Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Platt and another v. Burstall and another, from the Court of Queen's Bench for Lower Canada; delivered July 18th 1873.

Present:

SIR JAMES W. COLVILE.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR ROBERT P. COLLIER.

THE Respondents in this case are timber merchants, carrying on business at Quebec. The Appellants, though also described as merchants carrying on business at Quebec, appear in this transaction as persons engaged in the business of lumberers in the province of Ontario. The facts which led to the suit are short and simple, however difficult the questions which arise out of them may be. It appears that in the month of July 1870 the Appellants were bringing down the St. Lawrence two rafts of timber, of which, one, consisting of six drams, had arrived at Cape Rouge on or before the 2nd July. The Respondents being minded to deal with them for this timber, sent a culler, of the name of Gurry, to examine that raft; and upon the report which he made to them, they, on the 4th July 1870, entered into the written contract, upon which the action was afterwards brought. It is unnecessary for the present to consider particularly the terms of that contract. It contained no express guarantee for the quality of the timber, other than such as might be implied from the article providing for the rejection of certain pieces of timber falling within the description of culls, or

from the stipulation that all the wood should be of certain dimensions, and that the elm wood should be all rock or hard grey. The question however to be determined on this appeal does not arise on the terms of the contract, but is simply whether the Respondents were justified in rescinding the whole contract on the ground of fraud, inducing them to make that contract. On the arrival of the first raft at Quebec or Woodfield, which is in the neighbourhood of Quebec, it appears to have been sent to the Cove of Mr. Conolly, one of the witnesses in the cause. One of the drams, which was afterwards described as No. 1, was opened at that place in order that the timber composing it might be prepared for the shipment for which the purchasers had designed it. Mr. Conolly having found the timber contained in the lower tiers of this particular dram to be extremely bad, made a representation to that effect to his principals, and the result was that on the 15th July the Respondents wrote to the Appellants a letter in these terms:—"Gentlemen,—In consequence of your raft turning out so very "different to what you represented it and to "what the appearance led us to expect, we beg "to say we cannot take it." And on the 25th of July they wrote a second letter containing this passage:—"As we understand from Messrs. Ross "& Co. that it is your intention to endeavour "to compel us to take the four drams of timber "now at Woodfield Harbour, we beg to notify "you that we intend having them surveyed to-"morrow morning at half past nine." That survey, the result of which will afterwards be considered, took place, and the Respondents persisting in their repudiation of the contract, the present action was commenced by the Appellants on the 27th of August 1870. Their declaration stated the contract and its legal

consequences, and the question which arises upon this Appeal was raised by the Respondents in a plea called "a perpetual exception *peremptoire* "*en droit*," which is stated at page 87 of the record, and of which this is the material portion: "That the said Plaintiff intending "to defraud the said Defendants, and thereby "to induce them to purchase a lot of timber "which, without the fraudulent representa-"tions and deception herein-after mentioned, "they would not have purchased, caused the "said raft of timber to be so arranged, that "all the good timber was placed in the upper "tier which did not contain more than one-"fourth of the whole quantity, and that the "other tiers were so arranged that the ends of "the pieces of timber which were visible were "also of good quality, whilst all the rest of the "timber contained in the said drams, and being "three-fourths of the whole quantity, was of "inferior quality and of such small value as to "be useless to the said Defendants. That in so "arranging the said drams of timber the said "Plaintiffs fraudulently represented to the said "Defendants that the upper tier of the said "timber was of a fair average quality as com-"pared with the rest of the lot, and thereby "induced them to enter into the said contract "recited in the Plaintiff's declaration." On the trial of the cause, a very considerable body of evidence was given on each side, and Mr. Justice Stuart, who was the judge who tried the case in the first instance, found against the Respondents upon their plea, and gave a general judgment upon the declaration in favour of the Appellants. His decision was reviewed by the full bench of the superior court, and on that occasion Chief Justice Meredith and Mr. Justice Taschereau concurred in overruling it; Mr. Justice Stuart, who adhered to his former

