

Robson, J.]

[Feb. 21.]

SAWYER & MASSEY CO. v. FERGUSON.

Contract—Implied warranty—Fitness of machinery—Waiver—Sale of Goods Act—Notice.

The defendant by agreement in writing dated 21st August, 1909, agreed to buy from the plaintiffs a threshing machine and other articles for \$1,065 and to pay for same in two instalments, \$535 on 1st November, 1909, and \$530 and interest on 1st November, 1910. Shortly after the date of the contract, certain threshing machinery was delivered to defendant in presumed compliance with the contract. Defendant paid the first instalment and gave his note for the other instalment, but claimed at the trial that he had done so under protest, because the machinery was not satisfactory; and he defended this action for the amount of the note alleging breach of the warranty or condition that the machine would do as good work as any of the same size sold in Canada and that he had given the notices required by the terms of the agreement. The agreement contained the same provisions as are set out fully in the head note to *Sawyer & Massey Co. v. Ritchie*, 43 S.C.R. 614. The defendant sought at the trial, though not pleaded, to invoke the aid of section 16 of the Sale of Goods Act, R.S.M. 1902, c. 152, on the subject of implied conditions or warranties.

Held, following *Sawyer & Massey Co. v. Ritchie*, that the clauses of the agreement excluded the provisions of the Sale of Goods Act as to implied conditions, and that the purchasers' remedies for breach of warranty as to the working capacity of the machinery entirely depended on his having observed the terms of the warranty, so that if the defendant neglected to observe them, both his defence to the claim on the note and his counterclaim for damages for breach of the warranty would fail.

The notices relied on by defendant were as follows: He complained over the telephone to the plaintiffs' local agent, Menzies, who sent to plaintiffs at Winnipeg a telegram reading thus, "Send Badgley, J. M. Ferguson separator laid up." Badgley was an expert in such machinery employed by plaintiffs.

Held, that, as the alleged notice contained no information as to wherein the machinery failed to satisfy the warranty, it was not a sufficient notice to comply with the contract and that there was nothing from which to infer a waiver as in *American Abell v. Scott*, 6 W.L.R. 550.