1904
*Nov. 11, 14.
1905
*Jan. 31.

WALTER PHELPS (PLAINTIFF).....APPELLANT;

AND

H. F. McLACHLIN AND CLAUDE McLACHLIN (DEFENDANTS).....} RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Contract—Sale of goods—Refusal to perform—Specific performance—Damages.*

By contract in writing M. agreed to sell to P. cedar poles of specified demensions, the contract containing the following provisions: "All poles as they are landed in Arnprior are to be shipped from time to time as soon as they are in shipping condition. Any poles remaining in Arnprior over one month after they are in shipping condition to be paid for on estimate in thirty days therefrom less 2 per cent discount. * * For shipments cash 30 days from dates of invoices less 2 per cent discount."

*Held*, that for poles not shipped P. was not obliged to pay on the expiration of one month after they were in shipping condition but only after 30 days from receipt of the estimate of such poles.

M. refused to deliver logs that had been on the ground one month without previous payment and P. brought an action for specific performance and damages claiming that he could not be called upon to pay until the poles were inspected and passed by him, and also that M. should supply the cars. M. counterclaimed for the price of the poles.

*Held*, Sedgewick and Killam JJ. dissenting, that each party had misconceived his rights under the contract, and no judgment could be rendered for either.

APPEAL from the decision of the Court of Appeal for Ontario reversing the judgment for the plaintiff at the trial and ordering the judgment to be entered for the defendants on their counterclaim.

The material facts are set out in the head-note.

*PRESENT:—Sir Elzéar Taschereau C. J. and Sedgewick, Girouard, Davies and Killam JJ.

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*Watson K.C.* and *Slattery* for the appellants.

*S. H. Blake K.C.* and *Henderson* for the respondents.

THE CHIEF JUSTICE.—I concur in the opinion of Mr. Justice Davies.

SEDGEWICK J. (dissenting).—I agree with Mr. Justice Killam.

GIROUARD J.—I also concur in the opinion of Mr. Justice Davies.

DAVIES J.—The rights of the parties are to be determined as they existed on the 20th August, 1902, the date of the issue of the writ.

The agreement out of which the dispute arose is badly drawn and it is somewhat difficult to discover its real meaning. I agree, however, so far as the time for payment is concerned, with the trial judge and Mr. Justice Garrow and, as I gather from his reasons Mr. Justice Maclaren, that the purchaser, the plaintiff in the action, was to have thirty days for payment alike from the delivery of the invoice in cases of actual delivery of the logs, as from delivery of the estimate where the logs had been over a month at Arnprior in shipping condition. On this latter point I cannot agree with the Chief Justice of the Court of Appeal that the payment could be exacted (where actual delivery had not taken place) at the expiration of a month after the logs had been at Arnprior for one month whether vendee had notice or not. It seems to me to be a more reasonable construction that the vendee was to have a month for payment alike in cases of delivery and non-delivery after, in the one case, he received the invoice and, in the other, the estimate of the logs which were ready for delivery and

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had been in shipping condition for a month. I agree that the plaintiff had to supply the cars and the defendants load them.

I think both parties misconceived their rights under the agreement; the plaintiff was wrong in claiming that the cars should be supplied by the defendant and that he could not be called upon to pay for any poles unless they were first inspected and passed by him; the defendants were wrong in insisting that they had a right to immediate payment when the logs were on the ground a month and that without payment they could not be called upon to deliver.

I cannot see in any case how judgment could be given for defendant on his counterclaim. Under any construction of the contract the onus lies upon him of proving affirmatively that the poles, for which payment is claimed, were in a shipping condition for a month at Arnprior. The trial judge made no finding on this nor does the Court of Appeal. I cannot say the evidence establishes the fact. Both parties being at fault and misinterpretating the contract at the time the action was brought, the circumstances do not warrant a judgment being rendered for either. I would, therefore, allow the appeal, dismiss the action and the counterclaim without costs here or in the courts below.

