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*May 28.
*June 24.

WILLIAM RUSTIN (DEFENDANT) APPELLANT;

AND

THE FAIRCHILD COMPANY }
(PLAINTIFFS) } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR
MANITOBA.

Contract—Sale of machinery—Agreement for lien—Delivery.

The company sold R. an entire outfit of second-hand threshing machinery, for \$1,400, taking from him three so-called promissory notes for the entire price. Two days before giving the notes, R. had signed an agreement setting out the bargain, in which the following provisions appeared—"And for the purpose of further securing payment of the price of the said machinery and interest * * * the purchaser agrees to deliver to the vendor, *at the time of the delivery of the said machinery as herein provided or upon demand*, a mortgage on the said lands (*i.e.* lands described at the foot of the agreement), in the statutory form containing also the special covenants and provisions in the mortgages usually taken by the vendors. And the purchaser hereby further agrees with the said vendors that the vendors shall have a charge and a specific lien for the amount of the purchase money and interest, or the said amount of the purchase price, less the amount realized, etc., should the vendors take and re-sell the said machinery * * * and any other land the purchaser now owns or shall hereafter own or be interested in, until the said purchase money and all costs, charges, damages and expenses, and any and all notes or renewals thereof, shall have been fully paid, and the said lands are hereby charged with the payment of the said purchase money, obligations, notes and all renewals thereof, and interest and all costs, charges, damages and expenses as herein provided, and, for the purpose of securing the same, the purchaser hereby grants to the vendors the said lands * * * . And, on default, all moneys hereby secured shall at once become due, and all powers and other remedies hereby given shall be enforceable." In an action to recover the amount of the notes past due and to have a decree

*PRESENT:—Girouard, Davies, Idington, MacLennan and Duff JJ.

for a lien and charge upon the lands therefor under the agreement.

Held, reversing the judgment appealed from, that the right of the company to enforce the lien depended upon the interpretation of the whole contract; that the provision as to the lien only became operative in the case of a complete delivery pursuant to the contract, and that the alternative words "or upon demand" must be taken as meaning upon a demand made after such complete delivery.

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APPEAL from the judgment of the Court of King's Bench for Manitoba, affirming the judgment of His Lordship Chief Justice Debuc, at the trial, in favour of the plaintiffs for the sum of \$809.50 and for a lien therefor upon the lands described in the statement of claim.

The circumstances of the case are stated in the judgment of His Lordship Mr. Justice Idington now reported.

W. Redford Mulock K.C. for the appellant.

C. P. Wilson and *A. E. Hoskin* for the respondents.

GIROUARD J.—While concurring with my brother Idington in his reasons for allowing this appeal, I cannot assent to the reservations he makes of any other remedies the respondents may have. I prefer to leave them to work out such remedies which are not disposed of by our judgment as they may be advised.

DAVIES J.—I concur in the opinion stated by my brother Girouard.

IDINGTON J.—This appeal is from the Court of King's Bench for Manitoba, which was equally divided on an appeal from the learned trial judge's judgment

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for the respondents. The respondents sold the appellant an entire outfit of second hand threshing machinery for the sum of \$1,400 and took from the appellant three so-called promissory notes of equal sums covering the entire price agreed upon. Though these instruments are in the pleadings called promissory notes, I doubt if they are such in law.

The appellant also had signed, two days before giving these, an agreement setting forth the bargain between him and the respondents and, in this agreement, the following provision appears:

And for the purpose of further securing payment of the price of the said machinery and interest, and of all loss, costs, charges, expenses and damages as herein provided, and of the costs of drawing and registering the mortgage, *the purchaser agrees to deliver to the vendor, at the time of the delivery of the said machinery as herein provided or upon demand, a mortgage on the said lands in the statutory form containing also the special covenants and provisions in the mortgages usually taken by the vendors.* And the purchaser hereby further agrees with the said vendors that the vendors shall have a charge and a specific lien for the amount of the purchase money and interest, or the said amount of the purchase price, less the amount realized by the said vendors after deducting the costs, charges and expenses aforesaid, should the vendors take and re-sell the said machinery under the foregoing powers, whether such amount be considered liquidated damages or the purchase money or price, or the balance thereof, upon the said lands, and any other land the purchaser now owns or shall hereafter own or be interested in, until the said purchase money and all costs, charges, damages and expenses, and any or all notes or renewals thereof, shall have been fully paid, and the said lands are hereby charged with the payment of the said purchase money, obligations, notes and all renewals thereof, and interest and all costs, charges, damages and expenses as herein provided, and for the purpose of securing the same, the purchaser hereby grants to the vendors the said lands. And the said purchaser will pay all taxes, rates, incumbrances or any charges upon said lands from time to time, as the same should be paid, and in the event of the vendors paying at any time any premiums, rates, taxes, incumbrances, or any charge upon said premises (they, the vendors, shall be subrogated to the position and rights of the party to whom the payment is made), the amount thereof, with interest thereon at ten per cent. per annum until re-payment shall be a lien and charge upon the said lands, and shall be payable forthwith to

