USAGE OR CUSTOM IN THE CONFLICT OF LAWS

Nature of the enquiry. The subject is one scarcely touched upon by text-writers, though of great interest and importance; and what follows is a tentative classification and survey of the Canadian cases, and a step toward indicating some of the principles that may be drawn therefrom.

Let us first suggest the nature of the problems that arise. When two persons make a contract in one country to be wholly or in part performed in another it is apt to result that performance is affected by a local usage in one or the other country, by a usage of the particular industry or trade, or by some general or universal custom. The usage is not expressly mentioned in the contract by way of exclusion or inclusion, and one party is found to have relied on it, and the other not to have known of it or to have relied on another usage.

If the custom is a general custom, known and observed throughout the world, or known and observed throughout a whole department of trade, then persons contracting in such a manner that without expressly excluding such a custom they would be deemed to be contracting with reference to it, will be bound by it. In the process of interpreting the contract the court will definitely ascertain that there is this custom conditioning the contract, and will then assume that the parties contracted with reference to it. That comparatively clear issue is not the issue with which this inquiry will chiefly deal.

The enquiry is suggested rather by this example, out of many: Ontario apple dealers, through their New York brokers, offered "two cars of prime wood evaporated apples delivered New York", where a sale was completed. Nothing was said as to the number of boxes making up a car. The Ontario dealers shipped one car of 500 boxes. It was refused by the buyers in New York because under New York usage a car meant 600 boxes. It was held that the New York usage governed.[1] Obviously, the court was called upon to interpret the contract by ascertaining what reasonably must have been the intention of the parties. As the contract was silent about how many boxes made up a car, there was an *impasse* unless a means could be found to a decision between the parties. Something in a degree extrinsic to the contract proper had to be found to throw light upon the intent of the parties. A contract either explains itself, or it must be explained in the light of circumstances.

[1] *Aspegren & Co.* v. *Polly & White* (1909), 13 O.W.R. 442.

The "circumstances" were found in a usage. The court's problem was to discover which or what usage was to be held binding on both parties; and to do so on intelligible principles. These principles are illustrated in the following paragraphs.

Parol evidence. A custom, whether general or local, may be proved by parol evidence. It is unwritten law. Even foreign written law is proved in the first instance by the testimony of witnesses who say what the law is.[2] Before a court can decide whether in fact there is a custom, whether it is applicable, and what effect can be given to it as touching the construction of a contract and the intention of the parties, proof must be made of its existence and its nature.[3] Parol evidence is not admissible to vary, control, or contradict a written agreement; but it is admitted to explain the language of the contract according to the known usage of trade,[4] though not to introduce into the contract anything repugnant to the written instrument—anything, *i.e.*, which, if expressed in it, would make it insensible or inconsistent.[5]

Competent witnesses. Any witness who is acquainted with the fact is a competent witness. Thus a man who formerly was a merchant and stockbroker in Brussels, and was now a hotel-keeper in London, was permitted to prove the mercantile usage in Belgium as to the presentment of a promissory note payable at a particular place.[6] But the evidence of a Toronto manufacturer as to a usage in Quebec was insufficient.[7]

Strict proof requisite. The usage alleged must be clearly proved. As the custom is not set out in a legal document and its intendment is nowhere established, it is for the judge finally

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[2] JOHNSON, CONFLICT OF LAWS (Montreal, 1933) Vol. I, 19-22.

[3] FOOTE, PRIVATE INTERNATIONAL LAW, (1925), 570; ADDISON, CONTRACTS, *vo.* Usage of Trade, parol evidence. TAYLOR, EVIDENCE (1931), II, 743-6, 748-50, 762-64. *Laflamme* v. *Dandurand* (1904), Q.R. 26 S.C. 499: an allegation of a custom or usage of trade will not be struck out on demurrer. *The Trent Valley Woollen Mfg. Co.* v. *Oelrichs & Co.* (1894), 23 S.C.R. 682 at p. 691, reversing 20 Ont. A.R. 673; *Pitblado* v. *Rosenthal* (1909), Q.R. 37 S.C. 443; *Joyal* v. *Beaucage* (1920), Q.R. 59 S.C. 211; *Mostyn* v. *Fabrigas* (1774), Cowp. 174. And see, *infra*, Evidence of usage, when admissible.

[4] *The Provincial Insurance Co.* v. *Connolly* (1879), 5 S.C.R. 258, at p. 269; *Schollfield* v. *Leblond* (1821), 2. R. de L. 77, 2 R.J.R.Q. 156; *Chapman* v. *Larin* (1879), 4 S.C.R. at p. 354; *O'Keefe* v. *Desjardins* (1886), 30 L.C.J. 280; *John Morrow Screw and Nut Co.* v. *Hankin* (1918), 58 S.C.R. 74; *The Trent Valley Woollen Mfg. Co.* v. *Oelrichs & Co., supra.*

[5] *Palgrave* v. *S.S. "Turid"*, [1922] 1 A.C. 397; *Humphrey* v. *Dale* (1857), 7 E. & B. 266. FALCONBRIDGE, BANKING AND BILLS OF EXCHANGE (1935), 8.

[6] *Vander Donckt* v. *Thellusson* (1849), 8 C.B. 812, 19 L.J.C.P. 12. TAYLOR, EVIDENCE (1931), I. 51, II. 908.

[7] *McGillivray* v. *Parker* (1883), 6 L.N. 308.

to search out and interpret it according to his conviction.[8] The evidence must be clear, cogent and irresistible.[9] A usage is "public" when it has acquired such notoriety in the business or amongst the class of persons affected by it, that any person in that business or amongst that class, who enters into a contract affected by the usage, must be presumed to have intended that the usage should form part of the contract.[10]

A general understanding or custom cannot be extended beyond what the evidence clearly shows to be the limits of its sphere, and beyond what cogent evidence shows to have been the originating principle giving rise thereto.[11]

Where there is no usage on the point in doubt, or the usage invoked is not sufficiently general to be accepted or is contradictory, the issue must be decided in favour of the debtor.[12]

The decisions cited in support of this paragraph, some of them in conflict cases and some in domestic, are apposite; they illustrate the principle that the rules of evidence guiding the court are those of the *lex fori*.

Evidence of usage, when admissible. When the meaning of the parties in a contract is doubtful, their common intention must be determined by interpretation rather than by adherence

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[8] MASSÉ, DROIT COMMERCIAL, I. No. 83, at 71-2. But as to general customs, see FALCONBRIDGE, BANKING AND BILLS OF EXCHANGE (1935), 6, 8, and the authorities there cited.

