[PRIVY COUNCIL.]

SALLY WERTHEIM . . . . PLAINTIFF;

AND

CHICOUTIMI PULP COMPANY . . . . . DEFENDANTS.

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Feb. 16, 17, 18;
March 18.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

Breach of Contract—Late Delivery of Goods sold—Measure of Damages—Purchaser entitled only to Indemnity against Loss.

The general intention of the law in giving damages for breach of contract is that the plaintiff should be placed in the same position as he would have been in if the contract had been performed. In the case of late delivery the measure thereof in order to indemnify the purchaser is the difference between the market price at the respective dates of due and actual delivery of the goods purchased; but if the purchaser has resold them at a price in excess of that prevailing at the date of delivery he must in estimating his damages give credit therefor.

In an action for damages for breach of contract dated March 13, 1900, to deliver 3000 tons of moist wood pulp between September 1 and November 1 of that year the appellant claimed to recover 27*s.* 6*d.* a ton, the difference between 70*s.*, the market price at the port of delivery on the due date, and 42*s.* 6*d.*, the market price at the same place on the date of actual delivery; but it appeared that he had sold the goods at 65*s.* a ton, involving a loss to him of only 5*s.* a ton:—

Held, that he was entitled to recover only 5*s.* a ton. As the Court below had on the evidence decreed that amount on 2000 tons only, their Lordships increased the amount by 250*l.* in respect of the remaining 1000 tons together with a further amount as subsequently agreed between the parties.

APPEAL from a judgment of the Court of King's Bench for the Province of Quebec (October 3, 1908) reversing in part a judgment of the Superior Court (November 12, 1907) which had dismissed the appellant's action and entering judgment for the appellant for $2434 in respect of a portion of the appellant's claim.

The questions raised in the appeal arose out of a contract dated March 13, 1900, set out in their Lordships' judgment, for the supply by the respondents of pulp wood to the appellant, the main question decided being as to the measure of damages payable by the respondents for late delivery thereof.

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and LORD SHAW OF DUNFERMLINE.

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So far as now material the plaintiff sued under the circumstances detailed in the said judgment to recover $20,047.50 as damages for the respondents' failure to deliver 3000 tons of pulp under the contract of March 13, 1900, not later than November 1, 1900, representing the difference between the price of pulp in November, 1900 (70*s.*), and that in July, 1901 (42*s.* 6*d.*).

The respondents pleaded in regard thereto that they had manufactured the pulp with all possible celerity, but that the appellant had refused to take delivery in the autumn of 1900; that the appellant asked for it only in June, 1901, when it was shipped; and that he accepted it without reserve, in execution of the contract, and made no claim for damages.

The trial judge (McCorkill J.) found that the respondents had enough pulp in stock during the months of September, October, and November, 1900, to have fulfilled their obligation of supplying 3000 tons wet; and that the market price of pulp wood in November, 1900, when the pulp should have been delivered, was 70*s.* per moist ton, and that when the pulp was in fact delivered it had fallen to 42*s.* 6*d.* per moist ton. He dismissed the action, being of opinion that it was brought for late delivery, and not for failure to deliver, that when delivery was made in June no such claim in damages was contemplated, and that no notice had been given of the intention to claim damages.

The Court of King's Bench affirmed the judgment of the trial judge in respect of claims not material to this appeal, but reversed it on the question of damages for late delivery, and by a majority assessed them at $2434, being part of the $20,047 claimed.

The majority held that pulp had risen in England in the month of November, 1900, to 70*s.* per ton; that the appellant had contracted on March 2, 1900, for future deliveries to the Darwen Mills, and others, at 65*s.* per ton, and they allowed the 5*s.* difference in respect of 2000 tons only as being the measure of damages.

