THE CITY OF SAINT JOHN (DEFENDANT) ..... APPELLANT;

AND

JOHN J. GORDON (PLAINTIFF) ..... RESPONDENT.

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*Feb. 28, 29.
*May 7.

THE CITY OF SAINT JOHN (DEFENDANT) ..... APPELLANT;

AND

ROBERT QUINLAN AND ANOTHER (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Lease—Covenant to pay for improvements—Buildings and erections —Foundation—Piling and filling in—Intention of lessee.

The City of St. John leased certain mud flats, the lease containing a covenant that if the lessees should "put up any buildings and erections for manufacturing purposes" thereon the same, at the expiration of the term, should be appraised in the manner provided and the city should have the option of paying the appraised value or renewing the lease. On expiration of a term the city elected to pay.

Held, that the lessees were entitled to be paid the value of piling and filling in on said lots to form a foundation for buildings erected and in existence at the expiration of the lease, but not for such piling and filling in at a place where no buildings existed, but upon which buildings were intended to be erected for manufacturing purposes.

APPEAL from a decision of the Supreme Court of New Brunswick varying the decree of the judge in

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, and Anglin JJ.

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equity and granting the full claims of the respective plaintiffs.

The City of St. John leased to the New Brunswick Red Granite Co. certain lots on the west side of the harbour which at full tide were covered with water. By the terms of the lease the lots were to be used for manufacturing purposes only and it contained a covenant that if buildings and erections for such purposes were put up by the lessees they should be appraised at the end of the term and the city, at its option, would pay their value or renew the lease. The Red Granite Co. sold their interest in the lease to the appellants, who respectively obtained new leases from the city with the same covenants. When so transferred a stone-cutting plant was on the lots in order to establish which the original lessees had to sink piles for a foundation and to overcome vibration had to fill in the lots with stone and other material.

The city expropriated a portion of these lots for the purpose of widening a street, and in the expropriation proceedings the Supreme Court of New Brunswick awarded the lessees the value of the piling and filling in above mentioned. The judgments on these proceedings are reported. See *Sleeth et al.* v. *City of St. John; Gordon* v. *City of St. John*(1).

On the expiration of one term of the respective leases the buildings and erections were appraised, the valuators allowing nothing for the piling and filling in. The city elected to pay and the lessees filed a bill in equity to set aside the award. It was set aside by the Chief Justice sitting as a judge in equity, who held that the lessees were entitled to be paid the

(1) 38 N.B. Rep. 542; 39 N.B. Rep. 56.

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value of the piling and filling in which served as a foundation for buildings and erections existing on the lots when the lease expired. The Supreme Court of New Brunswick varied this decree in accordance with its decision in the expropriation case. The city appealed.

Baxter K.C. for the appellant. The plaintiffs seek compensation for piling and filling in where no buildings or erections exist. But these are not, in themselves, buildings or erections. See *Adamson* v. *Rogers* (1). And if they could be deemed erections they are not erections in the nature of buildings which they must be under this covenant. *Ex parte Benwell, In re Hutton* (2). See also *Truesdell* v. *Gay* (3).

Teed K.C. for the respondents. The case is concluded by the judgment of the Supreme Court of New Brunswick in *Sleeth et al.* v. *City of St. John* (4). See *London Dock Co. and Trustees of Parish of Shadwell, in re* (5), at page 32; *Flitters* v. *Allfrey* (6); *Tait* v. *Snetzinger* (7).

Baxter K.C. in reply. As to *res judicata* see *The Queen* v. *Hutchings* (8), at page 304.

THE CHIEF JUSTICE.—I would allow this appeal with costs.

DAVIES J.—This is an appeal from the judgment of the Supreme Court of New Brunswick upholding

(1) 26 Can. S.C.R. 159.
(2) 14 Q.B.D. 301.
(3) 13 Gray 311.
(4) 38 N.B. Rep. 542; 39 N.B. Rep. 56.
(5) 32 L.J.Q.B. 30.
(6) L.R. 10 C.P. 29.
(7) 1 Ont. W.N. 193.
(8) 6 Q.B.D. 300.

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but varying a decree made by Chief Justice Barker sitting as a judge in equity setting aside certain appraisements made by valuators or arbitrators selected under the provisions of certain leases made by the City of St. John (appellant) to the respondents (plaintiffs) respectively, John J. Gordon and Robert Quinlan and John J. Gordon administrator of the estate and effects of John Sleeth of certain water lots in the City of St. John. These leases contained provisions for their renewal at their expiration at the option of the city or in case of a decision not to renew for the payment of the value of the erections and buildings on the premises when the lease expired in November, 1906, and which had not been included in the compensation awarded by McLeod J. for a part of the leased premises which the city had expropriated a few days before the leases expired. The covenants in the leases are identical and as precisely the same questions arise in each of the cases they have been consolidated for the purpose of argument and decision.

