Privy Council Appeal No. 114 *of* 1925.

Price Brothers and Company, Limited - - - - - *Appellants*

v.

La Corporation d'Energie de Montmagny and another - - *Respondents*

FROM

THE 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 18TH JANUARY, 1927

Present at the Hearing:

VISCOUNT HALDANE.
VISCOUNT FINLAY.
VISCOUNT DUNEDIN.
LORD DARLING.
LORD WARRINGTON OF CLYFFE.

[*Delivered by* VISCOUNT HALDANE.]

The only question which it is necessary for their Lordships to answer in order to dispose of this appeal arises out of facts which may be stated very briefly.

On 10th October, 1918, certain lots of land on the banks of the Rivière du Sud in Quebec were sold by the predecessors in title of the appellants to Messrs. Rousseau and Hébert for $5,000. The deed of sale contained the following stipulation :—

> "The purchasers hereby bind and oblige themselves, their heirs, representatives, successors and assigns as proprietors of the lots of land hereby sold never to sell or to distribute electric power derived from the property hereby sold for lighting purposes in the town of Montmagny and in the parish of St. Thomas, and in order to guarantee the fulfilment of this condition a passive servitude is hereby created on the property hereby sold."

The appellants are incorporated by provincial charter of 7th October, 1920. They had succeeded to all the assets of

another Corporation created by Charter of 1904 and by supplementary Charter of 1910. These assets were conveyed to them by deed of sale of 30th October, 1920.

On the 10th October, 1918, the older Corporation had sold to Rousseau and Hébert, as already stated, all the rights which the vendors might possess in the lots specified with the burden of the obligations just set out. On the 8th March, 1919, Rousseau and Hébert had divested themselves of these lots in favour of the first respondent Corporation, the Corporation d'Energie de Montmagny. They sold the lots subject to all the obligations contained in their own title-deed and to all the servitudes, active and passive, created by the sellers or their predecessors in title, or stipulated in their favour and mentioned in the title-deeds.

The second respondent, the Compagnie Electrique de Montmagny, is a distributing Company which sells electric light in the town of Montmagny, and which has been impleaded in the present suit because a violation is alleged of the restriction already set out as contained in the deed of sale of the 10th October, 1918.

The first respondent was alleged, operating with the aid of the second respondent, to have distributed in Montmagny not merely electric energy for power purposes, as it was entitled to do, but also such energy for lighting. In October, 1922, the appellants commenced an action against the two respondent Companies, claiming an injunction to restrain the sale of electrical power for lighting purposes in the town of Montmagny and the parish of St. Thomas, and for consequential relief. At the trial of the action various points were raised. Letellier J., who tried the case, decided these points in favour of the appellant Company and gave judgment for it with costs. On appeal to the Court of King's Bench of Quebec that Court, by a majority of four to one, allowed the appeal and dismissed the action with costs. One of the main reasons was that the bulk of the power generated by the first respondent, so far as used for purposes contrary to the obligation, was generated from properties to which the obligation did not relate, and that it had, therefore, not been proved that there was any violation.

Their Lordships have, however, come to the conclusion that there is an antecedent question which supersedes those raised in the Court of King's Bench. That question was raised and pressed by Mr. Lawrence in the able argument which he put forward at the Bar. It is whether the right conferred by the terms in which the obligation is expressed in the sale deed of 1918 amounted to a servitude, the benefit of which remained after the then Corporation had disposed of it to the present Corporation in 1920, or whether it was a mere personal right which could not be transmitted on the footing of being attached to a dominant tenement. For it is clear that no such dominant tenement is defined by the terms of the obligation, and the mere declaration that a passive servitude was constituted could not, in itself, carry the matter

further. Their Lordships are of opinion that when the purchasers in 1918 bound and obliged themselves, their heirs, representatives, successors and assigns, as proprietors of the lots of land hereby sold, all they did was to enter into an obligation to the vendors personally. No doubt the benefit of this obligation was assignable, and it was capable of being made in a form which gave the benefit to a third person. The law of Quebec, as expressed in Article 1,029 of the Civil Code, differs in this respect from the Common Law of England. But unless the third person possessed an interest within the meaning of Article 77 of the Code of Civil Procedure of the Province he could not sue. The old Corporation had parted by the sale of 1918 with the whole of its interest in the plots it sold, and there remained nothing which could serve as a dominant tenement to which a real servitude was attached for its benefit (Civil Code, 499 and 546). Even, therefore, if the appellant Corporation had acquired the benefit of a personal stipulation from the earlier Corporation, it would not thereby be invested with the interest in the subject matter required by Article 77 of the Code of Civil Procedure in order to enable an action to be brought. And this difficulty is also fatal, in their Lordships' view, to the application of the principle stated by Lord Cairns in his judgment in *Doherty* v. *Allman* (3 A.C. 709 at p. 719), that when there is a negative covenant the duty of a Court of Equity is simply to enforce it. The decision in *Formby* v. *Barker* (1903, 2 Ch., 539) is one which turns in part on principles which are peculiar to English law, but it is relevant as authority for the interpretation of the words of the stipulation in question as conferring a right of a merely personal character as distinguished from one of servitude. It is true that the Law of Quebec, unlike the Common Law of England, permits a person who is not a party to a contract to acquire a right which is *quaesitum tertio* in his favour, but that difference does not in the present case assist the appellants, who lack the interest required by Article 77 of the Code of Civil Procedure.

The objection thus stated is one which goes to the root of the appellants' title to maintain this action. If it is well founded, as their Lordships consider that it is, it renders it unnecessary to decide any other point raised.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

PRICE BROTHERS AND COMPANY, LIMITED

v.

LA CORPORATION D'ENERGIE DE MONTMAGNY AND ANOTHER

DELIVERED BY VISCOUNT HALDANE.

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