CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

RICHMOND WINERIES WESTERN LTD. AND EAKINS PRODUCTS LTD. (PLAINTIFFS) ..... APPELLANTS;

1939

* Feb. 21, 22, 23.
* Nov. 30.

AND

W. R. SIMPSON AND JOHN A. McKINNEY, CARRYING ON BUSINESS UNDER THE FIRM NAME AND STYLE OF RICHMOND WINERIES, AND THE SAID RICHMOND WINERIES (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Sale of goods—Damages—Action for damages for vendors' breach of alleged contract for sale of wine—Evidence and findings as to contract—Statute of Frauds, ss. 4, 17—Measure of damages—Sale of Goods Act, R.S.B.C., 1936, c. 250, s. 56 (2) (3)—Damages based on estimated loss of profits.

The plaintiff's action was for damages for breach by defendants of an alleged contract (which contract was disputed by defendants) to sell to plaintiff 50,000 gallons of wine. The trial judge found that there was a verbal contract made (to the effect claimed) based upon, but varying in some respects, certain written documents; that s. 17 of the *Statute of Frauds* did not apply, as pursuant to the contract there were accepted and actually received three carloads of wine as part of the 50,000 gallons; that s. 4 of the *Statute of Frauds* was not a bar to the action, as, though the parties expected that all deliveries would not be made within one year, yet, as the purchaser (plaintiff) might, if it saw fit, accelerate deliveries, there was a contract which was not incapable of being performed within a year. As to damages, he held that s. 56 (3) of the *Sale of Goods Act*, R.S.B.C., 1936, c. 250, had no application, as there was no available market where plaintiff could have procured wine to fill the contract; that s. 56 (2) contained the rule to be applied, namely, that the measure of damages was the estimated loss directly and

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

naturally resulting, in the ordinary course of events, from the sellers' breach of contract; that plaintiff was entitled to recover the profits which it might have been expected to make on the sale of the wine which defendants did not deliver; on which basis, and accepting as a guide a certain estimate as to profits given in evidence, but also considering elements involved and making allowances, he fixed damages. The Court of Appeal for British Columbia reversed his judgment, holding that the documents and other evidence did not establish or support a contract such as that claimed. Plaintiff appealed.

Held: On the documents and other evidence (and in view of the trial judge's findings on issues of fact involving questions of credibility) there was a contract established for sale of 50,000 gallons of wine as claimed. S. 17 of the *Statute of Frauds* had no application, there having been acceptance and actual receipt by plaintiff of goods under the contract. S. 4 of the *Statute of Frauds* was not a bar to the action, for the reasons (*supra*) given by the trial judge. His judgment on the question of damages (*supra*) for breach was not impeachable on the ground that he erred in the principle he applied or in the manner of his application of it to the particular facts. (As to the canon applicable by an appellate court as to assessment of damages made at trial, *McHugh* v. *Union Bank of Canada,* [1913] A.C. 299, at 309, cited).

APPEAL by the plaintiffs from the judgment of the Court of Appeal for British Columbia which reversed the judgment of McDonald J. in favour of the plaintiffs. The action was for damages for breach of an alleged contract to sell wine to plaintiffs.

The defendants were a partnership who operated a loganberry winery in British Columbia. The plaintiff Richmond Wineries Western Ltd. was a company incorporated in Saskatchewan on May 29, 1936. The plaintiff Eakins Products Ltd. was a company incorporated in British Columbia on June 17, 1931, and was controlled by H. G. Eakins.

Eakins proposed to incorporate a company in Saskatchewan (later incorporated as Richmond Wineries Western Ltd. aforesaid) to sell loganberry wine to the Liquor Control Board of Saskatchewan.

On April 22, 1936, the following agreement was made:

Vanc'r. Apr. 22/36.

