GEORGE A. CHAPMAN.....APPELLANT; 1879

AND *Feb'y. 24,
*May 9.

CHARLES LARIN.....RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Contract, terms of delivery—Reasonable time—Damages—Arts. 1067, 1073, 1544, *C. C. L. C.*

On the 7th May, 1874, the appellant sold to the respondent five hundred tons of hay. The writing, which was signed by the appellant alone, is in following terms: "Sold to *G. A. C.* five hundred tons of timothy hay of best quality, at the price of $21 per ton f. o. b. propellers in canal, *Montreal*, at such times and in such quantities as the said *G. A. C.* shall order. The said hay to be perfectly sound and dry when delivered on board, and weight tested if required. The same to be paid for on delivery of each lot by order or draft on self, at

PRESENT:—Ritchie, C. J., and Strong, Fournier, Henry and Gwynne, J. J.

1879

CHAPMAN v. LARIN.

Bank of Montreal, the same to be consigned to order of Dominion Bank, *Toronto*."

In execution of this contract, the appellant delivered one hundred and forty-seven tons and thirty-three pounds of hay, after which the respondent refused to receive any more.

The appellant having several times notified the respondent, both verbally and in writing, by formal protest on the 28th of July, 1874, requested him to take delivery of the remaining 354 tons of hay.

On the 11th of November following, the appellant brought an action of damages for breach of contract, by which he claimed $3,417.77, to wit, $2,471 difference between the actual value of the hay at the date of the protest and the contract price, and $943.77 for extra expenses which the appellant incurred, owing to the refusal of the respondent to fulfil his contract.

Held,—That such a contract was to be executed within a reasonable time, and that, from the evidence of the usages of trade, the delivery, under the circumstances, was to be made before the new crop of hay, and that the respondent, being in default to receive the hay when required, was bound to pay the damages which the appellant had sustained, to wit, the difference at the place of delivery between the value when the acceptance was refused, and the contract and other necessary expenses, the amount of which, being a matter of evidence, is properly within the province of the court below to determine (1).

APPEAL from the Court of Queen's Bench for *Lower Canada* (appeal side), reversing the judgment of the Court of Review and maintaining the judgment of the Superior Court.

Action of damages for breach of the following contract:

"May 7th, 1874.

"Sold to *G. A. Chapman*, five hundred tons of timothy hay of best quality, at the price of twenty-one dollars per ton, f. o. b. propellers in canal, *Montreal*, at such times and in such places as the said *G. A. Chapman* shall order. The said hay to be perfectly sound and dry when delivered on board, and weight tested if required. The same to be paid for on delivery of each lot, by order or

(1) C. C. L. C., Arts. 1,067, 1,544, 1,073.

draft on self at Bank of Montreal, and same to be consigned to order of Dominion Bank, *Toronto*.

"C. LARIN."

The respondent alleged by his declaration, that on the 7th May, 1874, he sold to appellant 500 tons of timothy hay, at the rate of $21 per ton; which was to be delivered f. o. b.(which he interprets to mean, "taken from on board") propellers in the *Lachine* Canal at *Montreal*, at such time and in such quantity as the appellant should order, to be paid for on delivery of each lot; the whole in accordance with the terms of a written agreement prepared by appellant and signed by respondent.

The respondent further alleged, that at the date of that contract, hay was increasing in value; and that the hay in question was bought by appellant on speculation. That it was then and there understood and agreed between the parties, that the delivery of the hay would be ordered, and the hay paid for, within a reasonable delay, and before the new crops. And that by the terms of the agreement, the nature of the contract, the *pourparlers* which took place at the time of the said contract, and the custom of trade, the execution of said contract on the part of both parties was to take place within a reasonable delay, and before the depreciation in the price of hay, which would necessarily take place after the new crops.

That accordingly the respondent, a few days after the date of the contract, delivered to appellant 146 tons of the said hay, for which appellant paid respondent according to the agreement.

