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DIVISIONAL COURT.

BELL v. GOODISON THRESHER CO.

Sale of Goods—Threshing Outfit—Incapacity of Engine and Boiler Forming Part of Outfit — Contract — Warranty — Implied Warranty — Reduction in Purchase Money — Reference — Payment into Court — Promissory Notes — Damages.

Appeal by defendants from judgment of MAGEE, J., 8 O. W. R. 881, in favour of plaintiffs, as to part of the relief claimed, in an action by the purchasers of a threshing outfit for a return of the money paid and promissory notes given for the price, and for damages for breach of the agreement of sale.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

G. H. Watson, K.C., for defendants.

W. A. Boys, Barrie, for plaintiffs.

BRITTON, J.:—This case was tried at great length, at great expense, and with great care. A perusal of a good deal of the 549 pages of evidence, occasions great surprise to me that this matter, so much one of business on the part of defendants as manufacturers of threshers, separators, engines, etc., and apparently so easily capable of settlement, has not been settled between the parties. It also convinces

me that, whatever may be the legal difficulties in the way of plaintiffs to prevent recovery from defendants, if there are such, plaintiffs have acted in good faith in complaining, and have been put to considerable loss by reason of defendants not supplying plaintiffs with an engine, as part of a threshing and separating and cleaning outfit, yhich would do good work, according to the defendants' warranty.

The original agreement between the parties is dated 28th February, 1905, and is one of the very full, fine print agreements, framed as much in the interest of defendants as manufacturers as it could be. I do not think plaintiffs fully understood the full effect of the agreement as protecting them as limiting the liability of defendants; but plaintiffs did sign, and so defendants have, as they are entitled to have, the advantage of this instrument.

This action is not upon the warranty in the oroginal agreement, but upon a distinctly new agreement, which it is alleged was subsequently made, and made by reason of the Goodison traction engine supplied under the original agreement failing to do good work.

Plaintiffs had certain rights under the original agreement; so of course had defendants. Defendants could have said they would leave plaintiffs to enforce their rights, and that they (defendants) would be liable only so far as they were made liable, if at all, by the original agreement. Defendants did, as I view the evidence, make a subsequent agreement.

The original purchase by plaintiffs was of a rebuilt McCloskey thresher, a Goodison traction 17 h.p. engine, and a Goodison side fan stacker, all fitted up, mounted, and thoroughly equipped, as particularly set out, and at the price of $2,000; and if a Goodison "wind-stacker" was included, $250 additional was to be paid therefor.

These machines were warranted by defendants to be well made, of good materials, durable, and with good care, proper usage, and skilful management to do as good work as any other of the same size manufactured in Canada. The case of the purchaser having trouble with the machine is provided for, at length and specifically. Then there is the proviso: "If the said machines do not work according to warranty, the said notes or moneys are to be refunded, and the purchasers shall have no claim for damages sustained by reason of the failure of the machine to satisfy this warranty."

The Goodison traction engine did not work satisfactorily. All that was done seems to be fully set out in the reasons for the judgment of the trial Judge.

Then on 23rd December, 1905, this agreement was made between defendant and plaintiff Edwin Bell: "We agree to repair your traction engine purchased from us the past season in either of the two ways hereinafter mentioned, to be decided by you:—

"(1). We will put a new cylinder on your engine with a new valve, repair the flues, and pay freight on the engine to the shop from your place, and also back again, all of the above being done free of charge.

"(2). We will put a new boiler on your engine with 7 foot flues and repair the engine, you to pay us $150 and freight one way. We pay the freight the other way.

"You agree to accept either one of the above proposals, and to pay your payments according to the original contract.

"The John Goodison Thresher Co., Ltd.

"Accepted, Edwin Bell."

Mrs. Bell did not sign. A somewhat voluminous correspondence followed. Edwin Bell says he understood, and I think he did understand, that the $150 was part of the price according to the original contract. Defendants intended that as extra for the new boiler, etc.

Nothing came of this proposed agreement. It apparently was never completed, either by its acceptance by Mrs. Bell, or by Edwin Bell electing which of the two things he would have done. I put that aside, except as shewing that defendants realized the necessity of something, and that plaintiffs had a right to relief.

Then a new agreement was made. This is shewn by the correspondence, beginning with defendants' letter of 24th March, 1906, in which reference is made to the agreement of 23rd December, 1905. Defendants ask for balance of payment according to original contract, assert that they are prepared to carry out their part of the agreement, and then say, "we now wish to know what is to be done in reference to this matter." They further say they are willing to carry out "either one of the proposals as made you," and wind up, "we await your further reply, and hope that you will get this matter arranged without further delay."

Plaintiffs' solicitor replied on 29th March, 1906. Defendants wrote to plaintiffs' solicitor on 31st March again, calling up the agreement or proposals of 23rd December. Plaintiffs' solicitor wrote to defendants on 5th April, 1906, submitting 3 proposals as to what was to be done with the engine.

Defendants wrote on 7th April to plaintiffs' solicitor, still adhering to the agreement of 23rd December, and ignoring or misunderstanding plaintiffs' proposals.

Plaintiffs' solicitor wrote to defendants on 20th April, stating: "He (Mr. Bell), expects you to fulfil your contract and provide him with an engine capable of producing 17 horse power in good running order, and in accordance with the contract on which the engine was first shipped . . . It must be distinctly understood that the engine when put in shape must be capable of developing 17 h.p., under the working conditions provided for in the original contract."

Defendants wrote to plaintiffs' solicitor on 23rd April, in part as follows: "Replying to your favour of the 20th, would say it will be necessary to have Mr. Bell's engine here not later than May 15th, but might state he has never advised us yet in which way he wants the engine repaired. . . . We shall be pleased to receive the balance of his payments at once, and advise how he wants his engine repaired, and if it will be here by 15th May, we will put the engine in shape as quickly as we possibly can."

Apart from what follows, that was an election by defendants for plaintiffs of the first rather than the second of the proposals in the proposed agreement of 23rd December. It was "to put the engine in shape" to do the work necessary in the outfit, for which plaintiffs were asked to pay.

