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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. JULY 30TH, 1918.

*LE PAGE v. LAIDLAW LUMBER CO. LIMITED.

Costs—Action for Price of Goods—Dispute as to Quantity of Goods—Failure of Plaintiff on Main Issue—Recovery of Small Sum—Plaintiff Ordered to Pay Defendants' Costs—Appeal—Findings of Fact of Trial Judge.

An appeal by the plaintiff from the judgment of MIDDLETON, J., who tried the action without a jury at Toronto, directing that the plaintiff should recover $162.85 and should pay the defendants' costs of the action, less the sum recovered.

The action was brought to recover $1,649.20 for 4,712 lbs. of glue at 35 cents per lb., less contra-account of $216.55, balance $1,432.65.

The defendants denied that they had bought this quantity of glue, alleged that they agreed to accept only sufficient glue to balance the $216.55 which the plaintiff owed them, and that it was part of the agreement that the defendants would pay for any trifling addition "so as not to break a bag" to get the exact quantity to equal the balance.

By the appeal the plaintiff sought to recover the full sum sued for, $1,432.65, with his costs of the action.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, SUTHERLAND, and KELLY, JJ.

I. F. Hellmuth, K.C., for the appellant.

H. J. Scott, K.C., for the defendants, respondents.

* This case and all others so marked to be reported in the Ontario Law Reports.

CLUTE, J., in a written judgment, after reviewing the evidence, said that the view taken by the learned trial Judge was sufficiently supported by the evidence, and was more probable than the plaintiff's statement. Upon the evidence it was wholly improbable that the defendants purchased the full amount which the plaintiff said he sold them. The finding of the trial Judge ought not to be disturbed.

Upon the question of costs, the learned Judge referred to the Judicature Act, R.S.O. 1914 ch. 56, sec. 74 (1); Harris v. Petherick (1879), 4 Q.B.D. 611; Forget v. Ostigny, [1895] A.C. 318; Fielden v. Cox (1906), 120 L.T.J. 521; Re Rotch (1909), 127 L.T.J. 617; Bew v. Bew, [1899] 2 Ch. 467; Estcourt v. Estcourt Hop Essence Co. (1875), L.R. 10 Ch. 276; Vipond v. Sisco (1913), 29 O.L.R. 200; Holmested's Jud. Act, 4th ed., pp. 251-253; and said that the learned trial Judge having found, upon sufficient evidence, that the plaintiff did not intend to sell nor the defendants to buy the quantity of glue that was stored in a certain warehouse, the price of which formed much the larger part of the plaintiff's claim, it followed that the plaintiff had failed as to that which was the real bone of contention between the parties. There could be no doubt that the trial Judge intended to exercise and did exercise a discretion in regard to the costs. The circumstances were peculiar. The litigation was unnecessary, caused wholly by the plaintiff. There was no ground for interfering.

The appeal should be dismissed with costs.

SUTHERLAND, J., agreed in the result, for reasons stated in writing, in which MULOCK, C.J.Ex., agreed.

KELLY, J., also agreed in the result, for reasons stated in writing.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. JULY 30TH, 1918.

*GARDNER v. MERKER.

Sale of Goods—Action for Price—Counterclaim for Damages for Fraudulent Misrepresentation as to Value of Goods—Finding of Fact of Tiral Judge—Representation Made but without Fraud—Condition or Warranty not Established—Appeal.

The plaintiff sued in the County Court of the County of Hastings for $760.60, the balance of a sum of $1,500, the purchase-price of some junk sold by him to the defendants.

The defendants set up that, knowing the amount and value thereof at the current market price, the plaintiff falsely and fraudulently represented the junk as worth $2,000 and the lowest possible price $1,800, and that, induced by this false and fraudulent representation, they executed the agreement sued on; that they sold all the junk but a small quantity; it produced but $800; and they counterclaimed for $2,000 damages.

The trial Judge gave judgment for the plaintiff for $200 and dismissed the counterclaim.

The defendants appealed.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and KELLY, JJ.

W. J. Elliott, for the appellants.

H. S. White, for the plaintiff, respondent.

CLUTE, J., in a written judgment, said that the trial Judge found that the representation alleged by the defendants was made by the plaintiff and that the defendants acted upon the faith of the representation, but the trial Judge did not find that it was fraudulent. The plaintiff did not appeal, although he was not awarded the full amount of the contract price.

The learned Judge referred to Harrison v. Knowles, [1917] 2 K.B. 606; De Lassalle v. Guildford, [1901] 2 K.B. 215; Edward Lloyd Limited v. Sturgeon Falls Pulp Co. Limited (1901), 85 L.T.R. 162; Wallis Son & Wells v. Pratt & Haynes, [1910] 2 K.B. 1003, [1911] A.C. 394; Heilbut Symons & Co. v. Buckleton, [1913] A.C. 30.

