MORANG AND COMPANY (DEFENDANTS) ..... } APPELLANTS;

AND

WILLIAM DAWSON LESUEUR (PLAINTIFF) ..... } RESPONDENT.

1911

*March 20.
*Oct. 3.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Contract—Literary work—Publisher and author—Obligation to publish.*

In 1901, M & Co., publishers of Toronto, and L., an author in Ottawa, signed an agreement, by which L. undertook to write the life of the Count de Frontenac for a work entitled "Makers of Canada," in course of publication by M. & Co.; the latter agreed to publish the work and pay L. $500 on publication and a like sum when the second edition was issued. This contract was carried out and the publishers then proposed that L. should write on the same terms, the life of Sir John A. Macdonald, for which that of William Lyon Mackenzie was afterwards substituted. L. prepared the latter work and forwarded the manuscript to the publishers, who, although they had paid him in full for it in advance, refused to publish it, as being unsuitable to be included in "The Makers of Canada." L. then tendered to M. & Co. the amount paid him and demanded a return of the manuscript, which was refused, M. & Co. claiming it as their property. In an action by L. for possession of his manuscript,

*Held*, affirming the judgment of the Court of Appeal (20 Ont. L.R. 594), Idington and Anglin JJ. dissenting, that he was entitled to its return.

*Held, per* Fitzpatrick C.J., that the property in the manuscript (or what is termed literary property) has a special character, distinct from that of other articles of commerce; that the contract between the parties must be interpreted with regard to such special character of the subject-matter; that it implies an agreement to publish if accepted; and when rejected the author was entitled to treat the contract as rescinded and to a return of his property.

---

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

1911

MORANG & Co. v. LESUEUR.

*Held, per* Davies and Duff JJ., that there was an express contract for publication and an implied agreement that the manuscript was to be returned if publication should become impracticable for such reasons as those given by the publishers.

*Held, per* Duff J., that the publishers, until publication, could be treated as having possession of the manuscript for that purpose and, that purpose failing, there was a resulting trust in favour of the author.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment at the trial in favour of the plaintiff.

The only question raised for decision on this appeal was whether or not the plaintiff, LeSueur, who had written the life of William Lyon Mackenzie for the defendants, under the circumstances and in performance of the contract mentioned in the above headnote, was entitled to the return of his mss. which the defendants refused to publish. The trial Judge held that he was so entitled and his judgment was affirmed by the Court of Appeal, Moss C.J.O. dissenting. The defendants have appealed to the Supreme Court of Canada from the last mentioned judgment.

*Hellmuth K.C.* for the appellants. The plaintiff merely sold his mss. to the publishers and the property passed as in the case of any chattel. See *Parker* v. *Cunliffe*(2).

As to incorporating other terms in the written contract see *Lovell and Christmas* v. *Wall*(3).

The control by the publishers of the copyright given them by the contract vests in them the property in the mss. under the "Copyright Act." *Ward, Lock & Co.* v. *Long*(4).

*Lafleur K.C.* for the respondent.

(1) 20 Ont. L.R. 594.
(2) 15 Times L.R. 335.
(3) 27 Times L.R. 236.
(4) [1906] 2 Ch. 550.

1911

MORANG & Co. v. LESUEUR.

The Chief Justice.

THE CHIEF JUSTICE.—Once it is admitted, as it is by both parties here, that the manuscript Life of Mackenzie which the respondent was commissioned to write was originally intended for publication in book form in the series then being published by the appellant and known as "Makers of Canada," such an intention based on the facts revealed by the evidence implies a tacit agreement to publish the manuscript, if accepted; and, the manuscript having been rejected as unsuitable for the purpose for which it was intended, no property in it passed and the respondent was entitled to ask that the contract be rescinded and the manuscript returned upon the repayment of the money consideration which he had received.

I cannot agree that the sale of the manuscript of a book is subject to the same rules as the sale of any other article of commerce, *e.g.*, paper, grain or lumber. The vendor of such things loses all dominion over them when once the contract is executed and the purchaser may deal with the thing which he has purchased as he chooses. It is his to keep, to alienate or to destroy. But it will not be contended that the publisher who bought the manuscript of "The Life of Gladstone," by Morley, or of Cromwell by the same author, might publish the manuscript, having paid the author his price, with such emendations or additions as might perchance suit his political or religious views and give them to the world as those of one of the foremost publicists of our day. Nor could the author be denied by the publisher the right to make corrections, in dates or otherwise, if such corrections were found to be necessary for historical accuracy; nor could the manuscript be published in the name of another. After the author has parted with his pecuni-

1911

MORANG & CO. v. LESUEUR.

The Chief Justice.

ary interest in the manuscript, he retains a species of personal or moral right in the product of his brain. Lyon Cæn, note to Sirey, 1881.1.25.

What I have said is sufficient to shew that what is called literary property has a character and attributes of its own and that such a contract as we are now called upon to consider must be interpreted and the rights of the parties determined with regard to the special nature of the thing which is the subject of the contract. *Cox* v. *Cox*(1). An ancient manuscript or a papyrus might have by reason of its antiquity or the circumstances surrounding its discovery some intrinsic monetary value. But what may be the value to the writer or to the publisher of the manuscript in question here, so long as it is allowed to remain in the pigeonhole of the latter ? What was the consideration for the payment of $500 ? Not the paper on which the manuscript is written; its value is destroyed for all commercial purposes. Not the paper with the writing on it; that can have no value without publication, except for the purposes suggested by Mr. Justice Meredith. The only way in which the appellant can legitimately recoup himself for his expenditure must be by the publication of the manuscript, and in this I find an additional reason for holding that publication was an implied term of the contract.