Richmond Wineries
Steveston, B.C.
Gentlemen

We herewith confirm our arrangement with you whereby we are to purchase up to 50,000 gallons of your Loganberry wine, naked, Sales tax, gallonage Tax extra with cooperage at our cost: Wine to be a minimum

of two years, strength 28 degrees proof, at 55c. per Imperial gallon, payment to be made within thirty days of each shipment. Firm orders or shipping instructions are to be in your hands by July 1st, 1936. Sale to be f.o.b. your winery in Richmond District.

Yours truly,

Eakins Products Ltd.

H. G. Eakins.

Accepted
Richmond Wineries
Per W. R. Simpson.

Subsequently the plaintiff Richmond Wineries Western Ltd. was incorporated on May 29, 1936. Subsequently the following letter was written (and acceptance stated thereon):

Ste. 5, 410 Seymour St.,
Vancouver, B.C.
June 19th, 1936.

The Richmond Wineries,
Steveston, B.C.
Dear Sirs:—

Re:—Richmond Wineries Western Limited.

We beg to advise you that we have arranged to assign the contract dated the 22nd of April 1936 between ourselves and yourselves with respect to the purchase of 50,000 gallons of your loganberry wine to the Richmond Wineries Western Limited of Prince Albert, Saskatchewan. Will you please acknowledge receipt of this letter.

Yours truly,

Eakins Products Limited
Per: "H. G. Eakins."

Notice of Assignment Accepted:
Richmond Wineries
Per "W. R. Simpson"

On June 29, 1936, Eakins Products Ltd. assigned the agreement of April 22, 1936, to Richmond Wineries Western Ltd. No notice of this assignment was given to defendants, but the assignment was in accordance with the original intention and understanding of all parties and Simpson testified that after said letter of June 19, 1936, he dealt with Richmond Wineries Western Ltd. on the assumption that the agreement had been assigned to that company.

It was alleged that a certain telegram of June 30, 1936 (a copy of which was tendered at the trial but excluded) and confirming letter of July 2, 1936, were sent by Richmond Wineries Western Ltd. to the defendant Simpson. Simpson denied receiving these. There was admitted in evidence a certain telegram of June 30, 1936, from Richmond Wineries Western Ltd. to S. H. Gilmour, solicitor

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

for said company, which Gilmour stated was read by him to Simpson over the telephone on June 30, 1936, as follows:

> Register Company Victoria Stop have wired Simpson shipping instructions one car July 12th Balance contract three thousand gallons monthly till further notice stop assure yourself this notification received as vital part of contract.

About July 10, 1936, Simpson went to Prince Albert, and there were conferences there. According to Eakins, it was verbally agreed that defendants were to supply blended wine instead of the quality originally specified and that the terms of payment be altered. It was also alleged that a further agreement was made as follows: It was expected that the 50,000 gallons referred to in the April agreement (aforesaid) would supply the anticipated requirements of Richmond Wineries Western Ltd. for two years and Simpson agreed to supply it with 25,000 gallons a year for a three-year period to commence in 1938; in order to assist Simpson to finance his berry purchases to meet this added demand, Richmond Wineries Western Ltd. advanced him $5,000 against future deliveries of the wine under the additional three-year contract. Plaintiffs abandoned at the trial the enforcement of any claim arising out of this alleged additional contract.

Defendants shipped a carload of wine on July 17, 1936. In August, 1936, another carload was ordered and sent; this was paid for at the rate of 60 cents a gallon, following a letter from defendants of August 20, 1936, claiming an additional 5 cents a gallon because of the extra cost of the blended wine. In October, 1936, a further carload was ordered and delivered. On November 18, 1936, defendants sold their loganberry wine business to Growers' Wine Company Ltd. (made a Third Party in this action). A further order for shipment of wine not being complied with, the present action was brought for damages for breach of contract.

The facts of the case are more fully stated in the judgment of the Chief Justice of this Court, now reported.

