1915
*Nov. 4.
1916
*Feb. 14.

WILLIAM ROCHE (DEFENDANT) .....APPELLANT;

AND

SARAH FRANCES JOHNSON (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract—Sale—Payment in company stock—Unorganized company—Time for delivery.

J. agreed, by contract in writing, to sell certain coal areas to R., a promoter of a mining company which, it was expected, would eventually take them over. The price was to be paid partly in cash and the balance in stock of the company to be delivered within six months. The promoters were unable to secure the necessary capital and the company has never been organized. In an action claiming damages for breach of the contract to deliver the stock.

Held, Duff J. expressing no opinion, that the time limit in the contract and circumstances disclosed at the trial, shewed that the parties intended that the stock to be delivered was that of a fully organized company.

Per Fitzpatrick C.J. and Davies J., that both parties knew when the contract was made that no such stock existed; and as it never came into existence, for which R. was not to blame, the contract could not be enforced. Idington and Anglin JJ. contra.

Per Davies J.—The contract to deliver the stock was not an unqualified one, but was dependent upon the successful floatation of the bonds in the market.

Per Duff J.—The stipulation as to time in the contract was not of its essence, but R. was to have a reasonable time, the nature of the business he was engaged in being considered, for delivery of the stock; some time before the action J. abandoned his claim to the stock and demanded its value in money as damages, but up to that time there had been no breach on R.'s part and he had done nothing to entitle J. to claim that the contract was rescinded.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

1915

ROCHE v. JOHNSON.

Per Idington and Anglin JJ.—The contract was absolute for delivery of the shares within six months or a reasonable time thereafter; the Court cannot import into it the condition of successful floatation; R. has not fulfilled his part and J. is entitled to substantial damages for the breach.

Judgment of the Supreme Court of Nova Scotia (49 N.S. Rep. 12), reversed, Idington and Anglin JJ. dissenting.

APPEAL from a decision of the Supreme Court of Nova Scotia(1), varying the judgment in favour of the plaintiff at the trial by awarding substantial in lieu of nominal damages.

The plaintiff's action is on a contract in writing made between her husband W. H. Johnson and the defendant which is as follows:—

"It is hereby agreed by and between William H. Johnson, of Halifax, in the County of Halifax, of the first part and William Roche, of Halifax, aforesaid of the second part: That the party of the first part agrees to sell and the party of the second part agrees to purchase four square miles of coal lands at Chimney Corner in the County of Inverness, Nova Scotia, now held by the party of the first part under leases Nos. 222, 223, 224, and 225 from the Government of Nova Scotia and which were recently under option of purchase to Mr. E. L. Thorne and in part held by the party of the first part under option of purchase from S. George Cook at present of Sydney for the price of eleven thousand dollars in cash and seventeen thousand dollars of common stock of the Margaree Coal and Railway Company, Limited, said stock to be delivered within six months from the date hereof. The cash to be paid on the delivery of the good and sufficient transfers for said coal areas and leases from the

(1) 49 N.S. Rep. 12.

1915

ROCHE v. JOHNSON.

party of the first part and his co-owner S. G. Cook to the party of the second part."

The cash required to be paid under this agreement was paid on the delivery of the transfer for the four coal areas mentioned. The action is for damages for the non-delivery of the fourteen thousand dollars of the common stock of the Margaree Coal and Railway Co., the remaining three thousand of the capital stock having been assigned by Johnson to one Cook, who is not a party to the action.

W. H. Johnson, one of the parties to the contract, made an assignment to the official assignee for the benefit of his creditors, on May 18th, 1910, which assignment included any rights Johnson might have under this contract and on January 23rd, 1911, the assignee sold the rights under the contract to W. H. Johnson's wife, the present plaintiff for the sum of $100.

At the date the contract with the defendant was entered into by W. H. Johnson, the Margaree Coal and Railway Co. was not carrying on business and had no property nor assets, and no stock of the company had been subscribed or issued, and up to the present time the company has not acquired any property or assets, and no stock has been issued, except a few shares to the provisional directors, and under its charter the company never had authority to commence operations, as none of its stock has been subscribed, it being a condition in the charter that 25% of its stock must be subscribed and 10% paid up before operations could be commenced.

Johnson was offered the requisite number of shares before the six months expired, but refused them because the company had not been organized.

The trial judge held that there was a breach of contract by defendant in not delivering the stock within the six months or within a reasonable time thereafter. He also found that the shares which it was proposed to issue to Johnson were not the shares called for by the contract.

As to damages he found that the burden of proof was on the plaintiff to satisfy him that any damages have been sustained by the plaintiff, and that he was not satisfied from the evidence that the plaintiff had sustained any damages by the non-delivery of the stock other than nominal damages, because the shares were not and never had been of any value.

From this decision the plaintiff appealed to the Supreme Court of Nova Scotia *en banc* on the question of damages only, and the defendant cross-appealed claiming that the action should have been dismissed with costs.

The Court of Appeal decided by a majority (Townshend C.J., Graham and Russell JJ.) that the cross-appeal should be dismissed and that larger damages should be awarded the plaintiff and that new evidence might be taken before a referee to assess such damages. Drysdale J., with whom Longley J. concurred, decided that the trial judge was right in awarding only nominal damages because no value could be placed upon the stock under the evidence as given at the trial. He, however, deferred to the majority of the court as to the order which should be made, namely, that further evidence should be taken as to the question of the value of the stock and a reference ordered for that purpose.

