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

AND

JAMES R. GILLIES (DEFENDANT) .... RESPONDENT.

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*June 15.
*June 24.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Contract—Construction—Sale of foxes—Mixed breeds.

By contract in writing G. agreed to sell to C., who agreed to buy, two black foxes "to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911."

Held (Davies and Duff JJ. dissenting), that the proper construction of the contract was that the two foxes to be sold must have both Dalton and Oulton parentage and G. could not be compelled to deliver a pair bred from the Dalton strain only.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario reversing the judgment at the trial in favour of the plaintiff.

This action was brought by the plaintiff for damages for breach of an agreement to deliver two silver-black fox whelps of the litter of 1913, the offspring of Dalton and Oulton stock owned by the defendant. The agreement was reduced to writing, and the material parts are as follows: "The vendor (defendant) agrees to sell to the vendee (plaintiff), and the vendee agrees to purchase from the vendor (2) black foxes—silver tips—male and female whelps in 1913 on the ranch of the vendor in the Township of Fitzroy, County of Carleton, in Ontario, near the Town of Arnprior—the

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

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said foxes to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911, and to be a fair average pair selected by the vendor at or for the price or sum of $12,000, and on the terms and conditions hereinafter contained." The agreement also further provided that 10% of the purchase price was to be paid on the execution of the agreement, and the balance on or before the 10th September, 1913, delivery f.o.b. Arnprior, title and ownership to remain in the vendor until the whole of the purchase money is fully paid. Clause 4 was as follows: "In case the vendor shall be unable by reason of any unforeseen occurrence or accident to deliver the said foxes at the time hereinbefore mentioned, deposit of 10% of the purchase money shall be returned forthwith upon said occurrence or accident rendering the vendor unable to make delivery as aforesaid to the vendee, and this agreement shall *ipso facto* be cancelled and rendered null and void."

At the time of entering into this agreement the vendor had a pair of black foxes, silver tips, purchased from Charles Dalton in 1911 which he had interbred, and which had a litter of four or five pups, and also a pair purchased in the same year from W. R. Oulton, which he had interbred and which had a litter at this time of six, five males and one female. The defendant says that he selected the female of the Oulton and one of the Dalton males to answer the plaintiff's contract. All the Oulton litter died, but there was a pair, male and female, of the Dalton litter which the plaintiff was willing to take in performance of the contract. The defendant refused to deliver this pair under the contract, at first placing his refusal upon the ground that the plaintiff had only a third option, and that one

J. W. Jones had the first right to a pair from the litters. The contract is silent as to options. The defendant finally took the position by letter of 9th July, 1913, probably after having had legal advice, a position which has been maintained ever since, that the agreement intended that the pair should be selected one from each litter, and as the Oulton litter had all died he was relieved from his contract under clause 4 thereof. The plaintiff on the other hand contended that a pair from one litter or from each litter would satisfy the contract, and that he was willing to take the Dalton pair, that the defendant had broken his contract in refusing to deliver this pair, that the intention in inserting the two strains was for the sake of protecting himself from being supplied with inferior stock, Dalton and Oulton being well-known on Prince Edward Island as pioneers in the fox industry, and had practised selective breeding to improve the type for a longer period than any other breeder, and their breeds of foxes were much sought after and had the highest value.

The case came on for trial before Latchford, J., without a jury at Toronto on the 26th day of June, 1914, when he gave judgment for the plaintiff for $1,750 with costs. The defendant thereupon appealed to the Appellate Division of the Supreme Court of Ontario (Mulock, C.J., Clute, Riddell, and Sutherland, JJ.), and judgment was given on the appeal on the 28th of October, 1914, unanimously allowing it with costs and dismissing the action with costs.

From the judgment the plaintiff appealed to the Supreme Court of Canada.

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D. C. Ross for the appellant.

W. M. Douglas K.C., and *J. E. Thompson* for the respondent.

THE CHIEF JUSTICE.—I would dismiss this appeal.

