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*May 17.
*Oct. 5.

A. R. WILLIAMS MACHINERY COMPANY LIMITED (DEFENDANT) ..... } APPELLANT;

AND

JOHN T. MOORE AND JAMES MURPHY, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF MOORE & MURPHY, A REGISTERED PARTNERSHIP (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Contract—Sale of goods—Sum paid to satisfy claim under lien agreements—Securities handed over—Alleged failure of consideration—Suit to recover sum paid—Interpretation of contract—Interpretation of "dragnet" clause in lien agreement—Appropriation of payments—Appropriation by creditor, after debtor's bankruptcy, of payments not previously appropriated.

Defendant sold machinery to C. Co. under four lien agreements, duly registered. C. Co. made an assignment in bankruptcy. Defendant filed a claim for $771.44 as the balance then due on the machinery covered by said agreements. It subsequently notified the trustee in bankruptcy of its intention to remove said machinery. Subsequently the plaintiffs, who had taken a temporary lease, from the trustee and inspectors, of C. Co.'s premises and plant, etc. (from which lease was excepted such plant, machinery, etc., as was subject to liens) and were in possession, desired to purchase the property, but their proposals to the inspectors were rejected, and it was decided to advertise for tenders. On Oct. 13, 1921, plaintiffs wrote defendant: "We have taken over the plant of [C. Co.] We understand that you hold a lien on part of the machinery of this plant. This amount,

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

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we understand which is due, is in the vicinity of $800. In order that you realize this amount it might be necessary for you to remove considerable machinery at a cost which would not mean anything to you and which would naturally depreciate this plant. We feel sure that we can come to some terms with you. Will you kindly let us have a reply at once so that we may know what machinery is held by you and what your demands are." Defendant replied on Oct. 17, referring plaintiffs to its solicitors and stating its requirement of immediate payment to avoid its repossessing the machinery under its lien. On Oct. 26 plaintiffs telegraphed defendant "Your letter October 17th, make sight draft against Bill of Sale receipted. Wire amount so that we can arrange finances." Further correspondence ensued and defendant's solicitors made a sight draft on plaintiffs for $1,003.09, to which were attached the four lien agreements receipted. Plaintiffs paid the draft and obtained the documents. Plaintiffs removed the machinery covered by the lien agreements to another site. This machinery was however recovered from the plaintiffs by the trustee in bankruptcy in a replevin action in which it was held that, on a proper appropriation of the payments made by C. Co. to defendant, the lien agreements had been paid by C. Co., and that the present plaintiffs could not claim as under an assignment of the lien agreements, as there had been no notice or filing of the assignment. Plaintiffs then sued defendant for, among other things, return of the $1,003.09 which they had paid to it, claiming that there had been a total failure of consideration for such payment.

Held: There had been no failure of consideration and plaintiffs could not recover. The correspondence must be interpreted in the light of the facts and circumstances as known to and affecting the parties at the time. The "bill of sale" mentioned in plaintiffs' telegram of Oct. 26 must be taken to mean the lien agreements. Plaintiffs had got what they stipulated for, namely, the four lien agreements receipted. There had been no representation, concealment or warranty as to defendant's claim or security or right to payment. Defendant had its claim which it was endeavouring to recover and which it considered exigible and adequately secured. No question had then been raised as to the validity of the claim or the security for it. The principles laid down in *Smith* v. *Hughes* (L.R. 6 Q.B. 597 at 606-607), *Haigh* v. *Brooks* (10 A. & E. 309 at 320), and other cases, were applicable.

While deciding the case on the above ground, the Court considered the interpretation and effect of the "drag-net" clause in the lien agreements, providing that "the title in the said machinery and goods, and all other machinery and goods, included in former orders, and orders which may hereafter be given * * * shall not pass * * * till all moneys payable and notes given under this order and such other orders, and all judgments obtained therefor, have been paid and satisfied," and expressed the view that the word "orders" must have been intended to apply only to conditional orders, and that machinery unconditionally sold and delivered after the time of the agreements in question was not within the application of the clause. *Re Canadian Optical Co., A. R. Williams Company's claim* (2 Ont. L.R. 677), dist.

