LEO PAGE (PLAINTIFF).....APPELLANT.

AND

WALLACE CAMPBELL AND ANOTHER (DEFENDANTS).....RESPONDENTS.

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*Feb. 10.
*Mar. 11.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

*Action—Sale of land—Building restrictions—Conveyance by vendee—Breach by purchaser—Action by original vendor—Interest—Laches.*

A syndicate owning land conveyed it to P., one of their number, in trust to subdivide and sell. P. made several subdivisions and sold lots in one with a covenant by his grantees to erect only residential buildings. The grantees conveyed the lots to a church corporation who proceeded to build a church thereon . In an action by P., in his personal capacity, for an injunction and demolition of the church building.

*Held*, Brodeur J. dissenting, that P. had no interest to maintain the action having before the trial sold all his holdings in the subdivision containing the church. Brodeur J. held that he owned and continued to own one lot in the area affected by the covenant of P.'s grantees.

*Held* also, per Idington and Anglin JJ., that as the injunction was not applied for until the church was practically completed P. was probably estopped by laches from bringing an action.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario, reversing the judgment on the trial in favour of the appellant.

The only question raised on this appeal is whether or not the appellant could maintain his action under the circumstances set out in the head-note. The trial judge held that he could but was reversed by the Appellate Division.

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*PRESENT:—Sir Louis Davies, C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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THE CHIEF JUSTICE

*F. D. Davis* for the appellant.

*Wigle K. C.* for the respondent.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be dismissed with costs for the reasons stated by Chief Justice Sir William Meredith in delivering the unanimous judgment of the Appellate Division. The grounds on which the learned Chief Justice based his opinion are succinctly and clearly stated in the following paragraph of his reasons for judgment:

> In my opinion the respondent is not entitled to the relief awarded to him. He has no interest in the question raised, and does not represent any one who has an interest. If the owners of the other lots have rights, the dismissal of the action will not affect them. The extraordinary remedy sought ought not to be awarded even if the respondent had a technical right to enforce the covenant, especially in the circumstances to which I have referred, and he has not been damnified by what the appellants have done.

I concur in these conclusions alike of law and fact and have nothing useful to add to them.

IDINGTON J.—The appellant and others were owners of some farm lands, of which, by and through him, as their trustee, they made a subdivision for residential purposes.

All of said subdivisions had been sold before this action except two lots, and at the beginning of the action those two were sold.

Hence at the trial he had no interest in the maintenance of such an action as this, which is brought against the respondents, as trustees and owners of some lots in said sub-division upon which a church was being built, to restrain their building there because doing so is alleged to be in violation of a restrictive covenant given appellant by some of his grantees from whom respondents acquired their title.

The substance of the said covenant is thus set forth in the appellant's factum:—

> The grantees, for themselves, their heirs and assigns, hereby covenant and agree with the grantor, his heirs and assigns, that no buildings shall be erected upon the said lands except for residences and their necessary outhouses, such residences to be erected as single residences or double tenements only, and all such residences, if they be single residences, are to be erected at a cost of not less than $1,500.00, and if they be double tenements are to be erected at a cost of not less than $2,500.00, and no buildings are to be erected on the said lands at a distance of less than twelve feet from the street line of the said Moy Avenue.

The decision in the case of *London County Council* v. *Allen* (1), seems conclusively to restrict the right recognized in *Tulk* v. *Moxhay* (2), and asserted by appellant herein to enforce such a covenant to one who owns part of the land in question.

Surely all that was within the contemplation of him and the parties giving such like covenants was to protect the area of the sub-division of which each so covenanting was buying a part. Appellant pretends herein that he holds under the trust deed from his fellow adventurers other lands not subdivided and hence owns part of the land in question and therefore comes within the terms of the judgment in the said *London County Council Case* (1).

The trust deed to him and under which he acted imposes no such restrictive scheme as part of his trust.

It would seem as if the restrictive covenant scheme was a development of his own and was limited to the area of the sub-division in question, and though presumably his *cestuis que trustent* assented to the use thereof so far as that area was in question, it by no means follows that they would assent to it in regard to other sub-divisions and he certainly, in execution

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of his trust, could not impose it, without their consent, in relation to other subdivisions. That might in one section of the property be advantageous to the sellers but in another quite the reverse.

Again it is urged that he is a trustee for those who bought other lots than those immediately in same subdivision.

I fail to find the trust anywhere expressed. Indeed the appellant seems to have carefully avoided creating such a trust, or having it imposed upon him.