On 1st May, defendants wrote to Edwin Bell, deprecating the necessity for correspondence with solicitors, and then say: "We intend doing what is right with you in every respect. . . . If you keep your present engine, and send it here near threshing time, we will be so busy that it will be almost impossible to get it out in time for you. . . . This engine should have been sent here some time ago—and while we were not too busy, and we would put it in shape and return promptly. . . . We shall be glad to hear by return mail and advise definitely just what time you propose shipping the engine . . . and at the same time advise us just exactly what you want done."

On 11th May the solicitor wrote to defendants as follows: "Mr. Edwin Bell has instructed us to state that he will ship the engine on the 21st of this month for the purpose of having you put it in running order, capable of developing the horse power called for by the contract and in other respects fulfil the terms and conditions of the contract. He does not presume to dictate to you what you should do, as he takes it for granted that you are better able to form a conclusion upon the matter than he is."

Defendants raise no further objection or question, but hope that Mr. Bell will arrange to ship the engine by the 21st, as promised.

Then further delay occurred about sending the engine—defendants consenting to this delay—and finally the engine was received by defendants on 5th July, 1906, and its receipt was acknowledged by letter of that day.

Defendants, by accepting the engine sent to them as I have stated, did so upon the agreement by them that they would put it in running order capable of developing 17 horse power, and that it would in other respects fulfil the terms and conditions of the original contract, viz., that with good care, proper usage, and skilful management, it would do as good work as any other of the same size manufactured in Canada, and if finally the engine (as part of the outfit) would not do as good work, etc., according to the warranty, the notes or moneys given are to be refunded, and the machines to be returned to defendants as provided.

The engine was, as defendants contend, repaired. They put it, as they contend, in "first class working order." According to their statement they did what they felt themselves obliged to do, and what, I think, was the least they could do under the circumstances, but unfortunately in the subsequent test of a practical working with good care, proper usage, and skilful management, it would not do good work. I think it is a perfectly fair inference, if not specifically proved, that the engine as repaired and returned to plaintiffs did not and would not do as good work as any other of the same size manufactured in Canada.

What took place after the return on 31st July, 1906, is fully and correctly set out in the reasons of the trial Judge, and I agree with the conclusions at which he has arrived, and I think there is ample evidence to warrant these conclusions.

There was nothing to prevent defendants making a new contract with plaintiffs, ancillary to the original, or a new contract altogether, in reference to the existing engine, in the terms as to that engine, as to its fitness, and the work it would do, according to what was represented in the original contract. The engine had been manufactured by defendants or sold by them to plaintiffs, returned by plaintiffs to defendants pursuant to an engagement, to have work done upon it; work was done upon it, all in the ordinary course of defendants' business. Such a contract need not be under seal of defendants. That new contract was in the terms of the old to this extent, that the engine with the outfit that plaintiffs bought would do good work as described or as in the warranty incorporated in the former agreement. Surely, after all that has taken place in reference to this engine, plaintiffs ought not to be told that, although the engine did not do good work, and could not be made to do good work with the thresher, separator, etc., purchased from defendants, they cannot succeed because the engine was made of good materials and was of 17 horse power. I am satisfied from the evidence that this engine did get reasonably "good care," reasonably "proper usage," and that with reasonably skillful management, it did not do good work—not as good work as the ordinary machine of same size made in Canada, not as good work as plaintiffs expected and had a right to expect from it.

This is not the case of merely buying a well known and defined article. It is the case of an arrangement of a dispute after it had arisen—a new agreement in reference to the taking—buying—of an article manufactured by defendants, supplied to plaintiffs, found by plaintiffs not fit, subsequently admitted by defendants to be unfit, and which defendants, upon the consideration that plaintiffs would accept it, undertook to make fit for a particular purpose. In this case there was complete knowledge by defendants, as to what the engine was for, even apart from the letter of plaintiffs' solicitor of 11th May, 1906. That letter puts it as plainly as language can that plaintiffs relied upon defendants' judgment, knowledge, and skill in the matter as manufacturers, and so there was the implied warranty that the engine when returned to defendants on 31st July, 1906, was fit for the use to which it was to be applied. I am unable to conclude that any express warranty in the original agreement can be invoked to exclude an implied warranty in what

subsequently took place between the parties as to the engine.

Holding the opinion as above, I see no reason, upon appeal of defendants, for interfering with the decision of the trial Judge. It might well be argued that plaintiffs are entitled to more than the relief given, but plaintiffs have not appealed. They are entitled to as much at least as the present judgment gives them, so I think this appeal should be dismissed with costs.

FALCONBRIDGE, C.J., gave reasons in writing for the same conclusion.

RIDDELL, J., dissented, for reasons stated in writing.

AUGUST 26TH, 1907.

DIVISIONAL COURT.

BROWN v. DULMAGE.

Sale of Goods — Contract — Failure to Carry out — Resale by Vendor — Conversion — Possession — Purchase Money — Tender — Rescission — Damages — Costs.

Appeal by plaintiff from order of MABEE, J., in the Weekly Court, allowing an appeal from the report of the Master in Ordinary finding that plaintiff was entitled to recover $968.89 damages in an action for conversion.

The appeal was heard by FALCONBRIDGE, C.J., BRITTON, J., RIDDELL, J.

F. E. Hodgins, K.C., for plaintiff.

E. L. Dickinson, Goderich, for defendant.

RIDDELL, J.:—On 28th May, 1903, the defendant entered into a contract with the plaintiff for the sale to him of a stock of goods, &c., in Wingham. The agreement is in writing, and the important terms are as follows:—

"Stock fixtures, &c., in the Kent block to be sold at 40 cents on the dollar invoice price, any dispute to be re-

ferred back to the stock sheet. Deposit to be $100. If stock exceeds $7,000, balance to rated (sic) at 30 cents on the dollar, $2,000 cash on completion of stock taking and checking. Balance in two and four months equal notes. If stock exceeds $7,000, deal may be declared off."