Quaere as to the question whether defendant, after bankruptcy of C. Co., could appropriate payments not previously appropriated.

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Judgment of the Supreme Court of Nova Scotia *in banco* ([1925] 2 D.L.R. 1009) reversed.

APPEAL by the defendant, by special leave granted by this court, from the judgment of the Supreme Court of Nova Scotia *in banco* (1) which, reversing judgment of Rogers J., held that the plaintiffs were entitled to recover from the defendant the sum of $1,003.09 with interest. The facts of the case are sufficiently stated in the judgment of the majority of the court delivered by Newcombe J., now reported. The appeal was allowed.

J. L. Ralston K.C. for the appellant.

Finlay MacDonald K.C. and *J. A. Ritchie K.C.* for the respondents.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The plaintiffs, who are the respondents in the case, brought their action in the Supreme Court of Nova Scotia against the defendant company, appellant, for the recovery of damages for breach of an alleged contract of sale and delivery of machinery purchased by the respondents from the appellant, averring that it was an implied condition or warranty of the sale that the appellant was the owner of the machinery and had the right to sell, and, moreover, that the appellant falsely and fraudulently represented to the respondents that it was the owner and had the right to sell; that in fact the machinery was not the property of the appellant, but of one Geo. E. Faulkner, trustee in bankruptcy of the Cape Breton Engineering Works Ltd., who subsequently recovered the possession from the respondents. These allegations were denied, and the parties went to trial, but, at the trial, the plaintiffs were permitted to amend by adding to their statement of claim a paragraph to the effect that what the defendant company agreed to sell was its right and title under certain conditional agreements of sale, whereby the defendant had sold the machinery to the Cape Breton Engineering Works; that the plaintiffs paid the defendant

(1) [1925] 2 D.L.R. 1009.

the purchase price of $1,003.05, but that the defendant had no right or title, as the Cape Breton Engineering Works had fully paid for the machinery; that there was therefore a total failure of consideration for the payment made by the plaintiffs to the defendant, and that the plaintiffs were entitled to have their payment of $1,003.05 returned to them. The defendant company pleaded, with other matters of defence, that the payment sought to be recovered by the plaintiffs was made pursuant to an arrangement, whereby the latter, representing themselves to be equitable owners of the goods, agreed to pay to the defendant the stipulated sum upon delivery by the defendant to the plaintiffs of the agreements of sale receipted, and that the defendant complied with this condition, and received the payment in question in consideration of the delivery of the sale agreements, and the defendant's acknowledgment of the payment of the sum claimed to be due thereon.

The facts are very fully stated in the judgment of Rogers J., who tried the case, but for present purposes may be usefully recapitulated.

In March, April, May and June, 1920, the defendant company, which is a dealer in machinery, at St. John, N.B., sold to the Cape Breton Engineering Works, Ltd., a company then carrying on the business of machinists at Sydney, N.S., various articles of machinery for the aggregate purchase price of about $13,000. The sales were evidenced by four agreements in writing, identical in form, and signed by the purchaser, by which it was stipulated that the purchase price should be paid, one-half in cash on delivery, and the balance in two equal notes, at three and six months, with interest at 7%; that, if default were made in any payment, the whole amount should then become due; that the goods should be at the purchaser's risk; that the purchaser would at all times keep the goods insured for an amount sufficient to cover the vendor's interest, and that

> the title in the said machinery and goods, and all other machinery and goods, included in former orders, and orders which may hereafter be given by me, us, to you, shall not pass from you until all the terms and conditions of this order and such other orders shall have been fully complied with by me, us, and till all moneys payable and notes given under this order and such other orders, and all judgments obtained therefor, have been paid and satisfied;

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it was also provided by the agreements that the purchaser should not sell or remove the goods without the vendor's consent, and that, in case of default or breach of any of the provisions of agreement, or if the goods were seized for rent or taxes or other execution, or if the purchaser should make an assignment for the benefit of its creditors or become insolvent, the vendor might enter upon the purchaser's premises and take down and remove the goods and sell them, crediting the proceeds, less expenses and commission of sale, the purchaser agreeing to pay the deficiency, and there was a further stipulation on the part of the purchaser that

> any note or notes or other security given by me, us, to you for any indebtedness under this or any of said orders or any part thereof, shall be collateral thereto, and that you may apply all payments made by me, us, to you as you may at any time desire.

