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*Oct. 10.
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*Feb. 22.

HARRIETT ESTELLE HOLLESTER ET VIR (PLAINTIFFS)..... } APPELLANTS;

AND

THE CITY OF MONTREAL (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, APPEAL SIDE.

*Municipal corporation — Expropriation proceedings — Negligence—Interference with proprietary rights—Abandonment of proceedings—Damages—Servitudes established for public utility—Arts.* 406, 407, 507, 1053 *C. C.—Eminent domain.*

Where, under authority of a statute authorizing the extension of a street, a servitude for public utility was established on private land which was not expropriated and the extension was subsequently abandoned, the owner of the land was not, in the absence of any statutory authority therefor, entitled to damages for loss of proprietary rights while the servitude existed. *Perrault v. Gauthier et al.* (28 Can. S. C. R. 241) referred to.

The Chief Justice dissented.

APPEAL from a judgment of the Court of Queen's Bench, (appeal side), affirming a judgment of the Superior Court, District of Montreal, which maintained a demurrer filed by the defendant and dismissed the plaintiff's action with costs.

A statement of the case will be found in the judgment of the majority of the court delivered by Mr. Justice Girouard.

*Trenholme Q.C.* and *Gilman Q.C.* for the appellants. The statutes which enabled the corporation to institute the expropriation proceedings must be construed as a contract authorizing dealings with private lands and the customary clauses as to indemnity to the

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

owners must be supplied as a matter of course. See arts. 407, 1017, 1589, 1591 C. C.; art. 903 Mun. Code, Que.; sec. 11, "Town Corporation General Clauses Act;" C. S. L. C. c. 70, s. 30. The statute did not authorize the long delays, about twenty years, that the corporation permitted to elapse in this case, leaving clouds on the title through all that period. The owner had no power to force the city to proceed with the extension of the street and is not to blame in any manner for that delay. For the whole period she had no beneficial use of her property. The taxes she paid on it form part of the damages sustained in consequence of the proceedings taken, so long delayed and finally abandoned; art 1053 C. C. The following citations were made on behalf of the appellants: *Grenier* v. *City of Montreal* (1); *Bell* v. *City of Quebec* (2); *Brown* v. *City of Montreal* (3); *City of Montreal* v. *Robillard* (4); *Harold* v. *City of Montreal* (5); 2 Dillon on Corporations, ch. 16; Cooley, Constitutional Limitations, ch. 15; *McLaughlin* v. *Municipality* (6); *Reeves* v. *City of Toronto* (7); *Desloges* v. *Desmarteau* (8); *Mersey Docks Co.* v. *Gibbs* (9): *Morrison* v. *City of Montreal* (10); *Turgeon* v. *City of Montreal* (11); 1 Sourd. at nn. 427-433; 2 Aubry & Rau, n. 233 at pp. 439 *et seq.*; Beven on Negligence, vol. 1 pp. 344, 345 and cases there cited.

*Ethier Q.C.* for the respondent. There is no fault chargeable against the corporation, which merely exercised, in the proceedings taken, not only the power, but the duty as well, provided by the statute, and the appellant is not entitled to any indemnity for the

(1) 25 L. C. Jur. 138.
(2) 5 App. Cas. 84.
(3) 4 R. L. 7; 17 L. C. Jur. 46.
(4) Q. R. 5 Q. B. 292.
(5) 11 L. C. Jur. 169.
(6) 5 La. An. 504.
(7) 21 U. C. Q. B. 157.
(8) Q. R. 6 Q. B. 485.
(9) L. R. 1 H. L. 93.
(10) 25 L. C. Jur. 1.
(11) M. L. R. 1 S. C. 111.

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inconveniences suffered, if any, either under the Code or under the special statutes relating to the expropriations. The effect of the Acts was merely to create a servitude for purposes of public utility, and the owner was not at any time, during the period in question, deprived of her property; she continued to use and enjoy it, subject to the restrictions imposed by the statute and to which she was obliged to submit without indemnification. As a matter of fact no real damages have been proved to have been suffered. We refer to Art. 1053 C. C.; 11 Toullier no. 119; 1 Delomcourt, p. 6; Rolland de Villargues, vo. "Dommage," no. 14; 5 Larombière, Obligations, p. 690, no. 10; 7 Laurent, nos. 476, 477; 6 Laurent, pp. 186 and 195; S. V. 1833, 1, 604 and 608; *City of Montreal* v. *Drummond* (1); *Boulton* v. *Crowther* (2); *Hammersmith Railway Co.* v. *Brand* (3); *The Queen* v. *The Vestry of St. Luke* (4); Angel on Highways, pp. 99 and 211 *et seq.*; Abbott on Corporations, nos. 185, 193, 197, 261, 463; Sedgwick on Damages, nos. 110-113.

