

The jury found, in answer to questions submitted to them: (1) that the letter of the 27th September cancelling the order was not posted; (2) that this letter was not received by the plaintiff; and (3) that the sand was shipped "within a reasonable time after the time agreed upon and that the sand was No. 2 moulding sand."

The plaintiff's claim was for \$49.44 price of the sand and \$202 paid for demurrage.

The jury assessed the damages at \$194.50, but how that sum was arrived at it was impossible to say.

It was argued for the defendants that there was no acceptance of the order as to the second car-load, and therefore no binding contract as to it, and that, as the car-load was not shipped until long after the 1st October, the defendants were justified in refusing to accept.

The defendants were entitled to succeed upon the second ground. It was clearly the duty of the plaintiff to have made the shipment by the 1st October, and there was no warrant for importing into the transaction the question as to reasonable time which was submitted to the jury. In order that he should succeed it was incumbent upon the plaintiff to prove that shipment had been made in accordance with the terms of the contract. The plaintiff was not in a position to do that, and so his action failed and should have been dismissed. See *White v. Greer* (1916), 36 O.L.R. 306, at pp. 316 et seq.

The appeal should be allowed and the action dismissed with costs. There should be no costs of the appeal to either party. They were both responsible for the trial Judge treating the case as one in which the plaintiff was entitled to a reasonable time after the 1st October to make this shipment.

Appeal allowed.