 and 4 lying to the south of plaintiff's lot 2. No reference is made in the lease to defendants of the plan of 1836, which is referred to in all the plaintiff's leases.

The lands leased the defendants embrace practically water lots No. 3 and 4 as shewn on the original plan of 1836, and the description begins at the south-east corner of lot No. 2 and runs along the whole of its south boundary line. It contemplates a prolongation and broadening of the Sidney-Market wharf, as shewn on a plan attached to it, and leases more land in depth than is contained in plaintiff's lease.

This, however, does not in any way affect the question before us. It is most important to bear in mind that no complaint is made or is being dealt with of any obstruction of plaintiff's right of access to and from Sidney-Market wharf on the west side of his water-lot. Had there been any such interruption or

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stoppage of that right a different question altogether would have arisen. The sole and only question before us in this appeal relates to the plaintiff's claim of a right of uninterrupted access to and from the southern boundary of his water-lot No. 2.

Now it may well be asked: When and how did such right first arise or come into existence ? What created it ? Did the lease of 1850 or that of 1858 or any of the subsequent renewals do so ? If not, did the lessee plaintiff gain it by prescription or can it be held to have arisen in some mysterious way because, as it is alleged, the original scheme contemplated in 1850 as shewn by the plan of 1836, which is read into the lease of that date and the subsequent renewals, has since been abandoned by the city.

For my part, I pressed counsel on the argument on these points, but could not get what for me was any satisfactory answer, nor does the supplementary factum which they were permitted to file afford any such answer.

The learned Chief Justice, if I understand his reasoning correctly, seemed to think the rights of the plaintiff arose out of the new leases granted in 1858, on the surrender of the lease of 1850, because, as he puts it, the description of the lots leased in that later lease of 1858

> left the southern side of lot No. 2 of eighty feet open to the water as affording the only access by water the owner of that lot had to his property.

If the fact was as stated it might be a strong argument in support of the position plaintiff takes and which the Chief Justice indorses; but as I understand the facts and the situation they are altogether different. No one contends that under the lease of

1850 the plaintiff or his predecessor in title had any such right of uninterrupted access on his southern boundary as is now claimed by him. The right of access he had by that lease was not along his southern boundary at all. It was along his east and west boundaries where he had covenanted to build public wharves or highways over one of which he was to have the right to charge and collect wharfage, and his right of access to and from the harbour existed and was provided for. In one sense the language of the Chief Justice is correct, namely, that the only direct access from his own lot No. 2 to the waters of the harbour was on the south side of his lot. But surely the answer to that is that no such direct access to and from his south boundary ever was contemplated. The access which he was intended to have was not from his southern boundary, but from his east and west boundaries into the two slips, Sidney-Market slip and Charlotte slip, over and across the public wharves there. The plan shews that clearly and beyond doubt. It shews a public wharf surrounding all these lots and excluding access to the harbour excepting over this wharf. It shews lots 3, 4, 5, 6, 7 and 8 all lying south between plaintiff's lot and this contemplated wharf. This plan was referred to in such clear and distinct terms as made it a controlling factor in construing the lease of 1850. It is introduced in each succeeding new or renewal lease to the plaintiff and his predecessors in title. It shews clearly that no such right of direct uninterrupted access from the southern boundary of his lot to the waters of the harbour ever was intended or contemplated. Such a right, if conceded, would have effectually destroyed all the other water-lots. The changes made in the description of the lease in

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1858 did not in any way add to the plaintiff's previous rights of access on his southern boundary. Instead of bounding on the wharf to be built by him on the twenty feet of land lying between his lot No. 2 and Charlotte slip on the east, he was bounded on Charlotte street which had been extended and covered the slip. The lessee got that additional land lying between Charlotte street and lot No. 2 included in his lease of 1858. But in what possible way could this change agreed to by lessor and lessee add to or take away from the lessee's rights along his southern boundary ? I fail to see. His access to the harbour remained from his west boundary by way of Sidney-Market slip and on the east from the extension of Charlotte street. That access still remains, as far as we know, unimpaired. At any rate this action is not brought for any infringement or impairment of that right.

