JAMES LUMBERS (DEFENDANT).....APPELLANT;

AND

THE GOLD MEDAL FURNITURE MANUFACTURING COMPANY (PLAINTIFF).....RESPONDENT.

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*June 5, 6.

*Oct. 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Lease—Provision for termination—Sale of premises—Parol agreement—Misrepresentation—Quiet enjoyment.

A lease of premises used as a factory contained this provision: "Provided that in the event of the lessor disposing of the factory the lessees will vacate the premises, if necessary, on six months' notice."

Held, reversing the judgment of the Court of Appeal (26 Ont. App. R. 78), and that of Rose J. at the trial (29 O. R. 75), that a parol agreement for the sale of the premises, though not enforceable under the Statute of Frauds, was a "disposition" of the same under said provision entitling the lessor to give the notice to vacate.

Held, further. that the lessor having, in good faith, represented that he had sold the property, with reasonable grounds for believing so, there was no fraudulent misrepresentation entitling the lessee to damages even if no sale within the meaning of the provision had actually been made, nor was there any eviction or disturbance constituting a breach of the covenant for quiet enjoyment.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming by an equal division of opinion the judgment of Mr. Justice Rose at the trial (2) in favour of the plaintiff.

The following are the material facts of the case as stated by Mr. Justice Osler, in giving judgment in the Court of Appeal.

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*PRESENT:—Sir Henry Strong C.J. and Taschereau, Gwynne, King and Girouard JJ.

(1) 26 Ont. App. R. 78. (2) 29 O. R. 75.

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The plaintiffs on the 12th November, 1896, leased from the defendant certain flats or rooms in a large factory building for the term of three years and two months from the 1st December, 1896. Their lease is expressed to be made in pursuance of the Act respecting short forms of leases, and contains the usual covenant for quiet enjoyment and also the following proviso:

"Provided that in the event of the lessor disposing of the factory the lessees will vacate the premises if necessary on receiving six months' notice, or a bonus of $350."

It was very much to the defendant's interest that he should entirely get rid of the factory, which was a *damnosa hereditas*, although as regards the parts leased to the plaintiffs there is no doubt that the rent was a profitable one.

In December of the same year, 1896, the defendant was negotiating an arrangement with a person named Gardner, and, on the 31st of that month, having as he thought brought it to a conclusion, except that it was not finally reduced to writing, he gave the plaintiffs the following notice:—"As I have disposed of my interests in the factory premises I beg to notify you that you will be required to vacate that portion of the premises occupied by your firm on or before the 1st of July, 1897."

In point of fact the agreement the parties were negotiating was not finally settled and signed until the 11th January, 1897. As then signed it was, however, one similar to that which defendant supposed he had secured on the 31st December, though with some unimportant variations in the terms. In substance it provided that Gardner was to manage the factory for a year (apparently without any direct compensation), until the 1st January, 1898. Defendant

was to advance $1,000 for repairs and improvements to be expended by Gardner under his directions. Gardner was to use every effort to get tenants at the highest rents. These rents were to be paid to and to be the defendant's property. The leases were to be in his name and the tenants his tenants. If at any time during the year the income exceeded the expenditure, Gardner had the right to require Lumbers to grant him a sub-lease of the factory for the residue of the term, less one day, for which Lumbers himself held it. And if on the 1st of January, 1898, the same state of affairs existed and from the nature of the existing tenancies it should appear probable that it would continue for three months longer, Lumbers had the right to require Gardner, and the latter was bound, to accept a similar lease, and he was also to have the option, at any time during the currency of the proposed tenancy, to purchase the lease from the Land Security Company to his lessor.

Some time during the month of January, 1897, the plaintiffs consulted their solicitor to know if it would be wise for them to remain and let the defendant prove his sale, and were advised not to do so lest they might be sued for damages. Then they applied to defendant to know if they might be permitted to move at any time, as the six months would expire at a very inconvenient time for them, and they addressed Gardner on the same subject, who wished them to move at once. Lumbers, at their instance, wrote the letter of the 22nd January, 1897. "In reference to the notice I gave you to vacate on the 30th June next, I understand you wished me to state that in the event of your wishing to move previous to the time stated that you may be relieved of the liability to pay rent after the premises are vacated, to which proposition I reply that when I disposed

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of the premises I had the option to, and that I availed myself of the former course and gave you the six months' notice, and my settlement with Mr. Gardner, to whom I sold the property, was completed with the calculation that you would remain in possession and pay me the rent of same for the six months. However," etc.,—and then the defendant goes on to say that they may vacate the premises at the end of any month, giving one month's notice and paying rent up to the date of leaving.