In June the plaintiff "declared the purchase off," claiming that the stock exceeded $7,000. He had, however, in the meantime paid $1,000 on account of the purchase money.

He thereupon brought an action against the present defendant, 2nd October, 1903, setting out that he (plaintiff) had rescinded the contract, and that he had demanded the return of the $1,000, and he claimed the sum of $1,000 and interest from 5th June, 1903. The defendant pleaded the contract, the stock taking, and the exercise by the plaintiff of his option to purchase; that the plaintiff took possession of the stock and sold portions of it, and retained the proceeds of the portions so sold, and dealt with the stock in all respects as if he were the owner thereof; that subsequently plaintiff abandoned the possession of the goods and refused to complete the contract; that consequently defendant notified plaintiff that he would proceed to sell the goods and hold him responsible for the loss and damage the defendant might sustain; that defendant did try to sell the stock en bloc and failed; and that he was now endeavouring to dispose of it by retail; that he was at all times ready and willing to carry out the agreement.

The case came on for trial before Meredith, C.J., at Barrie, 16th May, 1904: the trial Judge dismissed the action with costs: see Brown v. Dulmage, 4 O. W. R. 91: but "without prejudice to any action the plaintiff may choose to bring, based upon the alleged wrongful act of defendant in selling the goods, or for an account of the proceeds of the sale." The trial Judge added: "I must not be taken to indicate that, in my opinion, any such action, on the facts of the case, is maintainable."

Then this action was brought, plaintiff alleging the contract, the delivery of the goods by defendant to plaintiff, and the payment of $1,000 on account of the purchase price, conversion by the defendant of the stock, and claiming a declaration that the defendant had so converted the stock, damages for such conversion, and in the alternative for an accounting by the defendant "if the Court should be of

the opinion that the defendant rightly took possession" and "payment by him to the plaintiff of the amount due and for damages."

The statement of defence admits the contract and the payment of the $1,000, and denies all else; alleges that the plaintiff was to pay $2,000 to the defendant on the completion of the stock list and to give his promissory notes at 2 and 4 months; that he neglected and refused to pay the balance of the $2,000 and to give his notes; that the defendant never delivered possession of the stock to the plaintiff, nor did the plaintiff ever demand or claim possession thereof, but that the defendant was always ready and willing to deliver up possession to the plaintiff upon payment of the said balance and the delivery of the said notes; that plaintiff is in default and was never entitled to possession, and is not entitled to maintain any action for conversion. The statement of defence goes on to set out the sale of the goods by the defendant, after notice to the plaintiff; that such sale netted $1,106.80 after payment of all the proper expenses of such sale; and, by way of counterclaim, claims the difference between the net proceeds of the sale and the purchase price.

This case came before my brother Clute at Barrie Assizes, 7th March, 1906, and, without declaring the rights of the parties, an order was made referring "to the Master in Ordinary in Toronto to inquire and state the true measure of damages to which the plaintiff is entitled and to take the account of the same as between the parties . . . ;" and further directions and costs were reserved. The Master in Ordinary proceeded with the reference 28th September, 1906, and made his report of date 7th December, 1906, finding that "the true measure of damages to which the plaintiff is entitled is the value of the goods converted to his own use, which I fix at the sum of $1,975.40, being the amount received by the plaintiff for a portion of the same, and as to the goods still remaining in his possession, the sum of $855.20, making a total of $2,830.60, from which I have deducted the original purchase money still unpaid upon the said goods, being $1,861.71," and further finding "the damages to which the plaintiff is entitled are the difference between the sums of $2,830.60 and $1,861.71, namely, $968.89."

An appeal was taken from this report, which came on before my brother Mabee, 17th January, 1907, and he set

aside the report, ordered that upon payment by the plaintiff to the defendant of the sum of $207.31 and the costs of defence, including the costs of the reference and of the appeal, within 60 days, the defendant should deliver to the plaintiff the goods remaining in his possession, and, in default of such payment, the action should be dismissed with costs. The learned Judge seems to have turned the appeal into a motion for judgment—no objection is taken on that ground—indeed, it was agreed that we should treat the appeal to us as a motion for judgment. It was also agreed before us that upon the present appeal from the judgment of Mabee, J., all facts found by Meredith, C.J., in the former action, should be considered found in this action for the purpose of this motion for judgment.

The order in appeal, as I read it, is really an adjudication that the plaintiff had no right to bring this action, but it gives him a right—if he sees fit—to get the goods remaining in the hands of the defendant upon paying the costs of the action and the balance of the money after crediting the net sales thus:—

Purchase money		$2,862.71
Less paid in cash by plaintiff	$1,000.00	
Received in cash for goods sold	1,975.40	
	$2,975.40	
Less expenses	320.00	
	$2,655.40	2,655.40
Balance due defendant		$207.31

This is a privilege which could not, in my view of the case, be given the plaintiff without the consent of the defendant, but the defendant does not appeal.

It seems to me that this case will turn upon the question of fact; "Was the plaintiff entitled to the possession of the stock?" And incidentally the further question will arise: "Did the defendant actually deliver the stock to the plaintiff?"

It is to be noticed that the defendant has shifted his ground since the former action—in that action he asserted that he had delivered possession to the plaintiff, and the Chief Justice says: "If, as the defendant's pleadings seem

to shew, and as he offered some evidence to establish, the plaintiff had taken possession of the goods, then there may be a serious difficulty in the defendant's way. If so, then he was a mere wrongdoer in endeavouring to sell by auction." In this action, as will be seen, the plaintiff it is who is asserting that the goods were delivered to him, and the defendant is denying such delivery. The Chief Justice does not find that the goods were delivered, nor is his judgment rested, in whole or in part, on such delivery having taken place. This, then, seems to be an open question, and it must be decided upon the evidence taken before the Master in Ordinary, and the facts found by the Chief Justice in the former action. And the following are the facts as I find them to be:—

