Privy Council Appeal No. 78 of 1917.

The Westholme Lumber Company (Limited) - *Appellants,*

v.

The Corporation of the City of Victoria and Others - - - - - - - *Respondents,*

FROM

THE COURT OF APPEAL OF BRITISH COLUMBIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH OCTOBER, 1917.

Present at the Hearing:

LORD PARKER OF WADDINGTON.
LORD STRATHCLYDE.
SIR WALTER PHILLIMORE, BART.

[*Delivered by* LORD STRATHCLYDE.]

The appellants carry on business as contractors in the Province of British Columbia, and in December 1911 they undertook the construction of a waterworks system between Sooke Lake and the City of Victoria in that province, a distance of about 20 miles. The contract is expressed in writing. It is lengthy and elaborate in its provisions, and *inter alia* contains the following clause:—

"46. Understanding. The contractor hereby distinctly and expressly declares and acknowledges that, before the signing of the contract, he has carefully read the same, and the whole thereof, together with, and in connection with, the said plans and specifications; that he has made such examination of the contract and of the said plans and specifications, and of the location where the said work is to be done, and such investigation of the work required to be done . . . . . as to enable him thoroughly to understand the intention of same . . . . . and distinctly agrees that he will not hereafter make any claim or demand upon the purchaser based upon or arising out of any alleged misunderstanding or misconception on his part of the . . . . . stipulations" . . . . . .

of the contract. It may be observed, in passing, that it was not maintained, on behalf of the appellants, that they laboured under any misconception regarding the work which they were called

upon to perform. For upwards of a year they continued in the performance of the work, and from time to time received payments to account, all under and in terms of the contract. Finally, although they abandoned the work on the 14th April, 1913, they did not abandon the contract. On the contrary, they insisted upon being allowed to go on and complete the work in terms of the contract. And never, until the writ in this action was issued, did they say or suggest that the work which they had executed, or desired to continue to execute, was not work under the contract. These simple and undisputed facts seem to their Lordships to be fatal to the appellants' present contentions. For what they seek in this action is (1) to have the contract set aside on the ground that they were the victims of fraudulent misrepresentation, but for which they never would have entered into the contract; (2) to have 500,000 dollars of damages on account of the fraud practised upon them; and (3) to have a *quantum meruit* for the work actually performed by them under the contract, on the ground that, as they now say, it was essentially different from the work they undertook. The case was tried on a number of issues, mainly, if not entirely, irrelevant, before Mr. Justice Murphy in the Supreme Court of British Columbia, and after a prolonged enquiry, in which the learned Judge was assisted by two Assessors (engineers), the action was dismissed. The contractors appealed, but the Judges of Appeal unanimously sustained the judgment of the Trial Judge. Their Lordships see no reason to differ from the conclusion arrived at by both Courts in British Columbia. It would be idle to review the facts and the reasoning on which the able and exhaustive judgments appealed against rest. The main ground on which the challenge here of the validity of the contract was based was that the route which the pipe was to traverse had not been surveyed at the time when the plans and sections were issued to the contractors, and that the route actually chosen and followed differed from the route contemplated when the contract was made. To use the words of Mr. Justice Galliher:—

> "There was no location of the line upon the ground. There was insufficient *data* upon which what I understand as an approximate estimate of quantities could be based, and in a country of the nature of that through which this waterworks scheme was being constructed, any material change in location might, and actually in this case did, greatly alter quantities."

But from the very outset of the work and throughout its whole course the contractors knew very well that the pipe was not to follow the precise route shown on the plans. It appears that there were certain stakes in the ground which indicated the general location of the line of pipes, within reasonable limits. The stakes were not prepared for that purpose; but they served the purpose. And the whole line was staked as rapidly as the work required and in advance of the contractor's requirements. This was the method pursued without the smallest objection on the part of the contractors, who for their

work done from time to time claimed and received payments to account on the basis of the unit prices set out in their tender. It is true that the diversion of the line from that shown on the plans may have largely increased the quantities of work done, and also its character. More excavation and specially more rock excavation than was shown in the specifications may have been rendered necessary. But this was not fraudulent misrepresentation, and certainly was not misrepresentation but for which the contractors would never have engaged to perform the work. The best evidence of that is that, from the beginning and throughout, they saw exactly what they were called upon to do, and they did it without protest or remonstrance, never once suggesting, until this action was raised, that it was not contract work they were performing all the while. Under these circumstances it is impossible to resist the conclusion reached by the learned Judges in the Court of Appeal that—

> "For months before that time (the time when the contractors were finally obliged to abandon the work) they knew of all the matters which they now complain of as fraudulent, but took no steps and made no complaint about fraud being practised upon them—in fact, they must be taken to have affirmed the contract after full knowledge."

In truth the appellants were not the victims of any fraudulent misrepresentation whatever, and made no complaint because they had none to make. Increased quantities and more rock work merely added to the contractors' profits, as the Trial Judge advised by his Assessors found. To speak of a contractor being cheatedby being asked, with his eyes open, to undertake such work is idle. The conduct of the appellants throughout makes it clear that they considered all the work they actually performed down till the date when they ceased operations was work done under the contract, which assuredly it was. The conclusions drawn by the Trial Judge from the evidence, oral and documentary, seem to their Lordships to be sound, and no serious attempt was made to impugn them. It was agreed by Counsel for the respondents that nothing decided in this action will affect any claims which the appellants may have under the contract or the respondents' counter-claim. But inasmuch as the respondents' engineer, Mr. Meredith, seems to have been personally much mixed up in the controversies which have arisen under this contract, Counsel for the respondents undertook that a neutral engineer would be named in place of Mr. Meredith to decide such questions as by the contract are referred to the determination of the engineer. This undertaking was, of course, given subject to the understanding that the respondents' rights under the Contract of Indemnity, dated the 2nd December, 1912, were in no way affected thereby. Their Lordships will therefore humbly recommend His Majesty to refuse the appeal and to affirm the judgments appealed against. The appellants will pay to the respondents the costs of the appeal.

In the Privy Council.

THE WESTHOLME LUMBER COMPANY (LIMITED)

v.

THE CORPORATION OF THE CITY OF VICTORIA AND OTHERS.

DELIVERED BY

LORD STRATHCLYDE.

PRINTED AT THE FOREIGN OFFICE BY C. R. HARRISON.

1917.