

1893      JOHN PHILIP DUMOULIN AND }  
 \*Mar. 16, 17.      OTHERS, RECTOR, ETC. (DEFENDANTS) } APPELLANTS;  
 \*May 1.

AND

GEORGE BURFOOT (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Contract—Sale of land—Building restrictions—Description—Street boundaries—Construction of covenant.*

The owners of a block of land in Toronto, bounded on the north by Wellesley street and west by Sumach street, entered into an agreement with B. whereby the latter agreed to purchase a part of said block, which was vacant wild land not divided into lots and containing neither buildings nor streets, though a by-law had been passed for the construction of a street immediately south of it to be called Amelia street. The agreement contained certain restrictions as to buildings to be erected on the property purchased which fronted on the two streets north and west of it respectively and the vendors agreed to make similar stipulations in any sale of land on the south side of Wellesley street produced.

A deed was afterwards executed of said land pursuant to the agreement which contained the following covenant: "And the grantors \* \* covenant with the grantees \* \* that in case they make sale of any lots fronting on Wellesley street or Sumach street on that part of lot 1, in the city of Toronto, situate on the south side of Wellesley street and east of Sumach street now owned by them that they will convey the same subject to the same building agreements or conditions" (as in the agreement).

---

\* PRESENT:—Sir Henry Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

The vendors afterwards sold a portion of the remaining land fronting on Amelia street and one hundred feet east of Sumach street and the purchaser being about to erect thereon a building forbidden by the restrictive covenant in the deed, B. brought an action against his vendors for breach of said covenant, claiming that it extended to the whole block.

1893  
  
 DUMOULIN  
 v.  
 BURFOOT.  
 —

*Held*, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that the covenant included all the property south of Wellesley street; that the land not being divided into lots any part of it was a portion of a lot of land fronting on Wellesley and Sumach streets and so within the purview of the deed; and that the vendors could not by dividing the property as they saw fit narrow the operation and benefit of their own deed.

*Held*, per Gwynne J.—The piece of land in question did not front nor abut on either Wellesley or Sumach streets, but on Amelia street alone and was not, therefore, literally within the covenant of the vendors.

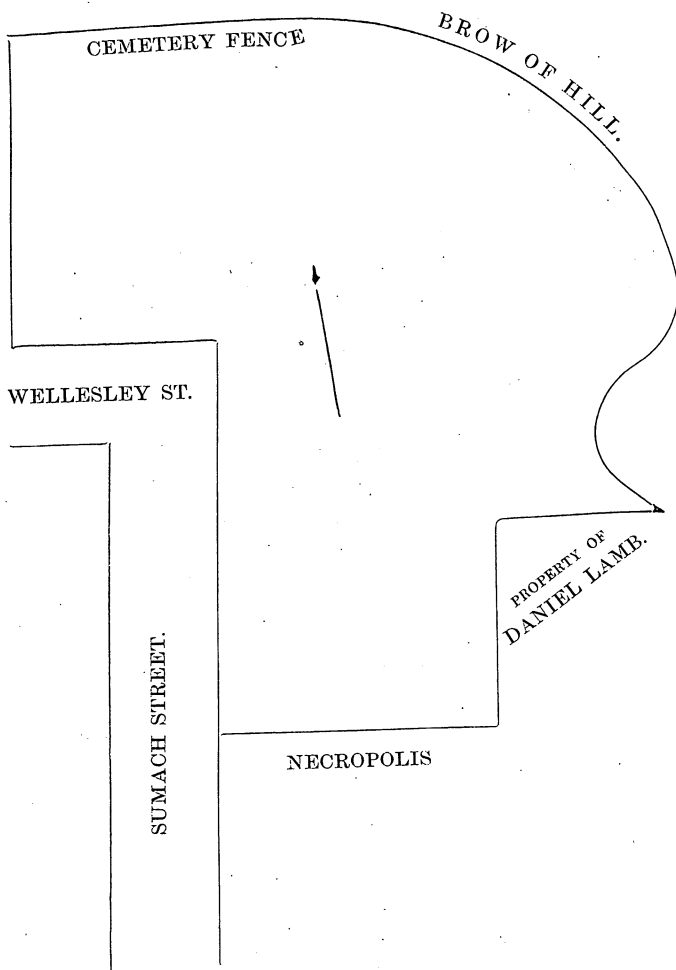
**APPEAL** from a decision of the Court of Appeal for Ontario reversing the judgment of the Divisional Court in favour of the plaintiff.

The following statement of the facts on which the appeal was decided is taken from the judgment delivered by Mr. Justice Sedgewick.

On the 1st of February, 1889, the appellants, the Rector and Church Wardens of St. James Cathedral, Toronto, were the owners of a block of land on the west side of the River Don in the city of Toronto. It was of the following shape:

1893

DUMOULIN  
v.  
BURFOOT.



At this time there were neither buildings nor streets on the land, although at the time it was proposed (and a city by-law had been passed for the purpose) to construct a street along the southern boundary westward from Sumach street, to be called Amelia street. Neither had the property been subdivided into lots, although a

firm of surveyors had been employed to survey and had surveyed and made a plan of it at the instance of the appellants.

