1915
*Dec. 10
1916
*Feb. 14

JACOB KOHLER AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

THE THOROLD NATURAL GAS COMPANY (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

*Contract—Construction—Conditions—Mutual performance—Damages.*

In a contract for the sale and delivery of gas if the vendor, not being in default, is prevented, by the wrongful act of the purchaser, from fulfilling his obligation to deliver he is entitled to the compensation he would have received but for such wrongfull act. *Mackay* v. *Dick* (6 App. Cas. 251) and *Wilson* v. *Northampton and Banbury Junction Railway Co.* (9 Ch. App. 279) applied.

Anglin J. dissented on the quantum of damages.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial in favour of the plaintiffs and dismissing their action.

The plaintiffs own gas wells in the County of Haldimand and entered into a contract whereby they agreed to supply gas to the defendants at their meterhouse in Dunnville "against the line pressure from time to time in the company's line at that point." The contract recited agreements with other parties to deliver gas through the company's line at Dunnville at a pressure of fifty pounds to the square inch. The plaintiffs' complaint was that the company had placed a

*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

regulator on its line at that place and by its use had prevented plaintiffs from delivering at the pressure agreed upon and they claimed the amount that would have been delivered but for the interference according to the daily records on their own line. The contract is set out in full in the opinion of Mr. Justice Duff.

The case was heard by the Chancellor, who held that the company was liable and referred it to the Judge of the County Court to have the damages ascertained. The referee awarded plaintiffs all they claimed and his award was maintained by the Chancellor. The Appellate Division reversed and dismissed the action.

*Tilley K.C.* and *W. T. Henderson K.C.* for the appellants.

*Collier K.C.* for the respondents.

DAVIES J.—I concur in the judgment of Mr. Justice Duff.

IDINGTON J.—The appellants by an agreement dated 14th October, 1911 (wherein they were called the contractors), agreed with the respondent as follows:—

1. The contractors agree to sell and deliver to the company at its meter house in the Town of Dunnville, in the County of Haldimand, against the line pressure, from time to time in the company's line at that point, having regard to the contracts aforesaid, all the natural gas of a quality and purity suitable for domestic consumption which is now being, or which may be hereafter obtained from the lands now leased or controlled by the contractors in the Township of Canboro, particulars of which are set forth in the schedule hereto attached marked "A," or hereafter acquired or controlled by them in the said township, in such amounts as they shall have available for delivery at the rate of twenty cents per thousand cubic feet up to April 1st, 1912, and after that date at the rate of sixteen cents

1916

KOHLER
v.
THOROLD
NATURAL
GAS CO.

Idington J.

per thousand cubic feet to May 1st, 1913, and thereafter at the rate of twenty cents per thousand cubic feet.

The respondent therein agreed as follows:—

2. The company agrees to purchase from the contractors the said gas in the last paragraph mentioned at the prices aforesaid.

The next clause partly exonerated appellants from the comprehensive terms of said agreement by permitting them to use some of said gas obtained from said field for specified purposes incidental to their business operations.

By clause 10 the agreement was to remain in force and effect so long and so long only as gas could be found in paying quantities in the territory then leased or otherwise acquired by the contractors in the said township and they are able to deliver it at a pressure sufficient to enable the company to transmit it as specified.

I should have supposed that the contract was tolerably plain but for the difference of judicial opinion which must make one pause.

The respondent had directly or indirectly prior contracts whereby it was bound to take, in the same transmission line from each of two other contractors respectively, a supply of a specified annual quantity of gas to be delivered.

The transmission line at Dunnville, to be used by the contractors respectively operating, under said prior contracts, apparently was contemplated to be the same line as that to be used for delivery by the appellants in fulfilling their contract.

There is not in appellants' contract any restriction upon the quantity to be supplied per annum or otherwise as there was in each of the other prior contracts.

There is the following provision in clause 9 of appellants' contract:—

9. The contractors shall not at any time or times turn in any gas into the company's main without giving reasonable notice to the company, nor turn off any gas which shall have been turned into the company's main without the consent of the company first having been obtained.

There is not in appellants' contract any obligation to maintain any specified degree of pressure or any express limit upon the pressure permissible for appellants' gas.

The gas therefrom was to be conducted for eight miles by a $4\frac{1}{2}$ inch pipe. To enable the construction of that pipe by appellants the respondent contributed a loan of $5,000 without interest until the 1st of April, 1912, when that was to be repaid. There is nothing in the contract making the supply dependent upon the consuming capacity of the respondent or its customers.

The transmission line was of eight inches in diameter and capacity; and from Winger to St. Catharines was some twenty-two miles in length.