From 1858, when the lease of water-lot No. 2 was granted to the plaintiff, and down to 1909 when lot No. 3 was leased to the defendants the title to lot three remained in the City of St. John. That lot 3 bounded plaintiff's lot 2 on its entire southern side. As the owner of lot 3 it was the right of the city to build or use lot 3 as it pleased. If it chose to fill it up or otherwise use it so as to prevent access from the southern side of lot 2 to the waters of the harbour, it was clearly within its right to do so. Whether under the scheme contemplated by the plan of 1836 if such right was exercised a corresponding duty of extending the contemplated wharf along the east side of Sidney-Market slip in front of lot 3 would arise is an entirely different question and does not arise here. The only question before us is as to the claimed right of

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uninterrupted access by the plaintiff to the waters of the harbour from the south side of water lot 2 leased to him.

As to the abandonment of this plan, which was suggested, I fail to see any sufficient evidence of it. The renewed and continuous introduction into all the leases of lots 1 and 2 given from 1850 down is cogent evidence against such abandonment. There was no covenant, express or implied, on the part of the city that the complete wharf would be built by it as shewn in the plan. The scheme contemplated was, I think, the leasing of the several lots 1 to 8 inclusive, and the construction of the wharf by the lessees just as in the case of the lessees of lots 1 and 2. The fact that no leases were given of lots 3 to 8 until 1909, is not of itself evidence of any abandonment of the original scheme. There is no evidence that any such lease was ever applied for or ever refused. The absence of any reference to this plan of 1836 in the lease to the defendants in 1909 is explained by the fact that the plan had been lost, but whatever inference of abandonment of the scheme of constructing a continuous wharf around the eight lots contemplated by the plan of 1836 might be drawn from the granting of the lease to the defendants in 1909 of the water-lots on the south side of the lot 2 leased to plaintiff, it could not possibly operate to confer upon the plaintiffs' rights of access which their own leases not only did not give them, but which, in my judgment, these leases read in conjunction with the plans incorporated in them clearly negatived.

The argument that any such right as that claimed by the plaintiff could have been under the facts of these successive leases gained by prescription was mentioned, but hardly pressed, by counsel and could not, in my judgment, be sustained.

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If there could, under the evidence, be held to have been an abandonment in 1909 when defendants' lease was given or, before that, of the original scheme of constructing a public wharf or highway around these lots connecting with the city streets such an abandonment could not possibly operate to confer upon the lessee of lot No. 2 rights such as these claimed herein not necessary for the enjoyment of his lot and not directly arising out of his lease. Whether in case such abandonment was proved and the defendants suffered any damage as a consequence a right of action accrued to them for such damages gives rise to a question which I do not stop to discuss, as it does not arise in this action.

The appeal should be allowed, the injunction dissolved and the action dismissed with costs in all the courts.

IDINGTON J. (dissenting).—The question raised by this appeal is whether or not the City of St. John, having demised to the respondent's predecessor in title a part of the foreshore in said city, has derogated from its grant by a lease to Francis Kerr under whom appellants claim.

The city was incorporated by royal charter on the 26th of July, 1785, and granted all the then ungranted land or ground whatsoever, covered or uncovered with water, and lying within the boundaries of said city and given

> full power, license and authority not only to establish, appoint, order and direct, the making and laying out all other streets, lanes, alleys, highways, water-courses, bridges and slips, heretofore made, laid out or used, or hereafter to be made, laid out and used, but also the altering, amending, and repairing all such streets, lanes, alleys, highways, water-courses, bridges and slips, heretofore made, laid out or used, or hereafter to be made, laid out or used in and throughout the said City of Saint

John, and the vicinity thereof, throughout the county of Saint John hereinafter mentioned and erected, and also beyond the limits of the said city, on either side thereof, so always as such piers or wharves so to be erected, or streets so to be laid out, do not extend to the taking away of any person's right or property, without his, her, or their consent, or by some known laws of the said Province of New Brunswick, or by the law of the land.

This grant of incorporation, and of land and powers or privileges, was confirmed by 26 Geo. III. ch. 46 (3 L. & P. S., p. 3).

