1926
*Nov. 18, 19.
1927
*Feb. 1.

ALPHONSE WEIL ET FRERES (PLAINTIFFS) ..... } APPELLANTS;

AND

THE COLLIS LEATHER COMPANY, LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Sale of goods—Calfskins—Description in contract—Weight—Some skins over stipulated weight—Purchaser's right of rejection

Plaintiffs contracted to sell to defendant calfskins, of certain kinds described. Defendant refused to accept delivery, objecting as to quality, and plaintiffs sued for damages for breach of contract. The descriptions of the skins in the contracts contained the words "weight 7 to 15 lbs." or "weight 8 to 15 lbs." A material number weighed over 15 lbs.

Held, plaintiffs could not recover; defendant was entitled to reject the skins offered for delivery, and was not confined to a remedy in damages for breach of warranty; the stipulations descriptive of the weights were material terms constituting conditions of delivery; there was no evidence sufficient to establish any custom of trade, usage or course of dealing by which defendant became bound to accept overweight skins; and the right to reject such skins involved or carried with it the right to refuse a quantity materially less than that ordered, or packages with which substantial quantities of goods which defendant was not liable to accept were intermingled.

Where sellers of goods do not satisfy the stipulated descriptions, the question whether or not this is a cause for rejection or gives rise only to a claim for damages, depends upon the intention of the parties as evidenced by the contract in the light of the surrounding circumstances.

Graves v. *Legg* (9 Ex. R. 709, at p. 716), *Bentsen* v. *Taylor* ([1893] 2 Q.B. 274, at p. 281), *Levy* v. *Green* (5 Jur. N.S. 1245), and other cases, referred to.

Held, further, that there was nothing in subsequent agreements between the parties, or elsewhere in the negotiations, whereby defendant became bound to accept goods not of the descriptions required by the contracts of sale, or, by reason of its refusal to accept such goods, to forfeit certain allowances which it had received in accordance with such subsequent agreements.

Judgment of the Appellate Division of the Supreme Court of Ontario (58 Ont. L.R. 1) affirmed, with a minor variation.

APPEAL by the plaintiffs, and cross-appeal by the defendant, from the judgment of the Appellate Division of

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

the Supreme Court of Ontario (1) affirming the judgment of Rose J. (2), dismissing the plaintiffs' action, and holding the defendant entitled to recover $3,446.33 in respect of its counter-claim.

The plaintiffs sued for damages for refusal by the defendant to accept delivery of calfskins sold, under contracts, by the plaintiffs to the defendant. The defendant claimed that the skins offered for delivery were not according to contract, and, besides denying liability, set up a counter-claim for alleged defects in skins accepted and paid for and for alleged shortages and other matters. Rose J. dismissed the plaintiffs' action and dismissed defendant's counter-claim except as to the sum of $3,446.33 (2). An appeal and cross-appeal to the Appellate Division was dismissed (1). The plaintiffs appealed to the Supreme Court of Canada, and the defendant cross-appealed, asking for an increase of the amount awarded on its counter-claim.

The material facts of the case are sufficiently stated in the judgment now reported. The judgment below was varied by reducing the amount allowed defendant on its counter-claim to $373.96, and subject thereto the appeal and cross-appeal were dismissed with costs.

Wallace Nesbitt K.C., R. S. Robertson K.C., and *G. M. Huycke* for the appellants.

J. W. Bain K.C. and *M. L. Gordon* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The claims in controversy arise out of some unfortunate commercial transactions between the parties during the year 1920. The story may be briefly told.

The plaintiffs are a partnership, carrying on business in Paris and New York as dealers in skins. The defendant, a joint stock company, is a manufacturer of leather, and has a tannery at Aurora in Ontario. There are four contracts between the parties, described as the March, April, May and June contracts respectively, each expressed to be c.i.f. New York, viz., the contract of 22nd March, whereby the

(1) (1925) 58 Ont. L.R. 1. (2) (1924) 58 Ont. L.R. 1.

