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*Mar. 1.

*May 6.

EDMUND JAMES KING, *et al.* (OPPOSANTS) ..... } APPELLANTS;

AND

PHILEAS DUPUIS *dit* GILBERT PLAINTIFF AND CONTESTANT) ..... } RESPONDENT.

AND

ALPHONSE TASCHEREAU,

Defendant in the Superior Court.

ON APPEAL FROM THE SUPERIOR COURT FOR LOWER CANADA SITTING IN REVIEW AT QUEBEC.

Appeal — Jurisdiction — Amount in controversy — Opposition afin de distraire—Judicial proceeding—Demand in original action—R. S. C. c. 135, *s.* 29—*Contract—Construction of—Agreement, to secure advances—Sale—Pledge—Delivery of possession—Arts.* 434, 1025, 1026, 1027, 1472, 1474, 1492, 1994 *c., C. C.--Bailment to manufacturer.*

An opposition *afin de distraire*, for the withdrawal of goods from seizure, is a "judicial proceeding" within the meaning of the twenty-ninth section of "The Supreme and Exchequer Courts Act," and on an appeal to the Supreme Court of Canada, from a judgment dismissing such opposition, the amount in controversy is the value of the goods sought to be withdrawn from seizure and not the amount demanded by the plaintiff's action or for which the execution issued. *Turcotte* v. *Dansereau* (26 Can. S. C. R. 578), and *McCorkill* v. *Knight* (3 Can. S. C. R. 233; Cass. Dig., 2 ed. 694,) followed; *Champoux* v. *Lapeirre* (Cass. Dig. 2 ed. 426), and *Gendron* v. *McDougall* (Cass. Dig. 2 ed. 429), discussed and distinguished.

K. B. made an agreement with T. for the purchase of the output of his sawmill during the season of 1896, a memorandum being executed between them to the effect that T. sold and K. B. purchased [all the lumber that he should saw at his mill during the season, delivered at Hadlow wharf, at Levis; that the purchasers should have the right to refuse all lumber rejected by their culler; that the lumber delivered, culled and piled on the wharf should be paid for at prices stated; that the seller should pay the

PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

purchasers $1.50 per hundred deals, Quebec standard, to meet the cost of unloading cars, classification and piling on the wharf; that the seller should manufacture the lumber according to specifications furnished by the purchasers; that the purchasers should make payments in cash once a month for the lumber delivered, less two and a half per cent; that the purchasers should advance money upon the sale of the lumber on condition that the seller should, at the option of the purchasers, furnish collateral security on his property, including the mill and machinery belonging to him, and obtain a promissory note from his wife for the amount of each cullage, the advances being made on the culler's certificates showing receipts of logs not exceeding $25 per hundred logs of fourteen inches standard; that all logs paid for by the purchasers should be their property, and should be stamped with their name, and that all advances should bear interest at the rate of 7 per cent. Before the river-drive commenced, the logs were culled and received on behalf of the purchasers, and stamped with their usual mark, and they paid for them a total sum averaging $32.33 per hundred. Some of the logs also bore the seller's mark, and a small quantity, which were buried in snow and ice, were not stamped but were received on behalf of the purchasers along with the others. The logs were then allowed to remain in the actual possession of the seller. During the season a writ of execution issued against the seller under which all moveable property in his possession was seized, including a quantity of the logs in question, lying along the river-drive and at the mill, and also a quantity of lumber into which part of the logs in question had been manufactured, at the seller's mill.

Held (Taschereau J. taking no part in the judgment upon the merits), that the contract so made between the parties constituted a sale of the logs, and, as a necessary consequence, of the deals and boards into which part of them had been manufactured.

APPEAL from a judgment of the Superior Court for Lower Canada, sitting in Review, at Quebec, affirming the judgment of the Superior Court, District of Beauce, which dismissed the appellants' opposition *afin de distraire*, with costs.

