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*June 3

*Oct. 29.

WILLIAM R. SINCLAIR AND JAMES FLANAGAN (PLAINTIFFS).. } APPELLANTS;

AND

WILLIAM A. PRESTON AND W. J. MUSSON (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR MANITOBA.

Interest—Debt certain and time certain—3 & 4 *Wm. c.* 42 *s.* 28 (*Imp.*)

To entitle a creditor to interest under 3 & 4 Wm. 4 ch. 42 sec. 28 (Imp.) the written instrument under which it is claimed must show by its terms that there was a debt certain payable at a certain time. It is not sufficient that the same may be made certain by some process of calculation or some act to be performed in the future.

APPEAL from a decision of the Court of King's Bench for Manitoba (2) reducing the damages given at the trial by deducting the interest allowed.

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

(1) 29 Can. S. C. R. 494. (2) 13 Man. L. R. 228.

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One Charlebois had a contract to build the Great North-West Central Railway, and the defendant Preston contracted with him to do the fencing, taking Musson, the other defendant, into partnership for the work. Plaintiffs then agreed with defendants to do the fencing, the agreement containing the following provision.

"Estimates for the said work shall be made monthly by the company's engineer, or at such other times as the said engineer shall deem reasonable and proper, and such estimates, less ten per cent rebate, shall be paid forthwith upon same being paid to said Preston and Musson by said company, and the said ten per cent rebate shall be paid forthwith upon same being paid to said Preston and Musson by said company."

Charlebois not having been paid by the company, Preston took proceedings and obtained judgment, which it was agreed should be entered against the company direct. This judgment was assigned to other parties by which plaintiffs claimed that their right to judgment under the above clause immediately attached. They received the principal of their claim and brought suit for the interest, which the trial judge allowed but the full court deducted from the amount given by the verdict.

Aylesworth K.C. for the appellants. The court below followed *Merchant Shipping Co.* v. *Armitage* (1) in holding that plaintiffs were not entitled to interest. That decision does not bind this court, and is not in accord with others before and since. *Duncombe* v. *Brighton Club & Norfolk Hotel Co.* (2) decided in the following year, is directly opposed to the ruling in *Merchant Shipping Co.* v. *Armitage*, as is *Macintosh* v. *Great Western Railway Co.* (3), decided ten years

(1) L. R. 9 Q. B. 99.

(2) L. R. 10 Q. B. 371.

(3) 4 Giff 683.

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earlier, and in *London, Chatham & Dover Railway Co.* v. *South Eastern Railway Co.* (1), Lindley L. J. characterizes the decision in *Merchant Shipping Co.* v. *Armitage* as " a restricted, or perhaps it may be called rather a narrow contruction of this Act of Parliament." See also the opinion of Lord Cairns in *Rodger* v. *Comptoire D'Escompte de Paris* (2), and *McCullough* v. *Clemow* (3), in which the whole question as to interest is discussed by Mr. Justice Osler.

Christopher Robinson K.C. and *Elliott* for the respondents. *Merchant Shipping Co.* v. *Armitage* (4) has never been overruled, and was followed by the Court of Appeal in *London, Chatham & Dover Railway Co.* v. *South Eastern Railway Co.* (5) overruling the judgment of the Chancery Division cited by the learned counsel for the appellants. And see *Webster* v. *British Empire Mutual Assurance Co.* (6).

THE CHIEF JUSTICE.—I am of opinion that the appeal should be dismissed.

TASCHEREAU J.—I do not see that upon any of the grounds taken by the appellants, they can succeed upon their appeal. I entirely agree with the reasons given in the full Court of Manitoba. I would dismiss the appeal with costs.

GWYNNE J.—By the contract of the 12th of October, 1889, declared upon in this case no sum of money was made payable or could ever become payable to the plaintiffs except for work then yet to be performed, accepted and certified by the engineer of the railway company as executed in conformity with the provi-

(1) [1892] 1 Ch. 120.
(2) L. R. 3 P. C. 465.
(3) 26 O. R. 467.
(4) L. R. 9 Q. B. 99.
(5) [1893] A. C. 429.
(6) 15 Ch. D. 169.

sions of the contract; what amounts, if any, and when any such amounts should be so certified depended on the judgment of the engineer and subject to this further condition that nothing should become payable by the defendants until they should receive payment for work which they had contracted to perform for one Charlebois who claimed to have a contract with the Great North West Central Railway Company for constructing their railway, part of which work was the work which the plaintiffs by sub-contract with the defendants contract to perform.

