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*May 17, 18
*Oct. 19

WENDELL DAWSON (*Plaintiff*) .....APPELLANT;

AND

HELICOPTER EXPLORATION CO. LTD. (*Defendant*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Performance subject to conditions—When bilateral rather than unilateral contract will be implied.

In an action for breach of contract based on correspondence exchanged between the parties it was held, Kerwin C.J. dissenting, that a bilateral agreement was entered into subject to two conditions in the performance thereof.

The question of interpreting an offer in a unilateral and bilateral sense, considered.

The Moorcock 14 P.D. 64 at 68; *McCall* v. *Wright* 133 App. Div. (N.Y.) 62; *Wood* v. *Lady Duff Gordon* 222 N.Y. 88 at 90; Williston on Contracts 1936 Ed. Vol I, 76, 77; *A. R. Williams Machinery Co.* v. *Moore* [1926] S.C.R. 692 at 705; Pollock on Contracts 13 Ed. p. 30; *Hellas & Co.* v. *Arcos Ltd.* 43 Ll. L.R. 349 at 364; Anson's Law of Contracts 20 Ed. 310-11, referred to. *The American National Red Cross* v. *Geddes Bros.* [1920] S.C.R. 143, distinguished.

Kerwin C.J. dissenting, concurred in the finding of the trial judge, Coady J., whose decision was affirmed by the Court of Appeal for British Columbia, that there was no contract.

*PRESENT: Kerwin C.J. and Rand, Estey, Cartwright and Fauteux JJ.

APPEAL from the judgment of the Court of Appeal for British Columbia which dismissed the appellant's appeal from the judgment of Coady J. who had dismissed the appellant's action for damages for breach of contract.

J. W. deB. Farris, Q.C. and *M. A. Manson* for the appellant.

C. K. Guild, Q.C. and *K. L. Yule* for the respondent.

THE CHIEF JUSTICE (dissenting):—During the course of the argument of this appeal there was considerable discussion as to whether there was what was termed a unilateral or bilateral contract between the appellant and Springer, but, in my view, we are concerned with the problem as to whether there was any contract. All the letters between the appellant and Springer have been referred to in the reasons for judgment of the trial judge and, having considered them, I have come to the conclusion that Mr. Justice Coady was correct in his finding that there was no contract. This conclusion is reached without reference to the correspondence between the appellant and Fowler.

In the letter of January 17, 1951, from Springer to the appellant the writer states:—

> I would be interested in making some arrangement next summer to finance you in staking the claims for which we would give you an interest and would undertake development of the claims. I would suggest that we should pay for your time and expenses and carry you for a 10% non-assessable interest in the claims.

In his reply of January 22, 1951, the appellant states:—

> Your proposition as stated in your letter appeals to me as being a fair one. I would be pleased to meet you in Ogden.

and I agree with the trial judge that this was not an acceptance of the proposition made by Springer. In the letter of March 5, 1951, from Springer to the appellant it is stated:—

> I hereby agree that, if you take us in to the showings and we think they warrant staking, that we will stake the claims and give you a 10% non-assessable interest.

I also agree that at this stage the matter had not advanced beyond mere negotiation.

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As Mr. Justice Robertson pointed out, there is also a letter of February 28, 1951, from the appellant to Springer, in which the following appears:—

> As I informed you in a previous letter, your offer of a 10% non-assessable interest for relocating and find these properties is acceptable to me, provided there is a definite arrangement to this effect in the near future.

and the following counter-proposal made by Springer in his letter of March 5, 1951, was never accepted:—

> I hereby agree that, if you take us in to the showings and we think they warrant staking, that we will stake the claims and give you a 10% non-assessable interest. The claims would be recorded in our name and we will have full discretion in dealing with them—you to get 10% of the vendor interest.

For the reasons given by the Court of Appeal there was no object to be attained by granting the amendment to the pleadings asked for by the appellant.

The appeal should be dismissed with costs.