In 1836 the common council of the city took steps to frame a scheme for the utilization of a large part of the foreshore so granted. And a plan reported to the council by a committee was adopted, yet there seems a doubt as to the finality or legal effect thereof.

The report accompanying the plan recommended the leasing of lots laid out according to said plan when completed.

Their acts in regard thereto even if valid were liable to change. The city and those claiming under its leases or licenses, according to the plan, might be held bound thereby for the purposes of such leases or licenses. But a plan and the purposes of that day were not immutable. And the conduct of the city authorities as well as the public right to which I will hereafter advert, must all be borne in mind if we would determine this case aright.

This plan was somewhat extensive and evidently too ambitious for the time. The part of it we are concerned with may be described as a rectangular block, (105) one hundred and five feet wide by (650) six hundred and fifty feet in length, having on its north side a street called Britain street, running along and barely touching the foreshore. On the west side was a slip known as Sidney-Market slip, (150) one hundred and fifty feet in width, and (650) six hundred

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and fifty feet in length southerly from the said Britain street. On the east side the boundary was the extension of Charlotte street running at right angles to and south from Britain street two hundred feet to a wharf twenty-five feet wide which runs parallel with Britain street, and from the south side of that wharf to the southern end of the block (425) four hundred and twenty-five feet a slip to be known as Charlotte slip (60) sixty feet wide.

There lay south of it and other like blocks parallel to it a large tract of land only dry at low water. As the tide rolled in at high water the block in question would be covered by water to a depth of from ten to fifteen feet or more, if we assume the condition then the same as now. I infer such vessels as could, came in over it as of right to Britain street.

The plan proposed to divide this block as follows: Two lots one hundred feet long and together eighty feet wide fronting on Britain street and flanked by Charlotte street and marked by names of persons probably occupying them then. South of these lots there were to be laid out eight lots each fifty feet in width and sixty feet in depth, numbered from the north end to the south, one to eight. And on the east side of said lots so numbered, a strip was marked for a wharf twenty feet wide between Charlotte slip and the ends of said lots. On the west side of all of said lots a strip was marked for a wharf twenty-five feet wide running from Britain street to the southerly boundary of the block. And the whole south end of the block, between lot eight and the southerly side of the block was marked as if to connect both wharves by one of fifty feet wide.

This plan was filed in the office of the common

clerk and so remains, though mislaid at the time when this litigation began and for many years previously.

There does not seem to have been anything done with the property so plotted out till the year 1850, when the city demised to one John Sandall for twenty-one years to be computed from the 1st of May, 1849,

all those two several lots, pieces and parcels of land, beach or flats, situate, lying and being in Sidney ward in the said city and known and distinguished on the plan of water-lots laid out there by the said Mayor, Aldermen and Commonalty of the City of Saint John, approved of in common council, on the 26th October, A.D. 1836, and on file in the office of the common clerk of the said city by the numbers (1) one and (2) two in the block of lots distinguished by the letter "A," the said lots being each fifty feet front on a vacant space reserved for a wharf and highway of twenty-five feet wide on the east side of Sidney-Market slip and extending back eastwardly continuing the same breadth sixty feet, as exhibited on the said plan, with all and singular, the rights, members and appurtenances to same lots belonging or in any wise appertaining: to have and to hold * * *

Sandall covenanted within two years from said date to

erect, build and complete a good substantial and strong wharf of twenty-five feet wide and of such height as will allow the top thereof to be two feet above high water at the highest spring tides along the whole front of the said lots on Sidney-Market slip as aforesaid, and also within the time aforesaid, erect, build and complete another good substantial and strong wharf of twenty-five feet wide and of similar construction and height along the eastwardly sides of the said lots on Charlotte slip, as exhibited on the said plan. The said several wharves when completed to be used as streets and public highways and for that purpose to be delivered up to the said Mayor, Aldermen and Commonalty of the City of Saint John and their successors for public accommodation, he, the said John Sandall, his executors, administrators and assigns, nevertheless, being entitled to demand and have, receive, and take all wharfage and emoluments which may arise and become payable from any ships or vessels lying, loading or discharging at that part of the said wharf which may have been so built by him, the said John Sandall, his executors, administrators or assigns, on Charlotte slip aforesaid, for and during so long a time as he, the said John Sandall, his executors, administrators or assigns may continue to hold the lots and premises aforesaid by virtue of these presents.

