

R. A. STEWART *et al* (PLAINTIFFS),.....APPELLANTS;

1893

AND

\*Mar. 9.

HENRY ATKINSON (DEFENDANT).....RESPONDENT.

\*June 24.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR  
LOWER CANADA (APPEAL SIDE.)*Sale of deals—Contract—Breach of—Delivery—Acceptance—Quality—  
Warranty as to—Damages—Arts. 1073, 1473, 1507 C.C.*

In a contract for the purchase of deals from A. by S. *et al.*, merchants in London, it was stipulated *inter alia*, as follows :—"Quality—Seller's guarantee quality to be equal to the usual Etchemin Stock and to be marked with the Beaver Brand," and the mode of delivery was f. o. b. vessels at Quebec, and payment by drafts payable in London 120 days sight from date of shipment. The deals were shipped at Quebec on board vessels owned by P. & Bros. at the request of P. & P. intending purchasers of the deals. When the deals arrived in London they were inspected by S. *et al.*, and found to be of inferior quality, and S. *et al.*, after protesting A. sold them at reduced rates. In an action in damages for breach of contract ;

*Held*, reversing the judgment of the court below, that the delivery was to be at Quebec, subject to an acceptance in London and that the purchasers were entitled to recover under the express warranty as to quality, there being abundant evidence that the deals were not of the agreed quality. Arts. 1507, 1473, 1073 C. C. The Chief Justice and Sedgewick J. dissenting.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) confirming the judgment of the Superior Court.

This was an action in damages for breach of contract for \$12,252.44. The facts as alleged by the declaration were as follows :—

That on the 10th November, 1880, at Quebec, the appellants then merchants in London, England, acting

\* PRESENT :—Sir Henry Strong C. J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

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through one Porteous their agent specially authorized for that purpose, made a contract for the purchase of certain quantity of deals with the respondent, a merchant in Quebec.

That the contract provided for the quantity, specification and price of the deals and the time at which they were to be ready for delivery. The mode of delivery stipulated for was f. o. b. vessels by respondent at Quebec.

Two clauses provided for "quality" and "payment" and read as follows :—

Quality.—Sellers guarantee quality to be equal to the usual Etchemin Stock and to be marked with the Beaver Brand.

Payment.—By acceptance of sellers' drafts payable in London at 120 days sight from presentation and exchange for bill of lading and shipping documents as each shipment is made.

That there was in the contract a further stipulation to the effect that should any of the goods remain unshipped on first of August the respondent was to have the option of drawing for the estimated amount of invoice for whatever quantity they had then ready for delivery, and in like manner on the first of November for any further quantity which they might have ready and not shipped.

That part of the deals were shipped at Quebec in September, 1881 and 1882, and on their arrival in London and when they had been piled in the docks, their defective quality was brought to the notice of the respondent, who was then in London.

That they were all paid for before they had reached London.

To this declaration, respondent answered as follows : Firstly, by a general denial, secondly, by a perpetual peremptory exception in which he alleged :

1. That J. S. Porteous, mentioned in the declaration, acted throughout in the execution of the contract as appellants' agent.

2. That before the deals had been all sawn and before the first cargo had been shipped, the appellants had already sold them to Price & Pierce, of London, represented at Quebec by Price, Bros. & Co. to whom, by appellants' instructions, contained in a letter of date the 8th September, 1881, the respondent was to deliver the goods.

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3. That the deals were delivered to Price Bros. & Co. as appears by the receipts for bills of lading produced.

4. That the deals were of the stipulated quality, as admitted by Price & Pierce, who declared that they were satisfied.

5. That before delivery, Price had caused the said deals to be measured and culled.

6. That respondent's drafts were paid by the appellants, without protest, after delivery of the deals by Price & Pierce.

7. That when the said drafts became due and were paid, the goods had passed into the hands of Price & Pierce, the appellants having no interest in them, and having sold them at a profit to Price & Pierce, who had resold the same.

To these pleas, the appellants replied generally.

The evidence as to the acceptance, delivery and quality of the deals is reviewed in the judgment of Mr. Justice Fournier hereinafter given.

*Fitzpatrick Q. C.* and *Ferguson Q. C.* for appellants contended that the proper construction of the contract was that the delivery was to be at Quebec subject to an acceptance in London. If so, there is abundant evidence that the deals were of an inferior quality and under articles 1507, 1473, 1073 C.O. the appellants were entitled to recover. Moreover, there being an express warranty, they could not bring their action under art. 1063 until they had sold the deals and therefore art. 1530 relied on by respondent does not apply.