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plaintiffs sold to the defendant about 10,000 green salted Paris and best French trimmed calfskins, weight 7 to 15 lbs., averaging about 10½ to 11 lbs., at 80 cts. per pound, and about 10,000 best French calfskins, weight 8 to 15 lbs., averaging about 10½ to 11 lbs., at 65 cts. per pound; the contract of 10th April, for the sale of 10,000 green salted Paris and best French trimmed calfskins, weight 7 to 15 lbs., averaging about 10½ to 11 lbs., at 80 cts. per pound, and about 10,000 best French calfskins, weight 8 to 15 lbs., averaging about 10½ to 11 lbs., at 65 cts per pound; the contract of 17th May, for the sale of about 5,000 green salted Paris and best French trimmed calfskins, weight 7 to 15 lbs. at 70 cts. per pound, and the contract of 1st June, for the sale of 10,000 green salted Paris and best French trimmed calfskins, weight 7 to 15 lbs., at 65 cts. per pound. The prices, in each case, were to be computed in United States currency. There is a dispute as to the existence of the April contract, which, although reduced to writing and signed by the plaintiffs, was not signed on behalf of the defendant, but the learned trial judge finds upon the evidence, including the correspondence in the case, that this contract was concluded, and that the parties became bound, and I see no reason to doubt the propriety of this finding. The defendant also, at one time, denied the June contract, but Mr. Bonisteel, the defendant's manager, acknowledged at the trial that it no longer remained in question.

Mr. Bonisteel, who negotiated the contracts, left Aurora on 7th April and sailed for Europe on the 9th. While absent he made the contracts of May and June. He returned to Aurora on or about 7th June. In the meantime some of the shipments of the goods contracted for had arrived, and been delivered to the defendant at Aurora. Other shipments were on the way. The defendant's storehouse was stocked with skins; but the prices had fallen, and the market was still going down.

As to the ordinary manner of shipment and payment, the plaintiffs, who were the shippers, tied the skins in bundles, each containing 6 to 8 skins, without any regard to uniformity of weights, so that all weights were mixed together in the bundles; shipped them to New York to the order of the shippers, and drew, at sight, on the defend-

ant company at Aurora for the invoice prices, through their bank in Paris, with the shipping documents attached to the drafts. The drafts were forwarded for collection to La Banque d'Hochelaga at Montreal, and were presented and collected, when the defendant paid them, by the Imperial Bank, agent of La Banque d'Hochelaga at Aurora. When the defendant paid such a draft it sent the ocean bill of lading to the plaintiffs at New York, and the plaintiffs saw to the entry and receipt of the goods, and forwarded them by rail to the defendant at Aurora, the defendant paying the cartage and freight. When the draft was not paid, it was returned with the documents to the plaintiffs in New York, and thus they got possession of the goods. If, as sometimes happened, goods which were in the plaintiffs' warehouse in New York were dispatched to the defendant at Aurora, the plaintiffs made a sight draft in New York, with railway bill of lading attached, which the defendant would take up at Aurora, and receive the goods.

Mr. Bonisteel, having returned to Aurora, and finding that he had ordered in excess of his requirements, confirming a telegram, wrote to the plaintiffs' New York house, on 10th June, with regard to a shipment of 1,690 bundles from Havre, of which he had been advised, questioning the right of the plaintiffs to forward these skins, and he said:

> This week, we have been getting cancellations of orders in every mail, and it will be impossible for us to take in any more skins, and we have asked you in this telegram to cable Paris not to ship these skins, or any other skins, and we would ask you to kindly cancel all our orders, as it will be impossible for us to take care of the drafts, and it will be of no use your Paris House making shipments to us when we will be unable to take care of the drafts, and we are obliged to accept the cancellations that are coming in.

Correspondence followed, and Mr. Cahn, the plaintiffs' New York manager, went to Aurora to see Mr. Bonisteel, on or about 12th June. The contracts and deliveries came under discussion, and in the result a memorandum was signed at Toronto, dated 16th June, by Mr. Cahn for the plaintiffs, and Mr. Bonisteel for the defendant, whereby, in order that all existing contracts between the parties should be filled, it was agreed that an allowance of 10 cts. per pound should be made on several parcels of skins invoiced at Paris, on 29th April, in the aggregate 15,222 skins, and an allowance of 15 cts. per pound on other skins in-

