

WILLIAM C. CLARK (PLAINTIFF).....APPELLANT;

AND

THE CITY OF VANCOUVER }
(DEFENDANT) } RESPONDENT.

1904
*May 26.
*June. 8.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Title to land—Conveyance upon conditions—Public park—Trust—Forfeiture—Assignment of reversionary interest—Decree in favour of assignee—Champerous agreement.

C. conveyed lands to the city for the purposes of a park or public recreation place with conditions prohibiting their use for certain specified purposes and, within a time limited, that the city should clear the land of stumps and roots, plough, level and harrow the same according to the natural contour of the ground, seed it down, build a road to it and “maintain the same in such fit, proper and good condition, as aforesaid”. In an action by the assignee of C. for a declaration that the city held the lands in trust and for re-conveyance of the same to him, under the proviso on breach of conditions, it appeared that about one-sixth of the land had been left in its natural state, “virgin forest,” but that the remainder had been cleared and made fit for “ordinary athletics, Scotch athletics” although not suitable for games or sports requiring “nice” level ground. It appeared, also, that the road had been built but that, as population did not increase in the vicinity, the grounds were not in demand for athletic or exhibition purposes, they had not been used and had become somewhat covered with undergrowth of chaparal and bracken.

Held, Sedgewick J. dissenting, affirming the judgment appealed from, that there was no such breach of the trusts as could warrant a declaration of forfeiture under the provisos of the deed of conveyance.

Per Killam J.—Had there been a breach of trust, the resulting forfeiture could have been decreed in favour of the assignee of the grantor.

*PRESENT :—Sedgewick, Girouard, Davies, Nesbitt and Killam JJ.

1904
 CLARK
 v.
 CITY OF
 VANCOUVER.
 —

APPEAL from the judgment of the Supreme Court of British Columbia, *in banco*, (1) affirming the judgment of Mr. Justice Martin, at the trial, dismissing the plaintiff's action with costs.

The questions in issue on this appeal are stated in the judgments now reported.

Travers Lewis and *Smellie* for the appellant.

Chrysler K. C. and *Hammersley K. C.* for the respondent.

SEDGEWICK J. (dissenting). — I dissent from the judgment of the majority of the court on the ground that the evidence discloses a breach of the conditions upon which the land to be used as a park was conveyed to the city. The city held the land subject to these conditions and, the breach having been committed, it continued to hold the land in trust for the grantor and is obliged to re-convey it to him or his assigns.

GIROUARD J. concurred in the judgment dismissing the appeal with costs.

DAVIES J.—This was an action brought by one Clark against the City of Vancouver claiming a declaration that the defendant held certain lands in trust for him and should convey the same to him.

The plaintiff claimed as the assignee of his uncle, one E. J. Clark, who had conveyed the lands in the year 1889 to the city in fee simple "as and for the purpose of a park or public recreation place."

The clauses of the deed containing the trusts upon which the lands were to be held and upon which the plaintiff claimed to have the lands re-conveyed to him were as follows :

1. That the said lands forever hereafter, while the same shall remain vested in the said corporation, its successors and limited assigns upon

trust as aforesaid, shall be used continuously and only as and for the purpose of a park or public recreation place, and that games and athletic sports of all kinds may be permitted thereon, and also the holding of fairs, industrial and horticultural displays, exhibitions of natural products, manufactures, machinery or works of art, or for any other public purpose which shall be for the benefit of the citizens of the said City of Vancouver.

1904
 CLARK
 v.
 CITY OF
 VANCOUVER.
 ———
 Davies J.
 ———

2. Provided nevertheless and it is hereby agreed and declared that nothing herein contained shall authorize the use by the said corporation, its successors or limited assigns, of the said lands for the purpose of a general market for the sale of any horses, cattle, sheep, swine, or other animals, nor for the purpose of a general market for the sale of produce, fish or other commodities, for the purpose of any manufactory, or manufacturer's business, nor for any purpose, object matter or thing whatsoever, which would, could or might cause a nuisance to either the public generally or to any person or persons resident for the time being in the vicinity of the said lands and premises.

3. And upon further trust and condition that the said corporation, its successors or limited assigns, shall within twelve months from the first day of January, A.D. 1890, clear off stumps, roots, and plough, harrow and level off same, according to the natural contour of said ground, and seed down same, and shall and will within twenty-four months from the said first day of January, A.D. 1890, build a road leading to said ground and shall forever thereafter, while the said lands and premises shall remain vested in the said corporation, its successors or limited assigns, upon trust as aforesaid, maintain the same in such fit, proper and good condition as aforesaid, according to the true intent and meaning of these presents.

