1918
*Nov. 26.
*Dec. 23.

JOHN MORROW SCREW AND NUT COMPANY (DEFENDANT) ..... APPELLANT;

AND

FRANCIS HANKIN (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE SUPERIOR COURT OF THE PROVINCE OF QUEBEC, SITTING IN REVIEW.

Contract—Memorandum in writing—Conditions missing—Parol evidence—Relation of documents—Statute of Frauds—Usage of trade—Option—Provincial laws in Canada—Judicial notice—Art. 1235 C.C.

The respondent agreed by contract in the form of a letter to appellant' and "approved" by him, to purchase steel drills, without mentioning any "prices" but merely quoting the sizes and a rate of discount. It was stipulated that "the value of this contract" would "be from $25,000 to $35,000," and that "our shipping instructions, invoicing instructions, etc., given on July 10th, 1915," would "hold good." The letter of July 10th, 1915, contained an express reference to a standard drill price list, in use by the whole drill trade of North America.

Held, that the respondent had the right to establish by parol evidence that the discount mentioned in his letter meant, according to the usage of trade, discount off the standard drill prices and so to prove that the contract in writing contained all essential terms.

Held also, that, according to the terms of the agreement, the respondent was bound to purchase goods to an amount of $25,000, with the right to order an additional amount of $10,000 which the appellant could not refuse to supply, the option being entirely with the respondent.

Per Davies C.J. and Anglin, Brodeur and Mignault JJ.—The written agreement between the parties was intended not to be a mere option revocable until acted upon, but an actual agreement entailing mutual obligations.

Per Anglin, Brodeur and Mignault JJ.—While the proof of a contract, within Art. 1235 C.C., must as a matter of procedure be made according to the *lex fori*, its validity depends upon the *lex loci contractus*.

Per Anglin, Brodeur and Mignault JJ.—The laws of the Province of Ontario and those of the Province of Quebec as to the requirement of writing in the case of contracts such as in this case differ in their effect.

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

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Per Anglin, Brodeur and Mignault JJ.—The Supreme Court takes judicial notice of the statutory or other laws prevailing in Provinces of Canada other than that in which the action or proceeding under appeal to it has been instituted. *Logan* v. *Lee*, (39 Can. S.C.R. 311), *followed*.

Judgment of the Court of Review [Q.R. 54 S.C. 208], affirmed.

APPEAL from the judgment of the Superior Court of the Province of Quebec, sitting in review at Montreal (1), affirming the judgment of the trial court and maintaining the plaintiff's action with costs.

The material facts of the case are fully stated in the above head-note and in the judgments now reported.

W. N. Tilley K.C. for the appellant.

Eug. Lafleur K.C. and *Weldon* for the respondent.

THE CHIEF JUSTICE.—This action was one brought in the Superior Court of the Province of Quebec by the plaintiff, respondent, Francis Hankin, against the defendant, appellant, to recover damages alleged to have been sustained by him owing to the refusal of the defendant to carry out an alleged contract made by him with plaintiff to manufacture and deliver to plaintiff a stipulated quantity of "twist drills of cast steel."

The Superior Court sustained the plaintiff's action and awarded the plaintiff $10,032.31 as damages, which judgment was confirmed "in all things" by the Court of Review and from which latter judgment this appeal is taken.

From the evidence at the trial, it appeared that the appellant, defendant, issued to the trade periodically a catalogue accompanied by a standard twist drill price list which is a list in use by all manufacturers of twist drills in the United States and Canada. On this

(1) Q.R. 54 S.C. 208.

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list the gross prices remain unchanged from year to year. As net prices are constantly fluctuating, they are quoted by way of discounts of greater or less amount from these standard gross prices. This manner of quoting, the plaintiff contended and the trial judge found, was well established in the trade so that dealers, when buying or selling, quote merely the kinds or sizes of the drills referred to and the rate or rates of discount which is understood as referring to the standard list and thus establish the prices agreed on.

Plaintiff, through his manager Hill, had, several times before the contract in question here, entered into contracts with defendant for the purchase of drills, the negotiations being made and concluded either with Coulter, the president, or with Horton, who styled himself variously as "assistant to the president" or the "manager," or as "acting for the president."