The defendant was carrying on business as a dry goods merchant in Wingham; he made the agreement spoken of on 20th May, 1903; shortly after the making of the agreement he closed the store and with the plaintiff started to take stock; the plaintiff paid $1,000 on account of the purchase money; the goods were cased up by the defendant, and remained upon the premises of the defendant cased up, the plaintiff having bought all the goods, &c., in the store, "lock, stock, and barrel," as it is put, and these were left in the store where the defendant had been carrying on his business. These goods were intended to be sent to the plaintiff, when and where he secured a place of business, and the defendant was awaiting his instructions: but he found a difficulty in getting a place to enter into business. He is confronted with the difficulty that he would probably have to offer the goods again for sale as a job lot, and then attempted to "declare the deal off." The plaintiff had, however, actually sold $1.25 worth of goods, and put the money in his pocket, and though the defendant, in the examination for discovery, contended that the plaintiff had taken possession of the goods the day he paid the $1,000, which seems to have been the same day as he sold the $1.25 worth of goods, it seems clear that he is simply giving his definition of what is "possession." Nothing is done by the plaintiff in the way of taking possession of any goods, except the trifling quantity he sold, and the goods were at all times upon the land of the defendant and in his actual possession.

On 20th June the plaintiff attempted to rescind the agreement by letter "declaring the deal off," demanding the return of his $1,000, and saying that he expects wages

at say $1.50 per day for helping to take stock. It has been held that he had not the right to rescind.

On 23rd June the solicitors for the defendant wrote the plaintiff saying: "There is no doubt that you have purchased the goods and stock, and we therefore notify you that the same are here at your risk and expense, and we would like to have you make some arrangement as to same, or take them away." No answer having been received, the solicitors on 29th June again wrote: "We notify you to take away from his premises the stock and goods purchased by you from him on or before the 15th day of July, and unless same are taken away by that date, we will proceed to sell them and hold you responsible for the loss sustained by him, if any, and also for all the charges and expenses occasioned by your failure to carry out the agreement, and also for damages."

It would thus seem that the defendant was insisting that the contract was in full force—in any event the former action decides that the contract was not rescinded.

Then came a letter from the same solicitors, 11th July, 1903, notifying the plaintiff that, as the time had elapsed for him to take away the goods, the same would be sold by the defendant, and the plaintiff held responsible for the difference, &c., and damages. Further correspondence ensued, and on 1st August the defendant wrote the plaintiff that he would on Monday unpack the goods, and if the plaintiff did not move at once, the stock would be sold en bloc. This was attempted on 19th August, and failed, and thereupon defendant made sales over the counter. It has been found that "the mode of selling which defendant adopted was reasonable and practically the only one open to him, and that which was calculated to realize the best price for the goods:" 4 O. W. R. at p. 92.

The Master has found that the amount of cash received by the defendant in this way is $1,975.40, and this is not in dispute. But this is in excess of the value of the goods, in that it required the use of a shop and of salesmen, &c., to realize this sum. The actual value of the goods sold as they were when the plaintiff declined to accept them, and the defendant undertook to sell them, must be the price obtained or obtainable for them, less the reasonable cost of obtaining such price, and that my brother Mabee has fixed at $320.

It is not disputed that this is a reasonable sum, if any allowance is to be made to the defendant for expenses, &c.

The value, then, at the time of the alleged conversion is $1,975.40, less $320, that is, $1,655.40. The value of the remaining goods may be more difficult to determine, but, in the view I take of the case, it is not necessary to consider this question. If any value is to be placed upon these goods still unsold, a reasonable sum should be allowed for the expense of realizing on them. In any case, therefore, I think the Master is wrong. But it seems to me that no right of action existed. The plaintiff did not pay the $2,000—he paid only $1,000 of it—even on his own contention, as shewn in the judgment at the trial of the former action, the other $1,000 was deposited in the bank to be paid upon the shipment of the goods, and the time for the shipment of the goods had not arrived when he repudiated the agreement and put an end to the deposit. And in any case he did not give his notes. Not having at any time any actual possession of the goods, he never acquired any right to the possession, as he did not pay or tender the purchase money.

Upon the plaintiff attempting to rescind the contract, there were three courses open to the defendant:—

1. Accept the rescission. In that case, the goods revest in him, and the plaintiff is entitled to receive back his money. This was not done—as has been decided.

2. Insist upon the contract—claiming that the goods are the purchaser's.

3. Accept the rescission so far as to put an end to the contract, but retaining the right to sue for damages.

I am of opinion that the evidence here is that the defendant was throughout insisting on the continued existence of the contract, though he may, perhaps, have mistaken his legal remedies. The contract, then, is in full force, and the defendant is simply doing that which seems a natural thing to do under the circumstances, but which I do not say is or is not justified when he takes the goods of the plaintiff, as he does in this case, and sells them to pay himself the purchase money with the proceeds thereof. But, as the plaintiff had not the right to possession, he has no right to bring an action for the conversion alleged, without first paying or

tendering the amount of the purchase money, and thereby placing himself in the position of being entitled to the possession: Milgate v. Kibble, 3 M. & G. 100; Moore v. Sibbald, 29 U. C. R. 487, 490; Butler v. Stanley, 21 C. P. 402, 406; Blackburn on Sales; 28 Am. & Eng. Encyc. of Law, 2nd ed., p. 664.

But can he bring an action to recover back the purchase money, or the part thereof paid down? Of course, if the defendant, as in Moore v. Sibbald, repudiated the contract and refused to deliver the goods on demand, he must repay the instalment of purchase money. But, if that is not the case, the law has been authoritatively laid down for us by the Judicial Committee in Page v. Cowasjee Eduljee, L. R. 1 P. C. 127, at pp. 145, 146, as follows: Lord Chelmsford, giving the judgment of the Court, says: "There may be cases where the vendor might sell without rendering himself liable to an action, as where goods sold are left in the possession of the vendor, and the purchaser will not remove them and pay the price, after receiving express notice from the vendor that, if he fail to do so, the goods will be resold. But the authorities are uniform on this point, that if, before actual delivery, the vendor resells the property, while the purchaser is in default, the resale will not authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it which may be still due;" and he adds that this is *a fortiori* where there has been a delivery, and the vendor takes it out of the possession of the purchaser and resells it.