Much learning was displayed in the argument at bar as to the right of the plaintiff, as assignee of the grantor, E. J. Clark, to maintain this action even if there had been such a breach of the trusts or conditions of the deed to the city as would work a forfeiture of the estate of the latter, and the judgment of the majority of the Supreme Court of British Columbia was based upon that ground. The counsel for the City of Vancouver also contended before us that the plaintiffs' assignment was void as contravening the law against champerty. I do not, however, find it necessary to consider either of these grounds of defence

1904
 CLARK
 v.
 CITY OF
 VANCOUVER.

Davies J.

as I fully agree with the main conclusion reached by the learned trial judge, Mr. Justice Martin, that the action should be dismissed for want of merits.

The trial seems to have proceeded and much of the evidence to have been given under a misapprehension of the true meaning of the deed of conveyance from Clark to the city, a misapprehension which the learned trial judge himself seems partly to have shared and which was adopted by the counsel for the appellant in the argument at bar. That misapprehension was that the trust deed required the lands to be prepared and levelled so as to be suitable for all athletic sports and that the *whole of it* had necessarily to be cleared of the trees growing thereon.

A reference, however, to the terms of the trust will shew that its main purpose was to provide "a park or public recreation place" for the citizens of Vancouver, and that while the second clause prohibited *general markets* for the sale of animals or produce from being held, or the user of the park for the purposes of a manufacturing business or other uses which might cause a nuisance, games and athletic sports of all kinds and the holding of fairs, industrial and horticultural displays and exhibitions, etc., *were expressly mentioned as "to be permitted"* as also

any other public purpose which shall be for the benefit of the citizens of the said City of Vancouver.

The main object and purpose of the grounds, however, were the providing "a park or public recreation place" for the citizens and a very wide discretion was necessarily vested in the city as to the purposes for which they would allow the park to be used. These facts need only be stated to shew how absurd was the contention that it was the duty of the corporation to denude the place of all trees and to remove all traces of the virgin forest. As a matter of fact the evidence

shewed that at a cost of some \$5,000 the corporation had, within the time specified in the trust deed, caused a road to be built to the park and five-sixths of the ground, which was very gravelly, to be "cleared, grubbed, harrowed and seeded down" and "the large stones, the boulders, all taken off." Either through a mistake as to the boundaries or from what I would call the exercise of a prudent and well grounded judgment, the remaining one-sixth of the grounds were allowed to remain in its original condition as "virgin forest." I am at a loss to understand how the grounds could fairly and reasonably be said to have been maintained as a park or place of "public recreation" if it had been entirely denuded of trees. I think the proportion left as virgin forest a reasonable and proper one and that no just construction of the trust deed required this forest to be entirely destroyed.

The evidence of Tracy, the city engineer, and of Fraser, the contractor, shews that as to the rest of the ground

all the trees and stumps and everything had been taken off it (and) that it was cleared down to the natural grade or contour of the ground, that there are no hollows or abrupt lumps on it and that, owing to its "natural contour" or slope, the ground while suitable for "ordinary athletics, Scotch athletics" was not suitable for cricket or games requiring a nice level and could only be made so at enormous expense which of course the city was not bound to incur. Fraser also proved the making, opening and grading of a road to the park from the city, one and a quarter miles in length as required by the trust deed.

Population has not grown up around or in the neighbourhood of the park, and there being no demand for the grounds for athletic or exhibition purposes, they have been allowed to remain as they were.

1904
 CLARK
 v.
 CITY OF
 VANCOUVER.
 Davies J.

1904
 CLARK
 v.
 CITY OF
 VANCOUVER.

Davies J.

“cleared, grubbed, harrowed and seeded down” until they have been covered with a growth of bracken which it would take a couple of days to remove.

To hold that this is a breach of the trusts of the deed from which a declaration of forfeiture should be made would be to my mind unjust and contrary alike to the language and intent of the deed.

The donor, Mr. Clark, at or about the time he gave the park to the city being the owner of a large tract of land of which the six acres given for a park formed a small part, duly registered a plan of his estate showing the park grounds and afterwards sold and disposed of all his other lands surrounding the park to third parties, all the sales having been made with reference to that registered plan. He refused to pay and has never paid any part of the \$1,000 which under the terms of his deed he agreed to pay to the city towards the expenditure it was obliged to incur on the ground or pretext that the city had not carried out the trusts of the deed, and now he or his nephew, the assignee, claims that the park itself has been forfeited to him under a strict and, as I think, improper construction of the terms of his trust deed. I think the evidence shews that the city has at a very large expenditure substantially fulfilled its trust, and while the growth of population has unfortunately not met the expectation of either party a careful perusal of the evidence has convinced me that the merits of the case are all with the defendant and that the appeal should be dismissed with costs.