The learned Judge then said that, applying the principle that an affirmation at the time of the sale is a warranty, provided it appears on evidence to be so intended, which intention is to be deduced from the whole of the evidence, he was of opinion that

the evidence in this case did not shew that the representation made was intended by the parties to be contractual respecting the accuracy of the statement, but was in fact nothing more than the opinion or estimate of the vendor.

There being no fraud, and no condition or warranty proven, the defendants failed upon their counterclaim.

The appeal should be dismissed with costs.

MULOCK, C.J.Ex., agreed with CLUTE, J.

RIDDELL and KELLY, JJ., agreed in the result, for reasons stated by each in writing.

SUTHERLAND, J., also agreed in the result.

Appeal dismissed with costs.

HIGH COURT DIVISION.

MULOCK, C.J.Ex., IN CHAMBERS. JULY 25TH, 1918.

RE HOBBS AND KENABEEK CONSOLIDATED SILVER MINES LIMITED.

Company—Winding-up—Dominion Company in Course of Winding-up in Quebec Court—Mechanic's Lien Registered against Land of Company in Ontario—Leave to Commence Action to Enforce—Mechanics and Wage-Earners Lien Act, R.S.O. 1914 ch. 140—Winding-up Act, R.S.C. 1906 ch. 144, sec. 22—Application for Leave—Jurisdiction—Forum.

Motion by Hobbs, a lien-holder under the Mechanics and Wage-earners Lien Act, R.S.O. 1914 ch. 140, for leave to commence an action against the Kenabeek Consolidated Silver Mines Limited, a company incorporated by a Dominion charter, now in liquidation in the Province of Quebec, to enforce his lien.

The claim of lien was registered on the 27th May, 1918, and the winding-up order was made by the Superior Court of the Province of Quebec on the 5th June.

Under the Mechanics and Wage-Earners Lien Act, the lien ceases to exist at the expiration of 90 days after the work was performed, unless an action has been commenced. The Dominion

Winding-up Act, R.S.C. 1906 ch. 144, sec. 22, requires that leave shall be granted before an action is commenced against a company ordered to be wound-up.

A. G. Slaght, for Hobbs, supported the motion.

G. H. Kilmer, K.C., for the liquidator appointed by the Quebec Court, contended that the Quebec Court had become seised of the company's affairs, and the Supreme Court of Ontario could not interfere. He cited Baxter v. Central Bank of Canada (1890), 20 O.R. 214; Blais v. Bankers' Trust Corporation Limited (1913), 14 D.L.R. 277; Lavell v. Canadian Mineral Rubber Co. Limited (1913), 14 D.L.R. 521.

Slaght, in reply, pointed out that the land against which the lien was registered was in Ontario; the company had been carrying on business in Ontario; the statute which gave the lien was an Ontario Act; the action to preserve the lien must be brought in an Ontario Court; and the applicant ought not to be forced to go to a foreign Court for leave to commence an action in this Court.

MULOCK, C.J.Ex., was of opinion that the leave sought could be granted only by the Quebec Court, and dismissed the motion.

FALCONBRIDGE, C.J.K.B. JULY 31ST, 1918.

*SCOTT v. CRINNIAN.

Vendor and Purchaser—Agreement for Sale of Land—Purchase-money Payable in Instalments—Destruction by Fire of Buildings on Land—Insurance Moneys—Application of—Principal and Interest under Agreement not in Arrear—No Right in Vendor to Apply on Instalments not yet Due—Lien of Vendor on Moneys—Disposal of—Payment into Court—Mortgages Act, R.S.O. 1914 ch. 112, secs. 2 (d), 6.

On the 14th May, 1912, the plaintiffs agreed to sell land in Sarnia upon which an hotel stood to T. H. Crinnian and P. C. McGowen for $21,000, to be paid $1,000 on the date of the agreement and $300 every year thereafter until the whole amount should be paid, with interest at 5 per cent.

By a clause in the agreement of sale and purchase, the purchasers were to insure the hotel-building to its full insurable value, in their own names, but loss to be payable to the vendors as their interest might appear.

The purchasers transferred their interest under the agreement to the defendant, and the defendant, in pursuance of the agreement, insured the building in various companies.

The building was damaged by fire. The loss was apportioned among 9 insurance companies, who issued cheques to the aggregate amount of $15,000, payable to the order of the defendant and the plaintiffs.

This action was brought to compel the defendant to execute such a release as might be necessary to secure the delivery of the cheques or to endorse the cheques so that the plaintiffs might obtain the proceeds.

