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APPELLATE DIVISION.

SECOND DIVISIONAL COURT. NOVEMBER 16TH, 1920.

RE W.

Infant—Custody—Right of Father—Misconduct—Welfare of Infant—Custody Given to Maternal Grandfather—Appeal.

An appeal by Walter W. from the order of ORDE, J., in Chambers, ante 50.

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

J. R. Roaf, for the appellant.

C. A. Thomson, for the respondent.

THE COURT dismissed the appeal with costs.

SECOND DIVISIONAL COURT. NOVEMBER 17TH, 1920.

MATTERS v. RYAN.

Infant—Custody—Dispute as to Parentage—Trial of Issue—Evidence—Finding as to Birth of Child—Appeal—Fresh Evidence.

An appeal by the plaintiff from the judgment of LENNOX, J., 17 O.W.N. 232.

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

R. T. Harding, for the appellant.

A. E. Fripp, K.C., for the defendant, respondent.

THE COURT dismissed the appeal with costs and declined to receive further evidence which was merely confirmatory of testimony adduced at the trial of the issue.

SECOND DIVISIONAL COURT. NOVEMBER 18TH, 1920.

McGUIRE v. EVANS.

Church—Contest as to Right to Funds—Action for an Account—Findings of Trial Judge—Appeal—Various Funds of Church—Trustees—Parties—Amendment—Costs.

An appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J.K.B., 17 O.W.N. 382.

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

I. F. Hellmuth, K.C., and George Wilkie, for the plaintiffs.

W. R. Smyth, K.C., for the defendants, respondents.

MULOCK, C.J. Ex., in a written judgment, said that the action was brought on behalf of the Toronto branch of the Reorganised Church of Jesus Christ of Latter Day Saints to recover from the defendants certain moneys which, the plaintiffs contended, were the property of the Toronto branch—moneys forming certain funds known as the Tithing Fund, Sunday School Fund, Zion Religio Fund, Sermons and Theatres Fund, Building Fund, and Ladies Auxiliary Fund. During the argument counsel for the defendants admitted that the moneys in the hands of the Zion Religio Society belonged to the Toronto branch and said that the defendants made no claim thereto; and counsel for both parties informed the Court that it had been agreed that all moneys in the Sunday School Fund up to the 14th April, 1918, were to belong to the plaintiffs, and that any moneys collected for that fund between that date and the 3rd June, 1918, should be divided equally between the plaintiffs and defendants, and that the adjustment and disposition thereof would be arranged by counsel for the parties without the aid of the Court. After action begun, the defendant R. C. Evans paid into Court $341.50 in full of the balance admitted by him to belong to the Tithing Fund, and during the argument counsel did not challenge the correctness of this balance nor did they ask for an accounting in respect of the Tithing Fund. It must be assumed that they were satisfied that the payment of this sum into Court rendered any further accounting unnecessary; the defendant R. C. Evans was entitled to a declaration that he had fully accounted in respect of that fund; and the judgment appealed from should be amended accordingly, and also by making proper directions as to the disposition of the sum paid into Court.

There thus remained in controversy between the parties only the Building Fund, the Ladies Auxiliary Fund, the Sermons and Theatres Fund, and the question as to the proper disposition to be made of any moneys in respect of which the defendants were accountable.

As to the Building Fund, the learned Chief Justice, after reviewing the evidence, stated his conclusion that the defendant R. C. Evans had failed to shew any ground upon which he should be relieved of liability to account for all subscriptions received by him for the erection of the new church of the Toronto branch of the Reorganised Church. The appeal on this branch should be allowed.

As to the Ladies Auxiliary Fund, the learned Chief Justice was of opinion that the plaintiffs' claim failed and was properly dismissed by the trial Judge.

The next claim was for moneys collected by the defendant Evans at theatre meetings and from the sale of his sermons. The learned Chief Justice was of opinion that these theatre and sermon activities were personal ventures of the defendant Evans, the profits and losses being his and not the Toronto branch's. Evans disclaimed any intention of profiting personally by them, but that disclaimer did not give the Toronto branch the right to the profits, nor was the parent church entitled to them. This claim of the plaintiffs was, therefore, properly dismissed.