NESBITT J. also concurred in the dismissal of the appeal.

KILLAM J.—It appears to me that the learned judges in British Columbia erred in treating this case as one in which there was a question of a condition broken.

The conveyance was to the "corporation, their successors and limited assigns," with *habendum* to

the said corporation, their successors and limited assigns, to and for their sole and only use forever, *subject nevertheless* to the reservations, limitations, provisoes and conditions expressed in the original grant thereof from the Crown and particularly subject nevertheless also to the trusts, provisoes, conditions and agreements hereinafter declared and contained, concerning the same, that is to say : etc. etc.

None of the subsequent clauses provide for the determination of the estate thus conveyed, except by reconveyance. But, in certain events, the corporation was to hold the property in trust for the grantor in fee and to reconvey to him, his heirs or assigns. The word "limited" before "assigns" seems meaningless. The legal estate passed absolutely to the corporation, with a trust to arise upon a contingency and an agreement to convey to the *cestui que trust*. I cannot appreciate the difficulty in the way of the enforcement of the trust and of the agreement, by a court of equity, in favour of a transferee, if they are such as would have been enforced in favour of the original grantor. The doctrine of the invalidity of conveyances of lands in adverse possession of another and the statute, 32 H. VIII. c. 34, can have no application to such a transaction. The question whether, upon its terms and in view of the surrounding circumstances, the conveyance to the plaintiff would be held invalid in equity as being champertous or as savouring of champerty, is entirely different.

As the city accepted the conveyance and expended a large sum upon the property, and as the claim is one, in effect if not in form, of a forfeiture, the case should be treated strictly. The plaintiff should be confined to the allegations in the statement of claim, and strict proof should be required of him.

The following were among "the trusts, provisoes, conditions and agreements" of the conveyance :

1904
CLARK
v.
CITY OF
VANCOUVER.
Killam J.
—

1904
 CLARK
 v.
 CITY OF
 VANCOUVER.
 ———
 Killam J.
 ———

1. That the said lands forever hereafter, while the same shall remain vested in the said corporation, its successors and limited assigns, upon trust as aforesaid, shall be used continuously and only as and for the purpose of a park or public recreation place, and that games and athletic sports of all kinds may be permitted thereon, and also the holding of fairs, industrial and horticultural displays, exhibitions of natural products, manufactures, machinery or works of art, or for any other public purpose which shall be for the benefit of the citizens of the said City of Vancouver.

Par. 2 prohibited the use of the property for certain specified purposes.

Par. 3. And upon the further trust and condition that the said corporation, its successors or limited assigns shall, within 12 months from the first day of January, A.D. 1890, clear of stumps, roots and plough, harrow and level off same according to the natural contour of said ground, and seed down same, and shall and will, within twenty-four months from the said first day of January, A.D. 1890, build a road leading to said ground, and shall forever thereafter, while the said lands and premises shall remain vested in the said corporation, its successors or limited assigns, upon trust as aforesaid, maintain the same in such fit, proper and good condition as aforesaid, according to the true intent and meaning of these presents.

The clause relied on as providing for the arising of the trust in favour of the grantor and the right to a reconveyance was as follows :

PROVIDED always and it is hereby declared that the grant and conveyance hereby made is so made upon the express trust and confidence that in the event of the said corporation, its successors and limited assigns, failing to comply with the trusts and provisions expressed and contained in the third paragraph hereof within the period thereby limited for that purpose or in case of their due compliance therewith then afterwards in the event of any breach, non-performance or non-observance of any of the trusts and conditions herein contained for the space of twelve months and notwithstanding any prior breach or breaches for the space of twelve months of any of the trusts and provisions on the part of the said corporation, their successors or limited assigns, to be by them observed and performed which may have been overlooked or waived by the said grantor, his heirs or assigns, then and immediately thereafter the said corporation, its successors and limited assigns, shall hold the said lands and premises in trust for the said grantor, his heirs and assigns and to be reconveyed to him and

them accordingly, but neither of the parties hereto, nor their heirs, successors or assigns shall have any claim against the other of them for any loss, costs, damages or expenses arising out of the trusts provisoes and conditions herein contained or in respect of any matter or thing arising out of the premises.

