*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Town of Outremont* v. *Alfred Joyce, from the Court of King's Bench for the Province of Quebec (Appeal Side), delivered the 30th October* 1912.

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PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD ATKINSON.
LORD SHAW.
THE PRESIDENT OF THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

[DELIVERED BY LORD ATKINSON.]

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This is an Appeal by special leave from a judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec, dated the 23rd of March 1910, confirming a judgment of the Superior Court of the said Province dated the 12th of October 1909.

By this latter judgment the claim of the Appellants to recover from the Respondent a sum of $1,132.53 with interest at 4½ per cent. per annum was dismissed. The sum claimed was the first of 20 instalments of special assessments on land in the town of Outremont belonging to the Respondent, in respect of the cost incurred by the Appellants in "macadamizing" certain public streets of that town named Villeneuve Street, Nelson Street, and McNider Street, upon which the said lands

of the Respondent abutted. The Appellant Municipality was incorporated in the year 1895 by an Act of the Legislature of the Province of Quebec, 58 Vict. c. 55, under the name of "The Town of Outremont." This Statute was amended by 63 Vict. c. 55 and 4 Ed. 7 c. 58. The facts and circumstances out of which the claim arises are, so far, as material, as follows:—The Appellants were minded to make three new streets in their town, to bear the names already mentioned, over land theretofore private property not subject to any public right of way. The Respondent, who was a member of the municipal body, and had theretofore filled the office of Mayor of the town, by an instrument in writing bearing date the 15th of May 1905 generously granted to the Appellants, free of charge, certain portions of his land which were to form or help to form the sites of these new streets. The grant was made by the Respondent and accepted by the Appellants on this express condition, amongst others, that as to each of these streets respectively the Appellants should "form a public street of a "uniform width of 66 feet to be forthwith opened "by the said town for use as a public street."

This instrument contained in addition a provision upon which the sole question for decision turns. It ran as follows:—

"That no special assessment shall be levied upon the "remainder of the said Lots Numbers Twenty-nine and "Thirty, to defray the cost of the opening of the various "streets hereinbefore referred to; but this shall not be con- "strued as exempting the lands bordering on said streets "from special assessments for drains, macadamizing such "streets and sidewalks therein.

"That the town shall pay the cost of this deed and its "registration."

The three new streets have been made. The Respondent has been specially assessed in respect of this land of his with the cost of all the work done upon these streets other than procuring

the land to form them. The Appellants contend that on the proper construction of the above-mentioned clause, the cost "of opening streets" merely means the cost of obtaining the land to form them, and, that as the streets cannot be macadamized till they have been prepared for the final operation of placing the broken road metal upon their surface, the work of all kinds involved in this preliminary preparation, such as grading, filling up hollows, cutting through rocks where necessary, and levelling, &c., are covered by the word "macadamizing," and are comprehended in the work it describes. The Respondent, on the other hand, in his case, contends that the term "macadamizing," which has been adopted in the vernacular of both the French and English languages, is not a term of doubtful meaning, but is used to denote the finishing process of covering a road with small broken stones to form a smooth surface. Their Lordships have not to decide on this Appeal between these two constructions. The only question they have to decide is whether the Appellants' construction of this clause in the agreement is its true construction. If it be the true construction, then the only return which the Respondent will receive for his generosity in making a present of his land to the Appellants is probably this, that he will escape being assessed for the professional costs and charges incurred in vesting his own land in the Appellants, and proclaiming to the public that the acquired soil was open and free to them to traverse. In all other respects he will stand in the same position as any other owner whose lands abutted on those new streets. Their Lordships are, for several reasons, quite unable to adopt the construction of this clause contended for by the Appellants. First amongst these reasons is this, that in the conditions contained in the agreement the use of the words "to be

forthwith opened by the said town " for use as " a public street," evidently imposes upon the Appellants the obligation to have done on the land granted, all the work of whatever kind, necessary to render the contemplated street fit to be used by the public for the traffic of the various kinds that in such communities is carried over public streets. It would be quite irrational to suppose that the Respondent had contented himself with putting the Appellants under terms merely to announce to the public that they might traverse the land he had given to the municipality in the state it then was. Frontage rights on such a highway would be worthless. There is nothing in these conditions about grading, levelling, macadamizing, or anything of that kind. The duty to do all these things is imposed by the words " to be forthwith opened " by the said town for use as a public street." And yet according to the Appellants' contention this phrase, so wide and comprehensive, is, when it comes to dividing the costs of the operations it includes, to be narrowed into meaning little more than a mere proclamation to the public that they may traverse the land bestowed upon them by the Respondent. Again, the very words of the excepting clause above extracted seem to suggest of themselves that the words " to defray the costs of opening," mean the cost of making the streets fit for traffic, else it would be quite unnecessary to provide, as is provided, that these words are not to be construed as exempting the lands bordering on the streets from special assessment for " drains " and " macadamizing " the streets and side walks. The natural construction of such a clause would appear to their Lordships to be that but for these latter words the Respondent's lands were to be exempted from assessment for the costs of all kinds of work necessary to make the road

into public streets fit for such traffic as is usually carried over public streets in this town. On the consideration of the agreement itself, therefore, it would seem to their Lordships impossible to hold that the parties to it intended at the time it was entered into to give to the word "open" the meaning now contended for. An examination of the statute incorporating the Appellants, and of the bye-laws they have passed supports this conclusion.

In the 20th sub-section of Section 23 of this statute dealing with existing roads the word "macadamizing" is used in a restricted sense, as opposed to planking, *i.e.* making the surface of the road.

By Sub-section 29B the cost of making any of the improvements mentioned in the preceding sub-section is thrown on the owners of property abutting on any street, alley, boulevard, and, on referring to the earlier sub-section, it will be found that these improvements are "to open, "widen, prolong, alter, grade, level, or otherwise "make or pave any street, &c." Much reliance was placed on this enumeration. It was contended that it showed that grading, or levelling, or paving a street were not included in the word opening. Their Lordships do not think this is a legitimate deduction from the use of the words relied upon. The sub-section deals with existing streets as well as with new streets, streets which have already been opened, as well as those about to be opened, and consequently naturally uses terms which apply to improvements to be effected on either description of street. That, however, does not at all lead to the conclusion that these words "grading," or "levelling," or "paving," are not, in the case of a new road, intended to be covered by the phrase "open for public "use."

Lastly, the fourth of the bye-laws passed on the 20th of October 1905 by the Appellants

dealing with all streets, all roads or sections thereof that may be required for public utility, old or new, uses the word " macadamizing," and, this is the vital point, draws a distinction between macadamizing and grading. There seems to be no warrant, therefore, for the contention that the word " macadamizing " in the exempting clause of this agreement bears a meaning, not only inconsistent with the earlier provisions of the agreement itself, but differing altogether from that which it bears in the statute which incorporated the Appellants, and in the bye-law which they themselves have passed. Their Lordships are therefore of opinion that the construction contended for by the Appellants is not the true construction of Clause 6 of the agreement, and that the Appeal fails and must be dismissed, and they will humbly advise His Majesty accordingly. The Appellants must, in accordance with the undertaking given by them on the hearing of the petition for special leave to appeal, pay the Respondent's costs of the Appeal as between solicitor and client.

In the Privy Council.

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THE TOWN OF OUTREMENT

*v.*

ALFRED JOYCE.

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DELIVERED BY LORD ATKINSON.

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