These agreements are known in the case as lien agreements, and the learned trial judge tells us that they were in due course filed with the Registrar of Deeds in compliance with the provisions of the *Bills of Sale Act* relating to hiring and purchase agreements, but they were not treated as bills of sale under the earlier sections of the Act, and were not therefore accompanied by the affidavits of bona fides appropriate to a bill of sale as such.

The *Bills of Sale Act*, as in force at the time, was c. 11 of 1918, and, by the definitions of the Act, the expression "Bill of Sale" includes among other meanings "authorities or licenses to take possession of personal chattels as security for any debt."

After the transactions represented by these lien agreements, the defendant sold and delivered to the Cape Breton Engineering Works on credit, during the succeeding months, from July to November inclusive, tools or machines, the price of which amounted to $838.08. It is claimed on behalf of the appellant that, although these goods were sold unconditionally, they were nevertheless subject to the terms and conditions of the preceding agreements, because of the clause therein, known as the drag-net clause, which is quoted above. The Cape Breton Engineering Works made large payments on account, but other payments fell into arrears, and the appellant, on 8th February, 1921, placed its claim in the hands of solicitors for collection. At that time the amount due was $3,209.05, including all items, whether specifically secured by the agreements or not; of this amount $2,295.74 repre-

sented balances due upon the lien agreements, and $913.31, including interest, was for the tools and machinery subsequently purchased.

On 25th July, 1921, the Cape Breton Engineering Works made an assignment in bankruptcy to Geo. E. Faulkner, an authorized trustee. Previously, in March, the company had paid the sum of $750, on account, to the appellant's solicitors, and had given a promissory note for the balance, which, at the time of the assignment in bankruptcy, had been reduced by payments to the sum of $617.66, and it is admitted that this balance, with interest, insurance premium and costs, constituted the total of the appellant company's claim against the bankrupt estate of the Cape Breton Engineering Company. As to the amounts collected by the solicitors, Mr. Mather, the vice-president and manager of the appellant company, testifies:—

Q. The account was sent to McLean, Burchell and Ralston for collection in February, 1921?

A. Yes.

Q. They collected a certain amount. What was done with the money remitted to you from time to time?

A. We credited it to the Cape Breton Engineering Co., Ltd. Later, when we had notice of their assignment, we treated the moneys as applying to goods not covered by specific liens, and made up our balance under the liens and forwarded it with the orders to the trustee.

Q. As proof of the debt?

A. Yes.

Thus, after the assignment, the appellant company appropriated the payments, and filed its claim against the trustee in bankruptcy for the sum of $771.44, as the balance then due on the property covered by the lien agreements, valuing the security furnished by these agreements at $3,895, and the trustee recognized the appellant as a secured creditor.

The plaintiffs had been largely interested as stockholders and employees of the Cape Breton Engineering Works, and, immediately after the suspension of that company, entered into partnership and began the business of machinists on their own account. By lease of September, 1921, the trustee and inspectors of the bankrupt estate, by authority of a resolution of the creditors, leased to the plaintiffs

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All and singular the plant, machinery, tools, equipment, office furniture and premises of the said Cape Breton Engineering Works Limited situate and being at Sydney aforesaid; excepting and reserving therefrom all and any plant, machinery and equipment upon which any persons, firms or corporations have chattel mortgages, bills of sale or other liens.

for and during the term of three months, for the monthly rent of $470, and it was provided by the lease that the tenancy might be determined at any time, during the term, by the lessors giving the lessees at least fifteen days' notice to that effect. It will have been observed that, according to the description of the demised premises, plant, machinery and equipment under chattel mortgage, bill of sale or other lien are excepted.

