THE V. HUDON COTTON COMPANY, HOCHELAGA (DEFENDANTS)... } APPELLANTS.

AND

THE CANADA SHIPPING COMPANY (PLAINTIFFS)..... } RESPONDENTS.

1882

*Nov. 21 & 22.

1883

*April 30.

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

Plea of tender and payment into Court acknowledgment of liability—Agent—Contract by, for undisclosed principal—Sale with privilege of taking bill of lading, or reweighing at seller's expense—Pleading.

An action was instituted by the Canada Shipping Co., to recover $3,038.43, being the price of 810 tons, 5 cwt. of steam coal sold

*Present—Sir W. J. Ritchie C.J., and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

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by their agents, Thompson, Murray & Co., through T. S. Noad, broker, as per following note:

No. 3, 435. Montreal, 13th Aug., 1879.

Messrs. Thompson, Murray & Co.:—

"I have this day sold for your account, to arrive, to the V. "Hudon Cotton Mills Company, the 810 tons, 5 cwt. best South "Wales black vein steam coal, per bill of lading, per 'Lake "'Ontario,' at $3.75 per ton, of 2,240 lbs, duty paid, ex ship; "ship to have prompt despatch.

Terms, net cash on delivery, or 30 days, adding interest, buyer's "option.

"Brokerage payable by you, buyer to have privilege of taking bill of "lading, or reweighing at seller's expense."

The defendants pleaded, 1st, that the contract was with Thompson, Murray & Co., personally, and that the plaintiffs had no action; and by a second plea, that the cargo contained only 755 tons, 580 lbs., the price of which was $2,868.72, which they had offered Thompson, Murray & Co., together with the price of 10 tons more, to avoid litigation, in all $2,890.72, which they brought into court, without their acknowledging their liability to plaintiffs, and prayed that the action be dismissed as to any further or greater sum.

Held, per Ritchie C.J. and Taschereau and Gwynne JJ., that that it was unnecessary to decide the question as to whether the action could be brought by the undisclosed principal, for by their plea of tender and payment into court the defendants had acknowledged their liability to the plaintiffs, although such tender and deposit had been made "without acknowledging their liability;" Fournier and Henry JJ. dissenting.

Per Strong J.—That the action by respondents (undisclosed principals) was maintainable.

Per Fournier and Henry JJ, that the action by respondents (undisclosed principals) was not maintainable and that the appellants were not precluded from setting up this defence by their plea of tender and payment into court.

At the trial it was proved that the defendants agreed to take the coal as per bill of lading without having it weighed. They, however, caused it to be weighed in their own yard, without notice to the vendors, and the cargo was found to contain only 755 tons, 580 lbs. About three weeks after having received the bill of lading, when called upon to pay, they claimed a reduction for the deficiency.

Held, Fournier and Henry JJ. dissenting, that the appellants had no right to refuse payment for the cargo on the grounds of defi-

ciency in the delivery, considering that the weighing was made by the defendants in the absence of the plaintiffs and without notice to them, and at a time when the defendants were bound by the option they had previously made of taking the coal in bulk.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) (1) reversing the judgment of the Superior Court, dismissing the plaintiff's (respondents) action. The facts and pleadings are fully stated in the judgments hereinafter given.

Beique and *Trenholme* for appellants:

1st. As to compatibility of pleas:

See C. P. C. art. 146. *DeMontigny* v. *The Watertown Agricultural Ins. Co*, not reported; *Leclerc* v. *Girard* (2); *Middlemiss* v. *Procureur General of Quebec* (3).

2nd. As to first plea:

(1) Authorities cited by Sir A. A. Dorion: (2 Dorion's Q. B. B. 356.)

(2) Civil Code of Quebec, arts. 1023 and 1028; Pothier Obligation (4); Maynz (5); Demolombe (6); also Civil Code, arts. 1206 and 1234.

Cujacius (7); Vinnius Institutes (8).

Molitor Obligations (9); Hunter's Roman law (10); Bell Commentaries (11).

Domenget, Mandat (12); Sirey, code de. com. (13); Pardessus (14).

As to agency of broker; Civil Code art. 1735. *Syme et al* v. *Howard* (15); Wharton on agency (16); *Browning*

(1) 2 Dorion's Q. B. R. 356.
(2) 1 Q. L. R. 382.
(3) 7 Rev. de Leg. 255.
(4) No. 82.
(5) Vol. 2 pp. 189 & 190.
(6) Vol. 1 of contracts No. 287.
(7) Commentaire de verbo ob. L. 79, and Digest 14. 1. 18.
(8) B. IV. T. VII. No. 2 & 3.
(9) Chap. IV. No. 52.
(10) Verbo Agency pp. 441, 443.
(11) 1 vol. p. 510.
(12) Vol. I, Nos. 384 and 388; Vol. II, Nos. 802 and 855.
(13) Art 92, Nos. 12 and 14, and authorities there cited.
(14) 2 vol. No. 573.
(15) 1 L. C. J. 19.
(16) Sec. 723.

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v. *The Provincial Insurance Co.* (1).

3rd. On second plea.

Code of L. C. arts. 2390, 2420, 2421, 2422, 2424.

Abbott on Shipping (2); Kerr on Fraud and Mistake, *verbo* misrepresentation (3); Taylor on Evidence (4).

Laflamme Q. C and *Davidson* Q. C. for respondents, relied on Arts: 1701, 1716, and 1735 C. C.; Pothier Mandat, No. 88, and other authorities referred to in the judgments of this court.

Sir W J. Ritchie C.J.—Was of opinion that the appeal should be dismissed for the reasons given by Taschereau J.

STRONG J.—I am for affirming the judgment upon the following grounds: First, that the action is maintainable by the respondents. Arts. 1716 and 1727 of the Civil Code, which make the principal liable to third persons, even although the agent may have contracted in his own name, and as a principal, thus assimilating the law of Quebec to the English law, must, I think, be considered by an extensive construction as also making third persons so contracting with the agent liable reciprocally to the principal, since it must proceed on the implication that in such a case a contractual obligation between the principal and the third person shall be considered to have been created by the contract of the agent. From the terms of the articles and from the report of the commissioners, it appears to have been intended to make this provision accord with the doctrine of Pothier, Mandat (5); see also Molitor, Droit Romain (6), and the corresponding rule of English commercial law which, as is well known, differs in this respect from the modern French law.