The defendant now appeals to the Supreme Court

1915

ROCHE v. JOHNSON.

of Canada claiming that the action should be dismissed, or in the alternative that the trial judge was right in deciding that only nominal damages should be awarded.

Rogers K.C. and *Ralston K.C.* for the appellant. By the company's charter the provisional directors had power to allot stock and respondent's shares could have been delivered at any time.

As to the obligation to deliver see *Field* v. *Pierce* (1).

The shares never had any market value and substantial damages could not be recovered. *Gibson* v. *Whip Publishing Co.*(2); *Barnes* v. *Brown*(3).

Mellish K.C. and *Allison K.C.* for the respondent. The market value is not the test in a case of this kind. *Elbinger Actien-Gesellschafft Für Fabrication von Eisenbahn Materiel* v. *Armstrong*(4); *Chaplin* v. *Hicks*(5).

Kirschmann v. *Lediard* (6) is very much in point. And see *Huse and Loomis Ice and Transportation Co.* v. *Heinze*(7); *Henry* v. *North American Railway Construction Co.*(8).

THE CHIEF JUSTICE.—The plaintiff in the action claimed $16,000 damages for failure to deliver $17,000 of common stock of the Margaree Coal and Railway Co. Ltd. pursuant to an agreement dated 5th Novem-

(1) 102 Mass. 253.
(2) 28 Mo. App. 450.
(3) 130 N.Y. 372.
(4) L.R. 9 Q.B. 473, at p. 476.
(5) [1911] 2 K.B. 786.
(6) 61 Barb. 573.
(7) 102 Mo. 245.
(8) 158 Fed. R. 79.

ber, 1909. To the knowledge of the parties there was no such stock in existence. It may be supposed that they expected the company would shortly be in a position to issue it; difficulties however arose in raising the necessary capital and the company has never been organized.

A careful examination of the record has convinced me that it must be assumed the parties to the agreement declared upon only intended to bind themselves on the condition that the company would be completely organized and the defendant placed in a position to deliver the stock. I am satisfied that Roche never intended to bind himself personally and that Johnson never expected or intended that he should.

It is well known that there can be no sale of goods which have not at least a potential existence at the time of the contract of sale. Shares in a company are not goods, but rather in the nature of choses in action. I do not think, however, this can make any difference.

Can the respondent claim damages for breach of a contract to deliver such non-existent shares which it is obviously impossible for the appellant to do?

The case is different from that of a contract to deliver so many goods of a particular kind where no specific goods are to be sold, for then the contractor may be made liable in damages for breach of his contract. But in *Taylor* v. *Caldwell*(1), it was held that:—

> Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract ar-

(1) 3 B. & S. 826.

1916

ROCHE v. JOHNSON.

The Chief Justice.

rived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

If in cases where the particular specified thing is in existence at the time when the contract is made, a condition is to be implied that it must continue to exist at the date for fulfilment much more must such a condition be implied where the thing is not in existence at the date of the contract and both parties know that unless and until it does come into existence the contract will be impossible of performance.

Taylor v. *Caldwell*(1) has been followed in later cases and notably in that of *Howell* v. *Coupland*(2), where the specific thing contracted for was not in existence at the date of the contract and it was pointed out by Lord Justice Mellish that this could make no difference in the application of the principle that if the thing perishes before the time for performance the vendor is excused from performance by the delivery of the thing contracted for.

If a party to a contract is relieved of his obligation to deliver where the goods, though existing at the time of the contract, have been subsequently destroyed or where though non-existent at the time of the contract they have subsequently come into existence and been destroyed, much more it would seem is he entitled to relief if the goods never come into existence at all. It seems indeed almost necessary in such case to imply

(1) 3 B. & S. 826. (2) 1 Q.B.D. 258.

a condition in the contract that the goods must come into existence, for no man could be supposed to bind himself to such an impossibility as the delivery of a non-existent thing.

The trafficking in shares of a company which has no existence seems a highly undesirable practice and one which I think may well be limited as far as possible certainly to the extent of not holding the contractor liable in damages for failure to deliver a particular specified thing which to the knowledge of both parties must be impossible at least until the thing comes into existence.

I think this disposes of the only point raised in the action, though it may leave open certain questions between the parties arising out of the transaction to which it relates; these cannot be properly disposed of here.

The appeal should be allowed and the action dismissed with costs.

DAVIES J.—This appeal is from a judgment of the Supreme Court of Nova Scotia varying the judgment of the trial judge who had awarded plaintiff nominal damages and remitting the case back to a referee for the assessment of such damages as the plaintiff might by further evidence be shewn to have sustained by reason of the breach of the defendants' obligation under the contract to deliver the plaintiff certain shares in a coal company to be organized.

Drysdale and Longley JJ. dissented on the ground that no evidence had been given as to the value of the stock for failure to deliver which the action was brought and no attempt was made to put a value upon

1916

ROCHE
v.
JOHNSON.

Davies J.

it and that the trial judge was right under these circumstances in awarding nominal damages only, but at the same time yielded their opinion to that of the majority and agreed to the reference.

