

Appeal by the defendant from the judgment of the County Court of the County of Lanark in favour of the plaintiff in an action to recover \$640, the balance remaining unpaid of the price of hay sold and delivered by the plaintiff to the defendant.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

R. J. McLaughlin, K.C., for the appellant.

R. J. Slattery, for the plaintiff, respondent.

RIDDELL, J., in a written judgment, said that the plaintiff, a farmer, in the autumn of 1916, baled 65 tons of hay and placed it, baled and pressed, in his barn. The defendant made an offer of \$10 a ton for the hay—he to draw it away; the offer was accepted, and \$10 paid on the bargain. This was a few days after the 20th December, 1916. The plaintiff suggested that the defendant should draw the hay away between Christmas and New Year's day; the defendant agreed to draw it "as soon as possible"—and that was acceded to.

Upon the evidence, no time for payment was mentioned.

Early in January, the plaintiff, who was not then living on his farm, asked the defendant if he had begun to take the hay away. The defendant said he had not, and the plaintiff asked him to remove it, and send a cheque for \$300 on account. The defendant answered that he would remove the hay soon, or as soon as he could, and would pay the whole amount then.

On the 14th March, 1917, the defendant began to draw, and drew more than 23 tons. Then a bale broke, and the hay in the centre was found to be musty. The defendant examined some 20 more bales, musty on the outside, but did not open them. He drew no more; and by telephone told the plaintiff that he had struck musty hay, offered to cull out such of the hay as he thought would answer his contract, and pay for what he took. The plaintiff refused to discuss the matter, taking the position that the hay was the defendant's.

On the 14th March, the defendant wrote the plaintiff: "I have stopped drawing your hay . . . as there is too much of it musty, so I will send you a cheque by next mail for the amount I have out."

The defendant drew no more, but left about 42 tons in the barn, where it remained and was when this action was tried.

On the 19th March, the defendant sent the plaintiff an account of the hay drawn away by him, 46,346 lbs. and a statement shewing that he owed the plaintiff \$221.72, concluding "hope you will be