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voiced under five later invoices, 18th May to 3rd June, covering 17,801 skins, and that the defendant would pay, within six weeks from date, for the shipments invoiced under date of 29th April, and, for all other shipments, within three months. At this time a considerable quantity of the skins contracted for in March had been received by the defendant, and carloads were coming forward from New York, or were waiting at Aurora for delivery to the consignees. Mr. Cahn says that Mr. Bonisteel was in a much agitated condition; that he had found his business in bad shape upon his return from Europe; that his bankers, upon whom he was dependent for money to retire the drafts, refused to make further advances for the purchase of skins, and that his customers were, owing to the condition of the market, cancelling the orders upon which he depended for his receipts. He says, as to the shipments which were on the cars at Aurora, or coming there, that Mr. Bonisteel volunteered to take these into his warehouse, and keep them separate until he could pay for them, but that he, Mr. Cahn, considered that

> in view of the fact that he told me that he was not getting any money from the bank, and his agitated condition, I thought that he was not any good any more, and I refused to touch the skins and rather stored them in New York.

Accordingly, Mr. Cahn ordered these cars back to New York, and put the shipments into store there, where they remained, along with other skins shipped under the various contracts and unaccepted, until disposed of in the manner which will presently be disclosed. The defendant company did not meet the payments within the extended terms stipulated by the memorandum of 16th June, but, at the end of July, sent in claims in respect of the skins which it had received for damages or allowances due to the quality of those skins; the complaints relating especially to butcher scars. After some correspondence and interviews Mr. Bonisteel, on 24th August, had an interview with the plaintiffs at their office in New York, the result of which is stated in a memorandum of that date as follows:

> With reference to the shipments of French Calfskins, on which drafts are being held by the Banque d'Hochelaga, we had to-day another conference with Mr. Bonisteel, of the Collis Leather Co., and the following differences due to the Collis Leather Co. were established:

1. Excess shrinkage $10,294 64
   Allowances for quality, etc..... 17,661 18
   Allowances for quality, etc., in full settlement of all shipments made to the Collis Leather Co. to date..... 30,000 00
   $57,955 82

2. Credit was established in favour of the Collis Leather Co. for $59,161.15 on the invoices now in abeyance, which include allowances of 10c. and 15c. per lb. respectively and excess shrinkages on these lots.

3. It was agreed that the skins should be shipped within a reasonable time in accordance with the instructions received by the Collis Leather Co.

4. As shipments of skins now in warehouse are made Alphonse Weil & Bros. will send a check to the Banque d'Hochelaga, which will include the excess shrinkages and allowance as per paragraph 2, and also 20% of the amount of the original Paris Invoices for the skins shipped, this 20% to apply against shrinkages and allowances as per paragraph No. 1. Alphonse Weil & Bros. will instruct the Banque d'Hochelaga to accept from the Collis Leather Co., in lieu of amount of draft, the difference between the amount of check sent to the Banque d'Hochelaga and the amount of original draft, and to deliver upon payment B/L for the respective shipment.

This memorandum was not signed by Mr. Bonisteel, although I think he admits that it sets out substantially the arrangement which was made, and, according to Mr. Cahn, the reason he gave for not signing it was that he was not permitted by his bank to sign any further agreements. There was however an additional claim of upwards of $7,000 which Mr. Bonisteel put forward, and which the plaintiffs were unwilling to allow, and Mr. Bonisteel says that he did not sign the memorandum because "I was not satisfied as they would not allow me all my claims." The learned trial judge considered that the agreements of 16th June and 24th August, although relied upon by the defendant as evidence of admissions by the plaintiffs affecting the quality of the skins, were not in fact intended so to operate, but rather as allowances which, on account of the state of the market, the plaintiffs were willing to make conditionally, in so far as these agreements were carried out. Mr. Cahn however tells us upon discovery that the agreement of 24th August was a compromise settlement, and he reiterates in his testimony at the trial that the allowance was a compromise. Subsequently the plaintiffs made two shipments of 665 bundles of skins, on 26th August, and 784 bundles, on 15th September, which the defendant

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received and paid for, and, as to which, allowances were received by the defendant in accordance with the terms of the August agreement; but the defendant claimed that the skins comprised in these two shipments were not of contract quality, in that they were salt stained, butcher scarred, or had long shanks.

