FRANK J. WEBB AND A. W. REEVES (DEFENDANTS) ..... } APPELLANTS;

AND

FELIX DIPENTA AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

1924

*Nov. 13.
*Dec. 9.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

Contract—Specific performance—Agreement to sell land—Time limit—Vendee owning interest—Agreement to sell on failure to purchase whole—Sale pending purchase agreement—Amendments—Penalty.

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

1924

WEBB v. DIPENTA

D. and others, by contract in writing, agreed to sell certain land, within a stated time, for $30,000 to W. who, within such period, was to have the exclusive right to buy it. W. had an interest in the land which, if he failed to purchase, he agreed to sell for $1,000. But, while the contract was in force, he sold this interest to R. for $4,000 of which he got paid $1,125 on account. W. did not purchase within the time stated and was tendered a deed with a cheque for $1,000 to convey his interest as agreed to D. and others. This being refused, the latter brought action for specific performance of the contract and to have the deed to R. set aside as being given without consideration and with a collusive and fraudulent intent. The trial judge dismissed the action holding the conveyance to R. to be *bona fide* and that performance could not be decreed. The court *en banc* accepted his finding of *bona fides* but held the plaintiffs entitled to other relief than damages against W. for breach of contract, which the trial judge held was the only remedy they had. The relief granted by the court *en banc* was to award to the plaintiffs the balance of the purchase money due from R to W. and give them the benefit of a lien or charge of W. on his interest in the land for payment of his purchase money therefor.

Held that, under the *Registry Act* of Nova Scotia then in force (R.S.N.S. 1900, c. 137, s. 15), R. has acquired a title clear of all legal and equitable claims; but the option agreement was still in existence as against W. and also bound R., after he had actual notice of it, to the extent to which it was then available; and it should be given effect to on equitable principles as to the unpaid purchase money.

The question whether the right to the vendor's lien ever existed was not raised by the plaintiffs, nor evidence upon the subject taken at the trial.

Held that the judgment appealed from (57 N.S. Rep. 262), should be varied by striking out the direction that the plaintiffs should have the benefit of any lien in favour of W. as unpaid vendor.

Evidence was given at the trial showing that W. had obtained an advance from a bank, which was not a party to the action, on the security of the money payable to him by R.

Held, that R. is entitled to protection against the bank's claim and the case should be remitted to the court below to have the bank added as a party and its rights to R's purchase money ascertained. That court has inherent power to correct the error in its judgment resulting from its failure to dispose of the bank's claim. R's failure to bring this matter to the attention of the court on the settlement of the judgment would, according to the general rule of procedure, be a reason for depriving him of his costs but the court feels justified in making an exception in this case.

Idington J. dissenting, would allow the appeal and restore the judgment of the trial judge.

APPEAL from a decision of the Supreme Court of Nova Scotia (1), reversing the judgment at the trial in favour of the appellants.

The facts are fully stated in the head-note.

C. B. Smith K.C. for the appellants.

W. F. O'Connor K.C. for the respondents.

(1) 57 N.S. Rep. 262.

The judgment of the majority of the court was delivered by Rinfret J.

RINFRET J.—The appellant Webb and the respondents herein, on the 2nd November, 1922, entered into the following contract:—

This agreement made the 2nd day of November, A.D. 1922,

Between Tony D. Pistone, broker; Felix Dipenta, business man; Alex. Martinello, business man; all of the city of Sydney in the county of Cape Breton, hereinafter called the vendors on the one part, and Peter J. Webb, of the city of Sydney in the county of Cape Breton, real estate broker, hereinafter called the purchaser of the other part.

Whereas, the vendors allege that they are part owners of the estate known as the Monastery of Petit Clairveaux of Big Tracadie, in the counties of Antigonish and Guysborough, and the province of Nova Scotia, containing 709½ acres more or less.

Now this agreement witnesseth that the vendors in consideration of the sum of five dollars of lawful money of the Dominion of Canada, in hand well and truly paid to them by the purchaser, the receipt whereof is hereby acknowledged, hereby covenant and agree to sell to the purchaser, his heirs or assigns, or the nominee of the said purchaser, free from encumbrances, the said land and buildings for the sum of thirty thousand dollars ($30,000) at any time before the second day of July, A.D. 1923. This offer to be irrevocable until the said last mentioned date. This offer, if accepted before the said date, shall thereupon constitute a binding contract of purchase and sale; all adjustments to be made to the date of transfer; the purchaser to examine the title at his own expense.

