SAMUEL S. CARROLL AND WILLIAM E. CARROLL (PLAINTIFFS).. } APPELLANTS;

1896
*Mar. 5, 6.
*May 18.

AND

THE PROVINCIAL NATURAL GAS AND FUEL COMPANY OF ONTARIO (DEFENDANTS) .... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Subsequent deed—Inconsistent provisions.

C., by agreement of April 6th, 1891, agreed to sell to the Erie County Gas Co. all his gas grants, leases and franchises, the company agreeing, among other things, to "reserve gas enough to supply the plant now operated or to be operated by them on said property." On April 20th a deed was executed and delivered to the company transferring all the leases and property specified in said agreement, but containing no reservation in favour of C. such as was contained therein. The Erie Company, in 1894, assigned the property transferred by said deed to the Provincial Natural Gas and Fuel Co. who immediately cut off from the works of C. the supply of gas and an action was brought by C. to prevent such interference.

Held, affirming the decision of the Court of Appeal, that as the contract between the parties was embodied in the deed subsequently executed the rights of the parties were to be determined by the latter instrument, and as it contained no reservation in favour of C. his action could not be maintained.

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

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APPEAL from a decision of the Court of Appeal for Ontario affirming, by a divided court, the judgment of the Divisional Court in favour of the defendant company.

The material facts will sufficiently appear from the above head-note and are fully set out in the judgment of the court on this appeal.

Aylesworth Q.C. and *German* for the appellants. There is no superior instrument in this case. Both the earlier contract and the deed are in force and binding on the parties. *Palmer* v. *Johnson* (1). And see *Morris* v. *Whitcher* (2); *Smith* v. *Holbrook* (3); *Disbrow* v. *Harris* (4).

McCarthy Q.C. and *Cowper* for the respondents referred to Rogers on Mines (5); *Besley* v. *Besley* (6); *Allen* v. *Richardson* (7).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—On and prior to the 6th of April, 1891, the appellants were the owners as the lessees or licensees under leases or licenses from several persons of the right to mine for and take natural gas over a large tract of country in the county of Welland. By an agreement entered into between the appellants of the one part and the Erie County Natural Gas and Fuel Co., dated the 6th of April, 1891, the appellants contracted to sell to that company all gas leases held by them in the townships of Humberstone and Bertie, in the county of Welland; and also all gas grants, leases and franchises issued to and then owned by them in the Dominion of Canada, and also the gas wells now on such leases, for the sum of $205,000 of the paid up

(1) 13 Q. B. D. 351.
(2) 20 N. Y. 41.
(3) 82 N. Y. 562.
(4) 122 N. Y. 362.
(5) P. 820.
(6) 9 Ch. D. 103.
(7) 13 Ch. D. 524.

capital stock of the company when the same should be increased as thereinafter provided for at its par value. And the appellants agreed that on the leases they would put down at their own expense five natural gas wells properly located. On the part of the purchasers it was by the same instrument agreed that they would at once take the necessary legal steps to cause its capital stock to be increased to the sum of $500,000 and that as soon as the stock was so increased it would issue to the appellants the sum of $205,000 of its paid up capital stock, in payment for the said gas leases, franchises, gas wells, and other property before mentioned. It was also further agreed that in case the company should not issue and deliver to the appellants the $205,000 of stock on or before the 20th of April, 1891, the appellants might declare the contract void, and it was declared that time was of the essence of the contract. After some other stipulations, which need not be particularly referred to, the agreement contained the following provision:

It is understood that the parties of the first part reserve gas enough to supply the plant now operated or to be operated by them on said property.

On or before the 20th of April, 1891, the day fixed for completion by the contract, the purchasers procured the capital of the company to be increased as they had agreed, and before or at the time of the execution of the deed poll hereafter mentioned paid up stock to the amount of $205,000 was issued to the appellants.

By a deed poll executed and delivered to the company on the 20th of April, 1891, the appellants transferred to the company all the leases and property specified in the contract, specifying a number of leases and declaring that the deed should pass not only those specified but all others held by them. The deed contained the following covenant:

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And we agree that on the said leases we will put down at our own expense five natural gas wells properly located, said five wells to include the four wells already down so that when said wells are put down on said leases there shall be but five in all.

No reservation in favour of the appellants of any right to take gas for their own use such as they had stipulated for in the agreement of the 6th of April, 1891, was contained in the deed.

On the 18th of July, 1894, the Erie County Natural Gas and Fuel Company assigned to the respondents all the before mentioned leases and their rights under them, and immediately the respondents cut off from the plaintiffs' works the supply of gas which they had been drawing from them, though not without protests and interruptions at intervals.

The appellants thereupon brought this action to restrain the respondents from interfering with their supply of gas. The respondents by their pleading in defence deny the appellants' right to take any gas from any of the wells or under any of the leases assigned, and make a counter-claim for the value of the gas used by the appellants.