The market appears to have gone from bad to worse, and ultimately, in October, the defendant company temporarily closed its factory. In the meantime the skins, in respect of which the action is brought, remained with the plaintiffs in their New York warehouse, and there came a time when, on 29th September, the plaintiffs wrote the defendant that

> unless you will be here next week to approve of the skins we shall be obliged to take other steps to finally reach a conclusion of this matter.

Then the defendant wrote the plaintiffs, on 4th October, reiterating or referring to its complaints with regard to the skins shipped subsequently to 24th August, and saying:

> As we have already notified you, if the balance of the skins are as represented, we are, and always have been, willing to accept them, but if they are anything like the skins which have been recently shipped, we will not accept them as they are of no use to us.

Subsequently, in October, Mr. Bonisteel with others, the defendant's employees, or acting under their instructions, came to New York for the purpose of examining the skins in store, and he obtained from Mr. Cahn, or from his office, an order to the warehouseman to permit the inspection. He, and those who were with him, did inspect the skins on that occasion, and, after a day and a half, he went to the plaintiffs' office and told them that he would not accept the skins, as they were not of correct quality. And, on 2nd December following, this action was begun.

The defendant, as I understand the case, has accepted and paid for all the calfskins of the March contract, except 1,150 Paris and best French trimmed, weighing 12,623 lbs., at 80 cts. per pound; also all the skins purchased by the April contract, except 5,045 trimmed, weighing 54,001 lbs., at 80 cts. per pound, and 3,197 best French calfskins, weighing 40,074 lbs. at 65 cts. per pound. None of the skins provided for by the other two contracts has been accepted or paid for, and in the action the plaintiffs seek to establish a tender of the skins which were not accepted; that the defendant refused to accept delivery thereof or to pay therefor, and that the plaintiffs are entitled to recover, in

respect of the unaccepted skins appertaining to each contract, the prices stipulated therefor respectively in the original contracts, less $53,338.60 which the plaintiffs ultimately realized upon the sale of the unaccepted skins, the total claim amounting to $141,852.57.

The defendant, having finally rejected the skins which remained in the plaintiffs' warehouse, and which were examined on the defendant's behalf in October, the plaintiffs disposed of them in the following manner. They sold all the trimmed skins, under 12 lbs. in weight, to Albert Trostel and Sons Company, of Milwaukee, and all the trimmed skins, over 12 lbs. in weight, to the Monarch Leather Company of Chicago, and they reshipped to Paris all the untrimmed skins with heads and short shanks, where they sold them; Mr. Cahn stating, as to the latter, that they were too light for the trade in America at the time; that the market had collapsed, and that they were sure of getting more money in France where the market was high. This disposition of the skins involved the breaking up of the bundles, and distribution according to the weights of the skins, and it was found that a very considerable number of them weighed in excess of 15 lbs. each, the limit fixed by the defendant's contracts. The invoices to the Monarch Co. show that there were no less than 787 heavy skins, that is, exceeding 16 lbs. The evidence further shows that the skins were about equally distributed as to weights, and that therefore, taking the upper limit as 15 lbs., there would have been a proportionate increase of heavies. The learned trial judge put his finding in this way. He said that:

> On the weighing it was found that there were 8,020 skins weighing over twelve pounds each and that of these 714 were over sixteen pounds, running up to twenty pounds, in some instances; and a witness says, and it seems probable, that of the remainder of the 8,020 a good many weighed between fifteen and sixteen pounds. The witness said that approximately there were as many skins of any given weight as of any other; and it is suggested by counsel that from this evidence one can ascertain the number that there were over the fifteen pounds, which was the limit in the defendants' case, but not exceeding the sixteen pounds, which was the limit on the sale to the Trostel (sic) Company. This would be to take the evidence rather too literally. It may, however, be assumed that the number of those that weighed over fifteen pounds each was considerably in excess of 714; and it may, and ought to be found that the skins weighing over fifteen pounds were distributed throughout the various consignments.