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*Casgrain* Q.C., Attorney General of Quebec for  
 STEWART respondent, contended that the evidence of the  
 v. appellant on his own behalf was not admissible  
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 — in holding that there had been delivery and acceptance  
 at Quebec. This is nothing else than a redhibitory  
 action and it has not been brought within a reasonable  
 time. Art. 1530 C. C.

The Chief Justice was of the opinion that the appeal should be dismissed for the reasons given by the court below.

FOURNIER J.—Le 10 novembre 1880, les appelants, marchands de Londres, en Angleterre, par le ministère de Porteous, leur agent spécialement autorisé à cet effet, firent avec l'intimé un contrat pour l'achat d'une certaine quantité de madriers.

Le contrat mentionne les quantités, spécification, et prix des madriers et l'époque de la livraison.

Les autres clauses concernant la qualité et le paiement sont comme suit :

*Qualité.* Les vendeurs garantissent la qualité comme égale à celle du stock ordinaire d'Etchemin portant la marque de Beaver Brand.

*Paiement.* Sur l'acceptation de traites des vendeurs payables à Londres cent vingt jours après la présentation.

Le contrat contient aussi la stipulation que dans le cas où une partie des madriers vendus n'auraient pas été expédiée le 1er août, l'intimé aurait l'option de tirer pour le montant de la valeur des madriers qui seraient alors prêts à être délivrés, que pareillement au premier de novembre, il pourrait tirer pour toute quantité qui serait alors prête, mais qui n'aurait pu être expédiée.

Ce contrat fut fait à une époque où non seulement les madriers n'étaient pas faits, mais où même les billots

qui devaient servir à les faire n'étaient pas encore coupés, de sorte que la qualité des billots, la classification des madriers restaient entre les mains de l'intimé, la seule protection des appelants qui demeurent à Londres, étant la clause de garantie contenue dans le contrat.

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La preuve fait voir clairement que depuis nombre d'années les madriers manufacturés par l'intimé aux moulins d'Etchemin portaient une marque appelée le "Beaver Brand" et avaient une valeur particulière sur le marché de Londres, en conséquence de la qualité des billots employés à leur manufacture et particulièrement de la sévère inspection à laquelle ils étaient soumis. Les appelants se considéraient comme suffisamment protégés par la garantie que les madriers achetés seraient de qualité égale à celle du stock d'Etchemin portant la marque de Beaver Brand.

Les madriers ne furent expédiés qu'en septembre 1881 et les premières charges arrivées à Londres furent dans les docks où l'on pouvait facilement les examiner. Leur qualité inférieure fut constatée en novembre 1881, lorsque la première cargaison fut déchargée et l'intimé, requis de venir les voir, afin de juger par lui-même de leur qualité, refusa constamment d'y aller. Ce n'est qu'après plusieurs demandes à cet effet que l'appelant prit son action pour recouvrer la différence de valeur entre les madriers livrés et la qualité garantie par le contrat.

L'intimé a répondu à cette action par un plaidoyer, alléguant que les appelants n'avaient plus d'intérêts dans les madriers, les ayant vendus avant même que le bois fut coupé et avant la date de la première livraison et qu'ils avaient donné ordre de livrer tous les madriers à MM. Price et Pierce, de Londres, représentés à Québec par M. Price, Frères et Cie.

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Que l'intimé avait livré les madriers suivant les instructions reçues à cet effet, conformément aux termes du dit contrat.

Que MM. Price et Pierce avaient reconnu lors de la livraison que les madriers étaient conformes aux stipulations du contrat et qu'ils les avaient pris et reçus en s'en déclarant satisfaits et que l'intimé avait fidèlement rempli son contrat.

Que les dits Price et Pierce avant de recevoir les dits madriers les avaient fait examiner, mesurer et inspecter, et avaient constaté qu'ils étaient en tout égaux en qualité aux stock d'Etchemin, portant la marque "Beaver Brand."

Le plaidoyer allègue ensuite le paiement des dits madriers par l'acceptation des traites tirées sur les appelants et qu'à chaque acceptation des dites traites ainsi que lors du paiement d'icelles, les appelants se sont déclarés satisfaits de la qualité des madriers; que les appelants ont reçu de Price et Pierce tout le prix de leur bois, et ont cessé depuis d'avoir aucun intérêt dans ce bois qui depuis le commencement de l'année 1882 a passé en d'autres mains, sans aucunes pertes ni dommages, mais au contraire avec profit et avantage.