This offer may be accepted by a letter posted or telegram sent to the vendors at their last known address.

If the vendors paint the exterior walls of all wooden buildings and the roof of the Monastery as well, the purchaser agrees to pay for the land and buildings herein, in that event, the sum of thirty-five thousand dollars ($35,000). Should the purchaser fail to buy the property herein on or before the 2nd day of July, 1923, then he will sell to the vendors for one thousand dollars ($1,000) whatever interest he may have in the herein mentioned property. The purchaser herein is hereby appointed by us to be the sole and only agent or party, from the date of the ensealing and delivery of this agreement until the said 2nd day of July, A.D. 1923, with authority to sell and purchase this property, and he is thereby given exclusive rights to sell, buy or bargain for the sale or purchase of the above estate within the time herein mentioned. We, the vendors herein, bind ourselves to abstain from any dealings, either directly or indirectly, with persons or corporations of whatsoever nature, for the purpose of sale, purchase, transfer, or dealing of or with the herein estate.

It is hereby declared and agreed that these presents and everything herein contained shall respectively enure to the benefit of and by binding upon the parties hereto, their heirs, executors, administrators and assigns forever.

Signed, Sealed and Delivered in the presence of:
(Sgd.) A. A. OLLERHEAD.

(Sgd.) TONY D. PISTONE (Seal)
(Sgd.) FELIX DIPENTA (Seal)
(Sgd.) ALEX. MARTINELLO (Seal)
(Sgd.) P. J. WEBB (Seal)

1924

WEBB v. DIPENTA

Rinfret J.

Webb failed to buy the property on or before the 2nd July, 1923. About the 11th of July, the respondents tendered him a deed and a cheque for one thousand dollars ($1,000) for his interest in the property. He declined to accept them and then disclosed the fact that he had already deeded the property to the appellant Reeves.

The respondents thereupon brought this action to enforce their contract specifically, alleging that Webb had transferred his interest to Reeves for the purpose of defeating their rights under the agreement, and that such transfer was without consideration and was taken by Reeves with knowledge of the agreement of the 2nd November, 1922, and entered into between Webb and Reeves with a collusive and fraudulent intent.

By the prayer of their statement of claim, respondents asked for a declaration that the deed from Webb to Reeves was void, an order setting it aside, specific performance of the agreement of the 2nd November, 1922, and that the appellants should be ordered to execute a proper conveyance to the respondents of all their interest in the property; and "such other relief as to the Honourable Court may seem right and proper."

The appellants Webb and Reeves filed separate defences.

Webb pleaded that the agreement of the 2nd November, 1922, did not and was not intended to preclude his disposing of any interest he might have in the lands therein referred to. He denied the tender and added that, if made, it was made too late. He admitted the execution of a deed of his interest to Reeves, but denied that it was without consideration or collusion and fraudulent and that it had been made in order to defeat the respondents' rights.

Reeves also denied that the deed was without consideration and more particularly that he had knowledge of the agreement between Webb and the respondents.

The trial judge found that the respondents had failed to prove a covinous agreement between Webb and Reeves. He declared that he accepted the latter's evidence in full and that this showed that Reeves was not aware of the agreement of the 2nd November, 1922, which was not registered, as he had ascertained by having the records searched. Reeves was held to have been a *bona fide* purchaser for value of Webb's interest in the property. It was therefore immaterial whether Webb had acted in bad faith or not.

Cameron v. *Moseley* (1). The fact was that Webb had placed it out of his power to perform his part of the agreement of the 2nd November, 1922, and specific performance could not therefore be decreed against him. The respondents were left with the possibility of recovering damages for breach of contract against Webb, if they elected so to proceed.

Upon appeal, while all the judges accepted the trial judge's findings of fact, a majority of the court differed from him in regard to the relief to which the respondents were entitled.

Mr. Justice Rogers, with whom the Chief Justice and Mr. Justice Chisholm concurred, was of opinion that, on the facts as they appeared, there was an insuperable difficulty to granting specific performance simpliciter as against Reeves, who had honestly entered into the bargain and had completed his title by registration without notice, actual or constructive, of the agreement of the 2nd November, 1922. He thought, however, that the option agreement was still in existence as against Webb and also bound Reeves, after he had actual notice of it, to the extent to which it was then available; and that it should be given effect to on equitable principles as to the unpaid purchase money.

Webb had sold his interest to Reeves for $4,000; he has been paid $1,125 on account of the purchase money and was still entitled to a balance of $2,875 which, in equity, was the money of the respondents and should be accounted for to them.

