Privy Council Appeal No. 35 *of* 1920.

Frederick Lampson - - - - - - - *Appellant*

v.

The City of Quebec - - - - - - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH AUGUST, 1920.

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT CAVE.
LORD DUNEDIN.
LORD ATKINSON.

[*Delivered by* LORD ATKINSON.]

The point for decision in this appeal is a very short one, although it has given rise to considerable division of judicial opinion. The facts too are comparatively few and simple. The appellant and his late brother, Georges Lampson, deceased (of whom the appellant is the universal legatee), by two emphyteutic leases, both dated the 22nd March, 1888, demised to one Claude Giguère each of two plots of ground respectively in Champlain Ward in the City of Quebec, each for a term of twenty-five years from 30th April, 1888, at a rent in each case of 25 dollars per annum, payable half-yearly on the 1st May and 1st November in each year. Each lease contained two covenants by the lessee: first that he would build a good house with brick or stone chimney within two years from the date of the lease, and keep the same in order and repair during the term of the lease; and secondly that he would at the end of the lease give up the rented premises to the lessor in good order and repair together with all improvements.

The true nature of an emphyteutic lease under the Civil Code of Lower Canada is not disputed. It is a contract by which the proprietor of an immovable conveys it for a time to another for a term not less than nine nor more than 99 years, the lessee undertaking (1) to make improvements, (2) to pay to the lessor an annual rent, and such other charges as may be agreed upon. (Art. 567, C.C.) So long as the term lasts the lessee has all the rights attached to the quality of a proprietor; he may alienate, transfer or hypothecate the immovable leased, without prejudice, however, to the lessor's rights (569–570 C.C.). His interest may be seized as real property under execution against the lessee at suit of his creditors, and sold (571 C.C.). He holds subject to all the real right and land charges to which the property is subject (576 C.C.). He is bound to make the improvements he has undertaken to make. He is bound to execute all necessary repairs (577 C.C.).

Claude Giguère, the lessee, entered into possession, built a house as stipulated, and remained in occupation till the 5th July, 1893, when by a notarial deed he conveyed and assigned all his interest under these leases in the premises respectively demised by them to one Joseph Côté. During the same year Joseph Côté omitted to pay to the respondents the taxes due to them in respect of the demised premises. The respondents sued him to recover these taxes, with the result that his estate and interest under the leases was taken in execution by the Sheriff, who on the 6th April, 1894, sold it to the respondents, and by deed dated the 10th October, 1894, conveyed it to them. The respondents became liable to pay to the lessor or his representative the rents reserved by these leases, and to perform all the covenants by the lessee contained in them.

The respondents immediately after their purchase took possession of the premises purchased, and some months before the date of the Sheriff's conveyance to them, by a notarial deed dated the 31st July, 1894, leased them for a period of two years, *i.e.*, from the 1st August, 1894, to the 1st August, 1896, at an annual rent of 100 dollars, to one Madame Falardeau, wife of David Falardeau.

This sub-lease, for such it may be styled, contained covenants by the sub-lessee, Madame Falardeau, to pay quarterly in advance to the respondents the rent reserved, to pay to the appellant the rent reserved by the emphyteutic lease, to keep the premises in repair during her term, and at the end of the term to deliver them up in good repair and condition. This lease contained the following clause upon the construction of which the question for decision mainly turns :—

> " Il est convenu entre les parties que ladite Cité de Québec sera tenue et obligée de consentir à la dite Dame Falardeau, un titre de vente de ses droits et pretentions sur les dits baux emphytéotiques lorsque ladite somme de deux cents piastres aura été entièrement payée, et alors la dite Dame Falardeau entrera en pleine propriété du susdit immeuble sujet toutefois au paiement de ladite rente emphytéotique."

Madame Falardeau immediately on the execution of this lease of the 31st July, 1894, went into possession of the premises demised to her. She completed the payment of the sum of 200 dollars within the term of the sub-lease. Before the expiration of this term a dispute had arisen between Madame Falardeau and the respondents as to whether a passage was or was not included in the premises demised by the emphyteutic lease. The consequence of this was that the respondents and Falardeau being unable to agree the respondents never executed a deed conveying to her an interest in the premises demised by the emphyteutic lease.

Madame Falardeau continued in occupation of the premises for some ten years from the date of her lease, and then sub-let them to different tenants, who continued in occupation of them up to and after the expiration of the emphyteutic lease on the 1st May, 1913. In the interval between the expiration of the sub-lease, on the 1st August, 1896, and the expiry of the emphyteutic lease some rent was paid from time to time by Madame Falardeau to Lampson, but at the time the action was instituted the rent reserved by the emphyteutic lease was largely in arrear, and the premises demised by it were out of repair.