The judgment of Rand and Fauteux JJ. was delivered by:—

RAND J.:—Two questions arise in this appeal: the first is whether there was a concluded contract between the appellant, Dawson and the respondent company, and secondly, if so, was it thereafter so affected by the conduct of both or either of them that no cause of action arose on which these proceedings could be founded.

The existence and terms of the contract, if any, must be gathered from correspondence carried on between Dawson and agents of the respondent. It began with a letter dated December 28, 1950 from Dawson, an American citizen, then an officer in the United States Naval Reserve Engineering Corps, at Willard, Utah, to Kidd in Vancouver, a geologist with whom Dawson had had previous communications. It recalled the latter which concerned a mineral deposit at the head of Leduc River in British Columbia, in very rough country, which had been discovered and staked by Dawson, and claims filed which later lapsed, and had been described by him in a report made in 1931 to one Stewart which was later published in a British Columbia Mines Department report. Kidd was asked whether he thought it possible to interest Canadian mining men in the deposit. The opinion

was expressed that large quantities of high grade concentrate might be flown out to Tidewater and that there would be no difficulty in again locating the showings.

This was acknowledged on January 3, 1951. Kidd stated that, although they had been in the district, "our men" had not seen anything like that which the report describes, but that "one has been most keen to go back". It added,

> We now have our own helicopter which should be ideal for hopping over from Stewart. I will follow this up and write you again shortly.

In Dawson's reply of January 13, 1951, he expressed anxiety to "get some responsible party interested in these properties as soon as possible" and his willingness "to work with them" (the interested party) "toward that end."; and he stated that "A large mining company in Salt Lake is showing a definite interest. To protect my own interest, it will be necessary for me to arrive at some definite arrangement soon."

The next communication, of January 17, came from one Springer of Vancouver, an associate of Kidd, to whom the latter had turned over Dawson's letter of the 13th. After mentioning that he and Kidd had developed a gold property on the Unuk River, in the vicinity of the Leduc, and had been doing general exploration in the area and to the north which they expected to continue, he proceeds:—

> I would be interested in making some arrangement next summer to finance you in staking the claims for which we would give you an interest. I would suggest that we should pay for your time and expenses and carry you for a ten per cent non-assessable interest in the claims.
>
> I will probably be in the south-western states sometimes during the winter and will be pleased to call on you at Willard. In the meantime you could advise me if the arrangements as outlined above would be satisfactory to you.

To this Dawson replied on January 22 from Ogden, Utah. He says:—

> Your proposition as stated in your letter appeals to me as being a fair one. I would be pleased to meet you in Ogden.

On February 14, 1951, Dawson wrote Springer from San Francisco that he had been recalled to active duty and was under orders to leave for overseas (Pacific) about March 10, but that

> This abrupt change in my plans need not necessarily interrupt our plans regarding the Leduc R. plans. It is quite possible I can get away for a short time, and if not, I have a man who can locate these properties.

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On February 28 Dawson followed this with another letter to Springer. There had been a change in orders and he was leaving for overseas the next day. He suggested that if convenient and so desired by Springer, arrangements could be made through his wife in Ogden who had authority to handle his business affairs during his absence. She was said to have in her possession and to be familiar with all of his information concerning the Leduc properties consisting of maps and photographs "of generous size, extremely clear and well preserved". He concluded:—

As I informed you in a previous letter, your offer of a 10% non-assessable interest for re-locating and finding these properties is acceptable to me, provided there is a definite arrangement to this effect in the near future.

If it is not possible for me to get away for a month or so to personally undertake this work, I will send in a man with your party who knows the location of these properties. It is very probable that with your assistance and contact with the proper government agencies, that I can get some time off. Or you may prefer to use the information mentioned above and use your own party. Personally, I would prefer going in myself, if that is possible.

A postscript was added:—

The reason that I prefer going in is to personally check up the possibility of getting some of this ore out. I have some very definite information and ideas along this line.