The law seems to be accurately stated in Blackburn on Sales, 2nd ed., at p. 459: "At all events it seems that a resale by the vendor, whilst the purchaser continues in default, is not so wrongful as to authorize the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price or to resist paying any balance of it still due: nor yet so tortious as to destroy the vendor's right to retain, and so entitle the purchaser to sue in trover." The last English edition of Benjamin on Sales, ch. 6, gives a large number of cases, but I do not think it necessary to do more than refer to that work, as the judgment of Lord Chelmsford in Page v. Cowasjee Eduljee, L. R. 1 P. C. 127, seems sufficient.

Both parties standing on their strict rights, as they do, I am of opinion that this action cannot succeed, and that it should be dismissed with costs. The judgment appealed from, so far as it dismisses the action with costs incurred to that time, is right; and as to the provision introduced in ease of the plaintiff, as no appeal has been taken, I would affirm that also, adding, however, that the costs of this appeal should be added to the costs and purchase money to be paid by the plaintiff before he may exercise the option given him.

If this privilege be not accepted by the plaintiff, it may be worth while for the parties to consider the following.

It would seem that upon the plaintiff tendering the balance of the purchase money and interest, he may possibly bring an action in trover: Chinery v. Veall, 5 H. & N. 288; though this is at least doubtful, in view of the case in the Privy Council and of the judgment of the full Court in Moore v. Sibbald, 29 U. C. R. at p. 452.

If an action does lie, the result would be: the defendant pays—

$1,000 and interest from June, 1903, (3 years, 10 months at 5 per cent.—$101.67)	1,191.67
½ of $861.71—$430.85 and interest from Aug. 1903, (3 years, 8 months, at 5 per cent.—$78.99)	509.84
½ of $861.71—$430.85 and interest from Oct. 1903, (3 years, 6 months, at 5 per cent.—$75.40)	506.25
In all	$2,207.76

If an action lay at all, it would then seemingly lie in trover, and the amount of damages, as matters now appear (if we did not interfere with the findings of value by the Master), would be:

Cash received	$1,975,40	
less expenses, &c	320.00	$1,655.40
Goods still on hand	$855.70	
Expenses of selling (2/5 of $320	128.00	727.20
		$2,382.60

Amount of purchase money still unpaid	2,207.76
Balance	$174.84

If the defendant would allow this sum, $174.84, upon the costs which the plaintiff is ordered to pay, and the plaintiff thereupon release his cause of action, it seems to me the merits of the case would best be served. If not, the troublesome questions as to the real value of the goods unsold must come up—and I am far from agreeing with the Master—and, in view of the finding of fact by Meredith, C.J., in the former action "that the net proceeds (of the sale over the counter) will fall considerably short of satisfying what remains due of the purchase money" (4 O. W. R. 92), the plaintiff will find great difficulty in the way—perhaps insuperable—in any attempt to prove that the value of all the goods to which he would be entitled upon a tender of the money was in excess of the balance of the purchase money.

I should perhaps add that, on the facts of this case, I think no special action would lie as for injury to the plaintiff's "reversion."

FALCONBRIDGE, C.J., agreed with the judgment of RIDDELL, J., for reasons stated in writing.

BRITTON, J., dissented, for reasons stated in writing.

CARTWRIGHT, MASTER. AUGUST 30TH, 1907.

CHAMBERS.

EASTWOOD v. HARLAN.

Writ of Summons—Service on Defendant Company—Regularity—Rules 146, 159—Service on Clerk at Company's Office—Service Brought to Knowledge of Company.

Motion by defendants to set aside the service of the writ of summons, on the ground that it was not served as required by Rule 159.

G. C. Campbell, for defendants.

J. P. Crawford (Montgomery & Co.), for plaintiff.

THE MASTER:—The motion is supported only by an affidavit of the defendants' stenographer. This states that no officers of the company were then in the city, but that she stated to the sheriff's officer that she was in charge of the office under the instructions of the secretary, but that she did not intend it to be understood by him that she was a person on whom service could validly be effected.

The affidavit in answer shews that, before the service now objected to, defendants' solicitors had received writ and forwarded same to see if they were to accept service, and that afterwards they returned it, saying that they had no instructions. The service attacked then was made, and the solicitors entered a conditional appearance without leave, as required by Rule 173.

It was stated in argument that defendants desired time. This could have easily been obtained without taking a step not allowed by our practice, whatever may be the case in England.

As it is, the service seems regular under Rule 159 (b), and in any case the issue of the writ has been known to defendants ever since 8th July, as appears by letter of the defendant Harlan, and the present motion is made on behalf of the defendants, and on their instructions.

Under all the circumstances, I think the motion cannot succeed, and should be dismissed with costs to plaintiff in any event.

If, after the delivery of the statement of claim, the defendants require time for pleading, it can be granted on proper terms.

It is to be observed that the object of Rules 146 and 159 is to require that service, if not personal, shall be made on some one who it may be safely affirmed will bring the matter to the notice of the necessary parties. This has been done in this case, and the motion is therefore useless.

CARTWRIGHT, MASTER. SEPTEMBER 9TH, 1907.

CHAMBERS.

COATES v. THE KING.

Particulars — Petition of Right — Commission on Sale of Treasury Bills and Bonds — Names of Purchasers — Dates of Sales—Prices Paid—Particulars for Pleading — Delay.

Motion by defendant for particulars of certain paragraphs of the petition of right.

N. Ferrars Davidson, for defendant.

Featherston Aylesworth, for plaintiffs.

THE MASTER:—In this case the plaintiffs seek to recover a sum of £3,000 or $14,600, being one quarter of one per cent. on £1,200,000, the amount of certain bonds which were issued by the provincial government for the building of the Temiskaming Railway.

In the 8th paragraph of the petition of right the plaintiffs allege that under a memorandum of 10th October, 1904, signed by the Hon. R. Harcourt, who at the time was a member of the provincial government, and acted as their agent in the matter, it was agreed that the plaintiffs should negotiate (1) the sale of treasury bills for £1,200,000, and that the subsequent sale of the bonds to retire these bills should be intrusted to them. The bills were to be sold at a price representing a rate of interest not exceeding 4 per cent. Nothing was said as to terms of the sale of the bonds.

