

After examination of the potatoes, Branch rejected them, and stopped payment of the cheque which he had given for the purchase-price.

It was the duty of the appellant to take steps on the 27th, 28th, 29th, and 30th April to sell these perishable goods and prevent a sale by the railway company for freight and demurrage. In what he afterwards did he acted reasonably and properly in an endeavour to realise the best price obtainable.

The plaintiff must satisfy the onus of justifying his failure to take up the draft and take care of the potatoes on the 21st April; and this he could do only by establishing as of that date a right of rejection on the ground that the potatoes were not merchantable. This he had not attempted to do. The only evidence upon that point was that when the potatoes finally arrived in Buffalo about the 20th or 21st May they were in part rotten. That evidence was irrelevant. The sole question was, whether their condition was such on the 21st April as to justify rejection. That not being shewn, the subsequent loss must fall on the plaintiff as the result of his failure to take care of the potatoes according to agreement.

The appellant should be credited with a further sum of \$1,079.94 and the amount of the judgment should be reduced to \$863.97. To that extent the appeal should be allowed, and the plaintiff should pay the appellant's costs thereof.

MULOCK, C.J. Ex., and SUTHERLAND, J., agreed with MASTEN, J.

RIDDELL, J., read a dissenting judgment. He was of opinion that the trial Judge's findings should not be interfered with, as he had seen and heard the witnesses, and no sufficient reason appeared for saying that he was wrong in his conclusions of fact or law.

Appeal allowed in part (RIDDELL, J., dissenting).