(1) L. R. 5 P. C. 263.
(2) Chap. 11 sec. 1.
(3) Pp. 22, 66, of English edition.
(4) Vol. 1 p. 356, section 491.
(5) No. 38.
(6) Tome 2 p. 149 Ed. 2.

As to the right to compensation or recoupement in respect of shortage, I am clearly of opinion that all right to this was waived by the appellants when they received the coal without insisting on its being weighed at the ship's side. They thus got the chance of any advantage which might accrue to them from overweight, and it would be out of the question now to say that they should, after having declined a weighing according to the ordinary course of business, in the presence of the respondent, be entitled to claim an allowance for shortage which they allege they have found on an *ex parte* weighing made in their own yard, after having taken delivery in the manner before mentioned. The appeal should be dismissed with costs.

FOURNIER J.—Les faits qui ont donné lieu au présent litige sont en résumé comme suit :—

Le 13 août 1879, J. S. Noad, courtier, de Montréal, vendit à l'appelant pour le compte de Thompson, Murray et Cie., marchands, une cargaison de charbon alors à bord du vaisseau des intimés, appelé le "Lake Ontario," attendu d'un jour à l'autre à Montréal. Cette vente fut faite à raison de $3.75 par tonne de 2,240 livres, et de plus aux conditions notées comme suit sur le carnet du courtier :

To wit.

No. 3435. Montreal, 13th Aug., 1879.

Messrs. Thompson, Murray & Co.,

I have this day sold for your a/c to arrive, to the V. Hudon Cotton Mills Co., the 810 tons 5 cwt. best South Wales black vein steam coal per bill lading, p. Lake Ontario, at 3.75 p. ton of 2240 lbs, duty paid, ex ship, ship to have prompt despatch.

Your obedient servant,

J. S. NOAD, Broker.

Terms net cash on delivery or 30 days adding interest. Buyer's option. Brokerage payable by you.

Buyer to have privilege of taking B/L or reweighing at sellers expense.

Un mémoire de cette vente fut remis à Messrs. Thompson, Murray & Co., et un autre à l'appelante.

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A l'arrivée du "Lake Ontario," celle-ci au lieu de prendre livraison du chargement après avoir fait peser de nouveau, accepta la quantité déclarée dans le connaissement.

Cependant comme la livraison se faisait auprès de sa manufacture, l'appelante fit peser la cargaison avec soin, et avec des balances vérifiées, mais sans avis aux intimés. Le résultat constata qu'il y avait cinquante-cinq tonnes de moins que la quantité mentionnée dans le connaissement. Avis de ce déficit fut donné à Thompson, Murray & Co., avec offre du prix de la quantité de tonnes reçues, et de plus le prix des dix autres tonnes. Ces offres furent refusées et les intimés intentèrent leur action pour la quantité mentionnée dans le connaissement.

L'appelante répondit à cette action : 1o qu'elle avait contracté avec Thompson, Murray & Co., personnellement et que les intimés n'avait aucun droit d'action contre elle. 2o que la cargaison ne contenait que 755 tonnes et 580 livres dont le prix se montant à $2,868 72 avait été offert à Thompson, Murray & Co , avec en outre le prix de dix tonnes de plus, en tout $2,890.72. Cette somme fut déposée en cour, mais avec déclaration spéciale que c'était sans admettre aucune responsabilité envers les intimés. 3o l'appelante invoquait l'usage du commerce au sujet du déficit ou surplus dans les ventes faites d'après la quantité portée au connaissement comme suit :—

That in purchasing said cargo of coal and in making option to receive the same as per bill of lading instead of having said coal weighed at the expense of the vendor, the said defendants never agreed or intended, and could never have been understood, according to the custom and usage of trade, to have agreed or intended, to assume the risk of a deficiency in said coal of more than ten tons.

Enfin l'appelante plaidait fraude, en alléguant que l'intimé savait que le commandant du "Lake Ontario" était dans l'habitude de signer des connaissements con-

tenant de fausses déclarations de quantités.

L'intimé répondit spécialement que le connaissement avait été régulièrement signé, les droits de douane payés suivant la quantité vendue, que la charge avait été acceptée par l'appelante, qui n'avait jamais offert de la rendre. A cette dernière allégation l'appelante répondit qu'elle n'avait pu faire la remise du charbon parce qu'il se trouvait mélé avec d'autre, et que d'ailleurs elle n'était pas obligée de le rendre.

Après enquête et audition au mérite, l'action fut renvoyée par le jugement de la Cour supérieure.

Les questions soulevées par les faits de cette cause sont 1° Le commettant peut-il porter une action sur un contrat fait personnellement par un agent qui n'a pas fait connaître le nom de son commettant?

La deuxième question ne devrait pas être seulement de savoir si l'appelante est obligée de payer la quantité de charbon mentionnée dans le connaissement, ou bien si elle a droit à une diminution de prix en proportion du déficit constaté par le pesage qu'elle a fait faire. En vue du plaidoyer invoquant l'usage du commerce, ne devrait-on pas se demander, de plus, si une vente, faite dans les circonstances de celle dont il s'agit, ne se trouve pas tacitement sujette à certaines conditions acceptées par l'usage général du commerce concernant le surplus ou déficit dans la quantité spécifiée dans des ventes de cette nature?

Quant à la première question la manière dont s'est opérée la vente en question fait voir bien clairement que les parties au présent procès, n'ont jamais fait ensemble le contrat sur lequel l'action est fondée. Ce contrat a été fait par l'intermédiaire de J. S. Noad, entre Thompson, Murray & Co., d'une part, et l'appelante de l'autre, ainsi qu'il est constaté par les écrits échangés entre eux à ce sujet, exhibits 12 et 14. Ces écrits ne font aucunement voir que Thompson, Murray

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& Co., n'étaient que des agents de l'intimé dans cette transaction. Il est vrai que celle-ci a produit un mémoire de cette vente dans lequel le mot agent a été inséré ; mais il est évident que cette addition a été faite après coup dans le but, sans doute, de faire disparaître une difficulté que l'on appréhendait sur l'existence du droit d'action. Cette addition qui ne se trouve pas dans le mémoire livré à l'appelante ne peut aucunement affecter sa position. Il résulte certainement de ces écrits que le contrat a été fait entre Thompson, Murray & Co., et l'appelante, et non pas entre celle-ci et l'intimé. Il n'y a partant aucun lien de droit entre elles et conséquemment pas de droit d'action de la part de l'intimé contre l'appelante. Indubitablement Thompson, Murray & Co., parties au contrat, avec l'appelante ont droit de réclamer d'elle l'exécution de ce contrat, et aucune action n'aurait dû être intentée sans les mettre en cause, afin d'éviter à l'appelante les dangers d'une seconde action.

