

APPELLATE DIVISION.

MARCH 19TH, 1913.

GRAHAM CO., LIMITED v. CANADA BROKERAGE
LIMITED.

4 O. W. N. 957.

*Sale of Goods—Damages for Non-Acceptance—Sample Rejected—
Tender of Other Sample—Refusal to Accept—Sample Sent Not
in Accordance with Contract—Variation of Contract.*

Action by vendors of certain apples against purchasers for damages for their refusal to accept the same. The contract provided that it should be contingent upon the approval by defendants of 5 boxes to be sent as a sample. Plaintiffs sent one box as a sample which defendants claimed was not of the required quality and immediately after receiving notice of defendants' dissatisfaction therewith sent a sample lot of five boxes which defendants refused to accept, claiming the contract was at an end.

DEROCHE, Co.C.J., found in favour of plaintiffs for \$300 and costs.

APPELLATE DIVISION *held*, that the sending of the first sample and the correspondence relative thereto did not introduce a new term into the contract or vary the former terms so that plaintiffs were still bound to send and defendants to accept 5 boxes as a sample.

That an appropriation and tender of goods, not in accordance with the contract and in consequence rejected by the purchaser is revocable, and the seller may afterwards within the contract time, appropriate and tender other goods which are in accordance with the contract.

Borrowman v. Free, 4 Q. B. D. 500 followed.

Appeal dismissed with costs.

Appeal by defendants from a judgment of His Honour Judge Deroche, Senior Judge of the County Court of Hastings, in favour of the plaintiffs for \$300 and costs, in an action for breach of contract, tried at Belleville on the 18th January, 1913, without a jury.

The appeal to the Supreme Court Ontario (Second Appellate Division) was heard by HON. SIR WM. MULOCK, C.J.Ex., HON. MR. JUSTICE CLUTE, HON. MR. JUSTICE RIDDELL, HON. MR. JUSTICE SUTHERLAND and HON. MR. JUSTICE LEITCH.

Shirley Denison, K.C., for defendants.

M. Wright, and W. D. M. Shorey, for plaintiffs.

HON. MR. JUSTICE CLUTE:—The plaintiffs, through their commission agents, Messrs. Anderson, Powis & Co., on the 31st August, 1911, sold to the defendants "600 50-lb. boxes good primes, at 10c. per lb., f.o.b. Ontario shipping point; subject to approval of 5 boxes when ready for shipment;