The appellants filed an opposition *afin de distraire* claiming ownership, under a written contract, in effect as stated in the head-note, of a quantity of logs and lumber worth $3,500, seized in execution under a writ

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of *fi. fa. de bonis* issued by the plaintiff, (present respondent), upon a judgment recovered by him in an action in the Superior Court, District of Beauce, against Alphonse Taschereau, the defendant, for $119.57 and costs, being the full amount of his demand in the action. The plaintiff, as execution creditor, contested the opposition and, after the adduction of evidence and hearing upon the issues joined, the Superior Court at Beauce, dismissed the opposition with costs. The judgment now appealed from was rendered in the Court of Review at Quebec, affirming the decision at the trial.

A motion was made to quash the present appeal on the ground that the amount in controversy was limited to the amount of $119.57 demanded by the plaintiff's action, and that consequently the Supreme Court of Canada had no jurisdiction to hear the appeal. After hearing the parties on the motion to quash, the court reserved judgment and directed the hearing upon the merits to be proceeded with, and that the questions raised both upon the motion to quash and upon the merits of the case should be disposed of together.

Fitzpatrick Q.C., (Solicitor General), and *Taschereau Q.C.* for the appellants. The opposition is a distinct "judicial proceeding" within the meaning of sec. 29 of "The Supreme and Exchequer Courts Act," and raises a new controversy as to the ownership of a quantity of logs and lumber worth more than the sum or value of $2,000. See *Turcotte* v. *Dansereau* (1). The issues between the plaintiff and the defendant in the original action are not now in question, but new issues tried between the opposant, and the contestant, as to the logs and lumber seized, quite aside and apart

(1) 26 Can. S. C. R. 578.

from the plaintiff's claim by his action or under the execution. See *Miller* v. *Déchène* (1), per Casault J., at page 22. An opposition of this kind is to all intents and purposes a new action in revendication.

The agreement amounted to an absolute sale of the mill output for the season, the clauses in relation to advances of money to carry on the log making in the bush and the river-drive to the mill do not alter the character of the bargain made for the purchase of the lumber output. See *La Banque d'Hochelaga* v. *The Waterous Engine Works Company* (2). The delivery of all the logs was completed at the time of the culling and marking in the bush, *Church* v. *Bernier* (3), and the defendant never had any possession of them thereafter except as the agent of the opposants and for their benefit and purposes. The boards and deals manufactured out of these logs were consequently the property of the opposants and, although in the defendant's temporary possession, they never ceased to belong to the opposants. See *Price* v. *Hall* (4). There was merely a bailment of the logs for the purpose of having them sawn into boards and deals and delivered at the Hadlow wharf after manufacture. Articles 1025-1027, 1472, 1492 and 1493 C. C. apply. See also 24 Laurent, no. 167; 6 Marcadé p. 223; *Vankoughnet* v. *Maitland* (5); *Young* v. *Lambert* (6); *Ross* v. *Thompson* (7); *Tourville* v. *Valentine* (8); Troplong, "Nantissement," nos. 308, 309, 320, 335; Dalloz, Rep. Jur. "Nantissement," nos. 125-128, 130, 132. This is not a question of goods sold by weight or measure but a "lump" sale of effects, certain, fixed and well defined. Art. 1474 C.C.; Pothier "Vente," no. 308; 2 Pardessus pp. 321, 322;

(1) 8 Q. L. R. 18.
(2) 27 Can. S. C. R. 406.
(3) Q. R. 1 Q. B. 257.
(4) 2. Q. L. R. 88.
(5) Stuarts K. B. 357.
(6) L. R. 3 P. C. 142.
(7) 10 Q. L. R. 308.
(8) Q. R. 2 Q. R. 588.

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Merlin, Rep. "Vente,"; 16 Duranton, no. 92; Cass. 11, Nov. 1892; Troplong "Vente," no. 85.

Belcourt for the respondent, (*Letellier* with him.) There is no jurisdiction in the Supreme Court of Canada to hear this appeal as the amount demanded and recovered and for which the execution was issued is less than the requisite appellate amount of $2000; R. S. C. c. 135, s. 29. The opposant seeks to avoid an execution for $119.57 and costs and at the present moment the payment of $119.57 with a few dollars for interest and costs would put an end to all controversy in this matter, and release the property from seizure. As to the question of jurisdiction we rely upon *Gendron* v. *McDougall* (1); *Champoux* v. *Lapierre* (2); *Flatt* v. *Ferland* (3); *Kinghorn* v. *Larue* (4); *The Bank of Toronto* v. *Le Curé et Les Marguilliers de l'Œuvre et Fabrique de la paroisse de la Nativité de la Sainte Vierge* (5).