The contract upon which the action was brought reads as follows: (see pages 19 *et seq., ante*).

The right of the plaintiff to maintain the action depends upon the true construction of this agreement. If it was an absolute and unconditional contract to deliver the stock as the learned trial judge held and the Court *en banc* confirmed and there was a breach of it on defendant's part, the only question remaining would be whether the Court *en banc* was right in remitting the case back to a referee to take further evidence and assess the damages.

In the view I take of the whole case and the proper construction to be put upon the contract, it is not necessary to discuss the reference back for assessment upon further evidence to be taken on the question of damages.

I am of the opinion that the contract is not an absolute and unqualified one and that the defendant's obligation to deliver the stock was one dependent upon the coming into existence of a fact anticipated and hoped for by both parties, namely, the success of the Margaree Company in organizing and financing its undertaking in England or elsewhere and in floating its bonds for £40,000 on the market.

The learned trial judge said:—

> I have before me a contract absolutely clean cut, plain and simple on its face and without any ambiguity or room for conjecture or doubt as to its meaning. I must be guided by the plain, literal meaning of the words used, and I cannot go counter to them, even though I may think it very likely that both parties at the time

contemplated the delivery of the stock when the company was on its feet.

But with the greatest possible respect, I think the learned judge had before him much more than that. He had matter and facts which made it essentially necessary to be considered in determining what was the real contractual obligation of the defendant, what it was the parties were contracting about, and what they each had full knowledge of and what under such considerations was the real intention of the parties as expressed. The substance and reality of the matter being dealt with and the real nature of the transaction have to be considered before the meaning of the defendant's obligation can be fairly determined.

The evidence shewed conclusively that the promoters of the Margaree Coal and Railway Company, Ltd., had been negotiating for months in England for the financing of their undertaking; and the sale of their bonds to the extent of £40,000, sterling, was to enable them to operate their mines and to construct a railway from their coal lands to tide water, and the necessary terminals and that the floating of these bonds was known by both parties to the contract to be a vital and essential necessity for the success of the undertaking.

Johnson, the plaintiff, it is true, says substantially that when he signed the contract both defendant and Morrison, the active promoter of the company, told him that the stock had been actually underwritten.

The defendant and Morrison positively denied that anything of the sort had been told Johnson and the trial judge accepted their testimony.

That testimony was to the effect that negotiations for the financing of the company were proceeding

1916

ROCHE v. JOHNSON.

Davies J.

satisfactorily in London and that it was hoped they would be successful.

Under the facts as found by the trial judge I cannot believe that any such absolute contract as was contended for ever was intended or that the contract entered into was such.

Such a construction really amounted to a guarantee on Roche's part that the £40,000 required would be forthcoming within the six months and the evidence satisfies me that no such intention ever existed or was thought to exist between the parties.

I agree with the trial judge and the court *en banc* that the shares which it was proposed at one time to issue to Johnson were not the shares the contract called for and that both parties intended. In the literal construction, however, which is sought to be put upon the contract, but which I do not accept, there is much to be said in favour of the view that these shares offered to Johnson were a fulfilment of Roche's contractual obligation.

Johnson, however, from the first objected and refused to accept any shares other than those in a fully organized company which had been financed so as effectively to carry out its undertaking.

If he had an unqualified contractual right to such shares then I think he had a right to substantial and not nominal damages and that the judgment below was right.

Holding the view, however, of the proper construction of the contract I have above expressed I do not think the plaintiff has succeeded in proving any cause of action.

The conditions which he himself says governed and

controlled the issue of the shares he was to receive never came into existence. No fault was or could be imputed to the defendant for this and Roche's contractual obligation was not therefore broken.

Any remedy the plaintiff may have under the contract (on a return of the $11,000 cash paid to him) to have his interest in the coal areas restored him are not affected by this judgment.

The appeal should be allowed and the action dismissed with costs.

IDINGTON J. (dissenting).—The appellant agreed with the respondent's husband to buy four square miles of coal lands for the price of eleven thousand dollars in cash and seventeen thousand dollars of common stock of the Margaree Coal and Railway Company, Limited, to be delivered within six months from the date of the agreement.

This agreement was so far fulfilled that the lands were transferred to appellant and the cash paid, but the stock has never been delivered. The respondent later on acquired the title to this agreement and right to sue for its breach.

I shall not enter upon the wide field of what is the correct measure of damages the appellant should pay. I am quite clear the court below is right in holding that the damages are more than nominal and entitled to refer the assessment thereof to a referee.

Notwithstanding a most elaborate argument well presented, there is really nothing more in this appeal.

I may be permitted respectfully to say, however, that after paying the closest attention to the argument it seemed to me a setting up men of straw to knock them down.

1916

ROCHE
v.
JOHNSON.

Idington J.

The fact that the respondent's husband may have seemed to imagine he was entitled to have the common shares of a company which had not only got organized, but also been so far successful in its operations as to float an issue of bonds, seems beside what we have to deal with.

The referee may have to consider all that, in order to determine whether or not in light of the surrounding circumstances the contract, so far as relative to the kind of common stock to be given, by implication reached so far and whether in assessing damages for its breach he can hold them, if assessable at all, properly based on such implications and thus to have been within the contemplation of the contracting parties.

So far as we are concerned that is not the question before us.

