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HIGH COURT OF JUSTICE.

SUTHERLAND, J. JULY 4TH, 1912.

SUNDY v. DOMINION NATURAL GAS CO.

Contract—Construction—Supply of Natural Gas—Breach—Damages—Continuing Breach—Costs.

An action for an injunction and damages in respect of an alleged breach of an agreement.

J. A. Murphy and R. S. Colter, for the plaintiffs.
J. Harley, K.C., and A. M. Harley, for the defendants.

SUTHERLAND, J.:—In or about the year 1896, natural gas was discovered in the county of Haldimand, at or near Attercliffe station. The plaintiffs, Sundy, Strome, Kenny, and one Harold Eagle, were then residing at or near that station. They or one of them drilled a well; and, some time after, when there was talk of others piping the gas from that field to the city of Brantford, a second well was put down to insure, as far as practicable, to them and those to whom they might see fit to sell gas, a continued supply. The plaintiffs obtained a supply of gas for themselves at their respective dwellings, and also sold some to others.

A company was incorporated by them with a capital stock of $2,000, under the name of the Attercliffe Station Natural Gas Company Limited. Each of the named persons became a shareholder therein, and the company commenced to do business, and was apparently succeeding and paying dividends.

On the 25th March, 1902, a written agreement was entered into between the company and H. Cockshutt and W. J. Aikens, by which a new company was to be formed to take over the holdings of the original company. Under this agreement the named plaintiffs and Eagle were to and did take stock in the new company in the proportions of their holdings in the old company. It was also agreed that they should have, "in addition, gas for

their private dwellings free for ordinary purposes.'' The new company was incorporated under the name of the Imperial Natural Gas Limited. A supplemental agreement, dated the 16th December, 1902, was made between the original company and the individual shareholders thereof and such new company. This agreement contained a clause referring to the shareholders of the original company, including the said named plaintiffs and Eagle, by which they became ''entitled to receive'' from the new company ''gas for ordinary purposes for use in their private dwellings at and adjacent to Attercliffe station, in accordance with the agreement recited in the premises,'' which agreement alleged to have been recited in the premises was, no doubt, the agreement of the 25th March, 1902.

The Imperial company proceeded to extend its operations in the Attercliffe gas field, and in doing so drilled nine new wells. It also continued to supply the plaintiffs with free natural gas at their dwellings. There had been a company known as the Dunnville Natural Gas Company, operating near the town of Dunnville, several miles distant from Attercliffe station, and supplying gas for the use of the inhabitants of that town. These two companies, the Imperial and the Dunnville company, were merged into a new company, called 'The People's Natural Gas Company,'' in which the plaintiffs again took stock in exchange for their stock in the Imperial company; and they say in evidence that they were to continue to have free gas as before. It was apparently understood, at the time of this amalgamation, that gas was to be piped from the Attercliffe field to Dunnville; and a pipe line was thereafter put down for that purpose, and gas was piped there.

In the year 1905, the People's company is said to have been ''absorbed'' by the defendant company, the Dominion Natural Gas Company Limited; and in connection with this arrangement a written contract was, on the 2nd February, 1905, entered into between the Dominion Natural Gas Company Limited, of the first part, and Eagle, Strome, Sundy, Reily, and Kenny, of the second part, which is in part as follows: ''Whereas the parties of the second part hereby agree to sell, assign, convey, and transfer their stock now held in the People's Natural Gas Company for par value of same to be paid forthwith by W. J. Aikens: Now this agreement witnesseth, and it is hereby agreed by and between the parties hereto as follows: The parties of the second part shall be entitled to receive from the parties of the first part gas free for use in their private dwellings at and adjacent to Attercliffe station in accordance with the agreement entered

into with the Imperial Natural Gas Company on the 16th day of December, 1902. It is understood that this agreement is to extend to the successsors and assigns of the parties of the first part." . . .

Each of said named plaintiffs and Eagle was paid in cash, under the said agreement, the par value of their stock, amounting to $444.

Some time after the last-mentioned agreement, Harold Eagle died, and the plaintiff Rosina Eagle is said to be his heir-at-law. It was agreed by counsel at the trial that she was not properly a party to the action, and her name was struck from the record. The defendant company continued to supply the plaintiffs Sundy, Strome, and Kenny with natural gas, free of charge, down to April, 1911, when they discontinued doing so, and took up the pipe line between Attercliffe station and Dunnville.

There is some disagreement between the parties as to whether, after discontinuing the supply to the plaintiffs in April, 1911, the defendant company did or did not first offer to sell to them certain wells in which there was still some gas available, apparently, for purely local purposes, before selling them to other persons. By that time some of the wells had been abandoned as useless, and the others they then sold for sums representing approximately the cost of the casings therein.

The position of the defendant company in this action is, that, when the plaintiffs sold out to them in February, 1905, it was in the contemplation of all parties that the gas was being or would be piped from the Attercliffe field to Dunnville, where there was a considerable population to be supplied, and that the result would inevitably be to cause the Attercliffe field to be sooner exhausted than it otherwise would. They say that, the pressure in the wells in the Attercliffe field having run down to a point where it was not commercially feasible to continue to pipe from those wells, they were justified in discontinuing operations therein, and in declining further to supply the plaintiffs with gas free at their dwellings.

