

The lumber was sold as in the yards of the Tomiko Mills Limited, in the district of Nipissing, and was there on the 30th June, 1910, when a fire occurred in the mills and yards, which destroyed the whole of the lumber. The cheque had not then been presented, and the defendant stopped payment of it.

The defendant counterclaimed against the plaintiffs and the Tomiko Mills Limited for damages for negligence in causing the fire, and, in the alternative, for an account of the insurance moneys which they had collected or should have collected in respect of the lumber destroyed.

The action and counterclaim were tried without a jury at Toronto.

R. McKay, K.C., for the plaintiffs.

W. N. Tilley, K.C., for the defendant.

SUTHERLAND, J., in a written judgment, after setting out the facts, and referring to the grounds of defence, said that he was of opinion that the property in the lumber had, at the time of the fire, passed to the defendant, and thereafter was at his risk as to loss by fire.

At the time of the fire, the plaintiffs had existing insurance upon the lumber in the yards, including that sold to the defendant, to the extent of \$50,000, and the insurers paid that sum to the plaintiffs, exacting from the plaintiffs, however, an undertaking to sue the defendant upon his cheque, and (if successful) to reimburse the insurers to some extent.

Upon the evidence, the learned Judge was unable to find that a representation was made by the plaintiffs to the defendant that the lumber was fully insured or would be kept insured in whole or part for the benefit or protection of the defendant; and there was no term in the contract requiring them to insure for the defendant's benefit.

The plaintiffs were entitled to bring this action upon the cheque, even though the insurers should have the benefit of the result of the action.

Reference to *Castellain v. Preston* (1883), 11 Q.B.D. 380, and other cases.

The plaintiffs signed a warehouse receipt for the lumber, which, the learned Judge said, was to be regarded as a receipt under the provisions of the Bank Act, 53 Vict. ch. 31. The plaintiffs were thus bailees for the defendant—*gratuitous bailees*. The *prima facie* presumption against a bailee in whose possession chattels are injured or lost may be rebutted by proving