Supreme Court of Canada
Colonial Real Estate Co. v. La Communauté des Sœurs de la Charité de l'Hopital Général de Montréal, (1918) 57 S.C.R. 585
Date: 1918-12-09

The Colonial Real Estate

Company (Plaintiff) Appellant;

and

La Communauté Des Soeurs De La Charité De L'hopital General De Montréal (Defendant) Respondent.

1918: November 15; 1918: December 9.

Present: Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

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

Principal and agent—Contract—Sale—Real estate—Conditional option —Expiration of delay—Commission—Art. 1082 C.C.—Art. 1176 C.N.

S. gave to C. an option to purchase lots for $395,176, and promised to pay him a commission of one per cent if a sale was effected "during the currency of the option * * * and not otherwise." Within the time limit, C., at the request of S., named as the purchaser of the property one D., who had himself made arrangements to sell it to M. for $425,000. On the last day of the option, as M. declined to execute his undertaking, D. refused to sign a draft deed of sale and the transaction fell through. Three weeks later S. sold the property to M. on terms similar to those under which it was to be sold to D. C. then claimed from S. $3,951.76, being the commission of one per cent. on the price of sale.

Held, Davies C.J. and Idington J. dissenting, that, under the law of the Province of Quebec, a conditional obligation fails when the condition itself fails; and when a term is fixed during which the condition must be accomplished, the obligation ceases if the condition is not accomplished during the term.

Per Anglin J.—When time is made of the essence of a contract, strict compliance with the stipulation is exacted under the English equity system as well as at common law.

Per Anglin, Brodeur and Mignault JJ.—On a question arising under Quebec law, a decision rendered according to the rules of the English law should not be relied on unless it appears that there is no difference between the two systems of law in regard to the subject matter. *Burchell* v. *Gowrie* ([1910], A.C. 614) and *Stratton* v. *Vachon* (44 Can. S.C.R 395), distinguished.

[Page 586]

Per Davies C.J. dissenting—The relation of M. as purchaser from S. was brought about by C.; and S., by directly dealing with M., even after the expiration of the stipulated delay of the option, waived the time limit and adopted the contract negotiated by C. within the stipulated time. S., having taken advantage of C.'s work as its agent, cannot repudiate

its liability to pay the agreed commission. *Burchell* v. *Gowrie* ([1910], A.C. 614) and *Stratton* v. *Vachon* (44 Can. S.C.R. 395), followed.

Judgment of the Court of King's Bench (Q.R. 27 K.B. 433), Davies C.J. and Idington J. dissenting, affirmed.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec[1], reversing the judgment of the Superior Court, District of Montreal, and dismissing the plaintiff's action with costs.

The material facts of the case are fully stated in the above headnote and in the judgments now reported.

Eug. Lafleur K.C. and T. P. Butler K.C. for the appellant.

H. Gérin-Lajoie K.C. and J. H. Gérin-Lajoie for the respondent.

THE CHIEF JUSTICE (dissenting)—This was an action to recover a commission claimed by the plaintiffs, appellants, upon a sale made by the respondent Sisters of Charity to Messieurs Mignault and Morin of a parcel of real estate in Montreal.

The action was maintained by the trial judge for the sum claimed, $3,951.76, and on appeal was dismissed by the Court of Appeal.

No material facts are in dispute. The question to be decided is whether on these facts the defendants, respondents, are liable to pay the plaintiffs the commission sued for.

Respondents, in September, 1912, gave the appellants an option to purchase the lands in question for

$395,176 good until Friday 13th September, 1912, noon, and on the same day, by a separate letter referring to the option, bound themselves to pay appellants a commission of one per cent. on the amount of the purchase-money if the sale was effected by them during the currency and on the terms of the option.

It is common ground that the time limit for carrying out the option was extended until 12th November, 1912.

The plaintiffs accepted the option, and, at the time of accepting, paid the respondents $5,000 on account.

[1] Q.R. 27 K.B. 433.

