1944
*Nov. 3
1945
*Feb. 6

CONSUMERS CORDAGE COMPANY, LIMITED (DEFENDANT) ..... APPELLANT;

AND

ST. GABRIEL LAND & HYDRAULIC COMPANY, LIMITED (PLAINTIFF). RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

*Contract—Agreement called "lease"—Enjoyment of water power rights and immoveables appurtenant thereto—Action for unpaid "rental" instalments—Renewal periods of 21 years—Same stipulated "for ever" —Validity of agreement during current period—Whether agreement a "lease" in perpetuity—Such lease not contrary to law of Quebec—Resolutory condition in the agreement—Crown entitled to claim back power rights—Whether agreement contrary to public order—Validity of the agreement during current period—Agreement not illegal, and, if illegal, merely voidable—Articles 990, 1593, et seq., 1601, 1608, 1609, 1657, 1660 C.C.*

In an agreement, called a "lease", entered into in 1876, respecting certain water power rights in the Lachine canal forming a part of the public domain together with the immoveable appurtenant thereto, situated in the city of Montreal, it was stipulated that "at the expiration of said term of twenty-one years, from the first day of March, 1851, the period for the termination of the present lease, and at such subsequent period of twenty-one years thereafter forever, the parties of the first part shall grant, and the parties of the second part shall take, a renewal of these presents * * * save and excepting only the amount of the yearly rent herein stated" for such subsequent period of 21 years, it being provided that, should the Crown at such period, increase the amount of the rent, the rent to be paid would be increased in the same ratio. It was also provided that the agreement could be resiliated at any time by the Crown, in case the latter would require the water power, or any part thereof, for public purposes. Pursuant to deeds of transfer, the appellant now stands, in respect of the deed, in the place and stead of the parties of the first part and the respondent in the place and stead of the parties of the second part. The current twenty-one year period or renewal, having started on the first day of March, 1935, would thus expire in 1956. The respondent brought an action against the appellant for $2,000, representing five unpaid "rental" instalments of $400 each, which became due and payable respectively on July 1st, 1939 to July 1st, 1941, both inclusive. The trial judge held that the agreement was a lease in perpetuity of property, and, as such, contrary to the law of Quebec, against public policy, and, therefore, void and of no effect *ab initio;* but, as the appellant had been in peaceable possession of the property and water rights for a period of time, he granted to the respondent a sum of $1,066.66 as representing the reasonable

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

value for that use and occupation. On appeal, the judgment of the trial judge was reversed. The defendant company appealed to this Court (1).

*Held,* affirming the judgment appealed from (Q.R. [1944] K.B. 305) that the agreement was a valid subsisting one for the current period of 21 years at the time of the institution of the respondent's action and that the action should be maintained for the full amount of $2,000 claimed by it.

*Per* The Chief Justice and Kerwin, Taschereau and Estey JJ.:—The agreement is not contrary to public order nor prohibited by law. Assuming it to be illegal on account of being made in perpetuity, it would then be merely voidable, remaining in existence until annulled by a judgment of a court of justice; and it would be difficult for the appellant to succeed on that ground in view of the absence in its plea of any conclusions for annulment. But the agreement is not illegal. A lease, or demise, of property in perpetuity is not contrary to the law of Quebec; perpetuity of consideration is acknowledged by the Civil Code and no text makes it contrary to public order or illegal; in fact, several grants recognized by the code are perpetual. The nullity of the agreement, therefore, does not arise in this case. Moreover, were there a question of perpetuity, the existence in the agreement of a resolutory condition, resulting from the intervention of the Crown in claiming back the power rights for public purposes, would be sufficient to eliminate any doubt as to the validity of the agreement in that respect. Finally, as a result of their own free will, the parties have renewed their agreement until 1956, and the agreement continues to govern their relations, duties, obligations and rights, at least until the expiration of that period.

*Per* Rand J.—Whether the agreement is considered as *bail à rente, louage* or *contrat innommé,* it was at least within a *de facto* term of twenty-one years when the rent for which the action was brought accrued.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (2), reversing the judgment of the Superior Court, Greenshields C.J., which had maintained the respondent's action in part for $1,066.66, and maintaining that action for the full amount of $2,000 as claimed.

