1921
*May 27.
*June 20.

GRACE AND COMPANY (PLAINTIFF)..... } APPELLANT;

AND

C. E. PERRAS (DEFENDANT) ..... RESPONDENT.

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

Vendor and purchaser—Contract—Verbal agreement—Letter sent by purchaser containing it—Silence of the vendor—English doctrine of estoppel—Not part of the law in Quebec.

Where one of two parties to a verbal commercial agreement thereafter writes a letter to the other purporting to state the terms of a contract arrived at between them, the failure of the latter to repudiate such contract within a reasonable time does not *de jure* import an assent to it, and, in this case, the circumstances did not warrant that inference of fact from the silence of the recipient of the letter.

Per Mignault J.—The doctrine of estoppel, as it exists in England and the common law provinces of Canada, is no part of the law in Quebec.

APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec, (1) affirming the judgment of the trial judge and dismissing the appellant's action.

The action taken by the appellant was for $74,532.77 for damages for a pretended breach of contract entered into by the appellant with the respondent, by which the latter were to deliver 5,400 sides of chrome patent cow hides. The respondent pleaded that he had received a verbal order from appellant for 1,200 sides,

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) Q.R. 31 K.B. 382.

which were delivered and paid for. There was no written contract; but, subsequently to verbal negotiations with an employee of the respondent, the appellant sent a letter to the respondent as follows: "We herewith beg to confirm our verbal purchase from you of 450 dozen sides * * * . Kindly let us have your confirmation in due course for our records * * * * ." The letter was delivered to the same employee of the respondent, the latter being then absent from Canada, but it was never answered. At the trial, the employee testified that he left the letter on his desk without paying any more attention to it, and the respondent swore that he knew of its existence only after the institution of the action. The 1,200 sides were delivered to the appellant after the sending of the letter.

H. N. Chauvin K.C. for the appellant.

Ernest Lafontaine for the respondent.

IDINGTON J.—I do not think I can add anything useful to what has been said in the courts below.

Without affirming all that has been so expressed I agree in the result and conclude that having regard to the entire evidence there was no such contract established as contended for by the appellant.

I therefore think the appeal should be dismissed with costs.

DUFF J.—The questions on this appeal are questions of fact. I can see no adequate ground for differing from the conclusion of the court below.

1921

GRACE AND COMPANY v. PERRAS.

Anglin J.

ANGLIN J.—I cannot accept the appellant's contention that as a matter of law wherever one of two parties to a verbal commercial negotiation immediately thereafter writes a letter to the other purporting to state the terms of a contract arrived at between them the failure of the latter to repudiate such contract within a reasonable time imports an assent to it and affords conclusive evidence that the contract in fact exists in the terms stated. There may no doubt be—perhaps in the majority of such cases there are—circumstances which warrant that inference from the silence of the recipient of the letter. If followed by action on the part of the sender thereby induced, a case of estoppel may arise. But the presumption or inference is one of fact and the circumstances may be such that it should not—often cannot—be drawn.

The courts below have so regarded this case; and so far am I from being convinced that their view of it was erroneous that I incline to agree with it. The evidence of the two parties to the oral negotiations is in accord that a contract was made but is in direct conflict as to the quantity of goods agreed to be furnished to the plaintiff by the defendant. The circumstances that the defendant had expressly instructed his agent to make no sale that he had not arranged a purchase to cover and that the agent had arranged such a purchase for the precise quantity which he says he agreed to sell to the plaintiff tend to corroborate his version of the result of the negotiations. Taken with the fact that the plaintiff's letter appears never to have come to the personal notice of the defendant these circumstances go far to preclude the inference of assent that might otherwise have been drawn from the defendant's silence.

The plaintiff in my opinion has not established the contract on which he sues. The appeal therefore fails.

BRODEUR J.—La demanderesse appelante, Grace and Company, prétend que le défendeur-intimé, Perras, s'est obligé, en mai 1919, de lui vendre et livrer 5,400 demi peaux de vache. Ce dernier nie l'existence de ce contrat; il prétend en outre qu'il ne s'est obligé de n'en livrer que 1,200 et qu'il a exécuté son obligation. Il n'y a pas d'écrit de la part du défendeur. L'article 1235 du code civil déclare que dans les matières commerciales excédant cinquante dollars aucune action ne peut être maintenue contre une personne sans un écrit signé par elle dans le cas d'une vente d'effets, à moins que l'acheteur n'en ait accepté ou reçu une partie.

Dans la présente cause il y a eu livraison d'effets, mais cette livraison s'est-elle faite en exécution d'un contrat de 5,400 articles ou seulement d'un contrat de 1200? Sur ce dernier point la preuve est contradictoire.

Je serais porté à croire que la prétention de la demanderesse est bien fondée, que le contrat intervenu entre les parties couvrait bien la quantité de 5,400 peaux, vu que la lettre de la demanderesse en date du 13 mai, addressée à la raison sociale du défendeur, dit formellement:

> We herewith beg to confirm our verbal purchase from you of 450 dozen sides,

et cette lettre est restée sans réponse écrite. D'un autre côté le silence de celui à qui une déclaration est faite de l'existence d'un contrat n'implique pas consentement ou obligation de sa part en règle générale. Son défaut de réponse n'équivaut pas en lui-même à un refus. Pour consentir et s'obliger il faut un fait positif. Baudry Lacantinerie, Obligations, vol. 1er, no. 44.