The appellants had in April, 1912, fifteen wells and drilled two more afterwards. Exactly how many existed at the date of the contract does not accurately appear.

In the first of the prior contracts in question (which I shall hereinafter call the Waines' contract) there was imposed upon the contractors an obligation to deliver their gas through respondent's line as then laid to Dunnville at a pressure of fifty pounds to the square inch, provided that the respondent should not maintain a pressure of greater than fifty pounds in its own line at the said point. There was nothing in

1916

KOHLER v. THOROLD NATURAL GAS CO.

Idington J.

it preventing a delivery at a greater pressure if the company chose to assent thereto.

The appellants took, by the plain terms of the contract, the risk of being able to deliver against the line pressure from time to time in the company's line at Dunnville.

That if supplied at fifty pounds pressure by a pipe in the Waines' system of equal dimensions to the eight-inch line of respondent's would obviously supply all the respondent needed if kept up continuously. But I infer the Waines' delivery pipe being only five and five-eighths inches diameter could not thereby shut out by its resistance another supply pipe's product. Nor could the product delivered through that and the delivery through another pipe of same dimensions combined shut out the appellants' product entirely. How much it would have permitted I cannot say.

The problem so presented has not been scientifically dealt with in any such way as it should have been; and I do not venture to speculate. I merely desire to point out by this illustration what I think were the possibilities the appellants faced in their contract.

Instead of letting, as I think the contract intended, the resistent forces in the line of the respondent created by the pressure resulting from the deliveries from both the Waines' and Aikens' supply pipes combined, however great that might be, to determine the matter, the respondent applied to the appellants' delivery pipe a regulator it had never contracted for being so applied.

I do not think it had any such right, nor do I think

such a thing was ever in the contemplation of the parties. Having departed from the plain terms of the contract and adopted a test not provided for in the contract, the onus rested upon it of demonstrating, much more clearly than has been shewn herein, that the result obtained by the use of the regulator must of necessity have been the same as, or at least no more detrimental to the appellants than, the application of the test which the contract plainly expresses.

For example, I am unable to explain why, the average pressure in the respondent's line, nearly always during the eight months at least, in question herein, was below, and most markedly below, the fifty pound pressure, which the respondent would have us believe the regulator continuously provided against, although for the most part the average pressure in appellants' pipe during the same period exceeded fifty pounds pressure.

The only answer counsel for respondent could suggest as to this was that the hourly pressure forming the basis for the tables produced and sworn to, might not produce an accurate result. He suggested the average is derived from the hours by day as well as by night, when the pressure might have materially varied by reason of the use of gas being much greater in the day than during the night.

I agree there is a possibility of discrepancies arising out of that, but I cannot think that it entirely accounts for the remarkable result that the evidence shews. And it is to be remarked that this is the basis upon which, as it seems to me, the payments under the contract for the supply of gas seem to have rested.

Again, this is only by way of illustration, for it

1916

KOHLER v. THOROLD NATURAL GAS CO.

Idington J.

devolved upon the respondent to have demonstrated and made clear, when it departed from the terms of the contract, how such results were possible.

It is said that the words "having regard to the contracts aforesaid" cover the whole thing, and mean that a regulator was to be applied.

If so, assuredly it was a very simple thing to have had it so expressed. It is neither so expressed in this contract nor in the Aikens' contract which was made two years later than the Waines' contract, and three to four months before the appellants' contract and subject to the obligations in the Waines' contract.

I am driven to the conclusion that the device of a regulator was entirely an afterthought and never present to the mind of any one at the time of making the contract.

It is said appellants must have known of its existence, and yet never remonstrated, but that is not proven. And on the other side we have the distinct claim put forward on the 23rd of January, 1913, reiterating complaints that appellants' gas was not being taken according to contract, and stating in letter of that date to the respondent's manager amongst other things, as follows:—

> Contrary to the terms of our contract you have maintained a regulator for the purpose of creating an artificial pressure against which we cannot feed and against which we beg to protest.

To this we have no reply in the evidence. Throughout the evidence there is a most remarkable absence of reference to proof relative to the regulator except the fact of its existence. And the results seem to destroy the alleged fact as to its proper setting.

There is quite apparent, in this case, the fact that Mr. Aikens was a contractor in one of the prior con-

tracts as well as in that in question, and thus perhaps not personally so damaged as to induce him to cry out as much as otherwise he might have done on the score of this device.

But the respondent took the very unjustifiable course of contracting for and obtaining another contract for further supply and packing the pipes with the product thereof.

