

COURT OF APPEAL.

NOVEMBER 19TH, 1912.

THE WELLAND COUNTY LIME WORKS COMPANY
v. AUGUSTINE.

4 O. W. N. 338.

Action for Damages—Injunction—Supply of Natural Gas—Non-fulfilment of Conditions—Joint Contract—Relief from Forfeiture—Parties—Judgment in Previous Action—Res Judicata.

An action for an injunction to restrain defendants from interfering with certain gas wells claimed by plaintiffs and damages for alleged wrongful taking possession of said wells by defendants. The plaintiffs' rights in this case depended upon an agreement made between them and the defendants on November 20th, 1903. By this the defendants agreed to give to the plaintiffs the usual oil and gas leases of their respective farms "to continue so long as the plaintiffs continue to comply with the conditions agreed upon." That condition was mainly to supply free of charges sufficient gas to heat the defendants' houses. In *Welland Co. Lime Works v. Shurr*, Divisional Court, 21 O. W. R. 481; 3 O. W. N. 755, reversed judgment of Sutherland, J., 20 O. W. R. 637; 3 O. W. N. 398, holding that the agreement was a joint one and not severable as to Shurr. The Court also held, that the company had by its own act forfeited its rights under the agreement and had no *locus standi* in Court.

BOYD, C., held, 22 O. W. R. 235; 3 O. W. N. 1329, that the plea of *res judicata* relied on was a sufficient defence. The company must by some means, if possible, get rid of the forfeiture declared by the Court before they could be rightly in Court as to the gas well. The present action was not well advised and should be dismissed with costs.

COURT OF APPEAL, in view of the decision of the Court in the *Shurr Case*, ante, 397, reversed the judgment of Boyd, C., and gave plaintiffs the relief sought, but without costs.

An appeal by the plaintiffs from a judgment of Hon. SIR JOHN BOYD, C., 22 O. W. R. 235, 3 O. W. N. 1329.

The appeal to Court of Appeal was heard by Hon. MR. JUSTICE GARROW, Hon. MR. JUSTICE MACLAREN, Hon. MR. JUSTICE MEREDITH, Hon. MR. JUSTICE MAGEE and Hon. MR. JUSTICE LENNOX.

W. M. German, K.C., for the plaintiffs.

S. H. Bradford, K.C., and L. Kinnear, for the defendant.

HON. MR. JUSTICE MEREDITH:—It follows from the decision, in this Court, of the case of *The Welland County Lime Works Co. v. Shurr*, that the plaintiffs in this action are entitled to the relief sought by them in it; but I do not think they should have their costs of it, as a separate action might easily have been avoided; the defendant Augustine might very well have been made a party defendant, in the other action, at some time; and all the necessary relief against him might have been had in it.

I would allow the appeal; and grant the injunction sought, which I suppose is all the plaintiffs now really seek, in this action.