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The lease provided that if Sandall put wharves, bridges, buildings or other improvements on these lots, such erections were to be valued at the end of his term and the city to have the option of paying same or re-letting the property to him for seven years by lease to contain the like covenants.

There seems to have been an interest in lot 1 assigned by Sandall to one McAvity, and in 1858, both surrendered to the city, and on the same day new leases made by the city to each of the parties so become interested.

The new leases are made to cover more ground. McAvity got lot one, and Sandall lot two, but the description comprising lot two is as follows:

> All that certain lot, piece and parcel of land, beach or flats, situate, lying and being in Sidney ward, in the said city and known and distinguished on the plan of water-lots laid out there by the said Mayor, Aldermen and Commonalty of the said City of Saint John, approved of in council on the 26th October, A.D. 1836, and on file in the office of the common clerk of the said city, by the number (2) two, in the block of lots distinguished by the letter "A," the said lot being fifty feet front on Charlotte street, extending back preserving the same breadth, eighty feet, or to the east side line of the wharf erected as and for a public highway on the east side of Sidney-Market slip, with all and singular the rights, members, and appurtenances to the said lot belonging, or in any wise appertaining: to have and to hold * * *

It is clear from this that the plan was so far departed from as to abandon the purpose of continuing Charlotte slip as such, and to constitute that space a street and the land demised is made to front on that street, and run back eighty feet to the wharf on the west side, to be used as a public wharf and highway, which, I infer, Sandall had constructed in accordance with his covenant to do so, before the surrender and new demises.

A curious feature of the case is that this public

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wharf is now sixty feet wide, including the twenty-five feet in width thus erected, as I infer, by Sandall. When was it so widened, and by whom ? Witnesses who do speak of the existence of this wharf refer to it as being in existence for fifty to fifty-five years. Collins, who worked in 1874 at the premises in question, says the public wharf was twenty feet, about, in width. I think the fair inference is that it had been extended to sixty feet wide shortly after that time, and indeed may have been so at the time of the granting of the last renewal leases in 1882. Since that, which would be for seven years, in fact there has been no further renewal made.

The new leases to McAvity and Sandall respectively, made in 1858, were to continue for the term of twelve years which exactly covers the residue of the twenty-one year term in the original lease to Sandall.

No one seems to have taken up the other lots in this block till Kerr got the lease I am about to refer to.

Meantime the Sandall lease has been renewed from time to time till 1882, and ever since has been assumed to be renewed by the conduct of the parties and payment of rent, for the space just described. The last term is now thus vested in respondent and unexpired containing covenants for compensation for improvements or renewals as first provided, unless the term may have become a yearly tenancy as to which no contention is set up.

All these successive lessees of lot two and the added easterly strip, have used, apparently as of right from time to time, the south end of the wharf erected on said lands as well as the westerly side for unloading vessels. The leases were clearly to enable the

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lessees to use the demised premises for the business of wharfingers and the like businesses needing access to and from the sea or tidal waters thereof.

It is, therefore, contended that the city's lease gives this right of access, and thereby it became appurtenant to said land and was so, when last demised "with the appurtenances" to the respondent or those under whom he claims.

In argument there are several ways that the grounds of such claim were presented. The right having been acquired by prescription was tentatively suggested; and then that a grant might be presumed after so long an exercise of the right; and finally that the plan was entirely abandoned and the case one of a demise of so much land clearly useful only for wharf purposes, and unloading and storage in connection therewith, and impliedly demised for such purposes, with two sides open to the sea the right of access must be presumed to have been intended as part of the grant made by way of demise. One means of access was alongside and over the public wharf and highway on the east side, and the other on the south open to the tidal flow of the sea.

