

KILBUCK COAL CO. v. TURNER & ROBINSON—LENNOX, J.—OCT. 23.

Contract—Supply of Coal by Brokers to Retailers—Rates Mentioned in Contract under Seal—Subsequent Variation—Evidence — Onus — Consideration — Account — Credits — Reference.]—Action for the price of coal supplied by the plaintiffs to the defendants. The action was tried without a jury at Whitby. The issue was, whether the plaintiffs, who were coal brokers, were to be paid for the coal at rates set out in a contract under seal entered into on the 5th June, 1912, or at higher rates. The learned Judge, after stating the facts at length, said that the contract, though under seal, could be abandoned by mutual consent, or it could be varied, or a new contract could be substituted for it. It was a question of fact whether anything of this kind was done, and—the defendants denying it—the onus was on the plaintiffs. The essential elements of a new contract, including consideration, must be shewn beyond any reasonable doubt, if the original contract was to be superseded. The learned Judge then reviewed the evidence, and stated that, after a great deal of consideration, and not entirely without hesitation, he had come to the conclusion that, in respect of the class of coal specified in the written agreement, the plaintiffs were entitled to recover only at the rates therein set forth. The learned Judge also finds that the defendants are entitled to credit for various sums amounting to \$60 in addition to the sums credited in the plaintiffs' account. At the trial the plaintiffs gave no evidence as to the state of the account taken upon the basis of the contract. The learned Judge understands that the parties agree that, if the plaintiffs are entitled to recover at contract rates only, they have been paid in full. Judgment dismissing the action with costs, unless within ten days the plaintiffs give notice that they desire a reference; in which case there will be a reference to the Local Master at Whitby to take the accounts upon the basis of the prices set out in the agreement, with additional credits as above. In the event of a reference, the defendants' costs down to and including the trial will be paid by the plaintiffs, and further directions and costs of the reference will be reserved. W. H. Harris and A. E. Christian, for the plaintiffs. H. L. Ebbels, for the defendants.