1925
*Nov. 18.
*Dec. 18.

PENINSULAR SUGAR COMPANY LIMITED (DEFENDANT) ..... APPELLANT;

AND

F. HOWLETT (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Sale of goods—Contract—Contemplating building a factory—Preliminary order of bricks—"About a million and a half"—Written order—"All brick required"—Breach of contract—Damages.

The defendant, an incorporated company contemplating building a sugar factory at Petrolia, wrote to the plaintiff, on September 29, 1922, asking a price on 500,000 brick f.o.b. Petrolia. In answer to this a price of $19 per thousand was quoted. This was met by a counter offer of $18. The plaintiff then suggested a price of $18.50. An interview followed as to which the only evidence is that of the plaintiff. The plaintiff says that Mr. Schoen, the defendant's president, stated

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that he would need about 1,500,000 of brick for the buildings and the plaintiff then agreed to deliver the bricks at $18. Following this interview and after the delivery had started, a letter was sent by the defendant to the plaintiff to confirm the verbal order given. Enclosed with this letter was an order form in which the goods sold were described as "all brick required for the Petrolia Sugar Factory, to be delivered at such time as ordered by us. * * * This is to confirm verbal order given your Mr. Howlett. Price $18 per thousand." Some half million bricks were delivered and paid for. In October, 1923, the defendant wrote to the plaintiff that it had decided not to use brick for the main building and would not be able to take any more. The plaintiff sued for breach of contract, declaring upon the written order.

Held that, although there were several expressions of expectation on the part of the defendant as to the quantity of bricks to be taken, there was no warranty and no fraudulent representations; that the purchase was not of 1,500,000 bricks, but merely of such brick as the defendant should require and order for the building of the factory, and that there had been no breach of the contract.

APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario, reversing the judgment of the trial judge and maintaining the respondent's action. —Appeal allowed with costs.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

H. J. Scott K.C. for the appellant.

G. W. G. Winnett for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The defendant company (appellant) was proposing to construct a sugar factory at Petrolia, to consist of a main building, sugar warehouse, boiler house, lime house and machine shop. The plaintiff (respondent) was a brick and tile manufacturer at the same place. By letter of 29th September, 1922, the defendant asked the plaintiff for a price for 500,000 bricks, f.o.b. cars at Petrolia, to be delivered that fall. On 30th September, the plaintiff wrote in reply, quoting a price of $19 per thousand, f.o.b. defendant's factory. A short time afterwards Mr. Schoen, the president of the defendant company, went to the plaintiff's brick yard and had a conversation with the plaintiff, of which the latter gives the following account:

He said, "Your price is too high." And I said, "I do not think so, Mr. Schoen. I have been getting $20; the Canadian Oil Company ordered brick from us and they gave us $20 for them." He said, "Oh well, they

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never bought only a few. This is practically—we will need a million and a half of brick. Look at the amount of brick we are using." He talked for a considerable time that way; anyway, before he left I asked him to make me an offer, "if $19 was too much make me an offer for them"; and he said "Well, I will give you $18 and give you the contract for all we need." "We will need about a million and a half," he said, "I have built these factories before and I know just what we will need," and he said "We will need that many anyway"; "but, (he says) you do not need to tell me now, you can sleep over it; let me know in a day or two."

On 28th October, the plaintiff wrote to Mr. Schoen that after considering his offer for $18 he had decided to meet him half way "which would be $18.50, f.o.b. sugar plant." While this letter was in transit Mr. Schoen called the plaintiff on the telephone. The plaintiff testifies to the conversation which then took place:

He asked me what I thought about the $18, and I said "We will split the difference, $18.50"; and he said "No, we will give you $18 and you can furnish all we need." He says "We will need about a million and a half." He said that quite a few times, so I told him "all right, I would accept the order."

The plaintiff says that he commenced to deliver "just a short time afterwards," before he received the written order to which I shall now refer. The date of the conversation by telephone, when the price was agreed upon, is not precisely fixed, but it must have been after the plaintiff's letter of 28th October, and before the letter of 4th November, which was written to the plaintiff by Mr. Schoen in the defendant's name as follows:

Enclosed please find purchase order no. 8 covering brick required for the Petrolia sugar factory. This is to confirm verbal order given you by the writer a few weeks ago. As we want to finish the sugar warehouse by Christmas at the latest, you are supposed to deliver at least 300,000 brick at such times that work may not be interrupted.

The purchase order enclosed was written on a printed form; I quote the material portion of it:

Nov. 4, 1922.

To F. Howlett:

Please ship to Peninsular Sugar Company, Petrolia, Ont., f.o.b. site, the following goods:

All brick required for the Petrolia Sugar Factory; to be of good quality kiln run brick, well burned and of uniform colour. Brick to be uniform in size and to be delivered at such time as ordered by us, so that our work may not be interrupted.

This is to confirm verbal order given your Mr. Howlett.

Price $18 f.o.b. site.

Peninsular Sugar Co., Limited,
Per A. Shoen.

