

FIRST APPELLATE DIVISION.

JUNE 8TH, 1914.

## ORTON v. HIGHLAND LUMBER CO.

6 O. W. N. 470.

*Contract—Manufacturing Lumber — Quantity and Price—Measurements—Extra Payment or Bonus—Voluntary Promise—Absence of Consideration—Non-performance of Contract—Non-compliance with Condition—Termination by Consent—Reservation of Rights—Findings of Trial Judge—Variation on Appeal.*

SUP. CT. ONT. (1st App. Div.) varied the trial judgment in an action on a lumber contract by reducing the amount.

Appeal by defendant from a judgment of HON. MR. JUSTICE LENNOX, 25 O. W. R. 378.

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

A. E. H. Creswicke, K.C., and A. B. Thompson, for appellant.

M. B. Tudhope, for respondent.

HON. MR. JUSTICE HODGINS:—The Court is asked in this case to do what the parties might, when the data were at hand, have readily done for themselves. The lumber, the production of which forms the basis of the present action, has been sold and distributed, and it is not possible to reconcile the accounts given of its measurement with the counts and estimates now put in. The learned trial Judge has seized upon the actual tally kept by Gouin, the trimmer in the mill, as forming the best basis for computing the lumber cut under the contract. There is western judicial authority that a count in that position, i.e., at the saw, is the most trustworthy. See Hunter, C.J., in *Lequime v. Brown* (1905), 1 W. L. R. 193. No record of the scaling in the woods was put in, there was no measurement just prior to the removal of the product of the mill to Sundridge, immediately after, or during piling, so that the matter is left between Gouin's measurement, Tate's estimate, Quance's quantities in the piles at Sundridge, and the car shipments. After endeavouring, in the light of the careful arguments of both counsel, to arrive at a solution, my conclusion agrees with that of the learned trial Judge. The only criticism made by Mr. Creswicke, upon which I feel any doubt, is one dealing with Quance's figures upon the piles at Sundridge, they being on