Supreme Court of Canada
Acton Tanning Co. v. Toronto Suburban Rway. Co., (1917) 56 S.C.R. 196

Date: 1918-03-05

The Acton Tanning Company and Others *(Defendants) Appellants;*

and

The Toronto Suburban Railway Company *(Plaintiffs) Respondents.*

1917: November 13, 14; 1918: March 5.

Present: Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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

Railway—Permission to enter land—Oral agreement—Statute of Frauds—Compensation—Company—Authority of president.

A railway company, without expropriating, ran its line through the yards of a tanning company and did work improving the yards and other work beyond the ordinary scope of a railway project. Four years later the tanning company applied to a judge for the appointment of arbitrators under the "Railway Act" to determine the compensation for the right of way which the railway company, opposing the application, claimed to be entitled to without payment under an oral agreement with the president of the tanning company since deceased. The judge ordered the trial of an issue, with the railway company as plaintiff, to determine the rights of the parties and on appeal from the judgment of the Appellate Division:—

Held, Idington J. dissenting, that the evidence established that such an agreement was entered into.

Held, also, Idington J. dissenting, that the agreement was binding on the tanning company, that said company was owned and controlled by a commercial firm of which the president was the head and the partnership articles and evidence at the trial shewed that he had authority to bind the company; and that the Statute of Frauds could not be relied on to defeat the action as it was not brought to charge the defendants on a contract for the sale of land or of an interest in land. If applicable it was taken out of the statute by part performance.

Duff J. also dissented from the judgment pronounced.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming the judgment at the trial in favour of the plaintiffs.

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The facts are sufficiently stated in the above head-note.

H.J. Scott K.C. for the appellants. The president had no authority to bind the company by the agreement. See Calloway v. Stobart Sons & Co.[1]

[1] *35 Can. S.C.R. 301.*

The possession of the railway company may be referable to the compulsory powers under the "Railway Act" and not to the agreement which brings the case within the Statute of Frauds. See Maddison v. Alderson[2]; Mercer v. Liverpool Railway Co.[3]

Nesbitt K.C. and Christopher Robinson for the respondents cited McKnight Construction Co. v. Vansickler[4]*; McGregor v. Curry*[5] *and Wilson v. Cameron*[6]*.*

THE CHIEF JUSTICE.—This appeal should be dismissed with costs.

DAVIES J.—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J.—The respondent began to construct its railway through the yard of the Acton Tanning Company at Acton some time in 1913. And when the latter insisted upon being compensated and proceded to have an arbitrator named, under the "Railway Act" in question, to fix the compensation for such expropriation, the application was opposed by respondent on the pretension that the late Walter D. Beardmore, who was the president of the said Acton Tanning Company at the time of the entry upon its lands, had assented to what was done and agreed that there should be no compensation demanded.

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Thereupon the application was directed to stand over until the respondent had had an opportunity to establish by means of this suit what it then alleged.

The learned trial judge entered judgment for the respondent and the Appellate Division of the Supreme Court of Ontario has upheld same. Hence this appeal.

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[2] 8 App. Cas. 467.
[3] [1903] 1 K.B. 652; [1904] A.C. 461.
[4] *51 Can. S.C.R. 374.*
[5] *31 Ont. L.R. 261.*
[6] *30 Ont. L.R. 486.*

The Acton Tanning Company had, prior to the existence of the respondent, expended some forty thousand dollars in order to have sidings constructed by the Grand Trunk Railway Company connecting the line of that railway with the tanning company's works, and that railway company had expended a considerable sum besides in such construction.

This had apparently been done under a written agreement between the companies which is not in evidence save indirectly by reference made to it as a possible obstacle to carrying out the project of respondent as it might desire. It was admitted in argument that it had provided for the Acton Tanning Company agreeing to give the Grand Trunk Railway Company the exclusive right to the carriage of its freight. An opinion was got from the respondents' solicitors that this provision being against public policy was not binding.

The question of the business policy of thus ignoring an important agreement certainly was deserving of consideration on the part of others as deeply concerned in the management of the appellant company's business as the late Mr. Beardmore.

The further questions of discarding or at all events meddling with the works so constructed thereunder and substituting thereby the new line or rearranging the tracks to provide for that new line and the old, each having suitable access to appellant's company's business premises, also seem to be of a character that

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demanded they should be brought under the notice of the company's directors and shareholders.

