Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Commercial Rubber Company, Limited, v. *The Corporation of the Town of St. Jerome, from the Court of King's Bench for the Province of Quebec (Appeal Side); delivered the 16th July* 1908.

Present at the Hearing:

LORD ROBERTSON.
LORD ATKINSON.
SIR ARTHUR WILSON.
SIR HENRI ELZÉAR TASCHEREAU.

[*Delivered by Sir Henri Elzéar Taschereau.*]

The facts which gave rise to the litigation involved in this case are as follows.

In September 1896, the Respondent Municipal Corporation, by a bye-law in the regular form, voted in favour of a certain manufacturing company, called the Boston Rubber Company, a bonus of $50,000, in consideration of which, by its subsequent acceptance thereof, the Company bound itself to acquire, within the limits of the municipality of St. Jerome, a water power or other motor power as well as immovable properties, upon which was to be constructed a building for the operation of the business of the Company during at least 10 consecutive years without intermittance; to employ during the first year not less than 150 employees all residing within the limits of the municipality, 50 of whom were to be heads of families, and to pay at least $50,000 in salaries; and for the second year to employ not less than 200 employees residing within the municipality, 75 of whom

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at least were to be heads of families, and to pay at least $65,000 in salaries; to give the Respondent, as a guarantee of the execution of its obligations, a first hypothec of $50,000 on its real estate in the municipality; and to begin the works of such construction within three months after the approval of the bye-law by the municipal electors, the said bonus to be payable as follows,—$25,000 as soon as the Company had constructed its factory and installed its machinery and plant, and was in operation, and had executed the above-mentioned deed of hypothec for $50,000, and another $25,000 as soon as the Company had in its employ 150 employees of the description above-mentioned.

The bye-law contained an exemption for 20 years of the Company from all municipal taxes, with the exception of the water tax, and further decreed that, in default of the Company fulfilling any of its obligations thereunder, the bonus as well as the exemption from taxation would be forfeited, and that the Respondent would in that case have the right to recover all the moneys theretofore advanced to the Company.

On the 12th March 1898, the Company, as it had agreed to do by accepting the said bye-law (which had previously been approved by the municipal electors) acquired immovable properties within the municipality upon which it afterwards erected and commenced to operate its factory.

On the 16th June 1898, by a deed subsequently duly registered, the Company, in fulfilment of the further obligation imposed upon it as aforesaid, gave the hypothec now in question upon its immovable properties, whereupon (on the same day) the Respondent paid the first $25,000 on account of the bonus.

In November 1902 the Company, being in a hopeless state of insolvency, entirely ceased

to work its factory, and in April 1904 was regularly put in liquidation.

In virtue of an order of the Court, the liquidator, on the 28th January 1905, under the provisions of the Winding-up Act, sold to Sir Hugh Allan the Company's immovable properties free from all encumbrances, according to the deed, except as follows :—

> "A hypothec of $50,000 existing in favour of the Corporation of St. Jerome under a deed . . . . granted in its favour by the Boston Rubber Company . . . on the 16th June 1898, . . but the Vendor expressly declares that he does not admit but has reserved the right to contest the claim under said deed . . . and undertakes to contest the same at the expense of the purchaser."

The price paid by the purchaser was $65,000, with the covenant, amongst others, that he, in addition to paying that sum, would—

> "Fulfil and carry out to the complete exoneration of the Vendor the conditions set forth in the deed of hypothec granted in favour of the Corporation of the Town of St. Jerome by the Boston Rubber Company . . . on the 16th June 1898, . . . but only in so far as he is obliged to do so, the Purchaser denying absolutely that the said town has any valid hypothec upon said property or any claim against the property hereby sold."

On the 8th February 1905 Sir Hugh Allan sold these properties to the present Appellant, the Commercial Rubber Company, for the price of one dollar, the Appellant expressly undertaking—

> "To fulfil and carry out to the complete exoneration of the Vendor the conditions set forth in the deed of hypothec granted in favour of the Corporation of the Town of St. Jerome by the Boston Rubber Company . . . on the 16th June 1898, . . . but only in so far as he is obliged to do so, the Purchaser denying absolutely that the said town has any valid hypothec upon said property or any claim against the property hereby sold."