the vendors, without demand or notice and, on default, all moneys hereby secured shall at once become due, and all powers and other remedies hereby given shall be enforceable.

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The lands are described at the foot of the agreement.

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The action is to recover the amount of the notes past due and to have a lien and charge upon the said lands for the sum of \$1,344 still owing and unpaid under the said agreement, etc., etc.

The entire outfit of machinery bargained for never was delivered by the respondents to the appellant. Very substantial parts thereof needed for immediate use were removed by some prior lien-holder. Some parts never came to the appellant's hands. Other parts came into the possession of the appellant and were tested by him and found wanting in that efficiency he was entitled to expect under the terms of his bargain, and had he notified the respondents of this, he would, apparently, have been entirely freed from any liability of any sort arising out of the bargain. Instead of doing so, he dealt with the matter in such a way that he may have incurred some liability.

The question now raised is independent of that and as to the right of the respondents to enforce the lien called for under the provision above quoted. It must be determined by the interpretation of the whole contract and especially this provision, neither of which anticipate changes in the original bargain.

I am of the opinion that the said provision will only become operative in the case of a complete delivery pursuant to such a bargain.

Such, as I read it, is the express language of the contract.

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The alternative "or upon demand" must be taken to mean upon demand after the delivery.

It certainly would surprise any buyer signing any such agreement to have a demand for a mortgage made upon him at the execution of such an agreement which might only provide for a delivery months after the signing.

The later words regarding a lien upon the lands must, when we consider the scope of the provision, be held to be governed by what precedes them. They are merely intended to cover the same property when a mortgage has not been asked and mean no more than that, in default of the mortgage being given, a lien will be held to have been created by the delivery; or, in other words, by the complete fulfilment by the vendors of their part of the bargain, no alternative modification of the original bargain and sale being provided for by the agreement.

The appeal must be allowed with costs and the alleged lien declared never to have existed and the claim for and action to enforce it be dismissed.

The appellant, however, dealt with the respondent in relation to some parts of the machinery in such a way that he may be liable to pay as for goods sold and delivered or otherwise.

The appellant may have some explanation in regard to this phase of the dealing that may relieve him from such liability.

The respondents may also have some right to place their claim in quite a different light than that presented herein.

They refused to amend or ask leave to amend and put any sort of alternative claim in such a way before the court below as to enable us properly to adjudicate

upon it, and, I think, they must abide the result of doing so.

I do not feel that we can here give them relief by way of judgment as asked on the notes past due. The questions raised by the elimination of the question of lien, leave the claim upon the notes above as apparently or imperfectly untried. A reference back seemed to me at first possible, but I see nothing to be saved or gained thereby on the whole.

All rights the respondents may have outside of the claim to enforce the lien or mortgage claim on the land must be reserved to the respondents.

In dismissing the action, as it seems we must do with costs, it should be declared to be without prejudice to the rights of the respondents against the appellant for anything save and except the right or claim to enforce the alleged lien or claim for a mortgage.

In assuming that the respondents may have some other remedy of such a nature as I have indicated, it must be clearly understood that I have formed and pass no opinion in favour thereof or against it.

The case, in that regard, has only been considered by me so far as to see if, upon this record, we could here properly give any relief.

It seems quite impossible to deal effectively and properly with anything but the alleged claim for mortgage or lien.

The appeal must be allowed with costs and the action dismissed with costs, including costs of appeal in the court below.

MACLENNAN J.—I concur in the opinion stated by my brother Girouard.

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DUFF J.—I concur in the judgment allowing the appeal with costs and dismissing the action with costs for the reasons stated by my brother Idington.

Appeal allowed with costs.

Solicitors for the appellant: *Mulock & Loftus.*

Solicitors for the respondents: *Campbell, Pitblado,
Hoskin & Grundy.*