The defendant, alleging that all past-due instalments of the purchase-price had been paid, but that the portion of the purchase-money not yet due was greater than the total amount of the insurance moneys, contended that the insurance moneys were the property of the defendants, subject only to a lien in favour of the plaintiffs, and to the right of the plaintiffs, so often as there should be arrears of principal or interest payable to the plaintiffs by virtue of the agreement, to apply so much of the insurance moneys as might be necessary in payment of the arrears, and claimed a declaration accordingly.

The action was tried without a jury at London.

Sir George Gibbons, K.C., for the plaintiffs.

T. G. Meredith, K.C., for the defendant.

FALCONBRIDGE, C.J.K.B., in a written judgment, said, after setting out the facts, and referring to sec. 6 of the Mortgages Act, R.S.O. 1914 ch. 112, and the meaning given to "mortgage," "mortgage money," "mortgagor," and "mortgagee" by sec. 2 (*d*), said that the definition of "mortgage" was wide enough to cover the charge commonly known as "a vendor's lien," and he was inclined to think that the plaintiffs were mortgagees within the meaning of sec. 2, and therefore of sec. 6, though he doubted whether the Legislature ever considered very seriously the effect of applying this wide definition to every individual provision of the Mortgages Act.

Reference to Edmonds v. Hamilton Provident and Loan Society (1891), 18 A.R. 347; Corham v. Kingston (1889), 17 O.R. 432.

There was nothing in the judgments in those cases to justify the plaintiffs' contention that they were entitled to apply the insurance moneys in payment of instalments not yet due; but it appeared from those cases that, if the plaintiffs were mortgagees,

they were entitled to the security of the insurance money, just as before the fire they were entitled to the security of the buildings which the money represented.

Even if the plaintiffs were not mortgagees within the statute, the same principles would apply as between vendor and purchaser. The plaintiffs were not entitled to apply the insurance moneys in payment of instalments not yet due, but were entitled to look to the insurance moneys as part of their security.

The learned Judge did not see how he could direct the moneys to be held in trust for the long period for payment allowed by the agreement—more than 60 years—and, unless the parties could agree as to the disposal of the moneys, they should be paid into Court.

The parties were fairly seeking the direction of the Court in the ascertainment of their right; and, as neither of them succeeded completely, neither should be penalised with costs.

No order as to costs.

STOCK v. MEYERS—FALCONBRIDGE, C.J.K.B., IN CHAMBERS—AUG. 2.

Replevin — Rule 359 — Security — Rule 362 — Jurisdiction of Master in Chambers.]—Appeal by the defendants from a replevin order made by the Master in Ordinary, sitting in Chambers in the absence of the Master in Chambers. FALCONBRIDGE, C.J.K.B., in a written judgment, said that the making of the order seemed to be well within Rule 359, and there was no particular reason for substituting a bond from the defendants for the security which the Sheriff must take under Rule 362. The appeal should be dismissed. If there was any reason to question the jurisdiction of the Master in Chambers (as suggested in Holmested's Judicature Act, 4th ed., p. 866), a substantive order might be made. Costs of the appeal to be costs in the cause to the plaintiff in any event. R. T. Harding, for the defendants. R. S. Robertson, for the plaintiff.

EDEN v. BIRKS—FALCONBRIDGE, C.J.K.B.—AUG. 2.

Nuisance—Established Business—Motion for Interim Injunction.]—Motion by the plaintiff for an interim injunction restraining the defendant from operating cleaning-works next door to the plaintiff's dwelling-house in such a way as to constitute a nuisance. The motion was heard in the Weekly Court, Toronto. FALCONBRIDGE, C.J.K.B., in a written judgment, quoted with approval the remark of Middleton, J., in Danforth Glebe Estates Limited v. Harris (1917), 12 O.W.N. 189, 190, that there are no cases "in which a business established and in operation for some time and which is alleged to constitute a nuisance has been interfered with by an interim order." The decisions cited by the plaintiff's counsel were pronounced after trials. The motion should be adjourned till the trial without an injunction in the meantime; costs to be costs in the cause unless the trial Judge should otherwise order. W. H. Hodge, for the plaintiff. G. H. Kilmer, K.C., for the defendant.

CORRECTION.

In FERRIS v. EDWARDS, ante 311, at p. 312, line 11, for "carried" read "conned."

YOUNG v. CANADIAN PACIFIC R.W. Co., ante 352, was in the District Court of the District of Parry Sound.

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12. Construction—Devises and Bequests—Gift of "Balance" or Residue—"My Heirs Named in this Will as Devisees"—Inclusion of Legatees. *Re Bolton*, 14 O.W.N. 87, 143—SUTHERLAND, J.

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15. Construction—Fund to be Divided among Surviving Members of a Class on the Death of two Annuitants—Class Ascertainable at Time of Later Death—Member of Class Surviving one Annuitant and Predeceasing the other. *Re Draper*, 14 O.W.N. 81.—MIDDLETON, J.

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