S. E. PERIARD (PLAINTIFF) .....APPELLANT;

AND

NOEL BERGERON AND WILLIAM RICKSON (DEFENDANTS) .....RESPONDENTS.

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*Oct. 11.
*Nov. 11.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Sale of goods—Condition as to prices—Lost invoices—Secondary evidence—Waiver—Breach of contract—Damages.

The defendants agreed to purchase the plaintiff's stock-in-trade at a valuation to be based upon an advance of 13% on the invoice prices of the goods when taken into stock. On stock being taken by the parties the plaintiff was unable to produce invoices for a large portion of the goods, but insisted that their prices could be ascertained from private markings on the packages which, she alleged, represented the prices taken from the missing invoices. Differences arose between the parties respecting the prices of these goods, but the inventory was closed with the prices, as they had been marked on the packages, carried into the valuation columns. The defendants refused to complete the purchase on account of failure to produce the invoices in question and the action was brought to recover damages for breach of the contract.

Held, reversing the judgment appealed from (2 D.L.R. 293; 1 West. W.R. 1103), Duff J. dissenting, that the consent of the defendants to the closing of the inventory with the prices in question stated according to the information obtained from the private markings constituted satisfactory proof of the fulfilment of the original agreement and, consequently, damages could be recovered for breach of the contract to purchase.

Per Duff J. dissenting.—There could be no contract capable of enforcement until the prices of the whole of the stock had been ascertained in the manner contemplated by the agreement, and the closing of the inventory with prices supplied from the unverified statements of the plaintiff did not constitute a new contract varying the condition in the agreement as to the fixing of the prices to be paid. Therefore, no action could lie to recover damages for breach of the contract to purchase.

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*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from the judgment of the Court of Appeal for British Columbia(1), affirming the judgment of Morrison J., at the trial, by which the plaintiff's action was dismissed with costs.

The action was to recover damages for breach of a contract to purchase a stock of merchandise and the trade fixtures in a shop in Vancouver, B.C. The circumstances of the case are stated in the head-note and the questions raised on the appeal are fully discussed in the judgments now reported.

Newcombe K.C. appeared for the appellant.

Ewart K.C. and *W. L. Scott* for the respondents.

DAVIES J.—I think this appeal must be allowed. I agree with the opinion of Chief Justice MacDonald in the Court of Appeal and see no ground for imputing any dishonesty in the transaction in question to the appellant or to those who acted for her.

The appellant was unable, it is true, to produce all the invoices shewing the prices at which she had bought the goods, but she gave the best evidence in her power and the production of these missing invoices was not insisted upon at the stocktaking by the parties. The custom of the appellant had been to mark the boxes containing goods and other packages and parcels with the selling price and also with a private mark representing the cost price. Bergeron, one of the respondents, had been with the appellant in the store for nearly a month before the stocktaking, with every opportunity afforded him of acquiring a thorough knowledge of the business and merchandise

(1) 2 D.L.R. 293; 1 West. W.R. 1103.

he had contracted to purchase. The inference I draw from the evidence, which I have carefully read, is that in the cases where disputes arose as to the cost price and the invoices could not be produced, these disputes were practically settled either by reference to the private marks on the packages shewing the cost price, or by the decisions of Mr. French, who was called in by both parties to determine what should be allowed. These disputes I gather were, considering the quantity of the goods in question, comparatively few. The conclusion I reached from a perusal of the evidence was that they arose from the fact of Periard having paid more for some classes of her goods than a close and good buyer could have purchased them at.

But this, if true, would not justify the purchasers in repudiating their contract, which was that they would pay Periard for her "merchandise at the rate of one hundred and ten cents on the dollar invoice price." This was subsequently increased to $1.13 to cover freight charges. Whether, therefore, the Periards had purchased skilfully and closely or improvidently and carelessly had nothing to do with the question of prices. The one thing that had to be determined was what had been *bonâ fide* paid by Periard as the purchase price of the goods.

