

ROBERT THOMSON & CO. (DEFEND-  
ANTS) ..... | APPELLANTS; 1900  
\*April 19, 20.  
\*June 12.

AND

JOHN A. MATHESON & BRO., }  
AND HENRY WINEMAN, THE } RESPONDENTS.  
YOUNGER (PLAINTIFFS) ..... }

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Contract—Sale of lumber—Inspection.*

A contract for the sale of lumber was made wholly by correspondence, and the letter which completed the bargain contained the following provision: "The inspection of this lumber to be made after the same is landed here" (at Windsor) "by a competent inspector to be agreed upon between buyer and seller and his inspection to be final."

*Held*, reversing the judgment of the Court of Appeal, that it was not essential for the parties to agree upon an inspector before the inspection was begun; and a party chosen by the buyer having inspected the lumber and before his work was completed the seller having agreed to accept him as inspector, the contract was satisfied and the inspection final and binding on the parties.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Divisional Court by which the judgment at the trial dismissing the action with costs was set aside and a new trial ordered.

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

1900      The facts of the case are sufficiently stated in the  
THOMSON above head-note.

v.  
MATHESON.

*Riddell Q.C.* for the appellant.

*Aylesworth Q.C.* and *Smith* for the respondents.

The judgment of the court was delivered by :

SEDGEWICK J.—The appellants are lumber dealers doing business at Windsor, in the County of Essex, and the respondents are lumber dealers doing business in Detroit, Michigan. Early in May, 1897, the appellants sold, and the respondents purchased, a certain quantity of pine lumber at various prices according to the grade, and delivery at Windsor within a specified time. The contract was wholly by correspondence. The letter of the appellants of the 3rd May, 1897, completed the bargain between the parties, and contained the following clause :

The inspection of this lumber to be made after the same is landed here (Windsor), by a competent inspector to be agreed upon between buyer and seller, and his inspection to be final ;

and the only question in this case is as to whether the inspection thus provided for was in fact made by a person agreed upon between the parties. The action was tried before Mr. Justice Ferguson without a jury, and judgment was rendered for the appellants. Upon appeal to the Divisional Court the judgment was set aside and a new trial granted, which judgment was confirmed by the Court of Appeal, Mr. Justice MacLennan dissenting. The case now comes to this court in appeal from that decision.

A majority of the judges of the appellate courts below seem to have considered that the inspector referred to in the letter, a part of which I have just set out, should have been agreed upon before he began to inspect at all. If they are correct in that view the

appeal must be dismissed. We are of opinion, however, that that is not the correct view, and the question is whether or not both parties, at any time before the inspection was completed, agreed upon Jubinville, who actually did inspect the lumber, and gave a certificate to that effect to the buyers. The learned trial judge, who heard the witnesses, found as a matter of fact that he was agreed upon by the parties as an inspector, while the lumber was being landed at Windsor.

1900  
 THOMSON  
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 MATHESON.  
 —  
 Sedgewick  
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It is not necessary to review the evidence, but in my view it fully justifies the finding of the learned trial judge. Mr. Justice Maclellan, in his dissenting judgment, has discussed the evidence and in a way which meets with my entire concurrence, and with him I am of opinion that the appeal should be allowed with costs and that the judgment of the trial judge should be restored, the appellants having their costs in all the courts below.

*Appeal allowed with costs.*

Solicitors for the appellants: *Clarke, Cowan, Bartlet & Bartlet.*

Solicitors for the respondents: *Fleming, Wigle & Rodd*

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