ROBERT THOMSON (DEFENDANT).....APPELLANT;

AND

NATHANIEL DYMENT (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

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*May 27 & 28.

*Nov. 8.

Contract—Sale of lumber—Acceptance of part—Right to reject remainder.

T. contracted for the purchase from D. of 200,000 feet of lumber of a certain size and quality, which D. agreed to furnish. No place

*PRESENT.—Sir W. J. Ritchie C.J., Fournier, Henry, Taschereau and Gwynne JJ.

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was named for the delivery of the lumber, and it was shipped from the mills where it was sawed to T. at Hamilton. T. accepted a number of carloads at Hamilton, but rejected some because a portion of the lumber in each of them was not, as he alleged, of the size and quality contracted for.

Held, affirming the judgment of the Court of Appeal for Ontario, Fournier and Henry JJ. dissenting, that T. under the circumstances of the case had no right to reject the lumber, his only remedy for the deficiency being to obtain a reduction of the price or damages for non-delivery according to the contract.

APPEAL from the decision of the Court of Appeal for Ontario (1), affirming the judgment of the Common Pleas Division (2) in favor of the plaintiff.

The material facts of the case are as follows:

The defendant, Thomson, was a dealer in lumber at Hamilton, Ont., and previous to the year 1884, he had purchased lumber from the plaintiff. In January, 1884, he received a letter from the plaintiff containing the following offer: "I am informed you want 200,000 feet 2 "inch plank, 18 feet; I will furnish it for same price "and terms as last summer." On January 26th, 1884, he answered said letter as follows: "I will take 200,- "000 feet 2 inches, 18 feet, 6 inches up to 12 inches, "good, sound, square edge, fit for car flooring, at $10, "3 months." On February 2nd, 1884, the defendant received the following: "I could not furnish the "200,000 feet 2 inch plank, 18 feet, for less than $10.50 "per thousand," On February 20th, he wrote as follows: "I will take 200,000 feet cut as follows, 2 x 6, "2 x 8, 2 x 9, 2 x 10, 2 x 12, 18 feet, at $ 10.25, 3 "months. It must be good, sound, square-edged stuff, "red and white pine." On February 23rd, he received the following answer: "I will accept your offer for "the 200,000 feet of 18 feet plank, from 6 to 12 wide, "quality same as I supplied you last year, your accept- "ance at three months from date of shipments."

On the strength of this correspondence the plaintiff

(1) 12 Ont. App. R. 659 (2) 9 O. R. 566.

began in June, 1884, to ship the lumber from his mills on the line of the Hamilton & North-Western Railway to the defendant at Hamilton, who accepted a number of car loads, but refused to accept others on the ground that a portion of the lumber in them was not up to the standard of his letter of February 20th. All the lumber had been sent to Hamilton except one car load which, by defendant's orders, was sent to London.

The plaintiff sued for the whole amount shipped, and defendant in his statement of defence offered to pay for the portion which was of the proper size and quality.

The plaintiff recovered a verdict at the trial for the full amount, and both the Common Pleas Division and the Court of Appeal refused to disturb it. Both these courts held that the defendant had no right to reject the lumber, his only remedy being to proceed against the plaintiff for damages for non-delivery according to contract. From the decision of the Court of Appeal the defendant appealed to the Supreme Court of Canada.

Bain Q.C. and *Cappelle* for the appellant, as to right of inspection and rejection, and when and where it must be exercised, in addition to cases cited in the court below, referred to *Towers* v. *Dominion Iron and Metal Co.* (1); Campbell on Sales (2); Chitty on Contracts (3); *Morton* v. *Tibbett* (4).

As to rights of buyer to reject goods on ground of difference in kind or quality see Benjamin on Sales (5); *Barr* v. *Gibson* (6); *Gompertz* v. *Bartlett* (7); *Behn* v. *Burness* (8).

The vendor is bound to give opportunity to inspect goods. Benjamin on Sales (9).

