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*Oct. 22, 23.
*Nov. 7.

CANADIAN TERMINAL SYSTEM, LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

THE CORPORATION OF THE CITY OF KINGSTON (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Agreement between company and city for construction and operation of elevator by company—Bonds deposited by company as security for due construction and completion—City to convey to company lands for elevator site—Failure to complete elevator—Lands not conveyed to company owing to obstacle of title—Interpretation and effect of agreement—Conveyance of lands a condition precedent—Company's right to return of bonds—Waiver—Estoppel.

The question on the appeal was the plaintiff company's right to compel defendant city to return certain bonds. A company (plaintiff's assignor) and the city made an agreement dated October 13, 1930, whereby (*inter alia*), the company was to construct by October 1, 1932, and operate for at least ten years, a grain elevator on certain lands; the city was to transfer to the company (for the elevator's site and operation) part of certain water lots, which the city had applied for to (but not as yet obtained from) the Crown, and certain "lands shown in black" on a plan, which lands included certain golf club land, on which the city had secured an option, and a small piece of land thought to belong to the golf club (and to be covered by said option) but in fact still in the Crown; and the company was to deposit certain bonds (those in question) as security for the due construction and completion of the elevator "in the event of" the city conveying to the company the said lands shown in black, "and in the event of the failure" of the city to convey said lands, "then, as security for the purchase" by the company from the golf club of certain lands in accordance with an agreement between the company and the golf club whereby, in the event of the city failing to exercise its said option (which, however, it did exercise), the company was to purchase certain lands from the club. By a "deposit agreement" of October 13, 1930, the company deposited the bonds as security to the city for the due completion of the elevator "provided the [city] conveys" to the company the said lands shown in black, and it was provided that "should the [city] convey" said lands to the company and should the company fail to complete the elevator within the time and in the manner provided for, the bonds should be forfeited as liquidated damages, and that "should the [city] convey" the said lands to the company, then upon due completion of the elevator the bonds were to be delivered back to the company. (By said deposit agreement, the bonds were deposited with the city "and the golf club," and if the city failed to convey said lands to the company, the deposit was to be as security to the club for the company's performance of its said purchase from the club, and the bonds were to be forfeited to the club if the company

*PRESENT:—Duff C.J. and Rinfret, Lamont, Davis and Kerwin JJ.

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did not, and were to be delivered to the company if it did, carry out that purchase. Owing to the city's exercise of its said option from the club, the club ceased to have any interest in the bonds). Until default by the company, it was to receive the bond interest coupons. (It did receive those maturing before October 1, 1932).

Before or upon execution of the agreements, some work was done on construction, but the company later found itself without sufficient funds to complete the work. The city did not convey the lands—the Crown delayed granting the water lots, and an obstacle came to light against the Crown's granting its said piece of land included in said "lands shown in black," which obstacle also prevented its grant of the water lots. In answer to enquiry by the city in September, 1931, as to completion, the company replied that reorganization was being effected, and, shortly after, a new company, the plaintiff, took over the company's assets, but did nothing to complete the elevator. On enquiry by the city in February, 1932, plaintiff replied to the effect that it was making efforts to interest new capital. In September, 1932, plaintiff wrote asking for an extension of two years, and in this letter mentioned that the city had not conveyed the lands. Later plaintiff sued, claiming (*inter alia*) return of the bonds.

Held: Plaintiff was entitled to return of the bonds. Under the terms of the "deposit agreement," even in the light of the other documents and all the circumstances, the city's right to retain them was dependent upon it conveying said "lands shown in black." There was in evidence no conduct of the company which could be considered as a waiver of its right to return of the bonds, or as an estoppel against it. The mere fact that the company itself was in default did not prevent its insisting upon such return (*Mayson* v. *Clouet,* [1924] A.C. 980).

Per Duff C.J., Rinfret and Davis JJ.: The proviso that the city should convey the lands to the company was a condition precedent to the city's right to retain the bonds; the intention of the parties in this respect being clearly shown by the nature of the subject matter; it was the very basis or essence of the contract whereby the company undertook to deposit the bonds with the city, that the city should convey to it the lands, which were essential in the elevator scheme.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario allowing the defendant's appeal from the judgment of Makins J. ordering the defendant to deliver certain bonds to the plaintiff and reserving rights to the parties to proceed for damages. The judgment of the Court of Appeal dismissed the action, without prejudice to any claims of the plaintiff (or its assignor) if it could thereafter be shown that the defendant was in default, and without prejudice to claims of any party for damages, and declared that nothing in the judgment should be construed as a declaration that the bonds in question were forfeited to the defendant.

