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*Mar. 20, 21.
*Dec. 14.

D. C. CAMERON AND W. MOFFATT JR. (PLAINTIFFS) ..... APPELLANTS;

AND

PAXTON, TATE & CO. (DEFENDANTS)..RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR MANITOBA.

Principal and agent—Contract by agent of two firms—Sale of goods for lump sum—Excess of authority.

An agent of two independent and unconnected principals has no authority to bind his principals or either of them by the sale of the goods of both in one lot, when the articles included in such sale are different in kind and are sold for a single lump price not susceptible of a ratable apportionment except by the mere arbitary will of the agent.

There can be no ratification of such a contract unless the parties whom it is sought to bind have, either expressly or impliedly by conduct, with a full knowledge of all the terms of the agreement come to by the agent, assented to the same terms and agreed to be bound by the contract undertaken on their behalf.

APPEAL from a decision of the Court of Queen's Bench, Manitoba, setting aside a verdict for the plaintiffs and ordering a non-suit.

The plaintiffs, Cameron & Moffatt, wishing to equip a saw mill, made a contract with a firm of Muir & Co. for the necessary plant. Muir & Co. were agents for two firms, Doty & Co. manufacturers of engines and engine machinery, and the defendants Paxton, Tate & Co. manufacturers of saw mills and saw mill machinery, under separate and distinct authorities, and a contract was made between the plaintiffs and Muir & Co. to supply, for a lump sum of $6,000 to be paid partly in cash and partly in notes, the power and the saw mill

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

(Mr. Justice Henry heard the argument in this case but died before judgment was delivered.)

and machinery. The agreement was signed by Muir & Co. agents for Doty & Co. and Paxton, Tate & Co. Subsequently Muir & Co. by letters arranged separately with the firm of Doty & Co. for the saw mill and the respondents for the machinery.

The power and machinery were supplied and Muir & Co. having received the stipulated price paid part of it to Doty & Co. for the power and arranged with the defendants as to amount to be paid them, Muir & Co. retaining for themselves the cash payment. The machinery supplied by the defendants was, however, found to be defective, and the defendants endeavored to remedy the defects, but failed to do so to the satisfaction of the plaintiffs, who brought an action for damages sustained by breach of the contract to supply machinery of a stated capacity. A verdict for $2,000 damages was rendered for the plaintiffs which was set aside by the Court of Queen's Bench and a non-suit ordered on the ground that Muir & Co. had exceeded their authority by making the contract on behalf of two principals for a lump sum. The plaintiffs then appealed to the Supreme Court of Canada.

Robinson Q.C. for the appellants.

An agent can act for more than one principal, and as to the law of this case there is no difference between a factor and an agent to procure sales. Story on Agency (1); Wharton on Agency (2); *Corlies* v. *Cumming* (3).

If the defendants had objected to the act of their agent when it first came to their knowledge the plaintiffs would have had difficulty in enforcing their contract, but the defendants ratified the contract by accepting the notes and putting in the machinery and cannot now set up want of authority in the agent.

(1) 9 Ed. ss 38, 179. (2) Sec. 764.
(3) 6 Cowen (N. Y.) 181.

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Moss Q.C. for the respondents. It cannot be said that there was any ratification for the defendants knew nothing of Doty & Co.'s connection with the contract. If the defendants are liable on this contract they would be answerable for a breach by Doty & Co. This shows that Muir & Co. could not bind the defendants by such a contract.

This is an action for breach of warranty which will not lie because the property had not passed to the plaintiffs when the action was begun, the contract providing that it should not pass until paid for. *Frye* v. *Milligan* (1); *Friendly* v. *Canada Transit Co.* (2); *Tomlinson* v. *Morris* (3).

Sir W. J. RITCHIE C.J.—I think the evidence clearly discloses a contract between the plaintiffs and the defendants through their agent, and adopted by the defendants and acted upon by both parties, and for which the defendants received from the plaintiffs large payments. A clear breach by the defendants of such contract was shown, in fact admitted throughout by the defendants without any question being raised as to their obligation to the plaintiffs for its fulfilment, all of which the correspondence between Cameron & Co., and Paxton, Tate & Co, abundantly demonstrates.

I cannot discover that Muir & Co., in acting for the two firms of Doty & Co. and Tate & Co., bound either firm beyond the goods and machinery each was to deliver; in other words the contract with Muir was not intended to make Tate & Co. liable for the performance of Doty & Co.'s undertaking or *vice versâ*; the price each was to receive was entirely independent of the other, and separate payments appear to have been made to each party irrespective of the other and separate notes appear to have been made out and delivered to the two firms respectively.

(1) 10 O. R. 509.
(2) 10 O. R. 756.
(3) 12 O. R. 311.

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The correspondence shows that Tate & Co. were informed that Doty & Co. were to supply the motive power while they were to supply the mill, &c. I think the correspondence cannot be read without being forced to the conclusion that the intention is most clearly shown that there should be, and was, throughout the whole, a direct privity of contract between the plaintiffs and the defendants, and I can find nothing to justify the conclusion that Muir & Co. bought the goods from the plaintiffs and resold them to the defendants; on the contrary, I think the jury were fully justified on the evidence in coming to the conclusion that the contract was made and entered into between the plaintiffs and the defendants through Muir & Co. their duly authorized agents in that behalf.

