Privy Council Appeal No. 34 *of* 1929.

Daniel Eugene Lecavalier - - - - - - *Appellant*

v.

The City of Montreal - - - - - - *Respondents*

FROM

THE HIGH COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH OCTOBER, 1929.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD DARLING.
LORD WARRINGTON OF CLYFFE.
LORD TOMLIN.
LORD THANKERTON.

[*Delivered by* LORD WARRINGTON OF CLYFFE.]

This is an appeal from a judgment dated the 14th January, 1929, of the Court of King's Bench (Appeal Side) for the Province of Quebec, whereby that Court reversed a judgment dated the 10th of March, 1927, of the Superior Court of Quebec in favour of the appellant and dismissed his action with costs.

The action was commenced on the 30th June, 1923, the appellant being the plaintiff and the City of Montreal being the defendants.

The plaintiff alleged that he was the owner (propriétaire) of certain lands lying to the north of the City and bounded on the north by the Rivière des Prairies. These lands were intersected by a watercourse called the Ruisseau-Raimbault, which eventually flowed into the Rivière des Prairies. The appellant complained in effect that the City had used this watercourse as a common sewer, discharging into it quantities of foul and other

noxious substances, thereby occasioning a very serious nuisance to the appellant, and he claimed an injunction and damages, alleging loss of revenue from the lands and a diminution of their value.

He afterwards on the 18th December, 1925, by leave of the Court, delivered an amended statement of claim, whereby he alleged that the conduct of the respondents amounted in effect to an expropriation of the land, and claimed, as an alternative to an injunction, the actual value of the land, offering, in the event of such claim being allowed, to convey the lands to the respondents.

By his judgment the learned trial Judge, Duclos J., declined to grant an injunction, but allowed the alternative claim of the appellant, assessed the value of the land at $90,000, and awarded this sum, with 12 years' interest at 5 per cent., amounting altogether to $144,000, to be paid by the respondents to the appellant, with interest from the date of the judgment, with costs, and declared that on payment of principal, interest and costs the registration of the judgment should confer title on the respondents.

It ought to be mentioned that in the meantime the appellant had obtained an interim injunction restraining the continuance of the nuisance complained of. This injunction was not obeyed, and on three several occasions the respondents were fined $500, $500, and $2,000 respectively, payable to the Crown for non-compliance therewith. It does not appear whether the payment of these fines was enforced.

The existence of a serious nuisance was established at the trial and is not in issue, but the respondents contended and repeated their contention before the Board, that the action was unfounded, for the following reasons :—

(1) That the allegation on the part of the plaintiff that on the 30th June, 1923, the date of the commencement of the action, he was the owner of the land in question, was shown by his own evidence to be and was in fact untrue, and that he had no other interest sufficient to support an action.

(2) That there was no foundation in fact or in law for the claim that the conduct of the respondents amounted to an expropriation, and that the appellant was entitled to recover the value of the land.

(3) That inasmuch as on the 20th September, 1920, the appellant had sold the land and had ceased to be the owner thereof, he could not recover any damages for loss of revenue since that date, and any claim to damages on that head for a period prior to that date was barred by prescription, the period of which for damages for a tort (*quasi délit*) being fixed by the Code Civil at two years.

These grounds of defence were accepted by the Appeal Court, with the result stated above, and their Lordships proceed to consider them in their order.

(1) The appellant by his statement of claim alleged that he was the owner (propriétaire) of the land. This was met by a plea which, it is agreed, amounts to a plea of non-admission according to our practice, and leaves upon the appellant the burden of proving his title. In his examination in chief the appellant proved that the land had been conveyed to him in 1912 and the conveyance had been duly registered.

So far, therefore, he had proved his title, but it came out, accidentally to all appearance, in the course of cross-examination, that this was not the whole story, but that on the 20th September, 1920, he had sold and conveyed the property to a company called the Luna Park Company Limited, by whom, on the 6th July, 1924, more than a year after the commencement of the action, it had been reconveyed to him. It is true that neither of these documents had been registered, but their Lordships agree with the Judges of the Court of Appeal that though this fact would have given priority to a third person claiming under a registered deed, it has no bearing on the question now to be determined.