That since the delivery of the said quantity, appellant had neglected and refused to order any more hay, or to receive the balance of the quantity mentioned in the agreement; although the respondent had, at different times, tendered the said hay to the appellant; and always declared himself ready, and was ready to

1879

CHAPMAN v. LARIN.

deliver it; and had in fact the said hay, at different times after the notification to appellant, and more particularly in the months of July and August then last, ready to be delivered in the *Lachine* Canal, as agreed

That about the 30th July then last, the respondent notified, and protested in writing, appellant, that he had the balance of 354 tons of hay ready for delivery; that it had been stored ready for that purpose; that he was obliged to remove it for storage to other places, which would entail expense and trouble; and that he would hold appellant liable for all loss, damage and expenses which would be incurred with the hay, on account of appellant not receiving the same. And he protested against keeping the hay any longer; of which so called protest he produces a copy.

But that appellant still neglected and refused to order and receive the remainder of the hay, and to pay respondent the value of the hay at the contract price, viz., $7,266.

That since that period hay had only averaged from $12 to $14 per ton, and the respondent had had the balance of the hay resold at an average of $14 per ton. That he had to incur extra expense for the cartage, storage, weighing and selling of the hay, and thereby had sustained damage to the extent of $3,414.77; that is, $943.77 for expenses in labor, cartage, storage, weighing and selling the hay, and $2,471, difference between the actual value at $14 a ton, and the price at which it was sold.

That appellant had often notified respondent that he would not receive the balance of the hay.

Wherefore he prayed for a condemnation against the appellant for the above two sums, amounting together to $3,414.77.

The appellant pleaded the general issue, and there-

upon the parties proceeded to evidence, which is reviewed in the judgments.

The Superior Court, Mr. Justice *Rainville* presiding, rendered judgment, maintaining the respondent's action to the extent of $2,970.87; being the difference between $14 per ton, and the price agreed upon; and $500, for expenses; but this judgment was reversed by the Court of Review, and the action was unanimously dismissed with costs. Thereupon the respondent appealed to the Court of Queen's Bench: and the judgment of the Court of Review was reversed and the judgment of Mr. Justice *Rainville*, sitting in the Superior Court, was confirmed in its material points.

Mr. *Kennedy* for appellant:—

The contract is within that class of cases where the consideration for the promise is contingent; that is, it consists in the doing of something by the promisor which he need not do unless he chooses. The appellant need not order unless he chose, and until the order is given no binding contract was made: *Great Northern R. W. Co.* v. *Withan* (1); *Burton* v. *Great Northern R. W. Co.* (2); *Benjamin* on Sales (3).

The respondent had the right before the appellant ordered to notify the appellant, that unless he ordered within a reasonable time he would rescind the contract.

The contract must be construed so as to give the literal meaning to every sentence; and although the word *sold* is used in the beginning of the contract, its use is consistent with the fact of it being a conditional sale, that is contingent on the appellant's order. To construe it otherwise would have the effect of eliminating the words, "at such times and in such quantities as the said *G. A. Chapman* shall order," for a contract without these words would imply a delivery within

(1) L. R. 9 C. P. 16. (2) L. R. 9 Exch. 507.

(3) P. 55.

1879

CHAPMAN v. LARIN.

a reasonable time: *Ellis* v. *Thompson* (1), *Leak* on Contracts (2).

No parol evidence can be given to alter or vary a written contract; and importing into the contract in question that delivery is to be within a reasonable time is an alteration and variation, as the contract states that the delivery shall be as the appellant "shall order," thereby negativing the implied time of delivery: Civil Code, article 1234; *Leak* on Contracts (3), *Greenleaf* on Evidence (4).

