

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of McLaren and another v. Murphy and another from Canada; delivered 17th July, 1872.

Present:

SIR JAMES W. COLVILLE.
SIR MONTAGUE SMITH.
SIR ROBERT P. COLLIER.

THIS was an Appeal from the Court of Queen's Bench in Canada, reversing the decision of the Superior Court in favour of the Plaintiffs (the Respondents).

The action was brought by the Respondents, who are merchants in Quebec, against the Defendants (the Appellants) also merchants in Quebec, to recover damages for the non-delivery of timber under a contract, which is in these terms:—

“ Quebec, 1st July, 1864.

“ J. McLaren and Co. sells and Arthur H. Murphy and Co. buys:

478 Red pine spars, at \$35
11 White pine masts, for \$520
And 1 Crib white pine, &c., at 15 cents per foot.

“ Terms:— $\frac{1}{3}$ Cash.

$\frac{1}{3}$ 60 days.

$\frac{1}{3}$ 90 days.—M. I. Wilson, Esq.—Paper indorsed by A. H. M. and Co. Spars, &c., to be delivered outside of Mr. Connolly's booms, free of charges, to-morrow, or as soon as they can be got out of the hands of the guardian; but purchasers not bound to take them if not delivered in one week, unless they like.

(Signed) “ J. MACLAREN & Co.

“ ARTHUR H. MURPHY & Co.

The circumstances under which the contract was made, which are necessary to explain its meaning, are as follows:—

In June 1864 a quantity of timber arrived at Cape Rouge, Quebec, marked with the initials of one

Meech, and which are stated to have been known as "Meech's lot." Messrs. Roche and Co. who were creditors of Meech, on the 21st of June commenced an action against him and issued a writ of *arrêt simple* (on mesne process) in pursuance of which the timber was seized, and one Rafferty was appointed guardian of it, in accordance with the Canadian Law.

Rafferty took the timber from Cape Rouge, to a cove in Woodfield harbour, in the possession of a Mr. Connolly, a timber merchant, and delivered it to Connolly for safe custody. Whereupon the following documents were signed respectively by Rafferty and Connolly:—

" Woodfield Harbour,
" 23rd June, 1864.

" James Connolly, Esq. :

" Sir,

" Hold raft of red pine spars, marked C. G. M., of which I am guardian, appointed by the Sheriff, in a cause of Roche and others against Meech, subject to my order. Raft supposed to contain between four and five hundred pieces.

" JNO. RAFFERTY,
" Guardian."

" Received the above-mentioned raft, which I will hold subject to Mr. John Rafferty's order, upon the usual terms and conditions, and without guarantee of the precise number of pieces.

" Woodfield Harbour,
" 23rd June, 1864.

" JAS. CONNOLLY."

On the 27th of June the Defendants, who claimed to be the true owners of the timber, intervened in the action of Roche and others *v.* Meech, and obtained a Judge's order for the delivery of it to them, that on good and sufficient security being given and upon payment by them, as condition precedent of *frais de garde*, and cove charges, *sauf répétition*, to be duly taxed and allowed, the said raft and spars were to be delivered over to the said James McLaren and John McLaren, the Intervenants in the present cause.

The costs under this order were not taxed, and consequently the timber did not become deliverable under it, until the 2nd of July.

On the 1st of July, Messrs. Burstall and Co., also creditors of Meech, issued a writ of *saisie arrêt simple*, in execution of which the bailiff seized this said timber, and appointed Connolly "voluntary" guardian of it—*i.e.*, guardian without payment,

which appointment was accepted by Connolly who signed the inventory made by the bailiff. At the same time Messrs. Burstall issued another writ termed *saisie arrêt en main tierce*, directed to the Sheriff of Quebec, requiring him "to attach by seizure and arrest in the hands of James Connolly . . . and James Maclaren . . . garnishees, all sums of money, &c., which they may owe to Meech, and all the moveable effects and estate belonging to him, to the value of 2,400 dols. . . . Meech is summoned to appear on the 1st September, the return day of the writ, and the garnishees are then required to attend to declare upon oath what effects of Meech they now have, or shall or will have in their hands."

It was on this day, "the 1st of July," that the contract sued upon was executed.

