

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of Otto  
Mog v. Sidney Oliver Schutz and another,  
from Her Britannic Majesty's Supreme  
Consular Court, Constantinople; delivered  
Wednesday, 16th December 1874.*

---

Present:

SIR JAMES W. COLVILLE.  
SIR BARNES PEACOCK.  
SIR MONTAGUE E. SMITH.  
SIR ROBERT P. COLLIER.

THIS is an appeal against a decree of Her Majesty's Supreme Consular Court at Constantinople, which cancelled and annulled a decree of the Consular Court at Alexandria, and substituted for it a decree in these words: "That the Appellant, Otto Mog, in his person as administrator of the estate of Cesar Tortillia, deceased, be restrained from bringing any action or suit against the Respondent, Sidney Oliver Schutz, or any other partner in the Alexandria and Ramle Railway Company for the recovery of any dividends due on the 1,000 and 100 shares which have formed the subject matter of dispute in the present action. That the said Respondent, Sidney Oliver Schutz, be ordered to pay to the Respondent, Robert Fleming, executor under the will of Henry Bulkeley, deceased, all dividends which have become due on the said 1,000 and 100 shares since the 17th day of December 1869."

The circumstances that led to the litigation which was closed by this decree may be very shortly stated. It appears that in the year 1868

one Mr. Bulkeley was the holder of 1,000 shares in the Alexandria and Ramle Railway Company, and that he had mortgaged those shares to the Egyptian Commercial and Trading Company, who were threatening to sell them in order to pay off their advance. In that state of things an agreement was entered into between a Mr. Fleming, who seems to have acted partly as the agent of Bulkeley, and partly with a view to the interests of himself or of some other persons in the transaction, and one Cesar Tortillia, to the effect that the latter should purchase the shares from the Egyptian Commercial and Trading Company, and should hold them upon certain terms which were first orally discussed between the parties, and were afterwards reduced to writing in the two French letters set out at pages 11 and 12 of the Record. In the course of the argument, various points touching the construction to be put upon those letters, and the nature of the contract therein embodied have been raised and discussed. Their Lordships, however, do not, for the reasons which will be hereafter mentioned, propose to give anything in the nature of a final judgment upon the questions which may be in dispute between the parties, with regard either to the construction of some of the terms of this agreement, or to the consequences which ought to follow from the breach of any of them, if broken they have been, except so far as may be necessary for the determination of the present suit. But it is necessary, for the purpose of deciding this case, to consider the general effect and nature of the agreement.

Looking at the two letters, their Lordships have no doubt, nor does it seem to be disputed on either side, that Cesar Tortillia was, subject to any obligations to which he might have subjected himself by the contract, the purchaser,

in the full sense of the term, of the shares. He says distinctly in the letter signed by him, "I have bought this day from the Trading Company 1,000 shares of the Ramle Railway at the price of 10*l.* 5*s.* a share." In the other letter Mr. Fleming says that he thereby confirms the verbal agreement, "that is to say, the purchase on your part from the Trading Company of 1,000 shares in the Railway Company, &c., &c." Now the agreement by which the rights of the purchaser were qualified was, that in the event of a sale or cession of the shares before the expiration of the year, Mr. Fleming was to receive 60 per cent. out of the net profit which might be realised by that sale or cession; the remaining 40 per cent. of such profit being retained by Tortillia. Tortillia, however, further stipulated that, in the event of such a sale taking place, he should at all events receive, before (as their Lordships understand) the balance of profit and loss on the transaction was struck, the 10,250*l.* which he had paid as the price of the shares, with one year's interest thereon, which, calculated at 12 per cent., amounted to the sum of 1,230*l.*; and further that, as a security for the payment of such interest, 100 other shares should be deposited with him. It was further stated that the agreement was to last only for a year, calculated from the date of the letters. It is obvious from this statement that if there were no sale or cession within the meaning of the agreement, or if no profit were realised thereby, Tortillia would remain in any event the owner of the shares, and that the other contracting party would be under no obligation to repay the money expended in the purchase of them.