Maintenant les faits n'étant pas douteux que la vente en question a été faite par Thompson, Murray & Co., sans divulguer leur qualité d'agents, la loi reconnaît-elle à leur commettante (l'intimée) le droit d'intenter une action sur un contrat auquel elle n'était pas partie ? A cette question, deux réponses contraditoires se présentent. L'une, d'après le droit anglais, est dans l'affirmative, l'autre d'après le droit français dans la négative. Il est clair que ce n'est pas dans le droit anglais que l'on doit chercher la solution d'une telle question. Ce droit n'est pas en force dans la province de Québec, en matière de contrat.

Les règles de la preuve en matières commerciales seulement y ont été admises. Adopter en matière de contrat un principe tiré du droit anglais, différant du droit français sur le même sujet, ce ne serait plus une application de la loi, une interprétation, mais ce serait

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un acte législatif, substituant un système de droit à celui qui est en force dans la province de Québec. Quelqu'avantageux que puisse être sous certains rapports la solution offerte par le droit anglais, elle ne peut être acceptée sans violer l'esprit du code civil. Il est donc tout à fait inutile d'aller chercher de ce côté-là des autorités sur cette question. C'est uniquement dans le droit français que nous devons en trouver la solution.

Les autorités ne manquent pas sur le sujet.

Dans le droit romain le mandataire traitait toujours en son propre nom, et le mandant n'avait pas d'action contre les tiers, ni ceux ci contre le mandant. Plus tard, une action équitable fut accordée par le prêteur contre le mandant, en faveur des tiers ; mais la réciprocité ne fut pas admise en faveur du mandant. Dans le droit français, tel qu'exposé par Pothier, Mandat (1), cette réciprocité n'a pas été admise non plus. Le droit d'action est reconnu en faveur du tiers contre le mandant dont le mandataire n'a pas divulgué le nom. Mais il n'est pas accordé au mandant dans le même cas. Les codificateurs du Code Civil de la Province de Québec ont adopté la doctrine du Pothier et l'ont consignée dans les articles 1716 et 1727. Mais ils n'ont pas été plus loin. Ils n'ont pas jugé à propos d'accorder au mandant dont le nom n'avait pas été révélé aux tiers une action contre ceux-ci. Il eut peut-être été plus logique d'admettre le réciprocité du droit d'action en pareil cas,—mais puisqu'ils n'ont pas jugé à propos d'en faire même la suggestion à la législature, les tribunaux peuvent-ils suppléer à cette omission ? Sans doute que non. Ce serait peut-être une amélioration, mais nous n'avons pas le pouvoir de la décréter. A l'origine il n'y avait aucun droit d'action parce que le mandataire traitait toujours en son propre nom, plus tard l'action fut accordée aux tiers contre le mandant,

(1) Au No. 881.

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—c'était une amélioration, un progrès,—c'en eût été un autre, si l'action eût été accordée au mandant contre les tiers; mais elle ne l'a pas été comme on peut s'en assurer par le rapport des codificateurs à ce sujet (1).

Il y a cinq articles dans cette section, le premier numéroté 23, proclame la règle générale de la responsabilité du mandant et diffère peu de l'article 1998 du code Napoléon. Troplong cependant interprète de manière à ne pas lier le mandant lorsque le contrat est au nom du mandataire sans déclaration du nom du principal, excepté dans quelques cas particuliers. Cette interprétation est en harmonie avec la doctrine du droit romain; mais elle est en opposition directe avec celle de Pothier, qui est d'accord avec les lois anglaise, écossaise et américaine. L'article soumis est basé sur l'exposé de la règle de Pothier et comprend tous les actes du mandataire soit qu'il ait agi en son propre nom ou en celui du mandant. Les seuls cas exceptés sont ceux mentionnés dans l'article.

On voit que les codificateurs n'ont adopté que l'opinion de Pothier qui reconnaît le droit d'action des tiers contre le mandant et rien de plus. Les articles de notre code ne diffèrent pas en principe de ceux du code français, on peut citer l'opinion des commentations sur ce dernier comme applicables à la solution de cette question.

Troplong, Du Mandat (2).

Vide aussi Nos. 523 & 535.

Le mandataire agissant en son propre nom s'oblige directement, avons-nous dit. A cette proposition viennent se joindre deux règles que je trouve constatées par les monuments les plus importants de la jurisprudence.

Savoir: Que le silence gardé sur l'existence du Mandat, fait 1o. Que le mandant n'a pas d'action contre les tiers; 2o. Que les tiers n'ont pas d'action contre le mandant.

Quando mandatarius, says Casaregis, *simpliciter contrahit, non expressio mandato, adeo in eo redicatur contractus, ut mandanti amplius contra tertium nulla competere possit actio.*

Et plus bas il ajoute ces paroles remarquables: *Respectu habito ad tertium, mandans consideratur ut persona extranea.*

Ainsi point d'actions contre les tiers de la part du mandant.

(1) Observations des codificateurs; Mandat, Ch. III, Section II, Obligations envers les tiers (article 1727).

(2) No. 522.

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Laurent (1):

Quels seront dans cette hypothèse (dans le cas où le mandataire a traité en son nom personnel avec les tiers, sans dire qu'il agit comme mandataire) les rapports du mandant avec les tiers? Il n'y a aucun lien entre le mandant et les tiers, puisque les tiers n'ont pas traité avec le mandant: celui-ci étant étranger à la convention, il ne peut s'en prévaloir contre les tiers, de même que les tiers ne peuvent s'en prévaloir contre lui.

Sebire & Carteret (2); DeLamarre & Le Poitvin (3); et aussi Duranton (4):

Il n'est pas douteux, quand le mandataire a traité au nom du mandant, que celui-ci peut agir directement contre le tiers avec lequel le mandataire a traité, et, réciproquemement, que le tiers peut agir directement contre le mandant, mais il n'en est pas de même quand le mandataire a traité en son propre nom, ainsi que cela avait constamment lieu chez les Romains, et comme on le voit parfois chez nous en matière de mandat ordinaire, et presque toujours quand c'est un commissionnaire qui traite. Dans ce cas, le mandant a besoin, pour agir contre le tiers, de se faire céder l'action du mandataire contre le mandant, pour agir contre ce dernier; autrement, l'un et l'autre n'exercerait que l'action générale de l'art 1166, et au nom de leur débiteur.