It does not distinctly appear whether it was executed earlier or later in the day than the issuing the writs in the second suit against Meech. The Court of Queen's Bench, however, assume that it was made with knowledge of the second as well as of the first seizure, and of the appointment of Connolly as guardian under that second seizure. Their Lordships do not doubt that assumption, which does not appear to have been disputed on either side, to be correct.

Before stating the construction which their Lordships put upon the contract, it is convenient to narrate the circumstances subsequent to it as well as precedent, which bear upon the case. On the 2nd of July the taxation of costs under the first order (in the suit of Roche and Co. v. Meech) was completed, but they do not appear to have been immediately paid.

On the same day a Mr. Forsyth was substituted for Connolly as guardian by a Judge's order in the second suit. It is stated that Forsyth, who was a friend of Maclaren, was so substituted at his instance with a view to facilitate the delivery of the timber to him.

It does not appear that Forsyth made any demand or application to Connolly for the delivery of the timber to him, or that he actually obtained possession of it, or made any attempt to do so.

On the 4th of July, the following document was signed by Connolly—

“Wood-field Harbour, July 4, 1864.

“I hold, subject to the order of Messrs. Maclaren and Co., Meech's lot of red pine spars placed in my hands by the Sheriff, viz., 478 red pine spars, 11 white pine masts, 16 pieces square white pine, 2 pieces square red pine—507 pieces.

“JAMES CONNOLLY.”

On the same day the Defendants took this paper to the Plaintiffs, and at their request endorsed upon it the following delivery order—

“Quebec, July 4, 1864.

“Please deliver the within-mentioned spars, masts, &c., to the order of Messrs. Arthur H. Murphy and Co., free of charges.

“T. MACLAREN AND Co.”

Connolly however refused to deliver the timber. His reasons for this refusal are thus stated by him in his evidence.

He says that he was induced to sign the document above-mentioned by this representation made to him by the Bailiff, accompanied by Mr. Maclaren one of the Defendants. “I was to give up the spars the seizures having been removed.”

This statement must be taken to have been made, for neither the Plaintiff nor Mr. Maclaren was called to contradict Mr. Connolly, and it was incorrect because the seizure of Messrs. Burstall was certainly still in force. He further says that Mr. Hearn who was his Attorney and also the Attorney for Messrs. Roche and Co., told him that he would not be safe in delivering the spars, that upon Mr. Hearn's suggestion he instructed him to get a guarantee from Messrs. Roche, which was subsequently given. He adds “If I had not got the guarantee or promise that I should have it, I cannot say whether I would have held the spars or not. It was in consequence of the *saisie arrêt* in my hands under which I was garnishee that I held them.”

In consequence of the refusal of Connolly to deliver the timber, Messrs. Murphy, on the 5th of July, signed a protest requiring Messrs. Maclaren to deliver it, and declaring that they would hold them responsible for all damages, &c., consequent on the non-delivery.

On the 7th July, Messrs. Maclaren intervening in the suit of Burstall *v.* Meech obtained from a Judge,

an order nisi, made absolute on the 8th of July, for the delivery to them of the timber subject to the payment (which does not then appear to have been made), of the costs and charges under the order of the 27th of June in the action of Roche and another *v.* Meech.

Connolly appealed against this order to the full Court, in consequence of which appeal the Judge declined to make any further order interfering with his possession of the timber. The appeal stood over for hearing during the long vacation, and was heard on the 6th of September, when it was dismissed. Connolly thereupon delivered the timber to the Defendants, who offered to deliver it to the Plaintiffs, the Plaintiffs however refused to receive it in consequence of a fall of the price of timber in the meantime, and commenced the present action.

The question turns upon the construction of the words of the contract "to be delivered to-morrow or as soon as they can be got out of the hands of the guardian."

It appears to have been admitted on the part of the Defendants that they were bound to use due diligence in order to effect this, and on the part of the Plaintiff that they were guilty of no default in this respect.

It was contended on the part of the Respondents, that the duty of the McLarens to deliver the timber became absolute as soon as the guardianship in the first suit was legally determined, or at all events as soon as Connolly, or whoever might be guardian, ceased to have the legal right to hold it as such in either suit—that when Forsyth was appointed, Connolly's legal right to hold ceased, or that, at all events, it ceased upon the Judge's order of the 8th of July being made. On the part of the Appellants it was contended that the Maclarens undertook no more than to deliver the timber as soon as they in fact got it out of the possession of the guardian, whether the guardian held possession legally or otherwise; that they did not, in fact, get it out of the hands of the guardian into their own, so as to be able to deliver it, till the 6th of September, when they offered to deliver it.