The defendants fixed the price of the machinery and the evidence very clearly shows that they looked to the plaintiffs for its payment, and not to Muir & Co. their agent. Doty & Co. appear to have performed their contract and were paid, and I can see no good reason why Tate & Co. should not perform theirs.

The only difficulty in my mind has been as to the amount of damages the plaintiffs are entitled to recover for such non-fulfilment on their part of the contract, but the case seems to me to have been very fairly left to the jury, and I can find no sufficient grounds for disturbing their finding.

Under these circumstances I think the appeal should be allowed.

STRONG J.—This is an appeal from a judgment of the Court of Queen's Bench of Manitoba, making absolute a rule for a non-suit in an action brought by the appellants against the respondents in respect of an alleged breach of warranty said to be contained in a contract for the sale of a set of machinery for a saw

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mill. The facts, so far as they are material to the present appeal, may be stated as follows: In February, 1884, the appellants, who, together with a Mr. Caldwell (since dead), were in partnership as lumber manufacturers, had had a quantity of saw logs on the shores of the Lake of the Woods and in the neighborhood of Rat Portage, which they intended to cut up at Rat Portage, for which purpose they proposed to erect a saw mill there. In order to procure the necessary machinery for this mill the appellants applied to Mr. Robert Muir, who carried on business as a machinery agent or broker at Winnipeg, and who was the agent, under separate and independent authorities, of the respondents, who were manufacturers of mill machinery at Port Perry, in Ontario, and also of the John Doty Engine Company, a company engaged in the manufacture of steam engines and steam machinery at Toronto. The authority under which Muir acted for the respondents was in writing and was as follows:

PORT PERRY, ONTARIO, 5th July, 1883.

To ROBERT MUIR, ESQ., Machinery Broker,
P. O. Box 584, Winnipeg, Man.

Dear Sir,—We hereby agree to give you the sole agency for our circular saw mills, shingle machines, turbine water wheels and mill machinery, in Keewatin, Manitoba, and N. W. Territory. You are to sell by price lists used by us upon which we will give you 12 per cent. commission on all the above excepting mill machinery, upon which we pay 5 per cent. commission. Terms of sale to be one-half cash or a reasonable cash payment upon delivery to purchasers, balance on a credit of six months and not over one year with satisfactory security. You are to use your best endeavors to sell on short time, all notes to draw seven per cent. interest per annum. While selling for us you are not to sell for any other firm. Goods as above mentioned, excepting when we cannot fill your orders, in such cases you are at liberty to get from others. You are to use a reasonable diligence in pushing the business and advancing our interest by advertising, &c., &c. We will in all practicable cases direct parties to you to close contracts. We will do all we can to make sales for you and will pay the commission as above specified on all goods ordered, excepting large contracts subject to special commission. You to

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agree to accept drafts for any goods remaining in stock, with the privilege of making return drafts for what goods remain in stock when said drafts mature. Where an order is lost through our not shipping in time agreed upon we will pay you a half commission on said sale.

PAXTON, TATE & CO.

The negotiations with Muir resulted in a contract, entered into on the 8th of February, 1884, for the sale by Muir to the appellants of the machinery for the saw mill and also of the engine and machinery for motive power for working it. This contract is contained in two letters (exhibits 7 and 8) which were taken as proved at the trial and which are in the following words:—

WINNIPEG, 8th Feb., 1884.

ROBERT MUIR & Co.,

Agents for John Doty Engine Co. and Paxton, Tate & Co.

Sir,—Furnish us circular saw mill, saw not included, 240 h. p. boilers, 175 h. p. engine, 1 Stearn's double edger, 1 slab saw, 1 cut off saw, 10 live rolls, 1 bull wheel rig without chain, 1 steam pump, 3 by 5 cylinder, necessary shafting, hangers, boxing and as per your letter of 8th February, or to-day such as made by and deliver the same for us at Winnipeg about the 1st day of April, 1884, for which we agree to pay the sum of six thousand dollars on delivery in payment as follows:—Cash, a satisfactory note for $———, due 188—, with interest at —— per cent. A satisfactory note for $———, due 188—, with interest at —— per cent.

We further agree to furnish satisfactory security if required. We are to have immediate possession and use of the articles, but the property therein is not to pass to us until full payment of the price, and of any obligation given therefor, or for any part thereof. If we make any default or if the property is seized for debt or rent, the whole amount of the notes is at once to become payable, and to bear interest at ten per cent. per annum till paid, and you may resume possession and sell the articles towards paying the unpaid price or balance thereof. This order and your acceptance thereof constitute the whole contract between us, and there is no other agreement between us respecting these articles but what is herein expressed.

CALDWELL & MOFFAT.

EXHIBIT 8.

WINNIPEG, MAN., 8th February, 1884.

Messrs. MOFFATT & CALDWELL, Winnipeg:

Gentlemen,—For the sum of six thousand dollars we will deliver to you f.o.b. in Winnipeg the following machinery, viz.:—One circular

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saw mill to cut logs 30 feet long, saw not included, with all necessary shafting, pulleys and boxing, 1 Stearn's double edger, 1 slab cut off saw with four saws, 10 live rolls 9 by 20 friction bull wheel rig without chain, steam pump, Northey's, with water cylinder 3 by 5, shafting, hanger, boxing and pulleys to drive (two) boilers of 40 h.p. capacity each, one engine of 70 h.p. capacity, 60 feet of suitable smoke stack. This mill to be capable of cutting about 30,000 feet of lumber per day of 12 hours; the whole to be built in a first class workmanlike manner of good material. The chain for jacker is worth $1 to $1.50 per foot, according to weight.

