PATTERSON, Co.C.J.:—The facts in this case are of the simplest character. The defendant ordered some evaporated apples of one Graham. By a mistake of the storage company who had stored with them plaintiff's apples as well as Graham's, those of plaintiff were sent him. Before he had done anything with them plaintiff made him aware that the apples were plaintiff's and asked either that he return them or pay for them. He did neither, but disposed of them as his own, and this action is brought for goods sold and delivered upon the implied contract arising from defendant's conduct. It is too clear for argument that it must succeed, and were it not for an interesting question of evidence that arises, nothing further would need to be said.

Plaintiff lives in Ontario and a commisson was issued to take his evidence and that of one of his witnesses at Belleville in that province. The defendant was not represented at the taking of the evidence and the commissioner received without objection and returned a whole lot of irrelevant matter, and some bits of hearsay. With these I have no difficulty. It is clearly my duty to reject them. (Jacker & International Cable Co., 5 T. L. R. 13). But besides the irrelevant matter and the hearsay there is much secondary evidence. Indeed the plaintiff's whole case is made out by secondary evidence—copies of letters and copy of a bill of lading, given without laying the grounds for it, and if it is to be rejected he must fail. No objection was made to this evidence before the commissioner—nor when it was being read in Court by plaintiff's counsel, not until the argument at the close of the trial was any exception taken. According to the old and as Sir Wm. Young, C.J., said in delivering the judgment of the Court in Smith & Smith, 2 Old 303, "the obviously sound" rule an objection taken then would be too late. But that rule was especially for trials with a jury, and there is language in the books from which it might be inferred that it does not apply in a trial by a Judge alone. On such a trial, says Phipson (4th ed. pp. 636-7): "if inadmissible evidence has been received whether with or without objection it is the duty of the Judge to reject it when giving judgment, and if he has not done so it will be rejected on appeal as it is the duty of the Courts to arrive at their decisions upon legal evidence." From this it is clear I think that I should reject anything received that was not evidence whether objection was taken or not. But secondary