

1905  
 \*Nov. 2  
 \*Nov. 16.

EMERY LESPÉRANCE (DEFEND-)  
 ANT) ..... } APPELLANT;

AND

JOSEPHINE GONÉ ET VIR (PLAIN-)  
 TIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL  
 SIDE, PROVINCE OF QUEBEC.

*Title to land—Servitude—Construction of deed—Reservations—“Representatives”—Owners par indivis—Common lanes—Right of passage—Private wall—Windows and openings on line of lane—Arts. 533-538 C.C.*

A conveyance of lands fronting on public highways with the right of passage merely over a private lane does not create a servitude that can entitle the grantee to make windows and openings in walls which are built upon the line of the lane.

A reservation in a deed of partition to the effect that lanes through subdivided lands should be held in common by the proprietors *par indivis* or their representatives must be construed as reserving the rights in common only to the co-proprietors, their heirs or the persons to whom such rights in the lanes might be conveyed.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of the Superior Court, District of Montreal, and maintaining the plaintiffs' action with costs.

A block of land in the City of Montreal, bounded by public streets, was subdivided into building lots by the proprietors *par indivis*, with private lanes in rear and at the sides of the lots of sub-division, each of the

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\*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and MacLennan JJ.

lanes being described by a number on the plan. The lane in question in the present case bore the number 41, and formed the rear boundary of a lot numbered 47, on the corner of Roy Street and Laval Avenue. On the opposite side it formed the side line of another lot of the same sub-division numbered 40, fronting on Laval Avenue. Subsequently the owners *par indivis* executed a deed of partition among themselves, by which it was declared that the lanes shewn upon the plan of sub-division should be held in common for themselves and their representatives.

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The defendant acquired lot 47 through the plaintiff, Josephine Goné, one of the parties to the deed of partition, "with the right of passage" over the lanes bearing the numbers 36 and 41, and proceeded to construct a building on the lot he purchased, with the rear wall on the line of the lane (No. 41), and pierced openings in this wall for doors and windows.

The plaintiff, Josephine Goné, owner of lot 40, authorized by her husband, then brought an action *negatoria servitutis* for a decree ordering that the openings in the wall should be closed up. The defendant pleaded that the conveyance of the lot to him with the right of passage over the lanes constituted him the representative of the former owner, and vested in him a right of servitude which entitled him to have doors and windows opening upon the lane as accessory and appurtenant to lot 47 and to the use of the right of passage granted therewith.

The plaintiffs' action was dismissed with costs by Mr. Justice Davidson, in the Superior Court, who held that the plaintiff, Josephine Goné, had conveyed all accessory rights in respect of the lane (No. 41) when she sold lot 47 to the defendant, and that the rights of view and light possessed by her had vested in the

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defendant. This judgment was reversed by the judgment now appealed from, which ordered the defendant to close and stop up all the windows and openings made by him in the rear wall of his building, within four months from service of the judgment upon him, and in default of his doing so, that the plaintiffs should have the right to close and stop up the same, with all costs against the defendant.

*Mignault K.C.* for the appellant.

*Angers K.C.*, and *DeLorimier K.C.*, for the respondents.

The judgment of the court was delivered by

GIROUARD J.—Je suis d'avis de renvoyer l'appel avec dépens.

La question soulevée me paraît simple. Quatre héritières, co-propriétaires d'un immeuble, en font un partage entr'elles et un plan de sub-division faisant face à des rues publiques et traversées par des ruelles, leur propriété, qu'elles déclarent devoir être "en commun tant pour elles que pour leurs représentants." Ces derniers ne peuvent être que des héritiers ou des acquéreurs. Or le titre d'achat de l'appelant au sujet de ces ruelles déclare simplement qu'il acquiert l'immeuble

avec droit de passage dans les ruelles portant les numeros trente-six et quarante-un de la subdivision, etc.

En présence d'une déclaration aussi expresse, la servitude de l'appelant est restreinte au droit de passage sur deux des ruelles, et non pas sur toutes; elle ne comprend certainement pas un droit de vue. La cour d'appel a donc eu raison d'ordonner la fermeture

des fenêtres et ouvertures et le jugement qu'elle a rendu doit recevoir son exécution.

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Je concours pleinement dans les observations du juge en chef Lacoste.

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*Appeal dismissed with costs.*

Solicitors for the appellant: *Robillard & Rivet.*

Solicitors for the respondents: *Angers, DeLorimier & Godin.*

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