In the absence of English authorities on the subject, I referred to the French books which treat at great length of such contracts as we are now considering. The majority of French writers, and among them some of the most eminent, such as Pardessus, held that the obligation to publish is always to be considered as an implied term in every contract for

(1) 90 R.R. 601.

1911

MORANG & Co. v. LESUEUR.

The Chief Justice.

the purchase of the manuscript of a book; but admitting with the minority that a contract might be drawn which would transfer the whole property in the manuscript to the purchaser so that it would be in his power to retain it in his possession for his own personal use, all the French authorities admit that where, as in the present case, the parties have chosen to leave so much to intendment and implication, the court should give to the contract a construction wide enough to include the obligation to publish, that being, generally speaking, the more probable intention of the parties, as it was in this case their admitted intention at the inception of their negotiations.

See Pandectes Francaises, vbo. Propriété littéraire, Nos. 1912 and 1913. Pouillet, Propriété littéraire, 2nd ed., No. 308.

In conclusion, therefore, I hold that, as argued on behalf of the respondents and as found in both courts below, the conditions which together made up the consideration moving to the respondent were the payment of the stipulated price, $500, in instalments of $250 each, and the publication of the work in and as part of the series, "Makers of Canada." The respondent fully performed his contract when he wrote and delivered the manuscript and if, in the exercise of his undoubted right, the appellant properly rejected it as unsuitable for the purpose for which it was intended, viz., publication in the "Makers of Canada" series, then both parties were free to rescind the contract altogether and the respondent upon the return of so much of the consideration as he had received was entitled to have the manuscript returned to him. It cannot be denied that by the appellant's refusal the respondent was deprived of the chief consideration

1911

MORANG & CO. v. LESUEUR.

The Chief Justice.

which moved him to write the manuscript, that is the benefit to his literary reputation resulting from publication. Tindal C.J. in *Planché* v. *Colburn*(1).

It is unnecessary for me to go over in detail the evidence of the contract and the correspondence, all of which must be taken into consideration, as well as the standard form of contract used by the publisher with all his contributors. In the judgment of the Court of Appeal and in the notes of my brother judges all that is useful is discussed with much ability.

For the short reasons which I have just given and for those more fully set out by Mr. Justice Meredith in the Court of Appeal, I would confirm the judgments below and dismiss this appeal with costs.

DAVIES J.—I think this appeal should be dismissed. From the fact that no regular contract was drawn up between the parties regulating their duties and rights, and these latter have to be determined from the rather loose correspondence between them, all the difficulties have sprung.

It is impossible in my judgment to put a proper construction upon this correspondence and fairly to deduce from it what the real intentions of the parties were without reference to their previous dealings.

The appellant company was engaged in publishing an historical series of books under the name "Makers of Canada," and in the year 1901 the respondent, LeSueur, had agreed to write for that series "The Life of Frontenac," and to complete it by a fixed date. The company on its part agreed to publish the book at its own expense in that series and to pay the re-

(1) 34 R.R. 613.

spondent certain royalties specified in the agreement as his compensation. Frontenac was written, accepted and published in the series, but by mutual agreement the method of payment was changed from the royalties previously agreed upon to two cash payments of $250 each, payable one on the publication of the book and the other on the publication of its second edition.

Some years afterwards the company suggested to Mr. LeSueur that he should write for "The Makers of Canada" the life of Sir John Macdonald "on the same terms as Frontenac," but afterwards feeling itself committed to another writer for Macdonald's life, suggested to the respondent that he should write the life of William Lyon Mackenzie instead, saying in one of their letters to respondent that "the Mackenzie book offers as good an opportunity for you as the Macdonald." Finally LeSueur agreed to write "Mackenzie." In its letter of 11th December, 1905, so often referred to in the argument, the company speaks of the agreement as a bargain with them by LeSueur "to do William Lyon Mackenzie for the sum of $500, payable in instalments of $250 as outlined."

The respondent LeSueur wrote the book and delivered the manuscript to the appellant company, but before its delivery he had been paid the whole consideration money of $500.

In the result the company declined to publish the manuscript on the ground that it was not suitable for the series for which it had been prepared and although respondent on learning their refusal to publish promptly tendered them back the $500 he had received and demanded the return of his manuscript, the company declined to accept the money tendered or

1911

MORANG & Co. v. LESUEUR.

Davies J.

return the manuscript, expressing their view that "according to the terms of the agreement under which you did the work and were paid for it the manuscript is the property of the company."

The issue between the parties was therefore whether under the contract between them the total consideration for the writing and delivery of the manuscript life of Mackenzie was the money payment of $500 as contended by the company, or whether its publication in the series of "The Makers of Canada" was an integral part of the consideration as contended by respondent LeSueur.

The respondent does not, of course, contend that the company had not the right to reject a manuscript unsuitable for the purpose for which it was intended, but that having rejected it and refused to publish, he, as the writer, had the right on returning the money consideration to a return of his manuscript.