Yours truly,

ROBERT MUIR & CO.,

Agents for John Doty Eng. Co. and Paxton, Tate & Co.

P.S.—The above does not include saw, belting or chain.

Immediately upon the contract being completed, Muir ordered the mill machinery from the respondents and the steam engine and the machinery connected with it from the John Doty Engine Company for separate prices, the orders so given being entirely independent of and unconnected with each other. The respondents' firm, as well as the John Doty Engine Company, accepted the orders respectively addressed to them, and in fulfilment of them manufactured and forwarded the machinery and engine to Muir & Co. at Winnipeg, who sent the same to the appellants' firm at Rat Portage. The price agreed to be paid by Muir & Co. to the Doty Engine Company and to the respondents respectively did not amount in the aggregate to the $6,000, which, as stipulated in the letter of the 8th of February, was the price to be paid by the appellants to Muir & Co. The price of $6,000 which was the amount agreed to be paid by the appellants to Muir & Co. for all the machinery, as well for the engine and machinery for motive power obtained from the John Doty & Co. as for the mill machinery furnished by the respondents, was settled by the appellants by a payment to Muir & Co. of $2,000 in cash and the delivery to them of promissory notes for the residue of $4,000. Some of these notes were handed by Muir & Co. to

the respondents, to whom they were made payable, and the others were delivered to the John Doty Company, but the whole of the $2,000 paid in cash was retained by Muir & Co., and no portion of it was paid over by them either to the respondents or to the Doty Company, nor, so far as the evidence shows, was any distribution of it between the respondents and the John Doty Company made by Muir & Co., even in the way of apportioning it as credits in account. The machinery was erected and the mill got into working order some time in July, 1884, but the appellants very soon after they had begun to saw complained that the mill was of inadequate capacity to cut the quantity of lumber stipulated for, and that it was in other respects not according to the contract. Direct negotiations for remedying the defects in the machinery of the mill were then entered upon between the appellants and the respondents, and the respondents then proposed to furnish new machinery and to enter into a new and supplementary contract for that purpose, but these negotiations never reached the stage of actual contract, and they were wholly broken off after the respondents had sent up to Rat Portage some new and additional machinery with instructions that it was not to be delivered to the appellants until certain payments were made, which payments the appellants refused to make, whereupon this proposed new arrangement came entirely to an end, and the machinery which had been forwarded was retained by the respondents. The appellants soon afterwards, and in August, 1885, commenced this action for a breach of the contract of February, 1884. The declaration as originally framed contained three counts, besides the common counts, to which an additional count was afterward added under a judge's order, but all these counts were for various breaches of the origi-

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nal contract of February, 1884, which the declaration averred to have been made with the respondents. The defendants pleaded a variety of pleas, but it is sufficient for the present purpose to say that the first plea was an express traverse of the allegations in the declaration that the contract set out in the different counts was one which had been entered into with the respondents. At the trial, which took place before the present Chief Justice of Manitoba, a number of witnesses were examined, the evidence being principally directed to the question of the sufficiency of the mill and to the damages. There were, however, four witnesses examined who were able to speak as to the contract and as to the subsequent proposals to furnish new machinery, viz., the appellants Messrs. Cameron and Moffat, Mr. Dryden, one of the respondents, and Mr. Muir, with whom the contract of February, 1884, was actually made, as already mentioned. None of this evidence established the existence, *de facto*, of any contract other than that entered into with Muir at Winnipeg, and which is contained in the two letters bearing the date of the 8th of February, 1884, already set forth. At the trial the defendants' counsel, at the close of the plaintiffs' case, moved for a non-suit upon several grounds, one of them being that there was never any privity of contract between the appellants and the respondents. At page 121 of the printed case we find this objection thus distinctly stated by the counsel for the defendants in these words:

> The contract at most is only a contract of these plaintiffs with Muir & Co., and not a contract with these defendants. If we have made any contract whatever it is a contract with Muir to deliver f. o. b., at Port Perry at certain prices, and Muir's contract was not the same with these plaintiffs, but was a contract to deliver free at Winnipeg, showing that they are not the same contract. We never agreed to deliver at Winnipeg; we agreed to deliver at Port Perry, and therefore there are two contracts, and if we are answerable to any one it is only to Muir.

That would be, in effect, that Muir in this transaction was not acting as our agent, but was acting as a seller himself, to these plaintiffs.

The learned judge refused to non-suit, but reserved leave to the defendants to move in term, and the case proceeded with the result that there was a verdict for the plaintiffs for $2,500. Subsequently the respondents moved the court *in banc* for a non-suit on the leave reserved, or for a new trial, and the court after argument ordered a non-suit to be entered. The learned judge who delivered the judgment of the court, Mr. Justice Killam, expressly rests the decision upon the ground already mentioned as having been taken on the motion for a non-suit at the trial, viz., that there never was any contract such as that sued upon in existence as between the appellants and the respondents. It lies therefore upon the appellants, who now impugn the correctness of this judgment of the Court of Queen's Bench, to show that the specific ground thus taken is erroneous before they can entitle themselves to a reversal, and we must therefore proceed to inquire whether they have succeeded in doing this.

