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*March 5.
*March 13.

THE MONTREAL STREET RAILWAY COMPANY (DEFENDANTS). } APPELLANTS;

AND

THE MONTREAL CONSTRUCTION COMPANY, AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

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

Vendor and vendee—Sale of securities—Interpretation of contract—Arts 1018, 1019 *C.C.—Railways—Debtor and creditor—Right of way claims—Legal expenses incurred in settlement.*

The plaintiffs sold the defendants stock and bonds of the P. & I. Ry. Co. with an agreement in writing which contained a clause stipulating as a condition that the vendees might declare the option of paying a further sum of $30,000, in addition to the price of sale, in consideration of which the vendors agreed to pay all the debts of the P. & I. Ry. Co. except certain specially mentioned claims, some of which were in respect of settlement for the right of way. The final clause of the agreement was as follows:—"After two years from the date hereof the Montreal Street Railway Company will assume the obligation of settling any right of way claims which the vendors may not previously have been called upon to settle and will contribute $5,000 towards the settlement of any such claims which the vendors may be called upon to settle within the said two years. Any part of the said sum not so expended in said two years or required by the purchasers so to be, shall be paid over to the vendors at the end of the said period, it being understood that the purchasers will not stir up or suggest claims being made." The vendees exercised the option and paid the $30,000 to the vendors who reserved their right to any portion of the $5,000 to be contributed towards settlement of the right of way claims which might not be expended during the two years. An unsettled claim for right of way, in dispute at the time of the agreement,

*PRESENT:—Fitzpatrick C.J. and Girouard, Idington, Maclennan and Duff JJ.

was, subsequently, settled by the vendors within the two years. The question arose as to whether or not this claim, then known to exist, and legal expenses connected therewith was a debt which the vendors were obliged to discharge in consideration of the extra $30,000 so paid to them, and whether or not the $5,000 was to be contributed only in respect of right of way claims arising after the date of the agreement.

Held, affirming the judgment appealed from, that the agreement must be construed as being controlled by the provisions of the last clause thereof; that said last clause was not inconsistent with the previous clauses of the agreement and that the vendees were bound to contribute to the payment of such claims and legal expenses in respect of the right of way to the extent of the $5,000 mentioned in the last clause.

APPEAL from a decision of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, in favour of the plaintiffs for the sum of $2,164.14 with interest and costs, Sir Alexander Lacoste C.J. and Blanchet J. dissenting.

The case is stated, as follows, by His Lordship Mr. Justice Trenholme, in the court appealed from:

"TRENHOLME J.—The question to be determined is whether the respondents (plaintiffs) are entitled to recover this sum ($2,164.14) from appellants (defendants) in virtue of the agreement formed by correspondence between the parties of 20th June, 1901, invoked in the case.

"On that date, the respondents, acting by Mr. H. S. Holt, by letter addressed to appellants offered to sell to appellants for one million odd dollars almost the entire stock and bonds of the Park and Island Railway Co., and added:

'A further condition of these presents is that in accepting the present offer of sale you may declare your option of paying a further sum of $30,000 to the

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vendors, in consideration whereof the vendors will undertake to liquidate and pay all the debts of the Montreal Park and Island Railway Co., except the following:

'1. A sum of $500, on which the interest is payable in perpetuity to the Maison St. Joseph du Sault, for the right of way.

'2. A mortgage on the Shamrock property, $1,455.00, part of the lots only being used for the right of way.

'3. A mortgage on the car-barn property and adjoining lots for $9,179.54.

'4. The balance remaining due on the lot, corner Mount Royal Avenue and Park Avenue, $2,666.67.

'5. A mortgage in favour of T. A. Dawes, Jr., for $3,128.13 for right of way at Lachine, with the current interest accrued on the said several sums.

'6. The debt and costs (if any) which may be due to the plaintiffs or their attorneys, in the suits of the Royal Electric Co. against the Montreal Park and Island Railway Co. and the Montreal Construction Company, which suits are contested.

'7. Any arrears of interest due on the 58 bonds not held by the Syndicate.

'8. Any amount which may be payable to the Town of St. Louis as the price of the road of the Turnpike Trust, which amount (by reason of the judgment annulling the franchise and the contract) is not considered payable.

'9. All amounts payable for coal under contract for future delivery or in stock.

'10. Amounts payable on current and future newspaper advertisements, $490.

'11. The current monthly account for supplies; on 27th April last it amounted to $3,363.78.'

"The offer closed with the following clause:

'After two years from the date hereof, the Montreal Street Railway Co. will assume the obligation of settling any right of way claims which the vendors may not previously have been called upon to settle, and will contribute $5,000 towards the settlement of any such claims which the vendors may be called upon to settle within the said two years. Any part of the said sum not so expended in said two years or required by the purchasers so to be shall be paid over to the vendors at the end of said period, it being understood that the purchasers will not stir up or suggest claims being made.'

"On the same day the offer was accepted by appellants as follows:

'Montreal, June 20th, 1901.

'H. S. Holt, Esq.,
City.

Dear Sir,—

'On behalf of the Montreal Street Railway Company, I hereby accept the proposal contained in your letter of June 20th, to sell to this company nine hundred and sixty-seven bonds, three thousand one hundred and fifty preferred shares, and four thousand two hundred and eighty-nine ordinary shares of the Montreal Park and Island Railway Company, on the terms and conditions set out in your letter. On behalf of the company I also declare this company's option of paying the sum of $30,000 to the vendors, in consideration of the vendors undertaking to liquidate and pay all the debts of the Montreal Park and

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Island Railway, except those mentioned in your letter.