I think the argument submitted by the respondent in support of the judgment of the Court of Appeal is sound, namely, that in effect the contract provided that LeSueur should write a manuscript life of Mackenzie substituted for Macdonald with the hope that it would be accepted and published by the company in their series of books "Makers of Canada"; that until acceptance the author was at all the risks of suitability or unsuitability of the manuscript; that if accepted the property passed and the company was bound to complete the money payments if incomplete and publish the manuscript as part of the series, while if rejected no property in the manuscript passed and no right to retain the rejected manuscript remained after the tender or return of the money consideration paid by them. It seems a constrained and unreason-

able construction of this contract to hold that under it the publisher should not only keep but be bound to keep and pay for an unsuitable manuscript. If the publisher was not so bound that, of course, would put an end to his claim as of right to retain the manuscript and still not publish it.

The whole question rests upon the construction of the contract and not upon any special rights of either authors or publishers apart from contract. In my opinion the terms of the Frontenac contract were agreed upon as those which should govern the writing of the life of Macdonald, and when Mackenzie was agreed to be substituted for Macdonald it was upon the same terms except where specifically changed. Publication in the series was undoubtedly one of the terms or consideration for the writing of Frontenac. It was incorporated in the Macdonald contract in clear language, and when Mackenzie was substituted for Macdonald and nothing said changing that specific term of the contract as part of the consideration which the author was entitled to claim, must be held to have remained part of the Mackenzie contract now in controversy.

The appeal should be dismissed.

IDINGTON J. (dissenting).—The appellant company of publishers were publishing a series of biographical works known as "The Makers of Canada." The respondent had, pursuant to a written contract with them, dated 26th August, 1901, written a life of Count Frontenac which seems to have been finished in the early summer of 1905. He was engaged also apparently as reader and critic of other works in the same series.

In December, 1905, he had in the course of this

1911

MORANG & Co. v. LESUEUR.

Idington J.

latter service, so reported upon the life of one Mackenzie, which had been contributed by another person for the same series, that its publication was suppressed.

In reference to this and other like works, appellant's manager wrote on the 6th of December, 1905, to respondent, and amongst other things, said:

> You have given the period considerable study, and have furnished us with copious notes, which ought to make it comparatively easy to do the Mackenzie book. I wish you would reconsider your position regarding this and undertake the book, for which we will give you $500.

On the 7th of December, 1905, the respondent replied as follows:

> Ottawa, 7th Dec., 1905.
>
> Dear Mr. Morang:—
>
> The life of W. L. Mackenzie is a ticklish bit of work for the simple reason that you cannot write it so as to please both parties, but as Wrong has decided not to take it up, I will take it in hand on the terms you mention, and have it ready by the 1st of July next, or at latest by 1st August.
>
> I see there is a movement on foot for raising a monument to Mackenzie in Toronto, and doubtless if the scheme is carried out there will be a good deal of glorification of him in connection therewith. I feel as if my book would not be quite in key with it all.
>
> However, I will try my best to do justice to him and to view such faults as he had with charity.
>
> Yours sincerely,
> (Sgd.) W. D. LESUEUR.

On the 11th of December, 1905, the appellant replied as follows:

> 11th Dec., 1905.
>
> Dear Dr. LeSueur:—
>
> In reference to your letter of the 7th, in which you accept our offer to do William Lyon Mackenzie for the sum of $500.00 payable in instalments of $250.00 as outlined. Your stipulation that you will have it done by the first of July, or the first of August, is satisfactory. We accept your offer.
>
> Yours very truly,
>
> Dr. W. D. LESUEUR,
> 88 Maclaren Street,
> Ottawa, Ont.

These letters seem to form a tolerably clear contract needing no interpretation except the surrounding facts and circumstances to indicate who and what the man Mackenzie was, and the nature and probable size of the book to be written.

The manuscript was produced by chapters from time to time and so delivered to appellant.

The $500 was paid by the monthly remittances on account of this and other literary services according to the wishes which respondent had later indicated would suit his purpose and convenience better than two instalments which originally may have been contemplated.

These payments had so progressed that by the 26th of July, 1907, the respondent felt it right to say he had got $650 for this and other work, in all amounting to $680, and yet he had not got Mackenzie off his hands, and asked further payments to be stopped until he was in credit again.

He says in the same letter, "When I hand you over Mackenzie and begin the index you can begin paying me again." The index, I gather, was not a necessary part of the contract to write the Mackenzie life.

He refers also in the same letter to facts relative to the progress of the Mackenzie book and his work, but nothing turns thereupon.

The work was finished and delivered and all paid for when appellant's readers seem to have condemned it as out of harmony with the rest of the series.

The respondent, feeling no doubt naturally hurt, and acting as a high-minded man might, tendered the repayment of the $500 and demanded the return of the manuscript.

The appellant company refused this. They say the property in the manuscript had become theirs.

1911

MORANG & CO. v. LESUEUR.

Idington J.

Respondent brought this action for recovery of the manuscript and for damages, but at the trial abandoned the latter and was awarded the former.

This judgment having been maintained by the Court of Appeal we are asked to reverse it.

I confess I have found considerable difficulty in understanding upon what ground the judgment proceeds. Divers reasons are given. Amongst others an implication is found that the contract had proceeded upon the understanding that the work, when produced, would be published in the said series.

In the evidence it appears that in the way of advertising this series the respondent is put down as the writer who was expected to deal with the life of Mackenzie.