The materials upon which we must determine whether there ever was, either originally or by ratification, a contract between the parties, consist of the evidence of the depositions of the four witnesses already named, and some documentary evidence, comprising the letters of the 8th February, 1884, which contain the original contract with Muir and certain letters referred to in the appellants' *factum* which passed between the appellants and the respondents when they came into direct communication after the mill had been tried and found defective. There cannot be any doubt or question that the written contract contained in the letters signed by the appellants and Muir respectively and dated the 8th of February, 1884, (exhibits 7 and 8) was on its face a

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contract exclusively between Muir as vendor and the appellants as purchasers. Then this contract was one for the sale of the engine and the machinery required for the power and the mill machinery in one lot for one single lump price. But although this written contract on its face purports to be, and according to the only admissible construction of it is, one between the appellants and Muir exclusively, yet according to the principles laid down in the well known case of *Higgins* v. *Senior* (1) it was competent for the appellants to establish by parol evidence that, beyond and in addition to the liability of Muir, the respondents were liable as principals on whose behalf the contract had been entered into. But in order to do this it was, of course, requisite that the appellants should show, not only that Muir intended to bind the respondents, but also that he either had authority to enter into a contract on their behalf, identical in terms with that of the 8th of February, 1884, or that, if such a contract had been originally entered into without authority, it had been subsequently ratified by those whom Muir had assumed to represent and to bind by it. Then neither of these conditions has been fulfilled by the appellants. The terms of the authority which had been conferred on Muir by the respondents are to be found clearly stated and defined in the letter of the 5th July, 1883, (exhibit 9) already set forth, but they contain nothing which empowered him to enter into such a contract as that contained in the letters of the 8th February, 1884, whereby the goods to be furnished by the respondents and those of the John Doty Engine Co., are combined in one lot and agreed to be sold for one single, indivisible price. As regards the John Doty Engine Co., no written authority from them to Muir has been put in evidence, and as regards both the last

(1) 8 M. & W. 834.

mentioned company and the respondents the oral testimony is destitute of anything to show that such authority as Muir must have had, in order that he should have been authorized to bind his principals by the terms of the agreement actually made, was ever conferred upon him by either of his constituents.

Next, as to ratification. In order to bind the parties, in whose name and behalf an unauthorized person has assumed to enter into a contract, by subsequent recognition and adoption it must be shown that either expressly, or impliedly by conduct, the parties whom it is sought to bind have, with a full knowledge of all the terms of the agreement come to by the person who assumed to bind them, assented to the same terms and agreed to abide by and be bound by the contract undertaken on their behalf. But can it be said that the evidence in the present case, either oral or documentary, shows such a ratification? The answer must be that beyond all question it does not. In order to make out a ratification here it would be essential to show that both the respondents and the John Doty Company had assented to the terms of agreement and adopted the contract contained in the letters which had been interchanged by Muir and the appellants, by which as already shown all the machinery described in the letters, as well that to be supplied by the one firm for the motive power, as that to be furnished by the other for the saw mill, were included in one joint sale for one single price and by which each firm further agreed to warrant all the machinery (not only that supplied by itself, but also that to be supplied by the other firm) and its fitness and sufficiency for the purposes specified in the contract. The evidence entirely fails to establish any such joint adoption and it is impossible to point to anything in it indicating that the respondents ever assented to any such terms

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or ratified any such contract. Indeed there is nothing to show that the terms of the contract between Muir and the appellants were ever communicated to or brought to the notice of the respondents or the John Doty Company, so that each firm so far from intending to become joint vendors with the other was, as we must assume, entirely ignorant of the essential fact that Muir had included the goods of both in one contract of sale, and had agreed to such provisions that the effect of a ratification would have involved the unreasonable consequence that each manufacturer would have become a warrantor of the goods of the other.

The case which we have before us for decision may be made even more plain by a simple illustration. The owner of a carriage sends it to a repository for sale and the owner of a horse sends it to the same repository for the same purpose, the two owners having no connection but each acting independently of the other. Further, each owner gives authority to warrant his own property. The commission agent to whom the property is thus entrusted for sale thinks fit, it may be with a view of making a more advantageous sale, to include the horse and carriage in one lot and to sell them together for one price and with a general warranty of both. Could it be said in such a case that, apart from any evidence of custom or usage, the agent had properly executed the authority conferred upon him, and that the owner of the carriage was bound by the warranty of the horse and the owner of the horse by the warranty of the carriage? And would each owner be bound to accept such proportion of the price as the agent might think fit to assign to him? And further, if the owner of the horse were to accept such portion of the price as the agent might choose to pay over to him without informing him how the sale had really been effected, could it be said that he thereby ratified

the unauthorized mode of selling and bound himself not only to make good the warranty of his own horse but that of the other man's carriage as well ? In this plain case every one would say at once that such conclusions would be manifestly unjust and entirely inadmissible. Then in all essential features the case supposed is indistinguishable from that now before us.

The authorities referred to in the appellants' *factum* do not support the proposition for which they were cited, viz., that such a sale as that made in the present case was within the implied powers of the agent, although no express authority to that effect had been conferred. The case of a sale by a factor referred to in the passages quoted from Story on Agency and Wharton on Agency, and which was the subject of decision in the case of *Corlies* v. *Cummings* (1), where it was held that a factor could, where such a mode of dealing was sanctioned by the usage and custom of the market in which he dealt, bind two independent and unconnected principals by the sale of the goods of both in one lot, can manifestly only apply where the goods of both principals are commodities of the same kind, and are sold either at a ratable price, or at a price susceptible of a ratable apportionment, as a quantity of wheat at so much a bushel, or of flour at so much a barrel, or (as was the actual case in *Corlies* v. *Cummings*) of cheese at so much a hundred weight—all cases in which such staple merchandise having been sold in a lot for one fixed price, the factor or agent can easily apportion the price between his principals according to the quantity of goods each may have contributed to the common lot. In such cases the principals are not entirely dependent on the mere arbitrary discretion of the agent for the portion of the price which each is to receive, although they do certainly even in that case trust to the fairness

(1) 6 Cowen (N. Y.) 181.