When the contract itself is plain, no usage or custom can be proved to vary the terms of delivery. Here the contract is plain that the time of delivery should be at the option of the appellant; *Taylor* on Evidence (5), *Greenleaf* on Evidence (6); *Lewis* v. *Marshal* (7), particularly the remarks of *Tindal*, C. J., at p. 745: *Bowes* v. *Shand* (8), and the remarks of Lord *Hatherley*, at p. 473: "If the contract bears a plain natural sense and meaning, nothing should make us deviate from that plain natural sense and meaning but the strongest evidence, not the opinion of this or that witness, but of a custom of the trade or business which forms the subject matter of the contract." And of Lord *Gordon*, at p. 486: "We must construe the contract itself according to its reasonable and literal sense; and again: "the safest rule in all these cases is to allow the parties who were interested in making the contract to explain themselves."

No particular custom as to this trade was proved, the witnesses themselves not agreeing, and the evidence being simply an opinion; and no evidence was given of any case where this custom was followed. As to evidence necessary to establish a custom, see *Willans* v.

(1) 3 M. & W. 445.
(2) P. 836.
(3) P. 176.
(4) Vol. 1 p. 321 and p. 328.
(5) Sec. 1058.
(6) 1st vol. p. 344, p. 347 and note at p. 350.
(7) 7 M. & G. 744.
(8) L. R. 2 App. Cases 455.

1879

CHAPMAN v. LARIN.

Ayers (1), *Bowes* v. *Shand* (2), *Taylor* on Evidence (3), *Addison* on Contracts (4).

The fact of the contract being in favour of the appellant, and pressing hard on the respondent, is no reason why its literal meaning should not govern. The Court cannot supervene to relieve a person from an improvident contract: *Addison* on Contracts, (5); *Cheale* v. *Kennard* (6).

By the evidence it appears that the appellant drew the contract as it is to avoid the probable want of storage that might occur, and that did occur. That it was owing to the respondent's acts that the appellants had not room to store the hay, for it appears first that the steamship *York* brought up 88 tons of damaged hay on the 21st May, 1874. After this appellant received on account of the contract, 147 tons of good hay, and on the 6th June, the respondent's agent brought to the appellant, and got him to store for him 191 tons, on the open end of a wharf, by covering same with tarpaulins, requesting him at the same time to sell this 191 tons first, and this hay was not sold until October, 1874.

The appellant therefore contends that if the evidence can be looked at to construe the contract, it shews that the intention of the parties was, that the hay should be received in such quantities as would enable the appellant to store it, and the respondent, by his own act, rendered it impossible to have the contract carried out according to the intention expressed when it was made.

Mr. *David* for respondent:

The appellant contends, that the hay having to be delivered *at such times and in such quantities as the said G. A. Chapman shall order*, the execution of the contract was merely facultative on his part; so that, according

(1) L. R. 3 App. Cases 133.
(2) L. R. 2 App. Cases 455.
(3) Sec. 1076, also sec. 1078.
(4) P. 166 7th ed.
(5) P. 12, 7th ed.
(6) 3 DeG. & J. 27.

1879

CHAPMAN v. LARIN.

to that pretention, it was in his power to hold continually and always the respondent bound by the contract without being so himself. The appellant at any day, at any time of the year, might order the respondent to deliver to him one ton or one hundred tons of hay and the respondent ought to be ready to deliver them. It might also please him to sleep upon his contract a year and the respondent should have remained under the obligation of keeping in a safe place, always ready to be delivered, the balance of the hay.

The contract was signed on the 7th day of May, eleven or twelve weeks before the crop of the new hay. At that time hay had gone up in *Montreal* to the extraordinary price of $21 to $22 per ton; in *Toronto* it was selling at $34 and $40 per ton. The time was good for speculation. The appellant, who is a merchant, goes to *Montreal*, or names a representative there, and buys the hay in this case mentioned.

It is evident that both parties had the intention of executing the contract in a reasonable time: the respondent to get the price of sale, the appellant to realize a benefit the soonest possible, and with more certainty before the new hay.

The learned counsel referred to arts. 1013, 1014 and 1016, 1067, 1544, 1073, C. C. L C.

