Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Douglas C. Cameron v. Thomas Afred Cuddy and another, from the Supreme Court of Canada (Privy Council Appeal No. 95 of 1912); delivered the 7th August 1913.

PRESENT AT THE HEARING:

LORD ATKINSON.
LORD SHAW.
LORD MOULTON.
LORD PARKER OF WADDINGTON.

[DELIVERED BY LORD SHAW.]

This is an Action brought by the Respondents, who were vendors of the shares of a certain lumber company. They sue the Appellant to recover payment of their purchase money. Judgment was obtained for the sum of $83,532. This judgment was pronounced in the Supreme Court of British Columbia, and an Appeal against it was dismissed by the Court of Appeal for that Province. A further Appeal to the Supreme Court of Canada by the Appellant also failed.

The Action was grounded upon a certain agreement of parties. That document provided for the payment to be made for the stock transferred being liable to certain deductions. For instance, section 3 provides for an abatement "if upon investigation and examination " it turns out that there are less than 6,000,000 " feet of logs at Chehalis River." Similiar provisions are made by section 4 for the case

of a deficiency in regard to goods laid down at the Harrison River. By section 5 the parties agree that the number of piles, &c., in the schedule are correct, but that "if upon investi- " gation and examination there is a deficiency, " the amount thereof, estimated at the value " of the piles, shall be deducted from the " purchase money still owing and unpaid." It was explained at the Bar that under these three sections, namely, 3, 4, and 5, of the Agreement, deficiencies had been discovered to exist, that the allowance between the parties had been arranged, and that deductions from the purchase price had been made.

The scheme of the contract appears to have been that a scheduled statement of maximum contents and prices was made, and an arrangement for deductions and for the striking of the true balance which would be the true price.

The present deduction, which is the subject of dispute, is made under section 6 of the Agreement, which is in these terms:—"The " said parties of the first part further guarantee " that the balance of the assets of the said " company over and above the logs, stock in " store, piles, boom sticks and bcom chains, " are truly and correctly set forth in the " said schedule, and if upon investigation and " examination it turns out that the said assets " or any of them are not forthcoming and " cannot be delivered, the value of said deficiency " shall be estimated by three arbitrators, one " to be chosen by each of the parties of the " first part and second part, and a third by " the two arbitrators so named as aforesaid, " and the amount of the award of the said " arbitrators shall in manner hereinbefore " mentioned be deducted from the said purchase

" money still owing and unpaid under this " Agreement." This section is also in complete accord with the general scheme of the bargain as above set forth.

In the working out of this clause 6, something in the nature of a real misadventure has occurred. An actual deficiency is admitted to exist, yet a decree stands against the Appellant as if it did not. An Order has been pronounced that he shall pay the full sum without deduction, and that notwithstanding his contractual right to have a deduction made. He accordingly stands due to pay money which it is admitted on all hands that he is not owing, and he is left to take recourse in further litigation so as to retrieve the amount of over-payment.

This mischance occurred in this way. A claim in respect of the deficiency having been made, that claim was submitted to the judgment of three arbitrators in terms of clause 6 of the Agreement. Unhappily the arbitrators could not agree and made a majority award. The Court, the contract being in the terms quoted, and for reasons which need not be entered upon, declined to give effect to the award. In these circumstances, when the Respondents sued for their purchase price, the Appellant asked the Court itself to fix the value of the deficiency, and in terms of section 6 of the bargain to deduct it from the price due. This claim for deduction was not admitted to probation and was given effect to. In their Lordships' opinion it was a proper claim, and was properly stated by way of defence.

When an arbitration for any reason becomes abortive, it is the duty of a Court of Law in working out a contract of which such an arbitration is part of the practical machinery, to

supply the defect which has occurred. It is the privilege of a Court in such circumstances and it is its duty to come to the assistance of parties by the removal of the impasse and the extrication of their rights. This rule is in truth founded upon the soundest principle, it is practical in its character, and it furnishes by an appeal to a Court of Justice the means of working out and of preventing the defeat of bargains between parties. It is unnecessary to cite authority on the subject, but the judgment of Lord Watson in *Hamlyn* v. *Talisker Distillery Company* (1894, A.C. 202), might be referred to.

