1932
*Oct. 18, 19.
1933
*Feb. 7.

THOMPSON AND ALIX, LIMITED (PLAINTIFF) . . . . . APPELLANT;

AND

B. F. SMITH (DEFENDANT) . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Contract—Sale of goods—Contract for sale of potatoes to be delivered in carload instalments—Rejection by purchaser of carloads shipped, as being of inferior quality—Question whether these carloads were shipped on account of the contract—Question whether rejection amounted to repudiation of the whole contract—Jury's findings—Sale of Goods Act, R.S.N.B., 1927, c. 149, s. 28 (2).

By contract dated September 3, 1927, respondent agreed to sell and appellant to buy 20 carloads of white potatoes, Cobblers or Green Mountains, Canada Grade A, at 90 cents per 90 pounds, bulk, delivered at rate of 5 cars per week, payment to be made in cash against documents. All cars were to be Government inspected and certificate of grading was to accompany the draft for each car as shipped. The contract did not specify time of shipment, but no Government certificate as to grade could be obtained before October 1 (*Root Vegetables Act*, R.S.C., 1927, c. 181, s. 19). On September 17 the broker who had arranged the contract wired respondent: "Thompson and Alix (appellant) would like you ship one car this coming Monday against their contract can you do so if not kindly wire immediately present price and conditions," to which respondent replied: "Will ship one car Thompson and Alix 90 per bag bulk to-morrow or Tuesday best can do." A car was shipped on September 21 and was followed by another. Appellant refused to accept and pay for these, claiming they were of inferior quality, whereupon respondent refused to make further shipments. Appellant sued for damages. The jury found that the two cars were shipped under the contract, that the potatoes therein were grade A, that respondent did not commit a breach of the contract, that respondent, by appellant's statements and conduct, was justified in repudiating the contract and relieved from making further delivery under it; but the trial judge held that, on interpretation of the documents, the two cars were not shipped under the contract, and, notwithstanding the jury's findings, ordered judgment for appellant. The Supreme Court of New Brunswick, Appeal Division (4 M.P.R. 245), set aside the judgment and ordered a new trial. Appellant appealed, and respondent cross-appealed, to this Court, each asking for judgment in its or his favour and (there having been already two trials) for a final decision that would avoid further trials.

Held (Lamont J. dissenting): Appellant had not repudiated the contract, and was entitled to damages for non-delivery by respondent.

Per Smith J.: Assuming the first car of potatoes was shipped on account of the contract (requirement of certificate of grading being waived as to it), and was of the required quality, appellant's rejection of it

*PRESENT:—Rinfret, Lamont, Smith, Cannon and Crocket JJ.

1933

THOMPSON & ALIX LTD. v. SMITH.

(though making him liable for breach in respect of that car) was not, and there was no evidence on which the jury could find that it was, a refusal to carry out the contract. The second car was never ordered, had not the necessary certificate, and appellant was not bound to accept it, and there was no evidence justifying the jury's finding in reference to it.

Per Cannon and Crocket JJ.: Assuming the two cars were shipped on account of the contract (Cannon J. was clearly of opinion they were not; Crocket J. thought there might be justification for a finding that the first was, but none for a finding that the second was), and was of the required quality, appellant's rejection of them was merely a "severable breach giving rise to a claim for damages," and was not, and a jury could not, on the evidence, reasonably find that it was, a repudiation of the contract.

Per Lamont J. (dissenting): The jury was justified on the evidence in finding that the two cars were shipped on account of the contract and were of the required quality, and, in view of the contract, letters and other evidence, it was open to them to find that appellant's refusal to accept and pay for them evidenced an intention to repudiate the whole contract unless respondent would ship Green Mountains (instead of Cobblers as shipped) which the contract did not require him to do.

The Sale of Goods Act, R.S.N.B., 1927, c. 149, s. 28 (2); *Freeth* v. *Burr,* L.R. 9 C.P. 208, at 213, and other cases referred to.

As to the Court finally determining on this appeal the issue between the parties, Cannon J. referred to Order 58, Rule 4, and Order 40, Rule 10, of the New Brunswick Rules of Court, and to *Skeate* v. *Slaters,* 83 L.J.K.B. 676, at 680-681, 686, and *Banbury* v. *Bank of Montreal,* [1918] A.C. 626.

APPEAL by the plaintiff from the judgment of the Supreme Court of New Brunswick, Appeal Division (1).

By a contract in writing dated September 3, 1927, the defendant agreed to sell and the plaintiff to buy 20 carloads of white potatoes, Cobblers or Green Mountains, Canada Grade A, at 90 cents per 90 pounds, bulk, delivered at Sherbrooke, Quebec, at the rate of five cars per week, payment to be made in cash against documents. All cars were to be Government inspected and certificate of grading was to accompany the draft for each car as shipped. The contract was arranged by a broker in Sherbrooke. No date was specified in the contract as to the time of shipment, but no Government certificate as to grade could be obtained before October 1 (*Root Vegetables Act,* R.S.C., 1927, c. 181, s. 19).

(1) (1932) 4 M.P.R. 245.

1933

THOMPSON & ALIX LTD. v. SMITH.

On September 17, the broker wired defendant:

> Thompson and Alix [the plaintiff] would like you ship one car this coming Monday against their contract can you do so if not kindly wire immediately present price and conditions.

to which defendant replied:

> Will ship one car Thompson and Alix ninety per bag bulk to-morrow or Tuesday best can do.

A car of potatoes was shipped on September 21, and was followed by another. The plaintiff refused to accept and pay for these cars, claiming that they were of inferior quality; whereupon the defendant refused to make any further shipments.

There was considerable correspondence other than the above, much of which is set out in the judgments now reported.

The plaintiff brought action for damages, claiming the sum of $3,290, as being the difference between the contract price and the price paid by the plaintiff in the open market at the time of the alleged breach by defendant.