To this the plaintiffs, who had in the meantime consulted their solicitor, as above stated, replied on the 29th January:—"In reply to your two notices, December 30th and January 22nd, would say it is very inconvenient for us to move at present as our stock is very large, and as June is our busy month and we could not move. However, we have no option in the matter as you say you have sold property, so we hereby notify you that we will vacate our present premises the end of February, 1897, under protest, as we can find no sale registered."

Plaintiffs finished moving into other premises on the 28th February, 1897, and on the following day their solicitor wrote to defendant claiming damages for loss sustained by fraudulent misrepresentations, stating that it had recently come to their knowledge that no sale or disposition had in reality been made by him, and that he had deceived the plaintiffs by representing that it had and had caused them to surrender their lease and move out at great loss to themselves.

On the 3rd of March this action was commenced. It was launched and tried out as an action of deceit, but the learned trial judge, while not expressly deciding that it was not maintainable on that ground, held that the plaintiffs were entitled to recover as for a

breach of the covenant for quiet enjoyment and gave judgment on that ground, with leave to the plaintiffs to amend their statement of claim.

Watson Q.C. for the appellant. There was no misrepresentation entitling plaintiff to damages. *Derry* v. *Peek* (1). No action lies for innocent misrepresentation. *Cowling* v. *Dickson* (2); *White* v. *Sage* (3); *Glasier* v. *Rolls* (4).

The agreement was a disposition of the property under the provision in the lease. *Elston* v. *Schilling* (5); *Hill* v. *Sumner* (6); *Kennedy* v. *City of Toronto* (7).

S. H. Blake Q.C. for the respondent. An action lies for non-performance of a legal obligation even in the absence of fraud. *Polhill* v. *Walter* (8); *Low* v. *Bouverie* (9). Moncrief on Fraud and Misrepresentation, p. 137. Physical interference with the lessor's possession is not necessary to authorize an action for breach of covenant for quiet enjoyment. *Edge* v. *Boileau* (10).

The agreement for sale was not a "disposition" of the property under the lease as no interest was parted with. See *Astley* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (11).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—The judgment delivered by Mr. Justice Osler, in the Court of Appeal, is prefaced with a statement of the facts which is quite sufficient for the purposes of the present appeal.

I am of opinion that there was no actionable misrepresentation. So far from it I incline to think that

(1) 14 App. Cas. 337.
(2) 45 U. C. Q. B. 94.
(3) 19 Ont. App. R. 135.
(4) 42 Ch. D. 436.
(5) 42 N. Y. 79.
(6) 132 U. S. R. 118.
(7) 12 O. R. 211.
(8) 3 B. & Ad. 114.
(9) [1891] 3 Ch. 82.
(10) 16 Q. B. D. 117.
(11) 2 DeG. & J. 453.

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the appellant was strictly accurate in stating in the letter of the 31st December, 1896, that "he had disposed of his interests in the factory premises." At that time he had according to the evidence entered into an agreement for the sale to Gardner, which though not reduced to writing and therefore not enforceable by action as between the parties by reason of non-compliance with the Statute of Frauds, was notwithstanding a completed and concluded contract. This agreement, with a few alterations of a non-essential character, was afterwards embodied in the written instrument of the 11th of January, 1897, signed by the parties. If, on the 31st of December, 1896, there was a concluded agreement, though one resting in parol only, I think it entitled the appellant to give the notice which he had the power of giving under the proviso in the lease to the respondents.

The agreement was clearly a disposition of the property; it was in terms and in substance and reality a sale of the whole leasehold interest which he had in the factory of which the respondents' premises formed part. That it was not binding between the parties by reason of the Statute of Frauds did not, in my judgment, make the appellant guilty of fraud or false representation, or what may be called a constructive eviction of his lessee, when he denominated it a "disposition." The appellant wrote this letter himself and he cannot be supposed to have had knowledge of the technical or legal effect of his agreement, or of the provisions of the Statute of Frauds; he believed he had sold his leasehold interest in the property and in good faith gave the notice. Moreover, the agreement constituted a contract, although being within the fourth section of the Statute of Frauds it could not be enforced as such in an action brought by either of the parties to it until it was put into writing. The