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and good faith of their agent not to prejudice them by allotting their goods with others of inferior quality; and this last consideration shows that, even as applied to goods such as have been just referred to, this mode of selling can only be admissible, in the absence of express authority, where it is warranted by a recognized and well established mercantile usage. But where the articles included in the sale by the agent are different in kind, as in this case, and as in the case put of the horse and carriage, such a mode of executing the agent's authority cannot possibly be otherwise than *ultra vires*, for the simple reason that there is no principle or rule upon which he can apportion the price between his constituents, so that, if it is distributed, the division must be according to the mere arbitrary will of the agent to which it is not to be inferred that the principals ever intended to submit themselves for such a purpose. Applying these considerations to the facts of the case now in appeal, the inevitable conclusion is that Muir had no authority, either express or implied, to bind the respondents by such a contract as that he entered into with the appellants, and further that nothing was ever done by the respondents which could amount to a ratification of such a contract, even assuming that the evidence shows that it was Muir's intention, so far as he had it in his power to do so, to bind his principals in the terms of his own agreement of the 8th February, 1884, a question, which in the view taken of the other points, it is not worth while to consider. Therefore, save in so far as any new rights and obligations may appear to have been created in the course of the direct negotiations which sprung up between the appellants and the respondents subsequent to the delivery and erection of the machinery, there never was any contract between them such as the appellants have set

forth in their declaration, but the agreement of the 8th February, 1884, was an executory contract of sale by which Muir exclusively agreed to sell to the appellants all the machinery mentioned for $6,000; and it was in order to carry out this agreement with the appellants that Muir subsequently became himself, in his own name and in his own behalf, in separate lots and for separate prices, the purchaser from the respondents and the Doty Company of the two sets of machinery which he had thus agreed to sell to the appellants. Further, this view is confirmed by what was pointed out by the defendants' counsel at the trial, that whilst in the agreement between Muir and the appellants the former is bound to deliver f. o. b. at Winnipeg, the respondents, in their contract with Muir, only undertook to deliver at Port Perry, thus showing, as strongly as anything could, that the two contracts, containing different terms on such an important point as delivery, could not be parts of the same whole, but were, according to the foregoing conclusion, separate and distinct agreements between different parties.

It follows that for any breach of the agreement with the appellants they should have sued Muir, and not the respondents between whom and themselves there was no privity of contract.

Of course if there really had been separate prices for the two sets of machinery, that required for the saw mill and that for the steam power, it might have made no difference that in the written contract with Muir a single lump price was alone named, for in such a case it might have been said that, whilst the written contract with Muir, the agent, comprised all the machinery and bound him accordingly, there was behind this written contract two other distinct and several contracts made by parol through the agency of Muir, but with his two principals, which latter con-

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tracts having been executed by the receipt and acceptance of the goods, thus taking them out of the statutes extending the provisions of the statute of frauds to contracts for the sale of goods not in *esse*, were binding though not in writing. But there is no express evidence of any such distinct parol contract with the respondents, nor are there any facts in evidence which could properly have been left to the consideration of the jury as warranting the implication of a contract of this kind. From first to last there never was any division of the single price of $6,000 in such a way that separate prices could be assigned to the two different sets of machinery to be furnished by the respondents and the Doty Company respectively; and no principle can be suggested on which, as between the appellants and respondents, it can be said that there was a sale or an agreement for a sale of the saw mill machinery by itself for a price which the appellants were to pay. Of the whole price of $6,000 for both sets of machinery $2,000 was paid in cash by the appellants to Muir, and for the difference notes were given. As to the latter portion of the price there certainly was a division and an appropriation of it between the two vendors, but as to the sum paid in cash to Muir no division of it was ever made and no principle has been indicated or even suggested on which it could be divided. I have carefully examined the depositions of the two appellants, of the respondent Dryden, and of Mr. Muir, the only witnesses who were conversant with the facts bearing on this point, and they all fail to give any clue to a solution of the difficulty. The documentary evidence is equally deficient in this respect. Any division of the cash part of the price would, therefore, have been purely arbitrary. Therefore, even if we assume that it was open to the appellants to have established by parol evidence that there was originally a separate con-

tract for the mill machinery between themselves and the respondents, we must hold that they have failed to do so, for the reason that it is essential to a contract of sale, executed or executory, that there should be a price either ascertained or ascertainable to be paid by the vendees and received by the vendors, and in the present case it is apparent that there never was any such price as between the respondents and the appellants, the price paid to the former by Muir for the goods supplied by them having been the amount of the notes which he procured the appellants to make and handed over to the respondents and which did not represent the whole price which the appellants were to pay and did pay to him. Further, it may well be doubted, even if such a parol contract distinct from the written contract with Muir could have been implied from the surrounding circumstances, whether it would have been taken out of the provisions of the act already mentioned, inasmuch as the acceptance and receipt of the goods would have been referable, not to any separate contract with the respondents, but exclusively to the written agreement with Muir, as would have been apparent from the price actually paid. Next, it cannot be said that there was any new contract arising out of the subsequent direct negotiations between the appellants and respondents as to making good the alleged defects in the machinery. The offers and counter offers as to supplying new machinery never ripened into a contract, and there is nothing which I can find, either in the oral evidence or the correspondence, which shows that there was between the parties any binding contract or agreement operating retroactively to convert the original contract of the appellants with Muir into a several contract for an ascertained price or consideration with the respondents. To establish this, everything which is required to make

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out what is termed "novation" would have been essential, and therefore some new consideration would have been indispensable; no such new consideration can, however, be pointed out.