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The agreements in question and the material facts of the case are sufficiently set out in the judgment of Kerwin J. now reported, and are indicated in the above head-note. The appeal to this Court was allowed and the judgment of the trial judge was restored with costs throughout.

R. S. Robertson K.C. and *Sir William Hearst K.C.* for the appellant.

D. L. McCarthy K.C. and *T. J. Rigney K.C.* for the respondent.

DUFF C.J.—I concur in the judgments of Mr. Justice Davis and Mr. Justice Kerwin.

RINFRET J. concurred with Davis J. and Kerwin J.

LAMONT J. concurred with Kerwin J.

DAVIS J. (Concurred with by Duff C.J. and Rinfret J.)—Were it not for the fact that we are reversing a unanimous judgment of the Court of Appeal I should be content merely to record my concurrence in the conclusion of my brother Kerwin that the appeal must be allowed and the judgment of the trial judge restored with costs throughout.

The point in the appeal is a very simple one. A. delivers certain securities to B. in pursuance of an agreement in writing between them whereby the securities are to be held by B. as security for the completion by A. of a certain grain elevator provided B. conveys or causes or procures to be conveyed to A. certain specified lands for use in connection with the operations of the proposed elevator. B. frankly admits that it has never conveyed nor tendered a conveyance of the lands to A. To me, is it plain that B. cannot retain the securities. The proviso that B. should convey the lands to A. was clearly a condition precedent. No precise form of words is necessary to constitute a condition, and the question whether a particular stipulation in a contract is a condition or not depends entirely upon the proper construction to be placed upon the words in which the particular stipulation is expressed. The intention of the parties is clearly shewn in this case by the nature of the subject-matter to which the stipulation relates. It was the very basis or essence of

the contract whereby A. undertook to deposit the securities with B. that B. should convey the lands to A. It is inconceivable that A. would have contracted to deposit these securities on the footing that the conveyance of the lands could be enforced by a cross action for damages only. It was argued that, even if the stipulation be regarded as a condition precedent, A. waived performance of the condition. But there is nothing in the evidence of any conduct by A. that could fairly be calculated to induce B. to believe that the condition need not be performed. The lands in question were essential to the operation of the proposed elevator and I cannot understand the suggestion that there was a waiver of performance of what was plainly an essential in the scheme of the proposed elevator.

I would allow the appeal and restore the judgment of the learned trial judge with costs throughout.

KERWIN J. (Concurred in by Duff C.J. and Rinfret and Lamont JJ.)—The Corporaiton of the City of Kingston and The Canadian Terminal System Limited, being desirous that the latter should erect an elevator in Cataraqui Bay to the west of the city's limits, carried on negotiations which resulted in three agreements of October 13, 1930. So far as material to this action, the lands bordering on the bay are lots 15 and 16 and the broken front of lots 15 and 16, all in the first concession in the township of Kingston, while the water lots are known as the water lots fronting upon lots 15 and 16. The lots are numbered from west to east. A road known as the front road runs westerly between lot 16 and the broken front of lot 16 and between part of lot 15 and part of broken front lot 15, and then skirts the north shore of the bay where the waters encroach on lot 15. Prior to the date of the agreement, the city had applied to the Provincial Department of Lands and Forests for title to the water lots in front of lots 15 and 16, which title was in the Crown in the right of the province. The city had also secured an option from the Cataraqui Golf and Country Club Limited to purchase all the golf club land, being part of the broken front of lot 16. The title to the small piece of land forming the broken front of lot 15 adjoining the club's lands was thought to

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be in the club, or perhaps it is more accurate to state that both parties considered that the club lands extended to the dividing line between lots 15 and 16 in the first concession; but it subsequently transpired that the title to this small piece was also in the Crown in the right of the province and was subject to the provisions of an Ontario statute of 1881 (44 Vict., cap. 38).

