JOSHUA SPEARS AND WILLIAM C. SPEARS (Plaintiffs)..... } APPELLANTS;

AND

JAMES WALKER (Defendant)..... RESPONDENT.

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*Feb'y.21,26,
*June 23.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Building contract—Enforcement of—Violation of city by-law—Liability of owner—Effect of by-law passed after contract was made.

S. & Co., contractors for the erection of a building for the respondent in the city of St. John, N.B., brought an action claiming to have been prevented by respondent from carrying out their contract. The declaration also contained the common counts, part of the work having been performed. By the terms of the contract the building, when erected, would not have conformed to the provisions of a by-law of the city passed (under authority of an Act of the General Assembly of New Brunswick, 41 Vic., ch. 7) two days after the contract was signed.

On the trial of the action the plaintiffs were non-suited, and an application to the Supreme Court of New Brunswick to set such non-suit aside was refused.

*PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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Held, (Henry, J., dissenting)—That the by-law of the said city of St. John made the said contract illegal, and, therefore, the plaintiffs could not recover. *Walker* v. *McMillan* (1) followed.

Per Henry, J.—That the erection of the building would not, so far as the evidence showed, be a violation of the by-law, and, therefore, the non-suit should be set aside and a new trial ordered.

APPEAL from the Supreme Court of the Province of New Brunswick, refusing to set aside a non-suit and order a new trial.

The action in this case arose out of a contract made between the appellants and the respondent for the erection of a building in the city of St. John, N.B. After the building was partially up a portion of the centre wall gave way, and the appellants (the contractors for the erection of the building) refused to complete it, unless an undertaking was given by the owner that by so doing they would not be considered as acknowledging responsibility for the fall of the wall. Such undertaking was refused and respondent completed the building himself. It appears that two days after the signing of the contract a by-law had been passed by the corporation of the city of St. John, (under the provisions of 41 Vic., ch. 7, N. B.) regulating the erection of buildings in the city, and the erection of this building, according to the terms of the contract, would not be in accordance with the provisions of such by-law.

The contract itself and other facts bearing on the case will be found set out in the case of *Walker* v. *McMillan*.

Weldon, Q. C., and *Barker*, Q. C., for the appellants.

This case is very different from *Walker* v. *McMillan*. That was an action by a third party who had sustain-

(1) 6 Can. S. C. R. 241.

ed damage by the negligence of the owner of an adjoining building and the contractor employed by him. Here, we are claiming redress for breach of contract, and would submit:

That the contract being lawful when made, and, by subsequent agreement, so altered as to make its performance lawful, it is not affected by a by-law passed after it was made, and the parties had no intention of violating the law, which is an important ingredient in the case, the action being upon a contract. *Waugh* v. *Morris* (1); *Pearce* v. *Brooks* (2); *The Teutonia* (3).

There was evidence to go to the jury as to whether or not a new agreement was made, and, if so, whether or not it was within the terms of the by-law.

Tuck, Q. C., and *Straton*, for the respondent.

From the time of the injury to respondent's building the contract was in contravention to the city by-law and unlawful. It is admitted that the centre wall, as agreed to be built, became unlawful as soon as the by-law was passed, and such a contract cannot be enforced. *Walker* v. *McMillan* (4); *Stevens* v. *Gourley* (5).

The intention of the parties has nothing to do with the question. They seek to recover under a contract to erect a building in a manner forbidden by law. The following cases also were cited: *Ellis* v. *The Sheffield Gas Co.* (6); *Bower* v. *Peate* (7), and *Angus* v. *Dalton* (8).

Weldon, Q. C., in reply.

RITCHIE, C. J.:—

I agree with Mr. Justice King that this case is concluded by the judgment of this court in *Walker* v. *McMillan*(9), which judgment is, in my opinion, fully

(1) L. R. 8 Q. B. 202.
(2) L. R. 1 Ex. 213.
(3) L. R. 4 P. C. 171.
(4) 6 Can. S. C. R. 241.
(5) 7 C. B. N. S. 99.
(6) 2 E. & B. 767.
(7) 1 Q. B. D. 321.
(8) 4 Q. B. D. 162 affirmed on appeal 6 App. Cas. 740.
(9) 6 Can. S. C. R. 241.

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sustained by the case of *Hughes* v. *Percival* (1), decided in the House of Lords since the case of *Walker* v. *McMillan* was decided. Unless we are prepared to overrule that case (which most certainly I am not prepared to do), the non-suit must stand.