On March 5, 1951, Springer directed a letter to Dawson at Ogden. After remarking that he had thought to see Dawson before that time and that he had just received the letter of February 28, he proceeds:—

I agree with you that the best arrangements would be to have you take us into the property, as you know definitely where your showings are.

I am expecting to operate the helicopter in that country this year. It would depend upon whether I get a pilot or not. If I am operating it, it will be a simple matter to go into this country, probably from Stewart or Summit Lake, north of the Premier.

I hereby agree that, if you take us in to the showings and we think they warrant staking, that we will stake the claims and give you a 10% non-assessable interest. The claims would be recorded in our name and we will have full discretion in dealing with them—you to get 10% of the vendor interest.

I do not think one should attempt to go into this country until about the first of August, so any time during August would do. You can keep me advised as to your movements and when you could get away during that month. If it is impossible to get away in August, the last half of July and all September would be alright.

My full name is Karl John Springer. I note you have been addressing me as Otto, due to my poor writing.

I wish you the very best of luck in your present activities.

To this, on April 12, 1951 from the Naval Operating Base, Dawson answered:—

Your recent letter regarding the Leduc R. properties was forwarded by my wife.

August or Sept. is the proper time to inspect this locality. The most ground can then be seen.

If you will inform me, if and when you obtain a pilot for your 'copter, I will immediately take steps for a temporary release in order to be on hand.

Should it appear that you will not be able to get a pilot I would appreciate it if you would so inform me.

This was followed by a letter of May 27, 1951:—

Would like to know if your plans for further exploration work in the Unuk River area have become definite. In your last letter you stated that you had obtained a helicopter, but did not yet have a pilot.

For me to get away from my present duties on a furlough, it may be necessary for me to have several weeks notice.

On June 7, 1951, Springer wrote as follows:—

Up to a little over a week ago it did not look as though we would be able to secure a pilot for our helicopter. However, we have a man now who we hope will be satisfactory.

I was talking to Tom McQuillan, who is prospecting for us this year; he said he had been over your showings at the head of the Leduc River, and in his opinion it would be practically impossible to operate there, as the showings were in behind ice fields, which along with the extreme snow falls made it very doubtful if an economic operation could be carried on.

We have also been delayed in getting away this year, due to pilot trouble, and have so much work lined up that I am doubtful whether we will have time to visit your showings, also I do not think we would be warranted in making the effort to get in there due to the unfavorable conditions. I must advise you therefore, not to depend on our making this trip, and suggest if you are still determined to go in, to make other arrangements.

To this no reply was sent by Dawson. On August 1 an exploration party of the respondent investigated the Leduc area and located the showings reported in 1931 by Dawson. This did not become known to Dawson until some time in 1952. In 1953 the respondent made arrangements to enter upon the development of the claims by a new company to which the claims were sold in exchange for paid-up shares of the capital stock. Later on Dawson took legal advice and the action was launched on November 23, 1953.

The substantial contention of the respondent is that any offer contained in the correspondence and in particular the letter of March 5 called for an acceptance not by promise but by the performance of an act, the location of the claims

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by Dawson for the respondent. It is based upon the well known conception which in its simplest form is illustrated by the case of a reward offered for some act to be done. To put it in other words, no intention was conveyed by Springer when he said "I hereby agree" that Dawson, if agreeable, should have replied "I hereby accept" or words to that effect: the offer called for and awaited only the act to be done and would remain revocable at any time until every element of that act had been completed.

The error in this reasoning is that such an offer contemplates acts to be performed by the person only to whom it is made and in respect of which the offeror remains passive, and that is not so here. What Dawson was to do was to proceed to the area with Springer or persons acting for him by means of the respondent's helicopter and to locate the showings. It was necessarily implied by Springer that he would participate in his own proposal. This involved his promise that he would do so and that the answer to the proposal would be either a refusal or a promise on the part of Dawson to a like participation. The offer was unconditional but contemplated a performance subject to the condition that a pilot could be obtained by the respondent.

