

Reasons for the Report of the Lords of the Judicial Committee of the Privy Council on the Appeal of The McArthur Export Company v. J. B. Klock (carrying on business under the name of R. H. Klock and Company), from the Court of King's Bench for the Province of Quebec (Appeal Side) delivered the 24th January 1908.

Present at the Hearing:

LORD MACNAGHTEN.

LORD ROBERTSON.

LORD ATKINSON.

LORD COLLINS.

SIR ARTHUR WILSON.

[Delivered by Lord Robertson.]

When disentangled from a mass of details having no effect on its decision, this case stands out in singular simplicity. It is an action for goods, to wit timber, sold and delivered; and the allegations of the Plaintiffs (now the Respondents) are contained in ten lines of print. The sale alleged is by a written contract, produced; and the delivery is said, in the writ, to be detailed in an account produced, this document again being of excellent brevity and precision, covering only five lines of print, but stating all that was necessary, the pieces delivered, their sizes and the prices charged. The decree sought is for payment of the price of the wood.

The Appellants had refused to accept delivery of the wood tendered and they refused to pay. They admitted the contract but denied that what was tendered was conform to contract, either in size or in quality. In the present appeal, as in the Canadian Courts, the Appellants denied liability, and asserted that both in sizes

and in quality the wood tendered was disconform to contract. The two questions, of sizes and quality, were entirely separable. The facts about measurements were undisputed, while the question of quality was largely one of opinion. Their Lordships deemed it well first to hear the parties on the question of sizes without entering on the question of quality, and they have found the former to be decisive of the controversy. What is now to be said relates solely to the disputes as to sizes, and their Lordships find that the wood was disconform to contract.

Now, in an action of this kind, this much is clear, that the demand of the Plaintiff is that all that he tenders shall be accepted, and that all that is accepted shall be paid for, at the prices stated in the demand.

As the question is thus of the Appellants' liabilities under the contract, it is necessary that that document should be examined; and it is in the following terms:—

Messrs. R. H. Klock & Co., of Mattawa, sell, and Messrs. The McArthur Co., Limited, of Quebec, purchase all the White Pine timber, waney and square, and all the Red Pine timber made by the former during present winter, estimated about as follows:—

Block A lot, with a small quantity from Indian Reserve, all to be marked [K].

150,000 cubic feet White Pine, of which about one-quarter is estimated to be square, three-quarters waney, and 6,000 feet Red Pine. The waney pine is estimated to average not less than twenty-three feet lineal, or seventeen and a half inches girth; the square white pine thirty-seven feet cube, and the red pine forty feet cube. Liskeard lot made in New Ontario to be marked [K] O.

50,000 cubic feet white pine, of which about one-quarter is estimated to be square, three-quarters waney, and 4,000 feet red pine. The waney pine is estimated to average not less than twenty-three feet lineal, or seventeen inches girth; the square pine thirty-seven feet cube, and the red pine forty feet cube.

The two lots to be put together to ascertain all-round averages, but to be measured separately, and kept separate in specifications.

Prices to be as follows all round :—

Waney white pine, not less than 23 feet average lineal, if 16 inches average, 61c. ; 16½ inches average, 62c. ; 17 inches average, 63c. ; 17½ inches average, 64c. ; 18 inches average, 65c. Square White pine, if 32 feet average cube, 32c. ; 33 feet average, 33½c. ; 34 feet average, 35c. ; 35 feet average, 36½ ; 36 feet average, 38c. ; 37 feet average, 39½c. ; 38 feet average, 41c. ; 39 feet average, 42½c. ; 40 feet average, 44c.

Red pine at fair market value.

All per cubic feet, supervisor's measure, and to be paid for in cash less 2 p. c. thirty days after completion, or at sellers' option cash less 2½ p. c. on completion of delivery on cars at Quebec.

Settlement to be on supervisor's specification, as ascertained by supervisor's culler before loading on cars at Temiskaming.

Advances to be made by buyers against the Liskeard lot by their notes given in sellers' favour against timber made, and due as follows :—

\$3,000, 1-4 May ; \$3,000, 1-4 July ; \$3,500, 1-4 August ; \$3,000, 1-4 September, say \$12,500 in all. Said notes to come into settlement for timber.

The timber not to be inferior in make and quality to that seen by Mr. Joseph Boulet. Sellers will endeavour not to exceed twenty per cent. second class in waney.

R. H. KLOCK,
The McArthur Export Co., Lim.
ED. HARPER WADE,
Manager.

In duplicate.
Montreal,

24th November 1903.

The case went to trial in the Superior Court of the Province of Quebec ; and much evidence was given. On 27th December 1905, the Chief Justice gave the Respondents (Plaintiffs) judgment for the due balance of \$64,654 which he held to be the price. This judgment was

appealed against on both sides, but was, on 5th October 1906, affirmed by the Court of King's Bench, except to the extent of \$598.14 by which amount the sum awarded to the Respondents was increased. A different theory of liability was held in either Court.

The Respondents founded on the first part of the contract a very confident argument, which went so far as to show that the Appellants were bound to take all the White Pine timber and all the Red Pine timber made by the Respondents during that winter. They also made much of the fact that the language descriptive of sizes in the first part of the contract is that of estimate or expectation. This argument prospers so long as the latter part of the contract is ignored. But as there is no contract of sale without a price fixed or ascertainable, an argument so conducted beats the air. The liability of the Appellants is clearly that of a purchaser; and the prices he has got to pay define the things he has got to take. Under the heading "Prices to be as follows all round" the minimum sizes of waney wood for which payment is to be made are specified, with the relative prices. And it is highly important that this definition stands side by side with, and in marked contrast to, the statement that Red Pine is "at fair market value."

Comparing then the latter with the former part of the contract and reading it as a whole, it is plain that the liability of the Appellants as purchasers was only to take such waney wood as had got a price fixed for it in the contract. Further, no law was cited giving any countenance to the idea that it is a good tender to offer a mixed mass of goods, some conform and some disconform to the contract.

This, however, is what the Respondents did. Out of 2,278 pieces of one kind of wood, 240

were, in the view of both Courts, "too short"; and, out of 1,294 pieces of another sort, 408 were "too short." It seems to their Lordships that this is decisive of the case.

The Chief Justice, indeed, proceeded to ascertain the value of the "too short" pieces from evidence given at the trial and to make the Appellants pay that price for them. The Court of King's Bench discarded the "too short" pieces; but they reached substantially the same figure by raising the prices above those sued for in the action. The Appellate Court justified their conclusion by reference to the evidence of one Sharples, which, it was suggested rather than asserted, showed a custom of trade adverse to the Appellants. But a custom of trade involving so serious an alteration of the general law would require a broader basis than the evidence of one witness, and their Lordships do not find in Mr. Sharples himself the exponent of any more advanced doctrine than that, when it is for his advantage, he waives his rights, and when it is not, he adheres to them.

Their Lordships on the 14th December last agreed humbly to advise His Majesty that the Appeal ought to be allowed, the judgments in both Courts reversed, and the action dismissed, with costs in both Courts, and to direct the Respondents to pay the costs of the Appeal.

