

the plaintiff will be entitled to the portion of the contract-price that was to be paid in cash—\$4,000—and to the value of all trees cut by the defendant on the Peterborough lands; and the defendant will be entitled to his damages, to be fixed at \$1,575 more than the net allowance to the plaintiff in respect of the charges against the Saskatchewan lands and chattels, unless either party, at his own risk as to costs, elects to take a reference to determine the damages; and there will be a reference to the Local Master at Peterborough to ascertain the value of the trees cut by the defendant and to ascertain the defendant's damages, if either party elects to have such damages determined upon a reference, and to take any other necessary accounts between the parties; and the proceeds of the sale of the lands will be applied accordingly; if there is any surplus after payment of the plaintiff's claim, it will go to the defendant; but, if there is a deficiency, the plaintiff will have judgment against the defendant for the amount of it; there will be no costs to either party down to trial, and the question of the subsequent costs will be reserved until after report.

The defendant was not confined to the remedy provided in the agreement made at the same time as the agreement for sale, i.e., a claim for \$5 per thousand feet of the deficiency—the document did not touch the case of a deficiency of cordwood, ties, poles, or posts; and the misrepresentation was fraudulent.

The defendant did not waive his claim to damages by proceeding with the contract after he had knowledge of the misrepresentations. The defendant did not know his rights until, in consequence of being served with the writ of summons by which this action was commenced, he consulted his solicitors. See *Webb v. Roberts* (1908), 16 O.L.R. 279.

MASTEN, J.

DECEMBER 27TH, 1919.

RUSSELL MOTOR CAR CO. LIMITED v. CANADIAN
PACIFIC R.W. CO. AND PERE MARQUETTE R.W. CO.

*Railway—Carriage of Goods—Shipment in Car—Deficiency in
Quantity Found in Car at End of Transit—Evidence—Onus
—Failure to Shew Quantity in Car when Possession Taken by
Consignees—Liability of Railway Company as Warehousemen
only—Absence of Negligence.*

Action to recover the value of certain goods consigned to the plaintiffs and said to have been lost in transit by the defendants, the carriers, or one of them.