*Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of The Erie County Natural Gas and Fuel Company, Limited, and others,* v. *Samuel S. Carroll and another; and of Samuel S. Carroll and another* v. *The Erie County Natural Gas and Fuel Company, Limited, and others, from the Court of Appeal for Ontario; delivered the* 14*th December* 1910.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.
LORD MERSEY.

[DELIVERED BY LORD ATKINSON.]

In this case both the parties in an action in which Samuel S. Carroll and William E. Carroll were Plaintiffs and The Erie County Natural Gas and Fuel Company, Limited, and The Provincial Natural Gas and Fuel Company, Limited, were Defendants, have lodged Appeals against a judgment of the Court of Appeal of Ontario, dated the 5th of April 1909, whereby the Appeal of the Defendants against a judgment of the High Court of Justice of Ontario, dated the 9th of December 1907, delivered by Mr. Justice Britton, was dismissed, and this latter judgment affirmed.

By the judgment of the 9th of December 1907 the report dated the 20th of April 1907 of the

Local Master at Welland, made on a reference under an order of the Judge presiding at the trial to assess damages, was modified, and damages to the amount of $54,031. 82 awarded against the Defendants.

The facts so far as they are relevant to the question arising for their Lordships' decision are as follows:—

In the year 1889 a subterranean gas, commonly termed natural gas, useful both as an illuminant and as fuel, was discovered to exist in considerable quantity in the earth in certain districts in the county of Welland in the Province of Ontario.

The mode adopted for reducing this gas into possession, as it is phrased, is this: A pipe something over three inches in diameter is sunk into the ground by drilling until the gas field, lying generally about 800 feet below the surface, is reached and the gas supply thus tapped. A smaller pipe, usually about three inches in diameter, is then inserted into the larger pipe so sunk. Through this tubing the gas impelled by the pressure from below flows up into the air. To prevent it from being wasted a valve or cap is fitted to the tubing, and the structure is then known as a "gas well." When the gas is required for use a smaller pipe is attached to the well, and the gas is by this pipe conducted to its destination.

Those who may desire to obtain from gas bearing lands belonging to others, the natural gas such as above described, usually obtain from the owners of the land, on terms agreed on between them, licenses in writing called "gas leases," conferring upon the licensees the right to explore and drill the lands for gas and to conduct the gas when found from thence to such place as they may desire, and dispose of it as they may deem fit. The Plaintiffs in the

present action had obtained many such leases in the townships of Humberstone and Bertie in said county. One taken as a sample is printed at page 232 of the record. It purports to demise and let "the exclusive right of drilling "and operating for petroleum oil and gas" on the lands described, the "right of way over and "across said premises, the right to lay pipes to "convey oil and gas, providing a well is sunk on "the premises and the right to bring upon, erect "or remove any machinery or fixtures required "by the party of the second part," *i.e.*, the licensee. But as far as appeared in this case none of them contained any demise or grant of land.

The Plaintiffs, previous to the year 1891, carried on the business of quarrying stone and burning lime at Sherkston, in the county of Welland, on a somewhat extensive scale. They had two kilns; but in 1891, at the date of the agreement hereinafter mentioned, only one of these was actually in use. Before 1890 they had used wood and coal as fuel in these kilns, but after the discovery of natural gas they used the latter as fuel exclusively. In April 1891 they had sunk, and had flowing, four of the above-described gas wells. On the 6th of April 1891 the Plaintiffs entered into an agreement with the Erie County Natural Gas and Fuel Company, Limited, whereby they agreed to sell to the Company for the considerations therein-mentioned "all gas leases now held by them" in these townships, and also "all gas grant franchises "issued to and now owned by them in the "Dominion of Canada, and also the gas wells "now on said leases"; the Plaintiffs binding themselves to put down five gas wells properly located on the property within the townships referred to in said leases; and the Company on its side undertaking to "cause the

" necessary mains and pipes of suitable size " to be laid to connect said wells and deliver " said gas at the city of Buffalo " and to distribute the same to the consumers thereof in said city. This agreement was signed by the Plaintiffs, by George Bork, the Secretary of the Company, and by Gerhard Lang, its President, and bore the corporate seal of the Company.

It contained the clause following :—" It is " understood that the parties of the first part " (*i.e.*, the Plaintiffs) " reserve gas enough to supply " the plant now operated or to be operated by " them on said property."