The dispute in the case now before us arose as stated in Chief Justice Barker's judgment

> over the lessee plaintiff's claim for compensation for the earth and stone deposited in the lots for the purpose as they alleged of supporting and stiffening the crib work erected as a foundation for the buildings (which they had constructed on and over the crib work) and which was necessary to prevent the vibration incident to the use of steam engines and the support of heavy weights and necessary in the carrying on of manufacturing for which the lots were by the terms of the leases to be used.

The contention on the part of the city was that this filling was in no sense either a building or erection within the meaning of those words as used in the covenant in the lease providing for compensation

being made for them in the event of the city, the landlord, deciding not to renew the lease.

The learned Chief Justice found that

> the arbitrators proceeded on the assumption that the filling in was no part of the erections and they, therefore, excluded its value, if it had any, from their consideration.

He, therefore, set aside their valuation or appraisement and made a decree declaring that the words "erections and buildings" for which the tenants under the leases in question were in certain events and contingencies entitled to be compensated

> did not include any piling, capping or woodwork on the said demised lots or the filling in of the same except where such piling, capping or woodwork should on the first day of November, 1906 (the day of the expiration of the leases), be in actual use as a foundation for a building for manufacturing purposes; and that in that case the plaintiff is entitled by virtue of the said covenant to have included in the appraisement thereunder such amount as the appraisers may find to be the value on the said 1st November, 1906, of such foundation including therein the value of any earth or other material filled in such formation which was necessary to strengthen and support the same so as to render it a safe and suitable foundation.

The Supreme Court of New Brunswick on appeal refused to accede to the limited construction of the words "erections and buildings" contended for by the City of St. John which was broadly, as re-stated in this court, that stone or other material filled in upon the water lots was not "a building or erection" within the meaning of those words in the covenant no matter what might have been the object and purpose for which such stone or other material was so filled in and irrespective of such stone or other material being at the expiration of the lease in actual use as a foundation for a building erected over them for manufacturing purposes. The Supreme Court adopted and confirmed the decree as far as it went and substan-

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tially for the reasons given by the Chief Justice, but it went further and varied the decree, by adding words to the effect that the compensation to which the tenants were entitled should extend not only to such filling in as was in actual use as a foundation for a building actually existing for manufacturing purposes at the termination of the lease, but to such as had been placed on the lot with the intention of using it as a foundation for a building intended afterwards to be erected, and whether such intention had been carried out or not.

This variation and addition to the equity decree seems to me to go much further than the language of the covenant justifies. It opens up a wide field of speculation and in a case such as that before us where filling in may have been made for more than the one and only purpose and object for which compensation could be assessed, carries us away into the region of mist and doubt and makes it incumbent upon us to determine the issue with respect to the filling forming or not forming part of the erections and buildings upon the land when the lease expired, not upon the facts and circumstances as they then existed, but upon the doubtful frame of mind of the lessee when he made the filling. I do not think the covenant providing for compensation extended beyond buildings and erections for manufacturing purposes actually existing at the time of the expiration of the lease. It did not in my judgment cover erections which not being in themselves made or suitable for manufacturing purposes the tenants may have a more or less vague intention of turning into a manufacturing establishment.

Our attention has not been called to any evidence

or proved facts shewing the existence of conditions to which the variation in the degree would be applicable. I do not understand that such an extended right of compensation dependent upon intention was argued before the Chief Justice in the present case or before the Supreme Court of New Brunswick in the cases decided in the expropriation proceedings before Mr. Justice McLeod, and which the respondents contend finally settled the law as to the construction of the covenant in question. I do think that if adopted the variation would give rise to interminable difficulties and open up a wide field of doubtful speculation. I think the true construction of the covenant should be limited to the foundation of buildings or erections for manufacturing purposes actually erected or existing at the expiration of the lease as distinguished from work done with an intention of making it part of a manufacturing building which intention was never carried into effect or which for many reasons may have changed before the expiration of the lease.

No formal rule, order, judgment or decree was, we are told, ever taken out in the applications made to the court to instruct Mr. Justice McLeod as to what damages he should allow or disallow and we are driven to find out what was really decided from the reasons given by the learned judges who determined the case. There was no stated case; no issue joined and the court were, of course, only asked to construe the covenant in the lease respecting compensation in so far as it dealt with the practical facts relating to the expropriated portions of the lots as to which Mr. Justice McLeod was assessing damages. The question appears to have come before the court three

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times. We have reports of two of these hearings and one is unreported. As to this latter it appears that Mr. Justice Landry and Mr. Justice McLeod, both of whom sat in the case, do not agree as to what was decided.

