

THE RUTLAND RAILROAD COM- } APPELLANTS;  
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1906

\*Feb. 20.  
 \*March 1.

AND

FRANCOIS LIGOURI BÉIQUE }  
 AND THE MINISTER OF RAIL- } RESPONDENTS;  
 WAYS AND CANALS FOR CAN- }  
 ADA..... }

FRANK D. WHITE..... APPELLANT;

AND

FRANCOIS LIGOURI BÉIQUE }  
 AND THE MINISTER OF RAIL- } RESPONDENTS;  
 WAYS AND CANALS FOR CAN- }  
 ADA..... }

EDWARD A. D. MORGAN..... APPELLANT;

AND

FRANCOIS LIGOURI BÉIQUE }  
 AND THE MINISTER OF RAIL- } RESPONDENTS.  
 WAYS AND CANALS FOR CAN- }  
 ADA..... }

ON APPEALS FROM THE EXCHEQUER COURT OF CANADA.

*Judicial sale of railways—Interested bidder—Disqualification as purchaser—Counsel and solicitors—Art. 1484 C.C.—Construction of statute—Discretionary order—Review by appellate court—4 & 5 Edw. VII. c. 158 (D.)—Public policy.*

Solicitors and counsel retained in proceedings for the sale of property are not within the classes of persons disqualified as purchasers by article 1484 of the Civil Code of Lower Canada.

The Act, 4 & 5 Edw. VII. ch. 158, directed the sale of certain rail-

\*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard, Davies, Idington and MacLennan JJ.

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ways separately or together as in the opinion of the Exchequer Court might be for the best interests of creditors, in such mode as that court might provide, and that such sale should have the same effect as a sheriff's sale of immovables under the laws of the Province of Quebec. The judge of the Exchequer Court directed the sale to be by tender for the railways, *en bloc* or for the purchase of each or any two of the lines of which they were constituted.

*Held*, that the judge had properly exercised the discretion vested in him by the statute in accepting a tender for the whole system, in preference to two separate tenders for the several lines of railway at a slightly increased amount, and that his decision should not be disturbed on appeal.

**A**PPEALS from the decision of the judge of the Exchequer Court of Canada, rendered on the 8th of November, 1905, accepting the tender of the respondent BÉIQUE for the purchase of the railways authorized to be sold under the provisions of the Act, 4 & 5 Edw. VII. ch. 158 (D.), for the sum of \$1,051,000.

In giving the reasons for acceptance of the tender of the respondent BÉIQUE for the purchase of the railways in question, *en bloc*, the learned judge of the Exchequer Court of Canada, His Lordship Mr. Justice Burbidge, said:

"By an Act of the Parliament of Canada, 4 & 5 Edw. VII. ch. 158, respecting the South Shore Railway Company and the Quebec Southern Railway Company, it was among other things provided that the Exchequer Court might order the sale of the railways mentioned and their accessories as soon as possible and convenient after the passing of the Act, and that such railways and their accessories respectively should be sold separately or together as in the opinion of the Exchequer Court would be best for the interests of the creditors of the said companies. The order for such sale has been made and tenders have been received in accordance therewith as follows:

"First.—A tender of \$105,000 for the East Richelieu Valley Railway;

"Secondly.—A tender of \$503,000 for the South Shore Railway;

"Thirdly.—A tender of \$1,006,000 for all the said railways together;

"Fourthly.—A tender of \$551,000 for what was formerly known as the United Counties Railway and the East Richelieu Valley Railway together; and

"Fifthly.—A tender of \$1,051,000 for all the said railways together;

"And the question now is which tender or tenders it is for the best interest of the creditors to accept? That is a question that the statute leaves to the opinion of the court.