The judgment in the declaration alleged to have been pronounced by the High Court of Justice for Ontario upon the 28th of September, 1891, in the suit of Charlebois against the railway company (to which suit the Union Bank who were then assignees of the whole right, title and interest of the plaintiffs in, and under, the said contract and on whose behalf and in whose interest the present action is prosecuted were parties, defendants, to the said suit equally as the plaintiff Preston) can not, in my opinion, by reason of anything therein contained be construed to constitute, as the appellants contend, payment to the defendants in the present action within the meaning of the contract of the 12th of October, 1889, of the sums therein mentioned, the payment of which to the defendants was by the contract made a condition precedent to the plaintiffs having any cause of action against the defendants.

It appears upon the record before us that in the month of January, 1890 the Union Bank as assignees of all the rights and interest of the appellants in and under the contract of the twelfth of October, 1889, received as money payable to the appellants under their contract with the respondents, the sum of $2,611 out of monies payable to, and paid on account of, the

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respondents' claim against Charlebois under their contract with him. It in like manner appears also that shortly after the rendering of the judgment of the High Court of Justice in Ontario on the 28th of September, 1891, the respondent Preston with the knowledge and consent of the Union Bank as assignees of the appellants assigned all the right, title and interest of the respondents to receive payment under the said judgment for the work performed by them under their contract with Charlebois to one Nugent (then the attorney of the respondents, now the attorney of the plaintiffs in the present action which is plainly brought in their names in the interest of and for the Union Bank) upon trust to pay thereout when received the balance of the amount due to the appellants under their contract.

It is not disputed that since the month of January, 1890, no sum was actually paid to either of the respondents personally or to any one on their behalf until the month of February, 1898, when the sum of $8,400 as due to the respondents under their contract with Charlebois was paid to Nugent as such trustee for the Union Bank, the assignees of the claim of the appellants against the respondents. Out of this sum it appears that Nugent paid the bank the sum of $5,835.50 retaining the balance in his own hands. Upon affidavits of these facts it also in like manner appears that application was made by the respondents for an order to have Nugent joined as a defendant with them which motion was refused, for what reason does not appear, and judgment was thereupon rendered in the action against the defendants therein, the now respondents, for the sum of $1,078.50, with interest thereon at the rate of six per centum per annum from the commencement of the action until the recovery of judgment.

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From that judgment the respondents have not appealed and the sole question therefore before us on this appeal is upon a question whether or not the appellants or the Union Bank in their right are entitled to recover interest which they claim from the 28th September, 1891, under statute 3 & 4 Wm. 4, ch. 42, s. 28, upon the sum of $6,914, which as now appears would have been the amount then payable to the plaintiffs if the defendants had then received the amount due to them under their contract with Charlebois.

Now in *The Merchant Shipping Co.* v. *Armitage* (1) it was held in the month of November, 1873, unanimously by seven judges in the Exchequer Chamber, that where by a charter party a lump sum of £5,000 was agreed to be paid for freight after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the Custom House, and part of the cargo was lost by fire the full sum of the £5,000 was payable under the contract. So far as the sum was concerned there was a sum certain payable under the contract, but it was held unanimously that it was not made payable *at a time certain* by the contract. In the month of March, 1874, the case of *Hill* v. *The South Staffordshire Railway Co.* (2) was decided by Vice Chancellor Hall. The question there arose upon a contract between the railway company and a contractor which provided that payments should be made monthly as the work proceeded on the certificates of the company's engineer; some payments on account were made and a demand was made by the contractor upon the company for payment of a balance claimed by the contractor. This amount was in excess of the amount recovered in an action brought by the contractor in consequence of the

(1) L. R. 9 Q. B. 99.

(2) L. R. 18 Eq. 154.

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company not having complied with the contractor's demand and it was held by the learned Vice Chancellor that interest could not be recovered under 3 & 4 Wm. 4, ch. 28, there being *no sum certain* payable under the contract *at a time certain*. This case was determined wholly independently of *The Merchant Shipping Co.* v. *Armitage* (1) which was not cited by counsel on the argument nor by the learned Vice Chancellor. The case of the defendants was argued by Lindley Q.C., subsequently Lord Justice Lindley, whose argument the Vice Chancellor seems to have adopted, and it appears to me so much to the point that I quote a few passages of it. At p. 163 he says:

> The statute only applies to debts or sums certain. Is the sum now found due from the defendants a debt *or sum certain*—that will depend on the meaning of the expression *certain*. There was no certainty what would become payable to the contractor even in respect of the £92,000—*for that was subject to variation*, and unquestionably the other sums which were payable under the contract were not sums certain. It is said that anything is certain which can be rendered so by the contract or anything else—that is clearly too wide a construction.