Sur cette contestation les parties ont procédé à l'enquête et la cause ayant été entendue au mérite, la cour Supérieure à Québec, a rendu jugement renvoyant l'action; ce jugement a été confirmé par la cour du Banc de la Reine.

Dans le contrat il est stipulé que le bois sera livré à Québec et le jugement déclare que MM. Price et Cie, après l'avoir reçu à Québec l'ont expédié aux appelants en Angleterre, sur leurs vaisseaux, ou vaisseaux loués par eux, conformément aux instructions des appelants; que les employés de Price Frères et Cie, avaient auparavant examiné ce bois et l'avaient trouvé conforme au

dit contrat et de la qualité connue sous le nom de Beaver Brand.

La preuve ne supporte pas ces considérants.

Messieurs Price Frères et Cie, n'ont point reçu le bois en question pour les appelants. L'honorable Evan J. Price, entendu comme témoin, dit positivement le fait. Sur des instructions reçues de MM. Price et Pierce de Londres, ils se chargèrent de fournir les vaisseaux pour transporter le bois en question en Angleterre. Il s'exprime comme il suit à ce sujet :

A. As far as my recollection goes, we received a cable from London, from Price & Pierce, requesting us to see to the shipment of these cargoes, that they had made arrangements with Stewart Brothers about them. We engaged ship here, and had the deals shipped to London—the deals were shipped by Atkinson, and not by ourselves and he handed us the Bills of Lading after the shipments were made. With the exception of giving Atkinson instructions about the shipping of the deals we practically had nothing to say to them.

A la question de savoir s'ils avaient des instructions concernant la qualité, le témoin répond :

A. It was giving orders for the vessels. We took up ships and gave orders to suit the stocks that might be on hand at the time.

Q. Had you, as acting for Price & Pierce, anything to do with the quality of the deals shipped, or with the accepting of them on their behalf, as being under the contract?

A. Nothing whatever.

Il affirme aussi qu'ils n'ont reçu aucune instruction des appelants et qu'ils n'ont agi que sur celles des MM. Price et Pierce.

Les MM. Price et Frères n'ont pas non plus fait recevoir et examiner le bois en question, ni pour les appelants ni pour eux-mêmes. Ce lot de bois étant sur le marché ils l'ont fait examiner pour leur information seulement, pour se tenir au courant du marché comme ils ont l'habitude de le faire.

Walter J. Ray, le foreman de leur établissement, dit aussi au sujet de la réception des madriers.

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We had nothing to do with the receiving or accepting of the deals here ; all we had to do was to see to their shipment under instructions from Price & Pierce.

Il est donc contraire à la preuve de dire que le bois a été reçu et approuvé par Price Frères, comme étant de qualité conforme au contrat.

On voit à la page 93 du dossier, une lettre des appelants informant l'intimé qu'ils ont vendu à MM. Price et Pierce le bois qu'ils ont acheté de lui ; mais cette vente ne paraît pas avoir été faite de suite, comme le fait voir la partie suivante du témoignage de M. Price.

Q. Did you become aware at any time after the receipt of that cablegram as a matter of fact Price & Pierce did not purchase these deals ?

A. Yes, I knew they did not, but they informed me themselves that they were only handling the deals for Stewart.

On voit aussi par le témoignage de T. L. Pierce, l'un des associés de Price et Pierce, que cette vente n'a pas eu lieu. Le rapport s'exprime ainsi :

He repeats his previous statement that the deals were sold by his firm on account of the plaintiffs (appellants), between 1881 & 1883 :

Price et Pierce n'ont en conséquence pas agi pour eux-mêmes dans la réception du bois, soit à Québec lorsqu'il a été mis dans les vaisseaux, soit à Londres, lorsqu'il a été déposé sur les quais. La livraison ayant été ainsi faite sans qu'il y eut quelqu'un de spécialement chargé de le recevoir, il n'est pas extraordinaire que ce bois se soit trouvé d'une qualité inférieure au point de faire dire à un témoin que les meilleurs mardriers semblaient avoir été triés avant l'expédition de la cargaison. La valeur en était beaucoup au-dessous des prix du marché.

Plusieurs témoins ont été entendus sur ce sujet et ont positivement établi le fait de l'infériorité de la qualité du bois et constaté que les appelants ont dû nécessairement souffrir des dommages parce que le



bois n'était nullement de qualité conforme à celle du contrat.

Pour constater ce fait, je me bornerai à donner quelques extraits des témoignages.