Dawson's answer of April 12 was, as I construe it, similarly an unqualified promissory acceptance, subject as to performance to his being able to obtain the necessary leave. It was the clear implication that Springer, controlling the means of making the trip, should fix the time and should notify Dawson accordingly. As the earlier letters show, Dawson was anxious to conclude some arrangement and if he could not make it with Springer he would seek it in other quarters.

Although in the circumstances, because the terms proposed involve such complementary action on the part of both parties as to put the implication beyond doubt, the precept is not required, this interpretation of the correspondence follows the tendency of courts to treat offers as calling for bilateral rather than unilateral action when the language can be fairly so construed, in order that the transaction shall have such "business efficacy as both parties must have intended that at all events it should have":

Bowen L.J. in *The Moorcock* (1). In theory and as conceded by Mr. Guild, an offer in the unilateral sense can be revoked up to the last moment before complete performance. At such a consequence many courts have balked; and it is in part that fact that has led to a promissory construction where that can be reasonably given. What is effectuated is the real intention of both parties to close a business bargain on the strength of which they may, thereafter, plan their courses.

This question is considered in Williston on Contracts, 1936 Ed. Vol. 1, pp. 76 and 77, in which the author observes:—

> Doubtless wherever possible, as matter of interpretation, a court would and should interpret an offer as contemplating a bilateral rather than a unilateral contract, since in a bilateral contract both parties are protected from a period prior to the beginning of performance on either side—that is from the making of the mutual promises.
>
> At the opening of the present century the courts were still looking for a clear promise on each side in bilateral contracts. A bargain which lacked such a promise by one of the parties was held to lack mutuality and, therefore, to be unenforceable. Courts are now more ready to recognize fair implications as effective: "A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed," which the courts will regard as supplying the necessary reciprocal promise.

The expression "instinct with an obligation" first used by Scott J. in *McCall* v. *Wright* (2), is employed by Cardozo J. in *Wood* v. *Lady Duff Gordon* (3), in the following passage:—

> It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. *The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal.* A promise may be lacking and yet the whole writing may be "instinct with an obligation" imperfectly expressed.

These observations apply obviously and equally to both offer and acceptance.

The question of an anticipatory breach by the letter of June 7 was raised, but that was superseded by the subsequent events. Dawson was bound to remain ready during a reasonable time prior to that mentioned for the trip to endeavour, upon notice from Springer, to obtain leave of

(1) (1889) 14 P.D. 64 at 68. (2) (1909) 133 App. Div. (N.Y.) 62.
(3) (1917) 222 N.Y. 88 at 90.

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absence. But in promising Dawson that the company would co-operate, Springer impliedly agreed that the company would not, by its own act, prevent the complementary performance by Dawson. In doing what it did, the company not only violated its engagement, but brought to an end the subject matter of the contract. By that act it dispensed with any further duty of readiness on the part of Dawson whether or not he was aware of what had taken place. Even assuming the technical continuance of the obligations and the necessity of an affirmative step in order to treat an anticipatory breach as a repudiation, the action was not brought until long after the time for performance had passed. Being thus excused, Dawson's obtaining leave, apart from any pertinency to damages, became irrelevant to the cause of action arising from the final breach.

I would, therefore, allow the appeal and remit the cause to the Supreme Court of British Columbia for the assessment of damages. The appellant will have his costs throughout.

The judgment of Estey and Cartwright JJ. was delivered by:—

ESTEY J.:—The appellant contends that he and respondent entered into a contract under which he would endeavour to relocate certain mineral claims and was prevented from so doing by respondent's refusal to carry out its obligations thereunder and, in this action, claims damage suffered thereby. The learned trial judge held a contract had not been concluded and, even if it had, the plaintiff had abandoned it prior to the bringing of this action. The Court of Appeal for British Columbia unanimously dismissed appellant's appeal.

After preliminary correspondence relative to the relocating of these mineral claims, the appellant, on February 28, 1951, wrote to Springer, President and General Manager of the respondent, who at all relevant times conducted the correspondence on behalf of the respondent, in part:

> As I informed you in a previous letter, your offer of a 10% non-assessible interest for relocating and finding these properties is acceptable to me, provided there is a definite arrangement to this effect in the near future.