The trial judge took the view that the document of April 22, 1936, constituted an offer by defendants to sell a quantity of wine not to exceed 50,000 gallons; that offer was open for acceptance until July 1, 1936; the communication through Gilmour of June 30, 1936, purporting to accept that offer, not being in the terms of the offer in

that it contained the words "till further notice," did not serve to constitute a completed contract. But he found that there was a contract concluded at Prince Albert during Simpson's visit there, by which contract the plaintiff Richmond Wineries Western Ltd. was to buy and defendants were to sell 50,000 gallons of blended wine at 60 cents a gallon, and save as to this the contract was to buy and sell in accordance with the contents of said document of April 22, 1936, and the said telegram of June 30, 1936, read by Gilmour to Simpson. He held that, as pursuant to that contract Richmond Wineries Western Ltd. accepted and actually received three carloads of wine as a part of the 50,000 gallons, s. 17 of the *Statute of Frauds* did not apply; also that s. 4 of the *Statute of Frauds* was not a bar to the action on the facts with regard to the contract as he had found them; although the parties did expect that all deliveries would not be made within one year, nevertheless, in view of the fact that Richmond Wineries Western Ltd. might, if it saw fit, accelerate deliveries, there was a contract which was not incapable of being performed within a year (citing *Quance* v. *Brown* (1)). As to damages (the difficulties in estimating which he emphasized) he held that s. 56 (3) of the *Sale of Goods Act,* R.S.B.C., 1936, c. 250, had no application, as there was no available market where plaintiff could have procured wine to fill the contract; that the rule to be applied was contained in s. 56 (2) of that Act; that the measure of damages was the estimated loss directly and naturally resulting, in the ordinary course of events, from the sellers' breach of contract; that plaintiffs were entitled to recover the profits which the court considered they might have been expected to make on the sale of the 41,360 gallons which defendants failed to deliver. On the evidence, including evidence as to estimate of profits, and considering elements involved and allowing for possible losses in business, he estimated the net profit at 65 cents per gallon and fixed the damages on this basis at $26,884. (The defendants' claim against the third party for indemnity was left to be proceeded with).

The Court of Appeal held that the agreement of April 22, 1936, as varied in Prince Albert, was in essence an

(1) (1926) 58 Ont. L.R. 573.

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

option agreement, and until an order or orders were given the buyer remained free from obligation (and there being no mutuality of obligation, there was no contract); that the telephonic order given by Gilmour to Simpson on June 30, 1936, could not be construed as an order for the entire 50,000 gallons or as constituting a binding contract for delivery of more than one carload of wine; that the orders in August and October were likewise separate orders creating separate contracts which were duly executed by delivery; that whether these orders be regarded as given and accepted under an extension of the agreement of April 22, 1936, or it be considered that the option expired on June 30 for failure of the buyer to comply with its terms, and each subsequent order be looked upon as an offer by Richmond Wineries Western Ltd. incorporating, by reference, the terms of the expired option and accepted by Simpson on that basis, was of no moment because the result was the same; these transactions were completed and closed and the orders for limited and specified quantities of wine could not be regarded as firm orders for the entire 50,000 gallons; that the failure to deliver wine pursuant to the order of February 1, 1937 (the order given by Richmond Wineries Western Ltd. after the sale by defendants to Growers' Wine Co. Ltd.) did not amount to a breach of contract; in the first place, there was not a binding contract for the delivery of the wine until the order was accepted and in this instance it was not accepted; on the other hand, if the option agreement, as extended by the forbearance of Simpson to insist upon its exact terms, be considered as binding defendants to deliver upon orders to be given from time to time until 50,000 gallons had been delivered, there was nothing in the agreement of April, 1936, compelling defendants to remain in business, and on the facts of this case the court could not imply any such stipulation in the said agreement; defendants were, therefore, on February 1, 1937, precluded by the sale of their business from making any further deliveries; that there was nothing in the evidence to support the finding that a contract was concluded at the said conferences at Prince Albert as found by the trial judge.

The plaintiffs appealed to the Supreme Court of Canada.