M. J. L. Pierce dit de plus :

That he knew of the contract and had seen it ; that the goods were put into the hands of his firm for sale by the plaintiffs ; that they had occasion to examine the same minutely, owing to a report that the quality was not what it ought to be ; that he had frequently had occasion, previous to 1881, to see these deals, and that he was able to speak with certainty as to their usual and ordinary quality ; that the deals in 1881 were not equal to the usual quality, and not equal to the average of previous years, the culling not so strict as it should have been, and usually had been ; and that the inferior quality prevented ready sale, causing extra dock charges and interest to a serious amount ; That he was aware the plaintiffs lost money ; that he knew that the deals were inspected and surveyed by Mr. W. Browning, a man of great experience in the timber trade ; that he knew as a fact that the culling was not in accordance with the usual culling of the Etchemin stock ; that the stock had been usually sawn from a run of logs of so good a quality that the brand had been a favourite one ; that the deals shipped under this contract were sawn out of logs totally different and of an inferior nature, and that the culling of even these was not so strict as it should have been ; that if the deals had come forward of the usual good quality, plaintiffs would have made a profit, and certainly no loss ; that they were finally realized for the plaintiffs ; that he had seen the Etchemin deals between 1867 and 1881, inclusive and visited the mills personally in 1866 or 1867 ; that the deals could have been sold for full market price, had they been of the ordinary Beaver Brand. He repeats his previous statement that the deals were sold by his firm on account of the plaintiffs between 1881 and 1883.

Mr. E. G. Price, autre associé de la maison Price et Pierce dans son interrogatoire dit :

That he knew of the contract which was handed to his firm in 1881 ; that he had seen the deals when they came into their hands for sale, and that he examined them minutely ; that he knew what the usual quality was, having had occasion to see them every year from 1872 to 1881 ; that he had frequently sold them and could speak with certainty as to the usual and ordinary quality ; that the deals shipped under this contract were not of the usual quality and not equal to the pre-

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vious years, owing to the first quality being coarser and containing more centre deals cut from smaller logs and the seconds and thirds being also coarse and not equal to the usual quality ; he knew the plaintiffs had lost money on the contract ; he knew of a survey by Browning which was made at the request of his firm for the purpose of ascertaining whether or not the deals had been shipped according to the usual custom at the Etchemin Mills, with the result that they were not considered equal to the usual quality ; and he produces Mr. Browning's letter which is attached to his evidence ; that he knew the culling was not as usual, having had occasion to examine the stock in previous years ; that he had sold some of these deals at 30 shillings per standard less than the figures at which they were selling other good deals ; that on the arrival of the deals they gave samples to different buyers at £11 10s. 0d. per standard, and all declined them although they wanted them badly ; that ultimately they sold them at £9 and £9 10s. when they were making for good deals such as they should have been £11 10s. and £12. He speaks of good deals arriving at the same time as these came in, and being sold readily at £11 and £12, while these deals were kept on hand for months and finally disposed of at reduced prices.

This was in reference to the first quality. Buyers of the second and third qualities, he stated, were very much dissatisfied with their purchases and declined to take more. He also states that being specially interested in the spruce trade he had seen and examined these deals every year from 1872 to 1881 ; that the deals should have brought £11 10s. for first quality, £9 for the second and £8 10s. for third, if they had been of the ordinary quality, and that they could have sold them at these prices ; that his firm had sold all these deals for the plaintiffs.

Mr. J. H. Howard, de la Société Pace & Sons, dit :

That he knew of the contract "quite recently" ; that he saw part of the deals when being landed and others afterwards, that he had occasion to examine them very minutely, his object being to purchase them for Pace & Sons for the purpose of making match boxes specially ; that he reported verbally to his firm that they were of inferior quality and that in consequence they did not buy them ; that he knew the usual quality known commonly as "Beaver Brand" ; that he had occasion every year since 1870 to examine them ; that from 1870 to 1875 he purchased them for Pace & Sons, (of which firm he was a partner) ; that he is able to speak with certainty as to the usual and ordinary quality ; that they were not equal to usual quality although marked with the "Beaver Brand" ; that they had 30 per cent of heart or centres and that usually the percentage was 3 per cent ; that he estimated

the difference in value from the usual shipments at 30 shillings per standard for first quality and 12s. 6d. for the third quality ; his firm did not buy second's ; that he knew that the culling was not according to usual culling, that the culling of the stock stood first in London ; that there were not deals like them ; that they fetched more in the London market than any other ; that the deals shipped under this contract were so inferior that they were perfectly useless for the purpose for which they had used them before ; that he knew that if they had been according to the usual quality, they would have fetched full market prices, which prices were higher than in 1879 or 1880 ; that he had seen and examined the stock in Quebec, in 1874, 1876 and 1878, and that he had seen and examined it elsewhere every year from 1870 to 1881 ; that he had made these examinations for the purpose of purchasing ; that the market was not a falling market but a rising one for first quality from 1879 ; he estimated the values ; first quality £11 10s. ; third quality, £8 and he knew that they could have been sold for these prices, because he had paid £11 10s. and £8 for goods inferior to the usual "Beaver Brand."

