1924
*Feb. 28.
*April 22.

THE T. H. VAN DYKE COMPANY (PLAINTIFF) ..... APPELLANT;

AND

THE LAURENTIDE COMPANY (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Contract—Sale—Pulpwood—"1920 cut"—"About 4,000 cords"—Construction.

The appellant sold to the respondent a certain quantity of pulpwood described as follows: "All our rough pulpwood now hauled and being hauled (1920 cut) about four thousand cords, 4,000 cords * * *."

Held, Idington J. dissenting, that in the circumstances of this case the subject matter of the sale was the entire cut of 1920, the words "about 4,000 cords" being mere words of estimate as to quantity.

Judgment of the Court of King's Bench (Q.R. 34 K.B. 565) reversed, Idington J. dissenting.

APPEAL from the decision of the Court of King's Bench, Appeal Side, province of Quebec (1), affirming the judgment of the Superior Court (1) and dismissing the appellant's action.

*PRESENT:—Idington, Duff, Mignault and Malouin JJ. and Maclean J. *ad hoc*.

(1) [1923] Q.R. 34 K.B. 565.

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The appellant's action was brought against the respondent company upon an agreement for the sale of pulpwood, the terms of which were contained in a letter by the appellant dated December 23, 1920, confirming a verbal understanding, as follows: "We beg to confirm sale of all our rough pulpwood now hauled and being hauled (1920 cut) about four thousand cords (4,000 cords) * * *." The appellant contends that under the contract the respondent was obliged to take the whole of its 1920 cut of rough pulpwood and claims $10,342.03 as the balance due. The respondent refused to accept and pay for more than 4,400 cords, adding to the 4,000 cords specified in the contract the usual ten percentage.

Lafleur K.C. and *A. Langlais K.C.* for the appellant.
St. Laurent K.C. for the respondent.

IDINGTON J. (dissenting).—The appellant is a lumber company operating timber limits in the county of Montmagny in the province of Quebec and makes pulpwood thereon.

The respondent is a pulp and paper company in that business at Grand'Mère, and in course thereof using pulpwood as its raw material.

In the years 1918 and 1919 respectively the respondents had by verbal contract in each of said years bought rough pulpwood from appellant.

The verbal contract for the first of said years was based on an estimate of 600 to 700 cords, but it turned out appellant was able to produce, by including purchases from small farmers in the district, and supply respondent therewith, 1,162 cords.

And for the next year the verbal contract was based on an estimate of 2,500 cords, but it turned out that by including not only its own product, but that got from farmers, as in the previous year, it was able to turn over to respondent 3,121 cords.

When the time came for dealing with the product, 1920-21, a verbal discussion took place between the respective managers of appellant and respondent at some meeting in Quebec and something was said about the possibility of 4,000 cords being supplied at same price as previous years.

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There was nothing definite reached and as the price was likely to go down the respondent's manager had issued orders that no new contracts were to be taken for purchase of rough pulpwood.

This gave rise to the following correspondence between said respective managers of the appellant and the respondent, which constitutes the only contract between said parties now in question herein.

Hamilton, the respondent's manager, wrote as follows:—

Grand'Mère, December 20, 1920.

Gordon McLeod, Esq.,
c/o Van Dyke Land Company,
56 Palace Hill,
Quebec, P.Q.

Dear sir,—It will be necessary for you to confirm sale of rough pulpwood sold me verbally when last in Quebec by letter to enable me to protect your price for this wood, as at present we are not in the market and are reducing our purchases as much as possible.

Your prompt attention to this will greatly oblige.

Yours very truly,
H. F. Hamilton,
Pulpwood Division.

and appellant replied as follows:—

Quebec, December 23, 1920.

Mr. H. J. Hamilton,
Laurentide Company, Limited,
Grand'Mère, Quebec.

Dear sir,—Replying to your letter of the 20th inst, and confirming verbal agreement made with you in Quebec a short time ago.

We beg to confirm sale of all rough pulpwood now hauled and being hauled (1920 cut) about four thousand cords, 4,000 cords, at a price of $20 per cord of 128 cubic feet delivered at your mill in Grand'Mère.

We will send you a letter from Mr. Langlois as promised very shortly.

Wishing you the compliments of the season, and with all good wishes for the new year.

Yours very truly,
T. H. VAN DYKE & Co.,
C. MacLeod,
Agent.

and respondent's manager replied:—

Grand'Mère, April 28, 1921.