By the first of the three agreements of October 13, 1930, known as the "City Agreement" and made between the city and The Canadian Terminal System Limited, after reciting the desire of the parties to enter into an agreement whereby the city would undertake to convey or cause or procure to be conveyed certain lands and lands covered by water to the company, if and as acquired, as a site for the elevator, and to grant or procure a fixed assessment thereon, and whereby the company would agree to construct a grain elevator upon certain parts of the said lands covered by water, and the city would agree to apply to the Legislative Assembly of the Province of Ontario for a special Act to provide for the fixed assessment and to authorize and validate the agreement; it was provided:—

1. The company shall construct a transfer and storage elevator of modern design and substantial construction with a storage capacity of not less than 2,500,000 bushels of grain upon that part of the water lots for which application has been made by the corporation to the Crown and fronting upon Lots 15 and 16 in the First Concession of the Township of Kingston, in the County of Frontenac, more particularly described in paragraph 5 hereof, on or before the first day of October, 1932.

2. The company shall operate and maintain the said elevator for a period of at least ten (10) years immediately after completion, providing such operation and maintenance is not prevented by the intervention of an act of God, vis major, fire, lightning, flood, tempest, explosion, or other cause beyond the reasonable anticipation or control of the company.

* * *

5. Subject to such legislative authority and/or approval, if any, as may be necessary, the corporation shall and will transfer, or cause or procure to be transferred or granted to the company, that part of the water lots for which application has been made by the corporation to the Crown and fronting upon Lots 15 and 16 in the First Concession of the Township of Kingston, County of Frontenac, bordering upon Cataraqui Bay, which may be described as follows: (here follows a description of the proposed site of the elevator).

A satisfactory deed, grant or conveyance of said portion of said water lots shall be delivered to the company when and so soon as the company has duly executed this agreement and has furnished the bonds provided for in paragraph 7 hereof. The corporation further agrees to likewise transfer and convey, or cause or procure to be transferred and conveyed,

to the company the lands shown in black on the said plan attached hereto and described as follows: [here follows a description which takes in not only the northwesterly part of the golf club lands but also the small piece of land forming the broken front of lot 15] provided . . . . a by-law to be submitted by the corporation to the ratepayers of the municipality under the provisions of the Municipal Act for the purchase of certain lands is duly approved by the said ratepayers.

The corporation further agrees to transfer and convey to the Crown in the right of the Dominion of Canada for dredging purposes for the proposed elevator, such parts of said water lots as it may acquire, as are shown coloured green on the plan hereto attached and marked.

Provided, however, that the Cataraqui Golf and Country Club, Limited (hereinafter referred to as the "Golf Club") shall have the right to use and occupation of those parts of said Lot Sixteen (16) now owned by said golf club until the first day of December, 1931, free of charge.

* * *

7. The company shall deposit with the corporation and the golf club sixty thousand dollars ($60,000) par value twenty-year first mortgage (leasehold) sinking fund gold bonds, Series A, of National Utilities Corporation, Limited, the property of the company, free of all liens and charges, duly endorsed by the company to the corporation and the golf club, as security for the due construction and completion of said elevator, together with the necessary wharfage and dockage facilities for the proper operation and use of the same, *in the event of the corporation conveying or causing or procuring to be conveyed to the company the lands coloured black on the plan attached hereto as provided for in paragraph 5 hereof; and in the event of the failure of said corporation to convey or cause or procure to be conveyed to the company said lands as aforesaid then, as security for the purchase by the said company from the golf club of the lands mentioned in a certain agreement between the said city and the said golf club bearing even date herewith in accordance in all respects with the provisions of said agreement; such bonds to be deposited subject to all the terms, conditions and provisions particularly set forth in a Deposit Agreement, bearing even date herewith, between the company, the corporation and the said golf club.*

8. The corporation or its nominee shall have the right of free use of any railway siding now or hereafter constructed in common with the company, upon entering into a satisfactory agreement in respect of such joint use.

9. The corporation shall make application to the Legislative Assembly of the Province of Ontario at the next session thereof for a special Act granting or making provision for granting a fixed assessment of the said elevator and the lands, trackage, and docks connected therewith, including business assessment, for the period of ten years next following the first day of January after the completion of said elevator, at the sum of fifty thousand dollars ($50,000) (but this shall not apply to or affect taxation for school purposes or local improvements) and dispensing with all provisions requiring the submission of a by-law to the electors of said corporation of any other municipality for the purpose of so fixing said assessment. In the event of said assessment not being so fixed by special Act, the corporation will through its council submit to the electors of the municipality and endeavour to secure the passage of a proper by-law under the provisions of the Municipal Act for the purpose of so fixing the said assessment.