Sir R. Finlay, K.C., and *G. G. Stuart, K.C.*, for the appellant, contended in the first place that on the evidence the Court of King's Bench was wrong in only allowing damages in respect of the failure to deliver at due date 2000 tons of moist pulp. It

was established that the breach extended to the whole 3000 tons contracted for. With regard to the measure of damages for late delivery the rule as formulated in Benjamin on Sales, 5th ed., p. 987, is too well established to be disregarded. It is "the difference between the value of the goods at the date fixed for delivery and their value when delivered." When there is a market their value is prima facie the market price; when there is no market their value may be otherwise determined—e.g., by the price of the best substitute procurable. There is the further rule that where the goods at the time of contract have been sub-sold or are bought for sub-sale, then if there is a market and a sub-sale the buyer's duty to his seller is to buy goods in the market to supply the sub-purchaser, the difference in price being in the absence of special circumstances the measure of damages. Here, although there was no market in Chicoutimi, yet, on the long course of dealing between the parties and consequent communication between Chicoutimi and Manchester, the market price at Manchester less the admitted cost of carriage should be taken to be the market price at Chicoutimi. Applying this rule, the measure of damages should be the difference between the value of the pulp on November 1, 1900, when the respondents made default, and its value at the time of delivery in June, 1901, namely, 27*s.* 6*d.* per ton. The appellant did not by taking delivery in June, 1901, waive his right to damages for failure to deliver in November, 1900.

J. R. Atkin, K.C., L. A. Taschereau, K.C., and *Theobald Mathew*, for the respondents, contended that the claim of $20,047, being the total of 27*s.* 6*d.* per ton, as damages for late delivery was excessive and unreasonable. The evidence shewed that the actual loss incurred by the purchaser was 5*s.* a ton and that payment to him on that footing would afford him a complete indemnity, which was all that he was entitled to. The obligation of the buyer under this contract was to provide a vessel on which the respondents should place their goods. To the extent to which he did not do so he had no claim. He failed entirely to comply with that requirement, and it was contended that his claim for damages could not be sustained. The appellant should have provided a ship in October, and if he had done so, and the

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respondents had failed to deliver, the measure of damages would have been the difference between the contract and market price on October 31, which according to the authorities was the day on which the damages should be fixed. The place of delivery in this case was Chicoutimi, but there was no market there, and consequently the rule could not be applied. It was contended that the decree of the first Court dismissing the action was right, and that in any event the sum of $2434 decreed by the Appellate Court was the utmost which the appellant could reasonably claim. Reference was made to *Borries* v. *Hutchinson* (1) and *Ogle* v. *Earl Vane.* (2)

Sir R. Finlay, K.C., in reply, referred to *Grand Tower Co.* v. *Phillips* (3) as to the measure of damages where there is no market, and to the following authorities in support of the general rule as to damages contended for by the appellant:— *Cahen* v. *Platt* (4); *Wemple* v. *Stewart* (5); *Rodocanachi* v. *Milburn* (6); *Elbinger Actien-Gesellschafft* v. *Armstrong* (7); Benjamin on Sales, 5th ed., p. 991, referring to *Dunlop* v. *Higgins* (8); Mayne on Damages, 7th ed., p. 64; *Ströms Bruks Aktie Bolag* v. *Hutchison* (9); *Duff & Co.* v. *Iron and Steel Fencing and Buildings Co.* (10); *Warin* v. *Forrester* (11); Sale of Goods Act, 1893, s. 51; and to the notes on p. 971 of Benjamin on Sales, 5th ed.

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The judgment of their Lordships was delivered on March 18, 1910, but its issue was delayed at the request of parties in order to arrive at a consent enhancement of the amount awarded for damages. The amount of 2102*l.* 14*s.* 8*d.* was eventually substituted for 250*l.*, and in February, 1911, the judgment so amended was issued which had been delivered by

LORD ATKINSON. This is an appeal from the judgment of the Court of King's Bench for the Province of Quebec (Appeal

(1) (1865) 18 C. B. (N.S.) 445.
(2) (1867) L. R. 2 Q. B. 275; and in appeal, (1868) L. R. 3 Q. B. 272.
(3) (1874) 90 U. S. 471.
(4) (1877) 69 N. Y. 348.
(5) (1856) 22 Barbour (N.Y.), 154, 159.
(6) (1886) 18 Q. B. D. 67, 77.
(7) (1874) L. R. 9 Q. B. 473, 476.
(8) (1848) 1 H. L. C. 381, and note on p. 992.
(9) [1905] A. C. 515.
(10) (1891) 19 R. 199.
(11) (1877) 4 R. 190; affirmed in 4 R. (H.L.) 75.