Je n'en repéterai pas ici toutes les citations; je me contenterai de référer aux notes du Juge en Chef, Sir A. A. Dorion qui en contiennent une longue énumération, ainsi qu'au factum de l'appelante qui en contient plusieurs autres. Pour les raisons adoptées par l'Honorable Juge en Chef et par l'Honorable Juge Ramsay je suis d'opinion avec eux que l'intimée n'a pas droit d'action contre l'appelante en vertu de la vente faite à cette dernière par Thompson, Murray & Co.

Un des motifs du jugement de la majorité de la Cour du B. R., est que l'appelante ayant offert $2,390.72, seul montant dû, d'après le contrat, suivant elle, s'est par cette offre désisté de son objection contre l'existence du droit d'action. Cette proposition serait juste, si l'offre eût été faite sans réserve. Mais comme au con-

(1) Vol. 28 No. 62.
(2) Vo. Commissionnaire, Nos. 12, 82, 83, 121.
(3) Tome 1 p. 25.
(4) Vol. 18 No. 262.

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traire elle n'a été faite qu'avec la déclaration formelle que c'était sans aucunement admettre qu'elle était endettée envers l'intimée, cette offre ne peut avoir l'effet de priver l'appelante du bénéfice de son autre moyen de défense. Dans l'ordre des plaidoyers c'est la question de l'existence du droit d'action qui doit être décidée la première. Si elle est décidée en faveur de l'appelante, elle met fin à la contestation et l'action doit être renvoyée. Ce n'est que dans le cas où la décision est contraire à l'appelante que le second plaidoyer doit être examiné et qu'il peut y avoir lieu de déclarer si les offres sont suffisantes ou non. Cette manière de plaider est d'ailleurs conforme au Code P. C. et à la pratique suivie dans la cour de la province de Québec, et ne peut pas être invoquée contre l'appelante comme une rénonciation de sa part à son premier plaidoyer. Elle est aussi conforme à l'autorité de Carré et Chauveau. En traitant de l'ordre des plaidoyers il s'exprime ainsi (1):

La première c'est qu'on peut se borner à ne présenter que les exceptions de procédure, en se réservant toutefois de procéder au fond au cas qu'elles fussent rejetées; et alors c'est au défendeur à plaider le premier, parce qu'il est demandeur en exception: *Reus excipiendo fit actor.* La seconde c'est que les exceptions de procédure doivent nécessairement être opposées avant les exceptions de droit, qui, elles-mêmes, doivent être présentées avant les moyens du fond, puisqu'elles ont pour objet d'en éviter la discussion.

Néanmoins, comme les exceptions de droit peuvent être opposées en tout état de cause, à moins qu'on ait renoncé à celles qui ne tiennent qu'à l'intérêt privé, on n'aurait point à craindre qu'elles fussent rejetées pour n'avoir pas été opposées avant les défenses proprement dites.

Bioche Vo. Acquiescement (2):

Mais la partie qui plaide au fond *sous toutes réserves,* est réputée ne plaider que pour obéir à la justice, et non pour renoncer à ses droits, Cass. Ier Mai 1811, s. 11, 217, voir aussi Nos. 106 et 107.

Acceptant l'opinion que le droit d'action n'existe pas

(1) Proc. Civ. vol. 2 p. 153. (2) P. 49, No. 105.

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il devient inutile à ce point de vue de s'occuper du second plaidoyer. Cependant je crois devoir faire l'observation qu'il ne me paraît pas avoir été pris en considération dans son ensemble. On a perdu de vue, je crois, le fait que l'appelante prétend que la vente dont il s'agit doit être considérée comme ayant été faite conformément à l'usage du commerce. D'après cet usage le surplus ou déficit ne doit pas excéder dix tonnes. Dans le cas contraire il donne lieu à une réclamation pour paiement de l'excédant ou pour diminution du déficit. L'usage invoqué a été prouvé de la manière la plus satisfaisante et l'appelante, dans le cas où le droit d'action existerait devrait en avoir le bénéfice.

On a semblé mettre en question le droit de l'appelante de faire un semblable plaidoyer à une action fondée sur un contrat et dire que tout au plus elle pourrait se porter demanderesse incidente. Cela n'est pas nécessaire d'après notre manière de plaider dans la province de Québec. Dans un cas comme celui-ci il y a lieu à l'exception tout aussi bien qu'à l'action *quanto minoris*. La jurisprudence et la pratique sont d'accord de depuis longtemps (1) à éviter la multiplicité des demandes incidentes, pour admettre la compensation plaidée par exception, pourvu que l'exception soit accompagnée de conclusions spéciales. La diminution du prix invoqué par l'appelante était bien plaidée.

En résumé je suis d'avis, 1° que l'intimée n'a pas droit d'action ; 2° qu'en supposant que ce droit existât, l'appelante avait droit d'invoquer les modifications à son contrat apportées par l'usage du commerce.

Il y a en outre une allégation de fraude, mais elle n'a pas été prouvée.

Pour ces motifs je suis d'avis que l'appel devait être accordé.

HENRY J.—This action is brought against the

(1) Voir *Beaulieu* v. *Lee*, 6 L. C. R. p. 33.

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appellants in this case to recover the value of a cargo of coal shipped by the respondents in their own vessel on a bill of lading signed by their own captain. The appellants purchased, not from the respondents, but from Messrs. Thompson & Murray, and they purchased from them, not as agents of the respondents, but as being the owners of the property, goods or chattels so purchased by the appellants. The real owner of the goods at the time was not disclosed to the purchaser. No doubt at one time, neither in France nor in Quebec could either of these parties bring an action, but the law of Quebec was changed to the extent that the party purchasing who deals with the agents of an undisclosed principal is entitled to bring an action against the principal. That is laid down in the code, but it goes no further; it does not say that the mandator shall have an action against the party who deals with his agents. But we are told that because there is an action allowed by the code against the mandator, therefore it works both ways. We may fairly assume that if it was intended by the code that that should be the case it would have been provided in the code as well that the mandator should have the right of action as that the party contracting with his agent should have the right of action against him. I therefore take the ground that this action will not lie under the present legislation in the Province of Quebec.

