Privy Council Appeal No. 18 of 1923.

The United States of America and another - - - - - *Appellants*

v.

Motor Trucks, Limited - - - - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY 1923.

Present at the Hearing :

EARL OF BIRKENHEAD.
VISCOUNT HALDANE.
LORD SUMNER.
SIR HENRY DUKE.
MR. JUSTICE DUFF.

[*Delivered by* THE EARL OF BIRKENHEAD.]

The present dispute, like so many others, had its origin in the sudden termination of the Great War. The entry of the United States of America into that war, and their desire to add to the resources already existing in that country, and available for the manufacture of warlike munitions, led to a number of contracts with Canadian firms. Amongst others the respondents to this appeal, Motor Trucks, Limited, who were carrying on a manufacturing business in the City of Brantford, in Ontario, entered into a contract dated the 18th May, 1918, with the United States Government. In the opinion of the Board the operative clauses of this contract were superseded by a later and binding contract, referred to hereafter as "The Settlement Contract," which it will be necessary to examine with some

care at a later stage. But although, in the view which their Lordships have formed, the contract of the 18th May has ceased to be a decisive instrument for the purpose of determining the rights of the parties, some reference to its provisions is necessary to make the matter intelligible. In this connection the most important clause of the agreement is contained in Article VIII, which for convenience is here set out :—

"ARTICLE VIII.—This contract being necessitated by a state of war now existing between the United States and certain foreign countries, it is desirable and expedient that provision be made for its termination upon fair and equitable terms in the event of the termination or limitation of the war, or if in anticipation thereof or because of changes in methods of warfare the Chief of Ordnance should be of the opinion that the completion of this contract has become unnecessary. It is therefore provided that at any time, and from time to time, during the currency of this contract, the Chief of Ordnance for any of the foregoing reasons may notify the contractor that any part or parts of the shell herein contracted for then remaining to be delivered, shall not be manufactured or delivered.

"In the event of the termination of this contract as in this article provided, the United States will inspect the completed shell then on hand, and such as may be completed within thirty (30) days after such notice, and will pay to the Contractor the price herein fixed for the shell accepted by and delivered to the United States. The United States will also pay to the Contractor the cost of the component materials and parts purchased by the Contractor for the performance of this contract and then on hand in an amount not exceeding the requirements for the completion of this contract, which shall be in accordance with the specification referred to in Schedule I hereto attached, and also all costs shown by the contractor to have been theretofore necessarily expended and for which payment has not previously been made and all obligations necessarily incurred solely for the performance of this contract of which the Contractor cannot be otherwise relieved. It is understood and agreed that should any such cancellation occur of the total of two hundred and fifty thousand (250,000) shell, as aforesaid, the Contractor will be entitled to reimbursement for the cost of the increased facilities described to the extent of an amount computed by multiplying the number of shell cancelled by a unit figure, obtained by dividing the cost of the increased facilities by the total number of shell named in this contract, namely, two hundred and fifty thousand (250,000) shell. This is upon the Contractor's representation that, prior to the execution of this contract, the Contractor's facilities were inadequate for the performance of the contract and the Contractor agreed to provide and erect the necessary buildings, equipment, machinery, tools, and other facilities at his own cost, which increased facilities in addition to the Contractor's normal facilities were required to enable the Contractor to perform this contract. The Contractor shall file, at the earliest practicable time, with the contracting officer a schedule of the kind and cost of all such increased facilities. To the above may be added such sums as the Chief of Ordnance may deem necessary to fairly and justly compensate the Contractor for work, labour and service rendered under this contract.

"Title to all such component material and parts paid for by the United States under this article shall, immediately upon such payment, vest in the United States.

"The United States may refuse to make any payment or to reimburse the Contractor for or on account of component material or parts intended to form a part of the shell to be delivered under this contract, whether

unused or in the process of manufacture or manufactured, in respect of the delivery of which shell the Contractor shall be in inexcusable arrears at the time of such termination.

"The decision of the Chief of Ordnance as to payments of allowances to the Contractor under this article made in accordance with the terms of this contract, and with the 'Definition of "Cost" pertaining to contracts' issued by the Chief of Ordnance of the United States Army, dated the 27th June, 1917, made a part hereof by reference, will be final and binding on both parties hereto.