J. W. deB. Farris K.C. for the appellants.

Martin Griffin K.C. and *C. H. Locke K.C.* for the respondents.

The judgment of the Chief Justice and Davis, Kerwin and Hudson JJ. was delivered by

THE CHIEF JUSTICE.—This appeal turns (in respect of one of the two grounds upon which I base my decision) upon one or two fundamental questions of fact in respect of which the evidence is partly documentary, partly oral. The learned trial judge has found these issues of fact (involving as they do questions of credibility) in favour of the appellants. The Court of Appeal appears to have thought that there was no evidence to support these findings. I am not in agreement with the view of the Court of Appeal. It is necessary, therefore, to review the facts and refer to the evidence in some detail.

In the spring of 1936, the respondents W. R. Simpson and John A. McKinney, under the trade name of the Richmond Wineries, were the owners of a loganberry winery in British Columbia and had on hand a large quantity of matured loganberry wine. H. G. Eakins owned and controlled a personal company, the Eakins Products Limited. Eakins was, until July, 1936, a considerable shareholder in the Growers' Wine Company and had endeavoured to induce that company to enter the business of manufacturing loganberry wine in Saskatchewan but without success. He then decided to form a company for that purpose, but first of all, since it takes considerable time to mature loganberry wine, it was necessary to secure a supply of matured wine in order to provide a stock in trade while engaged for the first year or two in establishing his business; and for this reason he arranged to purchase wine from Simpson. The following memorandum was signed:

Vancouver, Apr. 22/36

Richmond Wineries
Steveston, B.C.
Gentlemen

We herewith confirm our arrangement with you whereby we are to purchase up to 50,000 gallons of your Loganberry wine, naked, Sales tax, gallonage Tax extra with cooperage at our cost: Wine to be a minimum of two years, strength 28 degrees proof, at 55c per Imperial

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

Duff C.J.

gallon, payment to be made within thirty days of each shipment. Firm orders or shipping instructions are to be in your hands by July 1st, 1936. Sale to be f.o.b. your winery in Richmond District.

Yours truly,

Eakins Products Ltd.

H. G. Eakins.

Accepted

Richmond Wineries

Per W. R. Simpson

Simpson was well aware of Eakins' plan and that his intention was to transfer the agreement of the 22nd of April to the new Company. In May, Simpson wrote to Eakins saying he had no objection to the use of the name Richmond Wineries of Saskatchewan for the new company and offered to act as a director if desired. The Richmond Wineries Western, Ltd., was incorporated on the 29th of May in Saskatchewan and, on the same day, licensed to carry on business for the year ending the 31st of December, 1936. It was registered as an extra-provincial company in British Columbia on the 14th of July, 1936. On the 19th of June the Eakins Products Limited wrote to the Richmond Wineries the following letter:

Ste. 5, 410 Seymour St.,
Vancouver, B.C.
June 19th, 1936.

The Richmond Wineries,
Steveston, B.C.

Dear Sirs:

Re: Richmond Wineries Western Limited

We beg to advise you that we have arranged to assign the contract dated the 22nd of April 1936 between ourselves and yourselves with respect to the purchase of 50,000 gallons of your loganberry wine to the Richmond Wineries Western Limited of Prince Albert, Saskatchewan. Will you please acknowledge receipt of this letter.

Yours truly,

Eakins Products Limited

Per: "H. G. Eakins."

Notice of Assignment Accepted:
Richmond Wineries
Per "W. R. Simpson."

On the 29th of June, 1936, a formal assignment of the contract of the 22nd of April, 1936, to the Richmond Wineries Western, Ltd., of Prince Albert, was executed by the Eakins Products Limited, in consideration of an agreement on the part of the Company to issue to Eakins 6,000 fully paid up shares of the new company. On the 30th

of June, the solicitor for the company, S. H. Gilmour of Vancouver, received from the Richmond Wineries Western, Ltd., at Prince Albert, the following telegram:

Register Company Victoria Stop Have wired Simpson shipping instructions one car July 12th Balance contract three thousand gallons monthly till further notice Stop Assure yourself this notification received as vital part of contract.

