

HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.:—I find that the preponderance of evidence is against defendant as to the matters set up in par. 2a of the statement of defence and that his recollection is at fault when he thinks that he inspected, or was led to believe that he inspected, every stick in the bay at Kearney, but that the fact is as stated by H. Brennan, Corcoran and McKenny, whatever pines he called for were canted for and inspected by him, constituting about 75 per cent. of the lot, and that the remaining 25 per cent. were not inspected because he did not ask for them.

The contract is made between two business men, and there is nothing in it about the time of shipment. H. Brennan states that the time of shipment was not even mentioned before the contract was signed. Defendant declares that he had Brennan's assurance as to the time of delivery and so it did not occur to him to have it in writing. If so, that is his misfortune, for I cannot reform the contract on that contradictory testimony. There has been no such custom of the trade established as would justify me in finding that the parties contracted with reference to it.

It is to be observed that the first complaint of the shipments not being made in time is in defendant's letter of 30th September. The delay in delivery was due to matters not within the control of the plaintiffs, viz., the action of the Government in taking stop logs out of the dam and so lowering the water. This might not excuse plaintiffs if they had actually contracted to ship within a certain time. *Ford v. Cotesworth* (1868), L. R. 4 Q. B. 127.

The contract says "the grade of timber to be accepted as made, except that the Canada Pine Lumber Co. are to keep out what they consider the poorest 10 pines."

I find that the defence fails on all points.

Judgment for plaintiff for \$2,727.38 with interest from 30th September, 1912, and costs.

Thirty days' stay.