Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of McConnell v. *Murphy and others from the Court of Queen's Bench of the Province of Quebec, Canada (Appeal side); delivered 22nd April* 1873.

Present:

SIR JAMES W. COLVILE.
SIR ROBERT PHILLIMORE.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS is an action brought by the Plaintiff, (the Appellant,) who is engaged in the lumber trade and resides in Ottawa, against the Respondents, who are merchants at Quebec, for not accepting a quantity of timber under a contract of sale.

The defence made to the action was, that the timber tendered was not in compliance with the contract, and therefore that the Defendant (the Respondent) had a right to reject it.

The circumstances which led to the contract are as follows. The Plaintiff had cut a quantity of timber in Ottawa, and the person whom he had employed in cutting it was a man of the name of Brousseau, who appeared to have considerable reputation for his skilful mode of selecting and cutting timber. It seems that Brousseau had sent down to Quebec, to an agent of the Plaintiffs, a specification of the timber he had cut. From that specification it appears that the quantity of spars cut was 603. The length of the spars is given, and also the square or the girth. The important matter to be considered in this Appeal as far as measurement goes is the square or girth of the spars. The specification

showed spars of varying girths ranging from as high as 20 inches to as low as 14 inches, the average of the whole specification being 15½ inches. The course of business appears to be that the spars are dressed in the woods where they are cut, but roughly dressed there, and that in the specification which is sent down to Quebec after that dressing, and in which the measurements are stated, allowance is made for a further dressing, which is to take place in Quebec by persons called cullers who not only measure the spars there for the purpose of the Government Revenue, but again dress the spars and to some extent reduce their girth. The course seems to be that the persons who first dress the timber in the woods in their estimate of the square or girth of the timber make a large allowance for what is likely to be the reduction in the second dressing, and so large that the spars will, when measured by the cullers, exceed the measurement which they insert in their specification. That mode of inserting the girth in the specification appears to be known to those engaged in the trade, as both parties in this case were.

After the specification had been sent down, interviews took place between one of the Respondents and the agent of the Plaintiff, in which the specification was shown to the Defendants, and after having seen it, and with a knowledge of the general circumstances of the trade, the contract in question was made. Undoubtedly there was one fact which was in the knowledge of the Plaintiff's agent, and which does not appear to have been communicated to the Defendants, namely, the fact that in this particular case Brousseau had informed the Plaintiff's agent that he had no doubt that the spars would measure, according to the cullers measurement, 16 inches upon the average. However, that really was only communicating in this particular case the fact which was generally known throughout the trade, resulting

from the mode in which the measurements were usually made.

The whole question turns upon the construction of the agreement. The agreement is in these terms:—"Richard M'Connell, Esquire, "sells, and Messrs. Arthur H. Murphy and "Co. buy, all of the spars manufactured by "Richard M'Connell, say about six hundred red "pine spars, averaging sixteen inches by cullers "measurement in Quebec, at the sum of 34 "dollars currency, payable as follows." And then the mode of payment is stated. "The "above spars will be out of the lot manufactured "by Jean Brousseau, the lengths of which, "according to his specification, I am satisfied "with." The time for the delivery of the spars was afterwards enlarged in consequence of the impossibility of bringing down the rafts to Quebec from the state of the river, but no question turns upon that enlargement of the time. It was not until 1865 that the spars reached Quebec, and when measured by the cullers it turned out that the whole lot did not average 16 inches, but that out of the whole there was a quantity of 497 spars only which reached the full average of 16 inches. That fact being ascertained, the 497 spars were formally tendered to the Defendants, who refused them, giving no reason for their refusal. It is plain that at this time the price of spars had very considerably fallen, and that it was not to the interest of the Defendants to complete the sale. They do not disguise that they were unwilling to take the spars in that state of the market. The question is whether they were justified in refusing to accept them.

The construction put upon the contract by the Defendants in order to justify their refusal to accept the spars, which upon the average did measure the girth stipulated for, is that the Plaintiff was bound to tender to them about 600 spars of this average, and that they were not bound to accept any less quantity when tendered.

That is the ground of their defence, and the question is, whether their view of the contract is right, namely, that it does contain a description of the thing sold which binds the seller to deliver that quantity, and justifies the vendee in refusing to accept any smaller quantity.