The court *en banc* accordingly awarded the respondents judgment against Webb for $125 representing the amount by which he had been paid in excess of the sum of $1,000 which he was to get from the respondents under the agreement of the 2nd of November. It further declared that the respondents were entitled to all unpaid purchase money in respect of the property sold by Webb to Reeves, namely, $2,875; and decreed that Reeves should pay this amount to the respondents, who, it held, were also entitled to the full right and benefit of a lien and charge of Webb, as vendor, for the unpaid purchase money against the interest in the lands conveyed by him to Reeves.

(1) 56 N.S. Rep. 300.

1924

WEBB v. DIPENTA

Rinfret J.

In the words of Mr. Justice Rogers:—

> The court thus turned over to the respondents all the benefit of their contract upon which it could lay its hands.

As the view of the case on which equitable relief was thus accorded had not been presented on the pleadings or at the trial, the court *en banc* allowed all proper and necessary amendments and dealt with the action as if they had been formally made.

Mr. Justice Mellish dissented. Although of opinion that the disposition of the case made by the majority of the court might be justified by the facts disclosed by the evidence, he thought that it should not be made without Reeves having had an opportunity to raise such defences as he might desire to offer. He was unwilling to interpret the general prayer in the statement of claim "for such relief as the court may think right and proper," as sufficient to warrant such a disposition of the rights of the parties on the pleadings and evidence as they stood. The evidence had disclosed that, in the previous November, Webb had secured an advance from the Bank of Commerce and assigned to the latter any moneys that he might receive from the sale of the property now in question. The respondents had made no intimation that they were willing to recognize such assignment. Moreover, they had thus far taken pains to have the sale from Webb to Reeves set aside and, in his opinion, unless they were now willing to affirm that sale, their only remedy lay in damages; and it was very doubtful whether they could now affirm the sale after having elected to disaffirm it.

Finally, in his view, the appellants might have sought relief against the clause in the agreement requiring Webb to make a conveyance of his interest for $1,000, as in the nature of a penalty or forfeiture for his failure to carry out the other terms of the agreement. Under all these circumstances, he deemed it not desirable to make the disposition of the case favoured by the majority of the court.

It will thus be apparent that the judges in the Nova Scotia courts differ only in regard to the propriety of granting upon the present record a remedy appropriate to the state of facts upon the existence of which they are in accord.

It cannot be and is not disputed that, under "The

Registry Act" of Nova Scotia then in force (R.S.N.S., 1900, c. 137, s. 15), Reeves has acquired a title clear of all legal and equitable claims. But the unregistered agreement of the 2nd November, 1922, was nevertheless a document of a nature to create an interest in land, upon its being accepted by the respondents. No repudiation by Webb resulting from the mere alienation to Reeves, in the absence of communication to respondents, could affect the latter's right to insist upon specific performance so far as possible (Williams, Vendor & Purchaser, 3rd ed., vol. 1, p. 14). The acceptance here was unconditional and made within reasonable time; and, if Webb could still set up irregularity in the tender of the 11th July, after he had rendered any tender futile by conveying the property to Reeves, any exception to it was abandoned at bar.

What we have really to consider in this case, is whether the granting of the remedy decreed by the court *en banc* should be upheld on the present record.

No doubt the administration of the relief by way of specific performance is in the discretion of the court—a discretion not arbitrary or capricious, but judicial, and to be exercised according to fixed rules (Lord Chelmsford in *Lamarre* v. *Dixon*) (1), yet "more elastic than is generally permitted in the administration of judicial remedies" (*Harris* v. *Robinson*) (2). Although the trial judge refused to decree specific performance, he did so only because he thought that "Webb had placed it out of his power to perform his part of the agreement." It is not pretended that the form of relief accorded by the appellate court was submitted for his consideration, nor does it appear that, if it had suggested itself to him, he would have refused to resort to it, rather than merely reserve to the respondents a right of action in damages against Webb.

The question now before us, however, is whether the remedy directed by the court *en banc* is not the best that could be devised under the circumstances; and, if all legitimate interests are otherwise adequately protected, whether the granting of that remedy should not be approved. It must not be forgotten that the refusal to grant specific

(1) L.R. 6 H.L. 414, at p. 423. (2) 21 Can. S.C.R. 390, at p. 397

1924

WEBB v. DIPENTA

Rinfret J.

performance, in a case like the present one, does not rest upon the nature or terms of the contract, nor upon any principle of justice that operates in favour of the defendant, but is based upon the necessity of the case arising out of the nature of the relief sought

(Fry, Specific Performance, 6th ed., page 463, par. 990).