[9] *Kirchner* v. *Venus* (1859), 12 Moo. P.C. 361; *The Trent Valley Woollen Mfg. Co.* v. *Oelrichs & Co.* (1894), 23 S.C.R. 682, reversing 20 Ont. A.R. 673. And see the discussion of the evidence as being contradictory or otherwise insufficient, in *Aspegren & Co.* v. *Polly & White* (1909), 13 O.W.R. 442 at p. 452; *Williams* v. *Corbey* (1880), 5 O.A.R. 626; *Sanitary Packing Co.* v. *Nicholson & Bain* (1916), 33 W.L.R. 594; *The "Freiya"* v. *The "R.S."* (1922), 65 D.L.R. 218, 21 Can. Ex. 232, [1922] 1 W.W.R. 409, reversing 59 D.L.R. 330, 21 Can. Ex. 87, 30 B.C.R. 109; *Denis Advertising Signs* v. *Martel Stewart Co.* (1914), Q.R. 47 S.C. 266; *Parsons* v. *Hart* (1900), 30 S.C.R. 473; *Banque Nationale* v. *Merchants Bank of Canada* (1891), M.L.R. 7 S.C. 336, 35 L.C.J. 295; *Mannheim Ins. Co.* v. *Atlantic & Lake Superior Ry. Co.* (1900), Q.R. 11 K.B. 200, 15 S.C. 469; 10 C.E.D. (Ont.), 540; *Greenberg* v. *Plotnick* (1927), 34 R. de J. 404; *Joyal* v. *Beaucage* (1920), Q.R. 59 S.C. 211 at p. 225; *Rochon* v. *Bennette* (1922), Q.R. 60 S.C. 537; *Marsh* v. *Leggatt* (1898), Q.R. 8 K.B. 221 at p. 232, 29 S.C.R. 739; *Provincial Ins. Co.* v. *Connolly* (1879), 5 S.C.R. 258 at p. 271; *Lemieux* v. *Seminary of St. Sulpice* (1912), 18 R.L.n.s. 434 at p. 442; *Bouchard* v. *Desruisseaux* (1933), Q.R. 72 S.C. 3; *Mile End Milling Co.* v. *Peterborough Creal Co.*, [1924] 4 D.L.R. 716; *Duclos* v. *Paradis* (1909), 16 R. de J. 49.

[10] *The "Freiya"* v. *The "R.S."* (1922), 65 D.L.R. 218, 21 Can. Ex. 232, [1922] 1 W.W.R. 409, reversing 59 D.L.R. 330, 21 Can. Ex. 87, 30 B.C.R. 109; *Parsons* v. *Hart* (1900), 30 S.C.R. 473 at p. 480. *Mannheim Ins. Co.* v. *Atlantic & Lake Superior Ry. Co.* (1900), Q.R. 11 K.B. 200, 15 S.C. 469. *Macdougall* v. *Demers* (1886), M.L.R. 2 Q.B. 170 at p. 199: local custom of brokers to close out options on transactions on a foreign market. *Roberts* v. *Tartar* (1908), 13 B.C.R. 474: dismissal of masters of coasting vessels.

[11] *The "Freiya"* v. *The "R.S."* (1922), 65 D.L.R. 218 at p. 224.

[12] MASSÉ, DROIT COMMERCIAL, I. No. 604; DEMOLOMBE, XXV, No. 18; LAURENT, XVI, Nos. 505-508.

to the literal meaning of the words of the contract.[13] When the meaning is doubtful, certain extrinsic evidence is admissible to clarify the intention of the parties.[14]

As one instance of that rule, whatever is doubtful, must be determined according to the usage of the country where the contract is made; and customary clauses (*i.e.*, customary under the law of such country) must be supplied in contracts, although they be not expressed.[15] Deeds are construed according to the laws of the country where they were passed, unless there is some law to the contrary, or the parties have agreed otherwise, or by the nature of the deed or from other circumstances, it appears that the intention of the parties was to be governed by the law of another place; in any of which cases, effect is given to such law, or such intention expressed or presumed.[16] Contracts produce obligations; and the obligation of a contract extends not only to what is expressed in it, but also to all the consequences which by equity, usage or law, are incident to the contract, according to its nature.[17] The introduction of proof of a usage

[13] Art. 1013 C.C.

[14] Thus, to show that in the trade or business the contract is not complete until a certain usage or custom is complied with: *Fried Mendelson & Co.* v. *MacKenzie, Ltd.* (1921), 20 O.W.N. 484; *cf. Rownson Drew & Clydesdale* v. *Imperial Steel & Wire Co.* (1918), 15 O.W.N. 453, confirming 14 O.W.N. 298. And see 2 C.E.D. (Ont.), 892, n. 45. *Bellavance* v. *Black Lake Lumber Mfg. Co.* (1929), 35 R.L.n.s. 368: measurement of wood; where the contract is silent as to the manner of measurement, usage must be relied on.

[15] Arts. 1016, 1017 C.C. But the court cannot, under pretext of the silence of the contract, presume a tacit customary clause contrary to positive law; and must not consult usage and equity except in the absence of written law: LAROMBIÈRE, art. 1135, n. 3; 16 LAURENT, n. 182; LYON-CAEN-RENAULT, n. 51; MASSÉ, DROIT COMMERCIAL (1874), I. no. 83, 111, no. 1441. *Smardon* v. *Lefebvre* (1884), M.L.R. 1 S.C. 387, 8 L.N. 330; custom or usage cannot prevail against a formal provision of law. *Rochon* v. *Bennette* (1922), Q.R. 60 S.C. 537: recourse to usage only in cases not covered by written law; and to override law the usage must be general and well established. And where the custom sought to be proved is contrary to common law, it will be rejected: *Cowie* v. *Apps* (1873), 22 U.C.C.P. 589. No usage can prevail if it be directly opposed to positive law, whether by statute or decision. To give effect to usage which involves a defiance of positive law would be to subvert fundamental principle: *Goodwin* v. *Roberts* (1875), L.R. 10 Ex. 337, cited in *"The "Freiya"* v. *The "R.S."*, *supra*, where it was sought to show that by local custom, salvage was not due for assistance to a fishing vessel, notwithstanding the salvage section of the Canada Shipping Act (R.S.C. 1906, c. 113, s. 759). But where the language of an instrument is ambiguous or obscure, the intention of the parties should be ascertained by consideration, of the circumstances attending the execution of the agreement: *Deserres* v. *Brault* (1906), 37 S.C.R. 613. *Mile End Milling Co.* v. *Peterborough Cereal Co.*, Supreme Court of Canada, [1924] 4 D.L.R. 716: a buyer of flour could not establish a right of rejection because the vendors had refused to reduce price, based on an alleged custom of trade that the contract price should be reduced to the market price at the time of delivery, as this would involve a variation of the terms of a written contract. Art. 1234 C.C.

[16] Art. 8 C.C.

[17] Arts. 1022, 1024 C.C.

or custom, is an aid to and part of the process of interpretation of the intention of the parties as of the construction of the contract.

Usage of the locus contractus. It will be for the court charged with the interpretation of the contract to decide whether proof of a foreign usage is necessary or admissible.[18]

If the contract is vague and leaves the court in doubt as to the clear intention of the parties, the general rule is that a custom *valid* by the law of the country where the contract was made, may, if alleged and proved, be used to elucidate what is doubtful and ambiguous.[19] So explicit is the intention of the rule, that even if a custom were proved, the court would ignore it if the contract taken by itself is reasonably[20] clear and unambiguous. To hold otherwise, would be to permit the alleged custom to vary or contradict the contract, not to assist in its interpretation because of its ambiguity.[21] Thus, where D bought F's entire

[18] In *Joyal* v. *Beaucage* (1920), Q.R. 59 S.C. 211, Bruneau J. laid down that in default of proof to the contrary, parties are presumed to have adopted the usage of the place where they contracted in all matters relating to the form of the contract, its *mode of proof*, and its fundamental conditions. But in that case the court was that of the place where the contract was made. The mode of proof, it is submitted, is not that of the place where the contract was made, but that dictated by the *lex fori*.

