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*Nov. 2, 3.
*Nov. 27.

VERA CECIL, EXECUTRIX OF THE ESTATE OF HENRY CECIL, DECEASED (PLAINTIFF) ..... APPELLANT;

AND

CONRADE WETTLAUFER (DEFENDANT).. RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Contract—Commission—Sale of shares—Commission dependent on payment—Insolvency of buyer—Purchase of assets by seller—Payment or equivalent.

W. having agreed to sell shares in the capital stock of the Orr Gold Mines Co. to the Kirkland-Porphyry Gold Mines Co. entered into a contract to pay W. a commission for services in effecting the sale. The purchase price of the shares was to be paid as follows: $100,000 on transfer to the purchaser and the balance by instalments at specified dates and the commission was to be paid out of the respective instalments. A clause in the contract provided that if the payments were not made by the purchaser W. would be under no liability to pay the commission. The initial payment of $100,000 was made and the commission thereon paid to C. When the next payment fell due the purchaser defaulted and shortly after was placed in liquidation under the Winding-Up Act. The liquidator offered the assets for sale and accepted the tender of W. and H.W., a creditor who had advanced money to the insolvent company for its operations. The successful tenderers received all the assets of the estate including the stock sold by C. and other stock in the Orr Co. and paid the claims of the other creditors. In an action by C. for the balance of his commission there was no evidence that the assets had a cash value equivalent to the amount of the unpaid purchase price of the shares.

Held, Idington J. dissenting, that W. had not received payment for the shares sold to the Kirkland Co. and the commission was not earned.

Per Duff J. By the transaction with the liquidator the contract sale of the shares to the Kirkland Co. was virtually rescinded and the evidence fails to show that what C. received in purchasing the assets was received or given in the performance by the Kirkland Co. of its obligation under the contract of sale of shares.

Held, also, that there is nothing on the record to show that C. did anything to prevent the contract for sale of the shares from being carried out.

Per Idington J. There should be a reference to ascertain the value of the assets purchased from the liquidator.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial in favour of the respondent.

The facts are fully stated in the above head note.

Slaght K.C. and *G. F. Macdonnell* for the appellant.

Glyn Osler K.C. and *Munnoch* for the respondent.

THE CHIEF JUSTICE.—After giving full consideration to the argument at bar of Mr. Slaght for the appellant, I remain of the conclusion I reached at the close of the argument that the appeal should be dismissed with costs.

The reasons for the unanimous judgment of the Court of Appeal, affirming the judgment of the trial judge, Middleton J., were stated by Mr. Justice Ferguson. In these reasons the learned judge reviewed all of the somewhat complicated facts out of which this litigation has arisen. I do not think it of any advantage to restate these facts as I fully concur in his conclusions.

The pith of the learned judge's reasons is contained in the latter part of them, which I quote in full:

> Having read the evidence, I am of the opinion that none of the parties to the purchase and sale between Wills and Wettlaufer on the one part, and the liquidator on the other part, looked upon the transaction as a cash sale for $611,000 cash, that none of them considered the bonds and the assets pledged therefor as securities or properties that could be sold or dealt with so as to realize $600,000 cash, or anything like that sum, and unless we must give effect to the form and disregard the substance, I do not think it could be reasonably suggested, let alone found, that the bonds held by the defendant were realized upon in cash —or in something which the defendant voluntarily elected to take instead of cash; the defendant had to save as much as he could from the wreck, and make the most of a difficult situation—and I do not think that in doing so he can, because of the form of his offer, be held to have realized cash or been paid in cash as was contemplated he should be paid before the plaintiff became entitled to commission under the agreement sued upon. It was for the conversion of the plaintiff's property into cash that the plaintiff was to be paid.
>
> Admittedly the shares have not been converted into cash, and I can find nothing in the evidence to suggest that anything the defendant did prevented such a conversion. What the defendant got by his purchase was merely salvage of a part of his property, but not cash.

IDINGTON J. (dissenting).—Since this action was instituted and tried, Henry Cecil, the plaintiff therein and later appellant, has died and been succeeded, as appellant

herein, by his widow who is executrix of his last will and testament.

The said late Henry Cecil and respondent entered into the following agreement:

This agreement made this Fifth day of September, 1918.