*A. H. Elder K.C.* and *Paul Casey K.C.* for the appellant.

*Aimé Geoffrion K.C.* and *R. C. Holden K.C.* for the respondent.

The judgment of the Chief Justice and of Kerwin, Taschereau and Estey JJ. was delivered by

(1) *See* [1944] S.C.R. 381. (2) Q.R. [1944] K.B. 305.

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Rinfret C.J.

THE CHIEF JUSTICE—The respondent claimed from the appellant the sum of two thousand dollars ($2,000.00), representing five outstanding and unpaid rental instalments of four hundred dollars ($400.00) each which became due and payable respectively on July 1st, 1939, January 1st and July 1st, 1940, January 1st and July 1st, 1941, pursuant to and in virtue of the terms of an agreement entered into on the 29th day of February, 1876, in the city and district of Montreal, between Charles H. Gould et al. and John A. Converse.

Mr. Converse already had the enjoyment of the property and rights, which formed the subject matter of that agreement, since the year 1853, and he continued to hold such enjoyment until 1892 when the Dominion Cordage Company Limited, which had acquired the property and rights from him, sold them to the Consumers Cordage Company Limited, by deed, dated the 6th of January, 1892. Then, in 1938, the Consumers Cordage Company Limited, sold to the Consumers Cordage Company (1938) Limited, whose name was subsequently changed to that of of the appellant:—

> All the Vendor's right, title and interest in and to the unexpired term of lease (*sic*) of Water Power from the Lachine Canal with all the privileges connected therewith as presently possessed by the Vendor in virtue of, under and pursuant to that certain deed passed before J. H. Isaacson, N.P., on the twenty-ninth day of February eighteen hundred and seventy-six under the number 23821 between John A. Converse and Charles H. Gould et al.

On the other hand, it is common ground that the respondent, the St. Gabriel Land & Hydraulic Company, Ltd., now stands, in respect to that deed, in the place and stead of C. H. Gould et al.

Under the agreement and in consideration of the rents, covenants, conditions, provisoes, and agreements therein contained, Gould

> granted, bargained, demised and leased (to Converse) a portion of the surplus water, heretofore belonging and held in part by the Honourable Commissioners of Public Works, of the Province of Quebec, appointed under and by virtue of an Act of the Provincial Parliament, 9 Victoria, Chapter 37, and acting on behalf of Her Majesty the Queen, her Heirs and Successors; and which were conveyed by said Commissioners, by the said lease, bearing date the 14th day of February, 1851, to John Young and Ira Gould, to wit, the surplus water or water power hereinafter mentioned to be used on a lot of land the property of the party of the second part (John Young and Ira Gould) situated lying and being partly in the

St. Anne's ward of the said City of Montreal on the south side of the Lachine Canal and known and distinguished on the official plan and in the book of reference of the said ward by the number ten hundred and sixty-three No. 1063—and partly in the parish of Montreal and known and distinguished on the official plan and in the book of reference of the said parish of Montreal by the number two thousand five hundred and ten, No. 2510.

Gould et al. declared that the lease transferred and assigned to Converse

all and every the rights of them and each of them * * * in and to any portion of land lying above the cadastral lot of land No. 1062 of St. Anne's ward and between that lot and the line of the limits of the said City of Montreal along the present tow path on the south side of the Lachine Canal, be the same more or less, the said portion or strip of land being a portion of the land leased to the said late Ira Gould and Jacob DeWitt under and by the said lease of the 14th day of February, 1851.

Then the following clause appears in the agreement:—

To have and to hold the said Lot, with the easements and privileges and flow of Surplus Water, as aforesaid, unto the party of the second part, from the First day of March, 1851, for and during the term of twenty-one years therefrom, renewable as hereinafter provided; yielding and paying therefor to the parties of the first part the yearly rent or sum of eight hundred dollars Canada Currency payable in half-yearly instalments, to become due and payable on the first days of July and January in each year the first of which shall become due and payable on the first day of July, in the year of Our Lord One Thousand Eight Hundred and Sixty-Six—all previous rents up to the first day of January last 1876 having been paid.

