

No person can take advantage of a condition the performance of which has been hindered by himself.

The inability of Wilson to meet his obligation did not affect the right of the plaintiffs, as assignees of the benefit of the defendants' covenant with Wilson, to proceed against them.

The measure of the liability of the indemnifier is not the capacity of the indemnifier to pay, but his liability to pay: *British Union and National Insurance Co. v. Rawson*, supra.

Both defences were overborne by direct authority.

The plaintiffs should have judgment for \$4,265, 09, with interest on \$4,138.13 from the 1st April, 1919, and costs.

LATCHFORD, J.

NOVEMBER 20TH, 1920

\*PLEET v. CANADIAN NORTHERN QUEBEC R.W. CO.

*Railway—Carriers—Loss of Car-load of Perishable Goods by Freezing—Failure of Consignee to Remove from Car within Reasonable Time after Notice of Arrival at Destination—Particular Circumstances—Termination of Liability of Railway Company as Carriers—Liability as Bailees—Absence of Negligence—Bill of Lading—Responsibility for Loss of Goods when on Connecting Railway—Onus—Evidence—Act of God—Inherent Vice in Goods.*

Action by a produce-merchant of Ottawa against the railway company (common carriers) for damages resulting from the loss sustained by the plaintiff on a shipment on the 15th January, 1920, by the defendants' line of railway, of a car-load of potatoes from a siding near Huberdeau station, about 40 miles north of St. Jerome, in the Province of Quebec, to Ottawa.

The action was tried without a jury at Ottawa.

A. E. Honeywell, for the plaintiff.

G. F. Macdonnell, for the defendants.

LATCHFORD, J., in a written judgment, said that the plaintiff alleged that the potatoes when shipped were in good order, and that when delivered to him in Ottawa they were greatly depreciated in value, owing to the fact that they were frozen, through the neglect or default of the defendants in not keeping the car properly heated while in transit from Huberdeau to Ottawa.

Upon the evidence, the learned Judge found that the potatoes were not frozen when loaded near Huberdeau nor when inspected at St. Jerome. Between the morning of Thursday the 15th