

order and have no right to waive any of its rules: *Bacon on Life Insurance*, 2nd ed., secs. 117 et seq.; *Heffernan v. Friends*, 29 O. R. 125; *Devine v. Templars*, 22 A. R. 259. Held, also, that some of the answers in the application being untrue, and the application being part of the contract, the plaintiff could not recover: *Russell v. Canada Life*, 8 A. R. at p. 723. Action dismissed with costs; thirty days' stay.

J. Kyles, solicitor for plaintiff.

Tytler & McCabe, solicitors for defendants.

LOUNT, J.

AUGUST 13TH, 1902.

TRIAL.

SOUTHAMPTON LUMBER CO. v. AUSTIN.

Contract—Unascertained Goods—Appropriation—Passing of Property—Acceptance and Part Payment.

Action to recover balance due on a contract for the supply of cedar railway-ties and 5 to 6-inch pole cedar ties f.o.b. at Pine Tree harbour; and also 15,000 unburnt posts and pavements.

Thomas Dixon, Walkerton, for plaintiff.

J. H. Rodd, Windsor, for defendant.

LOUNT, J., held that the defendant had not at any time inspected, accepted, or received the ties, nor was there any selection or appropriation of them by him, nor were they at any time unconditionally appropriated to the contract either by plaintiffs with defendant's assent or defendant with plaintiffs' assent. The contract is for the sale of unascertained or future goods by description—an executory contract—and the rule in such cases is that the property does not pass until goods in a state in which the buyer is bound to accept them are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the latter with the assent of the former: *Chalmers*, 4th ed., p. 43; *Blackburn*, 2nd ed., p. 128; *Heilbutt v. Hiskeon*, L. R. 7 C. P. at p. 449; *Wilson v. Shaver*, 3 O. L. R. at pp. 114-5. The property in the ties never passed. The plaintiffs were always in possession. As to the claim for the posts, however, the plaintiffs should recover. After the posts had been got out the defendant requested the plaintiffs to peel them, and agreed to pay one cent per post. The plaintiffs peeled 10,000, and defendant paid \$200 on account, and on these facts there was a