

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJA.

G. F. Shepley, K.C., W. E. Middleton, K.C., and W. W. Osborne, Hamilton, for defendants.

Wallace Nesbitt, K.C., H. S. Osler, K.C., and H. E. Rose, K.C., for plaintiffs.

GARROW, J.A.:—The action was brought to recover the price of certain machinery supplied by the plaintiffs to the defendants under contracts of conditional sale, by the terms of which the property was not to pass until payment, or, in the alternative, for a return of the articles and payment of the difference between the purchase price and the proceeds of a sale of the articles so returned.

The defendants denied acceptance of the goods, denied that they were in accordance with the contracts, and counter-claimed for damages for breach of the contracts, and for moneys paid on account thereof.

The main, and at this stage the only, contest between the parties is concerning the two generators, for I understand that neither side objects to the reference as to the other matters

The facts are all stated in the very full and careful judgment of Anglin, J., with which in the main I agree.

The duty of the plaintiffs was, of course, to supply generators of the quality and capacity and within the time limited and provided in the contract. This it is clear they did not do. The duty of the defendants was either to accept or reject the generators actually supplied within a reasonable time after they had had an opportunity of testing them and discovering their defects. In the correspondence which passed prior to the reconstruction agreement of 11th January, 1902, the defendants definitely enough assumed the position that they would not accept the articles in question; and their continued user thereafter and until the reconstruction may well, on the evidence, be assumed to have been at the instance and with the consent of the plaintiffs, in the hope, for all parties were apparently acting in good faith, that the machines might in the end be made satisfactory.

But after the reconstruction under the terms of the last-mentioned agreement, which agreement was clearly intended