Between:—

CONRAD E. WETTLAUFER, of the City of Buffalo, in the State of New York, hereinafter called

The First Party;

and

HENRY CECIL, of the City of Toronto, in the County of York, hereinafter called

The Second Party.

WITNESSETH that in consideration of the efforts of the said Second Party in making the sale of stock of Orr Gold Mines, Limited, the First Party agrees to pay to the said Second Party Ten per cent (10%) upon five hundred and thirteen thousand two hundred and 40/100 dollars, the purchase price thereof, out of the proceeds of said sum as follows:—

(*a*) Five thousand dollars ($5,000) to-day in cash out of the first payment under an agreement made between the First Party hereto and Kirkland-Porphyry Gold Mines Limited. The receipt of which is hereby acknowledged.

(*b*) Ten thousand dollars ($10,000) out of the second payment to be made under said agreement on the 1st day of September, 1919, when such payment shall have been made; and

(*c*) Thirty-six thousand three hundred and twenty and 40/100 dollars ($36,320.40) out of the third payment under said agreement of three hundred and thirteen thousand two hundred and 40/100 dollars, when such payment shall have been made.

Should said payments not be made by the said Kirkland-Porphyry Gold Mines Limited, the First Party shall be under no liability to the Second Party for the payment of any commission by reason of said sale.

THIS AGREEMENT shall enure to the benefit of and be binding upon the parties hereto, and their respective heirs, executors, administrators and assigns.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of Wm. J. Magavern.	Conrad E. Wettlaufer	(Seal).
	H. Cecil.	(Seal).

This action was brought, on the 22nd of July, 1922, to recover from respondent the balance due in respect of the $46,320.40, balance of commission due under said agreement.

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The respondent and said Kirkland-Porphyry Gold Mines Limited, on the same date as the above agreement was made, entered into a long agreement in writing whereby said respondent agreed to sell and did sell to said company, which agreed to buy and did buy from him, 873,000 shares of Orr Gold Mines, Limited, for $513,200.40, payable as follows:—

"(*a*) One hundred thousand dollars ($100,000.00) on the transfer of the shares referred to in paragraph 1 hereof.

(*b*) One hundred thousand dollars ($100,000.00) on or before the 1st day of September, 1919; and

(*c*) The balance of three hundred and thirteen thousand and two hundred 40/100 dollars ($313,200.40) on or before the first day of September, 1920."

The said first payment thereunder, $100,000.00, was made and the late Cecil then got the $5,000.00 mentioned in above quoted agreement on account of his said commission, but the second and third payments were not made by the said company. They had been secured, not only by the terms of the said agreement, lastly mentioned, but by the promissory notes of the said company, and the collateral security bonds of said company to the amount of $420,000.00 charged upon all the assets of the Kirkland-Porphyry Gold Mines Limited, which, of course, would bind the stock transferred to it in the Orr Gold Mines, Limited, and furnish a controlling interest therein. Practically the respondent thus and thereby got not only the control of the Kirkland-Porphyry Gold Mines Limited for the full amount of this balance of $413,200.40 due him, but also, indirectly, of the Orr Gold Mines, Limited.

The remarkable thing happened, however, that he formed an alliance with one Wills, which I suspect originated before the event of liquidation of the company, on which this case has turned in the courts below.

Though the said Wills had put into the said Kirkland-Porphyry Gold Mines Limited, at and after the time of said agreements and later to develop its resources, a total sometimes stated to be $190,000.00 and at other times said to be $290,000.00, yet he put it (according to the statement

of the case herein) into liquidation shortly after the first of said promissory notes became due.

Thereupon in due course of time an offer was made by the respondent and said Wills which led to the liquidator transferring to them the entire assets of the said company which as already stated practically meant the control of and, I imagine, practically the entire assets of the Orr Gold Mines, Limited, save a possibility not cleared up of rights of its remaining shareholders.

This successful tender was, so far as respondent's share thereof is concerned, based entirely on the surrender of his bonds held as collateral security for the payment of the balance due him.

The learned trial judge held he could not, on his construction of the agreement above quoted, see how the plaintiff then before him could rest at all on the result of said purchase from the liquidator. The price had not been paid by the company and thus the matter ended unless in the case of fraud, which was not charged.

