1929

CANADIAN CONSOLIDATED RUBBER CO. (PLAINTIFF) ..... } APPELLANT; *Oct. 17, 18, 21.

AND

1930

T. PRINGLE & SON, LIMITED
AND
THE FOUNDATION COMPANY LTD. (DEFENDANTS) } RESPONDENTS. *Feb. 4.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Architect—Builder—Building perishing in whole or in part within ten years—Vices du sol—Liability of builder acting under employer's architect—Evidence—Onus on builder—Art. 1688 C.C.

The approval and direction of a competent architect, or his omission to ascertain the nature of the soil of the foundation by known and available tests, does not exonerate the builder from the consequences of following such direction or of building on the foundation without making himself sure of its efficiency.

When there has been a breach of warranty of the stability of a building, the onus is on the builder to shew that he is exempted from liability by some exception in his favour, which must be made out (if at all) by legal implication.

Such construction to be put upon article 1688 C.C., respecting the liability of the builder in case of a building perishing in whole or in part within ten years, has been authoritatively settled since 1871 by the decision of the Privy Council in *Wardle* v. *Bethune* (L.R. 4 P.C. App. 33).

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Duclos J., and dismissing the appellant's action.

The material facts of the case are stated in the judgment now reported.

Ls. St-Laurent K.C. and *Errol M. McDougall K.C.* for the appellant.

Geo. H. Montgomery K.C. and *J. A. O'Gilvy* for the respondent T. Pringle & Son Ltd.

Gregor Barclay K.C. for the respondent The Foundation Company Ltd.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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CANADIAN CONSOLIDATED RUBBER CO. v. PRINGLE.

The judgment of the court was delivered by

SMITH J.—The respondent T. Pringle & Son, Limited, pursuant to agreement with the appellant, prepared plans and specifications for a dam to be erected for the appellant in connection with its mill on the North River at St. Jérome, and supervised the carrying out of the work as provided in the agreement. The respondent The Foundation Company, Limited, pursuant to agreement with the appellant, constructed the dam from the plans and specifications so furnished, and under the supervision of the respondent T. Pringle & Son, Limited, the work having been completed in August of 1919.

In March of the following year cracks were discovered in seven of the nine piers of the dam so constructed, which, appellant claims, necessitated extensive repairs and additional works to secure the stability of the dam, which both the respondents refused or neglected to make after request and which appellant, in consequence, was obliged to make at its own cost, which, it is alleged, amounts to $89,612.79. This action is brought to recover this amount from the respondents as damages, for which it is claimed they are jointly and severally liable.

Article 1688 of the Civil Code reads as follows:

> If a building perish in whole or in part within ten years, from a defect in construction, or even from the unfavourable nature of the ground, the architect superintending the work, and the builder are jointly and severally liable for the loss.

The declaration does not expressly state that the claim is based on this article, and if the article were to be regarded as introducing into the law of the province a new statutory liability, questions might arise as to its construction and meaning. Such questions, however, have been settled to a large extent by the decision of the Privy Council in the case of *Wardle* v. *Bethune* (1). There the action was brought before the enactment of article 1688 of the Civil Code, but the appeal was heard after that enactment. At p. 52 of the report it is stated that articles 1688 and 1689 C.C. are declaratory of the law of Lower Canada as it was before the enactment of these articles, and are expressly founded on the case of *Brown* v. *Laurie* (2), affirmed on appeal by the

(1) (1871) L.R. 4 P.C. App. 33. (2) (1851) 5 L.C.R. 65.

Court of Queen's Bench in 1854, and not open to review because incorporated into the Civil Code. At pages 54 and 55 there is the following statement:

> The broad general rule of law established by the case of *Brown* v. *Laurie*—the rule certain for architects and builders in the execution of the works entrusted to them (1)—is that there is annexed to the contract, by force of law, a warranty of the solidity of the building that it shall stand for ten years at least.

It is further pointed out that it was not decided whether this was to be taken as an absolute warranty or with an implied exception of cases in which the building gives way within the time, wholly or in part, from causes that could not have been discovered or removed by due diligence and competent skill, but it was decided that the approval and direction of a competent architect, or his omission to ascertain the nature of the soil of the foundation by known and available tests does not exonerate the builder from the consequences of following such direction or of building on the foundation without making himself sure of its efficiency.

