UPPER CANADA COLLEGE (DEFENDANT)..... } APPELLANT.

1920
*Dec. 1.
*Dec. 17.

AND

F. J. SMITH (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Action—Commission—Statute of Frauds—Leave to amend—6 Geo. V., c. 24, s. 19 (Ont.); 8 Geo. V, c. 20, s. 58 (Ont.)

By 6 Geo. V, ch. 24, sec. 19 amended by 8 Geo. V, ch. 20, sec. 58, sec. 13 of the Ontario Statute of Frauds, R.S.O. [1914] Ch. 102 was enacted as follows:—"No action shall be brought to charge any person for the payment of commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

Held, Idington J. dissenting, that this enactment is not retrospective and does not bar an action to recover commission under a contract made before it came into force. Opinion of the Appellate Division (48 Ont. L.R. 120) and of the trial judge (47 Ont. L.R. 37) overruled on this point.

Judgment of the Appellate Division (48 Ont. L.R. 120), allowing the pleadings to be amended and damages claimed for breach of contract, affirmed, Idington J. dissenting.

Per Duff J.: The Appellate Division should have allowed the appeal and refused the motion for dismissal of the action. No amendment was necessary, the pleadings as they stood being sufficient.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the judgment at the trial (2) in favour of the defendant but allowing the plaintiff to amend his statement of claim if he wished.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 48 Ont. L.R. 120. (2) 47 Ont. L.R. 37.

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The plaintiff sued for a commission on the price of land sold through his efforts and the only question raised on the appeal was whether or not the Act 6 Geo. V, ch. 24, sec. 19, amended by 8 Geo. V, ch. 20, sec. 58, which is set out in the head-note applied in the case of a contract entered into before it came into force. The trial judge held that it did. The judges of the Appellate Division took the same view but the majority held that the action should have been one for damages and allowed the pleading to be amended accordingly.

Arnoldi K.C. for the appellant.

J. F. Lawrence for the respondent.

THE CHIEF JUSTICE—I concur in the opinion of Mr. Justice Anglin.

IDINGTON J.—This is an action for the recovery of a commission on the sale of land under a mere verbal contract which would have entitled the respondents to succeed but for the provisions of the amendment, by 6 Geo. V, ch. 24, sec. 19, and 8 Geo. V, ch. 20, sec. 58, to the Ontario Statute of Frauds, which reads as follows:—

> No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

The parties stated in their respective pleadings their respective contentions and agreed that the issues should be disposed of thereon under Rule 122 of the Ontario Judicature Act.

Upon argument before Mr. Justice Middleton he held that under the imperative requirements of said amendment the respondent's action must fail, and dismissed it accordingly.

On appeal to the Appellate Division they all seemed impressed with the correctness of that decision of the case presented to him but, upon the suggestion of Mr. Justice Riddell that the action had been misconceived and should have been founded upon facts which seemed to imply, in his view, a legal obligation resting upon appellant not to interfere with respondent's right to earn said commission, a judgment was reached, concurred in by the majority that the appeal should be dismissed and leave given to amend and substitute a new action founded upon such implication.

When I say "concurred in by a majority" it is to be observed that one of the three constituting the majority did so hesitatingly.

The others expressed their view by the opinion written by Mr. Justice Masten in which the Chief Justice of the Exchequer Division concurred, holding that the case as presented had been properly decided, but apparently assented to the permission to amend should that be made within ten days, and default thereof, the appeal and action should be dismissed with costs.

No such amendment has been made and the case has been argued before us upon its original footing.

We are always reluctant to interfere with mere matters of procedure in the courts below, but is this proposed alteration of the record a matter merely of procedure? I think not in light of the fact that respondent has not accepted what has been proffered.

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The amendment, if made, would only result in the trial of an action for damages upon the implication of contract and breach thereof, which never could result in any substantial damages.

How can there be substantial damages for breach of an implied contract upon which, in the ultimate result, the respondent could not shew that he had lost anything because he was only deprived of the possibility of acquiring a result upon which in law he could never recover?

I think this cause, in any form it is put, is hopeless in light of the imperative requirements of the above quoted amendment, and hence that this appeal should be allowed with costs here and below, and the judgment of the learned trial judge be restored.