All we have to deal with involves only the question of whether or not such stock as offered, being that of an unorganized company issuing so much paper of doubtful legality and no value, can reasonably be said to have been an offering of what was within the contemplation of the contracting parties.

I have no hesitation in answering it was not. If it had been, there was no possible meaning in providing six months for the issuing and delivery thereof.

Between that extreme and the other which appellant may claim, there is a wide field for the referee to deal with.

The court below might well, if it had seen fit, have defined the proper measure of damages, but how can we say, in face of the judgment of this court in the recent case of *Wood* v. *The Grand Valley Railway Co.*

(1), that an imperative duty in law rested upon that court to have laid down the limits within which the referee should proceed ?

That case presents an entirely different state of facts from this, but the principles of law applicable thereto are closely analogous to if not absolutely identical with those which must govern the referee in proceeding herein.

In that case, I felt that the divisional appellate court for Ontario, in order to save needless expenses and avoid the possibility of a miscarriage in the conduct of the reference, might have been well advised in more accurately defining the legal grounds upon which the referee should proceed and the limits of the damages to be allowed.

Unfortunately I stood alone and must now bow to the decision of the court and say that so long as there is a case of damages to be considered by a referee there is no error in the judgment now appealed from.

There is something which might be said relative to the attitude of Johnson in the demands he made upon appellant in its bearing upon this respondent's right to recover. If it had appeared that he, so clearly in his own right or in right of what he was authorized by respondent as assignee, had presented his or her demands, in such clear-cut shape as to absolve appellant from proffering anything but what he did in discharge of his obligation then he was thereby released from further attempts to satisfy the claim.

The whole evidence bearing upon such an issue when fairly read does not justify such a contention.

Indeed, such contention is not pleaded, yet it was

(1) 51 Can. S.C.R. 283.

1916

ROCHE v. JOHNSON

Idington J.

only, if resting thereon, that the evidence referred to on the subject could be made to serve the defendant in law.

The appeal should be dismissed with costs.

DUFF J.—The litigation which led to this appeal was instituted by the respondent for the purpose of enforcing a certain agreement, dated November 5th, 1909, between her husband and the appellant, under which certain coal areas in the County of Inverness, N.S., were to be transferred to the appellant in consideration of a present payment of $11,000 and

$17,000 of the common stock of the Margaree Coal & Railway Company, Limited, said stock to be delivered within six months from the date hereof.

The Margaree Company was incorporated in the year 1903-1904, with a nominal capital of £500,000 and with power to incur indebtedness to the extent of £600,000. The plan of the promoters was that the company should acquire certain coal areas in Inverness, 48 in number, to develop and work these areas and for that purpose to construct a railway about 50 miles in length connected with the Intercolonial Railway and with shipping points. It was intended that in the usual way the property should be paid for partly in cash and partly by the transfer of fully paid up shares, the necessary capital being procured for the purchase of the areas and for construction and development by sales of bonds and shares.

The appellant, who appears to have been the moving spirit in the enterprise, obtained an option from Johnson on his four areas in 1907. Shortly after that the persons interested in the areas, the promoters, pooled their interests, a trustee being appointed and

options and transfers in escrow of the leases being given to the trustee. The option on Johnson's areas was extended from time to time until, in 1909, Johnson, being pressed for money, urged the respondent to take over his areas at a cash price and eventually the agreement above mentioned was arrived at. In 1910, before the expiration of the six months within which the shares were to be delivered, under the literal terms of the agreement, Johnson made an assignment for the general benefit of creditors and some months afterwards the assignee with the assent of Johnson's principal creditors transferred Johnson's rights under the agreement to Mrs. Johnson, the respondent, for the consideration of $100. Johnson's estate appears to have been hopelessly involved and it is quite evident, I think, that his rights under the agreement were not regarded by the competent businessmen, who at that time considered the matter, as having any present realizable value. The efforts of the promoters to obtain capital in England and France from time to time appeared to them to be on the point of succeeding and in the summer of 1911 Mr. Morrison, one of the promoters, went to England in the full expectation of succeeding in obtaining the necessary capital; he did not succeed and at the time of the trial the efforts of the appellant and his associates to obtain adequate capital had produced no result.

In the meantime Johnson on behalf of his wife had called upon the respondent to perform his agreement by delivering shares, the first demand having been made in the beinning of 1911 about eight months after Johnson's assignment to the trustee for creditors. There were several interviews between Johnson

1916

ROCHE v. JOHNSON.

Duff J.

and the respondent and between Johnson and Mr. Morrison on the subject at which Johnson appears to have been informed that shares would be allotted and transferred to him if he insisted upon it. Johnson always, however, assumed the attitude that under the agreement he was entitled to shares in a company furnished with capital for carrying on its operations. There is considerable variety in the form of expression used, but I think according to the fair reading of Johnson's own evidence that is the view of his rights under the agreement which he was putting forward and insisting upon at that time. He says explicitly he would not have accepted shares without being satisfied that the company was properly organized and financed. A correspondence ensued between the appellant and Mr. Allison, the respondent's solicitor, in which a demand was made on behalf of the respondent for payment in money of the amount of the face value of the shares and the action followed.