As to prescription or presumption of a grant, it seems to me on reading the evidence and considering all the circumstances, and especially want of evidence of transfer from one lessee to another, it is idle to contend for either. They were each and all independent lessees claiming under the same landlord for brief periods. I think certainly this part of the history might have been made clearer.

The only arguable ground, as it seems to me, upon which the respondent's contention of right of access to the southerly side of lot two can be maintained, is

some such ground as is stated in the ground last mentioned, or what was not precisely taken in argument, but may be a fair presentation of what was aimed at therein. It is this, that the departure from the plan in 1858 closing up Charlotte slip and thereby depriving the lessees of access for vessels on that side followed by so long a period of actual use by its lessees of the southerly access, and recognition thereof by the city, it must be taken to have intended, in making later renewals, and especially this last one, to have included this right of access to the south side as one of the appurtenances covered by the lease.

If there had never been framed any plan or scheme for developing this foreshore property, but the city in the exercise of its rights and powers over it acquired by the grant above quoted, had demised for wharf purposes this very land now held by respondent, and described it by metes and bounds after having appropriated, as in fact had been done in this instance, the lands adjoining the northerly and easterly sides, could it be said that thereafter the city could with impunity shut off access on both or either of the remaining sides ? Is it conceivable that such a proceeding could be held as a thing rightfully done, and that it was not a derogation from the grant ?

Something was said of there being no riparian rights in such a case, and it seemed to be supposed by this argument that when quit of that basis of right the appellants were freed from the law as laid down in the case of *Lyon* v. *Fishmongers' Co.*(1). The principle of law proceeded upon therein must surely be observed. The right of access in that case rested upon the riparian rights of the plaintiff. The right in this

(1) 1 App. Cas. 662.

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case rests upon the nature of the grant and the necessary implications therein, having regard to "the position into which the parties have placed themselves," as expressed by Cotton L.J. in the *Birmingham, Dudley and District Banking Co.* v. *Ross*(1), at page 308.

I am disposed to bear in mind in this connection in addition to the considerations noted by Chief Justice Barker, the peculiar nature of the title to and powers over the foreshore conferred upon the city by the grant to it.

The cases of *Attorney-General* v. *Burridge*(2), and *Attorney-General* v. *Parmeter*(3), as well as the case of *Mayor of Colchester* v. *Brooke*(4), at page 374, and other cases, shew that a grant such as this by the Crown is held subject to the general public right of passage, and cannot entitle the grantee to use the property in a way detrimental to the public.

There may be sanctioned by Parliament an alienation of the foreshore that may destroy any such public right.

But the original grant by the Crown in question here seems to have been such as those which were in question in the cases I refer to. And I doubt if the language of the statute confirming that grant added any more to its effect than if validly granted. It seems to have been simply of a confirmatory nature and possibly to overcome the difficulty akin to that suggested in the case of *The Queen* v. *Clarke*(5), relative to the powers of colonial governors.

Did it not leave the grant to be in effect simply what this court held in *Wood* v. *Esson*(6), resulted

(1) 38 Ch. D. 295.
(2) 10 Price 350.
(3) 10 Price 378.
(4) 7 Q.B. 339.
(5) 7 Moo. P.C. 77.
(6) 9 Can. S.C.R. 239.

from a grant by the Crown merely passing the title to the soil ? And if the grant is considered it seems to be no more than that, and a measure of conservancy which would, when confirmed, enable the exercise of a regulating power.

In argument the question was raised, but not fully argued, and I do no more now than point out that it is not to be lost sight of in considering the implications lying in such a lease so given.

The city shortly before this suit made a lease to Kerr, under whom appellants claim, of the land to the south side of that held by respondent. The lease is dated 11th of March, 1909, and demises

> all that certain piece and parcel of land, beach and flats situate, lying and being in Sidney ward, in the said City of Saint John and bounded as follows, that is to say: beginning at a point on Charlotte street extension three hundred (300) feet south of Britain street or at the south-easterly corner of lot No. 2, thence running in a westerly direction along the southerly end of Sidney-Market wharf one hundred and forty (140) feet, thence southerly along a prolongation of the line of the westerly side of said Sidney-Market wharf parallel to said Charlotte street extension one hundred (100) feet, thence easterly parallel to said southerly end of Sidney-Market wharf one hundred and forty (140) feet or to the westerly side of Charlotte street extension thence northerly along said westerly side one hundred (100) feet to the place of beginning, all as shewn within the red margin on the plan hereto annexed, with all and singular the rights, members and appurtenances to the said lot belonging, or in any wise appertaining: to have and to hold * * * for the term of ten years.