It looks as if respondent desired to lay hands upon as much territory as possible against the day when gas might be running short, and was content, therefore, to run the risk of paying for more than it could consume.

So much as can be gathered by way of the conduct of the parties interpreting the contract, as was suggested by respondent as of some weight, I think it operates entirely against the respondent when all the circumstances are considered.

I think the construction of the contract is that put upon it by the learned referee and maintained in appeal by the Chancellor.

And as to the damage I see no reason for interfering with same so ascertained and so maintained.

If, however, the assessment of damages had of necessity to turn alone upon the assumption of fact that the appellants' field had been depleted by the rivals referred to in the case, I should hesitate much to accept that alone as sufficient basis for such substantial damages.

The evidence put forward by each party on this head falls singularly short of what I should have liked to hear in a case turning upon the solution of problems respecting which none of the witnesses seem to me to have had either the knowledge or experi-

1916

KOHLER v. THOROLD NATURAL GAS CO.

Idington J.

ence which if possessed might have rendered their evidence very helpful.

For example, how can the daily experience of a man boring in the wrong place help us ?

They, however, tell us enough to suggest the possibility that the man who postpones the reaping of his crop on such a field, runs imminent risk of losing a great part of it.

But it is not alone, from the supposed rivals in the immediate vicinity reaping that crop, as it were, that the risk is run.

What the appellants call their field is perhaps but a very narrow part of a much wider field which may be so developed beyond it to their detriment pending delay in operations.

Fortunately we are not driven to rely upon such speculations alone. There may be in the evidence enough to found an assessment of a substantial sum based upon reasonable possibilities alone, but it does not strike me it would, necessarily, reach so far as the sum assessed.

There is in the case coupled with that a much more substantial element in the loss from a large fraction of unproductive capital invested, lying waste, as it were, by reason of the breach of the contract. But again we have nothing to shew how much.

And again, what is much more palpable is the fact that the respondent instead of taking from the appellants what they tendered, chose to discard their legitimate claims and take from the Waines' contractors what they were not entitled to insist upon, and from yet others who should never have been brought into competition with appellants, that from which appel-

lants should have obtained most substantial returns. The extent to which this was done to appellants' detriment is entered into and well demonstrated in Mr. Tilley's factum.

The result reached is one I cannot feel at liberty to interfere with and be assured I can do any better than the learned referee.

The appeal should be allowed and the judgment of the referee and the Chancellor be restored with costs.

DUFF J.—The first question concerns the construction of the agreement of October, 1911. The material passages are in the following words:—

Whereas in a contract made between the United Gas Companies, Limited, and one Frederick M. Waines, on the 13th day of February, 1909, and amended on the 19th day of July, 1909, the said United Gas Companies, Limited, agreed to purchase from Waines gas as therein stated, to be delivered through the company's line as now laid to Dunnville, at a pressure of fifty pounds to the square inch, provided that a greater pressure is not maintained in the company's line between Dunnville and Winger;

And whereas the company agreed with the United Gas Companies, Limited, to transmit the gas so purchased from Waines through its said line for delivery into the lines of the United Gas Companies, Limited, in the Township of Wainfleet;

And whereas by a contract made between William J. Aikens, Frank R. Lalor and S. A. Beck, of the one part, and the company of the other part, bearing date the 28th day of June, 1911, the company agreed to purchase gas from the said Aikens, Lalor and Beck as therein stated;

And whereas the company desires to recognize the obligations of the United Gas Companies, Limited, binding upon it under said Waines' contract in so far as the transmission of the Waines' gas through its lines is concerned; and also to recognize its obligations to the said Aikens, Lalor and Beck to purchase and transmit gas pursuant to the said contract with them;

And whereas the contractors are the owners of a gas field in the Township of Canboro, in the County of Haldimand, and have agreed to sell the gas developed in the said field, and hereafter to be developed therein, to the company, upon the terms and conditions hereinafter set forth;

1916

KOHLER v. THOROLD NATURAL GAS CO.

Duff J.

Now, therefore, this agreement witnesseth as follows:—

1. The contractors agree to sell and deliver to the company at its meter house in the Town of Dunnville, in the County of Haldimand, against the line pressure from time to time in the company's line at that point, having regard to the contracts aforesaid, all the natural gas of a quality and purity suitable for domestic consumption which is now being, or which may be hereafter obtained from the lands now leased or controlled by the contractors in the Township of Canboro, particulars of which are set forth in the schedule hereto attached and marked "A," or hereafter acquired or controlled by them in the said township, in such amounts as they shall have available for delivery at the rate of twenty cents per thousand cubic feet up to April 1st, 1912, and after that at the rate of sixteen cents per thousand cubic feet to May 1st, 1913, and thereafter at the rate of twenty cents per thousand cubic feet;

2. The company agrees to purchase from the contractors the said gas as in the last paragraph mentioned at the prices aforesaid.

