

1913

LEONARD & SONS v. KREMER.

*March 6.

*April 7.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Sale of goods—Delay in delivery—Damages—Construction of agreement—Deficiencies in machinery—Exemption clause—"Unable to deliver"—"On or about" stated date.

APPEAL from the judgment of the Supreme Court of Alberta (1), reversing the judgment of Harvey C.J. at the trial by which the counterclaim of the defendant (respondent) had been dismissed with costs.

The action was brought by the appellants for the price of a boiler and attachments and the defendant counterclaimed for damages on account of delay in the shipment of part of the machinery within the time stipulated in the sale-agreement and the unsuitability of other parts for the works in which they were to be used. The trial judge dismissed the counterclaim because of an exemption clause in the agreement providing if for any reason the appellants were "unable to fill" the order which the defendant had given for the machinery "or deliver the goods at the time stated" that they would not in any way be held responsible for damages, and also because the delay had been caused by failure to deliver a part of the machinery which had not been included in the order. By the judgment appealed from the Supreme Court of Alberta held that as the evidence did not shew inability to

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

deliver the machinery at the time stated the clause did not protect the sellers, and also, that the failure to deliver certain parts of the machinery in question had not been the actual cause of the delay from which the damages claimed had resulted. Simmons J. dissented.

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After hearing counsel on behalf of both parties the Supreme Court of Canada reserved judgment and, on a subsequent day, it was ordered that the appeal should be allowed in part, that the judgment appealed from should be set aside, that the appellants should recover \$465.30 on their claim with interest from the 28th of February, 1911, at the rate of 8% per annum on \$444, that the defendant should recover on his counterclaim the sum of \$200, and the appellants should have leave to enter judgment for the difference between these two sums. It was also ordered that the costs of the action and counterclaim should follow these events respectively in the usual way and that there should be no costs allowed upon the appeal to the Supreme Court of Canada nor on the appeal to the Supreme Court of Alberta *in banco*.

Appeal allowed in part without costs.

George S. Gibbons for the appellants.

Mellish K.C. for the respondent.