What afterwards happened was as follows: In October 1869 a dividend on the shares was declared. Tortillia died on the 2nd December,

and on the 12th December an application was made on the part of Fleming to a Mr. Bleton, a person who had been Tortillia's agent, to sell. Bleton stated that his power was at an end, and that therefore he could not sell; and the year during which the contract was, in the terms of the letters, to subsist, ended on the 17th December 1869. A more formal demand for a sale was served upon Bleton on the 24th December 1869, *i.e.*, after the expiration of the year. In the meantime Mr. Mog, the Appellant, had become entitled to represent Tortillia, but he could not for some time perfect his character of administrator by reason of his not being a French subject. It was not until April 1870 that he became the legal personal representative of Tortillia. He then brought his action against the Company for the payment of the dividends due on the 11th November 1870. On the application of the Company an interpleader order under the statute was granted by the Consular Court at Alexandria, but that order was, on appeal, quashed by the Supreme Consular Court at Constantinople, and the present petition or claim, which is in the nature of an interpleader suit, was filed in the former Court on the 22nd December 1872.

Assuming for the sake of argument, and only for the sake of the argument, that the agreement has been broken by Tortillia or his representative, by the failure to sell the shares pursuant to the notice, their Lordships have to consider what were the rights of the Respondents under the contract, and whether they can be enforced in a suit like the present. The learned Judge of the Supreme Consular Court at Constantinople has treated the transaction as one in the nature of a mortgage, and the Appellant as a mortgagee subject to be redeemed. Mr. Kay, arguing on this view of the case, has argued with great force that the relation of

mortgagor and mortgagee, if it subsisted between the parties, would not justify the decree, inasmuch as the mortgagee could not be deprived of the dividends accruing on the shares, except on a full redemption of the shares or an offer to redcem them. Sir Henry James, however, repudiated that view of the contract, and treated it, and, as their Lordships have already intimated, more correctly treated it, as being in the nature of a special contract, by which, in a certain event, the rights of Tortillia, as purchaser, were to cease, and he was bound to sell the shares to a third party at a profit, if a profit could be realised, and was then, retaining his principal and interest, to divide the balance of the purchase money between himself and Fleming in certain proportions. Now, the breach of such an agreement as that would, at first sight, seem to sound in damages, for which the party injured might sue in an action properly framed for the purpose, and in which the loss which had been sustained by reason of the breach of the agreement would be assessed in the usual course. It may also be that the contract might have been made the subject of a suit for specific performance; that Fleming, appealing in such a suit to the equitable jurisdiction of the Court, might have obtained a decree, notwithstanding the expiration of the year, for a sale of the shares, a division of the profits in the terms of the contract, and possibly might have made out a case for charging the other party with the profits which, but for his wilful default, he might have realised. If, however, either of these or any other remedy were open to the Respondent Fleming, it was open to him only on the condition of his taking the proper measures to enforce it. This he has not done. No direct action was taken by him against Mr. Mog as the representative of Tortillia under the contract, but he gave

a notice to the Railway Company not to pay the dividends. The Railway Company, being sued, on the other hand, by Mr. Mog, for the dividends, instituted this interpleader proceeding, and it has been ruled, and properly ruled, by the learned Judge of the Supreme Consular Court at Constantinople, overruling the decision of the Consular Court at Alexandria, that all that can be decided in such a suit is the question who was entitled to receive the dividends that are the subject of the dispute.

Now it appears to their Lordships that the only person who is entitled to receive the dividends is the legal owner of the shares; that it has never yet been decided in any proceeding in which that question, and the general rights and liabilities of the parties under the agreement, properly could be considered and determined, how far the title of Tortillia, as the purchaser of those shares, has been affected by the agreement, or by any breach of the agreement which may have taken place, and that the only question in this interpleader being which of the two contending parties was, as against the Company, entitled to receive the dividends, there can be no doubt that the person so entitled was the representative of Tortillia, the holder of the shares.

There is not the slightest pretext for saying that the effect of any breach of the agreement that may have taken place was to take the property in the shares out of the Appellant, and to vest it in the Respondent Fleming; and the decree, which gives him the dividends, without adjudicating on the title to the shares, in their Lordships' opinion ought not to stand.

Under these circumstances, their Lordships, without deciding any further question between the parties, will humbly recommend to Her Majesty that the order of the Supreme Consular Court

under appeal be reversed, except in so far as it reversed the order of the Consular Court of Alexandria, and that in lieu thereof it be ordered that the dividends in question be paid to the Appellant Mog, and that the costs of the Appellant Mog in this suit in the Courts below be paid by the Company, which is to have them over against the Respondent Fleming, and that the costs of this Appeal be paid to the Appellant by the Respondent Fleming.

