Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of George D. Emery Company v. Wells, from the Supreme Court of British Honduras; delivered the 24th July 1906.

Present at the Hearing:
LORD DAVEY.
SIR ARTHUR WILSON.
SIR ALFRED WILLS.

[*Delivered by Sir Arthur Wilson.*]

The controversy between the parties to this Appeal arose out of a contract between them, under which Wells (Respondent) was to cut timber upon land of, or over, which he had obtained a grant from the Government, and to deliver the timber to the Company (Appellant) in order that they might ship it at the bar of the Monkey River.

The contract was entered into on the 26th February 1903, and was in the following terms:—

"An Agreement made the 26th day of February 1903, "between D. S. Wells of Monkey River, in the Colony of "British Honduras, Planter, of the one part, and Geo. D. "Emery Company of Boston, Mass., Hardwood Dealer, of the "other part, witnesseth as follows:—

"The said D. S. Wells agrees to cut and deliver to the "said Geo. D. Emery Company within the year 1903 200,000 "feet of mahogany and cedar logs in the round, such logs to be "in lengths of 12 feet 6 inches, 14 feet 6 inches, and 16 feet "6 inches, and to be sawn off at each end of the log, the said "logs to be from 18 inches in diameter at the small end of the "log, inside of the bark narrow way of the log, the measure- "ment to be made according to Doyle's rule for log measure- "ment in Scribner's Log Book of 1900, and be straight as "reasonable and free from defects, such wood to be delivered "to the said Geo. D. Emery Company or their agent at the "bar of Monkey River.

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" For the consideration above mentioned the said Geo. D. " Emery Company agrees to pay to the said D. S. Wells the " under-mentioned rates per 1,000 feet:—

" From 18 ins. to 24 ins. in diameter, $50.00 U.S. currency.
" „ 25 ins. to 30 ins. in diameter, $55.00 U.S. currency.
" „ 31 ins. to 40 ins. in diameter, $65.00 U.S. currency.
" „ 41 ins. to 48 ins. in diameter, $80.00 U.S. currency.
" „ 49 ins. and upwards in diameter, $87.50 U.S.currency.

" In the event of any of the logs being so large that they " cannot be taken out in the round they may be squared.

" Should the said D. S. Wells be desirous of obtaining an " advance on account of this contract the said Geo. D. Emery " Company agrees to pay him 50 per cent. of the purchase price " of the mahogany and 50 per cent. of the purchase price of the " cedar so soon as the said D. S. Wells shall have the wood " on the bank of the river and free from all encumbrances, to " the satisfaction of the said Geo. D. Emery Company ; such " wood shall then be stamped by the said Geo. D. Emery " Company, and shall be deemed to have been delivered to " him, but the said D. S. Wells shall nevertheless be bound, " when notified by the said Geo. D. Emery Company or their " agent, to bring the wood to the said bar at his own cost, and " should he neglect to do so the wood may be brought down " to the said bar by the said Geo. D. Emery Company and the " expense of bringing the same down shall be deducted from " the balance due to the said D. S. Wells.

" It is hereby agreed that in the event of the death of " the said D. S. Wells all wood cut and on the bank of the " river on which the said Geo. D. Emery Company have made " any advances to the said D. S. Wells, the said Geo. D. " Emery Company is hereby empowered to bring said wood " to the bar for shipment on their account, and any residue " remaining after advances made by the said Geo. D. Emery " Company to the said D. S. Wells have been paid, said " residue to be paid by Geo. D. Emery Company to the heirs " or assigns of the said D. S. Wells. Should such wood " that is cut and on the bank of the river, however, not be " sufficient to cover said advances then the said Geo. D. " Emery Company shall have the right under this contract " to cut and extract sufficient mahogany and cedar to liquidate " the indebtedness of the said D. S. Wells to the said Geo. D. " Emery Company.

" It is also hereby agreed that all mahogany and cedar on " this body of land now granted to the said D. S. Wells by the " Government of British Honduras is to be delivered to the " said Geo. D. Emery Company and for which contracts shall " be made annually for the amount to be delivered.

" In witness whereof the parties have hereunto set their " hands the day and year first above written.

Witness (Sd.) " D. S. Wells,
(Sd.) " Geo. D. Emery Co.,
" per D. W. Buskirk."

"N.B.—In the event of the said D. S Wells not being
"able to procure the necessary labour for the working of this
"contract in 1903 an extension will be given for deliveries of
"wood until the said D. S. Wells can make satisfactory
"arrangements for labour.

(Sd.) "D. S. Wells,
(Sd.) "Geo. D. Emery Co.,
"per D. W. Buskirk."

As contemplated by the contract, the time for delivery of the 200,000 feet of timber was extended from 1903 to 1904.