Upon the pleadings the only question raised which it is material to consider on this appeal is the right of the appellants to have the benefit of the reservation of the privilege of taking gas for their own use contained in the agreement of the 6th of April, 1891, notwithstanding its omission from the deed of the 20th of April, 1891. No case of error or mistake in the latter deed is made nor is any relief by way of rectification of the latter instrument sought

The foregoing statement is taken from the judgment of Mr. Justice Street by whom the action was tried without a jury, and by whom the action was dismissed, a reference being directed to assess the respondents' damages under the counter-claim.

From this judgment the appellants appealed to the Court of Appeal and the learned judges of that court being equally divided in opinion the appeal was dismissed.

The Chief Justice and Mr. Justice Osler were of opinion that the judgment of Street J. was correct and should be affirmed whilst Mr. Justice Burton and Mr. Justice Maclennan were of the contrary opinion.

Whatever reasons we may have for suspecting that there was some omission or mistake in the deed by which the contract of the 6th of April was carried into execution they can be of no weight and can have no influence in deciding this appeal, the sole question in which is whether the clause in the agreement reserving to the appellants the right to take gas for their own use continued in force after the deed or was superseded by it.

By the agreement of the 6th of April, 1891, the appellants contracted to sell and convey to the Erie Company all the rights to take gas which they had under the leases, with the exception of such gas as they reserved to take from the wells and lands covered by the assigned leases for their own use. By the deed poll they assigned the very same subjects without any such reservations. Surely it cannot be said that the continuance of this reserved right after the execution of the deed was consistent with the absolute terms of that instrument which conferred on the Erie Company the right without any reserve whatever. In the case of an executory agreement to sell land reserving an easement in favour of the vendor, carried into execution by a purchase deed in which there is no such reservation, could there be a doubt that the deed would be conclusive and that the reservation would be superseded by it? Again, in the case of an agreement to sell land reserving the timber to the vendor

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and then a conveyance in execution of the agreement containing no reservation, could it be doubted that the grantee would be entitled to the timber? To say that in either of such cases the whole property as described in the deed completing the purchase did not pass, would be equivalent to saying that if by an executory contract it is agreed to sell a lot of land of one hundred acres, reserving one acre to the vendor, a conveyance purporting to convey the whole hundred acres would leave the reservation of the contract intact. That the parties in the present case were dealing, not with the property in the land itself, but with what may be called a dismemberment of the right of property can surely make no difference. To recognize the retention by the vendors of any such right would be to permit them to derogate from their own grant, for upon its face the deed is inconsistent and incompatible with the reservation claimed.

It was quite competent for the parties in the interval between the agreement and the deed to have changed their contract, by the abandonment by the appellants of the right reserved to take gas, and the terms of the deed require us to presume that there was such an abandonment.

I should have thought the judgment of Mr. Justice Street, founded as it is upon one of those principles of the law of property which it is of the utmost importance to conserve inasmuch as the security of titles to land depend on such conservation, required no authority to support it. I entirely agree, however, with Mr. Justice Osler that the case is covered by authorities some of which he quotes.

In *Clifton* v. *The Jackson Iron Co.* (1) the case which I have above suggested was actually presented for decision; the defendants had by a written agreement

(1) 74 Mich. 183.

contracted to sell land to the plaintiff reserving the timber, and subsequently a conveyance was executed containing no such reservation, the defendant supporting his contention upon arguments precisely similar to those urged by the appellants here, that the reservation of the agreement still continued in force and entitled them to cut down the deed accordingly, but the Supreme Court of Michigan held the contrary, Campbell J. in delivering the judgment of the court saying:

Had no deed been made it is agreed that the reservation would have prevailed. But a previous contract cannot contradict or control the operation of a deed. It was competent for defendant to relinquish any contract reservation, and a deed which grants and warrants without any reservation has that effect. We do not hold that if the deed were so made by some mistake within the cognizance of equity the mistake might not be corrected.

In *Teebay* v. *Manchester &c. Railway Company* (1), there was a preliminary contract by which the plaintiff agreed to convey land to the defendants reserving by way of easement a right of access over the land which formed the subject of the sale. Subsequently a conveyance was executed which conveyed the property contracted for absolutely and without any reservation. The plaintiff brought an action claiming the benefit of the exception in the contract, but Vice-Chancellor Bacon unhesitatingly dismissed it, treating the conveyance as nconsistent with the agreement and holding that the vendor was bound by the deed which had been executed for the purpose of carrying out the sale. As it was put in argument by the defendants' counsel in that case the true rule governing all such questions is that

where an agreement for purchase has developed into a conveyance, no previous contract or previous arrangement between the parties can be looked to in order to put any construction upon the conveyance, which is absolute and alone must regulate the rights of the parties.

(1) 24 Ch. D. 572.

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The Vice-Chancellor also distinguished the case from one asking relief on the ground of error in the deed. He says:

In this case if there had been a bill filed alleging that the deed of 1871 had been executed by mistake or inadvertence, or without properly attending to the rights of the parties then existing I might have listened to such a case. In such a case it is not necessary for me to say there might be a question as to the specific performance of the agreement or as to the rectification of the deed of conveyance, but no such case is presented to me.