The letter of 4th November, with the confirming written order, was received by the plaintiff, presumably in due course. There is no evidence of any answer to this letter, but the plaintiff says that

everything went along first class, there was no hitch came.

He delivered 504,000 bricks, for which he was paid, and I infer that these satisfied all the orders for delivery which he received. On 21st June, 1923, Mr. Schoen, in the name of the defendant company, wrote to the plaintiff:

As the board of directors of the Peninsular Sugar Company has decided not to start delivering brick again, until the arrangements for financing the company, which are at present pending are concluded, we hope that we will get to work again within two or three weeks.

You do not need to be alarmed about the amount of brick furnished us by J. J. Kerr & Co. as the amount is comparatively small.

There is no desire on our part to curtail your order, but as we could save a little money we purchased this brick. The amount still to be furnished by you is very considerable and am quite sure will keep you busy for quite a while.

And on 12th October, 1923, Mr. Schoen, in the defendant's name, wrote again to the plaintiff:

Kindly refer to our purchase order no. 8, dated November 4, 1922, covering our requirements in the brick for this plant.

Pleased be advised that we have now all the brick on hand that we need for the sugar-warehouse, boiler house, lime house and machine shop. It is not our intention to use brick on the main building, but in all probability will resort to reinforced concrete construction.

We therefore will not be able to take any more brick from your yards.

The action was commenced on 3rd November, 1923. The plaintiff, by his statement of claim, alleges that:

2. On or about the month of October, 1922, the defendant called for tenders for all brick needed for the erection of a factory in the town of Petrolia, estimated at one and a half million brick, f.o.b. their factory.

3. The plaintiff tendered to supply said brick at $19 per thousand.

4. Shortly after the plaintiff's tender was put in, the defendant company, through their president, offered to buy from the plaintiff their total requirements, estimated at one and half million brick, at $18 per thousand, which offer was accepted by the plaintiff, and on the fourth day of November, 1922, the defendant confirmed the said arrangement by giving the plaintiff purchase order no. 8, in the words and figures follows:

The purchase order, of which the material portion has already been quoted, is then set out in full, and, by the next following paragraph, it is alleged that:

5. In pursuance of the said order the plaintiff proceeded to manufacture and did manufacture, 850,000 bricks, of which 550,000 have been delivered to the defendant.

The defendant's letter of 12th October, 1923, is alleged as a breach of the contract, and the plaintiff claims damages for the breach.

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The defence is that the defendant engaged to purchase from the plaintiff only such number of bricks, of the description specified, as it might require for its Petrolia sugar factory, to be delivered as ordered, and to be paid for at the rate of $18 per thousand.

There is no dispute about the facts. I have stated in substance all the material evidence for the plaintiff. None was introduced on behalf of the defence.

The action was tried before Riddell J. of the Supreme Court of Ontario who, after consideration, found that:

> The defendants agreed to purchase from the plaintiff the quantity of bricks they should require for their factory—there were several expressions of expectation but nothing binding the defendants to take more than they should require. No fraud is charged, and I remain of the opinion, expressed at the trial, that the plaintiff is not entitled to claim for more bricks than the defendants required, i.e., in good faith determined that they should use. On the main ground therefore the plaintiff fails.

It developed at the trial that the defendant, after the making of its contract with the plaintiff, had purchased for its factory 100,000 second-hand bricks from J. J. Kerr & Co., Ltd., which, if bought from the plaintiff, would have yielded him a profit of $400, and for that amount the defendant was held bound, but as to that part of the claim there is no question upon this appeal. These are the bricks, purchased from J. J. Kerr & Co., referred to in the defendant's letter of 21st June, 1923, above quoted.

The plaintiff appealed from the judgment of Riddell J.; his appeal was heard by the second Divisional Court, and Middleton J.A., pronounced the judgment, reversing the judgment of the learned trial judge. The learned justice of appeal was of the opinion that the contract between the parties was an oral contract for 1,500,000 bricks; that although when the written order went forward the expression used was "all brick required," yet, in view of the fact that to complete the building as contemplated 1,500,000 bricks were necessary and would be required according to the plans,

> the failure of the plaintiff to note and repudiate the change in the expression used is not sufficient to defeat the action. "All brick required" is ambiguous and may as readily mean, as the plaintiff contends, all brick required to complete factory building as per plans and specifications, as all brick which the defendant may choose to use after making changes in their plans and substituting concrete for brick, as contended by the defendants and interpreted by the trial judge.

The appeal was therefore allowed, and the damages were

assessed at $4,000, for which amount the court directed judgment to be entered.

I am disposed, notwithstanding the judgment of the Court of Appeal, for which I entertain very great respect, to accept the findings of the trial judge.