And on the same day Mr. Gilmour, acting on behalf of the Company, communicated the contents of the telegram to Simpson, reading the document to him. On the 2nd of July, 1936, Richmond Wineries Western, Ltd., sent to the Richmond Wineries at Steveston a letter confirming a telegram to Simpson of the 30th of June in the following words:

July 2, 1936.

Richmond Wineries
Steveston, B.C.

Attention of Mr. W. R. Simpson

Dear Mr. Simpson:

We are confirming herewith our telegram to you of June 30th:

> "Ship one carload wine per contract on or about July 12th consigned to Liquor Commission Prince Albert notify Richmond Wineries Western Limited stop We prefer the blended type stop Ship balance contract at rate of three thousand gallons monthly till further notice stop Are you coming out. Answer."

I had been expected to hear from you that you were on your way here as I particularly wanted you to meet the crowd down here and so much more can be done on the spot. Please let me know if you can possibly come out before Logan season starts.

We are enclosing herewith waiver for you to sign and return as a Director. You were issued one share to qualify as a Director at the preliminary meeting which will be forwarded to you by the next mail or as soon as signed by the President, Mr. Sanderson. Furthermore, we believe, Mr. Eakins has transferred to you One Thousand Dollars paid up stock which will also go through concurrently.

All formalities in connection with the launching of the new company were implemented this week and legal registration is now being effected in Victoria, the stocks are allotted and the funds transferred and we are ready for business. Hence our telegram to you.

We do hope to do a rousing business in time and are naturally concerned as to the first shipment. In as much as the public here apparently prefer the blended to the straight Logan, I think we had better start off with this character of wine and leave that end of it to you.

Please wire or write anything any time.

Yours truly,

Richmond Wineries Western Ltd.

The learned trial judge thought (and herein the Court of Appeal agreed with him) that the document of the

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

Duff C.J.

22nd of April was an offer which was to be accepted not later than the 1st of July and held that the communication made by Gilmour on the 30th of June was not an acceptance of this offer, not conforming, as he thought, to the terms of the offer.

Hereafter, I shall refer to the appellants as the Wineries Western and Eakins respectively, and to the respondents as the respondents.

It is unnecessary to consider whether the document of the 22nd of April, signed by both parties, could properly be considered as merely an offer by the respondent to Eakins. In form it is an agreement by which Eakins and the respondents agree that the former shall buy and the latter shall sell the respondents' loganberry wine "naked" up to 50,000 gallons on the terms stated; but the quantity is to be determined by firm order or shipping instructions given by Eakins by the 1st of July. A firm order or shipping instructions given pursuant to this term of the agreement will give rise to a binding contract to buy and sell the quantity thereby named. I shall deal later with the position of the Wineries Western.

The next point is the effect of the communication made by Mr. Gilmour to Simpson. Simpson denies that he received this communication. He begins by taking refuge in a mere *non mi ricordo* but adds that the matter was so important that he would have remembered the communication if he had received it; but he implicitly denies the receipt of it, when he declares that he visited Prince Albert because, not having received any order or shipping instructions, he wanted to ascertain the position there. The trial judge and the Court of Appeal have both found that he did receive this communication and I have no doubt that he received also the letter of the 2nd of July which, admittedly, was sent.

What is the meaning of the communication? Mr. Gilmour says that he read the telegram to Simpson. The purport of the telegram seems to me to be clear enough. "Contract" in the phrase "balance of contract" can, I think, mean nothing but the quantity mentioned in the contract, 50,000 gallons; and the telegram, I think, is a notice that the balance of the 50,000 gallons is to be delivered at the rate of 3,000 gallons a month until this rate of delivery is altered by further notice. Strictly,

"until further notice" relates to the rate of delivery and, I think, that is the natural reading of this telegram which professes to be a firm order or shipping instructions within the meaning of the document of the 22nd of April. That seems to me to be the natural construction and I can perceive no adequate ground for reading it in such a manner as to make it senseless and inoperative for the purposes for which it was intended.