Mr. *Kennedy* in reply.

RITCHIE, C. J.:—

The plaintiff complains in this case, that he sold to defendant 500 tons of hay under a contract, of which the following is a copy, signed by the plaintiff, (respondent) and affirmed and acted on by appellant. [His Lordship read the contract] That a few days after the date of that contract, plaintiff delivered to defendant 146 tons, for which defendant paid as per agreement; that since then defendant has neglected and refused to

1879

CHAPMAN v. LAR'N.

Ritchie, C.J.

order any more, or to receive the balance of the 500 tons, although plaintiff has offered and tendered to defendant, particularly on the 28th July, '74, the 354 tons; that defendant notified plaintiff that he would not receive the balance of the hay; that the hay having fallen in value, plaintiff re-sold balance, and claims the difference in price and expenses.

If the contract had been to supply defendant with whatever hay he might from time to time order at so much per ton, defendant would not be bound to give orders (1). But that is not this case. This was a contract for the sale of a specific quantity (500 tons) of hay, and though the delivery as to times and quantities was left to be fixed by the purchaser, this gave him no right to repudiate the contract in whole or in part, but he was bound to order delivery at reasonable times and in reasonable quantities, and if there was any well known usage of the trade in regard to the articles sold, in respect either to times for delivery or quantities to be delivered, it would be a criterion by which the question of reasonable times or quantities might be decided; in other words, if not conclusive, cogent evidence of what would be reasonable times and quantities. If the vendee unreasonably witheld his orders, the vendor discharged his duty by a tender or offer of performance, that is, of delivering at the place specified, at or after a reasonable time had elapsed, thereby giving the vendee an opportunity of accepting a complete performance. The buyer by this contract undertook to order the hay which he had purchased, and as no time was fixed at which he was to do this, the law implied he was to do it within a reasonable time under the

(1) See *Great Northern Ry. Co.* v. *Withan*, L. R. 9 C. P. 16; *Burton* v. *Great Northern Ry. Co.*, L. R. 9 Exch. 507.

1879

CHAPMAN v. LARIN.

Ritchie, C.J.

circumstances, and the dictum of the court in *Ford* v. *Cotesworth* (1) bears directly on this case:

Whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances.

Leake (2) says:

Where there is no time fixed by the contract, the law in general implies that the performance must be at a reasonable time, having regard to the nature and circumstances of the performance (3).

In *Ellis* v. *Thompson* (4) *Alderson*, B., says that:

The correct mode of ascertaining what reasonable time is in such a case is by placing the Court and Jury in the same situation as the contracting parties themselves were in at the time they made the contract; that is to say, by placing before the jury all those circumstances which were known to both parties at the time the contract was made and under which the contract took place. By so doing you enable the Court and Jury to form a safer conclusion as to what is the reasonable time which the law implies and within which the contract is to be performed.

Leake on contracts (5):

Under a written contract for the sale of goods appointing the time for payment, but silent as to the time for delivery; and, therefore, presumptively importing delivery within a reasonable time upon credit, evidence was held admissible of a usage in the trade, that the delivery should be made concurrently with the payment and could not be demanded before (6).

And I can discover nothing in the law of the Province of *Quebec* at variance with these principles, which, after all, are only the principles of common law and common justice. In this case the evidence shows, I think, conclusively that a reasonable time for giving an order or orders had elapsed on the 28th of July, when the time

(1) L. R. 4 Q. B. 133.
(2) P. 836.
(3) Co. Lit. 56, b.; see per Rolfe, B., in *Startup* v. *Macdonald*, 6 M. & G. 610.
(4) 3 M. & W. 445.
(5) P. 200.
(6) *Field* v. *Lelean*, 6 H. & N. 617, distinguishing or over-ruling *Spartali* v. *Benecke*, 10 C. B. 212.

1879

CHAPMAN v. LARIN.