(1) 11 Ont. App. R. 315.
(2) Ed. '81, pp 387, 388 & 389.
(3) 11th ed. p. 424.
(4) 15 Q. B. 428.
(5) 3 ed. p. 902.
(6) 3 M. & W. 390.
(7) 2 El. & Bl. 849.
(8) 3 B. & S. 751.
(9) 3. ed. p. 687.

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Delivery to carrier is delivery to purchaser, but carrier can only receive not accept goods. Benjamin on Sales (1).

In a severable contract the buyer is bound to accept such parts as are in accordance with the contract, but has a right to reject such as are not. *Couston* v. *Chapman* (2); *Borrowman* v. *Free* (3); *Highlands Chemical Co.* v. *Matthews* (4).

The question of goods being or not being according to the contract is for the jury. *Weiler* v. *Schilizzi* (5); *Bannerman* v. *White* (6).

McCarthy Q.C., for the respondent, contended that under the circumstances the appellant had not the right of rejection as claimed, but his remedy was either by a reduction in the price claimed or by cross-action or counter claim. He referred to Benjamin on Sales (7) and to *Campbell* v. *Mersey Docks* (8); *Rohde* v. *Thwaites* (9).

Bain Q.C. in reply cited *Wait* v. *Baker* (10).

Sir W. J. RITCHIE C.J.—After a careful consideration of this case I have arrived at the conclusion, on the facts presented, that by the shipments on the railway of lumber which answered generally the kind of lumber contracted for there was a substantial compliance with the contract, and the vendee had no right to reject any number of carloads because of the inferiority in quality of a very small portion in each carload, but that his redress was a claim for reduction in the price, or for damages which would appear, in this case, to have been, comparatively, of a very trifling amount and for which he has been allowed an abatement in the price. Of course, if the article shipped was of an entirely different

(1) 3 ed. p. 686.
(2) L. R. 2 Sc. App. 250.
(3) 4 Q. B. D. 500.
(4) 76 N. Y. 145.
(5) 17 C. B. 619.
(6) 10 C. B. N. S. 844.
(7) 3 ed. p. 902.
(8) 14 C. B. N. S. 412.
(9) 6 B. & C. 388.
(10) 2 Ex. 1.

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character the case would be very different, but here the description was substantially satisfied, which resolves the dispute into one of quality; and the verdict establishing that the deficiency in quality only amounted to $90, or about 4½ per cent., an amount insufficient to justify the rejection of the lumber, which, in other respects, answered the terms of the contract, and defendant having been allowed that amount, substantial justice has, in my opinion, been done, and I cannot see any object to be gained by disturbing this verdict, though I must say I cannot very well understand why the evidence as to quality should have been rejected in the first instance as applicable either to the question whether the article supplied accorded with the contract, or as matter in reduction of the price; but I think we must take the verdict as establishing, after defendant was permitted to go into the evidence of the quality and character of the lumber, exactly how defective it was, and therefore there can be no possible object gained by sending the case to another trial by reason of the rejection of the evidence in the first instance.

FOURNIER J.—Le contrat fait entre les parties résulte de leur correspondance à ce sujet. L'intimé s'obligeait à livrer à l'appelant pour le prix convenu 200,000 pieds de bois de la qualité et des dimensions mentionnées dans la correspondance. Le bois s'étant trouvé de dimensions plus petites que celles convenues et de mauvaise qualité,—14 charges de chars furent refusées à leur arrivée à Hamilton, parce que les madriers n'avaient pas 18 pieds de longueur, 2 pouces d'épaisseur, et de 6 à 12 pouces de largeur,—

And was not "good sound square edge stuff and of the same quality" as was shipped the previous year by plaintiff to the defendant.

Après une correspondance entre les parties à ce sujet, l'appelant offrit la somme pour la qualité de bois

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qui s'était trouvée conforme au contrat. Dyment fit suivre le refus de cette offre d'une action. Au procès, et après l'enquête du demandeur close, M. Lount, conseil du défendeur, fit entendre celui-ci pour prouver que le bois rejeté à Hamilton n'était pas conforme au contrat. Il avait 8 autres témoins pour prouver ce fait. Le conseil du défendeur objecta à cette preuve, prétendant que l'appelant aurait dû inspecter le bois abord des chars, aux moulins du demandeur, que ne l'ayant pas fait, il ne pouvait plus l'inspecter et le rejeter à Hamilton ; qu'il ne pouvait plus alors exercer que son action en dommages ou prouver l'infériorité de la qualité en déduction du prix du contrat. Cette objection fut maintenue par l'hon. juge qui déclara que la preuve offerte était inadmissible comme défense à l'action et ne pouvait servir qu'à établir une réclamation de dommages ou en réduction du prix du contrat.

