

through an exceptional or accidental cause were at defendant's risk.

Per RUSSELL, J., dissenting, that the burden was upon plaintiff of shewing that the deterioration was due to an accidental or exceptional cause and that in the absence of such evidence the Court must conclude that the goods were not in such condition when shipped as to be merchantable for a reasonable time after their arrival at the place to which they were shipped.

*F. H. Bell*, for appeal. *H. Mellish*, K.C., contra.

Full Court.]

[Dec. 22, 1906.]

COLBIN v. PURCELL.

*Contract for sale of business—Misrepresentation as to profits—Restitution—Counterclaim—Judgment not appealed from.*

In an action claiming a balance as due on a contract for the sale of a milk route, etc., defendant relied on misrepresentation as to the profits derived from the business and counterclaimed damages for such misrepresentation. The counterclaim was dismissed and there was no appeal.

*Held*, 1. As defendant had received the property and had dealt with it in such a way that he could not make restitution he could not reply upon the alleged misrepresentation as ground for rescission.

2. The counterclaim having been dismissed and no appeal taken that the Court was not in a position under the order corresponding to O. 58, r. 4 of the English rules to make the order that the judge below should have made; that the counterclaim being a independent action if defendant was dissatisfied with the judgment dismissing it he should have appealed.

*J. C. O'Mullin*, for appellant. *J. J. Power* and *M. M. Reynolds*, for respondent.

Full Court.]

[Dec. 22, 1906.]

SLIPP v. MORRIS.

*Appeal—County Court judge—Jurisdiction to dismiss action on appeal from Justices' Court—Certiorari.*

In an action to recover a small sum in the Magistrates' Court the defendant appeared and contended that the justice had no