T. Van Dyke Company,
58 Palace Hill, Quebec, P.Q.,
Attention Mr. G. McLeod.

Dear sirs,—I have made arrangements to permit you to start loading your pulpwood after the 1st of May at the rate of two carloads per day.

As soon as we are able to increase this, we will advise you.

Yours truly,
LAURENTIDE Co., LTD.,
H. F. Hamilton,
Logging Division.

The question raised herein is whether or not the appellant is entitled to recover for more than 4,400 cords. And that must turn upon the meaning to be attached to the words " about four thousand (4,000) cords " in said letter of 23rd December, 1920, when interpreted in light of all the surrounding circumstances and especially the evidently urgent need of accuracy.

The learned trial judge, Sir F. X. Lemieux, decided against the plaintiff, now appellant, allowing nothing beyond the price for 4,400 cords adding thereby the usual ten percentage added when a contract is made for a named specific quantity and that is accompanied by words such as " about " or " more or less " or such facts and circumstances as to indicate that such ten per cent of the named quantity as the parties concerned could be reasonably held to have had in their mutual view when contracting.

The reasons pointed out by respondent's letter above quoted clearly indicate that there was urgent need for knowing what the respondent could rely upon, and beyond which it would not be expected to go. The result shews the appellant's guess was not such as the respondent was entitled to expect and rely upon, and hence is not entitled to claim further than the learned trial judge has allowed.

The appellant was the only one to know. The respondent knew nothing of appellant's situation and facilities for production.

I need not dwell further upon the very many details and requirements upon which the argument for appellant is founded. The necessity of appellant's situation created by itself cannot justify going so far.

Contracts such as that in question cannot be interpreted properly if we disregard the peculiar surrounding facts and circumstances which led to the use of the term " about." Sometimes the circumstances may justify discarding entirely the word " about " but not here.

I agree in the main with the reasoning of the learned judges in the Court of King's Bench who concluded that the appeal from the learned trial judge should be dismissed.

The very peculiar circumstances I have alluded to which evoked the contract herein in question are such as to leave

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little room for the application of decisions cited to us and which were not founded on such peculiar circumstances as gave rise to what we are concerned with.

I am of the opinion therefore that this appeal should be dismissed with costs.

DUFF J.—The action out of which this appeal arises was brought by the appellants against the respondents upon an agreement for the sale and purchase of pulpwood, the terms of which are admittedly stated in a letter addressed by the appellants to the respondents, dated the 23rd December, 1920, in these words:

December 23, 1920.

Dear sir,—Replying to your letter of the 20th inst, and confirming verbal agreement made with you in Quebec a short time ago.

We beg to confirm sale of all rough pulpwood now hauled and being hauled (1920 cut) about four thousand cords, 4,000 cords, at a price of $20 per cord of 128 cubic feet delivered at your mill in Grand'Mère.

We will send you a letter from Mr. Langlois as promised very shortly.

Wishing you the compliments of the season, and with all good wishes for the new year.

Yours very truly,
T. H. VAN DYKE & Co.,
G. MacLeod.

It is not seriously open to dispute that the appellants' rough pulpwood now hauled and being hauled (1920 cut) amounted to approximately 5,000 cords. The price of pulpwood having fallen the respondents declined to accept more than 4,400 cords, being the quantity indicated by the figure mentioned, 4,000 cords, with the addition of ten per cent of that quantity as an allowance for inaccuracy of estimate, as admittedly contemplated by the letter.

The appellants contend that the agreement as expressed is an agreement for the sale and purchase of the whole of their rough pulpwood answering the description in the letter, and that this designation of the subject matter of the contract is not qualified by the words of quantity, "about four thousand cords." On behalf of the respondents two alternative constructions are put forward: The first of these is, that the quantity mentioned, "about four thousand cords," is the governing element of the description of the subject matter, and that the vendor was not bound to deliver more and the purchaser not bound to

accept more than that quantity. The alternative view advanced by the respondents as to the effect of the contract is that while the vendor bound himself to sell and deliver the whole of his "rough pulpwood," as described, the words of quantity import a contractual representation that the pulpwood described would not exceed in quantity 4,000 cords or thereabout.

I do not think myself that there is any difficulty in construing the language of the letter. The subject matter of the contract seems to be plainly described, and I do not think that the words of quantity introduce any qualification. If they have any effect at all they can, I think, more naturally be read as indicating the minimum quantity of rough pulpwood which may be expected to be embraced by the description. At the lowest, the effect of the words appears to be altogether too disputable to treat them as qualifying the description of the subject matter in the manner contended for by the respondents.