En conséquence de la décision de l'hon. juge, aucun des huit autres témoins prêts à établir le fait que le bois n'était pas conforme au contrat ne fut entendu, et il s'ensuivit entre les conseils un arrangement par lequel on convint de suspendre le procès et de laisser entrer un jugement pour $1,325 et les frais, sans préjudice aux droits du défendeur de faire motion pour faire mettre de côté la décision du juge. Par cet arrangement, tout ce qui aurait eu lieu après cette décision devait être considéré comme non avenu, si la décision était annulée. Le montant de la réduction mentionnée alors ne représentait pas la valeur de la différence entre le bois mentionné au contrat et celui qui avait été livré puisque la preuve en avait été interdite.

La principale question que soulève cet appel est de savoir si la décision de l'hon. juge déclarant que l'appelant n'avait aucun droit d'inspecter et de rejeter le bois à Hamilton est fondée en loi.

Cette question doit être examinée et décidée sans

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égard à la réduction de $90 consentie par l'appelant. Il est évident que ce montant n'a été admis que parce que l'appelant avait confiance de faire casser la décision de l'hon. juge, et avait aussi la conviction que s'il réussissait à faire entendre ses témoins il établirait la suffisance de ses offres. Peut-on maintenant s'appuyer sur cet arrangement pour en conclure comme l'a fait la Cour d'Appel que l'insignifiance de la réduction $90, est une preuve que le contrat a été rempli ? C'est oublier que cette admission n'a été donnée que pour un but particulier, et c'est violer la convention des parties que de s'en servir pour empêcher l'examen de la question que cette admission avait pour but unique de soumettre à la revision d'un autre tribunal.

Ces arrangements entre les parties, en face de la cour, lorsqu'elle y donne son approbation, ont la force d'un contrat judiciaire qui est aussi obligatoire que la chose jugée. La partie qui y a donné son consentement ne peut plus le rétracter. (1).

Le contrat de vente dont il s'agit n'a rien déterminé au sujet du lieu de l'inspection. L'intimé devait fournir du bois venant de trois établissements différents. Il l'a expédié en différents temps et sans en donner avis à l'appelant qui n'a jamais eu l'occasion d'en faire l'inspection ailleurs qu'à Hamilton.

La prétention de l'intimé, qu'il devait le livrer à bord des chars est contredite et par lui-même et par la correspondance et par le fait qu'à l'exception d'une seule charge de char tout le bois a été livré à Hamilton.

Dans le silence des parties à cet égard, il faut en conclure que l'appelant avait droit d'inspecter et de rejeter le bois à Hamilton.

Indépendamment de cela, la vente d'articles non encore en existence, lors même que la propriété est passée à l'acheteur, ne lui enlève pas le droit de les ins-

(1) *Holt* v. *Jesse* 3 Ch. D. 177.

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pecter et de les rejeter, dans un délai raisonnable. La loi à cet égard est clairement exposée dans la cause de *Pope* vs *Allis* (1):

The authorities cited sustained this proposition, that when a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract.

Cette décision doit avoir d'autant plus d'application à la présente cause qu'elle est fondée sur les précédents anglais qui y sont cités, et que les circonstances de la cause sont parfaitement analogues à celles mentionnées dans cette décision. Les jugements contraires de la Cour d'Appel ne saurait prévaloir contre cette autorité ni contre celle de *Grimoldby* v. *Wells* (2) où Brett J. s'exprime ainsi au sujet du droit d'inspection :

There is here a contract for the sale of goods, and by agreement they are to be delivered before a fair opportunity for inspection arises, for it cannot properly be said that it would be reasonable to hold the defendant bound to examine where they were delivered to him at half way of the journey.