Then he cited *Annandale* v. *Pattison* (2) decided it is true under a different statute namely the Stamp Act 55 Geo. 3 ch. 184, but strongly in support of his argument. Then again he says:

> Can it be said that because the chief clerk has found that a sum—now of course *a certain sum*—is payable by the defendants that it is a debt or sum certain within the meaning of the statute? When was it certain? Was it so before it was ascertained? How can it be said that a sum which is ultimately found due in respect of all sorts of work constitutes a debt or sum certain within such meaning? It can only be upon the theory that everything is certain when it is made so—a proposition not disputed—but it is plain that interest is to be payable in respect of a certain instrument; therefore *it must be a definite stated sum mentioned in the agreement itself. It cannot be found in the contract itself what particular sum can possibly be payable under it. To do that the functions of the engineer must be performed*, for it was deputed to him to find out in respect of what work the calculation was to be made.

(1) L. R. 9 Q. B. 99. (2) 9 B. & C. 919.

This argument resting so forcibly upon the uncertainty of the sum—a point not in uncertainty in *The Merchant Shipping Co.* v. *Armitage* (1) may possibly account for that case not having been referred to in *Hill* v. *The South Staffordshire Railway Co.* (2) in which case the argument on behalf of the plaintiff was largely rested upon *Mildmay* v. *Methuen* (3), and *Macintosh* v. *The Great Western Railway Co.* (4). These cases were also cited by the plaintiffs in the present case, but the learned Vice Chancellor shows why they are wholly unsatisfactory authorities and unreliable upon the question before him as to which in giving judgment he says:

> Independently of any authority upon the point I should have said that this was not a case in which within the meaning of the statute there had been a demand made in writing of *a sum certain* payable at a *certain time.*

In the month of June, 1875, the case of *Duncombe* v. *The Brighton Club and Norfolk Hotel Company* (5) came before the Court of Queen's Bench composed of Blackburn, Mellor and Lush JJ. The terms of the contract were contained in a letter dated the 28th of September, 1865, from the plaintiffs to the defendants, which was as follows:

> I have thought over your application respecting the Norfolk Hotel, the best terms I could offer would be one-third in cash and bills at six and twelve months for the balance.

This letter related to negotiations which had taken place between the writer of it and the company in relation to furnishing the hotel.

The terms of the letter were accepted by the company and the furnishing was completed in the month of March, 1866, at the cost as appeared by the bill rendered by the plaintiff of £3169 1s 11d.: the defendants

(1) L. R. 9 Q. B. 99.
(2) L. R. 18 Eq. 154.
3 Drew. 91.
(4) 4 Giff. 683.
(5) L. R. 10 Q. B. 371.

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paid on account of the third of this amount the sum of £800 0s 0d, leaving £256 0s 0d unpaid. Subsequently an action was brought to recover this sum, and it was in respect of interest claimed upon it from the completion of the furnishing of the hotel in March, 1866, that the question arose.

Now it is to be observed that neither *The Merchant Shipping Co.* v. *Armitage* (1), nor *Hill* v. *The South Staffordshire* (2), was cited, and from the judgments pronounced by the learned judges it is quite plain that they were not aware of either of these decisions. Blackburn J. was of opinion that the case did not come within the statute, and he held that interest was therefore not recoverable. He said:

> I think that the construction of the statute is that the written instrument should specify the time; and if that be so, the written instrument in this case does not do so,

and he expresses his surprise that there is so little authority on the subject; and again he says:

> I have already expressed my opinion that they (the words of the statute) do mean that the debt *or the sum certain must be* payable at a certain time by virtue of the written instrument, and that it is not enough that it afterwards becomes payable on a certain day. The section does not mean by *a certain time*, a time which is to depend upon a future named event, which will when the event happens become certain.

Mellor J. while differing from the opinion of Blackburn J. said that he did so with doubt and hesitatation. He stated his opinion to be

> that the object of the statute was not that the actual day should be ascertained on the face of the instrument, but that *the basis of the calculation* which was to make it certain *should be found in the instrument in writing.*

Then he explained how as he was of opinion *that such basis* appeared on the letter of the 28th of September, 1865.

(1) L. R. 9 Q. B. 99. (2) L. R. 18 Eq. 154.

The goods were to be paid for one-third in cash, one-third by a bill at six months, and the residue by a bill at twelve months. I think when the goods were sent in the time for the payment of one-third in cash had arrived, and all the *rest of the calculation* must depend upon that.

And what he meant he explains further by saying:

It is not necessary that the day for payment should be named *e. g,* "*the debt shall be payable on the 1st of October,*" but it is sufficient if the time can be ascertained *by* the terms which are in writing *and which enable the jury to form a safe basis of calculation* as to the time certain at which it is to be payable,

and he closes his judgment by saying:

I am, shortly, of opinion that if the basis of the calculation is to be found in the written instrument it is enough.