DAVIES J. (dissenting).—This action is brought by the plaintiff appellant for damages for breach of an agreement to deliver two silver black whelps of the litter of 1913, the offspring of Dalton and Oulton stock owned by the defendant. The agreement was reduced to writing and the material parts are as follows:—

> The vendor (defendant) agrees to sell to the vendee (plaintiff) and the vendee agrees to purchase from the vendor (2) black foxes—silver tips—male and female whelped in 1913 on the ranch of the vendor in the Township of Fitzroy, County of Carleton, Province aforesaid, near the Town of Arnprior—the said foxes to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911, and to be a fair average pair selected by the vendor at or for the price or sum of $12,000, and on the terms and conditions hereinafter contained.

Clause 4 is as follows:—

> In case the vendor shall be unable to deliver the said foxes at the time hereinbefore mentioned, deposit of 10% of the purchase money shall be returned forthwith upon said occurrence or accident rendering the vendor unable to make delivery as aforesaid to the vendee, and this agreement shall *ipso facto* be cancelled and rendered null and void.

At the time of entering into this agreement the vendor had a pair of black foxes, silver tips, purchased from Charles Dalton in 1911, which he had interbred and which had a litter of four or five pups, and also a pair purchased in the same year from W. R. Oulton, which he had interbred and which had a litter at this time of six, five males and one female. The defendant

says that he selected the female of the Oulton and one of the Dalton males to answer the plaintiff's contract. Unfortunately all the Oulton litter died, but there was a pair, male and female, of the Dalton litter which the plaintiff was willing to take in performance of the contract.

The defendant refused to deliver this pair under the contract, at first placing his refusal upon the ground that the plaintiff had only a third option, and that one J. W. Jones had the first right to a pair from the litters. This was clearly an untenable ground, as the contract is silent as to options. The defendant finally took the position by letter of 9th July, 1913, that the agreement intended that the pair should be selected one from each litter, and as the Oulton litter had all died he was relieved from his contract under clause 4 thereof.

The plaintiff on the other hand contended that a pair from one litter as well as one from each litter would satisfy the contract, and that he was willing to take the Dalton pair, that the defendant had broken his contract in refusing to deliver this pair, that the intention in inserting the two strains was for the sake of protecting himself from being supplied with inferior stock, Dalton and Oulton being well known on Prince Edward Island as pioneers in the fox industry, and as breeders who had practised selective breeding to improve the type for a longer period than most of the other breeders, and whose breeds of foxes were much sought after and had the highest value.

The case came on for trial before Latchford J., without a jury, at Toronto, on the 26th day of June, 1914, when he gave judgment for the plaintiff for $1,750 with costs.

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On appeal this judgment was reversed by the second Appellate Division of Ontario and the action dismissed on the ground that the contract meant delivery of a pair of foxes

> which were the offspring of the two pairs purchased from Dalton and Oulton, that is one from each pair, and that to otherwise interpret the language of the contract "or" must be substituted for the word "and."

I cannot agree with this conclusion or reasoning. I agree that the language used is not as clear as might be wished, but I do not think the substitution of the word "or" for "and" would remove any ambiguity which may at present exist. The pups were to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton. Now if "or" was inserted instead of "and" it would be argued that these foxes must be from either one or other of the Dalton or Oulton purchases and not from each of them as is now contended.

I do not doubt what the real intention of the parties was. I think, though it might have been made clearer, it is tolerably clear as the contract reads. The dialectician and the lawyer may dispute over the meaning, but the men in the business of fox raising, or the businessman on the street would, I think, have no doubt whatever what the intention was. As the trial judge says:—

> Any pair of cubs—a male and a female—from either one or both of the litters would have satisfied the language of the agreement.

I think the conduct of the parties afterwards shews what the true meaning of the ambiguous language was understood by the parties to be. The contract does not say that the pair is to be selected by the vendor from each strain, Daltons and Oultons. The position

taken at first by the defendant respondent in his correspondence was not that the plaintiff's contract had become null and void because the Oulton litter had all died, but that the purchaser was not entitled to the surviving pair of Dalton pups or cubs because he had only a third option, Professor Jones having a prior one, and the female selected for the plaintiff had died.

It was only after this defence had failed that he set up this other construction of the agreement now relied on. Such later construction never seemed to have entered his mind when he first was called on to carry out his contract.

My view is that the contract could have been satisfied in any one of three ways: (1) A pair from the cross-breeding of the strains, Dalton and Oulton; this, however, was impossible because they were interbred; (2) a pair selected from either litter; (3) a pair selected one from each litter.