The action was tried twice, each time before Le Blanc J., with a jury. On the first trial, the jury gave a general verdict for the defendant and judgment was entered in his favour. The Appeal Division set aside that verdict and judgment and ordered a new trial (1). On the second trial the jury answered the questions submitted to them in favour of the defendant, finding (*inter alia*) that the two cars sent were shipped under the contract, that the potatoes therein were grade A, that defendant did not commit a breach of the contract, and that defendant, by the statements and conduct of the plaintiff, was justified in repudiating the contract and relieved from making any further delivery under it. But the trial judge held that, on interpretation of the documents, the two cars were not shipped under the contract, and, notwithstanding the jury's findings, ordered judgment to be entered for the plaintiff for $3,290. The Appeal Division set aside this judgment and ordered a new trial (2).

The plaintiff appealed to the Supreme Court of Canada, asking that the judgment of the Appeal Division be set aside and the judgment of the trial judge restored. The defendant cross-appealed, asking that, in so far as the judgment of the Appeal Division ordered a new trial, it be

(1) (1929) 1 M.P.R. 510. (2) (1932) 4 M.P.R. 245.

varied and that judgment be entered for the defendant. Both parties asked that this Court, if possible, put an end to the litigation and render a final judgment.

P. J. Hughes, K.C., and *W. J. West* for the appellant.

W. P. Jones, K.C., and *G. McDade* for the respondent.

RINFRET, J.—There have already been two trials in this case. The Appeal Division of the Supreme Court of New Brunswick has again ordered a new trial (1). The parties have requested us, if possible, to put an end to the litigation and to render a final judgment.

I agree with my brothers Cannon and Crocket that there was no repudiation of the contract by the appellant and that the appeal should be allowed and the cross-appeal dismissed with costs throughout, judgment being entered in favour of the plaintiff for the sum of $3,290, the amount of damages assessed by the jury.

SMITH, J.—I agree with my brothers Cannon and Crocket that there was no repudiation by the appellant of the contract.

The first car of potatoes shipped was not government inspected and had no certificate of grading, as required by the terms of the contract; but appellant, by his telegram asking for the shipment of this car, waived the requirement as to that particular car because of his knowledge that there could be no such inspection at that time. The appellant was entitled to reject this car if the contents were not in compliance with the terms of the contract. The jury, however, has found that the contents were in fact in compliance with the terms of the contract, and that appellant was not entitled to reject it. Appellant, therefore, remained accountable to the respondent for that car of potatoes at the contract price, or for the loss sustained by its rejection; but that is the full extent of its liability for its refusal to accept that particular car, whether shipped as part fulfilment of the contract or on an independent contract resulting from the telegram. It was not a refusal to carry out the contract, and there was no evidence before the jury on which they could come to any such conclusion.

(1) (1932) 4 M.P.R. 245.

1933

THOMPSON & ALIX LTD. v. SMITH.

Smith J.

The second car was never ordered, had not the necessary certificate of inspection, and appellant was not bound to accept it; and there is no evidence justifying the finding of the jury in reference to it.

The jury has assessed the damages for respondent's breach of contract at $3,290. I therefore agree that the judgment of the trial judge should be restored, with costs of this appeal and of the appeal to the Appeal Division to the appellant.

CANNON, J.—The plaintiff's claim is for damages for non-delivery of potatoes, under a contract dated the 3rd September, 1927, for twenty minimum carloads of white potatoes, Cobblers or Green Mountains, Canada Grade A, at the price of ninety cents per ninety pounds, and ten cents per bag extra, to be delivered at the city of Sherbrooke, in the province of Quebec, or some other point with equal freight, the same to be shipped at the rate of five carloads per week, mostly over the Canadian National Railways. All potatoes were to be Government inspected, and the certificate of the grading was to accompany the draft of defendant and bill of lading for each car shipped. The potatoes were to be paid for by the plaintiff with cash against documents of title and bills of lading. According to the plaintiff, the defendant refused to deliver and compelled the plaintiff to purchase in the open market at an advanced price, whereby the plaintiff suffered damages for $3,290.

The defendant pleads in substance that he had the right to fulfil his contract with the plaintiff by shipping Cobbler potatoes or Green Mountain potatoes, or both, at his option, of a certain quality and description; and that defendant, at the request of plaintiff, did ship a portion of said potatoes, being Cobbler potatoes conforming to such quality and description; whereupon the plaintiff refused to accept and pay for such portion so shipped by the defendant, who was entitled to treat the said contract as having been repudiated by the plaintiff. The defendant also pleaded a custom, ancient, general, uniform, certain, notorious and universally recognized and acted upon in the potato trade, that when a carload of potatoes, being a perishable product, is shipped from one province to another province in Canada, as one

instalment under a contract providing for the shipment of several instalments, where each instalment is to be paid for separately, and if such carload answers the requirements of the contract, the buyer must take delivery of the carload; and if in doubt as to whether or not the potatoes in such carload answer the requirements of the contract, the buyer must unload the potatoes; and if the buyer does not unload the carload and take delivery of the same, subject to claims, the seller is justified in regarding the whole contract as having been repudiated by the buyer; and the seller may, under such circumstances, refuse to ship the other instalments.

I may say immediately that there is no evidence of such general and uniform custom. I have quoted this paragraph to show that defendant himself considered that this contract provided for shipment of several instalments where each instalment had to be paid for separately.

The case was tried twice before Leblanc, J., with a jury; and the Court of Appeal of New Brunswick has twice ordered a new trial. Both parties come before us requesting that judgment should be rendered on the merits of the case and are both dissatisfied with the order for a third trial. The trial judge, after the second trial, ordered a verdict to be entered in favour of plaintiff, although the jury's answers to the questions put to them by the trial judge were mostly favourable to the defendant. The Court of Appeal, in its second judgment (1), disapproved of the course followed by the trial judge; but instead of rendering judgment for the plaintiff or for the defendant, as they had the power to do, notwithstanding the verdict of the jury, ordered a new trial.

We stand in the position of the Court of Appeal and have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, under Rule 4 of Order LVIII of the Rules of the Supreme Court of New Brunswick, which have been numbered to conform, as far as possible, to the English Judicature Rules of 1883.

