

OSLER, J.A.—The action was brought on a contract for the construction of pavements on certain streets in the city of Hamilton. It was tried at great length, and an immense volume of evidence taken on various issues relating to the condition of the streets, the causes of their disrepair, etc., et ., and from defendants' point of view, whether all or any of these causes were such as they were, within the contract, liable to make good. The trial Judge held that they were all within it, on the proper construction of the contract, and so holding, also held that it was not necessary for him to pass upon the specific issues of fact presented on the pleadings and evidence, and that plaintiffs are therefore entitled to succeed to the full extent claimed. He finds the amount of damages, apparently measured by the whole cost of the repair, giving the defendants a reference at their own expense and risk, if so advised. The defendants are appealing, and they desire to limit their appeal, in the first instance, to the point on which the trial judgment has turned, viz.: the construction of the contract, in order to avoid, if possible, the expense which would be entailed by an appeal upon the evidence and the special issues of fact. The additional expense of this it was said would be not far from \$1,000. The motion was opposed on the ground that the respondents would be embarrassed by having the appeal launched in this manner, involving, as it possibly (probably) would, two arguments in this Court, and a difficulty in possible subsequent appeals to the Supreme Court. If the whole case were before us, as in strictness and according to the usual practice it ought to be, as it was before the trial Judge, the plaintiff would have the right to support his judgment, in whole or in part, upon every ground open to him on the evidence in the issues, as well as upon that on which the learned trial Judge has rested it. We might direct the argument on the former to stand over until we could see that it was necessary for the plaintiff to enter upon that branch of the case, delaying in that event our final judgment until after the second argument. Either party would then be in a position to go to the Supreme Court upon the whole case. The strict right of the respondents here is to be in that position should our judgment be adverse to them on the question of construction.

If, on the other hand, this Court should be prepared to support the judgment at the trial, on the ground on which the learned Judge placed it, the defendants may go to the Supreme Court (and they are not prepared to say that they will not do so) and in that event also they must supply the evidence, so that the plaintiffs in the exercise of their right