On 1st September, 1921, the appellant gave to the trustee in bankruptcy notice that, at the expiration of fifteen days, the company would remove from the premises of the Cape Breton Engineering Works all its property covered by the four lien agreements. On 5th October, the trustee gave to the respondents the requisite fifteen days' notice, stipulated by the lease, requiring them to vacate the leased premises on 20th October. The plaintiffs desired to purchase the property, and had submitted proposals to the inspectors, but these were rejected by the creditors at their meeting on 12th October, when it was decided to advertise for tenders. The plaintiff, Moore, admits that his proposition had been unfavourably received and that he knew that he was not likely to get the property. In this posture of affairs, on the day following, 13th October, the plaintiffs wrote the defendant company as follows:—

> We have taken over the plant of the Cape Breton Eng. Works, Ltd., Sydney, N.S.
>
> We understand that you hold a lien on part of the machinery of this plant. This amount, we understand which is due, is in the vicinity of eight hundred dollars $800.
>
> In order that you realize this amount it might be necessary for you to remove considerable machinery at a cost which would not mean anything to you and which would naturally depreciate this plant.
>
> We feel sure that we can come to some terms with you.
>
> Will you kindly let us have a reply at once so that we may know what machinery is held by you and what your demands are.

To this the defendant replied, on 17th October, that its claim was in the hands of its Nova Scotia solicitors, to whom it was forwarding the plaintiffs' letter for attention, adding however that the company would not consider any

further extension of credit, and that, if its claim were not paid within two weeks, it would proceed to repossess all the machinery under its lien, concluding with an expression of hope that the plaintiffs would be able to raise the funds necessary, as the amount of the claim was not very large. On 26th October, the plaintiffs, having received no other communication from the defendant or its solicitors, telegraphed direct to the defendant, saying:—

> Your letter October 17th, make sight draft against Bill of Sale receipted. Wire amount so that we can arrange finances.

That by "bill of sale" in this message the plaintiffs meant the lien agreements is, I think, clear beyond question; that was the sense in which at the time both parties understood and acted upon the message.

At an adjourned meeting of the creditors, held on 26th October, it was decided to accept the offer of Capt. H. C. Verner, who had been the managing director of the bankrupt company, and his associates, for the purchase of the plant. On 27th October, the defendant replied to the plaintiffs' telegram of the preceding day, reminding them that the matter was entirely in the hands of the company's solicitors, to whom it was posting instructions to get in touch with the plaintiffs, but intimating that the solicitors could proceed upon a cash basis only, and that no delay or partial payment could be considered. On 28th October, the defendant's solicitors at Halifax telegraphed the plaintiffs as follows:—

> As instructed by A. R. Williams, we are forwarding to-morrow Bills of Sale receipted with sight draft attached for one thousand and three dollars nine cents covering claim interest, insurance, solicitors' charges.

The solicitors then made a sight draft for $1,003.09 upon the plaintiffs, to which were attached the four original lien agreements, with the following receipt endorsed upon each of them:—

> Paid. A. R. Williams Machinery Co. (Maritime) Ltd., October 29th, 1921, A. P. Coleman, Halifax.

Mr. Coleman was the defendant's Halifax manager. On or before 2nd November, the plaintiffs paid and took up the draft, with the documents attached, and, on the last mentioned date, they telegraphed to the defendant company, saying:—

> Have paid draft and obtained papers attached. Solicitor advises that your agent here formally repossess articles and transfer same to us.

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The defendant telegraphed the plaintiffs, on the same day:—

Telegram received. Will instruct our solicitors to act accordingly.

And they wrote the plaintiffs, at the same time, as follows:—

We have your wire as follows:

"Have paid draft and obtained papers attached. Solicitors advise that your agents here formally repossess articles and transfer claim to us."

In reply we have wired you as per copy attached, that we are instructing our solicitors to act accordingly, and we are urging them to see that there is no further delay.

We are glad to know that you have taken over the plant of the C. B. Engineering Works, and also that you are able to pay our claim and thus prevent the dislocation of the plant.