"In answering that question it is not necessary to consider the first tender or the third tender mentioned. Obviously it would not be in the interests of the creditors to accept either of these. The question lies between the acceptance of the second and fourth tenders which would give a price of \$1,054,000 for the whole property, or of the fifth tender which would give therefor the somewhat smaller sum of \$1,051,000. By accepting the second and fourth tenders the property would realize for the creditors \$3,000 more than would be realized therefor by accepting the fifth tender. That course would have another advantage. It is easy to foresee that in the distribution of the moneys arising from the sale of the property in question, and probably in other connections, it will be necessary to attribute a portion of such moneys to each railway, and if the second and fourth tender is accepted, that question, so far as the South Shore Railway interests are concerned, will be eliminated, leaving only the question as to the distribution of the sum of \$551,000

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between the United Counties Railway interests and the East Richelieu Valley.

It is suggested that the latter question ought not to present any serious difficulty, seeing that the value of the East Richelieu Valley Railway may be taken to be determined by the bid of \$105,000 made therefor. But if that view is correct, then equally it might be contended that the value of the South Shore Railway is determined by the bid of \$503,000 made for that railway and its accessories, and that would leave the balance, whatever it might be, for the United Counties Railway. For example, if the second and fourth tenders were accepted we should have:

"The South Shore Railway.....	\$503,000
The United Counties Railway.....	446,000
The East Richelieu Valley Railway..	105,000
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Total .....	\$1,054,000

"and if the fifth tender were accepted we would have on the basis of division above mentioned, for

"The South Shore Railway.....	\$503,000
The United Counties Railway.....	443,000
The East Richelieu Valley Railway..	105,000
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Total .....	\$1,051,000

"In that way the difference of \$3,000 would fall upon the United Counties Railway interests.

"But whether in case the one tender rather than the two were accepted, the whole difference should fall upon the United Counties Railway or be equitably distributed between the three railways is a question that need not now be determined. The matter may be left for future consideration, but upon the main ques-

tion I see no reason to doubt that a fair distribution of the total price may be made between the three railways without any considerable expense.

"There is, however, another consideration. If the property is sold and part sold to one purchaser and part to another, two new and diverse interests will at once arise, and it will be necessary to divide the property both real and personal and to make two transfers. It is also to be seen that these interests may be adverse and perhaps hostile, and the expense of determining any controversies that may arise between them is likely in the main to fall upon the funds that will be brought into court as the price of the several railways. What the amount of that expense may be it is of course not possible to foresee, but experience suggests that it may very easily exceed a sum of three thousand dollars. I am therefore of opinion that it is better for the creditors of the said companies, and in their best interests, not to create any such diverse interests, but to avoid that difficulty by accepting the single tender of \$1,051,000 for the whole property.

"So far I have dealt with the matter wholly from what, in my opinion, is the best interests of the creditors of the said companies, as I agree that under the statute that is the proper test to apply.

"But we cannot overlook the fact that it is a question in which the public have a large and direct interest. That interest in the present proceeding is represented by the Minister of Railways and Canals, and counsel for the minister has stated that in the minister's opinion the public interest will be best served by a sale of the whole property to one person or company. The interest of the public is that the several roads be kept open and be duly operated for the public convenience, and it seems reasonable to conclude that that is

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more likely to happen where the property passes into the hands of one person or company, than where it passes into the hands of two persons or companies. If in this case the public interest and the best interests of the creditors of the several companies were opposed, I should think that, in accordance with the statute under which the sale is made, the interests of the creditors should prevail, but in my opinion they are not opposed. It appears to me to be both in the best interests of the creditors and in the public interest, that the highest tender for the property as a whole should be accepted.

"That brings me to another matter. There has been filed with the registrar of this court a letter or notice purporting to come from the Atlantic & Lake Superior Railway Company protesting against the sale of the properties in question here. It purports to be signed by the secretary of the latter company and has been read in open court so that all parties interested may have notice of it. There is also an opposition filed on behalf of the Great Northwestern Telegraph Company against including in the sale of the property of the several companies mentioned its interest in the equipment of the telegraph system along their said lines. I do not propose at present to deal with the question raised by the letter or notice mentioned, nor with the petition of the Great Northwestern Telegraph Company; neither do I think that I should delay action with respect to the tenders. I shall leave these matters largely with the purchaser, and he must satisfy himself as to what weight or consideration is to be attached to the communication of the Atlantic & Lake Superior Railway Company. If in that respect there should be any defect in the title that the court can give under the statute, the loss, if