opinion, dissenting. The final finding of the superior court upon the question of fraud was expressed in the following terms, "seeing that it "is proved that the said Plaintiffs intentionally "and fraudulently constructed the said drams so "as to expose to view portions only of the timber "which were of excellent quality, and to conceal "from view the rest, which was of a wholly "different and very bad quality, and that when "the said drams were opened up, it was found "that the second and third tiers of the said drams "were less valuable than the upper tiers by five "pence per foot, that being one-third of the "price agreed to be paid for the said timber, and "that the said drams would not yield to the said "Defendants even one-half of the quantity of "first-class timber which they had reasonably a "right to expect under the said contract," and for that and the other considerations expressed in their judgment, the court decided that the plea was a good answer to the action of the Plaintiffs, which accordingly it dismissed. There was an appeal from this judgment to the Court of Queen's Bench, and in this court four of the judges concurred in thinking that the judgment of the superior court was right, and that the action ought to be dismissed, Mr. Justice Monk alone of the five judges dissenting. Therefore the result of the judicial finding in the colony has been, that six judges out of eight have found that the Appellants have been guilty of a fraud which led to the contract, and that the Respondents had a right to rescind their contract on that ground, two of the learned judges dissenting from that conclusion.

At the close of his very able argument, Mr. Benjamin admitted that this was a pure question of fact, viz., fraud or no fraud. He said that he was unable to discover any doubtful question of law in the case, and, indeed, it seems to be clear

from the article in the Canadian Code, which is cited in the judgment, and which is also set forth in the Respondent's case, that fraud is a cause of nullity when the artifices practised by one party, or with his knowledge, are such that the other party would not have contracted without them. The law of Lower Canada appears in fact to be rather less favourable to sellers than the law of our own country, where the maxim of *caveat emptor* receives a larger application; but even here, if the particular artifices were shown to have been fraudulently contrived in order to deceive the purchaser into a contract, our courts would consider that that was a good ground for rescision. It is, however, unnecessary to consider our law, when the law of Lower Canada has been so explicitly declared by the code.

The misrepresentation on which the Respondents rely is not a verbal one; it is one resulting from the acts of the Appellants, and the composition of the raft inspected by Gurry. It is alleged that in making up this raft the best timber was put upon the top, and wherever else it would be visible, whilst the lower tiers, those which would necessarily be invisible until the raft was broken up, were composed of timber of a very inferior description; and that this was done purposely, in order that upon inspection of the raft, an intending purchaser, judging from the timber he saw, might be tricked into the belief that the raft, taken as a whole, would turn out much better than it really was. It was urged at the bar, as it had been urged in the courts below, that this composition of the raft was in accordance with a known custom of the trade, and, therefore, that there was no deception. There was, undoubtedly, evidence to show that the rafts which come from Ontario and have to pass across the lake and afterwards through

certain rapids, differ in their composition from those which come from the timber districts of Ottowa, and many of the witnesses depose to a practice of putting the best of the timber at the top, and to the fact that intending purchasers always make some allowance for that. Admitting this to be the fair result of the evidence, their Lordships feel considerable doubt whether, supposing rafts to be so made up with the motive of inducing purchasers to think better of them than they deserve, such a practice ought to be treated as a known usage of trade, which a court of justice ought to recognise and uphold. Upon this point they concur in what was said by Chief Justice Duval in the last sentence of his judgment. But it is obvious that the practice is one which is to be kept within reasonable limits; and the question which seems to have been tried in the colonial courts was, whether in this particular case those limits had not been so grossly exceeded as to deceive the purchaser and support the imputation of fraud.

