

The Northern Pipe Line Company, Limited, and others - - *Appellants*

v.

The Canadian Gas Company, Limited - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 21ST OCTOBER, 1924.

Present at the Hearing :

VISCOUNT CAVE.

LORD DUNEDIN.

LORD CARSON.

LORD BLANESBURGH.

MR. JUSTICE DUFF.

[*Delivered by MR. JUSTICE DUFF.*]

Under an agreement dated the 27th May, 1908, between the Leamington Oil Company and Holmes and Gordon the predecessors of the appellants the Pipe Line Company, as amended by a subsequent agreement dated the 7th September, 1909, between the Leamington Oil Company and the Pipe Line Company (which had assumed the obligations of Holmes and Gordon under the parent agreement of 1908) the Leamington Oil Company became bound to supply natural gas to the Pipe Line Company to the extent of the capacity of its mills and that Company agreed to provide a pipe line and its accessories for conducting this gas to Wallaceburg in Kent County in Ontario and there to sell it for use as fuel by a Sugar Refinery owned by the Dominion Sugar Company and a Glass Manufactory, owned by the predecessors of the Dominion Glass Company, as well as to the inhabitants of the town for domestic purposes. The minimum price to be charged the Sugar Company and the Glass Company was fixed

by the agreement at 12 cents per thousand cubic feet, and it was stipulated that the Pipe Line Company should pay to the Leamington Company "upon all gas sold for manufacturing purposes from and after the 13th October, 1909," to the Glass Company and the Sugar Company "30 per cent. of the gross sum received."

The controversy giving rise to the present litigation turns upon the price, on the basis of which the respondent company is accountable in respect of gas supplied to the Glass Company. In 1912 the Leamington Oil Company assigned its assets to the respondents the Canadian Gas Company including its interest in the agreements mentioned; and in execution of the provisions of these agreements gas was furnished by the producers and sold by the distributors for some years without dispute. In 1918 by legislation enacted by the Legislature of Ontario, the Ontario Railway and Municipal Board was invested with authority to control and regulate the production, sale and distribution of natural gas, including authority to fix the rates to be charged in any locality to distributors and consumers; and it was in consequence of orders made in professed execution of this authority that the differences arose which led to the present litigation. There were two orders, one of the 27th June, 1918 (coming into operation on the 1st July) and one of the 28th November, 1918, by the first of which consumers of natural gas were to be charged for gas supplied at an "unvarying and uniform rate," which was to be the "highest domestic rate charged in the municipality" where the gas was delivered. Pursuant to this order the appellants the Pipe Line Company charged the Sugar Company and the Glass Company at the rate of 35 cents per 1,000 cubic feet and sent these companies accounts on that footing. The order of November was a special order dealing with the price of gas supplied to the Sugar Company and the Glass Company and provided that the rates to be charged these companies by the Pipe Line Company should be a rate "no higher than 25 cents per 1,000 cubic feet." In the meantime the Sugar Company had raised a dispute concerning the validity of the order of June; taking the position, on several grounds, that its liability was limited by the terms of its contract, by which, as already mentioned, it was entitled to the delivery of gas at the price of 12 cents per 1,000 cubic feet. And having first refused to pay at the rate fixed by the order, that company brought an action in October, 1918, claiming a declaration in that sense and an injunction preventing the Pipe Line Company shutting off its supply of gas.

After the commencement of the Sugar Company's action the Glass Company advanced the same contention and in November began to pay, and thereafter, until the settlement to be mentioned presently, continued to pay, at its contract rate of 12 cents. The action of the Sugar Company having proceeded to trial, judgment was pronounced by the trial Judge, Falconbridge, C.J., on the 22nd May, 1919, declaring the plaintiffs to be entitled to the delivery of gas at the contract rate. In the meantime, by an

agreement of the 17th April, 1919, the respondents the Canadian Gas Company sold their assets (including their contracts with the Pipe Line Company) as of the 1st March, 1919, to the Union National Gas Company, a company having 60 per cent. of the shares of the Pipe Line Company, so that the Canadian Gas Company ceased to be interested in the sale of gas by the appellant company after that date.

