action in a Division Court for the same breaches of the contract as set up in this action, and that a settlement of all matters in dispute in that action was had, the action withdrawn, a delivery made of certain fixtures, and payment of moneys made, and a release given of a claim by defendant for $75, in full discharge and satisfaction of all claims under the contract. Defendant also alleged that the dynamos were fit for their intended purpose, and that plaintiff had after a fair trial accepted and paid for them.

J. T. Garrow, K.C., for appellant.

W. Proudfoot, Goderich, for plaintiff.

The Divisional Court (FALCONBRIDGE, C.J., STREET, J., BRITTON, J.), held, BRITTON, J., dissenting, as follows:—The following are the material parts of the contract:—"Henry Cook, please ship to my address two Manchester-type dynamos . . . The dynamos must be manufactured by the United Electric Co. of Toronto, and their latest improved compound two-field type machine must be furnished, and guaranteed against any inherent defects due to bad workmanship or material for one year after starting. The manufacturing company's guarantees to be taken by you. . . ." Plaintiff repeatedly complained about the way the machines were working. On 24th October, 1900, he brought an action in a Division Court against defendant for not supplying him with one volt and other articles, claiming $100. The action should have come on for trial on 5th November, 1900, but before that date plaintiff agreed to withdraw it upon certain terms. Afterwards plaintiff alleges he, for the first time, discovered that the dynamos were second hand, and he then commenced this action. The Judge at the trial found that the bargain made was for new dynamos, and not for second hand ones, and that plaintiff was entitled to $50 for certain articles not supplied to him. We, after several times reviewing the evidence, agree with his findings, but it is necessary to consider the legal objections raised by defendant. He urged that the plaintiff's right to recover was, under the terms of the contract, limited to the guarantee or promise of the defendant contained in the contract to correct "any inherent defect in the machines, due to bad workmanship or materials, for one year from starting." But this is not an action upon any guarantee, either express or implied, but for damages because the thing supplied to plaintiff was not the thing he contracted for, but something different, and of less value, and he can now maintain this action: Chanter v. Hopkins, 4 M. & W. 399, 404; Gosling v. Kingsford, 13 C. B. N. S. 447; Azeman v. Casella, L. R. 2 C. P. 431; Smith v. Hughes, L. R. 6 Q. B. 597; Heilbutt v. Hickson, L. R. 7 C. P. 438; Shepherd v. Kain, 5 B. & Ald. 240; Cowdry v.