He was thus of opinion that if *anything* had to be done further than a mere calculation made upon a basis sufficiently defined in a written instrument then the case would not be within the statute, and interest would not be recoverable. We may, I think, reasonably conclude that a majority of two to one would not have arrived at the judgment if the case in the Exchequer Chamber had been cited. However the judgments of Blackburn J. and Mellor J. both make reasonably clear that in a case like *Hill* v. *The South Staffordshire Railway Co.* (1) where the functions of an engineer must intervene before anything becomes due under the contract, which was the case here, they would have entirely concurred with the argument of Lindley, Q.C. and the judgment of the Vice Chancellor in that case.

In the *London & Chatham Railway Co.* v. *The South Eastern Railway Co.* (2) the cases of *The Merchant Shipping Co.* v. *Armitage* (3), and of *Duncombe* v. *The Brighton Club & Norfolk Hotel Co.* (4) came under the consideration of the Court of Appeal

(1) L. R. 18 Eq. 154.
(2) [1892] 1 Ch. 120.
(3) L. R. 9 Q. B. 99.
(4) L. R. 10 Q. B. 372.

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consisting of the Lords Justices Lindley, Bowes and Kay, and it was unanimously held that the latter case was inconsistent with the former by which, it being a judgment of the Exchequer Chamber, the Court of Appeal was bound. It is true that Lord Justice Lindley there expressed the opinion that the construction put upon the statute by the Exchequer Chamber was a narrow construction but he nevertheless entertained no doubt that it must prevail. We cannot, however, from that observation infer that the Lord Justice had any doubt of the soundness of his argument or of the judgment of the learned Vice Chancellor adopting it in *Hill* v. *The South Staffordshire Railway Co.* (1) between which and the present case rather than between the present case and the Armitage case a parallel exists. The judgment of the Lords Justices having been appealed from to the House of Lords (2), was affirmed there. Lord Chancellor Herschell did not express any opinion as between the Armitage case and the Duncombe case because in his opinion neither case supported the claim of the appellants in the case before the House. He stated, however, his opinion upon the construction of the statute to be that the *certain sum* payable must be a sum certain which is due absolutely and in all events from the one party to the other although it may not constitute strictly speaking a debt, and he held that in the case before the House *there was not a sum certain payable at a certain time by virtue of a written instrument.* The application of the rule so expressed is quite sufficient for the purposes of the present case. Lord Watson was of opinion that the statute was evidently framed in recognition of the law as stated by Lord Tenterden in *Page* v. *Newman* (3) to the effect that interest is not due on money secured by a written instrument unless it appears *on*

(1) L. R. 18 Eq. 154. (2) [1893] A. C. 429.
(3) 9 B. & C. 378.

the face of the instrument that interest was intended to be paid or unless it be implied from the usage of trade as in the case of mercantile instruments. Lord Morris unhesitatingly expressed his entire concurrence in the judgment of the Exchequer Chamber. Lord Shand while concurring with the Lord Chancellor in other respects alone expressed his inability to concur in the opinion of Lord Morris. In this state of the authorities the rule as laid down in the Exchequer Chamber is still binding in all parallel cases, but as already observed the case of *Hill* v. *The South Staffordshire Railway Co.* (1) is most similar in its circumstances to the present case, and there does not appear to have ever been raised any objection to the construction of the statute upon which that case proceeded.

Upon the authorities as they stand I cannot hesitate to say that in the contract before us there is *no sum certain* payable *at a time certain* within the meaning of the statute. I entertain no doubt that the judgment of the 29th September, 1891, in the declaration mentioned did not constitute payment to the defendants of the monies, the payment of which to them was, by the contract, made a condition precedent to the plaintiffs having any cause of action against the defendants. What was sought to be done by that judgment was, by a rather irregular mode, but still to endeavour to obtain better security for payment at some future time not only of the claims of the defendants here but also of the Union Bank and others for claims against Charlebois by transferring his liability to the railway company and so substituting them, the parties really benefited by the work done, in the place of Charlebois, but of present or immediate or proximate payment no expectation was at the time entertained by any one. To treat that transaction as a payment of the defendants

(1) L. R. 18 Eq. 154.

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claim against Charlebois or the company is in my judgment wholly inadmissible. The appeal must be dismissed with costs.

SEDGEWICK and GIROUARD JJ. concurred in the dismissal of the appeal.

Appeal dismissed with costs.

Solicitors for the appellants: *Ewart, Fisher & Wilson.*

Solicitor for the respondents: *Geo. A. Elliott.*