How can this inducement to subscribers form part of this contract which had preceded the advertising?

The entire contract is in writing. The respondent frankly admits he had made no other or further terms orally.

It is said that an implication which entitles the plaintiff to rescission arises from the nature of the work or from that coupled with the earlier written contract relative to the life of Frontenac.

Two complete answers appear to me to meet this latter suggestion. In the first place there is not a word in this contract to import the other one or its terms into this. In the next place if it could be taken as a guide to find the intention of the parties, there is in the Frontenac contract an express provision for delivery of the manuscript to the appellant. And that is followed by an express assignment of all rights and property in the work; and an agreement that the company shall have the exclusive right to take out

copyright for it and get renewal thereof and to publish it during the terms thereof. Then in consideration of all that the company agree to publish at their own expense in such style as they deem advisable, and to pay the author a royalty named.

This provision for a royalty was abandoned by a later agreement, and a lump sum agreed upon in lieu thereof, before the contract we have to pass upon was thought of.

I cannot see how under such a contract the non-publication could have in law the effect of divesting the company of the property in the manuscript solemnly assigned and pursuant thereto delivered to the purchasers.

So far from the prior contract aiding respondent it is, if those terms of it that remained unchanged at the time this was entered into are to be imported into this one *pro tanto* as evidencing the relations of the parties thereto, an impassable barrier in the way of respondent asserting a title to the property in the manuscript, by reason of the terms and by force of the "Copyright Act."

If we consider this contract independently of aught else, then I can see no basis for such an implication of right to divest the owners of their property clearly vested in them by virtue of the terms of the contract and delivery of the goods so contracted for.

Can it be possible to hold that the appellant having accepted and paid for the work as agreed, could, merely because it did not when produced suit certain views, and its publication be a doubtful venture, return the manuscript and demand the $500 and recover it ?

It may suit respondent to have this done in this

1911

MORANG & Co. v. LESUEUR.

Idington J.

case, but how many writers could endure such a test of the like contract?

The right of rescission, if implied at all, must be mutual and reciprocal. I can find no warrant for holding such a thing as an implication of such a right based merely on disappointment.

Novel theories as to the consideration being of a two fold or combined character, that is money and fame, are no more workable as implications of law in contracts respecting products of the brain put into manuscript than into other things.

If the workmen desires, in addition to the cash consideration, something else springing from the use of the products of his labour, then he must stipulate for it.

There exists in law no implied condition precedent as suggested here, that the property in any product of a man's labour with either pen or pencil, or brush or chisel, does not pass until it reaches the point or place, and be put to the use, where he can admire, and ask others to admire it; no matter how reasonable his hopes or expectations of such ambition being gratified and that gratification becoming part of the fruits of his labour.

I agree in all that Chief Justice Moss has, in his judgment, said relative to this case, save the possible implication he sees that in this case there might have existed a right in appellant to reject the work.

It does not seem to me under the circumstances of this case that even that possibility of rescinding the contract existed, so long as the labour was honestly done to the best ability of the workman who was well known to the publisher and employer. It is the product of that particular man's brain he is buying and

the workman is selling. Its publication may be prevented by a fire destroying the manuscript, or a wave of public opinion destroying its value. No such thing as right of rescission can in either case be held possible in law for either party finding himself in such a plight.

Even publishers signing contracts to pay literary workmen of whose capacity they have had an opportunity to judge, must reserve such rights if they wish to enjoy same. If another view is conceivable then the right implied must surely be mutual. I can find no such implied right, and unless expressed it does not exist.

The appeal should be allowed with costs here and in the courts below.

DUFF J.—One of the terms of the agreement between the appellants and respondent was, I think, that the appellants should publish the respondent's book as part of the consideration for the stipulations that he should write the work mentioned and that it was to become the property of the appellants.

It is, in my judgment, impossible to escape this conclusion except by acting upon the invitation of the appellants to shut one's eyes to everything which preceded the last two or three letters of the correspondence in which the arrangement was finally concluded. That, of course, is contrary to all principle unless it is perfectly clear — what nobody suggests in this case — that in these few letters the parties were professing to state completely the terms of their agreement. "It is one of the first principles," said Lord Cairns, in *Hussey* v. *Horne-Payne*(1),

(1) 4 App. Cas. 311 at p. 316.

1911

MORANG & CO. v. LESUEUR.

Duff J.

that where you have to find your contract or your note or memorandum of the terms of the contract in letters, you must take into consideration the whole of the correspondence which has passed.

The matter becomes perfectly simple when one looks at the transactions and communications between parties in the order in which they occurred. They came together in 1901. In that year the respondent was asked to write the biography of Count Frontenac for a series of biographies of men prominent in the history of Canada to be known as the "Makers of Canada." The respondent consented and a formal contract was executed in these terms:

W. D. LeSueur, of Ottawa, Ont., hereinafter called "The author," hereby enters into an agreement with George N. Morang & Company, Limited, publishers, of Toronto, to write "A life of the Count de Frontenac." The said work to contain not less than 65,000 words and not more than 70,000 words. And the author hereby agrees to deliver the manuscript of the same to George N. Morang & Company, Limited, complete, on or before 1st March, 1902.

The author hereby grants and assigns to George N. Morang & Company, Limited, all rights and property in the above-mentioned work, and agrees that they shall have the exclusive right to take out copyright, and to hold said copyrights and renewals, and to publish said work during the terms thereof.

