McKESSON & ROBBINS LIMITED (DEFENDANT) ..... } APPELLANT;

AND

JOHN HUBERT BIERMANS (PLAINTIFF) ..... } RESPONDENT.

1936
* Nov. 3, 4.
1937
* Feb. 2.

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

Assessment and taxation—Lease—Church assessment—Lessee to pay "all taxes, assessments and rates general and special"—Whether lessee bound to pay church assessment—Parish and Fabrique Act, R.S.Q., 1925, c. 195—Articles 471, 1021, 2011 C.C.—Articles 509 & seq. C.C.P.

The respondent leased to the appellant a property situated in the city of Montreal; and the lease contained, *inter alia*, the following stipulation under the heading "Conditions": "* * * the lessee binds itself * * * to pay all taxes, assessments and rates general and special which may be imposed on or in respect of the said property * * * *". The parties submitted a stated case, under article 509 *& seq.* C.C.P., as to whether "the appellant (was) liable for the

* PRESENT:—Rinfret, Crocket, Davis, Kerwin and Hudson JJ.

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payment of * * * church assessment under the provisions of the lease."

Held, Davis J. dissenting, affirming the judgment of the Appellate Court (Q.R. 60 K.B. 289), that the church assessment provided for in the *Parish and Fabrique Act,* R.S.Q., 1925, c. 195, of which the material provisions are outlined in the judgment of the court, is one of the "taxes, assessments or rates" in respect to which the parties have stipulated in the above clause of the lease; and, further, that such assessment is a tax *in respect of* the property leased to the appellant by the respondent.

Per Davis J. (dissenting): The church assessment, although a tax, assessment or rate imposed on or in respect of the property, is a statutory charge of a special and peculiar sort and is not something which may be fairly presumed to have been understood by the parties to the lease as covered and intended to be covered by the indemnity clause. As a matter of interpretation, the true sense and effect of the language of the clause, read as a whole, does not impose upon the lessee a burden of this sort.

APPEAL from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Chase-Casgrain J. (2), condemning the appellant, a lessee, to pay to the Oeuvre et Fabrique de St. Francois d'Assise, Longue Pointe, or to the respondent for the purpose of making payment to the latter, the sum of $2,700, being the first instalment of an assessment for the erection of a church.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

W. F. Chipman K.C. for the appellant.

A. R. Holden K.C. for the respondent.

The judgment of the majority of the Court (Rinfret, Crocket, Kerwin and Hudson JJ.) was delivered by

RINFRET, J.—The respondent leased to the appellant a property situated in the city of Montreal, for a period of five years from the first day of October, 1931.

The lease contained the following stipulations, under the heading "Conditions":

The present lease is made upon the following charges and conditions to the fulfilment of which the lessee binds itself, namely:—

1° From the first day of October nineteen hundred and thirty-one to pay all taxes, assessments and rates general and special which may be

(1) (1936) Q.R. 60 K.B. 289. (2) (1935) Q.R. 73 S.C. 251.

imposed on or in respect of the said property, during the said term of five years (excepting the instalments payable after the expiry of the said term, of special taxes payment whereof is permitted to be made over a term of years). The lessee has paid to the city of Montreal the proportion from the first day of October nineteen hundred and thirty-one of the taxes unpaid for the municipal year now current and a similar adjustment will be made at the end of the term in respect of the municipal year then current.

The property in question being situated in the parish of St. François d'Assise, in Montreal, has become liable, since the execution of the lease, for a church assessment, the first instalment of which, amounting to $2,700, became due and payable by the respondent, as owner of the property, on the 1st of May, 1934.

The assessment was duly imposed under an order of the authorized commissioners and by force of the provisions of the *Parish and Fabrique Act* of the province of Quebec (R.S.Q., 1925, c. 195).

The respondent, having received an account for the first instalment of $2,700, requested the appellant to pay the same; but the latter denied that he was liable for it under the provisions of the lease.

Accordingly the parties agreed to join in submitting the case for decision under art. 509 & seq. of the Code of Civil Procedure, stating that the question of law upon which they are at variance is as follows:

Is the appellant liable for the payment of said instalment of the said church assessment under the provisions of the said lease produced as exhibit number 1?