I am satisfied that the learned trial judge was right in inferring from all the facts that in effect the parties did by their conduct and their expressions declare to one another at Prince Albert that this was the footing upon which they were dealing; and that pursuant to this understanding the shipments of July, August and October were received and paid for.

There is a feature of the dealings that was not much discussed on the argument which I regard as of great importance. Mr. Gilmour says that when he communicated the contents of the telegram from Prince Albert to Simpson, Simpson asked, "Does he say anything about the money?" That this is true I have no doubt. The evidence of Simpson's partner McKinney is very clear on the point. Before Simpson's departure for Prince Albert, they, McKinney says, discussed the contract of April 22nd and they discussed the question of securing payment for shipments to be made under the contract; and McKinney's evidence shews that, as he understood it, this matter of security was the principal object of Simpson's visit to Prince Albert. Simpson pretends that it was only after his visit there that the idea of security occurred to him. And he swears that he had no discussion on the subject with his partner. I can see no reason for not accepting the evidence of Mr. Gilmour and McKinney on that point in preference to the evidence of Simpson. Mr. McKinney's testimony is illuminating and I quote it:

218. Q. You don't think so. Did you have any discussion with Mr. Simpson before he went to Prince Albert with reference to an order which had been placed for wine? A. Just on that 50,000 gallons.

219. Q. Just on the 50,000 gallons. A. Yes.

220. Q. Now what discussion did you have about that? A. Well, we figured we had to increase our output for that year if we were going to carry on a business of that capacity.

221. Q. Did you know that an order has been placed for wine? A. Yes.

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

Duff C.J.

222. Q. Before Mr. Simpson went to Prince Albert? A. Yes.

223. Q. And how many gallons was that that had been placed at that time? A. That was the 50,000.

224. Q. All the 50,000? A. Just the 50,000.

* * *

230. Q. And that was the reason Mr. Simpson went to Prince Albert, wasn't it, to see how you could get paid? A. Yes.

* * *

232. Q. Yes, and you had discussed that with Mr. Simpson? A. Yes. We wanted to get security on our wine.

* * *

237. Q. And I show you the invoice dated July 17th, 1936, of 55 barrels of loganberry wine, 2,869 gallons. That was what was— A. That was the first.

238. Q. And then this matter had been discussed between you and Mr. Simpson before he went up there on the question of delivering that first order, is that right? A. Delivering the first order and getting security on that wine, that is what we figured on.

* * *

252. Q. Yes, that is, the contract was to be assigned to this company which was incorporated and called the Richmond Wineries Western Limited. You knew that. Isn't that so? A. Yes.

Simpson, of course, says that the $5,000 received in July from the Wineries Western was merely a loan to enable him to finance his pack for that year. But even his evidence, when read as a whole, shews that his real purpose in getting the advance was to get security for payment of shipments to be made under the existing contract.

The arrangement as to the alteration of the terms of payment, that each instalment might be paid for at any time before the shipment of the next, which, Simpson implies, was correlative with and dependent upon Eakins' agreement to make the advance, strengthens the significance of this last-mentioned agreement and Simpson's conduct in relation to it.

Eakins, no doubt, believed that Simpson was contracting to supply an additional 75,000 gallons of wine after the 50,000 gallons they had contracted for had been exhausted. Simpson denies not only that there was any such arrangement, but even that the subject was discussed; I have no doubt he did so orally contract. The arrangement, I have no doubt, was as Eakins says that " after the exhaustion of our existing contract " the respondents were to supply to Wineries Western wine at the rate of 25,000 gallons annually and that the $5,000 which was to be paid to Simpson, and was paid to Simpson, was to be an annual deposit