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He found that there was no custom of the trade entitling the vendor to deliver skins not of the weight contracted for, and that, in the absence of such a custom, the fact that a substantial number of heavy skins were mixed with the contract skins, in the bundles which were tendered for inspection and delivery, justified the defendant's refusal to accept, and he referred to the case of *Levy* v. *Green* (1). In that case the vendor had sent a crate containing a deficient quantity of the particular goods ordered, along with other goods not ordered, packed in the same crate. He debited the whole contents of the crate, which the defendant refused to receive upon the ground that they were out of time; but, at the trial, the objection was taken that the defendant was not bound to take any part of the goods, because of the manner in which they were sent, accompanied by goods not ordered. In the Queen's Bench (2) Lord Campbell C.J., and Wightman J., considered that the purchaser was not bound to accept, while Coleridge and Erle JJ., were of the contrary opinion. But, in the Exchequer Chamber (3), Martin, Bramwell and Watson BB. and Willes and Byles JJ. were unanimous in holding, with Lord Campbell and Wightman J. that the purchaser had the right to reject the whole. It was for a like reason that the present action failed at the trial, and the judgment was unanimously upheld by the Appellate Division.

The plaintiffs (appellants) now object, upon appeal, that the judgment is erroneous for various reasons. They say that the presence of overweight skins did not entitle the defendant to reject; that there was no breach of condition, but at most a breach of warranty, on account of which the defendant's remedy was in damages, and that, in any case, according to the general course of dealing and conduct of the parties, the defendant had no right to reject for overweight. I am of the opinion, however, that the stipulations of the several contracts, descriptive of the weights of the skins which were to be supplied, were material terms, constituting conditions of delivery. The clause which is common to all the contracts, 7 to 15 lbs. (or

(1) (1859) 1 El. & El. 969; 5 Jur. N.S. 1245.

(2) (1857) 8 El. & Bl. 575.

(3) (1859) 5 Jur. N.S. 1245; 1 El. & El. 969.

8 to 15 lbs.), obviously defines by reference to weights the kind or character of the skins which were intended to be shipped; moreover the word "calfskins," in itself, is not apt to include skins weighing more than 15 lbs.; these, up to 25 lbs., are, according to the plaintiffs' evidence, classified in the trade as "kips." The plaintiffs have therefore not satisfied the stipulated descriptions. Whether or not their non-compliance is a cause for rejection, or gives rise only to a claim for damages, must depend upon the intention of the parties as evidenced by the contracts and the facts in proof. See the judgment of Parke B., in *Graves* v. *Legg* (1). *Bowen* L.J., said in *Bentsen* v. *Taylor* (2):

> There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out. There, again, it might be necessary to have recourse to the jury. In the case of a charterparty it may well be that such a test could only be applied after getting the jury to say what the effect of a breach of such conditions would be on the substance and foundation of the adventure; not the effect of the breach which has in fact taken place, but the effect likely to be produced on the foundation of the adventure by any such breach of that portion of the contract.

See also *per* Fletcher Moulton L.J., in *Wallis* v. *Pratt* (3), whose judgment was upheld by the House of Lords (4). Applying these principles to the interpretation of the contracts in question, I find myself in accord with the view, which I conceive to be implied, if not expressed, in the judgments of the courts below, that the plaintiffs' right to recover is dependent upon the skins offered for delivery having the descriptive weights. There is no evidence sufficient to establish any custom of trade, usage or course of dealing by which the defendant became bound to accept skins not within the description by which the goods are defined in the documents, and the right to reject such skins involves or carries with it the right to refuse a quantity

(1) (1854) 9 Ex. R. 709, at p. 716.
(2) [1893] 2 Q.B. 274, at p. 281.
(3) [1910] 2 K.B. 1003, at p. 1011 et seq.
(4) [1911] A.C. 394.

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materially less than that ordered, or packages with which substantial quantities of goods which the defendant is not liable to accept are intermingled. The proof and the findings leave no doubt as to the materiality of the quantity of the skins which were overweight. The court is, of course, always very careful, in the interpretation of commercial contracts, not to introduce a variation. A kindred question was recently considered in this court in *California Prune and Apricot Growers* v. *Baird & Peters* (1). See also the well known case of *Bowes* v. *Shand* (2).