Since April, 1911, the plaintiffs have been obliged to secure their supply of gas from the purchasers of these wells, and have so obtained it, and apparently it has cost them in the neighbourhood of $50 to $60 a year.

In this action the plaintiffs assert that on the 25th April, 1911, the defendants, in violation of the agreement of the 2nd February, 1905, shut off and refused to supply them further with free gas, and still refuse to supply them therewith. They

ask, in consequence, "an order restraining the defendants from the continuance of the said breach," and damages therefor.

It appears that, while the main pipe line from Attercliffe station to Dunnville has been taken up, the defendant company are still drawing gas from wells in the Attercliffe field, which they still own, and piping it by another line along the Dilks road to Dunnville. The defendants say that these wells are not wells which were owned by the plaintiffs or the Imperial company, but wells put down by the Dunnville company before the merger. These wells are about a mile east of the Attercliffe station, and there was a line from the Dilks road to Attercliffe station formerly, which is said to have been taken up after the main pipe line from Attercliffe station to Dunnville was taken up.

The plaintiffs contend that, as the contract to supply them with free gas is an unconditional one, the defendant company must continue to supply them or else pay damages consequent upon their failure. The defendants, on the other hand, contend that, so long as the company could do so on a commercial basis and without loss to themselves, they had lived up to the contract, and that the moment they could not do so the contract was at an end.

The effect of the contract entered into on the 16th December, 1902, between the plaintiffs and the defendant company, is, I think, as follows: that the company would supply to the plaintiffs gas free for use in their private dwellings so long as they lived at and adjacent to Attercliffe station and gas was obtainable in the Attercliffe station field sufficient for that purpose. It is clear that, when the defendants refused further to supply the plaintiffs, there was still gas in that field, from wells owned by the defendants, sufficient to supply the plaintiffs for use in their private dwellings. It is clear that there is still gas in that field which the defendants are at the present piping to Dunnville by way of the Dilks road. It is said that the pressure in the wells in that field, still owned by the defendants, fluctuates, and at times it might be difficult to pipe any gas from these wells to Attercliffe station. It appears that at other times it would be quite practicable. It is plain, also, that, if the defendant company had not parted with the wells which they owned, they would have been in a position ever since they cut off the supply from the plaintiffs to supply them, as the present owners of those wells are now doing. The defendant company might have qualified their contract with the plaintiffs by the introduction of a clause such as that they were only to continue to supply so long as gas continued to be found in the Attercliffe station field

in paying quantities, or so long as they could supply the same without loss to themselves. They did not do so.

It has been laid down that "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract:" Clifford v. Watts (1870), 40 L.J. C.P. 36, L.R. 5 C.P. 586; Leake on Contracts, 6th (Can.) ed., p. 495; Wallbridge v. Gaujot, 14 A.R. 460 (affirmed 15 S.C.R. 650); Ridgeway v. Sneyd, Kay 632; Gowan v. Christie, L.R. 2 Sc. App. 273: "At common law the mere fact of 'unworkability to profit' affords no ground for reducing or throwing up a lease of minerals, which are in their nature subject to many vicissitudes."

The plaintiffs ask, and I think are entitled, to receive from the defendants damages for the breach of the agreement for failing to supply to them gas free. Approximately, it has cost them about $60 since the date when the defendants refused further to supply them with gas. I think each of the three plaintiffs, Sundy, Strome, and Kenny, must, therefore, have judgment for the sum of $60 down to the date of trial. I find that the covenant to supply free gas to the plaintiffs is still an existing and binding one upon the defendants. In case, therefore, they continue to refuse to supply the plaintiffs, the disposition I am making of this case will not in any way prejudice the rights of the plaintiffs in any future action.

I think it is a case in which High Court costs should be granted to the plaintiffs, and I make an order accordingly.

It is, of course, impossible to say exactly how long the Attercliffe station gas field will continue to supply gas for commercial purposes, or even for local purposes. Aikens, a gas expert who testified at the trial on behalf of the plaintiffs, says that the gas under present conditions and consumption would probably last eight or ten years for commercial purposes, and will possibly be completely abandoned for such purposes in twelve years. It may be that the parties would prefer that I fix a lump sum to be payable by the defendants to the plaintiffs for a release of any further liability under the contract in question. If so, the matter may be further mentioned.

SUTHERLAND, J. JULY 4TH, 1912.

DUBÉ v. MANN.

Contract—Sale and Purchase of Mining Claims—Completed Contract—Fraud and Misrepresentation—Failure to Establish—Royalty—Covenant to Pay—Claim for Reformation—Ore not Found in Paying Quantities—Lump Sum in Lieu of Royalty—Payment into Court.

Action for the first instalment of a royalty, $9,750, under an agreement in writing dated the 8th April, 1908.

By the agreement, the plaintiffs agreed to sell to the defendant, and the defendant to purchase from the plaintiffs, all their right, title, and interest in certain mining claims, in consideration of the payment of a royalty and $35,000 in cash.