Though the covenant is made with the appellant "his heirs and assigns" there is no evidence of his having assigned it, or of ever having given the purchasers of other lots the benefit thereof in any deed.

I fail to find, therefore, how any of those he pretends to be taking a paternal interest in, could set up any such claim.

Hence in light of the above cited cases appellant has no interest in equity to assert such right as he does and cannot properly pretend he is acting as trustee for such others as suggested in argument.

In conclusion the acquiescence and delay from at least some time in November until the 24th January, whilst the church was being built, should debar him seeking any injunction when the building was almost completed.

The purpose of so building was evident in October and if an injunction was to be the remedy, it should have been applied for promptly.

The covenant does not run with the land and hence the only possible remedy was in equity which does not countenance such a course of conduct.

This appeal should be dismissed with costs.

DUFF J.—The appeal should be dismissed with costs.

ANGLIN J.—That as owners deriving title under the covenantor the defendants are not bound to the plaintiff covenantee if he does not retain any land for the benefit of which the restrictive covenant sued upon was entered into is clearly established by *London County Council* v. *Allen* (1), and *Formby* v. *Barker* (2), decisions of the English Court of Appeal.

The doctrine of *Tulk* v. *Moxhay* (3), does not extend to the case in which the covenantee has no land capable of enjoying as against the land of the covenantor the benefit of the restrictive covenant. * * * Where the covenantee has no land, the derivative owner claiming under the covenantor is bound neither in contract nor by the equitable doctrine which attaches in the case where there is land capable of enjoying the restrictive covenant. Per Buckley L. J.

The plaintiff and certain co-adventurers formed a syndicate to purchase the Davis farm, a property in the city of Windsor, for the purpose of subdividing and disposing of it in building lots. The title was vested in the plaintiff as trustee for sale on behalf of himself and the other members of the syndicate. Three plans of subdivision of parts of the farm were prepared and registered in the following order as Nos. 579, 591, and 648 respectively. It does not appear whether any lot on plan 579 was disposed of before the registration of plan 648. The lots owned by the defendants they acquired from the original purchasers from the plaintiff, and on them they built the church which the plaintiff seeks to have removed. These lots are within subdivision 579 and front on Moy Avenue.

When the action was begun the plaintiff had some interest in a lot in this street and in another in Hall Avenue, both within subdivision 579, but he has since parted with both these lots and neither he nor

(1) [1914] 3 K.B. 642. (2) [1903] 2 Ch. 539.
(3) 2 Ph. 774.

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his co-adventurers have any interest now in any lot fronting either on Moy Avenue or Hall Avenue within subdivision 579. Personally he owns no land whatever within the subdivision.

He and his co-adventurers some time since divided amongst themselves all the unsold lands shewn on plan No. 579 and his trust as to that subdivision thereupon terminated. He still owns lot No. 605 in Moy Avenue within subdivision 648.

The purpose of the covenant sued upon would seem to have been to require the owners of lots 138 and 139, Moy Avenue, on which the offending church is built, to conform to the building scheme of the syndicate whereby Hall Avenue and Moy Avenue within the subdivision covered by plan No. 579 were to remain exclusively residential streets. It would appear to have been the lands abutting on these two streets within this subdivision and no others that were intended to be benefited thereby. While this is not explicitly stated in the record the following extract from the examination-in-chief of the plaintiff makes it tolerably clear that the trial proceeded on that footing.

Q. Which of these subdivisions are the lands in question in? A. 579.

Q. The lots are included in registered subdivision 579? A. Yes.

Q. There were restrictions included in your conveyance of the lots? A. Yes.

Q. Tell us how that happened? A. Certain streets, Moy and Hall, were restricted to residential property only.

His Lordship: Is not that a matter of written record?

Mr. Davis: I wish to show the general scheme. We say it was restricted property.

His Lordship: The deeds put in, I take it, contain the restrictions on which you rely?

Mr. Davis: Yes, my lord.

Q. Were all the lots sold under restrictions? A. Yes. Every individual lot was sold with a restriction of some kind on it.

His Lordship: It might be helpful to know over what land or lands the restrictions now in issue extended.

Witness: I can show it from the plan.

Mr. Davis: Q. What portion of the lands covered by these plans was subject to restrictions?

Mr. Wigle: Confine yourself to 579. That is the only one in question.

Mr. Davis: What portion of 579 was subject to restrictions? A. All of it except the one large block that was sold for a large home—everything except that.

His Lordship: Subject to what restrictions?

Mr. Davis: What restrictions were there? A. Moy and Hall avenues were restricted to residential streets.

