

In my opinion the appeal should be allowed and this action dismissed.

HON. SIR JOHN BOYD, C.

JUNE 7TH, 1912.

CANADIAN GAS POWER & LAUNCHES v. ORR BROS.

3 O. W. N. 1362.

Sale of Goods—Contract—Implied Warranty—Intention of Parties—Skill and Judgment of Sellers—Rescission of Contract—Purchaser's Right to Lien for Amount Paid—Right to Enforce Lien by Sale—Possession of Goods—Costs.

An action to recover possession of an engine and other articles and to recover damages for their detention.

A previous action between the same parties was tried by HON. MR. JUSTICE CLUTE, whose judgment was affirmed by the Court of Appeal, 19 O. W. R. 235, 23 O. L. R. 616, 2 O. W. N. 1070, and by the Supreme Court of Canada, O. W. R. ; S. C. R.

The present action was tried before HON. SIR JOHN BOYD, C., without a jury.

G. H. Watson, K.C., for the plaintiffs.

R. McKay, K.C., for the defendants.

HON. SIR JOHN BOYD, C.:—The sale of the engine, etc., was rescinded by the Court because of the default of the vendors. At the date of the action to enforce the contract, part of the price had been paid by the purchaser to the extent of \$500, and it was found by Mr. Justice Clute, that the vendors had made default and had no *locus standi* to sue for the balance of the price, and the action was dismissed. Judgment was given for the return of the purchase money already paid and also for damages and costs. This judgment has been affirmed after two successive appeals to the higher Courts. At the trial the Judge said that the engine should be returned; but, as he tells me, this was on the supposition that the judgment against the vendors would be paid. The vendors had pending action and before the trial and judgment gone into liquidation, but the liquidator, *quoad* this contract, stands in the shoes of the insolvents, the vendors.

Had the learned trial Judge then been asked to frame his judgment so that the re-delivery of the engine should be