Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Silvanus Morton v. *Jabesh Snow, from the Supreme Court of Halifax, Nova Scotia; delivered November 14th*, 1873.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THE question in this case is, whether the rule *Nisi* for a new trial ought to have been made absolute or not; and that depends upon the construction of the agreement of the 18th November 1800, and the ruling of the Chief Justice upon that subject.

The Plaintiff, Mr. Snow, who is the Respondent, claims under Mr. Gorham, and Mr. Morton, the Appellant, claims under Paul Collins. They have wharves near to each other, but separated by the dock, which is the subject matter of dispute in the present case. The real question is, whether Morton had a right to use the dock as a dock or merely to have it left open for the purposes of light and air and such purposes as were pointed out by the Chief Justice. That depends upon the construction of the agreement of the 18th November 1800, which was entered into between James Gorham and Paul Collins, under whom these two parties respectively claim. It appears from the recitals that the parties were disputing as to the boundary line between their respective properties, and that the line was then fixed which it is admitted

now is the red line marked on the plan in this case. Having settled the dispute as to the boundary between the two properties, the instrument proceeds, "and from that point or corner," speaking of the corner from which the line was to commence, "a line drawn or run to the river "in the direction of north 27 degrees west shall "for ever after this separate the lands of the two "parties aforesaid, and be counted for the true "line of separation at all future periods;" that is the red line marked in the plan. Then the agreement proceeds: "And it is hereby further "agreed by and between the said James Gorham "and Paul Collins that the dock between their "wharves on the eastern side of the aforesaid "line of separation shall for ever remain open as "it now stands; that is to say, that neither of "them shall fill it up with wharves or other "incumbrances whereby the convenience of the "same may be damaged to either party."

The dock, according to the line which is now admitted to be the boundary line between the two properties, lies on Mr. Snow's side, and is his property; and the question is, not whether the Defendant has any property in the dock, but whether he has got an easement or right to use it as a dock, in the same way as the Plaintiff has a right to use it. The learned Chief Justice held that he had not that right, and that his right was a much more limited one.

The Chief Justice in his summing up says, at page 12 of the Record, "Now it was clear that the "dock was to remain for ever open as it stood in "the year 1800, which secured to the Defendant's "property the advantage of air and light for "the erection of fish stores and otherwise, or an "open passage of 30 feet and upwards." He says, "Gorham and the Plaintiff claiming under him "could neither build upon nor close it. In the "words of the agreement, they could not 'fill it up

" ' with wharves or other incumbrances whereby
" ' the convenience of the same might be
" ' damaged to either party.' This last ex-
" pression was somewhat obscure; but as the
" title was declared to be in Gorham and the
" easement or use was to be a perpetual burden,
" it must not be carried further than the words
" plainly authorized. The agreement did not
" support the plea, which averred that the dock
" was to remain for ever for the use of the
" parties, their heirs and assigns ' in common.'
" These words, or words of similar import, would
" have settled the question; and as they were
" wanting, I was of opinion that the Defendant
" had no right to an equal use of the dock with
" the Plaintiff, which in fact would put the
" Plaintiff completely in his power, and enable
" him at any time to cripple or contract his
" business." It is said that Morton had a dock on the west side of the said wharf, which he had a right to use in common with another person, and that Snow, the Plaintiff, had no such dock on the east side of his. But that does not appear to their Lordships to be very material in construing the agreement. Again, the learned Chief Justice, in giving judgment with reference to the rule *Nisi* at page 31 of the Record, says, " As respects the agreement, I have already
" said that, while it professes to be very explicit,
" it is by no means so clear as one would desire.
" That the dock must for ever remain open,
" giving free access of air and light to the
" Collins' property on the west, is undoubted; it
" is not to be filled up with wharves and other
" incumbrances inconveniencing either party.
" But the question remains, by which of the
" parties is it to be used? And use in common is
" not declared, and, if granted, it would have
" been impracticable and most injurious to the

" rights of the owner, and to the reasonable and " due enjoyment of his property."

Now there are no words which confine the right of the owners of the Collins' property merely to light and air; and the question is, how does such a limited easement arise? There was some easement created, and what that was depends upon the words of the agreement between the parties. It is agreed by and between the parties that the dock shall remain open for ever as it now stands in order that each party should have the convenience of the same, that is, the convenience of the dock. The words are " that neither of them " shall fill it up with wharfs or other incum- " brances, whereby the convenience of the *same* " may be damaged to either party." The words are certainly not very clear, as the learned Chief Justice points out; but it appears to their Lordships that the real meaning of the agreement was that the dock was to ever remain open as it then stood for the convenience of both parties; in other words, the dock was to remain open as it then stood, for the convenience of either party to use it as a dock. If it was intended that the convenience of the one party should be more limited than the convenience of the other, there would have been naturally some words to that effect; but there is nothing to show that the convenience of one party was to be more extensive than that of the other.

If the only right intended to be reserved to Collins was the right to light and air, and it was not intended that he should have the right to enter the dock for any purpose, there was no necessity to stipulate that he should not fill it up with any incumbrances. The object of the stipulation seems to have been to prevent either party who was to have the right to use it as a dock from erecting any permanent incumbrance

which would prevent the other party from having the use of it as a dock. It appears to their Lordships that the easement which was created was that the dock should be kept open for the convenience of either party to use it as a dock.

That easement, then, having been created, further questions will arise for consideration at the trial and it will become necessary to inquire whether it had been lost by the Collins' property; whether by any act on the part of the Plaintiff, or by any abandonment on the part of the Defendant, he had lost that easement which was created by this instrument. Then, if he has not lost that easement, another question would have to be submitted to the jury, namely, whether in the use of that easement the Plaintiff was using it as he had a right to do, or whether the use he made of it was in excess of his right. That point was raised in the 7th plea, "whereby the Defendant "alleges that he was entitled to the free and "uninterrupted use of the said dock in com-"mon with the Plaintiff, and that the alleged "grievances were a rightful use by the De-"fendant of the said dock."

Under these circumstances, their Lordships think that the Court below ought to have made the rule absolute for a new trial; and they will, therefore, humbly recommend Her Majesty that the order discharging the rule *Nisi* be set aside, and that the rule *Nisi* for a new trial be made absolute, and that the Respondent pay the costs of this Appeal.