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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. SEPTEMBER 20TH, 1920.

BELL TELEPHONE CO. OF CANADA v. OTTAWA ELECTRIC CO. AND CITY OF OTTAWA.

Workmen's Compensation Act—Employee of Plaintiff Company Killed by Touching Live Wire—Payment by Plaintiff Company to Dependants of Deceased—Action to Recover Amount from Electric Company and City Corporation—Judgment at Trial against Electric Company—Amending Statute Passed after Judgment Increasing Rate of Compensation—10 & 11 Geo. V. ch. 43, secs. 8, 12—Retroactivity—Amendment—Claim to Add Sum to Amount Received—Parties—Dependants of Deceased—New Assessment of Damages—Appeal—Cross-appeal—Costs.

An appeal by the defendant the Ottawa Electric Company and a cross-appeal by the plaintiff company from the judgment of LENNOX, J., 18 O.W.N. 1.

The plaintiff company alleged that on the 22nd August, 1918, one of its employees, Eugene Gourgon, while acting in the course of his employment, in the city of Ottawa, came in contact with a wire charged with electricity, negligently left hanging by the defendant company or the defendant city corporation or both, and was instantly killed; that the plaintiff company had been unable to ascertain what was the arrangement between the two defendants; that, by reason of the negligence and consequent death of Gourgon, the plaintiff company had been compelled to pay Gourgon's dependants $5,427.07, under the provisions of the Workmen's Compensation Act, 1914, 4 Geo. V. ch. 25 (O.); and the plaintiff company claimed to be repaid this sum by the defendants or one of them.

The action was tried by LENNOX, J., without a jury, at Ottawa, and he gave judgment on the 1st March, 1920, for the plaintiff company against the defendant company for the amount claimed, and dismissed the action as against the defendant city corporation.

On the 4th June, 1920, the Workmen's Compensation Act, 1920, 10 & 11 Geo. V. ch. 43, received the royal assent, and came into force on the 1st July, 1920.

By sec. 8 of that Act, the limitation upon the total amount of compensation payable upon the death of a workman under the Workmen's Compensation Act of 1914 was increased from 55 per cent. to 66⅔ per cent. of the average monthly earnings of the workman; and by sec. 12 it was provided that "the increases in the amount of compensation payable under the Workmen's Compensation Act in cases of injury resulting in death shall apply to all pension payments accruing after the coming into effect of this Act, whether the accident happened before or after that date, and whether the award of compensation has been heretofore or is hereafter made, but nothing in this section contained shall entitle any person to claim additional compensation for any period prior to the coming into effect of this Act."

The plaintiff company, by its cross-appeal, asked for leave to amend its claim and vary the judgment by adding $3,022, the additional amount which the plaintiff company would be obliged to pay to the dependants of the deceased Gourgon, under the provisions of the Act of 1920. The cross-appeal was against the defendant city corporation as well as against the defendant company.

On the 20th September, 1920, the appeals and motion were heard by MULOCK, C.J. Ex., RIDDELL, SUTHERLAND, and MASTEN, JJ.

R. McKay, K.C., for the defendant company, supported the main appeal.

W. L. Scott, for the plaintiff company, asked, in lieu of an amendment, that there should be a new trial on the question of damages. The Act referred to had been passed since the trial, but was expressly made retroactive. He also asked for leave to amend by making the dependants of the deceased Gourgon plaintiffs.

McKay, K.C., for the defendant company, and F. B. Proctor, for the defendant city corporation, opposed the granting of the relief asked by the plaintiff company.

THE COURT gave judgment at the conclusion of the hearing, holding that the action was not properly constituted, as it should have been brought in the name of the dependants, and holding also that the statute was plainly retroactive.

The order made by the Court was, that so much of the judgment as fixed the amount of the damages should be set aside and that there should be a new assessment of damages; that in other respects the judgment should stand; that the plaintiff company

should have leave to amend as it might be advised; that the appeal of the plaintiff company against the defendant city corporation should be dismissed; that the costs of both defendants of the appeals should be paid by the plaintiff company forthwith after taxation; that there should be no costs of the past trial either to the plaintiff company or the defendant company; and that, if no amendment should be made by the plaintiff company within one month, the defendant company's appeal should be allowed, and the action dismissed with costs.