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Side), dated October 3, 1908, affirming in part and reversing in part a judgment of the Superior Court of that Province, dated November 12, 1907.

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By the former judgment the respondent company was condemned in a sum of $2434 and costs.

The defendant company carry on the manufacture of wood pulp at the town of Chicoutimi, which is situate on the river Saguenay, a tributary of the St. Lawrence in the Province of Quebec. The plaintiff is the sole partner in a German firm of merchants carrying on business at Hamburg in Germany. He has an agent at Manchester named Reichenbach, where he trades in the pulp he imports from Canada and elsewhere, and an agent at New York named Goldman.

He claims in this action to recover damages from the respondents under three separate heads for three separate breaches of a contract entered into between them on March 13, 1900, to deliver at Chicoutimi f.o.b. 3000 tons of moist wood pulp between September 1 and November 1 in that year, at a price which was equivalent to 25*s.* per ton. The contract was in the terms following:—

"Quebec, 13 Mars, 1900.

"La Compagnie de Pulpe de Chicoutimi consent à livrer à A. Wertheim & Cie., de Hambourg, trois mille (3000t) tonnes de sa pâte de bois habituelle, humides, de 2240 lbs., à $11.00 la tonne de 2000 lbs. sèche, livrée à Chicoutimi sur vapeur ou vaisseau ou char, du premier Septembre au premier Novembre courant si possible si faire se peut en partie plutôt.

"Ceci en règlement complet total et absolu de toute réclamation quelconque qu'ils ont ou pourraient avoir sur les transactions faites jusqu'à ce jour en vertu du contrat du 9 Décembre, 1898.

"Termes de paiement comme ci-devant.

"La Cie. de Pulpe de Chicoutimi,
"J. E. A. Dubuc, Dir.-Gt."

The first breach relied upon consists in the respondents having delayed the delivery of this quantity of pulp till the month of June, 1901; the second in the alleged inferior quality of the pulp actually delivered; and the third in its alleged

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deficiency in weight. In the view which their Lordships take of the appellant's claim under the second and third heads, it is unnecessary to deal with the amount demanded in respect of each. The first was the main claim. In respect of it the appellant claimed to recover 27*s.* 6*d.* per ton on the 3000 tons mentioned in the contract, that being the difference between the market price of such pulp at Manchester, the ultimate destination of the pulp, at the time it should have been delivered, namely, 70*s.* per ton, and its market price there at the time it was in fact delivered, namely, 42*s.* 6*d.* per ton; the differences between the market values of the pulp at these respective times being, according to Sir Robert Finlay's contention on behalf of the appellant, the well-established and indisputable measure of damages for delay in breach of contract in delivery of goods. The appellant in reality never sustained this loss nor anything like it, because he sold the goods under contracts, some anterior in date to the contract sued upon, the others anterior in date to the actual delivery, at the price of 65*s.* per ton, which is only 5*s.* per ton less than the top market price for which the pulp could presumably have been sold in Manchester had it arrived there in November, 1900, the contract time. Yet so rigid, it is insisted, is this formula or rule, that the resales must be ignored as collateral and irrelevant matters and damages be awarded for a loss which in reality has never been sustained. That, however, is not the only peculiarity of the appellant's claim. He admits that 13*s.* per ton would cover all the costs and expenses of the transport of the pulp from Chicoutimi to Manchester. It would thus cost him when delivered there 38*s.* per ton in all. If the pulp had been delivered in November and the appellant had sold it then at the highest market price, namely, 70*s.* per ton, he would have made a profit on it of 32*s.* per ton; but if the appellant was to succeed in this action, he would have received from the sub-vendees the price at which the goods were actually sold, namely, 65*s.* per ton, plus 27*s.* 6*d.* per ton, from the respondents in the shape of damages, making together 92*s.* 6*d.* per ton, leaving a profit of 54*s.* 6*d.* per ton, or 22*s.* 6*d.* per ton more than if the contract had never been broken at all.