The provision as to the royalty was in part as follows: "The royalty . . . shall commence immediately upon the expiration of two years from the day of the date hereof, and shall be at the rate of 15 cents for each long ton (2,240 lbs.) of ore removed from the said locations, the amount to be removed from the locations in each year to be not less than 65,000 of such long tons, and the said royalty of 15 cents per long ton shall be paid on 65,000 long tons per annum at least, whether that amount shall be actually removed or not, and such royalty shall be payable annually on the 8th day of April, in each year.

The $35,000 was paid by the defendant, and the claims were transferred to him.

The first instalment of royalty, $9,750, being 15 cents per ton on 65,000 tons, came due, as the plaintiff alleged, on the 8th April, 1911, and was not paid by the defendants.

This action was begun on the 29th May, 1911. Under an order made by CLUTE, J., in the course of the action, upon consent, the sum of $34,750 was paid into Court by the defendant. The order provided that this sum should, upon the termination of the litigation, be paid out, with accrued interest thereon, to the successful party or parties, and thereupon all parties should be discharged and released from all the terms and conditions of the agreement of the 8th April, 1908.

R. McKay, K.C., for the plaintiffs.
Leighton McCarthy, K.C., for the defendant.

SUTHERLAND, J. (after setting out the agreement and stating the facts at length and quoting portions of the evidence):—In his statement of defence, the defendant avers that he was induced to

execute the contract in question by the fraud and misrepresentation of the plaintiffs, and that the plaintiffs, or one of them, fraudulently represented to him, knowing the same to be untrue, that there were upon the mining claims in question large quantities of merchantable iron ore, and that the said claims were capable of producing at least 65,000 tons, long tons, of such merchantable iron ore per annum, whereas the claims had not thereon nor were capable of producing iron ore in any merchantable quantities whatever.

No evidence was adduced at the trial from which I could find that any fraudulent representations were made to the defendant by the plaintiffs. The fact of the matter was, that the defendant was in just as good a position, through his agent, Harris, and the knowledge he had obtained from him, as the plaintiffs, about the character of the properties in question and their possibilities.

The defendant also alleges "that the basis of the agreement, and particularly paragraph 3 thereof, was, that it was possible to work, raise, and remove from the mining claims in question not less than 65,000 long tons of merchantable iron ore per annum, and that the true intent and meaning of the parties, which was set up or intended to be set up in the agreement, was, that a royalty of 15 cents should be paid on every long ton worked, raised, and removed" from the mining claims, "providing that an average quantity of not less than 65,000 of such long tons should be removed from the said mining claims or locations every year, or the said royalty should be payable on that quantity, when weighed at the mine's mouth, whether that quantity should be actually removed from the said claims or locations or not."

He also further says "that, notwithstanding the expenditure of upwards of $75,000, the employment of competent mining experts, and the use of the most improved methods of mining and the best machinery, no merchantable iron ore whatever can be discovered upon the said mining claims, and that it is impossible to remove 65,000 long tons, or any commercial quantity whatever, of merchantable ore."

He further alleges that the "plaintiffs are not entitled to recover a royalty upon ore that does not and never did exist, and which, therefore, cannot be removed."

He further "submits that there has been entire failure of consideration for the alleged agreement, and the payments made by him to the plaintiffs in connection therewith."

By way of counterclaim, he asks that the agreement shall be declared null and void and of no force or effect, and for re-

payment of the sum of $35,000 paid by him to the plaintiffs, and an order declaring that the true intent and meaning of the parties to the agreement was as set out in paragraph 4 of the statement of defence, and that, if the Court should deem necessary, it should order the agreement to be rectified so as to make it embody the real intention of the parties.

In view of the fact that, in place of providing for a small down-payment, as is usual in the case of an option, and as had been the case in the agreements in the form of options which had previously been entered into between the parties, the contract in question provided for a cash payment of $20,000 and the payment of the two remaining cash instalments within one year, and that the purchaser assumed to go into possession and continued in possession until after all the purchase-money was paid, and thereupon received from the vendors written documents transferring all their right, title, and interest in the respective unpatented mining claims in question, and in view of the form of the agreement itself, which provided that the vendors were to sell and the purchaser to purchase all the right, title, and interest of the vendors in each of the mining claims, I have come to the conclusion that the document must be considered and treated as a sale and purchase, and not as a mere option.

On the purchaser obtaining the documents transferring the title of the vendors to him, he became and was the owner of the claims, subject to the payment of the royalty as mentioned in the agreement in question, and which was also referred to in the documents of transfer as follows: "The royalty hereinbefore referred to as being hereby expressly reserved and excepted from this transfer is the royalty agreed upon in the agreement dated the 8th day of April, A.D. 1908 . . . which royalty is to be paid on 65,000 such tons per annum at least from the said group and on more if more be removed, but the royalty is subject to be purchased by the owners of the properties at any time as to payments not overdue at the time of such purchase, for the sum of $25,000 cash."

The covenant on the part of the defendant is a definite and certain one, viz., that "the amount to be removed from the locations in each year" is "to be not less than 65,000 of such long tons, and the said royalty of 15 cents per long ton shall be paid on 65,000 long tons per annum at least, whether that amount shall be actually removed or not, and such royalty shall be paid annually on the 8th day of April in each year."

The purchaser also provided for his own protection, by the alteration made by his own solicitor in the contract as originally

drafted, that "shipments in excess of 65,000 tons in any year shall, to the extent of such excess, be credited in reduction of shortages in any subsequent year or years."

