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I would allow the appeal and direct a new trial of the action, and dismiss the appeal so far as it relates to the verdict on the counterclaim.

The costs of the trial of the action and of the appeal to be costs in the cause to the successful party.

DENNISTOUN, J.A.:—This is an appeal from the County Court of Winnipeg. The action was tried before Paterson, Co. Ct. J., and a jury. The judge withdrew the plaintiff's case from the jury and took their verdict upon the counterclaim alone. Judgment has been entered in favour of the defendant Lang against the plaintiff Smallman for \$235 and costs.

The action arose out of a contract for the sale of apples, which is evidenced by a receipt in writing which reads as follows: (See judgment of Fullerton, J.A.).

Bates was the sales agent of the defendant Lang at Winnipeg.

Under the agreement two cars of apples were shipped to Winnipeg from Ontario, by the defendant Lang, and duly paid for on arrival by the plaintiff Smallman. The apples in these cars were sold by the plaintiff after removal from the cars. The third car was sent to Neepawa. It was not inspected or accepted by the plaintiff. The fourth car was sent to Brandon where it was inspected by the plaintiff's agent and rejected. The fifth and sixth cars were diverted by the defendant to other points in Manitoba upon the plaintiff's refusal to accept any more apples. The seventh car was not shipped.

The plaintiff alleges that the first 2 cars of apples were not according to contract and sues for damages for breach of warranty. The trial judge withdrew the plaintiff's claim for damages from the jury upon the ground that the plaintiff Smallman inspected the apples at Winnipeg, removed them from the cars, sold a portion of them on the track and took the remainder to his warehouse where he disposed of them, and that having done so he had accepted them and had no case for damages.

The evidence given by Smallman as to acceptance is as follows:—

Q. What did you do with this car of apples? A. We started unloading it in the afternoon of the same day that I purchased it, and of course very few apples were taken out, only a few barrels. I then discovered my mistake in accepting the apples. They were in a terrible condition, very rotten, and I did not think the qualities or the grades that I bought.

Q. That was the next day? A. Yes.

MAN.
C. A.