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One cannot but feel that the reasoning which leads to results so unjust and anomalous must be fallacious.

On the assumption that by this delay in delivering of the pulp the respondents were guilty of a breach of their contract—a point to be dealt with presently—and that the appellant was therefore entitled to recover some damages in respect of it, the main question for decision is on what principle and by what rule those damages are to be measured under the circumstances of this case. That question has given rise, apparently, to much conflict of judicial opinion. By the judgment and decree appealed from, the damages seem to have been fixed at 5*s.* per ton, that being the difference between the full market value of the pulp at Manchester when it should have reached that town and the rate at which it was sold when it in fact reached it. The rate per ton so fixed is, in their Lordships' opinion, the highest rate at which it could properly be fixed, since it covers the loss actually sustained. And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed: *Irvine* v. *Midland Ry. Co. (Ireland)* (1), approved of by Palles C.B. in *Hamilton* v. *Magill.* (2) That is a ruling principle. It is a just principle. The rule which prescribes as a measure of damages the difference in market prices at the respective times above mentioned is merely designed to apply this principle and, as stated in one of the American cases cited, it generally secures a complete indemnity to the purchaser. But it is intended to secure only an indemnity. The market value is taken because it is presumed to be the true value of the goods to the purchaser. In the case of non-delivery, where the purchaser does not get the goods he purchased, it is assumed that these would be worth to him, if he had them, what they would fetch in the open market; and that, if he wanted to get others in their stead, he could obtain them in that market at that price. In such a case, the price at which the purchaser might in anticipation of delivery have resold the goods is properly treated, where no question of loss of profit arises, as an entirely irrelevant matter:

(1) (1880) 6 L. R. Ir. at p. 63. (2) (1883) 12 L. R. Ir. at p. 202.

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Rodocanachi v. *Milburn*. (1) The purchaser not having got his goods should receive by way of damages enough to enable him to buy similar goods in the open market. Similarly, when the delivery of goods purchased is delayed, the goods are presumed to have been at the time they should have been delivered worth to the purchaser what he could then sell them for, or buy others like them for, in the open market, and when they are in fact delivered they are similarly presumed to be, for the same reason, worth to the purchaser what he could then sell for in that market, but if in fact the purchaser, when he obtains possession of the goods, sells them at a price greatly in advance of the then market value, that presumption is rebutted and the real value of the goods to him is proved by the very fact of this sale to be more than market value, and the loss he sustains must be measured by that price, unless he is, against all justice, to be permitted to make a profit by the breach of contract, be compensated for a loss he never suffered, and be put, as far as money can do it, not in the same position in which he would have been if the contract had been performed, but in a much better position.

The authorities cited, *Wilson* v. *Lancashire and Yorkshire Ry. Co.* (2) and *Schulze & Co.* v. *Great Eastern Ry. Co.* (3), bear out this conclusion. In both these cases the goods, by reason of the delay in delivery, had become valueless or of less value to the purchaser. And it is clear from the judgments that the measure of damages in such a case is the difference between the contract price and the value of the goods to the purchaser when obtained. The same remark applies to the other cases cited.

In order to deal with the several points raised in argument, and to determine whether the respondents committed any breach of contract in fact, or what is properly the number of tons on which the rate of 5*s*. per ton should be calculated, and whether the appellant's claims under the second and third heads are valid or not, it is necessary to examine the correspondence and oral evidence at some length.

