1925
*Oct. 15.
*Dec. 10.

CALIFORNIA PRUNE AND APRICOT GROWERS, INC. (PLAINTIFF)..... APPELLANT;

AND

BAIRD AND PETERS (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPEAL DIVISION OF THE SUPREME COURT OF NEW BRUNSWICK

Agency—Contract—Sale of goods—Conditions—Warranty—Routing of goods—Right to repudiate

The appellants, under a written contract entered into on the 27th May, 1920, sold to the respondents one carload of prunes, growers' brand, to be delivered f.o.b. Pacific Coast shipping point. The contract contained four terms and conditions which were given special prominence, viz.,—"Destination—St. John, N.B.; Routing—Delivery routing may be given later; Consigned to—Order of seller; Time of shipment—October." Other terms of importance were: "Boxing specifications may be changed by buyer, provided such changes are received at this office prior to September 1, 1920." "Seller shall, where possible, recognize routing named by buyer, but seller has option of selecting the initial line." "No unimportant variation in the performance of this contract shall constitute basis for a claim." "Brokers or salesmen not authorized to sign this contract nor change terms or wording without written authorization by the seller." The sale was arranged through a representative of Sainsbury Bros., who advertised themselves to be the "direct representatives in Canada" of the appellant with its knowledge and acquiescence. Boxing specifications were given by the respondents to the agent and the same were acted upon by the appellant, and later routing instructions were given in writing to the agent and provided that the car should be routed C.N.R. from Chicago to destination. The car was, in fact, routed C.P.R., and upon its arrival in Saint John

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) [1907] Q.R. 31 S.C. 133.

(2) [1913] 48 Can. S.C.R. 137, at pp. 139, 141, 149, 153, 154, 160, and 161.

the respondents refused to accept the goods, holding that the failure to comply with their routing instructions was an important variation in the contract entitling them to repudiate. The appellant thereupon brought this action to recover damages for the alleged breach of contract.

Held, that the notice to the agent as to the routing of the goods was given in the manner contemplated by the contract.

Held also, that the mode of shipment is a material and indeed an essential term of the contract. The consequence is that its non-performance is not "an unimportant variation," which should in the present case be excluded as constituting a "basis for a claim," but on the contrary "may fairly be considered by the other party as a substantial failure to perform the contract at all." (*Wallis* v. *Pratt* [1911] A.C. 394).

APPEAL from a decision of the Appeal Division of the Supreme Court of New Brunswick, affirming a judgment of the trial judge, Mr. Justice Crockett, and dismissing the plaintiff's action. Appeal dismissed 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.

Wallace K.C. and *W. R. Scott* for the appellant.

Harrison K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—By a contract made in writing and dated the 27th day of May, 1920, the respondent (a New Brunswick firm), bought and the appellant (a California company), sold one carload of prunes to be delivered f.o.b. Pacific Coast rail shipping point.

The following terms and conditions were set forth on the contract with special prominence:

Destination: Saint John, N.B.
Routing: Delivery routing may be given later.
Consigned to: Order of seller.
Time of shipment: October.

There were further stipulations, amongst others, as follows:

Boxing specifications may be changed by buyer, provided such changes are received at this office (meaning no doubt the office at San José, California), prior to September 1, 1920.

Seller shall, where possible, recognize routing named by buyer, but seller has option of selecting the initial line.

No unimportant variation in the performance of this contract shall constitute basis for a claim.

Brokers or salesmen not authorized to sign this contract nor change terms or wording without written authorization by seller.

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On October 15, 1920, the appellant shipped from Red Bluff, California, to the respondent at Saint John, N.B., and consigned to the order of the appellant a carload of prunes of the brand and assortment conforming to the specifications provided by the respondent.

The carload of prunes was sent from Chicago to Saint John, N.B., over the line of the Canadian Pacific Railway and arrived in Saint John early in December.

The price of the prunes, with the freight added, amounted to $8,604.21. A sight draft for that amount, with bill of lading attached, was presented to the respondent, who refused to accept it. They moreover disclaimed any obligation on their part to receive the prunes and to pay for them. Their ground was that, by a notice in writing, they had directed the appellant to route the carload of prunes via Canadian National Railways from Chicago; that the appellant had failed to comply with the terms of this notice, which were in effect part of the contract; that the change in the routing as ordered was an important variation in the contract and that they were thereby relieved from any liability.

Whether the breach complained of gave rise to a right to reject the prunes and treat the contract as repudiated is therefore the important question to be determined in this case.

There is, however, another point raised by the appellant and which must first receive our attention.

It is admitted that no notice of delivery routing was given to the appellant direct; but, by letter under date of August 30, 1920, the respondent requested W. S. Clawson & Co., of the city of Saint John, to instruct the appellant to ship the carload of prunes by Canadian National Railway from Chicago to Saint John. The appellant alleges that this was not a delivery routing given in the manner contemplated by the contract.

