HUGH CLARKE.....APPELLANT; 1879

AND *Feb'y. 7.
*May 7.

TRUEMAN P. WHITE.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Agreement, construction of—Sale of Timber—Consideration—Right to recover back money paid.

C., after having examined a lot, entered into an agreement with *W.*, the owner, whereby the latter sold all the pine timber standing on the lot to *C.*, "such as will make good merchantable waney-edged timber, suitable for his purpose, at the rate of $13 per hundred cubic feet," and *C.* paid to *W.* $1,000, "the balance to be paid for before the timber is removed from the lot." *C.* cut $651.17 worth of first-class timber, suitable for the *Quebec* market, which was all of that class to be found on the lot, and sued *W.* to recover back the balance of the $1,000, namely $348.83.

Held,—That the true construction of the contract was that *W.* sold and granted to *C.* permission to enter upon his lot, and cut all the "good merchantable timber there growing, suitable for his purpose," and not merely "first-class timber;" that there was more than sufficient "good merchantable timber," still remaining on the lot to cover the balance of the $1,000, and that there was no evidence to show that the contract had been rescinded.

Per *Taschereau* and *Gwynne*, J. J., that the payment of the $1000 was an absolute payment, the plaintiff believing and representing to defendant that there was sufficient timber to cover that amount, if not more; on the faith of which representation defendant entered into the contract, which he otherwise would not have done, and that if the plaintiff made an error he, and not the defendant, must suffer the consequences of this error.

APPEAL from a judgment of the Court of Appeal for *Ontario*, reversing the judgment of the Court of Com-

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*PRESENT:—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

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mon Pleas of the said Province, rendered on the 29th December, 1877 (1).

This was an action brought by the plaintiff (appellant) to recover from the defendant a portion of certain purchase money for timber paid by the plaintiff to the defendant, the plaintiff alleging that there was a failure of consideration to the amount sought to be recovered back, also that there was a rescission of the contract under which the money was paid, whereby he became entitled to a return of that portion of the purchase money for which he received no value.

The action was in the Court of Common Pleas for *Ontario*, and was begun by writ of summons issued on the 30th day of May, A. D. 1877.

The respondent pleaded:—

1. Payment;
2. That he never was indebted as alleged;
3. Set off.

The contract reads as follows:—

"*Whitevale*, 8th September, 1876.

"I have this day sold to *Hugh Clarke*, of *Agincourt*, all the pine timber standing on south half of lot 33, concession 5, *Pickering*, such as will make good merchantable waney-edged timber, suitable for his purpose, at the rate of $13 per 100 cubic feet, and have received the sum of $1,000, the balance to be paid for before the timber is removed from the above lot, and I hereby grant the privilege of removing the timber across the land free of all incumbrance.

"T. P. WHITE."

There was evidence, which will more fully appear in the judgments, that "good, merchantable, waney-edged timber" is a definite description of timber, and that "first-class timber" is a different quality of timber.

(1) 28 U. C. C. P. 293.

Previous to entering upon the agreement the appellant represented to the respondent that there was on the lot some 15,000 to 16,000 feet of timber suitable for his purpose; and it was proved that all the "first-class timber" which was to be found on the lot was cut before appellant stopped cutting.

The cause was tried on the 24th day of October, 1877, at the Assizes for the County of *York*, at *Toronto*, before *Hagarty*, C. J., of the Court of Common Pleas, without a jury, and a verdict was then entered for the plaintiff for $348.

In Michaelmas Term, November 26th, 1877, the defendant obtained a rule *nisi* to set aside the said verdict, and to enter a non-suit, or for a new trial between the parties, and on the 29th December, 1877, a rule absolute was granted as of Michaelmas Term 41st *Victoria*, whereby the said rule *nisi*, obtained by the defendant, was discharged.

The defendant appealed from the said judgment to the Court of Appeal for *Ontario*, and on the 16th day of March, A. D. 1878, an order was made by the last mentioned Court whereby the rule *nisi* obtained by the defendant in the Court below was made absolute to enter a non-suit, and against the last mentioned order or judgment the plaintiff appealed to the Supreme Court of *Canada*.