By June 1904 difficulties had developed between the parties, the main subject of dispute being as to the meaning of the words, "on the "bank of the river," in the clause of the contract which entitled Wells to an advance of 50 per cent. of the purchase price so soon as the wood was in that position. A reference to the rough sketch, No. 126, Exhibit E, makes the question intelligible. It shows that there are three branches of the Monkey River, which become joined at a certain point, thus forming the Swasey branch, and that somewhat lower down the river is joined by the Cockscomb Creek. The Company contended that the "bank of the river" applied only to the main river after the junction of the three branches, to the exclusion of the banks of the branches and the banks of the Creek; Wells contended that the words in question extended also to the branches and the Creek.

Wells, as the jury have found, claimed to be credited with 50 per cent. of the price of the wood when it was on the bank, and in fact during a period commencing soon after the making of the contract the Company did pay to him sums aggregating 7,500 dollars, not expressly on account of the 50 per cent. advance, but at any rate on account of the contract, which perhaps comes to the same thing. The Company insisted upon Wells taking the timber

to the bar of the river and there handing it over. Other questions also arose between the parties which it is now unnecessary to consider. The facts are so far referred to only in order to make what follows intelligible. By the autumn of 1904 things had arrived at something like a deadlock.

On the 7th December 1904 Wells commenced his action against the Company. In his statement of claim he set out a number of circumstances from which he contended, amongst other things, that the Company had repudiated the contract, and he claimed damages accordingly. The Company by their defence denied the Plaintiff's case, alleged that the Plaintiff had himself broken the contract by his failure to bring the timber to the bar of the river, and by way of counter-claim asked for damages. The case was tried before the learned Chief Justice and a special jury in June and July 1905. At the close of the case no general verdict was taken, but the learned Chief Justice left sixteen specific questions to the jury, and received their answers. Those questions and answers, so far as they are now material, were as follows:—

"Question 1. Does the evidence raise any ambiguity in the "contract as to the meaning of the words 'bank of the river' "wherever they occur in the contract?—Yes.

"Question 2. If Yes, what do you find from the evidence "these words to mean? Do they mean (*a*) the bank of the "main river? or (*b*) do they mean any branch or creek of the "river near to which the Plaintiff was cutting mahogany and "cedar under the contract, and which would contain enough "water in ordinary floods to bring out the wood to the bar of "the river? or (*c*) what do these words mean?—The bank "of the river means (*b*) any branch or creek of the river near "to which the Plaintiff was cutting, &c.

"Question 6. Did the Plaintiff, or did he not, intimate to "the Defendants or their agents, or any of them, that he "desired them to credit him with 50 per cent. of the purchase "price of the wood when it was on the bank of the river?— "Yes; 5 to 2.

"Question 9. Was the delivery of the wood to the Defen-
"dants complete under the contract, and did they accept the
"wood so delivered?—Yes.

"Question 11. Did the Defendants, by sending the letter
"A 36 and the attached account to the Plaintiff, intend to
"repudiate those parts of the contract dealing with the
"advance of 50 per cent of the purchase-money of the wood?
"—No.

"Question 12. Did the Plaintiff expressly, or by his
"conduct, lead the Defendants to believe that he would not
"take the wood to the bar of Monkey River?—No.

"Question 13. What is the approximate number of super-
"ficial feet of mahogany and cedar which the Plaintiff had on
"the bank of the main river, the three forks or branches, and
"Cockscomb Creek in 1904? How much of the said wood
"was sound and of contract size?—886 logs, measuring, total
"319,401 superficial feet. Sound wood 827 logs, measuring
"202,294 superficial feet.

"Question 14. What is the approximate value (*a*) of all
"the above wood? (*b*) of the sound wood of contract size?—
"(*a*) $17,912. 03; (*b*) $17,306. 95.

"Question 15. What is the prospective damage which you
"find the Plaintiff has suffered?—$2,167. 85."

The Plaintiff subsequently moved the Court for Judgment, and after cause had been shown against the motion, the learned Chief Justice on the 25th July 1905 delivered his decision, directing Judgment to be entered for the Plaintiff for 11,974.80 dollars, and also in his favour on the counter-claim, with costs, and Judgment was entered accordingly. Against that Judgment the present Appeal has been brought.