In consideration of the rights granted, George N. Morang & Company, Limited, agree to publish the work at their own expense in such style or styles as they deem most advisable, and to pay the author, or his legal representatives, a royalty of ten (10) per cent. on the retail price of all copies sold in the Dominion of Canada, and a royalty of five (5) per cent. on all copies sold in England or foreign countries at special edition prices.

It is understood and agreed that no royalty shall be paid on any copies given away, or destroyed, or sold at a price below cost.

Statements of sale shall be rendered to the author by George N. Morang & Company, Limited, half-yearly, on June 30th and on December 31st of each year.

It is agreed that George N. Morang & Company, Limited, shall furnish to the author, free of charge, five copies of the volume as published, and should the author desire any more copies for his own use they shall be supplied at one-half the retail price.

Executed this 26th day of August, nineteen hundred and one.

Witness:

H. B. LeSueur.

George N. Morang & Company, Limited,
George N. Morang,
President.

W. D. LeSueur.

The arrangement contained in this document — the agent of the appellants, one of the editors of the series, so represented to the respondent when he signed it and the fact is not in dispute — was identical with that entered into between the publishers and each writer contributing to the series. The respondent completed the work which was the subject of this arrangement in 1902, and it was published in 1906. In the meantime the respondent came into communication with Mr. G. N. Morang, the President of the appellant company, and very friendly and confidential relations sprang up between them. The respondent became a member of the editorial staff engaged in editing the "Makers of Canada" and was asked to and did edit three works of the series. Among the manuscripts he was asked to read was that of a life of W. L. Mackenzie. Largely as a result apparently of the respondent's report on this manuscript it was decided by Morang that it was not suitable for publication. Then in December, 1905, the respondent was requested himself to undertake the book on Mackenzie; and this after some demur he finally agreed to do. The correspondence leading to this result seems conclusive on the point in hand. The first letter in evidence is one dated 4th October, 1905. This letter records the fact that the appellants have purchased the respondent's "rights in Frontenac," and that in consideration of the abandonment by the respondent of his right to

1911

MORANG & CO. v. LESUEUR.

Duff J.

royalties under his formal contract he was to receive $250 on publication of the first and the same sum on the publication of the second edition. Morang then, referring to a proposal that the respondent should undertake the life of Sir John Macdonald, said:

> If you undertake Macdonald, *I suppose the same terms as the Frontenac will be agreeable to you.*

It is impossible, I think, to suppose that (especially having regard to what had passed at the time of the execution of the contract of 1901) it could have occurred to anybody in the respondent's position that in proposing this arrangement the appellants were contemplating a departure from the Frontenac contract in one of its most essential terms. The suggestion here is that "terms" relates only to the money consideration. But what is there to justify such a limitation? The express agreement to publish was a vital part of the arrangement. Delete that and the whole consideration under the original contract and under the substituted arrangement mentioned in the letter disappeared. On this ground alone the suggested limitation of the natural meaning of the words is inadmissible. But apart altogether from the fact that under the arrangement the right to payment rested on publication—the publication as an object in itself was a substantial part of the consideration the writer was to receive without which (it does not require his testimony to shew) he would not have undertaken the work. It is equally impossible to suppose that the writer could understand this proposal in a sense different from that in which it was read by the respondent.

We start then with this as the proposed basis of any arrangement for a biography of Macdonald: that

if the respondent undertake it he shall do so upon the same understanding as to publication as that which applied to the book he had already written. The book on Macdonald was in the result not written by the respondent, but while the matter of the person who was finally to be entrusted with this book was in doubt, a suggestion was first made to the respondent respecting Mackenzie. On the 29th October Morang writes referring to the book on Macdonald, that he does not expect that book to be finished by the gentleman who was then engaged upon it, and adds:

> But if he should write on receipt of Edgar's letter agreeing to do what we require, I am sure you will do as you offered here, take another book. I think the "Mackenzie" book offers as good an opportunity for you as the Macdonald.

In December, however, Morang had become convinced that the biography of Macdonald would be satisfactorily completed by this person and definitely proposed that the respondent should assume the task of dealing with the career of Mackenzie. The passages in the correspondence relating to the subject are as follows:

> Dec. 6th, 1905.
>
> Prof. Edgar tells me that Wrong has decided that in his present position, it would not be wise for him to tackle Mackenzie. He practically decided to do it, but one of his cautious advisers warned him against it, and he has given us his decision. Hughes does not know, and never will know who advised us regarding his book. You have given the period considerable study, and have furnished us with copious notes, which ought to make it comparatively easy for you to do the Mackenzie book. I wish you would re-consider your position regarding this and *undertake the book, for which we will give you* $500.
>
> Dec. 7th, 1905.
>
> Dear Mr. Morang:—
>
> The life of W. L. Mackenzie is a ticklish bit of work, for the simple reason that you cannot write it so as to please both parties, but as Wrong has decided not to take it up, I will take it in hand

1911

MORANG & Co. v. LESUEUR.

Duff J.

on the terms you mention, and have it ready by the 1st of July next or at the latest by 1st August.

I see there is a movement on foot for raising a monument to Mackenzie in Toronto, and doubtless if the scheme is carried out there will be a good deal of glorification of him in connection therewith. I feel as if my book would not be quite in key with it all.

However, I will try my best to do justice to him and to view such faults as he had with charity.