As regards the passages in the correspondence between the parties, in which the respondents refer to a contract between the appellants and themselves and the appellants similarly to a contract with the respondents, it is to be observed that their admissions could not by themselves have been properly left to the jury, for they show nothing more than that the parties had adopted erroneous opinions of their legal obligations and rights, and consequently the letters referred to could not possibly have had the effect of creating liabilities not otherwise existing.

Lastly, I am of opinion that there was no evidence to show that in the course of the negotiations for a settlement the respondents did or said anything to estop themselves from insisting on the defence which they distinctly put forward at the trial and afterwards successfully urged in term, viz., that there never was any privity of contract between them and the appellants; indeed it is hard to see in the present state of the pleadings how such an answer to this defence could possibly have been admissible.

My conclusion is that the non-suit was in all respects right and that this appeal should be dismissed with costs.

FOURNIER J.—I concur in the reasons given by the Chief Justice for allowing the appeal.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed for the reasons given by my brother Strong.

GWYNNE J.—The respondents who are founders and machinists trading under the name of Paxton, Tate &

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Co., in manufacturing saw mill machinery at Port Perry in the Province of Ontario, in reply to an application made to them by Robert Muir, of the firm of, or trading as the firm of Robert Muir & Co., at Winnipeg in the Province of Manitoba, as jobbers and machinery brokers, appointed the said Robert Muir as their agent by a letter dated the 5th July, 1883, which is as follows (1) :—

On the 21st November, 1883, Mr. Muir addressed and mailed to the defendants a letter of that date, which counsel for the defendants admitted to have been received by them, and which as read from Mr. Muir's letter book is as follows :

WINNIPEG, 21st November, 1883.

Messrs. PAXTON, TATE & Co., Port Perry :—

Gents,—I have written you a note in pencil *re* saw mill, I now give you a description of mill so that no mistake will arise. The parties to purchase are connected with the Imperial Bank here, they want a mill that will cut 30,000 feet per day of eleven hours to cut timber 30 feet long. The mill to include one double edger, one slab saw, one butting saw, the necessary shafting, pulleys, hangers, &c., required to drive them, also live rolls to carry the timber from saw as per Stearn's circular, also bull wheel for endless chain. The mill to be complete, excepting the saw, endless chain and belting, a price per foot to be given for chain. The mill would be driven by 80 h. p. boiler, with 65 h. p. engine. In my former letter I asked you to wire me a price for the mill, giving the net price to me f. o. b. I can then add my commission ; if any mistake has arisen you can correct by wire. The mill would require to be first-class. The building is up and the plan could be furnished.

Yours truly,

ROBERT MUIR & CO.

The reply to this letter was not produced, but that there was one appears from a letter of 12th December, 1883, from Paxton, Tate & Co. to Muir & Co., relating to other matters, in which the following passage occurs :

In regard to the saw mill outfit you were writing us about we found on examining Stearn's catalogue you sent us that their live rolls were made of iron and much more expensive than we first included in

(1) See p. 626.

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our tender, hence our second telegram set you right. What is being done about the order?

The contract sued upon was contained in two letters dated the 8th February, 1884, one from Robert Muir & Co., written by Mr. Muir to Messrs. Moffatt & Caldwell and the other from the latter to the former. The original letters were not forthcoming, but secondary evidence was given of them. That written by Mr. Muir taken from his letter-book was as follows (1) :—

The answer to this letter was written upon a printed form of orders, of Muir & Co's., one of which Mr. Muir produced and filled in, with exception of blanks as to payment, as to which he stated that the agreement was that $2000 should be paid in cash and the balance on time in three payments at four, five and six months, but in what sums respectively did not appear. Nothing, however, turns upon this.

The reply as filled in by Mr. Muir was as follows (2) :—

Neither this contract or a copy of it was ever sent to the defendants, but on the 11th and 13th February, 1884, Mr. Muir wrote to them the following letters :—

WINNIPEG, 11th February, 1884.

Messrs. PAXTON, TATE & Co., Port Perry :—

Gents,—Have taken an order for saw mill from Messrs. Caldwell & Moffatt. It is the machinery we wrote you about on November 21. The mill is to be capable of cutting 30,000 feet of lumber per day of eleven hours. The machinery is to include circular mill with carriage to cut logs 40 feet long, without saw, one Stearn's double edger, one slab cut off saw (4 saws), one butting saw, 10 live rolls 9 by 20, and driving gear friction bull wheel, viz., without chain, all necessary shafting, pulleys and boxing. The whole to be built in a first-class workmanlike manner of good material. Will send the length of jack chain in a few days, also size of saws required. This mill is to be an A 1 mill. It will be placed at Rat Portage among mills cutting 100,000 per day, manufactured by Sterns, E. Allis & Co., and we want it to give a good account of itself. Make it heavy. See that the bull wheel is heavy enough; the butting saw, not an emery and garland trimmer, but a common butting saw. Let us