(1) 18 Q. B. D. 67.
(2) (1861) 9 C. B. (N.S.) 632.
(3) (1887) 19 Q. B. D. 30.

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The appellant and respondents had been dealing in this pulp for several years. During that time several consignments of it had, according to the evidence of Reichenbach, the local agent, been delivered to the appellant at Manchester. The appellant was not a manufacturer. He had no works at Manchester. The respondents must have known the goods were required for resale. On December 9, 1898, they had entered into a contract for the sale and delivery to the appellant of the entire output of the respondents' pulp mill at Chicoutimi for the year 1899, on the terms following as to payment:—

"Terms.—Buyers to open a credit in a bank against which sellers are to draw for full amount against bills of lading. In consideration of buyers paying full cash against documents, sellers agree to authorize their London bankers to give buyers a written guarantee of $5000 (five thousand dollars) in the event of any valid claims or deficiency in their invoices."

These are the terms to which the phrase "Termes de paiement comme ci-devant" contained in the contract sued on refers, and mean practically payment in advance. This contract of December, 1898, was carried out in the main; but differences arose between the parties in respect to it. These by the terms of the contract sued upon were settled. What was the nature of those differences, or of the claims alleged to arise out of them, does not appear, nor does it appear what effect, if any, they had on the contract price of the pulp to be supplied.

Much controversy was raised at the trial as to the nature of the contingencies against which the respondents sought to protect themselves by the introduction into the contract of the words "si possible." The appellant contended that the contract meant that the respondents should be absolutely bound to supply the specified quantity of pulp within the stipulated period, unless prevented by some fortuitous circumstances or by force majeure.

The respondents, on the other hand, contended that by the introduction of these words it was merely intended to provide that they, the respondents, should only be bound to deliver the 3000 tons of pulp within the months of September and October if their obligations under earlier contracts which, to the knowledge of the appellant's agent, they had theretofore entered into

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permitted them to do so. In the result, for reasons to be hereafter mentioned, it became unnecessary for the Courts to decide which of the two constructions was the true one, but it is clear from the correspondence that the respondents up to the last insisted that the latter of the two was the correct construction. They protested that after implementing those earlier contracts no sufficient surplus of their output remained over to enable them to deliver to the appellant the 3000 tons contracted for, or any portion of them, during these months, and asserted that because of this circumstance they had not, by their failure to deliver the pulp within the specified time, been guilty of any breach of their contract. They never repudiated the contract. Till the goods were actually delivered in the month of June, 1901, they never treated it as at an end. On the contrary, on the 11th of that month they delivered to the appellant an account claiming payment of interest on the purchase-money at the rate of 6 per cent. from December 20, 1900, to June 6, 1901, and also claiming payment of a sum of $500 for five months' storage of 3050 tons of pulp, and of a sum of $108 "insurance on stock pulp held over winter." The claim for each and every one of these items must have been based upon the assumption that the contract of March 13, 1900, was up to the month of June in the following year a valid, binding, and subsisting contract.

The river Saguenay, like the St. Lawrence, is frozen over in winter, and Chicoutimi becomes for some months an ice-bound port. In the year 1900 all navigation ceased on November 25.

As early as July 9, 1900, Goldman, the appellant's agent, wrote to the respondents a letter containing the following passage:—

"We should also like to know whether you can deliver us end of this month part of the 3000 tons which were to be delivered end of this year, which you stated you thought you could deliver in part before close of navigation on the St. Lawrence. If you can deliver us a quantity we probably could get one of Furness Line steamers to stop at Chicoutimi end of this month in order to load this pulp.

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"Kindly advise us in regard to this by wire on receipt of letter and oblige."

In reply to which he received on July 12 a telegram in these words: "Impossible to ship pulp presently."