Afterwards, on the 11th and 12th November, within the time limit, the appellants, having secured a purchaser ready and willing to take the property on the terms provided in the option, attended with such purchaser, one Desjardins, at a notary's office to carry out the agreement of purchase. Respondents were present by their attorney. Desjardins was present and ready and willing to carry out the purchase but was prevented from doing so by the claim set up by two third parties, Messrs. Mignault and Morin, to the effect that they, and not the purchaser Desjardins, had bought the property through the agency of the appellants and its sub-agent, one Rollit, and that they were entitled to a deed of the property for the sum of $395,176 instead of some $425,000 which Desjardins contended they had agreed to pay as the purchase-price from him to them.

The result of the dispute was the withdrawal of Desjardins from the purchase of the property.

Owing to the disputes between the two alleged purchasers, Desjardins on the one hand and Mignault and Morin on the other, each one claiming to be entitled as the purchaser through the appellants of the land and to receive a deed of the same for the consideration

price of $395,176, the transaction was not completed. The respondents, defendants, were not responsible for this.

A few days afterwards, however, and after the time limit had expired, namely, on the 4th December, the defendants, respondents, agreed to accept the claim of Mignault and Morin to be the purchasers as opposed to the claim of Desjardins to be such and executed to them a deed of the property in question for the sum of $395,176 on the same conditions as those stipulated for in the option they had given to the plaintiffs, appellants, and at the same time credited the said Mignault and Morin on the purchase-price with the $5,000 paid to them by the plaintiffs, appellants, on the 12th September previously.

By accepting these parties as the purchasers it is contended the defendants adopted the contract made by the plaintiffs, appellants, or their sub-agent with Mignault and Morin as purchasers, profited by the same, and could not deprive the appellants of their right to a commission on the sale, even though it was not completed until after the time stipulated for in the option and in the accessory obligation with respect to the commission.

The relation of Mignault and Morin as purchasers from the respondent defendants of the land in question was, it seems to me, brought about by the plaintiffs and by directly dealing with them even after the expiration of the stipulated delay for closing the transaction, the respondents waived the delay, adopted the contract negotiated for them by the plaintiffs within the stipulated time, and having done so and taken advantage of the plaintiffs' work as their agent, cannot be permitted to repudiate their liability to pay the commission.

The rule which should govern in cases of this kind has been laid down by the Judicial Committee of the Privy Council in the case of *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.*[2], and has been followed in this court in *Stratton* v. *Vachon*[3].

That rule is that where an agent has brought the landowner into relation with an actual purchaser he is entitled to recover his commission although the owner has sold, behind the agent's back, on terms which he had advised them not to accept. Lord Atkinson, in delivering the judgment of their Lordships, said, in answer to the contention that the acts of an agent cannot be held to be the efficient cause of a sale which he has opposed:—

> The answer * * * is that if an agent such as Burchell was brings a person into relation with his principal as an intending purchaser the agent has done the most effective and, possibly, the most laborious and expensive, part of his work, and that if the principal takes advantage of that work and, behind the back of the agent and unknown to him, sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's act may still well be the effective cause of the sale.

There can be no doubt in my judgment that the plaintiffs, appellants, brought the purchasers in this case, Mignault and Morin, into direct relation with the respondent vendors and that the plaintiffs were the efficient cause of the actual sale or acceptance by the defendants, respondents, of Mignault and Morin as the purchasers. The knowledge that they had when so accepting of Mignault and Morin having been brought as purchasers into relations with them as vendors by plaintiffs; the adoption of the terms of sale contained in the option they had given the plaintiffs; the crediting on the purchase-price to Mignault and Morin of

---

[2] [1910] A.C. 614.

[3] 44 Can. S.C.R. 395.

the $5,000 paid by the plaintiffs to them when the option was given and the commission agreement entered into; all combine to convince me that the respondents cannot be permitted to escape through the time limit from their liability to pay plaintiffs the stipulated commission sued for. They must be held to have clearly waived this time limit.

I would allow the appeal with costs here and in the Court of Appeal and restore the judgment of the trial judge.

IDINGTON J. (dissenting)—I would allow this appeal with costs here and below and restore the judgment of the learned trial judge.

ANGLIN J.—The material facts of this case and the relevant documents appear in the judgment delivered by Mr. Justice Pelletier in the Court of King's Bench[4], and in the opinion of my brother Mignault, which I have had the advantage of reading. I fully concur in my learned brother's view that the question presented must be determined not by the principles of English law, but by those of the civil law which obtain in the Province of Quebec.