The Plaintiffs on the 20th of April in the same year executed what purported to be an assignment, or conveyance on sale, to the Company of all the gas leases and franchises mentioned in the agreement of the 6th of April, enumerating the leases in detail, but not containing any reservation of gas to the Plaintiffs, such as that contained in the latter document. From the month of April 1891 to the month of July 1894 the aforesaid Company permitted the Plaintiffs to draw, at first from the gas well Schesler No. 1 and subsequently from the pipes or mains laid down by the Company in pursuance of their agreement, gas sufficient to supply the plant operated by the Plaintiffs.

On the 18th of July 1894 the above-mentioned Company, by indenture of that date, conveyed to the Provincial Natural Gas and Fuel Company, Limited, one of the Defendants, all its gas wells and franchises in the Province of Ontario, including those purchased by the first-mentioned Company from the Plaintiffs, and all machinery and plant belonging thereto.

Shortly after the execution of this conveyance the Provincial Company cut off the supply of gas theretofore enjoyed by the Plaintiffs, and refused to permit them to take or be supplied

with any gas from their pipes or mains or gas wells.

The Plaintiffs on the 24th of July 1894 instituted an action in the Supreme Court of Ontario against the Provincial Company, claiming in effect an injunction to restrain the latter from preventing the Plaintiffs from taking as theretofore from the pipes laid by the Erie Company, the gas required for their works.

The Provincial Company pleaded, *inter alia*, that the assignment of the 20th of April 1891 had superseded the agreement of the 6th of the same month, and that the Plaintiffs were therefore not entitled, as against the Provincial Company, to be supplied with the gas claimed. This plea was upheld by the trial Judge as a sufficient answer to the suit of the Plaintiffs. On appeal to the Court of Appeal for Ontario, that Court was equally divided in opinion, and the decision appealed from thus stood affirmed.

Shortly after, namely, on the 20th July 1896, the action out of which the present Appeals have arisen was instituted by the Plaintiffs against both the aforesaid Companies claiming that the assignment or conveyance of the 20th of April 1891 might be reformed by the insertion therein of a provision securing to the Plaintiffs a supply of gas sufficient to operate their works, and to recover damages in respect of the deprivation of that supply to which they claimed to have been entitled.

The case was tried before Mr. Justice Armour without a jury. He, on the 28th of April 1897, gave judgment directing that the deed of the 20th of April 1891 should be reformed, as of its date, by inserting therein, before the attestation clause, the reservation clause contained in the agreement of the 6th of April herein-before extracted, thereby bringing the two instruments into conformity with each other and he referred it to the Master at Welland as already mentioned

to ascertain and report what damages, if any, the Plaintiffs had sustained by being deprived of the use, in manner already mentioned, of the gas necessary to operate their plant. The learned Judge did not put any construction on the clause, so decreed to be inserted, but merely decided that the Plaintiffs were entitled to have it inserted, *quantum valeat*, into the deed of the 20th of April.

The Defendant Companies having appealed from this judgment and decision to the Court of Appeal for Ontario. That Court on the 3rd of October 1898 allowed the appeal and dismissed the action of the Plaintiffs. On appeal by the Plaintiffs to the Supreme Court of Canada this last mentioned judgment and decision were on the 5th day of June 1899 reversed and the judgment of the trial Judge restored. By an Order in Council of Her late Majesty Queen Victoria, dated 11th of January 1900, leave to appeal from this judgment of the Supreme Court of Canada was refused. The Plaintiffs did not proceed upon the reference to the Master till the 20th of January 1905 who did not report till the 20th of April 1907. Meanwhile, the Plaintiffs in order to obtain gas sufficient to operate their plant took gas leases from various persons owning gas bearing lands in their neighbourhood, drilled wells, bought and laid down pipes, and executed such other works as were necessary to procure from independent sources gas sufficient for their purposes. They did not require the gas, and did not use it for any purpose other than to supply their plant.

In their statement of damages at pages 116 and 117 of the record, the Plaintiffs set out in detail the different items of their expenditure on their works year by year, from the 15th of November 1894, amounting altogether to $58,297. 52, which, according to the evidence of H. E. Martin, their book-keeper, at page 41 of the record, included the rent or sum paid for permission to sink the newly acquired wells. The

accuracy of this account does not appear to have been questioned in any part of the proceedings. And it was not suggested that the gas actually extracted from the property comprised in the leases assigned to the Defendants was not amply sufficient to operate at all times the Plaintiffs' plant, or that the means thus adopted by the Plaintiffs to supply their needs were not, in themselves, reasonable under the circumstances.

