

Appeal by the plaintiff from a judgment of His Honour the Judge of Welland County Court, dismissing his action with costs.

The appeal to the Supreme Court of Ontario (Second Appellate Division) was heard by HON. SIR. WM. MULOCK, C.J.Ex., HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND, and HON. MR. JUSTICE LEITCH.

F. W. Griffiths, for the plaintiff.

No one contra.

HON. MR. JUSTICE RIDDELL:—The plaintiff brought his action in the County Court of the County of Welland, but failed, and now appeals.

The facts as found by the trial Judge are as follows—the defendant sold to the plaintiff all his timothy hay and lucerne (except what he needed for his own use), at \$12 per ton F. O. B. The plaintiff was to have notified the defendant when he wanted the hay delivered, but failed to do so. Some 22¼ tons of lucerne were delivered to and received by the plaintiff and a draft for \$268 given in payment therefor. The plaintiff complained (1) of non-delivery of the timothy; and (2) of the alleged failure of the lucerne delivery to fill the contract. At the trial the County Court Judge found, and rightly found, against the plaintiff, holding that he should have given notice of the time at which delivery was required of the timothy, and further that the lucerne delivered was such as was contracted for. So far as these findings were concerned we dismissed the appeal on the hearing. But the plaintiff also complained on this appeal that the trial Judge did not take into consideration the payment by him of \$50 at the time of the purchase. The point is specifically taken in the notice of motion and we must therefore examine the proceedings as best we may without the assistance of counsel to determine the fact. That \$50 was paid by cheque enclosed in the letter of 13th September, 1912, is quite clear; it is sworn to and not denied. The sight draft for payment of the lucerne was also paid before receipt of the lucerne. Therefore all the goods received were paid for and \$50 more was paid by plaintiff to defendant.

The Court below gives \$60 being “damages to the defendant for 30 tons of timothy, i.e., damages for non-acceptance of timothy sold; and also for “\$16 for damages with reference