It should be noticed that, under Rule 10 of Order XL, upon a motion for judgment, or upon an application for a new trial, the Court may draw all inferences of fact not

(1) (1932) 4 M.P.R. 245.

1933

THOMPSON & ALIX v. SMITH.

Cannon J.

inconsistent with the findings of the jury; and, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute or any of them, give judgment accordingly.

These two rules have been discussed by the Court of Appeal in England, in the case of *Skeate* v. *Slaters* (1), where Lord Reading said:

> There (under Order XL, Rule 10) the power to draw inferences of fact is limited, when there is a verdict of a jury, to such inferences as are not inconsistent with the finding of the jury. The application before us is not for a new trial, but is an appeal from the decision of the Judge. It is, however, important to consider whether the powers of this Court on appeal from a trial by a jury are limited to those formerly exercised by the King's Bench Division under Order XL, rule 10. *Millar* v. *Toulmin* (2) decided that under Order LVIII, rule 4, greater powers are given to the Court of Appeal than were conferred under Order XL, rule 10, and, in the words of Lord Esher, included "the power, if all the necessary materials are before the Court, of giving that judgment which in the opinion of the Court ought to be the judgment between the parties, even though such judgment be inconsistent with the findings of the jury." In that case the Court of Appeal entered judgment for the plaintiff, which was deciding affirmatively the rights of the plaintiff without the assistance of the jury, and left the question (if any) as to the amount to be decided by the Master. Lord Halsbury in the same case in the House of Lords criticised the exercise of this power. The other Lords expressed no opinion upon this point, and the House of Lords did not reverse the judgment upon that ground. In *Allcock* v. *Hall* (3), the Court of Appeal again considered the question with the assistance of the observations of Lord Halsbury, and came to the conclusion that they had such powers and exercised them by entering judgment for the defendants. Be it observed that Lord Justice Lindley added that the Lord Justices deciding that case had consulted their colleagues in the other branch of the Court, who had carefully considered the point and agreed with the decision. Lord Loreburn in *Paquin, Ltd.* v. *Beauclerk* (4), referring to these two cases, said: "Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn, I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough properly to be acted upon by a jury, is a fine distinction, and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value."
>
> The authority of *Allcock* v. *Hall* (5) was approved by Lord Loreburn there and is clearly binding upon us; and I am of opinion that this Court, if satisfied that it has all the necessary materials before it, and that no evidence could be given at a re-trial which would in this Court support a verdict for the plaintiff, ought to enter judgment for the defendants.

(1) (1914) 83 L.J. K.B. 676, at 680-681.
(2) (1886) 55 L.J.Q.B. 445; 17 Q.B.D. 603.
(3) 60 L.J.Q.B. 416; [1891] 1 Q.B. 444.
(4) 75 L.J.K.B. 395; [1906] A.C. 148.
(5) 60 L.J.Q.B. 416; [1891] 1 Q.B. 444.

And, in the same case, Lord Phillimore, L.J., said at page 686:

> The result, I think, is that the cases lay down that when the Court to which the motion for new trial is made sees that the verdict was wrong, and sees also that upon the admitted facts, or the only possible evidence that could be given, the verdict should be the other way, and has all the materials before it, it may conclude the case, dispense with another trial by a jury, which will either result in a verdict for the applicant or be itself set aside and so *toties quoties*, and at once give judgment.

I would also refer to *Banbury* v. *Bank of Montreal* (1).

I believe, in view of the request of both parties, who have, after two trials, adduced all the evidence that they could possibly place before the court, that we should finally determine the issue and put an end to this litigation.

The plaintiff carries on business in Sherbrooke, in the province of Quebec, and purchased from the defendant, carrying on business in East Florenceville, in New Brunswick, the potatoes described in their contract for October shipment through Dastous & Company Registered, who were acting as brokers for both parties. After the signing of the contract, 3rd September, 1927, the defendant, on the 8th of the same month, wrote that the only assurance they could give was that they would have potatoes inspected as loaded and each car would carry a certificate of Canada Grade A. Now, it is common ground that no such certificate could be obtained under section 19 of the *Root Vegetables Act,* R.S.C., 1927, c. 181, for new potatoes shipped between the 1st day of June and the 30th day of September, both dates included. It would, therefore, appear clear, to my mind, that the jury could not reasonably find that the two cars shipped in September were shipped under the contract. The telegrams covering the first car satisfy me that they referred to a separate sale independent of the contract. They read as follows:

Sherbrooke, Que., Sept. 17th/27.

B. F. Smith,
East Florenceville, N.B.

Thompson and Alix would like you ship one car this coming Monday against their contract can you do so *if not* kindly wire *immediately present price* and conditions.

Dastous and Co. Regd.

(1) [1918] A.C. 626.

1933

THOMPSON & ALIX LTD. v. SMITH.

Cannon J.

Defendant answered as follows:

East Florenceville, N.B., Sept. 18.

Dastous & Co. Regd.
Sherbrooke, Que.

Will ship *one* car Thompson and Alix ninety per bag bulk to-morrow or Tuesday best can do.

B. F. Smith.

Although plaintiff, perhaps in ignorance of the impossibility of securing a certificate before the 1st October, asked, on the 17th September, to ship one car against their contract, it is evident that Smith knew that he could not do so and accordingly wired that he would ship one car giving the price and the date. He also shipped on the 23rd of September a car that had never been ordered. Whether or not the potatoes shipped in September were equal in quality to potatoes that might, in October, have been graded by the Government Inspector as Canada One does not, to my mind, affect the issue between the parties. Even assuming, as found by the jury, that these two cars were shipped under the contract and that the plaintiff should have accepted delivery thereof, this does not in law help the defendant in any way to establish his plea of complete repudiation or rescission by the plaintiff of this contract by instalments.