By section 6 of this Agreement the Appellant had a contractual right to insist on a deduction equal to the value of the deficiency of assets delivered, such value being determined by arbitration. When the arbitration became abortive, that method of fixing the value became, of course, impossible. But by the well-recognised principle which has just been cited, the Court in such a case must take upon itself the burden of deciding that which the parties had intended originally should be decided by a domestic tribunal.

It follows, therefore, that section 6 must be read as though the provision that the value should be decided by arbitration dropped out. The clause accordingly would be a simple and plain provision that "the value of said "deficiency shall be . . . deducted from "the said purchase money." The Appellant properly took his defence according to these principles. In the 6th paragraph, Head E. thereof, he founds upon the Agreement, and says that, according to the terms of clause 6 of it, the Plaintiffs guarantee that the balance of the assets, &c., truly appeared in the schedule, and that "if upon investigation and examina-

" tion it turned out that the said assets or " any of them were not forthcoming and could " not be delivered, the value of the said " deficiency should be deducted from the said " purchase money still owing and unpaid under " the Agreement; and upon investigation and " examination it did turn out that there was " a great deficiency in the amount of the timber " set forth in the said schedule." Their Lordships are of opinion that the Appellant ought to have been allowed to prove this case in defence, and that the refusal to permit him to do so by the Trial Judge—a refusal supported in the other Courts in Canada—was erroneous.

The view upon which the Courts below proceeded is succinctly expressed in the Judgment of Mr. Justice Irving, who says:—" The " plain meaning of section 6 of the Agreement " is that there is to be an arbitration to " decide what deduction is to be made, and " unless and until such deduction is ascer- " tained in the way specified in paragraph 6, " the defendant has no available defence."

Their Lordships entirely differ from such opinion. The deduction cannot be ascertained, not on account of any fault of the Appellant, but because the machinery for arbitration, which was duly and properly invoked by him, broke down. The law could not permit that he should have to make payment in respect of assets which it is admitted he did not receive because the apparatus for fixing the value of the deficiency had in this way failed. Such procedure does not appear to be in accordance with sound principle.

Two learned Judges in the Supreme Court recognised very clearly the nature of the difficulty. In the Judgment of Mr. Justice Anglin, concurred in by the learned Chief Justice of

the Supreme Court, the opinion is expressed that it would have been more satisfactory and more in accord with the true rights of parties if "the defendant would not be compelled to "pay to the plaintiffs the entire price of the "share purchased, although entitled in a proper "proceeding to recover from them a sub-"stantial sum in respect of the deficiency in "the timber on the limits sold. That there "is such a deficiency is admitted."

The Supreme Court was, however, reluctant to interfere with the Judgment of the Court of Appeal, looking upon the question as largely one of procedure. But, in their Lordships' view, it was much more. It was a question which went in principle to the incapacity of a court of law to effectuate justice, by itself undertaking a duty to supply a defect which had occurred in the prescribed mode of ascertaining the rights of parties. It is further quite plain that when there is an admission of deficiency in assets delivered, it could be only in the most exceptional case that a judgment for the full value, and ignoring that deficiency, could be allowed to stand.

Their Lordships will humbly advise His Majesty that the Appeal be allowed, and that the Judgment of the Trial Judge, including his Order disallowing evidence as above mentioned, and all the Judgments of the Courts since that date, should be reversed, so that the trial may proceed, the value of the deficiency be ascertained, and judgment be given for the balance (if any) remaining after the deduction in respect of undelivered assets has been made. The Appellant will have his costs of the cause here and in the Courts below, except those incurred up to the date of trial which can be made still available in the cause.

In the Privy Council.

DOUGLAS C. CAMERON

v.

THOMAS AFRED CUDDY AND ANOTHER.

DELIVERED BY LORD SHAW.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1913.