There is another term of the contract, also, which was for his special protection and advantage, which is as follows: "Provided, also, that the purchaser shall have the right, at any time, to purchase such royalty from the vendors for the sum of $25,000 cash." He took upon himself, under the terms of the contract, "the burden of quantity and failure."

I think the case of Palmer v. Wallbridge (1888), 15 S.C.R. 650, has much application. It was there held "that the lease contained an absolute covenant by the lessee to pay the rent in any event; and, not having terminated the lease under the above proviso, he was not relieved from such payment in consequence of ore not being found in paying quantities." Here, too, there is an absolute covenant to take out a named quantity of ore and pay a definite amount of royalty thereon. Here, too, there is a clause permitting the purchaser to put an end to the royalty by payment of a lump sum in lieu thereof. Reference also to Phillips v. Jones (1839), 9 Sim. 519; Marquis of Bute v. Thompson (1844), 14 M. & W. 487; Mellers v. Duke of Devonshire (1852), 16 Beav. 252; Lord Clifford v. Watts (1870), L.R. 5 C.P. 577; Gowan v. Christie (1873), L.R. 2 Sc. App. 273; Battle v. Willox (1908), 40 S.C.R. 198; and Leake on Contracts, 6th (Can.) ed. (1912), p. 490.

The plaintiffs will, therefore, have judgment for the sum of $34,750, with interest, paid into Court under the order of Clute, J., as aforesaid, together with subsequent interest, and all parties to be otherwise discharged and released from the terms and conditions of the agreement in question. The plaintiffs will also have their costs of suit.

FALCONBRIDGE, C.J.K.B. JULY 4TH, 1912.

CLARK v. WIGLE.

Contract — Interlineation — Effect of — Option or Completed Agreement—Sale of Shares—Evidence—Onus—Corroboration.

Action for specific performance of a contract.

The action was tried before FALCONBRIDGE, C.J.K.B., without a jury, at Sandwich.

E. S. Wigle, K.C., for the plaintiff.
H. Clay and W. A. Smith, for the defendant.

FALCONBRIDGE, C.J.:—The plaintiff claims specific performance of the following contract:—

"Ohio City, Col., July 14th, 1911.

"This agreement made in duplicate this 14th day of July, 1911, between T. Clark, of Kingsville, Ont., and Darius Wigle, of same place. I hereby agree to sell two thousand shares of Sandy Hook to Darius Wigle, mining stock, *Wigle agrees to take said stock*, which mine is located on the Ohio Creek, Gunso County, Cal., at seventy-five cents per share, the same to be transferred three months from this date without interest, the parties hereto set their hand and seal in the presence of

"Norman Peterson, Thos. Clark.

"Witness Darius Wigle."

At the trial the plaintiff's counsel put in a few questions from the cross-examination of the defendant, admitting his signature to the document; and closed his case. The defendant, being called on his own behalf, testified that the writing was drawn up by the plaintiff in a tent at the mine in California, in presence of one Norman Peterson. He swore that the writing was not in the same condition as when he signed it; that the italicised words, "Wigle agrees to take said stock," had been inserted since he signed it; and he produced the paper which he said was written and signed at the same time. It is also in the plaintiff's writing, but does not contain these words. This, he says, is the real agreement "as near as possible;" that he never heard of the alteration until last winter, about February, or perhaps just before the issue of the writ (11th January, 1912).

Norman Peterson was called by the defendant, having heard the evidence of both the plaintiff and the defendant. He says that the defendant said something about if everything went as he calculated he would take it, i.e., the stock, or be able to take it. He says he paid very little attention to what was going on. He cannot say if the writing is in the same condition, or whether the two writings were just alike. And on cross-examination he says, "he thought it was a sale in the tent, the way they talked."

The plaintiff was then called in reply. He said that the defendant dictated this agreement, and he, the plaintiff, wrote it out; that he, the plaintiff, said it ought to have those words in it; that he, the plaintiff, reached over for the other copy to interline them, and the defendant said: "It is no matter; this binds you to give it, and that binds me to take it;" and that the defendant consented to have the underlined words inserted. That

was done there at the same time, and it was signed after the interlineation. He says the words "option" was never mentioned, and there was no condition about the matter, nor any words uttered by the defendant to the effect that, if matters turned out as he calculated, he would take the stock. This latter statement the defendant had sworn to.

The burthen is undoubtedly on the plaintiff to shew that the document which he propounds, differing as it does from the document produced by the defendant (both being in the plaintiff's own handwriting), represents the true agreement.

Unless I found that one or other of the parties, from his demeanour or otherwise, was manifestly lying, it is plain that, without the evidence of Peterson, the plaintiff could not succeed. Now, Peterson's evidence is partly corroborative of the plaintiff's story, and equally corroborative of the defendant's. Therefore, it goes for nothing. I do not overlook the argument based on the expression "without interest," as being inapplicable to the case of a mere option; but I do not think it is sufficient to turn the scale.

Therefore, on the application of the rule regarding the burthen of proof, the plaintiff fails.