My conclusions were, after considering the whole evidence, that the appellant had, on the stocktaking, given the best evidence she could of the cost prices of the goods and that though there was much wrangling over some of these prices they were adjusted and settled more or less satisfactorily with the aid and assistance, when he was called in, of Mr. French.

I think the true secret of the attempted repudiation by the respondents of their contract to purchase

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this stock of goods lies in the fact that the total amount of the purchase money was found largely to exceed that which was anticipated.

My conclusion is that the question of the non-production of the invoices was only resorted to as an excuse to escape from a bargain the obligations of which were found, after stocktaking, to be much heavier than had been anticipated.

I would allow the appeal and remit the case back for assessment of plaintiff's damages.

IDINGTON J.—Undue importance was attached in the courts below to the evidence of Mr. French. In answer to a question as to how much of the time of stocktaking he was present at, he says:—

> Not a great deal of the time. I was busy attending to my own business. I was sent for, as I say, possibly four or five times. I think the first day I was up there a couple of times, and I don't think any more. I was up in the morning once, and in the afternoon, and possibly the next day about the same. It may have been four or five times that I went up altogether. My man that works with me was up there assisting.

And in answer to a question relative to the substantial quantities of goods he had spoken of, he says:

> Oh, yes — fair quantities — particularly the hosiery, there was a considerable quantity of that there, and the shirts I cannot recollect how many dozens there were of those — and the ties there was a considerable number of them.

When we find that the stocktaking had involved three days of preparatory arrangement of said stock, and then parts of three days thereafter, making in all two full days' work for the staff employed by both parties checking it over and setting down the results in the lists used by each party; that the character of the stock was so varied as to embrace gents' furnish-

ing and boots and shoes, and clothing, and other things which, in the whole, made a total of nearly $18,000 estimated value; that an examination of the stock-lists so made out discloses, when roughly estimated, nearly four thousand entries of different items; that the witness French was only professing to be an expert as to classes of the goods involving, according to his own estimate, one-half of the total stock, and was called upon only in respect of disputed items of such half; that of the half-dozen things he was called to give an opinion upon some were satisfactorily explained; and that as to each and every one of such, according to the evidence of a number of witnesses, including Corderoy, the accountant, called by the respondent, the prices reached after hearing him (Mr. French) were set down in the list as settled, it seems impossible to rightly give much weight to his evidence as a determining factor in support of the judgment in the case.

There was not a single item of the thousands in question in the stocktaking reserved for future consideration, and no mark or note made of remonstrance for want of invoice or objection in that regard or otherwise.

And when we find these occasional appeals to Mr. French resorted to and that coupled with absence of record or note of any sort of objection in other instances, surely it must be concluded that these others had all been satisfactorily adjusted between those engaged in the work.

The calling him in to help to settle differences in half-a-dozen cases demonstrates how the parties concerned had felt and acted at the time relatively to the other items.

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Mr. French denies being a party to any settling or agreement in the result, as to the items regarding which he was called upon to give his opinion, but he cannot and does not swear they were not adjusted.

I pressed respondents' counsel to explain the absence of any record of objectionable items and he frankly and properly admitted he could not and that such a record would be what one might expect if permanent importance were to be attached to the objection relative to the want of invoices.

The erroneous taking of French's opinion on what the legal meaning of so plain and ordinary a phrase as "invoice price" implies seems to have misled the court. This was a purchase on a basis of price ascertainable either by the production of the original invoice, or such satisfactory evidence as would convince fair-minded business men skilled in such business of the truth of what the original invoice had, or of necessity must have, exhibited if correctly made out.

Neither party could be bound by an error in the original or deprived of his bargain because of the destruction of the original piece of paper. The price that appeared or ought to have appeared therein was the basis to be used. If Mr. French had made such a bargain and was deeply impressed with the idea that he had made one which should yield him a profit of ten thousand dollars, for example, and it was found when time arrived for taking stock that a thief had removed all original invoices, or other destruction, of which the vendor was innocent, had overtaken them, and his vendor had been tempted to re-sell the goods at an advance of five thousand dollars and set up the impossibility of producing the invoices as a

defence or reason excusing himself from observing the contract, I must be permitted to think he (Mr. French) would be constrained to see the absurdity of what he so persistently maintained in his evidence. True, he finally, under pressure, lessened his pretension, but that pretension and its sorry consequences seem, I respectfully submit, to have borne fruit.