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10. The corporation shall also make application to the Legislative Assembly of the Province of Ontario at said next session thereof for the enactment of provisions in said special Act or in another special Act, authorizing, validating and confirming this agreement and all the terms and provisions thereof and all things done and to be done pursuant thereto or in connection therewith.

The second of the agreements of October 13, 1930, known as the "Golf Club Agreement," was made between the club and the company, and, after reciting the option granted by the club to the city, provided:—

1. In the event of the corporation failing to exercise its said option with the club for the purchase of the lands therein described, then and in such case said club hereby agrees to sell and convey the said lands covered by said option and certain water lots hereinafter referred to, to the company and the company agrees to purchase the same for the price or sum of fifty thousand dollars ($50,000) cash.

2. The lands to be conveyed by the club to the company in the event of the corporation failing to exercise its said option, as aforesaid, may be more particularly described as follows: that is to say: Those parts of the broken front in front of Lots Numbers Fifteen and Sixteen (15 and 16) in the First Concession of the Township of Kingston, County of Frontenac, lying south of the travelled road now owned by the club, and all such water lots as the club may be entitled to have conveyed to it by the said corporation under an agreement bearing even date herewith, between the club and the said corporation, a copy of which agreement is hereto attached as Schedule "B" to this agreement, subject, however, to the right which is hereby expressly reserved for the free use and occupation by the club of said part of Lot Sixteen (16) to December 1, 1931, with the exception of such portion of said lot as lies in the immediate vicinity of the present eleventh green as may be required for the purposes of dredging for the proposed elevator. Provided also that the club shall have the right to remove any of the soil it may see fit to remove before the completion of the purchase without compensation to the company.

It is to be noted that, if this agreement became operative by reason of the city failing to exercise its option, the old company was entitled to purchase for $50,000, not merely the northwesterly part of the broken front of lot 16 (which is all it was entitled to under the last part of clause 5 of the City Agreement), but all of said broken front lot 16 owned by the club. It must also be remembered that, while clause 2 of the "Golf Club Agreement" mentions lots 15 and 16, there follows the words "now owned by the club."

Clause 3 of the "Golf Club Agreement" is as follows:—

3. The company shall deposit with the corporation and the golf club sixty thousand dollars ($60,000) par value twenty-year first mortgage (leasehold) sinking fund gold bonds, Series A, of National Utilities Corporation Limited, the property of the company, free of all liens and charges, duly endorsed by the company to the corporation and the golf

club (as security for the due construction and completion of said elevator, together with the necessary wharfage and dockage facilities for the proper operation and use of the same in the event of the corporation conveying or causing or procuring to be conveyed to the company the lands coloured black on the plan attached to a certain agreement bearing even date herewith between the said corporation and the company; and in the event of the failure of said corporation to convey or cause or procure to be conveyed to the company said lands as aforesaid, then, as security for the purchase by the said company from the golf club of the lands mentioned in a certain agreement between the said city and the said golf club bearing even date herewith in accordance in all respects with the provisions of said agreement, such bonds to be deposited subject to all the terms, conditions, and provisions particularly set forth in a Deposit Agreement, bearing even date herewith, between the company, the corporation and the said golf club.

The agreement referred to as schedule "B" is dated September 16, 1930, and was made between the city and the golf club, and provides that, in consideration of the club waiving its rights to patents to certain water lots adjacent to lot 16 in the first concession in favour of the city, the latter agrees that in the event of its failure to exercise its option to purchase the golf club land, it would transfer to the club all the water lots that it should acquire from the province lying east of the westerly limit of lot 16 except such part as the city has by agreement of even date agreed to transfer to the Canadian Terminal System Limited and to the Dominion for dredging purposes.

The progress of the negotiations is evidenced by the reference to an agreement "of even date," whereas as a matter of fact, the "City Agreement," as has been shown, was not dated until October 13, 1930. The necessity of the agreement of September 16, 1930, was that the Crown would not grant title to any water lots except to the riparian owners or their nominees and the club had so nominated the city.

