

and presumably understood the postal regulations of Canada as well, if not better than, the appellant's vice-president, who was a resident of the United States, and Mr. Ellis examined the envelopes 7, a, b, c and d, and was competent to judge whether, when the envelope was saled, the flap could be withdrawn without tearing or destroying the envelope. Even the learned Chief Justice, who is not an expert, was able to form an opinion, an erroneous one I, with great respect, think, upon the matter, by the ocular demonstrations which were made during the progress of the trial.

For these reasons I am of opinion that this defence fails.

It was apparently argued at the trial, as it was before us, although it is not set up in the statement of defence, that by having on the 10th August, 1911, given to M. V. Dawson & Co. of Montreal an exclusive license for the manufacturing and sale of the patented envelope for part of the territory covered by the license to the respondent the appellant had acquiesced in the position taken by the respondent, and was, therefore, not entitled to claim damages for the breach of the agreement of the respondent to pay the royalties.

That contention is clearly not well founded. Before the dealing with Dawson & Co. the respondent had repudiated the agreement, and it was the right of the appellant, as it did, to treat the repudiation as a wrongful putting an end to the contract, and at once to bring an action as on a breach of it, and to cover such damages as would have arisen from the non-performance of the contract at the appointed time, subject to abatement in respect of any circumstances which might have afforded the appellant the means of mitigating its loss, and the agreement with Dawson & Co. was but the availing itself of that means of mitigating its loss which it was not only the appellant's right, but its duty to do.

I would reverse the judgment of the learned Chief Justice, and substitute for it a judgment for the appellant for the damages sustained by reason of the respondent's breach of the agreement with a reference to the Master-in-Ordinary to ascertain the amount of the damage, and the respondent should pay the costs of the action and of the appeal.

HON. MR. JUSTICE MACLAREN, HON. MR. JUSTICE MAGEE, and HON. MR. JUSTICE HODGINS, agreed.