You can rest assured, that if you are prepared to operate this plant we will be only too glad to assist you as far as our means will permit. We understand our Halifax Office has quoted you on a certain drill you asked about, and we trust to have your order in due course. We have a large stock of machinery and supplies, and our prices are right, and we only ask the opportunity to show you what we can do.

On 2nd or 3rd November, the plaintiffs, being still in possession of the leased property, disconnected the machinery covered by the lien agreements, and removed it to a site which they had acquired for themselves. On 11th November, the solicitors wrote the plaintiffs, saying:—

Re C. B. Engineering Works.

Mr. Coleman has asked us to write you in connection with this matter.

Your telegram to the A. R. Williams Machinery Company of St. John instructed the A. R. Williams Machinery Company to make a sight draft with lien agreements attached and receipted. In accordance with this telegram we attached the original lien agreements duly receipted to sight draft made by ourselves on you. The draft was paid and receipted lien agreements delivered to you. This is the end of the matter so far as the A. R. Williams Machinery Company is concerned and they have nothing further to do with the matter and we have advised them accordingly.

Shortly after this, Mr. Faulkner, the trustee in bankruptcy, caused the machinery to be replevied. The plaintiffs defended the replevin action, which was tried before Mellish J., who upheld the proceedings and the right of the trustee. Thus the plaintiffs lost the property, which it was no doubt the object of their negotiations with the defendant company to acquire, and it was in consequence of this that they instituted the present action.

The defendant company was not a party to the replevin suit, but the judgment of Mellish J., and a transcript of the evidence upon which he proceeded, were put in as exhibits in this case. That learned judge reviewed the state of the account between the Williams Machinery Co., the present appellant, and the Cape Breton Engineering Works. He considered that the question depended upon the appropriation of the partial payments, and he found that the payments which had been made to the solicitors ought to be appropriated to the earlier items of the account, and therefore that the secured claim of the Williams Company had been paid, and that, although Moore and Murphy, defendants in replevin, claimed the machinery under an assignment to them of the lien agreements, they had given no notice of the assignment, and moreover that the assignment was not filed as required by the *Bills of Sale Act,* and therefore he upheld the claim of the replevisor.

Rogers J. reviewed the evidence very carefully. He considered that the case was to be determined upon the interpretation of the correspondence which had taken place by letter and telegram previously to the payment of the $1,003.09 on 2nd November. He referred to the opening sentence of the plaintiffs' letter of 13th October, "we have taken over the plant of the Cape Breton Engineering Works," as "a statement which, to say the least, was entirely lacking in frankness"; he found that the plaintiffs could not recover upon the allegations of the statement of claim upon which they went to trial; that there was no sale, and that it was not intended that there should be a sale, of specific articles. He said that

> the original inquiry was made by the plaintiffs as ostensible owners of the whole estate, and of the equity in the machinery, and concerned itself only with request for information for the details, so that they may know what machinery is held and what the demands are. The plaintiffs, as owner of the plant, could then, as fully known by both parties, have acquired ownership only from the trustee, and the plaintiffs (sic) had filed their claim and an account along with copies of their agreement for lien with the trustee. The plaintiffs knew of the amount (about $800) and there was available to them all the information asked for. Doubtless the purpose of the letter of the 13th October was to begin a negotiation which they hoped would place them in an advantageous position thereafter and perhaps enable the plaintiffs ultimately to discharge defendant's claim at a reduced amount, but the defendants were in no mood to lessen their demand. They stood on what they, I have no doubt, honestly believed were their legal rights.

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He found that

> there was no misrepresentation on the part of the defendant company, nor is there any express warranty or undertaking, either as to the title to the goods, or as to the amount of the indebtedness. There is a simple release to the supposed owners of the plant of the liens which the defendants held and believed enforceable, and which they wished to be released without delay. Their reasons for this anxious haste became apparent on the trial. They anticipated on October 12th that they would soon become proprietors of the going concern (so much so that they represented themselves as already proprietors), but, on October 27th their hopes were shattered by the creditors. What they had failed to obtain by negotiation they sought, at any rate as to part of the machinery, to obtain by acquiring defendant company's rights and thus dislocating and depreciating the plant now acquired by their rivals in business, a proceeding which they themselves deprecated in the initial communication of the 13th. They paid their money for precisely what they got: from defendant company's standpoint, the payment of its claim by the ostensible owner of the equity; from the plaintiffs', an opportunity to hamper their rivals, and the possibility of procuring a lot of valuable machinery at a very inconsiderable cost.

