1893

*Mar. 8.

*May 1.

JOHN J. WILLIAMS, *et al.* (DEFENDANTS)..... } APPELLANTS;

AND

THE HON. GEORGE IRVINE (PLAINTIFF)..... } RESPONDENT.

APPEAL FROM THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC, (SITTING IN REVIEW).

Right of appeal—54 & 55 Vic. ch. 25—Construction of.

By sec. 3, ch. 25, of 54 & 55 Vic., an appeal is given to the Supreme Court of Canada from the judgment of the Superior Court in review (P.Q.) "where and so long as no appeal lies from the judgment of that court when it confirms the judgment rendered in the court appealed from, which by the law of the province of Quebec is appealable to the Judicial Committee of the Privy Council."

The judgment in this case was delivered by the Superior Court on the 17th November, 1891, and was affirmed unanimously by the Superior Court in Review on the 29th February, 1892, which latter judgment was by the law of the province of Quebec appealable to the Judicial Committee. The statute 54 & 55 Vic. ch. 29 was passed on the 30th September, 1891, but the plaintiff's action had been instituted on the 22nd November, 1890, and was standing for judgment before the Superior Court in the month of June, 1891, prior to the passing of 54 & 55 Vic. ch. 25. On an appeal from the judgment of the Superior Court in Review to the Supreme Court of Canada, the respondent moved to quash the appeal for want of jurisdiction.

Held, per Strong C.J., and Fournier and Sedgewick JJ., that the right of appeal given by 54 & 55 Vic. ch. 25, does not extend to cases standing for judgment in the Superior Court prior to the passing of the said act. *Couture* v. *Bouchard*, 21 Can. S. C. R. 181, followed. Taschereau and Gwynne JJ. dissenting.

Per Fournier J.—That the statute is not applicable to cases already instituted or pending before the courts no special words to that effect being used.

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*PRESENT:—Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

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MOTION to quash the appeal from the judgment of the Superior Court for Lower Canada (sitting in Review) rendered on the 29th day of February, 1892.

This was an action brought by the respondent to recover from the appellant the sum of $5,191.20 for royalty alleged to be due upon asbestus under a deed of sale of mining rights.

The action was brought in November, 1890, the case was heard on the merits and taken *en délibéré* in June, 1891. On the 17th November, 1891, judgment was delivered by the Superior Court in favour of the respondent for the sum of $2,520, and this judgment was confirmed by the Superior Court (sitting in Review) on the 29th February, 1892.

The Dominion statute 54-55 Vic. ch. 25, giving the Supreme Court of Canada the right to hear appeals from the judgments of the Superior Court of the Province of Quebec (sitting in Review) was passed on the 30th September, 1891.

Mr. *St. Jean*, for respondent, moved to quash the appeal on the ground that 54-55 Vic. ch. 25 was not applicable to cases standing for judgment in the Superior Court when the act was passed.

H. Abbott Q.C. contra.

The cases and authorities relied on by counsel are referred to in the judgments.

The Supreme Court reserved judgment on the motion and heard the counsel on the merits, but the appeal was finally disposed of on the question of jurisdiction.

THE CHIEF JUSTICE.—I am of opinion that this appeal should be quashed for the reasons to be given by my brother Fournier.

FOURNIER.—L'action en cette cause a été commencée par un bref de sommation, émané de la cour Supé-

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rieure de Montréal, daté le 17 novembre 1890 et signifié aux appelants le 22 du même mois. Après une contestation régulière le jugement fut rendu le 17 novembre 1891 par la cour Supérieure et confirmé le 29 février 1892 par la cour de Révision. C'est de ce dernier jugement dont il y a appel à cette cour, en vertu de la 54-55 Vict., ch. 25, amendant la juridiction de cette cour de manière à permettre l'appel des jugements de la cour de Révision en certains cas. Cette loi a été sanctionnée le 30 septembre 1891, l'action avait été signifiée le 22 novembre 1890 et mise en délibéré devant la cour Supérieure dans le mois de juin 1891, plus de trois mois avant l'adoption de cette nouvelle loi. Alors l'action du demandeur n'était soumise à la juridiction de la cour Suprême que dans le cas où le jugement de la cour Supérieure n'aurait pas été confirmé par la cour de Révision. La cour Supérieure ayant été saisie de la cause dans le mois de juin 1891, par la mise en délibéré, avant la passation de la loi d'amendement, le demandeur, intimé, a droit à son jugement conformément à la loi telle qu'elle existait alors, bien que le jugement n'ait été rendu que le 17 novembre 1891, après la passation de cette loi.

