CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

THE CITY OF MONTREAL (DEFENDANT)..... APPELLANT;

AND

HENRY HOGAN (PLAINTIFF).....RESPONDENT.

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*May 14,

*Oct. 22.

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

Practice on appeal—Supplementary evidence—Objections not taken at trial—Amendment of pleadings—Abandonment of expropriation—Measure of damages—Costs.

On the hearing of the appeal, objection was taken for the first time to the sufficiency of plaintiff's title, whereupon he tendered a supplementary deed to him of the lands in question.

Held, following *The Exchange Bank of Canada* v. *Gilman* (17 Can. S. C. R. 108), that the court must refuse to receive the document as fresh evidence can not be admitted upon appeal.

Held, also, that the defendant could not raise the question as to the sufficiency of the plaintiff's title, for the first time, on appeal.

In this case it appeared that the allegations and conclusions of the plaintiff's declaration were deficient and the court, under sec. 63

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

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of the Supreme and Exchequer Courts Act, ordered all necessary amendments to be made thereto for the purpose of determining the real controversy between the parties as disclosed by the pleadings and evidence. *Piché* v. *City of Quebec* (Cass. Dig. (2 ed.) 497); *Gorman* v. *Dixon* (26 Can. S. C. R. 87) followed.

The city commenced expropriation proceedings and forthwith took possession of plaintiff's constructed works thereon and incorporated it with a public street. Subsequently, in virtue of a statute granting permission to do so, the city abandoned the expropriation proceedings without paying indemnity or returning the lands so occupied and used.

Held, that the plaintiff had been illegally dispossessed of his property and was entitled to have it returned to him in the state in which it was at the time it had been so taken possession of and also to recover compensation for the illegal detention.

Held further, that, in the present case, the measure of damages, as representing the rents, issues and profits of the lands usurped by the city, should be the interest upon the value of the property during the period of its illegal detention.

APPEAL from the judgment of the Court of Queen's Bench, Province of Quebec, appeal side (1), affirming the judgment of the Superior Court, District of Montreal maintaining the plaintiff's action with costs.

The plaintiff is the owner of the lands abutting upon Notre-Dame Street, in the City of Montreal. The city, pursuant to powers under 52 Vict. ch. 79, (Que.) for widening the street in front of the plaintiff's land, prepared a plan showing the lands required according to sec. 207 of the Act, which was confirmed by the court, and the corporation thereupon became entitled, upon compliance with the provisions of sec. 213 and paying indemnity, to obtain possession of the property and have it vested in the city without observing the formalities provided by the statute. The officers of the corporation forthwith took possession of

(1) Q. R. 8 Q. B. 534.

the land, made a macadamized roadway over it, removed sidewalks, electric light poles, etc., back to the new line of the street, and opened it to public traffic and since then, 1894, retained possession of the property, but the city abandoned the expropriation proceedings, which had been instituted, upon the passing of the Act, 59 Vict. ch. 49, s. 17, and offered to return the property to the plaintiff in the condition in which it then existed.

The plaintiff then instituted this action to recover the value of his property as having been illegally usurped by the city and for damages, and obtained judgment in the Superior Court, District of Montreal, for $3,436.60 with interest and costs. The appeal is from the judgment of the Court of Queen's Bench, appeal side, by which the trial court judgment was affirmed; Hall and Ouimet JJ. dissenting.

Atwater Q.C. and *J. L. Archambault Q.C.* for the appellant. The city is not responsible for acts of its officers prematurely done pending expropriation. The abandonment of the proceedings was not the voluntary act of the appellant; it was done in obedience to the directions of an Act of the legislature and plaintiff is entitled to no damages, but only to have his property returned to him. See Dillon, Municipal Corporations, par. 474. This has been tendered by the city. In any case the plaintiff has not proved title to the sole ownership of the land and his proceedings and proof of title are insufficient to entitle him alone to maintain the action. He is not entitled to damages as his land was subject to the servitude exercised as a matter of public utility; he has not suffered in any greater degree than other owners affected by the improvements and cannot complain.

Fitzpatrick Q.C. (Solicitor-General), *Archer* with him, for the respondent. Our claims rest on arts. 407 and

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1053 C. C. We refer also to the discussion of the question of liability of corporations in Mignault's Droit Civil Canadien, vol. 2, pp. 343 *et seq.* and to *Doyon* v. *La Paroisse de St. Joseph* (1); *Soulard* v. *City of St. Louis* (2); *Watson* v. *Bennett* (3). The proper measure of damages is the value of the land taken; *Mueller* v. *St. Louis and Iron Mountain Rd. Co.* (4); *Jones* v. *Gooday* (5); *Thayer* v. *City of Boston* (6).