Dr. *McMichael*, Q. C., for appellant:—

The case turns principally on the construction of the agreement under which the timber was bought. What is the meaning of the contract by itself? The words in dispute are "good merchantable waney-edged timber, *suitable for his purpose*." Parol evidence is permissible to show the meaning of the words "suitable for his purpose." The defendant contends that these words mean suitable for the *Quebec* market. Plaintiff contends

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that they mean the timber suitable for the contract he had to fulfil at the time. Plaintiff has proved that he took all the timber suitable for his purpose, and specified by his contract, and he has, therefore, a right to recover the balance of the money. The words "suitable, &c.," imply a power of selection, and they are controlled by the words "suitable for his purpose." These words mean "good, merchantable timber of *the first-class.*" Adding these words does not contradict the previous words. *Clarke* told *White* "that he was taking out the timber for the *Quebec* market for *McLean Stinson*, first-class waney-edged timber, and *White* must have so understood the contract. This evidence has been no doubt overlooked.

The agreement itself made the appellant the judge as to what would suit him and what would not, and he was not bound to take any but what suited him, and was entitled to all that would suit him. If, therefore, the agreement, unaided by parol evidence, is to control, the verdict was right and the judgment of the Court of Common Pleas should be affirmed, and the judgment of the Court of Appeal reversed. If parol evidence is admissible to explain the meaning of the words "suitable for his purpose," the parol evidence shows his purpose was to fill his contract with *McLean Stinson*, in other words, first-class timber such as that contract called for, and as there was upon the evidence, only a little over 5,000 feet of that kind of timber the appellant was entitled to recover back the difference between the $1,000 paid and the value of the quantity of that kind of timber obtained.

If we do not go out of the agreement, these words mean "what will suit me." See *Towers* v. *Barrett* (1). As to the question of the rescission of the contract, it

(1) 1 T. R. 133.

is not necessary to discuss it, as the Chief Justice says: "There was no contract left to rescind." All the timber that could be found was taken, and all that remained was to seek to recover back the amount mistakenly overpaid.

Hon. Mr. *McDougall* for Respondent:—

Plaintiff was lumbering for the *Quebec* market, and was an expert. He went into the defendant's lot and examined the trees. He (plaintiff) knew the soil. The plaintiff took another expert with him, and these two went through, settling in their own minds how many trees there were suitable for their purpose. They came to the conclusion that there were 150 trees suitable for their purpose—about 16,000 feet. They went to the plaintiff, who says: "I will not let you go into my bush and select my best trees and leave the rest." Then the agreement was signed. The form of the agreement was printed, and originally contained the words "square timber," which mean *first class timber*. These words were struck out, and the other words "good, merchantable, &c.," were *interlined*. The price was an average price. *Brady's* evidence proves this; and his evidence is uncontradicted, except by the plaintiff and *Stinson*, who go upon what they say the agreement calls for, viz.: first class timber. None of the illustrations used apply to this case. A better illustration would be that of a butcher engaged in sending cattle to a European market. He goes through the herd of a farmer and says: "I think there are 50 there suitable for my purpose. I will give you $10 a piece for them." He takes only 25 of the best. He must, in this case, be bound by what he considered his purpose.

At the trial, the Chief Justice thought there was a rescission of the contract, but there were only complaints on the part of the plaintiff. The defendant ad-

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mits there were some trees left suitable for his purpose, and there were sufficient trees of the first class to meet the contract. *Towers* v. *Barrett* is not applicable. There the subject matter was purchased on condition that it would meet with approval of a third person.

The plaintiff must show that the other party had the same understanding of the contract. See *Addison* on Contracts, p. 973.

Dr. *McMichael*, Q. C., in reply:

In the factum, the defendant does not contend there was sufficient quantity of first class timber left to complete the contract, but that there is a large quantity of merchantable timber left on the land. *Oxendale* v. *Weatherall* (1) is the converse of this case.

THE CHIEF JUSTICE:—

Action for money lent by plaintiff to defendant, for money paid by plaintiff for defendant, and at his request, and for money received by defendant for the use of plaintiff.

Plea—1st. Before action defendant satisfied and discharged plaintiff's claim.

2nd. Never indebted.

3rd. Plaintiff indebted to defendant in an amount equal to plantiff's claim for goods sold, work done, money lent, money paid, money received, and for interest.