The controversy reduces itself to two questions or rather falls into two divisions. First it is necessary to consider the legal effect of the agreement of the 5th November, 1909. Several views have been put forward. On the part of the respondent it is contended, and the contention seems to have been accepted by the learned Chief Justice in the court below, that the appellant's undertaking was something more than an undertaking that could be satisfied by the delivery of the paid-up shares in the Margaree Company validly allotted and issued. The parties, it is said, did not contemplate the allotment of the shares in the payment of the purchase price of any of the 48 areas, the titles to which had been pooled, until the company had procured the necessary capital to enable it to purchase

the areas under the terms of the pooling agreements and to enable it to develop the properties and put the whole undertaking into operation. That is, no doubt, the view though he somewhat crudely expressed it, which Johnson had in his mind when he refused to accept the shares offered by the appellant and that is, no doubt, the view intended to be expressed in the letter of the 31st of July, 1911, written on behalf of the respondent by the gentleman who was then acting as her solicitor.

On behalf of the appellant alternative constructions are advanced. First, that if the view just outlined correctly interprets the agreement, that can only be upon the theory that the real nature of the arrangement between Johnson and the appellant was that Johnson in addition to the sum of $11,000 cash was to share in the fruits of the promotion of the company in the ratio of $17,000 to the par value of the aggregate of shares allotted to the proprietors according to the terms of the pooling arrangements. And one result of this is said to be that the obligation to deliver must be subject to a condition that the promotion of the company should be brought to a successful issue. The alternative construction is that the "$17,000 of the common stock" of the Margaree Company is a description which is fully answered by shares of the par value of $17,000 validly allotted and fully paid up; but that the agreement being an agreement for the sale of the land the stipulation as to time is not of its essence and that a term should be implied to the effect that delivery of the shares should be exigible only after the lapse of a reasonable time for completing the contemplated purchase by the company of the property of the promoters.

1916

ROCHE v. JOHNSON.

Duff J.

There are arguments in favour of every one of these rival constructions of considerable plausibility; but having weighed them all I have not had much difficulty in concluding that on the whole the balance is definitely against the first.

There are three circumstances to consider in testing these constructions. First, there was no legal obstacle in the way of allotting fully paid up shares in exchange for the payment in cash of their full value at the time the agreement was entered into or at any time down to the trial; and consequently whether capital was obtained or not, sufficient for the purchase of the properties and the working of the company's enterprise, the agreement was at all times capable of being performed according to its literal terms.

Secondly, the appellant no doubt as well as Johnson fully expected that the efforts of the promoters to obtain capital would be successful within the period named in the agreement, six months from the date; and this delay, it may be assumed, was intended for the protection of the appellant in order to avoid the embarrassment certain to arise in connection with the issue of the shares and the transfer of them in payment for one of the properties while the promotion of the enterprise remained incomplete.

Thirdly, the sale was brought about by the appellant's desire to accommodate Johnson, who was pressed for money.

In these circumstances is there any justification for implying a term, as in the respondent's proposed construction, by which the appellant warranted that sufficient capital would be obtained within the time mentioned or indeed at any time? The principles

upon which in transactions of this kind the courts act in implying a term not found expressed in a contract have been stated in various ways. It has been said, for example, that the law will imply a term obviously intended by the parties and necessary to make the contract effectual, that is to say, where the written contract as expressed in writing would otherwise be futile; *per* Bowen L.J. in *Oriental Steamship Co.* v. *Tylor*(1), at page 527. Lord Watson has put the matter thus (and it is perhaps the most practical way of stating it) in *Dahl* v. *Nelson, Donkin & Co.* (2), at page 59:—

> I have always understood, that, when the parties to a mercantile contract such as that of affreightment, have not expressed their intentions in a particular event, but have left these to implication, a court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract of charterparty which were not actually present to the minds of the parties at the time of making it, and when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

It is necessary to add, however, a reference to the warning of Lord Esher in *Hamlyn & Co.* v. *Wood & Co.*(3) at p. 491; the effect of which is that it is not sufficient that the suggested stipulation should appear to be reasonable or that it should appear to

(1) [1893] 2 K.B. 518. (2) 6 App. Cas. 38.
(3) [1891] 2 Q.B. 488.

1916

ROCHE v. JOHNSON.

Duff J.

be reasonable to imply such a stipulation; the court must be satisfied that the implication is a necessary one, that is to say, that it must be presumed that both parties, if the matter had been brought to their attention would, as reasonable men, have insisted upon it.

I am by no means convinced that if the point had been raised Johnson would have insisted upon any warranty, indeed, I think it highly improbable in view of the fact that the appellant was buying Johnson's property at Johnson's solicitation and mainly for Johnson's accommodation, that Johnson would have thought of exacting such a stipulation. He knew that the appellant's interest in the promotion was much greater than his and that no effort would be wanting on the appellant's part; and I see not the slightest ground for inferring that he would have called upon the appellant to warrant by contract the success of his efforts. As to the appellant, there was nothing in the circumstances likely to suggest to any reasonable man in his position (inconveniencing himself to do Johnson a favour) that he ought to undertake the burden of such a stipulation.