Paragraph 2 of sec. 28 of ch. 149 of the Revised Statutes of New Brunswick, 1927, respecting the sale of goods, reads as follows:

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

I quite agree with the views of Mr. Justice White, in the first judgment of the Court of Appeal (1), where he says:

No one, I think, could reasonably infer that the plaintiff would not accept delivery of potatoes under the contract when the same were certified as Grade "A" by the inspector, merely because the plaintiff had refused to accept the potatoes in the car sent, where the question as to whether the potatoes were, or were not, equal in quality to Grade "A," was one the answer to which must depend upon the opinions of those who

(1) (1929) 1 M.P.R. 510, at 525-526.

had examined the potatoes. The contract provided that each separate shipment was to be paid for in cash.

When defendant, on September 23rd, learned by wire (Exhibit "T") that plaintiff refused to accept the first car sent and thought that possibly it had been shipped in mistake, he did not inform the plaintiff that the car was shipped against the contract, and that unless the plaintiff accepted it he would treat the contract as repudiated. It was not until September 30th that the plaintiff learned from defendant's wire (I.2) that he did not propose shipping plaintiff any potatoes. Assuming that the potatoes shipped in the first car were equal in quality to Grade "A," then from the facts in evidence I myself, sitting as a jury, would have had no hesitation in finding that the breach occasioned by the plaintiff's refusal to accept the potatoes was, in the words of the Sale of Goods Act, "a severable breach giving rise to a claim for damages but not to a right to treat the whole contract as repudiated."

But the question is not one of law merely but one of mixed fact and law, and therefore to be determined by the jury under the instructions of the Court as to the law. At the same time, I think, that under the evidence in this case, no jury *properly instructed as to the law, could reasonably find that the breach was other than a severable one entitling the defendant to damages but not entitling the defendant to repudiate the whole contract.*

Reference was made by defendant to the letter of the 26th September wherein the brokers stated that plaintiff would not accept the car as the buyers in Sherbrooke will not use any more of these potatoes (Cobblers). The defendant claims that this is a repudiation of the contract.

It is clear, as pointed out by White, J., that this statement referred to the potatoes shipped in the second carload, which were not shipped under the contract at all; and refusal to accept the same would not imply a repudiation of the contract.

In *Freeth* v. *Burr* (1), Coleridge, C.J., said:

In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest * * * I think it may be taken that the fair result of them is as I have stated * * * Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free.

The principle thus stated by Lord Coleridge was accepted and approved in *The Mersey Steel & Iron Company* v.

(1) (1874) L.R. 9 C.P. 208, at 213.

1933

THOMPSON & ALIX LTD. v. SMITH.

Cannon J.

Naylor, Benzon & Co. (1). Mr. Benjamin, speaking of this latter case, says:

All their Lordships as well as the Lords Justices accepted the principle stated by Lord Coleridge in *Freeth* v. *Burr* (2) as the true test; or, as it was expressed in the words of Lord Selborne: "You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation, to an *absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind,* and whether the other party may accept it as a reason for not performing his part."

The terms of the contract and the circumstances of the case clearly show, without evidence to the contrary, that plaintiff never had the slightest intention of repudiating or rescinding the contract. On September 28, Dastous & Co. wrote to defendant as follows:

P.S. With regard to shipments against contract for Messrs. Thompson & Alix which are to commence the 1st of October, will you kindly note to ship the first car to them at Sherbrooke and the second two cars to be billed to Magog notify them at Sherbrooke and you will of course make all drafts with bill of lading attached on Messrs. Thompson & Alix at Sherbrooke.

To which defendant, on September 30, answered as follows:

We do not propose shipping Thompson Alix any potatoes.

(Signed) B. F. Smith.

On the same day, Dastous answered as follows:

Sherbrooke, Que., Sept. 30, 1927.

B. F. Smith,
East Florenceville, N.B.

Your wire received upon communicating contents to Thompson and Alix they require and insist that you fill contract they have with you they have number cars sold for early October delivery therefore request that you make first shipments as specified our letter twenty-eighth instant and previous wire to-day.

Dastous and Co. Regt.

Sherbrooke, Que., 30th Sept. 1927.
Canada.

B. F. Smith, Esq.,
East Florenceville, N.B.

Dear Sir,

We confirm our wires to-day as per copies attached and specially with reference to your wire in which you state as follows—"We do not propose shipping Thompson Alix any potatoes," to which we have wired you as per copy attached advising you that upon communicating contents of your wire to Messrs. Thompson they require and insist that you fill the

(1) (1884) 9 App. Cas. 434. (2) (1874) L.R. 9 C.P. 208.

contract as per our contract form duly signed by them which has been forwarded you.

Messrs. Thompson & Alix of course presume that your attitude is taken largely on account of the two cars which have arrived at Sherbrooke from you and which they have not accepted. In the first place, only one of these cars was ordered for them as there has evidently been some oversight on the part of your office in billing two cars to Sherbrooke when only one was ordered.

With regard to Messrs. Thompson and Alix not accepting either of these cars we would just like to mention that we have been doing business with these friends for a number of years and they are as straight a firm as can be found and certainly would not turn down any shipments unless they had mighty good reason for doing so and they wanted the potatoes very badly too as they had orders awaiting to be filled but after examining these cars and finding so much rot in them the writer personally went with Mr. Thompson and examined second car and in casually picking up at least a dozen of the large size potatoes and even some not as large, when they were cut there were at least ten or eleven which were all rotted in the centre so they said they could not handle these potatoes as they had had a great deal of trouble with the previous shipments already.

Under these circumstances we do not see how this has any thing to do with the contract, especially *as the contract calls for Grade A Stock and it was understood that these would be government inspected and the Inspector's certificate would be attached to your draft on the Buyers.*

We therefore trust that we may hear from you promptly that you are making shipments as we have already specified against contract for Messrs. Thompson & Alix, otherwise they will take immediate action to protect themselves in the matter, especially as we mentioned in our wire they have a number of cars sold for early October delivery.

We also mentioned in our wire that we had sent on the bill of lading for the second car which was mailed from here on the 28th by registered mail so that same should have reached you before now. We did all we possibly could to try and get this car sent on, on a diversion order but it was impossible to make this arrangement.

We now await your further word and prompt reply also quotation on the five cars we have already mentioned for October shipment.