Plaintiff's case is that he purchased certain timber from defendant under the following contract: [His Lordship read the contract (2)]. That there was not a sufficient quantity of timber in the land of the description named in the contract at the rate of $13 per 100 cubic feet to amount to $1000, and that he is now entitled to recover back the difference by reason of the failure of consideration.

(1) 9 B. & C. 386. (2) See p. 310.

If, as a matter of fact, there was not sufficient timber at the price named to cover the $1000, I think plaintiff would be entitled to recover the difference. I think the consideration in this contract being severable and the price apportionable accordingly, a failure of part of the consideration would give a right to recover a proportionate part of the price. I think under the terms of this contract the quantity plaintiff was to pay for was to be regulated and determined by measurement; that it was never intended that plaintiff should pay more than $13 per 100 cubic feet. If there was in fact only 5000 cubic feet on the land, to allow defendant to retain the $1000 would be to make plaintiff pay $20 per 100 cubic feet instead of $13, which would be, in my opinion, in direct opposition to the express terms of the contract. In the case of *Devaux* v. *Conolly* (1), which was an action brought for money had and received, to recover back a sum overpaid as upon a partial failure of consideration, in the course of argument counsel cited the observation of Lord *Ellenborough* in *Cox* v. *Prentice* (2) as follows:

> Let us put the case of parties agreeing to abide by the weighing of any article at any particular scales, and in the weighing an error, not perceived at the time, takes place from some accidental misreckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereupon, would not, in that case, money had and received be sustainable?

Maule, J., says:—

> No doubt about that; it would be like the purchase of a box of eggs at so much per hundred, and after the buyer has paid for them upon the supposition that the box contained 4000, he ascertains there are but 3,500.

It is very obvious that both parties were under the impression that there was more timber on the land than $1000 worth, at the price fixed, and no doubt

(1) 8 C. B. 640. (2) 3 M. & S. 344.

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there was considerable discussion between the parties in reference to this, before the contract was finally closed, and it is very possible both parties were, more or less, influenced by this consideration. But, I think, that what took place as to the probable quantity of timber on the lot was merely matter of discussion and expression of opinion, and that both parties honestly thought there was more than $1,000 worth of timber at the price named, of the description in the contract on the land. But, I think, there was no fraudulent representation in respect thereof, nor any representation constituting a warranty; that what took place was not understood or intended to, and did not, form any part of the contract, and though both may have been disappointed in their expectation, that would not alter the terms of the contract; that what the defendant sold and what the plaintiff purchased was all the timber standing on the lot of the description named at a certain rate per 100 cubic feet; nothing more, nothing less; that neither party knowing how much there was, plaintiff paid on account $1000. If there was more timber than $1000 would pay for, plaintiff was to pay the balance, if not enough to amount to $1000, plaintiff, in my opinion, would be entitled to recover back the difference. If there was $1000 worth of timber on the land, plaintiff was bound to take it out, and could not leave any part in the woods, and claim to be repaid any portion of the $1000 paid, because in such a case there was no failure of consideration.

I do not think there is any evidence of any abandonment or rescission of this contract. I think the evidence shows Mr. *White* did not stop plaintiff or his men, or put an end to the contract. Plaintiff says:

When Mr. *White* stopped the men working, I saw him and told him then, that I would see the men, and see that they were more careful. The men went on cutting after that. Mr. *White* did not interfere with either my men or me after that.

The questions, then, which, I think, must determine the rights of the parties are: first, what is the construction of this agreement as to the description of timber? Having settled that, was there a sufficient quantity of the timber so specified in the agreement to amount to $1000?

As I read this contract the words "good merchantable waney-edged timber" designate the description or character of the timber, and the terms "suitable for his purpose," do not alter such description or character, but indicate that such timber will suit his purpose; that they do not justify any extension of or addition to such description, which appears to have a well understood meaning among those engaged in the lumbering business, still less to justify the insertion of qualifications by eliminating certain words and inserting others in their stead, which would remove the timber from the general class named, and limit and confine it to timber of a special class and of a superior quality; nor do I think there is anything in the parol testimony to vary this construction, but, on the contrary, if on the face of the contract there is any ambiguity which it would be proper to remove by parol evidence, the weight of evidence, I think, shows that this was the intention of the parties.

