*1919
May 12.
Oct. 14.

CASE THRESHING MACHINE COMPANY (PLAINTIFF)..... } APPELLANT;

AND

MITTEN AND OTHER (DEFENDANTS).. RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Sale—Principal and agent—Written contract—Evidence—Acceptance—Verbal representations—Warranty—Return of goods.

The respondent ordered from the appellant "one Case 40 Horse Power Case Gas Engine." The agreement provided that "the purchaser" could claim "the return of moneys paid * * * only * * * after he has returned the * * * goods to the place where he received them"; and that "no representations, warranty or conditions, expressed or implied, other than those herein contained nor * * * any agreement collateral hereto be binding upon the vendor unless it is in writing." The engine was delivered to the respondents, accepted by them in May, 1915, and never returned to the appellant. A promissory note due in November, 1915, was paid by the respondents without any protest. The engine had two tanks, one labelled "kerosene" and one "gasoline." An agent of the appellant represented to the respondents that the engine would also operate on kerosene and promised to send experts; but it stopped whenever so operated.

On an action by the appellant for the price of sale, the respondents alleged fraud and misrepresentations.

Held, Idington J. dissenting, that, upon the evidence, the engine delivered was accepted by the respondents as the engine ordered in the written agreement of sale.

Per Duff J.—The written contract is explicit, and its terms are not susceptible of modification by evidence of contemporary or antecedent negotiations.

Per Anglin J.—The agreement contained no warranty that the engine would run on kerosene, breach of which would support a claim for damages. *Schofield* v. *Emerson* (57 Can. S.C.R. 203), distinguished.

Per Brodeur J.—By paying their promissory note without protest and, *per* Brodeur and Mignault JJ. by not returning the engine to the appellant, the respondents waived any right they might have to rescission.

Judgment of the Court of Appeal ([1919] 1 W.W.R. 101), reversed, Idington J. dissenting.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), affirming the judgment of Taylor J. at the trial (2), and maintaining the plaintiff's action, and less certain deductions, without costs. The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Lafleur K.C. and *Bastedo* for the appellant.
Belcourt K.C. for the respondent.

IDINGTON J. (dissenting)—I agree so fully with the reasoning upon which the judgments of the learned trial judge and that of Mr. Justice Lamont on behalf of the majority of the Court of Appeal proceed, that I must dissent from the judgment herein allowing entirely this appeal.

I may be permitted to add that the generic term "gas engine" is in the circumstances ambiguous and fails to describe accurately what beyond doubt all concerned had in mind; and regard must be had to the conduct of the parties and collateral inscription on the machine in order to make clear what kind of gas engine was meant.

I have an impression in view of the state of the pleading that possibly a new trial limited to the determination of what would have been the proper sum to allow for the engine might well have been directed, but in view of the decided opinions of my colleagues I have not seen any good purpose to be served by fully examining that aspect of the case.

DUFF J.—The written contract declares in explicit words that the terms of the agreement between the parties are to be found in the writing and in the writing

(1) 12 Sask. L.R. 1; [1919] 1 W.W.R. 101.
(2) 11 Sask. L.R. 238; [1918] 2 W.W.R. 871.

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exclusively. In face of this provision it is not, in my opinion, competent for a court of law to resort to contemporary conversations or prior conversations or even to the legend on the article for the purpose of discovering a contract differing in its terms from that expressed in the unambiguous language of the instrument.

ANGLIN J.—After some hesitation I concur in the allowance of this appeal. This case is distinguishable from *Schofield* v. *Emerson Brantingham Implement Co.* (1), inasmuch as the evidence here establishes acceptance by the defendants of the engine supplied to them as that which they had agreed to purchase from the plaintiff. Their letters of the 20th and 26th of October, 1916, afford practically conclusive proof of that fact. Moreover, there is no warranty that the engine contracted for would run on kerosene, such as I thought existed in the *Schofield Case* (1), in regard to the rated horse power, breach of which would support a claim for damages. The defendants may have relied on some promises made to them by employees of the plaintiff that the engine would be made satisfactory to them but their contract precludes effect being given to such promises. The provisions of a formal written contract executed without fraud, mistake or surprise, cannot be entirely ignored.