Ritchie, C.J.

was about arriving for the crop of new hay to come into the market, and defendant, having then refused to order or receive the balance of the 500 tons, was, in my opinion, guilty of a breach of his contract, and rendered himself liable to pay to the plaintiff the difference between the then market value of the hay and the price agreed on. The measure of damage is the difference between the contract price and the market price, or value on the day fixed for the delivery, or in this case the day on which the hay was tendered to the vendee and should have been received by him, that being the time when the contract was broken, thus leaving plaintiff in the same situation as if defendant had fulfilled his contract. The vendor is not bound to re-sell, though he may, if he thinks proper so to do, and charge the vendee with the difference between the contract price and that realized at the sale, but it is requisite, in such a case, to show the property was sold for a fair price and within a reasonable time after the breach of the contract.

In this case the plaintiff appears to have used all reasonable efforts to dispose of this hay to the best advantage, and we can easily understand the difficulties he must have experienced in the face of a falling market and the competition of the new hay crop; and I cannot say that the amount the court below has allowed him for expenses necessary and incident to the disposal of so large a quantity of an article so bulky is not justified by the evidence.

STRONG, J., concurred.

FOURNIER, J.:—

L'action de l'intimé était en dommages pour inexécution de contrat et fondée sur l'écrit cité plus haut.

Après avoir accepté en exécution de ce contrat une certaine quantité de foin, l'appelant refusa d'en recevoir davantage, prétendant que par les termes de son con-

1879

CHAPMAN v. LARIN.

Fournier, J.

trat il n'y a pas de temps fixé pour la livraison, et de plus qu'il avait la faculté de n'en ordonner que ce qu'il lui plairait d'accepter. Cette prétention est formulée en ces termes dans sa défense :

As to the first point, the Respondent contends that the contract, as contained in the memorandum already printed, was perfectly intelligible and clear in itself. No time was fixed by that contract, within which the Respondent was to be obliged to receive the hay. The memorandum states in express terms, that the hay is to be delivered free on board propellers at *Montreal,* at such times and in such quantities as the said *G. A. Chapman* shall order.

There is not the slightest limitation of the discretion of the Respondent, as to when he shall order, and what he will receive ; that is left entirely to him. It is the Appellant who takes the risk of the orders being given at times and for quantities inconvenient to him. The Respondent had the right of making these times and quantities to suit his convenience, in entire disregard of the wishes of the Appellant.

La Cour Supérieure a considéré le contrat comme prouvé et a condamné le défendeur (appelant) à payer à l'intimé une somme consistant dans la différence du prix du foin, suivant le prix courant, à l'époque où le défendeur a refusé de continuer l'exécution de son contrat, avec la différence du prix convenu par l'écrit ci-haut cité, plus une somme de $500, pour frais de transport, tonnage, pesage et vente du foin en question.

Ce jugement soumis à la Cour Supérieure, siégeant en révision, a été cassé pour deux raisons principales.

La première que l'on trouve énoncée dans ce jugement, c'est que dans le cas actuel, le demandeur (intimé) avant de pouvoir revendre le foin qui faisait l'objet du contrat intervenu entre les parties, aurait dû notifier le défendeur (appelant) de son droit de demander la rescision du contrat. Cette proposition est énoncée de la manière suivante :

Plaintiff does not even state in his declaration that he notified defendant of any *claim of rescision* of contract, before re-selling the hay referred to ; and that in fact plaintiff did not *notify*

defendant of any rescision of contract, or of any proposed re-sale of said hay.

1879

CHAPMAN v. LARIN.

Fournier, J.

La 2ème. C'est que dans le cas particulier dont il s'agit, la loi ne permettait pas au demandeur de vendre le foin en question à vente privée,—mais qu'au contraire elle l'obligeait à le faire vendre par encan public, dans une seule vente (*at one time*), après avis au défendeur ; la vente à l'encan étant la seule manière légale de déterminer le prix courant qui devait servir de base pour l'appréciation des dommages.

