CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

PETER KEARNEY (PLAINTIFF)..... APPELLANT;

AND

ALPHONSE LETELLIER (DEFENDANT) RESPONDENT.

1896

*Oct. 8.

1897

*Jan. 25.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Contract — Sale by sample—Objections to invoice—Reasonable time—Acquiescence—Evidence.

If a merchant receives an invoice and retains it for a considerable time without making any objection, there is a presumption against him that the price stated in the invoice was that agreed upon.

(Judgment of the Court of Queen's Bench, that the evidence was sufficient to rebut the presumption, reversed, Gwynne J. dissenting and holding that the appeal depended on mere matters of fact as to which an appellate court should not interfere.)

APPEAL from a decision of the Court of Queen's Bench for Lower Canada, reversing the judgment of the Superior Court (1) in favour of the plaintiff.

The material facts of the case are as follows:—

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*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

(1) Q. R. 9 S. C. 128.

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In February 1895 the plaintiff Kearney, a wholesale tea merchant of Montreal, came to Quebec with a job lot of teas which the defendant Letellier agreed to buy, the plaintiff producing samples of the tea in tin boxes on which the price of each grade was marked. The price was to be paid by Letellier partly in wine and the balance by acceptances at 6, 8, 10 and 12 months. In March, 1895, the parties exchanged invoices, that of the plaintiff charging for the tea a uniform rate of 16 cents per pound, the defendant's being for the wine at the price agreed upon. In April part of the tea was shipped to the defendant and the balance in July in which month also the plaintiff received and stored the wine.

The defendant in April accepted three drafts on account of the price of the tea and a fourth for the balance claimed by the plaintiff was drawn on him after the last shipment of the tea, in August, which he refused to accept claiming that the amount was in excess of the balance actually due and alleging, for the first time, that he bought the tea at the several prices marked on the samples produced by the plaintiff when the bargain was made and not at one rate of 16 cents per pound for the lot. The plaintiff then brought an action to compel acceptance of the last draft, or, in default, for payment of the amount, and also for the value of 25 hogsheads of the wine, which he claimed was not of the quality agreed upon, and the charges thereon. At the enquête the plaintiff supported his own evidence as to the price being 16 cents per pound by the production of an invoice, sent to the defendant before the tea was delivered and kept by him some five months without objection, in which that price was charged. As against this there was the evidence of the defendant, who swore that the sample price was agreed upon, his son who swore that that the

tea was first offered to him at the prices marked on the samples and he referred the matter to his father, and a broker who was present when the bargain was made but who was not very positive as to the terms as appears from the following extracts from his testimony :—

Q. What did you do with the samples there in the hotel? A. Well, we looked at them, and I put the prices and quantities on them.

Q. Then, you went with Mr. Kearney to Mr. Letellier's? A. No, after that we went to the office with the teas, with the samples. I don't know whether we brought the samples down to the office, but eventually they got to the office.

Q. Did you go with Mr. Kearney to Mr. Letellier's? A. I am not sure whether we went over alone or went over together; however we eventually got there.

Q. Will you state what was the price agreed upon for the tea? A. I understood it to be the prices marked upon the samples.

Q. As a matter of fact, is that the price they were sold for? A. I think so.

Q. State whether after the sale was made, after the contract was completed, you said anything to Mr. Letellier about the price of the tea in the presence of Mr. Kearney? A. I think I said "let there be no mistake about this" and I wrote the terms down on a piece of paper.

Q. What terms? A. The time at which they were to be paid.

Q. Did you write the price on that piece of paper? A. No.

Q. Did you say anything about the price? A. There was a question about sixteen cents.

Q. That was a term of the bargain? A. I don't think so, I think that the idea was that these teas at these prices would come to sixteen cents. It appears they have not.

I guess he may have said it (that it would average sixteen cents) at Mr. Letellier's. There was so much talk about it I don't exactly remember.

Q. Can you remember exactly what he said about sixteen cents? A. No, I cannot.

Q. Did you mention at all * * and let there be no mistake * * * did you mention at all what was the price the tea was sold for? A. I don't think so.

