Smith (1888), 15 O.R. 413, 16 O.R. 421; McNeely v. McWilliams (1886), 13 A.R. 421; Sawyer & Massey Co. v. Ritchie (1910), 43 S.C.R. 614.

Nor is there any difficulty in the plaintiff's way from the Division Court action. There was no adjudication by a Court as to his rights, and his voluntary payment only deprived him of so much money without the chance of recovering it again.

On the case as it stands, the appeal should be allowed with costs and the action dismissed with costs.

But there are two matters that require consideration:—

(1) The jury have found (A. 7), on evidence which is sufficient, that "the agents stated that the engine would cut corn and fill the silo," as is sworn to by the plaintiff (p. 14). The agent, McIntosh, says (p. 65), "that the engine was not big enough;" (p. 61), that he "never asserted that twelve horse power would run a blower;" (p. 65), that he did not know the plaintiff wanted it to fill a silo; (p. 66) that "there was nothing said about what that power was required for or what it would do," and (p. 71), "I knew it wouldn't cut the corn."

On this evidence it must be manifest that, if McIntosh made the representation the jury find he did make, he made it knowing that it was untrue. This is fraud. The answers of the jury are not satisfactory, although perhaps not absolutely contradictory.

It is true that fraud is not charged in the pleadings; even before us no amendment was asked for; and it is not too much to require any one who intends to charge another with fraud or dishonesty to take the responsibility of making that charge in plain terms: Low v. Guthrie, [1909] A.C. 278, at p. 282, per Lord Loreburn, L.C.; Badenach v. Inglis (1913), 4 O.W.N. 1495, 29 O.L.R. 165.

If, however, the plaintiff is willing squarely to take the attitude on the record that the defendants were guilty of fraud, I think that he may have an opportunity of doing so. If he elects to do this, the judgment below will be set aside and a new trial ordered; costs of the former trial and of this appeal to be in the cause, unless otherwise ordered by the trial Judge. If such an election be made, the other matter referred to may be fully developed, i.e.: (2) a few days after the second contract was written, the agents of the defendants were desirous of obtaining the notes promised; the plaintiff demurred, and, as he says, was promised (in effect) that the defendants would make the engine right, whereupon he gave the notes.