It is to be observed that the evidence for the appellant shews that the invoice prices were discoverable from the private markings on the goods, or boxes holding them, that the respondent Bergeron had, as agreed, been engaged as a clerk in the shop for a month preceding the stocktaking, had been given every opportunity for acquainting himself with such marks, inspecting the goods, verifying the systems, and invoices, and comparing the latter with these markings, and that Erisman, a fellow clerk, describes very well how he had availed himself of his opportunity and ends his account of what had transpired by saying:—

> Well, really, Mr. Bergeron and I took stock of the whole store before the stocktaking took place.

Bergeron was called for the defence after this witness had given such evidence, but never ventured a word of either denial or explanation of what Erisman says.

It seems, I submit, rather an impudent thing on his part, after such an opportunity for investigation, and that investigation, to impute fraud to the appellant and fail so signally, not only to make no proof, but not even to try, and shew in a single instance, that the private markings in truth had been deliberately made to appear different from the original invoice.

It is absurd to suppose any merchant would in ordinary practice systematically put upon his goods or

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cases a false instead of the true private marking, which is intended only for the use of himself or his servants. It could only deceive himself.

It is conceivable that a systematic fraud of that kind might be resorted to by a man intending to sell his stock, but inconceivable he should invite his purchaser to spend a month in his shop and be given every opportunity to detect it. And there is not a word even from Bergeron, who had such opportunity of discovery to suggest that a single change had been made in such markings. It is sworn by Erisman that Bergeron had, whilst so engaged in his own investigation, gone over "those invoices," meaning, no doubt, those invoices to be had relative to what he had examined. If he could have shewn a false system had been adopted, or even a few instances suggesting it, no doubt he would gladly have done so. He would not then have had to set up such a cry as is made about the palpable mistake of a few shirts put in the wrong box. If there was an intention to commit fraud in the way suggested it was about as easily detected as possible to conceive of.

I go further and submit that it was the duty of the respondents to have exposed the fraud if it existed. If half the energy put by the respondents' solicitors into the fortnight of correspondence that ensued had been applied to investigate such a charge and to demonstrate its truth they could easily have done so if any foundation had existed for it. In the event of failure they ought to have submitted another alternative than this litigation.

I conclude from reading and considering every bit of evidence in this case that the defendants never had any reason to say that they were being unfairly dealt with in the matter of the invoices. Their own conduct

throughout destroys the pretension and makes it sound hollow.

If they had held over any items for production of invoices, had called for account books to verify anything, had specified certain items or varieties of the stock-in-trade and, where invoices were wanting, had insisted on duplicates as means of testing the questions involved, or done in short anything that ordinary business men anxious to complete a bargain would likely have done under the circumstances, then suspicion or surmise as to their motives might have been in order.

On the contrary without, so far as the evidence shews, anything of that kind having influenced the action of the defendants or been present to the mind of Mr. French, he called defendants aside at the close of the stocktaking and said the deal could not go through.

It was he who acted and not they. They knew from hour to hour over three days such, if any, difficulties as want of invoices had created. It had produced no operative effect on their minds.

He, as I have shewn, knew very little of what had transpired. And as to want of any invoice, he had called for them twice, he thinks, and failed once to get them produced; whether one item or what is not explained.