THE CHIEF JUSTICE.--As I am alone in thinking that this appeal ought to succeed, I do not propose to discuss at length the arguments of the parties, but to state very concisely the reasons and authorities which have led me to concur in the dissenting judgment of Mr. Justice Blanchet.

A statutory power such as the respondent undobubtedly had to lay down the proposed line of the new street which had the effect of rendering the appellants' property for several years unmarketable and unfit to be put to any profitable use, is, we are told, not to be exercised arbitrarily, but with due regard to the interests of landowners. In *Geddis* v.

(1) 1 App. Cas. 384.
(2) 2 B. & C. 703.
(3) L. R. 4 H. L. 171.
(4) L. R. 6 Q. B. 572.

*Proprietors of Bann Reservoir* (1), at page 455, Lord Blackburn lays this down very emphatically.

The same principle in stated as law and applied to cases like the present, by many American courts. Amongst a great number of these authorities, I may refer to Dillon on Corporations (4 ed.) p. 713; *The State* v. *Graves* (2); *Graff* v. *Baltimore* (3); *Mallard* v. *Lafayette* (4); *In re Roffignac Street* (5); Mills on Eminent Domain, sec. 313. In a note to Dillon at the page cited it is said:

> Where a Corporation commences proceedings to open a street and notifies the proprietor not to continue the making of improvements he had begun and the Corporation needlessly delays and finally abandons the proceedings, it is under these circumstances liable for the actual damages suffered by the proprietor, arising from the suspension of his improvements.

For this statement of the law the learned author refers to the case of *McLaughlin* v. *The Municipality* (6). And this decision, which is exactly in point with that before us, supports the text for which it is cited.

Although I concur with Mr. Justice Blanchet in thinking that the appellant is entitled to a remedy by way of damages, I could not agree with him as to the amount he proposes to award, but that, in the view the majority of the court have taken, is now immaterial.

The judgment of the majority of the court was delivered by:

GIROUARD J.—In October, 1874, the appellant purchased a lot of land, situate on Drummond Street, in the City of Montreal, measuring 72 feet 6 inches in front, by 100 feet in depth, and intended to build a large double villa thereon, jointly with a friend who

(1) 3 App Cas. 430.
(2) 19 Md. 351.
(3) 10 Md. 544.
(4) 5 La Ann. 112.
(5) 4 Rob. La. 357.
(6) 5 La. Ann. 504.

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was the owner of the adjoining lot of the same size facing on Drummond Street. The services of architects were even retained for the purpose.

The same year the legislature of the Province of Quebec granted a new charter to the City of Montreal, which is known as 37 Vict. ch. 51, and by section 167 of that Act, it is enacted that

> it shall be lawful for the said corporation, at any time, to cause public streets, highways, places and squares within the whole extent of the limits of the said city, to be laid out, fixed and determined at the city's expense, under the direction and supervision of the road committee * * *

Under this section a plan or map of the city was made and duly confirmed by the Superior Court, as provided by that statute.

On this plan were laid down lines indicating the extension of a street through appellant's lot, known as Burnside Street, from Stanley to Guy Streets; and later on, at the request of the architects of the appellant and other parties, the city surveyor indicated on the premises, by marks and spikes, where the projected prolongation was to go.

This course became necessary in face of section 171 of the same Act, which provides that the homologated plan shall be binding upon the corporation and the proprietors, who were deprived of their right to any indemnity or damage

> for any building or improvement whatsoever that the proprietors or other persons whomsoever may have made or caused to be made, after the confirmation of said plan.

In consequence, the appellant abandoned the building of her double villa, paid her architects for their plans and labour, and built an ordinary house on the remaining portion of her lot situate at the corner of Drummond Street and the projected Burnside Street, leaving 30 feet front by 100 feet in depth for the pro-

jected street vacant, which was afterwards used by her as a garden.

Several statutes were subsequently passed amending the charter of the city or granting a new one in lieu of the former ones, but they have no bearing upon the issue between the parties.

Nothing was done towards the extension of Burnside Street, appellant paying taxes in the meantime on the vacant land; but in 1895, after twenty years of complete inaction on both sides, the City of Montreal was empowered to abandon the same by 59 Vict. ch. 49, s. 18:

If the proceedings in expropriation for the opening or prolongation of Burnside place or street have not been commenced by the 1st of October, 1896, the lines showing such extension or prolongation shall be removed and expunged from the homologated plan of St. Antoine Ward of the City of Montreal.

In November, 1896, the respondent petitioned the Supreme Court to erase the lines of said projected Burnside street from the homologated plan, and the Superior Court duly ordered said lines to be erased without opposition from the appellant or any one else.