"The foregoing provision with regard to payments to be made by the United States upon the termination of this contract shall also apply in the event that performance by the contractor of this Contract is finally prevented by causes determined by the Chief of Ordnance to have been beyond the control or without the fault of the Contractor."

It is reasonably certain that neither of the parties to this contract anticipated what actually happened, namely, that the Armistice in the Great War would precede the delivery of a single shell under the terms of the contract. And so it came about that much controversy arose in the Courts below as to the meaning of what may conveniently be described as the "original contract," and particularly of Article VIII, in relation to the events which actually arose. The respondents contended that in such an event, on the true meaning of the contract, they were entitled to be repaid in full their expenditure upon the lands and buildings which they acquired and erected for the performance of the contract; and were also entitled to retain them as owners in such an event as that which has happened, namely, the termination of the war, while the contract in relation to deliveries of shells was still executory. The appellants disputed this view. Their Lordships, having regard to the view which they have formed of the Settlement Contract, do not find it necessary to state any conclusion upon this particular controversy. But it is material to notice that Article VIII provides that the decision of the Chief of Ordnance of the United States Army as to payments and allowances to the contractor under this article was to be final and binding on both parties thereto. Their Lordships have naturally not ignored the circumstances in which such a submission to the unilateral decision of a contracting party may be impeached either by the law of the United States or by the law of this country. It is sufficient to notice in this place that unless and until the jurisdiction was overruled by law, the Chief of Ordnance of the United States Government was in case of dispute *arbiter negotii*. The substitution by a later instrument of the authority of the ordinary Courts of the Dominion was of evident advantage to the respondents. Nor should this advantage be overlooked when considering the question put to the Board by Mr. Tilley why the respondents should have been willing to substitute a less favourable for a more favourable agreement.

On the termination of the war the contract was brought to an end, early in the month of November, 1918, and the plaintiffs

duly notified the defendant Company that all work thereunder should be discontinued at the earliest possible moment. This notification was contained in a letter dated the 27th November, 1918, from the Imperial Munitions Board to the respondents. The Munitions Board, it should be explained, had been appointed by the United States Government on their behalf to enquire into and settle all claims between the plaintiffs and the defendant Company arising out of the termination of the contract. It was to be assisted by two assessors appointed by the United States Government with ample powers for the adjustment of disputed claims. The concluding clause of a letter of the 27th November, 1918, addressed by the Board to the respondents, may perhaps be quoted :—

> " Your statement to the Board should cover your complete claims in respect of cancellation of your contract."

On the 18th December, 1918, a meeting of directors of the respondent Company was held at Brantford, in order to consider the situation created by the cancellation of the contract. Mr. Henderson, the Company's solicitor, was specially invited to attend the meeting. A statement was made to the meeting by Mr. Secord and Mr. W. T. Henderson, reporting upon their recent visit to Washington, and generally upon the actual situation.

Their Lordships take note in passing of the extreme improbability that a board of directors, convened to examine in the interests of their shareholders the situation which followed upon cancellation, should have failed to obtain the advice of their solicitor, expressly summoned to offer them such advice, as to their rights under the original contract.

On the 28th December, 1918, the respondent Company appointed Mr. Detwiler and Mr. Andrews (Secretary) to negotiate with the Board with reference to claims springing from the cancellation of the contract. These gentlemen were empowered to arrange a settlement of all claims with the Board.

On the 18th January, 1919, Colonel Craig, the Adjuster of Claims to the Imperial Munitions Board, addressed the following important letter to the respondent Company.

" OTTAWA,
January 18*th*, 1919.

" Messrs. Motor Trucks, Ltd.,
Brantford, Ontario.

" DEAR SIRS,

" In order to expedite the settlement of Contractors' claims against the United States Ordnance Department in respect of contracts, placed with them direct or through the agent of the Imperial Munitions Board, I beg to advise you that your claim should be filed not later than the 20th day of February next.

" Should you find it impossible to present your entire claim by this date, a reasonable extension of time will be granted if you apply for it, stating reasons for asking such extension.

"Where possible, contractors should use the forms and methods of making out their claims prescribed by the United States Ordnance Department, but should a contractor desire to use his own form he can do so, provided the necessary information is set out therein.