On March 5, 1951, Springer replied in part:

I agree with you that the best arrangements would be to have you take us into the property, as you know definitely where your showings are.

I am expecting to operate the helicopter in that country this year. It would depend upon whether I get a pilot or not. If I am operating it, it will be a simple matter to go into this country, probably from Stewart or Summit Lake, north of the Premier.

I hereby agree that, if you take us in to the showings and we think they warrant staking, that we will stake the claims and give you a 10% non-assessable interest. The claims would be recorded in our name and we will have full discretion in dealing with them—you to get 10% of the vendor interest.

I do not think one should attempt to go into this country until about the first of August, so any time during August would do. You can keep me advised as to your movements and when you could get away during that month. If it is impossible to get away in August, the last half of July and all September would be alright.

This letter was acknowledged by the appellant under date of April 12, 1951, reading as follows:

Your recent letter regarding the Leduc R. properties was forwarded by my wife.

August or Sept. is the proper time to inspect this locality. The most ground can then be seen.

If you will inform me, if and when you obtain a pilot for your 'copter, I will immediately take steps for a temporary release in order to be on hand.

Should it appear that you will not be able to get a pilot I would appreciate it if you would so inform me.

The appellant, a Lieutenant Commander in the United States Naval Engineering Corps, was stationed in the Marshall Islands from March, 1951, until the middle of December, 1951, and, therefore, the references to the letter being forwarded by his wife and to obtaining a temporary release.

The letter of March 5, 1951, was an offer on the part of the respondent made in response to appellant's request for "a definite arrangement" and, with great respect to those who hold a contrary view, the appellant's letter of April 12 constitutes an acceptance of that offer, more particularly as every portion thereof is consistent only with the appellant's intention that he was accepting and holding himself in readiness to perform his part. While it has been repeatedly held that an acceptance must be absolute and unequivocal, *McIntyre* v. *Hood* (1), *Oppenheimer* v. *Brackman & Ker Milling Co.* (2), *Harvey* v. *Perry* (3), it is equally clear that

(1) (1883) 9 Can. S.C.R. 556. (2) (1902) 32 Can. S.C.R. 699.
(3) [1953] 1 S.C.R. 233.

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such an acceptance need not be in express terms and may be found in the language and conduct of the acceptor. The learned author of *Pollock on Contracts,* 13th Ed., in discussing the rule that "the acceptance must be absolute and unqualified," states at p. 30:

> Simple and obvious as the rule is in itself, the application to a given set of facts is not always obvious, inasmuch as contracting parties often use loose and inexact language, even when their communications are in writing and on important matters. The question whether the language used on a particular occasion does or does not amount to an acceptance is wholly a question of construction, and generally though not necessarily the construction of a written instrument.

Lord Tomlin in *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (1), stated:

> . . . the problem for a court of construction must always be so to balance matters that without violation of essential principles the dealings of men may as far as possible be treated as effective and that the law may not incur the reproach of being the destroyer of bargains. . . . It is in the application of them to the facts of a particular case that the difficulty arises, and the difficulty is of such a kind as often to afford room for much legitimate difference of opinion and to present a problem the solution of which is not as a rule to be found by examining authorities.

The respondent's undertaking would require that it make reasonable efforts to locate a pilot and, having done so, that it would convey the appellant into the area in August or September of 1951 and if, when relocated, the respondent staked the claims it would give to the appellant a 10% non-assessable interest. If, under this contract, the respondent did not obtain a pilot, the contract would be at an end. Moreover, if the claims were relocated and, in the opinion of the respondent, were not worth staking, the appellant would not receive the 10%. These terms were agreed upon and may be described as conditions subsequent.

