1907

*June 10.
*June 24.

WILFRID CLICHE (PLAINTIFF).....APPELLANT;

AND

VENERAND ROY (DEFENDANT).....RESPONDENT.

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

Construction of deed — Title to land — Servitude — Acquiescence — —Estoppel by conduct—Actio negatoria servitutis—Operation of waterworks.

By a deed executed in 1879, C. granted to R. the right of building a reservoir in connection with a system of waterworks, laying pipes and taking water from a stream on his land, and in 1897, executed a deed of lease of the same land to him with the right, for the purposes of the waterworks established thereon, "de vaquer sur tout le terrain * * * et le droit d'y conduire des tuyaux, y faire des citernes et autres travaux en rapport au dit acqueduc et aux réparations d'icelui."

Held, that the deed executed in 1897 gave R. the right of bringing water from adjoining lands through pipes laid on the lands so leased.

APPEAL from the judgment of the Court of King's Bench, appeal side, reversing the judgment of His Lordship Mr. Justice Pelletier in the Superior Court, District of Beauce, and dismissing the plaintiff's action with costs.

In the court below, His Lordship Sir Alexandre Lacoste C.J. stated the case as follows:—(Translation)—"In 1879, Vital Cliche, the *auteur* of Wilfred Cliche, then proprietor of a farm, which now forms lots Nos. 540 and 598 of the Parish of St. Joseph de Beauce, granted to Benjamin Roy a servitude for

*PRESENT:—Girouard, Davies, Idington, Maclennan and Duff JJ.

waterworks over his farm permitting him to establish a reservoir on lot 598 and use a stream at that place for the supply of the reservoir, moreover to bring, by means of a pipe, water from a spring on lot 540. Following this, the waterworks were constructed which furnish water to the inhabitants of the Village of St. Joseph. Two years afterwards, in 1881, the reservoir proving insufficient, B. Roy brought water from adjoining lands through the pipe across the property of Vital Cliche. The right of servitude of B. Roy did not authorize him so to pass water from adjoining lands over the farm of Vital Cliche, nevertheless, he allowed him to do so and the pipe remained there up to the time of the *trouble* complained of. In 1883, B. Roy sold his waterworks and transferred his rights to his brother, Vénérand Roy, the defendant (respondent). On 17th May, 1897, Vital Cliche granted by a deed of lease to the (respondent), for the purposes of his waterworks, 'the right to carry on his works (*vaquer*) upon the lands of the lessor, Nos. 540, 540*a*, 598 and 1399 of the cadastre of St. Joseph and the right of placing pipes and making cisterns and other works in connection with the said waterworks and repairs thereto.' In 1900, Vital Cliche sold to his son, (appellant) the lands charged with the servitude charging him with the obligation to 'conform to the lease granting the servitude by the vendor to V. Roy and generally to all other servitudes which might exist upon the land sold, which the said purchaser declared he was aware of.' In 1899, the (respondent) formed a partnership with one Gagné, who was himself proprietor of certain waterworks supplying the Village of St. Joseph. The two systems of waterworks were combined, and the deed of partnership was registered

1907

CLICHE v. ROY.

on 23rd November, 1899, conformably to the law. In 1905, the firm of Roy & Gagné wished to renew the pipe which had been placed on the lots in question in 1881. The (appellant) objected to this and brought an action *négatoire* against the (respondent). The latter pleaded that he was not owner of the waterworks, alleged the partnership with Gagné, made public by the registration of the declaration, and, further, that the firm, owner of the waterworks, was within the exercise of its right of servitude in renewing the pipe."

The Superior Court held that the right of bringing water from the adjoining lands had not been granted by the deeds in question and maintained the plaintiff's action. On appeal, the Court of King's Bench held that the defendant had proved that he was acting for the firm of Roy & Gagné which claimed the right of maintaining the pipe on the land of the plaintiff and bringing water through it from the adjoining lands for their waterworks; that the firm was exercising the right of servitude granted by the deeds, and, consequently, reversed the judgment of the Superior Court and dismissed the action with costs. The plaintiff then appealed to the Supreme Court of Canada.

Alex. Taschereau K.C. for the appellant. The deed of 1897 limited the exercise of the servitude to lots 540 and 598. Consequently the respondent must shew authority for what he has done elsewhere. Arts. 549, 558 C.C. From these articles it necessarily follows: that the respondent must find all the rights which he claims in his title deed; that possession, even immemorial, of additional rights of servitude, would not

constitute a title; and that he can do nothing, in the exercise of his servitude, to aggravate the easement over the servient land. See *Riou* v. *Riou*(1); *Chamberland* v. *Fortier*(2); *Commune de Berthier* v. *Denis*(3); *Prévost* v. *Belleau*(4); *McMillan* v. *Hedge*(5); *Roy* v. *Beaulieu*(6); 3 Aubry & Rau, pp. 92, 93, 94; 8 Laurent No. 256; 8 Demolombe Nos. 847, 848.