In the following paragraph it is alleged that treasury bills were successfully sold at the prescribed rate, and in the 14th paragraph it is alleged that, at the request of the Provincial Treasurer, these bills were, on 15th May, 1905, renewed for another 6 months, and sold by the plaintiffs, and the previous issue repaid with the proceeds.

The petition of right was filed on 22nd November, 1906. It was stated on the argument that attempts had been made at settlement, so that the petition was not served until 6th June.

On 24th June particulars were demanded, which have been furnished. But, as to those asked for in explanation of paragraphs 9 and 14, the defendant has now moved for further particulars.

It was stated by Mr. Davidson that what was required were the names, &c., of the persons to whom the first and second series of the treasury bills were sold. He argued that, as the claim was based on the memorandum of 10th October, 1904, it was necessary for plaintiffs to allege, as they have done, that they, as agents for the provincial government, sold the treasury bills; and that they must prove this. He contended that it might be that plaintiffs had themselves been the purchasers, and that, in such case, they could not claim to have been acting as agents, and so their right to have the sale of the bonds would be gone, as well as the right to any charges in respect of the sale of the treasury bills.

Assuming that such a defence is in contemplation, it would be necessary to know how the fact is. Even if the motion was now refused, yet such a defence could be pleaded, and on discovery the evidence could be obtained, though this might require a commission to Great Britain.

The motion is supported by the affidavit of the Provincial Treasurer that it is necessary for the proper defence of the action that particulars should be furnished, shewing the dates of the sales to the various purchasers, with the name of each purchaser and the price paid.

In Arnoldi v. Cockburn, 9 O. W. R. 883, affirmed 10 O. W. R. 373, particulars were ordered before delivery of statement of defence, where it seemed that such particulars would be material to the defence.

For the same reason I think the order should be made in this case.

In opposition to the motion it was argued that delay would result from this order. But it will not cost much to send a cable, and a reply can be received in 10 days thereafter.

The time for defence will be extended until a week after particulars have been delivered, and the costs of the motion will be in the cause.

CARTWRIGHT, MASTER. SEPTEMBER 11TH, 1907.

CHAMBERS.

BARRETT v. PERTH MUTUAL FIRE INSURANCE CO.

Notice of Trial — Motion to Set aside — Irregularity — No Place of Trial named in Statement of Claim—Place of Trial named in Writ of Summons not Specially Indorsed —Waiver of Irregularity—Costs.

Motion by defendants to set aside plaintiff's notice of trial, in the circumstances mentioned in the judgment.

R. C. H. Cassels, for defendants.

C. A. Moss, for plaintiff.

THE MASTER:—This action was commenced with a writ of summons for special indorsement, and the place of trial was named therein as Barrie: and this could not be changed without an order. No place of trial was named in the statement of claim, as ought to have been done under Rule 529. But no objection was taken by the defendants, who delivered their statement of defence, and the cause was at issue before vacation.

On 4th September the plaintiff gave notice of trial for the sittings commencing at Barrie on 16th September, and defendants at once moved to set it aside, "on the ground that no venue is laid in the statement of claim." . . .

It was argued, on the one hand, that the notice of trial in question was a nullity, as there was no more justification for naming Barrie than Sarnia or L'Orignal, as the action was not commenced by a specially indorsed writ, and therefore, though that form was used, the mention of Barrie in the writ served could not be invoked in aid of the notice.

No case has been reported similar to the present. That of O'Brien v. Wells, 20 C. L. J. 369, is the nearest I have found. There the place of trial had been properly named in the statement of claim, but omitted in the notice of trial, and a motion to set it aside as irregular was refused, in the absence of an affidavit that the applicant had been misled.

In answer to the present motion, it was conceded that the statement of claim was undoubtedly irregular. This, however, it was said was waived when the statement of defence

was delivered. This might reasonably be held to have been done because the defendants knew that Barrie had been named in the writ; that it was the natural, if not the necessary, place of trial; and that no good purpose would be served by moving against the statement of claim on that ground.

This seems to me the proper view to take. Either the omission was noticed at the time by the defendants, or it was not. In the latter case they were not injured, and in the former they are not to be encouraged in lying by to spring this motion when it is too late for plaintiff to amend without being thrown over the sittings. Rule 312 defines the spirit in which litigation is to be controlled by the Court.

I therefore think that the motion should be dismissed, but without costs, as the plaintiff's statement of claim was admittedly defective, and the Rules ought to be observed. But the motion is so entirely without merit that the defendants should not be allowed to profit by it. . . . .

Moss, C.J.O. AUGUST 31ST, 1907.

C. A.—CHAMBERS.

CHICAGO LIFE INSURANCE CO. v. DUNCOMBE.

Appeal to Court of Appeal—Leave to Appeal from Order of Divisional Court — Special Circumstances — Amount in Controversy.

Motion by defendant T. H. Duncombe for leave to appeal to the Court of Appeal from the order of a Divisional Court, ante 425, allowing plaintiffs' appeal from judgment of BRITTON, J., 8 O. W. R. 898.

J. M. Glenn, K.C., for applicant.

C. St. Clair Leitch, St. Thomas, for plaintiffs.

Moss, C.J.O.—I have read the evidence and judgments and looked at the cases referred to therein and upon the argument before me, as well as some others not cited.

The case does not appear to me to present such special circumstances as to justify the granting of leave to appeal to

this Court. Notwithstanding the form of the judgment directed to be entered in the plaintiffs' favour, the damages assessed amount only to $325.72, and it is admitted that there can be no further assessment of damages for breaches of the conditions of the bond sued on.