But, to do Mr. French justice, he says it seemed as if they "could not produce the invoices" asked for and not produced, and he shews that he had no proper opportunity of deciding as to the validity of such a contention as is raised. Then he says that, at the close of the stocktaking, he called defendants aside and told

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them "we (meaning, I take it, the firms he represented) could not go on," and then adds:—

> I also had a conversation with Mr. Periard in which I told him unless he could alter his prices and make the thing a little more satisfactory than it was then that I would not have anything to do with it, and I would not advise these men to go on with it paying the price they were paying for the stock;

he says also that Periard and his daughter came to see him in his office another day and, though he cannot recall the conversation exactly, believes he told the man at the time

> that I did not care to go on with the thing as long as he was taking the stand he was in regard to prices.

Such was the attitude of French, who had from the inception been the directing mind.

It was not the want of invoices to verify prices, but the prices and the result of a total which he had not expected.

Appellant may have been loaded up with too much old stock at high prices, compared with what French's backers could have supplied such a stock for. And adding 13% to these prices when the total reached nearly $18,000, and a couple of thousand more for fixtures, and thus made the total figures rather high for men who had calculated on, and only provided for, fifteen or sixteen thousand dollars all told.

It is quite clear that that was the true situation and it was a surprise. French had undertaken to acquire for respondents a business on the unusual terms of invoice price plus 13%, which might not be an extravagant thing if applied to a small stock with the purpose of expanding the business after acquisition, but when applied to a large one, probably the safe limit to carry in any case, and not permitting expan-

sion meant, using French's own words, "commercial suicide."

He never ventured, when shewn the result, to challenge Periard to produce evidence of the actual invoice prices and that then he would pay.

And when the matter passed into the hands of the respondents' solicitors they insisted on "invoices or copies of same," a thing probably impossible in many cases, and waived aside appellant's suggestion of verification "in any reasonable way" in cases where invoices could not be produced. This proposal ought to have been accepted.

The appeal should be allowed with costs here and in the courts below and judgment be directed for appellant and the case remitted for assessment of damages with costs thereof to the appellant.

DUFF J. (dissenting).—This appeal is from the judgment of the Court of Appeal for British Columbia dismissing an appeal from the judgment of Morrison J. by which the appellant's action — for the recovery of damages for breach of contract to purchase a stock of goods in Vancouver — was dismissed. The contract upon which the action was brought is contained in three letters, set out in the statement of claim as follows:—

Vancouver, June 1st, 1910.

A. J. Periard,
Attorney for S. Periard,
Vancouver.

Dear Sir,—We, the undersigned, beg to submit the following proposition for the purchase of your stock of merchandise contained in the premises known as 135 Hastings St. East. We will pay you for said merchandise at the rate of one hundred and ten cents on the dollar, invoice price ($1.10). Fixtures to be taken at a valuation. Each party to have them valued. Failing to come to an agreement,

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the matter to be left in the hands of a third party by mutual consent. Terms of sale to be half cash on taking possession of the business, and the balance at the rate of one thousand dollars per month ($1,000), bearing interest at the rate of seven per cent (7%) per annum on approved notes, with the option of paying all cash at the time of taking possession. The date of said possession to be August 1, '10, or sooner, if so desired, or not later than the 15th of August. You to agree to immediately cancel all goods purchased by you for the coming fall, and to reduce the stock in the interval of taking possession as much as possible. One of the purchasers to have the privilege of working in the store during the month of July.

In consideration of this offer, we enclose our marked cheque for one hundred dollars ($100).

Awaiting your reply by letter, we remain,

Yours truly,

NOAH BERGERON.

W. RICKSON.

Witness:

A. French.

Vancouver, June 1st, 1910.

Messrs. Bergeron & Rickson,

Vancouver.

Dear Sirs,—Replying to your letter of this date. I hereby accept your offer for my stock at the rate of $1.10 cents on the dollar, with 3% added for freight. And I further want the sum of $2,000 deposited in any chartered bank as an evidence of good faith on your part. I will also deposit a like sum as an evidence of good faith on my part.

The other conditions of sale mentioned in your letter are quite satisfactory to me.

Yours truly,

S. E. PERIARD.

A. J. PERIARD,

Attorney.

Witness:

A. French.

Vancouver, June 2, 1910.