It is also stated (p. 55) that when there has been a breach of warranty of the stability of the building, the onus is on the builder to shew that he is exempted from liability by some exception in his favour, which must be made out (if at all) by legal implication.

To this extent, then, the construction to be placed on article 1688 C.C. is authoritatively settled.

In appellant's factum a long list of authorities in the Quebec courts is cited to shew that it has there been uniformly held that the old law of Lower Canada as stated above and article 1688 C.C. apply to works such as the dam here in question, and this proposition is not contested in the factums of the respondents.

Much was said on the argument as to the onus of proof. On the authority referred to it would seem that on proof by the appellant of the contracts with the respondents and the construction of the work pursuant to these contracts and its failure for reasons stated in the article within the ten years, the onus would be on respondents to exonerate themselves from liability. The respondents, however, contend that the appellant, by alleging specific causes for the failure and by first proceeding to prove failure from these causes,

(1) 5 L.C.R. 65, at p. 69.

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placed on itself the onus of establishing these allegations. It is quite conceivable that a plaintiff, in making a *prima facie* case, might by the same evidence establish the existence of some condition which, without more, might be held to be the cause of the failure, and which, on such finding, would exonerate the defendants. In such a case a plaintiff might very well at the outset undertake to shew that such condition was not the cause of failure, and to establish the real cause. This may have been the reason for the appellant in this case alleging and attempting to prove facts which, as claimed in the declaration, it was not necessary to allege or prove.

The question of onus does not, however, seem to be very material here, because the question of whether or not the failure resulted from the conditions that the respondents claim exonerate them from liability is one of fact as to which there is much contradictory evidence, and as to that fact there is a finding in the courts below in the respondents' favour not arrived at by reason of onus one way or the other, but deduced from consideration of the contradictory evidence.

What has now to be determined is whether or not this finding of fact on the evidence submitted should be reversed as the appellant contends, and, if not reversed, whether or not on that state of fact the respondents are exonerated, or are not to be held to have warranted stability under these conditions found to have existed and to have caused the failure. The conditions that the respondents rely on as exonerating them from liability are established solely by the appellant's witnesses, and are not in dispute.

To understand the relevancy of these conditions it is necessary to consider the design of the dam, and how, according to that design, it was intended to be operated to accomplish the object for which it was built.

(Smith J. then makes an extensive review of the voluminous evidence produced at the trial by the parties and adds:)

According to the decision of the Privy Council referred to, (1) article 1688 of the Civil Code imported into the contracts between the appellant and the respondent a warranty of the stability of the dam for ten years. This lia-

(1) L.R. 4 P.C. App. 33.

bility would not be different from the liability on such a warranty expressly written into the contracts, and would not apply where the use of operation is not in compliance with the design, and the failure is the result of departure in use or operation from the design. The departure from the designed mode of operation in this case is unquestionable, and the failure resulted from that departure, according to the finding already discussed. It is contended, however, that the respondents are nevertheless liable because they failed to instruct the appellant how to operate the dam according to the design. No authority is cited in support of this proposition and article 1688 C.C. does not purport to impose such an obligation. If it were deemed to exist, designers and contractors would be compelled at their peril to give instructions complete to the minutest detail as to the manner of use and mode of operation of every structure. In this case the appellant's engineers had, as such, expert knowledge of the construction, use and operation of dams. They had prepared plans themselves for the proposed development and collaborated with respondent T. Pringle & Son's engineer in the preparation of the plans adopted, and therefore knew all about the design and mode of operation. Henthorne says they had all the information required. Ruiter says he knew enough himself to take out the stop logs. He says Jenner, one of the respondents' engineers, told him the dam would operate itself, and, being asked what was meant by that, Mr. Ruiter answers,

He meant by that, "You would only have to take out the stop logs when the high water came." Those were just the words he said.

Later he tries to explain this away by saying he did not understand the question, but that does not change his statement at all, because he was giving the words Jenner used, and they did not in any way depend on the form of the question.

(Smith J. then continues the review of the evidence and concludes that, upon the evidence, the appeal should be dismissed with costs.) *Appeal dismissed with costs.*

Solicitors for the appellant: *Casgrain, McDougall & Demers.*

Solicitors for the respondent T. Pringle & Son, Ltd.: *Brown, Montgomery & McMichael.*

Solicitors for the respondent The Foundation Company, Ltd.: *Lafleur, MacDougall, Macfarlane & Barclay.*