The appellants proceeded to erect on said premises thus demised a wharf. Thereupon this suit was instituted. Clearly the result of such erection if continued will be to shut out respondent from all access to the southerly side of his premises enjoyed for half a century, and impair the possibility of access to same on the westerly side, if not destroy it entirely.

Chief Justice Barker finds that its effect is to close up respondent's entire water-frontage.

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And save such possibilities as the access to the Sidney-Market slip, this seems absolutely so.

That slip was narrowed by the widening of the public wharf some thirty-five feet. It is left only one hundred and fifteen feet wide. Not only have we no evidence of this being of no public use for vessels, but we have the difficulty of the right of access across the added width to the wharf, making it sixty feet instead of twenty-five, across which to transfer freight from vessels to the respondent's property, if at all possible.

Can such a proceeding be held not to be in derogation of the city's grant? Can it be tolerated in law? Does it need authority beyond the principles of law expounded in the *Birmingham, Dudley and District Banking Co.* v. *Ross*(1), and the *Fishmongers' Case*(2), though the points involved here are not identical with those apparent in either of said cases to demonstrate that the respondent is not bound in law to submit to such deprivation of what is implied in the grant to him or those under whom he claims?

Whether we look at it technically as a derogation from the grant or as a breach of an implied covenant as suggested by Bowen L.J., in the *Birmingham Case* (1), the wrong seems flagrant. The later cases of *Aldin* v. *Latimer, Clark, Muirhead & Co.*(3), and *Cable* v. *Bryant*(4), may also be looked at for instances of the application of the principle of law expounded therein and authorities cited in them relative to it.

But those who profess to give this right to do so are by the very terms of their charter, if we look at

(1) 38 Ch. D. 295.
(2) 1 App. Cas. 662.
(3) [1894] 2 Ch. 437.
(4) [1908] 1 Ch. 259.

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its language, scope and purpose, conservators of the public right and in duty bound as such to see that those acquiring leases such as respondent has are enabled to carry on their business as wharfingers.

The only excuse offered is that the plan referred to plainly indicated that lots three and four marked thereon were to have been the subject of such leases as made of numbers one and two, and that these lots are comprised in the lease to appellants. True they are, and a great deal more, but so far from following the plan the numbers of lots are not even named in the lease, but metes and bounds are assigned which are absolutely at variance with the plan.

The plan has been departed from in almost every other material respect. Why not also by leaving a slip at the south end wide enough to serve the land in question, and something further south as was proposed to appellants?

The plan must be treated as abandoned if fair dealing is to prevail. It certainly cannot, as against respondent, be appealed to unless the city is prepared to abide by it, save in so far as the closing of Charlotte slip, evidently assented to by all parties concerned when converted into a street. If the plan with that exception had been adhered to the respondent would have the entrance and access originally contemplated. Now he is to be deprived thereof on the strength of the plan. And in the next place they claim the plan is fatal to the right of plaintiff, but deprive him of the plan.

Counsel took exception to the comparison by the court below of the right involved, to that in cases of lateral support in the soil for adjacent buildings.

But without entering upon that inquiry, I may

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say the comparison and illustrations were made by Lord Cairns (in quoting with approval Lord Wensleydale in *Chasemore* v. *Richards* (1)) in determining the *Fishmonger's Case* (2). I have already pointed out the analogy in principle involved there and here. It all comes back to what right of access must be implied in a grant in a given case. The grant of anything for a specific purpose surely implies that the grantor should not so use his property or power as to destroy entirely (even though done bit by bit) that which he has granted.