If conditions existed which enabled the vendor to offer the purchaser a pair from either one litter or the other, I venture to say neither one of the parties would have dreamt that in doing so he was not fulfilling his contract.

Nothing could better exemplify what I venture to call the somewhat narrow construction placed on the contract than the paragraph in Mr. Justice Riddell's judgment where he says:—

> I think that the contract contemplated the delivery of young foxes the offspring in 1913 of all the four certain foxes bought in 1911 from the persons named, and not simply of some of these four foxes, and that the delivery of two pups which did not have between them the blood of all these four foxes would not be enough.

I think it would be difficult to prove the possibility of the offspring of the two pairs having between them

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the blood of all these four foxes unless by a cross-breeding of the strains which was not done. They had been interbred and their offsprings were alive and did not have between them the blood of all these four certain foxes, as their owner well knew, which is conclusive, if Mr. Justice Riddell is right, that the parties did not intend what is now said to be the meaning of the language used.

This language will be interpreted in the light of the facts which existed and were equally well known to both parties when the contract was entered into and if they used language somewhat ambiguous, the subsequent conduct of the parties can be used as explanatory of the real meaning of the ambiguous words.

I would allow the appeal and restore the judgment of the trial judge.

IDINGTON J.—The determining question raised herein must turn upon and be answered by the construction given that which forms the material part of a contract between the parties hereto and is as follows:—

> Witnesseth that the vendor agrees to sell to the vendee and the vendee agrees to purchase from the vendor two (2) black foxes—silver tips—male and female, whelped in 1913 on the ranch of the vendor in the Township of Fitzroy in the County of Carleton and Province aforesaid, near the said Town of Arnprior, the said young foxes to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911, and to be a fair average pair, selected by the vendor at or for the price or sum of twelve thousand dollars, and on the terms and conditions hereinafter contained, that is to say:—

It appears to me that having regard to what the parties were concerned about in framing the contract and the plain ordinary meaning of the language used that

the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton,

did not exist when the time came for fulfilment of the contract. It is not denied that the offspring of the Oulton litter died. It is neither alleged nor proven that the offspring of the Dalton litter could be described truthfully as in any way issue of the Oulton purchase specified.

The contract provided for the event of the deaths which took place and thereby relieved the vendor.

The Appellate Division of the Supreme Court of Ontario has correctly construed the contract and this appeal should be dismissed with costs.

DUFF J. (dissenting).—This appeal raises the question of the construction of the agreement upon which the action is brought. It is set out in the third paragraph of the statement of claim.

3. The said agreement is in the words and figures following:—

This agreement made (in duplicate) the fifteenth day of May, A.D. 1913.

Between: James R. Gillies, of the Town of Arnprior, in the County of Renfrew, and Province of Ontario, gentleman (hereinafter called the vendor), of the first part,

—and—

E. S. Coffin, of the City of Charlottetown, in the County of Queen's, and Province of Prince Edward Island, grocer (hereinafter called the vendee), of the second part.

Witnesseth that the vendor agrees to sell to the vendee and the vendee agrees to purchase from the vendor two (2) black foxes—silver tips—male and female, whelped in 1913 on the ranch of the vendor in the Township of Fitzroy in the County of Carleton, and Province aforesaid, near the said Town of Arnprior, the said young foxes to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911, and to be a fair average pair, selected by the vendor at or for the price or sum of twelve thousand dollars, and on the terms and conditions hereinafter contained, that is to say:—

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1. The vendee shall pay to the vendor for the said foxes the sum of twelve thousand dollars, payable as follows, namely: ten per cent. of the said purchase price, net at Arnprior aforesaid, upon the execution of these presents, and the remainder of the said purchase price, net at Arnprior aforesaid, on or before the tenth day of September next, 1913.

2. The vendor shall ship to the vendee and the vendee shall accept shipment of the said foxes not later than the tenth day of September next, 1913—f.o.b. Arnprior.

3. The title to and the ownership in the said foxes shall remain in the vendor until the whole of the said purchase price is fully paid as aforesaid.

4. In case the vendor shall be unable, by reason of any unforeseen occurrence or accident, to deliver the said foxes by the time hereinbefore mentioned, the said deposit of ten per cent. of the said purchase money shall be returned forthwith upon such occurrence or accident rendering the vendor unable to make delivery as aforesaid, to the vendee, and this agreement shall *ipso facto* be cancelled and rendered null and void.

