

to deliver the teas by the breach of contract of Lambe, they lost profits on their sale, and were liable in damages to their own vendee for non-delivery to him, in all \$835.24; and they claimed that in the event of the teas being delivered to plaintiff they should be subject to the lien of Hartlaub & Co. for \$835.24.

**PER CURIAM.** The facts of the case show a sale by Lambe to Hartlaub & Co. on the 5th February, 1880, duty paid—teas delivered in Toronto. They were shipped to Hartlaub & Co. by the Grand Trunk Railway Company, duty paid, but on their arrival here were immediately seized by the Customs, as having been fraudulently entered as coming direct from Japan, in which case the duty payable was 10 per centum *ad valorem*, whereas, if imported indirectly the duty was 20 per centum.

After some negotiations with the Government the teas in question were liberated, and it is proved that they were not fraudulently entered at the Customs. There is no proof of any default on the part of Lambe, and he cannot be held responsible for what was an inevitable accident. If the Customs authorities were to blame in the seizure, Hartlaub & Co. have their recourse against them, and not against Lambe who sold and delivered the teas according to contract at Toronto.

Judgment for plaintiff.

*D. Macmaster* for plaintiff.

*W. W. Robertson* for defendants.

### SUPERIOR COURT.

MONTREAL, April 28, 1881.

Before TORRANCE, J.

THOMPSON et al. v. CURRIE et al.

*Contract—Time of performance—Goods to be delivered "shortly"—Three months after not a reasonable time.*

The action was for specific performance of a contract of sale of iron pipe, through a broker, made on the 2nd February, 1880, by plaintiffs to defendants. A portion of the iron was in store, and deliverable from there. The balance was to arrive shortly, and to be delivered by the Grand Trunk Railway Company. The portion in store was delivered and paid for, and about the 29th March about 30,000 feet of the

remaining lot were delivered and paid for, and on the 11th May, of the remainder about 15,000 feet which were on board the steamer *Polyne-sian*, were tendered and refused. There was no evidence of the tender of the balance of 10,000 feet which came by the steamer *Lake Champlain*.

The pretension of the defendants was that the lot to arrive shortly was deliverable by the Grand Trunk Railway Company before the opening of the navigation, and that it was not reasonable or equitable to ask the defendants to take delivery at so late a date as the 12th May.

The demand of plaintiffs was that defendants be compelled to take delivery of the balance and pay for the same.

**PER CURIAM.** By the broker's note, the delivery was to be in two lots, one out of store, and the other to arrive shortly, and deliverable by the Grand Trunk Railway Company.

The pretension of the plaintiffs is that so long as they were not required to deliver they were in time to deliver.

The vendees, on the other hand, say that the delivery was to be by the Grand Trunk Railway Company before the opening of the navigation, which was not offered, and, moreover, it was to be shortly after the 2nd February.

The difficulty here, as in most of these cases, is, that there was a fall in price of some 45 per centum.

This is a mercantile contract, and where the time is fixed, the default arises by mere lapse of time; C. C. 1069. Benjamin on Sales, p. 481, remarking on stipulations as to time, says: "In determining whether stipulations as to the time of performing a contract of sale are conditions precedent, the Court seeks simply to discover what the parties really intended, and if time appear, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent."

Here, giving a fair consideration to the language of the contract and the circumstances of the case, we find that the iron was to arrive shortly, and to be delivered by the Railway. It was in the winter season, and if the time of delivery were extended into the summer, the delivery would be by a steamship in all probability, though there is imperfect evidence on this head, for I cannot supplement what is