

that this is void as against Niemi for want of consideration. Apart from that and assuming that it is a contract on which the plaintiff may rely, what is the true construction of it? It was not a contract of actual sale, by which the property immediately passed to the plaintiff. It was at most an agreement to sell, and the conditions precedent to the plaintiff becoming entitled to the property, were that the plaintiff would remove it within a reasonable time, and that before removing it, the plaintiff would pay the price agreed upon. The plaintiff did not pay, nor did he tender the amount required. He did not attempt or offer to remove the property within a reasonable time from the day of the date of the agreement. The plaintiff had not the actual possession, nor had the right of property or possession in the piling at the time of the sale to Whalen. There was no tender. What took place between Ray Short & Co. and plaintiff, by which plaintiff could have got the money, even if that was communicated to Niemi by any messenger sent by Ray Short & Co. could not amount to a tender, and there was no waiver by Niemi of the payment, or of any of the conditions in his agreement to sell. Upon the construction I am obliged to put upon the agreement the plaintiff fails in this action.

Many cases were cited by counsel for the respective parties, not only upon the question of plaintiff's right to succeed in this action of trover, but upon the many points discussed at bar. No useful purpose will be served by referring to the great majority of these. *Lord v. Price*, L. R. 9 Ex. 54; *Milgate v. Kebble*, 3 M. & G. 100, and *Brown v. Dulmage*, 10 O. W. R. 451, establish defendant's contention.

The defendant Whalen had notice of plaintiff's claim and after such notice and after an unsuccessful attempt to buy from plaintiff, bought from Niemi. It would be with great reluctance that I would hold, if I found myself bound by authority so to do, that a purchaser under such circumstances would be a purchaser in good faith within the meaning of the Bills of Sale and Chattel Mortgage Act.

The third party, up to the time of the sale by him to Whalen, was a consenting party to the plaintiff's delay in removing the piling. So far as appears he made no demand upon the plaintiff, nor did he give any notice requiring payment for, or removal of, the piling. A tempting offer was made to Niemi—to break what he thought was a binding obligation on him to sell to plaintiff.