Although art. 1082 C.C. omits the first, or positive, clause of art. 1176 C.N.:—

> Lorsqu'une obligation est contractée sous la condition qu'un évènement arrivera dans un temps fixe, cette condition est censée défaillie lorsque le temps est expiré sans que l'évènement soit arrivé,

the reproduction of the second clause in these terms,—

> if there be no time fixed for the fulfilment of a condition it may always be fulfilled,

clearly implies the converse proposition, that, where a contract contains a stipulation as to the time for the fulfilment of a condition to which the obligation

[Page 591]

imposed is made subject, that condition cannot be fulfilled so as to render the obligation absolute after the time so fixed has elapsed. On the expiry of the delay, if the condition remain unperformed, the obligation entirely ceases.

---

[4] Q.R. 27 K.B. 433.

Art. 1082, according to the codifiers' foot-note (first report, p. 71, No. 102), is based on Pothier (Bugnet) 209, 210 and 211, and 6 Toullier 623 *et seq.* The opening paragraphs of section 209 of Pothier read as follows:—

> 209. Lorsque la condition renferme un temps préfix, dans lequel elle doit être accomplie, comme si je me suis obligé de vous donner une certaine somme si un navire était cette année de retour dans les ports de France, il faut que la chose arrive dans le temps préfix; et lorsque te temps est expiré sans que la chose soit arrivée, la condition est censée défaillie, et l'obligation contractée, sous cette condition, est entièrement évanouie.
>
> Mais si la condition ne renferme aucun temps préfix dans lequel elle doive être accomplie, elle peut l'être en quelque temps que ce soit; et elle n'est pas censée défaillie, jusqu'à ce qu'il soit devenu certain que la chose n'arrivera point.

Toullier deals with certain exceptions indicated by Pothier, not material to this case, which the codifiers did not adopt. In the codifiers' First Report, p. 71, No. 102 (art. 1082 C.C.), art. 1178 C.N. would seem to be erroneously referred to instead of art. 1176 C.N. While the comment of the codifiers, at p. 20 of their report, does not explain the omission from art. 1082 of the first sentence of art. 1176 C.N., it must, I think, be assumed, in view of the reference to Pothier, that in their opinion it was unnecessary because of its obvious implication in the second sentence which they reproduced as art. 1082. The purview of that article is further evidenced by art. 1084, which is a reproduction of art. 1178 C.N. and presents the only case in which a condition is deemed to have been accomplished though actually not so. Art. 1083 C.C., which corresponds to art. 1177 C.N., throws further

[Page 592]

light upon the meaning of art. 1082 and the effect which it must have been intended to have. As to the operation of the last mentioned article—see *Letang* v. *Renaud*[5].

I entertain no doubt whatever; for the reasons stated by my brother Mignault, and by Carroll and Pelletier JJ. in the Court of King's Bench, that the failure of the plaintiff to bring about within the time stipulated the event on the happening of which, according to the terms of the contract, the defendants' obligation would arise amounted to the failure of a condition precedent with the result that the defendants were thereby entirely freed from any obligation to the plaintiff. *Deschamps* v. *Goold*[6], is in point. I rest my judgment on this view of the case and add the references to English law which follow merely to indicate that, in my opinion, the result, if ruled by its principles, would be the same. The contrary

[5] 19 R.L. 221.
[6] Q.R. 6 Q.B. 367.

view, if I may say so with respect, in the last analysis of it would appear to rest upon some misapprehension as to the scope and application of the equity doctrine that time, unless made so expressly or by necessary implication, is not to be deemed of the essence of contractual obligations.

Here the stipulation as to the time, for its fulfilment is made of the essence of the condition on which the defendants assumed an obligation to pay commission as distinctly as language could make it so. The promise which the plaintiff accepted was that the defendants would pay a commission of 1%

> if said sale is affected during the currency of said option which expires on Friday the 13th instant at noon, and provided also this sale is completed, the deed signed and first payment of one hundred thousand dollars ($100,000) duly paid to the Grey Nuns within fifteen days after the acceptation *(sic)* of said option and not otherwise.