5. In case the vendee shall make default in payment of the said purchase price as aforesaid, the vendor shall be entitled to retain the said deposit of ten per cent. of said purchase money, as liquidated damages and not by way of penalty, and shall be accepted by the vendor in full of all claims for or on account of such default on the part of the vendee.

In witness whereof the parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of (Sgd.) B. J. GILLIES. — (Sgd.) R. J. GILLIES.

Witness to signature of E. S. Coffin, (Sgd.) RITA MCKINNON. — (Sgd.) E. S. COFFIN.

At the time this agreement was entered into the fact was known to the purchaser as well as to the vendor that the vendor had two foxes purchased from Charles Dalton and two foxes purchased from W. R. Oulton and it is admitted that these are the foxes referred to as certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911. In fact at the time the agreement was signed the two Dalton foxes had been mated and the other

foxes had been mated, or rather the female of the Dalton pair was in pup by the Dalton male and the female of the other was in pup by the other male, and it is not disputed that the agreement contemplated selection and delivery of foxes from foxes comprised in these litters. Further the facts are stated in the judgment of Mr. Justice Latchford:—

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LATCHFORD J.:—Apart from the question of damages no issue of fact arises in this case.

On the 15th May, 1913, by an agreement in writing, the plaintiff agreed to purchase and the defendant to sell "two black foxes—silver tips—male and female, whelped in 1913, on the ranch of the vendor near the Town of Arnprior—the said young foxes to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911, and to be a fair average pair selected by the vendor at or for the price or sum of $12,000."

Ten per cent. of the purchase money, or $1,200, was payable, and was paid, upon the execution of the agreement. Delivery was to be at Arnprior not later than the 10th September, 1913.

The agreement provided that, should the vendor be unable, "by reason of any unforeseen occurrence or accident," to deliver the foxes, the deposit should be returned, and the agreement should thereupon be null and void.

It was known to the plaintiff that the defendant had at his fox ranch in this province at least four Prince Edward Island black foxes —one pair of Dalton ancestry and one pair of Oulton ancestry. The plaintiff does not appear to have known what other foxes the defendant had, as in his letter of the 7th May, written after the purchase had been made, though before it was embodied in the formal agreement, the plaintiff asks the defendant to "state breeding of parents and from whom purchased and when."

Each pair produced cubs in the summer of 1913. All the Oulton litter died. Several, if not all, of the Dalton litter survived. The plaintiff was willing to accept a pair of the Dalton foxes, but the defendant refused to supply them, contending, as he now contends in this action, that, upon the true interpretation of the agreement, one of the foxes to be delivered was to be of the Dalton strain, and the other of the Oulton strain, and that as, by an "unforeseen occurrence or accident"—the loss of the Oulton litter—he was unable to deliver an Oulton cub, the contract with the plaintiff, upon the return (which was made) of the $1,200, was at an end.

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The defendant's original contention, made as early as the 24th May, or within ten days of the date of the agreement, was, that the plaintiff had but the "third option" on the litters of 1913—"the Dalton, also the Oulton" stock—and that, as the female of the pair the plaintiff was to receive—inferentially the third pair—had died, the agreement could not be carried out. That the inference mentioned is correct is shewn by a letter in evidence written by the defendant a few days later, on the 28th May, to J. Walter Jones, of Charlottetown, offering to supply a pair, a male and a female, from the Dalton little of six puppies. It seems clear that, as the Oulton litter had perished, the defendant at first intended to supply the plaintiff with a pair of cubs from the Dalton litter. This litter must, on the defendant's statement, have contained at least two females—the one mentioned as having died, and the one the defendant was willing to sell to Mr. Jones.

Jones was—unknown to the defendant—interested in the purchase which the plaintiff had made, and informed the plaintiff of the offer of the Dalton pair made to him by the defendant. The plaintiff then claimed to be entitled under the agreement to a pair of the Dalton litter; and the defendant, after assuming a manifestly untenable position as to the order in which the agreement was to be fulfilled—after two other pairs had been set apart—ultimately, on the 9th July, in a letter to the plaintiff, set up the construction on which he now relies.