The sum of $325.72 is, therefore, the amount in controversy in the appeal. There is no question involved, either of law or of fact, of general importance. The trial Judge and the Divisional Court agree as to the period to which liability is to be confined. The difference of opinion between them is as to the proper construction of the bond in regard to the kind of advances covered by the condition, and also as to the duty or obligation of the plaintiffs to disclose to the surety certain matters alleged to be material when he was becoming a party to the bond. Difference of opinion between the tribunals would obviously not be, in itself, a sufficient ground for allowing a further appeal. But I do not think that any fairly reasonable ground for doubting the soundness of the judgment of the Divisional Court has been presented. Nor do I think that there is anything in the point suggested that the agency in respect of which the surety became liable only commenced on 7th May, 1906, to warrant further discussion.

I think the motion fails, and it must be dismissed with costs.

On the question of the plaintiffs' duty to make disclosures, reference may be made to Niagara District Fruit Growers Stock Co. v. Walker, 26 S. C. R. 629, where Railton v. Mathews, 10 Cl. & F. 934, strongly relied upon by the defendant, was discussed, and County of Simcoe v. Burton, 25 A. R. 478, not previously referred to.

ANGLIN, J. SEPTEMBER 12TH, 1907.

TRIAL.

CODVILLE GEORGESON CO. v. SMART.

Partnership — Ostensible Partnership — Infant Held out as Partner — Creditors of Ostensible Partnership — Creditor of Person Actually Carrying on Business — Priority — Costs — Interpleader.

An action to recover a debt against defendants Smart, and for a declaration of the plaintiffs' right to rank therefor

upon assets in the hands of the defendant Humble, as sheriff, in priority to the claim of defendant Green; and also an interpleader issue.

R. M. Dennistoun, Winnipeg, and P. E. Mackenzie, Kenora, for plaintiffs.

F. H. Keefer, Port Arthur, for defendant Mary Green.

J. F. MacGillivray, Kenora, for defendant John Smart.

ANGLIN, J.:—The plaintiffs are an incorporated company carrying on business in Winnipeg as wholesale grocers. The defendants William Smart and John Smart are sued as members of an alleged partnership. They carried on business as general merchants at Keewatin. The defendant Margaret Green is a judgment creditor of the defendant William Smart, and the defendant Humble is the sheriff of the district of Rainy River.

Upon the evidence adduced at the trial the following facts were found. The business carried on at Keewatin under the name of W. & J. Smart was the business of the defendant William Smart. The defendant John Smart, who is an infant, was not a partner in the business, but was the "J. Smart" whose name appeared in the firm name, under which the business was carried on. The defendant Margaret Green lent to the defendant William Smart—her son-in-law—the money for which she holds a judgment, to enable him to start in business; and a considerable part of the money advanced by her was paid by William Smart to the plaintiffs on the account for goods supplied by them to W. & J. Smart, for the balance of which they now seek to recover judgment.

In dealing with the plaintiffs and other wholesale merchants, William Smart represented that his brother John was his partner in the firm of W. & J. Smart. He obtained credit partly upon this representation. John Smart was cognizant that he was being held out by William as a partner in the business, and that his name was being put forward as that of a partner in advertisements and otherwise. He acquiesced to this course of holding out, and he conducted himself in relation to the business itself in many matters not as a mere employee, but as a partner or joint proprietor. His infancy was not known to the plaintiffs or to the other creditors of the business; but there is no evidence of any actual representation having been made that he had attained his majority.

The business appears to have been badly managed, and was soon in difficulties. Apprised, no doubt, of the condition of affairs before other creditors, Mrs. Green obtained a judgment for her advances against William Smart, to whom and whom alone she had given credit. Under her execution the sheriff seized the assets of the business of W. & J. Smart, and sold them for the sum of $581.36. Margaret Green also obtained an order attaching a debt of $335 owing by one Clifford Beaton to "W. & J. Smart." This debt remains subject to this attachment.

While the proceeds of the sale under Mrs. Green's execution were still held by the sheriff, the present plaintiffs intervened as claimants. They brought an action as creditors to recover judgment for their claim, amounting to $988.63, against William and John Smart as partners in the firm of W. & J. Smart. In some manner, which I do not understand, interpleader proceedings were also instituted, and the local Judge at Kenora directed the trial of an issue between the present plaintiffs and Margaret Green to determine whether or not the goods seized by the sheriff under Mrs. Green's execution and the Beaton debt "are partnership assets of the firm of W. & J. Smart, and as such payable to the Codville Georgeson Company in priority to said Margaret Green as an execution creditor of William Smart."

In this action the present plaintiffs were allowed by amendment to add Margaret Green and the sheriff as defendants, and to claim a declaration that the moneys realized under Margaret Green's execution and the Beaton debt are "subject to the payment in full of the plaintiffs' claim against the partnership firm of W. & J. Smart in priority to the claim of Margaret Green under her judgment," and consequential relief.

An order was subsequently made for the trial of the plaintiffs' action and of the interpleader together, and both were embodied in the record before me.

The interpleader proceedings were, in my opinion, wholly misconceived, and I shall deal with the record as if the interpleader issue were eliminated from it.

The plaintiffs are admittedly entitled to judgment for their claim against William Smart, and, if John Smart were not an infant, would have been entitled to judgment against him on the case of holding out which they made. But his infancy is a bar to a personal judgment against him: Lind-

ley on Partnership, 7th ed., p. 87; Lovell v. Beauchamp, [1894] A. C. 607.

Upon my findings that there was no partnership in fact between William and John Smart, and that the business of "W. & J. Smart" was the property of William Smart alone, but that there was such a holding out of John Smart as a partner, as would, had he been *sui juris*, have rendered him personally liable to the plaintiffs, it is contended for them that in regard to assets of the business of "W. & J. Smart" they are, as against individual creditors of William Smart, entitled to the same priority which they would have had, had there been in fact a partnership of William Smart and John Smart carrying on business as "W. & J. Smart."

In Ex p. Hayman, 8 Ch. D. 11, the English Court of Appeal had to consider, under a bankruptcy adjudication, the rights of persons similarly situated, and held that the assets must be treated as joint estate of the actual owner and his reputed partner; and a personal creditor of the former was postponed to a claimant who had given credit to the supposed partnership firm.