There was no sale to the appellants, and they did not obtain delivery and possession of logs or lumber at the date of the agreement, for the defendant had not then cut any logs, and even the culling was not done until long afterwards. Whilst the defendant was cutting and driving the logs he had the exclusive control of the men who did the work under him; he had sawn at his mill all the lumber seized; he alone was bound at his own expense to deliver the deals upon the wharf at Hadlow. With the exception of the culling, the appellants never interfered in the operations of the defendant. The marking of the logs was merly to identify them as having been culled. The agreement establishes that the moneys given by the appellants

(1) Cass. Dig. (2 ed.) 429.
(2) Cass. Dig. (2 ed.) 426.
(3) 21 Can. S. C. R. 32.
(4) 22 Can. S. C. R. 347.
(5) 12 Can. S. C. R. 25.

to the defendant at each culling were only advances to help him in his operations and did not constitute the real and definite price of the logs, and by its very terms it appears that no complete and definite sale took place of a fixed and determined quantity of movable goods. Arts. 1474 and 1026 of the Civil Code apply. See *Kelly* v. *Merville* (1); *Le Mesurier* v. *Logan* (2); *Contant* v. *Normandin* (3); *Ross* v. *Hannan* (4); *Villeneuve* v. *Kent* (5); *Archambault* v. *Michaud* (6). Until the measurement and culling of the lumber had been completed there was no perfect sale, and, until these formalities were accomplished no payment was exigible, and collateral security was provided for to ensure the repayment of the advances made.

The appellants may have rights and certain privileges as pledgees in connection with this lumber, but they are not in possession of it, and the respondent claims with respect to it, rights and privileges in preference to those of the appellants under 57 Vic. c. 47 (Que.) and Art. 1494 of the Civil Code.

TASCHEREAU J.—In this case a certain quantity of logs and deals having been seized by the respondent in execution of a judgment for $119, he had recovered against the defendant, the present appellants fyled an *opposition afin de distraire*, alleging that these logs and deals, worth $3,500, are their property. Upon contestation by respondent of this opposition, the judgment appealed from maintained this contestation, and dismissed appellants' opposition.

The respondent moved to quash the appeal for want of jurisdiction upon the authority of *Champoux* v. *Lapierre* (7), and *Gendron* v. *McDougall* (8). Not relying

(1) 1 R. L. 194.
(2) 1 Rev. de Leg. 176.
(4) 19 Can. S. C. R. 247.
(4) 19 Can. S. C. R. 227.
(5) Q. R. 1, Q. B. 136.
(6) 1 Rev. de Jur. 323.
(7) Cass. Dig. (2 ed.) 426.
(8) Cass. Dig. (2 ed.) 429.

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on the summary of these decisions as given in the digest, I have referred to the cases themselves to ascertain precisely what was the nature of the appeals therein, and the grounds upon which it was held that this court had no jurisdiction. It was at that time, I may premise, though perhaps unnecessarily, the amount in controversy upon the appeal to this court that ruled not, as it is now, the amount of the original demand, when the extent of our jurisdiction depends upon the amount in controversy. In *Champoux* v. *Lapierre* (1), Champoux who had recovered judgment against the Société de Construction for $640, had caused an immovable property of the *Société* to be seized in execution of that judgment. Lapierre fyled an opposition to this seizure, not claiming the ownership of this property, not in any way questioning the title to it, but simply on the ground that Champoux, with the other directors, had agreed that this property would not be sold without his, Lapierre's, assent, as long as he, Lapierre, was not paid a claim of $31,000 which he had against the *Société*. Champoux contested this opposition, not at all denying that Lapierre had a claim of $30,000 against the *Société* defendant, but controverting his right to oppose the sale on the grounds he alleged. The judgment appealed from to this court by Champoux maintained the opposition and set aside the seizure. Under the circumstances we held that as the amount in controversy upon the appeal did not amount to $2,000, the appeal should be quashed. Such is the entry in the minute book. There was clearly nothing there in controversy before this court other than Champoux's right to sell this property in execution of his judgment for $640. There was no controversy about Lapierre's claim of $30,000, no controversy as to the *Société*'s title to this

(1) Cass. Dig. 2 ed. 426.