Q. Did he ask you for the price? A. He must have done so. I left the samples and put the prices on there. I left the samples with Mr. Letellier.

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Speaking of the sale of teas by sample the witness says:

* * * Most of the Quebec people buy them in that way. Q. On what? On appearance? A. On appearance to see if they suit them. Q. And they can tell by appearance if they suit them? A. I presume so, if they buy them.

Q. Will you tell us exactly what took place at the time of the purchase of those teas between Mr Letellier and Mr. Kearney? A. I did tell you. Q. Repeat it over again in detail? A. When? Q. All that took place at the time the bargain was made? A. No, I cannot. * * * * * I will undertake to swear that according to the way I understood it, the prices marked on the samples would average about sixteen cents * * the prices marked on the samples I certainly understood the sale to be. Q. You have no doubt about that? A. According to my way of thinking I have no doubt whatever.

Q. Did you at that time (in a conversation within ten days before) tell him, (Mr. Kearney), you did not recollect whether it was for sixteen cents a pound or the prices marked on the samples? A. I may have said so.

Mr. Justice Andrews, who tried the case stated that he could not give credence to the evidence of the broker and he held that the defendant should pay at the rate of sixteen cents basing his decision on the retention by the defendant of the invoice without objection. He also held the plaintiff liable to pay for the wine as he had retained it for a long time without complaint and had credited it to defendant in the invoice for the tea. The plaintiff did not appeal from this judgment. The defendant appealed to the Court of Queen's Bench where the judgment against him was reversed, the court holding that though the acceptance of the invoice without objection afforded a presumption against the defendant, such presumption was completely rebutted by the evidence that the price of the tea was that stated on the samples.

The plaintiff then brought the present appeal to this court.

Fitzpatrick Q. C. for the appellant.

Languedoc Q.C. and *Dorion* for the respondent.

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The judgment of the majority of the court was delivered by :

GIROUARD J.—La bonne foi, qui doit présider aux opérations d'un négociant, imposant à l'intimé la nécessité d'une protestation dans un délai raisonnable, s'il n'était pas satisfait de la facture de l'appelant. Non seulement il garde le silence, mais il en confirme la teneur en l'exécutant, c'est-à-dire en envoyant, ses traites pour des montants tellement rapprochés de la facture qu'il était raisonnable de supposer qu'elle était acceptée. Ce n'est qu'après cinq mois, lorsque le dernier lot des marchandises lui est expédié, qu'il communique à l'appelant ses objections au prix indiqué. C'était trop tard. Par son silence et sa conduite l'intimé avait élevé contre lui une présomption de fait que la facture était correcte, conformément à l'article 1242 du Code Civil, présomption qui militera contre lui tant qu'elle ne sera pas repoussée par une preuve contraire. Or cette preuve n'existe pas. Quatre témoins ont été entendus sur le fait du prix du thé. L'appelant et l'intimé se contredisent carrément. Le fils de l'intimé n'était pas présent lorsque la vente a été conclue. Le témoignage du courtier Baldwin est si vague et incertain que, selon moi, il est sans valeur. L'appelant doit donc avoir jugement selon la facture.

Cette présomption a reçu la sanction des plus hautes autorités françaises en droit commercial. Gilbert sur Sirey, art. 109 du Code de Commerce, n. 17, dit: "L'acheteur qui garde la facture que lui envoie le vendeur, l'accepte par cela même." Il cite Pardessus, no. 248 ; Delamarre et Le Poitvin, t. 1er n. 158 ; Massé, t. 4 no. 2445 ; Voir aussi dans le même sens, Rivière, p, 258 ; Boistel, p. 302 ; Bédarride, Achats et Ventes, nos. 320 et suivants.