One of these earlier contracts was still in force and partially completed in August, 1915, when the contract now in question was made.

On August 21st, 1915, plaintiff's manager, Mr. Hill, went to Ingersoll and entered into negotiations with Mr. Horton for the purchase of cast steel twist drills of the net value of from $25,000 to $35,000. The negotiations were closed at the same meeting and a written contract was at once prepared in the form of a letter from plaintiff to defendant signed by Mr. Hill for plaintiff, marked "accepted" at the foot and signed by the defendant company per Mr. Horton. This contract is the basis of plaintiff's suit and is in the following terms:—

Ingersoll, Ontario, Aug. 21, 1915.

The John Morrow Screw & Nut Coy. Ltd.
Ingersoll, Ont.

Gentlemen:

As per my conversation with your Mr. Horton this morning you will enter our contract as follows:

Best quality Cast Steel Twist Drills, neither Drills, Packages or Cases to bear any other mark excepting size.

The value of this contract to be from twenty-five thousand ($25,000) to thirty-five thousand dollars ($35,000) net. Specifications to commence about three weeks hence and shipment of the whole lot is to be made before the end of March, 1916.

Discounts as follows:

Straight Shank Jobbers Drills, inch sizes	80, 10, 3½%
Taper Shank Jobbers Drills, inch sizes	80, 10, 3½%
Straight Shank Taper Length Drills, inch sizes	80, 10, 3½%
Drills ½" Shanks (both right and left hand Twist)	80, 10, 3½%
Drills ⅝" Shanks (both right and left hand Twist)	80, 10, 3½%
Bit Stock Drills	80, 10, 3½%
Number Sizes	80, 10, 3½%
Letter Sizes	80, 10, 3½%
Taper Square Shanks (both right and left hand Twist)	76%

Delivery F.O.B. Montreal.

Terms of Payment—Spot cash against invoice with original Inland Bill of Lading attached.

Our Shipping instructions, Invoicing instructions, &c., given on July 10th, 1915, to hold good unless modified by us later.

Yours truly,
FRANCIS HANKIN & Co.
Per A. H. Hill.

Accepted
JOHN MORROW SCREW & NUT CO. LIMITED,
Horton,
For President and Manager.

The letter of July 10th, 1915, referred to at the close of the above letter or contract, embodied the terms of one of the earlier contracts between the parties for the purchase and sale of drills and contained with the shipping and invoicing instructions an express reference to the standard twist drill price list on which all discounts are placed.

After plaintiff sent in his first order or specifications within the stipulated three weeks, defendant began expressing its fears that it would not be able to "live up" to the contract and asking plaintiff to consent to cancel it, which plaintiff refused to do, whereupon, defendant, by its letter of October 15th, formally declared it would not carry the contract out.

Plaintiff thereupon invited tenders from other manufacturers, for the same quantities and kinds of

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drills, and eventually closed a contract with the Cleveland Twist Drill Company for the kinds and quantities the defendant had undertaken to supply. The defendant was kept advised of the calls for tenders and of the Cleveland company's quotations and was formally put in default again by the plaintiff before closing with this latter company.

The amount paid by plaintiff to the Cleveland company for the kind and quantity of drills the plaintiff had contracted to supply was $10,032.31 above that which the contract, if binding, with the defendant provided for and this amount is the damages claimed by him and adjudged by the court.

Mr. Tilley for the appellant contended first that the alleged contract was an offer or option merely and was withdrawn, but I really do not think that such a construction is at all reasonable if it is once held that the contract is in other respects valid.

He further submitted that Horton had no authority to enter into the contract, but I am also of opinion that under the evidence there is no reasonable doubt of his authority to do so. It may be observed that Horton himself was not called as a witness and the only evidence given on defendant's part was that of the president himself which fell far short in the face of the proved facts of shewing want of authority on Horton's part. I think it clearly shewed that the company always recognized Horton, at any rate in the president's absence, and held him out as having full authority to transact such business as was involved in the entering into of such contracts as the one in question.