In somewhat like terms the Appellate Division of the Supreme Court of Ontario dismissed the appeal thereto and characterized that got as wreckage.

With great respect, I submit that the true interpretation and construction of the agreement above quoted in full is not, though I admit quite capable of such a construction as given it, been correctly construed and applied in light of the relevant facts and surrounding circumstances.

If to be read in an exceedingly narrow sense and, in the last analysis, effect only to be given to the clause which reads as follows,

> should said payments not be made by the said Kirkland-Porphyry Gold Mines, Limited, the First Party shall be under no liability to the Second Party for the payment of any commission by reason of said sale,

I can, though not agreeing therewith, quite understand the conclusion of one so reading it.

I should not be surprised to find now-a-days a contract expressly so constituted and be quite agreeable to enforcing it. But it would be of such an unusual character that I would expect it to be framed in other terms than that before us.

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I interpret that in the circumstances presented quite otherwise. It, to my mind, clearly intended not the actual payment of dollars on the dates specified, but the realization of that which would produce in equivalent dollars the stated values.

If the respondent chose to take in exchange another gold mine worth, beyond dispute, double the sum specified, I do not think he could, under this agreement, escape payment of this commission by any such subterfuge. And if the undisputed evidence is to be our guide, that is practically what he has done.

It was not the actual dollars to be paid but the amount in actual dollars to be realized that in fact was present to the minds of the contracting parties now in dispute herein.

The commission was to be derived "out of the proceeds of said sum" which I interpret to mean as the words imply.

And the concurrent agreement between the respondent and the company clearly indicates this was what the parties had in view for the respondent was given a predominant power over the operations of the company to whom he was selling, in section 9 thereof, as follows:—

> 9. IT IS EXPRESSLY AGREED as a condition precedent to the entering into of this agreement, that all expenditures made by the Second Party for salaries, development, mill and plant shall be approved of by a majority in number of a committee of three, two of whom shall be appointed by the First Party and one by the Second Party; it being agreed, however, that one of the consenting members of said committee shall be the nominee of the Second Party. It is also further agreed that the Second Party shall deliver to the said committee all of the bonds of the Company, except those referred to in clauses 2 and 8 of this agreement, such bonds so delivered to the said committee to be released by a majority in number thereof, of whom one shall be the nominee of the Second Party, only as required for financing the Second Party in its operations. It is further agreed that none of the treasury shares of the Second Party shall be sold or disposed of without the approval and consent of the majority in number of said committee, one of whom shall be the nominee of the Second Party. This committee shall exist with full authority in the premises until the notes given to the First Party for four hundred and thirteen thousand two hundred 40/100 dollars ($413,200.40) are fully paid.

It was out of the operative results so produced or otherwise in the course of events to be developed that he expected to be paid and out of that payment be obliged to pay the late appellant his commission.

It is in that light I should look at, interpret and construe this contract.

And hence in the events which have ensued the respondent should pay on the basis of his successful use of that he got and agreed to pay a commission upon.

What that result is appears from the uncontradicted evidence of the late plaintiff, which is as follows:—

Q. How close to the lines of the Orr property is shaft of the Kirkland Gold?

A. 60 feet. I sunk it there for the purpose of proving their property.

Q. Sixty feet from the boundary line of the Orr?

A. Yes.

Q. Is it a vertical shaft, or nearly so?

A. It is so.

Q. And on the 12th of June, 1920, when Wills and Wettlaufer bought the assets, to what depth had this shaft on the Kirkland claims adjoining, what depth had that shaft been sunk?

A. Over 900 feet.

Q. Had there been much lateral work done on that property?

A. Oh, yes, a great deal. They had about two years and a half of ore in sight.

Q. Have you been underground and familiar with it?

A. Yes.

Q. And what were the results and depth on the adjoining property, the Kirkland Claim Gold Mine, at the time in June, 1920—had it proven to be valuable?

A. It would have doubled the value of the Orr, absolutely doubled their value.

Q. It would have doubled the value of the Orr—you mean the ore in the ground, or what?

A. The shares of the Orr, or the exposure of the ore, would have doubled the value of the price of stock or the price of the mine.

