inches between his foot and the west curb. The defendant's servant, Stanley J. Kemp, a young man of about 16 years of age, was driving a horse with light rig. He had just come out of the stable, drove easterly on Scollard to Yonge, turned down Yonge, and one wheel of the rig went over plaintiff's foot, causing the injury complained of. Kemp says he saw the plaintiff and he thought the plaintiff saw him. Kemp was experienced in driving and his horse was going, as he says, only at a slow walk. Under such circumstances there would be no excuse, if the plaintiff's story is correct, for the accident. The so-called excuse given by Kemp was "that in going around the corner, the back wheel caught the curb, and slung it over and it went over his leg."

The learned trial Judge did not accept as correct the explanation given by Kemp. There certainly was evidence of negligence, and the question was wholly for the trial Judge. Upon the evidence the conclusion would be warranted that Kemp, having seen the plaintiff, carelessly drove too close to him and seeing the danger turned the horse sharply to the west, but not in time to prevent one wheel going over the plaintiff's leg and causing the injury. All we need say is, that there was evidence of negligence, and we must so say. Had there been a jury, the case could not have been withdrawn from them, and a verdict for the plaintiff for $150 would not have been disturbed.

The appeal of the defendant should be dismissed with costs.

There is no reason for increasing the damages. There was no permanent injury. The plaintiff has had good, practically complete, recovery. The cross-appeal should be dismissed with costs.

FALCONBRIDGE, C.J.K.B., and RIDDELL, J., gave reasons in writing for arriving at the same conclusion.

FALCONBRIDGE, C.J.K.B. MAY 30TH, 1911.

BROWN v. BROWN.

Contract — Condition Precedent — Impossibility — Defendant's Conduct Precluding Performance.

Action for specific performance of an agreement to lease an hotel.