Yours truly,

F. C. Henshaw,
Acting President.'

"On the 30th July, 1901, the respondents granted a receipt to appellants for the consideration price and the $30,000 payable under the option accepted by them, and in the receipt respondents expressly reserved their right to claim from appellants under the contract any part of the $5,000 which the appellants agreed to contribute towards the settlement of right of way claims and which might not be so expended during the two years from date of the contract, 20th June, 1901.

"As this reserve shews, as do also the contributions of the appellants to the settlement of two other right of way claims, the Lindsay and Larue right of way claims, out of the $5,000, both parties evidently understood and acted in the view that the acceptance of the option by appellants did not relieve appellants from contributing the $5,000 over and above the $30,000 and the other consideration payable by them under the contract.

"The appellants in fact in their pleas and factum do not deny, but admit that they contracted to pay the $5,000 towards settlement of right of way claims in addition to the other considerations of the contract. But they contend that the $2,164.14 which they have been condemned to pay, which was incurred for right of way over the Grand Trunk Railway property, was not a right of way claim mentioned in the last clause of the contract towards payment of which they agreed

to contribute, but was properly a debt which respondents were bound to pay in discharge of their obligation to liquidate and pay all the debts of the Park and Island Railway Co. in consideration of the $30,000 paid them under the option to that effect accepted by appellants.

"The question thus is: Was the claim for right of way over the Grand Trunk Railway property a right of way claim within the meaning of the last or $5,000 clause of the contract, to payment of which appellants must contribute out of the $5,000, or is it a debt which respondents must pay under the option accepted by appellants?

"A reference to the $5,000 clause shews that the right of way claims therein meant were claims to be settled and, therefore, unsettled claims and were not restricted, as appellants pretend, to right of way claims that only came to light for the first time after the date of the contract. It may be questioned if there were any such unknown claims at the time of the contract, as the road had been built and in operation for several years. Claims that at the time of the contract had been settled by being reduced to a definite obligation were debts and were payable by respondents under the option, but claims that were not then settled and reduced to a definite obligation were not debts within the meaning of the option. Any unsettled claims for right of way that respondents were called on to settle within two years from date of contract, were to be settled by respondents, and the appellants were to contribute $5,000 towards the settlement of such claims, or so much thereof as was required therefor, and to pay to respondents at the end of two years any balance of the $5,000 not so required. All un-

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settled claims for right of way which respondents were not called on within the two years to settle were to be settled by appellants.

"The appellants say that the right of way claim for crossing the Grand Trunk Railway in question herein was not only known at the time of the contract, but had been reduced to a definite debt or obligation long before the date of the contract.

"It is a fact that an arrangement had been agreed upon for right of way between the Grand Trunk Railway Co. and the Park and Island Railway Co. in 1897, but at the time of the contract in question, the 20th June, 1901, the Grand Trunk Railway Company had consented to depart from that arrangement which had never been carried out, and at the time of the contract the two companies, Grand Trunk Railway Company and Montreal Park and Island Railway Co. were engaged in effecting a new and different settlement which was completed between the parties within the two years. The record shews that respondents were called on to settle and did settle this right of way claim of the Grand Trunk Railway within the two years from date of contract and it is the only settlement of that claim that was ever carried out.

"The majority of the court think therefore that this right of way claim of the Grand Trunk Railway Co. is one appellants are bound to contribute to the settlement of, and that the judgment *a quo* is correct and should be confirmed, and it is accordingly confirmed with costs.

"The item for legal expenses in effecting the settlement of the claim is a part of the cost of securing the right of way, and is properly included herein as are the notarial charges."

Hague, for the appellants, referred to Arts. 1018, 1019 C.C.; *Fair* v. *Dolan*(1); *Watson* v. *Sparrow* (2); Larombière, art. 1162 C.N. No. 6, and the maxim, *"exceptio probat regulam de rebus non exceptis."*

We therefore respectfully submit that: (1) There are two alternative constructions of the contract, and if either be adopted respondents' action must fail; (2) According to the first, respondents having paid $30,000 can ask nothing further in any event; (3) According to second, respondents may ask a contribution of $5,000 from appellants for the purpose of settling certain claims, but the claims in question are not of the class entitled to such contribution.

Dandurand K.C. for the respondents.

The judgment of the court was delivered by

GIROUARD J.—I think this appeal should be dismissed. It seems to me that the last paragraph of the agreement of the 20th June, 1901, controls the whole instrument, and I must say that I cannot see any inconsistency between that paragraph and the former one, relied upon by the appellants. The first provides for a general case, that is, the payment of the debts of the respondent company, and the last for a special one, namely, the settlement of the right of way claims. The respondents agreed to settle all these claims which might be presented within two years from the date of the agreement whether existing and determined before that date or after, and towards this settlement the appellants agreed to contribute $5,000

(1) 2 Legal News 395. (2) Q.R. 16 S.C. 459.

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by way of compromise. They contend that the so-called Grand Trunk claim for right of way was a debt assumed by respondents under the first clause of the agreement. We do not understand the latter in this way. The letter of Mr. Ross, secretary-treasurer of the company, appellants, shews that the right of way claims did exist and were enforceable as such, although the company, respondent, in the first clause had assumed all the liabilities and debts, less some specified. The right of way claims therefore form an independent and special provision in the deed which the appellants had to satisfy to the extent of $5,000. The sum of money which they were condemned to pay in this case by the two courts below forms part of the said sum.

I think, therefore, the appeal should be dismissed for the above reasons which are more fully set up by the said courts, the whole with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Campbell, Meredith, Macpherson & Hague.*

Solicitors for the respondents: *Dandurand, Brodeur & Boyer.*