The dispute between the Glass Company and the Pipe Line Company touching the validity of the orders of the Railway and Municipal Board continued unsettled until November, 1919, when, as the result of negotiations begun early in that year, it was agreed that for gas supplied from the 1st July, 1918, to the 1st March, 1919, the Pipe Line Company was to receive 50 per cent. of the amount claimed, but that thereafter the rate prescribed by the Board was to be paid, and this settlement was carried out. At the date of this settlement the judgment of Falconbridge, C.J., in the Sugar Company's action still remained in force, although it was reversed in the following February by the Court of Appeal. From this judgment of the Court of Appeal an appeal was taken to this Board, but the action was settled by compromise before the hearing.

The present action was based upon two principal grounds: (1) That in the settlement with the Glass Company the Canadian Gas Company was unfairly discriminated against in favour of its assignees the Union Company; and (2) that the compromise was an unlawful arrangement in violation of the Statute of 1918, which left unaffected the duty of the Glass Company to pay at the rate of 25 cents under the orders of June and November, 1918, and, consequently, that the Pipe Line Company was accountable to the Canadian Gas Company on that footing.

The learned trial Judge found that the compromise with the Glass Company was effected in good faith and was in the circumstances a reasonable and prudent arrangement, a finding which was unanimously affirmed by the Court of Appeal. But he gave effect to the second of the contentions above mentioned, and held accordingly that the Pipe Line Company was accountable in respect of gas supplied to the Glass Company as if it had been paid for this gas at the rate of 25 cents per 1,000 cubic feet.

