

RIDDELL, J., said that the action was brought on a written contract to supply an Emerick pulveriser and an Emerick separator; in para. 15 of the statement of claim the plaintiffs set out that, in addition to "the said contract," the defendants knew that the plaintiffs required the machinery for specific purposes, and relied upon the skill and judgment of the defendants, etc., and alleged "that the sale and purchase of the Emerick machinery carried or implied a condition or warranty that the machinery supplied would answer the particular purpose, which condition or warranty has not been fulfilled or complied with." The claim was: "3. Damages for the said breach or breaches of said contract and the said guaranty or warranty contained in said contract. 4. In the alternative, damages for the breach of the implied condition or warranty referred to or set out in the 15th paragraph of this statement of claim."

The plaintiffs, thus distinguishing the claim (1) on the contract and (2) on the implied condition or warranty, went down to trial. Judgment was given in their favour by KELLY, J., 4 O.W.N. 721; in the formal judgment the following language was used: "And this Court doth further order and adjudge that it be referred to the Master in Ordinary to ascertain and state the damages which the plaintiffs have sustained in respect of the breach of contract in the statement of claim alleged." The Appellate Division, 4 O.W.N. 1189, did not disturb this judgment. On the reference, the Master ruled that the plaintiffs might, under the judgment, prove damages not only for breach of the express contract but also for breach of the implied warranty set out in para. 15. From that ruling the defendants appealed.

The learned Judge said that he could find nothing in the written reasons of KELLY, J., or in the case as it was presented to the Appellate Division, to indicate that what was intended was anything more than damages for the *breach* of the *contract* set out in para. 2 of the statement of claim—the word was in the singular, and referred to the claim in para. 3 of the prayer.

The Master had proceeded on a wrong principle, and the matter must be referred back to him to deal with it on the principle above set out; the defendants to have their costs of this appeal in any event.

The plaintiffs' motion for judgment was refused with costs.