In re Rowland and Crankshaw, L. R. 1 Ch. 421, also a decision of the English Court of Appeal, is the authority upon which the Court rests its judgment in Ex p. Hayman. The doctrine is broadly and unmistakably enunciated that in regard to the allocation of joint and separate assets to the payment of joint and separate claims, the rights of creditors are the same in the case of an ostensible partnership as they are where there has been a partnership in fact.

In Baker v. Dawbarn, 19 Gr. 113, Mowat, V.-C., held that the rule in equity, as well as in bankruptcy, is, that his separate creditors rank first upon the separate estate of each partner, while partnership creditors rank first upon joint estate of the partnership.

In Ex p. Hayman, Thesiger, L.J., at p. 25, said that but for the authority of In re Rowland and Crankshaw, L. R. 1 Ch. 421, and Ex p. Sheen, 6 Ch. D. 231, he "should have wished to hear further argument as to the consequences arising from an ostensible partnership in the event of bankruptcy, where there are both joint and separate creditors." The Lord Justice proceeds to point out the inapplicability of any principle of estoppel to the position of the separate creditor who is excluded from ranking upon assets of his debtor employed in the business of an ostensible partnership. He regards the consequence that such assets are to be deemed joint property

as an offshoot of the doctrine of reputed ownership. Lord Justice James is of opinion that the doctrine of reputed ownership was really the foundation of Lord Cranworth's judgment in In re Rowland and Crankshaw.

In Kelly v. Scott, 49 N. Y. 595, the Court of Appeals of the State of New York laid down the same doctrine. In Kleeck v. McCabe, 87 Mich. 599, and in Thayer v. Humphrey, 91 Wisconsin 276, the like rule was applied.

While there is an obvious difference between the present case and those to which I have referred, in that the ostensible partners of the real proprietors in those cases became personally liable to creditors, whereas in the present instance his infancy protects John Smart from personal liability, the preferential rights of the creditors of the ostensible firm are made to depend not upon the joint liability of the ostensible partners, A. and B., but upon the fact that the property with which the business of the ostensible partnership is carried on, though in law that of A. alone, will in equity be treated as the joint property of A. and B., with precisely the same incidents as if the partnership had been real and not merely ostensible. Had there been in the present case a real partnership between William Smart and John Smart, while the infancy of the latter would have precluded the plaintiffs from recovering a personal judgment against him, nevertheless all the partnership property, including the interest therein of the infant partner, would have been exigible to satisfy partnership debts: Lovell v. Beauchamp, [1894] A. C. 607. The fact that John Smart because of his minority escapes personal liability, does not affect the rights of persons who gave credit to the ostensible partnership to resort for payment to what were the apparent assets of such ostensible partnership in the same manner and to the same extent as if there had been a partnership in fact.

The hardship to which Mrs. Green is subjected by the application of this rule is manifest. But Lord Justice James said in Ex p. Hayman: "The hardship would have been exactly the same if there had been a real partnership. . . . The same consequences would then have happened as happen where there is only an ostensible partnership."

The plaintiffs will, therefore, have judgment against William Smart, trading under the name of "W. & J. Smart," for the sum of $988.63, with interest from 9th April, 1907, and costs of this action other than costs incurred upon or by reason of the interpleader proceedings.

They will also have judgment as against Margaret Green, declaring that they are entitled to payment in full of their claim (both debt and costs) out of the proceeds of the sale of the assets of the business of "W. & J. Smart" in the hands of the sheriff, and out of any moneys which the sheriff may realize under the attaching order against Clifford Beaton, in priority to the claim of Margaret Green as an execution creditor of William Smart.

The costs of the sheriff of this action, exclusive of costs of or occasioned by or by reason of the interpleader proceedings, will, after taxation, be paid to him by the plaintiffs, who may add to their claim against the defendant William Smart the amount so paid to the sheriff.

The plaintiffs will have judgment against the defendant Margaret Green for payment of their costs of this action, exclusive of costs of or occasioned by or by reason of the interpleader proceedings, and subject to a set-off of the costs of said Margaret Green incurred in or by reason of such interpleader proceedings.

As against the defendant John Smart the action will be dismissed without costs.

MULOCK, C.J. SEPTEMBER 13TH, 1907.

WEEKLY COURT.

TODD v. PEARLSTEIN.

Contempt of Court—Breach of Injunction—Deliberate Act—Punishment—Imprisonment—Costs.

Motion by plaintiff to commit defendant for breach of the injunction contained in the judgment pronounced in this action on 15th May, 1907, whereby in effect defendant was restrained from using the plaintiff's trade mark (commonly known as the union label) in connection with the sale of cigars.

T. J. W. O'Connor, for plaintiff.

J. H. Spence, for defendant.

MULOCK, C.J.:—On 11th July defendant called at the establishment of Thomas Murphy, tobacconist in Hamilton,

and endeavoured to sell to him certain boxes of cigars, but Mr. Murphy declined to purchase them, because they did not bear the union label. Thereupon the defendant withdrew, and shortly afterwards returned to Mr. Murphy's establishment with the union label stamp affixed to the boxes of cigars in question, and sold them so stamped to Murphy. This use of the union label was a clear infraction of the injunction.

The defendant by his affidavit admits selling the cigars in question; he says that Murphy insisted upon their bearing the union label; and that, having some of these labels in his possession, he attached them to the boxes. His contention is that the labels which he used were real union labels, not imitations, and that the injunction only enjoined him from using imitations, and he swears that he would not have done what is complained of if he had thought such action would be a breach of the injunction.

It is evident that this use by him of the union label was a deliberate act, and I am unable to discover in his affidavit any excuse for his conduct. Persons enjoined by an order of Court are bound to obey such injunction.

The defendant has been guilty of a deliberate breach of the injunction. He says he is a man of no means. Therefore a pecuniary fine in his case would be no punishment. The order of the Court, therefore, will be that he be committed to gaol for 24 hours, and until he purges his contempt by filing with the Court a suitable apology, and that he pay the costs of and incidental to this motion.