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property. These two facts were admitted by all the parties. The case has, therefore, no application here.

In *Gendron* v. *McDougall* (1), Gendron had seized a certain immovable property, the value of which was not alleged or proved, upon a judgment against Ogden for $231. McDougall fyled an opposition, claiming this property as owner. Gendron answered that McDougall held it as pledgee, not as owner. The amount for which this property was so held in pledge, if at all, was admitted on the record to be $637. The judgment appealed from to this court by Gendron, though maintaining McDougall's opposition, denied him the ownership of this property, simply declaring that he had a right to retain it as pledgee without saying for what amount. (It was one of the grounds of appeal, that the judgment was *ultra petita*). McDougall submitted to that judgment which rejected his claim to the ownership, so that there was no question of title to land upon Gendron's appeal to this court. All that he claimed, all that was in controversy upon the appeal, was Gendron's right to have it sold for $231, and McDougall's right to retain it and oppose the sale, till he was repaid his disbursements of $637, if the evidence is coupled with the judgment, or disbursements to an undetermined amount, if the judgment appealed from is taken alone, and the entry in the minute book is "appeal quashed for want of jurisdiction, the amount in dispute being under $2,000." That case again is clearly distinguishable.

Here it is the ownership of $3,500 worth of lumber that is in question. The appellant, by his opposition, intervened in the original case to assert his title to this lumber that the respondent had caused to be seized. Upon that opposition the respondent has recovered a judgment which holds that the appellant

(1) Cass. Dig. 2 ed. 429.

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is not the owner of this lumber. From this judgment the appeal is taken.

I do not see how, on this appeal, [upon what is clearly a judicial proceeding, *Turcotte* v. *Dansereau* (1),] it can be denied that the matter in controversy, and demanded by that opposition, is of the value of $2,000 or over. *Macfarlane* v. *Leclaire* (2) is in that sense. I analysed that case in *Kinghorn* v. *Larue* (3). In *McCorkill* v. *Knight* (4) certain lots of land seized in execution of a judgment against appellant's brother for $730 were claimed by her, the appellant, as her property. Plaintiff, respondent, had as here obtained the dismissal of the opposition from which appellant appealed. Objection was taken at the hearing that this court had no jurisdiction because the amount in controversy, that is to say, the amount of the judgment recovered by respondent in the original suit, was only $730. But, upon an affidavit and an extract from the valuation roll on fyle in the registrar's office, that the property in question on the opposition was of a value exceeding $2,000, the appeal was heard and determined on the merits (5). This is a precisely similar case.

The motion to quash is dismissed with costs.

On the merits, I do not take part in the judgment.

GWYNNE, SEDGEWICK and KING JJ. concurred in the judgment dismissing the motion to quash with costs, and were of opinion that the appeal should be allowed with costs and that the conclusions of the appellants' opposition should be granted.

GIROUARD J.—On the 13th day of August, 1896, the respondent brought a personal action in the

(1) 26 Can. S. C. R. 578.
(2) 15 Moo. P. C. 181.
(3) 22 Can. S. C. R. 347.
(4) 3 Can. S. C. R. 233.
(5) Cass. Dig. 2 ed. 694.

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Superior Court in the district of Beauce, against the defendant, Alphonse Taschereau, lumber dealer and proprietor of a sawmill in Saint Joseph de la Beauce, for the sum of $119.57, owing him for wages as a river-driver, and also for board of drivers in his employ during the spring of the same year.

On the 21st of August he obtained judgment upon a confession, and on the 24th of the same month, by consent, he issued a writ of *fieri facias de bonis*, and caused to be seized, for the benefit of all his creditors, all the defendant's movable property, and among other things, a certain quantity of boards, deals and sawlogs, the boards and deals fully described in the *procès verbal*, of seizure, and being in the neighbourhood of the defendant's mill, or near the station of the Quebec Central Railway, and 8,000 sawlogs lying along the rivers Chaudière and Calway from the mill upwards.

