

THE VICTORIA HARBOUR LUM- } APPELLANTS; 1895
 BER COMPANY (DEFENDANTS)..... }
 *Mar. 27, 28.

AND

*May 6.

JAMES M. IRWIN (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Sale of timber—Delivery—Time for payment—Premature action.

By agreement in writing I. agreed to sell and the V. H. L. Co. to purchase timber to be delivered “free of charge where they now lie within ten days from the time the ice is advised as clear out of the harbour so that the timber may be counted * * * Settlement to be finally made inside of thirty days in cash less 2 per cent for the dimension timber which is at John’s Island.”

Held, affirming the decision of the Court of Appeal, that the last clause did not give the purchaser thirty days after delivery for payment; that it provided for delivery by vendor and payment by purchasers within thirty days from the date of the contract; and that if purchasers accepted the timber after the expiration of thirty days from such date, an event not provided for in the contract, an action for the price could be brought immediately after the acceptance.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment of the Divisional Court in favour of the plaintiff.

The only question raised on this appeal was whether or not the plaintiff’s action was premature and that question depended on the construction to be placed on the following agreement between the parties.

“Memorandum of agreement, in duplicate, entered into this second day of May, 1883.”

“Between James M. Irwin, of the town of Peterborough, of the first part, and”

“The Victoria Harbour Lumber Company, of the city of Toronto, of the second part.”

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne Sedgewick and King JJ.

1895
THE
VICTORIA
HARBOUR
LUMBER
COMPANY
v.
IRWIN.

“The party of the first part sells and the parties of the second part purchase the following dimension timber, as per schedule annexed, now lying at John’s Island in care of Henry Colclough, to be delivered by the party of the first part to the parties of the second part free of charge where they now lie within ten (10) days from the time the ice is advised as clear out of the harbour, so that the timber may be counted, at a price of nine dollars and fifty cents (\$9.50) per thousand feet in accordance with the schedule hereto attached, which purports to be a condensed specification of Mr. Cochrane’s measurement of the same, who scaled the timber and whose scale is accepted between the parties.”

“Settlement to be finally made inside of thirty (30) days in cash less 2 per cent for the dimension timber which is at John’s Island.”

The defendant company contended that the second clause of this agreement meant that payment was not to be made until thirty days after the delivery was completed and it not having been completed until July 1st, 1893, the action which was commenced on July 12th, 1893, was premature. The trial judge agreed with this contention and dismissed the action. His decision was reversed by the Chancery Division, whose judgment was affirmed by the Court of Appeal.

Laidlaw Q.C. and *Bicknell* for the appellants.

McCarthy Q.C. and *Edwards* for the respondent.

The judgment of the court was delivered by :

GWYNNE J.—The sole question upon this appeal is whether or not the plaintiff’s action was prematurely brought. I concur in the argument of the learned counsel for the appellants that nothing was by the contract made payable for the timber expressed to be lying at John’s Island until delivery thereof. The true

construction of the first paragraph of the contract if it had stood alone was, as I think, that the appellants undertook to pay \$9.50 per thousand feet of that timber delivered free of charge, but in that contract if it had so stood no time was fixed for the delivery of the timber further than that it was agreed that it should take place "within ten days from the time the ice is advised as clear out of the harbour," the second paragraph was therefore inserted in the contract which provides that, "settlement to be finally made inside of 30 days in cash less 2 per cent for dimension timber which is at John's Island."

1895
 THE
 VICTORIA
 HARBOUR
 LUMBER
 COMPANY
 v.
 IRWIN.
 ———
 Gwynne J.
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This is the paragraph which was relied upon as giving to the appellants 30 days of grace for payment of the price after delivery of the timber, but it does nothing of the kind; what the paragraph was introduced for was manifestly to define more precisely the time for delivery of the timber than by the expression "within ten days from the time the ice is advised as clear of the harbour," and it expresses the mutual agreement of both parties to the contract, namely, that everything necessary to a final settlement of the contract by both parties, namely, delivery by the one and payment by the other, shall be made inside of 30 days from the date of the contract. For delivery after that date, and consequently for payment in the event of delivery after that date, the contract makes no provision. If the non-delivery within the 30 days was by reason of the respondent's default the appellants had their action for breach of contract; but having accepted a delivery of the timber after the expiration of the 30 days named in the contract within which it was to be delivered, for which event the contract made no provision, it is preposterous to hold that the appellants had by the contract 30 days after delivery, after the expiration of the time named in the contract for

1895

THE
VICTORIA
HARBOUR
LUMBER
COMPANY
v.

IRWIN.

Gwynne J.

delivery, for payment of the price of the timber delivery of which was so accepted. For such an event it is plain that the contract made no provision, so no question as to the action having been premature within the terms of the contract could arise.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Laidlaw, Kappele & Bicknell.*

Solicitors for the respondent: *Edwards & Murray.*