La doctrine énoncée dans cette autorité par l'hon. juge est sans doute celle qui devait régler l'effet du contrat en question dans cette cause. Pour cela il faudrait permettre la preuve qui a été refuseé, car ce n'est que par ce moyen que l'appelant pouvait établir si le bois livré à Hamilton était des description et qualité définies par le contrat. Je suis d'opinion qu'elle aurait dû être permise. Je dois ajouter que je concours entièrement dans l'opinion exprimée par l'hon. juge Henry dans les notes qu'il a eu l'obligeance de me communiquer. L'appel devrait être alloué et un nouveau procès ordonné.

(1) 115 U. S. R. 363.

(2) L. R. 10 C. P. 391.

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HENRY J.—By means of a correspondence entered into between the parties to this suit, the respondent, in 1884, agreed to sell to the appellant certain dimension lumber to be shipped to Hamilton, where the appellant resided.

The defence set up is that certain shipments, in whole or in part, were inferior in quality and not according to the contract, and that the appellant declined to receive the same. Some shipments were accepted.

When at the trial the counsel of the appellant was proceeding to adduce evidence to sustain the defence, the counsel of the respondent objected to any evidence to sustain it, but agreed that evidence in reduction of damages should be received, and his contention was sustained by the presiding judge. The contention of the respondent's counsel was that the appellant had no right of inspection at Hamilton but that it should have been made when the lumber was put on board the cars. It is shown that the lumber was shipped from three different mills of the respondent and from time to time. No notice was given the appellant of any of those shipments. How then could it be assumed that the appellant could have by any possibility made any inspection? It may be gathered from the correspondence and otherwise that the appellant was to pay the railway charges, but that, in my opinion, does not affect the contract otherwise. Such payment only affects the price. Suppose the respondent had agreed to deliver the lumber free of all expense at Hamilton, would not the right of inspection there be at once admitted, and when we consider that if the cost of transit was agreed to be paid by the appellant the respondent sold to that extent at a lower rate. The respondent agreed to put free on board the cars consigned to the appellant a particular quality and description of

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lumber, and the substantial question is: Did he do so? How can he claim that the appellant accepted the lumber shipped when he knew that the latter not only had not accepted the inferior lumber but was not given an opportunity of doing so?

It is shown that the appellant required and contracted for a particularly described article and the respondent agreed to supply that to him. Suppose a builder having a contract for the erection of a house is required to use dimension material and another agrees to supply the same and to put it free on board the cars of a railway; he ships it but without any notice to the party purchasing it, and when it reaches the place of delivery, and is found wholly unsuitable, would it not be monstrous to decide that the builder was bound to receive it and pay for an article he neither wanted or contracted for? The proposition would be monstrous, illegal and inequitable, and what have we here but substantially that same proposition?

I will put another case. A merchant in Halifax undertakes to ship to another at Montreal a quantity, say one hundred barrels, of herrings, sound and of good quality, and agrees to put them free on board the cars at the price agreed upon. The number of barrels of herrings are shipped, but on reaching Montreal are found to have been unsound when shipped and of inferior quality. Is the consignee in such a case obliged to accept the consignment? Is he required to take what he did not want or purchase? Who can be found to contend that he would, and yet it is contended the appellant is bound here. Would not the merchant in Montreal be entitled to refuse acceptance of the fish? And could he not claim to be reimbursed for the freight if he paid it and such damages for the breach of contract as he could prove? So in this case the appellant, in my opinion, is entitled to claim, in respect of any of the

shipments that on inspection in Hamilton turned out different from the contract, reinbursement of the freight paid by him and special damage if proved.

The contract in this case was, in effect, that the respondent would ship on board the cars the lumber according to the contract, and his right to recover was based on showing that the lumber so shipped was so. He did not attempt on the trial to prove it, but objected to the appellant showing the opposite by evidence that when the lumber reached Hamilton it was not according to the contract. I am of the opinion that such evidence was improperly rejected.

We need not speculate on the question of the right of the appellant to claim the property so shipped. It was, no doubt, his, but subject to his right to reject it. He had no doubt an insurable interest in it when shipped, but considerations of such questions do not affect the issues raised in this case.