Ces deux propositions sont-elles fondées en droit ? Le demandeur était-il bien obligé, après avoir mis le défendeur en demeure d'accepter le foin, de demander la rescision du contrat avant de pouvoir réclamer ses dommages ? Le contrat ne se trouvait-il pas plutôt nul de plein droit par suite du refus du défendeur d'en continuer l'exécution ?

Il est à remarquer que la vente dont il s'agit est une vente au comptant, le prix convenu est stipulé payable à la livraison de chaque lot. Après mise en demeure suffisante, (et celle prouvée l'est certainement) le défendeur était tenu d'enlever le foin qui lui était offert ; sur son refus ou négligence de le faire et de payer le prix convenu, la vente se trouvait résolue de plein droit.

Dan la vente de choses mobilières, l'acheteur est tenu de les enlever au temps et au lieu où ils sont livrables. [Si le prix n'en a pas été payé, la résolution de la vente a lieu de plein droit en faveur du vendeur, sans qu'il soit besoin d'une poursuite, après l'expiration du terme convenu pour l'enlèvement, et s'il n'y a pas de stipulation à cet égard, après que l'acheteur a été mis en demeure en la manière portée au titre des Obligations ;] sans préjudice au droit du vendeur de réclamer les dommages et intérêts (1).

Pour faire l'application de cet article au cas actuel, il ne reste qu'à savoir si la mise en demeure a été suffisante et conforme à l'art. 1067. Indépendamment des lettres et télégrammes concernant la livraison du foin, il y a le protêt formel en date du 28 juillet 1874, décla-

(1) C. C. L. C. Art. 1544.

1879

CHAPMAN v. LARIN.

Fournier, J.

rant que le demandeur est prêt à livrer la quantité de foin nécessaire pour parfaire le contrat, sommant le défendeur de l'accepter, avec de plus déclaration qu'il sera responsable de tous les dommages que son refus pourrait causer. Il est en preuve que le protêt est parvenu au défendeur. Le contrat en question étant par écrit, ce protêt conformément à l'article 1067 devait être par écrit. Ainsi le demandeur a rempli les formalités que la loi exigeait de lui pour mettre son adversaire en demeure. Le refus de celui-ci de se présenter pour accepter et payer le foin a eu l'effet, suivant l'article 1544, d'opérer de plein droit la résolution de la vente en question et de donner ouverture à la réclamation pour dommages. Rien dans la loi n'obligeait le demandeur à faire connaître son intention de faire résilier une vente que la loi déclarait résolue de plein droit, sans formalité quelconque. Pour ces raisons le premier motif donné par la Cour de Révision me paraît tout-à-fait erroné.

Il en est de même du 2ème qui contient l'énonciation d'un principe que l'on ne trouve nulle part. La loi n'a pas imposé l'obligation de faire, dans un cas comme celui dont il s'agit, une vente à l'encan pour servir de base à l'appréciation des dommages. A part de l'énonciation du principe général contenu dans l'article 1073 " que les dommages sont, en général, le montant de la perte subie et du gain dont on est privé," la loi laisse à la discrétion des tribunaux les moyens d'apprécier les dommages selon les circonstances. Elle ne leur prescrit point de règle absolue à ce sujet, et l'on ne trouve nulle part celle qui a été invoquée par la Cour de Révision. Au contraire, d'après les autorités, il est reconnu qu'il y a absence de règles positives, à part des principes généraux.

Duranton dit (1):

(1) Vol. 10 p. 464, No. 480.

1879

CHAPMAN v. LARIN.

Fournier, J.

Il n'est pas de matière plus abstraite que celle relative aux dommages-intérêts ; aussi la loi n'a-t-elle pu tracer que des principes généraux, en s'en remettant à la sagesse des tribunaux pour leur application, selon les circonstances et les faits de la cause.

La Cour de Révision n'était certainement pas fondée en droit à déclarer qu'il y avait nécessité de faire une vente à l'encan.