Then it is said that the defendant, although it may originally have had the right to reject, lost that right by reason of what occurred subsequently; that, although the defendant received benefits under the agreements of 16th June and 24th August by way of reduction in the prices, these reductions were made only conditionally, and that the defendant should at least be chargeable with the original contract prices of the two shipments which were made from New York subsequently to the agreement of 24th August, and which the defendant received at Aurora and paid for in accordance with the agreements of 16th June and 24th August. I do not consider however that these two agreements were intended to supersede the original agreements of March, April, May and June, under which the goods were shipped. The agreement of 16th June expressly declares that it is made in order that the existing contracts shall be fulfilled. It provides for the stipulated allowances of 10 cts. and 15 cts., and for payment to be made within six weeks and three months from the date of the agreement. The agreement of 24th August, according to its terms, establishes allowances for excess shrinkage and for quality as to the shipments which had already been received and paid for by the defendant, amounting in all to $57,985.82. As to the remaining invoices, which include the goods now in question, as well as the two shipments which were made later in August and in September, credit was established in favour of the defendant for $59,161.15, which includes the allowances resulting from the agreement of 16th June and for excess shrinkage upon the lots to be delivered, and it provides moreover that, as

(1) [1926] S.C.R. 208. (2) [1877] 2 App. Cas. 455.

the shipments were made of the skins in warehouse, the plaintiffs would pay to the bank the excess shrinkages and allowances upon the invoices outstanding on 24th August, and, in addition, 20% of the amount of the original Paris invoices for the skins shipped, to be applied in reduction of the general allowance of the $57,955.82 above mentioned; the plaintiffs and defendant thus to contribute proportionately to the payment of the original drafts, as the shipments were received by the defendant. There is no expression either in the agreement of 16th June, or in the written memorandum expressive of the agreement of 24th August, which makes them, or either of them, conditional upon the defendant accepting and paying for the entire quantity of the skins which the plaintiffs were holding in their New York warehouse, and which had been shipped from Paris in fulfillment of the original contracts. There are, however, some expressions that these agreements were intended to operate conditionally; they are comprised in three passages. Mr. Cahn, upon discovery, when asked as to whether he remained bound by the agreement of 16th June, considered the question to be one of law; he referred it to the solicitor who was representing him at the discovery, and the solicitor answered:

This was a conditional arrangement providing that Mr. Bonisteel do so and so, they were prepared to do so and so.

Mr. Cahn's answer was accordingly in the negative. Mr. Copeland, the plaintiffs' accountant, who was present at the meeting of 24th August, when asked in cross-examination as to whether the plaintiffs had agreed to pay the allowance of $58,000, answered:

Providing Mr. Bonisteel, The Collis Leather Company agreed to take delivery and pay the outstanding drafts.

Q. And pay the outstanding drafts for the goods which were then in the warehouse, were they?

A. Yes, under various contracts.

Mr. Bonisteel, in his cross-examination with reference to the agreement of 24th August, gave the following answers:

Q. And they (the plaintiffs) were, as we saw yesterday, if they allowed any amount on your claims, to deduct the amount of the allowances proportionately from later invoices; that was the method of dealing with it that was discussed?

A. Yes, sir.

Q. And it meant this, that unless you took the rest of the skins you did not get the allowance; that is so, isn't it?

A. That was the understanding.

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The learned trial judge, in considering the evidence as to the defective character of the skins, said:

> The defendants suggest also that in a memorandum signed by the parties at Toronto on June 16 (ex. 7), and in another prepared by the plaintiffs in New York on August 24, which Mr. Bonisteel refused to sign, there are admissions that the skins were defective; but, as a matter of fact, the documents evidence merely certain allowances that the plaintiffs were willing to make if the defendants fulfilled their contracts and took in and paid for all the skins shipped from France. The transactions between the parties had been extensive and mutually satisfactory; the plaintiffs had the skins on hand, and no market at nearly the price that the defendant had agreed to pay was available; it was very doubtful whether the defendants were able to pay for the skins at the contract prices, their market for leather being what it was; and whether they could pay or not, it was fair and businesslike on the part of the plaintiffs to give them some extra time and to share the loss with them. This was the purpose of the arrangements made in June and August; and the allowances conditionally, and only conditionally, agreed upon in respect of earlier shipments and of goods still to be delivered cannot be treated as admissions of defects either in the goods theretofore delivered or in those still to be delivered.