There remained his main contention that the contract was one required by the Statute of Frauds to be in writing and that oral evidence of the bargain to supply what was wanting in the written instrument could not be given.

Both parties, he said, agreed that there was no substantial difference between the law of Quebec and that of Ontario on the subject. The "prices" to be paid under the alleged contract were not stated in it nor was there any reference in it to the "standard list of prices" from which the prices of each class of articles stipulated for in the contract could be ascertained.

But I do not think such absence is necessarily fatal provided it can be supplied either by another document to which direct reference is made in the contract so that the two can be read together and so constitute a complete memorandum, or in the absence of direct reference in one to the other, if the two documents can be connected together by reasonable inference.

In the case of *Doran* v. *McKinnon* (1), I had to examine fully the authorities on the point and to express my conclusion from them and it was as above stated.

Applying this rule to the case before us we have the following facts proved: That in the twist drill trade there is only one price list on the whole North American continent; when either buyers or sellers quote discounts on drills in their orders or acceptances of orders, they have this price list in their minds and both parties understand that, when they refer to discounts on prices, they mean discounts on the gross prices given in the standard drill price list—necessarily in use by all manufacturers of twist drills and all dealers in the same. This is made abundantly clear by this uncontradicted evidence of Mr. Hill.

The discounts quoted in the contract above set out manifestly refer to some amounts or prices. The letter of July 10th, 1915, referred to in the last paragraph of

(1) 53 Can. S.C.R. 609 ; 31 D.L.R. 307.

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the contract, does mention the standard list along with the prices on which the discounts were to be made. The result is that the standard list of prices from which the discounts mentioned in the contract are to be deducted should and must be connected together by reasonable inference as having necessarily been in the mind of both parties to the contract when entered into and could not possibly have reference to anything else and that being so it is sufficient under the authorities to satisfy the statute.

As to the contention with respect to the meaning of the words "inch sizes" which I remark were not "inch size" merely, I think in the connection in which they were used they were trade terms known and well understood in and by the trade and that the weight of testimony as to their meaning was strongly in favour of the contention that "inch sizes" included drills in fractions of an inch or more than an inch. In the respondent's factum it is stated and was not challenged on the argument that

> of the three kinds of drills described in the contract as of "inch sizes" the first two were known as jobbers drills.

The price list shews and Mr. Young, a witness called by appellant, swore that jobbers drills were only listed in "fractional" sizes and run up to only half an inch in diameter. If, therefore, appellant's interpretation of the meaning of the term is the correct one he was offering and agreeing to sell jobbers drills of one inch in diameter, a thing which it did not manufacture and which did not exist in the trade.

It must be remembered that this objection was never raised until the trial, when the defendant applied to amend his plea so as to cover it. I think the learned trial judge correctly found the trade usage of the words to be that they covered fractional sizes.

Mr. Tilley contended with respect to the damages that in any event they could only be estimated on the failure of the defendant to deliver the $25,000 value of the goods up to which the plaintiff bound himself to order; and did not cover the other ten thousand in value which was only an option given to the plaintiff; a minimum and a maximum figure was stated. The plaintiff was bound to order $25,000. He had the right to order another $10,000, but there was no right on the vendor's part to refuse to supply the $35,000 value if ordered, the option was one entirely with the purchaser.

The defendant repudiated the contract absolutely on the 16th October and in a letter of that date suggested that plaintiff purchase the drills in the United States. The plaintiff replied on the 19th saying that in order to protect his interests he would proceed to purchase the drills elsewhere, charging the difference to defendant.

He called for tenders for from $25,000 to $35,000 in value of drills and notified the defendant of the result of the tenders in letter of 27th October.

Later, on 16th November, he again wrote defendant as follows:—

> In reference to our letter of 27th October, we find that in covering for only $25,000 to $35,000 of drills with Cleveland Twist Drill Company, on account of the increased price which we have had to pay this will not enable us to purchase the same quantity of drills as would be the case against your contract. We have therefore covered for an extra ten thousand to fifteen thousand and desire you to be notified of the fact.