One of the plaintiffs, Bishop McGuire, was one of the members who unitedly constituted the bishopric, and was its presiding head; and the learned Chief Justice was of opinion that the defendant Evans (Bishop Evans) was accountable, in respect of collections for the Building Fund, to the bishopric, that is, to all the members thereof as to one set of trustees, and not to one of them only, and that, therefore, the action was defective for want of necessary parties, but that leave should be given to amend by adding all necessary parties, such amendment to be made within one month from the issue of the order upon this appeal, or such further time as a Judge may allow. If the amendment is so made, there will be a reference to determine the amount owing by the defendant Evans—further directions and costs reserved.

The action should be dismissed as against all the other defendants.

All the defendants having appeared by the same solicitor and counsel, there should, if the amendments are made, be no costs as between the plaintiffs and the defendant Evans down to and including this appeal. The other defendants should have one-half of their full costs paid by the plaintiffs. If the amendments are not made, the appeal should be dismissed with costs.

MASTEN, J., in a written judgment, stated that he agreed with the judgment just read by the Chief Justice, except in one respect. He was of opinion that with respect to the moneys of the Ladies Auxiliary Society the judgment of the trial Judge should be reversed and the account asked for by the plaintiffs should be directed.

Reference to General Assembly of Free Church of Scotland v. Lord Overtoun, [1904] A.C. 515, 630; Murray v. Johnstone (1896), 23 R. (Ct. of Sess. Cas., 4th series) 981.

The appeal should be allowed on this branch of the case and a reference directed.

With respect to the question whether the plaintiffs were entitled to maintain this action, it is plain that trustees may be sued in respect of club or society property vested in them, and in such an action are considered to represent the members financially interested therein, and in any action by or against members of the club or society one or more of the members may sue on behalf or for the benefit of them all: Harrison v. Marquis of Abergavenny (1887), 57 L.T.R. 360. The plaintiffs should amend, and the action should be brought, as regards this branch of the case, by a member suing on behalf of herself and all other members of the Ladies Auxiliary Society. In default of amendment, the appeal on this branch of the case should be dismissed.

If the amendments allowed were made, the plaintiffs should be allowed their costs down to and including this appeal; further directions and subsequent costs reserved.

SUTHERLAND, J., and FERGUSON, J.A., agreed with MASTEN, J.

Appeal allowed in part.

SECOND DIVISIONAL COURT. NOVEMBER 18TH, 1920.

McDOWELL v. PROFFITT.

Estoppel—Conduct Inducing Person to Believe in Non-existing State of Facts—Action Based on Such Conduct to Prejudice of Actor—Evidence—Failure to Shew Action Taken—Sale of Goods—Liability for Price.

An appeal by the defendant Prack from a judgment of the County Court of the County of Ontario in favour of the plaintiff in an action for the price of goods alleged to have been supplied by the plaintiff to the two defendants.

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

M. H. Ludwig, K.C., for the appellant.

J. F. Grierson, for the plaintiff, respondent.

RIDDELL, J., reading the judgment of the Court, said that it was admitted that the liability, if any, of the appellant, must be based upon estoppel in pais, on the principle of Pickard v. Sears (1837), 6 A. & E. 469, and similar cases. To found a liability on such estoppel, two things must concur: (1) conduct inducing the plaintiff to believe in a non-existing state of facts; and (2) action by the plaintiff to his damage, induced by such conduct.

In the present case there was no evidence that the plaintiff had in fact acted upon the alleged belief that the defendant Prack was liable. It was not necessary to consider whether there was conduct by Prack which might induce the alleged belief: the fact already stated was sufficient to shew that the action should not succeed.

The appeal should be allowed with costs and the action as against the defendant Prack be dismissed with costs.

Appeal allowed.

SECOND DIVISIONAL COURT. NOVEMBER 19TH, 1920

PATON v. FILLION.

Vendor and Purchaser—Agreement for Sale of Land—Default Made by Purchaser in Payment of Price—Action for Declaration of Forfeiture of Instalments Paid and Property Transferred in Part Payment—Counterclaim—Misrepresentations Made by Vendor—Fraud—Relief from Contract—Rescission—Appeal—Cross-appeal—Amendment—Costs.