The annual freight expenditure for shipment over the Grand Trunk amounted to about a hundred thousand dollars. This fact alone helps to realize the magnitude of the problems presented to appellant company by the incoming of the new line.

The question of the location of such a line when it was proposed to bring it through the yard of the appellant company's business premises, must necessarily have raised grave matters for the consideration of its directors if at all a matter of bargaining, as it is claimed to have been.

Of course the respondent could probably expropriate such a route without regard to consideration thereof by any one.

It is said that the future extensions of the buildings had been mentioned as a possible necessity of the appellant company, but in relation thereto the selection between coming through on the north instead of the south side of said buildings was decided by the late Mr. Beardmore and that was acted on accordingly without reference to the other directors.

Three or four different lines had been surveyed by respondent's engineers for the purpose of going through the village of Acton. It is said by the respondent that of these the most expensive was chosen by the late Mr. Beardmore. Again nobody else was consulted. For a corporate company giving away or agreeing to sell any of its lands used in and for its business premises, I venture to think no president thereof has any authority in law unless formally conferred upon him by the by-laws of the company, or at all events by the board of directors, and possibly also the majority of the shareholders.

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When these several extraordinary powers relative to matters involving the future of the company alleged to have been exercised by the late Mr. Beardmore were dealt with in argument, counsel for respondent did not seem to rely much upon the inherent authority of a president, but upon that contained in articles of a partnership which he referred to as a holding company.

I shall presently advert to the provisions so relied upon, but meantime I think it well to set forth exactly what the appellant company was, and how constituted and governed.

The company was incorporated in the year 1889, under and by virtue of an "Act respecting the incorporation of Joint Stock Companies by Letters Patent," being chapter 157 R.S.O. 1887. The majority of the shares were held by members of an unincorporated firm known as Beardmore & Company, which was composed of Walter D., George, Alfred and Frederick Beardmore. These gentlemen held shares in other companies, incorporated in like manner, I presume, to the Acton Tanning Company, and had divers establishments carried on by such like corporations or otherwise by unincorporated management.

The by-laws of the company provided for a board consisting of three directors to be elected annually by the shareholders of the company, of whom two should form a quorum and the majority of the members of the board should govern in all matters.

The president was to have a casting vote in the event of a tie. He was to call meetings of the board whenever he might deem it necessary and also at the request of two directors, each member having one day's notice of the meeting.

He was bound to call a meeting of the stockholders at the written request of two or more shareholders

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holding at least one-quarter of the capital stock of the company.

Such being the tenor of the by-laws there seems little ground for the implication of there being a right inherent in the president to exercise such autocratic powers as it is alleged he exercised in this instance.

Then let us turn to the articles of partnership and see what, if any, authority they conferred on him for exercising the corporate powers of the company in such regards as involved in the momentous questions presented to him as president.

Walter D. Beardmore was not only to the eyes of the world apparently the most active man managing these various concerns above referred to, but also, by an agreement entered into on the 31st December, 1904, between them, was constituted, it is said, the manager of the whole.

So much turns, in my opinion, upon the powers conferred upon the said Walter D. Beardmore by virtue of the said agreement that I think it well to get accurately seized of a fairly correct understanding thereof. I think that may be accomplished by a careful consideration of the first three sections of the said agreement, and section 11, much relied upon, and the latter part of section 7 thereof.

There is nothing unusual in the agreement save in the magnitude of the business if we look at it as articles of partnership. The articles provide for the continuance thereof for a period of five years from the 1st day of January, 1905; that the head office of the firm should be at the city of Toronto; that the said partnership was intended to comprise and include:—

(a) The business of the present firm of Beardmore & Co. of Toronto and Montreal.

(b) The business of the present firm of Beardmore & Co. of Acton.

(c) All shares of the capital stock in the Muskoka Leather Company

> Limited, the Acton Tanning Company Limited and the Beardmore Belting Company Limited owned by the said parties including the stock in any of the said Companies standing in the name of the wife of the first party as to which the first party undertakes to secure transfers or declarations of trust in favour of the firm forthwith on the execution of these presents.
>
> And the capital of the said partnership shall be the interest of the parties in the said premises valued as hereinafter provided, estimated to amount approximately to $1,275,000 to be contributed by the said partners approximately in the following proportions—$500,000; $400,000; $250,000 and $125,000 by the first, second, third and fourth parties respectively. Said shares of stock in said companies shall continue to be held in the name of said partners individually but shall be so held in trust for the firm.