The plaintiff therefore appears to have no status to maintain this action.

Moreover he represented to the church authorities, through the defendant Allworth, before the church was erected, that personally he had no objection to its being built—that his opposition was solely because as trustee of the farm he deemed it his duty to protect customers to whom he had sold. In his evidence he says that it is in their interest that this action, although not purporting to be brought by him as a trustee or in any other representative capacity, is maintained. In view of the subsequent change in the defendants' position by the erection of the church, even if he still held land within the benefit of the covenant, it would seem not improbable that suing as an individual he would be confronted by an awkward estoppel.

He never was trustee for his vendees and has no status to assert any rights they may have. His trust for the syndicate, if still subsisting, would not seem to help his position, since the syndicate retains no land for the benefit of which the covenant was obtained. That trust, however, has come to an end.

Finally the fact that this action was brought only when the defendants' building was nearing completion would probably afford a defence on the ground of laches to the claim for the extraordinary remedy of a mandatory injunction for its removal.

The appeal fails and must be dismissed with costs.

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BRODEUR J. (dissenting)—The appellant's action is for an injunction restraining the defendants from erecting on the corner of Moy and Niagara Streets, in the City of Windsor, a church, contrary to the building restrictions which were stipulated in the deed of sale which the appellant made of the lots of land on which this church was to be built.

The appellant was the owner with some others of a farm which is within the boundaries of Windsor and they decided to subdivide it into building lots and the appellant was appointed trustee for his co-owners to make the sale of these lots; and a conveyance to that effect was made to him on the express covenant that building restrictions should be placed upon the lots fronting Moy Street. This covenant was fully carried out by the appellant in all the grants which he made.

In 1913, a sale was made of the lots in question in this case to the Turners, with the usual building restrictions; that sale was duly registered and the defendants purchased these lots from the Turners with notice of those building restrictions. The defendants tried to obtain the consent of several of their neighbours to the construction of the church because they realized that such an edifice would be a violation of those building restrictions. They failed to obtain the consent of a larger number of interested parties who petitioned the appellant to institute proceedings to restrain the trustees from constructing the church. Hence the present action, which was maintained by the trial judge but whose decision was reversed by the first Appellate Division on the ground that the plaintiff has no interest in the question raised since he has no lots on Moy Street.

The evidence shews that the plaintiff, after his co-owners entrusted him with the sale of the farm in question, had four subdivision plans prepared. The first one was made by Owner McKay on the 24th of April, 1911, and was registered under No. 579. It covered the front part of the farm to Erie Street and contained lots which were numbered 1 to 445. It contained on Moy Street the lots 138 and 139 in dispute in this case. At the time of the institution of the action, the plaintiff was personally the owner of lots 228 and 229 which were shewn on this survey plan No. 579, but he had sold them before the trial took place.

On the 22nd of March, 1912, the plaintiff went on with the survey of the farm from Erie Street. The same land surveyor, McKay, prepared a plan which was registered as plan No. 591. The lots described on this plan were known as Nos. 450 to 562. Moy Street was continued on this new plan as a prolongation of the one shewn on plan 579. There was on this latter plan a block of land called "Block A," which was then left without being subdivided; but on the 16th of November, 1912, the subdivision of this Block A was made and registered. The lots covered by this subdivision of Block A were numbered 566 to 591 inclusively.

On the 30th of January, 1913, plaintiff had the work of the subdivision of the farm continued from above Erie Street to Ottawa Street and a plan giving a description of the lots 592 to 707 was prepared by the same surveyor and registered under the number 648. On this survey is shewn the lot 605 which was situate on Moy Avenue and which was purchased by the plaintiff on the 17th of December, 1915, and which was at the time of the institution of the action and of the trial, and which is still, his property.

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Those three surveys covered a great part of the farm which the plaintiff and his associates had purchased in 1911.

When the plaintiff sold to the Turners on the 5th of August, 1913, the lots 138 and 139 situate on Moy Street, the three subdivision plans had been registered and the purchasers covenanted that they would not erect buildings upon these lots 138 and 139, except for residences.

When the plaintiff acquired lot 605, it was on a restrictive agreement of about the same nature as the one stipulated in the Turner contract.