As against this contention, there stands in the appellant's way the concurrent findings of the two courts of New Brunswick. The trial judge said:

> I have not the slightest doubt of the truth of Mr. Clawson's evidence and have no hesitation in finding that he negotiated this contract with the defendants as the agent of Sainsbury Bros. Neither have I any doubt that Sainsbury Bros. were the direct representatives in Canada of the plaintiff as they advertised themselves to be, and as the plaintiff by its

circular letter of February 15, 1919, addressed to Canadian buyers, informed the trade in Canada they were. I am of opinion that the defendants gave the delivery routing in the manner contemplated and in ample time to entitle them to have the goods shipped as directed by them.

Mr. Justice White, delivering the unanimous judgment of the appeal division of the Supreme Court of New Brunswick, confirms the holding of the trial judge in these words:

I have carefully read the evidence in the case and am satisfied that the learned judge could not properly have found the facts otherwise than as he found them.

On this matter, therefore, the appellant finds itself in a position of considerable difficulty.

It is not disputed that Mr. William S. Clawson was the agent of Sainsbury Bros. at Saint John.

A member of the firm of Sainsbury Bros., Arthur H. Sainsbury, was asked what was its chief business. He answered:

It was the agent for Canada for the California Prune and Apricot Growers, and three or four other California dry fruit concerns.

He states there was no agreement in writing, but said:

We had a letter that they (the appellant) had issued to the trade in Canada advising that we were the agents for the Canadian territory for the sale of their products.

This letter was produced. It is dated at San José, March 14, 1918, and reads:

This will introduce Mr. A. H. Sainsbury, who, with his brother, Mr. G. O. Sainsbury, will be the direct representatives of the California Prune & Apricot Growers Inc., in the Dominion of Canada.

(Sgd.) CALIFORNIA PRUNE & APRICOT GROWERS, INC.,
H. G. COYKENDALL,
General Manager.

This was supplemented by a circular letter from the appellant addressed "to Canadian buyers," on February 15, 1919, which states:

We have just completed our arrangements with the firm of Sainsbury Bros. for our exclusive and direct representation throughout entire Canada * * * We feel that the interests of this association and the interests of the wholesale trade of Canada as well will be in the proper hands, as Sainsbury Bros. have been with this association ever since its incorporation and are thoroughly conversant with the prune and apricot business from start to finish. We feel that no one is better qualified to handle a prune and apricot account. * * * * Furthermore, it is only through Sainsbury Bros. that you will be able to purchase our "Sunsweet brand" of either prunes or apricots.

On their own letterheads, Sainsbury Bros. styled themselves "direct representatives" of the appellant. These were used regularly in their correspondence with the latter and no exception was taken by them.

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In 1919, the year before the present contract, the respondent purchased a carload of prunes from the appellant. The bought and sold note then given to the respondent by Mr. Clawson was signed by Sainsbury Bros. Again it described them as the representatives of California Prune and Apricot Growers Inc., and asserted that they sold "for account of California Prune & Apricot Growers Inc." This contract was acted upon by the appellant, who then treated Sainsbury Bros. as their agents for purposes of receiving boxing specifications and routing instructions.

On such previous occasion, the course of dealing between the parties was exactly the same as that followed in the present case. In fact, it appears to have been the almost invariable practice for the buyer to give routing instructions in the manner which is shown to have been adopted here.

Moreover, all negotiations regarding the present contract took place between the respondent and Mr. Clawson. The appellant never had any correspondence with the respondent. Any communications on its behalf were given to the respondent by Sainsbury Bros. through Clawson. It was the latter who arranged the sale, took the written contract to the respondent to be signed, and later was requested to find out from the respondent and got from them the specifications as to assortment and boxing and also as to routing.

The respondent's instructions with regard to boxing specifications were given in precisely the same way as their routing instructions; no exception was taken to the method of notifying the sellers and the notice so given as to the former was acted upon.

Under all these circumstances, and even although there may be on the part of the traffic or sales managers of the appellant some statements, here and there, tending to the contrary, it is impossible to conclude that the concurrent holdings of the two courts below should be reversed.

It must be taken therefore that Sainsbury Bros. were the agents of the appellant and that they had authority to receive on its behalf routing instructions in connection with the contract in question.

It follows that the notice in the letter of August 30 from the respondent to Mr. Clawson:

bill our car of prunes to Saint John and route it Canadian National Railway from Chicago

amounted to a stipulation which, having been made in ample time, must be read into the contract.

There remains the question whether the breach of this stipulation gave rise to a right to reject the goods.

The law is now well settled that in mercantile contracts the time and the place of shipment are material or essential parts of the description of the goods sold and full compliance therewith is a condition precedent to the seller's right to recover.

