MAN.

C. A.

He could, however, under s. 13 of the Sale of Goods Act (R.S.M. 1913, c. 174), elect to treat the breach of such condition as a breach of warranty. Moreover, there is some evidence to shew that the plaintiffs were induced to accept the apples by the promise of the defendant's agent that the matter would be adjusted. I think there was evidence which should have been submitted to the jury.

The defendant Lang filed a counterclaim for damages for non-acceptance of 5 cars of apples. He alleges the plaintiffs instructed him to ship one car of apples to Neepawa and one car to Brandon, that plaintiffs refused to accept them, and in consequence he was compelled to sell them at a less price and thereby suffered damages. He also alleges that he shipped the other 3 cars; that plaintiffs refused to accept them, and that in consequence he suffered damages.

The evidence shewed that 6 cars were shipped, 2 to Winnipeg, 1 to Neepawa, 1 to Brandon, and 2 others which were diverted to Mariapolis after the plaintiffs had refused to accept them.

Defendant states that he lost on the Brandon car $286.50, on the Neepawa car $250.45, and on the other two cars $172. The seventh car was never shipped, and no claim is made in respect to it. There is no pretence that either the Neepawa car or the 2 cars sent to Mariapolis were ever inspected by the plaintiffs. They were allowed to remain on the siding, subject to demurrage until the defendant himself disposed of them.

The plaintiffs claim that they inspected the Brandon car and rejected it. A witness, Kennedy, swore that he was sent to Brandon to inspect the car of apples there; that he examined them, and found a shortage of Baldwins and Spys, and a good many apples that were damaged and not fit for sale. The defendant, on the other hand, says that the apples were in good condition.

The amount of the loss on the 4 cars as sworn to by the defendant Lang was $708.95. The jury found a verdict on the counterclaim for $235 only.

As there appears to be no answer to the defendant's claim for damages in connection with either the Neepawa car or the Mariapolis car, and the verdict is less than the loss sworn by the defendant to have been incurred in connection with these cars, I can see no reason for interfering with the verdict on the counter-claim.