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 \*Oct. 23.

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THE BELL TELEPHONE COMPANY } APPELLANT;  
 OF CANADA ..... }

AND

THE TORONTO, HAMILTON AND }  
 BUFFALO RAILWAY COMPANY, }  
 AND THE CORPORATION OF THE } RESPONDENTS.  
 CITY OF HAMILTON..... }

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS  
 FOR CANADA

*Practice and procedure—Motion to strike paragraphs from factum—Jurisdiction of a judge in chambers or the registrar.*

The rules of this court concerning the contents of the factum and the form and manner in which they shall be printed must be followed before the registrar will receive them; but, otherwise, it is not within the province of the registrar, or a judge in chambers, to control the manner and form in which the allegations of fact or the arguments of law are presented by counsel in their factum.

MOTION by the appellant for an order striking out certain paragraphs of the factums filed by the respondents, upon the ground that they were improper, vexatious and embarrassing.

*M. Powell K.C.*, for the motion.

*W. L. Scott K.C.*, and *A. J. Fraser*, *contra*.

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\*PRESENT:—Rinfret J. in chambers.

RINFRET, J.—The appellant moves for an order striking out paragraph no. 11 of the factum filed on behalf of the respondent, the Toronto, Hamilton and Buffalo Railway Company, and paragraph no. 12 of the factum filed on behalf of the respondent, the city of Hamilton, in this appeal, upon the ground that the said paragraphs are improper, vexatious and embarrassing. The motion was heard by the registrar, who, being of opinion that this was a “matter \* \* \* proper for the decision of a judge”, under rule 83, referred the same to me as rota judge.

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After having heard counsel for the parties, I am of opinion that the motion should be dismissed with costs.

The appeal is taken from a decision of the Board of Railway Commissioners for Canada pursuant to the provisions of the *Railway Act*. It is submitted upon a case settled by the Board. The statement of facts so settled contains the following paragraph:

2. Acting in pursuance of the powers conferred upon it in that behalf by its special Acts of incorporation, referred to in paragraph no. 1 hereof, and with the legal consent of the city of Hamilton, the appellant, the Bell Telephone Company of Canada, lawfully constructed its lines of telephone and plant over, along the sides of, upon, under and within the limits of the following streets, highways and public places within the limits of the city of Hamilton, namely: Charles street, McNab street, James street, Hughson street, Catherine street, Aurora street, Victoria avenue, Wood Market square and Baillie street.

The factums of each of the respondents set up the following allegation:

The appellant has not obtained authority to carry its lines, wires and conductors over or beneath the railway of the railway company as required by section 372 of the *Railway Act*, which said section reads as follows:

It is contended on behalf of the appellant that there is nothing in the statement of facts as settled and printed to support such an allegation in the respective factums of the respondents and that the appellant will accordingly be placed at an unfair disadvantage if this appeal is to be proceeded with upon the respondents' factums as they now stand.

There are rules concerning the forms of the printed case (Rules nos. 6, 7, 11 & 12) and they provide that the registrar shall not file the case without the leave of the court, or a judge, if these rules have not been complied with (rule 13). There are also rules concerning the con-

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tents of the factums and the form and manner in which they shall be printed. The registrar is not to receive them unless the requirements of these rules have been followed. But I cannot find any power vested in the registrar, or in a judge in chambers, to deal with the allegations of fact, or the arguments of law, which counsel deem it advisable to make in their factums. The factum is nothing more than a written argument. It sets out the "points for argument in appeal". It is not within the province of the registrar, or a judge in chambers, to control the manner and form in which these points for argument are to be presented.

The paragraph complained of in the respondents' factums is in the nature of an argument. It does not and cannot modify the statement of facts settled by the Board of Railway Commissioners. It will have to be appreciated and weighed by the court in the light of that statement of facts. The situation is vastly different from that where a party includes in his factum

evidence which formed no part of the case in the court below and forms no part of the case settled for appeal here, and the decision of Idington J. in *Bing Kee v. Yick Chong* (April, 1910, Cameron's Supreme Court Practice, 3rd ed., p. 405) can afford no precedent for the present application.

The appellant will not be prejudiced by my decision, for, if it should be found advisable, the matter can be dealt with by the full court when the appeal comes on for hearing (*Vernon v. Oliver* (1); *Coleman v. Miller*, Cassels' Digest, 2nd ed., p. 683; *Wallace v. Souther*, Coutlée's Digest, p. 1102; *Fairman v. City of Montreal*, Coutlée's Digest, p. 1105). In the reference *re Waters & Water Powers* (2) documents printed in the case were ordered struck out upon verbal application at the hearing.

As already stated, the motion will accordingly be dismissed with costs, including those already reserved by the registrar.

*Motion dismissed with costs.*

(1) (1884) 11 S.C.R. 156.

(2) [1929] S.C.R. 200.