Mr. Justice McLeod says that in this unreported case Chief Justice Barker

> explained that his previous reported judgments were intended only to cover the piling and filling in necessary for the foundations of the buildings on the lot.

Mr. Justice Landry regrets that his recollection of the unreported decision is not in accordance with that of McLeod J., but he does not say in what particular McLeod J.'s statement is at variance with his own recollection, or what his recollection as to the effect of that judgment is.

However, we have the fact that Mr. Justice McLeod assessed the damages on the basis of his understanding of the judgment and that from his award there was still another appeal to the full court. McLeod J. quoted the notice of appeal given in that case which shews that the question in controversy was whether the lessees were entitled to have the value assessed to them of the piling, stringing and capping and filling over the whole of the expropriated lot taken from the plaintiff, or only of those works under the buildings on the said portion so expropriated. No question was raised as to the right of the plaintiff extending to those portions of the piling and filling, etc., on the lot on which no buildings existed, but over which *buildings were intended to be erected for manufacturing purposes.* This latter part does not seem to me to have been mooted or discussed by counsel, and though there is some language in the reported judg-

ments which might be interpreted as covering the variation in the decree made by the Supreme Court and now before us in this appeal, such language in view of the reported arguments of counsel and of the two questions which Barker C.J. says in his judgment reported in 39 N.B. Rep., at p. 59, were before them then to be settled, must be considered merely *obiter*.

The fact that Barker C.J. in giving his judgment in the case now under appeal adopted and followed what McLeod J. says was his explanation of his reported judgment in 39 N.B. Rep., together with all the facts I have cited convince me that no judgment or decision of the Supreme Court of New Brunswick was ever given or pronounced upon the special point on which the Appeal Court of New Brunswick has varied Chief Justice Barker's decree which can be set up or pleaded as *res adjudicata* upon the point on which the judgment in appeal varies the decree of Chief Justice Barker. Even if the judgment had the effect contended for I wish to be understood as not expressing any opinion as to whether it could or could not support a plea of *res adjudicata* in this case.

The extent to which the decree as varied can be supported must, therefore, depend upon its merits and not upon the point having been *res adjudicata*.

For my own part, I am of the opinion that the decree as pronounced by Chief Justice Barker goes to the utmost limit of the proper construction of the covenant. For the reasons given by him in pronouncing the decree now in appeal and also for those given in his previous reported judgments in 38 and 39 N. B. Reports, pages 543 and 57 respectively, I am of opinion that decree should stand. I think he reached

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a fair legal conclusion as to the covenants in the leases covering and extending as well to the foundations necessary to uphold and maintain the manufacturing buildings erected on the lots and being there at the time of the expiration of the lease as to the buildings themselves. The substructure necessary to uphold and keep useful for manufacturing purposes the buildings and erections constructed upon them were as much part of the erections and buildings as those terms are used in the covenants of the lease as the superstructure itself. It mattered not whether that substructure was of concrete, of stone cemented with mortar, or of piles strengthened either by timber bolted to them or by stones or other filling placed for the purpose of strengthening and keeping them in place and steady so as to enable the contemplated manufacturing to be carried on. In each and every one of the cases suggested the substructure would, I think, form part of the superstructure within the meaning of the words in the covenant.

On this main point I am in full accord with the original decree and with the judgment affirming it of the Appeal Court. For the reasons given by me, however, I am unable to concur in the reasoning of Barry J. with whom the rest of the court concurred as to the variation made in the decree. Nor, as I have said, do I think the doctrine of *res adjudicata* can be invoked to sustain the variation of the judgment which I think cannot be sustained on its merits.

The conclusions I have reached are that the decree of the Chief Justice sitting in the Court of Equity correctly declares the meaning and extent of the covenant in the leases on which the tenants are entitled to have their compensation assessed; and that

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the variations of that decree made by the court *en banc* cannot be supported. That the prior judgments of the Supreme Court of New Brunswick, reported in the 38th and 39th volumes of the N.B. Reports, do not, properly interpreted, conclude the questions before us so far as the variations in the decree are concerned, and cannot be set up as *res adjudicata* of the present appeal. That these variations of the decree must, therefore, be supported, if at all, on their merits alone, and that for the reasons I have given they go beyond what I think the covenant calls for or justifies.