A. J. Periard,

Attorney of E. S. Periard,

Vancouver.

Dear Sir,—In reply to your letter of the 2nd inst. we beg to say that we accept the terms as laid down by you, viz., the 3% for freight, and we have deposited the sum of two thousand dollars

($2,000) in the Merchants Bank of Canada here to your credit, pending the taking over of the stock by us.

. Yours truly,

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The learned trial judge held that it was a condition of the contract that the appellant should produce reasonably satisfactory evidence of the prices at which the goods comprising her stock had been purchased by her in time to enable the purchasers to complete the contract and take possession at the date fixed in the first letter; and that the appellant had not produced such evidence and had given the purchasers reasonable grounds for thinking that her husband, who acted for her, was not acting in good faith in the matter of the information furnished by him respecting the prices alleged to have been paid for the goods and consequently that the respondents were justified in terminating the agreement. In the Court of Appeal Irving J. agreed with the trial judge. Galliher J. was unable to say that the trial judge was wrong, and McDonald C.J. thought the judgment of the trial judge ought to be reversed on the ground that, in the last week of July, the goods were gone over by the husband of the appellant and the respondents and that an inventory was made in which were entered the prices which the parties agreed were to be paid for the goods and that this agreement the appellant is entitled to enforce; and the contention in this court was that the appellant is entitled to succeed upon that ground. I think this view cannot be sustained and that the appeal ought to be dismissed.

The prices at which the goods, according to the agreement of June, were purchased were the "invoice prices" plus 10%. Until these prices were ascer-

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tained with sufficient precision to fix the amount to be paid by the respondents in figures there could, of course, be no completion of the contract; and it is quite obvious that the contract contemplated the ascertainment of these prices before the time fixed for completion, the first, or at latest the 15th, of August. The information, moreover, which would be required for this purpose being presumably in the possession of the appellant, the contract further contemplates that it shall be produced by her. It is not necessary to say that she was bound in every case to produce the original invoice, but it is clear that the respondents were, in cases in which invoices could not be obtained, entitled to some reasonable substitute, something which a business man would regard as satisfactory evidence of the price paid for the goods. The respondents were not bound to accept the appellant's own unverified statement; the appellant, on the other hand, was clearly bound to give, in good faith, every reasonable assistance to the respondents to enable them to get at the true facts.

As regards a large portion of the goods (the respondents say 50%, and the appellant admits 25%), it is quite clear that invoices were not produced. Nor is it suggested that in such cases there was any satisfactory evidence of what the prices paid actually were. The appellant must, therefore, succeed, if she can succeed at all, on the ground that the parties had agreed upon some other way of fixing the price of the property sold; and it is, as I have said, argued that this was done by agreement between the parties.

The inventory referred to contained an enumeration of goods and prices set opposite them. It was stated by the appellant's husband, her daughter (and

by one or two other witnesses who were in her employ at the time) that these prices were assigned only after the parties had agreed to them as the prices the appellant should receive under the contract. This is contradicted by all the witnesses called by the respondents. One of these witnesses, a Mr. French, is a partner in one of the two well-known firms of manufacturers who were financing the respondents, and he was present during part of the time while the inventory was being compiled. The learned trial judge has accepted his evidence as reliable and I do not think there is the slightest ground for casting a doubt upon his candour.

His evidence is as follows:—

I called on Mr. Periard on Saturday, and he said he would be ready to take stock on Monday, and on Monday we went up with Mr. Bergeron and Mr. Rickson and Mr. Corderoy, and Mr. Periard said he would not allow us in the store, as he proposed to take stock himself before we went in, and that consumed three days. On Thursday we were allowed to go in, and we were not there probably more than five minutes before a dispute arose about invoices which were not produced, and this continued throughout the two days, I may say. I was not there all the time, but I was frequently sent for and called up to try and settle disputes that arose between them. This lasted up until Friday afternoon, when they were through. * * * They claim, I believe, that I settled these prices and passed them, and I certainly did not.