to assist Simpson in financing the manufacture of wine to be matured for the purpose of carrying out that engagement. The whole arrangement was on the footing that there was an existing contract for the supply of 50,000 gallons of wine under the document of the 22nd of April which had become a binding contract by the communications of June 30th. I have no doubt either that Eakins is stating a fact in saying that Simpson mentioned a possible sale of his business to the Growers Company, and he having expressed apprehension of the effect of such a sale upon this "existing" contract between the Wineries Western and the respondents, Simpson assured him that that contract would not be prejudiced. In passing, it is worth while noticing that the contract of sale to the Growers Company by the respondents is made subject to a claim on the part of Eakins under certain letters annexed to the contract and while in this series of letters the document of the 22nd of April is disclosed, there is no reference to the Gilmour telegram or the Gilmour communication or to the letter of the 2nd of July.

Simpson, of course, fully realized the importance of Gilmour's communication. He says himself it was so big a thing that he was hardly likely not to remember it. Although he hesitates to admit it he meant by that, of course, that in the absence of such a communication there would be no binding contract. He must have known at the same time the importance attached to Gilmour's communication by Eakins. The telegram to Gilmour which Gilmour read to Simpson would make this clear.

Simpson must have known when he went to Prince Albert on July 10th that Eakins considered he had a binding contract, and, as I have said, he proceeded immediately to transact business with him on that footing. Eakins' first question to Simpson when he stepped from the train at Prince Albert was, "Have you shipped the car?" This, of course, could only refer to the shipment of 3,000 gallons on July 12th specified in Gilmour's telegram, and the telegram and letter to Simpson, and Simpson's answer was, "No, not yet." He added, producing a sample of blended wine:

> I am going to ship you four-year-old wine as incorporated in this sample rather than the two-year-old wine specified in our contract. This is the class of wine that I propose to send you under our contract.

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

Duff C.J.

Then the shipments and the correspondence relating to them show that the shipments were made pursuant to the communications of June 30th. Simpson, in order to explain his first shipment, says it was ordered at Prince Albert. Eakins says no such order was given there; and I have no doubt that the only order for that shipment was the order contained in the previous communication.

It is significant that the shipment was made the day after Simpson acknowledged receipt of the cheque for $5,000 which he had stipulated for at Prince Albert as a term of the contract with the object of protecting him respecting payments to be made under the contract; although, as appears, he did not disclose this purpose to Eakins.

Reading the correspondence, one sees very plainly that the parties are not dealing with individual, independent orders. Simpson's own letter of the 20th of August referring not to past, but to future, shipments explicitly acknowledges the existence of the contract—"I will ship as per contract." At all events, I find it impossible to escape the conclusion that Simpson was fully aware that in the transactions at Prince Albert and in the subsequent shipments Eakins was dealing with him on the footing of a concluded contract in the terms of the communication of June 30th; and that Simpson himself was actually dealing with Eakins on that footing, or was deliberately leading Eakins to believe that he, Simpson, was dealing with him on that footing.

But it is not necessary to attempt to fathom the mind of Simpson; he is bound by the interpretation reasonably ascribed to his words and conduct by Eakins and acted upon by him. As regards the assignment to the Wineries Western, it may be questionable whether the assignment of June 29th before there was a concluded contract could (even assuming a sufficient notice) take effect as a legal assignment of the contract as ultimately concluded. That is of no importance because it is plain from the oral evidence as well as from the letters that the parties dealt with one another and that the wine was shipped on the footing of a contract of sale in which the Wineries Western were the purchasers. Eakins, the proprietor of the Eakins company, was not only aware of, but was a party to all

the transactions and wrote the letters addressed to Simpson. The invoices were all addressed to the Wineries Western. In this aspect of the controversy, the letter of the 19th of June, and Simpson's examination of the minutes, and his reading of the formal assignment in the minutes, are relevant circumstances as well as the admission by all parties that from the beginning it was understood that as soon as Wineries Western was incorporated they were to be substituted for Eakins as purchasers. It must, of course, not be overlooked that the communications of the 30th of June were all addressed to Simpson by the Wineries Western. Simpson says that after the 19th of June he dealt with Wineries Western on the assumption that they had an assignment of the contract.

