ENCROACHMENTS ON THE STATUTE OF FRAUDS.

If one were to aver that the first section of the Statute of Frauds (R.S.O. 1927, Cap. 131)—undoubtedly the most important section of the Statute—was practically abrogated in Ontario, the statement would doubtless strike very many members of our Ontario profession as of a distinctly startling nature—yet it seems to the writer that such is the result of a comparatively recent case decided by one of our Ontario Divisional Courts. Section 1 reads as follows:

> Every estate or interest of freehold and every uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments shall be made or created by writing signed by the parties making or creating the same, or their agents thereunto lawfully authorized in writing, and if not so made or created shall have the force and effect of an estate at will only, and shall not be deemed or taken to have any other or greater force or effect.

Case Stated.

The case is *Mercier* v. *Campbell*.[1] It was a County Court case decided by the learned judge of the United Counties of Prescott and Russell in 1906. The facts as stated in the judgment of the Hon. Mr. Justice Riddell, were as follows:

The defendant desiring to purchase the hotel of the plaintiff, an agreement was arrived at, and reduced to writing, as follows:

> Memorandum of agreement entered into this 8th day of November, A.D. 1905.
>
> Between Mrs. Alex. Mercier, of the township of East Hawkesbury, conditionally.
>
> The said Mrs. Mercier agrees to sell the hotel property at Vankleek Hill for the sum of $5,800, consisting of the hotel stand and furnishings, together with double rig, bus, and harness, single buggy and single harness, 20 bushels of oats, and two tons of hay, which said agreement depends upon whether Mr. Carkner takes the farm recently sold to said Campbell back, according to the understanding between Campbell and Carkner.
>
> In case that Carkner takes the farm, as per the aforesaid understanding, then in such event Campbell takes the hotel stand and property without doubt.
>
> And in case Mrs. Mercier refused to carry out the sale of the property as aforesaid, she will have to pay to said Campbell the sum of $300.

[1] 14 O.L.R. 639.

And in said case Campbell refuses to carry out the part assigned to him in accepting the title to said property, he will have to pay Mrs. Mercier a like sum of $300.

Campbell is to make a deposit of $500 to bind the bargain when McInnes makes the writings.

And for the due fulfilment of this agreement, each of said parties hereby bind themselves and legal representatives.

In witness whereof the said parties to these presents have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of (Sgd.) JOHN SHIELDS.

(Sgd.) PHILOMENE MERCIER. By her agent, his (Sgd.) ALEXANDER X. MERCIER. mark.

(Sgd.) FRED. CAMPBELL.

The defendant insisted on the term that if for any reason the plaintiff did not carry out her agreement to sell, she should pay him $300; the plaintiff agreed to do so, and to have a clause inserted in the agreement accordingly, upon condition that the defendant should make a similar agreement on his part. This accounts for the clauses in the agreement providing for the payment of $300 under certain circumstances.

The condition that Carkner should take back his farm was fulfilled, but the defendant refused to accept the title or do anything toward carrying out the purchase.

The plaintiff did not attempt to enforce the agreement by an action for specific performance, but brought an action in the county court for the $300.

The County Court Judge decided (1) that the contract for the sale of the land was not enforceable, by reason of the provisions of the Statute of Frauds; and (2) that, as the agreement to pay the sum of $300 was in the same contract, and an alternative agreement, it could not be enforced.

The case was appealed to a Divisional Court composed of the Honourable Justices Falconbridge, Britton and Riddell. That Court reversed the original judgment, and held that although a part of a contract for the sale and purchase of land may not be binding under the Statute of Frauds, another part of it, if in the alternative and distinct from the agreement to purchase—e.g., that either party will pay to the other a named sum if he does not fulfil his agreement to sell or purchase—may, on his refusal to do so, be enforced against the party refusing.

The main judgment giving reasons and citing authorities was delivered by the Honourable Mr. Justice Riddell; Chief Justice Falconbridge concurred and Mr. Justice Britton delivered a short judgment agreeing in the result.

Effect of Decision.

It will be observed that this was tantamount to holding that the first section of the Statute of Frauds may be evaded by anyone who goes the right way about it, and that practically any real estate transaction may be completed by word of mouth.

For instance, A agrees verbally to purchase a parcel of real estate from B for $25,000.

They add the further verbal agreement that if either party backs out he shall pay the other $25,000. Apparently, under the decision in question, the former agreement is void under the Statute but the latter valid. The object of the parties is thus accomplished, without any recourse to writing—in the teeth of the Statute.