DUFF J.—The principle which in my judgment governs this appeal can be stated in the language of Willes J. delivering the judgment of the Exchequer Chamber and speaking on behalf of a court of six in *Phillips* v. *Eyre* in 1870 (1). The passage is as follows:—

> Retrospective laws are, no doubt, *prima facie* a questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. "*Leges et constitutiones futuris certum est dare formam negotiis non ad facta praeterita revocari; nisi nominatum et de praeterito tempore et adhuc pendentibus negotiis cautum sit.*" Accordingly, the court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature.

I think the case falls within the principle because, 1st, the considerations upon which that principle rests apply to their full extent to the statute before us and 2nd, the conclusion is powerfully supported by the decisions of the courts in cases in which the principle has been applied.

(1) L.R. 6 Q.B. 1, at page 23.

The well known passage may be recalled in which Lord Coke (2 Inst. 292) lays it down that it is

a rule and law of Parliament that regularly *nova constitutio futuris formam imponere debet non praeteritis*

and the rule that statutory enactments generally are to be regarded as intended only to regulate the future conduct of persons is, as Parke B. said in *Moon* v. *Durden*, in 1848 (1),

deeply founded in good sense and strict justice

because speaking generally it would not only be widely inconvenient but

a flagrant violation of natural justice

to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.

The plaintiff had a contract with the defendants. Under that contract he was entitled, upon the performance of certain conditions, to be paid by them a certain sum of money. He was entitled also to have them refrain from taking steps which would prevent him earning his right to be paid by hindering him in the performance of the conditions. The effect of the statute construed, as we are asked to construe it, on behalf of the defendant, was to enable the defendants to refuse to pay, to refuse to perform their obligations under this contract because the plaintiff could never acquire a right to bring an action upon it unless the defendants consented to sign a memorandum complying with the provisions of the statute. It is quite true that the statute does not in terms declare such a contract to be void but the effect of taking away the

(1) 2 Ex. 22, at pages 42 and 43.

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right to bring an action is that practically as regards the power of the plaintiff to secure the right which the contract gave him according to the law as it then was, the contract is reduced to an abstraction. The plaintiff's right at the time of the passing of the Act was a valuable right, a right capable of being appraised in money; after the passing of the Act it became, if the defendant's construction is the right one, deprived of all value. It is not of any importance that the right of action had not accrued when the statute was passed, for

> words not requiring a retrospective operation so as to affect an existing status prejudicially ought not to be so construed.

Main v. *Stark* (1), in 1890.

The application of the principle is disputed on two grounds: 1st, and this is the ratio of the judgment of Mr. Justice Middleton, it is said that the statute is a statute relating to procedure and the case therefore falls within the rule thus expressed by Lord Penzance, then Wilde B. in his judgment in *Wright* v. *Hale*, (2),

> but where the enactment deals with procedure only unless the contrary is expressed the enactment applies to all actions whether commenced before or after the passing of the Act,

and the 2nd: It is said that the language of the statute sufficiently expresses the intention of the legislature that it should govern all actions without exception begun after the date fixed by the statute itself for the commencement of its operation.

To consider first the language of the statute. As Parke B. said in *Moon* v. *Durden*, (3), the rule is "one of construction only" and

> will certainly yield to the intention of the legislature;

(1) 15 App. Cas. 384, at page 388, per Lord Selborne.

(2) [1860] 6 H. & N. 227, at page 232.

(3) 2 Ex. 22, at pages 42 and 43.

and that intention may be manifested by express language or may be ascertained from the necessary implications of the provisions of the statute, or the subject matter of the legislation or the circumstances in which it was passed may be of such a character as in themselves to rebut the presumption that it is intended only to be prospective in its operation. Examples might be multiplied in which judges of very high authority have said that the intention to affect prejudicially existing rights must appear from the express words of the enactment, e.g., by Fry J. in *Hickson* v. *Darlow*, (1), at page 692,

> they are not to have a retrospective operation unless it is expressly so stated.

And even more numerous instances might be adduced of dicta enunciating the doctrine that the intention must appear from the words of the statute itself.

> The principle is one of such obvious convenience and justice that it must always be adhered to in the construction of statutes unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively.

Rolfe B. in *Moon* v. *Durden* (2), at page 33. In *Midland Rly. Co.* v. *Pye*, in 1861, (3), at page 191, there is a passage in the judgment of Erle C. J. approved by the Privy Council in *Young* v. *Adams* (4), at page 476. It is in these words:—

> Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation unless the intention of the legislature that it should be so construed is expressed in plain and unambiguous language; because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment.

(1) [1883] 23 Ch. D. 690.
(2) 2 Ex. 22.
(3) 10 C.B.N.S. 179.
(4) [1898] A.C. 469.

