

THE TOWN OF RICHMOND (PLAIN- } APPELLANT;
 TIFF)..... }

1899
 *Oct. 11.
 *Nov. 29.

AND

JOSEPH L. LAFONTAINE AND } RESPONDENTS.
 OTHERS (DEFENDANTS)..... }

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

*Municipal corporation—Waterworks—Rescission of contract—Notice—Mise
 en demeure—Long user—Waiver—Art. 1067 C. C.*

A contract for the construction and maintenance of a system of water-works required them to be completed in a manner satisfactory to the corporation and allowed the contractors thirty days after notice to put the works in satisfactory working order. On the expiration of the time for the completion of the works the corporation served a protest upon the contractors complaining in general terms of the insufficiency and unsatisfactory construction of the works without specifying particular defects, but made use of the works complained of for about nine years when, without further notice, action was brought for the rescission of the contract and forfeiture of the works under conditions in the contract.

Held, that, after the long delay, when the contractors could not be replaced in the original position, the complaint must be deemed to have been waived by acceptance and use of the waterworks and it would, under the circumstances, be inequitable to rescind the contract.

Held further, that a notice specifying the particular defects to be remedied was a condition precedent to action and that the protest in general terms was not a sufficient compliance therewith to place the contractors in default.

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

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APPEAL from the judgment of the Court of Queen's Bench for Lower Canada, appeal side, affirming the judgment of the Court of Review, at Montreal, which reversed the decision of the Superior Court, District of Saint Francis, in favour of the plaintiff.

The action was brought in 1892 for the annulment of a contract made in 1881 between the parties in relation to the construction of a system of waterworks in the Town of Richmond and prayed for the forfeiture of the works in default of their removal within ninety days and for \$5,000 damages.

The circumstances under which the action was taken were as follows: In 1881 a contract was entered into between the plaintiff and the defendants by which the latter undertook to construct a system of waterworks and to furnish the Town of Richmond with a supply of water on certain conditions during a terms of years. This contract did not define any particular method of construction and there were no plans or specifications, but it was provided that the system of waterworks should be constructed within a specified time to the satisfaction of the appellant, and that, on default of the contractors to remedy defects within thirty days after notice, there should be a forfeiture of the works to the corporation or, at the option of the corporation, that the contractors might, on repayment of whatever money they might have received from the corporation, remove the works.

On the expiration of the time limited for the completion of the works in July, 1883, the works being still incomplete, the appellant served a written protest upon the contractors complaining of the imperfect, incomplete and unsatisfactory condition of the works in a general way and without specifying wherein any of the defects might consist but, notwithstanding the

protest, the appellants made use of the works for about nine years before commencing the action. The plaintiff complained in the action that the works had not been constructed in conformity with the contract and had not been completed in a satisfactory manner, that there was not a sufficient supply of good water provided, that the pressure was insufficient and that the contractors had failed to remedy the defects within the thirty days allowed by the contract after the signification of the protest. No special notice was given before the institution of the action.

By the judgment of the trial court the contract was resiliated and the works ordered to be removed. On appeal to the Court of Review the trial court judgment was reversed and the present appeal has been taken from the judgment of the Court of Queen's Bench affirming the judgment of the Court of Review.

H. B. Brown Q.C and *Lawrence*, for the appellant, cited *Brown v. Allan* (1); arts. 1065, 1067 C. C.; *Three Towns Banking Co. v. Maddever* (2).

Panneton Q.C. and *Belcourt Q.C.*, for the respondents, cited *Filiatrault v. Goldie* (3); *Prouty v. Stone* (4); *Bartley v. Breakey* (5); *Waterous v. Morrow* (6); Art. 1067 C. C.; 24 Demolombe, no. 491; 16 Laurent, no. 235.

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—I am of the opinion that this appeal must be dismissed. It would not be just and equitable now to rescind this contract after some fifteen years enjoyment by the appellant of the respondents' works and when the respondents can no longer be put

(1) Ramsay App. Cas. 144; Cass. Dig. (2 ed.) 146.

(2) 27 Ch. D. 523.

(3) Q. R. 2 Q. B. 368.

(4) 18 R. L. 284.

(5) 11 Q. L. R. 1; 19 R. L. 556.

(6) Cass. Dig (2 ed.) 138.

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in their original position. The respondents ought to have been put *en demeure*. It is impossible now after the long delay which has occurred since the protest of the 10th July, 1883, to give any effect to that act. It must by the subsequent acceptance and use of the waterworks by the appellant be deemed to have been waived.

I agree in the judgment of the Chief Justice of the Court of Appeal that the appellant should have given the notice required by the contract.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Lawrence & Morris.*

Solicitors for the respondents: *Panneton & Leblanc.*