On the 23rd November, 1896, the appellant instituted the present action against the City of Montreal to recover $15,000 in the nature of damages for having deprived her of the use of 3,000 feet of ground during the twenty years above mentioned, and also for fees paid to her architects, etc. The respondent demurred to the action and further pleaded a general denial. The demurrer was maintained by the Superior Court and the action dismissed with costs (Doherty J.), and this judgment was confirmed by the Court of Appeal, Mr. Justice Blanchet dissenting. We have no notes from the judges in appeal, and we must suppose that they simply concurred in the reasons set forth by the first court. The following are the chief grounds of its judgment:

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Considering that neither by the allegations of plaintiff's declaration nor by anything established in evidence in this cause doth it appear that the damages alleged by plaintiff to have been suffered by her in consequence of the facts alleged in her declaration are the result of any fault of defendant, or of plaintiff being compelled by defendant or at its instance to give up any part of her property for a purpose of public utility :

Seeing articles 1053 and 407 C. C.

"(1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

407. No one can be compelled to give up his property except for public utility and in consideration of a just indemnity previously paid)."

Considering that under neither of these articles is plaintiff entitled to claim damages or indemnity from defendant by reason of the facts alleged in plaintiff's declaration ;

Considering that the only interference with the full enjoyment by plaintiff of her rights of ownership of the property described in her declaration which resulted from the making and the homologation of the plan in her declaration referred to, was the effect of the disposition of the Act 37 Vict. chap. 51, sec. 171 (re-enacted by sec. 207 of the Act 52 Vict. chap. 79) that "No indemnity or damage shall be claimed or granted at the time of the opening of any of the new streets, public places or squares shown on the said plan * * * for any building or improvement whatsoever that the proprietors or other persons whomsoever may have made or caused to be made, after the confirmation of the said plan, upon any land or property reserved for new streets, public places or squares" ;

Considering that the effect of said disposition was not to deprive proprietors of property indicated on the said plan as reserved for new streets of such property, or to compel them to cede it, but merely to create a servitude for a purpose of public utility upon said property, or to impose a restriction upon the enjoyment of it, in the public interest ;

Seeing articles 406 and 507 C. C.

"(406. Ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulations. 507. The servitudes established for public utility have for their object the foot road or tow-path along the banks of navigable or floatable rivers, the construction or repair of roads or other public works. Whatever con-

cerns this kind of servitude is determined by particular laws or regulations.)"

Considering that under the first of said articles the absolute right of enjoyment belonging to an owner of property is subject to restrictions resulting from prohibitory laws or regulations as regards the use thereof;

Considering that under the second of said articles restrictions upon the right of enjoyment or use of his property by owner, which have for their object the construction of roads, constitute servitude for purposes of public utility, and that whatever concerns them is determined by particular laws or regulations;

Considering that in the absence of express disposition of the particular law creating any such servitude declaring that the owners of properties subjected to it shall be entitled to indemnity by reason of the restriction of their enjoyment resulting therefrom, such properties are bound to submit to such restriction without compensation (7 Laurent, 474 and following; 11 Demolombe 304);

Considering therefore that plaintiff has by law no recourse against defendant for the loss or damage set up by her in her declaration as having resulted from the making and homologation of the plan aforesaid, and that as regards all allegations setting up damages, resulting from said causes, and plaintiff's conclusions for a condemnation against defendant to pay the same, the defendant's demurrer should be maintained;

Considering, as regards the amount claimed as having been paid to plaintiff's architects, because prior to the homologation of said plan she was notified by defendant that the land in question would be required for said street and not to build thereon, and was in consequence prevented from building thereon in conformity with the plans said architects had then made, plaintiff has not proved any such notification, and even had she done so, such notice had not the effect of preventing her building, and if she chose voluntarily to acquiesce therein and abandon her prospect of building on the strip of land which defendant then contemplated or intended including in said plan, she cannot hold defendant responsible for the loss resulting from such voluntary act;

Considering that the demurrer of defendant is well founded and further that plaintiff has failed to make good her demand, as against the plea of general issue filed by defendant, etc.

We entirely concur in the views thus expressed by the learned trial judge. In the first place, this is not a case of expropriation. Such a proceeding was

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merely authorised, but not initiated. Finally, the respondent is not in fault, either when making a plan of the city indicating the continuation of Burnside Street or staking out said street on the premises according to said plan, and at the request of the appellant, but without any *prise de possession*, or not proceeding with the expropriation, or when abandoning said continuation. The city was acting within the limits of its rights as conferred by the legislature, and as the numerous French authorities quoted by the respondent establish, and according also to a recent decision of this court in *Perrault* v. *Gauthier* (1), whosoever acts within the limits of his rights commits no fault, and is not liable in damages.

For these reasons the appeal should be dismissed, and it is dismissed, with costs.

*Appeal dismissed with costs.*

Solicitor for the appellants: *F. E. Gilman.*

Solicitors for the respondent: *Ethier & Archambault.*

(1) 28 Can. S. C. R. 241.