On the 26th of August, 1896, the appellants, King Brothers, lumber merchants of Quebec, produced an opposition *afin de distraire* to this seizure and claimed as their sole and exclusive property all the sawlogs and a certain quantity of boards and deals among those seized, under a certain agreement in writing, or *convention sous seing privé*, dated Quebec, the 11th day of December, 1895.

It appears by that document that Taschereau

vends et King Brothers, de la cité de Québec, achètent tous les madriers, en épinette et en pin, que le vendeur devra scier â son moulin la saison de 1896, livrables au quai des acheteurs à Hadlow (*at Levis*), pas plus tard que le 15ième Septembre.

Les madriers devront être bien et correctement sciés et les acheteurs auront le droit de laisser tous les madriers rejetés par leur culleur.

Prix : Les prix pour les madriers livrés des chars cullés, et empillés sur les quais des acheteurs à Hadlow, seront : Etc.

Here follows the enumeration of the divers prices, according to the size and quality of the deals.

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The parties further agreed:

Il est covenu que le vendeur paiera aux acheteurs $1.50 par 100 madriers Q. S. (*Quebec standard*), pour rencontrer les frais de recevoir le bois des chars, le classifier et l'empiler sur le quai.

Le vendeur s'engage de faire scier les billots d'épinette, tant que possible en madriers de 11 pouses, mais il est entendu que les acheteurs auront le droit de faire scier les billots en autres largeurs ou en autres épaisseurs et que leur notification â cet effet sera assez.

Les acheteurs feront prendre la spécification du bois reçu une fois par mois, et ils payeront au vendeur la balance qui lui sera due, comptant moins 2 et demi par cent.

Les acheteurs averanceront sur l'achât de madriers, aux conditions suivantes:

Pourvu que le vendeur fournira comme sureté un acte de vente en réméré de sa propriété, y inclus le moulin et toute la machinerie qui l'appartient, ou qu'il fera passer par sa femme un billet promissoire pour le montant de chaque cullage, comme sureté collatérale, à l'option des acheteurs, les dits acheteurs avanceront sur le certificat du culleur qu'il a reçu tant de billots un montant à chaque cullage pas excédant $25 par 100 billots de la toise de 14 pouces.

Tous billots payés pour par les acheteurs seront leur propriété et seront reçus et étampés dans leur nom.

Toutes avances porteront intérêt à raison de sept par cent.

It is not alleged, nor does it appear from the evidence that this contract was in fraud of the creditors. The appellants were not creditors of Taschereau except for a small balance of about ten dollars. A fair price was stipulated for the deals and boards; it represented in fact the current market value in Quebec. It is not even suggested either that on the 11th December, 1895, and during the following winter and spring, Taschereau was insolvent, or even in financial difficulties. His insolvency only came out during the summer of 1896, about the time he was sued by the plaintiff and other creditors, long after the logs had been driven down the rivers Calway and Chaudière to his mill or near it, and partly turned into deals and boards.

It is also in evidence, and not disputed, that before the river-drive commenced the logs were culled and

received on behalf of the appellants on the shores of the Calway, and stamped by their culler with their initials or usual mark "K.B." according to the practice prevailing among lumbermen. The last culling and stamping was made on the 13th of April, 1896, in the presence of the respondent himself. Upon the receipt of the returns of the culler in Quebec the appellants paid Taschereau for the logs a total sum of $3,131.38, or 32.33 per hundred logs, when they had agreed to advance only $25. The payment for the last culling was made on the 16th April, 1896.

