

Under the terms of the contract, the appellant company was bound to pay for 150 volumes more or less; and the trial Judge rightly disposed of the respondent company's claim.

As to the counterclaim, the appellant company suggested that the number of volumes constituting a complete set of the reprint might greatly exceed 150, and claimed damages because of such anticipated excess. Until such excess was actually determined, it was impossible to say whether it was so unreasonable as to be actionable, and if so to what extent. The appellant company's counterclaim was premature, and should be dismissed with costs, but there should be reserved to the appellant company the right to maintain an action for damages in the event of the excess being so unreasonable as to give the appellant company a cause of action.

The appeal should be dismissed with costs.

CLUTE and SUTHERLAND, JJ., agreed with MULOCK, C.J.Ex.

MASTEN, J., for reasons stated in writing, agreed that the appeal should be dismissed.

RIDDELL, J., read a dissenting judgment. He said that the respondent company represented that the series would be completed in "about 150 volumes of 1,500 pages each;" that, on that representation, the contract was entered into; that it contained the statement that the set was "150 volumes more or less." The only question was, whether the plaintiffs were bound by the representation as a warranty. The intention of the parties was shewn by their conduct and their own words. The appellant company said, "Our contract calls for the completion of the work in 150 volumes." The respondent company did not deny that the contract called for the completion of the work in a certain number of volumes, but they said, "The number of volumes in a set is not absolute but qualified." Both parties understood and intended the statement in the contract "150 volumes more or less" as a warranty that that should be the number of volumes completing the work.

The appellant company was entitled, upon its counterclaim, to recover damages for breach of this warranty. By the respondent company undertaking to supply the remaining volumes gratis, these damages may be much diminished; otherwise they may be difficult to estimate.

In the absence of an agreement between the parties, there should be a reference to the Master to fix the damages once for all; and the amount of the respondent company's judgment should be paid into Court to await the result of the reference.

*Appeal dismissed with costs (RIDDELL, J., dissenting).*