[Page 593]

Terms more explicit and emphatic it would be difficult to indite. Where time is thus made of the essence of a contract strict compliance with the stipulation is exacted under the English equity system as well as at common law. *Conventio vincit legem.* An extension of the time for completion and payment of the first instalment (which was reduced from $100,000 to $50,000) until the 11th of November was agreed to, but, as appears from the letter of the defendants' agent, St. Cyr, of the 11th September,

> all other conditions (were) to remain the same.

Even if, upon a proper construction of it, time should not be regarded as having been expressly made of the essence of this contract, neither its character nor the nature of the relief sought admits of the application of the doctrine of equity which, under some circumstances, treats a term as to the time of performance as not of the essence of a contract. The contract before us would, under English law, create an ordinary common law obligation to pay money upon the happening of a stated event. The plaintiff's action, if brought in an English court, would be strictly a common law action to recover the money so contracted to be paid, and the common law rule as to the effect of the stipulation as to time would govern it. *Noble* v. *Edwardes*[7]. The case is not one in regard to which a court of equity would, before the "Judicature Act," have entertained a bill for specific performance, or to restrain proceedings at law, or for other equitable relief. It is, therefore, not one in

[7] 5 Ch. D. 378, at p. 393.

which, under the "Judicature Act," the equity view as to the effect of a stipulation as to time would control. *Stickney* v. *Keeble*[8]; *Renter* v. *Sala*[9]. The equitable

[Page 594]

doctrine could not be invoked to take such a case out of the rule of the common law, which exacts performance of á condition within the delay allowed as the foundation of the right to enforce the obligation to which it is attached.

Having made a contract under which it would become entitled to a commission only upon the happening of a stated event within a definite period "and not otherwise," the plaintiff in effect agreed to forego all claim to commission unless that event should happen within the time stipulated. In order that an action on such a contract should succeed the plaintiff must shew fulfilment of the condition according to its terms. *Alder* v. *Boyle*[10]; *Peacock* v. *Freeman*[11]. The authority of the case last cited, so far as relevant to that at bar, is not affected by a distinction in regard to it made by the Court of Appeal in *Skinner* v. *Andrews*[12].

The plaintiffs cannot recover merely because although the condition of the defendants' obligation is not fulfilled, they have derived a benefit from what it did. *Barnett* v. *Isaacson*[13]. This case, in some aspects, closely resembles that at bar. The defendant had promised the plaintiff a commission of £5,000 in the event of his introducing a purchaser of the defendant's business. An accountant, introduced to the defendant by the plaintiff as a person likely to procure a purchaser of the business, eventually bought it himself. Construing the contract on which the plaintiff claimed as entitling him to a commission if his introduction brought about the sale, but also as meaning that if it failed to produce that result he should not be paid the commission (implying the term expressed in

[Page 595]

the "and not otherwise" of the contract in the present case) the Court of Appeal held that the plaintiff could not recover. As the Master of the Rolls put it:—

[8] [1915] A.C. 386, at p. 417.
[9] 4 C.P.D. 239, at p. 249.
[10] 4 C.B. 635.
[11] 4 Times L.R. 541.
[12] 26 Times L.R. 340.
[13] 4 Times L.R. 645.

> All that the plaintiff did under the contract was done upon the terms that he was not to be paid unless he was successful. The jury gave him £2,000 (upon a *quantum meruit)* though he failed, and so the verdict could not stand.
>
> * * * * *
>
> To entitle the plaintiff to sue upon a *quantum meruit* the rule was that if the plaintiff relied upon the * acceptance by the defendant of something he had done, he must have done it under circumstances which led the defendant to know that if he, the defendant, accepted what had been done it was on the terms that he must pay for it.

Lord Justice Lopes said:—

> As to the claim upon a *quantum meruit,* it could only arise upon a promise to be implied from a request by the defendant to the plaintiff to perform a service for him, or upon the acceptance of services of the plaintiff so as to imply a promise by the defendant to pay for those services. Neither of these alternatives occur here. Nothing was done outside the contract.

In *Lott* v. *Outhwaite*[14], another authority for the latter view, Lindley L.J., in rejecting a claim for *quantum meruit,* observed that

> there could be no implied contract where there was an express one.

See also Green et al. v. Mules[15].