Q. Would have doubled the value of the price of the mine, I should have asked you before we left it—take the Orr Mine itself that you have told us about, being 400 feet down, and lateral work done, did the values —were there rich values or otherwise, at the 400 foot level on the Orr property?

A. Yes, we had about $23.80 across twelve feet.

Q. $23.80 across twelve feet—$23.80 to the ton?

A. To the ton.

Mr. Osler: That is on the Kirkland.

Mr. Slaght: No, on the Orr?

A. On the Orr.

Q. On the Orr itself, yes?—A. On the hanging wall of that there is six inches of stuff that would go over $700, not included in that assay.

It seems quite clear that out of the pitiable wreckage the Appellate Division could only see there is much more in sight and probably by this time realized.

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I should therefore direct a reference as to the facts and if so found declare the respondent's obligation to pay under said agreement.

If that is not the practical meaning of the results of the contract in question I fail, with great respect, to understand why so much time and labour was wasted upon it in the courts below.

If to be valued by the last clause alone and the terms of the concurrent contract for bringing about which the commission was to be paid must be discarded and only cash to be considered no more can be said; for then no use of all the effort of respondent's counsel at the trial and in appeal to justify the course of his client.

If that is the meaning of the contract the case is of the simplest character for no one pretends that the actual dollars were ever received.

I would direct a reference to ascertain if the foregoing statements of the late plaintiff are true in substance and in fact, or what are the actual facts.

If as the result thereof it be found that the sale by him to the said company has produced the receipt by respondent of that which is beyond all doubt such as to render him in justice liable to pay said balance of commissions the court on further directions should so declare, and I would reserve such further directions and costs in order that the proper remedy be given.

If the respondent at any stage had got, in lieu of cash, let us say, for example, victory bonds or the like unexceptionable assets, in his dealings with what bonds as were given him as collateral security could he thereby escape the payment of the balance of commission now in question because he had not received actual cash?

I submit not and I question much if the manipulations he has joined in have not produced the equivalent of such victory bonds.

I respectfully submit our law is not so poverty stricken as to render it impossible to produce justice in such a case.

The learned trial judge at the trial ruled out any such evidence expressly on the ground that it would be admissible only upon a reference.

I may remark that the question of any set-off arising out of the previous dealings and claims so made does not seem to me open in this case for whatever may be the facts the assignment thereof to respondent was made two days after the writ was issued in this case and seems out of the case.

There is another aspect of that and it is this, if an account were taken thereof it would involve not only the share of this commission but all the dealings between the deceased and Wills, or him and another.

Surely there has been enough invoked of what is or is not relevant, if the simple reading of this contract is all that is in question and so clear as found by the courts below, to settle the matter.

I cannot accede to that reading of the contract and therefore would allow the appeal and direct the reference I suggest to ascertain the actual facts as to the value of what the respondent has got as the proceeds of what he bargained for and if it is such as in justice to entitle appellant to claim the promised commission and reserve further directions and costs.

The facts so far as developed shew that what was got in the way of assets by the bargain of respondent and Wills with the liquidator, was six mining claims, assignment of lease made by Orr Gold Mines, Limited, to Kirkland-Porphyry Gold Mines Limited, and $29,000 worth of plant, besides the 873,334 shares of stock in the Orr Gold Mines, Limited.

The result was further so manipulated between them that respondent got immediately after the sale of the three first items of said assets to the Orr Gold Mines, Limited, not only his 873,334 original shares therein but also a further issue of treasury stock of said company in which he shared to a large amount.

It would require such a reference as I suggest to clarify all these manipulations and determine the actual resultant value of what respondent got thereout as the proceeds of the said sum referred to in the above quoted bargain for commission.

DUFF J.—By the agreement which is the foundation of the appellant's claim the respondent undertakes to pay 10%

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Duff J.

of $513,240, the purchase price of certain shares of stock in the Orr Gold Mines, Limited, out of the proceeds of the sale, in a fixed series of instalments, $5,000 in cash out of the first payment of purchase money, $10,000 out of the second payment and $36,000 odd out of the third payment. The appellant has received only the sum of $5,000 first payable and sues to recover the balance. It is admitted that the second and third instalments of purchase money were never in fact paid conformably to the provisions of the agreement of sale; and there can be no doubt that according to its literal terms the last clause of the agreement between the appellant and the respondent (which reads as follows

> should said payments not be made by the said Kirkland-Porphyry Gold Mines Ltd., the First Party shall be under no liability to the Second Party for the payment of any commission by reason of said sale),

would come into operation.