BRODEUR J.—This is an action by the appellant company to recover from the respondents the amount due by virtue of promissory notes which defendants have signed for the price of some agricultural machinery.

In 1915, the defendants, who are farmers and dealers, bought a separator and a 40 horse-power engine

(1) 57 Can. S.C.R. 203.

with different attachments for the price of $4,410. Those different articles were all delivered by the plaintiff company to the defendants on the 21st May, 1915. The defendants then gave a second-hand engine in part payment and made in favour of the plaintiffs three notes amounting to $3,660, falling due on the first of November, 1915, 1916 and 1917 respectively.

On the 1st November, 1915, a note became due and it was duly paid without any protest on the part of the purchaser.

In 1916, a few days before the payment became due, the defendants wrote a letter to the plaintiffs stating that they did not intend to make their payment this year until they were given their commission certificates on their machinery and, namely, on this gas engine and separator which they had received on the 21st May, 1915.

That letter remained unanswered. The appellant company did not feel disposed to pay any commission or to issue these commission certificates and the defendants failed to pay the notes which became due on the 1st November. An action was then taken by the plaintiffs a short time after, for the payment of the balance of the purchase price of the machinery, viz., $2,928. The defendants pleaded fraud and misrepresentations, claiming that it had been represented to them that the engine was a kerosene burning engine and that they had not received delivery of the machinery purchased. They counterclaimed also, repeating the allegation of fraud.

The trial judge found (1), that there was no fraud or misrepresentation but gave the defendant a set-off in damages for $1,885 on the implied condition that the engine was to be a kerosene burning engine. This

(1) 11 Sask. L.R. 238; [1918] 2 W.W.R. 871.

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judgment was confirmed by the Court of Appeal (1), Mr. Justice Newlands dissenting.

It seems to me that this defence of the respondents is the result of an afterthought. The machinery which was sold and delivered was a gas engine. The gas could be formed either by kerosene or by gasoline; in fact, there were two tanks on which the words *kerosene* and *gasoline* were painted. There seems to be no doubt that it did not work properly with kerosene (at least the evidence is conflicting on that point) but it worked very well with the use of gasoline. If the defendants were not satisfied with the machine as it was, why did they not return it in due time? Or why did they not then take proceedings to that effect? But they kept the machine for a year and made during that year enough profit to pay the cost of the whole machine. They paid their note which became due during that year, without any protest; and then, a year after, they would have paid the notes which then became due if the company had been willing to pay them some commission for which, I suppose, they had a claim more or less legitimate.

They seem to have waived in that way the rights which they might have if the machine did not run properly with kerosene; and in that respect they are too late now to claim what they virtually abandoned.

I am then, with deference, obliged to differ from the opinion expressed in the courts below.

The appeal should be allowed with costs of this court and of the courts below.

MIGNAULT J.—The appellant claims from the respondents the price of certain farming machinery sold to them, among which was a gas traction engine,

(1) 12 Sask. L.R. 1, [1919] 1 W.W.R. 101.

and the respondents have refused to pay because this engine, which apparently was designed to work with gasoline and kerosene as a fuel, would not run on kerosene. The respondents signed an order for the machinery on May 21st, 1915, while the appellant's engine was loaded on the cars, and it was immediately after delivered to them. This order or contract contains very strict conditions to which the respondents submitted by signing it, among others the following:—

4. Said goods are warranted to be made of good material, and durable with good care, and to be capable of doing more and better work than any other machine made of equal size and proportions, working under the same conditions on the same job, if properly operated by competent persons, with sufficient power, and the printed rules and directions of the manufacturers intelligently followed.

6. The purchaser shall not be entitled to make any claim for any breach of warranty unless he within ten days after his first using the said goods sends by registered letter a notice of the defect complained of, describing the same, and stating when it was discovered, addressed to the home office of the vendor, and to the dealer through whom this order was taken and unless the vendor fails to remedy such defect within a reasonable time after the receipt by it of such notice.

8. In no event shall the purchaser have any claim whatever under the agreement against the vendor for any damages but only for the return of moneys paid and securities given, and his claim for such shall only arise after he has returned the said goods to the place where he received them.

11. Nothing done by either party shall operate as a waiver of any of the provisions of this agreement unless the same is evidenced by writing signed by the party to be charged with such waiver.