SECOND DIVISIONAL COURT. SEPTEMBER 23RD, 1920.

*SHERLOCK v. GRAND TRUNK R.W. CO.

Railway—Carrier—Loss of Trunk Checked by Passenger—Limitation of Liability—General Order of Railway Board—Powers of Board—Railway Act, R.S.C. 1906 ch. 37, secs. 30 (h), (i), 31, 340 (3)—"Personal Baggage"—Payment into Court—Costs.

Appeal by the plaintiff from the judgment of ROSE, J., 47 O.L.R. 473, 18 O.W.N. 208.

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

T. H. Crerar, for the appellant.

D. L. McCarthy, K.C., for the defendants, respondents.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. SEPTEMBER 24TH, 1920.

*BOSTON LAW BOOK CO. v. CANADA LAW BOOK CO. LIMITED.

Contract—Sale of Set of Law Reports at Fixed Price per Volume—"150 Volumes more or less"—Estimate—Liability of Vendee to Pay for Volumes in Excess of 150—Prospectus—Representation—Warranty—Breach—Counterclaim—Damages.

Appeal by the defendant company from the judgment of MIDDLETON, J., 44 O.L.R. 529, 15 O.W.N. 294.

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

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

R. T. Harding, for the appellant company.

A. Bicknell and M. L. Gordon, for the plaintiff company, respondent.

MULOCK, C.J.Ex., read a judgment in which, after setting out the facts, he said that the first question was, whether the appellant company was bound to pay for volumes 151, 152, 153, and 154 of the set of law reports which was the subject of the contract.

By the terms of the contract (5th June, 1900), the appellant company agreed "to take 200 copies of each volume of the set (150 volumes more or less)," afterwards reduced to "150 copies per volume (of the full set of 150 volumes more or less) . . . at a price," etc.

The appellant company, by its defence and counterclaim, contended that the meaning of the contract as amended was that a complete reprint of the original reports to be delivered to the appellant company was to number not more than 150 volumes, and that, if it overran that number, the appellant company was entitled to the excess fee; that it had overrun that number; and, therefore, that the respondent company was liable in damages for breach of contract.

In support of this contention the appellant company gave evidence at the trial that during the negotiations which led up to the contract of the 5th June, 1900, the respondent company produced to the appellant company the prospectus and sample pages and in substance agreed that the reprint would be in accordance with the representation and statements contained in the prospectus. This the respondent company denied. The written contract signed by the parties contained no such term. Its language was unambiguous, and no case was made for its reformation, nor did the appellant company seek reformation. The learned Chief Justice was unable to discover any ground entitling the Court to read into the contract a term qualifying the meaning of the express language of the parties. The words "more or less" could not be disregarded. There was no evidence that the number of volumes was to be 150 absolutely neither more nor less, even if such evidence would have been admissible.

The prospectus was made part of the contract between the publishers, William Green & Sons, of Edinburgh, and the respondent company, but not of the contract between the respondent company and the appellant company.

The fact that the price fixed by the contract was a certain sum per volume, and not a bulk sum for the complete set, furnished an argument against the appellant company's contention.

Under the terms of the contract, the appellant company was bound to pay for 150 volumes more or less; and the trial Judge rightly disposed of the respondent company's claim.

As to the counterclaim, the appellant company suggested that the number of volumes constituting a complete set of the reprint might greatly exceed 150, and claimed damages because of such anticipated excess. Until such excess was actually determined, it was impossible to say whether it was so unreasonable as to be actionable, and if so to what extent. The appellant company's counterclaim was premature, and should be dismissed with costs, but there should be reserved to the appellant company the right to maintain an action for damages in the event of the excess being so unreasonable as to give the appellant company a cause of action.

The appeal should be dismissed with costs.

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J.Ex.

MASTEN, J., for reasons stated in writing, agreed that the appeal should be dismissed.