It is stated that some of the logs bore also the stamp of "A.T." the initials of the defendant, and that a small quantity of them was not stamped at all. The stamp of the defendant affixed before the appellants put their own could not defeat their rights, the defendant admitting himself that the property of the logs was transferred to the appellants. (4 Massé, n. 1607). As to the small quantity of logs which were not stamped because they were buried in the snow or covered by ice, they were received by the culler of the appellants on their behalf along with the others, and although the stamping is *primâ facie* evidence of ownership, any other proof is admissible and the reception of the whole lot by the appellants from the defendant is sufficient, especially as the monies paid by them to him exceed the amount they agreed to pay him for the same. Art. 1493. C. C

These facts are established by the book-keeper of the appellants, E. Quirouet, and their culler, G. McNaughton, and admitted by the defendant Taschereau. When examined as a witness for the appellants he says:

Q. Veuillez prendre communication de l'opposition afin de distraire des opposants en cette cause et dire 1o.—d'où proviennent les billots qu'ils revendiquent, qui a acheté ces billots et à qui ils ont été livrés et au nom de qui ils ont été étampés : 2o.—d'où proviennent

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les planches et madriers qu'ils revendiquent aussi?—R. 1o. Les billots revendiqués ont été achetés par moi des habitants et MM. King n'avaient pas d'affaire dans cela, et ensuite, les MM. King ont envoyé un homme pour les culler et les étamper au nom des MM. King. 2o. Les madriers et les planches revendiqués proviennent d'une quantité de billots ainsi achetés par moi de la même manière.

Q. Les billots qui ont produit ces planches et madriers avaient-ils d'abord été cullés par le culler de King Brothers, et étampés en leur nom?—R. Oui.

Q. Tous ces billots ont-ils été faits et achetés par vous et puis étampés au nom de King Brothers, en vertu du contract dont vous venez prendre connaissance et marqué exhibit "A" des opposants?—R. Oui.

Q. Connaissez vous l'étampe ou marque commerciale de King Brothers et quelle est cette étampe?

Objecté à la deuxième partie de cette question.

Objection réservée et réponse prise "de bene esse."—R. Je la connais, et l'étampe K.B., c'est-à-dire, c'est celle qui était mis sur les billots par le culler.

Q. Est-ce la marque dont généralement se servent les opposants pour indiquer les billots qui leur appartiennent?—R. Je crois que oui.

Q. Est-ce qu'il ne se trouvait pas dans les "drives" du printemps, de l'éte et de l'automne dernier, une certaine quantité de billots portant votre nom seul ou vos initiales et qui n'étaient point frappés des initiales K.B.?—R. Il pouvait s'en trouvér quelques-uns mais pas beaucoup et ils auraient dû tous porter la marque des opposants.

Finally, when examined by the respondent, and speaking of the logs, he says:

Q. Si quelques-uns de ces billots n'ont pas été revêtus les lettres K.B., c'est donc qu'ils étaient recouverts de neige et de glace?—R. Oui, ou bien par négligence, car ils auraient dû tous être marqués des lettres K.B. car j'en avais tout vendu le bois aux opposants.

It has been contended that Taschereau was hostile to his creditors and favourable to the appellants. The trial judge who heard and saw the witnesses, does not consider him so, nor does he throw any suspicion or discredit upon his character or credibility; the record rather shows an inclination on his part to favour his creditors generally. He gave to the respondent a confession of judgment and consented that an execution be taken out at once for the benefit of all his creditors, even against

the timber of the appellants; and when pressed, later on, to make a *cession de biens*, he did not resist, but immediately submitted. The record further discloses the fact that he is an honest man. Having consented that the whole of his movable estate should be sold *en justice*, to satisfy all his creditors in consequence of his insolvency, but remembering that, by mistake, he had omitted a portion of it, he went to the bailiff and insisted upon his taking possession of the same.

It must finally be remarked that the respondent claims a privilege upon the logs for the amount of his claim. Whether he has such a privilege or not, whether he can yet enforce it having parted with his possession of the logs, it is not necessary to consider. Such a privilege is no answer to the opposition of the appellants, if they are the true and lawful owners of the property seized, and we therefore believe that the demurrer fyled by them should have been maintained, and it is hereby maintained with costs.