Section 11, which I have referred to, was as follows:

> 11. Each partner shall at all times give such supervision and attention to the partnership business as may be necessary for the efficient management thereof but the first party shall have the general oversight and direction of the business.

and is really the most important in the whole document, when we come to consider what turns upon it.

Now the proposition of law which we are gravely urged by counsel arguing for the respondent company to adopt, that the president of such a company as the tanning company, armed only with the powers conferred upon him as its president, and the clause 11 quoted above in the partnership agreement, was entitled to ignore his fellow shareholders, his partners in business, and make such a bargain conceding not only the right of way, but all that was involved in determining where the right of way was to be exercised, is to my mind not only startling but absolutely unfounded.

But when we find that counsel taking that stand relies upon parapraph 11 of the partnership agreement, it is necessary to consider that. I have done so, and read same many times and I fail to find therein anything but a general oversight and direction of the business.

It is to be observed that it was the business that was being conducted there, and not the disposition of the property or a radical changing of its application that was being dealt with by this partnership agreement.

And when we find further that the partners who executed this agreement were not the only persons concerned, but that Mr. Clark, who had for years acted as superintendent of the carrying on of the business of the company in question, held thirteen shares which had not yet become the property of any one of the partners, but which we find referred to in the following language in paragraph 7 of the agreement:—

> And in case stock in the Acton Tanning Company Limited, now standing in the name of James E. Dunn and John Clark shall revert to said third party same shall be deemed the property of the firm,

we may ask how he came to be ignored.

We also find in the agreement when it was executed that there seems to have been a large block of stock held by the wife of the said Walter D. Beardmore. He bound himself by these articles of agreement, as appears in the passage quoted above, to procure the transfer thereof to the firm.

I am not sure whether that ever was obtained or not but in argument it was admitted that there were thirteen shares held by Mr. Clark which had not ceased to be his property at the time in question. We find also that Walter D. Beardmore only held 35% of the entire assets at the time of the said articles, and at the time in question by a renewal thereof which was in force then, a slight fraction less than that proportion of the entire interest in these amalgamated businesses.

I submit it is rather an untenable argument which in one breath emphatically holds that the majority of the shareholders in an incorporated company were,

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without any meeting, without consultation with the minority shareholders, simply because they constituted the majority, entitled to disregard the minority without going through the form of calling a meeting of the shareholders, and then in the next breath try to maintain the position that Walter D. Beardmore, who himself was only the holder of a minority of the shares, could by such slender authority as contained in paragraph 11 of the agreement, ignore the majority and deal with such an important piece of business as that in question in the way he is alleged to have done.

It looks very much as if either argument was only supposed to be good for the purposes of this case and that we are asked to adopt one or other of them to maintain the respondents' contention.

I am unable to accept either proposition. I think there was no authority in Walter D. Beardmore, by virtue of his position under the articles of agreement, to make such a bargain as it is claimed he did.

I am further of the opinion that if the majority of the shareholders had actually authorized such a transaction and ignored entirely in doing so the minority shareholder, or shareholders, in sanctioning such an agreement, they were doing so without authority in law.

In any way I can look at the transaction it was of such an important character that it is hard to suppose that any man of experience in business would venture upon a binding contract such as the late Walter D. Beardmore is alleged to have made without consulting his partners and fellow shareholders.

I can understand a man in his position tentatively taking the position that it would be a wise thing for his company to consider, and on that supposition was

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entirely within his rights in submitting to Sir William Mackenzie the proposition for his assent.

That, however, is very far from the contention that is set up by the respondents. It must involve a binding bargain or amount to nothing so far as the disposition of this case is concerned. Unless there was a definite conclusive bargain made which would entitle the court to stay proceedings for arbitration under the "Railway Act," this action must fail.

What transpired may be very cogent evidence, if admissible at all, in the way of minimizing compensation to be awarded in such an arbitration, but with that we have nothing to do.