If by the passage which I have quoted from the judgment on appeal it be intended to suggest that the expression "all brick required" was used anywhere in the correspondence or negotiations between the parties with express reference to plans and specifications of the buildings which the defendant proposed to erect, with the intention thereby of affording a means to ascertain a number of bricks which were to be the subject of the order, I must observe that there is no such evidence in the case; neither is there any proof upon which it can reasonably be found that the defendant intended by any stipulation with the plaintiff to restrict or qualify its freedom of design and choice of materials for the construction of its buildings. It would seem improbable that, as a business transaction, the defendant company would make arrangements for the supply of bricks for its projected factory which, in the event of enlarged requirements of material in the course of the work, would leave these requirements unprovided for, and, in case of a diminution of the building project, would involve the company in liability for loss of profit on the material comprised in the reduction. No plans or specifications were produced, and it is not shewn that the plaintiff ever saw any. There was no warranty or representation as to them. The plaintiff knew that some of the works were in course of construction, and that he had an order for 300,000 or perhaps 500,000 bricks, and an estimate that about 1,500,000 would be required altogether. Was it anything more than, as alleged in the statement of claim, an estimate? It would have been very easy for the parties to stipulate for the sale and purchase of 1,500,000 bricks if they had been so minded. When, on 29th September, the defendant wanted to purchase 500,000 bricks it submitted a definite inquiry for so many; there is no proof of any calculations or evidence that any requirements were definitely ascertained in excess of 500,000. Apparently, in 1922, the company had in contemplation to use bricks for the structure of the main building, and it was for this reason

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that Mr. Schoen said that they would need about a million and a half, and he fortified his statement by saying that he had built these factories before and knew just what they would need; it may be that the project of supplying the bricks for the main building influenced the defendant's consideration of the price; but there was no fraud, and therefore no representation the breach of which gave the plaintiff a right to damages. It is unlikely that the defendant would warrant the number of bricks to be used in the main building, which, consistently with the proof, had not even been designed; and, seeing that a warranty would have been given for no other purpose than to define or to ascertain the number of bricks to be purchased, it is remarkable that the parties would resort to this roundabout method when it would have been so easy to specify the number in the memorandum, if the company were willing to commit itself to a stated quantity. There is no warranty in the memorandum; the plaintiff made no objection to it as containing a fair statement of the terms agreed upon; he adopted and declared upon it in terms in his statement of claim. I see no ambiguity in its provisions. It calls for

all brick required for the Petrolia sugar factory.

There can be no requirement without a requiring will or intention, and it is expressly stipulated that the bricks are to be delivered at such time as ordered by the defendant. If one attempts to interpret the word "required" in an intransitive or passive sense, as the equivalent of "found requisite" or "necessary," immediately the difficulty is encountered that there is no standard set or defined by which a requisite or necessary quantity can be ascertained; neither the design nor the dimensions of the buildings nor the extent of the brick work have been made known, or are capable of definition or ascertainment, except according to the determination of the builder, and there is no proof of this, save the company's letter of 12th October, 1923, stating that it had then on hand all bricks needed for the structures mentioned, and did not intend to use brick on the main building, a conclusion which I think it was quite competent to the company to reach without incurring any obligation to the plaintiff.

There is a judgment of Lord Justice Bowen, *Fell* v. *The*

Queen (1), where a contract had been made between Her Majesty's Deputy Commissary-General and one Fell for the supply of mealies for the use of the troops in the Transvaal war. It was stipulated that Fell would provide and deliver for the use of Her Majesty's forces at Fort Napier, Natal, all such quantities of mealies as might be required for the period of twelve months from 1st April, 1881, and that the Commissary-General, on behalf of Her Majesty, would pay 11s. 9d. per 100 pounds. Fell, by petition of right, complained that the Government had purchased mealies from other sources during the continuance of his contract, but the learned Lord Justice held that it was for him to say as a judge what in his view was the meaning of the contract, and that, in terms, it imposed upon the Crown no obligation to take any mealies at all. The contract, he said, was in two parts, the first binding the contractor to supply all that was required, the other binding the Crown to pay for all mealies supplied. The question was whether the Crown had, by implication, made a contract certainly not made in terms. He pointed out that the contractor must necessarily receive orders for the quantities required, and he held that there was nothing in the contract, express or implied, binding the Government to take from the contractor all the mealies which might be wanted. See also *Churchward* v. *The Queen* (2); *The Queen* v. *Demers* (3).

It was found at the trial that there were in the negotiations several expressions of expectation, but nothing binding the defendants to take more than they should require. This finding commends itself to my judgment as just and reasonable and it should, I think, be restored. The rule enunciated by Holt C.J., that "an affirmation at the time of the sale is a warranty provided it appear on evidence to be so intended" was quoted with approval and followed in the House of Lords in *Heilbut, Symons & Co.* v. *Buckleton* (4), and Lord Moulton said at the end of his speech that

> it is of the greatest importance in my opinion that this house should maintain in its full integrity the principle that a person is not liable in

(1) [1889] 24 L.J. (Notes of Cases) 420; 87 L.T. 202.
(2) L.R. 1 Q.B. 73.
(3) [1900] A.C. 103.
(4) [1913] A.C. 30.

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damages for an innocent misrepresentation, no matter in what way or in what form the attack is made.

I would allow the appeal with costs, including the costs of the appeal to the Appellate Division.

Appeal allowed with costs.

Solicitor for the appellant: *R. G. R. MacKenzie.*

Solicitor for the respondent: *J. W. G. Winnett.*