GEORGE BALL (DEFENDANT).....APPELLANT; 1891

*Nov. 9,10.

AND

FRANCIS McCAFFREY (PLAINTIFF)...RESPONDENT; 1892

*April 4.

AND

THE ATTORNEY-GENERAL (INTERVENANT) ..... } *Mis en cause.*

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Appeal—Acquiescence in judgment—Jurisdiction—38 Vic. ch. 81, P.Q.—Charges for boomage—Agreements—Renunciation to rights—Estoppel by conduct—'Renunciation tacite.'

In an action in which the constitutionality of 36 Vic. ch. 81 (P.Q.) was raised by the defendant the Attorney-General of the province of Quebec intervened, and the judgment of the Superior Court having maintained the plaintiff's action and the Attorney-General's intervention the defendant appealed to the Court of Queen's Bench (appeal side) but afterwards abandoned his appeal from the judgment on the intervention. On a further appeal to the Supreme Court of Canada from the judgment of the Court of Queen's Bench on the principal action the defendant claimed he had the right to have the judgment of the Superior Court on the intervention reviewed.

Held, that the appeal to the Court of Queen's Bench from the judgment of the Superior Court on the intervention having been abandoned the judgment on the intervention of the Attorney-General could not be the subject of an appeal to this court.

F. McC. brought an action against G. B. for $4,464 as due him for charges which he was authorized to collect under 36 Vic. ch. 81, P.Q., for the use by G. B. of certain booms in the Nicolet river during the years 1887 and 1888. G. B. pleaded that under certain contracts entered into between F. McC. and G. B. and his *auteurs*, and the interpretation put upon them by F. McC. the repairs to the booms were to be and were, in fact, made by him, and

* PRESENT :—Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau and Patterson JJ.

1891

BALL
v.
MCCAFFREY.

that in consideration thereof he was to be allowed to pass his logs free; and, also, pleaded compensation of a sum of $9,620 for use by F. McC. of other booms and repairs made by G. B. on F. McC.'s booms, and which by law he was bound to make.

Held, reversing the judgment of the court below, that there was evidence that F. McC. had led G. B. to believe that under the contracts he was to have the use of the booms free in consideration for the repairs made by him to the piers, &c., and that F. McC. was estopped by conduct from claiming the dues he might otherwise have been authorized to collect.

Held, further, that even if F. McC.'s right of action was authorized by the statute the amount claimed was fully compensated for by the amount expended in repairs for him by G. B.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada, which affirmed the judgment of the Superior Court, sitting at Montreal, condemning the appellant to pay the respondent $4,186.55.

The action was for the recovery from the appellant of the sum of $4,464.70 for the use of certain booms and piers, lying on the river Nicolet, in the springs of 1887 and 1888.

The plaintiff (respondent) in his declaration, after referring to the act of the Quebec Legislature, 36 Vic. ch. 81, by which he, Antoine Mayrand and Charles McCaffrey were authorized to construct booms and other works on the river Nicolet, and to charge persons using them according to a tariff allowed by the act, alleged in substance that the works so authorized were constructed, that he stood in the rights of Antoine Mayrand and Charles McCaffrey as respects the collection of the charges authorized by the act, and that defendant (appellant) was indebted to him in the sum of $4,464.70 for the use he made of the booms during the years 1887 and 1888.

Plaintiff further set up that by deed of transfer from him to Mayrand, dated the 19th of April, 1873, he transferred to the latter, without warrant, all his

rights and privileges, under titles, leases and permits to all the piers of the islands, including the booms, &c., constructed on the river above the ferry of the old Catholic Church, called the upper booms, upon condition that Mayrand should, at his own expense, perform the obligations, including the maintenance of the booms to which plaintiff was bound, and in consideration, among other things, that the said Mayrand should have no claims for any work he might so perform against whomsoever *sous titre de frais ou coût du boomage*, but that plaintiff alone should collect the charges authorized from the act from all persons using the booms free, the revenue derived therefrom to be his property, and further, that Mayrand, his heirs and assigns, should be entitled to use all the booms free. That said Charles McCaffrey, *mis en cause* although not a party to this deed, abandoned all his rights under the act to plaintiff.