The respondent contended that the church assessment is a fixed "tax, assessment or rate, general or special" referred to in the lease; that this is confirmed by the provision of article 2011 of the Civil Code; that the assessment was imposed on the immovable leased or, in any event, it was imposed in respect of the said property—which is confirmed by the provisions of the *Parish and Fabrique Act*, and particularly by sections 55, 61, 63, 69 and 87 of that Act. These sections, so it was claimed, make it clear that the assessment in question is an assessment imposed on, or in respect of, the leased property, within the meaning of the stipulation contained in the lease. The appellant, therefore, expressly bound itself to pay the assessment, and the respondent is entitled to a judgment condemning the appellant to pay it.

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The appellant contended that, under the true construction of the foregoing quoted clause of the lease, the parties intended to deal only with taxes, assessments and rates imposed by the city of Montreal; that the words:

all taxes, assessments and rates, general and special which may be imposed on or in respect of the said property

are restricted by the words "general and special" and the words:

The lessee has paid to the city of Montreal the proportion from the first day of October nineteen hundred and thirty-one of the taxes unpaid for the municipal year then current

to taxes, assessments and rates imposed by the city of Montreal; that, under the provisions of the *Parish and Fabrique Act*, the assessment in question is a tax imposed upon the person and is secured only, and not imposed upon the property; that consequently it is not a tax, assessment or rate imposed on, or in respect of, the property as provided in the lease; that the assessment in question was not imposed upon the respondent until after the execution of the lease and there was no assessment of a similar kind or nature then in existence in so far as the leased property is concerned; that it is unreasonable that the appellant should be compelled to pay the assessment in question, which is an extraordinary charge that could not have been foreseen at the date of the execution of the lease and which increases the annual rental of $12,000 by almost twenty-five per cent; therefore, the appellant prayed that the contention submitted by the respondent be dismissed and that by the judgment to intervene it be declared that the appellant was not liable for either the first instalment or any further instalments of the said church assessment.

Both the Superior Court (1) and the Court of King's Bench (appeal side) (2) have unanimously decided in favour of the respondent's contention.

The question is one of construction both of the material sections of the *Parish and Fabrique Act* and of the lease, and more particularly of the stipulation contained in par. 1 of the "Conditions" of that lease, already quoted above.

Under the Act, whenever an order or decree has been made by the ecclesiastical authorities for the location, erection, alteration, removal or repair of a parish church, the majority of the inhabitants, being freeholders interested

(1) (1935) Q.R. 73 S.C. 251. (2) (1936) Q.R. 60 K.B. 289.

in such erection or repair, may apply, by petition to the commissioners (appointed by the Lieutenant-Governor under other provisions of the Act), praying that a meeting of the inhabitants of the parish be called to elect three or more trustees to carry out the decree (s. 42).

The trustees, having been elected and before entering on the duties of their office, must present a petition to the commissioners, praying that their election be confirmed and that they be authorized to assess the owners of lands and other immovable property, situate within the parish for which they have been elected and to levy the amount of the sum assessed on each person for his portion of the contribution, both for the erection and repairs in question, and for meeting the expenses thereby occasioned and deemed necessary by the said commissioners (s. 46).

It is provided, however, that nothing in the Act shall render any class of Protestants or any person whomsoever, other than persons professing the Roman Catholic religion, liable to be assessed or taxed in any manner for the purposes of this Act (s. 58).

As soon as the commissioners have made an order approving the election of the trustees and authorizing them to make an assessment and to levy the sums assessed, the trustees draw up an act of assessment comprising a specification of the work to be done and a detailed estimate of the expenses which they deem necessary for the erection or repairs in question; and also an exact statement of all the lands or other immovable property situate in the parish, showing the extent and value of each lot, the name of the real or supposed owner and the proportionate sum of money (and the quantity of materials, if any) which they have assessed on each lot towards the necessary expenses of such erection or repairs.

The act of assessment, when completed, is deposited in the parsonage of the parish; public notice of the deposit is given; a day is appointed to consider the act of assessment, when the trustees present the act to the commissioners for homologation; and the commissioners hear, judge and determine between the trustees and the persons interested, by rejecting, modifying or confirming the act of assessment altogether or in part, as they think just and reasonable (s. 55).

