Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Robert Gilmour Leckie and others v. *William Marshall and others, from the Court of Appeal for Ontario ; delivered the 18th May* 1911.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ROBSON.
SIR ARTHUR WILSON.

[DELIVERED BY SIR ARTHUR WILSON.]

This is an Appeal from a decision of the Court of Appeal for Ontario, dated the 15th June 1910, on appeal from a decision of MacMahon, J., of the 26th November 1909.

The learned Judges of the Appeal Court were in the result equally divided in opinion, and consequently the decision of MacMahon, J., was affirmed. The effect was that the action was dismissed, while the counter-claim of two of the Defendants was supported.

The circumstances out of which the suit arose can be sufficiently stated in a few words. By an agreement dated the 6th May 1908 the Appellant Leckie granted to the Respondent Marshall what has been held to be an option, for the purchase of certain mining properties for a sum which was to amount to $250,000. The period for the duration of the option was twelve months.

[33.] J. 53. 100.—5/1911. E. & S

As to payment, $12,500 was to be payable, as it was expressed, as the consideration for the option. That sum was liable to forfeiture in certain contingencies, but if all went through satisfactorily it was to form part of the consideration money. The balance of that consideration money was to be paid by instalments on dates fixed. The intended purchaser was, under the contract, put in possession of the properties covered by the contract.

By a subsequent agreement embodied in a letter of the 8th May 1908, the Respondent, Marshall, obtained for himself or his assigns an extension of the period for payment of the several instalments for 60 days in each case beyond the date originally fixed. At the same time the $12,500 which has been described as the consideration of the option was duly paid.

The Appellant Leckie assigned his interests and rights in the subject matters in question to the other Appellant, now the Montreal Trust Company; and the Respondent Marshall assigned his interest and rights to Grey's Siding Development, Limited, one of the now Respondents.

When the time came for payment of the first instalment, subsequent to that already mentioned as the price of the option, transactions occurred by reason of which that instalment was not actually paid and received. Those transactions will be noticed a little later; for one of the principal questions in the appeal relates to them.

Prior to the litigation out of which this appeal rises there were earlier legal proceedings between the present parties, or some of them, but those proceedings became abortive and it is not necessary now to examine them.

The present suit was instituted on the 21st August 1909. The Appellants were Plaintiffs

and the Respondents were Defendants. The statement of claim set out the facts of the case, as regarded from the Plaintiffs' point of view, and asked to have it declared that the option originally given to Marshall had expired without being acted upon, and that neither Marshall nor his assigns had any further right in the property. It was further claimed that possession should be given to the Montreal Trust Company, as the transferee of Leckie. The claim further asked for an injunction and for other subsidiary relief.

The Defendant, Marshall and his transferees, on the other hand, in their defence, deny the rights claimed by the Plaintiffs and counter-claim for specific performance of the agreements above mentioned.

The case was heard before MacMahon, J., without a jury on the 3rd and 4th of November 1909, who decided in favour of the Defendants.

From that decision an Appeal was brought to the Court of Appeal, Ontario, and that Court affirmed the decision of MacMahon, J., on the grounds which will be considered hereafter. The result of the decision was that the suit was dismissed and the counter-claim allowed.

Against that decision the present Appeal has been brought.

The first question arising for decision is one upon which three at least out of the four members of the Appellate Court agreed with the learned Judge of first instance, holding that the contract of the 6th May 1908 was a contract for an option as distinguished from a binding contract for an actual purchase. Their Lordships are of opinion that the view expressed by those learned Judges upon this question is correct, and their Lordships think it unnecessary to examine in detail the reasons for that conclusion.

The next question is whether the letter of the

8th May 1908 had the effect of extending the term of the option by 60 days, or whether on the other hand the option period remained limited to the original space of 12 months, merely the periods of payment of instalments being extended leaving the term of the option unchanged. On this question the learned Judges in the Court of Appeal were divided.

On this question also, their Lordships are of opinion that the view which has prevailed in the Courts in Canada is the right one, namely, that the time for exercising the option by payment of the instalments was extended by the letter in question. Reading the agreements, which are not very formal, as business contracts, their Lordships think that what the parties evidently contemplated was that in ordinary course the option would be exercised, if at all, by the payment of the money as prescribed, though it may be as was contended, that some other mode of exercising the option might have been adopted consistently with the contract. They think, therefore, the extension of the terms for payment had the effect of extending the right of option if exercised in the mode contemplated by the contract, that is to say, by payment within the extended period.

The next question is whether the intending purchaser did exercise his right of option by payment or tender within that period or whether necessity for an actual tender was waived. On this point there has been difference of opinion. The conditions necessary for an effective tender have often been considered for various purposes, and in some cases very strict rules have been laid down. In the present case, the only question that arises on this point is, whether what took place (be it tender or not) was a sufficient exercise of the intended purchaser's option to purchase. And as to it also their Lordships are

of opinion that the view which has prevailed in Canada is correct.

The other minor points raised upon the argument do not seem to their Lordships to call for discussion.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed.

The Appellants will pay the costs of the Respondents, William Marshall and Grey's Siding Development, Limited, the Respondents, the Royal Trust Company, not having appeared at their Lordships' Bar.

In the Privy Council.

ROBERT GILMOUR LECKIE AND OTHERS

v.

WILLIAM MARSHALL AND OTHERS.

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

1911.