As to the first question, I have carefully examined plaintiff's evidence, and all he says as to the description or quality of the timber is as follows in his direct examination:

I made a claim against Mr. *White*, because I could not get enough of timber suitable for the purpose. * * There was not enough stuff on the lot to answer the agreement. * * * Mr. *White* found fault that we were cutting very small pieces out of large trees, and I did not want to press him. I think some of the 40 trees his man cut might have answered my purpose. I saw his men cutting a tree myself that I thought would make a piece. * * *

I am in the habit of buying timber and cutting it for the

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Quebec market. * * * We only cut fifty trees, that being all that was there suitable for my purpose, I mean that in the whole bush only 50 trees were fit for my purpose. * * * I suppose my men cut down all the trees that were suitable. They were there for that purpose. I saw one tree afterwards that *White's* men were cutting that I thought would make a piece.

To his Lordship—I have been at the place since, there is no timber there suitable for my purpose.

I will swear there is not a number of trees suitable for my purpose there still.

Now, it is most remarkable, if what has been pressed on us is the true construction of this agreement, that the plaintiff himself does not, in his direct examination or re-examination, pretend to say that "good, merchantable, waney-edged timber" was not the timber intended, nor that such timber was not suitable for his purpose, nor, more remarkable still, does he say one word in his direct examination as to what his purpose was in getting the timber, but on cross-examination he says:

I am in the habit of buying timber and cutting it for the *Quebec* men. I was paying $130 per 1,000, I was getting $175 for the timber delivered at *Frenchman's Bay*. I had to haul it from lot No. 5, in *Pickering* to *Frenchman's Bay*, I paid as high as $110 in the same neighbourhood. I paid $135 to *Armstrong;* that was that season. The average that season was more than $110 or $115. The reason for my being anxious to get as much timber in that neighbourhood as possible, was that if I managed to get a full crib at *Frenchman's Bay*, I was to get the same price as at *Toronto;* but, if I did not succeed in this, I was only to get the same price as delivered at the railway, which was considerably less.

In all this it may be inferred he was getting this timber for sale deliverable at *Frenchman's Bay*, but, notwithstanding this was drawn from him in his examination in his own case, he does not tell us the description of timber he was to deliver at the bay; still less does he say that "good, merchantable, waney-edged timber" was not suitable for that purpose; nor does he, throughout his whole evidence, in his own case venture to say one syllable as to having communicated to defen-

dant, previously to or at the time of making the contract, any purpose for which the timber was to be suitable.

Bethune, the employee of plaintiff, says:

I know what timber would be suitable for Mr. *Clarke's* purpose. As far as my knowledge went, we cut all the trees that were there suitable for our business. I was through lately with Mr. *Clarke*. I saw but one tree there that there might be a short piece taken out of.

And his direct examination likewise ends without a word as to the purpose for which the timber was required, or as to the description of timber that would answer that purpose. But on his cross-examination he says:

We were supposed to take out first quality. * * * We were making timber suitable for the *Quebec* market. * * * I do not think there are trees standing there now out of which timber could be taken suitable for the *Quebec* market.

Though he refrains from saying what description of timber is suitable for the *Quebec* market, he gives this important evidence: "Merchantable, waney-edged timber, and board timber are the same," and "our instructions from Mr *Clarke* were to cut good board timber fit for the market." *Conway*, the measurer of *McLean Stinson's* timber, says he measured what he *Stinson* had bought from *Clarke*, and states the quantity. On cross-examination he says:

Between merchantable timber and first-class timber there is a wide range. * * * I say the timber, with the exception of three pieces, was first-class timber. * * * I did not examine the lot to see if there were any trees there still suitable for merchantable timber. * * * There were some trees would have made timber, but it would not have been first-class.

Re-examined—The difference is in length and thickness, and the way it is cut out as well. In merchantable timber you can make it with a few knots, but first-class timber you are supposed to make it free from knots. *Clarke's* agreement with us was for first-class timber.

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The son of the plaintiff says:

There is timber there that would make boards. * * *
But not timber to my knowledge that would answer that contract.