The case of *Burchell* v. *Gowrie and Blockhouse Collieries Ltd,*[16], chiefly relied on by the appellant, is, in my opinion, clearly distinguishable as my brother Mignault points out. The agent's employment in that case was a general one. The contract was, as Lord Atkinson puts it at p. 626:—

> that should the mine be eventually sold to a purchaser introduced by him, he (Burchell) would be entitled to a commission at the stipulated rate.

There was no such condition as in the case at bar that to entitle the agent to his commission the sale

[Page 596]

must be effected and carried out and part of the purchase-money paid within a fixed period—still less an agreement that unless all these things should happen within the time stipulated there should be no claim for commission—"and not otherwise,"

---

[14] 10 Times L.R. 76.
[15] 30 L.J. C.P. 343.
[16] [1910] A.C. 614.

The ground of Burchell's recovery was that the defendants had wrongfully deprived him of the benefit of his contract. The judgment proceeded, as my brother Mignault says, on the principle enunciated in art. 1184 C.C. as the citation by Lord Atkinson of *Inchbald* v. *Western Neilgherry, Coffee Plantation Co.*[17], in support of it shews. Here, on the contrary, the defendants put no obstacle whatever in the way of the plaintiff earning its commission. They were ready and willing, on the date fixed for completion and payment, to convey to the purchaser designated by the plaintiff. The failure to carry out the sale was not due to any fault of theirs or because of the intervention of Mignault and Morin as rival purchasers, as the appellant suggests, but solely and simply because Desjardins, the plaintiff's nominee as purchaser under its option, refused to carry out the transaction. When that occurred, the time within which the plaintiff might fulfil the condition entitling it to a commission having expired, the defendants were freed from all obligation to it.

In the case at bar the plaintiff was not "generally employed" to sell. Its employment was limited. Lord Watson, in *Toulmin* v. *Millar*[18], clearly indicates the difference between a general employment and a limited mandate to sell according to stated terms and not otherwise. In order to entitle a plaintiff to recover for services rendered under such a limited mandate its terms must be fulfilled.

[Page 597]

Stratton v. *Vachon*[19], was a case of general employment similar to that of Burchell.

When Mignault and Morin came to the defendants some time afterwards seeking to acquire their property on the terms on which they were willing to dispose of it, the defendants were at perfect liberty to sell to them. The mere fact that they had been prospective sub-purchasers from Desjardins in the event of a sale to him (procured for him by one Rollit, who had acted as a sub-agent for the plaintiff in procuring Desjardins himself to accept its option from the defendants) could not, after the expiry of that option, deprive the latter of the right to accept an offer from Mignault and Morin. *Sibbitt* v. *Carson*[20], is in point and, in my opinion, was well decided.

Much is made of the fact that the defendants credited to Mignault and Morin on account of their purchase-money this $5,000 received from the plaintiff when it had written to St. Cyr taking up the option which it held. It might have been more prudent had this not been

[17] 17 C.B.N.S. 733.
[18] 58 L.T. 96.
[19] 44 Can. S.C.R. 395.
[20] 26 Ont. L.R. 585; 5 D.L.R. 193.

done. But the defendants had offered the $5,000 back to the plaintiff from whom they had received it, thus evidencing their understanding that the option and the incidental commission agreement were at an end. The plaintiff had refused to accept the money. It, in fact, belonged to Mignault and Morin. Under all the circumstances the crediting of this sum to Mignault and Morin on account of the purchase-price payable by them for the property affords no ground for holding that the defendants adopted and carried out a sale which the plaintiff had arranged. On the contrary, it is abundantly clear that all relations between the defendants and the plaintiff

in connection with the sale of the property in question had been terminated and that the defendants sold it to Mignault and Morin as they might have sold it to any other purchaser who might offer to buy it.

In my opinion the plaintiff has neither a legal nor a moral claim against the defendant for the commission for which it sues.

BRODEUR J.—I concur in the opinion of Mignault J.

MIGNAULT J.—The question involved in this appeal is whether the appellants are entitled to a commission of $3,951.76 on a sale made by the respondent, on the 4th December, 1914, to Messrs. Mignault and Morin, of a property on Sherbrooke Street, Montreal, for the price of $395,176, the appellants claiming to be entitled to a commission of one per cent. under an agreement with the respondent. The Superior Court, Green-shields J., maintained the appellants' action, but this judgment was reversed by the Court of King's Bench, Cross J. dissenting. Hence the appeal to this court.

