BROWNE v. BOTHA.

1909. *April* 6. MAASDORP, C.J., and FAWKES and WARD, JJ.

Pleading.—Exception.—Declaration.—Cause of action.—Pledge.—Conversion.—Damages.—Tender of debt.

Where A in his declaration alleged that B had disposed of a drill pledged to him for an advance to A, and prayed for a return of the drill or damages, less the balance of the debt still due to B, and B excepted on the ground that there was no cause of action by reason of there being no tender in the declaration of the amount due, *Held*, that the exception must be dismissed with costs.
Goate v. *Bergsma* (4 H.C.G. 369) not followed.

The plaintiff in his declaration alleged that in or about the month of May, 1906, he had delivered to the defendant a certain drill and accessories by way of pledge for the purpose of securing an advance of £60; that the advance—except £10—had been discharged by work done and expenses incurred in connection therewith by the plaintiff for the defendant at the latter's request; that the plaintiff had before action tendered the £10 and required the defendant to deliver the drill and accessories, but that he had refused; that the defendant had sold the drill and accessories, and had wrongfully converted the proceeds of the sale to his own use; and that the plaintiff had thus suffered damage to the extent of £318, being the value of the drill and accessories, less £10; and he claimed delivery of the pledge or £318 as damages.

The defendant excepted on the ground that the declaration disclosed no cause of action, as it appeared from the allegations that a portion of the amount for which the drill and accessories had been pledged—namely, £10—was still unpaid and had not been tendered in the declaration, and therefore no action was maintainable for the recovery of the pledge or damages.

Blaine, K.C. (with him *Borckenhagen*), for the excipient: When property is pledged in security of an advance, the law makes it a condition precedent to the recovery of the property or its value that the whole advance for which it was pledged shall be paid or tendered to the pledgee. Any tender previous to the action must be repeated in the declaration. See Voet, 13, 7, 6, and Peckius on *Arrest*, 567.

Turner (with him *Rorich*), for the plaintiff: This is not an action for failure to return or deliver the pledge, but for the conversion of the property pledged. It is clear that in an action of this nature it is unnecessary to tender that portion of the original advance that may still be due from the pledgor. It is sufficient to give credit for the amount in the claim for damages.

[MAASDORP, C.J.: You cannot mix up your two claims: they are alternative.]

The exception says that there is no cause of action. It may have been superfluous to require delivery of the property, and the excipient might have asked for that part of the prayer to be struck out; but there is still a cause of action. A right to an action of damages accrues as soon as the property pledged is disposed of by the pledgee. See *Stephens* v. *Whitford* ([1903] T.H. 231).

Blaine, K.C., in reply: The declaration is based on contract, not on tort. See *Goate* v. *Bergsma* (4 H.C.G. 369).

[FAWKES, J.: In that case the claim was made after default. Would it not make a difference?]

Voet, 13, 7, 4, and 6, taken together, mean that no right of action accrues, even for wrongful disposal of the property pledged, until after payment or tender of the debt.

[MAASDORP, C.J.: Par. 6 only refers to an action for the recovery of the property, not to one based on conversion. The property belongs to the pledgor, and you have disposed of it.]

His property in it is subject to my right of pledge.

MAASDORP, C.J.: The exception to the declaration in this case is very wide: it says that there is no cause of action. If Mr. *Turner* had confined himself to claiming the property while he still owed £10, he would have had to tender and to repeat the tender in the declaration. But he goes further: he claims damages for conversion, and says he is prepared to allow £10 to be set off. The declaration discloses sufficient cause of action for damages at any rate. As to the case quoted by Mr. *Blaine*, I do not understand the decision arrived at. I can only conclude that it has been insufficiently reported, and that the statement of facts is incomplete and erroneous. If it were a case exactly on all fours with this case I should be obliged to dissent from the judgment, because it does not seem to be based on equity or common sense. If, as in this case, property to the value of £318 has been sold, is it seriously contended that the pledgor is bound first to pay the £10 due, and does not till payment or tender acquire the right to sue for damages? Such a contention would be absolute nonsense. The argument Mr. *Blaine* has based on the passages he quoted from Voet does not carry the case as far as he thinks. In par. 4 Voet lays down generally that a direct action of pledge can be instituted for the recovery of the property pledged. He goes on to say that if the pledgee has disposed of it the debtor may recover the value. Then he says in par. 6 that the action will not lie unless the amount of the debt has been repaid in full to the creditor or unless it is due to something done by the creditor himself that it has not been paid.

In the present case the plaintiff claims the return of the property pledged or its value. All that is necessary for him to say is that he will allow the amount of the debt still due to come off the damages he claims. He asks that the property shall be returned or its value paid. If the property is returned he will have to pay the £10. As a matter of fact the property cannot be returned, and consequently he claims damages for conversion, less the £10 he still owes. Voet does not support Mr. *Blaine's* contention, and the exception must be dismissed with costs. As to the costs, I must say that it was quite unnecessary to have gone to the expense of having this exception set down

specially for argument. It might have been heard equally well on the day of trial, and if Mr. *Turner* had been prepared to insert a tender of the £10, the Court would have allowed an amendment.

Plaintiff's Attorney: *J. H. Beyers;* Defendant's Attorneys: *Fraser & Scott.*