There are several conceivable constructions of the agreement treating it as a matter of verbal analysis simply. First, that "the said young foxes" means each of "the said young foxes" and that each of these foxes is to be the "offspring" of all of the four foxes purchased as mentioned. Admittedly this construction is inadmissible because both parties knew that on such a construction the agreement would be impossible to perform.

Secondly, that the description, "offspring of certain foxes purchased, etc.," applies to the two foxes sold as a group only; and that the group is to have the character of being the offspring of all the foxes "purchased, etc." The only way in which a description could take effect as applied to a group as such (in the circumstances in which the parties were con-

tracting) was that the two foxes together should combine the strains of all four.

Thirdly, that the description "the offspring, etc.," is applicable to each of the foxes sold but that the words of the description are to be read as "offspring of certain foxes purchased by the vendor from Charles Dalton and of certain foxes purchased by the vendor from W. R. Oulton"; so that each is to satisfy the condition of combining the character of being Dalton offspring with the character of being Oulton offspring.

Fourthly, that the description "the offspring, etc.," applies to each of the said foxes and that the description is satisfied if each one of them belongs to the category described by "offspring of certain foxes, etc.," and that this category is simply a class which is made up of all the foxes which are the offspring of the four foxes mentioned mated in the way in which they had been mated, whatever that might be at the time the agreement was entered into.

It is admitted that the third of these alternative constructions must be rejected for the simple reason that it was known to both parties that there had been no cross-mating. I think that on the facts found by Latchford J., which were not impugned before us, the second construction must be rejected. It is clear enough from the findings of the learned judge that the respondent was quite ready to insist on the fourth construction as the proper construction if he had been in the position to carry out the agreement under that construction. Had it not been for the conduct of the respondent, I am not sure that I should have been able to arrive at the conclusion which of these was the better construction. It may, however, be said that both

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parties admit that the fourth construction imposes the minimum of what it was intended that the appellant should be entitled to. If the appellant had been suing resting upon the third construction I think it would have been a complete answer to say, you have not stipulated for that, you have used language which is consistent with the intention to create the less exacting obligation and, therefore, you must fail in your contention unless you can shew some surrounding circumstances controlling the construction of the language. It seems to me perfectly clear that it could not be contended that there is any such absurdity in the fourth construction as to lead us to reject it. It is not shewn that the price paid was any higher than the price that should have been paid for a pair of Daltons.

If the purchaser intended to mate them with the other stock a pair of Daltons might for all the evidence shews to the contrary have been quite satisfactory; and it appears that two from the Dalton strain were in fact allotted to and accepted by a purchaser. There is nothing in the appellant's letters or conduct inconsistent with this construction.

It is possible, of course, for a contract to be so uncertain in its terms as to be incapable of enforcement; as to be indeed no contract; *Ryan* v. *Thomas*(1) is an example. But the parties undoubtedly intended to enter into an enforceable contract and I think that on the facts found by Latchford J. the right construction is that indicated above. *Bank of New Zealand* v. *Simpson*(2).

I may add that the discussion touching the reading

(1) 55 Sol. J. 364.

(2) [1900] A.C. 182.

of "and" as "or" of which we had a good deal on the argument, seems to miss the mark.

ANGLIN J.—The description of the pair of foxes sold in my opinion could be satisfied either by two foxes each having one parent of the Dalton strain and the other of the Oulton strain, or by two foxes one having parents both of the Dalton strain and the other parents both of the Oulton strain. But it could not be satisfied by the delivery of two Dalton foxes without any Oulton blood in either. Counsel for the plaintiff stated on his behalf at the opening of the trial that cross-breeding of the defendant's foxes of the Dalton strain with his foxes of the Oulton strain had not been contemplated by the parties. No doubt it was because this admission was made that evidence was not given to shew that the defendant's pair of Dalton foxes had already been bred together and that his pair of Oulton foxes had likewise been so bred, as the facts were, and that these facts were known to the purchaser. At all events, it would seem to follow from the admission made by counsel that the construction put upon the contract by the Appellate Division was the only one of which it was, under the circumstances, susceptible.

Anglin J.

The appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *DuVernet, Raymond, Ross & Ardagh.*

Solicitors for the respondent: *Douglas & Clipsham.*