STRONG, J., concurred.

FOURNIER, J.:

L'action en cette cause est bâsée sur un contrat passé le 24 septembre 1877. Le 26 du même mois un by-law de la municipalité de St. John, passé en vertu d'une loi du Nouveau-Brunswick, réglant les constructions de bâtisses dans la cité de St. John, déclarant illégal la construction dans la dite cité de murs d'une épaisseur moindre que celle posée par le dit réglement, devenait en force.

Quoique le contrat fût légal au moment où il fut passé, il cessa de l'être par l'adoption du règlement en question. Les appelants en connaissaient l'existence aussi bien que les dispositions, même avant d'avoir commencé leurs travaux, cependant ils les continuèrent, en contravention aux dispositions du règlement. Cette raison seule suffit pour faire rejeter la demande.

Je suis d'avis de renvoyer l'appel avec dépens.

HENRY, J.:—

This is an action by a declaration consisting of three counts—two of them on a building contract, and the third for work and labour done and materials provided. The declaration sets out the written contract, alleges part performance and a readiness to complete it, and that the contractors would have completed but they were hindered and prevented by the respondent from so doing, and that they were wrongfully dis-

(1) 8 App. Cas. 443.

charged and prevented from doing and completing the same.

The respondent in his eighth plea to the first count, and in his twenty-second plea to the second count, substantially denies that he so prevented or hindered the appellant from completing the contract, and alleges in both pleas that the appellants "utterly refused to go on and perform their part of the said agreement" and complete the building. The appellants do not and cannot contend full performance, but depend, to entitle them to succeed, on the reason they allege. The excuse for non-performance must be a legal one, and the onus of proving the issue is on the appellants who allege it. Under the issues raised by the two counts and the pleas thereto, which I have stated, the only question to be preliminarily decided was as to the truth of the appellants' allegation that they were prevented from the full performance of the contract by the respondent. That issue was one to be submitted to, and resolved by, the verdict of a jury, inasmuch as touching it there was conflicting evidence, although the weight of it preponderated greatly in favour of the respondent. The judgment of non-suit having been given, and none of the facts proven as to the issue in question, I think that the judgment of non-suit was not warranted, and that the non-suit should be set aside and a new trial awarded. There is, however, another view to be taken of the pleadings and evidence. The contract was entered into on the 24th of September, 1877, for the erection of a building on a lot of land owned by the respondent in the city of St. John, New Brunswick, bounded on the west by Prince William street. It was prescribed to be 55 feet front, four storys high, 105 feet deep, first story; 60 feet deep, second, third and fourth stories. From other evidence it is shown the walls were to have been 65 feet in height. The specification which formed

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part of the agreement provided for a central wall of brick from front to rear, sixteen inches thick. Two days after the agreement was entered into, the mayor, aldermen, and commonalty of the city of St. John passed a by-law—being authorized so to do by statute—requiring that brick or stone buildings to be subsequently erected in St. John should be according to the prescriptions thereof. The carrying out of the contract in this case, if it involved a breach of any of such prescriptions by any of the parties to it, would not be justifiable. It is shown that the appellants, immediately after entering into the contract, commenced work on the building and continued therewith till the early part of the autumn, when the partition or centre wall gave way, and the greater part of the erection fell. This partition wall was not built according to the provisions of the contract, it being partly built on clay. Before the fall of the building it had rained hard for a part of two days, and from the statements in evidence of one of the appellants, the mortar in parts of it had become softened and was pressed away from its proper connection with the bricks. Wm. M. Sears acted as agent and manager of the respondent as to the building and contract, and the evening before the 8th of September, the appellant, W. C. Spears, received from him a notice demanding him to remove the *débris* of the fallen building, and to rebuild the same as per contract. On the 8th the appellants replied, denying any responsibility for the loss, and refusing to remove the *débris* or restore the buildings without a written statement from him (Sears) declaring "that any such acts or operations on my part will in no wise be construed by you as an acknowledgment on my part of any errors or defects in my work, leading to the disaster." Upon this negotiations ended, and the respondent proceeded to re-erect the building at his own

costs and charges. He alleges that it cost him more than the contract price with the appellants. The question of the liability of the appellants to re-erect the building is not a matter for inquiry in this suit, and it is unnecessary to refer to it. Neither is the question of damages for non-performance of the contract. In addition to the other issue on the two pleas before mentioned, the respondent alleges, in a great many pleas, that the agreement for the partition wall of the width of sixteen inches, became illegal by the by-law beforementioned; that inasmuch as the walls of the building were over thirty-five feet in height, the partition wall should have been twenty inches to the top of the third floor to have complied with the by-law, and that he, the respondent, was therefore released from the agreement. A great deal of irrelevant evidence, I think, was admitted in this case, and much more than affects the only issues raised.