He considered that the defendant company was not bound by the judgment in replevin, and that it was unnecessary to express an opinion as to the appropriation of the payments made by the Cape Breton Engineering Works, or as to whether the indebtedness secured by the four agreements had actually been paid. He said that the consideration was completely executed on both sides by the plaintiffs' payment, and the delivery by the defendant of the documents evidencing its claim; that it was immaterial that the documents proved to be of less value to the plaintiffs than they anticipated, and that they must be regarded as worth to the plaintiffs what they were willing to pay for them, seeing that they could not acquire them for less.

The learned Chief Justice, who pronounced the judgment of the court *en banc,* interpreted the transaction differently. He thought the bill of sale referred to in the plaintiffs' telegram of 26th October was "a bill of sale or transfer of four lien agreements and the amount due thereon." He thought that the defendant had represented the amount due and secured by the four lien agreements to be $777.44, which was the amount of its claim against the bankrupt estate; that the plaintiffs had seen this account, and, adding interest, had understood it to be in the vicinity of $800. He referred to the letters and telegrams and he said that

in the face of this correspondence the defendants must be treated as if they had volunteered the information as to the amount due and secured by the lien agreements, and if the representation was untrue they must be responsible.

He reviewed the question as to appropriation of payments, and considered that the defendant would have been bound, by the judgment of Mellish J., if there had been an express contract of indemnity, but not otherwise. If I understand his judgment, his conclusion was that the defendant was not estopped by that judgment. Referring to the drag-net clause of the agreements he said,

I think it obvious that these orders referred to are orders similar to the four lien agreements, and that the object of the clause was to tie together all these liens and give the vendors the right to claim under the other three any amount still due under any one of them after the specific security had been exhausted.

and he expressed a view, in accordance with that of Mellish J. in the replevin suit, that

the defendants had, long before that suit was begun, wrongfully wiped out the unsecured claim on their books by crediting thereon payments specificially made on the secured debt.

He held moreover that the right of appropriation did not survive the bankruptcy of the debtor. Accordingly, by the judgment of the court *en banc,* the appeal was allowed, and the plaintiffs recovered $1,003.09 with interest.

This amount being below the ordinary appealable jurisdiction of the Supreme Court of Canada, application was made to this court for special leave to appeal, and leave was granted upon the submission that the case involved the interpretation of the lien agreements, which were in common form and in general use, and that the view expressed by the court *en banc* was in conflict with the judgment of the Divisional Court of Ontario in *Re Canadian Camera and Optical Co., A. R. Williams Co's. claim* (1). In that case the claimant had delivered to a company which was or became insolvent a turret lathe upon an order signed by the latter, by which it was to pay the price, one-quarter in cash, and the balance in three equal payments, on specified credit, and it was stipulated that the title should not pass to the insolvent until payment of the moneys payable by it under the order in question, as well as under any other orders which might be given by the insolvent to the

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claimant before the lathe was actually paid for. After the purchase of the lathe, the insolvent ordered and received from the claimant other goods, which were not paid for, and the price of which, together with one of the instalments upon the lathe, remained unpaid at the beginning of the winding up proceedings. The claimant contended that the lathe was subject to a lien, not only for the instalment of the purchase price unpaid thereon, but also for the price of the goods subsequently purchased. The liquidator, while admitting the lien for the instalment due upon the lathe, contended that the claimant must rank upon the estate as an ordinary creditor for the balance of its claim. Street J., who pronounced the judgment of the Divisional Court, in disposing of the question, said:

> The good faith of the parties to the contract is not impeached or attacked, and the agreement must be taken to express the true contract between them, viz., that, until the bailees should pay, not only the purchase money of the lathe itself, but also the purchase money of any other goods they should purchase after the sale of the lathe and before it was fully paid for, the property in it should remain in the claimants. I can find nothing in any statute affecting the validity of a contract of this kind, and I think it, therefore, entitled to prevail.