The majority of the court below have taken another view, and the judgments, in this sense, appear to rest upon two principal grounds. First, it is said that according to the rule in French law such a phrase as that which is here the subject of controversy imports a warranty; that the words of quantity form the governing element in the description. But the citations in support of this view appear to be far from conclusive, and the passage quoted by Mr. Justice Greenshields from 6 Marcadé, par. 2, is quite in accord with the view just indicated. As observed by Sir Montague Smith in delivering the judgment of the Judicial Committee in *McConnell* v. *Murphy* (1).

> It is seldom, in mercantile contracts, that any technical or artificial rule of law can be brought to bear upon their construction. The question really is the meaning of language, and must be the same everywhere.

The courts in England, as well as in the United States, have as a rule treated such phrases as being words of expectation and estimate only, and not amounting to warranty or to a qualification of the description of the subject matter. This is very plainly brought out in the speeches of the Law Lords in *Tancred, Arrol & Co.* v. *The Steel Company of Scotland,*

(1) [1873] L.R. 5 P.C. 203, at p. 219.

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Ltd. (1), cited by Mr. Justice Greenshields in his judgment, as well as in the judgment of Lindley L.J., in *McLay* v. *Perry* (2), and in the judgment of the Privy Council just referred to.

Then it is argued that the case comes within the scope of the rule of the French law by which, in cases of ambiguity, a contract of sale is to be read in the sense least favourable to the vendor. An argument is presented in the factum of the respondent based upon the omission from the *Code Civil* of the province of Quebec of arts. 1586, 1587 and 1602 of the *Code Napoléon;* that this rule has not formed part of the law of Quebec since the promulgation of the *Code.* Whatever significance may properly be attached to the omission mentioned, for the purposes of this case it is, I think, sufficient to refer to the judgment of Sir Montague Smith above mentioned, in which these words are found:

> * * * in cases of doubt, it may be that the interpretation should be against the vendor, but that must be understood of cases of doubt which cannot be otherwise solved. It would follow from these rules, that where a stipulation is capable of two meanings equally consistent with the language employed, that shall be taken which is most against the stipulator and in favour of the other party. But their lordships think that this contract is not properly capable of two meanings. In questions of difficult interpretation, not only two, but frequently many constructions may be suggested; and if that true construction can be arrived at with reasonable certainty, although with difficulty, then it cannot properly be said that there are two meanings to the contract.

In the case before us it is impossible, I think, to say, even admitting ambiguity, that the ambiguity is one which can be solved only by the application of the rather artificial maxim so invoked. Where ambiguity does occur in commercial contracts, it is a rule supported by good sense as well as by judicial practice to look to the previous dealings of the parties, if there have been such dealings, for assistance in ascertaining the sense in which the language of the contract has been employed by them. Now it so happens that contracts admittedly in virtually the same terms, that is to say, the same in all pertinent respects, had been made between the same parties in each of the two preceding years, and executed. In a letter dated the 16th September, addressed by the appellants to the respondents, it is asserted

(1) [1890] 15 A.C. 125. (2) [1881] 44 L.T. 152.

by the appellants that in each of these years, although the market price had risen above the contract price in the meantime, the appellants had delivered to the respondents pulpwood far in excess of the estimated quantities mentioned; the excess being in one case over twenty-five per cent, and in the other nearly one hundred per cent. This statement of fact is not disputed in the correspondence, although it is true that Mr. Hamilton, in his oral evidence, while admitting that the market price rose above the contract price in one of these years, denied that this occurred in both. I think it may be taken as established that the construction which both parties placed deliberately in one, at least, of the two preceding years upon a contract between them not sensibly different in language from that now in question, was the construction now contended for by the appellants.

The appeal should be allowed with costs here and in the Court of Appeal, and the judgment of the trial judge be set aside and judgment entered for the plaintiff with costs of the action. The precise amount which the appellant is entitled to recover depends to some extent upon the amount of his undelivered cut for 1920 and if the parties cannot agree as to this it should be spoken to on the settlement of the minutes.

MIGNAULT J.—The difficulty here has arisen in connection with the construction and effect of a contract whereby the appellant sold to the respondent

all our rough pulpwood now hauled and being hauled (1920 cut) about four thousand cords, 4,000 cords, at a price of $20 per cord of 128 cubic feet delivered at your mill in Grand'Mère.