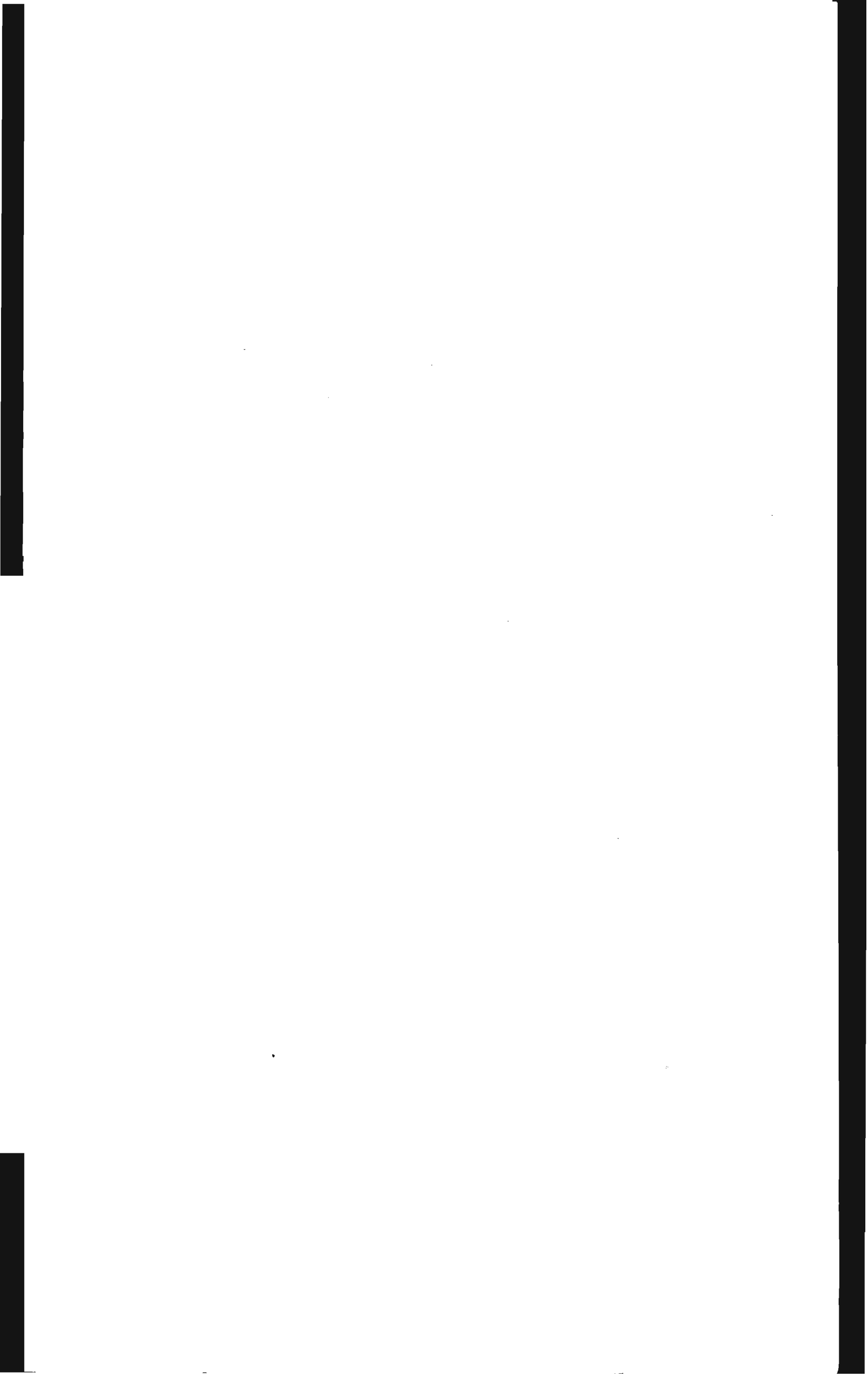
With this view of the learned trial Judge touching the obligations of the Pipe Line Company, two of the learned Judges of the Court of Appeal agreed; while the remaining two Judges who heard the appeal held that the Pipe Line Company was only accountable for the moneys actually received by it under the settlement, and, the Court being thus equally divided in opinion on the issue of the liability of the Pipe Line Company, the appeal was dismissed.

Their Lordships think it clear that the finding of the learned trial Judge upholding the compromise as both *bona fide* and reasonable, affirmed, as it was, by the Court of Appeal, is unassailable, but they do not agree with the view that this compromise

can be treated as non-existent in ascertaining the sums for which the Pipe Line Company is accountable under the agreements of 1908 and 1909.

Counsel for the respondent company contended that the agreement of compromise was an illegal act in contravention of the orders of June and November, 1918, exposing the parties to the penalties nominated by the statute of 1918. Whether such an agreement honestly entered into in compromise of a real dispute as to the legal validity of these orders, and as to the effect of the orders, would necessarily be an unlawful act, exposing the parties to it to penalties under the statute, is a question which need not be determined. The statute and the orders themselves give no rights to the respondent company as against the Pipe Line Company. These rights arise from the terms of the agreements, and under the agreements the Pipe Line Company is accountable in respect of sums "received"; and although, no doubt, that company could not escape responsibility by merely omitting to collect moneys due from consumers, it is another thing to say that by these agreements an obligation was imposed upon it to undertake the risk of litigation as far even as this Board, the result of which was considered to be problematical in view of the grounds which had been the foundation of the judgment of Falconbridge, C.J., and which its advisers might fairly think were not entirely without substance. No such obligation is expressed in the agreements and there appears to be no good reason for implying it.

Their Lordships will humbly advise that this appeal should be allowed with costs here and in the Court of Appeal and that the action should be dismissed with costs.



In the Privy Council.

THE NORTHERN PIPE LINE COMPANY,
LIMITED, AND OTHERS

v.

THE CANADIAN GAS COMPANY, LIMITED.

DELIVERED BY MR. JUSTICE DUFF.

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