For that reason, it is well understood that in capacity to perform a contract "literally and exactly" is not a reason for refusing to perform it in substance (Fry, p. 467, par. 1001) and the courts will be anxious to compel the execution of such a contract *cy-près*, if it is otherwise unobjectionable, and "such a plan is feasible" (Fry, page 470).

The following extract from Williams, Vendor and Purchaser (3rd ed., vol. 1, page 536), is in point:—

If the vendor, pending completion of the original sale, re-sell the land and convey the legal estate therein to another without receiving payment of the whole price, the second purchaser is protected against the first purchaser's prior equity as regards so much of his purchase money as he has paid before receiving notice of the first sale, and is entitled to hold his legal estate as security for the amount so paid. But, after he has received such notice, he cannot safely pay the rest of his purchase money; for he will not be entitled to set up his contract of sale as specifically enforceable against the first purchaser, and, as between himself and the vendor, that contract will be rescinded and he will be discharged from all further performance of his obligation thereunder.

Reference is made in a note to *Jones* v. *Stanley* (1); *Story* v. *Windsor* (2); *Hardingham* v. *Nicholls* (3); *Tourville* v. *Naish* (4). See also XXV Halsbury, Laws of England, page 377, no. 838. But for the Registry Act, that precise relief might have been awarded here. Yielding to the requirements of the Registry Law, the court will modify the relief which it would otherwise have granted, but only so far as is necessary to meet those requirements.

The Appellate Court has put into effect *cy-près* the principle expounded above; it has followed the property where it has found it, in another guise, converted into money (*Ferguson* v. *Wilson*) (5).

The course taken commends itself on equitable principles, unless it can be excepted to upon any legitimate ground open to the parties herein.

(1) 2 Eq. Ca. Abr. 685, pl. 9.
(2) 2 Atk. 630.
(3) 3 Atk. 304
(4) 3 P.W. 307.
(5) 2 Ch. App. bottom of p. 87.

Now the objections taken to the course followed are enumerated in the reasons of the dissenting judge in the court *en banc* and in the grounds taken before us by counsel for appellants. Some of them are opposed to the application of the relief generally; the others are open only to one or the other of the parties individually.

The first objection of Mr. Justice Mellish is that the court *en banc* could not dispose, as it has done, of the rights of the parties on the pleadings as they stood. But that difficulty no longer exists after all necessary amendments have been allowed. The exercise of the power to amend, when warranted, as it is here by the Judicature Act of Nova Scotia and Rule XXVIII made thereunder, is discretionary and, consistently with its jurisprudence in matters of practice and procedure, this court will rarely, if ever, interfere with it.

Another objection of the dissenting judge is based upon his doubt whether the respondents would be willing to accept the relief in the form ordered by the majority of the court *en banc,* that difficulty has also disappeared since the respondents have acquiesced in the judgment and are defending it before this court. And there is no inconsistency in their action. The result of the decree which they are now upholding is to enforce, as far as may be, the very relief which the respondents sought by their original statement of claim.

Another objection of the dissenting judge is that Webb might perhaps have himself claimed a relief in equity against the clause in the agreement requiring him to make a conveyance of his property worth $4,000 at least for $1,000, as a penalty or forfeiture for his failure to carry out the other terms of the agreement.

This objection was not taken in the statement of defence, nor apparently before the trial court. It is urged before us no doubt on account of its having been suggested by the dissenting judge in appeal.

We are unable to construe the clause in the agreement of November, 1922, now under consideration, as stipulating anything in the nature of a penalty or a forfeiture. It was, in fact, assented to in consideration of the main agreement by which Webb was given from the 2nd November, 1922, until the 2nd July, 1923, exclusive authority to

1924
WEBB
v.
DIPENTA
Rinfret J.

sell, purchase or bargain for the sale or purchase of the property for the sum of $30,000 (or $35,000 if the exterior walls and roof of the monastery were painted). The agreement was irrevocable, and on a sale made during that time, any profit in excess of the stipulated sum would have belonged exclusively to Webb. On the other hand, he voluntarily agreed that, in exchange for the right thus granted, he would, if he did not buy the property before the said 2nd day of July, 1923, sell to the respondents for $1,000 whatever interest he might have in it.