It is however to be inferred that the learned judge did not intend these observations to affect the defendant's right to the allowances which it had actually received upon the two shipments of 26th August (665 bundles) and 15th September (784 bundles), which were invoiced from New York and paid for subsequently to the agreement of 24th August, and as to which the deductions were actually allowed on the invoices and settled. Those he regarded, and I think rightly, as concluded transactions, because he did not find the plaintiffs entitled to recover the allowances which they had paid and deducted upon these invoices. Of course the defendant was, by the terms of the agreements, to receive its allowances upon future payments, and, if it did not make those payments, there was nothing upon which the deductions could operate; in that sense the allowances were conditional, but I think that is all that is intended or involved in the evidence and findings as to the conditional nature of the agreements. The benefits which the defendant received were those sanctioned by the agreements. They were spread over the invoices, and accrued only as payments were made, but the subject-matter of the original contracts of sale remained constant, and I find nothing in the arrangements of June and August, or elsewhere in the negotiations, whereby the defendant became bound to accept goods not of the descriptions required by the con-

tracts of sale, or, by reason of its refusal to accept such goods, to forfeit allowances which it had received.

For these reasons I am in agreement with the courts below that the action fails.

But there is also a cross appeal. The defendant counter-claimed for damages on account of shortages, defects, inferior quality and differences in weight of the skins delivered. The learned trial judge considered these claims very carefully, and he came to the conclusion that they could not be maintained, except as to the two items amounting to $3,446.33, to which I shall refer again. He thought that generally the claims themselves were put forward rather by reason of the defendant's anxiety to escape or mitigate its losses, due to the collapse of the market at a time when it had on hand an excessive quantity of stock purchased at the higher prices previously prevailing, than to the quality of the goods delivered, or any confidence which it had in the reality of its claims; and he expressed his preference for the testimony of Mr. Cahn, the plaintiffs' leading witness, where it differed from that of Mr. Bonisteel, the defendant's manager, and his findings were accepted unanimously by the Appellate Division. In these circumstances, while, speaking from the evidence as it appears upon the record, I might not be indisposed to modify in some particulars the findings which have been enunciated, I do not think that they can be disturbed consistently with the principles which regulate this court in the consideration of concurrent findings, or that any useful purpose will be served by reviewing at length the massive evidence which is comprised in the case. *SS. Hontestroom* v. *SS. Sagaporack* and *SS. Durham Castle* (1).

As to the sum of $3,446.33, for which the defendant recovered judgment upon its counter-claim, the item, except as to $308.61, is admitted as an original liability for shrinkage, but it would appear that the learned judge failed to take into account the allowances made for shrinkage of which the defendant had already received the benefit in the invoices of 26th August and 15th September. I am indebted to the appellants' factum for a careful analysis of

(1) (1926) 136 L.T. 33, at pp. 37 *et seq.*; [1927] A.C. 37.

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the accounts, and computation of the difference which this involves, and, if the point had similarly been drawn to the attention of the trial judge, I am sure it would not have been overlooked. It appears that the amount which the defendant had received by way of reduction from the Paris invoices in respect of the August and September shipments is $2,793.76, which of course it cannot also recover under its counter-claim. Also there is an item of $308.61, charged in the particulars of the statement of claim for freight prepaid on the 784 bundles of skins which were shipped in September. This item is proved by Mr. Copeland, the plaintiffs' accountant, and should apparently be taken in reduction of the amount found on the counter-claim, thus reducing that amount as follows:

Trial judge's finding		$3,446 33
Included in allowances of 26th August and 15th September	$2,763 76	
Prepaid freight	308 61	3,072 37
Balance		$ 373 96

to which the amount found for the defendant upon the counter-claim should be reduced.

While this leads to a variation of the judgment in the appellants' favour by a comparatively small amount, I would not therefore allow them the costs, because I think the amount should have been rectified upon the minutes before the trial judge, and that, if the matter had been so presented, an appeal would have been unnecessary; moreover the appellants did not limit their appeal, as authorized by the rules, to the minor point upon which they succeed.

The appeal and cross-appeal should be dismissed with costs, and the judgment should be varied by reducing the amount found upon the counter-claim to $373.96.

Appeal and cross-appeal dismissed with costs. Judgment varied.

Solicitors for the appellants: *Osler, Hoskin & Harcourt.*

Solicitors for the respondent: *Bain, Bicknell, White & Gordon.*