> A contract may contain within itself the elements of its own discharge, in the form of provisions, express or implied, for its determination in certain circumstances. These circumstances may be the non-fulfilment of a condition precedent; the occurrence of a condition subsequent; or the exercise of an option to determine the contract, reserved to one of the parties by its terms.
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> * * *
>
> In the second case the parties introduce a provision that the fulfilment of a condition or the occurrence of an event shall discharge either one of them or both from further liabilities under the contract. *Anson's Law of Contract,* 20th Ed., 310-11.

(1) (1932) 43 Ll. L. Rep. 359 at 364.

Moreover, when this correspondence is read as a whole, respondent's letter of repudiation dated June 7, 1951 (hereinafter set out) appears to be written on the basis that the parties had agreed with respect to taking the appellant into the area. It is not suggested that there was any term or item left in abeyance or to be subsequently agreed upon. The suggestion is rather that, because of the additional information, the project did not commend itself from an economic point of view, and, in any event, the respondent had not time to undertake it, and the letter concludes with the sentence:

> I must advise you therefore, not to depend on our making this trip, and suggest if you are still determined to go in, to make other arrangements.

The word "arrangements" is rather a general term with no precise meaning, but it is of some significance that the appellant, in his letter of February 28, 1951, asked for "a definite arrangement," which was concluded, and the respondent now suggests that appellant make other arrangements. A reading of this letter as a whole appears to corroborate that the parties had concluded a contract.

The learned trial judge further held:

> Alternatively if the correspondence establishes a contract, then there was a termination of it by Springer, accepted by the plaintiff, and a mutual abandonment of it by the parties.

The repudiation referred to is contained in respondent's letter to appellant dated June 7, 1951, reading as follows:

> Up to a little over a week ago it did not look as though we would be able to secure a pilot for our helicopter. However, we have a man now who we hope will be satisfactory.
>
> I was talking to Tom McQuillan, who is prospecting for us this year; he said he had been over your showings at the head of the Leduc River, and in his opinion it would be practically impossible to operate there, as the showings were in behind ice fields, which along with the extreme snow falls made it very doubtful if an economic operation could be carried on.
>
> We have also been delayed in getting away this year, due to pilot trouble, and have so much work lined up that I am doubtful whether we will have time to visit your showings, also I do not think we would be warranted in making the effort to get in there due to the unfavourable conditions. I must advise you therefore, not to depend on our making this trip, and suggest if you are still determined to go in, to make other arrangements.

The appellant made no reply to this letter and nothing passed between himself and the respondent until he called at the latter's office in Vancouver about December 15, 1952,

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when he and Springer had a conversation, during which, as the appellant deposes, Springer, in referring to the correspondence in 1951, said: ". . . it was not their original intention to go in but that Kvale had made an independent discovery of the copper back in 1948 and they decided to go back and check up on that." This statement is largely corroborated by Kvale and is not referred to by Springer. About April 4, 1953, appellant again interviewed Springer at respondent's office in Vancouver, when Springer made it clear that he would neither pay any amount to the appellant nor further discuss this matter. Appellant, in November of that year, put the matter in the hands of his solicitor.

It is contended that the appellant's silence, after his receipt of the letter of June 7, 1951, until his interview in December, 1952, constituted an abandonment of the contract. No authority was cited where silence alone has been held to constitute an abandonment. In *The American National Red Cross* v. *Geddes Brothers* (1), the Red Cross, upon receipt of the letter of repudiation, recorded in its books what amounted to an acceptance of the repudiation and, while it did not communicate its acceptance, its failure to complain with respect to the non-delivery of the yarn, as called for under the contract, was held sufficient to justify Geddes Brothers in concluding, as, in fact, they did, that the contract was abandoned. As stated by Duff J. (later C.J.) at p. 161:

> It is equally clear that the appellants intended to acquiesce in the abandonment of the contract by the respondents. We have here, then, a declared intention to abandon on part of the seller and a concurrence in fact on the other side accompanied by conduct which was treated by the seller as evidencing such concurrence.