* * * * *

12. The contractors agree to and with the company to lay a 4½-inch line from their wells, in the Township of Canboro aforesaid, to the company's meter house in Dunnville with the utmost possible expedition, so that the connection with the company's line can be made at the earliest possible moment and gas delivered by the contractors to the company under the terms of this agreement, the company advancing to the contractors the sum of five thousand dollars, towards the cost of construction of the said line, to be repaid by the contractors to the company without interest on or before the first day of April, 1912.

The rival constructions are: (1) By the appellants, that the respondent company agrees to take and pay for gas delivered by the appellants at the company's meter at Dunnville "against the line pressure" from time to time in the company's line at that point, such pressure not to exceed that occasioned by the execution of the contracts mentioned in the recitals.

(2) On behalf of the respondent company that the respondent company is to take such gas so delivered when the pressure does not exceed 50 pounds per square inch in the respondent company's line.

The second of these constructions is that which

was adopted in the Court of Appeal. As I read the judgment of Mr. Justice Hodgins the principal reason upon which this conclusion is based is derived from the fourth paragraph of the recitals. The view seems to be that by the two agreements mentioned in the recitals the respondent company or the United Gas Company assumed an obligation not to maintain a pressure in the respondent company's line greater than fifty pounds per square inch. With respect, I think, that is a misreading of the clause in the Waines' contract (clause 7), which is said to create this obligation:—

> Clause 7.—This said natural gas shall be delivered through a meter or meters into the company's pipe or line it may procure to be built by any other company for the purpose of receiving and transmitting the gas herein agreed to be purchased, hereinafter called the "transmitting company" at or near the west end of Canal Street in the Town of Dunnville, and is to be supplied and maintained at that point at a pressure of at least fifty pounds to the square inch, provided that the company shall not maintain a pressure of greater than fifty pounds in its own line at the said point.

There is a similar provision in the Lalor contract. I read the words beginning "provided that the company" as declaring simply the condition upon the fulfilment of which the contractor's obligation to deliver on the terms prescribed depends. That, I think, is the meaning of the language itself. But, furthermore, I am unable to avoid reading the first paragraph of the recitals in the Lalor contract or the first paragraph of the recitals in the contract we have to construe as giving expression to the interpretation which the parties themselves had put upon the pre-existing contracts and that interpretation seems to me to accord with the view I have formed independently from an examination of the words themselves of these contracts.

1916

KOHLER v. THOROLD NATURAL GAS CO.

Duff J.

I agree that it must be taken that these recitals are intended as a declaration that the appellants and the respondent company were themselves contracting with reference to the fact that there were these contracts. It does not, however, seem to me that the declaration carries us beyond this point, that the respondent company's line might be expected to be charged with gas to the degree that in the ordinary course would result from the fulfilment by the contractors under the earlier contracts of their obligations to deliver gas at fifty pounds pressure.

What then is the effect of this declaration upon the interpretation of the words "having regard to the contracts aforesaid" in the first paragraph of the operative part of the agreement before us? It cannot, I think, be held to qualify the words "against the line pressure from time to time in the company's line at that point" to the extent of the qualification imported by reading the words "of fifty pounds to the square inch" after "pressure" as the respondent company's argument requires. Nor do I think can they strictly be given the sense contended for by the appellants. It is more reasonable, I think, to explain their presence as arising from the desire to preclude any inference that the company was undertaking obligations incompatible with receiving and transmitting gas delivered to it under the provisions of the two recited contracts. That view is confirmed by the provisions of the preliminary agreement, the first paragraph of which provides that the vendors will deliver the gas at the company's meter house in Dunnville "to be received by it against the pressure in its line at that point."

The result is that the placing of the regulator, the effect of which was automatically to interrupt any access of gas from the appellants' pipe when the pressure in the respondent company's line exceeded fifty pounds to the square inch, was a wrongful act that prevented the appellants performing the condition entitling them to be paid in accordance with the terms of their contract.

It was argued by Mr. Tilley that there was delivery. I do not think it can strictly be said that there was delivery in fact because the gas alleged to have been "delivered" did not pass out of the power and possession of the appellants. I think that strictly it is a case of wrongful prevention of delivery rather than a refusal to pay for gas in fact delivered.