Sufferance confers no title. The Code specially enacts that a written title is necessary and that possession, even immemorial, is insufficient to establish a servitude. Even if Vital Cliche had verbally consented to the extension of the pipes, such consent could not be proved by parol evidence. He is not a party in this case, and there is no writing and no *commencement de preuve par écrit* to support such evidence. Art. 1233 C.C.

With regard to the partnership with Gagné and the objection that the action should have been directed against both, the court of appeal expressed no opinion. The trespass was committed by the respondent and he is therefore sued for the act which he committed himself; it is immaterial whether or not he was then member of a partnership. The trespass is a *délit* and he is therefore jointly and severally responsible with his partners and may be sued alone. Art. 1106 C.C.

The deed of 1900 contains no acknowledgment of any servitude of bringing the water from the adjoining lands. It merely provides for existing servitudes legally established and cannot be construed so as to include, in general terms, servitudes founded on no title

(1) 28 Can. S.C.R. 53; Q.R. 5 Q.B. 572.
(2) 23 Can. S.C.R. 371.
(3) 27 Can. S.C.R. 147.
(4) Q.R. 14 K.B. 526.
(5) 14 Can. S.C.R. 736.
(6) 9 Q.L.R. 97.

1907

CLICHE v. ROY.

whatever and without legal existence which cannot be presumed to have been accepted.

In 1879 the waterworks were supplied by the springs on appellant's lots, but they ran dry and the whole supply of water now comes from the adjoining lands. The servitude ceased when the things subject to it assumed such a condition that it could no longer be exercised. Art. 559 C.C. Therefore, the object of the servitude having ceased to exist, the servitude itself is extinct and the servient lands have ceased to be subject to it. But, if the appellant has the right to bring water from the adjoining lands to replace the former supply from these springs, a new servitude, which was not contemplated by the parties, is created.

Morin for the respondent. The respondent is a perfect stranger to the issues raised in this action; if any trespass has been committed, the firm of Roy & Gagné alone is responsible, and the judgment under appeal is right.

We also rely upon the reasoning of Chief Justice, Sir Alexandre Lacoste, which we make part of our arguments.

The circumstances did not call for impleading the firm, as warrantors, as provided by article 187 C.P.Q., because their title was registered; Arts. 2116, 2098 and 2127 C.C. The deed of 19th September, 1897, vested title in the firm to the servitude which has been exercised. The existence of the new branch pipes was known to the appellant at the time he acquired the property and accepted the charge of the servitude granted in favour of the firm and all other privileges vested in them for the purposes

of the waterworks and for making repairs to the same. If there can be a doubt in the meaning of the deed, it is to be construed, according to Art. 1014 C.C., in such manner as to the effective rather than nugatory.

The branch pipes which the appellant asks to have demolished are an integral part of the whole system of waterworks and demolishing them would prove fatal to the operation of the whole system. The expenses incurred in the repairs are estimated at $800, and the land on which right of servitude is contested is only about 150 feet wide, a pasture field of little value. The damages alleged to have sustained are purely nominal. The Superior Court assessed them at $10 for illegal occupation of that land during 25 years and Roy & Gagné merely renewed, at the same places and with pipes of the same size, the old pipes which had been in the same ground for 25 years.

The judgment of the court was delivered by

GIROUARD J.—Je suis d'avis de confirmer le jugement dont est appel avec dépens, non pas pour les motifs exprimés dans le texte du jugement, mais pour les raisons données par le juge-en-chef Lacoste, aux quelles je ne puis rien ajouter. Qu'il me suffise de signaler le passage suivant des notes du savant juge:—

> La cour supérieure * * * a considéré que ni l'intimé ni son auteur n'avait concédé le droit de conduire l'eau venant des terrains voisins et elle a maintenu l'action.
>
> Nous sommes d'opinion que l'acte de 1897 a accordé à l'intimé le droit de passer l'eau des terrains voisins sur la terre de l'intimé.
>
> L'état des lieux à l'époque de l'acte 1897 justifie l'interprétation que nous donnons de cet acte-là. Les parties elles-mêmes ont interprêté l'acte dans ce sens-là, puisque le tuyau est resté de 1897 à 1905 sur la propriété.

1907

CLICHE v. ROY.

Girouard J.

Il est difficile pour nous de croire que Cliche ignorait l'existence du tuyau puisque dans l'acte de vente que son père lui a consenti, il déclare bien connaître les lieux.

L'intimé prétend que cette servitude créée par l'acte de 1897 ne devait durer que le temps que V. Cliche serait propriétaire, vu que V. Cliche déclare qu'il n'entend pas lier ses "hoirs et ayant cause."

Mais lors de la vente faite à l'intimé en 1900, V. Cliche avait exigé de l'acquéreur qu'il se conformât "au bail comportant servitude fait par le vendeur à Vénérand Roy et généralement à toutes autres servitudes pouvant exister sur le terrain sus vendu, que le dit acquéreur déclare bien connaître."

Vital Cliche avait intérêt à maintenir cette servitude, puisqu'il était propriétaire ou bailleur des terrains du village.

L'appel doit être renvoyé avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Taschereau, Roy, Cannon & Parent.*

Solicitors for the respondent: *Pacaud & Morin.*