JOHN R. STOLTZE, JAMES B. KEMPER, AND R. M. HADRATH (DEFENDANTS) .... APPELLANTS;

1938
* May 2, 3.
* Dec. 12.

AND

GEORGE O. FULLER (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Conspiracy—Duress—Action for alleged obtaining of property by threat of criminal prosecution—Jury's findings—Ground of action—Substance of the claim—Remedy.

Plaintiff, who had been the general manager and a shareholder of a company, alleged that defendants, one of whom was the president and a large shareholder of the company, entered into an unlawful conspiracy to obtain from him a transfer of his shares in the company by threats of criminal prosecution; that pursuant to the conspiracy defendants made such threats and, induced thereby, he delivered to defendants a transfer of the shares as demanded; and he claimed recovery of their value. Defendants denied plaintiff's allegations and they alleged breaches of duty in plaintiff's management of the company, resulting in loss to it, and that plaintiff surrendered his shares in satisfaction of claims on behalf of the company for such loss. At the trial two totally different stories in the evidence went to the jury, who, in answers to questions submitted, found in favour of plaintiff's allegations. Judgment was given to plaintiff for the amount awarded as damages by the jury, being the value of the shares plus interest. An appeal by defendants to the Court of Appeal for Saskatchewan was dismissed, [1938] 1 W.W.R. 241. Defendants appealed to this Court.

Held: The appeal should be dismissed.

Per The Chief Justice, Crocket and Davis JJ.: There was evidence to justify the jury's findings. These findings were in effect that there was an intentional design on defendants' part to obtain from plaintiff, without any valuable consideration, a transfer of his shares and that

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* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

1938

STOLTZE
v.
FULLER.

the same was demanded and obtained by menaces and illegal extortion. This was quite sufficient to answer the argument that a mere threat in itself is not unlawful. A threat to prosecute may not of itself be illegal where a just debt actually exists and where the transaction between the parties involves a civil liability as well as, possibly, a criminal act (*Flower* v. *Sadler,* 10 Q.B.D. 572, at 576). Here the findings plainly negatived defendants' story that the transaction was merely the legitimate compromise of a claim for damages for breach of duty. Moreover, no question of plaintiff's civil liability to the company set up by defendants was asked of the jury and defendants had no finding that there was any such liability.

Per Davis J.: Remarks with regard to conspiracy as a ground of action. Inclination expressed to the opinion that civil conspiracy is not properly applicable to cases where physical property is sought to be recovered on the ground of duress and is really only relevant in cases of general or undefined rights, such as a right to trade, as distinguished from defined rights, such as the right to property. Doubt expressed whether the present case properly lies in conspiracy. But, whether or not plaintiff's remedy was properly laid as an action in conspiracy, the substance of the claim was that plaintiff had been maliciously and unlawfully deprived of his property by duress and coercion on defendant's part; that was the issue that was contested at the trial and that was the issue that really went to the jury.

Kerwin and Hudson JJ. adopted the reasons of Mackenzie J.A. in the Court of Appeal, [1938] 1 W.W.R. at 244-260.

APPEAL by the defendants from the judgment of the Court of Appeal for Saskatchewan (1) dismissing their appeal from the judgment of Taylor J., on the verdict of a jury, that the plaintiff recover from the defendants the sum of $26,840 and interest.

The action was brought to recover from the defendants the value of certain shares of stock in the Reliance Lumber Co. Ltd. The plaintiff had been the owner of the said shares; and he alleged that defendants entered into an unlawful conspiracy to obtain from him a transfer of said shares by threats of criminal prosecution; that pursuant to the conspiracy the defendants threatened to institute criminal proceedings against him unless he would transfer the shares to them; that, induced by said threats, he delivered to defendants a transfer of the shares, defendants obtained possession of the share certificates and had ever since been in possession of the same.

The plaintiff had been the general manager, and the defendant Stoltze was the president, of said company. The other defendants were employees of Stoltze and as such had made certain investigations into the affairs of the company.

(1) [1938] 1 W.W.R. 241; [1938] 1 D.L.R. 635.

In their defence the defendants denied plaintiff's allegations, and they alleged breaches of duty in plaintiff's management of the company, as a result of which, it was alleged, the company lost large sums of money and suffered and would suffer loss of profits, which the plaintiff became liable to repay and make good to the company, and that plaintiff agreed to surrender his shares to the company in full satisfaction of all claims of the company against him in respect of the aforesaid matters, and did so, delivering the share certificates endorsed in blank, and that the shares were now held by or on behalf of the company.

Defendants' allegations were denied by plaintiff.

The delivery of the share certificates (endorsed in blank), and also the resignation of the plaintiff as general manager of the company, took place immediately after a certain interview between the defendants and the plaintiff. Conflicting accounts of what was said at that interview were given at the trial.

