p. 43; Walton v. Simpson (1884), 6 O.R. 213; Webb v. Roberts (1907), 16 O.L.R. 279. Moreover, the jury have found that the engine was 12 H.P.

The above would be sufficient to dispose of the appeal from the judgment as it stands; but it must not be forgotten that the action is in the alternative form; either for rescission with consequent relief, or for damages for breach of warranty; and, if the latter claim could succeed, we should, in allowing the appeal, either find the damages or direct a reference on that matter.

The jury have found that an agreement was made that this engine would be capable of filling silos; and the learned County Court Judge in beginning his charge told them: "In this case the plaintiff wishes to recover on a written agreement and on a collateral verbal agreement; that is, an agreement made at the same time and not embodied in the written agreement."

Nothing is better established than that, where a description or representation is made concerning the subject-matter of a contract, which, being untrue, entitles the purchaser to rescind the contract, if he receives the article sold and deals with it in such a way as to lose the right to rescind, that description or representation becomes a stipulation by way of agreement, for the breach of which compensation may be sought in damages: Behn v. Burness (1863), 3 B. & S. 751 (Cam. Seacc). See cases cited in New Hamburg Manufacturing Co. v. Webb (1911), 23 O.L.R. 44, at pp. 53, 54.

Such a stipulation, however, has no such effect "unless the representation was made fraudulently either by reason of its being made with a knowledge of its untruth or by reason of its being made dishonestly with a reckless ignorance, whether it was true or untrue:" Behn v. Burness, 3 B. & S. 751 (head-note); Newbigging v. Adam (1886), 34 Ch. D. 582, at p. 592, per Bowen, L.J.; Adam v. Newbigging (1888), 13 App. Cas. 308; Whittington v. Seale Hayne, [1900] W.N. 31.

Here the jury have found that the actual misrepresentation by the agent was not fraudulent; this express representation must prevent any implied representation in the same matter—"Expressum facit cessare tacitum." The only stipulation that was made was, say the jury, innocent, and was not such as that under the authorities an action could be founded thereon.

We have not to deal with the question as to whether the evidence of such oral representation was properly received. That I understand to have been concluded by the judgment of the Court of Appeal in the case in 23 O.L.R.; otherwise we might have had trouble with Ellis v. Abel (1882), 10 O.R. 226; Betts v.