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*Oct. 18, 19.
*Nov. 2.

THE SAWYER & MASSEY COMPANY (PLAINTIFFS) .... APPELLANTS;

AND

THOMAS G. RITCHIE (DEFENDANT) .. RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Contract—Implied warranty—Fitness of machinery—New agreement—Breaches prior to new contract—Relinquishment of rights under former agreement.

R. & N. purchased threshing machinery from the company, in Nov., 1906, under an agreement similar to that in part quoted below, and gave notes for the price. They dissolved their business connection, after using the machine for some time, and, in March, 1907, after the threshing season was over, N. was released from his obligations under the agreement, the notes signed by R. & N. were cancelled, and R. gave the company his own notes in their place and entered into a new agreement containing the following provisions: "The said machinery is sold upon and subject to the following mutual and interdependent conditions, namely: It is warranted to be made of good material and durable with good care and with proper usage and skilful management to do as good work as any of the same size sold in Canada. If the purchasers after trial cannot make it satisfy the above warranty written notice shall within ten days after starting be given both to the company at Winnipeg and to the agent through whom purchased, stating wherein it fails to satisfy the warranty and reasonable time shall be given the company to remedy the difficulty, the purchasers rendering necessary and friendly assistance together with requisite men and horses; the company reserving the right to replace any defective part or parts; and if the machinery or any part of them cannot be made to satisfy the warranty it is to be returned by the purchaser free of charge to the place where received and another substituted therefor that shall satisfy the warranty or the money and notes immediately returned and this contract cancelled neither party in such case to have or make any claim against the other. And if both such

*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Anglin JJ.

notices are not given within such time that shall be conclusive evidence that said machinery is as warranted under this agreement and that the machinery is satisfactory to the purchasers. If the company shall at purchaser's request render assistance of any kind in operating said machinery or any part thereof or in remedying any defects such assistance shall in no case be deemed a waiver of any term or provision of this agreement or excuse for any failure of the purchasers to fully keep and perform the conditions of this warranty. When at the request of the purchasers a man is sent to operate the above machinery which is found to have been carelessly or improperly handled said company putting same in working order again the expenses incurred by the company shall be paid by said purchasers. This warranty does not apply to second-hand machinery. It is also agreed that the purchasers will employ competent men to operate said machinery. There are no other warranties or guarantees, promises or agreements than those contained herein. All warranties are to be inoperative and void in case the machinery is not settled for when delivered or if the printed language of the above warranty is changed whether by addition, erasure or waiver or if the purchasers shall in any respect have failed to comply herewith."

Some defects in the machinery had given rise to complaints, during the previous threshing season, and had been rectified by the company before the execution of the second agreement; they also made further repairs during the Autumn of 1907 and then notified R. that future repairs must be at his own expense. R. paid the first instalment of the price of the machinery, but, when subsequently sued on his other notes, contested the claim, pleaded breach of an implied warranty of fitness and counterclaimed for damages for this breach.

Held, that all claims for damages for breaches of any kind prior to the second agreement had been waived by that agreement and that the provision that there were no other warranties, guarantees, promises or agreements than those contained in the agreement excluded all implied warranties.

Held, further, that the condition requiring written notice of breach of warranty applied only to the warranty that "with proper usage and skilful management" the machinery would "do as good work as any of the same size sold in Canada," and that it had no application to the warranties that the machinery was "made of good materials" and would be "durable with good care."

The consideration for the release of N., and the acceptance of the sole liability of R. for the price of the machinery was the execution of the new notes and agreement which involved the relinquishment by both parties of all their rights under the first agreement.

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APPEAL from the judgment of the Supreme Court of Alberta affirming the judgment of Beck J., at the trial, by which the plaintiffs' action was maintained and the defendant's counterclaim was allowed for an amount equal to the plaintiffs' claim, one judgment being set off against the other and general costs allowed to the defendant.

The company brought the action to recover the balance due on the price of machinery sold, under the agreement mentioned in the head-note, and the defence and counterclaim set up that the plaintiffs had warranted the machinery sold as fit for the purposes for which it was manufactured and intended, that it did not fulfil the warranty and was defective in many respects and the defendant claimed damages for breach of the contract of warranty. At the trial, Beck J. entered judgment for the amount of the plaintiffs' claim, without costs, and awarded a similar amount to the defendant on the counterclaim, with costs, the defendant's judgment to be set off against the plaintiffs' judgment, *pro tanto;* the result being a judgment in favour of the defendant for the general costs of the action. This decision was affirmed by the judgment from which the present appeal was asserted.