The evidence is discussed at some length in the judgment of Davis J. in this Court, now reported, and also in the judgment of Mackenzie J.A. in the Court of Appeal (1).

At the trial the jury found in favour of the plaintiff. The questions submitted and the jury's answers thereto were as follows:

1. Did the plaintiff receive any valuable consideration for the transfer of his interest in his shares in the Reliance Lumber Company Limited referred to in the memorandum of agreement dated March 16th, 1936.
Answer: No.

2. Did the defendants, on or about the 16th day of March, 1936, enter into a conspiracy to obtain a transfer of the plaintiff's shares of the capital stock of the Reliance Lumber Company Limited by threats of criminal prosecution of the plaintiff?
Answer: Yes.

3. If you so find, did the defendants, pursuant to the said conspiracy, threaten to criminally prosecute the plaintiff?
Answer: Yes.

4. And if you find in the affirmative in answering questions 2 and 3, was the plaintiff induced by the said threat to transfer and deliver his said shares in the said company to the defendants?
Answer: Yes.

(1) [1938] 1 W.W.R. 241, at 244-260; [1938] 1 D.L.R. 635, at 637-651.

1938

STOLTZE
v.
FULLER.

5. Assess the damage sustained by the plaintiff in consequence of the said conspiracy, if you have so found.

Answer: $26,840, plus interest at legal rate (from) March 16th, 1936.

6. Did the defendants agree not to prosecute the plaintiff?

Answer: Yes, by implication.

The trial judge directed that judgment be entered for the plaintiff for the amount, with interest, as awarded by the jury. The defendants appealed from the verdict and findings of the jury and from the said judgment to the Court of Appeal, which dismissed the appeal (1), and defendants appealed to this Court. By the judgment of this Court, now reported, the appeal was dismissed with costs.

F. L. Bastedo K.C. for the appellants.

G. H. Yule K.C. and *R. L. Winton* for the respondent.

THE CHIEF JUSTICE.—I do not desire to lay down any rule of general application as to the scope of actions founded on conspiracy. Subject to that, I concur with the reasons and conclusion of my brother Davis.

CROCKET, J.—Subject to the same reservation as that indicated in the learned Chief Justice's memorandum, I concur in the judgment of my brother Davis.

DAVIS, J.—From some time in the year 1909 until March 16th, 1936, the respondent Fuller had been the general manager of the Reliance Lumber Company, Limited, a Dominion company with head office at Saskatoon in the province of Saskatchewan and with an executive office in St. Paul, Minnesota, U.S.A. The company carried on a retail lumber business in the province of Saskatchewan and had in March, 1936, about thirty lumber yards, mostly in the northern part of the province. The respondent resided in Saskatoon. The appellant Stoltze is the President of the Company and resides in St. Paul, Minnesota. His father, now deceased, had owned nine-tenths of the capital stock of the company and the respondent the other one-tenth. On the death of his father in 1928, the appellant Stoltze and his wife became the owners of, and still hold, nine-tenths of the stock of the company. The respondent remained the owner of the other one-tenth of the stock

(1) [1938] 1 W.W.R. 241; [1938] 1 D.L.R. 635.

of the company. Stoltze's co-appellants, Kemper and Hadrath, also reside in St. Paul, Minnesota, and were requested by Stoltze in February, 1936, to investigate for him certain charges of mismanagement against the respondent in respect of the company's affairs that had been reported to Stoltze by one Davies. Hadrath was in the employ of Stoltze, having done both clerical and executive work for some years for him in connection with different companies with which Stoltze was connected. Stoltze described Hadrath as his "confidential man—what in the United States we call in slang a trouble shooter. When something goes wrong I send him down to attend to it; if there is a problem before me, I ask him to look into it." Stoltze admitted that Hadrath had no special knowledge of the business of the Reliance Lumber Company. Kemper was an uncle of Stoltze's wife and had been assisting Stoltze in his office in St. Paul. Stoltze said he trusted him entirely but "he had no particular qualifications for this work."—that is, of investigating the affairs of the Reliance Lumber Company. Neither Hadrath nor Kemper appear to have had any shares in the company.

On March 16th, 1936, the respondent turned over to the appellant Stoltze all his shares in the company and resigned as secretary, general manager and a director of the company. His shares were admitted to be worth $30,000 and there is no question that they were his own property. The share certificates, immediately prior to their delivery to Stoltze, were in the Dominion Bank at Saskatoon, collateral to loans to the respondent of $3,160. This amount the company paid to the Bank in order to release the security. On April 2nd, 1936, the respondent by his solicitor demanded from the appellant Stoltze the immediate reassignment and delivery to the respondent of the share certificates in question, or their value, his contention being that the transfer of the shares had been obtained by duress, in the form of threats of prosecution. This action by the respondent against the appellants Stoltze, Kemper and Hadrath followed the refusal of Stoltze to return the share certificates.