The third agreement of October 13, 1930, called the "Deposit Agreement," is between the company, the city and the club. As the first point argued before us depends largely upon the construction of this document, it is imperative to consider all its terms which are as follows:

Whereas by agreement bearing even date herewith, between the company and the corporation (which said agreement is hereinafter referred to as the "City Agreement"), the company has agreed to construct an elevator with a storage capacity of not less than 2,500,000 bushels on the lands in said agreement described, together with the necessary wharfage and dockage facilities for the proper operation and use of the

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same, on or before the first day of October, 1932, subject to the terms, provisoes, conditions and stipulations in said agreement contained, a copy of which Agreement is attached hereto as Schedule "A" to this Agreement.

And whereas by Agreement bearing date the 25th day of August, 1930, between the golf club and the corporation (which said Agreement is hereinafter referred to as the "Option Agreement"), the said golf club granted to the corporation an option or right to purchase certain lands of the said golf club in the Option Agreement described at the price and upon the terms in said Option Agreement set forth, a copy of which Option Agreement is attached hereto as Schedule "B" to this Agreement.

And whereas by Agreement bearing even date herewith, between the said company and the said golf club (hereinafter referred to as the "Golf Club Agreement"), it is provided that in the event of the corporation failing to exercise said option, the golf club shall sell and convey to the company, and the company shall purchase the lands covered by said option and certain water lots in said Golf Club Agreement referred to, at and for the price or sum of fifty thousand dollars ($50,000) cash, a copy of which Golf Club Agreement is attached hereto as Schedule "C" to this Agreement.

And whereas the company has agreed to and with the corporation and the golf club to deposit sixty thousand dollars ($60,000) par value of twenty-year first mortgage (leasehold) sinking fund gold bonds, Series A, of National Utilities Corporation Limited, as security for the due construction of said elevator in the event of the corporation conveying or causing or procuring to be conveyed to the company the lands shown in black on the plan attached to said City Agreement in the manner provided in said City Agreement, and in the event of the city failing to convey said lands as aforesaid, as security for the purchase by the company from the golf club of the lands mentioned in said Golf Club Agreement in accordance in all respects with the provisions of said Golf Club Agreement.

Now this Agreement witnesseth:

1. That the company hereby delivers to and deposits with the corporation and the golf club sixty thousand dollars ($60,000) par value of twenty-year first mortgage (leasehold) sinking funds gold bonds, Series A, of National Utilities Corporation Limited, which said bonds are the property of the company free of all liens and charges, as security to the corporation for the due completion by the company of said elevator, together with the necessary wharfage and dockage facilities for the proper operation and use of the same in the manner and within the time provided for by said City Agreement provided the corporation conveys, or causes or procures to be conveyed to the company, the said lands shown in black on the plan attached to said City Agreement in the manner provided in said City Agreement, and in the event of the failure of the corporation to convey said lands to the company, in accordance with the provisions of said City Agreement, then and in such case as security to the golf club for the purchase by the company from the golf club of the lands mentioned in said Golf Club Agreement in accordance in all respects with the provisions of said Agreement.

2. Should the Corporation convey, or cause or procure to be conveyed to the company, the lands mentioned in the preceding paragraph hereof in accordance with the porvisions of said City Agreement, and should the company fail to complete said elevator, together with the necessary wharfage and dockage facilities for the proper operation and

use of the same, within the time and in the manner provided for in the said City Agreement, then and in such case said bonds shall become forfeited to and be the absolute property of the corporation as and by way of liquidated damages and not as a penalty. Should the corporation fail to convey said lands to the company as aforesid and should the company fail to complete the purchase of the lands referred to in the Golf Club Agreement as in said Golf Club Agreement provided, then and in such event said bonds shall become forfeited to and be the absolute property of the golf club as and by way of liquidated damages and not as a penalty.

3. It is distinctly understood and agreed between the parties hereto that the company shall not be or be deemed to be in default in any way under said Golf Club Agreement unless and until the corporation fails to exercise the option in said Option Agreement provided and one month's notice of such failure has been given to the company in the manner hereinafter provided. It being the intention and meaning of this Agreement that said bonds shall at the expiration of one month from the giving of the aforementioned notice, cease in any way to be the property of the company unless within that period the company has performed and discharged all its obligations with respect to the purchase of the said lands mentioned in said Golf Club Agreement as provided for by said Golf Club Agreement.

4. The company shall have the right and privilege at any time before default on its part in any of the conditions herein contained to have said bonds delivered to it upon depositing with the corporation and the golf club in lieu thereof, the sum of forty thousand dollars ($40,000) in cash or a satisfactory surety bond for a like amount, such cash or surety bond to stand in the place of said bonds and be subject to all the conditions and stipulations herein contained.

