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VOL. 2

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9604

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TORONTO:

CANADA LAW BOOK CO., LIMITED

32-34 TORONTO STREET

1912

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I do not think this can prevail when we consider the effect of sub-section 2 of section 30 of the Railway Act above referred to, and any order confirming a standard for water stand pipes of any particular railway system made under the powers therein granted would be as much within the legislative powers of the Board as would a general order.

It follows, therefore, that as the stand pipe in question conforms to this order of February 2, by which the defendants are protected, they are not guilty of negligence, and the plaintiff's appeal must be dismissed.

I merely desire to add that there was no evidence adduced to shew that these orders of the Board had been promulgated, but as neither side took objection, and the whole matter was argued before us as if they had, I have so dealt with the case.

Appeal dismissed.

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POWELL RIVER PAPER COMPANY, Limited v. WELLS CONSTRUCTION COMPANY AND AMERICAN SURETY COMPANY OF NEW YORK.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Gallihor, JJ.A. January 16, 1912.

1. PRINCIPAL AND SURETY (§ I A—3)—ARCHITECT TAKING WORK OVER FROM CONTRACTOR—LIABILITY OF SURETY—PARTICULARS OF LOSS.

As the provisions of a construction contract to the effect that an architect, who was thereby empowered, under certain circumstances, to take the work from the contractor's hands and complete it, should ascertain the cost of so doing, which award should be binding upon and be paid by the contractor, does not bind a surety upon a bond given by the latter, indemnifying the plaintiff against loss or damage arising from the contractor's failure to fulfil his contract, the trial Judge, in an action against such surety, rightfully ordered the plaintiff to furnish the defendant with particulars of loss, together with full details as to how it arose, where the only damages claimed referred to in the plaintiff's statement was the amount found by the architect to be due from the contractor to the plaintiff.

APPEAL by plaintiff company from an order made by Murphy, J., in Chambers at Vancouver, on the 20th of November, 1911, directing the delivery of particulars of amount of loss and damage referred to in the statement of claim, such order being made upon application of the defendant, the American Surety Company of New York.

The Wells Construction Company entered into a contract with plaintiff for the construction of a dam, bulkhead, etc., at Powell River, B.C., in accordance with specifications attached to and forming part of the contract. By the specifications the architect was empowered, under certain circumstances, to take the work out of the hands of the construction company and to employ workmen and procure material for the execution of the work; and the specifications further provided that the cost and

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charges of so executing the work should be ascertained by the architect and paid for or allowed to the plaintiff company by the construction company.

By the bond of the American Surety Company of New York, it became bound jointly with the Wells Construction Company to plaintiff company in the sum of $50,000, the condition being that if the Wells Construction Company should indemnify the plaintiff against any loss or damage directly arising by reason of the failure of the Wells Construction Company to faithfully perform its contract, the bond should be void. The work had been taken out of the hands of the construction company by the architect and completed by plaintiff company under his direction, and the statement of claim alleged that the cost and charges incurred by plaintiff company in so doing were ascertained by the architect at $155,250; that such amount had not been paid for or allowed to plaintiff company by the construction company; that the work should have been completed by the construction company under the contract for the sum of $118,561; that the architect settled and determined the amount payable to plaintiff company by the construction company in respect of the completion of the work by plaintiff company to be $36,688, against which the construction company was entitled to a credit of $5,056, leaving the amount of $31,632 as the amount of damage suffered by plaintiff company by reason of the construction company's failure to complete its contract.

The order appealed from directed plaintiff company to deliver particulars of its loss and damage, being the said sum of $31,632, with full details as to how the loss and damage arose.

The appeal was dismissed, GALLIHER, J.A., dissenting.

W. B. A. Ritchie, K.C., for appellants:—Plaintiff company's claim is based on the amount of loss and damage, ascertained by the architect, in accordance with the provisions of the contract, and the order appealed from, in effect, requires plaintiff company to give particulars of the way in which the loss and damage were ascertained by the architect. This is practically requiring a person in whose favour an arbitrator's award has been made to give particulars of how the arbitrator made up the amount adjudged by the award to be paid. The way in which the arbitrator made up his award is not a matter within the knowledge of the plaintiff company. Even if there is a question whether the American Surety Company is bound by the ascertainment of the architect, that is a question to be threshed out at the trial, and furnishes no justification for an order for particulars.