[19] As between merchants a trade sale, in the absence of an agreement to the contrary, is deemed to be subject to the custom of trade; and that custom if proved will be relied on to clarify what is doubtful in the contract: *Duclos* v. *Paradis* (1909), 16 R. de J. 43; *Joyal* v. *Beaucage* (1920), Q.R. 59 S.C. 211; ADDISON, CONTRACTS, 10th ed., 65. And proof of custom may be made not only when the terms of the contract are ambiguous, but also when the intention of the parties is not clear in the circumstances of the transaction: *Prior* v. *Atkinson* (1901), Q.R. 19 S.C. 210. Where the parties have not settled the salary of the mandatory, the salary depends upon the usage of the place where the transaction took place or upon the equitable determination of the judge: *Wright* v. *The King*, 22 D.L.R. 269, 15 Can. Ex. 203.

[20] As Paulus puts it: "The ambiguous clause must be interpreted either according to what is most reasonable or according to what is most commonly done."

[21] *Parsons* v. *Hart* (1900), 30 S.C.R. 473, per Sedgewick J.; "But, even supposing there was a custom, the terms of the bills of lading being inconsistent with and repugnant to the custom, they must prevail against the custom." So where grain was shipped from Toledo to Kingston under a bill of lading which became exhausted upon delivery of the grain at Kingston to forwarders who were to carry the grain to Montreal and who did not receive the original bill of lading, an alleged custom of trade to the effect, that such forwarders are subject to the original bill of lading, cannot be admitted to alter the established significance of that document or to alter the legal relations of the parties, or to make liability depend upon a contract to which the forwarder was not a party: *St. Lawrence & Chicago Forwarding Co.* v. *Molson's Bank* (1884), M.L.R. 1 Q.B. 75. *Cf. Paterson S.S. Co. Ltd.* v. *Continental Grain Co.*, [1935] 3 D.L.R. 371. And see *Deguire* v. *Bell* (1907), 13 R.L. n.s. 439 at p. 445: bill of lading exhausted. The same general principle was enunciated by Strong C.J. in *The Trent Valley Woolen Manufacturing Company* v. *Oelrichs & Co.* (1894), 23 S.C.R. 682, reversing 20 Ont. A.R. 673. *Jasmin* v. *Vinegost & Tafferi* (1928), 34 R.L.

cut of lumber of some million and a half feet, to be manufactured between May and November at Quebec, and to be shipped by boat and delivered on the wharf at Montreal, an alleged mercantile usage of the port of Montreal (which in any event did not exist at Quebec) could not be introduced to show that F was not to ship until he had instructions. The fact that D would be cutting the lumber in such a large quantity from May to November, and that as the season advanced boats would become scarce and the river eventually freeze, and the precise instruction as to the place of delivery, made out a contract so clear that in the absence of a formal stipulation to the contrary, F was intended to ship as he cut: otherwise he would be left at the mercy of D.[22]

Presumption in favour of the locus contractus. There is a presumption that the usage of the place where the contract was made is intended.[23]

Thus a contract executed at Montreal in April, required a Toronto manufacturer to supply straw hats to a Montreal merchant for the coming spring. On June 12, the hats not having arrived, the Montreal dealer wrote repudiating the contract, as it was getting too late in the season at Montreal for straw hats, and he sued for loss of profits. It was pleaded *inter alia* that the contract fixed no precise date for delivery. The action was maintained, the custom being proved—"considering it is proven that the year 1919 was a special year in the sale of straw hats, and that if plaintiff had accepted the hats in question subsequently to the cancellation of the order, it would have still made a profit on the sale though not as considerable as if the hats had been delivered at the end of May or commencement of June".[24]

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n.s. 321; *Sanitary Packing Co. Ltd.* v. *Nicholson & Bain* (1916), 33 W.L.R. at p. 599; *The Provincial Ins. Co.* v. *Connolly* (1879), 5 S.C.R. 258 at p. 269; *Melady* v. *Michaud* (1907), Q.R. 17 K.B. 25, reversing Q.R. 31 S.C. 1: if the contract is not ambiguous, oral evidence is inadmissible. *Melady* v. *Jenkins* (1909), 13 O.W.R. 439 at p. 441: "This complete contract is governed and is to be interpreted by its own terms." And see *Lemieux* v. *Seminaire de St. Sulpice* (1912), 18 R.L. n.s. 434 at p. 442: "usage cannot so change the intrinsic character of the contract. *Mollet* v. *Robinson* (1875), L.R. 7 H.L. 802." The mode of performance may be controlled by a custom of trade, regulating what is extrinsic, if the contract does not otherwise provide; but custom cannot change the intrinsic character of the contract, nor overrule what the parties have clearly agreed to: *Northern Elevator Co.* v. *Lake Huron & Manitoba Milling Co.* (1907), 13 O.L.R. 349.

[22] *Dufresne* v. *Fee* (1904), 35 S.C.R. 274.

[23] Arts. 1016, 1017 C.C.; Art. 8 C.C. STORY, CONFLICT OF LAWS, (ed. 1883), No. 272.

[24] *Normandin, Turcotte, Ltée.* v. *Robert Crean, Ltd.* (1921), 27 R.L. n.s. 245. *Cf. Marsh* v. *Leggatt* (1898), Q.R. 8 K.B. 221, confirmed 29 S.C.R.

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Ontario apple dealers, through their New York brokers, offered "two cars prime wood evaporated apples delivered New York", where a sale was completed. One car containing 500 boxes was shipped, but was refused by the buyers *inter alia* because under New York usage a car meant 600 boxes. It was held that the New York usage governed the contract.[25]

Usage of the locus contractus not imperative. The general rule above stated is not imperative, in the sense that the usage, if any, to be applied, must invariably be that of the place where the contract is made. While article 1016 C.C. refers us to the usage of the country where the contract is made for the determination of what is doubtful, article 8 C.C. must receive its due effect, according to circumstances. The intention may be expressly stipulated; it may appear only from all the surrounding circumstances. The intention of the parties, however it appear, must govern. The court must by construction and interpretation discover and enforce the intention.[26]

When, as often happens, the contract is made or concluded in the place where it is to take effect or be performed, the usage that may be applied will be the usage of that place; for such is manifestly the intention of the parties. But where a contract is made in one place to be completed in another, the intention may be that the usage of the latter shall govern. Where a contract was made in Montreal for hats "for the coming spring" in Montreal, to be supplied by a Toronto manufacturer, a

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739: custom for spring delivery not proved; but a custom of trade by which orders were to be filled according to dates of reception, "a real custom of trade", was held proved and binding—boot and shoe trade. And see also *Laurin* v. *Ginn* (1908), Q.R. 18 K.B. 116, reversing *Ginn* v. *Laurin* (1907), Q.R. 32 S.C. 521; *The Trent Valley Woollen Manufacturing Company* v. *Oelrichs & Co.* (1894), 23 S.C.R. 682, reversing 20 Ont. A.R. 673; Sale on Sample, Sale on Approval, *infra*. *Joyal* v. *Beaucage* (1920), Q.R. 59 S.C. 211; *The Columbus Fish and Game Club* v. *The W. C. Edwards Co.* (1907), 13 R.L. n.s. 566: computation of time. *Sanitary Packing Co., Ltd.* v. *Nicholson & Bain* (1916), 33 W.L.R. 594 at p. 599 (Man.): the contract was an Ontario contract, and no usage adopted by the trade in Winnipeg would be admissible to explain, vary or contradict its terms.