By which, of course, witness means "first-class timber."

After the plaintiff's case was closed, a motion was made for a non-suit. The learned judge appears to have re-called plaintiff, and the following appears to have taken place:

His Lordship to the plaintiff—When you were bargaining with Mr. *White*, and he signed that agreement, did you explain to him the kind of timber you were to get out for *Maclean Stinson*?

A. I did.

Q. Did you, in explaining to Mr. *White*, make use of the words suitable for your purpose? Did you explain to him what these words meant?

A. I told him I was taking out the timber for the *Quebec* market for *Maclean Stinson*—first-class waney-edged timber.

Here for the first time we hear from plaintiff of *McLean Stinson*, or for the purpose for which he was taking out the timber, and we find in this evidence an attempt not only to extend this written contract by adding thereto, but to entirely alter it by eliminating therefrom certain words and substituting others in their stead, thereby changing the subject matter of the contract from "good, merchantable, waney-edged timber" to "first-class waney-edged timber."

Now we have seen that merchantable waney-edged timber and board timber are the same, and that there is a wide range between merchantable timber and first class timber; and *Bethune* also says: "Our instructions from *Clarke* were to cut good board timber fit for the market." If this were true, plaintiff could not have expected them to cut only first class timber, and defendant entirely denies that by the words "suitable for his purpose" was intended first class timber. He says:

The way he explained the words "suitable for his purpose" was,

that he would take out all the merchantable timber that was there suitable for the *Quebec* market. I told him I would not allow him to go in and take all the first class timber and leave the rest. It was thoroughly understood between us that it was to include all the timber,—not only first class, but merchantable as well.

To his Lordship—I had never sold any first class; but I heard the people complaining that when they went to cut first class they would cut only a small piece out of a tree and waste a great deal; and I explained this to Mr. *Clarke*.

So that on the fair construction of this agreement, and on the evidence, I have come to the conclusion that "good, merchantable, waney-edged timber" will fill the contract, and was the timber intended by both parties. If this is the fair interpretation of the agreement between these parties, then did plaintiff take off all the timber on the lot that would answer this description. I think the evidence shows he did not, but that there was, when he stopped cutting, trees on the lot that would have made good, merchantable, waney-edged timber. Plaintiff's own case shows this; his son says there is timber there that would make boards; and it is clear that plaintiff's men, whatever instructions he may have given, only sought to get out first-class timber, and did, with the exception of three pieces, get out all first class timber, and, if they took only first class, it follows, as an almost necessary consequence, there must have been good merchantable timber, that they might and ought to have got to meet the contract.

But, if this was left in any doubt in plaintiff's case, defendant's evidence clearly shows there was left by plaintiff, as *Brady* says, "merchantable waney-edged timber suitable for the *Quebec* market."

This being the case, I think plaintiff has failed to establish any case that would entitle him to repayment of any portion of the $1000, the preponderating weight of evidence being in favor of defendant that there was

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sufficient "good merchantable waney-edged timber" to cover the $1000, and so no failure of consideration.

FOURNIER, J., concurred.

HENRY, J.:—

This is an appeal from the judgment of the Appeal Court of *Ontario*.

The action was brought by the appellant to recover, under a count for money had and received, a sum of money, being, as is alleged, a balance due to him of the sum of $1,000 paid by him to the respondent for certain trees growing on the lands of the latter, under a special agreement. [His Lordship referred to respondent's pleas and read the contract (1).] The appellant contends that the words "suitable for his purpose," following "merchantable, waney-edged timber," should be construed to mean the class of timber known as "first-class waney-edged timber." From the evidence it appears there is a well-known recognized difference in quality between "merchantable" and "first-class" waney-edged timber, and that the latter class is better and brings a higher price. If, therefore, the appellant wanted "first-class" timber, why did he purchase by name, as in the contract, an inferior quality and expect that the words "suitable for his purpose" would raise the character of the timber to first-class. We cannot allow parol evidence to contradict or vary a written contract. These words cannot be so construed, any more than if he contracted to purchase a quantity of a certain quality of flour, say that which is known as "fine," naming it as it is known in the trade, and by adding "suitable for his purpose" expect the seller to give him a higher and more valuable grade, say superfine, merely because he told him he had a contract to

