

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeals of
Connolly and another v. The Consumers'
Cordage Company, and of The Consumers'
Cordage Company v. Connolly and another,
from the Supreme Court of Canada ; delivered
the 4th August 1903.*

Present :

THE LORD CHANCELLOR.

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR ARTHUR WILSON.

[*Delivered by the Lord Chancellor.*]

THE result of the course which this litigation has pursued is, that their Lordships are asked to give an opinion upon a question of fact which has never been litigated in the Court below, and upon a question of law which has never been argued there.

With reference to the question of law their Lordships would, of course, be prepared to give their opinion, if the facts upon which that opinion was to be given were actually ascertained. But so much appears to depend upon the exact form of the alleged illegality, which may turn out to be only an offence against a particular law, that their Lordships regard it as more prudent not to enter into the question of law, and the distinctions arising from the law prevailing in the part of the Empire in question, until the facts have been actually ascertained.

With reference to the question of fact their Lordships entertain no doubt that it is the right and duty of the Court at any stage of the cause to consider, and, if it is sufficiently proved, to act upon, an illegality which may turn out to be fatal to the claims of either of the parties to the litigation. Their Lordships, however, do not desire to express any opinion on the subject of the supposed illegality of the contract in dispute beyond this, that the whole circumstances were undoubtedly fraught with suspicion, and their Lordships do not doubt that the learned Judges had a right, and that it was their duty, if they thought the facts were established, to take care that the process of the Court should not be used for the purpose of establishing a claim that ought not to be permitted to be enforced in a Court of Justice. At the same time, when one considers that neither at the original trial, nor at any subsequent period was any evidence offered on the question of illegality, it is impossible to resist the cogency of the argument of Counsel that he has not had an opportunity of meeting the allegations that are suggested against his client. As already stated, the circumstances are fraught with suspicion; but, suspicious as they are, they may, nevertheless, be susceptible of explanation, and, if so, the opportunity for explanation and defence ought to have been given. That has not been done; and whatever may be the suspicions that their Lordships, in common with the learned Judges below, may entertain upon the subject, mere suspicion, without judicial proof, is not sufficient for a Court of Justice to act upon. Their Lordships are accordingly unable to affirm the Judgment of the Supreme Court in regard to the question of illegality. The question now arises as to the form and extent of any recommendation to His Majesty which their Lordships are in a position to make, that will meet the justice of the case.

On the one hand, it is not desirable that all the expense should have been incurred in vain. Their Lordships are therefore disposed to think, that, upon proper application to the Judges, it would be right that the parties should be permitted to ask, and, if the learned Judges agree to it, to make use of the evidence which has already been given. Again, with reference to the question of the illegal agreement, and its effect, their Lordships think that opportunity should be given to those who are the natural and proper guardians of the administration of the law to intervene if they think fit. Their Lordships do not entertain any doubt that upon properly framed pleadings, the *prima facie* right of the Plaintiffs to recover the money lent could be established, and that but for the question of the illegality of the contract this would be an undefended Action. Their Lordships have, therefore, had carefully to consider in what way they can, after all this lapse of time, meet the justice of the case, and give to the parties the rights that are respectively due to them.

In the result their Lordships will humbly advise His Majesty to make an Order to the following effect:—

Discharge the Judgment of the Supreme Court of the 28th March 1901, and, on the Consumers' Cordage Company bringing into Court the amount of the original Judgment of the 31st May 1899, with interest calculated up to the date of payment, discharge all other Orders made in the action, and order a new trial in the Superior Court with liberty to both parties to amend their pleadings with reference to the conspiracy or illegal combination referred to in the Order of the Supreme Court dated the 7th December 1900, or otherwise as they may be advised, and with liberty to either party to apply

for leave to use the evidence already given in the action, or any part of it, on such terms as the Court may think fit. Order that notice of action be given to the Attorneys-General for Canada, Quebec, and Ontario. Order the costs of all parties other than the costs of these Appeals to be disposed of by the Superior Court after trial. In case the money is not brought into Court within three calendar months of the date of the Order in Council on these Appeals, order the Judgment of the Superior Court in Review of the 13th February 1900 confirming the Judgment of the Superior Court of the 31st May 1899, to stand, and the Defendants to pay all costs in the Supreme Court.

Their Lordships direct that the parties are to bear their own costs of these Appeals in any event.
