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ADOLPH LUMBER COMPANY (DEFENDANT) ..... } APPELLANT;

AND

MEADOW CREEK LUMBER COMPANY (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Contract—Construction—Ambiguity—Cancellation—Acquiescence.

M., respondent, contracted to supply lumber to A., appellant, and to make "shipping regularly." Owing to slow shipments, A. wrote cancelling the contract. M. merely acknowledged receipt of the letter; but its manager, later on during a visit to A.'s mill, made no protest, according to evidence accepted by the trial judge.

Held, Idington J. dissenting, that the cancellation of the contract by A. was accepted by M.

Judgment of the Court of Appeal (25 B.C. Rep. 298), reversed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Clement J. (1), and maintaining the plaintiff's action.

The appellant and the respondent entered into an agreement in October, 1915, whereby the respondent was to supply 2,000,000 feet of lumber and load it on cars from its mills for shipment. It was agreed that the respondent was to "continue shipping regularly." Later on, the shipments being slowly made, the appellant wrote the respondent cancelling the contract. The respondent's manager acknowledged receipt of the letter; and going afterwards to the appellant's estab-

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*PRESENT:—Sir Louis Davies C.J. and Idington, Anglin, Brodeur and Mignault JJ.

(1) 25 B.C. Rep. 298; [1918] 2 W.W.R. 466.

lishment, he declared to two of appellant's employees, according to evidence accepted by the trial judge, that he could not blame the appellant for cancelling the contract. On the same occasion, the respondent asked the appellant to take nevertheless three carloads of lumber he had on hand, which was agreed to. Some months after, the respondent claimed damages for breach of the contract in the sum of $4,985.

Tilley K.C. for the appellant.
Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—In my opinion the contract on which this action was brought was so ambiguously worded that it was almost impossible to determine from its language what the parties really intended and meant to express.

In these circumstances we have the right and the duty, as by their subsequent conduct the parties have themselves put a construction upon the contract, to adopt and apply that as the proper construction.

I think the trial judge has reached the right conclusion that there was a cancellation of the contract by consent of the parties or, to put it in another way, that the cancellation by the appellant was accepted and approved of by the respondent company.

The learned trial judge says:—

> I think the matter may be put in either one of two ways: either that what took place was a cancellation by consent or that the plaintiff company is estopped from denying that the cancellation or repudiation by the defendant company was justified. I think myself that at the time both parties were contented to drop the contract and did so by mutual consent.

The contract being ambiguous in its terms and a construction having been placed upon it by the conduct and language of the parties, that construction will be accepted by the court as the true one. That con-

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struction justified the cancellation of the contract and the acceptance by the respondent company of the lumber Murphy's company had on the cars at Gateway was a concession to Murphy made, as the trial judge finds, at his solicitation, after he had expressed himself as being under the circumstances unable to blame the appellant company for cancelling.

The appeal should be allowed and the judgment of the trial judge restored with costs.

IDINGTON J. (dissenting).—Having regard to the fact that the respondent refused to be bound to a regular shipment of a specific quantity of lumber per day, and that both parties agreed to adopt instead thereof the ambiguous term of "shipping regularly" without defining either the length of time over which the contract was to run, or the quantities contained in each shipment so long as shipped in car loads of not less than twenty-five thousand feet in a car, I do not think the appellant was entitled under the circumstances in evidence abruptly to cancel the contract.

I think the judgment appealed from is right for the reasons assigned by the Chief Justice and Mr. Justice Gallagher respectively.

The appeal should, therefore, be dismissed with costs.

ANGLIN J.—I would allow this appeal and restore the judgment of the learned trial judge substantially for the reasons assigned by him and by McPhillips J.A. I incline to think that, having regard to the circumstances known to both parties necessitating punctuality in deliveries, there was such substantial default by the plaintiff as entitled the defendant to cancel the contract between them. But, if not, I am satisfied that the plaintiff's representative, Murphy,

believed this to be the defendant's legal right. The trial judge's acceptance of the evidence of Morrow and Griffiths puts that practically beyond question. Counsel for the plaintiff frankly admits his client's urgent need of inducing the defendant to accept the two cars of lumber shipped to it after its notice of cancellation and of obtaining money from it to meet pressing obligations. Moreover, Mr. Murphy expected to dispose more advantageously of the greater part of the lumber which he had contracted to sell to the defendant. Under these circumstances, it seems to me quite probable that he was prepared to, and did in fact, acquiesce in the cancellation of his company's contract by the defendant upon receiving the assurance that it would take and pay for the two cars of lumber then standing on its railway siding. At all events, I am, with respect, convinced that the finding of the trial judge to that effect is so well supported by the evidence that it should not have been set aside. The delay in bringing this action makes it reasonably certain that it was an afterthought.

BRODEUR J.—The first question is concerning the right of the Adolph Lumber Company to cancel the sale of timber which the Meadow Creek Co. had agreed to deliver. It was stipulated in the contract that the vendor would start shipping by the 10th of November, 1915, and would "continue shipping regularly." The vendor started to deliver in due time; but his mill required repairs and he had to stop for a few days to have those repairs made. He had, however, taken the necessary steps to procure the logs from its own lumber limits and from some others and he had shipped six cars, when, on the 30th November, the purchaser, without any previous notice and

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without inquiry, cancelled the contract on the ground that the vendor had not shipped the quantity contemplated by the agreement.

The contract in that respect is somewhat indefinite. When the negotiations took place, the purchaser wanted to stipulate a car a day, but the vendor would not agree to that because his mill was small and had not been in operation for two years, that in cold weather it was impossible to have such a small mill run at its full capacity, that the trains sometimes only ran three times a week and that the cars might not be billed out or picked up for days after they were loaded, all circumstances well known to the purchaser.