I would, therefore, allow the appeal with costs in this court and in the Court of Appeal, leaving the costs on the cross-appeal to the Appeal Court as disposed of by that court.

IDINGTON J.—The appellant leased what may be aptly called water lots with the apparent intention that they should be built upon for manufacturing purposes. At least the lessee or successor was, if not given a renewal at the expiration of the term, to be compensated for such "buildings or erections for manufacturing purposes upon the * * * demised premises" as might have been erected thereon by the lessee or those claiming under him. If the value of such buildings or erections could not be agreed upon, appraisers were to determine same.

In January, 1907, the appraisers had made their awards in the cases before us, and in the following April the city tendered the respective sums thus awarded.

It had happened that the city prior to these proceedings had appropriated some small part in order to widen a street. In determining the damages to be

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paid in respect of the expropriation, a question arose as to the right of the respondents there concerned, to have an allowance made for some piling and filling in between the piles upon which the buildings upon that part rested. I suspect the refusal of the money tendered herein was caused by a desire to see the result of that rather prolonged litigation relative to expropriation and by an intention if the respondent concerned therein was successful, to set up the like claim to that made therein as a ground for attacking the award of the appraisers.

In 1909, a bill in equity was filed by each lessee or successor to set aside the award in regard to his or their respective claims. I may be permitted to doubt if in the then state of the law such a proceeding was open to them as against an award good on its face and in relation to which neither the good faith nor capacity of the appraisers could be impeached, and no very palpable mistake had occurred.

It does not seem to have been desired to take that line of defence and without objection evidence was given by the appraisers of the matters they had in fact considered, and omitted to consider, in estimating the amount to be allowed.

Chief Justice Barker finding error made manifest in this way set the awards aside. From his judgment a consolidated appeal took place to the Supreme Court of New Brunswick. That court modified the decree of Chief Justice Barker and in doing so expressed an opinion that the appraisers might have gone somewhat further than he had intimated permissible.

The city having appealed from this judgment it is now contended that the result of the litigation in the

expropriation case was to create a *res judicata* governing, in some way I do not understand, the determination of this case.

Mr. Justice McLeod on a second trial of said expropriation proceedings gave judgment therein which was confirmed by the full court and must be taken to be the final pronouncement in that litigation in respect of what seems to have been actually in question.

Sitting as an appellate judge in this case he speaks referring to same as follows:—

> Under that judgment the damages in the case before me were assessed simply for the piling and filling in intended for and forming a part of the foundation of the buildings and this Court, as I have said, in Hilary Term, 1909, held that that assessment was right and in accordance with the judgment reported in 39 N.B.R., page 56.

In the absence of the record, which is not produced, I think this must be taken as clearly defining the limits of any question of *res judicata,* that by any chance might be held here to bind anybody.

I have not overlooked a statement of Mr. Justice McLeod in the earlier judgment in appeal indicating that some land piled and filled had not been covered by the buildings. I reconcile it with above by observing the small part of land involved, and the possibility that the piling and filling in may, though not directly under the building, have yet been useful to maintain its stability. Clearly, it is in that regard that Chief Justice Barker and others treated the matter. The stability given the buildings in question seems the key-note of his judgment and of others in that case.

As I do not quarrel with Chief Justice Barker's judgment so far as it relates to the allowance of the value of the stability given to these buildings in question here by the filling in between the piles on which

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the buildings rest, I fail to see how I can make use of the wealth of learning the agitation of the question of *res judicata* herein has produced.

Counsel have very properly tried to make up for a defect in the record, but I do not think they can fairly be supposed to have intended going further than the facts as stated by Mr. Justice McLeod. All they designed doing was to put the record on a fair basis.

It is said by counsel for appellant that one of the cases before us involves no more than filling in between piles under buildings erected, to render them stable.

Counsel for respondent did not clearly concede this, though I suspect it is all that is in truth involved.

In regard to the other case respondent's counsel was quite clear the filling extended much further and involved much more. If so I fail to see how the *res judicata* can arise to help the plaintiff, though I can see how if given effect to, it may, if applicable, defeat him ultimately.

I am thus brought to consider the real issue in this case, and consequently the only issue we can properly pass upon in appeal.

The suit is one purely and simply to set aside the award. Such is the only express prayer of the bill and the general prayer can only extend to the things incidental thereto.

No question is raised now of Chief Justice Barker's right to set the award aside upon the evidence adduced as it was without objection; nor, admitting that evidence, can there be any question in my mind but that the award was properly set aside.

Neither directly nor incidentally to reaching such

a conclusion can the question of *res judicata* have any place.