1921

GRACE AND COMPANY v. PERRAS.

Brodeur J.

Le même auteur cependant dit au no. 515 du même traité que l'acceptation peut être induite du silence dans certains cas: et il parle de décisions où en matière de commerce l'absence de réponse à une lettre écrite

à l'occasion de relations d'affaires entamées doit être réputée valoir comme consentement.

Il déclare cependant que cette proposition des tribunaux est trop absolue.

Dans la présente cause la demanderesse, à la fin de sa lettre demandait la confirmation du contrat dont elle alléguait l'existence. Il y avait d'autant plus de raison pour elle de demander cette confirmation qu'elle savait n'avoir eu de négotiations qu'avec un subalterne et que le défendeur lui-même, dans une circonstance antérieure, n'avait pas voulu confirmer (et ce à la connaissance de la défenderesse) ce qui avait été fait par son employé.

La confirmation du contrat allégué par la demanderesse ne s'est pas effectuée: au contraire, au retour de son voyage, le défendeur a formellement répudié le contrat.

De plus la preuve testimoniale est contradictoire et le juge qui présidait au procès en Cour Supérieure a eu l'avantage de voir les témoins et il a pu se former une meilleure opinion que nous sur la véracité de ces témoins. Il en est arrivé à la conclusion que le contrat qui a été fait entre les parties n'avait trait qu'à 1,200 articles.

Dans ces circonstances, nous ne pouvons considérer le défendeur Perras comme s'étant obligé de livrer à la demanderesse la quantité de peaux qu'elle allègue.

Le jugement qui a renvoyé son action doit être confirmé avec dépens.

1921

GRACE AND COMPANY v. PERRAS.

Mignault J.

MIGNAULT J.—This case comes to this court with the findings of facts of the learned trial judge unanimously concurred in by the Court of King's Bench, and the dispute being as to the quantity of sides of chrome patent cow hides which were sold by the respondent to the appellant, is certainly a question of fact. So far as the matter rested on the testimony of Osborne (the plaintiff's representative) on the one hand or of Hubbell (the defendant's employee) and the defendant himself on the other, the trial judge accepted the statements of the latter. And, assuming that under art. 1235 of the civil code the contract could be proved by parol evidence in view of the deliveries which the appellant claims were referable to the larger contract, the respondent to the smaller one, there would be no difficulty whatever had not the appellant written to the respondent the letter of May 13th, 1919, purporting to confirm a contract of sale of 450 dozen sides, which letter was received by Hubbell who never answered it, but is shown not to have come to the knowledge of the respondent who was then absent from Montreal.

The value of this letter is of course merely as evidence of a contract which the learned trial judge on the testimony found had not been entered into. It is noteworthy that the appellant has suffered no prejudice by reason of the failure of a reply to its letter, for during the previous month it had committed itself to a Paris firm to which it had undertaken to sell 500 dozen sides, and no action on its part was induced by the respondent's silence. On this phase of the case, Mr. Justice Greenshields suggested that if it was the duty of the respondent to answer this letter, and if his failure to do so induced the appellant to do some-

1921

GRACE AND COMPANY v. PERRAS.

Mignault J.

thing which would not otherwise have been done and which resulted in damages, an action might lie, and if an action on these grounds were brought,

it may be that the respondent would be estopped in his defence upon the principle that where a man has kept silent when he ought to have spoken, he will not be permitted to speak when he ought to keep silent.'

I have no doubt whatever that Mr. Justice Greenshields will fully agree with me when I venture to observe that the doctrine of estoppel as it exists in England and the common law provinces of the Dominion is no part of the law of the Province of Quebec. This, however, does not mean that in many cases where a person is held to be estopped in England, he would not be held liable in the Province of Quebec. Article 1730 of the civil code is an example of what, in England, is referable to the principle of estoppel, and where a person has by his representation induced another to alter his position to his prejudice, liability, in Quebec, could be predicated under articles 1053 and following of the civil code. Whether such liability could be relied on as a defence to an action, in order to avoid what has been called a "circuit d'actions," is a proposition which, were it necessary to discuss it here, could no doubt be supported on the authority of Pothier. May I merely add, with all due deference, that the use of such a word as "estoppel," coming as it does from another system of law, should be avoided in Quebec cases as possibly involving the recognition of a doctrine which, as it exists to-day, is not a part of the law administered in the Province of Quebec.

In this case my opinion is, under the circumstances disclosed by the evidence, that the appellant could not create a contract by its letter affirming that contract had been entered into, that the failure of an

answer, under the same circumstances, cannot serve as evidence of a non-existing contract, and while I would certainly not say that under no circumstances the neglect to answer a letter cannot give rise to liability or serve as a tacit admission, my opinion is that in the present case Hubbell's failure to answer the appellant's letter cannot be used as evidence that the respondent entered into a contract which the learned trial judge, on the evidence, finds was never made.

The opinions of the learned judges in the court of King's Bench are so satisfactory to me that I respectfully express my concurrence therein.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Heneker, Chauvin, Walker & Stewart.*

Solicitor for the respondent: *Ernest Lafontaine.*