The case is within the principle stated by Lord Blackburn in *Mackay* v. *Dick* (1) in these words:—

> I think I may safely say, as a general rule, that where in a written contract, it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.

What then is the basis on which damages are to be computed? In order to answer that question it is important, I think, to note precisely the nature of the contract into which the appellants had entered.

Their undertaking was in part to construct a pipe line $4\frac{1}{4}$ inches in diameter connecting their wells with the respondent's line at Dunnville. They were, in the words of the contract, to "deliver" gas at Dunnville "against the line pressure" in the respondent's line.

(1) 6 App. Cas. 251.

1916

KOHLER v. THOROLD NATURAL GAS CO.

Duff J.

But that obviously means that, subject to their right to supply customers along the line of their pipe, they were to have their conduit so connected with their wells and their appliances arranged in such a way that the gas at Dunnville should be actuated by the full pressure available. The intent of the contract was that the contractors should do that. On the respondent company's part, it was to pay for such gas as should enter its line in these conditions, and as I have just said the company came under the implied obligation to do what might be necessary to enable the pressure in the appellant's line to have its natural and normal effect so that the compensation to which the appellants were entitled could be measured in the manner provided by the contract. Now it is perfectly clear that the appellants did everything which they were called upon to do under their contract, and, I think, this question of damages ought to be determined by the application of two well recognized principles.

The first principle is stated in a judgment of Mr. Justice Willes in a passage cited in and made the foundation of the decision of the Privy Council in *Burchell* v. *Gowrie and Blockhouse Collieries*(1), at page 626, which is in the following words:—

> In *Inchbald* v. *Western Neilgherry Coffee, etc., Co.*(2), Willes J. thus lays down the rule of law applicable to such cases: "I apprehend that wherever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay, is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it.

Their Lordships in that case held that, as the appellant had in substance done everything he was called

(1) [1910] A.C. 614. (2) 17 C.B.N.S. 733.

upon to do to earn his commission (although his right of action was strictly a right of action for damages for wrongful prevention of performance rather than an action for recovery of commission, as such) he was entitled in the circumstances to recover in the form of damages the sum which would have been payable to him as commission had it not been for the wrongful conduct of the respondents. It may be observed in passing that in the case to which reference has already been made—*Mackay* v. *Dick*(1)—Lord Watson at page 270 points out that by the law of Scotland where a debtor bound under a certain condition impedes or prevents the event, the condition is held to be accomplished if the creditor has done everything incumbent upon him. This principle, Lord Watson says, has always been recognized by the law of Scotland, which derived it from the civil law. I do not desire to express any opinion on the question whether that principle is strictly applicable here; although there would appear to be nothing inconsistent with legal principle or with justice in holding that the respondent company (being bound by an obligation not to bar the ingress of the appellants' gas into their pipe) is precluded from taking advantage of its own wrong by denying that in fact the appellants' gas did enter its pipe, as it would have done if the course of events contemplated by the contract had been allowed to proceed without interruption by its officers. I do not find it necessary to put my judgment upon that ground because I think the decision in *Burchell* v. *Gourrie and Blockhouse Collieries*(2) is a sufficient authority for holding that the appellants, having done

(1) 6 App. Cas. 251. (2) [1910] A.C. 614.

1916

KOHLER v. THOROLD NATURAL GAS CO.

Duff J.

everything incumbent upon them under the contract and their efforts having failed to produce the contemplated effect only because of the wrongful conduct of the respondent company, they are entitled *primâ facie* to the compensation that would have been payable to them had the respondent company not interposed and had the provisions of the contract with respect to compensation become fully operative. Reference may also be had to the judgment of Lord Alverstone C.J. in *Odgens* v. *Nelson*(1), at pp. 296 and 297.

The second principle is this: as against a wrongdoer, and especially where the wrong is of such a character that in itself it is calculated to make and does make the exact ascertainment of damages impossible or extremely difficult and embarrassing, all reasonable presumptions are to be made. The principle in the form in which it is applicable to this case is stated in these words taken from the judgment of Lord Selborne in delivering judgment for himself and the Lords Justices in *Wilson* v. *Northampton and Banbury Junction Railway Co.*(2) :—

> We know it to be an established maxim that in assessing damages every reasonable presumption may be made as to the benefit which the other parties might have obtained by the *bonâ fide* performance of the agreement. On the same principle, no doubt, in the celebrated case of the diamond which had disappeared from its setting and was not forthcoming, a great judge directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there. I do not say that that analogy is to be followed here to the letter; the principle is to be reasonably applied according to the circumstances of each case."