The other members of the firm, holding nearly two-thirds of the entire capital invested in the business and profits to be derived from carrying it on, had never been consulted.

It seems a most remarkable thing that the late Mr. Beardmore, who felt such a delicacy in acting without consulting his brothers in relation to a matter which was but a fractional part of what was involved in the very execution of the contract now set up, should write as follows:—

The Marlborough-Blenheim,

Atlantic City, N.J.,

October 28th, 1912.

Dear Sir William:

I have been in Boston, New York and Philadelphia, for a few days, and returning here find Ansell's (Annesley's) note (your secretary) enclosing consent to Acton crossing. Up till now I have not thought it well to mention the matter to my brothers. I am not sure that it would be policy to do so now, but you will agree with me that under the present circumstances it would hardly do for me to sign the consent without their concurrence. I expect to be home on Saturday or Sunday at the latest and will see Mr. Royce. I may tell you that a short time since when Mr. Hewson, the Grand Trunk Railway resident engineer, spoke to me about the matter, I told him at once that the G.T.R. must not look to me for any help as I would not oppose the crossing.

Very sincerely yours,

W.D. Beardmore.

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and yet he readily presumed not only to have absolute power, but to be taken as having asserted it.

I cannot see why, and still less when we realize the relations that existed between Sir William Mackenzie and himself, and the manner in which the subject was approached and handled throughout.

In the course of their social intercourse, Walter D. Beardmore and the said president, Sir William Mackenzie, are said to have got into conversation on the subject of freight from the Acton company's premises, and the desirability of greater facilities of shipment therefrom. This sort of conversation had taken place more than once, but it is alleged that on an occasion shortly after the trial lines had been run, it had become apparent that one of the favourite schemes of the engineers would, if executed, come too close to the home of Willie Beardmore, son of Walter D. and a son-in-law of Sir William Mackenzie. This feature of the project led to something more definite than had previously taken place.

A good deal, in fact a great deal, has been argued both before us and in the courts below, as to the exact nature of the final conversation on the subject.

Walter D. Beardmore is dead and the only direct evidence of the conversation is that given by Sir William Mackenzie. Much has been said about the exact nature of the conversation and whether there was any necessity for having it corroborated by some material evidence.

In my view of the case I do not think I need reach a very definite opinion on many of the issues thus raised. I need only to apprehend accurately what it is that is involved in that which Sir William Mackenzie states. His statement is alleged to maintain the proposition that the company of which he is the head

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was to have the right to pass through the yard of the appellant, the Acton Tanning Company, in the course of constructing their road.

Indeed he expresses the matter in somewhat different terms in the course of his evidence, but what he tried to make definite was that there was to be no cost of right of way to his company. He says:—

> We were going in there and he was not paying us to go in and we were not paying. We were not to pay anything to go in to give them the service.

It is quite clear that there was no definite location finally decided upon in these conversations. It is tolerably clear that they were to go through the yard but the exact spot that they were to pass over was even changed in the course of carrying out the instructions given pursuant to what the engineer, Mr. Wilkie, says in his evidence he supposed to be based upon what was a tentative agreement between Sir William Mackenzie and Mr. Beardmore.

There was no doubt in the service of the respondent someone as solicitor to prepare and have executed conveyances of the right of way as soon as agreed upon, and all the more likely to have that speedily completed if it was to be got for nothing. Why was that not done reif a definite and completed bargain had been ached?

There were accounts rendered respondents and paid, which had plainly as possible emphatically intimated that the appellants recognized no such bargain as now set up, and were waiving no claim to the usual compensation for right of way.

These explicit statements never were reported or denied or challenged in any way until Walter D. Beardmore had died.

I have already intimated my decided opinion that there existed no authority in Mr. Beardmore to make

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such a bargain and hence it is not necessary I should enter into an elaborate examination of the question of the right to specific performance if he had.

I venture, however, to suggest that the principles upon which courts of equity have uniformly acted in such cases of doubt and difficulty and possible injustice being done by the decree of specific performance, form an unsurmountable barrier in the way of any one seeking to enforce against those not actually parties to it, such an indefinite and incomplete arrangement resting only upon alleged conversations had with a man dead before it was sought to have it fulfilled and founded on such doubtful authority on the part of him so dead, and so inconsistent with his conduct in relation thereto in his lifetime and described by as intelligent a witness as the engineer who

located the line where it is because he had been told there was a tentative agreement being made.