On the part of the appellant it is shown, and uncontradicted, that on the learned judge deciding at the trial that the appellant could not inspect and refuse to accept the lumber alleged to be not according to the contract at Hamilton the right to have that judgment reviewed on appeal was agreed to, but that evidence should be received in reduction of the price agreed upon, or by cross action in case the decision of the learned judge upon that point should be affirmed. That after some evidence was given as to the value of the lumber independently of the question of its being according to the contract, it was agreed that $90 should, in that event, but only in that event, be considered as the sum to be deducted. That agreement does not in any way affect the consideration of the other and more important question. Our judgment is, therefore, required upon the latter subject. It is alleged too in the appellants factum, and tacitly admitted, that he had several witnesses to

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prove that the lumber was not according to the contract, but that the learned judge having refused to admit evidence on the point they were not examined. We must, therefore, not fail to mark the distinction between evidence of the value of an article and evidence as to an article being according to contract. A man is bound to accept only what he specifically bargains for, although the article offered is worth in the market even more than that contracted for. The factum of the respondent put the case fairly thus :—

The question in issue between the parties is the one simple question of law whether under the circumstances the appellant had the right of rejection at the place and in the manner mentioned above.

The contract was to deliver 200,000 feet of plank two inches thick, from six to 12 in width and eighteen feet long, to be good, sound, square edged stuff, red and white pine fit for car flooring. The appellant alleges in his statement of defence, that the lumber refused by him was "neither good, sound square edge stuff" of the size agreed for, nor of the proper quality. Issue was taken thereon and that is the only one legitimately before us. It is no question like that of a purchaser accepting an inferior article and refusing to pay the full contract price. In such a case the supplying party has failed to supply the proper article, and the purchaser may either demand a reduction in price or counter claim for damages. We must not confound the two positions. Where a party refuses to accept an article different from that contracted for, I can find neither any law or equity to force him.

On the trial the appellant was prevented by the learned judge from showing that the lumber was not according to the contract.

It cannot be denied that if the goods shipped or tendered are not the kind of goods agreed for, or where the description of the goods is not answered by the goods offered, that the right of rejection is still with

the buyer, notwithstanding shipment and delivery, as in that case there is a total want of fulfilment of the contract or a breach of a condition precedent on the part of the vendor. See *Chanter* v. *Hopkins* (1); *Bowes* v. *Shand* (2); Benjamin on Sales (3).

The appellant was not allowed to prove such a legal defence as every principle of justice requires and the law permits him to do. He is therefore, in my deliberate judgment, entitled to a new trial. I think therefore, the appeal should be allowed and a new trial granted with costs in all the courts.

TASCHEREAU J.—I am of opinion that this appeal should be dismissed upon two grounds. 1st, Because, under the circumstances as disclosed by the evidence, the property in the goods passed to the vendee at the time of shipment; 2nd, on the ground that the appellant having received, paid for and accepted a substantial part of the goods his right of rejection was gone.

GWYNNE J.—I find it difficult to understand how the misunderstanding in this case, which occasioned this appeal, has arisen.

The defendant pleaded a right to reject lumber forwarded to him by the plaintiff under a contract of purchase upon the ground that the lumber so rejected was not sound, good, square edge stuff, fit for car flooring, which, as he said, was the lumber contracted for.

When defendant's counsel, having called the defendant as a witness on his own behalf, was proceeding to examine him upon the quality of the lumber, counsel for the plaintiff objected to any such evidence being given for the purpose of establishing the defence set up

(1) 4 M. & W. 399.
(2) 2 App. Cas. 455.
(3) Pp. 896, 6 and 596 Eng. Ed., and secs. 887, 8 and 600 *et seq.* Am. Ed.