In other words, plaintiff substantially notified the defendant that he had exercised his option up to the $35,000 and that as the defendant had definitely and absolutely repudiated the contract he would go into the market and purchase up to that figure for the best price he could and hold the defendant responsible for any loss he would sustain.

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Under these circumstances I think the assessment of the plaintiff's damages was made on a correct basis and the appeal should be dismissed with costs.

IDINGTON J.—When the terms used in the alleged contract have been, as they were, duly and correctly interpreted, we ought, I submit, to find it quite intelligible and answering all the requirements of the Statute of Frauds.

But if it is attempted to so extend that as to incorporate something which is not obviously intended to be incorporated therewith, a difficulty arises in the way of him making the attempt, but not in our finding a contract.

There is a contracting letter of a date anterior to this contract which is referred to in the last sentence thereof. So far as same can, clearly and reasonably, be held to have been indicated thereby as the subject of incorporation, I see no difficulty in doing so. I refer to the "shipping instructions," "invoicing instructions," &c.

The "&c.", may, not unreasonably, be taken to mean the like kind of terms and thereby include the sentence in the letter referred to, and that falling therein under the heading "Re invoicing" "Drills to be billed at 80, 10, 3½ of your standard lists," and thus make clear that it was the appellant's standard lists of all sorts of inch sizes whether single or multiples or fractions thereof, which were had in view in contracting.

When that is done appellant says confusion is produced thereby of such a nature that you cannot find a definite contract, or at least one such as necessary to find in order to cover or lay a foundation for assessing a great part of the damages in question.

The sizes of the drills named in the contract falling

under the phrase "inch sizes" being of doubtful import led to the introduction of evidence of experts and I cannot say there is error in doing so or in that accepted by the learned trial judge. Indeed, if that evidence is admissible, which did not seem to be seriously questioned, I should say it is quite unnecessary to raise such issues as started upon the question of inch sizes unless to lead the court into the wilderness of confusion and succeed thereby.

For my own part I incline to think that the question so raised is of no consequence when we find in law that the measure of damages is the difference between the price or prices agreed upon and the market price at the time when the buyer was entitled to get delivery, and that seems to have been the same proportionate rise, or so nearly the same, in all the classes of tools in question, that the result of the breach of contract would be the same if measured by any selection the respondent saw fit to make.

It is not his buying or bargain that is the measure of damages, though that may be some evidence of market price and in some circumstances he may be bound to avert or minimize loss.

His power of selection under such a contract as this of course gives, or is liable to give, rise to confusion of thought, and had there been in fact a substantial deviation of the percentage of rise in the respective market values of the different classes of goods in the list from which the respondent was entitled to select, a difficult question might have arisen. But in regard to drills up to an inch and a half sizes at least, there would seem to have been no difference of percentage of rise in any class and respondent bought quite enough below that margin to fulfil his right to damages on the $35,000 limit of his bargain, without coming into the

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field of variation of percentages of rise and thus is eliminated any question turning upon the multiple of inches.

There was a contract definitely binding respondent to buy at least up to $25,000 worth, and the appellant to sell not only that much but also up to $35,000 worth if respondent should so select.

It seems at first blush that it is unfair to have the seller bound to such an extent when the buyer is not.

If the market accidentally goes one way there is a possibility of the one party to a contract suffering thereby, having to bear a heavier load than the other party might have to bear in case of the market going the other way.

That, however, is the result which the parties agreed to observe and in the light of which they must be held to have deliberately bargained to meet the consequences. The vendor in consideration of a supposed certainty of anticipated profit, coupled with a wider profitable possibility, saw fit to bind itself and so end all question.

There are numerous cases to be found in Blackburn on Sales, at pages 236-244, illustrating incidentally the law on the subject.

As to the alleged want of authority on the part of Horton, I should have hardly thought it arguable in light of all that had transpired between the parties thereto before and after the making of the alleged contract so clearly recognizing his ostensible authority.

The questions of a contract, and of the measure of damages being determined against the appellant, there seems, therefore, no alternative but a dismissal of the appeal with costs.