It is urged that the definite claim to compensation was not made until the road had been constructed.

That is no unusual occurrence in railway building or execution of works under municipal authority if the records of this court are taken as a guide.

I think the appeal should be allowed and the action dismissed with costs throughout.

DUFF J.—The appeal should be allowed with costs.

ANGLIN J.—This litigation is attributable to the neglect, too common in transactions between persons intimately connected by ties of friendship, marriage or blood, to apply business methods to business matters. Assuming the plaintiff's contention to be right, the most ordinary precaution for its officials to take would

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have been to have had a memorandum of its agreement with the defendants prepared, or a deed of the right of way executed. If, on the other hand, the defendants' position is correct, their allowing the railway company to enter and occupy a right of way through their property without opposition or protest and their subsequent inaction for at least three years evinces such neglect of most obvious business precautions that, coupled with other attendant circumstances, if affords evidence of no little cogency against the claim which they now prefer.

The material facts appear in the judgments delivered by the learned trial judge and in the Appellate Division.

To the plaintiffs' demand for a declaration that it is in possession of the right of way which it occupies through the defendants' yards under an agreement whereby, in consideration of its locating its railway where the defendants desired and paying the cost of removing certain buildings, sheds, piles of tan bark, etc., making certain improvements in the defendants' yards by filling, grading and otherwise, and providing for necessary changes in the location of Grand Trunk Railway spurs, it should obtain its right of way through the yards without other or further cost, whether for value of land taken or for injurious affection of adjacent property of the defendants, three defences are raised—denial of the making of the alleged agreement; a plea of the Statute of Frauds; and a repudiation of the authority of the late Walter D. Beardmore, its president and managing director, to bind the defendant company by such an agreement if made.

The first question is so purely one of fact that the finding of a trial judge, unanimously affirmed on appeal, would ordinarily be conclusive upon it. What-

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ever agreement there was was made between Sir William Mackenzie, the president of the plaintiff railway company, and the late Walter D. Beardmore. An alleged absence of corroboration of Sir William's evidence is chiefly relied upon by appellant. After giving the circumstances that led up to the arrangement being made, Sir William's evidence was:

> Mr. Nesbitt: I understood Mr. Henderson (the railway company's solicitor) to say that he had gone to see you and had told you of the southerly line? A. Yes, I was informed of the other lines and lines that it would cost less money to build.
>
> Q. And that Mr. Beardmore was asking you to go through there, and that they would not go there unless you said so, and I think he said something about the Davies arbitration? A. I don't remember anything about that coming up particularly, but the Beardmores were very

anxious to have this accommodation, and were willing that there would be no expense to them or to us, no more than building the line. Mr Walter Beardmore is the one that talked to me about it most I think nearly all the time, but I did mention it to George at one time in my office, and he said, oh, it was all right as far as he was concerned, that Walter attended to that business. Matters went on and we went through there.

Q. Did you have any arrangement or bargain with Mr. Walter Beardmore as to the terms on which you were going through? A. As I said this moment, there was to be no cost; we were going in there and he was not paying us to go in and we were not paying. We were not to pay anything to go in to give them the service.

Q. It was free of cost both ways? A. Yes.

Again on cross-examination he said:

When you were discussing the matter with Walter Beardmore, and you said he could have all this without it costing anything, had you anything in mind as the right of way? A. Why, of course, we could not give them the service without getting into the yard.

Q. The point is that if he could get it in there without costing him anything, what arrangement was made with the Grand Trunk? The question is how you and he, at that time, understood that the right of way was to be paid for? A. We were to have free right of way, and we were to do all our own work, anything done in the yard, like re-arranging, or getting rid of any buildings, or anything of that kind.

Mr. Mowat:

It is suggested that you and Walter Beardmore thought it was mutually advantageous to you to have the railway close to their shops and it is suggested that Walter did this without authority, and without

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consultation with his brothers? A. I don't know anything about that; but I did mention it to George.