[25] *Aspegren & Co.* v. *Polly & White* (1909), 13 O.W.R. 442. And see *Columbia Flouring Mills Co.* v. *Bettingen* (1910), 14 W.L.R. 669 (Alta.): sale of wheat, contract completed in B.C., rules of Winnipeg Grain Exchange not binding. *Melady* v. *Jenkins* (1909), 13 O.W.R. 439: different standards of weighing; place where contract made, place of execution; at p. 440: "This is a Canadian contract, and *prima facie*, I should say, the parties contracted as to the Canadian standard of measurement being applied to the Canadian (Manitoba) product (oats) shipped from the Canadian port. The silence of the contract as to the method of measurement may be made intelligible by evidence of usage or custom or other evidence not contradictory of what is expressed therein."

[26] STORY, CONFLICT OF LAWS, no. 272 BENJAMIN, SALE, (1931), 434. *Duclos* v. *Paradis* (1909), 16 R. de J. 43 at p. 46.

delivery late in June was too late, the usage governing the contract being that of the place where the contract was made.[27] But had the contract been made in Toronto, could it reasonably be said that the usage intended was that of Toronto rather than that of Montreal—of the market for which the hats were intended?[28] And orders given to a Canadian broker who had no seat on the New York Exchange, to sell or buy shares exclusively negotiated on that Exchange, must be taken to have been given subject to the rules thereof; so that shares handed to him for sale which were pledged in the course of the transactions, became security for the whole of the New York broker's account in accordance with the usage of that Exchange.[29]

Usage unreasonable, unjust, reprehensible. A custom must be reasonable, or at least not unreasonable. No one who is ignorant of an alleged usage can be bound by it if it appeared unreasonable; he can only be assumed to have acquiesced in a reasonable usage.[30] The fact that an alleged custom would be "most

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[27] *Normandin, Turcotte, Ltée.* v. *Robert Crean, Ltd.* (1921), 27 R.L. n.s. 245. Thus, *Paterson S.S. Ltd.* v. *Continental Grain Co.*, [1935] 3 D.L.R. 371, where the Supreme Court of Canada held that where a contract was made and freight paid in Duluth for carriage of wheat from there to Montreal, delivery must be made according to the bill of lading and the custom in Montreal which requires delivery into Montreal elevators; effect of custom and the "arrived ship". Art. 2429 C.C.

[28] *Cf. Joyal* v. *Beaucage* (1920), Q.R. 59 S.C. 211, where the place of the contract and of execution coincided; as also in *The Trent Valley Woollen Manufacturing Company* v. *Oelrichs & Co.* (1894), 23 S.C.R. 682, reversing 20 Ont. A.R. 673; and *Laurin* v. *Ginn* (1908), Q.R. 18 K.B. 116, reversing *Ginn* v. *Laurin* (1907), Q.R. 32 S.C. 521, where a sale on sample was to be completed by acceptance.

[29] *In re Belleau & Co.* (1930), 12 C.B.R. 1, [1931] S.C.R. 102 (*sub. nom. Grondin* v. *Lefaivre & Belleau*), affirming 11 C.B.R. 383. And see Vol. II, 344, Brokerage transactions. 10 C.E.D. (Ont.), 316. See Contracts, brokerage transactions. *Macdougall* v. *Demers* (1886), M.L.R. 2 Q.B. 170 at p. 199: alleged custom of Montreal brokers to close out options whether long or short on transactions on Chicago market; much to their advantage, but not necessarily warranted by law. *La Compagnie Champoux* v. *The Brompton Pulp & Paper Co.* (1910), Q.R. 38 S.C. 261: measuring pulp wood as shaken down after rail haul rather than at point of loading, in absence of stipulation as to place of measurement. *Duclos* v. *Paradis* (1909), 16 R. de J. 43: sale of hides in one place for delivery in another, right of buyer to inspect in his tannery.

And damages for loss of profit or upon a resale, will follow the general rules: *Normandin, Turcotte, Ltée.* v. *Robert Crean, Ltd.* (1921), 27 R.L. n.s. 245; *Melady* v. *Michaud* (1907), Q.R. 17 K.B. 25, reversing 31 S.C. 1; *The Trent Valley Woollen Manufacturing Company* v. *Oelrichs & Co.* (1894), 23 S.C.R. 682, reversing 20 Ont. A.R. 673; *Aspegren & Co.* v. *Polly & White* (1909), 13 O.W.R. 442; *Sanitary Packing Co.* v. *Nicholson & Bain* (1916), 33 W.L.R. 594; *Joyal* v. *Beaucage* (1920), Q.R. 59 S.C. 211; *Columbia Flouring Mills Co.* v. *Bettingen* (1910), 14 W.L.R. 669 (Alta.); *Dufresne* v. *Fee* (1904), 35 S.C.R. 274; *Marchand* v. *Gibeau* (1892), Q.R. 1 S.C. 266; *Mathys* v. *Ehrenbach* (1907), Q.R. 33 S.C. 19; *Chapman* v. *Larin* (1879), 4 S.C.R. 349 at p. 359; *Atlantic Fruit Co.* v. *Oke* (1919), 16 O.W.N. 121.

[30] *The "Freiya"* v. *The "R.S."*, *supra*; *Sanitary Packing Co.* v. *Nicholson & Bain* (1916), 33 W.L.R. 594; SMITH, MERCANTILE LAW, (1931), 336.

unjust", leads to the conclusion that it was no custom at all, or at all events a custom not binding upon the world.[31] And a court should refuse to accept reprehensible facts as setting up a custom.[32]

But, as we shall see in the next section, a person may (it is there suggested) be bound by a foreign usage of which he is in fact ignorant, when he must be deemed to have contracted with reference to it. If the alleged custom is valid, in the sense that it is reasonable, by the foreign law, it should not be an answer that it is unreasonable by the *lex fori*. Similarly, the foreign usage may be viewed as just by the foreign law, and as "most unjust" by the *lex fori;* but if the person objecting has contracted with reference to the usage, it is not unreasonable that he should be held bound by it. If it is based on reprehensible facts, again it is necessary to view the facts in the light of the proper law; subject to the stringency of the public policy of the *lex fori*. For our general principle, as already noted, is that a custom valid by the law of the country where the contract is made (and, more broadly, by the proper law), may, if alleged and proved, elucidate what is doubtful and ambiguous. If the alleged custom is invalid by the proper law, as being there unreasonable, unjust or reprehensible, it will not be enforced, though valid by the *lex fori*.

Ignorance of an alleged custom. Ignorance of an alleged custom, as we have just seen, may be of prime importance in a given conflict case. But it will depend upon how the question arises.

It has been perhaps too loosely laid down that a buyer in Canada, buying by means of correspondence, is not deemed to be familiar with nor bound by the foreign custom, nor to submit himself to a foreign law.[33] There, the transaction involved a

Implications of "reasonable" or "unreasonable": *Johnson* v. *Clark*, [1908] 1 Ch. 303; *Paterson S.S. Co.* v. *Continental Grain Co.*, [1935] 3 D.L.R. 371 at p. 376.

[31] *Parsons* v. *Hart* (1900), 30 S.C.R. 473 at p. 481.