Two totally different stories were given to the jury. The evidence on behalf of the appellants (defendants) was that at a meeting of the four persons, parties to this action, in the company's office in Saskatoon on the said

1938
STOLTZE
v.
FULLER.
Davis J.

March 16th, 1936, the affairs of the company were discussed for about an hour; charges of mismanagement and breach of duty by the respondent as general manager of the company were made on the basis that the respondent had caused the company great loss by buying lumber through the medium of his son, so that his son would get a commission; that after the respondent had asked what he could do or should do about the "mess" that Stoltze had told him he had got the company into, Stoltze suggested to the respondent that he might turn in his stock in reparation; and that the respondent agreed to do that. Stoltze said at the trial that his understanding was that the respondent was voluntarily turning over the stock in reparation of the damage he had permitted to be done to the company and that he, Stoltze, believed the turning over of the stock would be an equitable solution because he was satisfied that the losses were much greater than the value of the stock.

The respondent's story was that on returning from a western business trip he was summoned to his office at the company's head office by telephone on the day in question, March 16th, 1936, and found the three appellants there; they had changed the lock on the door of his office before his arrival; they made charges against him and threatened him with criminal prosecution and demanded, to avoid his prosecution, that he turn over to them all his shares in the capital stock of the company. The crucial part of his evidence as to the interview in the office that morning is this:

> Hadrath and Kemper both said, You had better come clean, come clean. And we have got the goods on you. * * * After that was gone over, it got to such an extent that I hardly knew what to say. And then it was Hadrath said, You had better throw yourself into the hands of Mr. Stoltze. * * * Another question came up that seemed to break the ice, was this: Why did you give Gerald—which is my son—all of this business? I said, Mr. Stoltze knows that Gerald got this business. Mr. Stoltze rather flew off in a huff, and he said, I didn't know that he got all of the business, or so much of the business. * * * He (Stoltze) says, You have had no sympathy with others, and I haven't sympathy with you; you ought to be in gaol, and that is where we are going to send you; and your friend Arthur Moxon agrees.

Mr. Moxon was the company's solicitor in Saskatoon and a man of very high standing in his profession. The significance of the words "and your friend Arthur Moxon agrees" would be very apparent to a local jury.

I was simply crushed; my mind was nearly a blank. They asked me a few more questions; and I was mentally—I hardly knew what they did ask; asked a few more questions. And I says, What do you want me to do? What do you want me to do? Or what can I do? What do you want me to say? I didn't know where I was at. I hadn't been told. And finally Mr. Stoltze came on to the scene again— * * * he spoke up. And he says, We want your shares in the Reliance Lumber Company; we want your resignation; we want you to agree not to compete with the Reliance Lumber Company anywhere, and to get out of the country.

The respondent said that he was crushed by all this; that Hadrath then went out into another room and came back with a paper which he respondent signed, containing his resignation and authority to the Dominion Bank to turn over his shares in the company. The respondent said that when Hadrath presented the document to him he said he thought he had better get a lawyer but was told by Stoltze, "This has got to be done before you get out of this room." Stoltze, on his cross-examination, when asked "Why didn't you go to him (the respondent) quietly, it seems the obvious thing to do, and say, 'Let us get together and talk about this quietly'?" answered, "That doesn't happen to be my way of doing things."

The respondent was obviously a man who was well and favourably known in his community, active in the work of the Y.M.C.A. and of the Rotary Club and was President of the Saskatoon Exhibition Board. He was a married man and his home was in Saskatoon. He said that he signed the document, not that he had done anything wrong, but he thought of "all those different things, different friends, and people, and associations, and I couldn't do it—the disgrace of it." He very positively swore that during his administration of the company's affairs he never knowingly did anything or omitted to do anything to the prejudice of the company; that there was in his mind no just ground for the complaints and charges that were made; and that he was not attempting to stifle the prosecution of any just charges against him. Overcome by the threats of these three men and the situation that confronted him, he sought escape by acquiescing in their demands that he turn over his shares.

Now those were the two stories that went to the jury. There was a mass of evidence directed to show that here and there the respondent had given advantage to his son in the buying of lumber for the company and suggestions

that the company had as a result been getting a poorer grade of lumber than it otherwise would have obtained. The charges were of the most general character and the respondent gave his explanation of the several impeached transactions. There was no suggestion that the respondent was offered any release by the company of any claims the company might have against him for any loss that may have occurred as a result of the alleged breaches of duty. What was said by the appellants was that these losses were in excess of $30,000 and that it was a fair transaction to take the respondent's shares in the company in reparation for the losses.

