

LAZARUS v. DE VILLIERS.

1910. December 15. MAASDORP C.J., and FAWKES and
WARD, JJ.

Contract.—Sale by sample.—Acceptance.

V, a farmer, delivered 161 bags of potatoes at R railway station in execution of a contract of sale by sample to L, a store-keeper. L sold one bag to S without examination of the contents, and, after cursorily examining two other bags, sent the 160 by train to Johannesburg, but retained possession of the sample himself. V knew that the potatoes had been purchased for resale at Johannesburg. All the bags were rejected by the Government inspectors at Johannesburg as unfit for human consumption except 22, which were admittedly inferior, but which were sold by L's agent on the Johannesburg market. L, after hearing of the condemnation of the potatoes, instructed his agent to have them sorted. *Held*, that L had accepted the potatoes at R, and that he could not, therefore, repudiate the contract on the ground that the potatoes were not up to sample.

This was an appeal from a decision of the Resident Magistrate of Kroonstad in a case heard on the 25th October and following days. The respondent (plaintiff below) had claimed £90 on a dishonoured cheque given to him by the appellant on the 24th September. The defence raised in the lower court was that practically the whole amount, namely, £88 odd, had been given in settlement of the purchase-price of 161 bags of potatoes at 11s. a bag, and that payment had been stopped on the ground that the potatoes were not up to sample. There had been a claim in reconvention for damages, which was dismissed. The appellant was a store-keeper, whose store was situated close to Roodewal station, near Kroonstad, and the respondent a farmer of the neighbourhood. According to an agreement between appellant and respondent, the latter had delivered between the 21st and 24th September 161 bags, a sample consisting of five potatoes having been supplied by respondent to appellant. Appel-

O.B.C. '10,

lant sold one of the bags to one Stevens without examination of the contents. Appellant was afterwards informed that the contents were infested with tuber moth. Of the rest, two bags were opened at the station and a portion of the contents somewhat cursorily examined by appellant. The 160 bags were sent in batches soon after their arrival at the station to Johannesburg. Respondent knew that the appellant intended to have them resold on the Johannesburg market. The sample potatoes were, however, retained at Roodewal by the appellant. All except 22 bags were condemned on arrival at Johannesburg station by the Transvaal Agricultural Department on the ground that their contents were infested with tuber moth. The balance of 22 somehow evaded inspection and were sold by the appellant's agent on the Johannesburg market for 10s. 6d. a bag, the public having commented on the fact that the potatoes were of very inferior quality. The market price for good potatoes was 14s. or 15s. a bag. The agent reported to the appellant, and the latter was also informed that the Agricultural Department experts intended to destroy the consignment unless they received instructions as to how they should dispose of them. Appellant had then issued instructions that the bags were to be sorted. The following are the magistrate's reasons for judgment:—

It is quite evident that plaintiff sold to defendant 161 bags of potatoes according to sample, which sample was good, sound potatoes. That 138 bags were rejected at Johannesburg, the bulk of which did not correspond with the sample. The balance of 22 bags, portion of the 161 bags, although diseased, were sold by defendant's agent for 10s. 6d. per bag, and the amount accounted to defendant.

At the time when the 22 bags of potatoes were sold defendant's agent knew that they were a portion of the parcel of 161 bags, 138 bags of which were already rejected, and quite cognisant of that fact sold the 22 bags, which were diseased, and informed defendant of the same.

Defendant knew well that the consignment of 22 bags formed part of the parcel of 161 bags, which were diseased and rejected, received the amount, ratified the action of his agent.

Delivery having taken place and the purchase-price paid, defendant failed to take any of the courses open to him under such circumstances.

Defendant, knowing full well that the potatoes were diseased and

unfit for human consumption, could have compelled the plaintiff to take back the same and repay him the purchase-price. But this defendant had not done. On the contrary, he treated the 22 bags of potatoes as his own property, had them sold, and only tendered plaintiff the balance, 138 bags, not even the purchase-price on the market of the 22 bags was tendered to plaintiff.

The purchaser is bound to accept or reject the article tendered as a *whole*: he cannot accept part and reject the remainder. See Maasdorp's *Institutes*, vol. 3, p. 183.