"This outside of payment for work completed or stopped in process, which will be dealt with under the Inventory by the United States Ordnance Department's officer at the plant, may be classified under the following heads :—

1st. Inventory of supplies and materials.
2nd. Machinery.
3rd. Installation expenses.
4th. Buildings or rentals.
5th. Commitments for materials or supplies.
6th. Other claims.

"Where contractors are working on more than one contract or order, a separate claim should be filed in respect of each contract or order.

"Claims should be classified so that the entire claim under each heading can be properly examined.

"Where a claim is made in respect of—

(*a*) Expenditure on plant ;
(*b*) Expenditure in preparation for execution of the contract ;
(*c*) Operating loss ;

it is advisable that such claims should be accompanied by a properly audited Balance Sheet and Profit and Loss Statement, together with the usual schedules necessary to a clear understanding of the same.

"In presenting their claims contractors should indicate what materials, supplies, machinery or buildings are included in their claim of which they are prepared to relieve the United States Ordnance Department and the rebate value they place on such items.

"Please note that after the date of Monday, the 20th January, all communications in regard to claims in respect of orders for the United States Ordnance Department should be addressed to :—

Imperial Munitions Board,
American Department,
Room 606,
Royal Bank Building,.
Toronto, Canada.

Yours truly,

JOHN CRAIG,
Adjuster of Claims, I.M.B."

This letter has been set out in full in order that it may be made plain that even at this early stage in the matter the Munitions Board, on behalf of the United States Government, was inviting claims for buildings, and was, in the second place, suggesting to the respondents that they should indicate what buildings were included in their claim of which they were prepared by repurchase, to relieve the United States Ordnance Department. And if such a case arose they were invited to indicate the rebate value which they placed upon such buildings. In other words, they were afforded the opportunity of making a salvage offer in relation to buildings which must *ex hypothesi* have become the property of the United States Government, for otherwise a salvage offer would have been inappropriate and even unintelligible.

On the 13th May, 1919, the respondent Company filed with the Imperial Munitions Board its claim, verified by affidavit and accompanied by a letter of the managing director, in which he said :—

> " We would emphasise the fact that this is a fixed price contract, and that all the expenditures incurred and obligations assumed are made after very careful and earnest consideration by the executive of this Company, and that recoupment of all such outlay would have been made from the proceeds derived from the contract.
>
> " The books and records of this Company have been audited and supervised by Certified Public Accountants, and the Claim, to the best of our knowledge and belief, is correct in every detail."

The total claim amounted to $1,950,804.55, of which $34,062.54 was claimed for land and improvements, and $342,434.35 for buildings.

Consideration of the claim so filed was carried on by the Imperial Munitions Board and those associated with it for that purpose, in the presence of the defendants' representatives : and an award was arrived at of $1,653,115.13, from which was deductible a loan by the War Credits Board of $937,000, which, with interest and an item of exchange, brought the total deductions to the sum of $1,015,302.55, leaving a balance payable to the defendants of $637,812.58. The amounts claimed as above for land and improvements and for buildings were not reduced by the Board and the assessors, the full amount of the claim under these headings being allowed and included in the award.

On the 7th October, 1919 a contract known as the Settlement Contract was made between the United States of America and the Respondents, although the actual date of signature was the 8th November. This instrument is so important that some of its provisions must be set out in full :—

> " WHEREAS a certain contract was entered into between the United States and the contract per War Ord. P. 8118-2383A, dated the 18th May, 1919 (hereinafter called original contract, which term also includes, wherever used herein, all agreements or orders, if any, supplementary to said contract, except this agreement) ; and
>
> " WHEREAS the furnishing and delivery of further articles of work under said original contract will exceed the present requirements of the United States ; and
>
> " WHEREAS it is in the public interest to terminate said original contract as herein provided, and the execution of this contract is in the financial interests of the United States ; and
>
> " WHEREAS pursuant to the original contract the Contractor has incurred expenses and obligations for the purpose of furnishing and delivering articles of work remaining undelivered under said original contract ; and
>
> " WHEREAS the Contractor is willing to accept termination of said original contract and to forego such profits as might have accrued to it from the completion of said original contract and to accept this contract in lieu of said original contract and any or all claims and demands of every nature whatsoever arising or which may arise out of said original contract ; and