Appeal by the plaintiff and cross-appeal by the defendant from the judgment of ROSE, J., 17 O.W.N. 305.

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

T. R. J. Wray and Helen Beatrice Palen, for the plaintiff.

F. D. Kerr, for the defendant, respondent.

MULOCK, C.J.Ex., in a written judgment, said that the purchase-price of the land (situated in Ontario) was $8,940, of which $4,940

was paid by the conveyance by the defendant to the plaintiff of certain lands in the Province of Saskatchewan, and the balance, according to the terms of the contract, was payable in annual sums of $500, with interest, on the 7th of each month of April thereafter until fully paid.

When the contract was entered into, the defendant was residing in the Province of Saskatchewan, and had never seen the plaintiff's lands. During the negotiations which resulted in the contract, the plaintiff represented such lands as containing a large quantity of valuable timber.

Relying on these representations, the defendant entered into the contract, and conveyed to the plaintiff his Saskatchewan lands, receiving therefor credit for $4,940 on the purchase-price. Until the 17th October, 1917, the defendant had never seen the land in Ontario. He was not a lumber expert, nor was he competent to form a correct estimate of the quantity of timber on the property. After this action was begun, he employed experts to make an examination, and they reported to him, and he then for the first time learned, that the representations of the plaintiff to him, on the faith of which he had purchased, was materially false.

The plaintiff played a fraudulent part in thus bringing about the contract, and the defendant, if he so elected, was entitled to be relieved therefrom.

During the argument on the appeal, leave was given to the defendant to appeal *nunc pro tunc* and to set up a claim to set aside the contract, and the defendant had entered an appeal. Apparently this leave was misunderstood; for, in lieu of asking for rescission, the defendant in his notice of appeal asked for an increase in the amount of damages awarded to him at the trial. If he desired rescission, leave should be given to him to amend his notice of appeal by asking therefor. If he did so, the contract was to be set aside and mutual restitution made by the parties. During the argument it was stated that the plaintiff had sold the lands conveyed to him by the defendant, and, therefore, was not in a position to reconvey. If that was the case, and the defendant was willing to accept the contract-price, $4,940, in lieu of the lands, the plaintiff should be ordered to pay to him that sum, and also the value of the chattel property delivered by the defendant to the plaintiff on account of the purchase-money. The timber cut by the defendant on the lands in question, not being ornamental but commercial timber, was the subject of compensation: Sugden, 14th ed., p. 644; Marker v. Marker (1851), 9 Ha. 1; Webster v. Donald (1865), 34 Beav. 451. In the adjustment of the account, the defendant should be chargeable with the market value of timber cut by him, less proper allowances for cutting and marketing.

If the defendant should not, within one month, or such further time as a Judge may allow, amend his notice of appeal and ask for rescission, his appeal should be dismissed without costs. If he should so amend, there should be a reference to settle conveyances, fix compensation, and adjust all matters between the parties growing out of their rights as determined by this judgment, and further directions and costs of the reference should be reserved.

If the defendant should not so amend, the plaintiff's appeal should be dismissed with costs.

RIDDELL and SUTHERLAND, JJ., agreed in the result.

MASTEN, J., read a dissenting judgment. He was of opinion that rescission had become impossible; that the plaintiff's appeal should be dismissed with costs, and the defendant's cross-appeal dismissed without costs.

Judgment below varied (MASTEN, J., *dissenting*).

SECOND DIVISIONAL COURT. NOVEMBER 19TH, 1920.

RE SARNIA METAL PRODUCTS CO. LIMITED.

Sale of Goods—Reliance of Buyer on Skill of Seller—Machine Required for Specific Purpose to Knowledge of Seller—Right to Reject as Unworkable—Waiver—Return of Machine—Return "on Consignment"—Evidence—Findings of Master—Appeal—Allowance of Claim of Creditor against Insolvent Estate in Winding-up Matter.

Appeal by the A. R. Williams Machinery Company Limited from the order of KELLY, J., 18 O.W.N. 98, dismissing an appeal from a report of the Local Master at Sarnia stating that he had disallowed all of the appellants' claim of $4,292.49, filed with the liquidator of the Sarnia company in a winding-up, except $300.