On the 8th September, 1915, the appellant instituted a suit against the respondents in the Superior Court of Quebec for the recovery of the 150 dollars arrears of the emphyteutic rent, 100 dollars damages in respect of the respondents' failure to deliver up possession at the expiration of that lease, and 745 dollars damages in respect of their breach of covenant to keep the premises in repair and for the recovery of possession of these premises.

On the 8th September, 1915, the respondents filed a plea to the effect that they had parted with all their rights to the property in question; that Madame Falardeau had become the lessee of the premises by the execution of the deed of the 31st July, 1894 (the sub-lease); that since that date she had been treated as owner of the property; that as such it was her duty to keep the premises in repair. The appellant, on the 16th September, 1915, delivered an answer to this plea denying that Madame Falardeau had become the emphyteutic lessee of the property, and on the same day raised on demurrer an issue of law to the effect that the rights of the appellant were unaffected at law by the dealings between the respondents and Madame Falardeau.

The demurrer was argued before the Chief Justice, who decided in the appellant's favour, ordering that the respondents should quit and deliver up possession of the property demised by the emphyteutic lease, should pay to the appellant 150 dollars in respect of the arrears of the emphyteutic rent, and 100 dollars damages in respect of the failure of the respondents to deliver up at the end of the term the demised premises in good repair and condition. On appeal by the respondents from this decision to the Court of King's Bench at Quebec the appeal was dismissed by a Court composed of the Chief Justice, Sir Horace

Archambeault, and Trenholme, Lavergne, Cross and Pelletier, JJ. From this judgment the respondents appealed to the Supreme Court of Canada, composed of the Chief Justice and Davies, Idington, Duff and Anglin, JJ. Judgment of the Court was on the 5th March, 1918, delivered by the Chief Justice (Duff and Anglin, JJ., dissenting) allowing the appeal and setting aside the judgment appealed from. From this judgment of the Supreme Court of Canada the present appeal has been brought. It would appear to their Lordships as if the learned Chief Justice had based his judgment on the assumption that this contested clause beginning with the words "Il est convenu" simply embodied a bald and precise agreement on the part of Madame Falardeau to pay to the respondents a sum of 200 dollars, and to purchase from them all their estate rights, title and interest in the emphyteutic lease for the unexpired residue of its term, and an agreement on the part of the respondents, equally bald and precise, to sell the same to her; that she went into and retained possession of the demised premises under and by virtue of that agreement of purchase and sale; that her possession of these premises was solely attributable to it; and that when she paid the respondents 200 dollars, as she in fact did, the property purchased passed to and became vested in her under the several provisions of the Code to which he referred without any deed conveying or assigning it ever having been executed. He said:—

> "I construe that clause, read with all that precedes, to mean that, when the sum of 200 dollars has been paid, Mrs. Falardeau becomes the owner of the unexpired term of Giguère's lease acquired by the City under the Sheriff's title and, in addition, the City binds itself to give a deed conveying to Mrs. Falardeau all its rights and pretensions to the unexpired portion of the lease."

In their Lordships' view it is not necessary for them to decide whether the learned Chief Justice was right in the opinion he apparently formed as to the operation and effect of the various Articles of the Code to which he referred in a case in which the facts were as he apparently assumed them to be in the present case; because their Lordships, with all respect to the learned Chief Justice, take a view entirely different from that which he apparently formed, both as to the proper construction of the contested clause itself and as to the nature, significance and effect of Madame Falardeau's action.

In their Lordships' view the contested clause, when properly construed, means this: that Madame Falardeau, on payment of the sum of 200 dollars, acquired the option of requiring the respondents to execute a deed (titre de vente) conveying to her all their rights, property and interest in the emphyteutic lease for the residue of its term. And that when these two conditions had been fulfilled (alors) thereupon Madame Falardeau would enter into full proprietorship of the aforesaid immovable, subject always to the payment of the emphyteutic rent. The City of Quebec

was bound to sell and convey to her their interest in the lease if she required them to do so. But that obligation was not reciprocal. She was not bound to purchase if she did not desire so to do. The conclusion at which their Lordships have arrived as to the proper construction of the contested clause is in exact accordance with the opinion expressed by Pelletier and Lavergne and Anglin, JJ., in the following passages in their judgments :—