Then follow several provisoes, to which it is not necessary to refer, and we come to the clause which has to be construed and applied in order to decide the present case:—

It is expressly agreed by and between the parties of the first part and the parties of the second part to these presents, that, at the expiration of the said term of twenty-one years, from the first day of March 1851, the period for the termination of this present Lease, and at such subsequent period of twenty-one years thereafter for ever, the parties of the first part shall grant, and the parties of the second part shall take a renewal of these presents, continuing and covering all the covenants, conditions, provisoes, and agreements, herein contained, save and excepting only the amount of the Yearly Rent herein stated, which said amount of Yearly rent for such subsequent period of Twenty-One years shall be determined in the following manner; that is to say, should said Commissioners at such period increase the amount of annual rent of the Water Power leased by them to the said JOHN YOUNG and IRA GOULD by the aforesaid instruments of Lease, then the said annual rent herein agreed to be paid shall thereafter be increased in the same ratio, but in no case to be made lower than the present rates. But without any such

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increase of rents for Water Power on the part of said Commissioners, there shall be no change in the amount of Rent on the present Lease Ground and Water Power from period to period of twenty-one years for ever.

It was further provided between the parties that if, at any time thereafter, it was determined by the Commissioners of Public Works that the leased water power, or any part thereof, was required for the use of the canal, or for any provincial public works whatsoever,

thereupon, on reasonable notice (of not less than three calendar months) being given to the party of the second part (Converse) by said Commissioners, or the party of the first part, to that effect, this Lease, or the Lease for the term then current, and all matters herein or otherwise contained, shall cease and be void, so far as respects the part of portion so required for such public provincial purposes as aforesaid;

and Gould et al. assigned, transferred and set over to Converse all their rights to ask and demand of the Commissioners, in virtue of the lease of the 14th day of February, 1851, to be paid the then value with an addition of ten per cent. thereon of all buildings and fixtures that shall be on the said lot of land herein before described, according to a valuation thereof to be made by arbitrators appointed as stated in the agreement.

The present action having been brought by the respondent, as already stated, to recover five instalments of four hundred dollars ($400.00) each under the agreement, the case came before Greenshields C.J. of the Superior Court in Montreal.

In his judgment, the learned judge referred to what may be called the renewal or duration clause, reproduced above, whereby the agreement was to be renewed for periods of twenty-one years. He pointed out that such an agreement called a "lease", continued for all time and forever; that the periods of twenty-one years were there to provide for a possible change in the rent on the part of the Commissioners of Public Works, but they did not affect the duration of the agreement and, therefore, it was really a lease and demise of property in perpetuity.

The learned judge then referred to article 1601 of the Civil Code, as follows:—

The lease or hire of things is a contract by which one of the parties, called the lessor, grants to the other, called the lessee, the enjoyment of a thing, during a certain time, for a rent or price which the latter obliges himself to pay.

and interpreting the words in that article "during a certain time" (which in the French version of the code read "pendant un certain temps"), the trial judge came to the conclusion that this was a lease in perpetuity of property in the province of Quebec and, as such, contrary to the law of that province, against public policy and, therefore, void and of no effect *ab initio*. For that proposition, he cited several French authorities.

He found accordingly that the notice of three months, which the appellant, under reserve of all its rights, had given to the respondent on the 15th day of November, 1939, of the cancellation and termination of the alleged lease, to take effect three months from the date of that notice, was altogether inoperative. But taking into consideration that the appellant and its auteurs had been in peaceable possession of the leased property and water rights up to the 30th of April, 1940, and that the appellant should pay the reasonable value for that use and occupation, the learned judge granted, as a *quantum meruit*, to the respondent the sum of $1,066.66, with interest from the date of the institution of the action and costs.

The case went to the court of appeal and there the judgment of the learned trial judge was unanimously reversed.

The court of appeal was of opinion that the agreement in question was not a lease in perpetuity and probably not a lease at all, but rather an agreement *sui generis* for a first period of twenty-one years, which was "a certain time"; that the renewal, or duration, clause was really an independent covenant, severable from the main agreement for the first twenty-one years and that, accordingly, the main agreement was in conformity with the article of the code; but that, further, the agreement was not made in perpetuity, in view of the fact that it could be resiliated at any time by the Crown if it required the property and water rights for public purposes and, therefore, the character of perpetuity did not exist.

