

## Province of Ontario.

### SUPREME COURT, APPELLATE DIVISION.

Garrow, MacLaren, Meredith, and Magee, JJ.A.,  
and Lennox, J.]

[April 22.]

McKENZIE v. ELLIOTT.  
(10 D.L.R. 466.)

*Appeal—Findings by referee—Reconsideration on appeal as to inferences from surrounding facts—Evidence—Variation.*

*Held*, 1. While a referee hearing the witnesses has the better opportunity for forming a right judgment upon the credibility of witnesses as affected by their demeanour in giving evidence and his finding where based upon credibility will not ordinarily be disturbed by an appellate court, the rule does not apply to the consideration of the weight to be given the evidence as affected by the surrounding circumstances and attendant facts; an appellate court should draw its own conclusions in regard to the probabilities and inferences to be drawn from such facts and circumstances.

2. In an action upon a building contract where the construction actually proceeded with differed from that contemplated by the written contract between the parties as to size of building and class of materials, the party who claims that the written contract was altogether abrogated and not merely varied in such respects by the verbal arrangement between the parties by which the change was assented to after the contract was made, has the onus cast upon him to prove such claim.

*McKenzie v. Elliott*, 2 D.L.R. 899, affirmed on appeal.

*Hellmuth*, K.C., and *W. Mulock*, for plaintiff. *Anglin*, K.C., and *J. Shilton*, for defendant.

### SUPREME COURT.

Middleton, J.]

[April 14.]

ROBERTS v. BELL TELEPHONE CO. AND WESTERN COUNTIES  
ELECTRIC CO.  
(10 D.L.R. 459.)

*Electricity—Injury by wires in streets—Dangerous agency doctrine—Effect of—Statutory authority—Proximate cause.*

*Held*, 1. The effect of conferring statutory authority upon