Mr. Justice Pelletier says :—

> " L'acte que nous avons devant nous est un bail avec une clause déclarant que, au cas de l'accomplissement de deux conditions, Madame Falardeau pourrait devenir propriétaire ; ces deux conditions sont : (1) le paiement de 200 dollars par Madame Falardeau à la Cité de Québec ; (2) la passation d'un titre. La clause du bail citée plus haut dit que c'est alors, c'est-à-dire après l'accomplissement de ces deux conditions, que Madame Falardeau entrera en propriété de l'immeuble en question.
>
> " Pour que Madame Falardeau serait devenue propriétaire, il fallait démontrer d'abord qu'elle avait payé les 200 dollars, et en second lieu que l'acte de transmission par la Cité de Québec à elle avait été passé."

As put by Mr. Justice Lavergne :—

> " Madame Falardeau pouvait devenir propriétaire en vertu du bail et de ces conditions après avoir payé la somme de 200 dollars ; secondement, par la passation d'un titre après l'exécution de ces deux premières conditions ; il est dit dans le bail : ' c'est alors que Madame Falardeau entrera en pleine propriété de l'immeuble.' Il n'y a jamais eu le titre donné par la Cité de Québec à Madame Falardeau."

If this construction of the contested clause be its true construction, as their Lordships think it is, it appears to them to be wholly irrelevant to discuss the question whether or not a deed was necessary to pass the property to Madame Falardeau, for the obvious reason that she had bargained to get a deed, and the City of Quebec contracted to give it to her. They are bound to give her what they contracted to give her, whether it be necessary or not. Madame Falardeau did not go into possession under or by virtue of an agreement to purchase. She went into possession under and by virtue of her sub-lease. She might never exercise her option to purchase. While that lease lasted she was bound to pay not only the rent reserved by the sub-lease, but also the rent reserved by the emphyteutic lease. She over-held no doubt after her term of two years had expired. The result of her over-holding is that a tacit renewal of the sub-lease took place for another year ; but if she continued liable in that character to pay the head rent to Lampson from time to time, any payments she made of that head rent therefore became wholly neutral facts ; because they were equally consistent with her having had vested in her all the interest in the emphyteutic lease the respondents could give her, or her being only entitled to the yearly tenancies mentioned. The learned counsel for the respondents relied much upon the principle embodied in the Code that a deed was to be construed according to the intention of the parties to it, but he appeared to their Lordships to discard the necessary qualification to be

observed in the application of this principle, namely, that the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself. The circumstances surrounding the making of a deed may, if it be ambiguous, give to its words a special meaning; but if the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a court of justice and say: "Our intention was wholly different from that which the language of our deed expresses; disregard what we said, and construe it according to what we meant to say, but did not say." The case of *Stevenson* v. *Rollitt*, 12 Quebec Official Law Reports (Superior Court), 322, was cited by the respondents' counsel in support of his contention. It does not support either of the propositions for which it was cited. The head note runs:—

> "A promise of sale with actual possession of the thing sold is not equivalent to a sale and does not cause the property therein to pass if the intention of the parties to the contrary appears from the terms of the contract. Hence in a promise of sale in which the price is made payable by instalments, a covenant that the parties will execute a deed of sale as soon as the two first instalments are paid is a suspensive condition upon the event of which only the sale is complete and property passes."

And at p. 328, Archibald, J., the presiding Judge, said:—

> "In this instance there is no resolutory condition. But there is also nothing to indicate that it was the intention of plaintiff to deliver the property and to give possession thereof until the title had been granted by the plaintiff."

This shows that it is the language of the contract which governs, and that a formality for which it stipulates must be observed, though not absolutely necessary to effect the end in view. In truth, what the parties quarrelled about in this case was the precise nature and extent of the physical immovable bargained for. Mrs. Falardeau insisted that the parcels demised by the emphyteutic lease embraced a certain passage. The respondents insisted it did not. She naturally insisted on getting what she supposed she purchased. The respondents naturally refused to convey what they contended they never contracted to sell. The language used by the respective parties in this controversy cannot be relied upon to alter the rights conferred by their written contract. Their Lordships are of opinion that this appeal succeeds, that the judgment appealed from was erroneous and should be reversed and that of the Court of King's Bench of Quebec (Appeal Side) was right and should be affirmed, and they will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellant in the appeal and in the Courts below.

In the Privy Council.

FREDERICK LAMPSON

v.

THE CITY OF QUEBEC.

DELIVERED BY LORD ATKINSON.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.

1920.