In *Leggott* v. *Barrett* (1) the question arose how far the construction of a deed executed to carry out a prior executory contract might be influenced by the agreement, and James L.J. says:

I cannot help saying that I think it is very important, according to my view of the law of contracts both at common law and in equity, that if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself.

Brett L.J. in the same case says:

I entirely agree with my Lord that where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing and in the second case entirely by the deed, and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document and by the governing part of that document.

Cotton L.J. also says:

If there is any difference between the agreement and the deed, the deed is that which the parties have thought it right to adopt as effectu-

(1) 15 Ch. D. 306.

ally protecting the rights of the purchaser under the previous contract of purchase and sale, and if there were any difference, as the Lord Justice has said, the deed must decide the rights of the parties (1).

Then a class of cases has been relied upon in support of the appeal which are plainly distinguishable from such cases as the present and those I have just quoted. In these cases I now proceed to refer to it has been held in England after some contrariety of opinion that a particular provision in a contract for the sale of land outlives the execution of the conveyance and is not superseded by it—the provision in question being that one ordinarily found in English precedents of conditions of sale by auction and preliminary contracts for the sale of land providing that in case there should eventually be found to be any deficiency in the quantity of land as described in the particulars of sale, the vendee shall be entitled to compensation in respect of such deficiency of acreage or contents. In the cases of *Bos* v. *Helsham* (2) and *Palmer* v. *Johnson* (3) the question was whether a conveyance not embodying a provision of this kind contained in the executory contract concluded the vendee's right to have the benefit of it, and it was held in both cases that the conveyance was not conclusive and that the purchaser was entitled to compensation. These decisions however proceeded upon a principle which is in no way inconsistent with the cases of *Leggott* v. *Barrett* (4) and *Teebay* v. *The Manchester &c. Railway Co.* (5), and the Michigan case before cited. It was held that the stipulation for compensation in the preliminary agreement related to something which it was not intended should be carried out by the conveyance, but to a matter altogether irrelevant and collateral to it. Thus we find

(1) See *Wheeldon* v. *Burrows* 12 Ch. D. 31.
(2) L. R. 2 Ex. 72.
(3) 13 Q. B. D. 351.
(4) 15 Ch. D. 306.
(5) 24 Ch. D .572.

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that the Master of the Rolls in *Palmer* v. *Johnson* (1) says:

> But *Bos* v. *Helsham* (2) has decided that this particular contract for compensation was one which was not to be carried out by the deed of conveyance and therefore it did not come within that principle of law and was not merged in the deed.

Lord Justice Bowen in the same case says:

> Suppose the parties should make a parol contract with the intention that it should afterwards be reduced into writing, and that that which is reduced into writing shall be the only contract, then of course one cannot go beyond it; but if they intend, as they might, that there should be something outside such contract they might agree that that should exist notwithstanding it was not in the contract which was put into writing. In the same way when one is dealing with a deed by which the property has been conveyed, one must see if it covers the whole ground of the preliminary contract.

Lord Justice Fry says:

> In *Leggott* v. *Barrett* (3), Lord Justice James and the present Master of the Rolls laid down what is indubitably the law that when a preliminary contract is afterwards reduced into a deed and there is any difference between them, the mere written contract is entirely governed by the deed, but that has no application here for this contract for compensation was never reduced into a deed by the deed of conveyance. There was no merger for the deed in this case was intended to cover only a portion of the ground covered by the contract of purchase.

It therefore appears very clearly that nothing decided in the case of *Palmer* v. *Johnson* (1) was intended in any way to affect the law as laid down in the preceding case of *Leggott* v. *Barrett* (3), and that as laid down in that case the law is that if you find any inconsistency between the deed and the contract which preceded it the deed is to be taken as conclusive.

That there is such inconsistency between the two instruments here is manifest when we find the first providing for the conveyance of the subject-matter of the purchase diminished by a reservation in favour of the vendors, whilst, by the deed itself, no such reservation is made.

(1) 13 Q. B. D. 351 (2) L. R. 2 Ex. 72.
(3) 15 Ch. D. 306.

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Therefore were we in the face of the deed to give effect to the claim of the appellants to withhold any part of that which it professes to convey we should be simply violating that fundamental rule of the law of property which forbids a grantor from derogating from his own grant.

There is no hardship in this construction for either the reservation was omitted from the deed by error and mistake or it was intentionally so omitted. If there was a mistake a plain simple remedy was open to the appellants, namely, an action in the nature of a bill in equity for rectification, but this remedy they have not thought fit to resort to. On the other hand it was quite competent to the parties to alter their contract in the time which intervened between the contract and the conveyance, and were we to concede the relief prayed by the appellants we should be assuming not only without evidence but against evidence that they had not done so, a very dangerous and unwarranted course to adopt.

I am of opinion that the judgment impeached is perfectly correct and should be upheld.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *German & Crow.*

Solicitors for the respondents: *Harcourt & Cowper.*