It may be that the plaintiff's explanation is true; and, if so, it is very unfortunate for him that he did not insist on having the interlineation made in both documents. He looked like a man of ordinary business capacity, and ought not to have allowed himself to be induced to neglect this reasonable precaution.

Entertaining, therefore, the doubt which I have expressed as to the correctness of this decision (I do not mean the legal correctness, as to which I have no doubt), in dismissing the action I make no order as to costs.

Action dismissed without costs.

TEETZEL, J. JULY 8TH, 1912.

HOLDEN v. RYAN.

Covenant — Breach — Building Restrictions — Semi-detached Buildings—Width of Lot—"Appurtenant"—"Front" of Building—"Main Wall"—Distance from Centre of Street.

Action for an injunction to restrain the defendant from erecting upon his land a building alleged by the plaintiff to be in violation of a certain building scheme, in accordance with which the lands were laid out by the original owner, and made subject to certain building restrictions running with the land.

The action was tried before TEETZEL, J., without a jury, at Toronto.

W. A. McMaster, for the plaintiff.

W. G. Thurston, K.C., for the defendant.

TEETZEL, J.:—The restrictions in question, with violation of which the defendant is charged, are numbers 3 and 5 of the scheme, covered by the covenants in the conveyances and endorsed thereon:—

"3. Every building erected upon any such lot shall be either detached or semi-detached. Every such detached building (except stables and outbuildings) shall have appurtenant to it land having a frontage on Palmerston avenue of at least thirty-three feet; and every such pair of semi-detached buildings shall have appurtenant thereto lands having a frontage on Palmerston avenue of at least fifty feet."

"5. Any building (except stable and outbuildings) erected upon any such lot, which has a frontage upon some other street as well as upon Palmerston avenue, shall have its front on Palmerston avenue."

The defendant's lot has a frontage of only forty feet on Palmerston avenue, and Harbord street adjoins to the south. The defendant's plans are for the erection of a building to be used as an apartment house or houses; and, having obtained a permit from the city architect, he was proceeding, at the commencement of this action, with the erection thereof.

As to the first alleged violation, the plaintiff charges that the proposed building is in fact a pair of semi-detached buildings, and not a detached building; and that, the total width of land appurtenant thereto being only forty feet, restriction number 3 is thereby violated.

In the proposed building there is a vertical division wall, running north and south, extending the whole height of the building, dividing it into two equal divisions, and in each division there are some seven or eight separate apartments. There is no door or other opening in this division wall, so that there is no means of access to and from the easterly and westerly halves of the building; each half has its independent entrance facing upon Harbord street.

I think, upon this question, the case is governed by Ilford Park Estates Limited v. Jacobs, [1903] 2 Ch. 522, in which it was held that a building structurally divided into two tenements on different floors, with no internal communication, common staircase, or common front door, constituted two houses,

within the meaning of a covenant not to erect more than one house on the site. I, therefore, hold that the proposed building is in fact a pair of semi-detached buildings, and to permit the same to be erected would be in violation of the restriction which provides that every "pair of semi-detached buildings shall have appurtenant thereto lands having a frontage on Palmerston avenue of at least fifty feet."

Although the word "appurtenant," if strictly construed, as urged by Mr. Thurston, would not be the strict legal expression to use, I think that what the parties meant is plain, and that, instead of giving the word "appurtenant" as used a strict legal meaning, its ordinary popular meaning must be given to it; and, so doing, I find that the defendant, if permited to erect the building in question, would be violating restriction number 3.

Then as to the other condition, I have no hesitation in finding, upon a consideration of the plan and the weight of evidence at the trial, that the proposed building will not have its front on Palmerston avenue, as required by restriction number 5, but will have its front upon Harbord street.

While it is true that there is an entrance to one of the apartments from Palmerston avenue, there is no connection between that apartment and any of the others in the building. The main entrance for all the other apartments in the easterly half of the building is on Harbord street, as is also the main entrance for all the apartments in the westerly half of the building.

While it is true that the portion of the building facing Palmerston avenue may be described as the front end, it is not the substantial or predominating front of the building, which, as already stated, having regard to the plan and to the weight of evidence at the trial, is on Harbord street, and is, therefore, in violation of building restriction number 5.

Among other ingenious and ably maintained defences urged by Mr. Thurston, much attention was paid to a defence alleging that the plaintiff himself had violated one of the restrictions of the scheme, and, therefore, cannot be heard to complain of violations by the defendant. I do not stop to discuss the law which would be applicable if there had been a violation by the plaintiff; but find as a fact that the violation charged by the defendant against the plaintiff was not established.

The claim is, that the main wall of the plaintiff's building has been erected nearer than fifty-five feet to the centre line of Palmerston avenue, in violation of restriction number 1.

In my opinion, it was well established by the plaintiff that the main wall of his building is not built in violation of that

condition. I think the main wall of the plaintiff's building is the wall which supports the superstructure and roof of his house, and not the wall in front of the bay-windows.

Judgment, therefore, will be, declaring that a building as proposed by the defendant would be in violation of conditions 3 and 5 of the building restrictions in question, and that the defendant must be restrained from proceeding with the erection of the building unless and until he alters his plan and complies with those restrictions.

The defendant must pay the plaintiff's costs of the action.

SUTHERLAND, J. JULY 9TH, 1912.