(1) See p. 627. (2) See p. 627.

know the price of butter and we will try and get the difference between it and the trimmer. This would make a much better rig. The edger now here will do for this mill. Arrange every thing in good shape for work. Will send plan of building now up, so that you can work from it. I have contracted for the complete mill delivered at Winnipeg. We have not been able to get a cash payment much larger than to cover freight. We have cash to pay for a steam pump. They will pay cash for saws and chains. The payments are four, five and six months from delivery at Winnipeg. The customers are good. They have a timber limit from the Imperial Bank at a low rate. Doty promised them six months on the power when we first made the offer. Have had to cut down, or lose this contract, to get it. The opposition was strong. We have agreed to deliver here by April 1. You will need to ship by March 1, and on no account later than 15th. The carriage should be made with platform for men to ride on. Let us know the weight of what you will ship and if it will go on one car. Doty furnish the power—80 h. p. boiler, 70 h. p. engine. They will add more machinery. Let us have a description of lath machine on list $100 and weight.

Yours truly,

R. MUIR & CO.

WINNIPEG, 13th February, 1884.

Paxton, TATE & Co., Port Perry:—

Gents,—The dogs for mill ordered were to be lever dogs. Moffatt insisted upon them. Kindly send me a price list of the different items composing this mill—that is net to us, also an estimate of probable weight of shafting, pulleys, boxing, &c., so that we may see how we stand. If we can afford it we will reduce the price of lumber trimmer so that we may get it in and make a complete outfit.

Yours truly,

MUIR & CO.

On the 25th February, 1884, Paxton, Tate & Co. wrote a letter of that date, in reply to the above, addressed to Messrs. Robert Muir & Co., as follows:—

Gents,—Your letters duly came to hand, and we would have replied promptly, but for delay in getting the plan, which only reached us Saturday afternoon. Now are we to follow Mr. Hackett's plans? If he is to do the work we presume we must work the machinery as he has drawn it out. Better telegraph at our expense who the millwright is to be, and his post office address, as we wish to get a few more particulars. We are not quite sure whether we can get all on one car, we are afraid we cannot. We will make the Lane mill, left hand, and be working at bull wheel rig in the meantime. But be sure and let us know the millwright's name and address as soon as it

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is possible to do so. Mr. Doty, jun., has gone up to see about changing the pulleys, &c., so keep us posted about the change if any. We will write you again as soon as we understand the plan better. Herewith find picture of lath mill, weight about 1200 lbs. It is liked much better than a Waterous machine. We can make a lumber trimmer, say with two saws, thus allowing room to shift the board before it reaches the second saw, so that you can adapt it to any length of boards, price, say $150. How would that do in place of an Emery and Garland trimmer? The plan shows 19 or 20 live rolls, but you only call for 10. Train just in, must close.

Yours, &c.,

PAXTON, TATE & CO.

No answer to this letter is produced unless a letter of March 18, 1884, is an answer to it. Muir having upon the 17th March arranged with the plaintiffs to make certain alterations in the contract of the 8th February, namely, to substitute a trimmer for the cut off saw and the slab saw, wrote to Paxton, Tate & Co. the 18th March as follows :—

Gentlemen,—Messrs. Caldwell & Moffatt have decided to leave out both slab and cut off saws, and in place put in an Emery & Garland trimmer to cut 12, 14, 16 feet. They are going to use the trimmer to cut what slabs they need to cut. The saws are to be solid tooth medium in guage, to be 52° and 54°, one of each. The timber is small—have teeth say 3 inches from point to point. They also want us to order the belting. Will you please take the sizes from plan giving us a list of belts and lengths? We can purchase cheaply here, but there may be some sizes that will not be in stock. We have another car leaving Doty's about April 1, and can order any belting we cannot get here. Caldwell & Moffatt have decided not to put in the shingle and lath mill at present. Ship the car *viâ* Grand Trunk R.R. to Chicago, then by Albert Lea route. Bill to us at Rat Portage as we pass customs here and forward. We presume you can put all on one car.

Yours truly,

ROBERT MUIR.

Now Mr. Muir, in his evidence, stated that what he had asked the defendants to forward to him as to quotations was—that they should quote prices of the several articles they should supply free on board at Port Perry and that the order would be filled when put on board there free; he said further that the

defendants did supply him with their prices for the articles supplied by them as asked for, which, as appears by the letter of the 13th February, 1884, was "net" to them, Muir & Co. Mr. Moffatt, one of the plaintiffs, in his evidence stated that the plaintiffs knew nothing about the detailed prices of any of the articles supplied, whether those which were supplied through Doty or through the defendants, that they knew nothing about what portion of the articles to fulfil the contract they made, as contained in the letters of 8th February, 1884, would be supplied by Doty or what by defendants—that they had nothing to say to apportioning the $6,000 they agreed to pay for the whole work between Doty & Co. and the defendants. In short his evidence amounted to this, that they paid Muir & Co. in cash, as they had agreed, $2,000 of the disposition of which the plaintiffs knew nothing and that they signed six notes which Muir had drawn in favor of Paxton, Tate & Co.