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M. E. D. Wilson, un marchand de Londres, dit :

That he had examined the deals minutely as an intending purchaser ; he speaks emphatically of knowing what the usual quality was ; that he had seen them for six or seven years previous to 1881, and that he had purchased them in very large quantities, he believed about 20 cargoes ; that the shipment under the contract in question was not equal to the usual quality, that they were inferior in respect of bad classification, the first quality being very "centry" and the second and third quality being very rough and inferior ; and he estimates the difference in value to the usual shipments at 20 shillings per standard on the first quality and 10 shillings on the second and third quality ; that he considered the culling was not the usual culling, and that the deals were distinctly inferior both in quality of wood and classification ; that he considered the contract would have been a good one for the plaintiffs if the quality had been right ; that he knew the deals from having purchased them from first class Quebec shippers who represented them as Etchemin deals under contract, describing them as such, also "Beaver Brand" ; that the market was not a falling one and he estimates the values at £11 for first quality, £8 15 0 for second quality and £8 for third quality, and knows that they could have been sold at these prices, because he was able to make a profit on them.

Robert H. Lightburn, un autre témoin, dit :

That he knew of the contract and he proves the payments, and due dates of the drafts drawn by defendant, and also proves that the

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deals were handled by Price & Pierce for the plaintiffs, and an account was rendered of the sales."

A. G. Sheriff dit :

That he knew of the contract and that the plaintiffs had bought the same stock of deals before in 1879 ; and that the deals in question in this case were not equal in quality ; he exhibits an account showing loss to the plaintiffs of £2,521 11s. 7d., proves the payment of the bills and puts in a table showing them to have been drawn between the 25th June, 1881, and the 15th December, 1881, and all paid ; he knew that the deals had been surveyed and the quality generally condemned ; describes his interview with the defendant, in which interview he urged him to go to the docks when in London to see the deals, and the indifference of the defendant to his request ; states that the Beaver Brand is a well known and favourite stock ; and that the quality of the shipments under this contract rendered them useless for what they were usually wanted, otherwise they could readily have been sold. He produces the account of sales, certified by Price & Pierce showing how the deals were sold for account of plaintiffs. He also deposes to having seen the survey of the late Mr. Browning, thus showing this gentleman's death previous to the closing of the commission and the consequent impossibility of examining him.

Tous ces témoins s'accordent à dire que le marché était alors plutôt à la hausse qu'à la baisse ; que la demande était bonne et que du bois de la qualité désignée au contrat se serait promptement vendu, au lieu que la vente de celui envoyé a été retardée.

Atkinson, l'intimé, se trouvant en Angleterre lors de l'arrivée d'une partie de son bois, fut informé par l'appelant de la qualité inférieure du bois, et invité à aller avec eux, l'examiner dans les docks. S'étant une fois rendu chez l'appelant qui se trouvait alors absent, il ne voulut plus y retourner quoique souvent requis de le faire, pour examiner le dit bois. Le dossier contient en outre plusieurs lettres des appelants se plaignant de la qualité du bois et lui demandant des instructions sur la manière d'en disposer ; mais il a toujours refusé de tenir aucun compte des réclamations des appelants. Enfin les appelants se sont décidés à s'adresser à la justice.

Je crois que les appelants ont fait une fort bonne preuve de leurs dommages et qu'ils ont droit à un jugement en leur faveur.

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Je suis d'avis que les dommages devraient être estimés à raison de \$3.00 par cent de madriers de première qualité, de l'étalon de St. Petersbourg (per hundred deals) et à raison d'une piastre et cinquante cents par cent madriers de 2e et 3e qualités de l'étalon de St. Petersbourg. Le tout avec frais et dépens.

TASCHEREAU J.—I would allow this appeal for reasons given by my brother Fournier. Damages \$3 per hundred St. Petersburg Standard for first class, and \$1.50 for second and third class.

GWYNNE J. concurred with FOURNIER J.

SEDGEWICK J. was of opinion that the judgment of the Court of Queen's Bench should be affirmed.

*Appeal allowed with costs.*

Solicitors for appellants : *Fitzpatrick & Taschereau.*

Solicitors for respondent : *Casgrain, Angers & Lavery.*