

FRANCIS WEBBER APPELLANT ;

1877

AND

June 9.

ROBERT H. COGSWELL RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Detinue, action of—Lien.

W. left with C. a chronometer for the purpose of its being repaired.

C., after taking chronometer to pieces, found detent spring much rusted, and sent it to *Boston* to have it made right. W. offered C. \$25.50 for his work, but C. said he would not deliver the chronometer until full charges were paid, viz., \$47.00. W. thereupon sued C. to recover possession and use of his chronometer. The evidence of the making of the contract

* PRESENT:—Richards, C.J., and Ritchie, Strong, Taschereau and Fournier, JJ.

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was conflicting, and the learned Judge at the trial charged the jury, as a matter of law, that even if Defendant's version were correct as to the orders given him by Plaintiff in reference to putting the instrument in order, Plaintiff was entitled to recover, because such order or instructions would give no authority to send the instrument to a foreign country to have any portion of the work done; and that if it was so sent, no lien would exist in Defendant's favor for the value of the work without special instructions or Plaintiff's consent; that no such order or consent was shown in the evidence, and that consequently no lien existed.

The jury, however, found a verdict for Defendant, stating at the delivery of it, that they had adopted the Defendant's statement as to the authority and instructions that he had received from the Plaintiff, in regard to the instrument, when it was left with the Defendant.

Held,—Affirming the judgment of the Supreme Court of *Nova Scotia*, that the rule *nisi* for a new trial should be discharged, and, as no fault was found with the work done, the Respondent had a lien until he was paid his charges.

APPEAL from a judgment of the Supreme Court of *Nova Scotia*, discharging a rule *nisi* for new trial in an action of trover and detinue, brought by the Appellant against the Respondent, to recover a chronometer.

Declaration: First count—That *Robert H. Cogswell* converted to his own use and wrongfully deprived the Plaintiff of the use and possession of the Plaintiff's goods, to wit: One chronometer.

There was also a second count in detinue, and the Plaintiff claimed \$300 damages.

To this Defendant (Respondent) pleaded: 1st, As to first count, that he did not convert to his own use or wrongly deprive the Plaintiff (Appellant) of the use and possession of the said goods, as alleged.

2nd Plea: As to said count—Goods not the goods of Plaintiff.

3rd Plea: As to second count—Did not nor does he detain the said goods as alleged.

4th Plea: As to second count—Goods not the Plaintiff's.

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And for a fifth plea, the Defendant, as to said second count, said that at the time of the alleged detention, the Plaintiff delivered the said goods to the Defendant for the purpose of their being repaired for the Plaintiff by the Defendant in the way of his trade of a chronometer and watch maker and repairer, for reward to the Defendant, and the Defendant received and had the said goods for the purposes and on the terms aforesaid, and repaired the same and found the necessary materials in that behalf for the Plaintiff; and at the time of the alleged detention the Defendant had a lien upon the said goods for money payable to him by the Plaintiff as such reward as aforesaid, for repairing the said goods and finding the necessary materials in that behalf as aforesaid, and the said money being still due and unpaid, the Defendant detained and still detains the said goods for a lien and security for the said money, which is the alleged detention.

The Plaintiff joined issue upon the Defendant's first, second, third and fourth pleas; and, as to the Defendant's fifth plea, said that he did not deliver the said goods to the Defendant for the purpose of their being repaired, but only for the purpose of their being cleaned and polished and having a strap put thereon, and that before the detention in the declaration mentioned, the Plaintiff tendered and offered to pay to the Defendant twenty-five dollars and fifty cents in satisfaction and discharge of the alleged lien, such last mentioned sum being sufficient to satisfy and discharge the same, and the Plaintiff then requested the Defendant to deliver up to the Plaintiff the said goods, which the Defendant refused to do.

The evidence as to the making of the contract was

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conflicting. The Plaintiff stated that he placed his chronometer in the hands of the Defendant for the purpose of ascertaining the condition of the instrument, and left it with him in order that he might clean the box and put a new strap on. The Defendant, on the contrary, on being examined as a witness, said that the chronometer was left with him to be put in order and to polish up the brass bands. That on taking the chronometer to pieces, he found the detent spring very much rusted, and was obliged to send to *Boston* to have it made right.

The instrument was put into perfect order, and Defendant became responsible for its working well for a year. There was no fault found with the work, and the charge for the work done was not exorbitant.

The Plaintiff tendered \$25.50 to Defendant and demanded the instrument, which Defendant refused to deliver.

The case was tried at *Halifax*, before Mr. Justice *Wilkins* and a jury, in November, 1875, and a verdict was rendered for Defendant.

On 1st December, 1875, a rule *nisi* was taken out to set aside verdict and for new trial.

On 13th December, 1876, a rule was made discharging the rule *nisi* with costs.

On 23rd December, 1876, an order was made allowing an appeal to the Supreme Court of *Canada*, and giving the Plaintiff until the 10th January, 1877, to file bond required for appeal.

The bond was allowed on the 6th January. A. D., 1877.

The appeal was from the judgment of the Court discharging the rule *nisi* to set aside verdict and for new trial, and the question to be determined was, whether the Respondent, having sent the chronometer to the

United States and had a part of the repairs done there by another person, had a lien on the chronometer for that work.

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Mr. *Cockburn*, Q.C. for Appellant:—

The Defendant's fifth or special plea was the only one that could avail him on the trial of this cause: Sec. 152, cap 94, *Revised Statutes of Nova Scotia*.

The Defendant had no lien on the instrument for what was charged him in *Boston*, because, according to his own statement, the instrument was delivered to Defendant to be repaired by him in the way of his trade of a chronometer and watchmaker and repairer, and for no other purpose, and Defendant did not make the necessary repairs and confessed his inability to make them. A workman has a lien only for the work done, in the way of his trade, by himself and the workmen in his employ (1).

[RITCHIE, J: Was not the question here, whether the Defendant had a lien for work done by another than himself, who lives out of his shop?]

It is a question of contract. There was no contract express or implied, that Defendant should employ the foreign workman, and his employment by Defendant was purely gratuitous and voluntary. Moreover, if such an important part of the instrument as the detent spring required to be repaired, increasing thereby the price one-third, this surely could not be done without first having notified the owner. The Defendant gave himself out as a skilled artisan.

[RITCHIE, J: Has the work been properly done, if so, why should you not pay for it?]

The contract was with the Defendant, and that con-

(1) *Roscoe*, N. P. Ev. 13th Ed. pp. 958 to 961.

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tract with him alone is to be looked at. See *Ess v. Truscott* (1).

The learned counsel then cited the following authorities:—*Story* on Bailments (2); *Robson v. Drummond* (3); *Addison* on Contracts (4); *Härmer v. Cornelius* (5).

Mr. *W. H. Walker* and Mr. *A. Ferguson* for Respondent, were not called upon.

The judgment of the Court was delivered by
 THE CHIEF JUSTICE:—

We do not think it necessary to call on the Respondent. There can be no doubt about this case, and the reasons given by the learned Judges of the Court below for the discharging of the rule *nisi* are sufficient. No fault was found with the work done, and the charge for it was not exorbitant.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for Appellant: *Cockburn & Wright.*

Solicitors for Respondent: *Walker, McIntyre & Ferguson.*

(1) 2 M. & W. 385.

(3) 2 B. & A. 308.

(2) P. 366, 8th Ed.

(4) P. 398, 6th Ed.

(5) 28 L. J. C. P. N. S. 85.