Province of New Brunswick.

SUPREME COURT—APPEAL DIVISION.

Hazen, C.J., White and Grimmer, JJ.] [43 D.L.R. 158.

MARITIME COAL, RAILWAY & POWER CO. v. CLARK.

1. *Sale—Acceptance of goods—No complaint as to quality—Action for purchase price—Defence of inferiority.*

A purchaser who makes no complaint to the vendor as to the quality of goods sold, until months after the goods have been accepted and paid for, although he has complained to an agent of the vendor, who has no authority except to receive orders, cannot set up such claim in an action for the purchase price of the goods.

2. *Sale—Screened coal—Trade designation—Coal screened at mine.*

A contract for the delivery of "screened coal" is carried out by the delivery of coal properly screened at the mine, although owing to the soft and friable nature of the coal more slack is produced in transit than would be produced from coal from other mines.

W. B. Wallace, K.C., for appellant; *M. G. Teed*, K.C., contra.

ANNOTATION ON ABOVE CASE FROM 43 D.L.R.

ACCEPTANCE OR RETENTION OF GOODS SOLD.

Damages where title fails. A purchaser from one who has no title was held in Ontario to be entitled to recover as damages the value of the chattel, and not merely the amount paid therefor. In *Confederation Life Association* v. *Labatt* (1900), 27 A.R., (Ont.) p. 321, Osler, J.A., said:—

"As to the MacWillie company: they undoubtedly sold as owners, and cannot successfully deny their liability to indemnify their vendee, *Eichholz* v. *Bannister* (1864), 17 C.B.N.S. 708, 144 E.R. 284, but they contend that recovery as against them must be limited to the amount of the purchase money paid by Labatt. There is no case in the English courts or our own which expressly decides that unliquidated damages may be recovered on the breach of an implied warranty of title. In all the reported decisions on the subject, the recovery has been confined to the price paid, but in all these cases the claim was simply one to recover back money paid as upon a failure of consideration, *Eichholz* v. *Bannister, supra, Raphael* v. *Burt & Co.* (1884), Cab. & Ell. 325, *Peuchen* v. *Imperial Bank* (1890), 20 O.R. 325. In Benjamin on Sales (1899), 7th Am. ed., from the Eng. ed. of 1892, and in earlier editions published in the author's lifetime, it is said: "*Eichholz* v. *Bannister* was on the money counts and therefore, strictly speaking, only decides that the price may be recovered back from the buyer on the failure of title to the thing sold; but as the *ratio decidendi* was that there was a warranty implied as part of