ANGLIN J.—The defendants appeal from a judgment of the Court of Review affirming a judgment of the

Superior Court holding them liable in damages to the extent of $10,032.31 for breach of contract. The grounds of appeal are that the alleged contract was not such in fact but a mere revocable option; that it was not "good" because of the omission from the writing evidencing it of the element of prices; that, although the plaintiff is claiming damages for failure to supply goods of sizes of fractional parts of an inch, "inch sizes" only are specified in the letter of August 21st, and they do not include sizes of fractional parts of an inch, and the price list relied upon and put in evidence contains no prices for sizes of an inch or multiple thereof; and that the agent of the defendants, who signed the document relied on, exceeded his authority.

Upon the whole evidence I have no doubt that the plaintiff's letter of the 21st of August, 1915, with the defendant's acceptance upon it, was intended by the parties not to be a mere option revocable until acted upon, but to be an actual agreement entailing mutual obligations. Those obligations were that the plaintiff on the one hand would order not less than $25,000 worth of goods of the descriptions therein set forth and that the defendants on the other would supply goods so to be ordered, up to, but not exceeding, the value of $35,000. The plaintiff was to send in specifications of the quantities of each of the classes of goods set forth that he might require in sufficient time to enable the defendants

to ship the whole lot before the end of March, 1916.

The prices, subject to the discounts specified, were to be those stated in the "standard drill price list," which the evidence shews is used by the whole drill trade of North America. The consideration for the defendants assuming an obligation to furnish such drills as might be ordered, within the limits specified,

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was the plaintiff's undertaking to order, within a period capable of ascertainment, at least $25,000 worth of such drills.

I have so far dealt with the case apart from any difficulty presented by the 17th section of the Statute of Frauds. While the proof of a contract within Art. 1235, C.C. must as a matter of procedure be made according to the *lex fori*, its validity depends upon the *lex loci contractus*, which in this case is Ontario. Mr. Tilley's contention that the laws of Ontario and Quebec in regard to the requirement of writing in the case of contracts such as that under consideration are the same in effect is not quite correct, although article 1235 C.C. is no doubt founded on the Statute of Frauds. *Munn* v. *Berger* (1). Under the 17th section of the Statute of Frauds, an absence of the prescribed memorandum, if it does not affect the validity of the contract itself (*Leroux* v. *Brown* (2)), presents the same obstacle to the enforcement of it by action as arises under the 4th section. *Maddison* v. *Alderson* (3). Under article 1235 C.C., the question would appear to be purely one of evidence and the Quebec courts, quite logically, do not require a defendant to plead a mere absence of evidence which the law obliges the plaintiff to supply. He may *ore tenus* object to the admissibility of parol evidence when offered by the plaintiff. Article 110 of the Code of Civil Procedure is not regarded as applicable. English and Ontario practice is to the contrary. English Rule 211, o. 19, r. 15; Ont. Con. Rule (1915) No. 143.

Another difference is suggested by decisions of the Quebec courts (as to the soundness of which it is of course quite unnecessary now to express an opinion),

(1) 10 Can. S.C.R. 512. (2) 12 C.B. 801, at p. 810.
(3) 8 A.C. 467, at p. 488.

that an admission of the contract by the defendant either in his pleadings or in giving evidence will satisfy article 1235 C.C. *Guay* v. *Guay* (1).

A judicial admission is complete proof against the party making it.

Article 1245 C.C. See too *Sheppard* v. *Perry* (2).

A plaintiff, in an English or Ontario court, cannot avail himself of a like admission against a defendant who sets up the statute as a defence. *Lucas* v. *Dixon* (3). Still another difference arises from the use of the words "accepted or received" in article 1235 C.C., in lieu of the words of section 17 of the English statute: "Accept * * * and actually receive." Mr. Justice Fournier discusses this important departure in *Munn* v. *Berger* (4).