The contract was verbal but was reduced to writing in the above terms in a letter written by the appellant company to the respondent, at the latter's request, on the 23rd of December, 1920. The price was subsequently reduced to $15 per cord f.o.b. loading point, and the appellant's letter to the respondent, dated the 28th of January, 1921, confirming the reduction, referred to the

sale of all our rough pulpwood cut during 1920.

This letter was accepted by the respondent's representative, Mr. H. J. Hamilton, the latter states in his testimony.

The whole question now is whether the sale was of all the appellant's rough pulpwood cut during the 1920 season,

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or merely of "about 4,000 cords" of this pulpwood. The two courts below placed the latter construction on the contract, and consequently decided that the respondent having taken and paid for 4,400 cords had fulfilled its entire obligation under the contract. They considered that an addition of 10 per cent to the 4,000 cords would give full effect to the word "about." The appellant appeals and contends that under the contract the respondent was obliged to take the whole of its 1920 cut of rough pulpwood, and claims the sum of $10,342.03 as the balance due.

There being here merely a question of construction, I do not think it necessary to look for similar cases in order to place a meaning on the language of the contract. The judgments of the learned judges of the Court of King's Bench have moreover almost exhausted the possibility of further research and they have dealt both with English and French sources of authority. I do not think it necessary to follow their example and were I to do so I would restrict my inquiry to civil law authorities, the question arising under the civil and not under the common law. But, with great deference, I think that the language of the contract is clear and cannot give rise to any doubt as to its meaning.

What the appellant sold to the respondent was

all our rough pulpwood now hauled and being hauled (1920 cut).

And in its letter of January 28 to the respondent, it again refers to the "sale of all our rough pulpwood cut during 1920." It is true that in the appellant's letter of December 23rd there is an estimate of quantity, "about 4,000 cords." But these are obviously words of estimate, and not a description of the thing sold. This is not a case where a contract is attacked because of an error induced by an estimate made by one of the parties. Both the appellant and the respondent adhere to the contract and the question is what did the former sell and the latter buy? On my construction of the appellant's letter, the sale was of all its rough pulpwood cut of 1920 then hauled and being hauled, and not of a quantity of rough pulpwood estimated at about 4,000 cords.

The only remaining question is what amount is due to the appellant on this contract? The total quantity of rough

pulpwood actually shipped by the appellant to the respondent, according to a statement filed by the appellant was, after correcting an error in addition, 4917·61 cords. The appellant had on hand 509·21 cords, and this was not shipped on account of the respondent's refusal to accept any more. Mr. Hamilton, the respondent's representative, in his testimony, stated that on the pulpwood actually shipped to the respondent by the appellant, in excess of the quantity paid for, there would be due to the appellant, at contract prices, $2,841.11.

The state of accounts between the parties, according to exhibit P. 6, and to Mr. Hamilton's statement, would be then as follows:

Balance due on rough pulpwood actually shipped	$2,841 11
509·21 cords in hand at $15	7,638 15
	$10,479 26

It would appear, however, that out of the pulpwood in hand a certain quantity was made up of pulpwood purchased by the appellant from farmers, which would not come within the description of all the pulpwood cut by the appellant which alone was comprised in the sale it made to the respondent. By the copy of the appellant's books it purchased 302 cords of rough pulpwood from farmers. This wood, at $15 per cord, would amount to $4,530, and should not be charged to the respondent.

Deducting this sum of $4,530 from the above amount of $10,479.26, the balance due by the respondent to the appellant would be $5,949.26, and the appellant must deliver to the respondent 207·21 cords of rough pulpwood of the 1920 cut, this figure representing the residue of 509·21 cords after deducting the 302 cords purchased from farmers.

I would, therefore, with great respect, allow the appeal with costs throughout and give judgment to the appellant for $5,949.26 with interest from the service of the action upon the appellant shipping to the respondent 207·21 cords of rough pulpwood of the 1920 cut in accordance with the terms of the contract.

The above figures of the undelivered balance of the pulpwood, after deduction of wood bought from the farmers,

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Malouin J.

I have taken from the appellant's books. But the judgment of the court gives the parties the opportunity of coming to an agreement as to the balance due on the undelivered pulpwood, the matter, if they fail to agree, to be spoken to on the settlement of the minutes.

MALOUIN J.—L'appelante poursuit l'intimée pour une somme de $10,342.03, balance de prix d'un contrat de vente de bois de pulpe non écorcé.