Then there is another objection that is taken by the party here; it is this: He said, "You purchased on this bill of lading, and you had the choice of purchasing the quantity mentioned in the bill of lading, or had the option of having it weighed at the expense of the sellers, Thompson, Murray & Co." Practically, they agreed to take it on the bill of lading, and, under ordinary circumstances, they might possibly be bound by it but

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for two reasons. In the first place it was proved on the trial and uncontradicted, that there was a universal practice in Montreal of purchasing cargoes on bill of lading, and it was only intended to cover a deficiency of four or five tons; it was never understood, and never intended by the parties that the shortage should go beyond that in such a contract. If that was the case and the parties said they would go by the bill of lading, they would not be answerable for more than four or five tons, and not for such a deficiency as forty or fifty tons. Then, there is another question, which is an important one here. When these parties disclose themselves they must take the contract in all its relations, and imported into that contract is the fact that their captain signed the bill of lading, certifying that he had all this coal on board when he had not. Then is it proved that he had not? It is, for this reason, that every single load of that coal is weighed, and there is not the slightest suspicion of the correctness of such weighing, and it is clearly shown that the quantity short is fifty tons. Then the owner of the coal says to the buyers, "You must pay us for that amount of coal!" The others say, "No, we did not get that amount of coal." "But," says the owner, "If you did not get it, the sellers say you agreed to take it according to the bill of lading of Thompson, Murray & Co." They reply that they did not buy the bill of lading, but they bought a certain quantity of coal as guaranteed by the bill of lading. They did not become the endorsers of the bill of lading, but got their right to that property by purchase direct from Thompson, Murray & Co., who told them "we have got a bill of lading saying that the captain has received so many tons of coal on board." But the owners come in afterwards, after the amount is in dispute, and say "you are bound to pay us because

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you agreed to take the quantity in the bill of lading." "It is true, we did agree," the appellants say, "but "we agreed through the false representations made by "your servant, the captain, that he had that quantity on "board, for which false representation you are answer- "able, and if there is liability upon us in one respect, "there is also liability on your part to counteract that." I am not sufficiently acquainted with the administration and procedure of the law in Quebec, but I believe I am justified in saying that under the pleadings and practice and administration of the law there, it is a good defence for those parties to come in and say, "we "did not get that coal, we bought it on the misrepresen- "tation of your servant, you never gave it to us." That being the case, and that being the law, I feel that this appeal ought to be allowed, and that these parties should be declared not liable to pay for coal which they never got. It is said, "you took the option at the time "and could have had it weighed in the presence of the "parties at the ship's side at the expense of the seller." I maintain that it is no matter where the coal is weighed if the evidence is sufficient to convince judge and jury that the quantity is as alleged, and that it is a correct weighing. The party was not obliged to get it weighed, and he was not obliged to give the other parties notice that he was going to weigh it. All that is required is to prove satisfactorily that the quantity was not there, and if it was not there, the question arises: Have those parties who represented that it was, the right to be paid for what they did not supply? I am of opinion that the appeal should be allowed.

TASCHEREAU J.—It is in evidence that Thompson Murray & Co. are the general agents at Montreal of the Canada Shipping Co., and well known to be such. Now, when the appellants bought coal from such a

firm, publicly known as the agents of the respondents, can they be said to have dealt with an undisclosed principal ?

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Le nom du mandant (says Troplong) (1) peut s'attacher à l'acte par des circonstances de fait, par une certaine publicité de position, que les tribunaux doivent apprecier avec équité.

See also Bédarride (2). Leaving this question aside however, I am of opinion with the Court of Queen's Bench that the Hudon Company, in tendering as they have done and depositing in Court with one of their pleas, the sum of $2,890.72. as part payment for the coal in question, have acknowledged the Canada Shipping Co. as their vendors, and have admitted the said Canada Shipping Co.'s *locus standi* in this case. The contention that they cannot be bound by the admission contained in that plea, because by another plea or in the same plea they denied the plaintiff's rights altogether, or any privity of contract with them seems to me untenable.

The conclusion of their said plea of tender and deposit is as follows :

Wherefore, the said defendants without acknowledging any in debtedness towards the plaintiffs, and praying *acte* of their said tender and offer of twenty-eight hundred and ninety dollars and seventy two cents, further pray that said tender and offer may be declared good and sufficient and that said plaintiff's action for any further and greater amount may be dismissed, the whole with costs, including costs of protest and of exhibits *distraits* to the undersigned.

It is true that a party is allowed to fyle incompatible pleas, but it is not the less true that the offer of a confession of judgment, even only for a part of the amount demanded, or a plea of tender and payment, in court, must be held to be an admission by the defendant of the plaintiff's title as his creditor. In the case of a confession of judgment, the plaintiff may accept it, and in the case of a tender and payment in court, he is entitled

(1) Mandat 540.

(2) Du dol et de la fraude, No. 1240 seq.

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to receive the monies paid in, without prejudicing his claim to the remainder. In *Marc Aurele* v. *Durocher* (1), though the defendant had offered, in one of his pleas, to confess judgment, he claimed that the action should be dismissed, Mr. Justice Johnson said :

> Still less importance attaches to the contention that this offer was made under reservation of all matters previously pleaded. It is intelligible that under the system of pleading that still exists in this country a defendant may plead everything he chooses, under reservation of everything else that he has already pleaded; that is to say, that he can go on contesting the action under as many new grounds as he pleases, reserving all that he has pleaded before tending to the same end, viz: the dismissal of the action; but I cannot understand how he can be allowed to reserve to himself the benefit of previous pretensions set up in order to get the action dismissed, while he admits that judgment ought to be rendered against him. A defendant may ask for the dismissal of an action against him for as many good reasons as he is able to give; but he surely cannot be allowed to ask in nineteen consecutive pleas that the plaintiff be sent out of court; and reserve to himself the benefit of all these pretensions in a twentieth plea admitting that the same plaintiff is entitled to judgment; or, in other words, asks to reserve means of defence which he expressly renounces.

What was said in that case by Mr. Justice Johnson about a confession of judgment applies with still greater force, it seems to me, to a plea of tender and payment in court.

In *Gorrie* v. *The Mayor of Montreal* (1) the defendants had pleaded a tender of part of the sum claimed with also a defence *au fonds en fait.* The Superior Court had dismissed the action altogether. The presiding judge, adopting the same ground as taken in the present case by the appellants, had said :

> The defendants admit the balance of £75, which is all the plaintiff is entitled to claim, but if the action does not exist, I can take no notice of such tender, it amounts to nothing.