He wrote again on the 12th of the same month, acknowledging this telegram and stating that he awaited their letter, in which he hoped they would advise him when they would make shipment; and again upon the 14th, two days later, he wrote to them a letter containing the following passage:—

"In regard to the 3000 tons we note that at present time you cannot state when you could deliver some of the 3000 tons that are due us. It would greatly accommodate us if you could deliver this quantity or part of it from now on until close of navigation at the St. Lawrence and we have received cable from Hamburg asking whether you could not oblige them and do this."

It does not appear whether any reply to this communication was received.

Goldman, on August 7, wrote again to the respondents, reminding them that, according to their contract, the delivery of the pulp was to commence on September 1 and if possible earlier, stating that it would be a great favour and help to his principals if they would commence delivery at once, begging of them as a favour to himself to advise him promptly whether they would commence the delivery at once, and further stating that he was aware, from shipment he had noted they were making, that they had pulp to spare beyond what was required for their contract with Becker & Co., and that in all justice to the Hamburg house they ought to make delivery on their contract before shipping pulp to other parties. He further reminded them that it was then getting to the close of the navigation on the St. Lawrence, that freights were very firm and were advancing, and that space must be engaged at once in order to secure room on steamers sailing from the St. Lawrence up to the close of the navigation.

Though a prompt reply to this letter was asked for, none was apparently received, or, if received, was not given in evidence.

After two months' delay the appellant wrote from Hamburg a letter in the following terms:—

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"Hamburg, 7th October, 1900.

"La Compagnie de Pulpe de Chicoutimi.

"Dear Sirs,

"According to arrangement made with you under date of 13th March, you have undertaken to ship 3000 ts. woodpulp for us from 1st Sept. till 1st November a.c., and only on this condition, viz., that you execute such undertaking we have declared ourselves willing to waive our different claims against you.

"The remark in the cited arrangement 'if possible' has been fixed verbally in presence of two members of your board and afterwards confirmed by correspondence from your managers as only referable to cases of force majeure. No such force majeure having been notified to us, the shipment is overdue partly already since several weeks.

"To our greatest surprise our representative Mr. Goldman informs us that you will not ship before November, but that besides you had sold some parcels during the summer to others.

"We herewith beg to give you notice that we require from you to put at our disposal 1500 to 2000 tons of your pulp latest last week of October and the balance of 1000/1500 tons latest 15th November next. Failing to do so we are compelled to hold you responsible for the consequences arising from such non-fulfilment. At the same time we beg to give you notice that in the event of non-fulfilment of our demand, we consider the arrangement made with you broken by you and consequently ourselves free to act with regard to our old claims as if such arrangement had not been arrived at. Besides we reserve ourselves the right in case of your delivering the parcels as requested above to charge you for such part delivered after the time stipulated in the arrangement the extra freight caused by such delay.

"We remain, dear Sir,

"Yours truly,

"A. Wertheim & Co.

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This letter seems to have been sent through Goldman. It must have taken some time to reach his office in New York.

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He apparently forwarded it to the respondents under cover of a letter from himself dated October 22. On October 26 the following letter in reply was received by Goldman :—

"S. Goldman, Esq., Agent,
"99, Nassau St., New York.

"Gent.,

"Your favour of 22nd inst. received, so was letter enclosed from Hamburg. Advise Hamburg that we did not sell a single ton after our agreement of 13th March, 1900, and as agreed as soon as possible we will deliver them 3000 wet tons. You remember it has been understood our previous sales had to be delivered before, and at that time we hoped we would be ready between 1st Sept. and 1st Nov. It has been impossible; we have not yet finished Mr. Becker's contract, and same must be over before we deliver you these 3000 tons.

"Yours truly,
"J. E. A. Dubuc, Manager.

"In reply to a few of your letters I kept you posted and you were always aware we could not deliver in Sept. and Oct."

Thus, whether the appellant craved as a favour, or demanded as a right, the delivery of the 3000 tons of pulp within the contract time or before the river St. Lawrence was closed by ice, the reply was in effect the same: "We cannot deliver; we are not bound to deliver to you; all our output is absorbed in implementing contracts anterior to yours."

