

It, therefore, follows that the motion must be dismissed with costs to the defendant in the cause only, the point being one of some difficulty. The plaintiff may have leave to amend, if it is thought that this will be of any service.

DIVISIONAL COURT.

SEPTEMBER 14TH, 1912.

KINSMAN v. KINSMAN.

Contract—Promissory Notes — Fraud—Counterclaim—Repayment of Money Paid for Shares in Company—Evidence—Conflict of Oral Testimony—Effect of Correspondence—Appeal—Reversal of Findings of Fact of Trial Judge.

Appeal by the plaintiff Emily S. Kinsman from the judgment of RIDDELL, J., 3 O.W.N. 966, in favour of the defendant Maria L. Kinsman on her counterclaim.

The appeal was heard by MEREDITH, C.J.C.P., TEETZEL and KELLY, JJ.

I. F. Hellmuth, K.C., and W. M. McClemon, for the appellant.

A. Weir, for the respondent.

MEREDITH, C.J.:—The action was brought by the appellant and E. Palmer Kinsman against the respondent and her husband, Homer F. Kinsman, for the delivery up and cancellation of a promissory note, dated the 2nd January, 1911, made by the appellant and E. Palmer Kinsman in favour of the respondent, and the delivery up and cancellation of another promissory note for \$1,000, bearing the same date, made by the appellant and her husband in favour of the respondent, or the cancellation of the appellant's signature to it, on the ground that they had been obtained by the respondent, through her husband as her agent, by fraud.

The defendants pleaded as a defence to the action a denial of the fraud alleged, and that the promissory notes were given in pursuance of an agreement entered into between the appellant and the respondent, that, in consideration of the respondent subscribing for \$3,500 of the capital stock of the R. E. Kinsman Lumber Company Limited, if she at any time desired to get her