(1) See p. 310.

give a quantity of that higher grade to another person. What he purchased he should be obliged to take and pay for, even if it did not suit his other contract. If he wanted quality or grade number one, he should not have bargained for number two, and in this case, when selling "merchantable," it was not the business of the seller but of the purchaser to contract in the one case for what would suit in the other. The contract for "merchantable" cannot be turned into "first-class," for that would be contrary to the written contract. The words "suitable for his purpose" cannot raise the class, but would characterize the description of "merchantable" timber, if the respondent and appellant had, when the contract was entered into, agreed upon the application of those words so to characterize the particular "merchantable" timber, the former was to cut and remove. His "purpose" might have been understood between them to mean timber of certain lengths and sizes in the square, or of certain dimensions otherwise. This, however, was not so understood, nor was there any other understanding, and for that reason, and from what I have before remarked, we cannot give any value to the qualifying words of the contract, and we must read the contract as if they were not in it.

This, in my judgment, settles the whole case, for, without doubt, from the evidence, there was sufficient on the property, and more, to have enabled the appellant to have got quantity enough of "merchantable waney-edged timber" to have repaid him for the advance and payment of the $1,000.

I feel it unnecessary to refer at length to the legal aspect of the case. The action for money had and received must, in such cases, be regarded as founded on such equitable principles as, I think, should stand in the appellant's way.

The law raises no implied promise in respect of money had and

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received, when the rights of the receiver of the money have been prejudiced by the mistake, and it would be inequitable to compel him to refund the amount.

* * * * * * * *

The law raises, also, an implied promise to pay back money that has been received without consideration or upon a consideration that has failed; * * * or on the purchase of a good will or fixtures, shares or chattels when the things contracted for, or some of them, have not been transferred or delivered (1).

The action for money had and received is an equitable one, and one *stricti juris*. It is enough if it appears upon the evidence that the plaintiff ought not in conscience to recover (2).

The respondent, unwilling to sell if he had on his land a small quantity of suitable timber, and who, it appears, had not inspected his land and felt incompetent to judge, was, as the uncontradicted evidence shows, induced by the representations of the appellant, who had inspected the land, to enter into the contract which he otherwise would not have done, believing from those representations that there was timber enough at the rate bargained for to make up, at least, the $1,000. If, therefore, the appellant represented even innocently that there was at least the value of the sum mentioned by which he induced the contract, he cannot be permitted to deny the truth of that representation. His claim would, therefore, fail in showing that equitable right to recover the amount sued for which, it is necessary should characterize it.

There is no evidence of the rescission of the contract by agreement of the parties, and a Court could only order a rescission where the party applying can put the other in *statu quo*, which the appellant could not do in this case. There is, therefore, no rescission of the contract, or, in my opinion, a failure of any part

(1) Addison on Contracts, pp. 1062, 1065.

(2) See judgment of Lord Mansfield in *Bird* v. *Randall*, 4 Burr. 1354.

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of the consideration. I think, therefore, the appeal should be dismissed, and the judgment below affirmed.

TASCHEREAU, J.:—

I am also of opinion that the plaintiff is not entitled to recover in this action.

There certainly was no rescission of the contract between the parties. It is true, that after the plaintiff's men had commenced to cut the timber, the defendant stopped them, and, not pleased at the way in which they were proceeding, said that he would rather that they would stop than take so little out of the trees. But the plaintiff merely promised that his men would be more careful in the future, and they continued the cutting. The plaintiff himself, in his evidence, admits that his men worked as long as they found suitable timber. And one of his men, named *Bethune*, examined by him, says that they stopped, because there was no more timber suitable for plaintiff's purpose. No importance can be attached to the fact that the defendant had cut saw-logs off the land, as they were not included in the contract with the plaintiff; and, then, it is in evidence, that this was done only *five or six* weeks after the plaintiff had given up cutting, and his men had gone away. In my opinion, there is not a scrap of evidence of rescission of this contract.