The defendant filed four pleas which may be summarized as follow:

1. That the river Nicolet is navigable over that portion of it referred to in said act, and that such act was *ultra vires* of the Legislature of Quebec. That Mayrand by transfer dated 31st of July, 1876, transferred to J. G. Ross all that he acquired from plaintiff under the deed of 18th of April, 1873; that Ross, by transfer dated 23rd June, 1886, ratified by deed dated 4th January, 1889, transferred to defendant what he had acquired from Mayrand; that the defendant, during the years 1887 and 1888, was proprietor and in possession of the upper booms, which were the only essential ones, and that he did all the work necessary to be done in connection with them to the knowlege and with the acquiescence of plaintiff incurring expense to the extent of $4,626.24; that plaintiff cannot make defendant pay for using his own property,

1891
BALL
v.
McCAFFREY.

that plaintiff and others use the booms, and plaintiff derived all the benefit resulting from defendant's work, which was greater than any amount he can claim from defendant for the latter's use of said booms, and there ought to be at least compensation;

2. That plaintiff did not perform the work he was bound to do under the act, during the years 1887-88, although put in default, and that consequently he has lost the privileges to which he was entitled.

3. That defendant's, as standing in the rights of Ross, acquired the right to pass his timber free, and that the parties, by their conduct, put this interpretation upon the contracts; that from 1873 to 1875 both the Mayrand and Ross logs were passed free with the knowledge and acquiescence of plaintiff, and repairs were done with Ross's money; that by deed of 31st July, 1875, Mayrand gave Ross the right to pass logs free, and he did so, except during the years 1880 and 1881, when Hall & Co. were his transferees and passed their timber free; that by the transfer from Ross to defendant, the latter acquired all the rights Ross had.

4. That plaintiff's claim is compensated by the two sum of $5,000 and $4,620, the first as the value of the use and revenues of the upper booms to plaintiff for 1887 and 1888; the second as the cost of urgent and necessary repair made by the defendant, which plaintiff should have made.

By his answers plaintiff alleged in effect, that by the terms of plaintiff's transfer to Mayrand and Mayrand's to Ross, Mayrand was bound towards both of them to maintain and repair the upper booms, and that defendant as transferee of Ross could only look to Mayrand to do the work; that if any repairs were made, plaintiff was not put in default and they were not necessary, and in any case in making them, they merely carried out Mayrand's obligation; that Mayrand never

1891

BALL
v.
McCAFFREY.

transferred to Ross, but expressly reserved his right to pass his logs free; that Ross never acquired such right and could not give it to defendant.

There was also an action in warranty taken by the plaintiff against Michael O'Shaugnessy but the court below dismissed the action in warranty and no appeal was taken.

The Attorney-General, having been notified of the conclusion taken by defendant to have the act of the Quebec Legislature, 38 Vic. c. 81, declared *ultra vires*, intervened, and by his intervention claimed that the act was not *ultra vires* of that legislature.

The following correspondence between the respondent and the appellant's predecessors in title, Messrs. W. G. Ross & Son, was put in evidence:

"NICOLET, 27th March, 1887.

"Messrs. W. G. Ross & Son,

"St. Nicholas.

"*Gentlemen*,

"As the season is fast approaching I consider it my duty to learn of you as soon as possible what you intend to do about the piers and booms on the Nicolet. It will soon be time for some one to take care of booms and piers. Please let me know what you intend to do about placing said booms, &c., or if you have given authority to some one to act for you in said affair.

"Respectfully yours,

"F. McCAFFREY."

The following letter was sent in reply:

"Yours of 17th to hand, and should have been answered sooner. I am not using the river now and I don't intend to put up my booms this spring for the use of others—but in the meantime I am anxious of relieving the interested parties from their natural anxiety and act fairly. I think we ought to meet and take some

1891

BALL
v.
McCAFFREY.

steps to secure the putting up of the booms by Mr. Ball or some one else; you must understand that it is necessary for you to help me as your interest is much greater than mine as I have no logs in the river this spring."

Laflamme Q.C. and *Charbonneau* for appellant, contended that by his conduct the respondent was estopped from collecting dues on the lower booms from the party who spread the boom, and that in any case the appellant was entitled to succeed on his plea of compensation having done work which the respondent was bound to do under his charter, and on the question of the constitutionality of 36 Vic. ch. 81, cited *Queddy River Boom Co.* v. *Davidson* (1).

Geoffrion Q. C. and *Honan* for respondent, cited and relied on arts. 443, 447, 483, 1992, 1973, and 1977 C. C.

Brodeur for Attorney-General contended that the question of the constitutionality of the provincial statute was not a proper subject of appeal, as the appellant had not appealed from the judgment of the Superior Court on that point.