Yours sincerely,

(Sgd.) W. D. LESUEUR.

11th Dec., 1905.

Dear Mr. LeSueur:—

In reference to your letter of the 7th, in which you accept our offer to do William Lyon Mackenzie for the sum of $500.00 payable in instalments of $250.00 as outlined. Your stipulation that you will have it done by the first of July or the first of August is satisfactory. We accept your offer.

Yours very truly.

This correspondence seems to leave little room for controversy. The book on Macdonald if undertaken was, as we have seen from the letter of the 4th of October, to be done on the same terms as that on Frontenac — which included an undertaking to publish on the part of the publishers. In default of the book on Macdonald one on Mackenzie was to be taken up. The offer is then made in concrete form to pay $500 for this last work — the exact sum the respondent was to receive for the first work; and finally — the respondent having agreed to this figure — Morang puts the matter beyond dispute by acknowledging the receipt of the respondent's acceptance of "our offer to do W. L. Mackenzie for the sum of $500 in instalments of $250 *as outlined.*" This last phrase can refer only to the passage already quoted from the letter of the 4th of October, stating the terms on which the respondent had agreed to the commutation of his royalties from the sale of the life of Frontenac;

and demonstrates that in the appellant's view the parties were proceeding on the conditions already established by that letter.

That point being reached the remaining questions do not appear to present any grave difficulty. The appellants having received the respondent's manuscript refused to publish it on the grounds stated by Morang in a letter of the 6th of May, 1908. In effect these grounds were that the book as a whole presented a view of Mackenzie's character and career and of the controversies in which he was engaged entirely at variance with views expressed upon the same points in other books of the series and with current historical opinion; that Mackenzie's character and career and public views had been discussed in a spirit of hostile criticism; and that as the subjects of other biographies in the series had been treated with sympathy Mackenzie and the movements he represented would appear to have been singled out for unfair partisan attack. The publication of such a work would (the publishers thought) gravely discredit the series as a whole and seriously interfere with the sale of the books.

In these circumstances the respondent did not insist upon the publication of his book. He did what might have been expected having regard to the character of this criticism — he tendered repayment of the money he had received on account of his work and asked for the return of his manuscript. The publishers after some delay took the position that the manuscript was their absolute property and refused his request.

It is not necessary to decide whether circumstances in fact existed which justified a refusal to publish.

1911

MORANG & CO. v. LESUEUR.

Duff J.

What appears to me to be perfectly clear is that on such grounds as those stated, the appellants could not rightly refuse to publish while retaining the manuscript; that the refusal to publish on such grounds constituted in effect a rejection of the manuscript.

It is not doubtful that the formal contract of 1901 left open many things to implication. The writer is to write a life of Frontenac containing a prescribed number of words; and the life of Frontenac so written is to become the property of the publishers and to be published by them. But it is not to be supposed that the writer merely undertook to put so many words together in the form of a book which might satisfy the description "Life of Frontenac." He had been selected as a person of competent skill to write a book for a certain series the general tone and character of which was well known to him and (while I think it is impossible to imply any absolute warranty of fitness for publication in that series) it is undeniable, I think, that he must be taken to have warranted to use honestly his best care and skill in the production of a work which should meet the reasonable expectations of the publishers in that regard, so far as he could fairly do so in justice to himself. Then there is a covenant to publish. That covenant in form is absolute; but if it had entered the mind of either party that the book when produced might be of such a character that the publishers in good faith should believe the publication of it likely to destroy or gravely depreciate the commercial success of the series as a whole and the writer should be unable from conscientious reasons to alter his work to meet the publishers' views — then I should think it may be presumed that all parties as reasonable people would have agreed

that in such circumstances the publishers should have the right to refuse to publish. So with the provision that the book was to be the property of the publishers; the right to refuse to publish would, in the event of such refusal, involve the correlative right on the part of the author to the return of his manuscript. If it had been suggested that in a given contingency the publishers should be relieved from the obligation to publish it is, I think, inconceivable that either party would have considered it possible in the event of such a contingency occurring and the publishers acting upon it that they should at the same time be entitled to retain the manuscript and suppress the author's work.

The case in this aspect of it is one of that class (referred to in *Dahl* v. *Nelson, Donkin & Co.*(1), at page 59, by Lord Watson) in which the parties to a contract have not expressed their intentions in the particular event which has happened (the production of a work which in the opinion of the publishers could not be published without gravely prejudicing the sale of the whole series), but have left them to implication. In such a case his Lordship says:

> A court of law, in order to ascertain the implied meaning of the contract, must assume that the parties intended to stipulate for that which is fair and reasonable, having regard to their mutual interests and to the main objects of the contract. In some cases that assumption is the only test by which the meaning of the contract can be ascertained. There may be many possibilities within the contemplation of the contract * * * which were not actually present to the minds of the parties at the time of making it, and, when one or other of these possibilities becomes a fact, the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would

(1) 6 App. Cas. 38.

1911

MORANG & Co. v. LESUEUR.

Duff J.

presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.

I should add that such having been the rights of the parties under the original contract those rights were, obviously, not affected by the fact of the money consideration having afterwards been advanced before the completion of the work.

But apart from any such implications the judgment must, I think, be supported. The appellants obtained this manuscript upon the faith of an agreement to publish it. In refusing to publish it they are guilty as Malins V.-C. said, in *Chattock* v. *Muller*(1), at page 181, of

> a flagrant breach of duty which in this court has always been considered as a fraud.