The case, however, was carried to appeal, and the judgment was reversed, and defendants condemned.

(1) 18 L. C. J. 197.

(1) 8 L. C. R. 236, also in note 9 L. C. R. 375, to re *Boulanget* v *The Mayor.*

Judgment in appeal not reported; I have a note of it through the kindness of the prothonotaries of the Superior Court, Montreal.

Also in *Boulanget* v. *The Mayor of Montreal* (1) though a tender had been pleaded and a payment in court of the sum so tendered had been made, the Superior Court had dismissed the plaintiff's action altogether, but on appeal this judgment was reversed and it was held, Sir L. H. Lafontaine delivering the judgment of the court, that a plea in a case by which the defendant admits that a part of the sum claimed is due to the plaintiff, praying *acté* of the deposit of the sum so admitted, and also praying that the plaintiff's action for the surplus be dismissed, entitles the plaintiff to a judgment for the sum tendered and paid into court. In the present case, it is true, the defendant's plea denied entirely the indebtedness, but how could he do so, or what effect can this have, when he offered the plaintiff a part of the sum claimed.

The law is that if one pays a debt voluntarily, knowing what objections he could oppose to the payment, he is presumed to renounce his right to avail himself of such objections. And this even if he pays under protest and reserve. Solon Nullités says (2):

L'exécution volontaire.....est une véritable ratification; elle couvre toutes les nullités de la convention exécutée, lors même qu'en exécutant la partie ferait des protestations et des réserves pour pouvoir l'attaquer dans la suite. On concoit que ces réserves tombent devant une exécution contraire à laquelle on n'était pas obligé.

And Bédarride de la fraude (3):

Exécuter volontairement un acte qu'on sait être nul ou rescindable, c'est indiquer aussi positivement que possible qu'on renonce à l'attaquer désormais. Cela est si évident que les réserves qui accompagnaient l'exécution n'en atténueraient aucunement l'importance et n'apporteraient aucun obstacle à la fin de non-recevoir

(1) 9 L. C. R. 363.
(2) 2 vol. No. 436.
(3) No. 609.

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qu'elle crée.

La réserve contraire au fait n'opère pas, lorsque l'exécution est libre is a maxim equally applicable to procedure (1), and to contracts and obligations, and the principles upon which it is based rule the pleas in a case, as well as the acts of the parties out of the case. If a party executes an act or performs an obligation under all the circumstances which would make such execution or performance a valid implied ratification of such act or obligation, the protest or reserve with which this execution or performance might be accompanied are of no avail and do not hinder the effect of the ratification.

Here, the defendants tendered as voluntarily as possible a part of the sum claimed; they did so with the full knowledge of their possible objections to the plaintiff's claim *in toto*: the protestations and reserves in their plea consequently fall to the ground.

Buchanan J. in *Bertrand* v. *Hinerth* (2), held that a *défense au fonds en fait* does not affect or impair the strength and force of admissions contained in another plea.

In *Monty* v. *Ruiter* (3), Berthelot J. held: "That in an action for false imprisonment, the admission of defendant in one of his pleas is sufficient proof of his having caused the arrest of the plaintiff, although another of the pleas is the general issue, and that such an admission relieves the plaintiff from the necessity of making other proof of the fact."

In *Viger* v. *Beliveau* (4), a plea of tender had been fyled with a plea of general issue, and the Superior Court had dismissed the actoin. The case was carried to appeal, and it was then held by Aylwin, Duval, Meredith and Monk JJ., that the defendant having ad-

(1) Bioche Vo. acquiescement No. 95.
(2) 25 L. C J. 168.
(3) 5 L. C. J. 50.
(4) 7 L. C. J. 199.

mitted by one of his pleas the existence of a verbal lease, the admission of this plea should be taken against him, although he had also pleaded the general issue, and that when there is a plea of tender for part of the sum claimed the action cannot be dismissed *in toto*.

In *Bussière* v. *Blais* (1), Mr. Justice Meredith, for the court, referring to an admission in the defendant's plea, says: "Here we have a very unequivocal recognition of the plaintiff's right of property; and according to a recent judgment of the Court of Appeals, the plaintiff has a right to the benefit of that admission, notwithstanding the *défense en fait* filed by the defendant."

Upon the question whether the defendants, present appellants, are entitled to claim a reduction for the alleged deficiency in the quantity of the coal, I concur fully in what the learned Chief Justice of the Court of Queen's Bench said for the court, as follows:

Upon the second question, we are, I believe, all of opinion that the respondent having made his option to take the cargo of coal for the quantity mentioned in the bill of lading, instead of having it re-weighed with the sellers, as he was entitled to, cannot claim a reduction in the price on account of deficiency in the quantity, except on the ground of fraud, and there is no fraud proved in this case. It would be extremely dangerous to allow a purchaser who has chosen to receive delivery in bulk and without weighing, to assert, two or three weeks after such delivery, and after the coal has been mixed with other coal, so as to prevent any verification by the seller, that there was, according to his own calculation, a deficiency for which he was entitled to a reduction in the price of his contract. The respondents are, we consider, by the option which they have made to receive the coal in bulk, concluded against claiming a reduction of the price of the coal. Moreover, their laches in not giving notice of their intention to weigh the coal and in mixing it with other coal, so as to prevent verification, before they informed the sellers of the pretended deficiency, would in any ordinary case, be sufficient to reject their claim for a reduction, and

(1) 7 L. C. R. 245.

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we are therefore of opinion that on both grounds, the tender made by the respondents is insufficient.

This seems to me unanswerable. The defendants, appellants here, having waived their right to have the quantity verified at the time of delivery, made the option to take the bill of lading as conclusive proof of the quantity They are estopped from now complaining of their own option. There certainly was no fraud on the part of the vendors; there may have been an error in the shipment of the cargo, or a part of it may have been jettisoned. Moreover, if the defendants, notwithstanding their option, thought that they had a claim for deficiency, they should have given notice to the plaintiffs of their intention to reweigh, and should certainly not have mixed the coal. Their mixing the coal with other in their yard was another acceptance of it, as sold per bill of lading. The delay in ascertaining that deficiency and notifying the plaintiffs of it was also too long. "Il suffit de remarquer que la verification doit être provoqué et faite dans le plus bref délai," says Pardessus No. 285. All the authorities are clear in the same sense.