Any hardship on the defendant which might flow from the specific performance of such an agreement would be merely a consequence of the fact that his speculation proved unfortunate for him (*Haywood* v. *Cope*) (1). The agreement apparently secured to him, at least when he signed it, an expectancy of profits corresponding in some measure with those which the respondents may now reap from their contract. Moreover, the mere inadequacy of the consideration, unaccompanied by any element of fraud or misrepresentation, would hardly afford him a good defence in the premises (Fry, 6th ed., nos. 399, 426, 436, 440, 444).

There remains a last objection suggested by the dissenting judge in appeal based upon the assignment by Webb to the Bank of Commerce of any money that he might receive from the monastery property. This really appears to be the most serious ground upon which the judgment *a quo* may be assailed.

What may be the rights of the Bank of Commerce under the assignment is not by any means clear, but this no doubt is due to the fact that only a passing reference was made to it in the evidence and, at the trial, it was not thought necessary further to inquire into it.

It does result, however, from the judgment of the court *en banc* that, while the interests of the Bank of Commerce cannot be said to have been finally disposed of, because it was not a party to the case, yet the appellant Reeves is ordered to pay the balance of the purchase money to the respondents although he had been made aware of an alleged assignment of the same purchase money by Webb to the bank.

(1) 25 Beav. 140.

Lord Langdale M.R., *in re Thomas* v. *Dering* (1), lays it down as a general principle

> that the court will not execute a contract, the performance of which * * * would be prejudicial to persons interested in the property, but not parties to the contract. The court, before directing the partial execution of the contract by ordering the limited interest of the vendor to be conveyed, ought to consider how the proceeding may affect the interests of those who are entitled to the estate, subject to the limited interest of the vendor.

See also what Lord Romilly, M.R., says in *Attorney-General* v. *Sittingbourne* (2).

Reeves is undoubtedly entitled to be protected against any claim of the bank before being required to make payments to the respondents. This can properly be done by remitting this action to the Supreme Court of Nova Scotia in order that the Bank of Commerce may be added as a party to it and that proper steps may then be taken to ascertain what rights, if any, it has in the money payable under the Webb-Reeves contract, and to determine the respective priorities of the bank and the respondents in regard thereto. That being done, proper directions can be given for payment by Reeves; and, on complying with them, his contractual obligations will be fully discharged.

The consideration given to the objections of Mr. Justice Mellish has disposed of all but one of the points in respect of which the appellants at bar alleged error in the judgment of the court *en banc*.

There remains only the objection resulting from the fact that the judgment appealed from decided that the appellant Webb had a vendor's lien against the estate of the appellant Reeves in the lands in question and that the respondents are entitled to the benefit of such lien.

The question whether the right to this lien ever existed was not raised by the pleadings. No evidence upon the subject was taken at the trial, and neither there nor in the court *en banc* was the matter ever mentioned.

Had the issue been raised, it would no doubt have been open to Reeves either to show that the right of lien had been expressly waived or that for other reasons such a lien did not exist or was not available to the respondents.

It is, however, unnecessary further to inquire into the propriety of the decree of the court *en banc* in that respect,

(1) 1 Keen, 729, at pp. 747, 748.

(2) L.R. 1 Eq. 636, at the bottom of p. 639 and p. 640.

1924

WEBB v. DIPENTA

Rinfret J.

since the declaration of the existence of a lien was not really material for the purpose of arriving at the conclusion which has been reached. Counsel for the respondents has stated before us that he did not insist upon the maintenance of the lien and the objection of the appellant Reeves on that ground can be met by striking out from the formal judgment any reference to the existence of such lien and charge in favour of Webb as unpaid vendor.

In the result, it follows therefore that this court finds itself in accord with the disposition which the Supreme Court of Nova Scotia *en banc* has made of this case and with the relief which it has seen fit to grant to the respondents, save the declaration of lien, and subject to the further inquiry into the respective rights of the respondents as found by that judgment and those of the Canadian Bank of Commerce.

It is eminently satisfactory that the matters in controversy can be thus finally determined and further litigation avoided. This accords with the spirit of the Judicature Act.