Appellants have failed so far to shew authority justifying their conduct, that counsel are driven to rely on the case of *Crook* v. *Corporation of Seaford* (3), which relates to an agreement relative to some marsh land, and was a case of specific performance in no way involving the rights of navigation or the accommodation therefor such as wharves.

As conservators of this harbour the city authorities are no doubt entitled to modify plans, but in so doing are not to deprive others of their rights.

The appeal should be dismissed with costs.

DUFF J.—I agree in the result.

ANGLIN J.—With very great respect for the learned Chief Justice and the judges of the Supreme Court of New Brunswick, I find myself unable to agree in the view which they have taken of this case.

It is, I think, unquestionable that under the original lease of lots one and two made to John Sandall

(1) 7 H.L.C. 349, at p. 382. (2) 1 App. Cas. 662.
(3) 6 Ch. App. 551.

in 1850 he took and held this property subject to the right of the city to lease or otherwise deal with the adjoining lots, Nos. 3 and 4, and the other lots in block "A" lying to the south for purposes which would deprive the lessee of lot No. 2 of any water-frontage along its southern limit. Although in 1858 there was a departure from the original plan of 1836 according to which lots 1 and 2 had been leased, in that provision was then made for converting the Charlotte street slip into a public street, the new leases which the respondent's predecessors then took establish their acquiescence in such departure and also sufficiently indicate that in other respects their rights as lessees of lots 1 and 2 were intended to be the same as they had been under the lease of 1850. That the city by the leases of 1858 forewent any of its rights in respect of lots 3 and 4 and the other lots in block "A" shewn on the plan of 1836 or subjected these lots to any such easement or servitude as the plaintiff asserts cannot, in my opinion, be successfully maintained. The leases themselves make it clear that the plan was to be adhered to subject to the necessary modification of it due to the conversion of the Charlotte street slip into a street. Throughout the subsequent renewal leases of lots 1 and 2 down to and inclusive of those under which the respondents now hold them (except that by an obviously clerical error 1856 is sometimes written for 1836) lots 1 and 2 are consistently described as lots in block "A" according to the plan of 1836, modified, of course, by the arrangement of 1858, which gave to the leased property an additional depth of 20 feet with a frontage on the Charlotte street extension in lieu of a frontage on Charlotte street slip. I, therefore, find nothing in the various documents under which the respondent asserts title, taken by themselves,

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which confers upon him any such right as he claims in this case.

Neither do I find in the circumstances existing at the time of the making of any of the several leases upon which the plaintiff relies, as disclosed in the record, anything which would, in my opinion, justify us in holding that the plan of 1836, which the parties deliberately embodied in these leases, as part of the description of the premises leased, should be put aside or ignored. The lease of lot 2 according to that plan, subject to the modification of 1858, excludes the idea that by virtue of it the plaintiff's predecessor in title acquired anything in the nature of riparian rights — anything which would now entitle him to require the city to preserve for him the water-access to the southern side of lot 2, which he had enjoyed merely because the city had not itself, or by any tenant or assign, exercised such rights as it possessed in respect of lot No. 3.

The evidence in the record is insufficient to establish a case of prescriptive acquisition of a right to have vessels come up to and lie against the southern face of the wharf built on lot 2 and of a consequent easement or servitude over lot 3, if indeed such a right could in the circumstances of this case be acquired by any mere user, however extensive or prolonged.

The terms of the charter of the City of St. John, confirmed by legislation(1), are wide enough to enable the city to lease lots 3 and 4 to the defendants for building purposes, as it had in the exercise of the same powers previously leased lots 1 and 2 to the predecessors in title of the plaintiff.

(1) 26 Geo. III. ch. 46.

By a clause of the charter (pages 1010-11) all

messuages, tenements, dwelling-houses, lots of ground and all other lands or grounds whatsoever, covered or uncovered with water, situate, lying and being within the said City of Saint John and the limits and boundaries thereof, saving all houses, lands, tenements and hereditaments held, enjoyed or legally claimable by subjects of the Crown) are vested in the Mayor, Aldermen and Commonalty of the City of St. John and their successors forever to be held "in free and common socage, as of our manor of East Greenwich, etc.