I have carefully read and examined the by laws before referred to, and I have wholly failed to find any prescription that the partition walls of a building such as the respondent's should be twenty inches, or indeed of any particular thickness. In fact, the thickness of partition walls in such buildings is, as far as I can see, not specially provided for. In respect of buildings in which the walls exceed thirty feet, provision is made that the foundation walls shall not be less than twenty-four inches, the external walls not less than twenty inches, party walls (other than dwelling houses) not less than twenty inches to the top of the second floor above the street. The only reference to the thickness of partition walls is to be found in number 24, which is as follows:

Every building hereafter erected, more than thirty feet in width, except churches, theatres, railroad station buildings and other public buildings, shall have one or more partition walls running from front to rear, and carried up to a height not less than the top of the second

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story floor joists; said wall or walls may be four inches less in thickness than is called for by the provisions relating to the thickness of walls; these walls shall be so placed that the space between any two of the floor bearing walls of the building shall not be over twenty-five feet.

The distinction between party walls and partition walls is readily appreciable, and such distinction is seen to be preserved in the by-laws. No. 18 provides that:

Party walls for buildings exceeding thirty five in height shall not be less than twenty inches.

No. 32 provides that:

All party walls shall be carried up to a height of not less than one foot above the roof covering, &c.

This shows that a party wall was not intended to be understood as a partition wall, as the latter could not regularly be, and never is, built out through the roof.

There is no provision in the by-laws requiring any wall of a building to be over twenty inches, except foundation walls, which are required to be twenty-four inches. Such, however, are not the walls referred to in No. 24, before quoted.

Such being the case, I fail to find anything in the by-laws requiring a partition wall to be over sixteen inches in thickness, that is, four inches less than the prescribed thickness of the party and external walls, which are required to be not less than twenty inches. There being no other provision for a greater thickness of partition walls, I cannot come to the conclusion that the agreement to build the partition wall in this case was illegal, and that on that account the respondent would be justified in refusing to permit the appellants to re-erect the building and finish their contract; and a non-suit of the appellants would therefore be unjustifiable. The contract, or rather the specification, refers to a plan under the head "stone walls," which were to

be built as cellar walls ; and under the head "brick-work," reference is also made to a plan, which was not put in evidence, in this way :—

All walls coloured red on plan to be built of brick of the given heights and dimensions.

And, after describing how other parts of the work were to be done,

To carry up all walls at least twenty-four inches above the roof to twelve inches thick above the top of the roof beams, all other walls sixteen inches thick throughout their height.

Without the plan referred to, where would, no doubt, be found "the given heights and dimensions," I am unable to construe satisfactorily the meaning of the provision as to "all other walls." I am, however, of opinion that the plan showed the external and party walls required to be twenty inches, and that the clause first above quoted was to provide for their height, and that the latter clause was not intended to apply to them. If it did apply to the external or party walls, the agreement would in that respect have been illegal, but as no pretence was made that they were not of sufficient thickness, the fair conclusion is that by the plan they would be shown to be provided to have sufficient thickness. The onus of showing the illegality was on the respondent, and it should have been clearly shown, which it has not been. So far then, I cannot see my way clear to sustain the non-suit.

There is, however, a plea setting up the illegality of that part of the contract which is alleged to provide that the walls were to be so placed that the space between the floor-bearing walls would be over twenty-five feet, which, under the concluding clause of number 24 of the by-laws, would be illegal. I have carefully consulted the specification and I can find nothing therein to show whether one or more partition walls were to have been built. That, however, I have no doubt