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

G. W. Mason, for the appellants.

J. M. Bullen, for the liquidator, the respondent.

THE COURT allowed the appeal and the appellants' full claim, with costs of proving the claim and of the two appeals.

RIDDELL, J., IN CHAMBERS. NOVEMBER 19TH, 1920.

TORONTO HOCKEY CLUB LIMITED v. ARENA GARDENS LIMITED.

Judgment—Amendment—Reference—Terms—Payment of Costs—Delay—Leave to Apply.

Motion by the defendants to vary the minutes of the judgment of the Court (ante 119) by adding a clause directing a reference to ascertain the amount due and owing by the defendants to the plaintiffs.

By direction of the Court, the motion was heard by RIDDELL, J., in Chambers.

A. C. McMaster, for the defendants.

W. R. Smyth, K.C., for the plaintiffs.

RIDDELL, J., in a short memorandum, said that, upon the defendants paying the costs of the application and undertaking to speed the reference, the motion should be granted. If the costs should not be paid within 10 days after taxation, the motion should be dismissed with costs. There should be liberty to apply in the event of delay in proceeding with the reference.

HIGH COURT DIVISION.

ORDE, J. NOVEMBER 15TH, 1920

*DOBBIN v. NIEBERGALL.

Vendor and Purchaser—Agreement for Sale of Timber-license—Action by Purchaser for Return of Deposit and Damages for Breach of Contract—Specific Performance—Forfeiture—Purchaser at Fault—Provision as to Time—Waiver by Extension—Qualification—Equitable Relief.

Action to recover moneys paid by the plaintiff upon an agreement for the purchase by him of a timber-limit from the defendant, and for damages for the defendant's breach of the agreement.

The action was tried without a jury at a Toronto sittings.

C. M. Garvey, for the plaintiff.

* This case and all others so marked to be reported in the Ontario Law Reports.

The defendant, although he had appeared and delivered a defence, was not present nor represented at the trial.

ORDE, J., in a written judgment, said that on the 1st December, 1919, the plaintiff and defendant entered into an agreement under seal whereby the defendant agreed to sell to the plaintiff the license for a certain timber-berth for $19,000, of which $500 was paid upon the execution of the agreement; of the balance, $6,500 without interest was to be paid on or before the 5th January, 1920, and the remaining $12,000 in 4 instalments, secured by 4 promissory notes. The agreement did not say when these promissory notes were to be delivered, but its whole tenor made it clear that they should be delivered on or before the 5th January, 1920, along with the $6,500. The plaintiff was to have the right to enter upon the land at once for the purpose of inspection or of establishing camps, and to commence active lumbering operations after payment of the $6,500. The defendant was to procure a transfer of the license (which was then incumbered) to the plaintiff, free from incumbrance, and the plaintiff was to assign it to the defendant as security for the payment of the promissory notes. Time was to be considered as of the essence of the agreement, and if the payments were not made promptly the defendant was to be at liberty to enter upon the land, and lease or sell it free from any claim of the plaintiff, and any moneys paid by the plaintiff should be forfeited as liquidated damages and not as a penalty; and if the $6,500 was not paid on the 5th January, 1920, the plaintiff was not to be at liberty to commence cutting.

Upon the strength of the $500 paid upon the execution of the agreement, the plaintiff entered into an agreement to sell the limit to other persons for $25,000, of which a substantial sum was to be paid by the 31st December, 1919. The plaintiff depended on the payment to be made by these sub-purchasers to enable him to pay the $6,500 to the defendant on the 5th January, 1920. The plaintiff applied to the defendant to extend the time for payment to the 19th January. The defendant agreed to this, on condition of the plaintiff sending him $1,000 by the 12th January, and wrote to the plaintiff accordingly, adding that if he did not hear from the plaintiff by that day he would "close a deal" with some other persons. The plaintiff was unable to pay the $1,000, but wrote to the defendant advising that his (the plaintiff's) sub-purchasers were willing to complete the purchase. On the 15th January, the defendant wrote that it was too late, as he had accepted another offer.

The plaintiff now sought the return of the $500 which he had paid and $11,000 damages for the alleged breach of contract, that sum being the profit which the plaintiff would have made on the resale to his sub-purchasers.