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Namur, t. 1er, p. 376, observe que "lorsqu'une facture contient des énonciations contraires à la vérité, par exemple relativement à l'indication du lieu de paiement, l'acheteur doit s'empresser de réclamer, parce qu'une facture acceptée sans protestation fait preuve contre lui." Il cite un arrêt de Bruxelles du 13 octobre 1827, qui jugea ainsi. Bédarride nos. 320 et 322, en cite plusieurs autres dans le même sens; Colmar, 18 juillet 1832; Nancy, 5 juillet 1837, et Aix, 24 juin 1842; Puis, au no. 323, il conclut:

> Donc, dès qu'elle (la facture) arrive en ses mains, l'acheteur est en demeure, et par conséquent dans la nécessité de s'expliquer, de contrôler les prétentions du vendeur, d'en établir l'exactitude.... En conséquence, l'acceptation pure et simple de la facture, contrairement à cet intérêt, ne peut être que la reconnaissance de la sincérité des conditions qu'elle énonce, reconnaissance dont le bénéfice, désormais acquis au vendeur, ne saurait lui être enlevé par la prétention ultérieure de se refuser à la consommation du marché.

Puis, il ajoute au no. 325:

> La cour de Bordeaux consacrait le principe et l'appliquait même dans le cas où la chose vendue doit être livrée par parties et à des époques différentes.... Cet arrêt est juridique. L'exécution partielle de la vente régit le contrat quant aux conditions auxquelles elle a eu lieu.

Ajoutons que le Code de Commerce n'a pas de disposition particulière sur ce point. L'article 109 déclare simplement que les achats et ventes se constatent de différentes manières, et entr'autres par la correspondance, les livres des parties, la preuve testimoniale ou "une facture acceptée". Ce n'est qu'en appliquant les principes du Code Civil concernant les présomptions de fait, semblables en substance à ceux de notre code, que la doctrine la jurisprudence ont consacré la règle que nous venons d'indiquer.

Même, si notre code était silencieux, les règles sur la preuve prescrites par les lois d'Angleterre—que nous devons suivre en l'absence de dispositions dans notre code, art. 1206—sont sur ce point semblables à celles

du droit français. Taylor on Evidence, ed. 1895, sect. 810, dit: "*Among merchants*, an account rendered will be regarded as allowed, if it be not objected to within a second or third post, or, at least, if it be kept for any length of time without making an objection." Il cite plusieurs décisions qui ont jugé dans ce sens.

La majorité de la cour est donc d'avis d'infirmer le jugement de la Cour d'Appel, et de rétablir le jugement de la Cour Supérieure, avec dépens devant toutes les cours.

GWYNNE J.—This appeal must, in my opinion, be determined by application to it of the rule so often enunciated and acted upon in this court—that we will not reverse a judgment rendered in respect of a pure matter of fact unless we are clearly satisfied that it is manifestly wrong and wholly unsupported by the evidence, and this cannot, in my opinion, by any means be said of the judgment which is before us on this appeal.

The question simply is, as to what in point of fact was the contract upon which certain teas, the price of which is the sole matter in dispute, were sold by the plaintiff to the defendant. The plaintiff who gave evidence on his own behalf swears that they were sold at 16 cents per lb. and he has shewn in evidence, and it is admitted by the defendant, that the plaintiff in a letter addressed to the defendant bearing date the 11th March, 1895, which was in due course received by the defendant, enclosed an invoice bearing date the 1st of March, wherein is shewn the weight of several half chests of tea numbering in the whole 1384, with marks upon each indicating the correspondence of the several packages with certain boxes of samples left with the defendant at the time of the sale at the foot of which the whole was summed up thus—62,601½ lbs. at 16 cents—$10,016.24.

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The evidence of the plaintiff was that on the negotiation for the sale, which took place through the intervention of a broker named Baldwin, he left with the defendant several boxes containing samples of the teas upon which were marked the brands and quantities of the several teas offered for sale In answer to a question whether certain figures indicating prices were not also on the several boxes of samples, he replied—*I presume so, I don't know I am sure.* Being further interrogated whether he had not himself mentioned to the defendant the prices marked on the boxes, he replied "I mentioned one price, I mentioned that ten cent one, saying it was very cheap," and being asked if he had not in a general way referred to the prices marked on the boxes, he replied—"not a general way no. I remarked these teas were very cheap; at the average price of 16 cents, they would be still cheaper at the prices marked on the tins. Being asked if he had not instructed his broker Mr. Baldwin to mark the prices on the boxes, he replied—"No, I did not give him any instructions; he asked me as a favour to give him the relative values of the different teas and to the best of my ability I did." He said further that Mr. Baldwin requested him to give an estimate of the different values of the teas, the *pro ratâ* value of the different teas; and being asked what this would be for, he replied:—