It is important to state at the outset that the appellants' action is based on a contract, and is not a claim of the nature of a *quantum meruit.* If this contract does not support the appellants' action, there seems no escape from the conclusion that their action was rightly dismissed by the judgment appealed from.

The contract is contained in two letters of Mr. Alfred St. Cyr, the respondent's agent, to the Colonial Real Estate Company. These letters are as follows:—

Montreal, September 3rd, 1912.

The Colonial Real Estate Company,

Montreal, P.Q.

Dear Sirs:—

I hereby agree to give you the option of purchasing from the Grey Nuns that certain piece of land situated on the corner of Sherbrooke, St. Lawrence and Milton streets, in the city of Montreal, haying a frontage of one hundred and sixty-six (166) feet on Sherbrooke

[Page 599]

st. Three hundred (300) on St. Lawrence st. and two hundred and three (203) feet on Milton st., comprising a total area of about forty-nine thousand three hundred and ninety-seven (49,397) feet, English measure, being lot No. one hundred and eighteen (118) of the official plan and book of reference of St. Lawrence ward, in the said city of Montreal, for the price of eight dollars ($8) per superficial square foot, English measure; one hundred thousand dollars ($100,000) payable cash on passing deed of sale and the balance, that is two hundred and ninety-five thousand one hundred and seventy-six dollars ($295,176), payable within five years from date with interest at the rate of five and a half per cent. (5½%) per annum payable semi-annually. The purchaser to pay taxes from first September, 1912, and proportion of insurance premiums from the same date.

Balance of the purchase-price payable at any time by giving a three months' written notice to that effect. The vendors declare that there is still a mortgage on the property of about fifty thousand dollars ($50,000) which the purchaser will assume. All buildings erected on grounds to be sold and all buildings to be erected shall be insured against loss by fire by companies and through insurance agencies approved by or chosen by the Grey Nuns. Said insurance to be not less than eighty per cent. (80%) of their value and the same to be transferred to the Grey Nuns to the extent of their interest. The sale to be made free of commission or expense to the Grey Nuns who, nevertheless, will supply to the purchaser their title deeds to said property. The purchase to be passed before our notary.

This option is good only until Friday the thirteenth instant at twelve o'clock noon and not later.

Yours truly,

ALFRED ST. CYR,

Agent Grey Nuns.

Montreal, September 3, 1912.

The Colonial Real Estate Company,

Montreal, P.Q.

Dear Sirs:—

In reference to the option given you this day on behalf of the Grey Nuns for the purchase of their property, situated corner of Sherbrooke, St. Lawrence and Milton streets, I beg to inform you that the Grey Nuns bind themselves to give you a commission of one per cent. (1%), that is to say, three thousand nine hundred and fifty-one dollars and seventy-six cents ($3,951.76), on the total amount of the sale of said property, if said sale is effected during the currency of said option which expires Friday the 13th instant at noon, and provided also that this sale is completed, the deed signed, and the first payment of one hundred thousand dollars ($100,000) duly paid to the Grey Nuns within fifteen days after the acceptation of said option and not otherwise.

Yours truly,

ALFRED ST. CYR,

Agent Grey Nuns.

[Page 600]

The terms of these letters can give rise to no difficulties of construction. The contract was a conditional one, the condition being the sale of the described property for the price of $395,176,

during the currency of the option * * * and not otherwise.

It is common ground between the parties that the term for the completion of the sale and the signing of the deed was extended to the 12th November, 1912, when it finally expired, and also that certain modifications were made as to the amount in cash which had to be paid on passing the deed of sale. These latter modifications, however, are not material for the decision of the case, the whole question being whether the appellants can claim a commission on a sale made by the respondents after the expiration of the option.

On the 12th September, the Colonial Real Estate Company wrote to Mr. St. Cyr, on behalf of an unnamed client, the following letter:—

September 12th, 1912.

MR. ALFRED ST. CYR,

Agent, Grey Nuns, Montreal, P.Q.