5. Should the corporation convey to the company the said lands in manner aforesaid, then and in such case upon the completion of said elevator, together with the necessary wharfage and dockage facilities for the proper operation and use of the same in the manner and within the time provided for in said Agreement, the corporation and the golf club shall deliver to the company said bonds, or said cash or surety bond deposited in lieu thereof under the provisions of the preceding paragraph hereof, free and discharged of and from all claims and demands of the corporation or the golf club, or either of them. Should the corporation fail to convey said lands in manner aforesaid and the company perform and discharge all its obligations with respect to the purchase of said lands mentioned in said Golf Club Agreement, as provided for by said Golf Club Agreement, then and in such case the corporation and the golf club shall immediately upon the completion of said purchase by the company, deliver to the company said bonds or said cash or surety bond free and discharged of and from all claims and demands of the corporation or the golf club, or either of them.

6. Until default shall occur on the part of the company, the company shall be entitled to have delivered to it the interest coupons attached to said bonds when and as the same shall become due and payable, and in case of the substitution of cash for said bonds, such cash shall be deposited with some bank or trust company in a special account in the name of the corporation and all interest payable in respect of said moneys shall be paid to the company until default shall occur hereunder.

7. Any notice required to be given hereunder may be given by registered letter addressed "The Canadian Terminal System Limited, Canadian Pacific Building, Toronto, Ontario."

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8. This Agreement shall be binding upon and enure to the benefit of the parties hereto and their respective successors and assigns.

Even before the execution of the agreements of October 13, 1930, the company had entered into an agreement with a contractor under which the latter transported certain material for the erection of the elevator to a spot presumably near the site of the proposed elevator. If not prior to October 13, 1930, certainly immediately afterwards, the contractor commenced work on the foundations and continued until severe winter weather set in. For this, the company paid the contractor a very substantial sum of money.

The city council submitted to the ratepayers a by-law to authorize the purchase of the golf club lands, and, upon it being carried, exercised its option, and on December 29, 1930, obtained a conveyance of these lands from the club. The city had also continued to press its application to the Crown Lands Department for the grant of part of the water lots to itself and for a grant of the remainder of the water lots to the Crown in the right of the Dominion so that the Dominion Department of Public Works might complete the dredging operations which it had already commenced.

Matters were in this position when the Provincial Minister of Lands and Forests was advised in a letter from the solicitors of the village of Portsmouth of certain claims by that municipality on behalf of its residents for access to Cataraqui Bay over broken front lot 15, and apparently based on the provisions of the statute of 1881. This claim effectively prevented, and still prevents, the granting of the city's application for conveyances of the water lots, and also brought to light the fact that the title to broken front lot 15 was still in the Crown in the right of the province, subject to whatever privileges arose under the statute. The city, however, did secure a special Act of the Legislature, validating the agreements and extending the limits of the city so as to include the site of the proposed elevator and other adjoining lands and water lots but was unsuccessful in having included therein the authority to grant a fixed assessment. The city also paid the sum of $2,665.50 to the Department of Lands and Forests for the water lots.

The coupons on the bonds deposited by the company with the city and golf club that were payable on March 15, 1931, were sent by the city to the company in April of that year. The company found itself without sufficient funds to complete the project, although, so far as appears, not as a result of any difficulty to obtain title to broken front lot 15 or to the water lots upon which the foundations of the elevator had been constructed. On September 14, 1931, the city clerk wrote the company stating that the citizens were anxious that the elevator should be completed and asked for information. The reply pointed out that a reorganization was being effected. This materialized when by an agreement of September 17, 1931, the plaintiff company in this action took over all the assets of the old company, including whatever rights the latter had in the bonds. The new company has done nothing to complete the elevator. The coupons on the bonds that were payable in September, 1931, were sent to the new company on November 7, 1931.

Possibly because of the uncertainty as to the completion of the elevator, a by-law to grant a fixed assessment was not submitted to the ratepayers of the municipality at the time of the 1931 municipal elections, and on February 15, 1932, the city clerk wrote the new company for information, to which the president replied on February 16, 1932, to the effect that the company was making efforts to interest new capital. In April and September of that year, the half-yearly coupons on the bonds were sent to the new company, and in the interval the Crown Lands Department was asked by the city as to what progress was being made in connection with the city's application for conveyances of the water lots.