> To give Mr. Baldwin an idea of the different values. He said he did not know the value. I quoted the price to Mr. Baldwin that he was to give to Mr. Letellier. Mr. Baldwin said I don't know the different values of these goods. I said it doesn't matter to me, I don't know either. He said *we must put a value on the different lines.* I said it didn't make any difference to him *so long as they averaged sixteen cents.* So with that understanding he commenced to value them from ten cents to twenty-two cents *which would make an average of sixteen cents*; he commenced at the low line of ten cents and went to the top line

and he added that this marking of the prices on the

boxes had no bearing whatever as far as he knew with the contract of sale so far as Mr. Letellier was concerned. The defendant only consented to purchase the teas if the plaintiff would purchase from him certain wine which he had for sale, to the amount of $2,937.12, and this being agreed to by the plaintiff the bargain was concluded, as the plaintiff says, in this manner :

We had, he says, a good deal of talk. Mr. Letellier did not want to take the whole of it, and when he accepted the whole account Mr. Baldwin got up and said, "let this be distinctly understood, you take these teas at 16 cents a pound and you take this wine at Mr. Letellier's price." Mr. Letellier said all right and we packed up the samples,

and so they parted, the plaintiff leaving with the defendant the samples of the tea with the prices marked thereon, and taking away with him samples of the wine given to him by the defendant.

Now this account of the transaction is contradicted in the most unqualified manner by the defendant and his son, and I must say that I cannot dissent from the conclusion arrived at by the court whose judgment is appealed from, namely, that it is contradicted also by the broker Baldwin. The teas were first offered by the plaintiff in the office of the broker Baldwin to the defendant's son who swears in the most positive manner that the teas were offered to him by the plaintiff at the different prices and quantities marked on each box. His account of the transaction with him is this : Mr. Baldwin asked him : Is your father open to buy a big lot of tea?

J'ai dit, cela dépend de la quantité. Il dit, *I will show you the samples*, —monsieur Kearney s'est levé, il dit : il y a telle et telle marque et il y en a tant de caddys, le prix, et à côté, cela vaut tel et tel prix. Là-dessus, j'ai dit que le lot était pas mal considérable. J'ai dit qu'on prendrait peut-être une marque, ou une partie de chaque marque mais que je ne pensais pas qu'il prendrait tout le lot. Là-dessus, il dit : J'irai voir votre père au bureau. Il m'a demandé à peu près l'heure qu'il y serait, il dit · J'irai au bureau avec M. Baldwin et on arrangera cela.

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The witness added that Mr. Baldwin had sent on the samples in about half an hour after witness had returned to his father's office. The defendant says that the contract of sale was made on the 13th February, 1895; what took place on that day is in his own words as follows:

> M. Kearney est arrivé au magasin après-midi, il était tard dans l'après-midi, avec M. Baldwin. Les échantillons étaient sur mon bureau, mais pas ouverts, et puis M. Kearney m'a demandé, tous les deux m'ont demandé si j'achèterais du thé. Ils ont ouvert les échantillons et me les ont montrés. J'ai trouvé la quantité un peu forte. J'ai hésité. Après les pourparlers, j'ai demandé à M. Kearney s'il achèterait du vin de messe et je lui ai montré mes échantillons. Nous avons convenu, je me suis décidé à prendre le thé au prix mentionné sur les échantillons et *je jure positivement qu'il n'a pas été question d'autre chose. Il m'a vendu les thés à ces prix-là.* Il a peut-être été dit dans la conversation que cela averegerait, que cela faisait une moyenne de seize cents, je n'avais pas de chiffres pour établir cela, moi. Je crois qu'il a été mention de seize cents, *mais j'ai acheté positivement sur ces prix-là, sur les prix mentionnés.*