Upon the best consideration that their Lordships have been able to give to this contract, which is not free from some difficulty, they are of opinion that the Defendants have not sustained their contention. The substance of the contract appears to be that so many of the spars manufactured by the Plaintiff through his agent Jean Brousseau as would, together, average 16 inches according to cullers measurement should be delivered to the Defendants. The contract does not appear to be a sale of the whole quantity manufactured by Mc Connell through Brousseau. If it had been it would have been differently expressed. The words are "McConnell sells, and Murphy "buys, all *of* the spars manufactured by "McConnell, say about 600 red pine spars, "averaging by cullers measurement in Quebec "16 inches." Now if the words "say about 600 red pine spars" are omitted, it is a sale of all of the spars manufactured by McConnell averaging by cullers measurement so much. It seems to be a reasonable construction to hold that the parties were referring to such of the spars so manufactured as should together average by the cullers measurement, which was to be a future measurement, so many inches. That the whole lot mentioned in the specification was not intended to be sold is made plain by the subsequent part of the contract, which provides that the above spars, that is, the spars sold, will be out of the lot manufactured by Brousseau, the lengths of which, according to his specification, the vendee expressed himself satisfied with. The words "out of" render it clear that the whole lot was not the subject of the sale. The meaning of the parties appears to be that

out of this lot of 603 spars coming down, which was to be measured by the cullers, the vendee, desiring to have spars of a certain girth only, was willing to take so many as would satisfy his requirements as to girth, and would not take any which would reduce the average below that girth.

It is said, on the part of the Respondents, that the Plaintiff warranted that the whole which so came down, or, at all events, as many as about 600 should average 16 inches. If that had really been the intention, one would have expected words more clearly expressing it. The words used are, "say about 600 red pine spars." The same words may have different meanings according to the context in different contracts, but looking at the way in which the words are used here, "say about 600 red pine spars," the words "say about" appear to be thrown in for the purpose of guarding the vendor against being supposed to have made an absolute condition as to quantity. There is not merely the word "about" which in itself creates some uncertainty, but "say about." These two words used together seem to be employed for the purpose of showing that nothing absolute or definite in the way of allegation of quantity was intended on the part of the vendor.

Their Lordships are supported in the construction which they put upon the words in this contract by the case of *Gwillim* v. *Daniell*, in the Court of Exchequer (2ndCrompton, Meeson, and Roscoe, page 61). There, in a contract to manufacture a quantity of naptha, and to supply it at stated intervals, the words were, "say 1,000 to 1,200 gallons per month." The Court, in putting a construction upon those words, held that they did not amount to a warranty that the manufacturer would supply that number of gallons, but only to an assertion of his belief that that was the quantity he should be able to supply. The words are almost identical with those in the

present case; "say from 1,000 to 1,200 gallons," are certainly not more uncertain than "say about 600 spars." This case is an authority that, unless there is something in the context to give them a more positive signification, such words ought not to be construed as words of warranty.

The same word "say" was found in another contract, which came before the Court of Queen's Bench in England, and received a construction in the case of Leeming *v.* Snaith (16th Queen's Bench, page 275). The contract was, that J. S., Defendant, sold to L. and C. what he may pull, up to the 6th January, say not less than 100 packs of combing skin at so much per pound. There the words "not less than 100" were very definite; they were negative words defining a minimum quantity. The word "say," which preceded them, was held by the court not to introduce uncertainty into words which were in themselves definite. The previous authority of *Gwillim v. Daniell* was referred to; and was certainly not overruled. Mr. Justice Pattison, in referring to it, distinguishes the case then under decision. He says, "I agree that the insertion "of the words 'not less than' distinguishes this "case from Gwillim *v.* Daniell. There the "words 'say from 1,000 to 1,200 gallons' were "held to be words of expectation only, and not "an undertaking that such should be the "quantity."

Their Lordships think that in this case the words "say about 600" were really words of expectation and estimate only, and did not amount to an undertaking that the quantity should be so much. The measurement was to be future, the spars were to be paid for at so much for each spar, not in a round sum, and the natural construction of the words appears to be that the quantity expected to come up to the average is about 600 spars. No fraud or intentional deception being charged against the Plaintiff, their Lordships think that the Defendant was bound to accept the quantity which

was offered to him, and that the Plaintiff has substantially performed the agreement which he entered into and is entitled to damages for the breach of it.