Yours very truly,

Dastous & Co. Reg.
Per G. W. Stevenson.

Then again, on October 3, 1927:

B. F. Smith,
East Florenceville, N.B.

Referring our letter twenty-ninth ultimo Please wire if car for Veilleux has been shipped if not will you be sure get it away to-morrow Thompson and Alix request immediate reply our wire and letter thirtieth ultimo you have not replied our request for quotations five cars October shipment.

Dastous and Co. Reg.

1933

THOMPSON & ALIX LTD. v. SMITH.

Cannon J.

and next day:

Oct. 4-1927

B. F. Smith
East Florenceville NB

Thompson and Alix requests immediate wire advice as to whether or not you have shipped cars against their contract as per instructions contained in our letter twenty eight ultimo will you therefore kindly wire us immediately advising.

Dastous and Co. Reg.

These two telegrams were confirmed by letter. Smith, the defendant, on October 5, notwithstanding this request, wired as follows:

Dastous & Co. Regd.
Sherbrooke, Que.

See my telegram thirtieth decision final.

B. F. Smith.

On October 6, through their solicitors, the plaintiffs notified the defendant that they were proceeding to purchase potatoes in the open market to supply their demand and would hold him responsible for all damages that they might suffer by reason of the breach of contract.

I therefore reach the conclusion that with the material before us, and even admitting that there might be sufficient evidence to support the finding of the jury that the first and second carloads of potatoes had been shipped under the contract and equalled Grade A potatoes and should have been accepted by the plaintiff, this would not be sufficient in law to support defendant's contention, which he had to establish, that the whole contract had been repudiated. Nowhere in the record is found an absolute refusal by plaintiff to perform the contract such as would amount to a rescission, according to the test adopted by Lord Selborne in *Mersey Steel & Iron Co.* case above quoted. The onus has not been and could not be legally satisfied under the contract and the circumstances of the case, while the plaintiff has proven clearly: 1. the existence of the contract; 2. the breach of the contract; and 3. the quantum of damages.

No car was ever shipped with the required certificate. This certificate could be secured only in October and on the 30th September the defendant took upon himself to repudiate his obligation. I am not prepared to say that there was no evidence to go to the jury. But I am per-

fectly satisfied that the findings of the jury as to the two cars shipped (questions 2-3-4-5), as to the breach of the contract (question 6), as to the alleged custom (questions 7-8-9-10), as to part of question 11 that the contract was broken by plaintiff, as to justification and the absence of damages (questions 12-13), were either against the evidence or against the weight of evidence, and were such as no jury could reasonably find. We therefore remain with the written agreement, whose existence is affirmed by the jury in their first answer, and the damages which the jury assessed at $3,290, after the judge's special request. The defendant, having failed to establish that he was legally justified in repudiating the whole contract as he did, must suffer the consequences of his conduct and reimburse to the plaintiff the difference between the amount paid for the twenty carloads which they purchased and the price they would have paid to the defendant under the contract for the same potatoes.

I would therefore allow the appeal and dismiss the cross-appeal and restore the order of the trial judge that judgment be entered for the plaintiff and against the defendant for $3,290, with costs throughout.

CROCKET, J.—The whole substance of the defence to this action lies in the alleged repudiation of the contract of sale by the plaintiffs before the defendant's admitted refusal to deliver the twenty carloads of potatoes contracted for. The decisive question, therefore, on this appeal is as to whether there was any evidence upon which the jury could reasonably find that the plaintiffs did in fact repudiate the contract and thereby relieve the defendant from his obligation thereunder.

Whether the car which the defendant shipped to the plaintiffs after receiving their telegram of September 17 constituted a delivery under the contract, as the jury found in answer to question 2, or was an independent shipment outside the contract, is open to serious question, as the cogent reasoning of my brother Lamont in this regard so clearly demonstrates. It is apparent from the learned trial judge's instructions to the jury on that point that the words " under the contract " as used in the question merely meant against or on account of the contract, and had no

1933

THOMPSON & ALIX LTD. v. SMITH.

Crocket J.

reference to its being shipped in compliance with all its terms. The jury could have understood nothing else. The question involved not only the interpretation of the defendant's reply to the plaintiffs' telegram of September 17, which, if it was in any way ambiguous, was a question for the court, but the consideration as well of the conduct of both parties in connection with the plaintiffs' rejection of the shipment, which was a question for the jury. If the decision of the appeal depended on the validity of the jury's answer to this question, I am not at all sure, upon a consideration of the terms of the two telegrams, and the conduct of the parties regarding the rejection and disposition of the shipment, that this finding could not be fully justified.

Be that as it may, the shipment by the defendant of one of the twenty carloads of potatoes and its refusal by the plaintiffs after their own inspection as being of unsatisfactory quality, falls far short, in the circumstances of this case, of satisfying the onus which lay on the defendant to prove a repudiation of the whole contract by the plaintiffs or an intimation to the defendant of their intention to abandon it entirely. Assuming that the first car was shipped against the contract and the second car as well—though there is, to my mind, no justification whatever for the finding that the second car was so shipped—the question as to whether the rejection of one or both these cars amounted to a repudiation of the whole contract or was a severable breach giving rise to a claim for damages, is one, which, under the provisions of subsec. 2 of sec. 28 of the New Brunswick *Sale of Goods Act,* depends on the terms of the contract and the circumstances of the case, as pointed out by my brother Cannon.

Although no time for delivery was mentioned in the contract itself, it is perfectly clear from the correspondence between the parties and from the fact that the contract provided for government inspection and that the defendant's draft for each car as shipped should be accompanied by an official government certificate of grading, which was not possible under the terms of sec. 19 of the *Root Vegetables Act,* R.S.C., 1927, c. 181, before October 1, that the intention of the parties was that shipments under the contract should not begin before that date. Both parties must

be taken to have known that no cars inspected and certified in accordance with the terms of the contract could be refused by the plaintiffs as of unsatisfactory quality upon their own inspection, as in the case of the two cars referred to. No question could arise between them as to quality, once a car was shipped, officially inspected and certified as the contract required. How the rejection of two cars shipped in the month of September, uninspected and uncertified, before the time for the performance of the contract had arrived, could be treated by the defendant as an absolute refusal on the part of the plaintiffs to accept and pay for inspected and certified cars, in accordance with the terms of the contract, or as an intimation of an intention on their part to wholly abandon the contract, I find it difficult to understand, when the terms of the contract itself and the circumstances of the case are considered.