[32] *Denis Advertising Signs* v. *Martel Stewart* (1894), Q.R. 47 S.C. 266; *Greenberg* v. *Plotnick* (1927), 34 R. de J. 404.

[33] As was held in *Laurin* v. *Ginn* (1908), Q.R. 18 K.B. 116, reversing *Ginn* v. *Laurin* (1907), Q.R. 32 S.C. 521.

The "Freiya" v. *The "R.S."*, *supra:* a person who is ignorant of an alleged usage cannot be bound by it if it appears unreasonable. But there the custom of voluntary salvage was, if at all, binding only on persons engaged in fishing, and could not apply to persons who limited their business and avocation to canning and buying fish. *Sanitary Packing Co.* v. *Nicholson & Bain* (1916), 33 W.L.R. 594: there was no evidence to affect the plaintiff with any knowledge of or assent to the alleged usage. But there was nothing to show that the alleged usage was intended to apply to the contract.

sale on approval, goods being sent from England to a prospective buyer in Quebec who held the goods for a period longer than was permitted by an alleged English custom, but not longer than permitted by custom in Quebec. The sale, if one took place, would be completed by acceptance here; the English custom was not brought to the buyer's attention; and he was entitled to assume that his responsibility would be governed by our law. The reverse position of the English vendor illustrates the principle that a party to a contract, not necessarily by correspondence, may be bound by a foreign custom of which he is in fact ignorant: for the effect of the decision was that the English vendor was bound by the Quebec custom.

It would seem more logical, then, to say that a person is not bound by a custom of which he is ignorant, when he clearly has not, and cannot be deemed to have contracted with reference to it;[34] and, reversely, that a person may be bound by a custom of which he may in fact be ignorant, when he clearly must be deemed to have contracted with reference to it.

Thus an Ontario firm, through New York brokers, bought on sample certain wool "laid down in New York", upon a contract made there. Delivery in New York "laid down" was delivery to the buyer. The New York vendor insisted on inspection and payment there in accordance with the usage of the place. The buyer insisted that by Ontario usage the wool must be shipped to Ontario for inspection, and refused payment. It was held that the vendor was not bound by an alleged Ontario usage (which was in fact not established) unless he could be shewn to have been cognizant of it and to have contracted with

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The usages of Lloyds, being those of a particular institution, not binding on persons unacquainted with them: SMITH, MERCANTILE LAW (1931), 434. *Banque Nationale* v. *Merchants Bank of Canada* (1891), M.L.R. 7 S.C. 336, 14 L.N. 347, 35 L.C.J. 295: clearing house rules, return of unaccepted cheque; a mere temporary rule not usually followed by the banks belonging to the clearing house association could not derogate from the ordinary rule of law as to the return of n.s.f. cheques. *Canadian Rock Products Ltd.* v. *Can. Nat. Ry. Co. & Eisele, King & Nugent*, S.C. 125566, February 7, 1935, Cousineau J., unreported, in Appeal: by-laws of the New York Stock Exchange as to lost and stolen securities not part of the law of New York state, and not binding in Quebec. Judgment reversed in Appeal, No. 80, 1935.

[34] And see *supra* the discussion of a "public" usage, and a "reasonable" usage; a usage may have acquired such notoriety that a person must be presumed to have contracted with reference to it. *Dominion Fish & Fruit Co.* v. *Great North Western Telegraph Co.* (1915), Q.R. 47 S.C. 225 at p. 228: comment on failure of defendant to prove that a stipulation of immunity for loss on failure to deliver message, contained in the original contract on the cable despatched from England, was the constant and current usage of commerce or known to the addressee in Canada; Q.R. 25 K.B. 230; 20 R. de J. 417.

reference to it.[35] So that the Ontario buyer was held bound by a New York usage with reference to which he was deemed to have contracted; though he may well have been ignorant of it since he stood an expensive action to defend his contention.

In the circumstances, though he were in fact ignorant of the New York custom, he would be bound by it.[36]

> A person who deals in a particular market must be taken to deal according to the known general and uniform custom or usage of that market, and he who employs another to act for him at a particular place or market must be taken as intending that the business to be done will be done according to the usage and custom of that place or market, whether the principal in fact knew of the usage or custom or not.[37]
>
> It may also be laid down as clear law that if a man deals in a particular market, he will be taken to act according to the custom of that market, and if he directs another to make a contract at a particular place, he will be presumed to intend that the contract should be made according to the usage of that place.[38]

Cases of the kind just discussed may be distinguished from the case where an agent abroad is acting under special instructions which by their nature exclude the operation of a custom or course of dealing contrary to their tenor, of which the principal is ignorant.

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[35] *The Trent Valley Woollen Manufacturing Company* v. *Oelrichs & Co.* (1894), 23 S.C.R. 682, reversing 20 Ont. A.R. 673; and English decisions there referred to, including *Kirchner* v. *Venus*, 12 Moo. P.C. 361, "being as it is binding upon us as a conclusive authority." And see *Parsons* v. *Hart* (1900), 30 S.C.R. 473; *Torrance* v. *Hayes* (1852), 2 U.C.C.P. 338; *Sanitary Packing Co.* v. *Nicholson & Bain* (1916), 33 W.L.R. 594; 10 C.E.D. (Ont.), 541 n. (q), for Ontario decisions; *Aspegren & Co.* v. *Polly & White* (1909), 13 O.W.R. 442 at p. 448.

[36] Assuming that it was not unreasonable, reprehensible, unjust, or illegal on principles already indicated. But the general principle is the fundamental one, in the interpretation of rights, that where the intention was to be governed by a certain law, the effect of the contract or transaction should be interpreted in the light of that law: DICEY, 44, 663 *et seq.* And see Contracts, interpretation; Brokerage transactions; Wills. The same principle is exemplified, *e.g.*, in the case of Marriage Covenants, JOHNSON, Vol. I, 356-367, 449. *Lloyd* v. *Guibert* (1865), L.R. 1 Q.B. 115-122: "The lawful usages of a market are as much a part of a contract entered into there, as if they were set down at large. The general law itself is in many points of view only an extended usage."

[37] BENJAMIN, ON SALE, (1931), *Vo.* Usage.

[38] TAYLOR, LAW OF EVIDENCE (1931), I. 165. BOWSTEAD, AGENCY, *Vo.* Usage; *Graves* v. *Legg*, 26 L.J. Ex. 316; *Robinson* v. *Mollett*, L.R. 7 H.L. 802, cited and relied on in *Aspegren & Co.* v. *Polly & White* (1909), 13 O.W.R. 442 at p. 448; *Scott* v. *Godfrey*, [1901] 2 K.B. 726 at pp. 734-5. SMITH, MERCANTILE LAW (1931), 336: "A custom may bind persons who are ignorant of it, if it is so general and notorious that persons dealing in the particular market must be presumed to know of it . . . . Where an agent is employed, he is implicitly authorized to deal in accordance with the usage of the market or trade, and the principal will be bound by such usage, even if he was ignorant of it, unless the usage was unreasonable."