The plaintiff relied upon Kilmer v. British Columbia Orchard Lands Limited, [1913] A.C. 319, Steedman v. Drinkle, [1916] 1 A.C. 275, and Brickles v. Snell, [1916] 2 A.C. 599, as establishing his right to a refund of the deposit of $500. But the judgment of the Appellate Division in Walsh v. Willaughan (1918), 42 O.L.R. 455, established that the return of the deposit is ordered only in cases where the plaintiff seeks specific performance and is ready and willing to carry out his contract and the circumstances are such that it would be inequitable to allow the vendor to retain the land and the money. The repayment in such cases is decreed as a form of equitable relief against forfeiture. In this case specific performance was not sought, the defendant having resold the timber limit. The case was on all fours with Walsh v. Willaughan.

The plaintiff's request for an extension of time for paying the $6,500 was granted conditionally—the defendant gave the plaintiff an extra week within which to pay $1,000, and, conditionally, another week to pay the remaining $5,500, but expressly stipulated that if he did not hear from the plaintiff by the 12th January he would close a deal with others.

There is language in the judgment in Steedman v. Drinkle which indicates that a mere extension of time without qualification may amount to a waiver of the right to insist upon time as of the essence of the contract; but it could not have been intended to decide that every extension, however qualified, should constitute such a waiver. What was intimated by the defendant was equivalent to a renewed stipulation that time would be of the essence of the contract for the extended period and a notice of the defendant's intention to avail himself of the right to resell. The $1,000 was not paid, and the defendant resold. The contract went off because of the plaintiff's own default, and he could not recover his deposit.

The claim for damages could have no foundation, there being no breach of the contract by the defendant.

Action dismissed without costs.

ROSE, J., IN CHAMBERS. NOVEMBER 20TH, 1920.

*REX v. MARTEL.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Having Liquor in Place other than "Private Dwelling House"—Apartment or Suite of Rooms in Building Containing two other Suites—Building not in City—Sec. 2 (i) (i) and (ii) of Act—Liquor Kept in Box outside of House—Evidence—Inadmissible Testimony of Defendant and Wife—Other Evidence—"Substantial Wrong"—Sec. 102a. (8 Geo. V. ch. 40, sec. 19).

Motion to quash a conviction of the defendant, by the Police Magistrate for the Town of Cochrane, for having intoxicating liquor in a place other than the private dwelling house in which the defendant resided, contrary to sec. 41 of the Ontario Temperance Act.

J. M. Ferguson, for the defendant.
F. P. Brennan, for the magistrate and informant.

ROSE, J., in a written judgment, said that it was clearly proved, by evidence to which no objection could be taken, that the defendant had intoxicating liquor in his dwelling; and the first question to be decided was whether that dwelling was or was not a "private dwelling house," within the meaning of the Act. It answered the description contained in sec. 2 (*i*) of the Act, for it was "a separate dwelling with a separate door for ingress and egress," and it was "actually and exclusively occupied and used as a private residence." But it was said that it was taken out of the class of private dwelling houses by sub-clause (i) of sec. 2 (*i*), which enacts that "private dwelling house" does not include or mean, inter alia, "any house or bui ding the rooms or compartments in which are leased to different persons."

The defendant and his family occupied a dwelling on the ground floor of a building; there was another dwelling on the same floor occupied by another tenant. Each tenant had his own door leading into the street; the defendant had, in addition, a door leading into a yard in the rear; there was no internal communication between the defendant's part and the part occupied by the other tenant. The part of the building above the ground floor was occupied, as a dwelling, by a third tenant. Access to it was by an outside stairway; there was no internal commuication between it and the ground floor. The building was not in a city, and sub-clause (ii) of sec. 2 (*i*) did not apply.

The learned Judge was of opinion, notwithstanding the words quoted from sub-clause (i), that the defendant's part of the building was a private dwelling house, and the defendant was not guilty of any offence in having liquor in the house.