There is, I think, more plausibility in the contention that both parties to the agreement in question contemplated a transfer to Johnson of shares allotted to the appellant by the company in payment of the purchase price of Johnson's areas in accordance with the terms of the pooling arrangement; a transfer which could only take place when the property as a whole had been taken over by the company. That is what the parties unquestionably had in view. And if the contention on behalf of the respondent, that I have just been examining, were to be accepted it

would seem to follow almost as a corollary that the appellant's undertaking to transfer should not be exigible until the property had been taken over by the company. On that footing the case would be well within the settled principle that where from the nature of the contract and surrounding circumstances it is clear that the contract is based upon the assumption by both parties that some condition or state of things going to the root of the contract and essential to its performance should be in existence, the non-existence of such condition or state of things when the time for fulfilment has arrived affords in general an answer to an action upon the contract. (*Taylor* v. *Caldwell*(1); *Krell* v. *Henry*(2); *Chandler* v. *Webster*(3); *In re Hull and Lady Meux*(4); and cf. *Herne Bay Steamboat Co.* v. *Hutton*(5).

I do not find it necessary to decide definitely whether or not this is the right view of the agreement before us. I have come to the conclusion that whether this view of the agreement or the second of the alternative constructions presented on part of the appellant be accepted, the respondent must fail in her action.

The stipulation as to delivery within six months is obviously not of the essence of this contract. Both sides have pressed the contention that the contract contemplates a transfer of shares allotted in payment of coal properties to be taken over by the company. Having regard to the circumstances already adverted to and to the subsequent conduct of the parties which

(1) 3 B.&S. 826; 32 L.J.Q.B. 164.
(2) [1903] 2 K.B. 740; 72 L.J.K.B. 794.
(3) [1904] 1 K.B. 493, at pp. 499, 501; 73 L.J.K.B. 401.
(4) [1905] 1 K.B. 588; 74 L.J.K.B. 252.
(5) [1903] 2 K.B. 683; 72 L.J.K.B. 879.

1916

ROCHE v. JOHNSON.

Duff J.

may, I think, be looked to for assistance in interpreting the contract, the proper conclusion is that both parties must have intended that the appellant was to have a reasonable time with reference to the nature of the business he was engaged in before being called upon to deliver the shares and that the parties were contracting upon that footing.

Accepting this construction of the agreement, then, has there been any breach of which the respondent is entitled to complain? The facts I am about to state are, I think, sufficient to shew that down to the time when, some months prior to the commencement of the action, the respondent through her solicitor demanded money in lieu of shares, there had been no breach on part of the appellant and nothing entitling the respondent to declare that by reason of the appellant's conduct the contract was rescinded.

The primary facts are really not in dispute, but it is necessary to notice them at some length in order to consider the legal consequence of them. I have already mentioned that the respondent through her husband had again and again declared that she would not accept shares in the coal company, even although fully paid up until it appeared that sufficient capital had been raised to set the company in operation. That position was reiterated by the respondent's husband in his evidence given at the trial in which he explicitly declared more than once with slight variations of phraseology that he would not have accepted shares until that condition had been satisfied. It is necessary, however, to refer to some communications which passed between Mr. Allison, the respondent's solicitor, and the appellant. In August, 1911, Mr. Allison

called upon the appellant and Mr. Morrison and made then, as he says, an unconditional demand upon the appellant for the delivery of the shares which, by a letter of the 27th July, 1911, addressed to the gentleman who was then acting as her solicitor, the appellant had offered her. This demand was not pressed Mr. Allison being informed by the appellant and Mr. Morrison of Mr. Morrison's contemplated visit to Europe and the expectation of both of them that a successful floatation would result. Mr. Allison was informed that the shares would be delivered if he insisted upon it, but that this would be a source of embarrassment; and for this reason the demand was not pressed, the respondent agreeing to await the event of Mr. Morrison's efforts.

One is entitled here, I think, to infer (it is not in the least inconsistent with the general effect of Mr. Allison's evidence), that the respondent acted in consenting to wait, with a view to her own rather obvious interest that the prospects of a successful floatation should not be impaired as the result of her importunities. The respondent did not move again until the 19th of February, 1912, when a letter was written by Mr. Allison demanding not the shares but the face value of the shares in money. This letter was followed by a letter of the 29th of February in which the respondent explicitly refused to accept shares and reiterated her demand to be paid the face value of the shares as damages. The conclusion to which I have come is that after the interview of August, 1911, considering all the circumstances, the respondent was not entitled without some further intimation to the appellant to treat a failure to deliver upon some particular date as a breach of contract on part of the appellant

1916

ROCHE v. JOHNSON.

Duff J.

entitling her to treat the contract as rescinded; and in any view the attitude assumed by the respondent in the letters of the 19th February, 29th February, 2nd of March and 8th of June and at the trial absolves the appellant from anything like a formal tender of the shares or the production of the shares in court.

The appeal should be allowed and the action dismissed with costs.

ANGLIN J. (dissenting).—This action is brought upon the following agreement: (see pages 19 *et seq.*, *ante*).

The coal areas covered by this agreement were, immediately upon its execution, conveyed by W. H. Johnson to the defendant, and the $11,000 cash was thereupon paid to Johnson. The shares have not been delivered. The floatation of the Margaree Coal Company has not yet been effected, difficulties hitherto insurmountable having been encountered in making the financial arrangements deemed necessary, and at the present time there appears to be no prospect of a successful floatation of the company. The plaintiff, who is the wife of W. H. Johnson, purchased from his assignee for creditors his interests under the agreement with the defendant.