A copy of the contract itself is not set out in the report, but, according to the effect of it as therein stated, there are noticeable differences between the clause which was there intended to provide security for the payment of the price of goods purchased in the future and the clause which is described in this case as the drag-net. In the latter it is stipulated that the title in the machinery and goods purchased, and all other machinery and goods included in former orders and orders which might thereafter be given

> shall not pass * * * till all moneys payable and notes given under this order and such other orders, and all judgments obtained therefor, have been paid and satisfied.

Now although, for the reasons which I am going to state, it becomes unnecessary for the purposes of this case to determine the interpretation of the agreements in this particular, yet, inasmuch as the question has been argued, and as leave to appeal was granted for review of the opinion expressed by the court *en banc* upon this branch of the case, I think it right to say that I have come to the conclusion that since the clause is expressed to apply, not only to the machinery and goods specified, but also to other

machinery and goods, whether previously purchased or subsequently to be purchased, it can be intended to apply only to conditional orders; obviously it does not affect property which had already passed, and therefore it does not apply to previous unconditional sales, but the word "orders" as used in the clause must naturally have the same meaning when used as descriptive of orders to be given as it has with relation to orders previously given, and therefore, if this be so, the machinery unconditionally sold and delivered after the time of the agreements here in question is not within the application of the clause.

This however does not determine the defendant's liability. In the order granting leave to appeal, there is, fortunately for the appellant, but unfortunately for the uniformity of practice in the court, no limitation of the questions which are to be discussed. The appellant is permitted to appeal from the judgment of the court *en banc,* and any question of law or fact which is raised, affecting the propriety of that judgment, must be considered.

In my view the findings of the learned trial judge ought not to have been reversed. Upon the first question propounded by the learned Chief Justice—what were the plaintiffs to get for the $1,003.09 which they paid to the defendant?—I think, with the utmost respect, that there can be only one answer: they got what they stipulated for, namely the four lien agreements, or bill of sale, as the agreements were called in the plaintiffs' telegram, and the defendant's acknowledgment upon each of them that the debt secured thereby had been paid. In order to interpret the correspondence we must look to the state of the facts and circumstances as known to and affecting the parties at the time. As said by Blackburn J., in *Fowkes* v. *Manchester and London Life Assurance and Loan Association* (1),

> the language used by one party is to be construed in the sense in which it would be reasonably understood by the other.

And Lord Watson said in *Birrell* v. *Dryer* (2),

> I apprehend that it is perfectly legitimate to take into account such extrinsic facts as the parties themselves either had, or must be held to have had, in view, when they entered into the contract.

(1) (1863) 3 B. & S., 917, at p. 929.

(2) (1884) 9 App. Cas. 345, at p. 353.

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It was known to the parties that the Cape Breton Engineering Works was indebted to the defendant; that it had made an assignment in bankruptcy; that the defendant had filed its claim as a secured creditor with the trustee for $777.44, for which it claimed the security of the four lien agreements, which were registered under the *Bills of Sale Act;* that the security had been valued under the provisions of the *Bankruptcy Act,* by the affidavit of the defendant's local manager, at $3,895, and that the machinery ordered by the Cape Breton Engineering Works, and of which it had received possession under these agreements, was still in place in the factory, or on the premises of the Engineering Works. Also it was known that the defendant company had given notice to the trustee of its intention to remove the machinery covered by the agreements. In this state of the case the plaintiffs introduced themselves to the defendant, by their letter of 13th October, with the statement that they had taken over the plant of the Cape Breton Engineering Works. They intimated their understanding that the defendant had a lien on part of the machinery of this plant, the amount of which was in the vicinity of $800; they referred to the fact that it might be necessary for the defendant to remove the machinery in order to realize; they expressed a desire to come to terms, and asked for a reply stating what machinery was held by the defendant, and what the defendant's demands were. The answer, on 17th October, refers the plaintiffs to the company's solicitors, stating however that the claim was long overdue, and that no further extension would be considered. The appellant company had its claim, which it was endeavouring to recover, and which it considered exigible and adequately secured. Nobody had suggested a question as to the validity of the claim, or the security for it. The respondents cannot complain if the appellant proceeded upon the assumption that they were telling the truth when they said that they had taken over the plant. If, as is the necessary inference from the respondents' letter, the plant which they said they had taken over included the machinery subject to the lien agreements, the desirability from their standpoint of obtaining a discharge of these agreements was sufficiently obvious. The appel-