The real question to be decided is, whether, under the said contract and the circumstances of the case, the appellants are the owners of the movable property they revendicate; in other words, does the agreement between the parties amount to a sale? The Superior Court (Pelletier J.), held that the appellant were mere pledgees not in possession, and the Court of Review (Caron and Andrews JJ., Sir L. N. Casault C.J. dissenting), confirmed this judgment for the reasons given by the Superior Court:

Considérant que la convention entre les opposants et le défendeur et telle qu'interprétée par eux, n'établit pas une vente parfaite, mais seulement un engagement par lequel les acheteurs ont fait des avances au vendeur, qui, de son côté s'est obligé à fournir des garanties en vue de la livraison d'une certaine quantité de madriers moyennant un prix déterminé lors qu'ils seront livrés, comptés et empilés sur le quai des opposants à Lévis.

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It is apparent from the wording of the written agreement of the 11th day of December, 1895, that though two contracts were entered into by the parties —one affecting the deals and boards and the other respecting the logs - only one transaction was intended, and only one object was in view, namely, the ownership of the timber by the appellants upon the payment of a fixed price.

As to the deals and boards, the terms of the agreement leave no doubt that the parties intended to make a sale of the same. But was it a sale of something uncertain or determinate within the meaning of article 1026 of the Civil Code, or a sale of movable things by weight or measure and not in the lump, contemplated by article 1474? The appellants contend that it was not, Taschereau selling not so many thousand pieces or feet of lumber to be counted or measured, but "all the pine and spruce deals that the vendor shall cut in his mill during the season of 1896, to be delivered at the purchasers' wharf at Hadlow." The thing sold, they argue, is therefore certain and determinate and in the lump, and is not by the number or measure. The price is certain and fixed, and the amount of the purchase money alone is uncertain and indeterminate and can be ascertained only when the deals and boards are delivered from the railway cars, culled and piled up at Hadlow. Under articles 1025, 1027 and 1472, they say finally, the sale was perfect by the mere consent of the parties, irrespective of any delivery, even against third parties in good faith. There is no doubt much force in this argument but it is far from being free from difficulty ; it has caused a great deal of diversity of opinions among the commentators and the tribunals of France under Art. 1585 C.N., which is not so sweeping as art. 1474 of the Quebec Code. We do not intend to pronounce upon this delicate point and we

prefer to base our judgment upon that part of the contract which deals with the logs. Were the logs actually sold? Taschereau understood it so, and he so declares in his deposition quoted above. Both McNaughton and Quirouet, employed by the appellants, had the same understanding of the transaction. It is very well known that the best mode of acquiring the property of logs by lumbermen is to stamp them with the initials or trade mark of the purchaser. McNaughton says that is the custom, and if we consult the law reports of the various provinces, we will see that that custom prevails over the whole Dominion and, we may add, over the entire continent of America. That custom has been sanctioned by high judicial authority both in France and in the Province of Quebec, and also by the Canadian Parliament: Criminal Code, Art. 338; *VanKoughnet* v. *Maitland* (1); Paris, 15th April, 1579, reported by Charondas; Cass. 26th January, 1808; Dal. Rép. Vo. Biens, n. 45-46; 21st June, 1820, S. V. 21, 1, 109; 15th January, 1828, D. 28, 1, 90; 25th March, 1844, S. V. 45, 2, 137; 9th June, 1845, S.V. 45, 1, 658; 17th January, 1865, S.V. 65, 2, 127; Dal., Rép. Vo. Vente, n. 616, 617; Charondas, 1, 7, c. 77, 7, 222; 16 Duranton, n. 96; Troplong, n. 103, 283; 1 Duvergier, n. 250; 24 Laurent, n. 167; 4 Aubry et Rau, p. 361; 1 Larombière, art. 1141, n. 13, p. 499; Gilbert sur Sirey, art. 1604 à 1607; Bédarride, Achats et Ventes, nn. 154, 238; 3 Delamarre et 4e Potevin n. 225, 234, 235; 6 Marcadé, p. 232; 4 Massé, ed. 1862, n. 1606; 3 Baudry-Lacantinerie, n. 514; 1 Guillouard, n. 210. The Roman law also recognized the stamping of timber as proof of sale and delivery. *Videri autem trabes traditas quas emptor signasset*, says Paul. So held Straccha, Menochius, Favre and Casageris, quoted by Massé.