Finally on September 29, 1932, the company wrote the city asking for an extension of two years to complete the elevator, and although the former manager of the old company stated at the trial on cross-examination that on several occasions he had asked the city for title to the golf club lands, this is the first letter in which appears the statement that while the bonds had been deposited, the city had not conveyed the lands.

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The request for an extension of time was submitted to a committee of the city council and referred to the city solicitor, but what decision was arrived at does not appear; the last notification, according to the evidence, being that the solicitor notified the company that he had reported to the city and would require its instructions before replying further. This was followed by a demand for the return of the bonds.

In its pleading, the plaintiff makes a number of claims, but at the trial, the sole question entertained was as to the right of the plaintiff to obtain the bonds from the defendant. It is true that was done against the objection of counsel for the defendant, but the Court of Appeal has similarly dealt with the matter and that is all, therefore, that falls to be determined in this appeal.

The document that specifically deals with the deposit of the bonds is the "Deposit Agreement" of October 13, 1930. The final recital speaks of the company's agreement to deposit the bonds

as security for the due construction of said elevator in the event of the Corporation conveying or causing or procuring to be conveyed to the Company the lands shown in black on the plan attached to said City Agreement in the manner provided in said City Agreement, and in the event of the City failing to convey said lands as aforesaid, as security for the purchase by the Company from the Golf Club of the lands mentioned in said Golf Club Agreement in accordance in all respects with the provisions of said Golf Club Agreement.

Clause (1), after providing for the deposit of the bonds as security for the completion by the company of the elevator, etc., continues:—

provided the Corporation conveys, or causes or procures to be conveyed to the Company, the said lands shown in black on the plan attached to said City Agreement in the manner provided in said City Agreement, and in the event of the failure of the Corporation to convey said lands to the Company, in accordance with the provisions of said City Agreement, then and in such case as security to the Golf Club for the purchase by the Company from the Golf Club of the lands mentioned in said Golf Club Agreement in accordance in all respects with the provisions of said Agreement.

The "City Agreement" provides for the conveyance to the company of part of the golf club lands and part of broken front lot 15. It is quite true that the conveyance could not be made until title should be acquired and the necessary legislative authority secured, but it will be observed that the bonds were deposited only in connection

with the lands shown in black on the plan. If the city did not exercise its option from the golf club, then it would have no further interest in the bonds which would remain with the club as security for the purchase by the company of the latter's lands (presuming for the moment that the "Club Agreement" refers only to lands "now owned by the club" as stated, and not to any part of broken front lot 15 which the club did not own). In that event, upon the company paying $50,000, it would secure all the club's lands and all the water lots that the club might secure from the city, and would be entitled to the return of the bonds. By reason of the city exercising its option, the golf club ceased to have any interest in the bonds. The city owns all of broken front lot 16 which it agreed to convey to the company, but no title to broken front lot 15. The company has neither bonds nor title. With great respect, I consider the terms of the "Deposit Agreement," even in the light of the other documents and all the circumstances, to be clear that the city's right to retain the bonds is dependent upon it giving a grant of the lands shown in black on the plan.

The company having a right to the bonds under the agreement, I am unable to find that anything that has transpired could be considered as a waiver of that right. Waiver must be based on new contract or estoppel. No new agreement has been suggested, and in fact, a request by the new company for an extension of time to complete the elevator was not granted by the city. As to estoppel, neither company made any representations, verbal or written or by conduct, and certainly none that were acted upon by the city to its prejudice. After the construction of the foundations of the elevator, all parties endeavoured to have the title to the various parcels of land and the water lots transferred to the designated grantees, but no obligation rested upon either company to demand earlier than was done that the city hand over the bonds. The mere fact that the company itself is admittedly in default does not prevent its insisting upon the return of the bonds. *Mayson* v. *Clouet* (1).

(1) [1924] A.C. 980.

1935

CANADIAN TERMINAL SYSTEM, LTD. v. THE CITY OF KINGSTON.

Kerwin J.

It may be that the city and the old company have valid claims for damages against each other, but with that we are not concerned in this action; and on the argument the appellant abandoned any claim for specific performance.

The appeal should be allowed with costs in this Court and the Court of Appeal, and the judgment of the learned trial judge restored.

Appeal allowed with costs.

Solicitors for the appellant: *Hearst & Hearst.*

Solicitor for the respondent: *T. J. Rigney.*