

Newfoundland Government and Newfoundland Railway Co., Ltd.

Opinion of William Finlay.

There would appear to be no question that the Reid Newfoundland Company have ceased to operate the Railway and are in default under the contract. This being so the Government has two courses open to them. They may treat the contract as at end with result that they would be entitled to claim damages but would not be entitled to rely on any of the terms of the contract. Or they may treat the contract as still subsisting with the result that they would be entitled to claim damages and also to rely upon the terms of the contract. If the Government elect to treat the contract as subsisting the mode of procedure would be to take possession of the Railway under Clause 38 of the Contract and to give the Company notice that this had been done and that the Government held the Company liable in penalties and damages for their breach of contract. In the event of the Company offering any special interference or opposition to possession being taken the Government should apply to the Newfoundland Court for an injunction to restrain such interference.

It cannot be doubted that in the event such a breach had occurred the Government would be the most advantageous party to the contract. The main question upon which my opinion is desired is as to what is the position of the parties under certain clauses of the contract.

I should preface what I have to say by pointing out that the questions are questions of general law but are of difficult and in some respects obscure contracts. It is possible to say that in my view is the right construction and this I propose to do but I do not wish to strike different notes in different ways and it is quite possible to advise with confidence or to state that the view which I think right will ultimately prevail.

In my opinion, as I have said, the Reid Newfoundland Company is in default. Admittedly it has ceased to operate the railway but it sets up as a defence that it was justified in so doing by reason of the failure of the Government to observe the terms of Clause 4 of the Agreement scheduled to the Act of 1921. In my view this construction of the Company fails altogether. Clause 4 does not impose an obligation upon the Government to pay \$1,000,000 dollars or any other sum. It imposes an obligation to pay losses up to \$1,500,000 dollars. This the Government have been willing to do. Accordingly follows that the construction of the Company on this point fails and the stoppage constituted default of the Company.

In these circumstances the Government is entitled to damages. The general principle is laid down by a great authority Baron Parke in Robinson v. Harman 1 Ex 850 at p. 855 "The rule of the common law is, that where a party sustains a loss by reason of a breach of contract he is as far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." If, as I suppose, it is essential that these railways should be operated the Government ought either to work them or to make a contract with some other contractor for working them. The Government adopting the latter course would then be entitled to claim and recover damages based upon the difference between the position of the Company had fulfilled their obligation and the position under the contract necessarily made in view of the default of the Company.

It is now come to the main point in the case, viz: that which depends upon the construction of clause 38 of the Agreement of 1921 and Clause 13 of the Agreement of 1901. I do not think it necessary to set out the history of the history of the matter as it is familiar to those instructing me and can be collected fully from the papers before me.

Before approaching the contracts actually in question it is desirable to look at the Operating Contract of 1923. That contract contains in Clause 1 a definition which ought to be compared with that in the Contract of 1921. It contains provisions for operating the railways and in Clause 2 a stipulation for the provision by the Contractor of additional rolling stock, etc. which on the termination of the contract was to be taken over and paid for by the Government. Clause 23 provides for the forfeiture of a security in case of default and also provides that in such case the Government may enter upon and take possession of all the railways.

What is to follow upon their taking possession is not defined but this much appears to me to be clear—that the railways referred to must be the railways in their actual condition at the time of default and that the contractors could not claim to exclude from clause 23 rolling stock, etc. upon the ground that it had been provided under clause 8. If this is sound it throws a certain amount of light upon the construction of the Agreements of 1921 and 1901.

In the Agreement of 1898 the Clauses most important to be considered are 2, 3, 8, 28, 29, 40. By Clause 39 the Contractor agreed to purchase "the rights interest reversion and property of the Government under and subject to the provisions of the foregoing contract." By Clause 3 the Contractor was to take possession and operate for 50 years. It is upon Clause 38 read with the Agreement of 1901 referred to below that the question mainly turns. That clause is in two parts. The first part makes the railway security for the performance of the contract. It seems to me that in this Agreement, as in that of 1898 the meaning must be that the railway as it exists at the date of breach is to be the security. Any other construction would lead to most serious practical difficulties. The argument against the view I take is based mainly upon the definition in clause 2. The construction of that clause is not easy. Grammatically I think the words "the property or to become the property of the Government" are applicable only to the "other materials" and not to the earlier part of the Clause. The argument against my view would be pressed to its full extent, lead, as it seems to me a complete impasse. If the railway is defined in bought and if the words "the property or to become the property" govern the whole definition then there is it would seem nothing upon which the charge in clause 38 could operate because as hypothetical part of the railway is the property or to become the property of the Government.

I therefore think that the charge in clause 38 extends to the railway as it exists at the date of breach. If this is so it is difficult to see how the second part of clause 38 as also extending to the railway as existing because whatever "railways" may mean it is hardly possible to think to suppose that it means something different in the first and second parts of clause 38. The consequences are rather drastic. It must be admitted but as Lord Sumner pointed out in a recent judgment "we are concerned not with consequences but with construction." I also admit that the word "revert" is awkward. But this word is not sufficient to induce me to alter my view which after considering the matter as carefully as I can I think the correct view of the section as a whole.