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When the act of assessment has been homologated by the commissioners, the trustees may exact from those assessed the payment of their rates or assessments and may sue for and recover the same (s. 59).

The secretary-treasurer of the trustees, in the month of November of each year, prepares a statement showing, in as many columns:

(*a*) The names, quality and residence of the persons indebted to the trustees for assessments as set forth in the act of assessment if they are entered therein;

(*b*) The amount of arrears of assessment then due by each of such persons or by persons unknown;

(*c*) The amount of costs of collection due by each of such persons;

(*d*) The description of all immoveable property liable for the payment of the assessments mentioned in such statement;

(*e*) The amount of assessments and costs affecting such immoveable property;

(*f*) All other information required by the trustees.

And the statement so prepared is submitted to the trustees and approved by them (s. 61).

The amount of any assessment on any land so to defray the expenses of the construction or repairs of a church is declared to be " the first charge on such land, and the first privileged debt affecting and binding the said land without its being necessary to register the act of assessment or the judgment of confirmation in any registry office " (s. 69).

There is a further provision to the effect that, whenever any land or immoveable property has already been taxed in the hands of the same owner for an edifice for religious purposes in another parish of which such land or immoveable then formed part, the commissioners, upon petition of the owner, and having regard to all the circumstances, shall exempt such land or immoveable property from the whole or part of the taxes in the new parish, and order, if necessary, that the sum so deducted be apportioned upon the other immoveable property comprised in the act of assessment (s. 87).

The Superior Court (1) and the Court of King's Bench (appeal side) (2) had no hesitation—and we have none in

(1) (1935) Q.R. 73 S.C. 251. (2) (1936) Q.R. 60 K.B. 289.

this Court—in deciding that the church assessment provided for in the *Parish and Fabrique Act,* of which the material provisions have just been outlined, is one of the "taxes, assessments or rates" in respect to which the parties have stipulated in the clause of the lease under discussion.

It is a tax, an assessment or rate from every point of view.

As was stated by Strong, J., in *Les Ecclésiastiques de Saint-Sulpice de Montréal* v. *The City of Montreal* (1):

> Every contribution to a public purpose imposed by superior authority is a "tax" and nothing less.

And see: *Lawson & Interior Tree Fruit and Vegetable Committee of Direction* v. *Attorney-General of Canada* (2).

This church levy is known as an assessment in the legal and statutory parlance of the province of Quebec. It is referred to in the Civil Code as "assesments for the erection and repair of churches" (art. 471), or:

> The assessments and rates which are privileged upon immoveables are:
> (1) Assessments for building or repairing churches, etc. (art. 2011).

And, as must have been noticed, it is also referred to as an "assessment" or "rate" throughout the sections of the *Parish and Fabrique Act* which we have already analysed. This church assessment is, therefore, one of those which, in the province of Quebec, is understood as being comprised in the words of the lease: "taxes, assessments and rates."

Under the lease, the appellant bound itself

> to pay all taxes, assessments and rates * * * which may be imposed;

and the particular assessment now in question is, therefore, included among the taxes, assessments and rates which the appellant undertook to pay, unless something in the language of the clause, or something to be inferred from the whole of the lease, may be construed as limiting or restricting the sweeping language in which is couched the undertaking to pay.

We agree with the courts below that

> there are no clauses in the lease which come in conflict with the clause above cited,

and that no restriction can be found in the context of the clause itself. The addition in the clause of the words "general and special," to the all-embracing words: "all

(1) (1889) 16 Can S.C.R. 399, at 403. (2) [1931] S.C.R. 357, at 363.

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taxes, assessments and rates," far from restricting the obligation to pay, as urged by the appellant, on the contrary, in our view, is there to emphasize the word "all." We need only refer to the holding in this court in *Les Ecclésiastiques de Saint-Sulpice* v. *The City of Montréal*, already adverted to (1), that the use of the word "taxes" alone would extend "to taxes imposed for special purposes."

