Province of Manitoba.

KING'S BENCH.

Full Court.] McCOWAN *v.* MACKEY. [Dec. 21, 1901.

Contract—Refusal to perform—Rescission—Remedies.

Action for recovery of damages for breach by defendant of his contract to purchase 100 tons of hay from the plaintiff. After delivery of two car-loads of the hay, defendant claimed that the hay in one of the car-loads was not of the quality required by the contract, and wrote to plaintiff that he would take no more hay from him unless he make the first car right, by which he meant that plaintiff should accept less than the price agreed on for it. The trial judge found as a fact that the hay objected to was part of the hay defendant had examined and agreed to purchase, and that he was bound to take it and pay the price agreed on for it.

Held, that defendant's refusal to complete the contract was of such a nature that plaintiff could elect to sue at once for damages for such refusal, and was not bound to wait for any further repudiation by defendant, or to hold himself in readiness to deliver any more hay: *Freeth* v. *Burr*, L.R. 9 C.P. 208; *Withers* v. *Reynolds*, 5 B. & Ad. 882; *Mersey Steel and Iron Co.* v. *Naylor*, 9 A.C. 434, followed.

When the plaintiff received the defendant's letter above referred to he had a third car-load of the hay ready for shipment to defendant at Keewatin, and at once sent it to Winnipeg where he sold it at a price less than the contract price; and, although he had more than enough hay on hand to fill the contract, he did not deliver any more of it to defendant, but placed the matter in the hands of his solicitors and shortly afterwards sold most of the hay that the defendant had in the first instance agreed to take. The solicitors first took proceedings in an Ontario court to recover the price of the hay defendant had received, and, after the settlement of that claim, they wrote defendant that plaintiff had instructed them to write to him to know if he would accept delivery of the balance of the hay ordered, viz., 79½ tons, and saying that their instructions were to issue a statement of claim by the end of the week if the defendant should refuse acceptance. Two weeks afterwards the statement of claim in this action was issued. On the above facts it was contended by counsel for defendant that even if defendant had refused to perform the contract, the plaintiff had not acted upon that refusal in such a way as to entitle him to take advantage of it, but had afterwards urged on the defendant compliance with the contract as if it were still existing, and that the facts brought the case within the principle laid down by Lord Esher, M.R.