In *Bowes* v. *Shand* (1), the contracts were for 8,200 bags of rice to be shipped at Madras during the months of March and April. The bags of rice (outside of 1,080), were put on board vessel, at Madras, in February. The rice was refused because it had not been shipped during March and April. The House of Lords held that the contract had not been complied with.

Norrington v. *Wright* (2), is a decision of the Supreme Court of the United States to the same effect. The time of shipment was there declared to be a material element in a contract, which must be strictly complied with and a breach of which justifies repudiation of the goods by the buyer.

The same court, in the case of *Filley* v. *Pope* (3), held that the place of shipment was also

a statement descriptive of the subject matter or of some material incident.

in a mercantile contract, and was to be regarded as a condition precedent, upon the non-performance of which the party aggrieved may repudiate the whole contract.

In that case, Pope & Bros., of New York, had sold to Mr. Filley, of St. Louis, 500 tons of pig iron to be shipped from Glasgow as soon as possible. The pig iron was shipped from Leith instead of Glasgow, because an earlier vessel could be got from that port. The iron in fact arrived sooner than if it had been shipped at Glasgow. The pig iron was refused on the ground that the seller had not complied with the terms of the contract as to place of shipment. In an action for non-acceptance, and without any evidence of damage being adduced, this sole ground of rejection was held good.

(1) [1877] 2 App. Cas. 455. (2) [1885] 115 U.S.R. 188.
(3) [1885] 115 U.S.R. 213.

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It will be well to examine the reasons given in these cases to see how far they can be made to apply to the present one.

In *Bowes* v. *Shand* (1), Lord Cairns L.C., said (p. 463):

My lords, if that is the natural meaning of the words, it does not appear to me to be a question for your Lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contract stipulations to which they do not attach some value and importance, and that alone might be a sufficient answer.

* * * * *

My Lords, I must submit to your Lordships that if it be admitted, as the Lord Justice is willing to admit, that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning, it is no observation which can dispose of, or get rid of, or displace, that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers without any real cause would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfilment of any term in any contract is a means by which a purchaser is able to get ride of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled.

Lord Hatherly said (p. 474):

Now under these circumstances, and with the plain meaning of the contract lying, as it appears to me, on its surface, we are not entitled to speculate on the reasons and motives which have induced those who are engaged in this particular trade, those who have this "usual run," as the witness describes it, of contracts before them from time to time, and who must have pondered upon the matter, to frame their contracts in the manner which pleases them best.

Lord O'Hagan said (p. 479):

I do not think that we are at liberty to speculate as to motives, or to consider what comparative benefit might practically have arisen from a shipment in February or a shipment in March.

Lord Gordon said (p. 485):

Now, the terms which are used in these contracts are naturally the result of the intelligence of the merchants who are engaged in making them, and we may rely upon this, that they have considered well the terms of the contract before they entered into it. What your Lordships are proposing to do is to adhere to the words of the contract.

In *Filley* v. *Pope* (2), Mr. Justice Gray said (p. 219):

The court has neither the means, nor the right, to determine why the parties in their contract specified "shipment from Glasgow," instead of using the more general phase "shipment from Scotland," or merely "shipment," without naming any place; but is bound to give effect to the terms

(1) 2 App. Cas. 455. (2) 115 U.S.R. 213.

which the parties have chosen for themselves. The term "shipment from Glasgow" defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment, nor does the buyer agree to accept iron shipped, at any other port. The buyer takes the risk of delay in getting shipment from Glasgow or of delay or disaster in prosecuting the voyage from Glasgow to New Orleans. But he does not take the risk of delay or of sea perils which may occur in the course of the different voyage from Leith to the same destination.

There does not seem to exist any sound reason why the principles thus enunciated with regard to time and to place of shipment should not receive equal application to a stipulation in respect of mode of shipment.

Lord Blackburn, in *Bowes* v. *Shand* (1), had already said (p. 480):

It was argued, or tried to be argued, on one point, that it was enough that it was rice, and that it was immaterial when it was shipped. As far as the subject matter of the contract went, its being shipped at another and a different time being (it was said) only a breach of a stipulation which could be compensated for in damages. But I think that that is quite untenable. I think, to adopt an illustration which was used a long time ago by Lord Abinger, and which always struck me as being a right one, that it is an utter fallacy, when an article is described, to say that it is anything but a warranty or a condition precedent that it should be an article of that kind, and that another article might be substituted for it. As he said, if you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at *Madras* or the coast of *Madras*. Equally good rice might have been shipped a little to the north or a little to the south of the coast of *Madras*. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the *Rajah of Cochin*. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped in this particular region, at that particular time, on board that particular ship, and before the defendants can be compelled to take anything in fulfilment of that contract it must be shewn not merely that it is equally good, but that it is the same article as they have bargained for—otherwise they are not bound to take it.