RIDDELL, J., read a dissenting judgment. He said that the respondent company represented that the series would be completed in "about 150 volumes of 1,500 pages each;" that, on that representation, the contract was entered into; that it contained the statement that the set was "150 volumes more or less." The only question was, whether the plaintiffs were bound by the representation as a warranty. The intention of the parties was shewn by their conduct and their own words. The appellant company said, "Our contract calls for the completion of the work in 150 volumes." The respondent company did not deny that the contract called for the completion of the work in a certain number of volumes, but they said, "The number of volumes in a set is not absolute but qualified." Both parties understood and intended the statement in the contract "150 volumes more or less" as a warranty that that should be the number of volumes completing the work.

The appellant company was entitled, upon its counterclaim, to recover damages for breach of this warranty. By the respondent company undertaking to supply the remaining volumes gratis, these damages may be much diminished; otherwise they may be difficult to estimate.

In the absence of an agreement between the parties, there should be a reference to the Master to fix the damages once for all; and the amount of the respondent company's judgment should be paid into Court to await the result of the reference.

Appeal dismissed with costs (RIDDELL, J., *dissenting*).

SECOND DIVISIONAL COURT. SEPTEMBER 24TH, 1920.

*SCHMIDT v. WILSON & CANHAM LIMITED.

Sale of Goods—Contract—Principal or Agent—Goods to be Imported from New Zealand—Breach by Vendors—Failure to Deliver all Goods Covered by Contract—Repudiation—Embargo upon Exportation from New Zealand—Effect of—Suspension of Contract during Period of Total Prohibition—Exportation with the Consent of Minister of Customs—Absence of Endeavour to Obtain Consent—Duty of Vendors—Time and Place of Breach—Damages—Measure of.

An appeal by the defendants from the judgment of LOGIE, J., 47 O.L.R. 194, 18 O.W.N. 15.

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

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

T. R. Ferguson, K.C., for the plaintiff, respondent.

SUTHERLAND, J., read a judgment in which he said, after setting out the facts, that it was clear, having regard to the terms of the written contract and the correspondence which followed, that the defendants contracted as principals with the plaintiff; and, second, that the plaintiff, by his own conduct and acts prior to the raising of the embargo, treated the contract as at an end, and in consequence was precluded and estopped from claiming any right or privilege thereunder. Whatever the effect might have been had the defendants, after some time had elapsed and the dilatory effect of the embargo upon their shipments became apparent, notified the plaintiff that they had bought some pelts on account of the contract which they would hold, and were in a position to buy the remainder, provided the plaintiff would agree to pay for the same under the terms of the contract and accept delivery when the embargo should be raised, alleging its operation and effect to be something beyond their control, but if the plaintiff would not agree to this would treat the contract as at an end, they did not pursue this course. They treated the contract not as annulled but as suspended: Andrew Millar & Co. Limited v. Taylor & Co. Limited, [1916] 1 K.B. 402. They did not repudiate the contract while the embargo was operative nor until some time after it had been lifted. The trial Judge found that there was a duty on the part of the defendants to use their best endeavours to obtain the consent of the Minister of Customs to permit the shipment of the pelts, and came to the conclusion, apparently well warranted by the evidence,

that, except during the period of absolute refusal to grant permits, permission would not have been refused if application therefor had been made: In re Anglo-Russian Merchant Traders Limited and John Batt & Co. (London) Limited, [1917] 2 K.B. 679.

It was argued that the date fixed by the trial Judge was an erroneous one—that, if any breach of the contract occurred, it was on the 16th August.

The trial Judge rightly found that the breach occurred when the defendants definitely repudiated the contract, on the 3rd June, 1917; that it occurred at the place where the vendor was to deliver the goods on board ship, which was Auckland, New Zealand; and that the measure of damages was, therefore, what the plaintiff would have to pay for pelts in New Zealand on that date.

On all grounds, the judgment should be affirmed and the appeal dismissed with costs.

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

KELLY, J., agreed that the appeal should be dismissed.

MASTEN, J., read a judgment in which he stated his general agreement with the judgment of the trial Judge; and referred, on the question of the measure of damages, to Merrill v. Waddell (1920), 18 O.W.N. 279.

Appeal dismissed with costs.

SECOND DIVISIONAL COURT. SEPTEMBER 24TH, 1920.

PROZELLER v. WILTON.

