1891
*Jan. 30,
*Feb. 2.
*June 22.

THE BRANTFORD, WATERLOO & LAKE ERIE RAILWAY CO. (PLAINTIFFS) ..... } APPELLANTS;

AND

PAUL HUFFMAN (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Construction of railway—Bond—Condition—Mutuality.

H. tendered for the construction of a line of railway pursuant to an advertisement for tenders, and his offer was conditionally accepted. At the same time H. executed a bond reciting the fact of the tender and conditioned, within four days, to provide two acceptable sureties and deposit 5 per cent of the amount of his tender in the Bank of Montreal, and also to execute all necessary agreements for the commencement and completion of the work by specified dates, and the prosecution thereof until completed. These conditions were not performed and the contract was eventually given to other persons. In an action against H. on the bond:

Held, affirming the judgment of the Court of Appeal, that the agreement made by the bond was unilateral; that the railway company was under no obligation to accept the sureties offered or to give H. the contract; that the bond and the agreement for the construction of the work were to be contemporaneous acts, and as no such agreement was entered into H. was not liable on the bond.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Armour C.J. at the trial.

The defendant submitted a tender for the construction of plaintiffs' line of railway and his tender was accepted. Then a bond was prepared and signed by the defendant which, after reciting the fact of defendant having so tendered, contained the following condition:

PRESENT:—Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau and Gwynne JJ.

(1) 18 Ont. App. R. 415.

1891

THE BRANTFORD, WATERLOO AND LAKE ERIE RAILWAY CO. v. HUFFMAN.

"Now the condition of the above written bond or obligation is such that if the said bounden Paul Huffman, to secure the completion of the said railway, shall, within four days from the date hereof, furnish two acceptable sureties to the said company, and deposit to the credit of the said company in Bank of Montreal at Brantford five per cent of the amount of his tender, and shall execute and complete all proper and necessary agreements for the construction and completion of the said railway by the fifteenth day of September now next, and the commencement of the construction of the said road by the fourth day of February now next, and the continuous prosecution thereof thereafter until completion, then the above obligation shall be null and void; otherwise shall remain in full force and virtue."

The defendant did not give the said security or make the deposit within four days, nor did he execute any agreement for the construction of the road, but he notified the company that he abandoned the contract. The contract was afterwards given to other parties and an action was brought against defendant on the said bond.

The action was tried before Armour C.J., who held it not maintainable, there having been no tender to defendant of the agreement to be signed. This judgment was affirmed by the Court of Appeal. The plaintiff then appealed to this court.

Lash Q.C. and *Wilson* Q.C. for the appellants. In a suit for specific performance the defendant could have been compelled to execute the agreement. *Sanderson* v. *Cockermouth Railway Co.* (1); *Hart* v. *Hart* (2); *Robertson* v. *Patterson* (3).

(1) 11 Beav. 497; affirmed on appeal 2 H. & Tw. 327.
(2) 18 Ch. D. 670.
(3) 10 O. R. 267.

1891

THE BRANTFORD, WATERLOO AND LAKE ERIE RAILWAY CO. v. HUFFMAN.

The obligation to prepare the agreement was on the defendant. *Parker* v. *Watt* (1).

On the defence set up that defendant did not know his position when he signed the bond there was an issue for the jury. *Ashby* v. *Day* (2); *Hunter* v. *Walters* (3); *Tamplin* v. *James* (4).

At all events, the court had no power to order plaintiffs, who obtained a verdict for nominal damages, to pay defendant's costs. *Wills* v. *Carman* (5). That would not make the appeal one for costs merely, but deals with a matter of principle.

Osler Q.C. and *Harley* for the respondents. As to the question of costs it cannot be urged successfully, as the court will never interfere on such ground. *Beatty* v. *Oille* (6).

The defendant was induced to execute the bond without understanding its nature and scope. *Vivers* v. *Tuck* (7); *Duke of St. Albans* v. *Shore* (8).

The company had made no financial arrangements for building the road when the bond was signed and was not in a position to assign the performance of the work by contract.

The following cases were referred to: *Mackay* v. *Dick* (9); *Budgett* v. *Binnington* (10); *Marshall* v. *Berridge* (11); *Pearce* v. *Watts* (12); *Brundage* v. *Howard* (13).

SIR W. RITCHIE C. J.—I am of the opinion that the bond in this case was of a most unqualified, unilateral character. There was no acceptance by the plaintiffs of the defendant's tender, nor was there any binding contract on the part of the plaintiffs to give the defendant

(1) 25 U. C. Q. B. 115.
(2) 54 L. T. N. S. 409.
(3) 7 Ch. App. 82.
(4) 15 Ch. D. 215.
(5) 14 Ont. App. R. 656.
(6) 12 Can. S. C. R. 706.
(7) 1 Moo. P. C. N. S. 516.
(8) 1 H. Bl. 271.
(9) 6 App. Cas. 263.
(10) 25 Q. B. D. 320.
(11) 19 Ch. D. 233.
(12) L. R. 20 Eq. 492.
(13) 13 Ont. App. R. 337.

1891

THE BRANTFORD, WATERLOO AND LAKE ERIE RAILWAY CO. v. HUFFMAN.

Ritchie C. J.

the contract. The company could give the contract to anyone they pleased until "all proper and necessary agreements for the construction and completion of the railway" had been entered into. And as the resolution of the board of directors says "a proper agreement satisfactory to the board" had not been entered into, I cannot see how the defendant could furnish two acceptable sureties to secure the fulfilment of a contract which never had an existence, and which might never have an existence, and which the plaintiffs never prepared or tendered, as it seems to me they should have done. The terms of the contract were never settled and agreed on. It is true the commencement of the construction of the railway was to be on the 4th of February, and its completion by the 15th of September. To this day it does not appear that the terms of those proper and necessary agreements had been fixed, ascertained or agreed upon, and until the tender was accepted and these terms had been mutually aranged, surely the defendant was not to deposit 5 per cent. of the amount of his unaccepted tender, or to furnish two accepted sureties to secure the completion of the railway for the construction of which no contract had been agreed on.

For these reasons and for those given by the judges in the court below I think this appeal should be dismissed.

STRONG and FOURNIER JJ. concurred.

TASCHEREAU J.—I would dismiss this appeal. I agree with Mr Justice Osler's reasoning in the court below.

GWYNNE J.—I am of opinion that this appeal should be dismissed. The bond which the plaintiffs procured

1891

THE BRANTFORD, WATERLOO AND LAKE ERIE RAILWAY CO. v. HUFFMAN.

Gwynne J.

the defendant to sign appears to me to have been a clumsy mode adopted by the plaintiffs to extend the time for the defendant putting his tender into such a shape that it should be entertained by the plaintiffs. This the respondent, I have no doubt, understood, and I think he had good reason to understand, to have been the object and intent of the plaintiff in procuring him to execute the bond. The plaintiffs certainly had not entered into any obligation to give the defendant a contract to build their road; they not only reserved to themselves the right at their pleasure or caprice of rejecting the sureties the defendant might offer upon the pretence that they were not acceptable to the plaintiffs, but the terms of the contract were to be matters of subsequent negotiation, which might lead to nothing as the plaintiffs had not bound themselves to anything, as has been ably pointed out in the judgments of the chief justice of the Appeal Court for Ontario and Mr. Justice Osler, to which I can add nothing and in which I entirely concur.

Appeal dismissed with costs.

Solicitors for appellants: *Wilson & Watts.*

Solicitors for respondent: *Harley & Sweet.*