The court of appeal then pointed out that the appellant had taken no conclusions in its plea praying for the annulment of the deed, but merely claimed that the agreement had been terminated as a result of the notice

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of three months given in November 1939, but that the notice did not have that effect and was quite inoperative in the circumstances; that the renewal clause had been acted upon by both parties as each period of twenty-one years occurred, and, in particular, on the 1st of March, 1935, which was the beginning of one of those periods. As a consequence, on that date, the parties had simply renewed for another period of twenty-one years, expiring on the last day of February 1956, and there was, accordingly, a valid subsisting agreement between the parties at least up to that time.

In 1956, when the current twenty-one year period would expire, the time would come for the parties to urge their pretended rights as a result of the expiration of the current period, and only then would it be open for them to raise their respective contentions with regard to the expiration of their mutual obligations.

For the present, the parties were in the midst of a twenty-one years period, provided for by the agreement, and which had been acted upon by each side, and the appellant, therefore, was under the duty of paying the instalments of rent which were claimed by the action. The appeal was maintained and the appellant was condemned to pay the sum of two thousand dollars ($2,000.00), representing the five instalments already mentioned, with interest from the date of the service of the action.

The appellant, who had not appealed from the judgment of the trial judge, now brings the judgment of the Court of King's Bench (appeal side) to this Court.

Before us, counsel for the appellant stated that he did not intend to argue that the agreement was contrary to public policy, or public order. It may be stated, however, that, if it had really been so, we apprehend that it would have been the duty of the Court to raise the question *proprio motu*. It is true that there are no conclusions in the plea praying for the annulment of the agreement, but, if the Court had been of the opinion that the agreement was against public order, it would have had, nevertheless, to declare the agreement void and null *ab initio;* and the only decision remaining to be given would have been one as to the costs between the parties.

If, however, the agreement, although not being against public order, was simply illegal on account of being made in perpetuity, then it might have been looked upon as merely voidable, remaining in existence until annulled by a judgment of a court of justice, and the appellant would have found itself in difficulty in view of the absence in its plea of any conclusions for annulment and by the fact that, far from praying for the annulment of the agreement, it only contended in its plea that the agreement was terminated by the notice it had given in November, 1939.

It is not our opinion, however, that the agreement is illegal and, consequently, voidable. A lease, or demise, of property in perpetuity is not contrary to the law of Quebec. For the discussion of that proposition, it is idle to refer to the modern French law, because the French Civil Code does not contain articles 1593 and the following of the Quebec Civil Code and the law is different. In fact, counsel for the appellant stated at bar that this case stood to be decided under the law having force in the province of Quebec alone.

The nullity of the agreement, therefore, does not arise in this case. Moreover, were there a question of perpetuity, the existence in the agreement of a resolutory condition, resulting from the intervention of the Crown claiming back the property and the rights in the water power for public purposes, would be sufficient to eliminate any doubt as to the validity of the agreement in that respect. Even in France, a concession in perpetuity, if found absolute, would not apparently be declared null, but would be reduced to ninety-nine years.

Perpetuity of consideration is recognized by the Quebec Civil Code and no text makes it contrary to public order, or illegal. In fact, several grants recognized by the code are perpetual, such as, for example: "A contract of sale" (Art. 1472 C.C.); "The alienation for rent" (Arts. 1593-1594-1595 C.C.); "The right to cut timber perpetually" (Art. 381 C.C.); "Constituted rents and all other perpetual or life rents" (Art. 388 C.C.); "Ground rents or other rents affecting real estate, although they are redeemable at the option of the debtor" (Arts. 389 and 391

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C.C.); and "Constitution of rent" (Arts. 1787 and 1789 C.C.), under which the capital remains permanently in the hands of one party who pays yearly interest to the other on the capital of the rent and which may be constituted either in perpetuity or for a term, although redeemable by the debtor, subject to the provisions contained in articles 390, 391 and 392 C.C.