An agreement in writing dated the 23rd of July 1902 was entered into between the Plaintiffs and one Fuller for the sale to the latter of the Canadian and Buffalo properties of the Plaintiffs for the sum of $250,000. 00. It contained clauses to the following effect :—

(1.) That the purchase price of $250,000 should carry with it and include all the plant and appurtenances as well as the leases on said quarry properties which Carroll Brothers then operated in Canada, and also the plant and appurtenances owned and used by them in Buffalo ; and

(2.) That the said Carroll Brothers were also, for the consideration above expressed, to convey or secure and cause to be conveyed to the said Fuller the fee and title to the lands in Canada then occupied and used by them under leases within one year from the date thereof.

To more effectually carry out this purchase and sale a conveyance bearing date the 1st of August 1902 was executed by the Plaintiffs under hand and seal. By it they purported to convey to Fuller the " entire plants used " by them for the production and marketing of stone, quick-lime, and sand situated in the Dominion of Canada and in the city of Buffalo, and it contained a clause setting out in detail what the plant in Canada was agreed and understood to consist of, one of the items being :—

" 16 producing gas wells, 2 wells being drilled, with " main line and connections."

In the course of the negotiations for this sale, the Plaintiffs wrote to Fuller a letter, to be found at page 251 of the record, containing a list of their plant in Canada corresponding exactly with the details set forth in the deed of conveyance, and opposite to that plant is set down the sum of $194,600. 00. A list of the Buffalo plant is set out in similar detail, and opposite to it is set down the sum $61,600. 00, making together with the former the sum of $256,200. 00. The letter begins with the following passage :—" The following is a list of " our plant. There may be a few things left " out. However, there is enough to show that " price named you was very low," *i.e.*, the price of $250,000. 00. The very first item in the list of the Canadian plant is the following "16 " producing wells, two wells being drilled, with " main line and connections, $75,000. 00."

It is quite true that the Plaintiffs are not estopped by that statement. They might, when cross-examined on the matter as they were, have explained away its significance if they could ; but unless it be explained away it is impossible to contend that in the purchase price, $250,000. 00, they did not receive something reasonably approaching $75,000. 00 in respect of the works they had constructed at a cost of less than $60,000. Even if the sum of $6,200. 00, the excess of the total sums named in this letter over the purchase price of $250,000. 00, were deducted exclusively from the above-mentioned sum of $75,000. 00 it would still leave $68,800. 00 as the price for which those works were sold. The outlay upon them was gradual. According to the statement of damages, pages 116 and 117, over $20,000 was expended in the years 1898 and 1899, and close upon $24,000. 00 in the years 1901 and 1902. No calculation was made as to what the interest at a reasonable rate upon that outlay would amount

to. It could scarcely amount to $13,000. 00. That this is plain appears from the examination of Martin beginning at Record, page 27.

Samuel Carroll was cross-examined on this item at page 62, line 30, and page 65, and W. E. Carroll at page 73, line 35 to page 76, line 28. They there give their explanation. It is quite unconvincing; entirely deserving the criticism passed upon it by the presiding judge at page 75, line 1. In their Lordships' opinion it in no way lessens the force of the item of $75,000. 00 appearing in the letter.

The Master by his Report, dated the 20th April 1907, Record, page 266, found :—

1. That the Plaintiffs were entitled to have the works operated by them supplied with natural gas from the mains of the Provincial Company from the 15th of November 1894 to the 1st of August 1902.

2. That the Company consumed 911,722,303 cubic feet of their own gas for that purpose within the above-mentioned period.

3. That this gas was worth $12\frac{1}{2}$ cents per thousand cubic feet, amounting to $113,965. 29 in all, which sum he found the Provincial Company (not both the Companies) liable to pay to the Plaintiffs. The result in money if this award held good would, if the figures $60,000 and $75,000 be accurate, be something like this.