Le contrat intervenu entre les parties est verbal; mais il a été confirmé le 23 décembre 1920 dans une lettre adressée par l'appelante à l'intimée dans les termes suivants:

> We beg to confirm sale of all rough pulpwood now hauled and being hauled (1920 cut) about 4,000 cords, at a price of $20 per cord of 128 cubic feet delivered at your mill in Grand'Mère.

Ce prix fut plus tard réduit à $15 par corde, de consentement mutuel.

L'appelante a expédié à l'intimé 4,967.61 cordes et elle veut encore lui livrer 509.21 cordes.

L'intimée prétend qu'en vertu de son contrat elle n'est pas tenue d'accepter plus de 4,400 cordes et se refuse d'accepter la différence.

La cour supérieure a décidé que l'intimée n'était pas tenue d'accepter plus de 4,000 cordes de bois avec en plus une marge de 10 pour 100.

La cour d'appel a confirmé le jugement de première instance, le Juge Greenshields étant dissident. C'est ce jugement qui nous est soumis.

Pour décider la question en litige, il faut se demander quel a été l'objet de la vente, quelle est la chose que l'appelante a vendue et qu'elle a promis de livrer et que l'intimée a promis d'accepter.

La réponse à cette question se trouve dans le contrat même. L'appelante a vendu toute sa coupe de bois de pulpe non écorcé de 1920. Je soumets avec toute la déférence possible que la coupe de 1920 est l'objet de la vente. Les mots "4,000 cordes environ" qui ont été ajoutés dans le contrat ne sont là que comme estimation probable du nombre de cordes de bois qui se trouvait dans le lot vendu, ne liant en aucune manière la partie qui l'a faite.

Le rôle ou la fonction du mot *environ* varie avec les circonstances. Si ce mot est ajouté à l'objet du contrat, il a sa

valeur et il faut en tenir compte; mais s'il est ajouté à une chose accessoire il est sans importance.

Je reproduis ci-dessous un passage de l'*American and English Encyclopedia of Law,* absolument au point, que je lis au mot "about":

The Supreme Court of the United States has laid down three rules for the construction of the terms "about" or "more or less" in executory contracts of sale, and the cases set out in the notes will be found in accord with these rules:

First. Where the goods are identified by reference to independent circumstances, e.g., all the goods deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or to be shipped in certain vessels, and the quantity is named with the qualification of "about," or "more or less," or words of like import, the contract applies to the specific goods, and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it.

Second. Where no such independent circumstances are referred to, and the engagement is to furnish goods to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words, in such cases, only provides against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight.

Third. But the qualifying words may be supplemented by other stipulations or conditions, e.g., "as much as the seller shall manufacture or the buyer shall require," and they will then govern the contract.

Je cite ce passage comme autorité de raison. Les règles qui y sont posées sont raisonnables et peuvent être appliquées utilement dans les contrats passés dans la province de Québec comme partout ailleurs. Au reste, elles sont conformes aux décisions rendues par le conseil privé dans les causes citées par M. le juge Greenshields en cour d'appel et celles citées par M. le juge Duff dans ses notes préparées dans la présente cause. Ces règles sont aussi conformes à celles posées par Marcadé, vol. VI, en commentant les articles 1585 et 1586 du Code Napoléon cités par M. le juge Greenshields en cour d'appel.

Par ces motifs, j'infirmerais le jugement de la cour supérieure et de la cour d'appel et je condamnerais la défenderesse-intimée à payer à la demanderesse la somme de $2,841.11 avec intérêt, étant la balance du prix du bois livré, avec en outre le prix à $15 la corde du bois non livré de sa coupe de 1920 (mais non celui acheté des fermiers) payable sur livraison de bois, avec dépens des trois cours.

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Maclean J.

MACLEAN J.—This appeal arises out of an action brought by the appellant against the respondent, under a contract for the purchase and sale of pulpwood, the appellant being a producer of pulpwood, and the respondent a manufacturer of pulp and paper. The material part of the agreement is contained in a letter dated the 23rd December, 1920, written by the appellant, and in response to a letter from a representative of the respondent, asking confirmation of an oral agreement previously made respecting the same subject matter. The important part of the letter reads as follows:

> We beg to confirm sale of all our rough pulpwood now hauled and being hauled (1920 cut) about four thousand cords (4,000 cords) at a price of $20 per cord of 128 cubic feet delivered at your mill in Grand'Mère.

All the relevant facts are fully set forth in the judgments given in the court below, and I need not repeat them here, nor are they seriously in dispute. Neither is the good faith of the parties in the action in question.