any, must fall upon the purchaser and not upon the creditors of the said companies. I shall also expect the purchaser to give a satisfactory undertaking to protect the creditors and the receiver and registrar and those acting under the authority of the court from any just claim of the telegraph company mentioned. There was, I am sure, no intention on the part of any one to include in the sale any property of the Great Northwestern Telegraph Company, nor am I aware that any of its property has been so included. But there may be some questions as to what its real interests and rights are in the matter, and as to that the purchaser must in the first instance satisfy himself. If under these circumstances he wishes to withdraw his tender and deposit rather than go on with the purchase, leave is given him to make an application for such withdrawal. If, however, notwithstanding the notice and petition he is willing to go on with the purchase on the terms and conditions I have mentioned, I ought not, I think, under all the circumstances of the case to defer action.

"Subject to the terms and conditions I have mentioned the order and direction of the court will be that Mr. F. L. Béique's tender of \$1,051,000 for the property as a whole be accepted, and that the several railways mentioned with their accessories, be sold to him for that price, and that steps be taken to give effect to and to carry out such sale."

The present appeals have been asserted by the Rutland Railroad Co., a creditor of the South Shore Railway Company and of the Quebec Southern Railway Company, Frank D. White, a creditor of the same companies, and Edward A. D. Morgan, a creditor and bidder for the property of the South Shore Railway Company.

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On the 20th of February, 1906, motions were made on behalf of the said respondents to quash the appeals with costs on the grounds:

(1) That the Exchequer Court judge, acting in the matter in question, was a special tribunal designated by Act of Parliament and was not a court of record, but a functionary named for a special purpose, whose discretionary order was final for those purposes and not appealable. Parliament having reserved to itself the power of finally deciding as to the title of the purchaser to operate the road;

(2) That mere bidders at the sale of the road had no standing in court to maintain an appeal;

(3) That unproved claimants and creditors could have no standing in court;

(4) That these persons were not parties to any suit in which a judgment had been rendered; and

(5) That in no case could any creditor or other party have an interest exceeding \$500 limited for appeals from the Exchequer Court, as the difference between the bid accepted and the combined amounts of the several separate bids for the several portions of the road separately (only \$3,000) when distributed, could only leave a few dollars to each of the creditors; and

Finally, that the discretion of the Exchequer Court judge was a commendable discretion as it avoided diversity of interest in the operation of the system of railways and was in the general interest of the public by thus placing the whole control with one corporation.

*Wallace Nesbitt K.C., Lafleur K.C., and Parent K.C.* appeared for the motions. The sale in question was conducted under a special statute, 4 & 5 Edw.



VII. ch. 158 (D.), and is not a proceeding in the ordinary sense in the Exchequer Court or under the "Railway Act, 1903," but before a *curia designata*, not a court of record. The functions vested in the officer are of a special character to be exercised in the interest of the public as well as of the parties more directly concerned and the statute contemplates, by its terms, that the exercise of these powers and the discretion thereby given should be final and not subject to any appeal.

Bidders at the sale can have no status to assert an appeal; neither can unproved claimants. The railway companies now appearing as creditors cannot, in any case, have any interest amounting to the value of \$500, as limited for appeals from the Exchequer Court of Canada, as the whole controversy is concerning the division of the difference of \$3,000 between a great number of interested parties, none of whom can have nearly as much interest as \$500 in the distribution of this amount. None of the appellants were parties to any of the proceedings in regard to the sale and, consequently, have no *locus standi* before this court.

We refer to *The Canadian Pacific Railway Co. v. Fleming* (1), at page 36, per Strong C.J.; *Lachance v. La Société de Prêts et de Placements de Québec* (2); *The Union Colliery Co. of British Columbia v. The Attorney-General of British Columbia* (3); *The Ottawa Electric Co. v. Brennan* (4); and *Birely v. The Toronto, Hamilton and Buffalo Railway Co.* (5).

*Chrysler K.C., J. E. Martin K.C., Morgan and Beulac* appeared to oppose the motions on behalf of the various appellants.

