sented the iron to be in perfect order and merchantable; whereas upon the removal of the iron from the plaintiff's store and the delivery thereof to the defendants at their store, it was discovered that a certain portion of it was not in good order, but was injured and damaged by water and rust, of all which the plaintiff forthwith had due notice. That the portion of the iron so injured and damaged was depreciated in value to an extent of at least $32, and the defendants sustained a loss of at least $32 upon the iron by reason of such injury. The defendants then alleged that they had always been ready to pay the amount of plaintiff's account less $32, and had tendered the same *à deniers découverts*, with costs, before the return of the action, and they brought the money into Court with their plea.

From the evidence it appeared that the iron remained in the plaintiff's store for some time after the sale. When the defendants began to remove it, after a few loads had been taken off the top, it was found that a portion of it was damaged by rust. Brady, the broker, was examined and stated that he did not, as far as he could recollect, say anything as to the condition of the iron, because he understood it to be in good order. If he had known it to be in bad order, he would have stated it. Taylor, the defendants' salesman, went to examine the iron, but he testified that it was merely for the purpose of testing its *quality*, not examining its *condition*.

Monk, J. This is an action for $448, the value of certain iron sold to the defendants, Mulholland & Baker. It appears that in August, 1865, a broker of the name of Brady was instructed by the plaintiff to sell a quantity of iron. Brady went to Mulholland & Baker, and asked them if they would buy it. They sent their salesman to examine it, for the purpose, as they allege, of testing the brand, and as the quality was found to be all right, a sale was concluded. After the iron had remained in the plaintiff's store for some time, the defendants sent for it. The first few loads were in good condition, but the third or fourth load began to look rusty, and it turned out that a considerable part of the iron was damaged by rust. The defendants remonstrated with Benson, had the iron surveyed, and claimed either that the whole lot should be taken back, or that a deduction of $32 should be made for what was unmerchantable. The plaintiff, however, refused to make any deduction whatever, and has now brought his action for the whole amount. The question comes up whether the sale was made under circumstances which exclude the defendants from claiming a deduction for unmerchantable iron. Thomson, the plaintiff's clerk, has been examined, and says he knew the iron was rusty. Brady, the broker, says he knew nothing about the iron being rusty, or he would have mentioned it. So we have a vendor employing a broker to sell a quantity of iron, and saying nothing to him about its being damaged. I am free to admit that if the defendants had bought this iron without the intervention of a broker, and had gone to examine it, it would have been for them to make a sufficient examination of it. But the plaintiff, knowing that the iron was rusty, employed a broker to sell it as in good condition, and as merchantable. Under these circumstances, although the defendants sent a clerk to examine it, yet as his examination is proved to have been merely for the purpose of ascertaining the quality, I think the plaintiff was bound to deliver the iron in good order, and that the defendants are entitled to the deduction which they claim. Their tender, therefore, is declared good and valid, and the plaintiff must pay the costs of the contestation.

A. & W. Robertson, for the Plaintiff.
Abbott & Carter, for the Defendants.

Nov. 30, 1866.

BOURDEAU *v.* GRAND TRUNK COMPANY.

Master and Servant—Damages—Injury caused by Negligence of Fellow-Servant.

Held, that an employee of a Railway Company has no action against the Company for damages, where the injury is caused by the negligence of a fellow-servant, while both are acting in pursuance of a common employment.

This was an action *in formâ pauperis* for $8000 damages, brought by Siméon Bourdeau, a brakeman, formerly in the service of the Grand Trunk Railway Company.