A number of authorities to the same general effect are referred to in *Lamb* v. *Kincaid*(3). This prin-

(1) [1903] 2 K.B. 287. (2) 9 Ch. App. 279, at p. 286.
(3) 38 Can. S.C.R. 516.

ciple is, I think, properly applied in holding as I do hold, first that the average daily readings are sufficient *primâ facie* evidence for determining the pressure ratios, and secondly, that the onus was upon the respondent company to produce satisfactory evidence of any circumstances upon which it desired to rely as reducing the amount of damages which the appellants are *primâ facie* entitled to recover. It was for them to shew if they desired to rely upon it as effecting the measure of damages that the gas, which otherwise would have passed into their pipe line, is still in the possession and power of the appellants and still available for sale. That appears to me to be an entirely reasonable application of the principle *omnia præsumuntur contra spoliatorem.*

I add a word with reference to the point of view from which this contract seems to have been regarded. It appears to have been treated as a contract for sale and delivery of property simply. In one aspect, it is that, unquestionably; that is to say, the contract unquestionably does contemplate the transfer of property for a money price. But the authorities touching the estimation of damages arising from breach of contract for the sale of goods are almost universally decisions given in contemplation of circumstances so widely different from the circumstances contemplated by this contract that I cannot think they are of much assistance, except in so far as they lay down the broad principle that as a general rule where a contract is broken the injured party is entitled to receive such a sum of money, by way of damages as will, so far as possible, put him in the same position as if the contract had been performed, provided that damages are not recoverable in respect of loss following the breach

1916

KOHLER v. THOROLD NATURAL GAS CO.

Duff J.

of contract unless the loss was (1) the natural and direct consequence of the breach, or (2) within the contemplation of both parties at the time of making the contract as the probable result of the breach. That is the broad principle which is strictly applicable, and I think the conclusions above indicated are strictly within the principle.

It is quite evident, moreover, that on the reference it was not seriously disputed that but for the regulator the appellants would have delivered, and would have been entitled to be paid for, the amount of gas in respect of which they claim. That is clear enough from the last paragraph of the referee's report which is in the following words:—

*It is admitted that plaintiffs, in addition to what was taken by defendant, had for delivery the quantity of gas they allege during the months from April to December, and were it not for the regulator would have delivered, viz.,* 44,853,170 *ft. at* 16*c. per thousand c. ft., or* $7,176.50.

The plaintiffs, however, with the defendant's consent sold—

| | |
|---|---|
| 1,050,000 c. ft. at 16c. | $147.00 |
| 250,000 c. ft. at 20c. | 50.00 |
| | $197.00 |
| The amount to which I find the plaintiffs are entitled is | $7,176.50 |
| Less | 197.00 |
| | $6,979.50 |

And there should be judgment for the plaintiffs for $6,979.50.

The evidence of Mr. Price, the respondent's manager, cited in Mr. Tilley's factum at p. 10, is quite sufficient to justify this paragraph.

The appeal should be allowed and the judgment of the Chancellor restored with costs in both courts.

ANGLIN, J.—After careful consideration of the several contracts in evidence in this case, I have

reached the conclusion that the "proviso" in the Waines contract did not merely state a condition to which the obligation of delivery under that contract was subject, but also imposed on the purchasers an obligation (within the meaning of the clauses in the Kohler contract which make it subject to the purchasers' obligations under the Waines contract) to prevent the pressure in their transmission line exceeding fifty pounds, whenever and so long as Waines was prepared to deliver gas at a pressure of fifty pounds. The defendant company admits that, in order to ensure the fulfilment of that obligation towards Waines, it resorted to the use of a regulator designed automatically to exclude the plaintiffs' gas whenever the pressure in the defendants' transmission line should exceed fifty pounds, and to admit such gas freely when that pressure should be less than fifty pounds. While the use of a device operating in this way may not have been beyond the defendants' rights so long as Waines was delivering at a fifty-pound pressure, they used it at their peril if in fact—whether by accident or by design, whether through a defect discoverable or remediable, or latent and impossible to overcome—it should exclude the plaintiffs' gas when the pressure in the transmission pipe was less than fifty pounds or when the Waines pressure fell below fifty pounds. The plaintiffs were entitled at all times to deliver against the pressure in the defendants' transmission line subject to the defendants' obligation to Waines to prevent that pressure excluding his gas delivered at fifty pounds. The plaintiffs had not the right to deliver gas in quantities which would increase that pressure beyond fifty pounds at a time when delivery under the Waines contract at fifty pounds pressure would be

1916

KOHLER
v.
THOROLD
NATURAL
GAS CO.