The appellant at the outset attempted to meet this point by contending that the objection founded on the conveyance to the Luna Park Company could not, on the pleadings, be admitted as it had not been specifically raised by the respondents. Their Lordships can find no support for this contention. The conveyance in question was part of the title of the appellant. It was, in fact, produced by him though the fact of its existence was only elicited in cross-examination. It was incumbent upon the appellant to prove his title, not on the respondents to disprove it, and there is no ground for the suggestion that the objection should have been raised by the respondents who so far as appears, did not know of the existence of the conveyance until that fact was disclosed by the appellant.

A more serious contention, and one that requires careful consideration, was : (*a*) that the conveyance of the 20th September, 1920, was not, and was never intended, to be operative as a transfer of the property ; or (*b*) that if it was ever operative at all, it ceased to be so as from the date, the 12th November, 1922, of a certain resolution of the Board of Directors of the Luna Company ; or (*c*) that at all events as from that date the appellant became entitled to call for a transfer of the property, and so ought to be treated as the owner in equity.

As to (*a*), the deed in question was formally executed before a notary, nothing remaining to be done to render it an effectual transfer of the property as between the parties to it. The property was sold "avec la garantie légale." As to possession it was provided that the purchaser should enjoy and dispose of the land in full and absolute ownership from the date of the deed, and should take possession of it immediately. The price was to be paid in certain shares of the company which the vendor acknow-

ledged to have received from the purchaser on the day of the date of the deed.

In their Lordships' opinion it would be impossible, especially in the absence of the Luna Park Company, who are not parties to the action—to come to the conclusion that the deed in question was not intended to operate according to its terms. But in truth the documentary evidence adduced by the appellant in support of his contention on this point is fatal to it. It consists of two documents, first, a resolution of the Board of Directors of the Company, dated the 12th November, 1922, and secondly, of a deed of retrocession in favour of the appellant dated the 6th July, 1924. The resolution is contained in the minutes of the Board under date the 12th November, 1922. There is no evidence that the appellant was present. The minutes recite that " il n'a pas été donné suite au contrat d'achat " there described, being in fact the deed in question. They then state the difficulty the company had met with in disposing of their property and their shares, and in the exploitation of the Park owing to the action of the respondents and the nuisance occasioned thereby. The sixth recital is as follows :—

> " Considerant que la Compagnie Luna Park se trouve dans l'impossibilité d'utiliser ces dites propriétés pour des fins qu'elle se proposait est obligée de faire un acte de rétrocession."

The resolutions follow, the first is immaterial ; the second purports to rescind and declare null in law the authority inscribed in the minutes of the 2nd July, 1920, to the President and Secretary to sign the deed in question. The third is immaterial. The fourth is as follows :—

> " Q'un acte de rétrocession soit fait par la dite compagnie au Dr. E. Le Cavalier (the appellant) et que le Président et la Secrétaire-Trésorier soient autorisés à le signer."

By these minutes the company recognizes that there was an effective purchase and that for the reasons expressed it is obliged to make a retrocession of the property, and resolve that such retrocession be made. In the face of this it is obviously impossible to hold that there was no sale at all.

The deed of retrocession was not executed for nearly two years after the date of the resolution, viz., on the 6th July, 1924. By that deed, which was also signed before a notary the company, for reasons mentioned in the above resolution retrocedes to the appellant, who was present and accepted the retrocession, the property in question. As to the company's title it states that the property had been acquired under the deed above mentioned. As to possession it provides that the appellant shall enjoy and dispose of the land in full and absolute ownership as from the day of the date of the deed. " les présentes prenant effet du 12 Novembre, 1922," the date of the resolution. What possible effect these last words can have had it is difficult to see, for they appear to be plainly inconsistent with those immediately preced-

ing. Finally, the retrocession is said to have been made for the same price which the vendor retroceding acknowleges to have received on the day of the date of the deed from the appellant in shares of the company, the details of which are given.