It now remains to consider the Agreement of 1901. Clause 13 of the Act of 1901 is important. Whatever may have been the motive with which it was inserted full effect must of course be given to it. Its importance resides in this that when once the construction of clause 38 is established then that construction must continue to prevail even if there is something inconsistent with it in the Agreement of 1901.

The main object of the Agreement of 1901 was to effect a re-sale to the Government of what it had sold in 1898. Clause 13 is the most important clause for the present purpose for the real point is whether that clause operates to take the rolling stock dealt with by it out of Clause 38 of the Agreement of 1898. I do not see how it can be said that it is necessary to rely upon a II of the Act for I think the clauses quite consistent with each other. The provision as to the Government taking over the rolling stock is a provision for the benefit of the contractor and it is a provision to operate on the effluxion of time or by mutual consent. It would be a very startling result if a party who has wrongfully repudiated a contract could rely on such a clause as this. See General Bill Posting Co. vs. Atkinson (1909) A. C. 118. See also Clauses 35 of 1898 and 13 of 1901 appear perfectly consistent. The one deals with what is to happen in case of default; the other deals with the termination of the contract by effluxion of time or consent. Here there has been no consent. The Contractor has repudiated his Contract and that is all. My attention has been called to the agreements of 1901 scheduled to the Railway Extensions Act of 1910. These agreements relate to the construction and operation of certain branch lines and clause 9 of the Operating Contract has a bearing upon the point now under consideration. That clause strongly suggests that there must have been discussion as to the correct interpretation of Clause 13 of the Contract of 1901. Under the clause of the 1910 contract it is impossible to suggest that the Government would be bound to take over and pay for the rolling stock except upon the termination of the contract by effluxion of time. This in my opinion supports the view I take of the clause of 1901 because it suggests that the parties were expressing in plain language what they conceived to be the right construction of the contracts of 1898 and 1901. If it were otherwise it will be observed that the rights of the parties would be entirely different with regard to rolling stock provided under the contract of 1901 and rolling stock provided under the contract of 1910. This is a result which I find it difficult to suppose was intended by the parties.

In my opinion, therefore, while I fully recognize that the point is both doubtful and difficult, the Contractor is not in the events which have happened entitled to rely on clause 38 of 1898 as extending to the railway rolling stock, etc. as existing at the date of breach.

There is another and an entirely different point which arises in the case. I understand that the Contractor rendered a number of services outside the contract during the war as by running additional trains heavier engines and other matters of that sort. No claim has yet been made in respect of these matters, but I understand it is practically certain that the claim will be made and will be very large. It is of course useless to deal with this matter at length in the absence of all details, but it may be useful that I should say that if it be the fact that services have been rendered and material supplied outside the contract at the request whether express or implied of the Government—then in accordance with well settled principles of law the Government would be liable to pay a reasonable price for those services and that material. I base this opinion upon general principles of law, but I may observe that there is in the Agreement (clause 7 of 1898) a clause expressly providing for compensation for running of special trains.

I do not upon the facts as they were outlined in conference entertain much doubt that the contractors have a real claim under this head. To ascertain the amount of that claim would obviously be a long and complicated task.

The above is my opinion upon the matters which seem to arise. I hope that I shall not be considered presumptuous if purely by way of suggestion for the consideration of the Government authorities I offer my view upon the course which regarding the matter practically ought to be pursued. I think that the matter is one which it would be desirable if possible to settle. Some of my reasons will be obvious from what I have above written—the doubt and difficulty of the main point—my view that the contractor probably has a good claim for special services, the long and complicated and difficult proceedings whether by arbitration or in Court) which must result if the whole matter is fought out. To these I will venture to add a consideration of a more public nature. I have had the advantage of reading the elaborate report of Mr. Morgan. If his view is generally correct it is obvious that this contract was from its inception impossibly onerous. This does not affect the legal position. The contractors having entered into the contract are in law bound to fulfil it.

BILLY'S UNCLE

SAY, YOU'RE NOT GOING TO LET MRS. WATT'S BIRTHDAY GO BY WITHOUT SENDING HER A PRESENT ARE YOU—WHY DON'T YOU SEND HER A BUNCH OF ROSES?

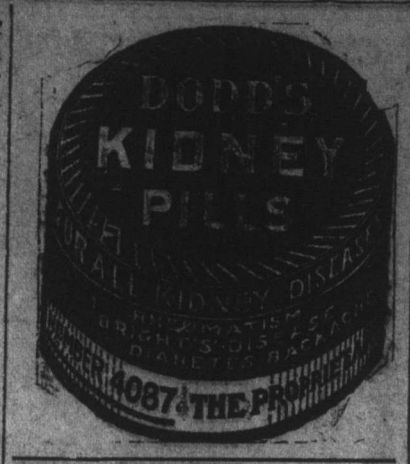
WHY SHOULD I SEND HER ROSES?

BUT ON THE OTHER HAND, SHE'S BEEN PRETTY COOP TO YOU—SHE'S GIVEN YOU FIVE DOLLARS—BUY HER THE ROSES YOURSELF!