GROCERS' WHOLESALE CO. v. BOSTOCK.

Solicitor—Lien for Costs—Judgment—Settlement or Compromise without Providing for Costs—Absence of Collusion or Improper Conduct—Jurisdiction—Costs of Petition.

Petition by a firm of solicitors, who represented the defendant in the above action, for an order declaring them entitled to a lien for their costs upon the judgment recovered in the action by the defendant against the Canadian Canning Company, third parties, and for payment of these costs by that company.

M. L. Gordon, for the petitioners.
H. E. Rose, K.C., for the Canadian Canning Company.

SUTHERLAND, J.:—The action was commenced about July, 1908, by the Grocers' Wholesale Company Limited against John L. Bostock and the Canadian Canning Company. On or about the 22nd September, 1909, the action was discontinued by the plaintiffs as against the Canadian Canning Company. A third party notice was served by the defendant claiming relief against the Canadian Canning Company. The action proceeded to trial, and judgment was given therein on the 20th October, 1910, in favour of the plaintiffs against the defendant, with a reference to ascertain the amount of damages, and judgment also that the Canadian Canning Company indemnify the defendant, as therein set out: 22 O.L.R. 130.

Upon the present application, counsel for the Canadian Canning Company took exception to the jurisdiction to entertain the

petition. In view of the finding of the trial Judge, when disposing of the action, I am inclined to think that it is not open now to the company to object to the jurisdiction. The judgment is reported in 22 O.L.R. 130, and at p. 143, the trial Judge says: "The fact that the third parties here plead in their statement of defence to the jurisdiction does not help them—their election was made on entering their appearance, and, that appearance standing, they cannot take a new position."

However, upon the merits of this application, with some hesitation I have come to the conclusion that the prayer of the petition cannot be granted.

The notice of lien on which the petitioners mainly rely is contained in a letter dated the 20th September, 1909, directed by the petitioners to the solicitor in Vancouver from whom they had originally received instructions to appear for the defendant (Bostock). I quote from his letter: "Up to date we have not been paid any fees by Mr. Bostock, and we would not care, under the circumstances, to incur any further costs unless our bill up to the present is paid and we are assured that the balance will be paid." In a letter dated the following day, they also say: "We wish that you would in the meantime take up the question of our costs with Mr. Bostock, and write us as to whom we are to look for payment of our costs."

The Vancouver solicitor apparently took the matter up with Mr. Bostock, who, on the 28th September, 1909, wrote directly to the petitioners, and I quote from the letter: "I went into the question of your account with Mr. Russell; and, although I contend that the Canadian Canning Company should pay this, yet your good selves had nothing at all to do with any action between the Canadian Canning Company and myself with regard to the account; and I, accordingly, enclose herewith my cheque for $51.61, which kindly acknowledge, and I shall be further obliged if you will let me have your account."

This correspondence was, of course, long before the recovery of the judgment. No subsequent notice of any claim for lien as to costs appears to have been given either to the solicitor in Vancouver or to the Canadian Canning Company. In fact, no specific notice to the latter appears to have been given at any time.

Subsequent to the judgment on the 24th January, 1911, and while the reference to ascertain the damages was pending, the defendant (Bostock) made a settlement with the Canadian Canning Company, in so far as their liability in connection with the said action was concerned. This document states as follows:

"The undersigned John J. Bostock hereby receipts to the Canadian Canning Company all liability from or by reason of the express warranty given, mentioned in this case, and upon which the said judgment is founded, and from the said judgment and every clause therein contained: the intention of this receipt being to stay any further proceedings as between the said John J. Bostock and the Canadian Canning Company, with a view to saving costs, and to release the Canadian Canning Company from all further or other liability in respect of the costs of action between the said John J. Bostock and the Canadian Canning Company, and to ensure that, if any costs are or have been incurred against the Canadian Canning Company in this suit in favour of either the plaintiff or the defendant, the said John J. Bostock shall assume the same and indemnify the Canadian Canning Company therefrom."

An affidavit is filed by the Vancouver solicitor in answer to the petition, in which it is stated, among other things, as follows:—

"9. On receipt of letters dated the 20th and 21st September, 1909, we again took up the question of costs with Mr. Bostock, and he again assured us that all costs had been paid, and that he would call the attention of the petitioners to the fact that we were not to be troubled further about his costs, which he evidently did, as appears from his letter to the petitioners dated the 28th September, 1909, when he tells them, 'Your good selves have nothing at all to do with any action between the Canadian Canning Company and myself with regard to the account; and I, accordingly, enclose herewith my cheque for $51.61, which kindly acknowledge, and I shall be further obliged if you will let me have your account.'

"10. From this date on and until long after the judgment, as between the Canadian Canning Company and Bostock, had been settled in full, as per memorandum of settlement, dated the 24th January, 1911, we heard nothing further from the petitioners with regard to their costs."

It appears that, originally, the Vancouver solicitor had not only instructed the petitioners to act for Bostock in the said action, but had also instructed solicitors at Hamilton to act for the Canadian Canning Company, the Vancouver solicitor apparently acting originally as principal for both defendants, and the defendants apparently being at first disposed to act together to a certain extent in their defence.