On these facts their Lordships cannot avoid the conclusion that the decision of the Appeal Court was right on this point, and that the appellant having sold and conveyed the property to the company on the 20th September, 1920, was not the owner thereof on the 30th June, 1923, the day of the commencement of the action.

But the appellant contends ((*b*), mentioned above) that as from the date of the resolution the deed of retrocession conferred the ownership upon him. This has in reality been already dealt with in discussing the terms of the deed of retrocession. No authority was cited to the effect that such a deed could have a retro-active effect as regards the transfer of the property, and, in fact, as already pointed out, the provision purporting so to provide is contradictory to the words immediately preceding it and to the terms of the conveyance itself. In their Lordships' opinion, this contention fails.

As to (*c*), there is no evidence of any binding contract on the part of the Company to give, or on that of the appellant to accept, a retrocession except that expressed in the deed itself, and there was therefore no right in the appellant to call for a conveyance prior to the date of that deed, and no equitable ownership on his part which might be such an interest as would under the Code be sufficient to support the action.

If this be so, the Appeal Court were right in rejecting the appellant's claim to compensation for damage to the capital value of the land.

As to the ground of defence (2), their Lordships are further of opinion that the judgment of the trial Judge could not have been supported even if the appellant had satisfied them that he was in fact the owner. The trial Judge proceeded on the theory that the action of the respondents amounted to an illegal expropriation of the land and awarded the entire value to be paid as compensation. With all respect to the trial Judge, their Lordships on this point agree with the view of the Appeal Court that in acting as it did the respondent City was a *tort feasor* and nothing more, liable no doubt to pay damages in an action by a person entitled to complain of nuisance, but not liable to be compelled to take over and pay for the land as expropriators.

One further point was made by Counsel for the appellant in his endeavour to establish his claim to an interest sufficient to support the action. He said, under the *garantie légale*, he was liable to the Luna Park Company for the injury to the land sold to them as a consequence of the acts of the respondents. But a reference to the Code Civile, Arts. 1507 and 1508, makes it plain that under the *garantie légale* the vendor is liable only for the consequences of a *right* existing at the date of the sale. In the

present case the acts from which injury to the land is said to have arisen are *ex-hypothesi* illegal, and for such acts on the part of a third party the vendor who has sold under the *garantie légale* is under no liability to the purchaser.

There remains the question whether the appellant could recover anything in respect of the rents and profits of the land alleged to have been lost by reason of the nuisance caused by the respondents' acts. (Point 3 above mentioned). For the period prior to the 30th June, 1921, two years before the issue of the writ, any such claim would clearly be barred by the provisions of the Code as to prescription. During the period succeeding that date and until after the commencement of the action the appellant was not the owner. He says he was in possession, but this statement is entirely unsupported. Not being owner, there is no presumption in his favour. The terms of the deed are against him. There is no evidence of any act on the part of the Company giving him the right to receive the rents and profits, if there were any. If he had no right to receive the rents and profits he cannot recover damages for being prevented from so doing.

The result is that, in their Lordships' opinion, the order of the Appeal Court was right and the present action was properly dismissed. They, however, cannot but feel some regret at being compelled to arrive at this conclusion, for it has been held that the respondent City committed a serious nuisance, which is still continuing, and nothing in this judgment must be taken to prejudice a claim to appropriate relief in an action properly framed and at the suit of a plaintiff in a position to claim such relief. They have carefully considered the appeal of the appellant to their discretion as to costs, but they cannot see any sufficient reason for depriving the successful respondents thereof. The City does not appear to have been guilty of any such misconduct in the course of the defence as would be sufficient for this purpose. It is true that it was in contempt for disobedience to the interim injunction, but it has been ordered to pay the costs of the several applications consequent on such contempt and these orders have not been set aside.

On the whole their Lordships are of opinion that the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

In the Privy Council.

DANIEL EUGENE LECAVALIER

v.

THE CITY OF MONTREAL.

DELIVERED BY LORD WARRINGTON
OF CLYFFE.

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