In the yard behind the house was a large box, which could not be said to have formed part of the defendant's private dwelling house. There was testimony that the defendant had liquor in the box, but the greater part of it was inadmissible, being evidence extracted from the defendant and his wife, whom the magistrate, in spite of objection taken by counsel, held to be compellable witnesses for the prosecution. Apart from the inadmissible evidence, there was some evidence which, if believed, would perhaps support, but no more than support, a holding that the defendant had liquor in the box. It seemed probable that the evidence as to which weight was given as to the box was the inadmissible evidence, rather than the admissible. "Some substantial wrong," within the meaning of sec. 102*a*. (8 Geo. V. ch. 40, sec. 19), was, therefore, occasioned by the admission of the evidence of the defendant and his wife: Rex v. Duckworth (1917), 37 O.L.R. 197; Rex v. Melvin (1916), 38 O.L.R. 231; Rex v. Grassi (1914), 40 O.L.R. 359. The case was not like Rex v. Collina (1920), 48 O.L.R. 199, in which there was "ample admissible evidence coupled with the prima facie proof of guilt to justify the conviction" (p. 202).

The conviction should be quashed, and there should be the usual order for the protection of those concerned.

LATCHFORD, J. NOVEMBER 20TH, 1920.

LAUGHLIN v. PORTEOUS.

Mortgage—Conveyance of two Lots of Land Subject to—Covenant—Assignment — Judgment — Indemnity — Foreclosure — Ability to Reconvey one Lot only—Inability of Covenantor Originally Liable to Meet Obligation—Effect of—Depreciated Condition of one Lot.

Action to recover from the defendants the amount of a judgment recovered by the plaintiffs against one Wilson.

The action was tried without a jury at Ottawa.

John R. Osborne, for the plaintiffs.

G. F. Henderson, K.C., for the defendants.

LATCHFORD, J., in a written judgment, said that before the 9th February, 1917, Wilson was the owner of two lots of land, which on that day he sold and conveyed to the defendants. Lot 1349 was subject to a mortgage in favour of the plaintiffs; lot 1351 was subject to two mortgages in favour of other mortgagees. The defendants covenanted with Wilson that they would assume and pay off the several mortgages to which the lots were subject. On the 24th June, 1918, the defendants sold and conveyed the two lots to one Hackett, for an entire consideration, subject to the three mortgages, which Hackett covenanted that he would assume and discharge. The buildings on lot 1349 were afterwards substantially damaged by fire, and Hackett released to one of the two mortgagees his equity of redemption in that lot. Neither the plaintiffs nor the defendants were parties to the transaction. In March, 1919, the plaintiffs obtained from Wilson an assignment of the covenant of the defendants, assuming the mortgage in favour of the plaintiffs expressed in the conveyance from Wilson to the defendants of lots 1349 and 1351.

In April, 1919, the plaintiffs, in a foreclosure action, recovered judgment against Wilson on the covenant in the mortgage which he had given them on lot 1351. The defendants were not parties to the action, nor were they added in the Master's office. A final order of foreclosure was obtained on the 29th November, 1919. The judgment against Wilson upon his covenant had not been satisfied in whole or in part. It was said that he had no assets out of which the judgment could be realised.

The plaintiffs were in a position to reconvey lot 1351 to the defendants, but not lot 1349.

Under the assignment from Wilson of the defendants' covenant with him, the plaintiffs claimed, in this action, from the defendants, $4,138.13, the amount of the judgment obtained against Wilson on the 1st April, 1919, with interest and costs.

The defence set up was that, as Wilson could not be compelled to pay the judgment against him, there was no amount in respect of which he was entitled to claim against the defendants. Another defence was that the lots were dealt with as a whole, and that lot 1349 was, in its depreciated condition, no longer under the control of the plaintiffs.

Reference to Mendels v. Gibson (1905), 9 O.L.R. 94, 98; Brown v. Brown (1912), 3 O.W.N. 543, 20 O.W.R. 986; Roberts v. Bury Commissioners (1870), L.R. 5 C.P. 310; Beatty v. Bailey (1912), 26 O.L.R. 145; British Union and National Insurance Co. v. Rawson, [1916] 2 Ch. 476, 487.

The mortgagors themselves had put it out of the plaintiffs' power to reconvey one of the lots—they were in a position to convey the other.

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

and the morning of Monday the 19th, they were badly damaged by frost. It was impossible, except as a matter of probability, to say just when the damage was done.