La loi qui doit servir à la décision d'une cause est celle qui est en force au moment où l'action est prise et non celle qui peut être passée après ; car c'est de la loi alors en existence que le demandeur tient son droit d'action, ou du titre qu'il peut avoir à ce moment. La loi passée depuis ne pourrait s'y appliquer sans lui donner un effet rétroactif, ce qui serait contraire aux principes, à moins que la loi ne contient une disposition bien spéciale lui donnant cet effet et la rendant applicable aux causes pendantes lors de son adoption.

Le jugement rendu par la cour de Révision étant final, l'intimé a un droit acquis à son jugement qui ne

peut pas être soumis à un droit d'appel qui n'existait pas lorsque la justice a été saisie de la cause.

Si l'appelant avait un droit d'appel, d'après la loi alors en force, c'était au Conseil Privé de Sa Majesté et non à la cour Suprême.

Cette question au sujet de l'application de la 54 et 55 Vict., ch. 25, est déjà venue plusieurs fois devant cette cour, et chaque fois il a été décidé qu'elle ne s'appliquait point aux causes dont la cour Supérieure ou de Révision étaient saisies, par la mise en délibéré, avant la passation de la loi. Dans la cause de *Couture* v. *Bouchard* (1) cette cour a décidé

that the respondent's right could not be prejudiced by the delay of the court in rendering judgment which should be treated as having been given on the 30th September, when, the case was taken *en délibéré* and therefore the case was not appealable.

La même chose avait été décidée dans la cause de *Hurtubise* v. *Desmarteau* (2).

Ces décisions sont conformes au principe du droit français qui veut que le ressort soit déterminé par la loi de l'époque où l'instance est introduite.

Bioche, de l'appel des jugements rendus en premier et dernier ressort, dit:

N° 49. Le taux du premier et du dernier ressort est déterminé par la loi de l'époque où l'instance est introduite et non par la loi de la date de l'acte qui donne lieu à la contestation.

N° 50. L'instance s'introduit par l'assignation et non par la citation en conciliation.

Conformément à cette autorité ce serait d'après la loi en force lors de la date de la signification de l'action que devrait se décider la question du droit d'appel en cette cause. En ce cas la loi en force à cette époque ne donnait pas encore l'appel à la cour Suprême et conséquemment cette cour est sans juridiction pour décider cette cause.

(1) 21 Can. S.C.R. 281. (2) 19. Can. S. C. R. 562.

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TASCHEREAU J.—I would have been of opinion that we had jurisdiction—I do not take part in the judgment.

Gwynne J.

GWYNNE J.—The effect of the Dominion act 54 & 55 Vic. ch. 25, is to amend sec. 29 of ch. 135 of the Revised Statues of Canada so as to enable this court to entertain appeals from all judgments of the Court of Review in the Province of Quebec in affirmance of a judgment of the Superior Court. Prior to the passing of the said act such judgments were by the law of the province of Quebec appealable to the judicial committee of the Privy Council in England. Now the judgment appealed from in the present case is a judgment of the Court of Review rendered subsequently to the passing of said act and is in affirmance of a judgment of the Superior Court. This court therefore has, clearly in my opinion, jurisdiction to entertain and determine the appeal from that judgment, and neither the judgment of this court in the *Queen* v. *Taylor* (1) nor that of the Exchequer Chamber or of the House of Lords in *Attorney-General* v. *Sillem* (2) nor that rendered in any of the cases cited in these cases is, in my opinion, at variance with this conclusion. In the *Queen* v. *Taylor* (1) the point adjudged was, that the act constituting this court which did not come into operation until the expiration of three months after the recovery of the judgment which in that case was sought to be appealed from, did not give to this court any jurisdiction to entertain an appeal from such judgment; that the act only gave to this court jurisdiction to entertain an appeal from—judgments which should be rendered subsequently to the coming into operation of the act constituting the court. *The Attorney-General* v. *Sillem* (2) decided that the right of appeal where no such right

(1) 1 Can. S. C. R. 65. (2) 10 H. L. 720.