In such a case, the learned V.-C. adds,

> the court would be bound if possible to overcome all technical difficulties in order to defeat the unfair course of dealing.

One remedy, I am inclined to think with Meredith J. in the court below in view of this feature of the case open to the respondent was specific execution of the agreement to publish. The case appears to be analogous to those cases in which a railway company having obtained possession of land on a promise to construct buildings thereon and afterwards refusing to do so the court, notwithstanding the general rule that specific performance will not be granted of an agreement to build, decrees the execution of the promise upon the faith of which the company got the land, *e.g., Wolverhampton Corporation* v. *Emmons*(2); *Wolverhampton and Walsall Railway Co.* v. *London and North Western Railway Co.*(3). But I do not think the re-

(1) 8 Ch. D. 177. (2) [1901] 1 K.B. 515.
(3) L.R. 16 Eq. 433, at pp. 440, 441.

spondent is confined to that. The suppression of this manuscript would so manifestly defeat the intention of both parties — is indeed so monstrous a fraud upon the agreement under which the appellants obtained possession of it that the court will, if possible, as Malins V.-C., says, "overcome all technical difficulties" to make that impossible. The decision of this court in *Briggs* v. *Newswander*(1), is authority for the proposition that the appellants until publication had possession of the manuscript for that purpose; and, the purpose having failed, there is a resulting trust in favour of the respondent.

On these grounds I humbly think the appeal fails.

ANGLIN J. (dissenting).—Apart from any effect which should be given to section 18 of the "Copyright Act" (R.S.C. ch. 70), I am of the opinion that, on the proper construction of the letters of the 6th, 7th and 11th December, 1905, the entire and unqualified right of property in the manuscript in question is vested in the appellant company and the respondent is not entitled to its return upon recouping to the company the sum which had been paid him for it. These three letters contain the contract of the parties, except as to one term, viz.: the dates at which the two instalments of $250 each should be payable, as to which, because of the reference in the words, "as outlined," contained in the letter of the 11th December, parol evidence was probably admissible.

The contract between the parties was an employment of the plaintiff by the defendant company to "do" for it the life of William Lyon Mackenzie, for which it agreed to pay him $500.

(1) 32 Can. S.C.R. 405.

1911

MORANG & CO. v. LESUEUR.

Anglin J.

Except the ordinary warranty that his work would be done with reasonable care and skill, there was no undertaking on the part of the author as to the character of his production — certainly none that he would produce a work in which only views agreeable to the publishers should be put forward. For a book written with the reasonable care and skill exigible from an author, the company bound itself to pay the stipulated price. It could not, I think, have justified a refusal to pay that price merely because conclusions reached by the author upon the acts and conduct of the subject of the biography were such that, as publishers, its directors deemed it inadvisable to place the book on the market.

On the other hand, the publishing company certainly did not undertake to publish any book written with reasonable care and skill which the author might tender to it, however unsatisfactory his conclusions, however unsuitable his production for the purpose for which it designed to use it. Neither is it possible, in my opinion, to imply upon its part an undertaking, in the event of its failure to publish the plaintiff's work, on being recouped the price which had been paid for it, to return him his manuscript with liberty to him to publish it or to have it published through another house, thus probably rendering available to some rival publisher a book which he might sell in competition with a volume of the appellant's own series. It is only by the implication of such a term or provision in the contract that the plaintiff can succeed, and the question for our consideration is whether such an implication should be made.

An author may make any agreement he pleases regarding the disposition of his manuscript. He may

assign it absolutely or subject to any condition or restriction upon its use. Such reservations or conditions as he makes and expresses the courts will protect and enforce. *Jefferys* v. *Boosey*(1), at pages 867-8. Certainly, too,

> there are some things which no one would think of expressing in terms, though undoubtedly they would form part of any contract made on such a subject.

*Lawrence & Bullen* v. *Aflalo*(2), at page 20. The question with which we are now confronted is whether any, and if so, what implication should be made in regard to a matter for which the contract does not expressly provide. This is not a question of law; it is a question of intention — a question of fact. While upon such questions "each case must stand on its own merits," we may discover in the authorities some analogies that may prove of assistance.

In regard to copyright it may be taken as settled law, since the explicit approval of *Sweet* v. *Benning* (3), by the House of Lords in *Lawrence & Bullen* v. *Aflalo*(2), that, in the absence of express agreement to the contrary or of special circumstances indicating a contrary intention, the proper inference from the employment of an author to write a book for the publisher of a periodical or of a serial publication, is that the copyright and the right to obtain copyright shall belong to the publisher. This inference does not depend on section 18 of the English "Copyright Act." It is drawn (to quote Lord Davey [*Lawrence & Bullen* v. *Aflalo*(2), at page 24], because

> in buying articles written by these gentlemen the inference is that both parties intended that the proprietor should have the right that

(1) 4 H.L. Cas. 815.
(2) [1904] A.C. 17.
(3) 16 C.B. 459.

1911

MORANG & CO. v. LESUEUR.

Anglin J.

was necessary for him adequately to protect the articles which he had purchased and the enterprise for the purpose of which these articles were intended to be used.