Q. And he said, "Walter is attending to that?" A. He said it was all right as far as he was concerned.

The anxiety of the Beardmores to have the railway go through their yards is deposed to by Mrs. W.D. Beardmore and her daughter. The objection of the right of way men and engineers to this route as more costly and difficult, and its ultimate selection solely because of an explicit direction of Sir Wm. Mackenzie, and upon the understanding that he had arranged with the Beardmores for the right of way through their yards is also well established. Moreover, it is undisputed that the railway company did work of filling swamps, and holes, cutting down side hills, grading, making roads, etc., thus improving the Beardmore yards, and paid for the cost of re-arranging shipping facilities and removing tan bark and cement blocks—all quite outside any obligations of a company merely carrying out a railway project in the ordinary way and attributable only to some special arrangement. But, apart from the corroboration afforded by these circumstances deposed to by several witnesses, explicit confirmation of Sir William Mackenzie's statement is given by Mr. Wicksteed, consulting engineer of the plaintiff company. He says:

> Q. Did you have anything to do with any bargain between him (W.D. Beardmore) and Sir William, or is your knowledge merely hearsay? A. Hearsay and inference. I was present at several interviews and it was quite evident to me that there was an understanding between them. That is as far as I can say.
>
> Q. The conversation proceeded on that basis? A. Quite so.
>
> Q. You were there when he was claiming that certain expenditures should be made? A. Yes.
>
> Q. And apparently it was assumed that they should be made by reason of a previous arrangement to that effect? A. Quite so. Sir William deputed me to arrange the details in several instances.
>
> Q. Where was the meeting with Mr. Beardmore held? A. In Mr. Beardmore's own office, on Front Street.
>
> Q. The office of Beardmore & Co. A. Yes, on Front Street.

And on cross-examination:

> Q. What was your understanding as to the actual right of way on which the railway was? Who was to pay for that? A. The tenor of all the conversations that I heard between Sir William and Mr. Beardmore—and I heard many—was that the right of way was free. The damage such as the removal of bark piles and such things as that were to be paid.
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> * * *
>
> Mr. Mowat: You understood that the lands inside the yard were to be free? A. Yes.
>
> Q. Where do you say the yards ended? Where was freedom to stop and payment to begin? A. The portion occupied by the work and bark piles.
>
> Q. The area which would be occupied by buildings and bark piles? A. Yes.
>
> Q. Roughly speaking, how much would that be? How far east of the easterly building? A. I would say about half a mile altogether.
>
> Q. A half a mile from east to west? A. Yes, about 3½ acres.
>
> Q. Your understanding was that outside of that the railway was to pay for the land taken at the average price in the district? A. I inferred that, at least I saw no reason to infer otherwise.

If corroboration were necessary I think we have more than enough here. I have not overlooked the adverse comment on Mr. Wicksteed's evidence based on a memorandum of the 18th November, 1913, in connection with voucher No. 851. Mr. Wicksteed was not confronted with that memorandum on cross-examination, as he should have been if it were proposed to rely upon it to impugn the credibility of his oral testimony. On the other hand, his letter of the 21st of October, 1913, which is in evidence, refers to the fact that running through the Beardmore property "has saved us a large sum in right of way." Both these documents were before the learned trial judge. He saw and heard both Sir William Mackenzie and Mr. Wicksteed and he appears to have fully credited their testimony. The verisimilitude given it by the probabilities arising upon the

surrounding circumstances no doubt weighed with the learned judge. To overturn in this court a finding thus supported

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and unanimouly affirmed by the court of last resort in the province is practically impossible. It must be assumed to be correct.

For the reasons given by the learned Chief Justice in the Common Pleas, delivering the judgment of the Appellate Division, the Statute of Frauds probably has no application. The action is not brought

> to charge (the defendants) upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them.

That the respondent is rightly in possession of the right of way is not questioned. There is no suggestion that it is a trespasser. It has admittedly given some consideration therefor—whether the whole or only a part is the matter in issue. The real plaintiffs are the appellants, who seek to recover an alleged balance of that consideration; the real defendant, the respondent, who resists their claim.

If the statute otherwise had application the case would appear to be taken out of it by part performance, The taking possession of the right of way and the construction of the railway without any proceedings having been taken under the expropriation clauses of the Railway Act, and without protest of any kind, the improvements made by the railway company in the defendants' yards and its expenditures for them on new buildings and the removal of piles of tan bark, etc.,

> must be referred to some contract and may be referred to the alleged one; they prove the existence of some contract and are consistent with the contract alleged. Fry on Specific Performance, 5th ed., par. 582; 27 Halsbury, No. 49; Wilson v. Cameron,[7].