The learned Judge also found that the plaintiff was notified on the morning of Friday the 16th that the potatoes had arrived on the previous evening at the point to which they were consigned, and that he went out to the defendants' freight station on the afternoon of that day; and time began to run against him from Friday morning, when he had knowledge of the arrival of the car.

On the lapse of a reasonable time after knowledge on the part of a consignee of the arrival of the goods at their destination, the liability of the carriers undergoes a charge, and they are thereafter responsible as warehousemen only—that is, merely for negligence: Richardson v. Canadian Pacific R.W. Co. (1890), 19 O.R. 369; Grand Trunk R.W. Co. v. McMillan (1889), 16 Can. S.C.R. 543, 555. What is a reasonable time depends on the circumstances of the particular case: Chapman v. Great Western R.W.Co. (1880), 5 Q.B.D. 278, 281, 282.

In this case the most obvious circumstances were the known susceptibility of potatoes to damage from frost, their shipment in midwinter from a point well to the north in Quebec, the intensity of the cold continuously prevailing during loading and transit, the delay after notice of arrival, the greater danger from frost while the car was not in motion, and the proximate incidence of a Sunday, when unloading would be illegal and further exposure inevitable.

Merely as a matter of convenience, the plaintiff desired the defendants to switch the car to the exchange tracks of a connecting railway.

After Friday evening—a reasonable time for unloading having elapsed—the defendants were liable only as bailees. Negligence subsequent to that time not having been proved against them, their only liability as carriers was for acts done or omitted before Friday evening, unless their position was altered to their prejudice by the switching contract made with the plaintiff.

By the conditions of the bill of lading, the defendants were made responsible for any loss to the plaintiff caused by the act, neglect, or default of the Grand Trunk Railway Company, to whose tracks the car was removed, and must satisfy the Court that the plaintiff's loss was not so caused. The onus thus cast upon the defendants had been fully discharged. Affirmative proof had been given that the loss was not caused by and did not result from the act, neglect, or default of the other carrier. The car was promptly moved, the heaters were in good order and burning on Sunday morning when inspected, and on Tuesday, when the car was opened. It was fairly to be inferred that they were burning during the interval.

At common law and under sec. 1 of the bill of lading, the defendants were liable, as *and while* carriers, for damage to the potatoes, unless the damage can be attributed to the "act of God" or an "inherent vice in the goods," mentioned in sec. 3. The defendants could not be made liable on either of these counts.

Reference to Ham v. McPherson (1842), 6 U.C.O.S. 360, 364, 365.

The plaintiff had failed to prove—and the onus was on him to prove—that the damage took place while the potatoes were under the control of the defendants. The probabilities all favoured the conclusion that the freezing occurred after the car had passed out of their possession.

The action wholly failed, and should be dismissed with costs.

CANADA STARCH CO. LIMITED v. TORONTO HAMILTON AND BUFFALO R.W. CO.—KELLY, J.—NOV. 19.

Fire—Negligence—Destruction of Property—Evidence for Jury—Verdict—Damages.]—Action for damages for destruction of the plaintiffs' buildings by fire alleged to have spread from the defendants' premises, where a fire was set out to burn rubbish. The action was tried with a jury at Brantford. KELLY, J., in a written judgment, said that at the close of the plaintiffs' case counsel for the defendants moved for judgment dismissing the action. The motion was refused, and the case was allowed to go to the jury, who found in favour of the plaintiffs. The learned Judge then believed and still believed that there was evidence to go to the jury from which it might reasonably be concluded, as a matter of fact and not as mere conjecture, that the fire was due to acts of negligence of the defendants. The verdict on the question of liability should not, therefore, be interfered with. The amount of damages assessed was in accordance with the uncontradicted evidence. There should be judgment in the plaintiffs' favour for $2,079.28 and costs. E. Sweet, for the plaintiffs. J. A. Soule, for the defendants.

CORRECTION.

In CITY OF OTTAWA v. GRAND TRUNK R.W. CO., CITY OF OTTAWA v. OTTAWA AND NEW YORK R.W. CO., ante 170, Redmond Code, not R. G. Code, K.C., appeared with D. L. McCarthy, C.K., for the defendants, the Grand Trunk Railway Company; and W. L. Scott appeared for the defendants the Ottawa and New York Railway Company.