lant's papers and business with respect to its claim against the Engineering Works were in the hands of its solicitors, to whom it naturally referred the respondents. Then came the respondents' urgent message of 26th October requesting sight draft against bill of sale receipted, and the draft, with the agreements receipted, was forwarded to the respondents by the appellant's solicitors on 29th October, and paid in due course by the respondents, who then took up the receipted documents. It is surprising in these circumstances to hear of charges of fraud or misrepresentation, or breach of warranty, on the part of the appellant company, or that it concealed information which it was bound to communicate. There are two very apt passages in the judgment of Blackburn J. in the well known case of *Smith* v. *Hughes* (1):

> In this case I agree that on the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought though it does not possess that quality. And I agree that even if the vendor was aware that the purchaser thought that the article possessed that quality, and would not have entered into the contract unless he had so thought, still the purchaser is bound, unless the vendor was guilty of some fraud or deceit upon him, and that a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit; for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.
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> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

See also *Monforts* v. *Marsden* (2). I find nothing in the case to indicate that the parties did not agree in the same sense, or that there was any representation, concealment or warranty as to the appellant's claim or security or right to payment, and it appears to have been a very reasonable and convenient transaction in the course of business that the respondents should pay off a comparatively small charge upon their property, and that the appellant should hand over its documents constituting the security to the

(1) (1871) L.R. 6 Q.B. 597, at pp. 606-607.

(2) (1895) 12 Cutler's Patent, Design, and Trade Mark Cases, 266.

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respondents, who, upon the case as represented by them, had acquired the property subject to the charge.

In *Haigh* v. *Brooks* (1), Lord Denman said:—

> The plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge.

See also *Lawes* v. *Purser* (2). These authorities, and there are many others, seem fully to justify the finding that there was no failure of consideration.

It is not necessary to enter upon the question of appropriation of payments as between the appellant and the Cape Breton Engineering Works. It is beyond the reach of controversy that the appellant honestly believed in its claim in the hands of the trustee in bankruptcy as filed and attested, and, if the trustee had questioned the validity of the claim, or its right to rank upon the machinery covered by the agreements, I am not satisfied that the claim could have been displaced by the evidence of appropriation of payments to be found in the case. It is contended that the appellant after the bankruptcy could not impute payments which had not been appropriated previously. I find no provision to this effect in the *Bankruptcy Act,* and none was cited at the argument; but that is however a question which I would be disposed to consider further, if it were material.

For these reasons I have come to the conclusion that the appeal should be allowed, and that the judgment at the trial should be restored; but, seeing that leave to appeal was granted upon the condition that the appellant should pay, in any event, to the respondents their costs of and incident to the appeal to this court, these costs will be disposed of accordingly. The appellant should however have the costs of the appeal to the Supreme Court of Nova Scotia *en banc.*

(1) (1839) 10 A. & E., 309, at p. 320.

(2) (1856) 6 E. & B., 930

IDINGTON J.—For the reasons assigned by Mr. Justice Rogers in his comprehensive judgment as trial judge, I am of the opinion that this appeal should be allowed and the judgment of the said learned trial judge be restored with costs of the appeal therefrom to the Supreme Court of Nova Scotia *in banco*.

Appeal allowed.

Solicitor for the appellant: *C. J. Burchell.*

Solicitor for the respondents: *Finlay MacDonald.*