Dear Sir:—

On behalf of our client we hereby accept your option dated September 3, 1912, for that certain piece of land situate on the corner of Sherbrooke, St. Lawrence and Milton streets, being lot No. 118 of the official plan and book of reference of St. Lawrence ward, in the city of Montreal said to contain 49,397 square feet for the price

> of eight ($8) dollars per square foot or a total price of three hundred ninety-five thousand one hundred and seventy-six ($395,176) dollars, on the following conditions: Forty-five thousand one hundred and seventy-six (145,176). dollars payable cash on passing of deed of sale. Fifty thousand ($50,000) dollars in one year from date of passing deed, and the balance, that is, three hundred thousand ($300,000) dollars payable within five years from that date with interest at the rate of five and a half (5½%) per annum, payable semi-annually. Taxes, interest and insurance to be adjusted as from September 1st, 1912.
>
> We enclose our cheque for five thousand ($5,000) dollars on account of the purchase-price.
>
> As per your letter of the 3rd inst. it is distinctly understood that you will pay us a commission of one per cent. of the sale price, that is to

[Page 601]

> say, three thousand nine hundred and fifty-one dollars and seventy-six cents ($3,951.76) on the completion of sale.
>
> Yours truly,
>
> THE COLONIAL REAL ESTATE COMPANY.

It appears that the appellants were then dealing with one Rollit who had made them an offer, also on behalf of the unnamed clients, for this property, with a cheque for $5,000, and this was the sum which the appellants sent to the respondent. Rollit was to get one-half of the commission from the appellants.

Subsequently, at the request of the respondent, the appellants named, by a letter dated the 11th November, 1912, Mr. J. A. Desjardins as the purchaser they had obtained for the property. This gentleman, the proof shews, had made arrangements to sell the same property to Messrs. Mignault and Morin for the sum of $425,000, thus making a clear profit of nearly $30,000. The respondent had nothing to do with this resale.

The respondent ordered notary Prud'homme to prepare a deed of sale of the property, and, on the 11th November, duly authorised representatives of the respondent went to the office of the notary to sign a deed of sale of the property which had already been prepared. However, as Messrs. Mignault and Morin declined to execute their undertaking to buy the property from Desjardins for $425,000, Desjardins refused to sign the deed of sale and to make the cash payment required, and the whole transaction fell through. The option expired the next day without the appellants having obtained a purchaser for the property.

At this stage there can be no doubt that the conditional contract the respondent had made with the appellants could give the latter no right to a commission; the condition having failed.

And now because the respondent, on the 4th

December, 1912, when it was free from any obligation towards the appellants or any one else, sold their property to Messrs. Mignault and Morin for $395,176, on terms similar to those under which it was to be sold to Desjardins, the appellants, basing their action, as I have said, on the expired contract, and not on a *quantum meruit,* claim the commission of one per cent. from the respondent.

I am, without any hesitation whatever, of the opinion that, under the law of the Province of Quebec, the appellants' action cannot succeed. Nothing is more elementary than that a person obliging himself to pay a sum of money upon the happening of a certain event, within a fixed term, is free from any obligation should the term expire before the happening of the event. In other words, a conditional obligation fails when the condition itself fails, and where a term is fixed during which the condition must be accomplished, the obligation is at an end if the condition be not fulfilled during the term. Art. 1082 of the Civil Code clearly implies this when it says:—

> If there be no time fixed for the fulfilment of a condition, it may always be fulfilled; and it is not deemed to have failed until it has become certain that it will not be fulfilled.

This article, although negative in form, while art. 1176 C.N. is affirmative, makes it clear that where a term has been fixed, the condition cannot be accomplished after the expiration of this term. This rule is really elementary and seems to require no argument, but I will nevertheless quote from Pothier and Baudry-Lacantinerie to shew that there is no possible room for doubt. Pothier, vol. 2, Obligations, ch. 3, no. 209, says:—

> Lorsque la condition renferme un temps préfix, dans lequel elle doit être accomplie, comme "si je me suis obligé de vous donner une certaine somme si un tel navire était cette année de retour dans un

> port de France;" il faut que la chose arrive dans le temps préfix; et lorsque le temps est expiré sans que la chose soit arrivée, la condition est censée défaillie, et l'obligation contractée sous cette condition est entièrement évanouie.