previously existed was a new right which could only be given by legislative authority and that the Imperial Act 22 & 23 Vic. ch. 21 gave no authority to the Barons of the Exchequer to give by rules of court an appeal in revenue cases; what was done having been the granting of an appeal from a judgment of the Court of Exchequer to the Exchequer Chamber in a revenue case in virtue of certain rules of the Exchequer Court which were relied upon as being sufficient to authorize the appeal. The Exchequer Chamber and the House of Lords held that no such power was conferred on the Barons of the Exchequer by the above statute which authorized them to apply and adopt the provisions of the common law procedure act to revenue cases. Now in the present case as already pointed out the judgment appealed from was rendered subsequently to the passing of the Dominion Act 54 & 55 Vic. and it comes precisely within the description of the judgments, appeals from which may after the passing of that act be entertained and adjudicated upon by this court, viz., a judgment of the Court of Review in the Province of Quebec affirming a judgment of the Superior Court in a case in which by the laws of the Province of Quebec there was already an appeal to the judicial committee of the Privy Council. The statute merely extends the jurisdiction of this court by enabling it to entertain and determine appeals from such judgments of the Court of Review which by the existing law were already appealable to the judicial committee of the Privy Council without depriving a suitor of any acquired right whatever. Such being the plain language of the statute I can see no reason why the jurisdiction of this court should be limited to cases in which not merely the judgment appealed from, but that also which had been rendered in the Superior Court and affirmed in Review should be rendered subsequently to the pass-

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ing of the Act 54 & 55 Vic. ch. 25. That act, construed as I construe it, instead of working any prejudice to existing suitors, may be said rather to confer a benefit upon them by enabling a domestic court to entertain appeals from all judgments of the Court of Review of the particular character specified which should be rendered subsequently to the passing of the act and to adjudicate upon such appeals at less expense to the parties than that attending appeals to the judicial committee of the Privy Council.

The case as to its merits turns wholly upon the proper answer to be given to the question: What were the rights of Arthur H. Murphy to the royalty secured by the deed of the 25th March, 1888, between him and the defendants at the time of the execution of the deed of transfer of the 12th April, 1890, by Murphy to the plaintiff, of all his, Murphy's, right, title and interest in and to the royalty stipulated in his favour by the deed of the 26th March, 1888? And that question raises simply a question as to the construction of the latter deed.

By that deed Murphy sold to the defendants two undivided fifth shares of lot No. 32, in range letter B, of the Township of Coleraine, in the County of Megantic, the said lot containing one hundred and twenty-three acres in all, subject to the following conditions, to the fulfilment whereof the defendants bound and obliged themselves, namely:—

1. That the defendants would furnish all the plant, machinery, tools and labour necessary to open up and work the asbestos mines upon the said property in a thorough and efficient manner and for the best advantage of the said property, and would begin the said operations as early as possible in the spring of 1888, and carry on the same during the term of this contract.

2. That they will pay the vendor a royalty of nine dollars upon each and every ton of asbestos of the qualities one, two and three, mined and shipped from the said mine, payable on the fifteenth of

each month following the mining and shipment of the said asbestos, for and during the term of three years, to be accounted from the 31st day of December last, that is to say, 1887.

3. That during each year of this contract, with the exception of the first year, they should mine at least four hundred tons of asbestos.

4. Each of the said parties shall give to the other the option of purchase of their respective interests in the said property, at the amount offered by any *bonâ fide* purchaser, which option must be accepted or refused within ten days after it is received by the other party.

The said deed contained also a clause to the effect that the said sale of two-fifth shares was made for and in consideration of the price and sum of six thousand dollars, which the said purchasers bound and obliged themselves to pay in and by four even and equal consecutive annual payments of fifteen hundred dollars each, the first whereof should become due and payable on the 31st day of December, 1888, and yearly thereafter, and until payment to pay interest thereon or on the part thereof at any time unpaid, at the rate of 6 per centum per annum, payable yearly with the said instalments, and it was thereby specially agreed between the said parties

That as the conditions of this sale, as hereinabove set forth, are part of the consideration thereof, that should the said purchasers fail to carry out the same in any essential, the said vendor shall have the right, upon giving to the said purchasers twenty-four hours notice, by registered letter, to cancel and annul the present sale, to sue for any portion of the price which may be then due, and to claim such damages as he may have suffered, directly or indirectly, in consequence of such default.

Now, can that instrument be construed as containing a covenant by the defendants to pay Murphy, the vendor, a royalty, not only upon every ton of asbestos of the qualities one, two and three which should be mined from the land in each of the three years named, but that such royalty should not be less than $3,600.00 in each of such years but the first? Did the defendants