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in the statement of defence, insisting that to entitle the defendant to reject the lumber he should have inspected it at the mills before the lumber was forwarded. The learned judge concurred in this view, but said he would receive the evidence subject to the objection, and he ruled that the defendant should have leave to file a counter claim. The counsel for the defendant disputed this point of law, insisting that the contract, which, as he contended, appeared in a letter which he relied upon, did not make the lumber deliverable on the cars, but to the defendant at Hamilton. The court then adjourned. When the court met again next morning, the defendant's counsel stated that he had decided not to enter a counter claim, and to offer no evidence as to quality, but to go to the jury for the sole purpose of determining what the contract was. Plaintiff's counsel then stated that he was quite willing that the defendant should give evidence that the lumber was not according to contract, and also as to quality with a view to reduction of the price. Defendant's counsel then stated that he would go on to give evidence as to a reduction in the price and to dispose of the whole case, and accordingly he called the defendant and went largely into evidence as to what the contract was, and as to reduction in the price by reason of defect in quality. Now, I do not see why the plaintiff's counsel in the first instance objected to the evidence as to defect in quality being gone into, for it was given in the result largely, although not, as is now said, to the extent it could have been gone into, as defendant had as he said, many witnesses in court who could have spoken to that point. The evidence of defect in quality offered to reduce the price might have proved sufficient to show that the quality was so utterly defective, and so unsuitable for the purpose for which the lumber was purchased, that it could not be said to have supplied the

contract, in which latter case, as was admitted by the plaintiff's counsel, the defendant might have rejected the lumber as he did. And it was also admitted that it was open to the defendant, if the evidence supported the contention, to have it put to the jury to determine whether the lumber was so defective in quality that it could not be said to supply the contract. So that in reality there appears to have been no reason why the defendant should not have offered all the evidence he had for the purpose of establishing the lumber to have been so defective in quality. But what took place was that after examining the defendant himself and two or three other witnesses called by the defendant, and after reading certain letters which had passed between the parties, the learned judge expressed the opinion that the contract was not as the defendant contended, but as the plaintiff contended that it was. Counsel for the defendant accepted this opinion which, plainly, materially affected the defendant's contention as to his right of rejection of the lumber, which he rested chiefly upon the contention that the lumber was purchased for a special purpose, namely, for car flooring, and for which, as was contended, it was wholly unsuitable, but which purpose was not expressed in the contract as it was found to be in the opinion of the learned judge, and the purpose for which, as the defendant contended, the lumber had been purchased not being in the contract might have rendered useless the evidence of the other witnesses which the defendant had in attendance. Under these circumstances defendant's counsel, not disputing the correctness of the learned judge's opinion as to the terms of the contract nor asking that the question should be submitted to the jury, agreed with the plaintiff's counsel that if the defendant was not entitled to

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reject the lumber as he did a verdict should be rendered for the plaintiff for the amount claimed by him, less the sum of $90.00, as the difference between the value of the lumber delivered and that contracted for, and it was agreed that the defendant's consenting to such verdict was not to prevent his moving in term against the ruling of the learned judge as to the defendant's right to reject the lumber. But the verdict must be taken to have been a fair settlement of the difference in value between the lumber delivered and that contracted for, and the plaintiff's contention as to the terms of the contract, as to which there is now no dispute, must, under the circumstances stated above, be taken to be correct, so that the verdict cannot but have a very material effect upon the question involved in such action for if the reduction in value was no more than $90.00, which amounted to 4½ per cent., such a difference never would have justified a rejection of the lumber, assuming Hamilton to have been the place where it should have been inspected. I think, therefore, that this appeal should be dismissed with costs for substantial justice appears to have been done by the deduction of $90.00 from the amount demanded, which sum must be taken to be the true amount of the difference in value between the lumber delivered and that contracted for, so that no useful purpose could be obtained by throwing open the case before another jury whether the lumber should or not have been inspected by the defendant before it was loaded on the cars at the mills, to be forwarded to him at Hamilton. The defendant must be taken to have accepted the opinion of the learned judge as to the terms of the contract, establishing it to be as the plaintiff contended, and not as the defendant contended it to be, and upon the terms of the contract being as the defendant claimed them to be, the whole

force of the defendant's claim of right to reject the lumber was rested.

Appeal dismissed with costs.

Solicitors for appellant: *Bain, Laidlaw & Co.*

Solicitors for respondent: *McCarthy, Pepler & McCarthy.*

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