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*April 21,23.
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*Feb. 19.

THE LAKE SIMCOE ICE AND COLD STORAGE COMPANY (DEFENDANT)..... ..... } APPELLANT;

AND

D. W. McDONALD (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Watercourses--Navigable waters——Cutting ice—Trespass on water lots.

An ice company in harvesting ice from navigable waters at a distance from the shore may use any reasonable means of conveying it to their ice-houses, and for that purpose may cut a channel through private water lots through which to float the ice.

Judgment of the Court of Appeal (26 Ont. App. R. 411) reversed, and that of MacMahon J. at the trial (29 O. R. 247) restored, Strong C.J. and Taschereau J. dissenting.

APPEAL from the decision of the Court of Appeal for Ontario (1) reversing the judgment at the trial (2) in favour of the defendant.

The defendant company in harvesting ice on Lake Simcoe, outside of water lots in a bay, at Jackson's Point, of which the plaintiff claimed title under a patent from the Ontario Government, cut a channel through said water lots in order to float the ice harvested to the shore for storage in their ice-houses. The plaintiff brought an action for damages caused by this interference with his property. The trial judge gave judgment for the defendant, which was reversed by the Court of Appeal. The latter judgment decided that defendant had no right to trespass on plaintiff's water lots for the purpose of getting their ice to shore, and also, on an issue raised by defendant, that the bay

* PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, Sedgewick and King JJ.

(1) 26 Ont. App. R. 411. (2) 29 O. R. 247.

at Jackson's Point was not a public harbour, and the patent to the plaintiff was, therefore, valid.

McPherson and *Campbell* for the appellant.

McDonald Q C for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs for the reasons given in the judgment of Mr. Justice Moss in the Court of Appeal.

TASCHEREAU J. was also of opinion that the appeal should be dismissed.

GWYNNE J.—I express no opinion whether the place in question consisting of twelve acres of land covered with the waters of Lake Simcoe was or was not a public harbour. But assuming the Letters Patent granted by the government of the province to be good, and concurring in the judgment of my brother King, I am of opinion that the acts of the defendants which are complained of by the plaintiff as constituting his cause of action were within the true intent and meaning of the special reservation in the Letters Patent "of the free use, passage and enjoyment of the waters of the lake." It seems to be impossible to hold that under those Letters Patent the plaintiff has as he claims to have, and as the judgment appealed from, if it should be left to stand, would give him, the right to exclude save at his will and pleasure all commercial intercourse between other places across and along the lake and the Grand Trunk Railway terminus at the place in question during at least three months of the year when the waters of the lake are covered with ice and when commercial intercourse with the railway is carried on with greatest ease and convenience upon the ice in the lake while the waters of the lake so frozen over and

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rendered most conveniently travelled over in winter, are by force of the reservation in the Letters Patent kept open for the free use, passage and enjoyment of every person.

The appeal must therefore, in my opinion, be allowed with costs and the action dismissed with costs.

SEDGEWICK J.—I am of opinion that the appeal should be allowed for the reasons stated in the judgment of Mr. Justice King.

KING J.—The question raised is one of considerable importance as affecting a growing business.

The facts shortly stated, are as follows:

The respondent claims to be owner, under a patent from the Government of Ontario, of certain water lots situate in a bay at Jackson's Point, in Lake Simcoe. The appellants, in harvesting their ice on the navigable portion of the lake outside the bay, cut channels to float it to the shore where their ice-houses were. Respondents claimed to own the ice cut out for these channels and to have a right to cut it for their own profit.

The appellants, as a defence to the action for damages brought against them, alleged: First, that the bay in question was a public harbour and the property therein being in the Dominion Government the patent under which plaintiffs claimed was *ultra vires*. Secondly, if this was not so, that they had a right to use any reasonable means of getting their ice to shore. If the last contention should prevail consideration of the other point becomes unnecessary.

The judgment appealed from reversed the decision of the trial judge in favour of the appellants, holding that they had no right to cut the ice on the water lots, the bed of which belonged to the respondents under the patent, and that the bay was not a public harbour.

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Water turned into ice is, for the time being, changed in its nature by losing its fluidity, but the water underneath the frozen surface remains unaffected in its legal as in its physical character. By analogy, the solid ice becomes the property of the person owning the soil below it, and any one cutting or removing it without leave or a superior right is a trespasser.

Here, the act of cutting is sought to be justified upon the ground that it was done in the exercise of the public right of navigation.

Now as to this right, where it exists it is not extinguished by the operations of nature in converting the fluid into a solid, but the exercise of the right is rendered precarious. Reference, if necessary, might be made to the not uncommon cases in some latitudes where navigation is regularly carried on by the breaking or crushing of the ice, or by cutting a passage through it, or to the case of polar navigation. There is also, it is conceived, the clear right to use the frozen surface as incidental to the carrying on of an act of navigation. Thus a vessel prevented from access to the shore by the formation of ice might well be unladen at the outer margin of the ice, and cargo or passengers be transferred over the surface of the ice, or the ice might be broken or cut to admit of the vessel's passage. In such case it would probably be a question as to which mode was the more beneficial for the ship.

The right of the vessel owners so to seek access to the shore would apply equally to the owner of other floatable goods, as for instance, a raft or lot of logs or lumber in course of transportation.

The question then is: How is it with regard to the floating of ice severed from the mass for transportation shoreward?

Supposing no claim on behalf of the Crown, ice cut in water, the bed of which is in the Crown, would

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become the property of him who had gathered it, and reduced it into possession as an article of personal property. After being cut it would be floating property, and might be transported to the shore by flotation if the means existed, and being transported by flotation for a commercial purpose, it is difficult to see why it is not in course of navigation as much as floating logs would be. There seems no valid reason why there should be a discrimination between different classes of personal property where the mode of transportation is the same.

It would not, indeed, be for the public interest to create a distinction whereby a useful (and as population increases an increasingly useful) commodity should be forced to become wholly lost through lack of facility for getting it to a place where it could be stored and preserved, which is open to other kinds of personal property dependent upon like means of transportation.

The material fact is that the ice when cut is floating property as much as logs floating in the same water.

At the same time the right of passing floating ice through a body of field ice is to be exercised, as all other rights, with due regard to the rights of others. The frost that created the ice seeking transportation also created the obstruction, and in so doing brought into existence other rights of property which equally with the first are entitled to consideration.

The pathway is therefore to be as direct as practicable and of no greater width than is reasonably necessary. It is manifest that, if properly done, the cutting of the inshore ice for a passage would ordinarily be advantageous to the owner of it in case he desired to make beneficial use of it as a commodity, as

enabling him at a less expense to gather his own crop of ice.

Upon the facts, it does not appear that more damage was occasioned by the plaintiff's operation than was reasonably incidental to it.

The case, as said at the beginning, is important as affecting an industry of considerable importance, and because of its presenting a new class of circumstances. It is satisfactory that it is capable of solution by the application of principles which, although framed in contemplation of different classes of facts, are wide enough to cover the new circumstances here presented. It is also satisfactory that the result advances the interests of trade, one of the main purposes of law.

It becomes unnecessary, in the view taken, to pass upon the question raised as to whether the locality in question was part of a public harbour or not.

If the above view is to be maintained the appeal is to be allowed.

Appeal allowed with costs.

Solicitors for the appellant: *McPherson, Clark, Campbell & Jarvis.*

Solicitors for the respondent: *Kerr, Macdonald, Davidson & Patterson.*