There is another mode of construing the agreement upon which some observations have been made during the discussion, namely, that the words "say about 600 red pine spars" apply only to the quantity manufactured, and that they do not refer at all to the quantity which was likely to average the 16 inches in girth. Their Lordships, however, consider that the parties were referring, in using those words, to the number that might turn out on the average to be of sixteen inches girth, and that this is a more natural interpretation of the words than to treat them as descriptive of the whole quantity manufactured by the Plaintiff. Reading them in this way their Lordships still think that they are words of expectation and estimate only.

It has been said that this contract ought not to be construed by the principles which the Courts of England would adopt, but upon rules of the Canadian law, founded upon the old French law. In mercantile contracts, and indeed in all contracts where the meaning of language is to be determined by the Court, the governing principle must be to ascertain the intention of the parties, through the words they have used. This principle is one of universal application.

It is seldom, in mercantile contracts, that any technical or artificial rule of law can be brought to bear upon their construction. The question really is the meaning of language, and must be the same everywhere. There may be rules to assist the Courts in the construction of contracts in certain cases, and some have been referred to as existing in the law of Canada, but they do not interfere with the decision to which their Lordships have come. It may be clear that by the law of Canada a vendor cannot enforce a contract unless the thing which he has sold can be definitely ascertained. If the contract is so

obscure that the subject matter of the sale cannot be identified, or the terms of the sale defined, the vendor could not enforce the contract. So also in cases of doubt, it may be that the interpretation should be against the vendor, but that must be understood of cases of doubt which cannot be otherwise solved. It would follow from these rules that where a stipulation is capable of two meanings equally consistent with the language employed, that shall be taken which is most against the stipulator and in favour of the other party. But their Lordships think that this contract is not properly capable of two meanings. In questions of difficult interpretation, not only two, but frequently many constructions may be suggested. And, after all, there must be one true construction; and if that true construction can be arrived at with reasonable certainty, although with difficulty, then it cannot properly be said that there are two meanings to the contract.

Their Lordships think that the interpretation at which they have arrived is one that the contract reasonably bears, and that it is the true meaning which ought to be placed upon it. The contract, although short in its terms, has undoubtedly given occasion to great difference of opinion in the Courts below, and the parties are to some extent responsible for the litigation, because they have chosen to use language difficult to construe. There are no questions upon which Courts differ more frequently than upon this class of cases. In the present action the judges of the Superior Court were unanimous in favour of the Appellant, whilst in the Court from which this Appeal comes a majority only decided in favour of the Respondents. Two of the judges were in favour of the present Appellant, and one of them, Mr. Justice Drummond, placed his judgment upon much the same ground as their Lordships have rested their own decision.

It is right, perhaps, to notice that an argument in favour of the construction of the Respondents

was derived from the Plaintiff's declaration. It was said that he had himself put a construction upon the contract which estopped him from now asserting that it was different from that which he had then alleged. Their Lordships, however, think that the Plaintiff is not so estopped. His declaration sets out substantially what the contract is. There is a slight variance, not affecting however the substance of it, to be found in that part which refers to the manufacture by Brousseau. But substantially he sets out the contract, and alleges the tender which was made and which their Lordships think was a sufficient compliance with it, namely, the tender of the 496 spars, which averaged 16 inches. He sets out in his declaration, no doubt, an alternative case, namely, his having acquired from another merchant a sufficient quantity to make up 600 spars and a tender of that number. Their Lordships intimated during the argument that in their opinion that would not be a compliance with the contract, which related to spars manufactured by Brousseau, supposing there had been a condition that the quantity sold should be 600 spars. But the insertion of that alternative case in the declaration does not interfere with the other statements which are independent of it, and which show substantially the contract and a tender in compliance with it.

In the result their Lordships will humbly advise Her Majesty to allow this Appeal, to reverse the judgment of the Court of Queen's Bench, and to direct that the judgment of the Superior Court be affirmed, and that the Respondents should pay the costs of the Appeal in the Court of Queen's Bench. They must also pay the costs of this Appeal.