

APPELLATE DIVISION.

MAY 15TH, 1913.

CLEVELAND v. GRAND TRUNK R.W. CO.

4 O. W. N. 1281.

Contract—Breach of—Contract of Hiring—Alleged Agreement to Pay in Part in Kind—Authority of Agent—Statute of Frauds—Evidence.

SUPREME COURT OF ONTARIO (Second Appellate Division) (Sutherland J., dissenting), dismissed plaintiffs' appeal from the Co. J. Hastings granting a non-suit in an action brought by plaintiff for damages for alleged breach of contract to give him certain hay in addition to his wages as a lamplighter of defendant company.

Appeal from the judgment of His Honour the Judge of the County Court of the County of Hastings, dismissing the action which was one brought to recover damages for alleged breach of contract.

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

E. G. Porter, K.C., for plaintiff (appellant).

D. L. McCarthy, K.C., for defendant (respondent).

HON. SIR WM. MULOCK, C.J.Ex.:—The evidence shews that the plaintiff was, on the 3rd of October, 1911, employed as sectionman on the defendant company's railway, by their foreman William Murphy; and shortly thereafter was appointed by Murphy as lamplighter for the company at Belleville, at the rate of \$1.50 per day, the maximum rate paid by the company to lamplighters, and Murphy had no authority to exceed that rate.

After working for a week or two as lamplighter, the plaintiff, according to his evidence, told Murphy, "I will keep this job steady if you will give me the hay that grows there at the east end of the yard." Mr. Murphy said: "If you keep this job steady, the hay is yours; until such time as that hay is fit to cut, the hay is yours." And the plaintiff answered: "I said, all right, sir, I will."

The plaintiff continued as such lamplighter until some of the hay was ready to cut, and upon going to cut it he found a portion of it already cut, and removed, by a man