The lumber, after being sawn at the Meadow Creek Co's. mill at a thickness of two inches, had to be finished at the purchaser's planing mill, which was rather large and which, in order to be run properly, had to be supplied with a much larger quantity than the vendor's saw mill, even running at its full capacity, could supply. The purchaser had then a supply of lumber which came from some other mills but the supply of this became exhausted on the 27th of November. He had been in negotiation with some other saw mill owners in the vicinity to buy from them, but he was unsuccessful; so he was, on the 30th of November, getting short of the quantity of lumber to run his planing mill properly, even if the respondent had delivered 20,000 feet a day, viz., the whole quantity that his saw mill could cut, because the planing mill of the appellant had a capacity of 50,000 feet a day.

The way the Adolph company proceeded in cancelling the contract without giving to the vendor notice of its intention to do so and without making any inquiry as to whether the vendor could fulfil his contract proves to me conclusively that the motive which

determined the purchaser to cancel the contract was not due to the insufficient delivery by the vendor but to the fact that he could not get the necessary supply of lumber from other contractors to keep his mill running.

Suppose there had been a breach on the part of the vendor, it would not be such a breach as would justify the purchaser to rescind. The non-performance goes only to a part of the contract and it must imply a virtual failure of consideration to authorize the rescission.

This is a contract providing for delivery at certain intervals. In the event of breach of one of them the general rule is that the remedy must be by action unless the parties expressly agree that breach of a single shipment shall entitle the other party to treat the contract as abandoned or unless the party shews by his acts an intention to no longer be bound by his contract. *Freeth* v. *Burr* (1); *Withers* v. *Reynolds* (2); *Simpson* v. *Crippin* (3); *Honck* v. *Muller* (4).

In the case of *Mersey Steel & Iron Co.* v. *Naylor* (5), Lord Blackburn said that:—

> The rule of law * * * is that where there is a contract in which there are two parties, each side having to do something * * * if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going to perform my part of it."

In the present case, there is nothing to shew that it went to the root of the matter and I fail to see how the defendant company could be justified in cancelling the contract, as it has done.

The trial judge, who decided in favour of the Adolph Lumber Company, on another ground, stated

(1) L.R. 9 C.P. 208.
(2) 2 B. & Ad. 882.
(3) L.R; 8 Q.B. 14.
(4) 7 Q.B.D. 92.
(5) 9 App. Cas. 434.

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positively that the cancelling letter was absolutely unjustifiable.

The other question at issue is whether the respondent company acquiesced in the cancellation and released the purchaser from any liability arising out of the cancellation.

The trial judge has come to the conclusion that the plaintiff company acquiesced. It is true that after the notice of cancellation was received, the manager of the respondent company went to see the appellants to induce them to take delivery of two cars which had been shipped; and later on to obtain payment of the money which was due to him. In his evidence, that manager says that in those interviews the cancellation has not been discussed.

On the other hand, the witnesses of the defendant company say that the question of cancellation was taken up and that the manager of the respondent company stated that he could not blame the appellants for cancelling the contract. The trial judge accepts the evidence of the appellant company's witnesses. It is a question of credibility; and in that respect I should concur in the finding of the trial judge who saw the witnesses and could form a better opinion as to their veracity than a Court of Appeal.

On this ground I would reverse the judgment of the Court of Appeal and restore the judgment of the trial judge.

The appeal should be allowed with costs throughout.

MIGNAULT J.—That this is a case where there is room for doubt is shewn by the equal division of opinion among the learned judges who have so far dealt with it. The trial judge dismissed the respondent's action and his judgment was reversed by the Court of

Appeal with two dissenting judges. While I have not felt entirely free from doubt, I have nevertheless come to the conclusion that the judgment of the learned tria judge should be restored, for I cannot think that under any reasonable construction of the contract the respondent made regular shipments to the appellant.

It seems also difficult to hold under all the circumstances of the contracting parties, well known to each other, that this stipulation of regular shipments was not of the essence of the contract, and Mr. Murphy, the respondent's manager, frankly admitted that he was to ship to the appellant the entire cut of his mill, which amounted to 20,000 feet, or substantially one carload, per day. This he lamentably failed to do up to the date of cancellation.

But what entirely satisfies me is Murphy's conduct after the cancellation. He acknowledged receipt of the letter of cancellation without a word of complaint, he went to the appellant's establishment and declared to two of the appellant's employees, whose testimony the learned trial judge believed, that he could not blame the appellant for cancelling the contract, but he asked them to take nevertheless three carloads he had on hand, which they agreed to do. Subsequently Murphy went to Fernie to get some money from Mr. Adolph, the appellant's manager, to pay a note, and he does not think that he said anything about the cancellation of the contract, having then, he explains, a deal on with another concern covering a million feet of lumber, and finally, it is only on the 8th of February that his solicitor wrote to the appellant threatening suit. I cannot help thinking that, even if the appellant has not (and I believe it has) made out a case for the exercise of the right of cancellation, it has at least shewn that the respondent fully acquiesced in the can-

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cellation of the contract. Viewing all the circumstances of the case, I have come to the firm conclusion that the Court of Appeal should not have disturbed the findings of the learned trial judge.

The appeal should, therefore, be allowed with costs here and in the court below and the judgment of the trial court restored.

Appeal allowed with costs.

Solicitors for the appellant: *Herchmer & Martin.*
Solicitors for the respondent: *Lawe & Fisher.*