The exception in the clause expressed thus

> excepting the instalments payable after the expiry of the said term, of special taxes payment whereof is permitted to be made over a term of years

are very apt words to cover the present church assessment, which, as provided for by s. 62 of the *Parish and Fabrique Act*, was made payable by instalments. This exception covers the exact case; and, in view of the fact that the assessment was made and imposed during the life of the lease, it removes any doubt as to whether the lessee might be called upon to pay the instalments coming due after the expiry of the term of the lease.

Reference in the clause under discussion is made to the fact that the lessee

> has paid to the city of Montreal the proportion from the first day of October nineteen hundred and thirty-one of the taxes unpaid for the municipal year now current, (and that) a similar adjustment will be made at the end of the term in respect of the municipal year then current.

It was argued by the appellant that the reference so made to the taxes due to the city of Montreal showed that, when dealing with taxes in this clause, the parties had in view only and solely municipal taxes imposed by the city of Montreal.

It is impossible for us, as it was found impossible by the courts below, to agree with that interpretation. The particular mention of the city of Montreal taxes rather suggests that, at the date of the signature of the deed of lease, these taxes were the only ones then in force extending over the period of a whole year; and the parties agreed that, as the lease was to begin on the 1st of October—a date which did not coincide with the "municipal year"—an adjustment would have to be made of the taxes for the then current year and a similar adjustment would be made,

(1) (1889) 16 Can. S.C.R. 399.

under the same circumstances, at the expiry of the term of the lease. This is a very usual clause in all deeds in the province of Quebec, and so notorious that we would think the Court might almost take judicial notice of it. Be that as it may, it does not in any way limit the obligation imposed upon the lessee to pay "all taxes, assessments and rates general and special." In our view, it is nothing more than the application of article 1021 of the Civil Code:

1021. When the parties in order to avoid a doubt whether a particular case comes within the scope of a contract, have made special provision for such case, the general terms of the contract are not on this account restricted to the single case specified.

We are also of opinion that, whatever be the true nature of the church assessment under discussion, whether in a sense it is a personal tax or a tax imposed on property (as to which there is a great deal to be said), the assessment undoubtedly is an assessment "in respect of the said property."

We are reminded of the words of Lord Thankerton, in *Provincial Treasurer of Alberta* v. *Kerr* (1):

Generally speaking, taxation is imposed on persons, the nature and amount of the liability being determined either by individual units, as in the case of a poll tax, or in respect of the taxpayers' interest in property, or in respect of transactions or actings of the taxpayers. It is at least unusual to find a tax imposed on property and not on persons, etc.

and it is interesting to note how far Lord Thankerton's statement is true when applied to the facts of the present case.

It is not correct to say that the assessment is on the person in respect of his religion, though measured by the extent of his property, since a Catholic resident in the parish is not assessed if he has no property in the parish, whilst, on the other hand, although he may reside in another part of the world, he will be assessed if he owns property in the parish. Such is inevitably the effect of the *Parish and Fabrique Act;* and, in our view, it shows that the taxation here, though the statute uses certain words referable to the person of the owner, is unquestionably taxation, if not properly speaking imposed on property, at least imposed "in respect of the taxpayers' interest in property." It is a tax in respect of the property leased. The respondent could not otherwise be taxed. He could not be taxed unless he owned this property. The whole

(1) [1933] A.C. 710, at 718.

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structure of the Act shows it is an assessment in respect of the immovable, with the added requirement that the immovable be owned by a Catholic.

By force of the statute, it is

> the owners of lands and other immoveable property situate within the parish

who are assessed. Those are the words of the charging section (s. 46).

It is only in another section (s. 58) that the further provision is introduced excluding all

> Protestants or any person whomsoever, other than persons professing the Roman Catholic religion

from liability to assessment. Then, in section 61, requiring the secretary-treasurer of the trustees to prepare in November the statement already alluded to, it is significant that the statement must include, under subsection (*b*), the amount of arrears of assessment due "by persons unknown," a provision which can have no application unless the recovery is intended against the immovable property. Under subsection (*d*) of the same section, the immovable property is referred to as "liable for the payment of the assessments"; and in subsection (*e*) the amounts of assessment are mentioned as "affecting such immovable property"; and then, of course, there is the provision in section 69 whereby the amount of the assessment (referred to as being "on the land") is made

> the first charge on such land, and the first privileged debt affecting and binding the said land.

