Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Booth and others v. *Ratté, from the Court of Appeal for Ontario; delivered* 1*st February* 1890.

Present:

THE LORD CHANCELLOR.
LORD WATSON.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The suit to which this appeal relates was brought by the Respondent in the Chancery Division of the High Court of Justice of the Province of Ontario against the Appellants, who are severally owners of saw mills in the city of Ottawa, on the Ottawa river. It was first heard by one Judge who dismissed the suit. On an appeal to the Divisional Court that Court set aside his judgment and gave judgment for the Plaintiff, and ordered that it be referred to one of the Masters of the Court to inquire and state the amount of the damages the Plaintiff had sustained, and the amount of such damages for which the Defendants were respectively liable. The Defendants appealed to the Court of Appeal for Ontario, which Court dismissed their appeal, and they have appealed to Her Majesty in Council.

The Plaintiff has a floating wharf and boathouse on the Ottawa river, about half a mile below the saw mills of the Defendants. The

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The wrongful acts complained of are thus described in the judgment of the Chancellor of the Divisional Court:—"The evidence very "clearly establishes that the Defendants are "wrong-doers, who from their mills allow saw-"dust, blocks, chips, bark, and other refuse to "fall into the River Ottawa, and thereby pollute "the water and impede navigation. This refuse "accumulates in great floating masses, substantial "enough occasionally for a man to walk upon, "and the tendency of the currents and the pre-"valent direction of the winds bring these "masses in front of the Plaintiff's property up "to his boathouse and wharf and the banks of "his lot. Depositions of sawdust are thus by "degrees formed before his property, and they "result not only in fouling the water, making "it offensive both to taste and smell, but produce "from the gas generated underneath the surface "frequent explosions, which are disagreeable "and sometimes dangerous. It is thus proved "that the Plaintiff sustains special injury beyond "the rest of the public by this unauthorized "interference of the Defendants with the flow "and purity of the stream. He is injured in "the personal enjoyment of the property and "the river, and he is injured in the business "which he follows of hiring and housing pleasure "boats." No evidence was given for the Defendants. The defence they relied upon was that the Plaintiff had no title to maintain the action.

The root of the Plaintiff's title is a grant from the Crown under the Great Seal of the Province of Canada, dated the 24th December 1850, to Joseph Aumond, of a piece of land in the town of Bytown, by the following description:—"Being composed of water lot number one in "letter O in the aforesaid town of Bytown, "being butted and bounded as follows, that is "to say, commencing where a stone monument

" has been planted on the west side of Metcalfe " Street, at the south-east angle of the said " water lot; then north 23° 30′ west three chains " more or less to where a monument has been " planted on the north-east angle of the said " water lot south 66° 30′ west four chains ten " links more or less to a point in the Ottawa " river two chains distance from the shore; then " southerly parallel to the general course of the " shore to a point in the northern limit of " Cathcart Street produced on a course of " south 66° 30′ west distant two chains from " the aforesaid shore of the river Ottawa; then " north 66° 30′ east six chains ninety-six links " more or less to the place of beginning." The power of the Crown to grant water lots in harbours and navigable rivers, subject to the public right of navigation, in Upper Canada was declared by the Act 23 Vict., ch. 2, sec. 35, Canada Statutes. Aumond appears to have sold portions of the water lot to different persons, and by a deed dated the 2nd November 1866 he sold and conveyed to Amable Prevost, amongst other lands, water lot number one, more particularly described in the deed from the Crown, excepting certain portions of the lot sold and conveyed by several conveyances to other persons who are named. By a deed dated the 23rd July 1867, Prevost sold and conveyed to the Plaintiff part of the water lot granted by the Crown to Aumond, by the following description of the boundary towards the river,—" thence along " the northerly line of Cathcart Street in a westerly " direction to the water's edge of the River " Ottawa, thence along the said water's edge " down the stream in a northerly direction to " the line of Bolton Street." It will be observed that here the boundary on the river side is called the water's edge, whilst in the Crown grant the boundary of the land granted is two

chains from the shore, and the contention of the Defendants at the original hearing and in the appeals was that the Plaintiff was not entitled to the two chains.

Before the conveyance to the Plaintiff was executed he was put in possession, by Prevost, of the subjects which were to be conveyed to him, and constructed a floating wharf and boathouse, in size 60 feet along shore and 16 feet wide, and moored it to the bank of the river. In 1874 or about that time he increased the size of the wharf and boathouse to 140 feet in length by 40 feet in width. It draws 4 or 4½ feet of water, and floats chained at each end. There is no evidence as to the depth of the water at the side or in front of it. The Plaintiff has from the time when the wharf and boathouse was first placed there occupied it without any question or objection by either the Crown or Prevost, and by means of it has been doing a very considerable business as a letter of boats, &c.

This is not a case of a stranger taking possession of part of the two chains. The Plaintiff moored the wharf to the bank where he thought fit, by virtue of his purchase, and had possession. The expression "along the water's edge" may either signify the line which separates the land from the water, or a water space of greater or less width constituting the margin of the river. The description in the conveyance is capable of being explained by possession, and it appears to their Lordships that the possession which, in this case, has followed upon the conveyance is sufficient to give the Plaintiff a good *primâ facie* title to the whole of the two chains as against Prevost. Even if he had not such a title and occupied only by the permission of Prevost, that would be sufficient to entitle him to maintain the action. No question arises in

this case as to the wharf and boathouse being an obstruction to the navigation, but it may be noticed tha the Chancellor in his judgment in the Divisional Court says,—" Here all the " tendency of the evidence as to the position of " the Plaintiff's bank, the bay there formed at a " distance of 700 feet from the main channel, " the great width of the Ottawa, its ample " facilities for shipping apart from the com- " paratively narrow strip where the Plaintiff's " wharf is moored, the fact that the Plaintiff has " thus occupied the property in question for over " 20 years, all strongly suggest that he has done " nothing detrimental to river and navigation, " but that on the contrary his wharf has been " a benefit to the boating public." So far from being an obstruction to navigation, the maintenance of a floating wharf of that kind is, in the circumstances stated by the learned Chancellor, a positive convenience to those members of the public who navigate the river with small craft. As a riparian owner the Plaintiff would be at liberty to construct such a wharf and would be entitled to maintain an action for the injuries to it which are complained of.

For these reasons their Lordships agree with the Divisional Court and the Court of Appeal that judgment should be given for the Plaintiff, and they will humbly advise Her Majesty to affirm the judgment of the Court of Appeal and dismiss this appeal. The costs will be paid by the Appellants.