I am of opinion that the appeal should be dismissed. It is unnecessary for me to consider the question decided affirmatively by the court appealed from, whether under our law, a principal can bring an action upon a contract made by his agent, when such agent contracted in his own name and without disclosing his principal. I do not wish my silence on this point, however, to be construed as throwing a doubt on my part on the correctness of the decision given by the court below on that part of the case.

GWYNNE J.—This is an appeal by the defendants in an action brought against them in the Superior Court of the Province of Quebec by the plaintiffs upon a contract alleged to have been entered into between the

plaintiffs and defendants through the intervention of a broker by bought and sold notes. The plaintiffs in their declaration, in short substance, allege that on the 13th day of August, 1879, the plaintiffs acting by a firm of the name of Thompson, Murray & Co., doing business at Montreal and general agents of the plaintiffs for the Province of Quebec, through James S. Noad of Montreal, broker, sold to the defendants at their request a certain cargo of best South Wales black vein steam coal, then on board the plaintiffs' ship, called the Lake Ontario, at the rate of three dollars and seventy-five cents per ton of two thousand two hundred and forty pounds, customs duty paid ex ship. That said cargo according to to the bill of lading of said ship contained eight hundred and ten of said tons and five hundred weight; that (among other things) it was stipulated as a condition of the said sale that the defendants should have the option of taking the said coal at the total weight appearing on the face of the bill of lading or of having said cargo reweighed at the expense of the seller and of paying for the exact number of tons so found to be contained in said cargo, that thereupon the said Noad on the said 13th day of August delivered to the defendants a bought note signed by him, setting out the said sale and said terms and conditions thereto attached, and on the same day delivered to said Thompson, Murray & Co. an identical note signed by him called a sold note, which last note is in the words and figures following (1).

That the ship arrived at Montreal on 3rd September; that the defendants thereupon elected and agreed to accept the said cargo according to the weight given to it on the face of the bill of lading, being entitled to any surplus and accepting the risk of deficit that might exist over or below the said bill of lading weight and

(1) See head note.

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refused to have the same re-weighed at the expense of the vendor; that the said cargo was duly delivered to the defendants, duty paid ex ship as per bill of lading, on the 3rd of September, 1879; that said bought and sold notes and the invoice which was rendered to the defendants according to the usage and custom of trade in that behalf and the previous dealings between said parties bear the name of Thompson, Murray & Co., but said coal was ever the property of the plaintiffs, and plaintiffs were the principals in said transaction, and the said sale was made in plaintiffs' interest and on their behalf alone, as the defendants well knew; the declaration then alleges non-payment of the price agreed upon or any part thereof by the defendants. The declaration also contains a count for goods sold and delivered.

To this declaration the defendants plead, 1st. A general denial of all allegations in the declaration; that the defendants never had any dealings with the plaintiffs, but that in all transactions of which mention is made in the declaration, the defendants contracted only with the firm of Thompson, Murray & Co.

2nd plea. Admitting that the defendants, on the 13th August, 1879, bought from Thompson, Murray & Co., through Noad, a cargo of eight hundred and ten tons (of twenty-two hundred and forty pounds each ton) and five hundred weight of the best South Wales black vein steam coal, mentioned in the bill of lading thereof, as being on board the ship Lake Ontario, then on her voyage and expected to arrive within a few days at Montreal, at the price of $3.75 per ton admitting also the arrival and the delivery to the defendants of a quantity of coal which the defendants caused to be weighed on an approved scale, avers that instead of said coal weighing 810 tons, 5 cwt., as bought by defendants, and as men-

tioned in the bill of lading, it weighed only 755 tons and 580 lbs.; that by the custom and usage of merchants the vendor of a cargo of coal as per bill of lading is always understood to sell the quantity mentioned in the bill of lading without any large or important variance therefrom, the purchaser being at all events understood to pay only for the quantity delivered; that vessels of the class of the "Lake Ontario," in transporting coal are well known to the mercantile community not to vary to an extent exceeding five or six tons, the surplus or deficiency being always less than ten tons, but that the deficiency of the cargo in question was 55 tons; that in purchasing said cargo and in making option to receive the same as per bill of lading instead of having said coal weighed at the expense of the vendor, the defendants never agreed or intended, and could never have been understood according to the custom and usage of trade to have agreed or intended, to assume the risk of a deficiency in said coal of more than ten tons; that the plaintiffs, at the time of the shipment of the coal on board said vessel and at the time of said contract and of the delivery of the coal, were and are now the owners of said vessel; that the captain of the said vessel as servants of the plaintiffs in signing the said bill of lading, represented that the quantity named therein was on board the said vessel; and that it was on the faith of that representation and of similar representations made by said firm of Thompson, Murray & Co., that the defendants agreed to take the said cargo as per bill of lading without asking the reweighing thereof; that the said plaintiffs were and are aware that the said master of said vessel has been in the habit of signing bills of lading for cargoes of coal without ascertaining the quantity thereof, and have allowed him to do so, assuming themselves the re-

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sponsibility incurred in consequence; that, to the knowledge of the plaintiffs, the said ship was not loaded in the ordinary and regular way, and said cargo was not weighed at the time when it was put on board the said vessel; that neither the plaintiffs nor Thompson, Murray & Co. paid for any more than the quantity of 755 tons and 580 pounds, the quantity delivered to defendants, and that said plaintiffs and Thompson, Murray & Co. well knew that the said cargo was not of the quantity of 810 tons, 5 cwt., but only of the quantity delivered to defendants as aforesaid, and that said Thompson, Murray & Co. in offering said cargo to be accepted for a cargo of 810 tons, 5 cwt., practiced a fraud upon the defendants.

The plea then alleges a tender to Thompson, Murray & Co. of $2,890.72, being at the rate of $3.75 per ton for 755 tons and 580 lbs. delivered to the defendants, and ten tons added as the extreme limit of variance allowed according to the custom of the trade together with interest thereon from the 3d September, 1879, which sum Thompson, Murray & Co. refused, and thereupon the defendants bring it into court and plead it as a payment into court in this cause.

To the first of these pleas the plaintiffs reply denying all the defendants' allegations therein to be true and reaffirming the truth of the allegations in the declaration.

To the second plea they reply that they were and are wholly ignorant of any weighing of said coal as alleged in the plea, and that they never had any notice thereof, and that the defendants chose to buy as per bill of lading instead of actual weighing, in the hope of making a profit thereby as they would have been entitled to do even had the surplus amounted to 50 or 60 tons.

