Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The City of Montreal v. *Cantin and others, from the Supreme Court of Canada; delivered the 14th March* 1906.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD ATKINSON.
SIR ARTHUR WILSON.

[*Delivered by Lord Davey.*]

In the year 1895 the City of Montreal was desirous of widening a section of Notre Dame Street, and on the 20th February 1895, in accordance with the procedure prescribed by the City Charter, the Commissioners appointed for the purpose deposited in the office of the City Treasurer a special roll of assessment. One half of the cost of the improvements was thereby assessed on the proprietors of the immoveables situate on each side of the street. The Respondents are the representatives of a Mrs. Cantin, who was then one of the proprietors assessed, and is now deceased. On the 8th August 1895 a number of interested proprietors, including Mrs. Cantin, pursuant to Section 144 of the City's Charter of 1889 (52 Vict. c. 79), filed in the Superior Court of the Province a petition praying that the roll of assessment be set aside (*cassé annulé et mis à néant*) on the ground of certain alleged irregularities and illegal proceedings of the Commissioners in framing it. From some cause, which does not appear on the

41989. 180.—3/1906. [13] A

record, delay took place in proceeding with the case, and the City did not answer or plead to the petition until the 26th October 1899. Judgment was given for the City on the 29th June 1900, and that Judgment was confirmed by the Court of Review on the 15th June 1901. On the 10th September 1902 the lands of the Respondents charged with the payment of the assessment were seized by the Sheriff of Montreal at the instance of the Appellant for the purpose of levying the amount claimed to be due from them. The Respondents filed an opposition, and pleaded prescription. The only question in this Appeal is whether the plea is a good one.

The Appellant's Charter or Act (52 Vict. c. 79) contains the following enactments:—

Sec. 120. "The right to recover any tax, assessment, or "water rate under this Act is prescribed and extinguished, "unless the city within three years, in addition to the current "year, to be counted from the time at which such tax, assess- "ment or water rate became due, has commenced an action for "the recovery thereof, or initiated legal proceedings for the "same purpose under the provisions of this Act; and the "privilege securing such tax, assessment, or water rate avails "to the city, notwithstanding any lapse of time, for the "recovery of any sum which may by any judgment be "awarded to the city for such tax, assessment or water rate: "provided that in any case any special assessment is made "payable by annual instalments, the prescription runs only "from the expiry of each such instalment."

Sec. 231. "The roll of assessment, when finally settled by "the Commissioners, as aforesaid, shall be filed and kept of "record in the City Treasurer's office; and such special "assessment shall thereupon become due and may be recovered "by the Corporation in the same manner as the ordinary taxes "and assessments which it is authorised by this Act to impose "and levy."

Sec. 241. "Whenever a roll of assessment or apportionment "for any street improvement shall be annulled and set aside, "the payments made under the authority of the same shall not "be thereby invalidated; but such payments, with interest "added, shall go to the discharge of the respective amounts to "be fixed by the new assessment roll, subject, on the part of "the ratepayer, to making good any deficiency, or to receiving "back any surplus, according to the difference that may "eventually exist between the old and the new roll of assess- "ment; and the present provision shall apply as well to special

" assessment rolls heretofore made as to those which may be " made hereafter."

In the Superior Court, Robidoux, J., held that the term for prescription ran from the filing of the special assessment roll when the special assessment became due, and that the right to recover the assessment was not suspended by the pendency of the proceedings for annulment. He therefore upheld the Respondents' opposition. This Judgment was affirmed by the Court of King's Bench, but two of the learned Judges held that prescription had not run against the City, and concurred in the Judgment affirming the Superior Court only on the special ground that inasmuch as another contestation of the same roll was pending at the time of seizure, the action of the City was premature, and the amount of the assessment did not become due until all the contestations of the roll had been disposed of. This Judgment was again affirmed by the Supreme Court of Canada by a majority of three to two, the Chief Justice and two other learned Judges holding that the City was barred by prescription, and the other two holding that the right of action was suspended during the pendency of the proceedings for annulment.

The case of the Appellant was argued before their Lordships on three grounds:—(1) That there was an absolute impossibility to act within the meaning of Article 2232 of the Civil Code during the pendency of the contestation, or (in other words) the right of action was suspended during that period; (2) That the petition for annulment was in itself an acknowledgment by the debtor of the right of the person against whom the prescription ran within the meaning of Article 2227 of the Civil Code, and the prescription was thereby "interrupted"; (3) That the debt was one depending on a condition within the meaning of Article 2236

of the Code, and the prescription did not run until such condition happened.