While, however, pleadings may be amended at any stage in order to do justice, care should be taken that issues should not be determined without due notice and hearing, and this is a principle which we are sure is fully recognized by the Supreme Court of Nova Scotia, but unfortunately in this case, in working out a measure of equitable relief and directing the necessary amendments, the majority of the court failed to consider the possibly competing rights of the Canadian Bank of Commerce, which, as appears from the testimony of one of its local managers, had, in order to secure an advance to the appellant Webb, obtained from him an assignment of any moneys payable from a sale of the Monastery property which might include the moneys payable by Reeves. The court was not, however, lacking in inherent jurisdiction to correct this error and to give directions which would have avoided the necessity of this appeal, and it would have been good practice and in the interests of economy if the appellant Reeves had presented his grievance to the court when the judgment came to be settled, and the fact that he failed to do so would ordinarily be a reason for depriving him of the

costs of this appeal in accordance with the principle enunciated in *Tucker* v. *N. B. Trading Co.* (1); and *Wilson* v. *Carter* (2). The following observation of Lord Hobhouse in the latter case is applicable:

> Their Lordships do not doubt that the court has power at any time to correct an error in a decree or order arising from a slip or accidental omission, whether there is or is not a general order to that effect.

A fortiori of course the court has power to correct slip or an oversight in the judgment pronounced when settling the terms of a decree or order. His Lordship proceeded to say:

> Unfortunately the respondent did not take the proper course of applying to the Supreme Court to correct the accidental omission in the order granting leave to appeal. If he had done so no doubt the mistake would have been put right as a matter of course.

The suggestion was, however, made during the course of the argument, and it met with no denial, that this jurisdiction is not exercised in Nova Scotia, and, moreover, since the right of the bank was one of the grounds of dissent expressed by Mellish, J., the appellant Reeves may have considered that the question had not escaped consideration by the majority of the court. In these circumstances we are disposed to think that the appellant Reeves ought not to be deprived of his costs of this appeal; but, for the reasons which we have stated, this case must be regarded as an exception from the rule of practice which prevails in this court that costs will not be allowed for the correction of an error upon appeal which might conveniently have been set right by application to the court below.

For these reasons the appeal of the appellant Reeves should be allowed; the judgment should be varied by striking out the declaration of lien, and the action should be remitted to the Supreme Court of Nova Scotia to add the Canadian Bank of Commerce as a party and to inquire into and determine the respective priorities of the appellants and the bank with respect to the moneys payable under the agreement of sale from Webb to Reeves; further directions and subsequent costs reserved to the Supreme Court of Nova Scotia. The appellant Reeves should have his costs of this appeal.

(1) 44 Ch. D. 249.

(2) [1893] A.C. 838.

1924

WEBB v. DIPENTA

Idington J.

IDINGTON, J. (dissenting).—This appeal arises out of an action brought by respondents against appellants in which the former, suing upon an agreement giving an option, alleged by their declaration that appellant Webb had, in order to defraud respondents of their rights under said option, conveyed the land in question to his co-appellant, Reeves, who well knew such fraudulent purpose, and respondents sought to have the said conveyance to Reeves set aside, and specific performance of said option directed.

The learned trial judge who heard the evidence of Reeves accepted his story and found he had bought in good faith and for valuable consideration and paid a substantial part of the price.

The action was accordingly dismissed with costs. The respondents made no application to amend their pleadings, nor, so far as I can see, was the case fought out on any other issue than that raised by said pleadings.

On appeal to the Court of Appeal that court maintained said findings of fact, but seemed, by a majority, to discover some other cause of action that respondents might have in way of following the fruits of the sale from Webb to Reeves through a presumed vendor's lien that Webb might have in virtue of the sale made by him to Reeves, and allowed the appeal to that court.

I may say there was no evidence adduced on that point and indeed the pleadings would not, until amended, permit of such a trial.

It is by no means certain to my mind that, under the circumstances, a lien existed.

A vendor's lien is so often defeated by reason of the attendant circumstances that accompany or ensue upon the carrying out of a sale that I would be very loath to hold that one existed unless a straight issue, of that question of its existence, had been raised at the trial.

Moreover there does appear, accidentally as it were, evidence leading me to believe it quite probable that the agreement of Reeves with Webb had been entirely assigned by Webb to the Canadian Bank of Commerce as security. If so, the said bank would, even if the existence of a vendor's lien was put beyond peradventure, have to be made a party in order to protect appellant Reeves.

The last word may not have been said on the question of respondents' right to enforce the option they claim.

For the foregoing reasons and those assigned by Mr. Justice Mellish in his dissenting opinion, I think this appeal should be allowed with costs here and in the court below and the judgment of the learned trial judge restored; without prejudice, however, to the respondents' rights, if any, to bring another action for other causes of action, than the issue fully tried out in this action.

I cannot refrain from observing that by his factum respondents' counsel, though two courts below have decided against the cause of action set up, seems far from being convinced that it has no foundation.

Appeal allowed with costs.

Solicitor for the appellants: *R. M. Langille.*
Solicitor for the respondents: *Finlay MacDonald.*