

ROBERT H. BOURK (DEFENDANT) . . . . . APPELLANT;

1928

AND

\*April 30.

CANADA PRODUCTS LIMITED }  
(PLAINTIFF) . . . . . } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Pleadings—Refusal of amendment at trial—New trial ordered—Costs—  
Claim for breach of logging contract.*

On the question, whether plaintiff or defendant was responsible for termination of a logging contract between them, the trial judge, on his construction of defendant's counterclaim, held that defendant was not entitled to rely on what took place prior to November 14, 1924, and refused to allow amendment. The Court of Appeal, Sask. (27 Sask. L.R. 29, allowing plaintiff's appeal, and dismissing defendant's cross-appeal, from the judgment at trial) took the same view on the pleadings, and also refused amendment. On defendant's appeal to this Court, a new trial was directed, as the Court, while not holding that the construction given below to the pleading was erroneous (though such construction seemed to this Court rather narrow), or that the trial judge had wrongly exercised his discretion as to amendment, was of opinion that, under the circumstances, the trial was unsatisfactory, and that justice could only be done by a new trial. Costs down to the asking of amendment at trial were to be borne by defendant, costs subsequent thereto to be in the discretion of the judge presiding at the new trial.

APPEAL by the defendant from the judgment of the Court of Appeal for Saskatchewan (1) allowing the plaintiff's appeal and dismissing the defendant's cross-appeal from the judgment of Maclean J. at the trial.

The parties entered into a contract whereby the defendant was to cut, log and deliver timber at the plaintiff's mill. The contract came to an end, the responsibility for which was a matter in dispute. The plaintiff sued for moneys alleged to have been paid by it, after the termination of the contract, to release liens placed upon their logs for wages due to the defendant's workmen. The defendant disputed the claim, and, alleging that the plaintiff had wrongfully repudiated and terminated the logging contract, counter-claimed for damages.

Maclean J. held that the plaintiff was responsible for the termination of the contract, and that, as its claim arose

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\*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

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under the contract, it could not recover, and dismissed the action; but he also held that, under the circumstances to be considered in fixing the basis and quantum of damages, and taking into account, for the purpose of estimating the damages, the moneys paid by the plaintiff to discharge the workmen's liens, the defendant had suffered no actual damage, and he dismissed the defendant's counterclaim. The plaintiff appealed, and the defendant cross-appealed, to the Court of Appeal for Saskatchewan. That Court (1) held that the defendant must be held responsible for the termination of the contract; that the plaintiff's claim should have been allowed, and the defendant's counterclaim dismissed; and, accordingly, allowed the plaintiff's appeal and dismissed the defendant's cross-appeal.

On the question of the responsibility for the termination of the contract, the judgments at trial and in the Court of Appeal proceeded upon what took place between the parties on and after November 14, 1924. Late in the course of the trial the judge interrupted defendant's counsel, while examining a witness, to remind him that the defendant was not complaining in his pleadings of having been delayed by the plaintiff before November 14. Counsel for defendant asked that, if necessary, he be allowed to amend, but this was refused. The Court of Appeal (1) took the same view as the trial judge as to the limited interpretation and effect of the defendant's pleading in charging the plaintiff for breach of contract, and also refused to allow an amendment. In the course of his argument before the Supreme Court of Canada, counsel for the defendant contended that a too narrow and strict interpretation had been taken of the defendant's pleadings in his counterclaim, and that, on such pleadings, he was entitled to rely on events prior to November 14, 1924.

After hearing argument by counsel for both parties, the members of the Court retired, and on their returning to the Bench, the judgment of the Court was orally delivered by

ANGLIN C.J.C.—While we are not prepared to hold that the view taken by the trial judge and affirmed by the Court of Appeal as to the proper construction of the pleading is erroneous, we think it rather narrow. We also think that

(1) 27 Sask. L.R. 29; [1927] 2 W.W.R. 741.

justice was much more likely to be done if the amendment asked for had been granted. Without reviewing the judgments below, and while not saying that the learned trial judge wrongly exercised his discretion, we are all of the opinion that the trial was unsatisfactory, and that justice between the parties can only be done by a new trial. A new trial is accordingly directed. The costs down to the time when Mr. Gregory asked for the amendment at the trial (Case, p. 111), will be borne (and are to be paid forthwith) by the defendant. The costs subsequent to that time are to be in the discretion of the judge who presides at the new trial, including the costs of this appeal.

*New trial ordered.*

*C. E. Gregory K.C.* for the appellant.

*C. C. Robinson K.C.* for the respondent.

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