Sale of Goods—Accounting for Goods Received—Acceptance of Part—Right of Rejection—Perishable Goods—Duty of Purchaser—Resale by Vendor.

An appeal by the defendant Wilton from the judgment of LENNOX, J., 17 O.W.N. 125.

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

A. C. McMaster, for the appellant.

J. W. Bain, K.C., for the plaintiff, respondent.

MASTEN, J., read a judgment in which he said that the matters in controversy in the action arose out of sales of potatoes by the defendant Wilton to the plaintiff in April, 1917. The trial Judge found the plaintiff entitled to a recovery against the defendant Wilton and the defendant the Union Bank of Canada to the extent of $1,943.91 with costs.

On the hearing of the appeal only two items were pressed by the appellant.

The first was an item of $74 loss alleged to have been incurred by the appellant on a resale of the potatoes in car 6376. The appellant contended that the plaintiff, by wrongfully breaking the seals of that car and abstracting one or more bags of potatoes, accepted the car-load, notwithstanding that the United States Agricultural Inspection Department had refused to permit this car to cross the border on account of defects in the potatoes.

The wrongful act of the plaintiff was something wholly unconnected with the contract, and could not be construed as an acceptance of this car by the plaintiff.

In this the Court agreed with the trial Judge. On this branch, the appeal should be dismissed.

The main contest was in respect of car D.L.W. 29407. This was a car of Delaware potatoes from New Brunswick, in respect of which the bargain was made on the 19th April, 1917. The car was sent from Toronto to Niagara Falls, Ontario, on the same day. The sale was f.o.b. Toronto; but, according to the understanding, the car was sent forward by the appellant with bill of lading in his own favour and with instructions to notify the plaintiff. The bill of lading and draft for the purchase-price were deposited in the appellant's bank in Toronto, and forwarded to Niagara Falls, Ontario, so that the plaintiff might take up the draft and then get the potatoes. The potatoes arrived at Niagara Falls, and the plaintiff was duly notified; but the draft was not taken up, and the car remained on a railway siding in Niagara Falls, Ontario, from the time of its arrival until sold by the appellant on or about the 1st May.

In these circumstances and having regard to the admitted fact that in April potatoes are perishable, it was the duty of the plaintiff, when the car arrived in Niagara Falls, about the 21st April, promptly to take up the draft and release the potatoes. There was no direct evidence of a term in the contract that the plaintiff had a right of inspection and rejection for unfitness at Niagara Falls, but the course of dealing between the parties in regard to other cars made it plain that such was the agreement.

No payment having been made by the plaintiff on this car down to the 30th April, the appellant on that day proceeded to realise his claim by selling the car-load to one Branch at Lockport.

After examination of the potatoes, Branch rejected them, and stopped payment of the cheque which he had given for the purchase-price.

It was the duty of the appellant to take steps on the 27th, 28th, 29th, and 30th April to sell these perishable goods and prevent a sale by the railway company for freight and demurrage. In what he afterwards did he acted reasonably and properly in an endeavour to realise the best price obtainable.

The plaintiff must satisfy the onus of justifying his failure to take up the draft and take care of the potatoes on the 21st April; and this he could do only by establishing as of that date a right of rejection on the ground that the potatoes were not merchantable. This he had not attempted to do. The only evidence upon that point was that when the potatoes finally arrived in Buffalo about the 20th or 21st May they were in part rotten. That evidence was irrelevant. The sole question was, whether their condition was such on the 21st April as to justify rejection. That not being shewn, the subsequent loss must fall on the plaintiff as the result of his failure to take care of the potatoes according to agreement.

The appellant should be credited with a further sum of $1,079.94 and the amount of the judgment should be reduced to $863.97. To that extent the appeal should be allowed, and the plaintiff should pay the appellant's costs thereof.

MULOCK, C.J. Ex., and SUTHERLAND, J., agreed with MASTEN, J.

RIDDELL, J., read a dissenting judgment. He was of opinion that the trial Judge's findings should not be interfered with, as he had seen and heard the witnesses, and no sufficient reason appeared for saying that he was wrong in his conclusions of fact or law.

Appeal allowed in part (RIDDELL, J., *dissenting*).