Anglin J.

thereby interfered with. That, I think, is the effect of the contract between the parties.

There would appear to have been some uncertainty at the trial as to the function which the regulator was intended to perform and as to its actual operation. I take the following extracts from the opinion delivered by the learned referee as printed in the appeal case:—

> It was contended by the defendant that while the contract did not in words provide for the placing of this regulator, still in order to keep faith with Waines and Lalor, Beck and Aikens under their contracts, the company was bound to prevent gas coming from the plaintiffs into their line at a greater pressure than 50 pounds to the square inch, and so placed the regulator fixed so that the gas could not come from plaintiffs' line at a pressure less (*sic*) than 50 pounds.

Later on he says:—

> An examination of the records during the period from April 1st, 1912, until December 31st, 1912, shews that the average pressure in the plaintiff's line was in some months in excess of the average pressure in the defendant's line, and in some months greatly in excess; and this was so notwithstanding the fact that the plaintiffs were compelled to shut off a number of their gas wells in the field.
>
> This would indicate that it was the regulator (and if these records are correct the regulator must have been fixed at more than 50 pounds) placed by the defendant in their line, and not the pressure from the gas supplied under the two other contracts that prevented the plaintiffs from delivering all their available gas into the defendant's pipe line, and was, I think, a breach of their contract, for which the defendant is responsible in damages, if any can be shewn.

The impression of the learned referee would seem to have been that the operation of the regulator was meant to depend, and did in fact depend, not upon the pressure in the defendants' transmission line, but upon that in the plaintiffs' supply pipe. The case may have been so presented to him in argument and it may be, although the oral testimony is to the contrary, that the pressure returns warrant the conclusion that, as a matter of fact, the opening and closing of the regu-

lator valve depended upon the pressure in the plaintiffs' supply pipe. If so, the use of the regulator was a clear breach of contract and the conclusion that it was "fixed at more than fifty pounds" would seem to be incontrovertible.

In view of the course of the argument in this court, there would seem to have been some misapprehension in this regard at the trial, and the conclusion there reached as to the extent of the defendants' liability is thus rendered less dependable than it otherwise would be. Counsel for both parties were in accord in this court upon the fact that the operation of the regulator was governed by the pressure in the defendants' transmission line, and the argument in the appellants' factum proceeds on that assumption.

Although by no means as satisfactory as it might have been made, the evidence afforded by the returns of average daily pressures put in seems to me to establish that, from some cause not made clear, the effect of the operation of the regulator placed by the defendants on the supply pipe carrying the plaintiffs' gas was to exclude that gas from entering the defendants' transmission line when the pressure in it was less than fifty pounds during at least a very considerable part of the period between the 1st of April, 1912, and the 31st December, 1912. Moreover, it would seem that during a great part of that period the Waines' pressure was below fifty pounds. But this evidence does not enable us to say for how many hours on any day the wrongful exclusion of the plaintiffs' gas continued, or to determine how much of that gas available for delivery and not taken might have been delivered during that period without raising the pres-

1916

KOHLER v. THOROLD NATURAL GAS CO.

Anglin J.

sure in the transmission line above fifty pounds, when the right to have it enter would cease, if, and so long as, Waines should be delivering at a pressure of fifty pounds. But the defendants having seen fit to place a regulating device upon the plaintiffs' supply line, and having had that device under their exclusive control, I think the burden was upon them to shew that it did not operate prejudicially to the plaintiffs' rights under their contract, or, if that could not be established, to shew the times and periods during which, and the extent to which it did not so operate. That they have failed to do, and they are, therefore, chargeable, in my opinion, with the consequences, whatever they may be, of having excluded the plaintiffs' gas during the whole period in question. Moreover, from the 19th December to the 31st December, it seems to be very clearly proved that the defendants took from contractors who had not priority over the plaintiffs 6,762,127 c. ft. of gas, much of which the plaintiffs might otherwise have delivered. They also appear to have taken under a contract with one Kindy (made subsequently to the contract with the plaintiffs) between August and December, 5,975,888 c. ft. of gas, the greater part of which the plaintiffs were entitled to supply.

But it is claimed on behalf of the defendants that the gas not taken by them has not been lost to the plaintiffs—that they still have it and have merely been delayed in marketing it. For the plaintiffs it is urged, on the other hand, that there were gas wells in operation in the same field as theirs belonging to other persons, and that the gas which the defendants excluded by the regulating device placed on their supply

pipe has passed away through such other wells and has been wholly lost to them. This was the conclusion reached by the learned referee; whereas the Appellate Division deemed the evidence insufficient to support it. With respect I am of the opinion that, subject to what I am about to say, there was evidence in the record sufficient to support this conclusion of the referee.