Q. By Mr. Reid: What is the last ?

A. They claim, I believe, that I agreed to these prices. I certainly did not, it would have been absurd.

Court: Those are the prices in the stock list ?

Witness: Those are the prices put down in the book — taken down.

Court: And you did not agree to that ?

A. No. There was so much disputing, and so much unpleasantness, that if we had not gone down and got the thing put down in some shape we would probably have been there now, trying to get it settled. I thought when I got through that I would have been able to make some reasonable settlement with Mr. Periard, but the further matters went the worse they were getting, and when they got into other lines

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that I did not know anything about the same disputes were cropping up, but these I can only speak of that I know of.

* * * * * *

Court: And you got them ?

A. No, I only saw the one invoice; that was the underwear, that Mr. Rickson insisted on getting.

Q. Now, what was Miss Periard's attitude on the question of producing invoices ?

A. Well, it appeared to me that they just simply could not produce them.

Q. Now, do you know whether this stock sheet was ever approved of by Rickson & Bergeron ?

A. It certainly was not approved by them. It was not approved when we got through because I said, "We cannot go on."

Mr. Reid: I object. Who did you tell ?

Court: Just wait. — Was Mr. Periard there when you told something to some one ?

Witness: No, I called Rickson and Bergeron to one side, and told them we could not go on, and I also had a conversation with Mr. Periard in which I told him unless he could alter his prices and make the thing a little more satisfactory than it was then that I would not have anything to do with it, and I would not advise these men to go on with it, paying the price they were paying for the stock. And Mr. Periard, I believe, took the construction from one of my remarks that these men could not finance it. Well, that was not right. We had $20,000 in sight, and could have got more, if necessary. But I would not have anything to do with it, or would not allow either of the firms I was representing to go into the thing and take over the stock at what it was listed down at.

* * * * * *

Q. Then you thought, Mr. French, that Mr. Periard ought to be compensated in some way ?

A. Yes and no. I did not think that Mr. Periard acted in good faith with us, because, as far as damages are concerned, these other men purchased goods to the extent of several thousand dollars.

Court: That is the defendants ?

A. Yes, they advertised that they were going into business. We ourselves shipped goods to Vancouver for them, and we lost money, because they had to be sold for the cost less the freight. They had made all their arrangements to go into business, and they were acting in good faith and I don't think that Mr. Periard was acting in good faith, and as far as damages are concerned it is horse and horse with them. But I did think, and I do think, as these men were leaving the matter pretty much in my hands——

Court: The defendants ?

A. Yes.

Court: Well, just refer to them as that.

A. Yes. When I took in the situation, and saw the trouble we were going to have, I do think that I make a mistake in not stopping right there — at the very commencement, when the trouble and disputes arose. In the first place, Mr. Periard had no right to close up his store Monday, Tuesday and Wednesday and not allow us to go in; it is a thing I never heard of in the mercantile business before, I never heard of a seller refusing the purchaser the right to go in and take stock with them.

Q. On what ground did you think that an offer should be made to Mr. Periard for compensation ?

A. For the two days that they had him closed. I said: "Give him what he thinks is reasonable," and I suggested this matter of settlement with Mr. Periard, but Mr. Periard had his head full of this $2,000 that was in the bank, and he said he was going to have it and the matter ended there.

Both Bergeron and Rickson also deny that they agreed upon the prices put into the inventory, and this evidence was accepted and acted on by the trial judge. The evidence on behalf of the appellant on the other hand was not accepted and was distinctly discredited by the trial judge, who took the view that the appellant's family (who were really in charge of the business) were not acting in good faith. There are several instances given by French of what would appear to have been rather bold attempts at overcharging in respect of classes of goods with which he was familiar and I agree with Mr. Justice Irving in thinking that the learned judge's view is supported by the evidence as it appears in the record.

