

*Privy Council Appeal No. 61 of 1925.*

Joseph W. Post - - - - - *Appellant*

*v.*

Walter N. Langell - - - - - *Respondent*

Walter N. Langell - - - - - *Appellant*

*v.*

Joseph W. Post - - - - - *Respondent*

*(Consolidated Appeals)*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 24TH JULY, 1925.

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*Present at the Hearing :*

THE LORD CHANCELLOR.

VISCOUNT HALDANE.

LORD CARSON.

MR. JUSTICE DUFF.

[*Delivered by* THE LORD CHANCELLOR.]

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This is a difficult case, but their Lordships think it desirable that they should deal with it at once. It is unnecessary to recite all the facts, which appear from the judgments of the Courts in Ontario; and it will be enough to state the conclusions at which their Lordships have arrived.

Now, first, in the view of the Board there is no case for rescission of the whole transaction in the manner ordered by the Appellate Division. Rescission was not claimed in the affidavit of the defendant, which in this case takes the place of a defence. Neither side has asked for it or asks for it to-day, and it is impossible,

having regard to what has occurred, and especially to the sale of the shares, to restore the *status quo ante*. Nor in their Lordships' view is there "frustration" in the sense in which the word is generally used. It is true that there has been legislation since the transactions in this case occurred; but the legislation, although not identical with that which existed in 1913, is very nearly on the same lines. It prevents any person from taking sand and gravel from this place except under a licence obtained from the Lieutenant-Governor in Council; but no such licence has been applied for, and it is by no means clear that if applied for it could not be obtained, and there is really not enough to amount to frustration of the whole transaction.

Passing to the order made by the Trial Judge, their Lordships are satisfied that there is no case for rectifying either the agreement or the grant—that is to say, the grant of the fee simple to the present appellant, Mr. Post. No such rectification was claimed in the proceedings, and the grant appears to be in accordance with the agreement.

Passing now to the lease, it is framed in terms which are hardly intelligible. The habendum runs in this way: "To have and to hold the said demised premises for and during the term of until required by the Lessor for the taking of sand and gravel and from thenceforth next ensuing and fully to be completed and ended for horticultural and agricultural purposes only." It is pretty plain that some words which were in the printed form which was used, and which ought to have been struck out, have not been struck out, with the result that the habendum makes nonsense. But apart from that consideration it purports to create an interest which is not known to the law. You cannot at law demise land for an indefinite period in that way, and the effect of well-known decisions, which date back a very long way, is that at law this document creates nothing but a tenancy at will.

Then comes the most important question: What view a Court of Equity ought to take of this transaction? There was a written agreement that the grant to Mr. Post should be followed by a lease upon the terms mentioned in the concluding paragraph of the agreement of the 3rd June, 1913. Having regard to that agreement it would be most inequitable that the plaintiff should be entitled, as he claims that he was entitled, to enter upon this land on the very day after these documents were executed. Where there is an agreement, the Courts of Equity struggle to give effect to it according to its real meaning, and, taking only the written documents and without depending upon the somewhat shifting ground of the oral evidence, their Lordships do see a way of so rectifying the lease in this case—for that is what the defendant claimed—so rectifying the lease as to give effect to this agreement between the parties. In their view the lease should be rectified by omitting the words "his executors administrators and assigns"

and by making the habendum an habendum for the life of the defendant, Mr. Langell, but adding a power for the lessor, Mr. Post, to determine the lease as regards any part of the land from which he may desire to remove the sand and gravel. The special covenant at the end of the lease, beginning with "the lessor will excavate and take the sand and gravel" and so on, which was inserted by agreement between both parties and after considerable discussion at the time, will remain and must have such effect as according to its true construction it ought to have.

The result is that in their Lordships' view the order of the Appellate Division should be set aside; there should be an order that the lease is to be rectified in the manner which has already been described, and as a consequence that the claim of the plaintiff for possession of the lands in question be dismissed. With regard to the costs of the proceedings, their Lordships think that it would be right that the plaintiff should pay the costs of the action as the Trial Judge ordered, but that, as in the subsequent proceedings both parties have been partly in the right and partly in the wrong, there should be no costs either of the appeal to the Appellate Division or of the appeals to this Board. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

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DELIVERED BY THE LORD CHANCELLOR.

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