If the Defendants had discharged their obligation the Plaintiffs would have got from them gas presumably sufficient to operate their plant without paying for it anything extra. The Defendants, however, failed to discharge that obligation for about $7\frac{3}{4}$ years, and the Plaintiffs by constructing works at a cost of less than $60,000, procured the necessary gas from elsewhere. After having this gas and worked their plant they sold these works presumably for

76,000*l.*, about $15,000 more than they cost; yet, because of the temporary default of the Defendants, the Plaintiffs are, notwithstanding their use and enjoyment of the substituted gas, to receive in addition the sum of $113,965. 22. as damages, thereby making a profit by the Defendants' breach of their obligation of about $128,965. 22, a somewhat grotesque result.

Mr. Justice Britton in delivering the judgment of the Supreme Court of Ontario apparently approved of the principle upon which the damages were assessed by the Master, and agreed with him as to the price at which it should be taken that the Plaintiffs could have sold the gas which they had used, namely, 12½ cents per 1,000 cubic feet, but thought the quantity found by the Master to have been produced was excessive, and reduced the damages to $54,031. 82, less than half the sum at which they had been assessed by the Master. The Court of Appeal concurred in opinion with him, affirmed his judgment and decision, and dismissed the appeal of the Defendants and the cross-appeal of the Plaintiffs with costs.

Their Lordships are quite unable to adopt these conclusions. In their opinion they are erroneous; and they think the error is due to the fact that the Court of Appeal did not take a true view of the nature of the transaction embodied in the agreement of the 6th of April 1891 and the conveyance of the 20th of the same month as amended or of the rights which in the circumstances of the case sprung from it.

It is plain, on the face of these documents, that the parties to them contemplated that more gas should be obtained from the properties leased than would be sufficient to operate the plant of the Plaintiffs, and the reservation contained in the agreement and subsequently embodied in the conveyance, merely amounts, in their Lordships opinion, to a contract on the part

of the Erie County Natural Gas and Fuel Company to supply the Plaintiffs, out of this larger volume of gas, with sufficient to operate their plant. Upon the execution of the conveyance of the 18th of July 1894 that contract of course became binding on the Defendants, the Provincial Natural Gas and Fuel Company, Limited ; but the amount of gas to be supplied was not specifically fixed. In the nature of things it would almost necessarily vary, as the operation of the plant varied in intensity or amount. No portion of the gas had ever been specifically set apart for or appropriated to the Plaintiffs' use, or had ever become their property. Had the Plaintiffs without the consent of the Defendants tapped the latters' mains and helped themselves, they would, according to *R.* v. *White*, 22 L. J. M. C. 123, a case of the highest authority, and *Queen* v. *Firth*, L. R. C. C. R. 173, have been liable to be convicted of larceny, and certainly would have been liable in trover. They were merely in the position of a person who had, for instance, purchased from the owner of a large quantity of grain in bulk a portion of it, while the portion purchased remained part of the bulk and before it has been in any way set apart or identified. The Defendants have admittedly broken their contract. They are liable for damages for that breach. The only question for decision, is what in the circumstances of the case, is the true measure of those damages. It would have been competent for the Plaintiffs to have abstained from procuring gas in substitution for that which the Defendants should have supplied to them ; and have sued the Defendants for damages for breach of their contract. They did not take that course. They chose to perform on behalf of the Defendants, in a reasonable way, that contract for them and to obtain from an independent source a sufficient quantity of gas, similar as near as might be

in character and quality, to that which they were entitled to receive. In such cases it is well established that the measure of damages is the cost of procuring the substituted article, not at all the price at which the substituted article when procured could have been sold by the person who has procured it. In *Hamlin* v. *Great Northern Railway Company*, 26 L. J. (Ex) pp. 20, 23, Alderson, B., thus lays down the law applicable to these cases: "The principle is that if the "party does not perform his contract the other may "do so for him, as near as may be, and charge "him for the expenses incurred in so doing." In *Le Blanche* v. *London and North-Western Railway Company*, L. R. 1, C. P. D., Lord Esher (then Brett, L.J.), at page 302, thus expresses himself: "We think it may properly be said that "if the party bound to perform a contract does 'not perform it the other party may do so for "him, as reasonably near as may be, and charge "him for the reasonable expense incurred in so "doing," but whether the thing done was a reasonable thing to do must be determined having regard to all the circumstances. Lords Justices James Mellish and Baggallay expressly approve of the principle laid down by Baron Alderson, with this qualification, however, that the second party must not take a course which as regards the party in default would be unreasonable or oppressive. This principle appears to be generally accepted and applied "Sedgwick on Damages," 8th Ed. Vol. I. pp. 322–325.