HERE'S A BIRTHDAY PRESENT FROM MY UNK, MRS. WATT!

THE DEAR SWEET MAN—AND ROSES TOO!

YOU JUST GIVE HIM A BIG HUG AND KISS FOR ME, BILLY!



New Institution for Nfd. Blind.

John Weir, Superintendent of the Newfoundland Institution for the Blind, has been in the city for several days. Mr. Weir was for a number of years attached to the Halifax School for the Blind, and is well known in the city and through the province.

Three years ago Mr. Weir went to Newfoundland to take charge of the work for the blind in that Dominion. Speaking to The Herald last night, he said that a splendid institution was now being made ready for occupation in the fall to give proper facilities for work among the blind.

Through the generosity of Sir Edgar Bowring, of the great British shipping and mercantile firm which bears his name, a palatial group of buildings has been given to the city of St. John's, facing a beautiful park which Sir Edgar had given to the city. These buildings were now being remodelled and added to, in preparation for the reception of a number of the blind in Newfoundland. The Government of the Dominion had made a handsome appropriation for this work, and had agreed to donate an annual amount for maintenance.

For the present, it was planned to carry on an industrial program—to aid the blind, to learn how to earn their own living and to give them employment. Besides this work at the institution, home teaching of the blind and a campaign of education for the prevention of blindness would be carried on.

At present the blind children of Newfoundland were being cared for at the Halifax School for the Blind and this arrangement would not be disturbed just now, the Newfoundland Institution limiting itself largely to adult training. Returned students from Halifax would be found employment by the Newfoundland Institution. Later it was hoped that facilities for general education of the blind would be available at the school in St. John's.

Mr. Weir leaves within a few days for the principal cities throughout the United States to make a study of the leading institutions for the blind in order that the most up to date program possible may be adopted when he opens the new institution. He is accompanied by his wife and daughter, Emily.—Halifax Herald.

enerous or not. But I think that a Government may well have some regard to such matters as are adverted to by Mr. Morgan and may properly take into account the fact that this was not apparently a wilful breach but was rather a breach due to circumstances outside the control of the parties.

Upon the precise stage at which a suggestion of settlement should be made and the precise amount to be offered I do not feel that I can offer any opinion. I will only say that the sums which were tentatively mentioned to me as possible figures of settlement did not fit in all the circumstances strike me as impossibly excessive.

I must apologise for the length of this Opinion, but I did not feel that I could express that general view of the case which was desired except by writing at length.

WILLIAM FINLAY,
25th August, 1922.

A smart summer sports costume is a linen-plated skirt worn with an embroidered coat.

What Do You Think of a Fluid

- That will draw roaches and ants out of every hole, crack, or crevice before killing them and not poison food?
- That will kill bugs instantly and not leave an unpleasant odor?
- That will knock flies off the wall and not harm paint or paper?
- That will keep the bedroom, kitchen, or verandah clear of flies, mosquitoes, etc., for several hours after a few sprays?
- That will take fleas off a dog and not harm the dog?
- That will destroy chicken lice without any injury to your stock?
- That applied in small quantities to the exposed parts of the body will insure you from Mosquito bites?
- That as a general disinfectant is stronger than the ordinary carbolic solution.

THAT FLUID IS SAN-O-SPRAY.

No insect can live where San-O-Spray is used. Yet San-O-Spray is non-poisonous to human beings and can be used with perfect safety in pantry, kitchen, dining room, and cellars, moreover San-O-Spray has an agreeable and delightful odor, removing all fetid or unpleasant odors. In addition San-O-Spray is a disinfectant and germicide. Keeps the home sanitary and free from infectious diseases.

Ellis & Co., Limited.

THE BRUISERS.

There is now a great revival of the well known fighting game, every bruiser seeks his rival and encamps upon his frame; there's a carnival of scrapping, slugging, punching, kicking, and we moralists are yapping that the whole thing is a shame. For the bruisers who are bruising might pursue a better trade; we would like to see them choosing honest effort with a spade; they might wall be fixing flivvers, or, as butchers, sliding livers, or, as loggers by the rivers where our beams and joists are made. Though the pugilist be clever, though his skill be understood, all his toil is waste endeavor, doing no one any good; in the ring we see him pawing; but our praise he would be drawing if he spent the long hours sawing fifty-seven kinds of wood. Why put in the golden morning knocking human maps askew? There are cows that need dehorning, there are useful chores to do; there are roofs that should be mended, there is corn that should be tended, there are labors large and splendid that are wearying for you. Every time a task is finished, you a victory have won; world disorder is diminished by the useful work you've done; but the world is none the better when a fighter dotes his sweater as the champion go-getter for a stack of unearned mon.

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A frock of wool challis in soft brown is figured in green, trimmed with corn organdie picot-edged in green, and worn with green suede belt.

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Constipation

Relieved Without The Use of Laxatives

It is a fact that a large number of people are afflicted with constipation, and that the cause is often a lack of natural lubrication.

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Castrol
A LUBRICANT—NOT A LAXATIVE

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