It is perfectly plain that the jury accepted the respondent's story of what took place and, it being entirely contradictory of the appellants' story of what occurred, the jury obviously disbelieved the appellants. The jury's verdict was that the appellants should pay the respondent $26,840 (being the value of the stock, $30,000, less the amount of the loans paid to the Bank, $3,160) together with interest on that sum at the legal rate from March 16, 1936.

Without for the moment giving consideration to the form of the action or to certain objections taken by the appellants as to the rejection of evidence, no one could fairly disagree with the jury, upon the contradictory evidence, having arrived at the conclusion they did. If it had not been for the exhaustive review of the evidence and the very able argument presented to us by Mr. Bastedo, counsel for the appellants, I should not have thought that there was the slightest hope for any interference with the jury's verdict.

Mr. Bastedo, however, contended with great force that, the action being laid in conspiracy and there being no express plea of malice and nothing in the charge to the jury on malice, malice cannot reasonably be read into the questions to and the answers by the jury. If the action was properly framed in conspiracy, I should not find any difficulty in implying not only a charge but proof of malice. I have very considerable doubt myself that a case of this kind properly lies in conspiracy. Where, for instance, the charge is a charge of defrauding a man of his money, the allegation of conspiracy may add nothing to the charge and be mere surplusage. Conspiracy may be

important where the act complained of is *prima facie* not a violation of a right, but may become so by reason of malice or spite. I am inclined to think that civil conspiracy is not properly applicable to cases where physical property is sought to be recovered on the ground of duress, and is really only relevant in cases of general or undefined rights, such as the right to trade, as distinguished from defined rights, such as the right to property. But however that may be, the effect of the jury's findings in this case is that there was an intentional design on the part of the three appellants to obtain from the respondent, without any valuable consideration, a transfer of the respondent's shares in the company that were worth $30,000 and that the same was demanded and obtained from the respondent by menaces and illegal extortion. That is quite sufficient to answer the argument that a mere threat in itself is not unlawful. As Lord Justice Cotton said in *Flower* v. *Sadler* (1), a threat to prosecute is not of itself illegal where a just and *bona fide* debt actually exists and where the transaction between the parties involves a civil liability as well as, possibly, a criminal act. But here the jury's findings plainly negative the appellants' story that the transaction was merely the legitimate compromise of a claim for damages for breach of duty. Moreover, the appellants set up a civil liability on the part of the respondent to the company for alleged loss by reason of the alleged breaches of duty but no such question was asked of the jury and the appellants have no finding that there was any such liability. Whether or not the remedy of the respondent was properly laid as an action in conspiracy, the substance of the claim was that the respondent had been maliciously and unlawfully deprived of his property by duress and coercion, on the part of the appellants. That was the issue that was contested at the trial and that was the issue that really went to the jury.

Objection was taken by Mr. Bastedo to the refusal of the learned trial judge to admit evidence that was tendered on behalf of the appellants at the trial as to the details of the report made to Stoltze by one Davies with charges of the respondent's misconduct as general manager of the company, and as to information given by Davies to

(1) (1882) 10 Q.B.D. 572, at 576.

1938
STOLTZE
v.
FULLER.
Davis J.

Stoltze as a result of which Stoltze caused the investigation to be made by Hadrath and Kemper, and of conversations between these persons, and of information obtained by Hadrath and Kemper on their trip of investigation through western Canada; also general evidence of the yard agents of the Reliance Lumber Company as to purchases of lumber being of a poor and inferior quality and below invoice grade, and evidence of prices paid by the Reliance Lumber Company to other companies in respect of which the respondent's son was alleged to be getting a commission. On the question of the exclusion of this evidence, the jury had before them the report of Davies upon which Stoltze acted, and the learned trial judge was quite right in declining to permit the trial to be dragged out interminably. The report of Davies was quite sufficient in itself for the purposes of the appellants. In any event the exclusion of the evidence did not occasion any substantial wrong.

The appeal should be dismissed with costs.

KERWIN, J.—Notwithstanding Mr. Bastedo's able argument, I think this appeal should be dismissed. I cannot usefully add anything to the judgment of Mr. Justice MacKenzie (1).

HUDSON, J.—I think this appeal should be dismissed with costs for reasons mentioned by Mr. Justice MacKenzie in the court below (2).

Appeal dismissed with costs.

Solicitors for the appellants: *Estey, Moxon, Schmitt & McDonald.*

Solicitor for the respondent: *Gilbert H. Yule.*

(1) [1938] 1 W.W.R. 241, at 244-260; [1938] 1 D.L.R. 635, at 637-651.

(2) [1938] 1 W.W.R. 241, at 244-260; [1938] 1 D.L.R. 635, at 637-651.