These facts

> are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced. Maddison v. Alderson[8].

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There remains the defence of alleged lack of authority on the part of the late Walter D. Beardmore to bind the Acton Tanning Company by the agreement to which Sir Wm. Mackenzie has deposed. The evidence puts it beyond doubt that the Acton Tanning Company was merely one of several subsidiary instrumentalities of the firm of Beardmore & Company. It was owned and controlled by, and carried on for and in the interest of that partnership. All the shares of its capital stock, except thirteen shares held by one Clark, an employee, were owned by the Beardmore partners. All its earnings, except the insignificant fraction representing the dividend on Clark's thirteen shares, passed for distribution into the partnership funds of Beardmore & Company. So negligible was Clark's position as a shareholder considered—so much were he and his shares regarded as under Beardmore control, that, as Mr. Alfred Beardmore tells us, in the adjustment made when Walter D. Beardmore retired in 1915, these thirteen shares were included in the assets of Beardmore & Company.

Walter D. Beardmore was the senior member of the partnership composed of himself and his three brothers, George, Alfred and Frederick. His interest in the firm was four-tenths. His son, Walter Williams Beardmore, speaking of his late father's position in the business, says:—

> Q. Who composed the firm of Beardmore & Company? A. My father, Walter D. Beardmore, G.W. Beardmore, A.O. Beardmore and F.W. Beardmore.

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[7] 30 Ont. L.R. 486.
[8] 8 App. Cas. 467, 485.

Q. Four brothers? A. Yes.

Q. Who was the active manager? A.W.D. was. He was the head of the firm and always took the initiative in the business.

Q. Would you say the leading part? A. Yes.

Q. Known to the public as Beardmore & Company? A. Yes.

* * *

Q. What form did his activity take? A. He took part in every

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detail of the business, Muskoka Leather, Acton Tanning Company, Montreal and Toronto.

Q. Would you say that he was the governing mind? A. He certainly was, and recognized by all the managers in the different departments as the one.

Q. As the directing mind? A. Yes, as the directing mind.

* * *

Q. Just to follow that: I notice that in all this correspondence the name of Beardmore and Company is signed even when apparently it was the business of the Acton Company? A. Yes.

Q. Was that common? A. Yes, quite common.

Q. Would you say that the whole of the business for all varieties of leather so far as the public was concerned was carried on under the name of Beardmore & Company? A. Absolutely.

Mr. Alfred Beardmore says:

Q. Your brother is the person who had the direction and control of the business? A. Yes, Walter.

Q. He was the head of the family and the head of the business? A. Oh, yes, decidedly.

Q. So far as the public was concerned? A. Yes.

Q. Frederick, George and yourself were of a retiring disposition? A. Sometimes.

Mr. George Beardmore says:

Q. Your brother Walter was very active in business prior to the time when he had the stroke? A. He always was, yes.

Q. And so far as the public was concerned he was the outstanding figure of Beardmore & Company? A. Oh, yes, naturally, he was the head of the firm.

Mr. Frederick Beardmore was not a witness.

The partnership articles of Beardmore and Company include in its assets all the shares of the capital stock of, inter alia, the Acton Tanning Company, owned by the partners. They provide specifically for the manner in which the balance sheet of the Acton Tanning Company shall be prepared and they contemplate the reversion of the Clark shares to the firm.

They contain this clause:

11. Each partner shall at all times give such supervision and attention to the partnership business as may be necessary for the efficient management thereof but the first party (Walter D.) shall have the general oversight and direction of the business.

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A short time previously, as managing director and in the course of his “general oversight and direction,” Walter D. Beardmore had secured the entrance of the Grand Trunk Railway into the

Beardmore yards by an expenditure of from $40,000 to $60,000, so important was it to the business to have direct shipping facilities by rail. That Walter Beardmore made, and was regarded as having full authority to make, this arrangement with the Grand Trunk Railway Company is the evidence of his son and is the only reasonable inference from the testimony of Alfred O. Beardmore. There is no suggestion that any resolution, formal or informal, of the directors of the Acton Tanning Company was deemed necessary for this purpose.