Then, what was the nature of the contract between the parties? The defendant is a farmer. He had timber growing on his land. The plaintiff, a lumberer, and an expert in the business, goes to him and asks to purchase his timber. The defendant says that he does not know if the timber is such as will suit the plaintiff's purpose. The plaintiff says that he has examined the timber with another man of experience in the business, and that he could guarantee that there was certainly far over $1,000 worth of timber on the land, and

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offers to pay $1,000 cash before commencing to cut it. The defendant says: "Very well; if you can get that much out, I will sell it to you," or words to that effect. The bargain is concluded on this, as per agreement, in writing, dated the 8th September, 1876, fyled in the record, and the $1,000 are paid by the plaintiff. The plaintiff now alleges that there was not $1,000 worth of timber on this land; that he, in fact, found and cut only $500 worth of it, and claims from the defendant the other $500. To this, the defendant pleads that he only sold on condition that the sale would bring him at least $1,000; that the plaintiff represented to him that such would be the case, and that the plaintiff cannot now recover from him any part of these $1,000, even if it was the case that there was no timber to that amount on the land.

I think that the defendant has proved his plea, and that the judgment of the Court of Appeal, dismissing the plaintiff's action, must be confirmed. There is no failure of consideration on the defendant's part. He would not have sold, if the plaintiff had not told him that there was at least $1,000 worth of timber on the land. If the plaintiff made an error, he, and not the defendant, must suffer the consequences of this error. Then is it the case that there is not on the land $1,000 worth of timber? That would appear to be so, if first-class timber only is meant. But the agreement between them speaks of "good, merchantable, waney-edged timber;" there is no mention of first-class timber. But the plaintiff says that the timber was to be suitable for his purpose, and that this meant first-class timber, as his contract with *Maclean Stinson*, for whom he bought this timber, was for first-class timber for the *Quebec* market. The defendant positively swears that he told the plaintiff that he would not allow him to go in and take all the first-class timber and leave the rest,

and that it was thoroughly understood between them that the contract was for all the timber, not only first-class, but merchantable as well. The plaintiff, it is true, swears the contrary. But as the agreement in writing speaks of merchantable, not of first-class timber, and, therefore, corroborates the defendant's testimony, I feel bound to accept the defendant's version. There is evidence that between *Clarke* and *Stinson*, first-class timber only was bargained for; but between *Clarke* and the defendant, it is proved to my satisfaction that the contract, as made, included merchantable timber as well as first-class timber; and I do not see it proved satisfactorily that the defendant was made aware of the nature of the contract between the plaintiff and *Stinson*. In fact, that enough merchantable timber remained on the property to make up the $1,000, I think is conclusively proved by the witness *Brady*. However, this is not important, according to the view I take of the case. The defendant never guaranteed, nor represented, that there was $1,000 of such timber.

I am of opinion the appeal should be dismissed with costs.

GWYNNE, J.:—

It is a canon of construction of all contracts that they are to be construed by ascertaining the intention of the parties, to be gathered, in the first instance, from the words of the instrument, but interpreted, if necessary, by the surrounding circumstances (1).

In *Wood* v. *Friestner* (2), *Kelly*, C. B, says:—

> The question in these cases [the construction of contracts] depends not merely on the words, but, when the words are at all ambiguous, requires a consideration of the circumstances to aid the construction.

Oral evidence, in fact, although inadmissible to add to, or to detract from, the plain, unambiguous terms of a

(1) *Carr* v. *Montefiore*, 5 B. & S. 428. (2) L. R. 2 Ex. 68.

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contract, is always admissible to show all the circumstances necessary to place the Court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument (1).

The plaintiff here seeks to recover back a sum of money paid by him to the defendant as part payment upon a contract, upon the alleged ground of failure of consideration. [His Lordship read the contract] (2).