In the same affidavit, the Vancouver solicitor says as follows:

"14. In January, 1911, the defendant (Bostock) came to me, knowing that I was no longer connected with the Canadian Can-

ning Company as manager or solicitor, and asked me if the claim as between himself and the Canadian Canning Company could not be arranged. I asked him then how he stood in the east, and he told me that he had arranged everything. I was particular to ask him how he stood with his own solicitors, and he told me he had paid them some $490. . . I then suggested that he should see Mr. Fleming, the manager of the Canadian Canning Company, and they came together and made the settlement, dated the 24th January, 1911. I was asked to draw this settlement up merely for the reason that I was more or less conversant with the facts of the case. It is for this same reason that, when this present petition was presented, I was asked to instruct agents in Ontario."

"16. I say that, from the time the plaintiffs discontinued their action against the Canadian Canning Company, and the defendant (Bostock) elected to proceed with his third party notice against the Canadian Canning Company, the petitioners have not acted as solicitors for the Canadian Canning Company, nor as agents of my firm, but have been acting under direct instructions from the defendant (Bostock) and his Vancouver solicitor.

"20. . . . I say positively that there was no collusion in any sense, direct or indirect, between Bostock and the Canadian Canning Company, or our firm or any member of the firm, having in view depriving the petitioners' firm of their proper charges for services rendered, or any part thereof."

It is said that at the time Bostock made the settlement for $1,100 with the Canadian Canning Company, he was in insolvent circumstances and in ill-health, and had left the country, and that the canning company compromised with him, under these circumstances, their indebtedness in connection with the remedy over which he had against them, at a much smaller sum than Bostock was reasonably entitled to claim.

While the circumstances may and do look somewhat suspicious, I am unable to find, particularly in the face of the affidavit of the solicitor in Vancouver, that there was any collusion or improper conduct on the part of the canning company to deprive the petitioners of their costs. See Reynolds v. Reynolds, 26 Times L.R. 104.

The prayer of petition will, therefore, be refused. I do not think, however, on the whole, that it is a case for costs, and I make no order as to the same.

DIVISIONAL COURT. JULY 11TH, 1912.

* HOWSE v. TOWNSHIP OF SOUTHWOLD.

Highway—Telephone Pole Placed by Unauthorised Person on Highway—Liability of Municipal Corporation—Injury Sustained by Traveller—Municipal Act, 1903, *sec.* 606—*Misfeasance—Nonfeasance—Stated Case.*

Appeal by the plaintiff from the judgment of MIDDLETON, J., ante 1295, upon a stated case.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

J. D. Shaw, for the plaintiff.

Shirley Denison, K.C., for the defendants.

FALCONBRIDGE, C.J.:—I agree with the learned Judge that the only possible liability would be under sec. 606 of the Municipal Act, 1903, arising from failure to repair. And this is nonfeasance, and not misfeasance, and the plaintiff's right of action is barred by lapse of time.

Appeal dismissed; with costs, if exacted.

BRITTON, J., gave brief reasons in writing for the same conclusion.

RIDDELL, J., agreed in the result, on the ground that the case stated did not contain any allegation of any act or omission of the defendants which resulted in or allowed the erection of the offending pole.

Appeal dismissed.

MCLEAN v. DOWNEY—SUTHERLAND, J.—JULY 9.

Negligence—Injury to Scow—Damages.]—Action for damages for injury to the plaintiffs' sand-scow by the defendants' negligence, as alleged. The plaintiffs delivered sand in their scow at the defendants' dock on the St. Mary's river, under a contract with the defendants. While the scow was at the dock in the course of unloading, she listed to one side, and was left in that position when the defendants' men who had been unloading stopped work at 6 in the evening. The next morning she

*To be reported in the Ontario Law Reports.

was found to be taking in water, and she ultimately sank, and so was badly damaged, and was taken to a dry-dock in the State of Michigan for repairs. SUTHERLAND, J., reviewed the evidence, and found that the damage was caused by the negligence of the defendants; and he allowed as damages: $488.15, paid for repairs; $121.25, paid for customs duty on the repairs; $105.40, for the use of the plaintiffs' tug while engaged in pumping the scow out, taking her to the dry-dock, bringing her back, etc.; and $500 for permanent injury to the scow—$1,211.80 in all—with interest from the date of the writ of summons and costs of the action. He declined to allow anything for the loss of the use of the scow while undergoing repairs. J. E. Irving, for the plaintiffs. J. L. O'Flynn, for the defendants.

M. HILTY LUMBER CO. v. THESSALON LUMBER CO.—SUTHERLAND, J.—JULY 9.

Contract—Sale of Timber—Representation or Guaranty——Oral Testimony—Admissibility—Fraud and Misrepresentation—Contemporaneous or Prior Oral Agreement—Discount on Price—Demurrage—Evidence—Counterclaim.]—This action arose out of a written contract for the sale of lumber. The Traders Bank of Canada were made defendants, as well as the Thessalon Lumber Company. The contract was in this form: "The party of the first part" (the Thessalon Lumber Company) "does hereby sell to the party of the second part" (the M. Hilty Lumber Company) "all of the white pine No. 3 and better lumber, to be cut from the saw-logs now cut and owned by it in the woods, on skids, or in the streams and on the banks of the streams on the Little Thessalon and Mississauga rivers, in the district of Algoma." The plaintiffs alleged that they were induced to make the contract by certain verbal representations made to their president, one Forster, by one Bishop, the general manager of the defendant lumber company, on the truth and accuracy of which they relied, to the effect that the defendant lumber company would undertake to deliver all of the saw-logs owned by them at the time of the contract, then cut, and manufacture the same into lumber, upon specifications to be furnished by the plaintiffs, and that the Mississauga run would cut into at least 5,000,000 feet of grade No. 3 and better. Upon the evidence, the plaintiffs asked for findings: (1) that there was a definite representation on the part of Bishop that there would