" WHEREAS the Contractor is willing to waive any and all rights that it may have under the provisions of original contract to a specified notice of termination or to continue the performance of said contract to any extent after the receipt of such notice of termination :

" NOW, THEREFORE, in consideration of the premises and of the mutual covenants herein contained, it is agreed between the parties hereto as follows :

" (1) This contract supersedes and takes the place of said original contract, which is hereby terminated, and the Contractor hereby releases and discharges the United States from any and all claims and demands of every nature whatsoever arising out of said original contract or the termination thereof, except that all articles of work delivered and accepted on or before the date of this contract under and in pursuance of said original contract and not yet paid for shall be paid for in accordance with the provisions of said original contract as if it had not been terminated.

" (2) The Contractor shall furnish and deliver and the United States shall accept and pay for no more articles or work agreed to be delivered under said original contract except to the extent provided for in paragraph (1) hereof. The total number of finished units or amount of work delivered or accepted on or before the date of this contract under or in performance of the original contract is nil.

" (3) The United States shall forthwith pay to the Contractor and the Contractor agrees to accept the sum of six hundred and thirty-seven thousand eight hundred and twelve 58/100 dollars U.S. Funds ($637,812.58) in full and final compensation for articles or work delivered, services rendered and expenditures, expenses and obligations incurred by the Contractor under the original contract and in full satisfaction of any and all claims or demands in law or in equity which the Contractor, his successors, representatives, agents or assigns may have growing out of or incidental to said original contract ; the said Contractor hereby expressly agrees that such payment when made shall constitute a complete settlement of every question or claim, legal or equitable, liquidated or unliquidated, by or on behalf of the Contractor, pertaining to or growing out of the said original contract or the termination thereof.

" (4) Title to all property specified in Schedule ' A ' hereto annexed and made a part hereof shall vest in the United States immediately upon execution of this agreement."

It is important to observe the express provision that " this contract supersedes and takes the place of the original contract, which is hereby terminated and the Contractor hereby releases and discharges the United States from any and all claims and demands of every nature whatsoever arising out of the said original contract or the termination thereof . . ."

Clause (4) of the Settlement Contract requires special notice, for it is upon this clause that the appellants' claim for rectification depends. " (4) Title to all property specified in Schedule ' A ' hereto annexed and made a part hereof shall vest in the United States immediately upon execution of this agreement."

The question which requires the decision of the Board is whether or not it was the intention of the parties that the land and buildings, which had been paid for as claimed without deduction, should be inserted in Schedule "A" and whether, if so, they were omitted therefrom by mutual mistake, so that rectification of an incomplete schedule should be ordered, or whether on the true interpretation of the intentions of the parties the respondents were entitled to receive all that they had expended upon acquiring the land and erecting the building, and, being so compensated, to retain both as their own.

The answer to these questions can only be found by reference to some legal considerations which their Lordships will hereinafter examine. If the parties intended that the lands and buildings should be included in Schedule " A," so that the omission in the instrument was accidental, rectification ought undoubtedly to be decreed. The Board, therefore, finds it necessary to examine the actions and the words of the parties at the relevant periods. And in enforcing the conclusions which will hereafter be stated their Lordships think it right to make it plain that they have entirely ignored the memorandum of the minutes of the meeting on the 7th October, 1919. In the opinion of the Board the terms of this memorandum were not admissible and should not have been admitted as evidence.

Their Lordships have reached the conclusion that both the appellants and the respondents intended that the land and buildings should be included in Schedule " A." That the appellants so intended has not been seriously disputed; and upon this point the Board entertains no doubt. Their Lordships, after giving careful attention to the matter, are no less confident that the respondents clearly understood that the award contemplated the transfer as owners to the United States of the land and buildings for which under its terms that Government had paid the respondents complete and generous compensation.

The reasons which have led their Lordships to a conclusion so clear may be shortly summarised.

It has been seen that the date of the signature of the Settlement Contract was the 8th November, 1919. The date of the delivery of the cheque by the appellants to the respondents was the 10th November.