But it is at the same time my view that it is not established that the loss of this gas is wholly attributable to wrongful conduct on the part of the defendants. Their manager, no doubt, said, in the course of his testimony, that if the regulator had not been placed upon their pipe the plaintiffs would have delivered during the period in question the quantity of gas for which they claim. But he did not admit that such gas was excluded from the transmission line in breach of contract. It may be that as against the plaintiffs the defendants were bound to prove that the exclusion was rightful and that in the absence of evidence it should be assumed that conditions never existed which would have entitled them to exclude the plaintiffs' gas under the clause in the Waines' contract. Yet we cannot shut our eyes to the fact that during the summer months the consumption of gas for heating and domestic purposes is much smaller than in the winter, and that, had there been no regulator set against them, it is more than probable that all the gas which the plaintiffs had available for delivery during the summer season could not have entered the defendants' pipe unless the latter had allowed gas to go to waste. As Mr. Justice Hodgins points out, the defendants did not undertake to find customers for all the gas the plaintiffs should have available for delivery. The

1916

KOHLER v. THOROLD NATURAL GAS CO.

Anglin J.

plaintiffs' right of delivery was limited to delivery against the pressure in the defendants' transmission line. It was, therefore, from its very nature subject to whatever restriction the limitations of the defendants' business should entail. Under these circumstances had there been no regulator used it seems tolerably clear that during the summer months a considerable quantity of the plaintiffs' gas available for delivery could not have been taken, and for gas held back on that account the defendants cannot be held responsible.

We have no records of the quantity of gas from all sources used by the defendants during these summer months. But we find that during April the plaintiffs delivered 8,609,495 c. ft.; from May to September the average monthly delivery was 4,672,076 c. ft.; in October it rose again to 7,522,787 c. ft. These figures indicate a lessening in the deliveries during the summer months, for which it is not unreasonable to assume that diminished consumption by the defendants' customers at least partly accounts. Moreover, as the other wells operating in the field were probably subject to similar conditions, it may be that gas held back at this season was not lost to the plaintiffs.

It is also noteworthy that from the 2nd to the 12th August, omitting the 3rd, for which the return is blank, the plaintiffs' average pressure was only 17.8 lbs. It was one pound on the 11th and 1.5 lbs. on the 10th.

The plaintiffs' claim is for 44,853,170 c. ft. Of this 31,863,414 c. ft. represents gas not taken during May, June, July, August and September. It is probably quite impossible to determine with even ap-

proximate accuracy how much of that gas the plaintiffs would have been able to deliver against line pressure in the defendants' pipe. But dealing with the matter as a jury probably would, I should say that at least one-half of it could not have been taken. I would, therefore, deduct from the amount of the damages assessed at the trial $2,560.57 (the value of 15,931,707 c. ft., at 16 cents per M.), leaving a balance of $4,418.93, for which the plaintiffs should have judgment.

In the Appellate Division attention is drawn to the fact that the defendants paid the same price for the Waines' gas as for the plaintiffs' gas, viz., 16 cents per M. But another fact is apparently overlooked, namely, that under the Aikens-Lalor-Beck contract, the price was only 13 cents per M., and the holding back of the plaintiffs' gas may have enabled the defendants to obtain under that contract at a cheaper rate gas which the plaintiffs would otherwise have delivered.

The monthly settlements of accounts between the plaintiffs and defendants made as provided for by the contract were set up in answer to the plaintiffs' claim. But there is nothing to shew that when these settlements were made the plaintiffs knew that their gas was being wrongfully excluded from the defendants' transmission line.

No doubt loss of profit is ordinarily the measure of damages on breach of a contract of sale and purchase of a commodity. But in the present case there is nothing to suggest that delivery of the gas wrongly excluded by the defendants would have entailed any additional expense or outlay to the plaintiffs. They

1916

KOHLER v. THOROLD NATURAL GAS CO.

Anglin J.

lost in its entirety the price to which they would have been entitled had that gas been taken by the defendants.

I am unable, on the other hand, to construe the contract as entitling the plaintiffs to be paid, not as damages for breach of contract, but as purchase money, for all gas available for delivery whether taken or not.

The appellants are entitled to their costs of the appeal to this court, and of the proceedings in the High Court Division.

BRODEUR J.—I concur with Mr. Justice Idington.

*Appeal allowed with costs.*

Solicitors for the appellants: *Wilkes & Henderson.*

Solicitor for the respondents: *H. H. Collier.*