be a cut of 5,000,000 feet at least on the Mississauga river of the kind of timber contracted for; (2) that there was an agreement that a discount of two per cent. should be allowed. The plaintiffs did not directly ask for a rectification of the agreement. They deducted $7,060 from the price, on the assumption that the agreement was entered into on the representation that the Mississauga run would cut into at least 5,000,000 feet, etc., and sought to treat the contract as though it contained a clause guaranteeing that. SUTHERLAND, J., said that he was not clear that it was open to the plaintiffs to shew by oral testimony that any such representation or guarantee had been made or given by Bishop prior to or at the time of making the contract—it was not the case of a collateral agreement about something not referred to in the document: Lindley v. Lacey (1870), 17 C.B. 578; LaSalle v. Guilford, [1901] 2 K.B. 215; Lloyd v. Sturgeon Falls Pulp Co. (1901), 85 L.T.R. 162. In any case, he was unable to find that there was any representation by Bishop that the Mississauga cut would run at least 5,000,000 feet; or that there was any false or fraudulent representation made by Bishop; or that there was any prior or contemporaneous oral agreement constituting a condition upon which performance of the written agreement was to depend; or that Bishop ever agreed that the two per cent. discount should be allowed. The plaintiffs claimed also $300 for demurrage. This, too, the learned Judge held, failed upon the evidence. The action was, therefore, dismissed as against the defendant lumber company. The defendant bank, under the terms of their letter, simply agreed to release their lien as the plaintiffs should from time to time, by paying for the lumber according to the terms of the contract, make their interest appear. The action failed also as against the bank. Judgment for the defendant lumber company, upon their counterclaim, for $7,060 and $1,360, with interest from the date when the former sum was first payable, and on the monthly sums making up the latter from the respective dates at which they should have been paid. As to the remainder of the lumber still in the possession of the defendants and available under the contract, the plaintiffs are to be at liberty to apply to the defendant lumber company and obtain it; but, in the circumstances, and to avoid further difficulty and possible litigation, they must first pay the $7,060 and $1,360 and interest and also pay for the remainder of the lumber in full as loaded on the boat. Both the defendants to have their costs against the plaintiffs. M. McFadden, K.C., and J. E. McEwen, for the plaintiffs. J. L. O'Flynn, for the defendant lumber company. P. T. Rowland, for the defendant bank.

HOME BUILDING AND SAVINGS ASSOCIATION v. PRINGLE—SUTHERLAND, J.—JULY 11.

Mortgage—Judgment for Redemption or Sale—Final Order of Sale—Motion to Open up Master's Report—Assignees of Equity of Redemption—Parties.]—Application by the defendants Victoria McKillican and David A. Smith to open up a report of the Local Master at Cornwall in a mortgage action, upon the grounds that, by reason of the failure of the plaintiffs, the mortgagees, to file a complete abstract of all lands covered by the mortgage, the applicants were not informed as to all the subsequent incumbrancers and other parties interested in the properties subsequent to the plaintiffs' mortgages; that the plaintiffs, at the time of the making of the report, concealed the fact that they had sold some of the properties and received a large amount of money therefor, and had been in possession of certain portions of the lands, and that no credits were given for the moneys so received, nor anything allowed for use and occupation; and that, since the date of the judgment and the making of the report, the plaintiffs had sold, without the consent of the Court, certain lands and premises and discharged the same from their mortgages, which properties were of greater value than the remaining mortgages. SUTHERLAND, J., after setting out the proceedings, said that, in his opinion, a case for opening up the report had not been made out. In the affidavit of the plaintiffs' manager filed on obtaining the final order for sale, he stated that no part of the money found due by the report had been paid, and that the plaintiffs had not been in possession of the lands or any part thereof. In a further affidavit, filed in answer to this motion, he cleared up in the main the material allegations contained therein. Rutherford v. Rutherford, 17 P.R. 228, applied to this motion. The applicants were assignees of the original mortgagor of the lands, and had ample opportunity during the progress of the reference to look after their interests. The solicitor for the applicants, in one of his affidavits filed on the application, stated that, in the presence of the Master, he asked the solicitor for the plaintiffs if he would, upon being given the amount found due by the report with subsequent costs to date, assign to the applicants the mortgages, including the properties which his clients had sold as set out in his (the applicants' solicitor's first affidavit), to which he replied that he would not do so, and would be willing to assign the mortgage only as to the properties which were undischarged at the time. No doubt, this

latter offer would still be open to the applicants. Motion dismissed with costs. C. H. Cline, for the applicants. F. A. Magee, for the plaintiffs.