It was contended, however, by Mr. Slaght in a forcible argument that, although the purchase money had not been paid strictly in pursuance of the terms of the agreement of sale, the respondent had accepted in satisfaction and in effect in payment of bonds received by him from the purchaser, the Kirkland-Porphyry Company, as security for the payment of the purchase money certain assets of that company and that this must be regarded as payment of the purchase money for the purpose of giving effect to the contract for commission. Alternatively Mr. Slaght contended that the respondent by his conduct had prevented the execution of the agreement for sale or at all events had interfered with it in a material way and that consequently according to the principle of *Burchell* v. *Gowrie and Blackhouse Co.* (1), and *Upper Canada College* v. *Smith* (2), the plaintiff was entitled to succeed in the action. As to the second of these grounds, I may say at once I can find no evidence to justify a finding that anything done by the respondent seriously augmented the improbability that the sale would be carried out.

As to Mr. Slaght's first point, the appellant could, I think, succeed only by establishing one of two things, either a real

(1) [1910] A.C. 614. (2) 61 Can. S.C.R. 413.

conversion of the property which was the subject of the sale into money, or the acceptance by the purchaser in substitution for cash of something that was truly considered by the parties to be the equivalent of cash.

Now Mr. Slaght rightly pressed upon us the fact that the bonds held by the respondent as collateral security for the performance of the purchaser's obligations under the agreement for sale were, by the very terms of the arrangement with the liquidator, treated as paid and discharged. But while *prima facie* important this fact ceases to be of any decisive significance when it becomes reasonably clear, as I think it is, that in substance, by the transaction with the liquidator, the sale instead of being carried into effect was put an end to. It is true that the transaction did not assume the form of rescission. Moreover another purchaser was interested with the respondent and another property was involved, but I agree with the court below that it is impossible to find on the evidence that what the respondent received was received or given as performance by the purchaser of its obligation under the contract of sale. It seems sufficient to say that it appears to me to be beyond controversy that the transaction with the liquidator did not involve "payment" of the purchase money in any sense contemplated by the contract upon which the action is brought.

The appeal should be dismissed with costs.

ANGLIN J.—In my opinion the conditions of the contract under which the appellant asserts the right to recover a balance of commission have not been fulfilled. The portion of the proceeds of sale out of which alone such balance of commission was made payable never came to the hands of the respondent. Excluding all idea of fraud or collusion, of which there is not the slighest evidence, I find it a little difficult to appreciate how a transaction by which the vendor took back the subject-matter of the sale can be regarded as the carrying of that sale to completion. Neither has it been demonstrated that the assets of the purchasing company, which the vendor acquired, had a cash value equivalent to the unpaid balance of the purchase price. Nor

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am I convinced that satisfactory proof on that point would have entitled the appellant to recover.

On the other aspect of the case I see nothing to warrant a conclusion that the insolvent Kirkland-Porphyry Company would or could have paid, or been made to pay the balance of purchase money due to the respondent if he and Wills had not taken over its assets.

I would dismiss the appeal.

BRODEUR J.—I concur in the result.

MIGNAULT J.—The appellant's argument was directed to show if possible, that the facts here come within a well known rule of law which may be stated in the words of Willes J., in *Inchbald* v. *Western Neilgherry Coffee Plantation Co.* (1) at page 741:

> Whenever money is to be paid to another upon a given event, the party upon whom is cast the obligation to pay is liable to the party who is to receive the money, if he does any act which prevents or makes it less probable that he should receive it.

