prove streets and bridges without a by-law for that purpose.

*Cassels*, Q.C., and *Pennyfather*, for the plaintiff.

*Idington*, Q.C., for the defendants.

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Ferguson, J.] [June 13.

MOVERS v. GOODERHAM.

*Contract for sale of cargo of rye—Action for price—Breach of implied warranty that rye sound and merchantable—Acceptance—Caveat emptor—Return of goods—Rescission of contract—Damages.*

The plaintiffs sold a cargo of rye to the defendants to be delivered at a future time at the defendant's dock in Toronto. At the time of its delivery it was inspected by an inspector employed by the defendants, and pronounced by him to be sound so far as he could inspect it. Subsequently, as it was being unloaded into defendant's elevator, it was found to be damaged. In an action for the price in which the defendants set up an implied warranty that the rye would be sound and merchantable, and a breach thereof, and the plaintiffs contended there was an acceptance of the rye, and that, as there was an opportunity for inspection at Toronto, the maxim *caveat emptor* applied. The defendants contended that as there was no opportunity to inspect at the time of the contract, and no subsequent waiver, the opportunity in Toronto was immaterial as long after the contract of sale.

*Held*, that there was an implied promise on the part of the plaintiffs that the commodity delivered would be saleable or merchantable under the description "rye," and that the maxim *caveat emptor* did not apply, and that there was a breach of the warranty contained by implication in the contract: *Jones* v. *Just*, L. R. 3 Q. B. 197, cited and followed.

The breach of the warranty of a specified chattel does not entitle the purchaser to return the chattel and rescind the contract, and is no defence to an action by the seller; but evidence may be given of the breach of the warranty in reduction of damages.

*Walkem*, Q.C., and *J. B. Walkem*, for the plaintiffs.

*T. P. Galt*, and *T. G. Blackstock*, for defendants.

Boyd, C.] [June 28.

RE DENNIS.

DOWNEY ET AL. v. DENNIS ET AL.

*Will—Devise—Sale by trustees directed if wished by majority of heirs—Consent of majority—Application by minority for partition.*

J. C, died in 1867, having by his will provided as follows: "And whereas trouble . . may arise among my family with regard to the property . . . on account of its being put out of the power of my trustees to sell or dispose of the property, I hereby order, direct, and fully authorize, at and after twenty years after my death, my trustees . . . to absolutely sell and dispose of my said property in T. to the best advantage, provided only that it be the wish of a majority of my heirs who may then be living to do so, and not otherwise, etc." In 1887 a meeting of a large majority of those interested was held, and it was decided to sell by public auction.

On an application by the plaintiffs who were trustees for one of the heirs, and represented only $\frac{1}{6}$ share of the property, for the usual court order for partition and sale, which was resisted by a majority of the heirs, it was

*Held*, that the land in question was vested in the trustees on the express trust to sell at the end of twenty years from the testator's death, provided a majority of the heirs were in favour of a sale, which was proved, and that the jurisdiction to partition was ousted.

*J. Maclennan*, Q.C., for the plaintiffs.

*Lash*, Q.C., and *J. R. Roaf*, for the defendants.

*John Hoskin*, Q.C., for the infants.

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Boyd, C.] [June 30.

PEGG v HOBSON.

*Mortgage—Action on covenant—Mortgagee becoming owner—Extinguishment.*

In an action on the covenant for payment in a mortgage, for the amount of the deficiency, after the exercise of a power of sale, defendant set up the sale under the power to one W., and a retransfer by W. on the same day to plaintiff, by which plaintiff became the owner of the land.

*Held*, on demurrer, no defence.

*E. B. Brown*, for the demurrer.

*W. M. Douglas*, contra.