Baudry-Lacantinerie, vol. 13, in his treatise on Obligations, No. 799, expresses the same opinion:—

> Si les parties ont fixé un délai pour l'accomplissement de la condition et que l'évènement ne se produise qu'après l'expiration de ce délai, en réalité, par celà seul qu'il n'a pas lieu dans le temps assigné, l'évènement qui arrive n'est pas celui que les parties avaient en vue. Comme le dit excellemment Demolombe: "La fixation du temps forme, dans ce cas, l'un des éléments constitutifs et comme une partie intégrante de l'évènement lui-même" (Demolombe XXV., n. 339).
>
> Il s'ensuit que les juges ne sont pas admis à proroger le délai. S'ils le prorogeaient, ils changeraient la condition et méconnaitraient la ioi du contrat.

Reliance is placed by the appellants on the decision of the Judicial Committee of the Privy Council in the case of *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.*[21]. This decision was rendered in a case originating in Nova Scotia, and obviously is based upon the English law.

May I say, with all possible deference, that I would deprecate, on a question under the Quebec law, relying upon a decision, even of the Privy Council, rendered according to the rules of the English law. It would first be necessary to shew that there is no difference between the two systems of law by referring to authorities binding under the French law, and this has not been done. Very earnestly, I am of the opinion that each system of law should be administered according to its own rules and by reference to authorities or judgments which are binding on it alone. What I have said also disposes of the decision of this court in the case of *Stratton* v. *Vachon*[22], an Alberta case, also relied on by the appellants.

I may, however, say that the decision of the Privy

[Page 604]

Council in the *Burchell Case*[23] has no application whatever to the present case. The head-note of the report says:—

> In an action by the appellant to recover an agreed commission on the proceeds of a sale of mining property by the respondent company the latter contended that he was not the efficient cause of the particular sale effected:—

[21] [1910] A.C. 614.
[22] 44 Can. S.C.R. 395.
[23] [1910] A.C. 614.

> *Held,* that as the appellant had brought the company into relation with the actual purchaser he was entitled to recover although the company had sold behind his back on terms which he had advised them not to accept.

There was no conditional contract with the agent in the *Burchell Case*[23]. The referee had held that Burchell had a *continuing power of sale,* which their Lordships construed as meaning that his employment was *"a general employment."* And they cite as applicable to such cases the rule laid down by Willes J. in *Inchbald* v. *Western Neilgherry Coffee Plantation Co.*[24].

> I apprehend that 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.

I could entirely concur in this rule, and base my opinion on art. 1084 of the Quebec Civil Code, but there is absolutely nothing in the present case which would justify this court in applying it to the respondent. There is no suggestion of any fraud or collusion chargeable against the respondent. It did what it could do to execute its obligation, and the transaction failed because the purchaser found by the appellants refused to sign the deed within the term.

Will it now be said that the respondent could not sell its property without incurring liability towards the appellants? Or for how long a time should it abstain from exercising its rights as an owner? And can it be contended that, assuming that the respondent could,

[Page 605]

after the term, sell its property, it should not, at anytime, sell it to any purchaser with whom the appellants had dealt, unless it was prepared to pay to the appellants a commission to which the latter never had more than a conditional right, which right had come to an end on the 12th November by the failure of the condition?

The Superior Court held that the respondent had adopted the appellants' contract and was, therefore, liable for the commission. With deference, I would say that it is immaterial whether it adopted it after the appellants' right had ceased to exist, provided it had done nothing to prevent the happening of the condition during the specified term.

---

[23] [1910] A.C. 614.
[24] 17 C.B. (N.S.) 733.

It is also said that the respondent kept the $5,000 it had received from the appellants and afterwards, on the 4th December, credited it to Mignault and Morin, to whom it really belonged. The respondent, on the 25th November, tendered back this money to the appellants and the latter refused to accept it. What more could the respondent do?

I have carefully examined the Quebec decisions of which the learned counsel for the appellants has since the argument filed a list. None of these decisions support the contentions of the appellants. I may add that nothing in the record shews any extension of the delay beyond the 12th November, 1912, or any waiver whatever by the respondent.

For these reasons my opinion is that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: T. P. Butler.

Solicitors for the respondent: Kavanagh, Lajoie & Lacoste.