I can find nothing in the letters or telegrams of the plaintiffs' brokers (Dastous & Co.) to the defendant between September 23, when they advised him by wire of the rejection of the first car, and October 1, which could fairly or reasonably be taken to indicate any intention on the part of the plaintiffs of renouncing the contract. Having received an invoice for the second car after their telegram advising rejection of the first, they at once, in confirming this telegram, called the defendant's attention to what they assumed to be an error in billing two cars to them as " there was only one ordered and possibly the one which has already arrived was not intended for Sherbrooke at all ". The defendant having wired them the following day that if the plaintiffs refused the first car, he would release to them and have them forward it to Montreal, they telegraphed that plaintiffs would not accept the first car but that they would accept the second if quality was satisfactory. On September 26 they wired the defendant again, advising him that they had diverted the first car to Montreal as instructed by him and that the second car had arrived and the plaintiffs would not accept as 90% of the large potatoes cut rotten inside, and requesting wired instructions, to which the defendant simply replied on September 27 that he was releasing second car to them and requesting them to forward this to Toronto. On the same date they telegraphed him asking if he could offer a car

1933

THOMPSON & ALIX LTD. v. SMITH.

Crocket J.

of good sound potatoes for immediate shipment and to wire price and what kind. To this defendant replied: "My experience Sherbrooke cannot book further orders".

It is true that in a letter dated September 26, confirming their wire regarding the diversion of the first car and the plaintiffs' refusal of the second, Dastous & Co. stated: "They (plaintiffs) will not accept the car as they state the buyers here will not use any more of these potatoes", and added a statement of their own that "there have been several cars of these Cobblers come into Sherbrooke and they have been distributed around pretty well and no body wants any more of them". Also that in a letter, dated September 27, referring to their telegraphic request of that date for an offer for a car of good sound potatoes, they spoke of the Cobblers which had come in to the Sherbrooke market having caused a lot of trouble, and stated that they hardly thought the retail trade there would take any more of them unless they were sure that there would be no more potatoes with rot in the centre. There is, too, another letter, dated September 28, referring to the diversion of the second car to Toronto, in accordance with the defendant's request, which contains the following paragraph and postscript:

> Trusting the above is satisfactory and regretting the trouble there has been over these cars but Messrs. Thompson & Alix needed the potatoes very badly and would gladly have taken them if it was not for the trouble they have had on the previous cars which were rotted the same way and which the Trade here will not accept any further lots of the same stock.
>
> P.S. With regard to shipments against contract for Messrs. Thompson & Alix which are to commence the 1st of October, will you kindly note to ship the first car to them at Sherbrooks and the second two cars to be billed to Magog notify them at Sherbrooks and you will of course make all drafts with bill of lading attached on Messrs. Thompson & Alix at Sherbrooke.

This was followed by the following telegram of September 30, Dastous to defendant:

> With reference two cars ordered to Magog for Thompson as per our letter twenty-eighth instant please be sure ship these in bags all others unless specially instructed to be shipped bulk try ship two Magog cars same day early as possible next week mailed blading second released car Thompson twenty eighth wire lowest price five cars Grade A October shipment.

to which defendant replied on the same day:

> We do not propose shipping Thompson Alix any potatoes.

Several further telegrams and letters from Dastous & Co. insisting upon the defendant delivering the potatoes under the contract brought no response from the defendant until October 5, when he telegraphed:

See my telegram thirtieth decision final.

Far from indicating an intention on the part of the plaintiffs to abandon the contract these letters and telegrams, I think, point quite the other way, and afford no ground whatever for the jury's finding on question 13, that the defendant was justified by the statements and conduct of the plaintiffs in repudiating the entire contract before the time for its performance had arrived and relieved from making any further delivery thereunder.

The contract and the breach by the defendant having been conclusively proved, judgment should, therefore, be entered in favour of the plaintiffs for $3,290—the amount assessed by the jury as the difference between the contract price of the twenty carloads contracted for and the amount paid by them for the potatoes which they were required to purchase to replace them.

The plaintiffs' appeal should be allowed and the defendant's cross-appeal dismissed with costs and judgment entered in favour of the plaintiffs for the amount above stated with costs of the action and of the appeal to the Appeal Division of the Supreme Court of New Brunswick.

LAMONT, J. (dissenting).—This is an appeal from a judgment of the Appeal Division of the Supreme Court of New Brunswick (1) directing a new trial. The facts are very simple: By a contract in writing, dated September 3, 1927, the respondent agreed to sell and the appellant to buy twenty car loads of white potatoes, Cobblers or Green Mountains, Canada Grade A, at 90 cents for ninety pounds, delivered at Sherbrooke, Quebec, at the rate of five cars per week. Payment was to be made in cash against shipping documents. All cars were to be Government inspected and a certificate of grading was to accompany the draft for each car as shipped. The contract was arranged by one G. W. Stevenson, a broker in Sherbrooke, who was trading under the name of Dastous & Co., Reg'd. No date was specified in the contract as to the time of shipment, but, as, under

(1) (1932) 4 M.P.R. 245.

1933

THOMPSON & ALIX LTD. v. SMITH.

Lamont J.

the *Root Vegetables Act*, R.S.C., 1927, ch. 181, Government certificates as to grade could not be obtained for new potatoes shipped between the 1st day of June and the 30th day of September, the parties may have expected the shipments to be made not earlier than October. Be that as it may, on September 17, 1927, Stevenson, acting for the appellant, wired the respondent as follows:

> Thompson and Alix would like you ship one car this coming Monday against their contract can you do so if not kindly wire immediately present price and conditions.