Where the contract is one for the sale of goods one of the modes in which a party to it may, on the default of the party bound to perform it, perform it for him, is, by going into the market and buying goods of a description and quality similar to those contracted for; but if he purchases at a sum equal to, or less than the contract price, he can only recover

nominal damages, because, the cost of procuring the substituted article not being greater than the contract price, he has got goods equal to those contracted for and at the same or a less cost, and has therefore suffered no loss.

*Valpy* v. *Oakeley*, 16 Q. B. 941 ; *Griffiths* v. *Perry*, 1 E. & E. 680. The case of *The Western Wagon and Property Co.* v. *West*, L. R. [1892] 1 Ch. 271, is an illustration of the same principle.

The same rule must apply whether the substituted goods or commodities are manufactured, or mined for, or otherwise produced, or purchased in open market. In the latter case the cost of procuring the goods is the price at which they were bought ; in the former cases the cost of procuring them is the cost of their production. The method adopted to procure them cannot make any difference.

If then the cost to which the Plaintiffs were put to acquire gas to operate their plant during the $7\frac{3}{4}$ years mentioned be the true test of damages in this case, as it clearly is, the next question to consider is what have the Plaintiffs shown to be the amount of the initial gross cost to which they were put, and what deductions, if any, the Defendants have shown should be made from that amount in order to ascertain the net cost, and consequently the actual loss, and therefore the sum recoverable. The Plaintiffs have vouched expenditure to the amount of $58,297. 52, in their statement of damages, page 116, and it was stated by Mr. Eldon Bankes, and not disputed, that this amount covered labour, materials, and sums paid for superintendence. The answers to questions 211, 212, 256, 269, and 312, would go to show that it included the expenses of the Plaintiffs. It is not suggested that it included interest on the money spent. It may possibly not have included maintenance. A reference to pages 116 and 117

shows that the main expenditure took place in the years 1898 and 1902. Even if the outlay be taken at $60,000, the interest at 5 per cent. on the different sums expended from the dates given at these pages could not, as has been already pointed out, well exceed $12,000, but that is a mere matter of arithmetic which could be readily ascertained. If these works cost the Plaintiffs more than this it was their business to show it. They cannot be permitted to recover damages on guesswork or surmise. They have failed to show it. Mr. Simon, on their behalf, contended that as the Defendants by their conduct had compelled the Plaintiff to become producers of gas, they are bound to pay the latter for their courage and enterprise. There is no authority for such a proposition. The contention is in their Lordships' opinion unsound. It may well be that if several reasonable but abortive attempts had been made to procure this gas the cost of these would have been properly treated as part of the cost of ultimately obtaining it, but that question does not arise in the case. The works having admittedly been sold, something must have been obtained for them. It is clear that if the Defendants are to pay for the cost of making those works and of thereby supplying the Plaintiffs with the gas the works produced they must get credit for the sum for which these works, after having supplied the gas, were sold, otherwise the Plaintiffs would make by the Defendant's breach of contract a profit equal to the price obtained on sale. It was therefore the business of the Plaintiffs to show how much that something was. The *primâ facie* inference to be drawn from the document printed at Record, page 251, is that $75,000 was the amount of it. That inference, unless rebutted, should in justice to the Defendants be acted upon. The burden of rebutting it lay upon the Plaintiffs.

They have, in their Lordships' opinion, failed to discharge that burden, and should not be permitted, by leaving the matters in obscurity, to recover more than they have lost. The Plaintiffs have not sued for the loss of their contract. They have only sued for the damages caused to them by the temporary deprivation of the gas. They have got the substituted article, identical in description and quality; have used it; and have failed to show that it has not in the result been obtained by them free of cost. They are therefore according to the principles established by the authorities already cited, only entitled to nominal damages.

Their Lordships therefore think that the Defendants' Appeal should to this extent be allowed with costs, and the Plaintiffs' Cross-Appeal dismissed with costs, and they will humbly advise His Majesty accordingly.

# In the Privy Council.

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THE ERIE COUNTY NATURAL GAS AND FUEL COMPANY, LIMITED, AND OTHERS

*v.*

SAMUEL S. CARROLL AND ANOTHER;

AND

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*v.*

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