1965
*Dec. 2, 3
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Jan. 25

BORIS T. PARKINSON and RUPERT A. PARKINSON (*Defendants*) ..... APPELLANTS;

AND

CHARLES R. REID (*Plaintiff*) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Easements—Grant of right of way over stairway—Covenant by servient owners to maintain and repair—Building including stairway taken down by subsequent owners following fire—Action for injunction to compel restoration of stairway and for damages dismissed.

The defendants were the owners of a lot which adjoined a lot owned by the plaintiff. In 1926 the predecessors in title of the defendants entered into an agreement under seal with the predecessor in title of the plaintiff with respect to a stairway that the former were constructing on their premises. The stairway was to lead to the second floor of their building and it was agreed that it should also lead to the second floor of the building on the adjacent lot. The parties of the first part, the defendants' predecessors in title, granted to the party of the second

*PRESENT: Cartwright, Martland, Judson, Ritchie and Spence JJ.

part, the plaintiff's predecessor in title, "the free and uninterrupted use and right of way to use the said stairway... in common with the said parties of the first part at all times without any let, molestation or hindrance from the said parties of the first part, their heirs, executors, administrators and assigns". The parties of the first part also entered into a specific covenant to repair and to reconstruct in case of partial or total destruction of the stairway. On March 18, 1961, the defendants' building was badly damaged by fire, and, subsequently, the building including the stairway was taken down, for which the defendants accepted responsibility. In an action for an injunction to compel the restoration of the stairway and for damages, judgment was rendered in favour of the plaintiff. On appeal, the trial judgment was affirmed by the Court of Appeal, subject to a variation as to the amount of damages. Pursuant to leave granted by this Court, the defendants appealed from the judgment of the Court of Appeal.

Held (Spence J. dissenting): The appeal should be allowed.

Per Cartwright, Martland, Judson and Ritchie JJ.: As held by the Court of Appeal, there was no privity of contract between the plaintiff and the defendants, there was no privity of estate between them, and the covenant to repair and reconstruct the stairway did not run with the land.

The principle referred to by the Court below in dismissing the appeal, *i.e.*, "the covenant to repair, which extends to the support of the thing demised, is *quodammodo* appurtenant to it, and goes with it", did not assist the plaintiff; the cases from which it is induced deal with leases or life tenancies where there is privity of estate. An obligation on the owner of the servient tenement to perform work on it would be inconsistent with the nature of an easement which as regards the servient owner is always negative, the obligation on him being either to suffer or not to do something.

Neither *Pomfret v. Ricroft* (1669), 1 Wms. Saund. 321, nor *Rider v. Smith* (1790), 3 T. R. 766 (which cases are usually cited as authority for the proposition that the owner of the dominant tenement may, under the doctrine of prescription, claim to have the way repaired by the servient owner) established that a covenant contained in a grant of a right of way that the grantor will keep the way in repair was enforceable against a successor in ownership of the servient tenement. In the case at bar, the parties of the first part to the agreement were bound by their express covenant to keep the stairway in repair but the burden of that covenant did not run with the land so as to bind subsequent owners.

Assuming that so long as the defendants made use of the westerly wall on the plaintiff's lot as a party-wall, as was provided for in earlier agreements, they were bound to keep the stairway in repair, they ceased to be under any such obligation when they no longer made use of that wall. *Halsall v. Brizell*, [1957] Ch. 169, referred to.

Per Spence J., *dissenting*: The stairway was passable after the fire and the plaintiff could have continued to enjoy his right of way. It was, however, necessary to the defendants for the proper enjoyment of their property that the burned-out building be torn down; this tearing down entailed the destruction of the stairway and, therefore, the effective denial to the plaintiff of his right of way. The grant of the right of way and the covenant not to interfere with the right of way which such grant implied ran with the land and the plaintiff was entitled to

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the benefit, and the burden fell upon the defendants as successors in title to the original grantor. The defendants, by their action, terminated the right of way and the plaintiff was entitled to damages for that breach of his right of way.

APPEAL from a judgment of the Court of Appeal for Ontario[1], affirming, subject to a variation as to the amount of damages, a judgment of Grant Co.Ct.J. Appeal allowed. SPENCE J. dissenting.

William Gray Dingwall, for the defendants, appellants.

W. B. Williston, Q.C., and *John Sopinka,* for the plaintiff, respondent.

The judgment of Cartwright, Martland, Judson and Ritchie JJ. was delivered by

CARTWRIGHT J.:—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for Ontario[1] affirming, subject to a variation as to the amount of damages, a judgment of His Honour Judge Grant pronounced in the County Court of the County of Dufferin. That judgment as varied by the Court of Appeal reads, so far as relevant, as follows:

1. THIS COURT DOTH ORDER AND ADJUDGE that the Defendants do forthwith restore the stairway referred to in the pleadings in such manner that the same can be used in the manner described in the agreement registered in the Registry Office for the Registry Division of the County of Dufferin on the seventeenth day of March, 1926, as number 12360 for the Town of Orangeville; AND DOTH AWARD the Plaintiff a mandatory injunction for the restoration of such stairway as aforesaid.

2. AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Plaintiff do recover against the said Defendants the sum of Seven Hundred and Ninety-five dollars ($795.00) for special damages.

The appellants are the owners of lot 28 on the north side of Broadway Street in the Town of Orangeville according to plan number 47. The respondent is the owner of lot 29 on the same plan. These are adjoining lots, 28 being to the west of 29.

On January 8, 1926, Alexander B. Holmes and Frank J. Crowe, who were then the owners of lot 28 entered into an agreement under seal with John E. Sanderson who was then the owner of lot 29. Holmes and Crowe were the parties of the first part and Sanderson was the party of the second part. This agreement was registered on March 17, 1926, as number 12360; it recites the ownership of lots 28 and 29 and continues:

[1] [1965] 1 O.R. 117, 47 D.L.R. (2d) 28.

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AND WHEREAS the parties of the First Part are constructing a stairway to the second story of the building now on their said lands, the said stairway leading up to the second story from the north side of Broadway Street in the said Town of Orangeville immediately and adjacent to the westerly wall belonging to the said party of the Second Part and the said party of the Second Part, his respective heirs, executors, administrators and assigns are to have rights in common with the said parties of the First Part, their respective heirs, executors, administrators and assigns in the use of the said stairway, the said stairway shall also lead up to the second story of the building erected on the lands owned by the said party of the Second Part and along the westerly surface of the westerly wall of the said building now erected on the said lands owned by the said party of the Second Part.

NOW THEREFORE THIS INDENTURE WITNESSETH that in consideration of the premises and the sum of One Hundred and Seventy-five Dollars now paid by the said party of the Second Part to the said parties of the First Part (the receipt whereof is hereby acknowledged) they the said parties of the First Part do hereby grant unto the said party of the Second Part, his respective heirs, executors, administrators and assigns on the said lands of the parties hereto of the First Part the free and uninterrupted use and right of way to use the said stairway herein described in common with the said parties of the First Part at all times without any let, molestation or hindrance from the said parties of the First Part, their heirs, executors, administrators and assigns.

The parties of the First Part covenant and agree with the party of the Second Part as follows:

The said stairway shall be constructed by the parties of the First Part and ready for use on or before the first day of March, A.D. 1926 and the said parties of the First Part agree with the said party of the Second Part to construct the said stairway in a good workmanlike manner using material which shall be proper, fit and adapted for the traffic required up and down the said stairway by either of the parties hereto. The said stairway shall be three (3) feet six (6) inches wide and completely built for the traffic required for same from the sidewalk up and leading into the door of the second story of the building erected on the said lands of the said party of the Second Part, and there shall be a suitable landing at the head of the said stairway for entrance into the second story of the said building erected on the said lands of the said party of the Second Part.

The said parties of the First Part covenant and agree with the said party of the Second Part that they shall keep the said stairway in good repair and re-construct the same in the event of partial or total destruction thereof so as it can be used safely for traffic up and down the said stairway by the said party of the Second Part.

AND it is agreed that the covenants herein contained shall run with the lands, but no covenant herein contained shall be personally binding on any person except in respect of breaches during his or their seisin or title to the said lands.

It is common ground that the stairway was constructed in accordance with the agreement and that the $175 was paid.

By deed dated December 29, 1936, Sanderson conveyed lot 29 to the respondent in fee simple,

together with all rights of the grantor as set out in Instrument 12360 for the said Town of Orangeville and covering a portion of lot 28 plan 47 aforesaid.

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By deed dated April 1, 1946, Alexander B. Holmes and Margaret Elizabeth Crowe, the devisee of Frank J. Crowe, conveyed lot 28 to Telford Sinclair Parkinson in fee simple,

> together with all the rights and privileges and subject to the obligations contained in the agreements registered as numbers 5294, 5330, 6134, 6518 and 12360 respectively.

Telford Sinclair Parkinson died on October 9, 1957, and lot 28 devolved upon the appellants under the terms of his will.

On March 18, 1961, the building on lot 28 was badly damaged by fire. Mr. Kyles, an architect, testified that he recommended that the building be taken down. His evidence reads in part:

> Q. In your opinion, would it have been safe to leave the stairway as it existed after the fire?
>
> A. Well, you could not leave the stairway or the building. We recommended that the entire building be taken down. You could re-erect it with new supports. You couldn't leave the stairway. You could take it down and re-erect it with new supports, but you couldn't leave it. You couldn't remove the rest of the building and leave it there.