Since the Eakins company, as well as the Wineries Western, are plaintiffs, non-compliance with the statutory formalities in respect of the assignment of legal choses in action under British Columbia legislation cannot affect the appellants' right to recover.

On the view of the facts above explained, it is not, of course, of cardinal importance whether the communications of the 30th of June were in strict conformity with the term that there were to be firm orders or shipping instructions by the 1st of July. Assuming there was an absence of strict conformity, an acceptance of the terms of those communications by conduct is clearly established. I agree with the trial judge that the proper inference from all the facts is that by words and conduct a contract was concluded between the parties of purchase and sale on the footing of the document of the 22nd of April and the communications of the 30th of June,—blended wine being substituted for "naked" wine, the terms of payment being altered, as already explained, and the price increased (by the letters of August 20th and September 2nd) to sixty cents.

I also agree with the learned trial judge that the seventeenth section of the *Statute of Frauds* has no application. There was acceptance and actual receipt by Wineries Western of goods under the contract. I also agree with him and for his reasons that the fourth section of the Statute is not an answer.

1939

RICHMOND WINERIES WESTERN LTD. ET AL. v. SIMPSON ET AL.

Duff C.J.

The question of damages remains. We have had an able and useful argument upon it. The learned judge had a difficult task but he recognized the difficulty and there is no ground for thinking that he did not apply his mind to the various considerations substantially involved; and I do not think his judgment is impeachable on the ground that he erred in the principle he applied; namely, that the appellants are entitled to reparation for the loss of the profits they might reasonably expect if the contract was performed. The application of the principle to the particular facts was by no means easy; but he came to the conclusion that the estimate of Mr. Young might be regarded as a safe basis and he accepted and acted upon it as a guide, although he did not slavishly follow it. The sale by the respondents to the rivals of the appellants at a high profit is a circumstance not to be overlooked.

Lord Moulton's judgment in *McHugh* v. *Union Bank of Canada* (1) supplies, I think, the canon by which we ought to govern ourselves in this case:

> The tribunal which has the duty of making such assessment, whether it be judge or jury, has often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous they should not be interfered with on appeal, inasmuch as the Courts of Appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to quantum of damage from the evidence that they give. Their Lordships cannot see anything to justify them in coming to the conclusion that Beck J's assessment of the damages is erroneous, and they are therefore of opinion that it ought not to have been disturbed on appeal.

The appeal should be allowed and the judgment of the trial judge restored with costs throughout.

CROCKET J.—My Lord the Chief Justice in his reasons, I think, clearly shews that there was ample evidence to support the learned trial judge's finding that there was a contract concluded between the parties at Prince Albert for the purchase and sale of 50,000 gallons of blended Loganberry wine at the increased price of 60 cents a gallon, to be shipped as per the terms of the telegram of June 30th, 1936, and the letter of April 22nd, 1936, this evidence consisting, not only of written communications and verbal conversations between the parties, but of their acts and conduct with reference to the matter in controversy.

(1) [1913] A.C. 299, at 309.

I agree with the view of the learned trial judge also that the contract as concluded between the parties was one which was not incapable of being performed within a year and that s. 4 of the *Statute of Frauds* accordingly does not bar an action upon it, and also that the acceptance and actual receipt by the plaintiff of three carloads of wine, as part of the 50,000 gallons contracted for, takes the case out of s. 17 of the same statute.

As to damages, I can see no reasons which would justify this court in interfering with the assessment the trial judge has made.

For these reasons I agree that the appeal should be allowed and the judgment of the learned trial judge restored with costs throughout.

Appeal allowed with costs.

Solicitor for the appellants: *S. H. Gilmour.*

Solicitor for the respondents: *R. W. Ellis.*