It may be a question whether a Roman Catholic person, on whom the assessment has been imposed because he was owner of land in the parish on the date of the assessment, continues to be personally liable for the subsequent instalments of such assessment after he has sold the land in respect of which the assessment was made—a point which it is unnecessary to decide in this case—; while it is clear that once the assessment is imposed, the consequential charge on the land and the privilege which affects and binds the land under section 69 of the Act continues to affect it in the hands of a new owner, even if he be not a Roman Catholic and even if it be a joint stock company (*La Compagnie des Terrains Dufresne Limitée* v. *Paroisse de Saint-François d'Assisse* (1).

(1) (1926) Q.R. 41 K.B. 391.

As pointed out by Barclay, J., in the Court of King's Bench,

> Roman Catholics as such are not taxed, but Roman Catholics who are proprietors of land or other immoveable property within the parish are taxed, and taxed because they are proprietors and not because they are Roman Catholics. It is true that the Act would not apply to them if they were not Roman Catholics, but being Roman Catholics, the Act does apply and taxes them in respect of their property in the parish and in proportion to its value.

Even if the assessment should be styled an assessment imposed on the person, it would nevertheless be an assessment "in respect of the property" leased. That point of view is well expressed in the words used in *Brett* v. *Rogers* (1), which we make our own:

> The words "in respect of the premises" are used in contradistinction to the words "on the premises," and an assessment of duty made or imposed not on the premises, but in respect of the premises, must be made or imposed upon some person in respect of the premises; and an assessment duly made or imposed upon any person in respect of the premises seems to us to come within the meaning of the covenant.

and again by Lindley, J., in *Hartley* v. *Hudson* (2):

> There is a distinction to be drawn between a charge upon premises and a charge upon a person, as the former would be binding on the realty, whilst the latter would be a mere personal liability for expenses incurred in respect of the premises; but in this case it may be said that there was a charge upon the premises and a charge upon the person, namely, upon the plaintiff as owner of the premises * * * Now, these expenses paid by the plaintiff were incurred in respect of the demised premises, and by the terms of the above section were a charge upon the premises until payment. The fact of the plaintiff paying them because he was compellable by law to do so, does not make them any the less a charge on the premises within the meaning of the covenant in the lease; and hence I am of opinion that the plaintiff is on this ground entitled to recover.
>
> But I think the plaintiff is also entitled to recover because these expenses were a charge upon "a person in respect of the premises," i.e., they were a debt payable by the plaintiff in respect thereof. The plaintiff, by the *Public Health Act*, 1848, had a duty cast upon him to pave, &c., and he neglected to perform that duty, and in consequence this expense was incurred by the corporation; this expense then became chargeable by the corporation to the plaintiff, and it was so chargeable in respect of these premises.

Nor can the appellant contend that the parties could not have contemplated the passing of such an imposition which, he says, at the time of the signature of the deed, must have been entirely unforeseen. The whole tenor of the lease points in a direction contrary to the appellant's contention in that regard. It is clear that the respondent intended to divest himself of all concern about the property. Incidentally, let it be mentioned that it is not in accord-

(1) [1897] L.R. 1 Q.B. 525. (2) (1879) 48 L.J.C.P. 751, at 752.

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ance with the terms of the lease to say that this church assessment would increase the annual rental by almost 25%. It is incorrect to say that the lease was for a sum of $12,000 per year. The rent was stipulated at $12,000 a year, plus all taxes, assessments and rates; and, in addition to that, the appellant

> agreed to do a great deal more than is ordinarily incumbent upon a lessee and they were almost (as pointed out by Barclay, J.) in the position of owners under the terms of the lease.

Above all, the *Parish and Fabrique Act* already formed part of the statutory law of the province where the lease was made. In the words of Walsh, J., in the Court of King's Bench:

> Its application was an eventuality which could have been foreseen by the parties.

This assessment could be no more unexpected than any other special assessment, such as that for the building of a school or for the construction of sewers. The terms of the lease are clear and unambiguous; and it cannot be said that the appellant could not have contemplated the occurrence as a result of which he is now called upon to pay this church assessment during the existence of the lease.