The respondents acquired lots 138 and 139 from the Turners in Sept. 1917 and got notice of the restrictive clauses affecting these lots, though no formal covenant was stipulated in their deed of acquisition. They tried to obtain the consent of their neighbours for the erection of a church on these lots. Some of them acquiesced and waived their rights. Some others, amongst whom is the plaintiff, refused to give the necessary consent. It is possible that if the church authorities had been willing to erect a stone or brick building all the objections would have vanished. It is not very clear in the evidence, but it may be surmised that a large construction of inflammable materials would be of such a dangerous character that these neighbours would not feel disposed to waive their rights under the building scheme which had been devised as to the nature of the constructions on Moy Avenue.

I cannot see how the Appellate Division has made the mistake of stating that the respondent had no interest in any lot on Moy Avenue. There has been perhaps a confusion as to some lots, viz., 228 and 229,

which appear on the plan 579 which the plaintiff possessed at the institution of the action but which he sold before the trial. He is asked the following:

Q. Do you own any lands now in the subdivision where the lots in question are? A. At the present time, no sir.

The witness evidently refers as we may see by the context to the subdivision plan No. 579. But he makes it very clear that he is still the owner of a lot, No. 605, on Moy Avenue.

This lot, No. 605, appears on the subdivision plan No. 648, of the 30th January, 1913, which was the continuation of the two previous plans Nos. 579 and 591, made respectively in 1911 and 1912. These three plans had been registered long before the Turners purchased in 1913, and long, also, before the respondent purchased in 1917.

This Moy Street was running in a straight line from Sandwich Street to Ottawa Street and all the lots sold on this street, including No. 605, were sold with building restrictions.

This is a case in which we should refuse to apply the principles laid down in the cases of *Formby* v. *Barker* (1); *London County Council* v. *Allen* (2); *Milbourn* v. *Lyons* (3), relied upon by the respondent, because in those cases the plaintiff had no interest in any land situate near the one in dispute.

In the present case the appellant is still the owner of a lot situate on Moy Avenue. He is himself under restrictive obligations. He is then entitled to rely on *Tulk* v. *Moxhay* (4), and to ask that the respondents, the subsequent purchasers of the lots 138 and 139 on Moy Avenue, be ordered to demolish the building which they have erected contrary to the covenant contained in their vendor's title.

(1) [1903] 2 Ch. 539.
(2) [1914] 3 K.B. 642.
(3) [1914] 2 Ch. 231.
(4) 2 Ph. 774.

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The respondents contended also that the plaintiff should not succeed because when the church was constructed he stood by and allowed the respondents to complete their building. The work began in December and the plaintiff almost immediately saw the respondents and made his objections to the building being erected. Correspondence was exchanged between the parties until January and, not being able to agree, the present action was instituted on the 16th of January. It cannot be contended in those circumstances, that the respondents may effectively say that the plaintiff stood by.

The judgment *a quo* should be reversed and the decision of the trial judge restored with costs of this court and of the Appellate Division.

MIGNAULT J.—On the ground that the appellant at the time of the trial owned no lots in the subdivision where the church erected by the respondents is situated, and therefore had no interest in the restrictious imposed when the lots were first sold by him, I think the appeal fails and should be dismissed.

He clearly says that he owns no land in this subdivision:

> Q. Do you own any lands now in the subdivision where the lots in question are? A. At the present time, no, sir.
>
> His Lordship: In 579? A. I did when this action was started, but they have since been sold.
>
> Mr. Davis: Have you no lands at all in the subdivision? A. No, sir, not at the present time. They have been sold since this action was started.

The restrictions preventing the erection of buildings not of a residential character had been imposed by the appellant on the predecessors in title of the respondents. The latter purchased the property with know-

ledge of these restrictions but without having, by their deed of purchase, covenanted to observe them. There is therefore no privity of contract between the appellant and the respondents.

On the authority, however, of *Tulk* v. *Moxhay* (1) the appellant contends that he is entitled in equity to enforce this covenant against the respondents who purchased with notice of the building restrictions.

The answer is that having disposed of all land in the subdivision, he is without interest to enforce the covenant, and that therefore the doctrine of *Tulk* v. *Moxhay* (1), does not apply; *London County Council* v. *Allen* (2); *Milbourn v. Lyons* (3).

The appellant when asked what interest he had in the enforcement of the covenant, answered that, as trustee of the farm, it was his duty to protect the customers to whom he sold lots. It seems to me that these customers, if they are aggrieved by the erection of the respondents' church, should assert their own rights. I am clear, however, that the appellant, having no longer any interest in the land to be benefited by the covenant, cannot now enforce the restrictions.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Davis & Healy.*

Solicitors for the respondents: *Rodd, Wigle & McHugh.*

(1) 2 Ph. 774. (2) [1914] 3 K.B. 642.
(3) [1914] 2 Ch. 231.