(1) 22 Can. S.C.R. 33.

(3) 27 Can. S.C.R. 637.

(2) 26 Can. S.C.R. 200.

(4) 31 Can. S.C.R. 311.

(5) 25 Ont. App. R. 88.

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After hearing counsel on the motions and without calling upon the appellants, the court reserved the further argument of the questions submitted until the hearing of the case upon the merits.

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*Chrysler K.C.* and *J. E. Martin K.C.* for the appellants, the Rutland Railroad Company; *Beulac* for the appellant White; *Morgan* for the appellant Morgan. The respondent Béique, in all the proceedings in this matter, appeared for and represented the receiver appointed by the Exchequer Court, both as solicitor and counsel; he virtually had charge of the sale of the railways, and, consequently, could not legally bid and become a purchaser thereof by reason of the position he occupied in respect to the proceedings. Art. 748 C.P.Q.; art. 1484 C.C.; Pothier, Proc. 218-220; Heric, Vente des Immeubles, 180, 181; Fuzier-Herman, vol. xxxvi., p. 851, vo. "Vente," also nos. 819-822; Fuzier-Herman, vol. vi., nos. 260, 269; vol. xxxiii., p. 728, vo. "Saisie Immobilière" nos. 1273, 1247; *Atkins v. Delmege* (1), at page 14; *Hall v. Hallett* (2); *Whitcomb v. Mitchin* (3); *Guest v. Smythe* (4); *Crawford v. Boyd* (5). The tender of the highest bidder should have been accepted. *Re Alger and The Sarnia Oil Co.* (6) and cases cited in the judgment in that case. The French jurisprudence is to the same effect.

The interest of the several appellants cannot be questioned as claims aggregating many hundreds of thousands of dollars have been filed against the rail-

(1) 12 Ir. Eq. R. 1.

(2) 1 Cox 134.

(3) 5 Madd. 62.

(4) 5 Ch. App. 551.

(5) 6 Ont. P.R. 278.

(6) 21 O.R. 440.

ways offered for sale and it is doubtful whether or not the price realized by the sale attacked will be sufficient to pay the creditors. All the appellants are interested in the marshalling of the assets and a ventilation according to the principles laid down in the Code of Civil Procedure (arts. 805 *et seq.* C.P.Q.).

On the question of jurisdiction we refer specially to *The North British Canadian Investment Co. v. The Trustees of St. John School District* (1); *The City of Halifax v. Reeves* (2).

*Nesbitt K.C.* and *Lafleur K.C.* appeared for the respondent Béïque, and *Aimé Geoffrion K.C.* for the Minister of Railways and Canals, but were not called upon for any arguments.

The judgment of the court was delivered by

GIROUARD J. (oral).—The objection now taken for the first time on this appeal, that the respondent, Béïque, could not legally bid or become a purchaser of the railways by reason of the position occupied by him as solicitor or counsel, ought not to prevail.

His position in regard to the proceedings does not bring him within the class of persons disqualified under the provisions of article 1484 of the Civil Code, but, even if it did so, the position he occupied would not involve absolute disqualification and render his acts null. There were no objections raised or steps taken to impeach his position before the judge of the Exchequer Court and none can now be taken on this appeal.

We have unanimously agreed that all the appeals should be dismissed with costs. We believe that the

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(1) 35 Can. S.C.R. 461.

(2) 23 Can. S.C.R. 340.

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learned judge of the Exchequer Court has properly exercised the discretion vested in him by the statute, 4 & 5 Edw. VII. ch. 158, and that we should not disturb his judgment or order.

The appeals are dismissed with costs.

*Appeals dismissed with costs.*

Solicitor for the Rutland Railroad Co., appellants:

*J. E. Martin.*

Solicitor for the appellant, Morgan: *E. A. D. Morgan.*

Solicitors for the appellant, White: *Carter, Goldstein, & Beulac.*

Solicitors for the respondent, Béique: *Béique, Turgeon, Robertson & Béique.*

Solicitors for the Minister of Railways and Canals, respondent: *Aimé Geoffrion & J. L. Perron.*