After several extensions of the time for delivery of the shares had been assented to, the plaintiff finally called upon the defendant to carry out his agreement; and she brings this action for damages for his failure to make delivery of the $17,000 of shares.

In order to determine the rights of the parties it is essential to ascertain what their bargain was. Two questions arise as to the meaning and effect of the writing to which they committed it. The first question

is: What kind of shares did W. H. Johnson stipulate for and William Roche undertake to deliver—shares in a company merely chartered, without capital or property, and with no prospect of being in a position to commence operations within any reasonable time, or shares in an organized company with sufficient capital provided for the development and prosecution of its undertaking and having its operations already begun, or being in a position immediately, or practically so, to commence operations? The second question is: When was delivery of the shares made exigible —at, or within a reasonable time after, the expiry of the six months named in the writing, or only if and when the defendant and his associates should succeed in financing the company and putting it in a position to commence active operations?

By the judgment at the trial it was determined that the shares contracted for were shares in a company "on its feet"—adequately financed and ready to prosecute its undertaking—that the defendant had contracted to deliver such shares not if and when floatation should take place, but within six months or a reasonable time thereafter, and that there had been a breach of this contract by the defendant entitling the plaintiff to damages. But because he deemed the evidence insufficient to enable him to assess such damages the learned trial judge held that the plaintiff could recover only nominal damages. On appeal by the plaintiff the full court held him entitled to substantial damages, indicated the basis on which they should be assessed and directed a reference to fix the amount. From that judgment the defendant appeals.

1916

ROCHE v. JOHNSON.

Anglin J.

In order to know what the parties intended respectively to stipulate for and to undertake, all the terms of the writing, the circumstances under which they contracted and the interpretation which their conduct shews that they themselves put upon their agreement must be taken into account.

The plaintiff alleges that the intention of the parties was that her husband should receive shares in a company sufficiently financed to be ready to begin active operations and that the defendant undertook to deliver such shares to him within six months. By his plea the defendant asserts that delivery of the shares was to be made only upon completion of the financial arrangements of the company and when it should be ready to begin operations and alternatively that if the plaintiff was entitled to the delivery of any shares before the completion of financial arrangements and before the company was ready to commence operations, her only right was to receive shares issued under section 10 of the incorporating statute that she refused to take such shares when offered to her, but that he is still ready and willing to bring them into court; and he submits to such order as the court may see fit to make in respect to them.

The evidence seems to establish that the plaintiff and her husband were more than once informed that they could have shares of the kind last mentioned. They always took the position that they would not accept such shares as they were not what they were entitled to. If shares in a company possessed neither of the money nor of the property requisite for its enterprise were what the plaintiff's husband had agreed to take, the defendant might properly ask that this action should be dismissed upon his carrying out the

offer of delivery made in his statement of defence. When the plaintiff and her husband refused to accept such shares, however, the defendant did not take the stand that they were not entitled to anything else. On the contrary he urged that they should allow further time for the financing in order that shares in a company ready to operate might be available. There was more than one extension of the time for delivery agreed to under these circumstances.

But the terms of the contract themselves perhaps furnish an argument even more cogent in support of the view that the parties were bargaining for shares in a company adequately financed and ready to prosecute its undertaking. Else why the stipulation for six months within which to make delivery ? Shares such as had been offered to the plaintiff and her husband more than once before action, and of which the offer is repeated in the defendant's plea, were immediately available when the agreement was made. There would be no reason for providing that their delivery should be withheld for six months. Shares answering the other description were not immediately available, but it was understood that the financial arrangements of the company were about complete and that it would undoubtedly be in operation well within the six months stipulated for. Indeed, so great was the expectation of an almost immediate floatation of the company's bonds and stocks, that the plaintiff's husband understood (as the trial judge has found), though erroneously, that the stock of the company had been actually underwritten. The learned Judge says:—

> There is an issue of fact between Mr. Johnson on the one side, and the defendant and Mr. Morrison and the other side. Mr. Johnson

1916

ROCHE
v.
JOHNSON

Anglin J.

says that Mr. Morrison and the defendant, both being present at the same time, told him that the stock in the company had been actually underwritten, this is denied by the defendant and Mr. Morrison, and I accept their testimony. I do not impute intentional untruthfulness to Mr. Johnson, and I have no doubt that words of strong expectation were used, which, after the lapse of time, Mr. Johnson may now think were representations of an actual existing state of affairs.

To quote another passage from the opinion of the learned judge:—

At the time when the contract was made, the defendant, I have no doubt, expected that before the six months elapsed, money would be raised in England to float the company, in which event the company would have been organized and the stock issued and delivered. This, I have no doubt, was what the defendant thought and intended to do.

There is abundant evidence to support these findings and I can see no reason why they should be disturbed.

As already stated the first position taken by the defendant himself is that his obligation was to deliver the shares only after the floatation of the company—that, as it is put in his factum,

the period of six months mentioned in the agreement * * * had reference merely to the probable time necessary to finance the company and were words of expectation only.