The claim of the respondents was made as early as the 13th May, 1919. Item 10, sub-items (*c*) and (*d*), were as follow :—

(*c*) Lands and improvements	$34,062.54
(*d*) Buildings	$342,434.35

This claim was verified by an affidavit of Mr. Andrews, the Secretary, dated the 13th May. The Imperial Munitions Board, acting at the request of the United States Government, on their behalf, allowed these items of claim in full. It is common ground that the claim as made included the total expenditure made by the respondents upon both lands and buildings. The conclusions

of the Munitions Board upon the total payments to be made to the respondents were summarised in the award, dated the 7th October, the same day as the expressed date of the Settlement Contract, though, as has already been pointed out, this contract was not actually signed until the 8th November. The interval between the preparation and the signature of the contract was marked by some illuminating correspondence. Thus on the 9th October, 1919, the respondents wrote to the Munitions Board *in misericordiam* pointing out that the total award was $1,574,199.39, whereas their own total liabilities were $1,582,478.01. The writer of the letter (Mr. Andrews, the Secretary) thereupon contends that the award was approximately $26,000 "short of meeting" the Company's liabilities. He suggested several methods of making up this comparatively insignificant deficit; of these the Board is only concerned with that which he places second—"10 per cent. compensation could be allowed on the buildings as due to the system under which these buildings were procured by us. This necessitated as much work and financing on our part as did the purchase of machinery."

Their Lordships hardly think it necessary to point out that the whole tone of this letter, and particularly the scale and scope of the discrepancy complained of, and of the remedy suggested, would have been patently impossible had the respondents imagined that the lands and buildings were to be retained by them in addition to the payment of their full value. Who in such a case would have spent time upon a deficit of $26,000 ?

There presented itself recurrently at the period with which their Lordships are now dealing an expression of desire on the part of the United States Government that the respondents should make what was known as a "salvage" offer for the lands and buildings; in other words, that they should buy back from the appellant Government, which presumably did not aspire to become the proprietors of lands and buildings in Canada, the properties of which they had divested themselves. It will be observed that the request for a salvage offer, and the making of such an offer, were wholly inconsistent with any view except that lands and buildings alike were intended by both parties to be included in the schedule. We do not, for instance, find the Company, when invited by the Board, to make such an offer, replying that it was impossible to bid for what *ex hypothesi* was its own property; we find it, on the contrary, prudently preferring to postpone such an offer until the award was made, lest, it may be inferred, its modesty, when disclosed, should depress the valuation of the Board. But on the 27th October, 1919, a board meeting of the Company's directors took place. The meeting authorised the three principal officials to purchase any machinery and equipment, "or any other items on the claim," for the least possible sum. And two days later a salvage offer was actually made alike for lands and buildings. This offer was rejected by the appellants as inadequate. Its dimen-

sions throw some light upon the liberality with which the respondents' own claim had been met.

On the 11th November Mr. Andrews addressed the following letter to the Salvage Board, a letter which Mr. Secord admits in his evidence that he read :—

"DEAR SIR,

"We completed negotiations yesterday with the Claims Board and received cheque in settlement of our claim. This settlement included running expenses up to the end of October, and we were advised by Colonel Stewart that any expense in connection witth the plant from that date would have to be taken up with the Salvage Board. As you are no doubt aware, we have at the present time two watchmen and firemen, telephones installed, etc. If it is agreeable to you we will continue to keep the plant heated and guarded, and pay all running expenses in connection therewith up to the end of November on the same basis as the Claims Board allowed for October, viz., $750.00. At the expiration of this time you will no doubt have your plans formulated as to the disposition of the plant. In order to keep this factory up to its present standard, it is very necessary to keep the plant heated, otherwise the steel sash will contract and the glass in the sides of the factory will crack and drop out. There is also the danger of the plaster contracting, cracking and dropping off. We would also suggest that the watchmen be retained, as the plant is situated in a very poor neighbourhood and a great deal of the contents will develop legs and the majority of the windows will be smashed if the plant is left unguarded . . .

Yours very truly,

F. ANDREWS,

Secretary."

It is sufficient to say of this letter that it is evidently explicable only upon the basis that the respondents were handing over the freehold. It offers advice and help to the new owners.