The learned trial judge evidently thought that the respondents having made their arrangements to take over the appellant's business and desiring, if possible, not to withdraw from the project (entailing, as such a course would necessarily, not a little loss to themselves), went on with the inventory even after they became aware that the appellant was not living up to the contract in the matter of the verification of prices

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in the hope that a satisfactory arrangement might ultimately be reached; and that neither party entertained the idea that the respondents by the part they took in connection with the inventory were irrevocably committing themselves to purchase at the unverified prices entered in it. That this was so appears to me to be demonstrated by the subsequent conduct of the parties. The appellant's husband and daughter admit that they were informed by French, shortly after the completion of the inventory, that the respondents would not go on with the purchase on account of the absence of invoices. Almost immediately a correspondence ensued between the solicitors for the appellants and the solicitors for the respondents.

The respondents' solicitor at once took the position that the agreement had fallen through because of the failure of the appellant to produce evidence of the cost prices of the goods, and proceeded to discuss a fresh arrangement. To this position he adhered throughout the two weeks during which the correspondence lasted. The appellant's solicitor insisted that she was under no obligation to produce invoices, but nowhere is there a suggestion that the parties have agreed upon the inventory prices. The whole correspondence, indeed, is inexplicable on that assumption. In a letter of August 1st, Mr. Reid, who acted for the appellant, proposes to leave the question of

> what is the invoice price of any goods concerning which the invoice cannot be produced to arbitration,

and proceeds to say that "she contends" not that the invoice price of such goods has been settled by agreement, but that

> the exact invoice price has in all cases been affixed to the articles in question.

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On the same day he writes:—

> We deny the inability to produce invoices to carry out the agreement for sale or that the agreement for sale requires the production of invoices.

Not a word about prices having been agreed upon.

Again, on August 4th:—

> Is it necessary to again point out that the production of invoices is not required by the contract? An inventory has been made out, submitted, checked over and verified by your clients, and in a great majority of cases the prices have been verified by invoices. There are some cases where the invoices cannot be found. In these cases, *if your clients think that the prices put by my clients are not the correct invoice prices,* the matter may be verified in any reasonable way.

Not easily reconcilable with the contention that the inventory prices had at that time been accepted by the purchasers.

Then, on August 9th:—

> We find on consultation with our clients that about 75% of the stock can be vouched for by invoices, and that *these were passed by your clients* when stocktaking was done.

This by implication is a distinct admission that the only items "passed" by the respondents were those in respect of which invoices were produced.

These passages are consistent with the general tenor of the letters and they appear to be incompatible with the hypothesis on which the contention I am considering is based. The attitude indicated by these letters was not departed from by the appellant down to the trial. The respondents in their defence set up the failure of the appellant to produce evidence of "invoice price." In reply the appellant dealt specifically with this defence by simply denying the facts alleged; there is no suggestion of an agreement to purchase at the inventory prices nor of waiver of the production of invoices, or evidence of "invoice price." It

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is impossible to believe (if the appellant's husband had really understood the respondents were binding themselves to accept the prices appearing in the inventory), that the appellant's solicitor could have so long remained in ignorance of this crucial point.

All these considerations convince me that the appellant's contention has no substantial basis and I think the appeal should be dismissed.

ANGLIN J.—Although I was, at the close of the argument, inclined to the view that this appeal should be dismissed, after carefully reading the evidence several times I am convinced that the conclusion in the defendants' favour reached by the British Columbia courts was erroneous and that the dissent of the learned Chief Justice of the Court of Appeal was well founded.

Assuming that the defendants were *primâ facie* entitled to have the prices of the stock which they had purchased vouched by the production of invoices, I am satisfied that in cases where such invoices were called for on the stocktaking and were not forthcoming, production of them was waived and either the prices demanded by the plaintiff were accepted or compromise prices were then agreed upon and such prices were thereupon inserted in the stock list. When the stocktaking was completed, on the Saturday afternoon, the prices of the entire stock had been settled and the defendants did not then take the stand that they would require the production of such invoices as the plaintiff had failed to exhibit. Neither did they keep any question of prices open by protest or other step taken for that purpose. It was not until the following Monday; when the defendants and their backer,