Thus a policy of reinsurance was sent by a reinsurer in Ontario to its agent in New Brunswick, for delivery to the assuring company. It was manifest on the face of the policy that it was not intended to be a binding instrument until payment of the premium, and that it was sent to the agent to be delivered only against payment. Loss by fire occurred before its delivery, and delivery was stopped by instructions from the reinsurer. As between the respective agents in St. John of the insurer and of the reinsurer, the agent of the latter had credited the agent of the former with the premium subject to a month-end adjustment of accounts. It was held, on an action by the insurer against the reinsurer, that if the evidence had established a course of dealing, known to the reinsurer, whereby assurances were effected by its agent without actual receipt of the premiums, it might be deemed to have waived the special instructions, and the agent deemed to have acted within the scope of the authority which the reinsurer, by such a course, would have held him out as possessing. But on the facts, even if the alleged custom as between the agents had been satisfactorily established, it would not be binding on the reinsurer unless authorized by it.[39]

A converse case, where the principal was entitled to rely on the custom of trade, nevertheless illustrates the same principle. Manufacturers' agents in Montreal received an order for goods, and posted it to the manufacturer in England. The latter promptly replied that the line was sold out, and offered goods at a higher price and not guaranteed as to the weight specified in the order. This offer was refused, and the buyers bought their requirements in the open market at a higher price, and sued the English manufacturer for the difference, alleging that the acceptance of the order by the agents bound their principals. The plea was that according to the established trade in Quebec, all orders taken by agents, in the absence of the principal's contrary instructions, were subject to confirmation—particularly so in this case, because owing to the great distance, it is impossible for manufacturers' agents in Montreal to know exactly what goods their principals in England may have on hand or how prices may have fluctuated.

The alleged custom was established by the evidence of many witnesses, and the Court of Review, confirming, said in part:

[39] *Western Assurance Company* v. *Provincial Insurance Company* (1880), 5 O.A.R. 190. Usage in Quebec as to agents commission on reinsurance policies: *Fire Association of Philadelphia* v. *British Oak Insurance Co., Ltd.* (1928), Q.R. 67 S.C. 451; *Fire Association of Philadelphia* v. *Thompson, Dale, Power & Mackie, Ltd.* (1928), Q.R. 67 S.C. 455.

> A mandate may be either special or general. In this case the mandate was not express. The mandatory cannot act beyond the authority given or implied by the mandate. In this case, no special powers are mentioned, and no particular authority given. No conditions, beyond the exclusiveness of the representation and the amount of the commission are mentioned. The contract, thus bare, was enough. The powers given to persons of a certain profession or particular calling need not be detailed—they are inferred. The usual powers of manufacturers' agents in Quebec are limited by custom—they take orders subject to approval and confirmation. The plaintiff, then, in order to succeed, must show that this order, as taken, was exceptional and that a completed sale resulted from the receiving of the order by the agents, which plaintiff failed to do.[40]

Local usage. The custom may be a usage local to some part, canton or district of a country where a contract is made—*in regione in quâ actum est*—though it must have the usual *indicia* of a custom as already defined, within the particular locality;[41] especially when it is shown that it has always been accepted by the parties in their business dealings and has been relied on in the transaction in issue.[42] Usages of trade are local as well as general,[43] and are known, or presumed to be known, in any locality, to or by every one engaged in any particular trade or business to which they are applicable.[44]

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[40] *Mathys* v. *Ehrenbach* (1907), Q.R. 33 S.C. 19; *Brock* v. *Gourley* (1890), M.L.R. 7 Q.B. 153, 20 R.L. 488: in law and by the custom of trade, the mere taking of an order by a traveller does not complete the contract of sale, so long as the order has not been accepted by his principal.

[41] *Joyal* v. *Beaucage* (1920), Q.R. 59 S.C. 211 at p. 223: a local usage overrides a contrary general usage; at p. 226, English and American authorities in the same sense; *La Compagnie Champoux* v. *The Brompton Pulp & Paper Co.* (1910), Q.R. 38 S.C. 261, disting'd. *Midland Navigation Co.* v. *Dominion Elevator Co.* (1904), 34 S.C.R. 578, confirming 6 O.L.R. 432: a named port having within it a usual or customary place for loading grain; the latter will be held to be the meaning of the contract. *Caron* v. *Bleau* (1906), 13 R. de J. 514. *Columbus Fish and Game Club* v. *The W. C. Edwards Co. (1907)*, 13 R.L. n.s. 566. *The "Freiya"* v. *The 'R.S."* (1922), 65 D.L.R. 218 at p. 222: "custom proper" and "local usage"; 21 Can. Ex. 232; [1922] 1 W.W.R. 409, reversing 59 D.L.R. 330, Can Ex. 87, 30 B.C.R. 109. But a local usage to the effect that a double endorsement of a note is equivalent to a renunciation of protest cannot free the holder of a note of his obligations under the Bills of Exchange Act, the operation, authority and application of which are general throughout Canada: *Morrissette* v. *Bidegare* (1933), 39 R.L. n.s. 460. An error, though repeated for many years, does not constitute a custom having legal force: *Marwood* v. *Canadian Credit Corporation, Ltd.*, [1931] S.C.R. 286, confirming Q.R. 47 K.B. 404, rev'g. 66 S.C. 378. Cf. Exchange, course of dealing, Vol. II, 313, 314, 318, 328.

[42] *Laflamme* v. *Dandurand* (1904), Q.R. 26 S.C. 499. But a general course of dealing must be shown to exist, and isolated instances of the way in which particular parties carry on their business is inadmissible: *The Trent Valley Woollen Manufacturing Co.* v. *Oelrichs & Co.* (1894), 23 S.C.R. 682 at p. 692. *Cf. Duclos* v. *Paradis* (1909), 16 R. de J. 43 at p. 49.

[43] For the distinctions between "custom proper" and "local usage", see the discussion in *The "Freiya"* v. *The "R.S."* (1922), 65 D.L.R. 218.

[44] *The Provincial Insurance Co.* v. *Connolly* (1879), 5 S.C.R. 258 at p. 269, per Henry J. The parties are deemed to contract with reference to

So, particular terms, or provisions employed or made, have authoritative and prescribed application, and, when used in contracts, are as well understood as if specially recited or explained. That is why evidence of them is admitted. The well known and fully accepted technical meaning of such terms is properly assumed to have been in the minds of contracting parties as fully as if stated at length, embracing, as it does, the principle that that is certain which can legitimately be made certain.[45]

Latent defects. The redhibitory action, resulting from the obligation of warranty against latent defects, must be brought with reasonable diligence, according to the nature of the defect and the usage of the place where the sale is made.[46]

Sale on approval—foreign custom of trade. A person who receives goods on approval from a foreign country is not bound, as to his liability to return them, by the law and custom of trade of the foreign country, in the absence of a contrary agreement.[47]

The rule is phrased from the decision of the Court of Appeal in the case noted below. Laurin, who was an amateur stamp collector, wrote to a dealer in London with whom he had previous transactions, asking that certain stamps be sent him on approval. The stamps were received by him on three different dates, the last packet on September 11, 1903. Between the night and

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the settled and generally known usages of mercantile trades or ports: SMITH, MERCANTILE LAW (1931), 434. Art. 1978 C.C.—the rules as to pledge or pawning are subject in commercial matters to the laws and usages of commerce. *Duclos* v. *Paradis* (1909), 16 R. de J. 43 at p. 46: sales of goods are subject either to general usage, or to special local usage.