Between the 11th and 15th November the respondents discovered, in circumstances which need not here be elaborated, that the lands and buildings were not after all included in Schedule "A" in the form in which they had received it. In an unfortunate moment they decided to take advantage of that which they certainly knew to be a mutual error, and wrote the letter of the 15th November to the Salvage Board—a letter which has not produced an agreeable impression upon their Lordships' minds. It was to the following effect :—

"GENTLEMEN,

"Referring to your telegram of the 13th instant to Motor Trucks, Limited, you seem to be under some misapprehension as to the position of matters.

"We have advised Motor Trucks, Limited, not to turn over the keys of their plant to your representative. While we are quite willing to afford you every facility to remove *from our property* and plant and equipment component parts and materials which belong to your Government, and which are listed in Schedule 'A' referred to in the Settlement Contract of the 7th October, 1919, we have advised Motor Trucks, Limited, that it is unnecessary to turn over to you the possession of the property in order to enable you to accomplish this. We have further advised Motor Trucks, Limited, to offer you every facility in the removal of your property, which

we desire to see accomplished with the least possible delay in order that the Company may proceed with its plans of reorganisation.

"In the meantime, and while the work of removal of your property is in progress, Motor Trucks, Limited, expect to be compensated for all expenses incurred in keeping their building heated, guarding the property and other incidental expenses. Motor Trucks, Limited, will also expect to be paid a reasonable rental charge *for the use of their lands and buildings* for the storage of your property until you have removed it.

"We would like to suggest again that Motor Trucks, Limited, will afford you every assistance for the speedy removal of all your property specified in Schedule 'A' and would urge you to lose no time in accomplishing this, as the Company's plans for future operations require the immediate use of these lands and buildings.

"Yours truly,

"HENDERSON & BODDY,

"W. T. HENDERSON."

The writer of this letter was the Mr. Henderson who attended the meeting of directors of the Company already referred to, held on the 18th December, 1918, in order to advise them as to their position in view of the cancellation. It is important to notice that the letter is wholly inconsistent both with the respondents' attitude up to this point, and with their argument before the Board, for it founds itself inferentially upon the omission of the lands and buildings from Schedule "A."

"We are quite willing to afford you every facility to remove from our property . . . materials which belong to your Government and which are listed in Schedule 'A.'" The letter does not say "We agree that the lands and buildings were omitted by mutual error from Schedule 'A,' but we meet this omission by a kind of counter equity, viz., our own earlier mistake." Yet this accidental omission is to-day as much the case of the respondents as of the appellants. Upon this point the evidence of Mr. Secord is conclusive. That gentleman was asked :—

"How did you come to make a salvage offer for these lands and buildings ?"

He replied, "My own idea is that we lost sight of our ownership under the terms of the contract at that time ; in other words, we forgot it."

This answer, and others like it, make it plain that the present case of the Company is that they all contemplated the inclusion of the lands and buildings in the schedule, so that the omission so to include them was the result of mutual error ; but that they never would have agreed so to include them had they recollected or appreciated what they now imagine to be their rights under the original contract. This admission, which is incontestible, might have saved their Lordships the trouble of examining the contemporary history as closely as has seemed desirable. But having regard to the view taken by the majority of the Judges in the Appellate Division of the Supreme Court of Ontario, it seemed to the Board worth while to make it plain from

that which the respondents said and did at the critical period that they had been unwillingly, and quite late in the day, driven to the admission that they, too, contemplated the inclusion of the lands and buildings in the schedule. Discovering that they had been accidentally omitted therefrom they decided to try and take advantage of this omission and to retain both the property and the price. Of this attempt their Lordships think it necessary to add nothing to the observations made by Mr. Justice Kelly—"The respondents," says the learned Judge, "seeing in the error a possibility of acquiring what they had failed to purchase, lent themselves to conduct and actions not creditable to themselves, and not in accord with business practices usually prevailing in this country." The admission, now necessarily but tardily made, that both parties shared the error as to the contents of the schedule, makes it superfluous to examine the circumstances in which the incomplete schedule was handed over to the Company. But it may be usefully noted that the explanation lay in the extreme anxiety of the Company to receive their cheque, and in the willingness of the appellants to accommodate them, even before the schedule could be completed. It remains, therefore, to consider what view in fact and in law must be taken of the respondents' remaining contention that their agreement to part with the ownership of the lands and buildings (in which is implicit their agreement to insert them in the schedule) was produced by an error as to their legal rights under the original contract. Whether they possessed any such rights as those supposed under that contract it is not necessary to consider, for the Trial Judge found as a fact that those who represented the Company were not at any single relevant moment forgetful of any right whatsoever which they may have possessed under that agreement. And their Lordships, so far from quarrelling with this finding, most expressly accept and approve it. Nothing need be added in parting with this contention, except that in all the circumstances it required considerable hardihood to conceive and put it forward.