For all those reasons, we are of opinion that the appeal should be dismissed with costs.

Solicitors for the respondent: *Meredith, Holden, Heward*

DAVIS J. (dissenting)—This appeal turns solely upon the proper interpretation to be given to an indemnity clause in a lease of an immoveable property situate in the city of Montreal. The lessee undertook with the lessor,

> From October 1st, 1931, to pay all taxes, assessments and rates general and special which may be imposed on or in respect of the said property during the said term of five years (excepting the instalments payable after the expiry of the said term, of special taxes payments whereof is permitted to be made over a term of years). The lessee has paid to the city of Montreal the proportion from October 1st, 1931, of the taxes unpaid for the municipal year now current and a similar adjustment will be made at the end of the term in respect of the municipal year then current.

While the lease was not executed by the parties until the 18th of March, 1932, the term of the lease was for a period of five years from the first of October, 1931, and in consequence an adjustment of taxes was necessarily involved at the time of the execution of the lease and a further adjustment of taxes would become necessary at the expiration of the lease.

The facts are not in dispute. The property is within the municipality of the city of Montreal and is within the parochial limits of the Roman Catholic parish of St. François d'Assisse in the said city of Montreal. It was admitted before us that school rates in the city of Montreal are collected by the city as part of the municipal taxation, and further that the taxation period of the city of Montreal is not the calendar year. Now the words "general and special" with reference to municipal taxation are well understood in this country. By "general" is meant those taxes which are imposed throughout the entire municipality for the purpose of raising money for the general expenses of the municipality. By "special" is meant those taxes which are imposed from time to time upon particular properties benefited by special services such as local improvements in the nature of streets, sidewalks, sewers, etc.

The problem raised in this appeal is whether a tax imposed by the Roman Catholic parish within which the property in question is situate, for the purpose of defraying the cost of a new parish church, is a tax intended to be covered by the clause of the lease above set out. The owner (lessor) is a Roman Catholic and I am satisfied that it is a tax, assessment or rate imposed on or in respect of his property. It is an impost under a statute that was in existence at the time of the making of the lease upon property owned by Roman Catholics within a defined area and is a tax within the true significance of the term. But did the parties, upon the fair construction of the language they used, intend that the lessee was to pay this sort of tax? Though the parties may not testify as to their intention, the clause in the lease should be read in its entirety for the purpose of assisting in the judicial determination of the real intention of the parties. Particular expressions or provisions which may be subordinate to the general object may throw light upon the general object and intention of the parties and supply the guidance required for dealing with disputes as to the application of the terms of an agreement to unforeseen questions which arise during the currency of the agreement.

For the purposes of this case it has been assumed that the Roman Catholic parish church properly made an allot-

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ment of a portion of the cost of its new edifice against the lessor because he was a Roman Catholic who owned property within the parochial limits and that the church had statutory authority to impose the amount thereof against his property. It is not a mere incident in the ownership of property but rather a personal matter arising out of the particular religious faith of the individual owner. It is a statutory charge of a special and peculiar sort and the question we have to determine is whether or not it was something which may be fairly presumed to have been understood by the parties to the lease as covered and intended to be covered by the indemnity clause. In my opinion, as a matter of interpretation, the true sense and effect of the language of the indemnity clause, read as a whole, does not impose upon the lessee a burden of this sort.

Having regard to what I have said as to the significance of the use of the words "general and special" (which words follow immediately after the words "all taxes, assessments and rates") in relation to municipal taxation and having regard to the use of the words "municipal year" in the declaration that

> The lessee has paid to the city of Montreal the proportion from the October 1st, 1931, of the taxes unpaid for the municipal year now current

and in the undertaking that

> A similar adjustment will be made at the end of the term in respect of the municipal year then current

all of which expressions occur in the one clause, I think it plain that the parties were contracting only within the sphere of municipal taxes. That construction excludes the church tax sought to be brought within the ambit of the clause because it is admitted that the church tax is not any part of the municipal taxation.

I would therefore allow the appeal, with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Meredith, Holden, Heward & Holden.*