But a defence of invalidity according to foreign law must be pleaded under each system alike (Lafleur, Conflict of Laws, 23). Here the only plea is that their acceptance of the plaintiff's letter of the 21st of August, directing the booking of his contract in the terms therein stated, does not by the law of Ontario constitute a valid contract enforceable against the defendants. Two professional gentlemen called as expert witnesses for the defence based their opinions that the contract was invalid under Ontario law—or rather that there was no contract—solely upon absence of mutuality of obligation. They regarded the document sued upon as a mere option. They were neither asked for, nor did they give, evidence as to the 17th section of the Statute of Frauds. The professional gentleman called by the plaintiff in rebuttal upheld the contrary view. Merely incidentally he said on cross-examination:—

A contract for the sale of goods does not require to be in writing. It can be oral.

(1) Q.R. 11 K.B. 425, at p. 427.
(2) 13 R.L. N.S. 188.
(3) 22 Q.B.D. 357, at p. 360.
(4) 10 Can. S.C.R. 512, at p. 521.

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(No doubt he meant, in cases within the 17th section of the statute, if it be not pleaded or if its alternative requirements be fulfilled.) He added that the element of price missing from the letter in question was sufficiently supplied by implied reference and by the evidence explanatory of the meaning of the discounts stated, which was received subject only to an objection based neither on the requirements of the Statute of Frauds nor on those of article 1235 C.C. There was no attempt to meet this evidence by calling testimony in sur-rebuttal. The learned trial judge apparently did not regard the validity of the contract under the 17th section of the Statute of Frauds as being an issue. He treated the omission of direct reference to the standard price list from the letter as raising an issue of contract or no contract independently of and apart from any question as to the sufficiency of the written evidence, and he found upon it, in my opinion quite rightly, against the defendants. He makes no allusion to the sufficiency or insufficiency of the letter of August 21st to satisfy the 17th section of the Statute of Frauds; nor is that question touched upon in the judgment of the Court of Review.

Yet in this court counsel for the appellants chiefly relied upon the absence of a reference to the standard drill price list in the letter of August 21st as affording his clients a defence under the 17th section of the Statute of Frauds. Without so deciding I shall assume that that defence was sufficiently pleaded to meet the requirements of Quebec procedure, although, in Ontario, it would be clearly otherwise, and, since counsel for the plaintiff did not object, I shall also assume that it is open to the appellants to invoke this defence in this court notwithstanding the apparent failure to do so at the trial.

Upon the evidence before it, the Superior Court, being bound to treat the construction and effect of the 17th section of the Statute of Frauds as a matter of fact to be established by evidence, could not have done otherwise than hold that its requirements had been satisfied. Mr. Hamilton Cassels so deposed and his testimony remained uncontradicted. The same is true of the Court of Review. See cases collected in Beauchamp, Rep. de Jur. Can., vol. 2, col. 2067, Nos. 326-7. Although we are required to render the judgment which the court appealed from should have rendered ("Supreme Court Act," section 51), it is the settled jurisprudence of this court that it

is bound to follow the rule laid down by the House of Lords in the case of *Cooper* v. *Cooper* (1), in 1888, and to take judicial notice of the statutory or other laws prevailing in every province and territory in Canada, *suo motu*, even in cases where such statutes or laws may not have been proved in evidence in the courts below and although it might happen that the views as to what the law might be as entertained by members of the court might be in absolute contradiction of any evidence upon those points adduced in the courts below.

Logan v. *Lee* (2). This view was tacitly acted upon in *Garland* v. *O'Reilly* (3). This conception of the functions of this court as "an appellate tribunal for the whole Dominion" is in harmony with the Imperial Act of 1859, 22 & 23 Vict. ch. 63, noted by Mr. Lafleur at page 34 of his work. See too *Bremer* v. *Freeman* (4).

It was in my opinion open to the plaintiff to establish by parol evidence, as he did, that the discounts stated in his letters of the 21st of August (meaningless in themselves) according to the usage of the trade meant and could only mean discounts off the standard drill prices according to the list in common use throughout North America and that both the parties must have

(1) 13 App. Cas. 88.
(2) 39 Can. S.C.R. 311; 313.
(3) 44 Can. S.C.R. 197; 21 O.L.R. 201.
(4) 10 Moo. P.C. 306.