12. The whole contract is set forth herein. There are no representations, warranties or conditions, expressed or implied, other than those herein contained, nor shall any agreement collateral hereto be binding upon the vendor unless it is in writing hereupon or attached hereto and duly signed on behalf of the vendor at its said home office.

The undersigned hereby acknowledge to have received a full, true and correct copy of this order, and that no promises, representations or agreements have been made to or with me not herein contained.

HENRY J. MITTEN,
WILLIAM J. MITTEN.

The learned trial judge, who decided in favour of the respondents, and whose judgment was affirmed by

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the Court of Appeal of Saskatchewan, Mr. Justice Newlands dissenting, has found that there was no misrepresentation on the part of the appellants, but that the respondents had previously purchased from the latter a gas engine which, when delivered, admittedly proved unsatisfactory in that it would not pull the load when working on kerosene. The appellant, the learned trial judge finds, agreed to take back this engine and credit the respondents with $750.00 on the purchase of another gas engine, the one in question, which, it was distinctly understood between the parties, was to be a kerosene burning engine. A casual examination of the engine, he adds, would lead to the belief that it was of a type specially designed to operate with kerosene, for it had two tanks, the larger one labelled "kerosene," and the smaller one for gasoline which was to be used only for starting the engine. He also finds that the appellant's agent Given had previously represented to and assured the respondents that the engine would operate on kerosene, and that he had seen engines of this type operating on kerosene, using 3½ gallons of kerosene to plow an acre of land. When it was attempted to run the engine on kerosene, it stopped, and the appellant, the learned trial judge finds, promised the respondents to send experts to make it work on kerosene, and did so, but to no avail.

Under these circumstances the learned trial judge held that the action of the respondents in relying on the undertaking of the appellant to make the engine work on kerosene, was entirely reasonable. He adds that he is satisfied that the respondents agreed to purchase one kind of engine, that that kind was never delivered to them, and that the engine actually delivered was worth at least $1,885.00 less than the engine

they should have received. And in answer to the contention of the appellant that this engine answers the description in the order "one case 40 Horse Power Case Gas Engine," he finds that this description is ambiguous, applicable to any type of gas engine, warranting the admission of evidence to shew which type of engine was intended.

The whole question is whether on these findings of fact, the appellant is entitled to recover from the respondents. The position of the latter is weakened not only by the terms of their contract, but also by the letters which they wrote to the appellant, which, up to that of the 11th November, 1916, do not mention the grievance that the engine would not run on kerosene, but merely complain that certain commission certificates which they claimed from the appellant had not been sent to them.

I have looked at this case from every possible angle, but notwithstanding Mr. Belcourt's able argument for the respondents, it all comes back to the question whether the respondents can escape from the obligations of the contract they have signed. The learned trial judge has found that there were no misrepresentations on the part of the appellant and therefore the contract stands. It is no doubt a very rigorous one, but persons who sign such a contract cannot expect a court of law to relieve them from its obligations because its terms seem harsh. The respondents strenuously argued that the engine they contracted for was not delivered to them. If this means that the appellant did not deliver the engine mentioned in the order, the contrary is proved and even admitted by the respondents. If it means that the engine delivered was defective and did not come within the description and warranties of the contract, the respondents have

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not returned the engine as required by paragraph 8 of their contract. Although the respondents allege in their plea that the engine was returned to the appellant, such is not the fact, and the respondents in their factum admit that they are liable to pay what the engine is worth. The appellant did not specifically deny this averment of the respondents (see Rule 153 of the Saskatchewan Rules of Court), but when the objection founded on paragraph 8 of the contract was argued before this court, the respondents did not suggest that the engine was returned, and they could not do so in view of the evidence and the judgment of the trial court which shew that the engine was never returned, but has been dealt with by the learned trial judge as having been sufficiently paid for. Under these circumstances, Rule 153 does not relieve me from my duty to deal with this case according to the state of facts which appear by the record.

I am for these reasons forced to the conclusion that the appeal should be allowed with costs throughout, and that the appellant's action should be maintained and the respondents' plea and counterclaim dismissed.

Appeal allowed with costs.

Solicitors for the appellant: *Gilchrist & Hogarth.*
Solicitor for the respondent: *A. E. Hetherington.*