

HON. MR. JUSTICE RIDDELL.

NOVEMBER 14TH, 1912.

WEEKLY COURT.

KELLY & CLOSE v. NEPIGON CONSTRUCTION CO.

4 O. W. N. 279.

Contract—Damages for Breach—Appeal from Referee—Railway Supplies—Obtaining Permits for Tie-cutting—Involves Location—Waiver of Delivery—Impossibility by Act of Defendant—Conversion—Defendants not Guilty of—Costs.

Appeal from report of Local Master at Port Arthur awarding plaintiffs \$12,815.08 damages in an action for breach of a contract to supply certain material and labour to defendants, railway contractors.

RIDDELL, J., reduced the damages to \$8,209.20, and gave judgment for plaintiffs for that sum with costs up to judgment. No costs of reference, appeal, nor motion for judgment to either party.

Where plaintiffs were to supply ties, but defendants were to obtain permits for the cutting of such ties, the burden of finding limits where such ties can be obtained is on the defendants.

Appeal from report of Local Master at Port Arthur, dated August 24th, 1912.

H. Cassels, K.C., for the appeal.

Glyn Osler, contra.

HON. MR. JUSTICE RIDDELL:—This is an appeal from the Master at Port Arthur.

The plaintiffs are a firm carrying on business in Port Arthur, while the defendants are a company engaged in building part of the National Transcontinental Railway.

In or about November, 1909, the parties agreed for the plaintiffs to do some freighting, etc., for the defendants—and they did so. The action is in part for these services.

Then on February 9th, 1910, the parties entered into a written agreement for cutting and delivering ties, which will require consideration. There are some other matters of minor importance also.

At the trial an order was made “that all matters in question in this action be referred for enquiry and report to . . . Local Master at Port Arthur . . .” and all questions of costs and further directions were reserved.

The Master made his report, August 24th, 1912, finding the defendants indebted to the plaintiffs in the sum of \$12,815.08. The defendants now appeal and the plaintiffs move for judgment, etc., etc.