

SECOND DIVISIONAL COURT.

SEPTEMBER 24TH, 1920.

*SCHMIDT v. WILSON & CANHAM LIMITED.

Sale of Goods—Contract—Principal or Agent—Goods to be Imported from New Zealand—Breach by Vendors—Failure to Deliver all Goods Covered by Contract—Repudiation—Embargo upon Exportation from New Zealand—Effect of—Suspension of Contract during Period of Total Prohibition—Exportation with the Consent of Minister of Customs—Absence of Endeavour to Obtain Consent—Duty of Vendors—Time and Place of Breach—Damages—Measure of.

An appeal by the defendants from the judgment of LOGIE, J., 47 O.L.R. 194, 18 O.W.N. 15.

The appeal was heard by MULOCK, C.J. Ex., SUTHERLAND, KELLY, and MASTEN, JJ.

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

T. R. Ferguson, K.C., for the plaintiff, respondent.

SUTHERLAND, J., read a judgment in which he said, after setting out the facts, that it was clear, having regard to the terms of the written contract and the correspondence which followed, that the defendants contracted as principals with the plaintiff; and, second, that the plaintiff, by his own conduct and acts prior to the raising of the embargo, treated the contract as at an end, and in consequence was precluded and estopped from claiming any right or privilege thereunder. Whatever the effect might have been had the defendants, after some time had elapsed and the dilatory effect of the embargo upon their shipments became apparent, notified the plaintiff that they had bought some pelts on account of the contract which they would hold, and were in a position to buy the remainder, provided the plaintiff would agree to pay for the same under the terms of the contract and accept delivery when the embargo should be raised, alleging its operation and effect to be something beyond their control, but if the plaintiff would not agree to this would treat the contract as at an end, they did not pursue this course. They treated the contract not as annulled but as suspended: *Andrew Millar & Co. Limited v. Taylor & Co. Limited*, [1916] 1 K.B. 402. They did not repudiate the contract while the embargo was operative nor until some time after it had been lifted. The trial Judge found that there was a duty on the part of the defendants to use their best endeavours to obtain the consent of the Minister of Customs to permit the shipment of the pelts, and came to the conclusion, apparently well warranted by the evidence,