

FIRST DIVISIONAL COURT.

MARCH 19TH, 1920.

OLIVER-SCRIM LUMBER CO. LIMITED v. GREAT LAKES
DREDGING CO. LIMITED.

Sale of Goods—Action for Price—Dispute—Adjustment of Amount Due—Counterclaim or Set-off—Damages for Breach—Special Circumstances—Knowledge of Parties—Contract Made in Reference thereto—Evidence—Alteration in Contract—Time for Deliveries—Default.

An appeal by the plaintiffs from the judgment of FALCONBRIDGE, C.J. K.B., 17 O.W.N. 48, whereby he dismissed the action with costs, on the ground that the defendants had established a set-off or counterclaim equal to or greater than the plaintiffs' claim.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

J. H. Rodd, for the appellants.

D. L. McCarthy, K.C., for the defendants, respondents.

FERGUSON, J.A., reading the judgment of the Court, said that on the 11th October, 1917, the plaintiff company and the defendants entered into a contract by which the plaintiff company agreed to deliver to the defendants 2,000 piles 80 feet in length at the rate of 40 cents per lineal foot. The plaintiff company failed to make shipments at the times and in the quantities agreed upon. On the 28th October, 1917, the defendants wired the plaintiff company: "Upon learning that you failed to begin shipment according to contract we began negotiations with Day. Not yet closed. However we must get piles as early as possible. Prompt shipment determines who supplies them." Having on the 3rd and 4th November entered into contracts with two other firms for their other 80-foot piles, the defendants, on the 2nd December, informed the plaintiff company that their contract was altered, and ordered them to deliver, instead of the piles contracted for, 1,000 piles 80 feet in length and 1,000 in shorter lengths. The plaintiff company continued to ship 80-foot piles and shorter lengths until the 28th May, 1918, at which time they had shipped 1,615 pieces, being 1,192 pieces of 80 feet and 423 in other lengths. A dispute arose as to the number of pieces rejected by the defendants as not being according to contract. This dispute was adjusted by an agreement made on the 10th October, 1918. The plaintiffs' claim was based on the adjustment. The defendants' answer was a set-off or counterclaim based on two allegations: (1) that the plaintiffs were liable for the difference