From the 13th February until the 9th March nothing was done. On the 9th March the defendant sent to the plaintiff an invoice of the wines sold by him, and on the 11th of March the plaintiff in his letter of that date enclosed the invoice of the tea which bore date as already said of the 1st March. The teas were forwarded in there parcels upon the 10th and 13th April and 8th July, 1895; the wines were at plaintiff's request left with defendant until required. Upon the 18th April the plaintiff drew two bills upon the defendant for $1750.00 each payable the one at six months and the other at eight months, and on the 15th July another for like amount payable at ten months from the 1st March as of which date all of the bills were drawn. All of these bills the defendant accepted and it was not until the 15th August, after the plaintiff had drawn a bill for $1829.12 which the defendant refused to accept, that he pointed out to the plaintiff what the

defendant insists now is an error in the invoice of the tea sent on the 11th March, the defendant being willing and offering to pay the amount really due according to defendant's contention at the prices named upon the respective boxes of samples; and he explains why he had not sooner drawn attention to the error which he now insists on by saying that he had the samples which shewed the prices at which he bought, and he never entertained the idea that Mr. Kearney would claim sixteen cents a pound when he had sold at the prices named on the samples; and he says that he accepted the bills because he had full value in his possession and he expected that Mr. Kearney when the last draft should be sent would correct the error in the invoice sent in March.

Mr. Baldwin says Mr. Kearney brought a lot of samples to him and handed them to him and asked him to try and sell them. At this time there were no prices marked on the samples. He put the prices on each box according to prices named to him by Mr. Kearney. The boxes with the prices and quantities marked upon them he left with the defendant; the plaintiff was present with him. Being asked whether the defendant asked for the price he answered, "He must have done so, I left the samples and put the prices on them and left the samples with Mr. Letellier"—and he adds "I always understood the prices were marked and the quantities." During the negotiations for the sale both he and the plaintiff had called on the defendant several times. Upon the day on which the sale was completed, he says that the defendant looked at the teas and at the prices and the quantities on each, the only discussion that there was being that the defendant thought it a big lot. Mr. Baldwin remembers no discussion with regard to prices at all; he says that the defendant looked at the teas upon which

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the prices were marked which spoke for themselves. He says that if he mentioned sixteen cents at all, but he does not think he did, he mentioned it as that the teas would average sixteen cents at the prices marked, and he says that he will undertake to swear that he understood the sale to be according to the prices marked on the samples and that these prices would average about sixteen cents, and that as to this, according to his way of thinking, he has no doubt whatever. He says in another place that although sixteen cents was mentioned he does not think it was mentioned as a term of the bargain; what he understood was that the prices marked on the samples were the prices at which the tea was sold but that at these prices the teas would come to sixteen cents, which, he says it appears now they have not. What took place at the close of the bargain according to him was this, that he said "let there be no mistake about this," and he wrote the terms of payment on a piece of paper but nothing whatever as to the price, which, according to his understanding of the bargain, was as already stated above.

Now upon this evidence it is impossible, I think, to say that there is manifest error in the judgment of the Court of Appeal at Quebec to the effect that Baldwin's evidence corroborates that of the defendant and his son, and that whatever may be thought to be unsatisfactory in the reasons given by the defendant for his not having sooner drawn the attention of the plaintiff to what the defendant insists is error in the invoice sent to him on the 11th March it cannot, I think, admit of a doubt that the evidence of the plaintiff as to the prices put upon the samples is equally unsatisfactory. It seems absurd that any man of business could for a moment entertain the idea that his broker was asking for and putting the prices named by the plaintiff upon the

samples placed in his hands for sale of the tea for any private purpose of the broker's own, or for any other purpose than to show the prices of the tea he was authorized to sell. So likewise is it impossible, in my opinion, to say that the judgment appealed from is manifestly erroneous in the estimate attributed by the court to the whole of the evidence unless in the face of the evidence of the defendant, his son and the plaintiff's broker, we must hold that the defendant's silence as to the error in the invoice he received in March, 1895, is absolutely uncontrovertible and conclusive. This we cannot do. The case therefore comes precisely within the class of cases with the judgments in which, as involving questions of mere matter of fact, this court will not interfere and this appeal therefore, in my opinion, ought to be dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Fitzpatrick & Taschereau.*

Solicitors for the respondent: *Miller & Dorion.*