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so understood. The case seems to me to fall clearly within the principle of the decision in *Spicer* v. *Cooper* (1), where parol evidence was held admissible to shew that a sale of fourteen pockets of Kent Hops at 100s. meant at 100s. per cwt. according to the usage of the hop trade.

In *Newell* v. *Radford* (2), Bovill C.J. says, at p. 54:—

> It has always been held that you may prove what the parties would have understood to be the meaning of the words used in the memorandum and that for this purpose parol evidence of the surrounding circumstances is admissible.

Byles J. says at p. 55:—

> Evidence has been held admissible to settle the meaning of the price or of the quantity of goods sold mentioned in the memorandum.

In *Macdonald* v. *Longbottom* (3), parol evidence was admitted to shew that "your" wool meant wool which the plaintiff had purchased as well as wool clipped from his own sheep. In *Hutchison* v. *Bowker* (4), Parke B. says:—

> If there are peculiar expressions used in a contract which have, in particular places or trades, known meanings attached to them, it is for the jury to say what the meaning of these expressions was.

Of course the jury must act on evidence. *Alexander* v. *Vanderzee* (5), *Ashforth* v. *Redford* (6). See also cases collected in Benjamin on Sales, 5th ed., p. 236. In Blackburn on Sales, 3rd ed., the rule is thus stated at p. 51:—

> The general rule seems to be, that all the facts are admissible which tend to shew the sense the words bear with reference to the surrounding circumstances concerning which the words were used, but that such facts as only tend to shew that the writer intended to use words bearing a particular sense are to be rejected.

See too Addison on Contracts (11th ed.), pp. 69 & 70.

(1) 1 Q.B. 424.
(2) L.R. 3 C.P. 52.
(3) 1 E. & E. 977.
(4) 5 M. & W. 535, at p. 542.
(5) L.R. 7 C.P. 530.
(6) L.R. 9 C.P. 20.

I prefer to rest my conclusion that the letter of August 21st sufficiently stated the terms of the contract between the parties in regard to prices on this ground rather than on any other implied reference in it to the standard drill price list, which I consider dubious, to say the least.

Upon the weight of evidence I am convinced that "inch sizes" mentioned in the contract include fractions as well as multiples of an inch—just as "millimeter sizes" admittedly include fractions of a millimeter.

I have no doubt that the contract in question was within the ostensible, if not within the actual, authority of the defendant's assistant manager, Horton.

The question of damages presents some difficulty owing to the non-specification of definite quantities in the contract. But *id certum est quod certum reddi potest.* The plaintiff has established that, but for the defendant's repudiation, he would in due course have specified under his contract with them the drills which he ordered in the American market. The orders in respect of which loss is claimed do not exceed the $35,000 limit placed by the contract upon the defendant's obligation. The evidence disclosed that the plaintiff took reasonable steps to minimize his loss. I find no ground for disturbing the assessment of damages.

The appeal, in my opinion, fails and must be dismissed with costs.

BRODEUR J.—I had prepared some notes with regard to this case but I find, after having read the opinion of my brother Anglin, that our views coincide. I would be then of opinion that the appeal should be dismissed for the reasons given by my brother Anglin.

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MIGNAULT J.—I have read the opinion of my brother Anglin and I concur in his reasons for the dismissal of the appeal.

The parties undoubtedly looked upon the letter of the 21st August, 1915, written by the respondent and accepted by the appellant, as forming a contract, and, in its letters seeking to be relieved from the obligations it had assumed, the appellant treated it as such. The opinion of the learned trial judge, not printed in the case, but filed at the hearing before this court, as well as a careful examination of the record, have convinced me that the grounds urged by Mr. Tilley in his argument before us were not contended for in the court below. It is true that learned counsel of the Ontario Bar were called by the appellant at the trial to support its plea that,

> by the law of Ontario, even if the said letter had been accepted by the appellant, the same does not constitute a valid contract enforceable against the defendant.