The sequel shews that the excuse thus put forward was false, and the accusations as to sale to others contained in Goldman's letter of August 7 only too well founded; but the excuse was made, and, in the face of it, it would have been absurd for the appellant to have tendered a ship to take a cargo which it was known beforehand could not, or would not, be provided, or to have made a formal demand that the goods should be delivered within a particular period, as that demand had in effect been already many times made to no purpose. The river closed on November 25. The offers contained in the appellant's letters of October 7 and November 27, though made in relief of the respondents, were declined, and, having been declined, the parties were left in precisely the same position as if the offers

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had never been made. They affect neither the rights nor the liabilities of the parties.

The appellant, however, wrote to the respondents the following letter:—

"Hamburg, 15 January, 1901.

"Chicoutimi Pulp Company,
Chicoutimi.

"Dear Sirs,

"After you have failed to deliver the 2000 tons wood pulp in the time stipulated in our arrangement of 13th March, 1900, whereby shipment of these 3000 tons will only have place after opening of navigation, so that thereby the essential purpose of said arrangement has become illusionary, we herewith give you notice that we have instructed our lawyers, Messrs. Caron, Pentland & Stuart, Quebec, to bring suit against you for the amount of our damages.

"Yours truly,
"A. Wertheim & Co.
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So things ended for the time.

The respondents continued during the winter to manufacture and store their pulp.

On May 22, 1901, the respondents were recalled to the performance of their obligations by the receipt of the following telegram from the appellant:—

"Hamburg cables have chartered steamer *Importer* to load 3000 tons at Chicoutimi for Manchester. Steamer expected ready to load about May 28th. Must load 600 tons daily, weather permitting. Have cabled credit Bank Nationale, Quebec. Make arrangements deliver pulp promptly as required."

To which they replied:

"Will do all possible to give her quick despatch. Might do in five days. How early will she be Chicoutimi?"

The steamer *Manchester Importer* soon after arrived. She was loaded and despatched in June. The 3000 tons of pulp were carried to Manchester, there received and despatched to the several sub-vendees; but there was no accord and satisfaction as has been suggested, since the respondents insisted they had been

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guilty of no breach of their contract, and if the statements contained in the letter of their manager dated October 20 had been true, they would have been right. There was no new contract, as has been also suggested. The performance of the old contract, which had been as it were in abeyance, was revived and carried out, and that was all.

The statements contained in Dubuc's letter of October 26, 1900, were entirely inaccurate. He had a surplus amply sufficient to enable him to carry out the contract with the appellant. In his evidence in chief and on cross-examination he admits it. The figures he gives on cross-examination are unintelligible unless on the assumption that he was dealing with tons of dry pulp.

He admitted that the respondents manufactured from January 1 to November 1, 1900, 9975 tons of dry pulp, and that of this his company delivered to Becker & Co. 6537 tons, and to two other customers 881 tons, making together 7418, leaving a surplus of 2557 tons of dry pulp, equivalent to over 5000 of wet or moist pulp. Out of this, had they been so inclined, they could have delivered to the appellant 1500 tons of dry pulp, equivalent to 3000 tons of wet or moist pulp.

The trial judge, McCorkill J., adopted these figures and found as a fact that the respondents had on hand sufficient after satisfying their earlier contracts to deliver to the appellant all the latter was entitled to demand. It appears to their Lordships to be quite an error to suppose, as apparently has been supposed, that this learned judge merely found that the respondents could have delivered 1500 or 2000 tons before November 1. His finding to the contrary is quite plain and unambiguous. Their Lordships are therefore of opinion that the damages should have been calculated on 3000 tons of pulp, not upon 2000, as appears to have been done, and that the sum awarded is therefore too little by 250*l*.