1904
 CLARK
 v.
 CITY OF
 VANCOUVER.

Killam J.
 —

The allegations in the statement of claim of the circumstances entitling the plaintiff to be treated as a *cestui que trust* and to have the land conveyed to him were as follows :

4. The defendants failed to perform the trusts and conditions following, namely : The defendants did not, within twelve months from the first day of January, 1890, clear the said hereditaments of stumps and roots and did not plough, level and harrow the same according to the natural contour of the ground and did not seed down the same, and did not, within twenty-four months from the said first day of January, 1890, build a road leading to the said hereditaments, and if they did build a road they did not maintain same according to the true intent and meaning of the condition in that behalf.

These are limited to non-performance of the stipulation for clearing the land of stumps and roots, and ploughing, levelling, harrowing and seeding it within the prescribed time, and to an alleged failure to build and maintain the road provided for. As counsel for the plaintiff interprets the third paragraph the maintenance of the road was not stipulated for. And I agree with this view. The words "maintain the same," as counsel admits, did not relate to the roads, but to the lands.

This consideration, however, appears unimportant, as I am of opinion that it is not sufficiently shewn that the corporation did not, within the meaning of the deed, clear the land of stumps and roots, or plough, harrow, level off or seed the same within the prescribed period, or build or maintain the required road.

The onus was upon the plaintiff to make clear and strict proof in some of these respects.

1904
 CLARK
 v.
 CITY OF
 VANCOUVER.
 Killam J.

I cannot think that, in requiring the land to be cleared of stumps and roots, the grantor intended that all trees were to be cut down. Ornamental trees are properly considered to be appropriate, and even necessary, in a public park. It appears to me that the corporation could properly have preserved such trees as might be considered fitted for the purpose.

And it seems impossible to believe that the grantor intended that every square inch of the property should be ploughed, harrowed and sown. Flower beds, ornamental shrubs, walks, rockeries, grottoes, arbours, would be appropriate and customary. Some of the purposes for which the land could be used would involve the erection of buildings or structures more or less substantial.

Further, some portion or portions of the property might be appropriately kept in its wild state. If suitable portions existed this would constitute an attraction and be of benefit for the purposes of an ornamental park or public resort.

It was not made incumbent upon the corporation to put the property in a fit condition for being the scene of every kind of game or athletic sport. These were merely specified purposes for which the corporation was authorized to use the property. This was not obligatory, any more than the use of the land for fairs, exhibitions, or other particular public purposes. All of this was left to the discretion of the corporation, the grantor giving merely general indications of his objects and desires.

It was shewn in evidence that the corporation did clear, level (so far as the ground permitted), plough, harrow and sow nearly all of the land. It left some portion or portions wholly or almost wholly untouched, principally a triangular piece in one corner.

The plaintiff's surveyor estimated the uncleared portion at 1.256 acres out of 6.858, or between a fifth and a sixth of the whole. Of an area, specified to be 1.123 acres, he said :

1904
CLARK
v.
CITY OF
VANCOUVER.

That has has never been cleared at all ; it is virgin forest, as it has originally grown ; fir, cedar and other timber.

Killam J.

The surveyor admitted that there was a difficulty about the lines in the locality and that he could not be sure that his survey was absolutely accurate. Some of his evidence was as follows :

Q. Will you guarantee your surveys correct ?

A. No, I guarantee nothing in 264 A, but I can arrive at a close approximation.

Q. Therefore you cannot guarantee the line being out a few yards distance, or not ?

A. No, I do not propose to guarantee any survey in 264 A, with absolute accuracy, but a close approximation I can give.

I add the following extract from the evidence of the city engineer :

Q. You know this Clark's Park, don't you ?

A. I know the place.

Q. Look at that plan. Does that show fairly how much has been cleared, and how much has not ?

A. I think that is about it, as near as I can tell ; the surveys are very indefinite ; in that district, I could not say positively ; I have gone over it and that is very nearly—

The only description of the uncleared portion which the evidence affords is that it is " virgin forest," whether ornamental or appropriate to be thus left, whether containing stumps and roots, other than those of growing trees, we do not know. Having reference to the difficulty in the surveys we cannot be certain of the exact proportion so left.

In my opinion the evidence is too meagre to warrant a finding that the corporation failed to fulfil the terms of the conveyance, according to a reasonable interpretation of them. Much had to be left to the

1904
CHARK
v.
CITY OF
VANCOUVER.

discretion of the civic authorities in designing the park, and it does not appear that it was not put in a condition which would have been warranted in the exercise of that discretion.

Killam J.

Subsequent lack of care in the maintenance of the park was not alleged in the statement of claim, and should not, I think, be considered upon this evidence.

I would dismiss the appeal, with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Wilson, Senkler & Bloomfield.*

Solicitors for the respondent: *Hammersley & Godfrey.*