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Again in *Perry* v. *Skinner*, in 1837 (1), Parke B. in a passage approved in the last cited case says that

> the law will not give retrospective effect to any Act of Parliament unless the words are manifest and plain.

The foundation of the rule being, as Lord Coke says that it is a

> rule and law of Parliament that regularly *nova constitutio non praeteritis "formam imponere debet,"*

this practice of Parliament itself would seem to be an adequate justification for the practice of the courts in restricting the application of statutes to the future unless the intention that they are to have a wider effect is perfectly plain.

Decisions seemingly inconsistent with this principle may generally be explained as having proceeded from the view that either the subject matter or the circumstances of the legislation excluded the application of the consideration of justice and convenience upon which the practice of Parliament is based. In *Cornill* v. *Hudson*, (2), for example, the court had to decide the question whether section 10 of the Mercantile Amendment Act of 1856, providing that the limit of the Statute of James should not be extended by reason of a person, in whom the right of action was vested, being at the time the cause of action accrued, beyond the seas or in prison. Lord Campbell in delivering the judgment of the Court said:—

> The intention was to prevent actions thereafter to be brought whether on past or future transactions. Does that tend to injustice? I see none. It only carries out what was probably the intention of the legislature, that persons should not, by merely remaining abroad, now that travelling is so easy and directions are so readily transmitted, be enabled indefinitely to prolong the time within which they may commence their actions. The period might extend to fifty years. Then

(1) 2 M. & W. 471.

(2) [1857] 8 E. & B. 429.

as to imprisonment. An imprisonment of six years for crime is extremely rare in this country: persons might often commit the grossest injustice by remaining voluntarily in prison to keep alive the right of action. The legislature intended to prevent this vexatious prolongation of the right. I see no injustice in this intention, which may fairly be collected from the words of the 10th section.

On the other hand in *Jackson* v. *Wooley*, in 1858 (1), at pages 787-8, the Court of Exchequer Chamber held that section 14 of the same Act should not be applied in such a way as to deprive the plaintiff of a right of action existing at the time the statute was passed and the rule of construction laid down by Lord Cranworth then Rolfe B. in *Moon* v. *Durden* (2), at page 33, quoted above was approved. Lord Hatherley L.C., *Pardo* v. *Bingham* in 1869 (3), at page 740, seems to have thought that *Cornill* v. *Hudson* (4), had been overlooked by the judges who decided *Jackson* v. *Woolley* (1), but the report shews that *Cornill* v. *Hudson* (4), was cited before the Exchequer Chamber; and in *Williams* v. *Smith*, in 1859 (5), at pages 563-4, it was stated by Erle and Crompton JJ. that all the judges of the King's Bench (the judges who decided *Cornill* v. *Hudson* (4)) agreed with the opinion of the Exchequer Chamber and Crowdy J. explicitly adopted the passage quoted above from the judgment of Rolfe B. in *Moon* v. *Durden* (2). Singularly Lord Hatherley does not refer to *Williams* v. *Smith* (5).

West v. *Gwynne*, a decision of the Court of Appeal in 1911 (6) is another case in which the point of view exemplified by the judgment of Lord Campbell in *Cornill* v. *Hudson* (4) dictated the opinion of the Court and it was held that the general

(1) 8 E. & B. 778.
(2) 2 Ex. 22.
(3) 4 Ch. App. 735, 740.
(4) 8 E. & B. 429.
(5) 4 H. & N. 559.
(6) [1911] 2 Ch. 1

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words of a statute passed for the purpose of correcting a state of law lending itself to grave abuse should not be restricted for the purpose of enabling people to exercise their legal rights unreasonably or oppressively from the vantage ground of the *apex juris*. Emergency statutes passed during the war providing for the suspension of particular remedies and intended only to be measures of temporary duration (see *Welby* v. *Parker* (1)), have been held to apply to existing contracts and securities on the ground that the language was clear and that the object of the legislation would otherwise be defeated.

Now coming more precisely to the language of the statute before us, there is one peculiarity of it which brings it within the scope of judicial comment of high authority, namely, the fact that the words "shall be in writing" point to a writing to be brought into existence after the passing of the Act. Because of the corresponding language of the Statute of Frauds, Pratt B. said, in *Moon* v. *Durden* (2), at page 27, that the

> form of the condition on which the right to bring an action was made to depend imported that future agreements alone

were struck at; and Rolfe B. in his judgment delivered in the same case at page 36 expressed the opinion quite decidedly that the previous decision in *Towler* v. *Chatterton* (3), was open to criticism on the ground that the similar language in Lord Tenterton's Act

> points to a writing to be signed by the parties * * that is to future acts only.