This evidence was not weakened on cross-examination and was not contradicted. The building including the stairway was taken down and counsel for the appellants stated at the opening of his argument that the appellants accept the responsibility for doing this.

It is clear, however, that the cause of the stairway being no longer available for the use of the respondent was the destruction by fire of the appellants' building of which the stairway formed part.

The statement of claim sets out the ownership of lots 28 and 29, the chain of title, the agreement number 12360, the removal of the stairway in March 1961, requests by the plaintiff that the defendants replace the stairway, their neglect and refusal to do so and concludes with a prayer for a mandatory injunction and damages.

The statement of defence says that the building of which the stairway was a part was destroyed by fire and continues:

> The defendants further say, as the fact is, that there is no privity of contract between the plaintiff and the defendants, and that the defendants are under no obligation in law to replace the said stairway which was destroyed by fire.

There is no dispute as to the relevant facts. The question to be decided is one of law.

The reasons for judgment of the Court of Appeal were delivered by Kelly J.A. After reciting the facts he held, (i) that there was no privity of contract between the plaintiff and the defendants, (ii) that there was no privity of estate between them and, (iii) that the covenant to repair and reconstruct the stairway did not run with the land. I agree with the views of the learned Justice of Appeal on these three points. They do not require elaboration. As to the third point the law is accurately and succinctly stated in Gale on Easements, 12th ed. at p. 77 as follows:

> The rule in *Tulk v. Moxhay* does not extend to affirmative covenants requiring the expenditure of money or the doing of some act. Such covenants do not run with the land either at law or in equity. The doctrine only applies to covenants which are negative in substance though they may be positive in form.

However, Kelly J.A. went on to hold the plaintiff entitled to succeed on three grounds.

The first of these was that the easement created by instrument 12360 was not a mere right of passage over a portion of the surface of the servient tenement but was a right to pass over a structure the terminus of which was at the level of the second story of the building on the dominant tenement, that the easement would be incapable of enjoyment unless the stairway was maintained in a safe state of repair and that the provision for its repair was an inherent part of the easement. Having said this the learned Justice of Appeal quoted from Broom's Legal Maxims, 10th ed., p. 482, as follows:

> . . .the covenant to repair, which extends to the support of the thing demised, is quodammodo appurtenant to it, and goes with it; . . .

With respect, I do not think that the principle stated in this quotation assists the respondent; the cases from which it is induced deal with leases or life tenancies where there is privity of estate. An obligation on the owner of the servient tenement to perform work on it would be inconsistent with the nature of an easement which as regards the servient owner is always negative, the obligation on him being either to suffer or not to do something. (*vide* Jowitt, Dictionary of English Law, vol. 1, p. 690).

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The second ground was based on the cases of *Pomfret v. Ricroft*[1] and *Rider v. Smith*[2]. These cases are usually cited as authority for the proposition that the owner of the dominant tenement may, under the doctrine of prescription, claim to have the way repaired by the servient owner, but I do not read either of them as establishing that a covenant contained in a grant of a right of way that the grantor will keep the way in repair is enforceable against a successor in ownership of the servient tenement. No case in which it was actually so decided was cited to us.

Both *Pomfret v. Ricroft* and *Rider v. Smith* are cited in the foot-notes to the following passage in Halsbury's Laws of England, 3rd ed., vol. 12, p. 579, para. 1256:

> As a general rule the owner of the servient tenement is under no liability to repair the way over which a right of way has been granted, for such a liability is not a condition incident by law to the grant of a right of way; nor is it even a legal obligation incumbent on the grantee. The person entitled to the use of the way must do such repairs as he requires, and has a right of entry upon the servient tenement for that purpose.

In the case at bar, no doubt, the parties of the first part in instrument 12360 were bound by their express covenant to keep the stairway in repair but I have already expressed my view that the burden of that covenant which is the basis of the respondent's claim did not run with the land so as to bind subsequent owners of lot 28.

The third ground was based on the maxim, *Qui sentit commodum sentire debet et onus*. It was said that as the appellants' predecessor in title, Telford Sinclair Parkinson, and the appellants themselves, had enjoyed the privileges contained in the agreements registered as numbers 5294, 5330, 6134, and 6518 referred to in the deed dated April 1, 1946, in part recited above, they could not refuse to perform the obligations contained in the agreement 12360. The first four mentioned agreements were not put in evidence but counsel for the appellants, for the purposes of this appeal, was willing to admit that they conferred on the owners of lot 28 the right to use the westerly wall on lot 29 as a party-wall.

