

das, and Glengarry, adjudging that the defendant should pay the costs of the action, although the action was dismissed.

The action was for the price of goods alleged to have been sold and delivered by the plaintiff, a wholesale merchant in Montreal, to the defendant, a merchant in Port Arthur. The plaintiff received the order for the goods through his traveller; by the order, the terms were "f.o.b. at Montreal against a sight draft." The goods were loaded on a ship at Montreal; the bill of lading was taken in the name of the plaintiff, and was by him endorsed in blank and sent to a bank, with a draft attached, and instructions to deliver the bill of lading to the defendant upon payment of the draft. When the shipment arrived at Port Arthur, the defendant found, by examination, that part of the goods, a case of cheese, was missing. He refused to pay the draft, and was not given the bill of lading. Some correspondence followed, the defendant declining to pay unless the cheese was forthcoming, but expressing his willingness to pay as soon as the shipment was complete. The bill of lading was returned with the unaccepted draft to the plaintiff; who then brought this action.

The County Court Judge held that, but for the Statute of Frauds, the plaintiff was entitled to recover \$154.17 for damages for non-acceptance of the goods, but considered that the statute was an absolute bar; and, accordingly, dismissed the action, but ordered the defendant to pay the plaintiff all his costs. The Judge gave leave to the defendant to appeal upon the question of costs.

The appeal was heard by CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

C. A. Moss, for the defendant.

C. H. Cline, for the plaintiff, argued that he was entitled to costs, because the Judge might and should have given him judgment for his claim.

RIDDELL, J., delivered a written opinion in which he said that the Court was bound by previous decisions to hold that there was no power to direct the defendant to pay the costs of an action which failed; and also that an order against a successful defendant for costs might, without a cross-appeal, be supported if, on the evidence, the defendant should not have succeeded.