Cette Cour n'a attaché aucune importance au principal moyen de défense de l'appelant, savoir, que le contrat ne contenant point un délai dans lequel il devait recevoir son exécution, était par cela même inexécutable, et qu'il n'avait en conséquence contracté aucun engagement. Elle semble au contraire, avoir répudié cette prétention et avoir été d'accord avec la Cour Supérieure et la Cour du Banc de la Reine, pour reconnaître que dans un cas semblable, "il y a tacitement un terme convenu, qui consiste dans le temps nécessaire pour son exécution" puisqu'elle prétend que le demandeur aurait dû demander la résiliation du contrat. C'est sans doute admettre qu'il a existé, et conséquemment, qu'il y avait un terme tacitement convenu qui devait être déterminé par les circonstances. Cette proposition de droit ne me paraît guère susceptible de doute. Elle a été traitée avec tant de développement par Sir *A. A. Dorion*, J. C., dans son opinion écrite sur cette cause, que je crois devoir me borner à exprimer mon concours dans la doctrine qu'il a si complètement établie par les nombreuses autorités qu'il a citées.

Si je n'entre pas dans la considération des questions de faits de la cause, c'est parce que j'adopte entièrement le jugement de la Cour du Banc de la Reine, qui, suivant moi, doit être confirmé et l'appel renvoyé avec dépens.

HENRY, J. :—

I concur in the view that the appeal in this case should be dismissed.

1879

CHAPMAN v. LARIN.

Henry, J.

The decision of the Court of Review I consider founded on incorrect statements of law. It is properly stated to have been a commercial case, and as such, on refusal of the appellant, he, if otherwise liable, is required by law to make good to the respondent such loss as may result from the non-acceptance of the hay in question; and the rule by which such loss is measured is the difference at the place of delivery between its value when the acceptance was refused, and the contract price. That difference may be shown in a variety of ways. The most usual one is by means of a sale by public auction at the place of delivery, but in the case of a perishable article, if not then in a place of safety, it might be removed for protection and a market to any convenient and reasonable distance. The sale was not by public auction, and it need not have been, but was conducted in a manner, I think, more for the interests of the appellant. It is not even pretended that the most, under the circumstances, was not realized for it, and for which the appellant has got the benefit. The difference in value sufficient to sustain the respondent's case, at the canal, and where it was sold, has been satisfactorily shown. The respondent is entitled also to be reimbursed his outlay for the expenses of removal and sale, including storage and insurance, for a reasonable time. There is no charge made for the latter, but for the other legitimate charges, for labour and cartage from the canal, storage, expenses of sale, weighing and loss of weight, the respondent is entitled to recover. He alleges his expenditure for those purposes amounted to $843.77, besides $120 for other carting not explained. The learned Judge who tried the cause allowed him $500 for those expenditures, which I think, under the evidence, reasonable.

The appellant contends, however, that he was not bound to take the hay when offered, and therefore not liable to damages for refusing it.

The contract provides for the delivery "at such times and in such quantities as the defendant (appellant) should require," but contains no provision between what dates the appellant shall exercise that right. The agreement is for a sale of five hundred tons of hay at the rate of twenty-one dollars per ton, and provides for the place and manner of delivery, to be paid for on delivery of each lot. The contention of the appellant is, that as no time was prescribed for the delivery of the whole, that he could ask for the delivery at any time or times, or that in fact it depended on his option to decline altogether any part of the number of tons sold. When the parties to a contract omit to limit their respective liabilities under it as to time, the law wisely provides that they shall end at the end of a reasonable time corresponding to the nature of the several liabilities. The law in such cases enjoins each party to perform his contract within a reasonable time. The appellant, therefore, had that reasonable time to provide the necessary means to accept, according to the contract, the hay purchased. He was to provide propellers, on board of which at different times and various quantities, as he should order, he was to take delivery of the hay, and the respondent, getting reasonable notice, was bound to deliver the same at those different times and various quantities, but with this proviso, that his requisitions to the respondent were made within a reasonable time. It would be indeed a strange law that under such a contract one party should be bound to have the hay on hand for months or years, and should suffer natural deterioration and loss of weight, and perhaps after the expiration of a year be obliged possibly to supply wholly different hay, keep it on hand and then possibly be told the appellant was not even then ready to receive it, and if the law put no limit to the liability of the respond-

1879

CHAPMAN v. LARIN.