This is admitted to be a question of fact upon which the learned judges of the courts below have adjudicated in the way I have already stated; and inasmuch as they have far more experience and knowledge of the timber trade in Canada than their Lordships can pretend to, the difficulty which their Lordships always feel about overruling judgments of local courts upon mere questions of fact would be greater in this than it is in ordinary cases. Their Lordships, however, after having given their best attention to the very able argument which has been addressed to them at the bar, are unable to see any ground upon which they ought to dissent from the judgments under appeal. The learned counsel rather avoided any particular consideration of the reasons given by the learned judges in the courts

below for their conclusions, of which the fullest, and perhaps the most important, are contained in the judgment delivered by Chief Justice Meredith in the Superior Court, and that delivered by Mr. Justice Badgeley in the Court of Queen's Bench. The former, which was the judgment under review in the Court of Queen's Bench, seems to their Lordships to contain a very fair and able summing up of the evidence on both sides. It is to be observed that the learned judge distinctly stated that he did not attach any particular weight or importance to that evidence, which has been so very strongly commented upon by Mr. Benjamin, and which their Lordships think may to some degree be pronounced suspicious, I mean the evidence of the lumberers who were engaged in making up the raft, and who professed to speak to conversations between the Appellants and persons employed by them, and to words uttered in a language which the witnesses do not appear themselves to speak. Chief Justice Meredith based his judgment chiefly upon the evidence of those who examined the timber after it reached Quebec, and in a considerable degree upon the absence of that kind of evidence which it might be supposed would be forthcoming, if the case of the Appellants had really been a good one He relied first upon the evidence of Mr. Stephen Conolly, which their Lordships have carefully read through, and which they think establishes beyond all doubt that which was hardly contested at the bar, namely, that dram No. 1 was exceedingly bad. The upper tier seems to have been like the upper part of the other drams, composed of superior timber, but his evidence, and indeed all the evidence in this cause, shows that the rest of the timber in that dram was of a very inferior description. That no doubt was a fact which, if the whole of the timber had been shown to be a fair average, might have been

capable of explanation, but when we come to the three other drams in that raft, we find that they were far below that which they might reasonably have been expected to be. Gurry's evidence, no doubt, is open to the observation that he took a far more favourable view of the upper tier of the raft than the other witnesses, who subsequently examined it, appear to have done. He says that he considered that there was 90 per cent. of prime timber in the upper tier of the raft; that he made in his own mind an estimate, allowing for the practice that I have alluded to, that the out-turn of the whole raft would be 60 per cent. prime, 30 per cent. fair average, and 10 per cent. railroad or inferior timber; but that wishing to be on the safe side, he reported to Mr. Burstall that he might probably calculate upon fifty per cent. prime, forty per cent. fair average, and ten per cent. railroads and culls. That was the report on which the Respondents made their contract. It certainly appears that none of the witnesses who subsequently examined the raft treated the upper tier as containing more than about 60 or 62 per cent. of prime, 30 per cent. superior average, and about 8 or 10 per cent. railroad timber. Roche and Timmony, however, the cullers who were named on behalf of the Respondents to examine these drams, judging from their inspection of the upper tier, consider that the lower tiers ought to yield about 44 per cent. first class, 33 per cent. second class, and 23 per cent. of the railroad or inferior class, and it is clear from their evidence and their report, that when the final state of those three lower tiers was ascertained, they did not average more than 25 per cent. of the first class, 50 per cent. of the second class, and 25 per cent of the third class. They therefore fell very far below what might reasonably have been expected from the

appearance of the upper tier, after fair allowance made for the custom or practice, or whatever it may be called, of the trade. The result of the evidence for the Respondents, is that whilst the first dram was exceptionally bad, the other three drams, so far from making any compensation for this, proved on examination to be far inferior to what they ought to have been, and afforded additional evidence of the fraudulent composition of the whole raft.

Again, Chief Justice Meredith remarked on the absence of any report from Mr. Bowen, the gentleman who was present on the part of the Appellants when this examination by Messrs. Roche and Timmony took place, and upon other defects in the evidence for the Appellants, and it appears to their Lordships impossible for them, on a review of the whole evidence, to say that the courts below were not justified in coming to the conclusion that the evidence for the Respondents so preponderated as to support that plea of fraud, which, if made out, justified them in rescinding their contract.

This being their Lordships view, they will humbly advise Her Majesty to affirm the judgment of the Court of Queen's Bench and to dismiss this Appeal with costs.