But the learned counsel based their opinion on what they considered a lack of mutuality, while admitting that if, subsequently to the letter, the respondent had specified certain goods, before there had been any revocation, there would have been a contract "*pro tanto*." I must, with deference, think that the objection of lack of mutuality was not well taken. Assuming that the respondent had the right, and had not in any manner lost this right, to specify the goods which the appellant had agreed to supply on specification, I fail to see how the latter could escape from its obligation to supply the goods by repudiating the whole contract before any specification had been made.

I also do not think that the letter of August 21st can be regarded as imposing no obligation on the respondent to take any goods. Properly construed, it obliged

him to purchase at least $25,000 worth of cast steel twist drills, with the right to take more up to $35,000. This, if accepted by the seller, would be a valid contract. The question whether any property passed is immaterial, for the contract would be valid even if the goods did not exist but had to be manufactured at a future date.

The objections of Mr. Tilley were very ably urged, but they appeared to me somewhat technical. Undoubtedly an order could be made subject to a standard price list, and I think that this was done in the present case. Of course, it is essential that a price be sufficiently agreed upon to constitute a valid contract of sale, but if, construing the contract according to the usages of trade, the prices were to be those determined by a standard price list in use in this trade, and were so understood by the parties, and if, moreover, as the evidence shews, the list of discounts mentioned in the letter, according to the common understanding of persons dealing in these articles, determined the price to be paid, I cannot believe that the element of price was absent in the agreement made by the parties. The appellant, in its letters to the respondent, never claimed that the contract was not understandable, but merely pleaded its inability to complete deliveries within the time fixed. The contention now made that the contract is meaningless seems in every way an afterthought.

I am clearly of opinion that the appellant cannot challenge the authority of Mr. Horton, who accepted the letter "for president and manager." The contract was not an unusual one, and this defence of lack of authority merely impresses me as shewing the anxiety of the appellant to escape from a contract which it repented having made.

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The effect of article 1235 of the Quebec Civil Code, on which Mr. Tilley relied, is well demonstrated by my brother Anglin. The whole question under this article is one of proof and not of validity of contract. My brother Anglin has also dealt with the effect of the Statute of Frauds under the Ontario law and I feel I can add nothing to his discussion of this question.

Perhaps I might add that, as the question came before the Superior Court, art. 1235 C.C. would have stood clearly in way of the respondent had he not produced a writing sufficient, under the terms of that article, to prove the contract alleged by him. I do not care to lay down any general rule on the question whether the proof of a foreign contract is, as a matter of procedure, governed by the *lex fori*, or by the *lex loci contractus*. But I do think that such a provision as article 1235 is one which a Quebec court must follow when it is sought to make evidence of any of the matters mentioned by it, quite irrespective of the locality where the contract, warranty, promise or acknowledgment was made. In this sense, and I do not wish to be understood as otherwise dealing with the subject of conflict of laws, the *lex fori* prevails over the *lex loci contractus*.

Mr. Tilley also relied on the decision of the Judicial Committee of the Privy Council in the case of *Reg.* v. *Demers* (1). In my opinion, this decision is clearly distinguishable from the one appealed from. Demers had undertaken to print certain public documents at certain specified rates. The contract imposed no obligation on the Crown to pay Demers for work not given him for execution, nor was there anything in the contract binding the Government to give him all or any of the printing work referred to in the agreement, the

(1) [1900] A.C. 103.

Government being free to give the whole work, or such part as it might see fit, to any other printer. Their Lordships did not hold the contract invalid, as is contended in the present case; on the contrary, they were of the opinion that for all work given to Demers on the footing of the contract the Government was undoubtedly bound to pay according to the agreed tariff, but they dismissed the claim made by Demers for damages because no printing work had been given him after a certain date.

In the present case the agreement of the parties properly construed was for the sale of certain goods to be specified by the respondent, the latter, in my opinion, being bound to take goods up to the amount of at least $25,000 with the right to order an additional amount of $10,000. The contract mentioned that the specifications were to commence about three weeks from its date and that shipment of the whole lot was to be made before the end of March, 1906. I cannot agree with the contention that there was not here a valid contract binding on both parties according to its terms.

On the whole, my opinion is that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Atwater, Surveyer & Bond.*
Solicitors for the respondent: *Weldon & Harris.*