The appellant entered into an agreement in writing with the respondent on September 5th, 1918, whereby he was to be paid by the latter a commission of five per cent on the payment to the respondent by the Kirkland-Porphyry Gold Mines Limited, of the purchase price of 873,000 shares of Orr Gold Mines, Limited. These shares were on the same date sold to the Kirkland Company by the respondent for $513,200.40, of which $100,000 was paid immediately on the transfer of the shares, $100,000.00 was made payable on September 1st, 1919, and the balance, $313,200.40 on September 1st, 1920. The agreement between the appellant and the respondent was that the latter would pay the former's commission out of the proceeds of the purchase price, and the appellant received $5,000.00 out of the cash payment of $100,000.00. The contract contained the following clause:

> Should said payments not be made by said Kirkland-Porphyry Gold Mines Limited, the First Party (the respondent) shall be under no liability to the Second Party (the appellant) for the payment of any commission by reason of said sale.

(1) 17 C.B. N.S. 733.

The last two instalments were never paid by the Kirkland company, which, on the petition of one Hamilton B. Wills, who had advanced it considerable sums of money, and notably the money for the first payment of $100,000.00, was put in liquidation as being insolvent.

The appellant's claim for his commission under his contract is based on what happened subsequently to the liquidation proceedings.

Wills and the respondent were both large creditors of the Kirkland company and held between them some $600,000.00 (nominal value) of its bonds. The respondent by the agreement which he made with the Kirkland company on September 5th, 1918, for the sale of the Orr Mines' shares, had received as collateral $420,000.00 (nominal value) of the company's bonds, this of course being to the knowledge of the appellant who signed the agreement as president of the company. And Wills also held bonds of the company as security for his advance.

When the Kirkland company went into liquidation, the liquidator, Mr. Clarkson, advertised its assets for judicial sale, and Wills and the respondent tendered for the same at an amount equivalent to the liabilities of the company, which they stated they understood to be in the neighbourhood of $610,000.00 or $611,000.00. They added that they were bond creditors in the amount of about $600,000.00, having filed their claims therefor.

This tender was accepted by the official referee on the advice of the liquidator, and a formal agreement was entered into between the liquidator and Wills and Wettlaufer for the sale to them of the assets of the Kirkland company (which included the Orr Mines' shares) at an amount sufficient to pay the expenses of the winding-up proceedings and the creditors' claims against the company. These expenses and claims, outside of those of Wills and Wettlaufer, amounted to some $11,000.00 which was paid in cash, the purchasers, of course, not having to pay over money which represented their own claims.

It is evident that this was not a payment by the Kirkland company to the respondent of the balance of the price of the Orr Mines' shares. The condition of the contract

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between the appellant and the respondent was therefore never fulfilled, and under the express terms of the contract the respondent was under no liability for payment of the appellant's commission.

Did the respondent do any act which prevented or made it less probable that the appellant should receive the money payable under the above condition?

It is conclusively demonstrated that the Kirkland company was hopelessly insolvent and could never have met these payments. What money it ever had, as well as the money used for the first payment to the respondent, was furnished by Wills who was under no obligation to continue to finance the company.

But the appellant urges that the respondent used the company's bonds of the nominal value of $420,000.00, which he had received as collateral, to purchase jointly with Wills the assets of the Kirkland company comprising the Orr Mines' shares.

The answer is that these bonds were given to the respondent as collateral in order to secure the payment of the balance of the price of the Orr Mines shares, to wit, $413,200.40, and he could have disposed of them under a contract which he made with the Kirkland company contemporaneously with the sale agreement and which the appellant signed as president of the company. It is not suggested that these bonds ever had any value. There certainly was no payment by the company of the amount which it owed the respondent, and which it was unable to pay, but at the most a taking back of the property for which it had not paid and a surrender of the collateral security the respondent had received. And in no way did the respondent prevent his debtor from paying for the Orr Mines' shares. No other offer was received for the purchase of the assets than that made by the respondent and Wills, and it seems perfectly idle to contend now that a better arrangement could have been made.

It is entirely beside the question to say that Wills and the respondent have made money out of their purchase of the assets of the Kirkland company, and still have the Orr

Mines shares and that these shares have increased in value. The appellant had a conditional contract the condition of which was never fulfilled and the respondent did nothing to prevent its fulfilment. There is no basis for the appellant's action.

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Mignault J.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Arthur G. Slaght.*

Solicitors for the respondent: *Blake, Lash, Anglin & Cassels.*