statute does not say that the contract by parol shall be void, but that "no action shall be brought" to enforce it, without writing. The writing is not required as one of the solemnities of the contract but merely as evidence against the other party to it, and the writing sufficient to prove it may be signed after the agreement is made at any time before action brought. *Lucas* v. *Dixon* (1); *Maddison* v. *Alderson* (2), per Lord Blackburn. I am not prepared to say that any writing was necessary to enable the appellant to prove the existence of this agreement in such an action as the present for purposes having nothing to do with the enforcement of the contract, but altogether collateral to it. Certainly the words of the 4th section of the statute do not require a writing for such a purpose as this.

Then if this is not sufficient I entirely agree in the opinions of the trial judge as to fraud, and those of Mr. Justice Osler and Mr. Justice Maclennan in the Court of Appeal. I fail to see that it was open to the learned Chief Justice to place his judgment on the grounds he has rested it on in the present state of the record by which the respondent's action is under the amendment directed at the trial, one for breach of covenant for quiet enjoyment, and not as originally one for fraudulent misrepresentation. But assuming the respondents to be still entitled even against the finding of the trial judge and after having accepted the amendment to fall back on their original complaint, I am clear that there was here no fraudulent misrepresentation entitling the respondents to damages.

The representation was made in good faith with reasonable grounds for believing it and making it, it was certainly not false, to the knowledge of the appel-

(1) 22 Q. B. D. 357.

(2) 8 App. Cas. 467 at p. 488.

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lant, which alone would be enough to entitle it to be characterised as innocent. Moreover, it was not acted upon by the respondents in such a way as to entitle them to maintain an action even if it had been false and fraudulent. As Mr. Justice Osler has shown, the appellant's assertion that he had disposed of the property was really not the cause of the abandonment of possession by the respondents. The possession was surrendered under an agreement between the respondents and the appellant, by which for a valuable consideration the respondents gave up the lease. It could not therefore have been said that the immediate cause of the respondents' going out of possession was the appellant's statement. In every action of this kind it is essential to show that the representation of the defendant was one which he knew to be false, and moreover was one *dans locum injuriæ*. In making out these essentials the respondents utterly failed. The learned judge who tried the case without a jury thus found, as he states in his judgment:

> I do not however find that the defendant intentionally, wilfully or maliciously misled the plaintiff. I think he was acting upon what he believed to be his rights, and was acting in good faith in the sense of doing what he did to advance his own interests in accordance with what he believed to be his rights under the proviso. I therefore cannot find any false and fraudulent representation to the plaintiff.

I think this finding was entirely correct upon the evidence.

Then to turn to the other causes of action under the amendment of the complaint permitted by the learned judge, viz., that converting the action for fraudulent misrepresentation into one for breach of the covenant for quiet enjoyment. The learned trial judge proceeded exclusively upon this. Mr. Justice Maclennan's judgment shows, I think, by unanswerable reasoning the fallacy of the original judgment. In

my view there was no eviction or disturbance here, for the reason that the appellant was justified in giving the notice, as I have before stated, upon the other branch of the case. It cannot be said that any decided case has ever gone to the extent to which the learned trial judge went in holding the letter of the 31st December, 1896, a breach of the covenant in question. The most that can be said of it, even if we hold it to have been unwarranted by the facts, is that it was premature, as having been eleven days too soon. Could it be said, as is well put by Mr. Justice Maclennan, that the covenant was broken by a lessor who having a right to put an end to the term gave a notice a single day too late which led to the tenant evacuating the premises. I should like to see a case so deciding before I acted on any such proposition. In my view there was no eviction in any view of the case; the respondents chose to act upon the notice and they cannot now complain or call that an eviction or disturbance of possession in which they acquiesced. Moreover, as Mr. Justice Osler demonstrates, the surrender of possession here is to be ascribed to an agreement for which the respondents received valuable consideration and in respect of which they cannot put the appellant back in his original position, and do not indeed offer or pretend to be able to do so; therefore it is perfectly justifiable to say that the respondents acquiesced in what they now call wrongful eviction. The action in either aspect of it wholly fails.

The appeal must be allowed and the action dismissed with costs to the appellant in this court as well as in the other courts.

Appeal allowed with costs.

Solicitors for the appellant: *Watson, Smoke & Masten.*

Solicitors for the respondent: *Pinkerton & Cooke.*