Applying a similar test to the situation with which we are now dealing, it seems to me that it was necessary for the adequate protection of the publisher and of its enterprise that it should, on payment of the stipulated price, acquire the author's entire interest and property in the manuscript which he was employed to produce, with all rights which such proprietorship carries, including that of withholding the book from publication. *Ward, Lock & Co.* v. *Long* (1). Otherwise the publisher might find that it had brought about the production of a work which it could not make use of, but which might be used by the author very much to its detriment.

There can be no doubt that the parties, contemplating no event except publication, intended that for the $500 to be paid to the author the defendant company should acquire all his rights in the book he was employed to write — his common law literary property in it before publication, and his right to statutory copyright upon publication. Both parties expected that the plaintiff would succeed in producing a work of such character and merit that the defendant would publish it. Both took some risk on this point — the defendant the risk of investing its $500 in an unsuitable book — the plaintiff the risk of failing to secure the opportunity of enhancing his literary reputation which the publication of his work might be expected to afford. I appreciate the observation of Tindal C.J. in *Planché* v. *Colburn* (2), that an

(1) [1906] 2 Ch. 550, at p. 558.

(2) 8 Bing. 14.

author is actuated by the desire for literary reputation as well as for pecuniary profit. For his literary fame he depends on publication. But it is quite consistent with the contract now under discussion, viewed in the light of all the circumstances surrounding it, that the author refrained from stipulating for publication, or, in the alternative, for the return of his manuscript and the right to have it published otherwise, because he relied upon his ability to produce a book of which the defendant's own business interests would ensure the publication, and that he was prepared to take the risk of the defendant suppressing it. This seems to me more probable than the view for which the plaintiff contends. At all events it is, I think, impossible to say that

> on considering the terms of the contract in a reasonable and business manner an implication necessarily arises that the parties must have intended that the stipulation suggested (by the plaintiff) should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned;

*per* Lord Esher M.R., in *Hamlyn & Co.* v. *Wood & Co.*(1), at page 491. There is nothing expressed in the letters of the parties which would limit or qualify the absolute title of the defendant to the work which it employed the plaintiff to produce. I find nothing special — nothing unusual — in the circumstances surrounding this case to warrant the introduction of any qualification or restriction upon the rights which the written contract *primâ facie* confers.

For the plaintiff it is urged that the provision made for payment in two instalments — one on the

(1) [1891] 2 Q.B. 488.

1911

MORANG & Co. v. LESUEUR.

Anglin J.

publication of the book, and the second on publication of a second edition — implies an undertaking by the defendant that it would publish the book. This was the provision for payment ultimately agreed upon in the case of the "Frontenac" contract, and it is to it that the words in the letter of the 11th December, "payable in instalments of $250 *as outlined,*" are said to be referable. Assuming that this term of the "Frontenac" contract was imported into the "Mackenzie" contract, it merely fixes the time at or the event upon which the defendant bound itself to pay. It does not import a covenant or undertaking on its part that the event will happen, but only that it will pay when it does happen, or, if it should fail to happen through its default, that it will, unless otherwise excused, pay as if it had happened. This provision of the contract therefore does not warrant the implication of an agreement by the defendant to publish the plaintiff's work — still less of an undertaking to return his manuscript and permit of its publication by the plaintiff or his nominees in default of publication by itself.

Apart entirely from the provisions of section 18 of the Canadian "Copyright Act" (R.S.C. ch. 70), I think it is reasonably clear that under the contract of the parties the defendant company became the proprietor of the manuscript which the plaintiff was employed to prepare and for which it paid him, and that as such proprietor it has the right to determine whether the plaintiff's book shall be published or suppressed. *Millar* v. *Taylor*(1).

But the provisions of that section of the "Copyright Act" appear to conclude this case in favour of

(1) 4 Burr. 2303, at p. 2379.

the appellant. Section 17 provides for the assignment of

> the right * * * to obtain a copyright and (of) the copyright when obtained.

It is, therefore, clear that the operation of the statute is not meant to be confined to the statutory copyright which exists only after publication. Although in section 18 "the proprietorship of such copyright" only is mentioned, having regard to the object of this provision, and to its collocation, that phrase should, I think, be taken to include not only the statutory copyright obtainable after publication, but also the right to obtain such copyright as an incident of the common law literary property which exists before publication. Indeed the section itself provides that the

> author shall not be entitled to *obtain* or to retain the proprietorship of such copyright, which is by the said transaction (the execution by the author of a literary work for another person) virtually transferred to the purchaser.

It is, therefore, reasonably clear that unless "a reserve" of copyright "is specially made by the author * * * in a deed duly executed," his employer — the other person for whom the literary work is executed — has by virtue of the statute the right to obtain the copyright. *Frowde* v. *Parrish*(1). This right is an incident of the common law literary property in the work which it is not unreasonable to assume is in such a case also vested in the person for whom the work has been executed.

In the absence of anything to indicate that the author in the present case in any manner specially reserved to himself any right of copyright or of control

(1) 27 O.R. 526; 23 Ont. App. R. 728.

1911

MORANG & Co. v. LESUEUR.

Anglin J.

over the work which he undertook for the defendant, I am, for the foregoing reasons, of the opinion that he is not entitled to demand the return of his manuscript on repayment of the $500 received by him. I would allow the appeal with costs in this court and in the Ontario Court of Appeal and would dismiss this action with costs.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Aylesworth, Wright, Moss & Thompson.*

Solicitors for the respondent: *Christie, Green & Hill.*