[45] *The Provincial Insurance Co.* v. *Connolly, loc. cit.*, at p. 269, per Henry J. SMITH, MERCANTILE LAW (1905), 359, 360. *Sanitary Packing Co.* v. *Nicholson & Bain* (1916), 33 W.L.R. 594: The construction of contracts containing words, the natural meaning of which has been changed by local usage discussed. And see 10 C.E.D. (Ont.), 540; *Schollfield* v. *Leblond* (1821), 2 R. de L. 77, 2 R.J.R.Q. 156. *Mills* v. *Continental Bag & Paper Co.* (1918), 44 O.L.R. 71: evidence refused because it did not conform to the rule governing evidence explanatory of doubtful words. *Re Satisfaction Stores*, [1929] 2 D.L.R. 435 at p. 443, N.S. Supr. Ct., per Paton J.: "If by the custom of trade or by statute certain words used shall mean definite things, ... something more than the same words might otherwise mean, and parties with knowledge of the meaning . . . . use them in an agreement, the agreement must be interpreted according to the enlarged meaning of those words. . . ." *Duclos* v. *Paradis* (1909), 18 R. de J. 43 at p. 46: commercial usages are deemed to be the tacit expression of the will of the parties.

[46] Art. 1530 C.C. *Lapierre* v. *Drouin* (1911), Q.R. 41 S.C. 133: an action taken abroad within a reasonable delay is proof of diligence, and the judgment interrupts prescription. The prescription involved was that of the action to resiliate a sale of wine to dealers in Cape Breton because of *vice cachée*. See Prescription, JOHNSON, Vol. II, 440.

[47] *Laurin* v. *Ginn* (1908), Q.R. 18 K.B. 116, reversing *Ginn* v. *Laurin* (1907), Q.R. 32 S.C. 521. The judgment in Appeal is that of the majority, Trenholme and Cross JJ., dissenting.

morning of September 21-22, his safe was burglarized and the stamps were stolen. Thus ten clear days had elapsed since actual delivery to him was complete. The London dealer sued for the value, and secured judgment. It was proved (though not alleged)[48] that in the stamp trade in England there is a definite custom that in the absence of any special agreement, if stamps are retained beyond six days after delivery, the consignee is deemed to have become owner and to be responsible for the price; and that this custom has the force of law; so that if the stamps are lost by theft or otherwise, after the six days and while in his possession, the consignee is liable for the price as having become the purchaser.

The court below ruled that the sale on approval was completed in England—where the dealer assented to the defendant's request for a consignment on approval, by mailing the stamps, and hence that the contract was to be construed by the law of England.[49]

> If the defendant did not desire to keep the whole or any portion of these stamps, he should have mailed them back to the plaintiff within a delay of not more than six days from their actual receipt. . . . . He must be held responsible as the purchaser . . . . . because he held them beyond the six days limit allowed him to make his selection; and should he not be held the purchaser, he must be held responsible for their loss, because they were stolen while in his possession and after a reasonable delay had expired, within which he had an opportunity to make a selection.

Sir Henri Taschereau C.J. rendering the majority judgment in Appeal, said :

> It is pretended that this contract of sale on approval, thoroughly known in the French law, must be governed by English law. This pretension cannot be supported. . . . . The custom has not even been pleaded. Moreover, a buyer in Canada, buying by means of correspondence, is not deemed to be familiar with the custom, nor to submit himself to a foreign law. The law of his own country suffices. The

[48] Q.R. 18 K.B. at p. 117. *Cf. Joyal* v. *Beaucage* (1920), Q.R. 59 S.C. 211 at p. 221: "Though the usages or customs are not pleaded, both parties have without objection proved them. I am bound to consider their value in law . . . . ". *La Compagnie Champoux* v. *The Brompton Pulp & Paper Co.* (1910), Q.R. 38 S.C. 261 at p. 263, where evidence of a custom was objected to as not having been pleaded, and it was contended in reply (without success) that a plea was unnecessary in view of article 1016 C.C. In *Maritime Bank* v. *The Union Bank of Canada* (1888), M.L.R. 4 S.C. 244 at p. 247: at the hearing, defendant offered evidence of a custom of banks, acting as agents for other banks, to cash uncertified cheques for them. The objection of no plea was upheld. *Mannheim Ins. Co.* v. *Atlantic & Lake Superior Railway Co.* (1900), Q.R. 11 K.B. 200 (15 S.C. 469, 476), at pp. 204, 210: evidence of custom introduced by plaintiff though not alleged.

[49] Art. 8 C.C.

> contract was perfect, if the contract was to be made here, by the sending of the stamps and by the acceptance which the buyer might make here. There was not an undue delay (*Il n'y a pas eu un délai considérable*). . . . . We must apply the well understood principles (of Quebec law) governing sale on approval. Naturally, if the vendor intended that at the expiry of a given time a firm contract should ensue, he was bound to warn his correspondent that once this delay expired he would be deemed to have become the buyer and owner, and hence that the stamps would be at his risk. This was not done; there was no putting in default. . . . . The delay was not unreasonable. We must apply the rule, *res perit domino*.

The rule of Quebec internal law is that the sale of a thing upon trial is presumed to be made under a suspensive condition, when the intention of the parties to the contrary is not apparent.[50] If under a suspensive condition—the vendor is bound, but the buyer is not bound, and there is not a passing of title or of risk, until he has had a reasonable time upon trial. What that reasonable time is, will depend upon usage, if there is one, or upon the view of the court. If under a resolutory condition—there is a passing of title and of risk, but after a reasonable time upon trial the buyer may cancel.

Sale on sample. Where goods are sold on sample, the place of delivery, in the absence of a special agreement to the contrary, is the place for the inspection by the buyer. If there is a custom, proved to be general, to the contrary, and if it be shown that the parties were cognizant of it and can be presumed to have contracted with reference to it, the custom may prevail.[51]

Brokers in New York sent samples of Buenos Ayres wool to T in Ontario which was for sale by O in New York. A contract was concluded in New York for "wool laid down in

[50] Art. 1475 C.C. MIGNAULT, VII, 22; LANGELIER, COURS DE DROIT CIVIL, art. 1475; MARCADÉ ET PONT, CODE CIVIL, VI, 160. *Cf.* arts. 8, 1016 C.C.

The judgment assumes that the contract would be completed if and when the buyer in Canada accepted some or all of the stamps, assuming that he held them for a time not deemed unreasonable by our usage; but that the vendor might have stipulated as a condition of his offer that the risk should pass to the buyer after a given delay.

[51] And see *Buntin* v. *Hibbard* (1865), 10 L.C.J. 1: in a sale by sample the purchaser has a reasonable delay to inspect and reject at point of delivery; the mere reception and a payment on account do not bar his right. *Kerry* v. *Sewell* (1865), 1 L.C.J. 62, 18 R.J.R.Q. 125, 519, 588: if the article proves to be something entirely different, the sale is null though made by sample. *Desmarteau* v. *Harvey* (1873), 17 L.C.J. 244: where the bulk proves inferior to sample, the whole may be repudiated. *Leduc* v. *Shaw* (1863), 15 R.L. 294, 13 L.C.R. 438: diminution of price. Where the goods delivered do not agree with the sample, the buyer must object within a reasonable delay: *Joseph* v. *Marrow* (1860), Q.R. 1 S.C. 543, 20 R.L. 21; *Guest* v. *Douglas* (1886), Q.R. 1 S.C. 543, M.L.R. 4 Q.B. 242. And see the references to MASSÉ, DROIT COMMERCIAL, III, No. 1610, and SIREY, 32-1-819, cited in *Duclos* v. *Paradis* (1909), 16 R. de J. 43 at p. 48.

