

MASTEN, J., read a judgment in which he said that the matters in controversy in the action arose out of sales of potatoes by the defendant Wilton to the plaintiff in April, 1917. The trial Judge found the plaintiff entitled to a recovery against the defendant Wilton and the defendant the Union Bank of Canada to the extent of \$1,943.91 with costs.

On the hearing of the appeal only two items were pressed by the appellant.

The first was an item of \$74 loss alleged to have been incurred by the appellant on a resale of the potatoes in car 6376. The appellant contended that the plaintiff, by wrongfully breaking the seals of that car and abstracting one or more bags of potatoes, accepted the car-load, notwithstanding that the United States Agricultural Inspection Department had refused to permit this car to cross the border on account of defects in the potatoes.

The wrongful act of the plaintiff was something wholly unconnected with the contract, and could not be construed as an acceptance of this car by the plaintiff.

In this the Court agreed with the trial Judge. On this branch, the appeal should be dismissed.

The main contest was in respect of car D.L.W. 29407. This was a car of Delaware potatoes from New Brunswick, in respect of which the bargain was made on the 19th April, 1917. The car was sent from Toronto to Niagara Falls, Ontario, on the same day. The sale was f.o.b. Toronto; but, according to the understanding, the car was sent forward by the appellant with bill of lading in his own favour and with instructions to notify the plaintiff. The bill of lading and draft for the purchase-price were deposited in the appellant's bank in Toronto, and forwarded to Niagara Falls, Ontario, so that the plaintiff might take up the draft and then get the potatoes. The potatoes arrived at Niagara Falls, and the plaintiff was duly notified; but the draft was not taken up, and the car remained on a railway siding in Niagara Falls, Ontario, from the time of its arrival until sold by the appellant on or about the 1st May.

In these circumstances and having regard to the admitted fact that in April potatoes are perishable, it was the duty of the plaintiff, when the car arrived in Niagara Falls, about the 21st April, promptly to take up the draft and release the potatoes. There was no direct evidence of a term in the contract that the plaintiff had a right of inspection and rejection for unfitness at Niagara Falls, but the course of dealing between the parties in regard to other cars made it plain that such was the agreement.

No payment having been made by the plaintiff on this car down to the 30th April, the appellant on that day proceeded to realise his claim by selling the car-load to one Branch at Lockport.