Now, "good, merchantable, waney-edged timber" is a definite description of a well known article, and it appears by the evidence, I think, sufficiently clear that there is a large quantity of such timber still upon the lot; but the plaintiff's contention is that, under the words "suitable for his purpose," there is to be added to the above description of the timber sold this further description, namely: That it should be of the first class quality, and such that, as first class timber, would meet the requirements of a particular contract, which the plaintiff says he had, to supply first class timber suitable for the *Quebec* market. Now, to give such a construction to the words "suitable for the purpose," would be certainly to add a very material term to the previous description of "good, merchantable, waney-edged timber," which is a definition perfect in itself, and would be, it seems to me, in plain violation of the canons of construction; and if, by reason of the ambiguity of the term "suitable to his purpose," we have recourse to the surrounding circumstances to aid the Court in construing the contract, it is apparent no such construction as that which the plaintiff contends for can be given to the contract, without imposing now upon the defendant terms totally at variance with *his* intention, and upon which he swears he never would have entered into the

(1) *Baird* v. *Fortune*, 4 Macq. 149; *Magee* v. *Lavell*, L. R. 9 C.P. 112. (2) See p. 310.

contract at all, for it appears that the defendant peremptorily refused to permit the plaintiff to go into his woods and to cull the timber, taking only first-class quality, and that he refused to enter into any contract except upon the faith that (as the plaintiff represented) there was from 16,000 to 20,000 feet of timber in defendant's woods suitable for plaintiff's purpose. The plaintiff having taken out 5,000 feet of first-class quality, declines now to take any more timber, upon the allegation that there is no more of first-class quality, and he brings this action to recover back a portion of the money paid as part payment upon a contract, which he had procured the defendant to enter into upon the faith of the above representation. It does not appear to me that under these circumstances it is necessary to enquire whether such representation was made *bonâ fide* or not. It is sufficient to say that it was the foundation upon which the defendant entered into the contract.

Now, in an action to recover back money already paid, upon the ground of an implied promise to re-pay any part of it, as it appears to me, the circumstances surrounding the contract, and in view of which the money was paid, are to be regarded, in order that we may see whether it would be just to imply the promise from such circumstances. It was contended by the learned counsel for the appellant, that this action lies, unless the plaintiff's contract amounted to a guarantee to take from 16,000 to 20,000 feet of timber from the lot; but this is not so, for in the one action the question is, was there a warrantry, whereas in this action, although there was no warrantry, the money may have been paid under such circumstances as to raise no implied promise to refund any part. The money may have been accepted upon the faith of assurances which would make it inequitable in the person who paid to recall any part of the amount so paid. That is what is contended for here.

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The plaintiff desired to get some timber out of defendant's bush. The latter told him that he could not, for any consideration, let any man enter his bush to strip it of its best timber, taking only the first-class timber, but that plaintiff might inspect the bush, and if he should find there timber that would suit him to a considerable amount, without taking the first-class timber alone, defendant might come to terms with him. Accordingly, the plaintiff himself, a skilled person in such a matter, with another person, also a skilled person, inspected the defendant's bush, and after satisfying themselves, the plaintiff informs the defendant that he found timber enough there that would suit him to the extent of from 16,000 to 20,000 feet. The defendant replies in substance that this would do, but that he would not enter into a contract unless there was some such quantity; upon the faith of this assurance that there was, and upon the payment of $1,000 *on account*, the defendant makes the contract. Thereupon the plaintiff enters into the bush, strips it of the timber of the best quality, which the defendant had informed plaintiff he never would consent to, and upon the implied promise of plaintiff that it should not be done had entered into the contract, and the plaintiff now in effect says to the defendant: "I have taken all the timber of the best quality from your bush, there is no more first-class timber there, consequently I shall not take any more timber. True it is, I have stripped your bush of the best quality, taking that only which was first-class, and which you told me you never would consent to. True it is, I induced you to make the contract upon the assurance that there was timber in your bush which would suit me to the extent of from 16,000 to 20,000 feet, and that but for this assurance you would have made no contract with me, and the payment which I made to you of $1,000 was upon account, but I was mistaken when I made to you the assurance which alone induced you to enter into the

contract, and from that mistake of mine the law implies a promise upon your part to repay me the difference between the $1,000, which I paid to you, and the value of the first-class timber of which, contrary to your intention and your express desire, I have stripped your bush."

In my judgment the law implies no such promise, and I cannot see that there has been any failure upon the part of the defendant to give any part of the consideration which he undertook to give, and that, therefore, upon the facts appearing here the plaintiff is not entitled to recover back any part of the $1,000, and the appeal should therefore be dismissed.

Appeal dismissed with costs.

Solicitors for respondent: *Jackes & Galbraith.*

Solicitors for appellant: *Spencer, McDougalls & Gordon.*