The plaintiffs further specially deny that any such

custom and usage of merchants as alleged in said plea exists. That cargoes vary considerably in their delivery weights, and that the defendants accepted all risk in connection with the actual output of the cargo in question. That the said bill of lading was signed by the captain of the "Lake Ontario" in good faith, after the customary weighing at the point of shipment, and in the belief that the said bill of lading represented the *bonâ fide* weight of said cargo.

That said cargo was bought on account of and for the plaintiffs who paid the price thereof and the Canadian customs duties thereon, upon the basis of the total weight set forth in said bill of lading, and the defendants specially deny that the captain of the Lake Ontario ever to the knowledge of the plaintiffs acted in the manner falsely set forth in said plea, and they deny that the said ship was not loaded in the ordinary and regular way, and that the said cargo was not weighed at the time the coal was laden on board the vessel, as falsely alleged in said plea, and they aver that the defendants accepted said cargo according to said contract and their said option to take the same as per bill of lading, and for more than a month after said acceptance did not pretend or object that they were not liable because of any of the matters alleged in the said plea and they have never tendered back such cargo and the plaintiffs deny that they recognize the tender alleged in defendants' plea as made previous to the institution of the action, but insist upon its insufficiency. And for second answer to said second plea the plaintiffs say that the allegations of said plea are false and that the allegations of plaintiffs' declaration are true.

The above pleadings contain all the material issues joined between the parties in this action.

As to the first part urged by and on behalf of the defendants, namely: that the contract was with Thomp-

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son, Murray & Co., who therefore should be the plaintiffs, it is not open to the defendants to urge that contention in the present action, for after a plea of payment into court the defendant cannot nonsuit the plaintiff nor take any objection however valid to the sufficiency of the cause of action to which he has so pleaded. *Wright* v. *Goddard* (1). The plea admits all material allegations in the declaration which the plaintiff might be compelled to prove in order to recover the amount paid in. *Dyer* v. *Ashton* (2); *Cooper* v. *Blick* (3); *Wright* v. *Goddard.*

Then, as to the allegations in the defendants' second plea to the effect that the plaintiffs were aware that their servant, the captain of their vessel, was in the habit of signing bills of lading for cargoes of coal without ascertaining the quantity thereof; and that to the knowledge of the plaintiffs their vessel was not loaded with the cargo in question in the ordinary and regular way, for that the cargo was not weighed at the time it was put on board the vessel; and that the plaintiffs paid for no more than the 755 tons and 580 lbs. delivered to the defendants; and that they knew the cargo, as delivered to the defendants, contained no more; all these allegations impose upon the defendants the burden of proving them and they have failed to do so. The case, therefore is made to rest upon the allegation of difference between the quantity as stated in the bill of lading and that delivered to the defendants, and the alleged usage of the trade in accepting delivery of a cargo as per bill of lading.

Upon this point, the contention of the plaintiffs is that when a purchaser of a cargo accepts, as the defendants did here, delivery of the cargo as per bill of lading, both vendor and purchaser assume the risk of any

(1) 8 A. and E. 144. (2) 1 B. & C. 3.
(3) 2 Q. B. 915.

variance, however great it may be, between the actual quantity delivered and that as stated in the bill of lading, so that in this case, if in truth only 100 tons had been actually delivered, the defendants must nevertheless pay for 810 tons, and if 1200 tons had been delivered, in fact, they should still only have to pay only for the 810 tons; on the contrary, the contention of the defendants is that it is well understood in the trade that in a vessel of the class of the Lake Ontario the difference should not exceed ten tons, and for such a variance it is admitted by the defendants that the vendor and purchaser alike assume the risk. The contention of the plaintiffs, if it should prevail, would establish a condition of things much more favorable to a vendor than to a purchaser, as it is more likely to occur that a cargo on board of a vessel should be less than the capacity of the vessel than that it should be, to any considerable extent, greater than the vessel's capacity; but the plaintiffs contention seems so to shock a sense of justice that no such usage as they contend for ever could, in my judgment, be permitted to prevail in law, and indeed it is not suggested in the evidence that such a usage is supposed to exist, or that, in fact, such a case ever occurred. The evidence seems to me to establish that a clearly proved variance of 55 tons out of a cargo of 810 tons, as alleged here, would be so utterly exceptional and unreasonable that the law could not justify the plaintiff's recovery for 810 tons, if in truth only 755 tons had been delivered; and if the plaintiffs here had had notice given them of the intended weighing by the defendants, on their own scales, of the cargo as delivered so as to enable the plaintiffs to check the weights, and if then it had been established beyond doubt that the alleged deficiency in the cargoes existed, and if the defendants had promptly asserted their claim and ascertained the deficiency so as to enable the

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plaintiffs to assert their claim against their vendors to correct an error which, however it occurred, we must upon the evidence, take to have been an innocent mistake, I cannot doubt that the defendants would have been entitled to redress in this action. It is, however, suggested that although it is admitted that for such a deficiency as is alleged by the defendants if satisfactorily proved to have existed they are still entitled to redress, yet that they are not so entitled as a defence to the present action, and that to obtain redress they must bring an action upon the bill of lading.

I can see no foundation whatever for this positon. In fact the defendants had nothing to say to the bill of lading, in the sense of its having ever belonged to them as their property. They did not acquire their title to the cargo through any transfer to them of the bill of lading. It is not indeed suggested that it was assigned to them. They acquired their title by the contract contained in the bought and sold notes by which they might accept delivery either according to the statement of the qantity in the bill of lading or by weight over the ship's side, and they had no occasion even to look at the bill of lading, unless it might be to see whether the qantity stated in it was the same as was stated in their contract. The bill of lading as an evidence of property discharged its functions when the plaintiffs, who were the consignees and owners of the cargo, received the cargo. To admit that the defendants are entitled to redress and compensation for the alleged deficiency, if they bring their action upon a bill of lading which never was their property, seems to me to be a mockery of their complaint. However, inasmuch as the defendants gave no notice to the plaintiffs of their intended weighing of the coal upon the defendants' own scales, and so the plaintiffs had no opportunity to check the weights, and as the defend-

ants did not make prompt claim upon the plaintiffs for the alleged deficiency, I do not think it would be reasonable to hold the plaintiffs to be bound by the *ex parte* weighing of the defendants, upon the evidence given in the case, or to recognise a claim so tardily made by the defendants.

Appeal dismissed with costs.

Solicitors for appellants: *Beique, McGoun & Emard.*

Solicitors for respondents: *Davidson & Cross.*