The circumstances of the case are stated in the judgments now reported.

Bennett K.C. for the appellants.

Chrysler K.C. for the respondent.

THE CHIEF JUSTICE.—I agree that this appeal should be allowed with costs.

GIROUARD and DAVIES JJ. agreed in the opinion stated by Anglin J.

IDINGTON J.—The respondent and one Neuffel entered into a written contract agreeing to purchase a threshing machine and horse-power from the appellants and to give three promissory notes for the price and on delivery of these goods gave these notes for the price as agreed in December, 1906.

The machine was used for some time and then on account of some differences they came to an agreement between themselves whereby respondent was to acquire Neuffel's interest and assume the burden of paying the appellants and, thereupon, they abandoned their claims as against Neuffel and entered into a new agreement with respondent which ostensibly treated the transaction as a new bargain for the sale of these goods to respondent, who agreed thereby to purchase same from the company and give his notes for the price.

This latter agreement was upon one of the usual printed forms used by the appellants in the course of their business as manufacturers, as was the first bargain, and is dated 12th March, 1907.

The respondent before signing this, wrote, on the 4th March, 1907, a letter that complained of some things found unsatisfactory in the use or quality of the machine, but instead of refusing to enter into the new agreement or trying to rescind the old agreement between the company and himself and Neuffel, he signed the new agreement and gave his notes.

In my view it is unnecessary to follow in detail all that was done with or in relation to the machines and the contract.

Suffice it to say that the appellants sued respondent and besides pleading defences to the action he made a counterclaim for the breach of warranties (as

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I assume though by no means clear) express and implied by reason of damages he had suffered.

The learned trial judge found appellants entitled to judgment for the debt and this is not now questioned.

He besides found appellants liable for damages for breaches of warranties both express and implied relative to the machines. He found the machines in some respects not made of good material and in some parts badly constructed, neither of which are specified, and assessed the damages at such sum as equalled the appellants' claim in their action.

The learned trial judge then ordered judgment for plaintiffs' claim without costs and judgment for defendant, now respondent, on his counterclaim for a similar amount with costs and that the defendant's judgment be set off against the plaintiffs', *pro tanto,* leaving the costs to be paid by the plaintiffs to the defendant.

From this judgment the appellants appealed to the Supreme Court *en banc* claiming a reversal of the judgment for plaintiffs with costs. This appeal was dismissed with costs.

The only question of the many argued which I need, in my view of the case, refer to is whether or not there was any warranty either express or implied upon which the respondent can maintain his claim upon the counterclaim.

There seems to have existed throughout a strange misapprehension of the exact legal rights of the respondent.

Damages seem to have been assessed for breach of the original warranties express and implied.

How can respondent claim any such damages here?

That contract was one in which the obligation of the appellants, if any, was to Neuffel and Ritchie, and Neuffel is no party to these proceedings.

Besides that contract was put an end to by what transpired. Another was entered into between the parties hereto making no reference to the previous contract, nor in any way transferring such claims, if any, as Neuffel and Ritchie had for breaches of the original contract.

Indeed, even if such claims might have existed, they clearly were in law, and I think in fairness and justice also, extinguished.

Moreover, the counterclaim rests expressly upon the later contract of the 12th March, 1907.

The language of this contract is evidently inappropriate to the business the parties had in hand. It contemplates a new machine had been ordered and had to be started which certainly was not the case.

Some complaints, as I have already said, having been made by the respondent's letter of 4th March, I infer, led to appellants sending, though on the face of the transaction in no way bound to do so, a man to put the machines in proper condition in the following September.

How all this came about is not as clear as it might be, but no doubt appellants felt bound, by a due regard to their self-interest if nothing else, to pay heed to the respondent's complaints of the 4th of March, even if covered in law by his signing the contract of the 12th of March, to do something to satisfy him.

The repairs no doubt had been postponed by mutual convenience to the time a new harvest was in sight.

However all this may be, a letter was written by

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appellants to respondent immediately after, to which no reply appears.

And by the terms of that the respondent surely in good morals as well as law was bound then to object thereto or forever hold his peace. It would seem to be his misfortune and fate to have done neither.