It was pointed out by Mr. Atkin, on behalf of the respondents, that the delivery contracted for was a delivery at Chicoutimi, not at Manchester; that there is no market at Chicoutimi, and that therefore the rule insisted upon on behalf of the appellant could not be applied; but, having regard to the long course of

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dealing between the parties and the intercommunication between Chicoutimi and Manchester consequent upon it, their Lordships think, on the authority of the three cases cited from the Reports of the State of New York, namely, *Grand Tower Co.* v. *Phillips* (1), *Cahen* v. *Platt* (2), and *Wemple* v. *Stewart* (3), as well as from *Bolag* v. *Hutchison* (4), the market price at Chicoutimi may for the purposes of this measure of damages be fairly taken to be the market price at Manchester, despite the distance which separates them, of course, less the cost of carriage, which in this case is admitted to be 13*s.* per ton. If this be taken to be so, the same sum of 13*s.* per ton must of course be deducted from the price (65*s.* per ton) obtained on resale, so that the difference between the two equally diminished sums is necessarily the same, namely, 5*s.* per ton. This is, in their Lordships' opinion, the amount of the damages which the appellant is entitled to recover under this head.

As to claims 2 and 3, the trial judge and each of the Courts before which the case has come have considered the evidence given in support of them loose and unsatisfactory. Their Lordships are inclined to concur in that view, and are not by any means so convinced that the decision arrived at was erroneous as to induce them to overrule it on a pure question of fact.

No cross-appeal has been lodged in this case, though it is stated that the respondents have appealed against the judgment and that this appeal is now pending in the Canadian Court. Their Lordships do not think, however, they are precluded from amending the judgment appealed against by increasing the amount awarded by 250*l.*, i.e., 5*s.* per ton on 1000 tons, together with the sum of 1044*l.* 19*s.* 8*d.* for freight from Manchester to the different places of delivery, and interest from February 28, 1902, to February 28, 1911, agreed at 807*l.* 15*s.*

As, therefore, both parties have failed in part and succeeded in part, each should bear their own costs.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed, but that the judgment appealed against should be amended by being increased by the sum of

(1) 90 U. S. 471.
(2) 69 N. Y. 348.
(3) 22 Barbour, 154.
(4) [1905] A. C. 515.

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2102*l*. 14*s*. 8*d*., or its equivalent in dollars, and that each party should bear his own costs of the appeal.

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Solicitors for appellant: *Stephenson, Harwood & Co.*
Solicitors for respondents: *C. Russell & Co.*

[PRIVY COUNCIL.]

JOHN MATTHEW VINCENT SMITH AND OTHERS . . . . APPELLANTS;

AND

CHARLES MATTHEW GERMAIN COCK AND OTHERS . . . . RESPONDENTS.

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1910
Nov. 30;
Dec. 2.
1911
Feb. 2.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Suit for Contribution—Trustees under Two different Wills—Discretionary Power to provide Maintenance for the same Legatee — Separate and independent Obligation—No Right of Contribution.

Discretionary power was given to the appellants as trustees under a will to pay to the testator's daughter 800*l*. a year, the unpaid portion thereof to fall into the residue of his estate. A like power was given to one of the appellants and a respondent as trustees under the will of her sister to pay such sums as they might think fit in and towards her maintenance, the residue of the income of the testatrix's estate to be paid to her nephew, the corpus to go in equal shares to his children on his death. The trustees under the first will paid 400*l*. a year to the daughter, but on the death of the testatrix they reduced the allowance to 100*l*. a year, while the trustees of the second will paid from 700*l*. to 800*l*. a year.

In a suit by the said nephew and the trustee of his insolvent estate for an order that the said daughter's maintenance should be provided for by a proportionate contribution from the two estates:—

Held, that there was no common obligation and no right to contribution. The trusts were different in their terms to be exercised at the discretion of different trustees, and the resulting obligations were separate and independent.

APPEAL by special leave from a judgment of the High Court (October 11, 1909) reversing a judgment of the Supreme Court of Victoria (February 8, 1909) at the trial of the action.

* *Present:* LORD MACNAGHTEN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, LORD MERSEY, and LORD ROBSON.

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