This description includes all the lots shewn on block "A" of the plan of 1836 and surrounding lands covered by water.

By another clause of the charter (p. 1014) the common-lands on the east side of the harbour are declared to be for the common use of the inhabitants of the city residing on that side of the harbour and it is provided that the rents, issues and proceeds arising by the sale or other disposal thereof shall be applied to the improvement, benefit and advantage of that part of the city and of the inhabitants thereof. The Mayor, Aldermen and Commonalty are also made conservators of the water of the river, harbour, and bay of the city (pp. 998-9) and have conferred upon them

the sole power of amending and improving the said river, bay, and harbour for the more convenient, safe and easy navigating, riding and fastening the shipping resorting to the said city;

and they are empowered

as they shall see proper (to) erect and build such and so many piers and wharves into the river as well for the better securing the said harbour and for the lading and unlading of goods as for the making docks and slips for the purpose aforesaid.

They are further empowered

to establish, appoint, order and direct the making and laying out of other streets, lanes, alleys, highways, water-courses, bridges and slips heretofore made, laid out or used or hereafter to be made, laid out and used and also to alter, amend and repair all such streets, lanes,

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alleys, highways, water-courses, bridges and slips * * * so always as such piers or wharves so to be erected or streets so to be laid out do not extend to the taking away of any person's right or property without his, her or their consent or by some known laws of the said Province of New Brunswick or by the law of the land.

The soil of the water-lots is therefore vested in the municipal corporation. As part of the common lands these lots are subject to the powers of the city to sell or otherwise dispose of them. The charter clearly contemplates that they may be leased. While private rights of property are expressly saved, the municipal corporation is empowered to construct, or to provide for the construction of slips, piers and wharves as it shall see proper, and in doing so it is empowered to interfere as far as may be necessary with the public right of navigation. The scheme of the plan of 1836 was within the powers conferred by its charter upon the City of St. John. In making the lease to the defendants of which the plaintiff complains the city, therefore, did not unwarrantably interfere with any public right, nor, as pointed out above, did it without sanction of law take from the plaintiff the private right or property of the loss of which he now complains. It could not take from him that to which he had no legal title.

The plaintiff's claim in this action and the judgment in appeal extend only to preventing the defendants injuring or obstructing the plaintiff's alleged

right of access to the waters of the harbour on the southern side of the plaintiff's wharf, or the privileges heretofore enjoyed by the plaintiff of laying and mooring craft, loading and unloading, and embarking and disembarking goods on the south side of the plaintiff's wharf.

The building of a wharf or other construction on the most easterly 80 feet of the premises which the city has purported to lease to the defendants and which

lie immediately along the southern frontage of lot No. 2 will effectually destroy the right which the plaintiff asserts. If the defendants cannot be prevented from building on this part of the premises leased to them this action must fail. The plaintiff presently makes no claim in respect of any erection which they have placed or may place on the westerly 60 feet of the premises lying immediately south of the east wharf of the Sidney slip. Indeed, if the defendants build upon the easterly 80 feet of their premises the plaintiff's access by water to the southern side of his existing wharf would be totally destroyed, and any erection on the westerly 60 feet could not further affect it. Whatever rights the plaintiff may have in respect of this latter parcel of land leased to the defendants, whether he is or is not entitled to have it utilized for the purposes of a public wharf and highway free from any buildings or other obstruction which would interfere with such use of it — whatever claim he may have against the city for damages based on any failure on its part to observe or fulfil its obligations to him in regard to the scheme defined by the plan of 1836, in my opinion he has not any right of access by water to the southern front of lot 2 such as would entitle him to the relief which he seeks in this action and which he has been accorded in the provincial courts. He has not made a case of prescriptive right; and the lease to the defendants, at all events as to lots 3 and 4 as shewn on the plan of 1836, involves no derogation by the city from its earlier deeds under which the plaintiff claims.

I would allow this appeal with costs in this court and in the provincial appellate court and would dismiss this action with costs.

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Appeal allowed with costs.

Solicitor for the appellants: *J. B. M. Baxter.*

Solicitor for the respondent: *A. A. Wilson.*