Of course, the agreement is styled a "lease", but it is hardly necessary to state that the name given to it by the parties does not change the nature of the agreement, and that point seemed to be common ground both between the parties and in the opinion of the judges of the Court of King's Bench.

We would be inclined to think that the agreement now under consideration is not strictly a lease, within article 1601 of the Civil Code. It was referred to in the court of appeal as a contract *sui generis,* or a lease for a specific term of twenty-one years, coupled with a personal undertaking to renew at the end of each succeeding period of twenty-one years. It does not follow however because the agreement does not come under article 1601 of the Civil Code, that it is not authorized under the law of Quebec, whether you call it a special contract for the use and enjoyment of water rights or a *contrat innommé.* The fact remains that this agreement, with its several covenants, cannot be said to be forbidden by the Code and that it does not violate any of its provisions. The policy of the code is the freedom of contract and it was open to the parties to stipulate the conditions upon which they agreed, provided they were not prohibited by law, or contrary to good morals or public order. (Art. 990 C.C.).

In our opinion, the respondent rightly submitted that under Quebec law the covenant for perpetual renewal is not contrary to public policy, nor prohibited by law, and that the covenant in the present agreement, as well as the agreement itself, is valid. Moreover, and in any event, as the agreement created rights and, for more than half a century has been acted upon and recognized as binding by the parties, no question of absolute nullity is involved.

The conduct of the parties leads to no other conclusion but that it was their expressed intention to renew their agreement for periods of twenty-one years, if the property and water rights were not taken by the Crown for purposes of public utility (Art. 1660 C.C.); and, the agreement being held good, the intention of the parties must prevail and they are mutually bound. More particularly, by force of the terms of the agreement, the lease was renewed on March 1st, 1935, for a period of twenty-one years without any objection being forthcoming on behalf of the appellant. That renewal period will end only in February, 1956, and we see no reason why the appellant should be relieved of its obligations thereunder.

At present, as a result of their own free will, the parties have renewed their agreement until the end of February, 1956, and the agreement continues to govern their relations, duties, obligations and rights, at least until the expiration of that period.

This is not an agreement having any connection with article 1608 of the Civil Code, applicable to persons holding real property by sufferance of the owner and without lease, or remaining in possession more than eight days after the expiration of their lease without any opposition or notice on the part of the lessor (Art. 1609 C.C.). It is not a case of tacit renewal. The renewal is covered by the agreement and the parties are governed, as between themselves, by the terms of the renewal clause.

For all these reasons, the appeal fails and the judgment of the Court of King's Bench (appeal side) should be affirmed with costs.

RAND J.—This appeal is supported, first, on the ground that, by reason of the provision for perpetual renewal obligatory upon both parties, the contract was void, and alternatively, that, being perpetual, it was a lease for an uncertain time within article 1657 of the Civil Code and was terminated by notice under that article: no other questions are raised.

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Rand J.

On the first point, I find it unnecessary to decide whether what was created was a perpetual lease, subject to the condition of termination by the requirement for public purposes of the water power; or whether it can be defeated by the refusal of either party to join in a renewal at the end of a twenty-one year period. It is sufficient to say that in neither case is it void. Such a result seems to me to be excluded by article 1593 C.C. but, at any rate, there is too definite a recognition of a legal interest of this character to support the contrary view taken by the trial judge; and nothing in rule or principle against it was presented to us from the French law underlying the Civil Code.

If perpetuity is not "a certain time" within the meaning of article 1601 C.C., then such an interest is outside of the definition of that article. What these words mean, I think, is "limited time" and the articles of the seventh title generally bear that out. It receives support likewise from article 1593 C.C. In that interpretation, article 1657 C.C. is inapplicable.

Whether, then, as *bail à rente, louage* or *contrat innommé* it was at least within a *de facto* term of twenty-one years when the rent for which the action was brought accrued.

The appeal should be dismissed with costs.

*Appeal dismissed with costs.*

Solicitors for the appellant. *Wainwright, Elder & Laidley.*

Solicitors for the respondent: *Heward, Holden, Hutchinson, Cliff, Meredith & Collins.*