Anglin J. (later C.J.) stated at p. 164:

> No explanation was made by them of these failures to carry out the contract and no complaint or demand for delivery came from the defendants. Indeed both parties acted as if the contract had ceased to exist—as if the defendants were acquiescing in the plaintiffs' request to be relieved from it and in their treating it as abandoned.

In construing this letter of June 7, 1951, it is desirable to look at the correspondence as a whole and endeavour, as far as possible, to place oneself in the position of the writer of the letter. As Newcombe J. stated:

> In order to interpret the correspondence we must look to the state of the facts and circumstances as known to and affecting the parties at the time. *A. R. Williams Machinery Co. Ltd.* v. *Moore* (2).

(1) (1920) 61 Can. S.C.R. 143. (2) [1926] S.C.R. 692.

Also at p. 705 his Lordship quotes from Lord Watson in *Birrell* v. *Dryer* (1):

> I apprehend that it is perfectly legitimate to take into account such extrinsic facts as the parties themselves either had, or must be held to have had, in view, when they entered into the contract.

This observation would be equally applicable when construing a letter of repudiation.

As already stated, Springer, at the outset of the correspondence, expressed his interest in appellant's claims and the respondent's financing him upon a percentage basis. In February, 1950, the respondent corporation was incorporated and Springer became President and General Manager. Both McQuillan and Kvale were employed by the respondent in 1951 and Kvale's contract is dated April 20 of that year. Springer, in the course of his evidence and in discussing the letter of June 7, 1951, stated:

> McQuillan was going out for us, and I had heard of these showings . . . I knew that McQuillan and Kvale had been up for another of my companies in that area and had looked over the showings, made discoveries. So I inquired of McQuillan about what he thought of Dawson's showings, and he said he didn't think they were of importance, and discouraged—and his report was quite discouraging.

The letter of repudiation is dated June 7, 1951, and during the next month Kvale and McQuillan were taken into the area by helicopter. They were again taken into the area where, on August 2 of that year, they staked a number of claims which were duly recorded. The record does not indicate when respondent changed its mind as indicated by Springer's remark to appellant at its office in December, 1952, but it is apparent that many of the difficulties emphasized in the letter of June 7 had either disappeared or been overcome by the following month. Upon this record it rather appears that the respondent concluded it could continue without assistance from the appellant and, therefore, wrote the letter of repudiation.

The respondent, in this letter of repudiation, set forth its reasons therefore which it would be difficult for the appellant, stationed as he was in the Marshall Islands, to effectively appraise. I do not think that under such circumstances a conclusion adverse to the appellant can be drawn from his failure to further press the respondent at that time. Immediately upon his return in December, 1950, he "wrote

(1) (1884) 9 App. Cas. 345 at 353.

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to the Mining Recorder at Prince Rupert" and apparently continued his examination to ascertain what had, in fact, taken place. He visited the premises in June and July, 1950, and relocated the three claims which he had found in 1931. When he had ascertained, at least in part, what had taken place, he made his position known to the respondent in December of 1952. Moreover, while silence may be evidence of repudiation, its weight must depend upon the circumstances and here I do not think his silence, coupled with the steps he took immediately upon his return from the Marshall Islands, sufficiently supports a conclusion that he, at any time, intended to abandon his rights under the contract.

Upon receipt of the letter of repudiation dated June 7, 1951, the appellant might have accepted it and forthwith claimed damages. Since, however, he did not accept it, the contract remained in force and binding upon both parties. It, therefore, remained the duty of the respondent, having obtained a pilot, to take the appellant into the area in August or September. Not only did the respondent not do so, but, notwithstanding the terms of its letter of repudiation, it, in fact, took Kvale and McQuillan into the area where they staked claims on behalf of the respondent. This conduct constituted a breach of its contract.

The appeal should be allowed with costs throughout and the matter referred back to the Supreme Court of British Columbia to determine the damages.

Appeal allowed with costs.

Solicitors for the appellant: *Mason & Lane.*

Solicitors for the respondent: *Guild, Lane, Sheppard, Yule & Locke.*