1893  
DUMOULIN  
v.  
BURFOOT.

On the date mentioned the appellant corporation entered into an agreement with George Leaver and George Burfoot, whereby the latter agreed to purchase "three hundred feet frontage on the northerly side of Wellesley street produced, commencing at the intersection of the west limit of Sumach street produced with the northerly limit of Wellesley street and of the depth to the edge of the plateau as marked on the plan" above referred to. The agreement contained among other conditions, provision that all buildings to be erected upon the property purchased were to be "detached or semi-detached two story neat and respectable houses, brick front, brick, brick-cased or stone \* \* of, actual cost not less than \$1,200 each house \* \* without out-buildings, the vendor agreeing to make similar stipulations in any sale of land on the south side of Wellesley street produced."

Subsequently a plan of the property was made and registered upon which Wellesley street extended was laid off as well as lots and a street to the north, but there was no division into lots south of Wellesley street.

The Corporation then by a deed dated 23rd April, 1889, conveyed to Leaver & Burfoot the lands referred to in the agreement or schedule substantially containing the conditions as set out in the agreement and the instrument contained this covenant:—

"And the grantors \* \* covenant with the grantees \* \* that in case they make sale of any lots fronting on Wellesley street or Sumach street on that part of lot 1 in the city of Toronto, situate on the south side of Wellesley street and east of Sumach street now owned by them, that they will convey the same

1893 subject to the building agreements or conditions as are  
DUMOULIN set out in the schedule to these presents.”

v.  
BURFOOT. On the 22nd of November following, Leaver conveyed his interest in the property to Burfoot.

On the 1st of May, 1890, the appellant corporation conveyed to one Wallace Finch a portion of the property immediately south of Wellesley street described as follows: “Commencing at a point on the south limit of Wellesley street where the said south limit of Wellesley street is intersected by the east limit of Sumach street, thence easterly along the south side of Wellesley street 240 feet, thence southerly parallel to Sumach street aforesaid 100 feet, thence westerly parallel to Wellesley street aforesaid 240 feet to the easterly limit of Sumach street aforesaid, thence northerly along the easterly limit of Sumach street 100 feet to the place of beginning.”

This deed contained the restrictive covenant as to buildings stipulated for in the deed to Leaver & Burfoot. But the property to the south between the lands just described and Amelia street still remained. But on the day before the conveyance last referred to, the corporation entered into an agreement with one James A. McIlwain for the purchase of this property. The land although rectangular in shape (173 feet x 198 feet) was described as two lots, as follows:—

“All and singular those certain parcels or tract of land and premises being composed of part of the St. James Cathedral Cemetery property in the city of Toronto, and being part of Park lot number one, Toronto, having a frontage of ninety-seven feet nine inches, more or less, on the northerly side of Amelia street, commencing one hundred feet easterly from the intersection of the northerly limit of Amelia street with the easterly limit of Sumach street, and extending easterly along the northerly limit of Amelia street to

the westerly limit of the property owned by the Lamb estate, and being of the depth of one hundred and seventy-three feet, more or less, to the rear of the lots of one hundred feet deep facing on Wellesley street. Also, all that parcel of land situated on the easterly side of Sumach street, having a frontage of one hundred and seventy-three feet, more or less, and extending northerly from the intersection of the easterly limit of Sumach street with the northerly limit of Amelia street, to the rear of the lots of one hundred feet deep facing on Wellesley street, and being the depth of one hundred feet ”

1893  
 DUMOULIN  
 v.  
 BURFOOT.  
 —

The property might with equal accuracy have been more shortly described as “that portion of Park lot No. 1, in the city of Toronto, owned by the Corporation fronting on and east of Sumach street and on the south side of Wellesley street, commencing at a point on Sumach street 100 feet south of the corner of Wellesley and Sumach streets, thence southerly along Sumach street to Amelia street, 173 feet to Amelia street, thence easterly along Amelia street 198 feet, thence northerly parallel to Sumach street 173 feet, thence westerly 198 feet parallel to Amelia street to the place of beginning.”

This agreement did not contain the restrictive building conditions, stipulated for in the original deed from the Corporation to Leaver & Burfoot.

Subsequently the Corporation with the concurrence of Mr. McIlwain conveyed to divers parties the land north of Amelia street 100 feet east of Sumach street without inserting in the conveyances these restrictive conditions.

The only question in controversy is whether the restrictive covenants described in the agreement between the Corporation and Leaver & Burfoot, as well as in the deed between the same parties, apply to that

1893  
DUMOULIN  
 v.  
BURFOOT.

portion of the land the Corporation agreed to sell to McIlwain, which is 100 feet east of Sumach street.

At the trial Mr. Justice Street decided in favour of the plaintiffs holding that the defendant Corporation had broken their covenant in omitting to insert the restrictive stipulations in the agreements and conveyances of the lots north of Amelia street above referred to.

Upon an appeal to the Divisional Court Mr. Justice Ferguson and Mr. Justice Robertson reversed the judgment of the trial judge and dismissed the action. Upon appeal to the Court of Appeal the judgment of the trial judge was by an unanimous judgment restored.