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in effect guarantee the richness of the mine and covenant that the royalty to be paid in each year, except the first, should not be less than $3,600.00? In my opinion, the answer must be that the contract is open to no such construction, and that nothing could be further from the intention of the parties than that the defendants, who were the purchasers only of two-fifth shares in the property, should so guarantee to the proprietor of the whole property the richness of the asbestos therein. It is obvious that the parties contemplated that asbestos might be produced from the property of a quality inferior to the qualities named as subject to the royalty. Upon such inferior quality no royalty whatever was payable. It might be that the defendants might take one thousand tons of asbestos from the property without succeeding in getting any of the qualities subject to royalty. It might be that after producing for a time asbestos of the qualities upon which the royalty was payable, the property should cease to produce any more asbestos at all. The asbestos might wholly fail. It is impossible, in my opinion, to construe the contract as containing a covenant by the defendants that they should pay a royalty of nine dollars per ton upon not less than 400 tons in each year except the first, whether such quantity of the qualities subject to the royalty could or could not be extracted from the land. The covenant of the defendants is, in my opinion, simply that they would pay the royalty named upon the three qualities of asbestos named if such qualities should be produced from the property, and that they would take out 400 tons of asbestos of such quality as the land should produce in each year except the first, but without any guarantee or covenant that the asbestos so taken out should be of any of the qualities subject to the royalty. If not of those qualities it is clear that no royalty would become

payable, although one thousand tons should be taken out. And if the defendants should cease to work the mine they could be made liable only for such damages

As the vendor could prove he had sustained by the default of the defendants to fulfil their special covenant to take out at least 400 tons in each year except the first.

Now the contention of the defendants is that they did not mine on the property subsequently to the year 1888, because that upon a thorough and most expensive test of the property by sinking shafts, &c., in that year, 1888, they found that the land ceased to produce any asbestos or at least any of a quality subject to royalty, and that such the defendants' discontinuance to mine on the property was for the reason stated, concurred in by Murphy, and that thereupon and for the above reason the parties interested agreed to endeavour to sell the entire property, and that in fact, in the early part of the year 1889 Murphy requested the defendants to remove their plant to another property of his which the defendants declined doing, only for the reason, that by so doing they might injuriously affect the contemplated sale of the lot 32. Now if this contention of the defendants should prove to be true, it would clearly be a good defence to any action if any had been brought by Murphy to recover damages from the defendants, for the injury sustained by Murphy by reason of the defendants' default in failing to take out 400 tons in the year 1889, for Murphy could have sustained no damage by reason of such default if the land ceased to produce asbestos of the qualities for which a royalty was payable. But the question is not now whether the defendants would have had a good defence to such an action for none such is brought, but whether when Murphy transferred to the plaintiff by the deed of the 12th April, 1890, all his, Murphy's, right, title and interest, in and to the royalty of nine dollars per ton stipulated for

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by that deed he had become entitled to such royalty upon 400 tons of either of the qualities one, two and three for the year 1889? And as no asbestos was taken from the property in that year, Murphy's claim, if any he had for that year, was not for royalty at all, but was reduced to a "claim for such damages as he could prove he had suffered directly or indirectly," in the words of the defendants' covenant "for their default" in not working the property and endeavouring to extract asbestos therefrom in the year 1889, and the defendants consequently were, in my opinion, entitled to have had judgment rendered in their favour in the present action.

The evidence adduced was, as it appears to me, irrelevant to the only question in the case which turned wholly upon the construction of the deed of the 26th March, 1888. It was argued that the agreement of the 15th October, 1889, upon the occasion of the execution of the power of attorney to Martin to sell the property, namely, that, in the event of a sale being effected for $36,000 nett, Murphy should deduct from the defendant's share, the unpaid balance of purchase money and accrued interest, and also royalty for present year of $3,600, constituted an acknowledgment then made by the defendants that such an amount was then due for royalty for the year 1889. When that agreement was made the defendants may have, although erroneously, thought themselves to be liable for royalty for the year 1889, or knowing themselves not to be so liable they may nevertheless have entered into that agreement in their anxiety to get rid of the property by a sale for such a sum as $36,000; or in order not to prejudice the contemplated sale, which might be prejudiced if by any means the sale of the property as a mining property should appear not to be of a going concern after mining operations had been entered upon

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and its value tested, but whatever may have been the motive of the defendants in entering into that agreement of the 15th October, 1889, that agreement cannot be referred to for any assistance in construing the covenant of the defendants in the deed of the 26th March, 1888. That deed must be construed upon the terms which are contained within itself and which are clear and unequivocal and, in my opinion, to the effect I have above stated. This appeal therefore, should in my opinion be allowed with costs and judgment be ordered to be entered for the defendants in the action with costs.

SEDGEWICK J.—I am of opinion that this appeal should be dismissed upon the authority of the case of *Couture* v. *Bouchard* (1) decided by this Court in December, 1892.

Appeal quashed with costs.

Solicitors for appellant: *Abbotts, Campbell & Meredith.*

Solicitors for respondent: *Préfontaine & St. Jean.*

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(1) 21 Can. S. C. R. 281.