KILLAM J. (dissenting)—I agree with the view taken by Mr. Justice MacMahon by whom the action was tried, and by Mr. Justice Garrow, in the Court of Appeal, as to the construction of the contract in question. It appears to me that the defendants were wrong in claiming that the amount of the estimate was payable immediately and in refusing to deliver further logs until this was paid. And it does not appear to me that the plaintiff's contentions were such as to disentitle him to hold the defendants in default. They may have

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been untenable but they did not amount to a repudiation of the contract on the part of the plaintiff. The plaintiff's counsel has argued the case before us upon the contention that the defendants' refusal to deliver further logs without payment of the amount of their estimates constituted such a repudiation of their contract as gave the plaintiff the right to sue for damages as for its breach. But even assuming that under the principles of the cases of *Hochster* v. *De la Tour* (1) ; *Danube & Black Sea Railway etc. Co.* v. *Xenos* (2); *Withers* v. *Reynolds* (3) ; and the *Mersey Steel & Iron Co.* v. *Naylor Benzon & Co.* (4), the plaintiff was entitled to rescind the contract and sue for damages as at common law, I think that he precluded himself from taking this position. I would refer in this connection to the principles laid down by Lord Esher M.R. in *Johnstone* v. *Milling* (5) at page 467:

> When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he thereby, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a renunciation of the contract he entitles the other party, if he pleases, to agree to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission. The other party may adopt such renunciation of the contract by so acting upon it as in effect to declare, that he too treats the contract as at an end, except for the purpose of bringing an action upon it for the damages sustained by him in consequence of such renunciation. He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation the contract is at an end except for the purposes of the action for such wrongful renunciation ; if he does not wish to do so he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would

(1) 2 E. & B. 678.
(2) 13 C. B. N. S. 825.
(3) 2 B. & Ad. 882.
(4) 9 App. Cas. 434.
(5) 16 Q. B. D. 460.

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arise. He must elect which course he will pursue. Such appears to me to be the only doctrine recognized by the law with regard to anticipatory breach of contract.

See also *Frost* v. *Knight* (1).

The plaintiff did not elect to rescind the contract. On the contrary he elected to insist upon its performance. On the 7th August, 1902, his solicitor wrote to the defendants:—

> Mr. Phelps is still willing to carry out his contract and will ask you to do the same. * * * * * * * * * *
> My instructions are to enter proceedings to have the contract enforced and for damages. If I have no word from you by the 9th instant that you are willing that the contract should be carried out I will proceed on instructions.

On the 20th August the action was begun. At that time the thirty days which, in my view, were to be allowed for payment had not elapsed; the plaintiff was not then in default. When he filed his statement of claim the plaintiff asked for specific performance of the agreement. It is true that he asked also for damages, but it is clear that at the time that he began the action he had not taken and he was not thereby taking the position of rescinding the contract so as to entitle him to damages as at common law. By their statement of defence the defendants denied any breach of the contract but stated that they were still ready and willing to have it performed and to perform it on their part. For these reasons I think that the decree of the court for specific performance should stand.

It is now urged on the part of the plaintiff that, after the lapse of time which has intervened, and which, it is claimed, was due to the defendants' course in contesting the action as they have done, it is unjust to compel the plaintiff to perform the contract and to accept the logs. Probably such delay would be in many cases a ground for the exercise by the court of

(1) L. R. 7 Ex. 111.

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the equitable jurisdiction under Lord Cairns's Act to award damages in lieu of specific performance, but it does not appear to me that in the present case this should be done. The plaintiff asked for specific performance. The court has decreed what he asked for. When the statement of claim was filed the time for payment for the logs upon the ground had, in any view of the contract, expired. The plaintiff was then, at least, bound to pay for those that had been left upon the ground on estimate. I cannot doubt that if he had then offered to do so any difficulty in the way of full performance of the contract would have been removed. From the time when the thirty days expired the plaintiff was in default and on that ground I think he should be left to the position in which he placed himself when he began the action.

I am not satisfied upon the evidence that there had been on the ground, in shipping condition, for the period required by the contract, logs to the number and dimensions estimated by the defendants, which were up to the standard of the contract. The judgment of the Court of Appeal admits that to be doubtful. I would have preferred a decree by which it should first be ascertained what poles were up to contract before the enforcement of the plaintiff's liability to pay for them. But in view of the opinion of the other members of the court it does not appear important to consider that question any further. I will simply say that I think that either such variation should be made or the appeal should be dismissed.

*Appeal allowed without costs.*

Solicitor for the appellant: *R. J. Slattery.*

Solicitors for the respondents: *MacCracken, Henderson & McDougal.*