The learned Counsel for the Appellant in opening the Appeal proceeded upon very broad ground. It was contended that questions had been left to the jury which ought to have been decided by the learned Judge himself, that the jury had been misdirected, that evidence had been improperly admitted, and that as to certain findings of the jury, either there was no evidence to support them, or they were against the weight of evidence. Such contentions as these, if well founded, could clearly only be ground for a new trial, and their Lordships' attention has been

called to the enactment relating to new trials in force in the Colony of Honduras (Consolidated Laws of the Colony of British Honduras, Part VI., Chapter 13, Section 213) which says:—

"A party desirous of entering a judgment *non obstante* "*veredicto*, or upon a point of law reserved, or upon any other "grounds reserved at the trial, or of obtaining a new trial of "any cause or matter on which a verdict has been found by a "jury, or by a Judge without a jury, must apply for the same "to the Court by motion for an order calling upon the opposite "party to show cause at the expiration of eight days from "the date of the order, or so soon after as the case can be "heard, why a new trial should not be directed, or why judg-"ment should not be entered as aforesaid. Such motion shall "be made within four days after the trial, or within such "extended time as the Court may allow, or at any such time as "the Court may determine upon application made immediately "after the trial."

In the present case no application for a new trial was made to the Court in Honduras. The enactment just referred to is imperative, and their Lordships have no power to relax or dispense with it. The result is, that on the present Appeal no contention directed to a new trial is open to the Appellants; and this excludes all questions as to whether there was a miscarriage of the trial itself, all questions as to whether any point was wrongly left to the jury, as to misdirection, as to improper admission of evidence, and as to the correctness of the findings of the jury.

What does remain open to the Appellant is, whether assuming the correctness of all that took place at the trial, and of the findings of the jury, the judgment subsequently delivered by the learned Chief Justice is justified by those findings. This of course greatly limits the scope of the present Appeal.

The first of the questions thus remaining open to the Appellant arises in this way. The finding of the jury in answer to the second question put to them unquestionably negatives

the contention of the Company that the words "bank of the river" in the contract were necessarily limited to the main river, to the exclusion of branches and creeks, and explained those words in a different sense. And their Lordships may add that, if and so far as there was a question of construction on the facts found, they do not differ from the finding of the jury. But it was said that there was no finding to the effect that the logs primarily in question in this case were in fact at the material time in positions falling within the definition laid down by the jury.

This is true, and it might have been a serious defect, had it not been for the finding of the jury upon question No. 9. By their answer to that question the jury found that the delivery of the wood (that is to say, the wood primarily in question in this suit) to the Defendants was complete under the contract, and that they accepted the wood so delivered. That finding precludes the Company, in this Appeal, from raising any question as to whether they were bound under the contract to accept any part of the wood so delivered and accepted.

Another question raised was whether there was any sufficient finding by the jury of a breach of the contract on the part of the Company. In their Lordships' opinion the answer of the jury to Question 6 is a sufficient finding of a breach, and of the real breach complained of, which was the failure to pay the full 50 per cent. of the price of the logs.

Then it was contended that the learned Judge was not justified in himself deciding that the breach of contract on the part of the Company went to the root of the contract, so as to entitle Wells to treat the contract as repudiated, and that a finding of the jury on the point was necessary. No doubt, in many

cases which can be imagined, such a question would properly be left to the jury. But where the question depends, as it does here, upon the construction of a written contract. their Lordships can see no reason why the Judge should not decide it as he would any other question so arising. In the familiar case of *Withers* v. *Reynolds* (2 B. & Ad. 882), always cited when this class of question arises, the point was made the ground of a non-suit.

The remaining questions relate to damages. The first branch of the damages relates to the wood which the jury by their answer to the 9th question found to have been delivered to, and accepted by, the Company, and which, by their answer to the 14th question, they valued at $17,306.95. The main objection to the damages so assessed, raised upon the present Appeal, was, that Wells was, by his contract, under an obligation to convey the wood to the bar of the river, notwithstanding the delivery and acceptance at the higher point, and that allowance ought to have been made for that by way of deduction in assessing damages. If that be so, it was a matter for evidence, and the Company had every opportunity at the trial of producing such evidence and having it left to the jury. In its absence their Lordships have nothing before them from which they could say that any allowance should be made on such ground. The $7,500 which were advanced have been duly credited.

The second branch of the damages is what is called, in the Judgment, prospective damages, entered in accordance with the answer of the jury to the 15th question. Those prospective damages relate to Wells' loss of profit to be earned in years subsequent to 1904, during the five years contemplated by the contract. The objection of the Appellant was, that no such

damages could be allowed at all on the ground that the contract was simply a contract for one year. The amount of the damages, if admissible at all, was not alleged to be excessive. The view of the learned Chief Justice was thus expressed:—

" Annual contracts were to be made for the amount to be " delivered each year, and my construction of the agreement " is, that however little or however much wood the Defen- " dants agreed to take in any particular year, during the " continuance of the term, they were bound to make arrange- " ments by which they would succeed in taking all the " Plaintiff's wood cut during the term of years."

Their Lordships agree with the learned Chief Justice as to the meaning of the contract, and therefore consider that the prospective damages were properly allowed.

Their Lordships will humbly advise His Majesty that this Appeal should be dismissed.

The Appellants will pay the costs.