The judgment of the court was delivered by,—

TASCHEREAU J.—The first point which comes up for our determination in this case is as to the right of this appellant now to appeal from the judgment upon the intervention of the Attorney-General on the constitutionality of the act in question in the case. In the Superior Court this intervention was maintained. The case was then carried to the Court of Appeal on the final judgments both on the intervention and on the action. Subsequently, however, the appellant abandoned his appeal as to the intervention, and the Court of Appeal, consequently, gave judgment only upon the issue between plaintiff and defendant. Since the in-

(1) 10 Can. S.C.R. 222.

scription of the present appeal from that judgment the appellant has given notice to the Attorney-General that he would claim before this court the right to have the judgment of the Superior Court on the intervention reviewed. Clearly, he has no such right. There was and there could have been no judgment by the Court of Appeal on that issue, and therefore there is no appeal to this court thereon. The Attorney-General's motion to have the appeal as to the intervention dismissed must be allowed with costs.

And neither can, on the principal appeal, the constitutionality of the said act be questioned before this court by the appellant, as he has acquiesced before the court below in the judgment of the Superior Court on that issue.

Now, as to the issues between the parties in the action. The plaintiff, present respondent, by his action instituted before the Superior Court, at Montreal, in November, 1883, claims from the defendant, present appellant, the sum of $4,464.60 for the use of certain booms on the Nicolet river during the years 1887 and 1888, under the authority of an act of the Quebec Legislature, 36 Vic. ch. 81, 1872, which authorized him and others, to erect and maintain booms and other works on said river, and to charge boomage for use thereof during twenty-one years according to a tariff allowed by said act, as an indemnity for the cost of said erecting and maintaining.

The Superior Court at Montreal gave judgment against the appellant for the sum of $4,186.55. The Court of Appeal affirmed that judgment, and he now appeals to this court.

By certain deeds with his co-grantees the respondent became vested, soon after the passing of the said act, with the exclusive right to the said charges for boomage authorized thereby. In 1873 he transferred all his rights of

1892

BALL
v.
McCAFFREY.

Taschereau J.

ownership in a part of the said booms called the upper booms to one Mayrand, upon condition that he, Mayrand, should, at his own expense, be bound to perform all the obligations to which he, the respondent, was bound for the maintenance and repairs of the said upper booms, in consideration of which obligation so assumed by him it was convenanted that the said Mayrand, his heirs and assigns, should be entitled to use all the booms, both upper and lower, free of boomage for his own lumbering operations, the said respondent, however, reserving to himself exclusively the boomage and the revenues thereof on both upper and lower booms from all other parties lumbering on the said river, the repairs and maintenance of the lower booms to be at his charge. By a deed dated the 31st July, 1875, Mayrand assigned to one Ross all the rights he had acquired from the respondent, the said Mayrand, reserving for himself, however, his heirs and assigns, the free use of the said booms conceded to him by respondent as aforesaid, and remaining charged with the obligation of maintaining and repairing the same imposed upon him by the respondent.

In 1886 Ross assigned his rights as collateral security to the present appellant, who, in 1887 and 1888, boomed a large quantity of logs for which the respondent now claims that he is liable. There appears to have been another deed of assignment executed on the 24th of January, 1889, between Ross and the appellant. I do not refer specially to it, however, as it was passed since he institution of this action; moreover, there is nothing in it that could affect this case. The appellant is undoubtedly, as the respondent contends, in Ross's position, entitled to all his rights and liable to all his obligations.

It appears by the evidence that in 1875 Mayrand became insolvent. In fact he was so since 1873, and

1892

BALL
v.
McCAFFREY.

Taschereau J.

had since been making logs mainly for the account of Ross. In 1875, however, he had to give up business, and, of course, having no logs to pass, abandoned the care of the upper booms altogether. Ross, then, for eleven years, from 1875 to 1886, either by himself, or in 1880 and 1881 by Hall Bros., for him and in his name, assumed the obligation, to the knowledge of the respondent and of O'Shaughnessy, and with their tacit acquiescence, to maintain and repair the said upper booms, in consideration of which the respondent during the said eleven years never charged him boomage. In March, 1887, the respondent wrote to Ross as follows:

NICOLET, 17th March, 1887.

Messrs. W. G. Ross & Son,
St. Nicholas.

Gentlemen,—As the season is fast approaching, I consider it my duty to learn of you as soon as possible what you intend to do about the piers and booms on the Nicolet. It will soon be time for some one to take care of booms and piers. Please let me know what you intend to do about placing said booms, &c., or if you have given authority to some one to act for you in said affair.

Why did the respondent write this letter to Ross and not to O'Shaughnessy? And how can he now argue that he was not put *en demeure* to make these repairs after having himself so thrown the liability thereto on Ross, and put him, Ross, *en demeure* to make them?

