Privy Council Appeal No. 92 of 1917.

John Usher Jones - - - - - - - - *Appellant*

v.

Ewart Scott Grogan - - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 3RD DECEMBER, 1918.

Present at the Hearing:

LORD SUMNER.
LORD PARMOOR.
LORD WRENBURY.

[*Delivered by* LORD WRENBURY.]

This is an appeal from an order of the Court of Appeal for East Africa affirming a judgment of the High Court of East Africa dismissing the plaintiff's action.

The action was brought for damages for breach of a contract dated the 3rd September, 1913, under which the plaintiff was employed for three years from the 1st September, 1913, to fell all trees of certain dimensions on a timber concession which the defendant held, and was to cut the timber into logs, cart the logs to the defendants saw mill, and further cart from the saw mill to Londiani railway station. Art. 2 empowered the defendant to determine the agreement if the plaintiff should in any one month deliver less than 25,000 super feet to the mill. Art. 11 empowered him to determine the agreement if the plaintiff should in any one month of the dry season bring in less than 75,000 super feet of sawn timber or 40,000 super feet of sawn timber in any one month of the wet season to Londiani station. By Art. 13 the plaintiff was on the 15th day of each calendar month to present

to the defendant a statement of all moneys due to him (which by virtue of Arts. 5 and 8 were to be calculated upon the number of super feet delivered at the mill or carted to the station) with vouchers to support the statement, and the defendant was to pay the amount found due on checking the account payment to be made at the end of the month.

Until the month of August, 1914, the plaintiff worked regularly under the agreement. In August, 1914, he had made some default in carrying the specified minimum quantities, but the trial Judge found that the defendant did not exercise his option to determine the contract on that ground, and the Court of Appeal agreed in that view.

In August, 1914, the plaintiff ceased to perform the contract. A question had arisen between him and the defendant as to the off loading of the timber at the station, and on the 11th August the plaintiff wrote to the defendant's manager, Mr. Brown: "I will discontinue bringing in any more until this matter is settled between us." From that date onwards he did nothing in performance of his obligations. On 13th August the defendant's manager wrote "we must request you to use every facility for doing this work otherwise we shall be compelled to make other arrangements." At the trial the plaintiff set up the case that his non performance was due to his oxen and wagons having been commandeered on August 16th by the Government for military purposes. There are concurrent findings that the oxen and wagons were not so commandeered. The facts are that on the 16th August he removed his oxen and wagons—that he kept them away and that he eventually sold them to the Government. Early in September the plaintiff ordered some more wagons, but failed to obtain delivery of them. In the early part of October he got some more wagons and some oxen, but did not bring them for employment in the contract work. On September 1st he wrote saying he was "prepared to commence as soon as disputes are settled." On the 11th September his solicitors wrote that "he has already ordered wagons to replace those commandeered, and as soon as he is in a position to do so he will resume work under his contract exactly as heretofore." On the 9th October the plaintiff wrote, "I have had my oxen inoculated to-day and will now be able to make a start with three wagons." The normal amount of wagons required for his contract was about eleven or twelve. He did not bring any wagons or resume work.

In the interval the defendant had on August 25th and August 27th written that he held the plaintiff responsible for breaking his contract, and that because he had broken it he had stopped a cheque given in his favour, and on September 30th that the plaintiff's "action in taking his transport off the road constitutes a very serious breach in the contract," and ultimately on October 20th wrote as follows:—

Molo,
October 20th, 1914.

Dear Sir,

In reply to your letter of the 9th instant as we previously informed you you have, by your breach of contract in removing all your waggons and

oxen from Maji Mzuri Mill, put us to very considerable trouble, and we have been compelled to make other arrangements, so that now we cannot re-engage you under the terms of the contract.

We also beg to inform you that we reserve the right of action for damages incurred by your breach of contract during August last.

Yours faithfully,
The Equator Saw Mills,
F. E. Brown, Manager.

By virtue of the East Africa Order 1897, Part IV., Art. 11b, the Indian Contract Act, 1872, is applicable—Sect. 39 of that Act is as follows :—