Benjamin on Sale (6th ed., p. 679), expresses the view that

the extract from Lord Blackburn's opinion above quoted shows that the place or mode of shipment may be as material a part of the description of the goods as the time.

At p. 401, the same author had written:

* * * if a particular mode of transmission be expressly or impliedly prescribed by the contract, as, for example, delivery to a specified carrier

(1) 2 App. Cas. 455.

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or by a particular route, the goods must be delivered to that carrier, or by that route.

See also Williston on Sales, 2nd ed. 585-587.

Moreover, this very question came up squarely for decision before the British Court of Appeal in the case of *L. Sutro & Co.* v. *Heilbut, Symons & Co.* (1).

The contract was for the sale of rubber

to be shipped during the months of March, April, 1916, by vessel or vessels (steam or motor) from the east to New York direct and/or indirect with liberty to call and/or transship at other ports.

The cargo was sent by steamship to Seattle and thence by rail to New York. The buyers refused to accept it because it had not been conveyed by sea to New York. No particular damage was shown.

Under a clause in the contract, the buyers' objection was submitted to arbitration; and the arbitrators found that, owing to the outbreak of war, it had become usual, at the time of this contract, to send by sea and rail shipments from the east which heretofore had gone the whole distance to New York by water. It was well known to those engaged in the trade that rubber sold on contracts in the form of the one in question would be forwarded by steamer to a port of the United States; hence they would be transmitted by rail to destination.

The Court of Appeal however held, affirming Mr. Justice Lush

that the contract provided for a sea carriage from the port of loading to New York; that the usage (assuming it was a usage), found by the arbitrators was inconsistent with the terms of the contract, and therefore was not applicable thereto; and that the tender was not a good tender and the buyers were not bound to accept the same.

Swinfen Eady L.J., delivering the judgment of the Court of Appeal, said (page 355) that it was not necessary for the buyers

to justify in a court of law the mercantile reasons for inserting any particular stipulation in a contract. The observations on this point of Lord Cairns in *Bowes* v. *Shand* (2) are very relevant.

He then proceeds to quote from Lord Cairns' judgment in the latter case the passage at page 463 to which reference has already been made above; and he goes on to say:

The court assumes that a merchant, in entering into a mercantile transaction, has regard to his arrangements for paying for goods purchased, and his intention about reselling them in the ordinary course of his trade.

and he concludes by saying that

(1) [1917] 2 K.B. 348. (2) 2 App. Cas. 455.

where a particular method of conveyance is stipulated for, it is not permissible to inquire whether there is not some other usual method; and a finding that there is another usual method is irrelevant.

The same underlying principle will be found in this decision of the Court of Appeal as in *Bowes* v. *Shand* (1) and *Filley* v. *Pope* (2) that

it is not for the court to speculate on the reasons or motives which have induced the parties to a mercantile contract to agree upon any particular term or to consider what practical benefit might have arisen from the performance of any particular term of the contract.

In the words of Williston on Sales, 2nd ed., p. 585,

the property will not pass if the goods are too many, or too few, or they are sent at a materially different time, or by a different route or method of shipment, or are misdirected. *Bidwell* v. *Overton* (3).

In that view, the mode of shipment is a material and indeed an essential term of the contract. The consequence is that its non-performance is not "an unimportant variation" which may, under the present contract, be excluded as constituting a "basis for a claim;" but, on the contrary,

may fairly be considered by the other party as a substantial failure to perform the contract at all.

(*Wallis* v. *Pratt* (4)).

If it were necessary, attention may be drawn to the fact that in the contract itself the parties, in this case, have given to "routing" the same conspicuous place as they have to "destination," "consigned to" and "time of shipment." These are the four conditions of the contract which appear to have been singled out as specially important.

When instructing Mr. Clawson, on the 30th August, the respondent wrote:

We want you to be particular to call their attention to the routing, as this car must come by C.N.R. from Chicago.

And, when transmitting these instructions to his principals, Mr. Clawson in turn insisted:

Be sure and see that car comes "Canadian National Railway from Chicago."

Moreover, the variation in the routing of this shipment has proven in the event to be of importance to the respondent. The evidence shows that the latter had an agreement with the Canadian National Railway for the hauling of its carload from Chicago to Saint John, whereby it would have been able to ship portions of the carload to its branches in New Brunswick while the car was in transit. The breach made this impossible.

(1) 2 App. Cas. 455.
(2) 115 U.S.R. 213.
(3) 26 Abbott's Cas. N.Y. 402.
(4) [1911] A.C. 394.

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Both courts in New Brunswick have decided that the appellant's action to recover damages for non-acceptance of the prunes should be dismissed with costs. For the reasons which we have given, we think those decisions ought to be upheld.

Appeal dismissed with costs.

Solicitors for the appellant: *MacRae, Sinclair & MacRae.*
Solicitors for the respondent: *Barnhill, Sanford & Harrison.*