French, had determined, for an entirely different reason, to escape from their bargain, that they brought forward the failure to produce certain invoices as a pretext for repudiating the contract. The real difficulty was that it then appeared that the plaintiff's stock would cost much more than the defendants had anticipated or had provided for and that at the unusually high figure they were paying for it — $1.13 on the dollar of invoice prices — the venture was likely to prove unprofitable, or much less profitable than they had expected. French, too, had then realized that with such a stock on the defendants' shelves their orders for his principals, manufacturers and wholesale dealers, could not be as extensive as he had hoped for and he probably began to doubt the wisdom of the latter advancing upwards of $12,000 to enable the defendants to carry out their purchase.

I have no doubt that these were the true reasons why the defendants repudiated the contract. They were not warranted in doing so. Their attitude from the Monday after the stocktaking and their final letter of repudiation on the 16th of August justified the plaintiff in refraining from taking steps towards ascertaining the value of the fixtures by arbitration. The fact that in this letter the failure of the plaintiff to make a deposit of $2,000 — which it is admitted had been waived at an early stage of the negotiations — is put forward as one of the chief grounds for the defendants' withdrawal confirms me in the view that they were looking for excuses and that the objection based upon non-production of invoices to verify prices and that based upon the plaintiff's failure to deposit $2,000 are of the same type — both of them pretexts to escape from an unsatisfactory bargain.

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I have had the advantage of reading the judgment of my brother Idington. I concur in his views upon the effect of the evidence as a whole, and in his appreciation of the testimony of French, to which I fear the learned trial judge attached quite too much importance.

The appeal should be allowed with costs to the plaintiff throughout and the action should be remitted to the Supreme Court of British Columbia for the assessment of the plaintiff's damages according to the usual practice of that court.

BRODEUR J.—In selling her stock at invoice price, it does not necessarily follow that the appellant was bound to produce the invoices themselves.

The sale of the stock was made under the conditions which have become of a very common practice. No lump sum is stipulated, but the price is fixed at so much as the goods cost. In the cases where a merchant has been in business for many years, it would become absolutely impossible to shew the invoices or to establish their relation to the goods that are in the store.

In this case, however, if the invoices that would cover all the goods that were inventoried were not produced, a large number of them were shewn or could be shewn if they had been asked for. The parties relied evidently upon the cost prices that had been put on the boxes containing the goods.

Some disputes arose as to the value of some of these goods; they seem to have been adjusted during the inventory. And if there is some doubt as to whether the prices mentioned in the inventory were accepted or not, the respondents had the opportunity as shewn

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by the correspondence to indicate later on the articles against the value of which they objected.

They refused to accept that proposition and preferred to stay their case on the ground that the invoices should be produced.

That question has already come up before the courts in England and we find a case of *Plank* v. *Gavila*(1), where the agreement provided that the commission of the plaintiff was to be fixed on the invoice price, it was held

that it was competent to the plaintiffs to shew the proximate value of the consignments upon which they claimed commission without producing the invoices.

It is evident to me that the respondents and their indorsers did not want to carry out the agreement after they found that the stock was larger than what they expected.

They at first claimed that the contract was at an end. But later on they saw how weak their position was in that respect and they carried on a correspondence which shewed very clearly their intention to repudiate their obligations. Because if they had been willing to stand by their contract they should have accepted the offer made by the appellant to arbitrate on the value of the goods in cases where they thought they were too high. No, they waited until the date which had been fixed for the delivery of the stock, and they formally declared that the plaintiffs not having put up a deposit and not having produced the invoices, they had to withdraw from the deal.

That claim as to the deposit is only a pretext, for it had been understood that such a deposit would not

(1) 3 C.B. (N.S.) 807.

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be made; and their request for the production of the invoices was not founded in law.

I have come to the conclusion that the action in damages instituted by the appellant for breach of contract ought to be maintained.

The appeal should be allowed with costs of this court and of the courts below and the case sent back to the Supreme Court of British Columbia to assess the plaintiff's damages.