To this the respondent on the following day replied:

> Dastous & Co. Regd.
> Sherbrooke, Que.
>
> Will ship one car Thompson and Alix ninety per bag bulk tomorrow or Tuesday best can do.
>
> B. F. Smith.

On September 21 the first car was shipped, and was followed by another before the respondent had received any acknowledgement of the receipt of the first. Both cars, which contained Cobbler potatoes, were rejected on the ground that the potatoes were of inferior quality. The cars were re-shipped—one to Montreal and the other to Toronto—where they sold as Canada Grade A potatoes.

On the appellant's refusal to accept and pay for these two cars, the respondent refused to make any further shipments, claiming that the appellant had repudiated the contract and that he was no longer bound by it. The appellant, after notification, proceeded to buy twenty car loads of potatoes in the open market to fulfill its engagements. These it purchased at a cost of $3,290 above the respondent's contract price. To recover this $3,290 as damages for breach of contract this action was brought.

At the first trial the jury brought in a general verdict for the respondent. This was set aside by the Appeal Division (1) and a new trial ordered on the ground that, even if the first car load was improperly rejected, it would not justify the respondent's refusal to deliver the balance of the twenty cars. In its judgment the court construed the telegrams of September 17 and 18 as a refusal on the part of the respondent to ship the first car on account of the contract.

(1) (1929) 1 M.P.R. 510.

1933

THOMPSON & ALIX LTD. v. SMITH.

Lamont J.

At the second trial questions were submitted to the jury who answered them all in favour of the respondent. They found that both cars had been shipped under the contract; that both contained Grade A potatoes; that the respondent had not committed a breach of the contract, and that, owing to the statements and conduct of the appellant, the respondent was justified in considering the contract to be at an end and he was, therefore, relieved from making further delivery under it.

The trial judge was very strongly of opinion that the jury's finding that the two cars were delivered under the contract was in conflict with the construction placed on the telegrams by the Appeal Division. He, therefore, refused to give effect to the finding but, instead, entered judgment for the appellant. This judgment the Appeal Division set aside and again a new trial was ordered (1). Against that order the appellant now appeals to this Court and asks to have the judgment of the trial judge restored; while the respondent asks that effect be given to the verdict of the jury.

The prolongation of this litigation has been due, in my opinion, to an erroneous construction placed by the Court of Appeal upon the telegrams of September 17 and 18. The Court held that from the respondent's telegram the appellant "not only might reasonably have inferred, but was bound to infer, that the defendant (respondent) had refused to send the car against the twenty car contract." The car referred to was the first car shipped.

With deference, I am unable to spell out of the respondent's telegram a refusal on his part to ship against the contract. Where is the refusal? He is asked if he can ship one car as against the contract on the coming Monday. He replies that he will ship on Monday or Tuesday. That is no refusal, nor is it evidence of an intention to make a new contract. It is only because he mentions the price of 90 cents per bag that any plausible argument for the court's interpretation is possible. But the price he mentioned is the contract price. If he was not willing to ship under the terms of the contract he was to wire present price and conditions. This, to my mind, implies that "the present price" would be one different from the contract price and

(1) (1932) 4 M.P.R. 245.

1933

THOMPSON & ALIX LTD. v. SMITH.

Lamont J.

that the conditions called for would be a statement of the kind and quality of the potatoes and the terms of payment; in fact all the information necessary upon which to base a new contract. No conditions whatever are mentioned in the respondent's telegram. Does, then, the fact that he mentioned in his wire the contract price justify the conclusion that he was refusing to ship against the contract of September 3, and was making a new contract for this car load? In my opinion it does not. The respondent testified that he shipped both cars against the contract; and Mr. Stevenson, who was called for the appellant, gave this testimony:—

Q. Now speaking of this first car that was shipped up there by Mr. Smith, * * * if that had been Canada Grade A in the judgment of the plaintiff would it have been applied to the contract?—A. Not necessarily.

Q. Why wouldn't it have been?—A. We didn't know how we might apply it, we didn't know from that wire if it was to apply.

Q. You remember giving evidence on another trial do you?—A. Yes.

* * * * *

Q. "Supposing that it had been for the sake of argument of Canada Grade A, it would have been a shipment on the contract, wouldn't it" and your answer "Well, the car would have been applied in that case." Didn't you make that answer at the last trial, didn't you make that statement?—A. If it is there I must have made it.

But more than that, if the respondent was not going to ship under the written contract his telegram of the 18th would be a proposal only, and would have to be accepted before he had a contract at all. The appellant acted as if they construed the respondent's reply to mean that he would ship against the contract. When the car arrived the appellant was on hand to inspect it and it was rejected—not because there was no contract for it, but because it was not Grade A in quality. If it was shipped under a new and independent contract there was no stipulation that the potatoes were to be Grade A, and the appellant had no right to reject it because it did not come up to that grade. I, therefore, think the jury were right in finding that the first car was shipped under the contract.

As to the second car the respondent says: that having been requested to ship one car under the contract, he concluded that shipments under the contract had begun with the first car delivered, and that he was called upon by the contract to ship five cars per week, of which this was one. The jury accepted his evidence and, in my opinion, were

right in finding that the second car was also shipped under the contract.

The appellant rejected both cars and refused to pay for them against the shipping documents. There was abundant evidence that both these cars contained Grade A potatoes. Both cars answered the contract in every respect save one, namely, that they had not been Government inspected and no certificate of grading accompanied the draft. Is this an objection of which the appellant can take advantage? In my opinion it is not. As I have already pointed out, Government inspection of new potatoes did not commence under the statute until after September 30. The obtaining of the certificate of grading was, therefore, impossible. Both parties are presumed to know the law and to know that certificates of grading could not be obtained at the date these cars were shipped. The request for shipment against the contract prior to October, therefore, constituted a waiver of the right to require Government inspection and the certificate, as was pointed out by White, J. in giving the first judgment of the Appellate Division. It cannot, therefore, be said that the respondent was in default under the contract in not having the Government certificate as to grade.