Henry, J.

ent, when would it end, unless his insolvency put him beyond the power of the appellant. But suppose the price of hay advanced greatly, and it became desirable for the appellant to obtain the delivery of the hay he must have made the necessary requisitions to the respondent for it, as the law puts it, within a reasonable time, otherwise he could recover no damages for the non-delivery. Each must act within a reasonable time, or no cause of action arises to him who is negligent because of his own laches. The true legal construction of the contract in question may be thus stated: The respondent bargains and sells to the appellant 500 tons of hay not immediately to be delivered, but the appellant virtually says to respondent: "You keep possession of the hay until I, within a reasonable time, advertise to you my desire that at such times and in such quantities as I may engage propellors to take it on board, when you shall deliver it free on board for me." We would have to say, under the circumstances, what that reasonable time should be, if the appellant had raised such an issue, but I do not think he has. The respondent, in his declaration, alleges that, by legal construction, the agreement was to be performed within a reasonable time, but the appellant does not, in his plea, take issue upon the question of reasonable time, or allege that at the time the respondent gave the notice of his readiness to deliver, which, however, under the contract, he was not bound to do, such reasonable time had not elapsed. His defence was not such, and therefore we need not have inquired into that question; and the mere *readiness* of the plaintiff to deliver and the question of damages, were all that regularly was in issue. If the respondent, in his declaration, had alleged generally his readiness to deliver *within a reasonable time*, and the failure or refusal of the appellant to ac-

cept, it would have been sufficient, and if denied, it would then depend on the evidence; but the declaration states the time when the protest or notice of readiness to deliver was given—on the 28th July, 1874. If necessary to decide the question of the reasonableness of the time, I should say it was, under the evidence, sufficient; but, notwithstanding that notice, up to the time of the commencement of this suit, on the 11th November following, the appellant made no requisition for delivery, and surely no one would contend that, at the latter date, reasonable time had not long before expired. The hay was sold on the 7th May, and the delivery commenced, as by the bills of lading, on the 1st of June following; nine shipments in all, six in June and three in May, up to the 29th, when they stopped, and after which, no requisition for any more appears to have been made. From the nature of the article, and from the correspondence and other evidence, the conclusion is irresistible, that both parties fully intended the whole delivery should take place before the new crop came in; and it is, I think, put beyond all doubt that the appellant clearly so understood it, for in his letter of the 14th of May (seven days after the date of the contract) he says: "I telegraphed you answer that I would write respecting your offer of three to four hundred tons of hay beyond the five hundred contracted for. But first, before setting price, I should wish to know the time of delivery of this second quantity, if purchased. If I bought, I should require to the end of June, to be shipped to my order, as I could make room for each cargo. It might not be till the end, but I should not wish to be crowded for the next two or three weeks to come till I get storage to receive it." The appellant, as that letter shows, contemplated taking the delivery of the additional 300 tons, by or before the last of June, so

1879

CHAPMAN v. LARIN.

Henry, J.

that he fully understood and intended the 500 tons previously purchased to be delivered, at the latest before the 23rd of June. I think that by the law and evidence the respondent is entitled to recover the amount stated in the judgment, and that the appeal should be dismissed with costs and the judgment of the Superior Court of first instance confirmed.

GWYNNE, J., concurred.

Appeal dismissed with costs.

Solicitors for appellant: *Abbott, Tait, Wotherspoon & Abbott.*

Solicitors for respondent: *Longpré & Dugas.*