

1919  
 \*Feb. 27, 28.  
 \*May 19.

HENRY McCLELAN AND OTHERS } APPELLANTS;  
 (DEFENDANTS) . . . . . }

AND

LEVI DOWNEY (PLAINTIFF) . . . . . RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME  
 COURT OF NEW BRUNSWICK

*Statute—Statutory powers—Commissioners of sewers—Constitution of board—Refusal to act or resignation—Rate—Majority.*

In Albert County, N.B., under the Act respecting Sewers and Marsh Lands, the parish of Hopewell is divided into districts each of which may elect a commissioner, all the persons so elected to be "Commissioners of Sewers" for the parish. Section 8 of the Act provides that "if the proprietors of any district fail to elect a commissioner, the remaining commissioners shall act and shall be "the Commissioners of Sewers." By section 18 "no rate shall be made without the consent of a majority of the commissioners; but one commissioner so elected may superintend work in progress and employ workmen for that purpose." Three commissioners were elected for the parish, one of whom refused to act and another tendered his resignation which was accepted by the third. Work having been done on the marsh lands the single commissioner made a rate for payment of the cost by the several districts. In an action for moneys due in respect to such work,—

*Held*, reversing the judgment of the Appeal Division (45 N.B. Rep. 90), Idington and Brodeur JJ. dissenting, that the one commissioner, though constituting the board for other purposes, had no authority to make such rate as he could not be a majority of the commissioners which was necessary under section 18 to do so.

*Per* Anglin J. It is doubtful that the third commissioner had authority to accept the resignation of his colleague and if not there were two on the board and the rate was not made by a majority.

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick (1) affirming the judgment at the trial in favour of the respondent.

In applying the provisions of the Act R.S.N.B. [1903] ch. 159 "An Act respecting Sewers and Marsh Lands" to the conditions existing in Albert County as disclosed in the above head-note Mr. Justice White who tried the case decided all the material issues in favour of the respondent and his judgment was affirmed by the Appeal Division (1) Crockett J. dissenting. Only one of these

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 \*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur andIGNAULT JJ.

issues was dealt with by the Supreme Court of Canada on this appeal, namely, whether or not the sole Commissioner of Sewers who remained in office after one of the three elected had refused to act and another had tendered his resignation which was accepted, could fix a rate for payment by the districts of the parish of the cost of work done by the board.

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Mr. Justice Crockett based his dissent from the judgment of the Appeal Division on the incapacity of the sole remaining commissioner to make the rate notwithstanding the fact that it was done in obedience to a writ of mandamus ordering the "Commissioners of Sewers" to levy the assessment. The majority of the judges in the Supreme Court of Canada, in reversing the judgment appealed against, contented themselves with adopting the reasoning of this dissenting opinion, Mr. Justice Anglin adding the view ascribed to him in the head-note. The appeal was allowed with costs.

J. B. M. Baxter K.C. appeared for the appellants and Teed K.C. for the respondent.

*Appeal allowed with costs.*

Solicitor for the appellants: *M. B. Dixon.*

Solicitors for the respondent: *M. & J. Teed.*