The last question is, was there evidence to support the jury's answer to Question 13? That question reads:

13. Q. Was the defendant by the statements and conduct of the plaintiffs, justified in repudiating the contract and relieved from making any further delivery under the contract?—A. Yes.

The *Sale of Goods Act*, R.S.N.B., 1927, ch. 149, section 28 (2), provides as follows:

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated.

In *Freeth* v. *Burr* (1), Coleridge, C.J., said:

In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an *intention to abandon* and altogether *to refuse performance*

(1) (1874) L.R. 9 C.P. 208, at 213.

1933

THOMPSON & ALIX LTD. v. SMITH.

Lamont J.

of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. * * * I think it may be taken that the fair result of them is as I have stated * * * Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free.

It is not contended that in every case a refusal to accept and pay for a partial delivery would of itself constitute a repudiation of the contract. The rule on this point is dealt with in *Millars' Karri & Jarrah Co.* v. *Weddel, Turner & Co.* (1), where, at page 29, Bigham J., with whom Walton J. agreed, said:

It is argued that it (the award) violates the well-known rule of law that where goods are sold to be delivered in different instalments a breach by one party in connexion with one instalment does not of itself entitle the other party to rescind the contract as to the other instalments. But I do not agree. The rule, which is a very good one, is, like most rules, subject to qualification. Thus, if the breach is of such a kind, or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated and may be rescinded. If, for instance, a buyer fails to pay for one delivery in such circumstances as to lead to the inference that he will not be able to pay for subsequent deliveries; or if a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot, or will not, deliver any other kind of goods in the future, the other contracting party will be under no obligation to wait to see what may happen; he can at once cancel the contract and rid himself of the difficulty. This is the effect of section 31, subsection 2 of the Sale of Goods Act, 1893.

That section is identical with the New Brunswick section in question here. See also *Munro* v. *Meyer* (2). In the case at bar the appellant not only refused to accept and pay for either of the cars shipped, although they contained Grade A potatoes, but also stated that all deliveries of such potatoes would be refused. This is made clear by the evidence of Mr. Thompson himself who gave this testimony:

Q. This car of potatoes that you saw you say in your opinion wouldn't pass as Grade A?

Q. And even if it had been bought on the contract you would have rejected it just the same?—A. Yes.

* * * * *

Q. If that was the only kind and quality that Smith had to ship although he had shipped you wouldn't have taken them on the contract? —A. No.

Q. You would have rejected car after car?—A. Why yes, that kind of stuff.

The jury had before them the contract and the communications between the parties. The appellant did not

(1) (1908) 14 Com. C., 25. (2) [1930] 2 K.B. 312.

communicate with the respondent directly but only through Stevenson. The evidence shews that in sending the letters and telegrams Stevenson was acting for the appellant.

The contract, as the jury knew, provided that either Cobblers or Green Mountains might be shipped at the option of the respondent who had on hand enough Cobblers to fill the entire contract and was ready and willing to ship them. The jury had also before them the following communications from Stevenson:

Letter of September 3rd, in which he asked:

> Will you also kindly advise if you will be able to ship mostly Green Mountain potatoes against the contracts as our Trade prefer this variety if possible.

The evidence shews that Green Mountains, as a rule, brought from ten to twenty cents per barrel more than Cobblers.

Letter of September 6, which contained the following:

> With reference to contracts booked for October shipment, our Buyers would like some assurance regarding the quality of the potatoes you will ship as in shipments of the new crop of Cobblers from New Brunswick which have recently arrived we find that while the outside of the potatoes look very nice and sound, a very large per cent of them on being cut shows a large hole and rot right in the centre of the potatoes.
>
> This is a very serious defect and if it prevails generally in the crop of Cobblers throughout New Brunswick our Trade would not want this variety shipped against contract.
>
> Would you therefore be in a position to ship all Green Mountains and are they free from blight or any disease of a serious nature.

Letter of September 10, in which he says:

> You did not mention in your letter whether you would be able to supply mostly Green Mountains and as these are much preferred by our Trade would ask that you kindly bear this in mind and arrange to ship as many cars of Green Mountains as possible against contract we are enclosing for twenty cars for Messrs. Thompson & Alix.

In a letter dated September 26, he says:

> We regret to say that the second car of potatoes which was on the way to Sherbrooke has not turned out satisfactory and Messrs. Thompson & Alix will not accept these as on inspection and cutting some of the potatoes they found almost every one of the large ones to be rotten inside and quite a few of the medium size are the same way. They will not accept the car as they state the Buyers here will not use any more of these potatoes.
>
> There have been several cars of these Cobblers come into Sherbrooke and they have been distributed around pretty well and nobody wants any more of them.

In addition Stevenson reported, on September 23, that on inspection Thompson & Alix found more than half the first car to be very poor stock: very small, also wet and

1933

THOMPSON & ALIX LTD. v. SMITH.

Lamont J.

full of mud. The jury, on abundant evidence, found these statements to be far from the truth, so far indeed that they may well have concluded that the appellant had some ulterior motive for making them, and, from the correspondence above quoted, may have considered the motive to have been a desire to obtain Green Mountains instead of Cobblers. That the appellant wanted the twenty car loads of potatoes delivered is, I think, clear, but he did not want to take Cobblers as these were not desired by the trade.

In view of the terms of the contract, the declaration of the appellant Thompson that all cars containing similar potatoes would have been rejected, and the letters, it was, in my opinion, open to the jury to find that the refusal by the appellant to accept and pay for the two cars shipped evidenced an intention to repudiate the whole contract unless the respondent would fulfil it by shipping Green Mountains instead of Cobblers. The respondent was within his rights in refusing to do so.

The appeal should, therefore, be allowed in so far as the judgment below ordered a new trial but, on the answers of the jury, judgment should be entered for the respondent dismissing the action with costs throughout.

Appeal allowed and cross-appeal dismissed, with costs.

Solicitors for the appellant: *Hanson, Dougherty & West.*
Solicitor for the respondent: *Gage W. Montgomery.*