New York". Upon the arrival of the wool there, T was advised that it was ready for inspection; but it insisted that the wool should be shipped to Ontario for inspection in its factory, and refused payment unless that were done. The payment was to be made by promissory note; and the giving of this note and the delivery and final acceptance of the wool were, according to settled construction, to be concurrent acts. If the inspection had to take place in New York, then O was not bound to deliver the wool in Ontario before receiving the price. The defence sought to prove a custom in Canada requiring delivery and inspection under the circumstances in Ontario. The evidence was rejected as unsatisfactory :

> . . . . . the law is that where the contract of sale is silent as to the place of inspection of goods sold by sample, it is to be presumed that the purchaser is to accept the goods at the place of delivery which here was undoubtedly New York, being at the place where the contract was made. . . . . Even if it had been established by sufficient evidence that such a mercantile custom as is contended for prevailed generally in the wool trade in Canada, that could not possibly affect the respondents, New York merchants selling goods in the New York market and not shown to be cognizant of any such Canadian usage as the appellant contends for. . . . . Much reliance was placed on the argument *ab inconvenienti*. It was said that the inconvenience of inspecting at New York would be so great, and the presumption of a contrary practice so strong, that it requires but little evidence to establish the usage contended for. The argument is sufficiently met by what has been already demonstrated, namely, that in the absence of sufficient legal evidence of a usage one is not to be inferred from circumstances for the purpose of altering the terms expressed by the parties in their written contract . . . . . there would be no inconvenience in an examination of the goods at New York.[52]

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[52] *The Trent Valley Woollen Manufacturing Company* v. *Oelrichs & Co.* (1894), 23 S.C.R. 682 at pp. 690-693; reversing 20 Ont. A.R. 673. As to the inconvenience: "The objection that the wool could not be examined in the bonded warehouse at New York entirely fails, for it is plain upon the evidence that if it should have been found necessary to open the bales that could have been done at comparatively small expense by changing the entry from one for direct export to Canada into an ordinary bonded warehouse according to the United States customs regulations, upon which a permit could be obtained for a thorough examination of the goods so held." *Quaere*, whether in the circumstances this was a sale on sample. *Cf. Aspegren & Co.* v. *Polly & White* (1909), 13 O.W.R. 442: goods shipped from Ontario to New York, "terms sight draft against bill of lading; draft to be held for arrival and examination of goods"; usual terms in the New York market under such a contract; contract on correspondence apart from bought and sold notes; delivering and tendering so as to allow sufficient time for examination and receipt within the limits of time allowed by usage at the place of delivery (at p. 445). *Columbia Flouring Mills Co.* v. *Bettingen* (1910), 14 W.L.R. 669 (Alta.): contract by telegram apart from bought and sold notes.

VARIOUS NOTES

Sale subject to inspection, weighing, measuring. When things moveable are sold by weight, number or measure, and not in the lump or bulk, the sale is not perfect until they have been weighed, counted or measured.[1] There may be a stipulation or a usage, governing the place and time of the inspection, weighing or measuring. The delivery may be at one place and the measuring at another, as shown by the intention of the parties.[2] Where the delivery and loading are to be made by the vendor in one place, for transit to another and nothing is stipulated as to the place of measurement, the vendor is entitled to exact from the buyer the measurement at the point of loading.[3] If the things are to be measured at the place where they are sold, then the measuring will, apart from contract, be done according to the practice in that place; if it is to be done at destination, then according to the practice there. The rule is not a matter of *statut*, but of intention.[4] Where hay of "first quality" was bought in Quebec, to be paid for against delivery on board cars for export to the United States, the buyer was bound to inspect at the place of loading where he took delivery. He could not plead defect of quality found by official inspectors in Boston upon arrival there. The vendor was not bound by such findings abroad.[5]

Calculation of freight. Unless the mode of calculating the weight or measurement of the cargo is indicated by the contract or by the usage of the particular trade, freight is payable according to the mode of computation at the port of loading.[6]

Lex Mercatoria: implications of, 10 C.E.D. (Ont.), 538. Custom and the Law Merchant, history of, FALCONBRIDGE, BANKING AND BILLS OF EXCHANGE (1935), 1; and at p. 12, the extent to which custom incorporated as part of the common law of England has been introduced or accepted in the law of the English provinces, and that of France in the law of Quebec; and at p. 18, that of England in the law of Quebec. Usage in C.I.F. contracts: KENNEDY, C.I.F. CONTRACTS, *Vo.* Usage.

Custom as a source of private international law, which itself is a kind of customary law: LAURENT, DR. CIV. INT. PR. I, 55, 440.

The rise of custom in Italy and France, MASSÉ, DROIT COMMERCIAL, I, No. 83, III, No. 1441.

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[1] Art. 1474 C.C.

[2] *La Compagnie Champoux* v. *The Brompton Pulp & Paper Co.* (1910), Q.R. 38 S.C. 261; *Duclos* v. *Paradis* (1909), 16 R. de J. 43 at p. 48: it is for the judge of the merits to decide on the facts where the cerification is to be made. And when the contract is F.O.B. shipping point: *Marchand* v. *Gibeau* (1892), Q.R. 1 S.C. 266; *Brace, McKay & Co., Ltd.* v. *Shmidt* (1920), Q.R. 31 K.B. 1 at p. 13; *Re S. Medine & Co.*, [1923] 3 D.L.R. 795 at p. 796; *Rodden & Co., Ltd.* v. *Cohn Hall Marx Co.* (1928), Q.R. 46 K.B. 42; *Grace & Co., Ltd.* v. *Clogg* (1919), Q.R. 57 S.C. 251, *Clogg* v. *Grace & Co., Ltd.* (1920), Q.R. 31 K.B. 538.

[3] *La Compagnie Champoux* v. *The Brompton Pulp & Paper Co.* (1910), Q.R. 38 S.C. 261; *Curtis* v. *Millier* (1898), Q.R. 7 K.B. 415. The contradictory measurement may take place at destination if not made at point of shipment: *Braithwaite* v. *Keddy* (1925), Q.R. 38 K.B. 404.

[4] LAURENT, DROIT CIVIL INT. PR. VIII, 219; *La Compagnie Champoux* v. *The Brompton Pulp & Paper Co., supra; Joyal* v. *Beaucage* (1920), Q.R. 59 S.C. 211. *Cf. Melady* v. *Jenkins Steamship Co.* (1909), 18 O.L.R. 251, 13 O.W.R. 439; *Duclos* v. *Paradis, supra.*

[5] *Marchand* v. *Gibeau* (1892), Q.R. 1 S.C. 266; *Hushion & Co.* v. *Denault* (1913), 20 R. de J. 277.

[6] *Melady* v. *Jenkins Steamship Co.* (1909), 18 O.L.R. 251, 13 O.W.R. 439; *La Compagnie Champoux* v. *The Brompton Pulp & Paper Co.* (1910), Q.R. 38 S.C. 261; *Joyal* v. *Beaucage* (1920), Q.R. 59 S.C. 211; *Martin* v. *Heald* (1923), 29 R.L. n.s. 347.