The express warranty would seem as applied to the transaction unworkable and in light of respondent's conduct a thing he cannot rely on.

He gave no notice as required by that, or protest against the terms of the letter.

Then is there any implied warranty relative to this second sale ?

I think not. It is impossible for me to say, whatever might have been said as to the original purchase in respect to which I express no opinion, that in regard to this second sale the respondent, in the language of section 16, sub-section 1, of the "Sale of Goods Ordinance," was thereby giving an implied warranty or condition by implication to a buyer

> who makes known to the seller the particular purpose for which the goods are required so as to shew that the buyer relies on the seller's skill and judgment, etc.

It is impossible to say he was so relying on the sellers' skill. The facts if nothing else exclude any such idea.

Nor does the language of sub-section 2 of the same section relative to sale by description help respondent. And other parts of the statute relied upon are still more irrelevant.

Moreover, there is very much to be said in favour of the view that the express terms of the contract excluded reliance on any implied contract.

I express, however, no opinion upon that for two

good reasons; one that I am not called upon herein to do so, and the other that the party who chooses in an every day business dealing to employ vague and ambiguous language is not entitled to expect very much help from any court.

Although the result must be to reverse the judgments of the court below and dismiss the counterclaim with costs on and up to and inclusive of the trial, I do not think I should interfere with the learned trial judge's judgment as to costs by altering the judgment for appellants so as to entitle them to costs of prosecuting their claim.

Of course we never interfere to rectify a judgment as to costs only, but, when the appellants do in another substantial way succeed in appeal, the question of costs is also, I think, reviewable as a rule.

The ambiguous form of contract used I think has led to litigation herein.

I do not agree in the learned trial judge's view of the respondent having been excused from trying to understand the writing. I must say, however, it is one I am quite sure should not be used and as to general costs of suit I would refuse them on that ground alone when there is reason to believe a frank, clear form of contract might have averted litigation.

ANGLIN J.—The plaintiffs (appellants) brought this action upon promissory notes given by the defendant in payment of the price of an "Eclipse" thresher, a waggon-elevator for separator, and certain trucks. There was no defence to the plaintiffs' claim; but, by counterclaim, the defendant sought to recover damages for breach of a warranty that

> the thresher and separator were fit for the purposes for which they were built and intended.

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The defendant and his then partner, or co-purchaser, one Neuffel, bought the separator and thresher from the plaintiffs in November, 1906. They then executed an agreement on the plaintiffs' usual form, similar to that executed at a later date by the defendant alone. They also gave their promissory notes for the price of the machinery. About the end of December, Ritchie and Neuffel determined to separate, and Ritchie agreed to take over Neuffel's interest in the threshing outfit. The agreement for the purchase of the trucks from the plaintiffs, dated the 3rd January, 1907, was accordingly made with Ritchie alone. On the advice of their agent that Ritchie was financially sound, the plaintiffs also agreed to accept his sole liability in lieu of that of himself and partner, for the separator and the thresher, stipulating, however, that Ritchie should execute a new agreement and should give new notes for the purchase money. Ritchie accordingly, on the 12th of March, executed a new agreement for the purchase of the thresher and separator from the plaintiffs and gave them the notes which are now sued upon. This agreement contains the following provisions:—

The said machinery is sold upon and subject to the following mutual and interdependent conditions, namely:—

It is warranted to be made of good material and durable with good care and with proper usage and skilful management to do as good work as any of the same size sold in Canada. If the purchasers after trial cannot make it satisfy the above warranty written notice shall within ten days after starting be given both to the company at Winnipeg and to the agent through whom purchased, stating wherein it fails to satisfy the warranty and reasonable time shall be given the company to remedy the difficulty, the purchasers rendering necessary and friendly assistance together with requisite men and horses; the company reserving the right to replace any defective part or parts; and if the machinery or any part of them cannot be made to satisfy the warranty it is to be returned by the purchaser free of charge to the place where received and another substituted there-

for that shall satisfy the warranty or the money and notes immediately returned and this contract cancelled, neither party in such case to have or make any claim against the other. And if both such notices are not given within such time that shall be conclusive evidence that said machinery is as warranted under this agreement, and that the machinery is satisfactory to the purchasers. If the company shall at purchaser's request render assistance of any kind in operating said machinery or any part thereof or in remedying any defects such assistance shall in no case be deemed a waiver of any term or provision of this agreement or excuse for any failure of the purchasers to fully keep and perform the conditions of this warranty. When at the request of the purchasers a man is sent to operate the above machinery which is found to have been carelessly or improperly handled said company putting same in working order again the expenses incurred by the company shall be paid by said purchasers.