The plaintiffs having declared upon a contract alleged to have been made between them and the defendants for the specific articles mentioned in the declaration, which articles as delivered to the plaintiffs they contend are not conformable to the contract, and the contract relied upon being that contained in the letters of the 8th February, 1884, the case seems to be resolved into a simple question of construction of those letters. If they do not contain in them the contract declared upon, that is to say, a contract between the defendants and the plaintiffs for the sale and delivery to the plaintiffs, by the defendants, of the specific articles mentioned in the declaration, the nonsuit ordered by the Supreme Court of Manitoba is correct, and no question of ratification can arise, for if the true construction of the contract as contained in the letters be that it is a single contract between the

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plaintiffs and Muir & Co. for all the work therein specified, and not two separate distinct contracts, the one with Doty & Co. for part, and the other with the defendants for other part, in such case there was nothing for the defendants to ratify; and, moreover, there is no evidence or suggestion that the defendants had any knowledge as to the terms of the actual contract entered into by Muir & Co. with the plaintiffs, until those terms appeared in evidence upon the trial of this cause; so that in either case ratification by the defendants of the contract, as appearing in the letter of the 8th February, appears to be out of the question. What then is the true construction of the contract as appearing in the letters of the 8th February, 1884? That seems to me to be the simple question to be determined. And, in my opinion, the true construction is that the contract entered into by the plaintiffs was one indivisible contract entered into by them with Muir & Co. as principals for goods, which, it is true, the latter contemplated procuring, partly from Doty & Co. and partly from the defendants, but with which the plaintiffs had nothing to do. The plaintiffs knew nothing as to what parts were to be procured from Doty & Co., and what from the defendants, or what should be the prices to be paid to Doty & Co. and to the defendants respectively, for such parts as they should respectively supply. These were matters in which the plaintiffs were in no way concerned nor, in fact, were they concerned whether Muir & Co. should get any part of the articles contracted for, either from Doty & Co. or from the defendants. Then, again, the contract is for a sawmill complete, with all the articles specified, including steam power and steam engine and everything else; now if the steam engine and power should not have been supplied at all there is no obligation upon the plaintiffs to take the remain-

ing articles or *vice versâ*. The plaintiffs were by their contract entitled to have the whole of the things contracted for by them before they could be obliged to pay anything under the contract. Mutuality of obligation under the contract can alone exist by treating the plaintiffs and Muir & Co. as the sole parties to it and as principals. It is incapable of being construed to be a separate contract made by the plaintiffs with the defendants for the sale and delivery, by the latter to the former, of the specific articles mentioned in the declaration, in respect of which the contract provides for no price or terms of payment, and a separate contract entered into by the plaintiffs with Doty & Co. for the sale and delivery, by the latter to the former, of the steam power and engine, &c., &c., as to which neither does the contract specify any price or terms of payment. The last clauses of the document of the 8th February signed by the plaintiffs shews, conclusively I think, that the plaintiffs were entering into and perfectly understood that they were entering into one indivisible contract with Muir & Co. as principals, namely, "this order and your acceptance thereof constitute the whole contract between us and there is no other agreement between us, respecting those articles but what is herein expressed."

Muir & Co. were, as it appears to me, dealing with the defendants in the matter from November, 1883, in such a manner as to enable them to determine whether they should enter into a separate contract for the defendants with the plaintiffs, as to the articles manufactured by the defendants on the agreed terms of agency and commission; and another contract between Doty & Co. and the plaintiffs as to the articles manufactured by Doty & Co., or whether they could purchase from the defendants and Doty & Co. the articles manufactured by them respectively upon such

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terms as would enable them to enter into an independent contract themselves with the plaintiffs which would probably give to them, Muir & Co., a greater profit than their commission upon separate contracts, entered into by them as agents of Doty & Co. and the defendants respectively would give them, and that they finally concluded to enter into such an independent contract themselves as principals. Their letters of the 21st November, 1883, and the 11th and 13th February, 1884, in my opinion support this view. In that of the 11th February, it appears that they and not the defendants determined that the edger of the defendants, then in Winnipeg in the hands of Muir & Co., would fill the contract they had entered into, and it is in the alleged utter insufficiency of this edger to meet their contract that the plaintiffs' chief complaint consists. Then the letter of the 13th February seems to me to be conclusive as to Muir & Co's. intention being that the contract was their own as principals with the plaintiffs. No stress or argument whatever can be laid or founded upon the acts of the defendants done by them to remove the plaintiffs' complaints whether these were well or ill founded, for the defendants had no knowledge then of the precise terms of the contract entered into by Muir & Co., and their reputation as manufacturers was equally at stake, whether they should be liable to the plaintiffs or to Muir & Co. for any defect there might be in goods manufactured by them, and they would naturally desire to remove any just grounds of complaint, to whomsoever they might have been liable. They knew that Muir & Co. had authority to have entered into a contract on their behalf and binding upon them with the plaintiffs, and that they might have entered into a contract upon their, Muir & Co's., own account, supplying themselves from the defendants with articles manufactured by the latter, but the de-

fendants do not then appear to have known which course Muir & Co. had adopted. The defendants' acts, therefore, after the plaintiffs complained of the insufficiency of the articles which Muir & Co. had procured from the defendants, cannot be regarded as in ratification of a contract made by Muir & Co. upon behalf of the defendants and as their agents with the plaintiffs, no such contract having ever been entered into as by the written contract which was entered into by Muir & Co. with the plaintiffs, I think, appears.

The appeal therefore, in my opinion, should be dismissed and the non-suit affirmed with costs.

Appeal dismissed with costs.

Solicitors for appellants: *Aikins, Culver & Hamilton.*

Solicitor for respondents: *J. W. E. Darby.*