As to the soundness of this interpretation of the agreement I shall have something to say presently. I refer to it now because it makes it practically certain that it was shares in a company completely floated and ready to prosecute its undertaking—a fact otherwise tolerably well established—that the parties had in view. The suggestion that the defendant's obligation could be satisfied by the delivery of shares in a company without indispensable capital paid, or even subscribed, and with no prospect of attaining a position

in which it would be ready to commence operations, issued under such a provision as section 10 of the "Incorporating Act," was the veriest afterthought.

But what as to the obligation to deliver within six months, which I regard as the really crucial question in the case? In the first place without distortion of plain language an unqualified undertaking to deliver shares within six months cannot be read as providing for delivery only when the company should be floated and as relieving from all obligation to deliver if floatation should be found impossible. An analysis of the exhaustive argument for the appellant on this branch of the case discloses that it rests wholly and solely upon the unlikelihood of the appellant having bound himself absolutely to make delivery. But if he meant that his obligation should be contingent on floatation how easy it would have been to express that idea! Why stipulate for six months? No doubt, in the light of subsequent events, it may seem astonishing that the defendant should not have anticipated the possibility of difficulties in the financing of his company. But the evidence makes it abundantly clear that at the time the agreement was made the expectation of everybody—of the defendant and his friends and advisers as well as of the plaintiff's husband—was that the floatation was already for all practical purposes, an accomplished fact, and that in undertaking to make delivery within six months the defendant was in reality not assuming any risk. It was in this frame of mind that he made his bargain. Why should we now import into it an element of contingency for which he did not provide and against which, had it been suggested to him at that time, he

1916

ROCHE v. JOHNSON.

Anglin J.

would probably have deemed it an excess of caution to guard? Moreover, having regard to Johnson's attitude—his refusal to renew options, his insistence on an out and out purchase of his areas, his determination to secure in some satisfactory form his price of $28,000—what justification is there for assuming that he was prepared to take, and did in fact take, the risk of failure of a floatation which was wholly in the hands of the defendant and his associates? No doubt under pressure of straitened circumstances he reduced his cash payment from $14,000 to $11,000, increasing the stock payment for $14,000 to $17,000—but on doing so he obtained from a man known to be in a financial position which made him capable of implementing it, an unconditional promise for the delivery of $17,000 of shares in a company which I think it has been conclusively shewn was to be a company financed and floated upon the basis which all parties then had in mind and regarded as practically an accomplished fact. With great respect for those who hold the contrary view, I cannot, because of any supposed hardship on the defendant—which I cannot but think is more apparent than real (for after all, he obtained the coal areas which we must assume he thought worth $28,000, or he would not as a promoter of the Margaree Coal Company have made the bargain he did)—introduce into that bargain a condition to which the parties did not make it subject and to which upon the whole evidence I see no reason to think they intended that it should be subject. *Hamlyn & Co.* v. *Wood & Co.*(1), at pages 491, 494-5.

I agree with the learned trial judge and the learned

(1) [1891] 2 Q.B. 488.

judges of the appellate court that the arrangement made with Mr. Thorn was not, and was not intended to be, a discharge of the defendant's contractual obligation.

The defendant further complains of the judgment in appeal because it allows the plaintiff on a reference to supplement evidence as to damages which the trial judge found to be insufficient to warrant a recovery of more than nominal damages. It is only upon this point, as I understand their judgment, that there was any difference of opinion amongst the judges of the provincial courts. There was, in my opinion, evidence which shewed that the plaintiff was entitled to recover substantial damages, though probably not all that might be furnished to enable the court to satisfactorily fix the amount which should be awarded. The attainment of precision or certainty in the ascertainment of the amount of actual loss is not essential to the assessment of damages in cases such as this. *Chaplin* v. *Hicks*(1). I am fully alive to the danger of allowing a plaintiff to supplement his proof either upon a new trial or on a reference such as the court *en banc* has directed. But there can be no doubt of the power of the court in a proper case to make such an order. The exercise of that power is necessarily from its very nature largely discretionary and should not be lightly interfered with on a further appeal. The question to be determined in the present action is: What would have been the probable value of shares in the common stock of the defendant company had it been successfully floated within six months of the making of the agreement or within any extension of that time

(1) [1911] 2 K.B. 786.

1916

ROCHE v. JOHNSON.

Anglin J.

assented to by the plaintiff? On such a question there is perhaps not the same danger in allowing further investigation as ordinarily attends the ordering of re-hearings on questions of fact. Moreover, I am not satisfied that all the aspects in which the question of damages should be considered in a case such as this were present to the mind of the learned trial judge. Many elements which must be considered in estimating what would have been the probable value of the shares have been suggested in the judgment of the present learned Chief Justice of Nova Scotia. For the view that, in a case in which the damages are difficult of ascertainment and largely of a contingent character and the evidence adduced at the trial, where the question of damages was gone into, shews that substantial damages have been sustained, but is insufficient to enable the court to determine the amount which should be awarded, it is not an improper exercise of discretion to direct a reference such as has been ordered in the present case, there is the authority of the recent decision of the Ontario Appellate Division in *Wood* v. *Grand Valley Railway Co.*(1), affirmed on appeal by this court(2).

I am for these reasons of the opinion that this appeal should be dismissed.

Appeal allowed with costs.

Solicitor for the appellant: *J. L. Ralston.*

Solicitor for the respondent: *E. P. Allison.*

(1) 30 Ont. L.R. 44.

(2) 51 Can. S.C.R. 283.