The Appellant, now in possession in virtue of that deed, is sued by the Respondent *en déclaration d'hypothèque*, with the usual allegations, for the sum of $25,000, the declaration alleging that the Boston Company (which was made *mise-en-cause*, but did not plead to the action) had forfeited all its rights under the bye-law, and was consequently liable under the terms thereof to refund to the Respondent the bonus of $25,000 paid to it in 1898 as aforesaid, for the following reasons:—(1) That, in disregard of its obligations, it had failed during the first year to employ 150 workmen and to disburse $50,000 in respect of salaries; (2) that during the second year it had not employed 200 workmen and had not paid $65,000 in respect of salaries; (3) that since over three years it had entirely ceased its operations, and had failed to work its factory during at least 10 years, as mentioned in the bye-law and the hypothecation deed of 1898; (4) that it was insolvent, and was being wound up under the Winding-up Act. And the Respondent prayed that the immovable properties in question be declared hypothecated in its favour for the refund of the $25,000 advanced as aforesaid to the Boston Company.

The Appellant pleaded in answer (1) that the Boston Company had not forfeited its rights as claimed; and (2) that the deed of hypothec was illegal, irregular, null and void, because the Board of Directors of the Boston Company had no power to authorize its president, or any other officer, to hypothecate the said immovable properties without the formality of a bye-law, passed in due form and previously submitted to its shareholders and approved by them. The Respondent replied that the Boston Company had forfeited its rights for the reasons alleged in the declaration; that the formality of a bye-law was not required in this

instance; and, further, that the Appellant was debarred from impugning the validity of the hypothec.

The Superior Court dismissed the Appellant's pleas, and maintained the Respondent's action. The Court of King's Bench unanimously confirmed that judgment.

Now, as to the question of fact, whether the Boston Company had, during the first and second years of its operations, employed the number of men and paid the salaries as required by the bye-law, their Lordships would not feel justified in interfering with the findings of the Superior Court (concurred in by the unanimous judgment of the Court of King's Bench and fully supported by the evidence), that the Company had entirely failed to fulfil its obligations in those respects. It was, however, contended at the argument that paragraphs 6 and 7 of the Respondent's bye-law released the Company from the obligations it had previously assumed, by paragraph 4 thereof, relating to the number of workmen to be employed and the amounts to be disbursed for salaries during the first and second years. Their Lordships are free to admit that these paragraphs 6 and 7 would, at first sight, give a plausible aspect to this contention. But the Boston Company, by subsequently (in 1899 and 1901) claiming, by notarial protests, the payment of the second instalment of the bonus, has clearly admitted that it was bound, during the first and second years, to employ the stipulated number of men. The effect of construing these paragraphs as contended for by the Appellant would be to repeal the first parts of the bye-law altogether. In their Lordships' opinion that cannot have been their purport, and they cannot be so read. Assuming, however, that the Appellant was right on this point, the indisputable fact remains that the Boston Company has not, during 10 or 12 years, kept its factory in operation, and is admittedly incapable of doing so. That fact

alone, in their Lordships' view, entitles the Respondent to claim the forfeiture of all the rights that the Company might have had under the bye-law, and the refund of the $25,000 claimed in the action.

The Appellant further contended that it was the Respondent who had first committed a breach of its contract. But that contention is not supported by the evidence and must be rejected, as it must necessarily be taken to have been rejected by the Court *a quo*, though that Court did not do so in express terms.