*Arnoldi* Q.C. and *Bristol* for the appellants contended that the covenant did not apply to this land, and cited, *Bowes v. Law* (1); *Hall v. Ewin* (2).

As to notice they referred to *Clayton v. Leech* (3); *Muttlebury v. King* (4); and as to damages, *Beatty v. Oille* (5).

*Nesbitt* and *Percy Gall* for the respondents.

THE CHIEF JUSTICE, and FOURNIER and TASCHEREAU JJ. concurred in the judgment delivered by Mr. Justice SEDGEWICK.

GWYNNE, J.—In my opinion this appeal should be allowed upon the single ground that the piece of land in question which is known and designated as lot B, fronting on Amelia street, in the city of Toronto, neither fronts nor abuts in any way on either Wellesley or Sumach streets but on Amelia street alone, and is not therefore, literally within the covenant of the appellant contained in their deed of 23rd April, 1889,

(1) L. R. 9 Eq. 636.

(3) 41 Ch. D. 103.

(2) 37 Ch. D. 74.

(4) 44 U. C. Q. B. 355.

(5) 12 Can. S. C. R. 706.

upon which covenant the action is based, and I can see no reason for giving to that covenant any other than its plain literal construction.

1893  
DUMOULIN  
 v.  
BURFOOT.

SEDGEWICK J.—I am of opinion that the judgment of the trial judge is the correct one.

In my view the stipulation in regard to the restrictive covenants whether in the deed itself which is the foundation of this suit, or in the agreement which preceded, it had reference to all the church property south of Wellesley street produced. In the agreement there is clearly no ground for the appellants' contention. There, the vendors agreed to make the restrictive stipulation in any sale of land on the south side of this street. The land in question comes without doubt within this description. But the question is: Is the deed from the appellants any narrower? Now it does not appear from the evidence that the parties contemplated any change in the terms or conditions of purchase in this regard between the dates of the execution of the agreement and the execution of the deed. It must, I suppose, be admitted that at law the deed must govern. But, admitting that, does not the locus come within the description in the deed "lots fronting on Wellesley street or Sumach street \* \* situate on the south side of Wellesley street and east of Sumach street"? I think it does. When the deed was executed there was no division into lots (so called) south of Wellesley street. It was all, as I understand, vacant wild land. Subsequently several methods of subdivision were contemplated, and the evidence does not even now indicate exactly the precise areas of the different holdings, but in my view the land in question, until the sale to Finch, was a portion of a lot of land fronting on Wellesley street and Sumach street, situate on the south side of Wellesley street and east of Sumach

Sedgewick J.



1893 street and therefore within the purview of the deed.  
DUMOULIN And even after the sale to Finch of the street immedi-  
v. ately to the south of Wellesley (although that makes  
BURFOOT. no difference) it was still within the description as part  
Sedgewick J. of a lot "fronting on Sumach street on the south side  
of Wellesley street and east of Sumach street" and  
therefore still within the purview of the deed.

I cannot appreciate the force of the other contentions. Some special meaning is given to the word "lot" that I do not understand. Has a "lot" any specific area or any definite shape recognized by law? When the defendant Corporation gave this deed to the plaintiff and imposed as they did, upon some area south of Wellesley street, the burden of the restrictive stipulation, upon what ground can it be argued that excepted from that burden was this particular parcel 198 feet by 173 feet in extent? Why that parcel and not another? Why that shape and not another? Was it within the contemplation of the parties that the vendors might without reference to the purchasers, and in spite of them, cut up and divide the property according to their pleasure or caprice so as to widen or narrow as they might think fit the operation and benefit of their own deed?

When the sale to Finch was made there remained a "lot" 198 by 173 feet "fronting on Sumach street," "on that part of lot one, in the city of Toronto, situate on the south side of Wellesley street and east of Sumach street," owned by the appellants. By what authority, supported by what argument, can it be contended that they can cut off a block of 98 feet from the rear of this lot and say "the front part of this lot is subject to the burden of our covenant, but this is not"? The defendants admittedly violated their agreement, when they agreed to sell to McIlwain the property just referred to. There was no restrictive stipu-

lation in this agreement, and I am inclined to think it was left out inadvertently, and that the contention that the locus was not within the description set out in the deed to the plaintiff was an after thought.

There is no sufficient evidence to justify the rectification of the deed whether as claimed by the respondent or the appellants. In the view I take the deed sufficiently expresses the true agreement, and the appellants have failed to show any case warranting rectification in their favour.

Our attention has been called to clause 5 of the formal judgment of Mr. Justice Street. That clause should, I think, be varied by directing a reference to ascertain the damages occasioned the plaintiff, not by the erection of the buildings complained of but by the breach on the part of the appellants of the covenant in their deed respecting the restrictive building stipulation.

In my opinion Mr. Justice Street's judgment should be varied as stated and that subject to such variation the appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for appellants: *Howland, Arnoldi & Bristol.*

Solicitors for respondent: *Beatty, Blackstock, Nesbitt & Chadwick.*

1893  
DUMOULIN  
v.  
BURFOOT.  
Sedgewick J.