It would, for the learned Chief Justice in doing so, and for an appellate court reviewing his work, be quite right and proper to elucidate the law relevant to the parties' rights as presented to the appraisers, and as existent at that time when they acted, in order to arrive at a proper determination as to whether or not they had discharged their duty or exceeded their powers.

In such cases the same or future appraisers being called on to act ought to give due heed to the opinion of the courts thus incidentally expressed.

But to introduce something in the nature of *res judicata* which had transpired a year or two after the award so affecting the rights of the parties and ask the court to pass upon it as we are asked to do here is beyond the power of the court unless it had power given it to direct something further to be done. All that was before the court was the single question of whether or not the appraisers had in the state of things before them properly discharged their duty. That question answered as it is by affirming the learned Chief Justice the court was *functus officio*.

I tried, on the argument, to make this point clear, and, if possible, obtain an answer to it, but was unsuccessful.

It occurred to me that there might be some statutory provision enabling, as in England and elsewhere, a power of direction given a court, so seized of a case as to set aside an award, to direct a further reference or remit the matter back to the appraisers with proper instructions.

And, of course, if there existed such a power it

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might be competent for the court to direct the lines upon which the appraisers should proceed and incidentally thereto to pass upon the question now raised of *res judicata* or its equivalent, the law that is to be applied in future proceedings.

Counsel were unable to refer to any such power and seemed to concede that such legislation as had taken place was not in force so far as to be applicable to this case.

The courts of common law had no power until the statute 9 & 10 Wm. III. ch. 15, to set aside an award. Of course, it might happen, when sued upon, to be held invalid by reason of what appeared on its face.

This common law jurisdiction was invoked thenceforward in cases where the submission could be made a rule of court, which was in modern times obtained, as of course, by a side bar rule.

The Court of Chancery had been resorted to and exercised a jurisdiction founded, as Story puts it, on the ground of relief to be given in cases of fraud, accident or mistake.

This state of things continued until the "Common Law Procedure Act, 1854," when the law took a new starting point of a growth I need not dwell upon.

The cases since are worth little as guides in this connection unless regard is had to the possible statutory foundation therefor.

If, as counsel seem to admit, there is no statute bearing on the question here, then the court's duty ended when the award was set aside.

It has occurred to me that there may have arisen in New Brunswick a local practice which we ought to observe and which may justify formulating the opinion of the court in the decree or judgment. I would not wish nor do I presume to disturb such a practice.

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But when relied upon, I cannot see how it can go or be taken further than an expression of opinion of the grounds for setting aside the award and thus, as already suggested, having that weight due to judicial opinion in such case.

In the absence of statutory authority the court can have no power to interfere with the future of the determination of the dispute; and thus certainly no more right to entertain the question of *res judicata* which intervened after the award, than it would if a release or aught else had been put forward.

I may say I have sought to find another state of the law for I think it to be regretted that we cannot refer this case back to the appraisers with binding instructions for their guide.

I think, therefore, Chief Justice Barker's judgment should not have been interfered with by the Court of Appeal.

If I had to pass upon the case as originally before him, I possibly would have expressed the view, that if a building had been actually in process of erection for manufacturing purposes, and had only got so far as the foundation, consisting of piling and filling in, it might be worth while, considering the uncompleted building, if good reason given to shew it was the result of a definite settled purpose merely unexpectedly broken in upon by the landlord's desire to terminate the lease.

So far as I can see there was nothing of this sort in the case. I suspect if there had been, we should have heard of it.

To go further would seem, I submit with respect, to be flying in face of the express language of the covenant.

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Even what I suggest as possible in such a case may go further than the express language, but is it not implied ?

In going thus far I feel I may be trespassing when we have no power to direct.

I have not overlooked the few cases where even before the "Common Law Procedure Act" a reference back was had at common law to complete the execution of the duty the arbitrators had assumed.

Nor have I failed to consider, though no point was made of it, the difference between appraisers and arbitrators.

The sum and substance of the matter is, that where parties have chosen a private forum no one has a right to interfere in the way of managing, controlling or directing that forum, so long as it keeps within its limits as defined in the contract constituting it; and even then the court, unless empowered otherwise by statute, can go no further than set its award aside.

I repeat that is all that was prayed for here.

The appeal should be allowed, as an interference for which there was no warrant, with costs here and in the Supreme Court of New Brunswick save as to the costs of cross-appeal therein, as to which the order providing therefor should stand as to such costs.

DUFF and ANGLIN JJ. concurred in the opinion expressed by Mr. Justice Davies.

Appeal allowed with costs.

Solicitor for the appellant: *J. B. M. Baxter.*

Solicitor for the respondents: *M. G. Teed.*