As to the plea that the Directors of the Boston Company were not authorized by its shareholders to give the deed of hypothec in question, the judgment of the Superior Court on this point, concurred in by the Court of King's Bench, is as follows :—

> Considering that in virtue of the general powers given to directors of a company by the Companies Act (Rev. St. Can. c. 119, s. 35) the said directors can bind themselves for and in the name of the company which they represent in regard to all contracts and agreements which are not contrary to the objects of the company or to the law which governs them, and which tend to the good administration of the affairs of the company ; that, in particular, the power to hypothecate the immovables of the company to guarantee the repayment of a bonus granted to such company is an inherent right of the said directors which cannot be contested ; that the only restriction in law in this regard relates to hypothecs which cannot be given by the company to guarantee the repayment of a loan, in which case the said loan cannot be made and the said hypothec cannot be agreed to except in virtue of a bye-law passed and approved by the votes of shareholders representing at least two-thirds in value of the capital stock of the company, at a special meeting called for that purpose ; that in this case there is no question of a loan contracted by the Boston Company, but of a bonus or gratuity accepted by it from the plaintiff corporation which had the power to grant the same in virtue of its special charter . . ; that, therefore, the directors had the right to give the said hypothec without the intervention and without the vote of the shareholders. . . . .

In their Lordships' opinion, the Appellant has failed to show any error in that reasoning. The contention that this bonus constituted a loan to the Company is untenable. It was nothing but a gift under certain conditions, the failure of which entitled the donor to a refund.

But assuming here again that the deed of hypothec ought to have been authorized by the shareholders of the Boston Company, the present Appellant cannot, in their Lordships' opinion, be allowed to avail itself of the want of such authorization in answer to the action. That Company clearly could not have done so. If in an *action personnelle hypothécaire* brought against it, while still in possession of these properties, it had attempted to defeat the Respondent's claim to a refund on the ground of the nullity of the hypothec, the plain answer would have been that, if the hypothec was not valid, the Company was bound to give a valid one It could never have been allowed to contend, as it were, that it had obtained the $25,000 under false pretences, by giving a hypothec which was not, in law, a hypothec, in defiance of its unquestionable obligation to give a valid one, without which the Respondent would certainly not have paid these $25,000. Nor can the Appellant, their assignee, be allowed to invoke nullities that their assignor could never have invoked. It is impossible that, by merely assigning the title to this property to a purchaser with full notice of the registered hypothec and of the circumstances under which it was given, the encumbrance should thereby be obliterated and discharged in the hands of the purchaser.

By the deed of sale of the 28th January 1905, already referred to and in part quoted, by the liquidator to Sir Hugh Allan, the latter

unequivocally assumed the discharge of this hypothec, though the vendor, it is true (virtually the Boston Company), reserved to itself the right to contest its validity.

Again, by this same deed, the purchaser further binds himself to carry out, "to the "complete exoneration of the vendor," the conditions set forth in the deed of hypothec in question, "but only in so far as he is obliged to "do so, the purchaser denying absolutely that the "said Town has any valid hypothec upon the said "property." The like reserve, in the same terms, is to be found in the sale to the Appellant by Sir Hugh Allan. And the Appellant strenuously argued that these reserves give it the right to impugn the validity of the hypothec in answer to the action. But their Lordships are unable to give them that effect. They merely amount to saying, "If we, or our vendors, have "the right to impugn the hypothec, we reserve "that right." The Appellant would assume that it has that right, that by these reserves it had created for itself that right. But that cannot be their effect. And it being clear that the Boston Company could never have been allowed to try and evade its obligation in that respect, the Appellant's contention that it acquired the properties free from this hypothec, duly registered as it had been, cannot prevail. Moreover, in the Order of the Court authorizing the sale by the liquidator under the provisions of the Winding-up Act, it is specially decreed that the consideration of the proposed sale is to be $65,000 *plus* the assumption by the purchaser of the hypothec in question for the amount of the Respondent's claim, whatever that amount might be. Their Lordships fail to see, under the circumstances, what right the liquidator had to consent to the insertion, in the deed of sale, of the reserve invoked by the Appellant, or that any

right could thereby have been conferred upon it which otherwise it had not.

A minor point was raised as to the taxes for two years, amounting to $1,050, claimed in the action. The Appellant, in answer to this claim, contended that these taxes were prescribed, and could not in any case be recovered against the properties in question. But prescription was not pleaded, and this not being a case in which the right of action is forfeited by lapse of time, its contention on this point, as on all the others, must fail.

For these reasons their Lordships will humbly advise His Majesty that the Appeal should be dismissed.

The Appellant will pay the costs of the Appeal.