The Quebec Code incorporates in Article 2232 the well known maxim "*contra non valentem* "*agere non currit prescriptio.*" A decision of the French Court of Cassation was cited from Dalloz, that prescription did not run against a purchaser for the price of the thing purchased during the pendency of a suit to reduce the contract of sale; and another decision of the same Court was cited by the Respondents to the contrary effect. The decisions of the Court of Cassation are no doubt entitled to great respect, but they are not binding authorities upon other Courts even in their own country. And their Lordships think that this case must be decided, not on conflicting decisions of a French Court, however eminent, but on consideration of the enactments in the Appellant's Act or Charter. The terms of Section 231 are clear and unambiguous. The amount of the assessment became due and recoverable on the filing of the roll of assessment, and there is nothing in the Act which in terms suspends the right of action during the pendency of a contestation which, by Section 144, may be brought within six months after the passing of the assessment roll. Nor is there any obvious inconsistency in the co-existence of the right of action with the proceedings for annulment. In fact Section 241 contemplates that payments may be validly made and received at any time before the roll is annulled and set aside, and enacts that such payments will not even in that event become returnable by the City, but may be retained and applied in or towards amounts to be fixed by a new assessment roll. And looking at the elaborate provisions for securing publicity and opportunity for persons liable to be assessed to make objections before the final settlement of the roll

contained in the earlier sections, it may well be that it was the deliberate intention of the Legislature that the amounts should be at once payable whether there was a contestation or not. It is argued that there was an absolute impossibility in law for the City to act because any seizure or action brought by it would or might have been stayed by injunction pending the proceedings in contestation. It is probable that the Court, in exercise of its discretion and with a view to the orderly administration of justice, would have granted such an injunction. There would then have been a real impossibility to act, but the City would have secured the benefit of its having commenced its proceeding within the prescribed delay. Or the Court might have required the Respondents to submit to judgment for the amount sued for, or have imposed such other terms as the circumstances might require for the protection of the City from being prejudiced by the delay in payment. It was then argued that any action by the City to recover an assessment might have been met by a plea of *lis pendens.* Their Lordships think that this argument is based on a misunderstanding. The validity of the assessment could not have been tried or decided in an action by the City to recover the amount of an assessment. If the Respondents relied as a defence on the invalidity of the assessment roll, their proper and only course would have been to have raised it by a cross-action or some proceeding in the nature of a counterclaim. The action of the City and the contestation of the Respondents would in fact have stood to each other in the relation of action and cross-action, and not that of two actions raising the same issue. The plea of *lis alibi pendens* would not therefore be maintainable. Their Lordships are of opinion that the City's right of action was not suspended during the pendency of the contestation.

In support of the second point the Appellant argued that the contestation was an acknowledgment of the Appellant's right and (it is assumed) a continuous acknowledgment until the contestation was finally disposed of. The petition for annulment avers that the roll of assessment is "*nul et de nul effet et doit être mis de côté*," for the reasons there given, and the eighth reason ends with the conclusion that the contestants find themselves taxed "*sans cause ni raison, sans "considération licite et pour une cause illégale.*" An acknowledgment of right which will interrupt a prescription must be something amounting to an admission of liability, and the averments in the petition to most people would look more like a denial and repudiation of liability.

Lastly it was said that the debt was one depending on a condition. This argument was based on Section 144 of the Act, which provides that after the delay of six months from the passing of the assessment it shall be considered valid and binding for all purposes whatsoever, provided that the subject-matter thereof be within the competence of the Corporation. The Appellant construes this as meaning that the assessment shall not be valid or the amount recoverable until after such delay, and the condition which he imports into the obligation is to this effect, viz., "if the assessment shall not "be attacked within six months, or if being "attacked it shall be found valid." Their Lordships think that this contention is at variance with the plain provisions of Sections 231 and 241 already quoted. And they hold with Mr. Justice Killam that the only effect of Section 144 is to fix a time within which an assessment may be attacked, and make it unassailable after the expiration of that time.

It has nothing to do with the date on which the assessment comes into force.

Their Lordships agree with the majority of the learned Judges in the Supreme Court that the prescription runs from the date on which the assessment roll was filed, and will humbly advise His Majesty that the Appeal be dismissed. The Appellant will pay the costs of it.