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The ownership is presumed from the mere stamping of the logs, unless the contrary be proved; in this case the presumption is supplemented by oral evidence that a transfer of property was really intended. But there is more. The proof of the sale appears upon the face of the written agreement. It is therein stipulated that "all logs paid for by the purchasers shall be their property and shall be received and stamped with their name." The price to be paid is mentioned, viz.: $25 for each 100 logs of 14 inches standard, which, and more, has been paid by the appellants to Taschereau.

It is contended that the next paragraph destroys the above stipulation, inasmuch as it provides for the charge of interest at 7 per cent on "all advances," and that therefore the parties intended to make a pledge and not a sale, to secure the payment of those advances. Here and elsewhere in the contract, the word "advances" does not mean a loan of money, but a payment in advance on the price of the deals to be delivered at Hadlow, and the contract says so in express terms; "The purchasers shall advance on the price of the deals on the following conditions, etc." The parties intended to operate a sale of the logs; they so declare under oath, and the stipulation made in the written agreement that they will become the property of the appellants would receive no effect, if a pledge only was created. No pledge can convey any permanent or absolute right of owership; it merely gives to the creditor the right to be paid by privilege, and the thing pledged remains in his hands only as a deposit to secure his debt. Here there was no debt, but a mere payment by anticipation on the deals; morever, it matters very little if the monies paid by the appellants were advanced in relation to or independently of the sale of the deals; the parties intended to make and did make a sale and delivery of

the logs. It was the natural sequence of the sale of the deals. Without it, Taschereau could not secure the necessary material, and it is only reasonable that the ownership of the two should be vested in the same name. The transaction could not be carried out successfully in any other manner. Any other conclusion would seriously disturb the business operations of dealers in lumber, if not render them unsafe and impossible in many cases.

It is also argued that after the stamping, Taschereau remained in possession of the logs; so he did, but for the benefit and in the name of the appellants, to carry out his part of the contract to drive the logs down the river to his mill, saw them, and deliver them at Hadlow. His possession was the same as that of any other driver who would undertake to carry the lumber of any merchant, or of a mill owner who uses the material of another; his possession was qualified and limited to those objects only. Finally it is proved that the appellants advanced $400 to pay the men who made the drive, and that they had a man named Olivier Côté, to oversee the drive.

It is finally stated that the fact that the appellants required further security for their advances, for instance, a deed of sale *à réméré* of his mill or a note of his wife, demonstrate that the logs formed the subject matter of a separate transaction, in fact a debt independent of the deals. The written agreement proves the very reverse. The additional security mentioned was only reasonable, as privileges for a large amount might be allowed to be taken on the logs by workmen in the shanties, or in the mill, or by river drivers. As a matter of fact, the appellants did not exercise the option given to them of additional security, whether in consequence of neglect on their part, or by reason of being satisfied that Taschereau would act honestly with the

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money paid to him in advance, the record does not show. The ownership of the logs being established, that the deals and boards cut out of the same must follow (art. 434, C. C.) the appellants having more than paid the cost of workmanship fixed by the contract. The statements and the evidence produced show that Taschereau was entitled to a total sum of $6,199.63 for deals and boards delivered at Hadlow both before and after the seizure, whereas the appellants actually paid and disbursed the sum of $7,809.61 on account of the deals and boards received at Hadlow, as well from Taschereau as from one Joseph Morin, who, after security being furnished by the appellants in due course, sawed the logs remaining not cut at the time of the seizure. Even as pledgees in possession of the logs, it would seem, upon the authority of the Privy Council in *Young* v. *Lambert* (1), that the appellants are entitled to succeed. But it is not necessary to examine this point. We hold that the written agreement and the evidence show that the contract between the parties constituted a sale of the logs, and, as a necessary consequence, of the deals and boards.

For these reasons, we are of opinion that the appeal should be allowed and the judgment of the Court of Review reversed. The opposition *afin de distraire* of the appellants is therefore maintained with costs before all the courts.

Appeal allowed with costs.

Solicitors for the appellants: *Taschereau, Lavery & Rivard.*

Solicitor for the respondent: *D. Doran.*

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(1) L. R. 3 P. C. 142.