The question is whether on the true construction of the contract, the respondent is liable to take delivery of the remainder of the appellant's entire cut of rough pulpwood for 1920, about 5,000 cords, and the point for our determination is whether, under the contract, there was a sale of about 5,000 cords of pulpwood, and whether the quantity, "*about four thousand cords*" are mere words of estimate, the subject matter of the sale being "all our rough pulpwood now hauled and being hauled (1920 cut)."

I am of the opinion that the subject matter of the sale was all the rough pulpwood cut by the appellant in 1920. The appellant was on the one hand contracting to sell, and the respondent on the other hand contracting to buy, the appellant's 1920 cut of rough pulpwood, whatever that might happen to be. The estimate of 4,000 cords was substantially exceeded, but nevertheless the buyer is bound to take the excess whatever it turns out to be. In the course of previous dealings between the parties, in respect of the same subject matter and under contracts of substantially the same terms, the respondent accepted deliveries in excess of quantities estimated.

The respondent bargained for the 1920 cut of rough pulpwood, and it was that he purchased. The words "about 4,000 cords" are used merely as an estimate. In *McLay*

& Company v. *Perry & Company* (1), the parties were dealing with a heap of scrap iron in a yard. The estimate was much greater than the heap turned out to be but inasmuch as it was held that what the parties bargained about was the heap, the fact that the estimate of what was in the heap was incorrect, was immaterial. In cases in which the bargaining was about "cargo" or "remainder of cargo" of some commodity, followed by estimates of quantity, it has been held that effect must be given to these words without reference to the quantity specified; *Levi* v. *Berk* (2); *Borrowman* v. *Drayton* (3). The offer to supply "all the steel required by you for the Forth bridge" was held to be the subject matter of the contract and not to be affected by words estimating the probable quantity required, *Tancred Arrol & Co.* v. *The Steel Company of Scotland* (4). This rule of construction is affirmed in *McConnell* v. *Murphy* (5).

In all these cases one must look to the particular contract and construe it. It is perhaps difficult to lay down a general rule, but one must apply the ordinary rules of construction and endeavour to give to the words their reasonable and ordinary meaning. I think it is quite clear that in this case the appellant sold and the respondent purchased, the 1920 cut of rough pulpwood. The language used, and which is quite plain, permits only of this meaning. That was the subject matter of the contract, and it is not to be affected by any estimate of quantity. In my view the correct interpretation of this contract requires the acceptance of delivery by the respondent, of the quantity of pulpwood tendered by the appellant.

I would allow the appeal with costs here and in the Court of Appeal, and the judgment of the trial judge should be set aside and judgment entered for the plaintiff with costs. The amount of the undelivered pulpwood belonging to the cut of 1920 has not been precisely fixed. If the parties can-

(1) 44 L.T. 152.
(2) [1885] 2 Times L.R. 898, at p. 899.
(3) [1876] 2 Ex. D. 15.
(4) 15 App. Cas. 125.
(5) L.R. 5 P.C. 203 at p. 219.

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Maclean J.

not agree upon this the point may be spoken to on the settlement of the minutes.

Appeal allowed with costs.

Solicitors for the appellant: *Roy, Langlais, Langlais & Godbout.*

Solicitors for the respondent: *St. Laurent, Gagné, Devlin & Taschereau.*

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*Mar. 25, 26.
*April 22.

DAVID DIAMOND (PLAINTIFF).....APPELLANT.

AND

THE WESTERN REALTY COMPANY AND OTHERS (DEFENDANT)..... } RESPONDENT.

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

Judgment—Interlocutory—Res judicata—Appeal—Final judgment—Discretion.

An interlocutory judgment which definitely decides a question of law and from which no appeal is taken may be *res judicata* when the question is raised between the same parties even in the same action.

On appeal to the Appellate Division from a decision of a judge refusing to grant an application for payment out of court of the applicant of over $6,000 the appeal court granted the application to the extent of $800 but refused any order as to the residue until rights of other parties had been determined.

Held, Idington J. dissenting, that the judgment of the Appellate Division was not a "final judgment" as that term is defined in the Supreme Court Act and was non-appealable on the further ground that it is discretionary in its nature. Supreme Court Act, section 37.

The judgment appealed against was affirmed as to the question of damages.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario affirming with a variation the judgment of a judge on appeal from a referee's report and on an application for payment of money out of court.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff and Malouin JJ. and Maclean J. *ad hoc.*