But even if the Company's officials had made a mistake—in the circumstances wholly incredible—such a mistake could not in law have produced any effect upon the rights of the parties. For it is not contended, and could not be, that the mistake was shared by the appellants; and unilateral error, which in such a case as the present would hardly be distinguishable from carelessness, does not afford to the respondents any ground of defence in proceedings such as these.

It was further suggested that the present action involved an attempt to enforce a parol contract inconsistently with the principle of the Statute of Frauds. It is, however, well settled by a series of familiar authorities that the Statute of Frauds is not allowed by any Court administering the doctrines of equity to become an instrument for enabling sharp practice to be committed. And indeed the power of the Court to rectify mutual

mistake implies that this power may be exercised notwithstanding that the true agreement of the parties has not been expressed in writing. Nor does the rule make any inroad upon another principle, that the plaintiff must show first that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified ; and secondly, that such agreement has been inaccurately represented in the instrument. When this is proved either party may claim, in spite of the Statute of Frauds, that the instrument, on which the other insists, does not represent the real agreement. The Statute, in fact, only provides that no agreement not in writing and not duly signed shall be sued on ; but when the written instrument is rectified there is a writing which satisfies the Statute, the jurisdiction of the Court to rectify being outside the prohibition of the Statute.

The respondents, however, advance still a further point of law. They contend that a plaintiff was not allowed to sue in the old Court of Chancery for the specific performance of a contract with a parol variation. There seems no reason on principle why a Court of Equity should not at one and the same time reform and enforce a contract ; the matter, however, has been much discussed in the Courts, and the balance of distinguished authority not unequally maintained. But the difficulty, which was almost entirely technical, has been, in the view of the Board, removed by the provisions of the Judicature Act, 1873, Section XXIV, which are reproduced in the Judicature Act of the Province of Ontario, Chapter 56, Section XVI (*h*) of the Revised Statutes of 1914. This section provides that the Court, which is to administer equity as well as law, is to grant, either absolutely or on such reasonable terms and conditions as it shall deem best, all such remedies as any of the parties may appear to be entitled to in respect of any and every legal and equitable claim properly brought forward by them in such cause or matter, so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings discouraged.

The analogous provisions of the English Judicature Act are stated by Sir Edward Fry in his book on Specific Performance, 5th Edition, para. 816. The learned author holds (and the Board agrees with him) that the controversy between the Chancery Judges has now become obsolete inasmuch as since the Judicature Act the Court can entertain an action in which combined relief will be given simultaneously for the reformation of a contract, and for the specific performance of the reformed contract.

Despite some differences in subsequent decisions, in which the principles of Section XXIV of the Judicature Act have not been sufficiently considered, it has been held by P.O. Lawrence J. and by the Court of Appeal in the very recent case of *Craddock Brothers* v. *Hunt* (unreported at present), that the principle as laid down by Sir Edward Fry must now prevail.

Their Lordships are of the same opinion, and conclude that under this head no difficulty confronts the appellants in the present case.

The Board has thought it proper to consider the matters raised in this appeal with some particularity, partly because of the importance of the case, and partly out of respect for the learned Judges who took a different view in the Court of Appeal. But on analysis the issue has proved to be extremely simple. Both parties intended the lands and buildings to be included in the schedule. These were inadvertently omitted. Rectification must follow unless some exceptional ground for excluding this remedy is advanced. The respondents have attempted only to show that they agreed to the schedule in its intended form by reason of an error as to their existing legal rights. This contention has been rightly negatived on the facts, and would, in any event, be irrelevant in law. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, the judgment of the Appellate Division of the Supreme Court set aside with costs, and the judgment of Kelly J. restored. The respondents will pay the costs of the appeal.

In the Privy Council.

THE UNITED STATES OF AMERICA AND ANOTHER

v.

MOTOR TRUCKS, LIMITED.

DELIVERED BY THE EARL OF BIRKENHEAD.

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