As to the question of title the respondent now tenders an absolute deed of the interest of the other grantee (Beaufort) to him which was not put in at the trial, the defendant having admitted the title by the pleas offering to give back the lands to plaintiff, *Chavigny de La Chevrotière* v. *City of Montreal* (7); *Childs* v. *City of Montreal* (8); *Leveillé* v. *City of Montreal* (9).

The judgment of the court was delivered by:

TASCHEREAU J.—The contention was put forward by the appellants at the hearing of this appeal that as by the deed of ownership of the property in question filed at the trial by the respondent as his title thereto, the sale thereof appears to have been made not to him alone but to him and one Beaufort jointly, he, the respondent, could not alone bring this action as he has done. To meet this objection, the respondent thereupon tendered a deed of assignment by Beaufort to him of all his rights in the property. We could not, however, allow the production of this document, as it has been the constant jurisprudence of this court not to receive here any new evidence whatever. *Exchange*

(1) 17 L. C. Jur. 193.
(2) 36 Mo. 546.
(3) 12 Barb. 196.
(4) 31 Mo. 262.
(5) 8 M. & W. 146.
(6) 19 Pick. (Mass.) 511.
(7) 10 Legal News 41.
(8) M. L. R. 6 S. C. 393.
(9) Q. R. 1 S. C. 410.

Bank of Canada v. *Gilman* (1). But the appellants cannot now avail themselves of an objection of this nature that was not taken at the trial, where, upon the necessary amendment of the declaration, the evidence to meet such objection could have been brought. They, by their pleas, acknowledge the respondent's title to the property by offering to return it to him. And for them at this stage of the case to turn round and ask, for the first time, the dismissal of his action on the ground that he has not proved his title is what cannot be allowed.

Now as to the merits of the appeal.

That the respondent has been illegally dispossessed of this property and that he is entitled to revendicate it cannot now be controverted by the appellants. A municipal corporation, it is needless to say, has no right to acquire real property except in the cases and in the manner provided by the statute from which it derives it powers. The allegations and conclusions of the declaration, as it reads now, are undoubtedly deficient, but we order such amendments to be made thereto "as are necessary" (to use the express words of sec. 63 of the Supreme Court Act) "for the purpose of determining the real controversy between the parties as disclosed by the pleadings and evidence." *Piché* v. *City of Quebec* (2); *Ferrier* v. *Trépannier* (3); *Gorman* v. *Dixon* (4); *Williams* v. *Leonard & Sons* (5); *Lumbers* v. *Gold Medal Furniture Manufacturing Co.* (6).

And upon such amendments being now considered as having been made, we order judgment to be entered declaring the respondent proprietor of the property in question, and ordering the appellants to put him, the respondent, in due possession thereof in the same state

(1) 17 Can. S. C. R. 108.
(2) Cass. Dig. (2 ed.) 497.
(3) 24 Can. S. C. R. 86.
(4) 26 Can. S. C. R. 87.
(5) 26 Can. S. C. R. 406.
(6) 30 Can. S. C. R. 55.

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as it was when they took possession of it, within fifteen days after the signification of this judgment.

This aforesaid part of the judgment may be unnecessary, as it appears that since the case was heard the appellants, upon the suggestion of the majority of the court, have, on the 21st day of September last, put the respondent in possession. However, there can be no objection to its being entered.

There remains the question of the amount which the respondent is entitled to as compensation for the illegal detention of his property. Upon the amendment made and on the evidence of record, we think that interest on the uncontradicted value of the property, $3,436, from the time the appellants illegally entered into possession thereof, 1st September, 1894, to the 21st September last, if they then did give it up to the respondent, or to the date when they will give it up, if that has not yet been done, is, under the circumstances, the proper measure of damages, as representing the *fruits et revenus* thereof, the appellants having detained it in bad faith, with interest on the amount of the aforesaid interest now accrued from this date till payment.

As to costs, considering the tyrannical conduct of the appellants and the flagrant illegality of their doings in the matter, we order that all the costs in all the courts be paid by them to the said respondent.

Judgment reformed, with costs against appellants.

THE CHIEF JUSTICE was prevented by illness from taking part in the judgment.

Appeal allowed in part with costs.

Solicitors for the appellant: *Ethier & Archambault.*

Solicitor for the respondent: *Charles Archer.*