This warranty does not apply to second-hand machinery.

It is also agreed that the purchasers will employ competent men to operate said machinery.

There are no other warranties or guarantees, promises, or agreements than those contained herein. All warranties are to be inoperative and void in case the machinery is not settled for when delivered or if the printed language of the above warranty is changed whether by addition, erasure or waiver or if the purchasers shall in any respect have failed to comply herewith.

In addition to the warranty expressed in these provisions of the contract the defendant alleges that there was an implied warranty of fitness. His counterclaim as pleaded appears to be based solely upon this implied warranty and the judgment in his favour also rests upon it.

There would appear to have been a number of defects in the threshing machinery, which caused trouble and difficulty during the threshing season of 1906-7. This threshing season had come to an end before the execution of the agreement of the 12th of March, 1907. The plaintiffs had made good a number of these defects. In September, 1907, they made some further repairs to the machinery and then notified Ritchie that any future repairs must be at his own expense. Before signing

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the agreement of the 12th of March, 1907, Ritchie made complaint about the threshing outfit, alleging that it was a constant source of loss and worry on account of defects in material and workmanship, having broken down six times in the course of seven threshings during the winter of 1906-7. He paid the first instalment of the purchase money under protest. The grain crop for the season of 1907-8 was a failure and there is no evidence that during that season the threshing outfit proved itself unfit for use. Only one or two small crops of grain were threshed and unsatisfactory results in that season may well be ascribed to the poor character of the grain itself.

Assuming that the defendant is entitled, notwithstanding the terms of his contract above quoted, to set up and rely upon an implied warranty of fitness, the record contains no evidence to support a finding of breach of such a warranty subsequent to the 12th of March, 1907. Whatever breaches there may have been, prior to that date, of any warranty, express or implied, under the contract between the plaintiffs and Ritchie and Neuffel, were, in my opinion, waived when the contract of the 12th of March, 1907, was entered into. Moreover, I think the provision that

> there are no other warranties or guarantees, promises or agreements than those contained herein

excludes all implied warranties. Upon this ground alone the defendant's counterclaim should fail inasmuch as it is based solely upon an implied warranty of fitness. But if, although he has not pleaded it, the defendant may, nevertheless, rely upon the express warranty above set forth, he is still confronted with insurmountable difficulties.

Upon the proper construction of this warranty the

provision requiring written notice of breach to be given to the company within ten days after starting, in my opinion, applies only to the warranty that

with proper usage and skilful management, the machinery will do as good work as any of the same size sold in Canada.

It has no application to the warranties that the machinery is "made of good materials" and will be "durable with good care." The notice is to be given "*if the purchasers* after trial *cannot make* it (the machinery) satisfy the above warranty." The purchasers had nothing to do with providing good material for the machinery or with making it durable. It was not their business to "make" it satisfy these warranties. It seems clear, therefore, that the provision as to notice can have no application to them.

Ritchie's failure to give the necessary written notice would preclude him from setting up breach of the warranty that

the machine will do as good work as any of the same size sold in Canada.

But as already stated, the evidence does not shew any breach of this warranty nor of the warranties as to good material and durability subsequent to the 12th of March, 1907. The consideration for the release of Neuffel by the company and their acceptance of the sole liability of Ritchie instead of that of Neuffel and Ritchie was the execution by Ritchie of the new agreement and his giving the new notes sued upon. The company expressly stipulated for both these things as conditions of Neuffel's release. Ritchie chose to assent to these terms. They involved the relinquishment by both parties of all their rights under the November agreement. The only agreement now in existence between

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Ritchie and the company is the agreement of the 12th of March, 1907. In order to succeed in his counterclaim he must, I think, prove breaches of warranty subsequent to that date. This he has failed to do.

I am, therefore, with respect, of the opinion that the plaintiff's appeal should be allowed with costs in this court and in the full court of the Province of Alberta, and that the defendant's counterclaim should be dismissed with costs. The plaintiffs should also have their costs of the action.

Appeal allowed with costs.

Solicitors for the appellants: *Lougheed, Bennett & Co.*

Solicitors for the respondent: *Jones & Pescod.*