That letter, it seems to me, is clear evidence that he, the respondent, looked to Ross, and to Ross alone, for the maintenance and repairs of the booms. For eleven years, by his course of conduct, he leads Ross to believe that the party who makes the repairs has the use of the booms free. Ball is thereby induced, as Ross has been, to make large repairs and disbursements, and now the respondent would make him pay boomage. I would think that, granting that he would have had the right in 1875, by assuming himself the cost of repairing and maintaining, to charge any such boomage to Ross, he

1892

BALL
v.
MCCAFFREY.

Taschereau J.

is now estopped by his line of conduct from claiming any from the appellant. He has ratified the understanding that he who made the repairs was entitled to pass his logs free. In 1875 and afterwards Ross was not obliged to make these repairs; and Mayrand or his assignee, not making them, the respondent would have been obliged to make them himself, otherwise his rights would have been gone; and he could not have claimed to be reimbursed from Ross, but only from Mayrand or his assignee. Renunciation to a right is not to be presumed, argues the respondent. As a general proposition of law that is unquestionable. But first, what rights to boomage would the respondent have had at all against Ross if these booms had not been maintained and kept in repair? Then if a party entitled to certain rights acts, in his dealings with any one, inconsistently with such rights, and thereby, knowingly, induces that other one to alter his position, or to submit to obligations or liabilities from which he would otherwise have been free, or to do that from which he might otherwise have abstained, that is evidence of renunciation or abandonment of his rights.

Because Mayrand remained liable for the repairs by his agreement of 1875 with Ross that did not free the respondent from his obligations towards the public and Ross himself. Ross, when Mayrand gave up business, as I have already remarked, assumed Mayrand's obligations to the repairs in consideration of which he exercised Mayrand's rights to free boomage; and such is the interpretation given to these deeds, and acted upon, during thirteen years by the respondent himself and Mayrand and his representative. Respondent says that he has not charged boomage to O'Shaughnessy who represents Mayrand under an assignment of June 15th, 1877. I do not see how that can affect the appellant. That does not concern him. Neither he nor Ross were

made aware of that assignment, and this O'Shaughnessy himself not only never expended a cent on these booms, but, when repairs were necessary, himself called on Ross or Ball to make them. The respondent's action should on these grounds be dismissed. If Ross was not liable the appellant is not. But assuming that his claim could at all be entertained, he must fail on the appellant's plea of compensation.

If he collects boomage from the appellant he must reimburse him his expenses for repairing and maintaining these booms. He cannot claim the profits and at the same time free himself from his obligations.

His contention against the appellant's plea as to this, that he was not put *en demeure*, or that the appellant might have recovered against Ross or against Maynard or O'Shaughnessy, cannot prevail against the principle that *nemo alterius detrimento locupletari debet*. The deeds moreover between Mayrand and Ross, and Ross and the appellant, are, towards him, the respondent, *res inter alios acta*. He could not, as against the public, free himself from the obligation imposed on him by the legislature of maintaining and replacing these booms. That was the express condition upon which this privilege was conceded to him, a condition precedent to any claim for boomage against Ross or any one else. If neither the appellant, nor Ross nor Mayrand, had made these repairs, upon the necessity and urgency of which there is ample evidence, where would he, the respondent, have been with his privilege if he had not made these repairs himself? He clearly benefited from the appellant's disbursements, and, it seems to me but just, on the principle of the action *de in rem verso*, that he should be held liable therefor. Then Mayrand, it is true, was obliged towards him, to make these repairs, but, on the other hand, he had the use of

1892

BALL
v.
McCAFFREY.

Taschereau J.

the booms free; and the appellant must likewise have had the booms free or be reimbursed his expenses. Ross had previously made the necessary disbursements for the annual repairs, &c., &c., but the respondent, as I have already said, never charged him boomage. I do not doubt that, as found by the learned judge of the Superior Court, the appellant never, at the time, contemplated to charge these disbursements to the respondent, but it is, in my opinion, as evident that he then thought himself not liable for boomage at all. In fact, the respondent himself did not then think he could claim such boomage from the appellant as I have shown. And he could not have been very confident of his rights even when he determined to take proceedings against the appellant, as he previously took the precaution to assign his property to his brother.

He would leave the appellant to exercise his recourse against Mayrand or his estate. Now, Mayrand died long ago, an insolvent. Or against O'Shaughnessy? But there is no privity of contract between appellant and O'Shaughnessy.

It may be that part of the appellant's bill of particulars should not be charged to the respondent; however, it is unnecessary for me to enter into an examination of its details as I am of opinion that the action is unfounded.

We are of opinion that this appeal should be allowed with costs on this appeal and in Queen's Bench against respondent, and the action dismissed with costs.

Appeal allowed with costs.

Solicitor for appellant: *L. Charbonneau.*

Solicitor for respondent: *M. Honan.*