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was provided for by the building plan referred to, but as it is not in evidence we cannot decide that the contract in that respect is illegal, when we have not the necessary proof. The width of the building from the centre of the two outside walls was shown to be 55 feet. Each wall 20 inches, taking half off each side would leave a space of 53 feet 4 inches. A wall in the centre of 16 inches would leave a space on each side of 26 feet, one foot more than prescribed by the by-law. It was for the respondent to furnish evidence of the illegality alleged, and that evidence is in this respect wholly wanting—because, for all that appears by the agreement the plan referred to may have provided for more than one partition wall. There are a great many other pleas on the record to which it is quite unnecessary, in my opinion, to refer; but in reference to the general plea of illegality of the agreement I may say that I have carefully considered the agreement and the by-laws, and can discover nothing that could affect our decision of the issues on that point. The judgment of a majority of this court in *Walker* v. *McMillan* (1) was cited and referred to on the trial, but the decision of this case depends on other evidence and the issues are wholly different. That was an action to recover damages for losses sustained by the negligence of the parties to this action. The decision of this court was not, in that case, founded solely on the statutory negligence attributed through a violation of the by-law, but upon other evidence of negligence on the part of the present appellants by means of defective building, by which the respondent's building fell down and injured that of the respondent in that case, and for which this court held the present respondent answerable under the facts in evidence in that case. The alleged deficiency in the thickness of the partition

(1) 6 Can. S. C. R. 241.

wall was not stated in the judgment of the learned Chief Justice of this court, in which my brothers Fournier and Taschereau and I concurred—to be the cause of the illegality referred to. The illegality was stated in general terms. As far as my memory serves me, it was tacitly, if not expressly, admitted on the argument of that case, that a 16-inch partition wall would be a violation of the by-law, and having examined the evidence, I find the plan was in evidence in that case. We had therefore, in that case, what was absolutely necessary to properly understand and construe the specification which referred to it, and which is, in respect of the question now under consideration, all important, and without which we cannot decide whether or not the agreement is illegal. To come to a conclusion on the issues now before us I had more specially to examine the agreement and by-laws, and with the result before stated.

At the instance of the counsel for the appellants, the learned judge on the trial did not submit the issues raised on the third count to the jury, as the counsel preferred a judgment of non-suit on the two special counts, and it is only with them we have to deal. I am of opinion that the non-suit should be set aside and a new trial ordered, with the costs of the appeal to this court.

GWYNNE, J.:—

In the case of McMillan against the above defendant (1), I was of opinion that the by-law of the corporation of the city of St. John for regulating the mode of constructing buildings in the city of St. John, passed upon the 26th September, 1877, in pursuance of the provisions of an Act of the Legislature of the Province of New Brunswick, 41 Vic., ch. 7, known as "The

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St. John Building Act of 1877," had no application whatever to the matters in issue in that action, which was one for damages alleged in the declaration to have been occasioned to certain property of the plaintiff by negligence in the manner in which a house, which was being erected for the defendant under a contract entered into by him with the present plaintiff, was erected. It seemed to me to be reconcilable neither with principle nor with authority that the plaintiff in that action should recover against the defendant by reason of the latter's non-compliance with the provisions of the by-law, for an injury which the plaintiff charged to be, and which the jury found to be, and which was upon all sides admitted to be, attributable, not to non-compliance with the provisions of the by-law, but to causes wholly independent of, and in no way connected with, the provisions of the by-law or the violation thereof. Non-compliance with the provisions of the by-law not having caused the injury complained of, I could not see what application the by-law could have to the matters in contestation in that action, but in the present one, that by-law and its provisions constitute, in my opinion, the material substance of the matter now under consideration. The by-law, and the fact that the work for which the plaintiffs bring this action was executed by him in violation of its express terms and provisions, and in a manner prohibited thereby, are specially pleaded in bar of the action, the gist of the pleas setting up this defence being, that although the contract declared upon was executed on the 24th September, 1877, and the by-law passed on the 26th of the same month, yet that the work now sued for was not commenced until after the by-law was passed, and thereafter the plaintiffs, in violation of the terms of the by-law, commenced and proceeded with the work; and the evidence, moreover, shows that they did so with full

knowledge of the by-law and its provisions. Upon this ground alone, without reference to the other grounds of defence pleaded, I am of opinion that the non-suit must be sustained, which, it appears, the plaintiffs agreed to accept rather than that the case should be submitted to the jury in the manner in which the learned judge who tried the case proposed to submit it, he having expressed the opinion that the plaintiffs could not recover for work done under the contract, such work having been of a nature which was prohibited by the terms of the by-law, and therefore illegal. Although the contract was not illegal upon the 24th September, when it was executed, the execution of the work thereby contracted for became illegal two days afterwards by the passing of the by-law, and the proceeding with the work thereafter by the plaintiffs, under the contract, was as illegal as if they had done so under a contract which had been executed after the passing of the by-law, and for such work they can no more recover in the one case than they could in the other. The judgment of the court below should, in my opinion, be affirmed, and appeal dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Weldon & McLean.*

Solicitor for respondent: *James Straton.*