Sir William Mackenzie tells us that when he spoke to Mr. George Beardmore about the plaintiff company giving the Beardmores' Acton business a connection and freight service, George Beardmore told him

> It was all right as far as he was concerned—that Walter attended to that business.

Mr. George Beardmore, called as a witness, does not contradict this statement, and from his somewhat indefinite evidence, I would infer that he had known that his brother Walter was making an arrangement for bringing in the plaintiff's railway. He says:

> Q. All you can say is that he (Walter) did not talk to you about the bargain about the road coming in? A. He did not talk a great deal about it. Really I have forgotten what the conversations were. I can not fix the exact conversations that we had, but he has always consulted me upon any decisions, and in fact sometimes left them to me to decide.

Of course it is not denied that the partners were fully aware of the advent of the plaintiff railway company and of the construction of its line and also of the work done in levelling and making roads and of the payments for removing bark piles, buildings, etc. It

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is equally impossible to suggest that they did not know that the railway had come in without any expropriation proceedings under some friendly arrangement, though not informed of its precise

terms, or that they were ignorant that whatever arrangement was made had been entered into by the late Walter D. Beardmore on their behalf and on behalf of the company they controlled.

Having regard to the position he occupied and to his relations with his brothers and the Acton Tanning Company as disclosed by the evidence, I am satisfied that it was, in fact, within the authority of the late Walter D. Beardmore in the course of his management of the business of Beardmore & Company to negotiate and settle the terms on which "the advantage"—as Mr. Alfred Beardmore says it is—of having the plaintiff's railway pass through the Beardmore yards should be secured. Their freight business with the Grand Trunk Railway amounted to $100,000 a year. A recent strike on that railway had made the desirability of a second connection very plain and the benefit to the shipper of competition in carriage is obvious. It seems to me to be quite within the scope of the authority of the president of such a company as the Acton company, entrusted with "the general oversight and direction of the business," to arrange and settle the terms on which it should obtain railway connection and shipping facilities.

That authority to make an agreement such as that under consideration might have been conferred by its directors on the president and managing director of a company such as the Acton Tanning Company will scarcely be questioned. That Walter D. Beardmore was held out to the world as having full authority to act for all the interests controlled by

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Beardmore and Company, and that Sir William Mackenzie dealt with him as clothed with that authority is the only fair conclusion from the evidence. This aspect of the case is covered by the judgment of this court in McKnight Construction Co. v. Vansickler[9].

There was no notice to the plaintiff or to Sir William Mackenzie of any limitation on Walter Beardmore's ostensible authority. The letter from Atlantic City of the 28th Oct., 1912, relied on by

[9] 51 Can. S.C.R. 374.

the appellants, had reference not to the terms on which the plaintiffs' railway should enter the Beardmore yards but to its crossing of the Grand Trunk Railway. Having regard to the tenor of that letter, Mr. Walter Beardmore's subsequent formal consent to that crossing would rather strongly suggest that he had consulted his partners and fellow-directors, and had secured their approval and concurrence.

But if that were not the case and if the other partners, who knew what had occurred in connection with the bringing in of the Grand Trunk and were aware that the only arrangement for the entrance of the plaintiff railway had been made with Walter Beardmore, did not mean to acquiesce in his authority to make a binding agreement on their behalf and on behalf of the Acton Tanning Company, their conduct in allowing it to enter their yards and to build its line of railway through them without any suggestion of opposition or of protest—in demanding and accepting as having been promised by Sir William Mackenzie, benefits not usually incidental to railway construction, unless under special agreement, and in failing to institute any proceedings to recover compensation until some months after Walter Beardmore's death,

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four years after the railway had first come in, is to me inexplicable.

On the grounds, therefore, that the late Walter D. Beardmore had actual authority to make the arrangement deposed to by Sir William Mackenzie—that, if not, he had ostensible authority to do so—and that that arrangement has been so far acted upon and acquiesced in by the defendants that they should not now he heard to question his authority to enter into it, I conclude that the agreement, which it has been found was in fact made, is binding upon the defendants and cannot be repudiated by them.

Appeal dismissed with costs.

Solicitors for the appellants: Mowat, Maclennan, Hunter & Parkinson.

Solicitors for the respondents: Boyce, Henderson & Boyd.