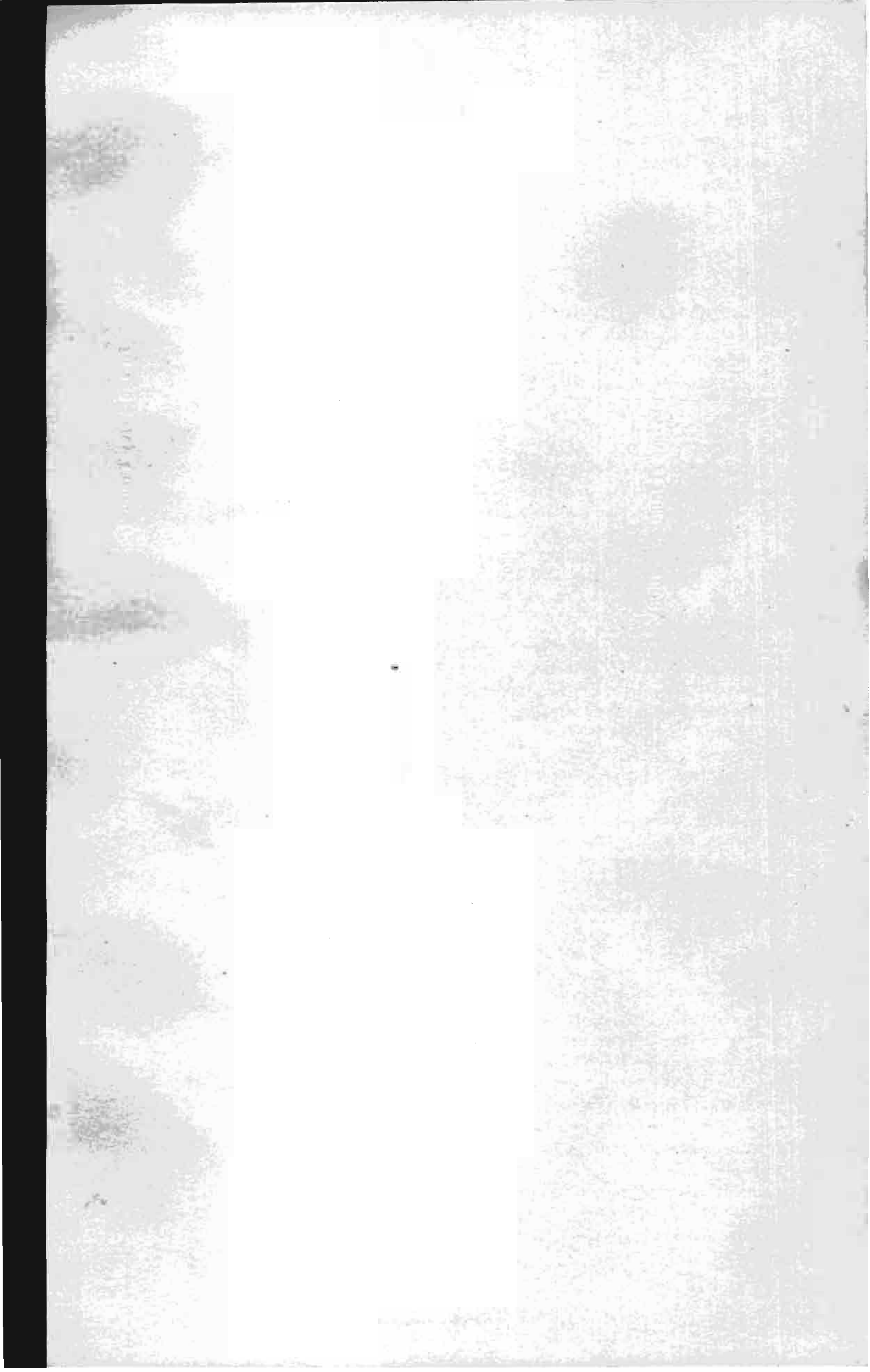
S. 39. When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety the promisee may put an end to the contract unless he has signified by word or conduct his acquiescence in its continuance.

The section operates in two cases, refusal and self-created disability. The appellant has argued and in their Lordships' opinion rightly argued that it is not every self-created disability that is within the section. If the due date of payment of an instalment has been allowed to pass, the promisor has of course become disabled from making payment on the due date and it may be said that his disability is self-created because it is by reason of his conduct that payment was not made in time. Nevertheless non-payment of an instalment may not be sufficient ground for avoiding the contract. The contention, however, is not relevant to the case before their Lordships. In the case put, performance has by effluxion of time become impossible. In the present case performance was not impossible, but the plaintiff by parting with his oxen and wagons disabled himself from performance. True, that after September was past he could not deliver in September the quantity deliverable in September. But he had disabled himself from delivering in the current month of October the amount deliverable in October. The section according to its true meaning refers to either refusal to perform or self-created disability in the promisor to perform a possible act. The plaintiff here by parting with his oxen and wagons had disabled himself from carting the timber at all. Did the defendant then (the promisee) put an end to the contract ? Was the letter of October 20th a determination ? In their Lordships' opinion it was. The plaintiff in par. 10 of his plaint himself says that it was. It stated that the defendant had " been compelled to make other arrangements," and added " so that now we cannot re-engage you under the terms of the contract." If the defendant was entitled to put an end to the contract this letter was in their Lordships' opinion a determination. It remains to consider whether the defendant had " signified by word or conduct his acquiesence in its continuance." Their Lordships cannot find in the facts any such acquiescence. Between the 11th August and the 20th October the defendant at first on August 13th pressed for performance, and subsequently insisted from time to time that the contract had been broken. It has

been found that he did not exercise his option to determine the contract for the breach in August, but there was another breach in September. On the 20th October the defendant was in a position to avail, and in their Lordships' opinion did avail himself of his right under the section to put an end to the contract.

It is unnecessary to consider whether he was entitled to do the like under the right of determination contained in the contract itself.

In their Lordships' opinion the action was rightly dismissed. They will humbly advise his Majesty that this appeal ought to be dismissed with costs.



In the Privy Council.

JOHN USHER JONES

v.

EWART SCOTT GROGAN.

DELIVERED BY LORD WRENBURY.

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