Assuming that so long as the appellants made use of the last-mentioned wall as a party-wall they were bound to keep the stairway in repair, they ceased to be under any

[1] (1669), 1 Wms. Saund. 321, 85 E.R. 454.
[2] (1790), 3 T.R. 766, 100 E.R. 848.

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such obligation when they no longer made use of the respondent's wall. It is not suggested that the appellants have made any use of that wall since their building was destroyed by fire. A case in which this principle was applied is *Halsall v. Brizell*[1] which was discussed in the reasons of Kelly J.A.

For the above reasons I am of opinion that since the time when the building on lot 28 was destroyed the appellants have been under no obligation enforceable at law or in equity to replace the stairway.

I would allow the appeal, with costs throughout, including the costs of the motion for leave to appeal, set aside the judgments in the Court of Appeal and at the trial and direct that judgment be entered dismissing the action; the respondent will recover from the appellants the costs of the motion to quash the appeal.

SPENCE J. (*dissenting*):—I have had the privilege of reading the reasons of my brother Cartwright. I agree with the conclusions of law outlined therein but on the peculiar circumstances present in this case I have come to a different result.

Firstly, it must be noted that by Instrument No. 12360 the parties of the first part, the predecessors in title of the appellants here, granted unto the party of the second part, the predecessor in title of the respondent here, "the free and uninterrupted use and right of way to use the said stairway herein described in common with the said parties of the first part at all times without any let, molestation or hindrance from the said parties of the first part, their heirs, executors, administrators and assigns". It is also true that the parties of the first part entered into a specific covenant to repair and to reconstruct in case of partial or total destruction of the stairway. I shall concern myself with the grant of the right of way alone as, for the purposes of these reasons, the covenant to maintain and repair may be ignored.

According to the evidence of the plaintiff, here respondent, a fire occurred in the premises of the appellants on March 18, 1961. That fire seems to have been fiercest on the west side of the property, *i.e.*, the side farthest away from

[1] [1957] Ch. 169.

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the property owned by the plaintiff, here respondent. The plaintiff swore that from the day of the fire until the defendants commenced to wreck the building on April 27, 1961, his tenant continued to use the stairway, which is the subject-matter of this action, for the purpose of gaining access to the apartment on the second floor.

John Douglas Kyles, the architect employed by the defendants to advise them, was asked in direct examination:

Q. You could get up the stairs?

A. The east stairs. I don't know whether you could get in the west stairs . . .

He further testified that at the time he considered the building should be entirely torn down as the damage extended into every part of the building and that there was nothing he could see that could be saved. He further testified:

A. Well, you could not leave the stairway or the building. We recommended that the entire building be taken down. You could re-erect it with new supports. You couldn't leave the stairway. You could take it down and re-erect it with new supports, but you couldn't leave it. You couldn't remove the rest of the building and leave it there.

John Knox Henry, called by the defendant, was the contractor who had wrecked the defendants' building. When he was asked in direct examination if he had looked at the stairway at all, his answer was:

A. Where the stairway was, there wasn't any fire there. That was next to Mr. Reid's, the brick wall where you entered the stairway where the danger was.

Q. What about the entrance to the stairway?

A. It was quite dangerous.

The situation would appear therefore to be that this stairway was passable after the fire and that the plaintiff, here respondent, could have continued to enjoy his right of way. It was, however, necessary to the defendants for the proper enjoyment of their property that the burned-out building be torn down and this tearing down entailed the destruction of the stairway and, therefore, the effective denial to the plaintiff of his right of way. The grant of the right of way and the covenant not to interfere with the right of way which such grant implies do, of course, run with the land and the plaintiff, here respondent, was entitled to the benefit, and the burden fell upon the appellants as successors in title to the original grantor. The appellants,

by their action, terminated the right of way and the plaintiff is entitled to damages for that breach of his right of way.

I cannot understand that the fact that the appellants had to destroy that stairway in order to properly utilize their own lands would provide any excuse: *Thorpe v. Brumfitt*[1]; *Kain v. Norfolk*[2].

In the Court of Appeal, the appeal of the present appellants was dismissed with costs. The formal judgment of that Court varied para. 2 of the judgment of Grant Co.Ct.J. to provide that the damages should be $795 although by the judgment of the County Court Judge such damages had been fixed at $570 for special damages and $1,200 for general damages. The reason for this variation does not appear in the record. It might well be that the Court of Appeal has felt that the sum awarded in its formal judgment compensates for the damages which the plaintiff suffered from interference with his right of way.

I would dismiss the appeal with costs.

Appeal allowed with costs, SPENCE J. *dissenting.*

Solicitors for the defendants, appellants: Willis, Dingwall & Newell, Toronto.

Solicitors for the plaintiff, respondent: Church & Church, Orangeville.