E. P. Davis, K.C., for respondent, American Surety Company of New York:—The architect in the contract was plaintiff company's architect, and they are possessed of full information as to the loss and damage claimed. The American Surety Company

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is not bound by the amount of loss or damage as ascertained by the architect, his determination being binding only upon the Wells Construction Company: *Ex parte Young, In re Kitchin* (1881), 17 Ch.D. 668. Plaintiff company can only claim against the American Surety Company for the actual amount of loss or damage caused by the construction company's breach of contract, irrespective of the determination of the architect as to such amount, and as to such loss or damage, plaintiff company must furnish particulars.

MACDONALD, C.J.A.:—I think the appeal should be dismissed. I cannot take the view so strongly urged by Mr. *Ritchie* that this contract of suretyship is one which renders the surety company liable and bound by the finding of the architect as between a principal debtor and creditor—that they agreed to abide by the decision of the architect. I cannot find that the surety company has decided to have the architect established as a tribunal to settle the differences between the parties.

IRVING, J.A.:—I agree.

GALLIHER, J.A.:—I take a different view from my learned brothers. The specifications provide:—

> To prevent any disputes, doubts, differences or litigations arising or happening, touching or concerning the said work, or any portion of it, or relating to the quantities, qualities, description, classification or manner of work done and executed, or to be done and executed by the contractor, or to the quality, or classification of the materials, to be employed therein, or in respect to any additions, deductions, alterations, or deviations made in, to or from the said work, or any part of it, or touching or concerning the meaning or intention of the specifications and of this agreement, or any part thereof, or of any contract entered into by and between the company and the contractor pertaining to work herein described, or of any plans, drawings, instructions or directions referred to in the said specifications or the contract, or which may be furnished or given during the progress of the works, or touching or concerning any certificate, order or award which may have been made by the architect, or in anywise whatsoever relating to the interests of the company, or of the contractor in the premises; it is expressly agreed that every such question, doubt, dispute and difference shall from time to time be referred to and be settled and decided by the architect, who shall be competent to enter upon the subject-matter of such question, doubt, dispute or difference, with or without formal reference or notice to the parties to this agreement, or either of them, and that he shall judge, decide, order and determine thereon; and that to the architect shall also be referred the settlement of this contract, and the determination of the sum or sums or balance of money to be paid or to be received by the contractor from the owner, and it is further expressly agreed that such decision as to any and every question, doubt, dispute and difference, and said determination and estimate of the quantities, qualities, classifications, and of the sum, values, and all other matters hereinbefore mentioned and described, shall be a condition precedent

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to any right of the contractor to receive, demand or claim any money or other compensation under this agreement, and a condition precedent to any liability on the part of the owner to the contractor or on account of this contract, or for any labour or materials furnished in connection therewith.

That conveys to my mind, at all events, one meaning: there is a contract, which contract is referred to in and attached to this bond. There is a provision in the contract that the loss shall be for a specified sum or a sum to be found by the architect, and when the architect does find that sum, that is the sum that will be due, and could not be disputed by a principal in the first instance; that is the sum which, as I read the paragraph in the bond, the principal has agreed to pay. If the architect had found a much smaller sum, it does not seem to me that the principal could recover any more than he had agreed to recover from the obligors under the bond. Holding that view I, with great respect, dissent.

Appeal dismissed, GALLIHER, J.A., *dissenting*.

ROYAL BANK OF CANADA v. FULLERTON LUMBER AND SHINGLE COMPANY, Limited.

British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. January 17, 1912.

1. APPEAL (§ VII I 3—355)—DISCRETION AS TO GRANTING LEAVE TO DEFEND—JUDGMENT BY DEFAULT.

The Court of Appeal will not interfere with the exercise of a trial Judge's discretion in granting leave to defend an action after judgment by default, unless it appears that there was an abuse thereof.

2. APPEAL (§ VII I 3—355)—TRIAL JUDGE'S DISCRETION—JUDGMENT BY DEFAULT—LEAVE TO DEFEND.

An order granting leave to defend an action, after entry of judgment, upon payment of the costs of the action up to judgment, and payment into Court of the amount of the judgment, to abide the result of the trial, does not amount to such an abuse of the wide discretion vested in the trial Judge, as will justify interference by the appellate Court.

APPEAL from an order of Howay, Co. J., at New Westminster, on the 18th of December, 1911, giving defendant leave to defend, after judgment had been entered by default, on paying the costs of the action up to judgment, and also paying into Court the full amount of the judgment to abide the result of the trial. The default of the defendant's counsel was due to an oversight in the solicitor's office, as to the date of the trial. Defendant appealed.

The appeal was dismissed.

J. H. Senkler, K.C., for appellant:—The order is an improper one and should not have been made. Defendant has sworn that he has a good defence, and is and was ready to defend. He is willing to pay the costs occasioned by the over-