

Held, that this was misdirection, as contributory negligence may be a defence to an action for breach of a statutory duty. *Groves v. Wimborne* (1898) 2 Q.B. 419, Beven on Negligence, pp. 633, 634, 643, and the cases there cited, and that, notwithstanding the judge submitted to the jury the question of contributory negligence which they answered in plaintiff's favour, there should be a new trial. *Bray v. Ford* (1896) A.C. at p. 49, and *Lucas v. Moore*, 3 A.R., at p. 614, followed.

Elliott and Macneill, for plaintiff. *Aikins, K.C.* and *Curle*, for defendants.

Perdue and Phippen, J.J.A.]

[Dec. 21, 1908]

PROUT V. ROGERS FRUIT CO., LTD.

Sale of goods—Representation or warranty—Acceptance—Rescission—Damages.

Appeal from verdict of a County Court judge in favour of defendants in an action for the price of 63 cases of eggs sold and delivered to the defendants on 5th March, 1908.

Some days previously the defendants had bought from the plaintiff a large quantity of a stock of eggs known as the Kerr & Payne eggs, and these seemed to have been satisfactory. On the 5th of March, in answer to inquiry by telephone, plaintiff said he still had some of the Kerr & Payne eggs estimated at between 1,800 and 2,100 dozen, part of which had been candled. Asked how they were running, plaintiff said, in good faith, about 2½ dozen bad out of each case of 30 dozen. The price being agreed on at 15½c. for candled eggs and 14½c. for uncandled, defendants stated that they would take the lot. Plaintiff then delivered the remainder of the Kerr & Payne eggs and defendants received them at their warehouse. Upon examination by their expert, it was found that the proportion of bad eggs in each case was considerably greater than plaintiff had represented, whereupon defendants repudiated the contract and attempted to return the eggs.

Held, that the defendants could not rescind the contract, but were entitled to deduct from the price agreed on, by way of damages for breach of warranty, the sum of \$23.65, on account of the extra number of bad eggs found in the lot over and above what the plaintiff had represented. Appeal allowed with costs.

Pitblado and Haig, for plaintiff. *Robson*, for defendants.