The writer, being of the opinion that the decision of the Divisional Court was questionable, ventured, with all deference, to express that view in an article in *The Canadian Law Journal*.[2] In that article the writer referred to the aspect of the matter now under discussion as follows:

> In *Lord Walpole* v. *Lord Oxford*,[3] for instance (where the question at issue related to the validity of an alleged agreement to make reciprocal wills), we find the Attorney-General (arguendo) expressing himself thus: "The Statute of Frauds is at an end if under the name of an agreement a thing may be made a devise or under the name of a devise an agreement, which is not either according to that statute"; compare also the language of Mr. Justice Lord in *Chase* v. *Fritz*,[4] which decides that an agreement to comply with the statute is within its provisions, and no action can be maintained for its breach. "It would leave but little, if anything, of the Statute of Frauds to hold that a party might be mulcted in damages for refusing to execute in writing a verbal agreement which unless in writing is invalid under the Statute of Frauds." All of which goes to show that the strong feeling both of Bench and Bar has always been that come what may the Statute of Frauds must be preserved inviolate.
>
> Heretofore, moreover, whatever may have been the fate of other enactments too numerous to mention, no one has ever been able to boast that he has succeeded in driving the proverbial coach and horses through this statute.
>
> That being the light in which one has grown accustomed to regard this Act, it must be confessed that the effect of the decision now under discussion

[2] 46 C.L.J. p. 273.
[3] 3 Ves. 410.
[4] 132 Mass. 361.

was calculated to be somewhat startling, as the judgment seems at first sight to convey the impression that the Statute of Frauds may henceforth be practically evaded in all cases by a very simple expedient.

English Opinion.

The point seemed to the writer to be one of considerable importance, if it is considered a matter of moment that the Statute of Frauds continue inviolate. That it was so considered also by leading legal sentiment in England, where the Statute originated, and is still in force, is evidenced by the action taken by the two leading English Law Journals on the subject, both of which, noticing the writer's article in the *Canadian Law Times*, took the matter up.

The *Law Times*[5] reprinted the writer's article and discussed shortly the point raised. In the same month *The Law Quarterly Review*,[6] having also evidently noticed the matter under discussion, expressed itself as follows:

> The *Canada Law Journal* (Toronto) of May 2nd calls attention, rather late, to the law laid down by a Divisional Court in Ontario on appeal from a County Court (whereby the decision was final) in 1907, *Mercier* v. *Campbell* (*supra*). The Court appears to have decided that a liquidated damages clause annexed to an agreement subject to the Statute of Frauds is collateral and separable, and if the statute is not satisfied the agreement can nevertheless be indirectly enforced by suing for the liquidated damages assigned for its non-fulfilment. We agree with the learned commentator that the decision is wrong. The agreement in question was in writing and intended to be formal, but in fact inartificial amateur work. It was for the sale of real estate on a vaguely expressed condition, of which the uncertainty seems to have been the formal defect relied upon. We confess we should have thought it uncertain enough to spoil the agreement even apart from the statute. However, the agreement was in fact admitted in the Divisional Court to be not enforceable by reason of the statute, but otherwise certain enough to support an action. In the body of the same document two short paragraphs were added to the effect (the exact words are not material) that either party refusing to perform his part of the agreement should pay the other $300. The action was brought by the vendor to recover that sum from the purchaser for non-performance. In the County Court the judge said (*ex relatione* the writer in the Canadian Law Journal): "This is an attempt to introduce a most startling principle. It amounts to this; that any contract within the Statute of Frauds, however informal it may be, may be the foundation of an action at law for damages, provided the parties have beforehand fixed and agreed upon what sum shall be recoverable in case of breach thereof. . . . A stipulation in a contract as to liquidated damages cannot alter the nature of such damages nor indirectly validate a void agreement. Such stipulation must stand or fall with the contract itself." This appears to us

[5] 129 L.T. 223.
[6] 26 L.Q.R. 195.

very sound, and we find no answer to it in the leading judgment in the Divisional Court, per Riddell, J., save the bare assertion that the promise to pay $300 is a distinct and alternative agreement. It seemed clear to the learned judge that these reciprocal promises are severable from the body of the agreement of which, as a document, they form part. To us it seems clearly otherwise. Here is no more a separate contract than in the penalty of a bond, if the agreement be read as a whole, as every instrument should be, to arrive at its true intent. No doubt collateral agreements have been held enforceable in many cases; but before such authorities become applicable we must be satisfied that the agreement in question is really collateral, and this is the point about which the Court says least.

A large number of cases are cited, mostly American which we do not profess to examine. But the English cases most nearly in point are easily distinguished. *Jeakes* v. *White*[7] was really this: "In consideration that I investigate your title with a view to a loan, will you pay my costs in any event?" *Boston* v. *Boston*[8] comes to this: "If you buy Whiteacre I will repay you the purchase-money." In neither case is there any contract for an interest in land at all; no one is bound to convey or to buy. We hope the doctrine of *Campbell* v. *Mercier* will be reconsidered by some Court of higher authority.

The matter therefore stands in that position. It seems to the writer that the statement made at the opening of this article is fully justified, and that in the absence of a decision overriding the decision in question, or of legislative action, the section in question must be looked upon as so vitally emasculated as to be virtually abolished in Ontario. It is no doubt the fact that many able lawyers have expressed the opinion that the Statute of Frauds has served its purpose and were better repealed. On the other hand the vast preponderance of eminent legal opinion coincides with the view expressed by Chief Justice Lord Kenyon in *Chater* v. *Beckett*[9]:

> I lament extremely that exceptions were ever introduced in construing the Statute of Frauds; it is a very beneficial statute, and if the Courts had at first abided by the strict letter of the act it would have prevented a multitude of suits that have since been brought.

But if it is desired to retain it in its pristine efficacy the question arises whether it would not be desirable that the Legislature deal wth the matter.

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[7] 6 Ex. 873, 86 R.R. 527.
[8] [1904] 1 K.B. 124 C.A.
[9] 7 T.R. 201 at p. 204.