Their Lordships are sensible of the difficulty which frequently arises of defining the meaning of mercantile contracts, wherein, as in the present, the

parties are content to express themselves in loose and inaccurate language, and it is not without some hesitation that they have come to the conclusion that the construction of the contract contended for by the Appellants is the correct one. When the contract was made both parties to it knew that the timber was in the hands of a guardian or guardians appointed by law, and (as has been before intimated) their Lordships agree with the Court of Queen's Bench that they must be taken to have known Connolly to be the guardian or one of the guardians. The time was uncertain when it could be got out of the hands of the guardian so as to enable the McLarens to deliver it, that time might arrive the next day, or it might not arrive for more than a week, in which latter case the purchaser was protected from loss by being enabled to refuse the timber. Their Lordships think that it is not a reasonable interpretation of the contract to hold it to mean that the McLarens bound themselves to deliver the timber upon the accrual of the legal right to the possession—a right which might involve legal difficulties and which they could only enforce by action—and that it is rather to be inferred from the common and simple language used, that as between mercantile men, the actual and not the constructive, "getting out of the hands of the guardian," was intended. It appears therefore to their Lordships that the timber was not "got out of the hands of the guardian" within the meaning of the contract until September; that the McLarens were guilty of no default, and are not liable in damages to Messrs. Murphy. This view of the case makes it unnecessary to determine whether or not (as has been suggested) Connolly was acting fraudulently and in collusion with Messrs. Roche or their attorney. Connolly's legal right to detain as guardian terminated when Forsyth was appointed in his place, but he had also been served with a writ which required him to hold as garnishee all goods of Meech in his possession, and their Lordships think it by no means necessarily to be inferred that he acted fraudulently or collusively, because he did not undertake to determine that Burstall's claim to the timber as the goods of Meech was unfounded, and that the order in the former suit for delivery to the McLarens gave them a conclusive title against all the world. Upon the order being

made of the 8th of July, Connolly would have been protected in giving up the timber, and it would have been proper of him to do so. His appeal against that order may be regarded as obstructive, nevertheless, in appealing he exercised a legal right, and until the Appeal was decided he did in fact hold the timber under a claim to hold it by authority of the law.

It has been suggested that the undertaking by him on the 4th July to hold to the order of the Maclarens, constituted a contract whereby he became their warehouseman or wharfinger, and that thereafter his possession after that date was virtually theirs. Independently, however, of the question whether there was any consideration for such a contract, it appears to their Lordships that Connolly's evidence to the effect that he was induced to give the undertaking under a misapprehension caused by a misrepresentation of fact by the bailiff and one of the McLarens, uncontradicted as it is by either of those persons, must be taken to be true; and, if so, although the misrepresentation may not have been intentional, it seems to their Lordships that Connolly was not bound by this undertaking, and that the character of the possession was not changed by his giving it.

For these reasons their Lordships will humbly advise Her Majesty that the Judgment of the Court of Queen's Bench be reversed, and that of the Court below be affirmed, and the Appellants will have the costs of the Appeal.

*Judgment on the Appeal of Connolly v. McLaren,
from Canada; delivered at the same time.*

This was an action brought by the Messrs. McLaren against Mr. Connolly, "en guarantie," alleging that, in consequence of his wrongful detention of a raft of timber, of which they were the owners, they were unable to deliver it to Messrs. Murphy, in pursuance of a contract of sale to them; that Messrs. Murphy sued them for breach of contract and recovered damages, whereupon the Defendant was bound, as "garant," to indemnify them. Inasmuch as their Lordships have held in the principal suit that Messrs. Murphy had no cause of action against

Messrs. McLaren, they are of opinion that the foundation of this action fails, without determining whether or not the McLarens or any persons to whom by sale from them the property in the timber passed, might have a remedy by original action against Connolly for his detention of it. Their Lordships will therefore humbly advise Her Majesty to reverse the Judgment of the Court of Queen's Bench, and affirm that of the Court below; the Appellant will have the costs of this Appeal.