The court held that the defendant, in disposing of the 22 bags of diseased potatoes and accepting payment for the same, treated them as his own property, was debarred from the *actio redhibitoria*. The potatoes were sold in one lot.

Judgment for plaintiff in convention for £90 and costs; claim in reconvention dismissed with costs.

Blaine, K.C., for the appellant: The appellant had the right to decide whether he would accept or reject the potatoes at Johannesburg. The place of delivery to complete the obligation of the seller (namely, Roodewal) must be distinguished from the place of delivery for the purpose of changing the ownership in the potatoes. The facts of this case take it out of the ordinary rule. Delivery was to be at the railway station, and not at appellant's store. The contract was made with a view to the resale of the potatoes on the Johannesburg market. It would not only have been unreasonable, but even absurd, for the parties to have contemplated an inspection at Roodewal, when the potatoes were only delivered there with a view to being sent by train to Johannesburg. See *Greenshields v. Chisholm* (3 S.C. 220).

P. U. Fischer, for the respondent: The appellant accepted at Roodewal station. In a sale by sample the purchaser must be given a reasonable opportunity of inspecting. If the purchaser in this case was not bound to accept at Roodewal, the seller would have been liable on inspection in any market the purchaser liked to send them to. The defendant actually took the opportunity of inspection afforded at Roodewal. The case of *Greenshields v. Chisholm* is distinguishable. The barley in that case was sold to a purchaser residing at Kimberley, and it would have been unreasonable to have required inspection at De Aar,

though it was handed to a carrier for the purchaser at that place; see 3 S.C. at p. 225. See Benjamin on *Sale* (5th ed.), p. 754, and *Perkins v. Bell* ([1893] 1 Q.B.D. 193), there quoted. Defendant exercised his right of ownership by asking to have the bags sorted at Johannesburg. The plaintiff should have been informed directly the potatoes were condemned.

Blaine, K.C., in reply.

MAASDORP, C.J.: In this case the plaintiff sues the defendant practically for the purchase-price of these potatoes. To this claim the defence is raised that they were sold according to sample, and that they did not come up to sample. One is inclined to be carried away by the circumstances and more especially by one's knowledge of the very inferior condition of the potatoes as seen at Johannesburg, and to think the transaction was on the verge of fraud. We cannot, however, allow ourselves to be influenced by that consideration, as fraud was not pleaded, and no doubt the transaction was a *bond fide* one. The question is whether the stuff delivered was according to sample and whether it was accepted at any time. Now the potatoes had to be delivered at Roodewal station, where the defendant was resident and had seen the sample, and where the parties entered into the contract. There was no one in Johannesburg who had seen the sample or who could decide whether the potatoes were according to sample or not. It is only reasonable to hold that they were accepted at the place where they were delivered and where the sample was. Two bags were examined at Roodewal, where they were delivered, and closed again and sent off. After this examination—if it can be so called—one bag was at once dealt with by the defendant in sale to Stevens. One is as good as 160 to show whether there was acceptance. This one bag was accepted, dealt with and sold, and defendant had had an opportunity of examining it. He sold to Stevens without even concerning himself as to whether the bag was up to sample or not. He therefore took the risk, and as he was in a hurry to get it off, he relied on the honesty of the seller instead of on the sample. He had examined two bags, and in order to get them off quickly he at once sent them off by train to

Johannesburg. When the stuff arrived at Johannesburg his agent informed him of the defect in the potatoes and of the fact that they had been rejected by the Government inspectors. Instead of saying even then that he would have nothing further to do with the potatoes, he instructed his agent to have them sorted. That was another act of ownership on defendant's part after he knew of the defect. He had in his mind the thought that he had already accepted and was going to make the best of it. It turned out so bad that he could not get rid of these potatoes, and therefore repudiated the transaction, but too late. The place of delivery was Roodewal station. He had had an opportunity of examining the bags, and as a matter of fact he had examined some and made a full acceptance there, and it was too late for him after that to say that they were not according to sample. The appeal must therefore be dismissed with costs, though not exactly for the reasons given by the magistrate. If the question had entirely depended on those reasons we might have had to consider the matter further.

Appellant's Attorneys: *Botha & Goodrick*; Respondent's Attorneys: *Steyn & Vorster*.