And the form of this phrase appears to be a complete answer to the suggestion made by Mr. Arnoldi that the postponement of the date of the coming into

(1) [1916] 2 Ch. 1. (2) 2 Ex. 22.

(3) 6 Bing. 258.

operation of the statute is in itself a ground for thinking that it is to have a retrospective effect. As to this point, moreover, it could have little weight in relation to the bearing of the statute upon *negotia pendentia* in respect of which, of course, a cause of action might not accrue until after the date named.

I come now to the first mentioned ground upon which the appellant relies, the ground upon which Mr. Justice Middleton proceeded. Is this a statute predudicially affecting rights as contemplated by Lord Coke's canon or is it a statute relating to procedure only within the rule stated by Lord Penzance. The last mentioned rule rests upon the simple and intelligible reason stated by Mellish L. J. in *Republic of Costa Rica* v. *Erlanger*, in 1876 (1), at page 69, in these words:—

> No suitor has any vested interest in the course of procedure, nor any right to complain if during the litigation the procedure is changed provided, of course, that no injustice is done.

True, in the application of this rule difficulties and differences of opinion frequently arise. In *Wright* v. *Hale*, (2), already referred to, it was held that a statute enabling a judge to deprive the plaintiff of costs in a case in which but for the statute he would have had an unqualified right to receive costs, was a statute relating to matter of procedure only (23-24 Vict. c. 126, s. 34); but in a subsequent case, *Kimbray* v. *Draper*, in 1868 (3), Cockburn C. J. and Blackburn J. used language indicating that in their view the decision in *Wright* v. *Hale* (2) was not a proper application of Lord Penzance's principle.

(1) 3 Ch. D. 62 (2) 6 H. & N. 227.
(3) [1868] L. R. 3 Q. B. 160.

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The rule, of course, does not imply that all new laws prejudicially affecting remedial rights are *prima facie* retrospective. Both Lord Penzance and Mellish L.J. used very guarded language, the former limiting the application of the rule to statutes which affect procedure alone and the latter excluding it where the effect of applying it would be to make the statute an instrument of injustice. It seems too obvious for argument that a statute declaring contracts enforceable by the usual method, (that is to say by action) for the breach of which either party may recover damages, to be no longer enforceable by action so that the parties have no longer any legally enforceable right under such contracts, is a statute which, if our language is to have any relation to the facts of the economic world, abrogates or impairs rights just as a statute taking away property does. A right in the legal sense, not only in the common language of men but in the language of common lawyers everywhere, connotes a right which the courts will protect and enforce by some appropriate remedy.

This may be illustrated by a reference to statutes giving or taking away a right of appeal. A right of appeal is, of course, a remedial right and the courts have had to consider frequently the question whether a statute giving or taking away a right of appeal should *prima facie* be construed as affecting the parties to pending litigation. If such statutes are to be regarded as regulating procedure only within the meaning of this rule, then prima facie their application would not be restricted to proceedings subsequently instituted. Speaking broadly, the courts have persistently refused to take this view of such statutes; they have almost uniformly been held not to

fall within the category of statutes relating to procedure only on the reasoning expressed in these words by Lord Macnaghten in *Colonial Sugar Refining Co.* v. *Irving* (1), at page 372.

> On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

There is however a group of authorities, which in this connection merits some discussion—cases relating to the construction of statutes dealing with the limitation of actions.

First, a word as to the decisions under the statute of William IV. The language of section 8 of 3 & 4, Wm. IV, ch. 27, was held to be retrospective. *Jukes* v. *Sumner*, in 1845 (2); *Angell* v. *Angell*, in 1846 (3). That section is declaratory in its terms and was said by Parke B. in the first mentioned of these cases speaking on behalf of the Exchequer Chamber to effect a "parliamentary conveyance." In Doe d. *Evans* v. *Page* (4) it was held by the Court of King's Bench that section 7 of the Act was not retrospective.

In *Towler* v. *Chatterton* (5), it was held that 9 Geo. IV, ch. 14 (Lord Tenterden's Act) prevented the plaintiff recovering in an action brought after the

(1) [1905] A.C. 369.
(2) 14 M. & W. 39.
(3) 9 Q.B. 328.
(4) 13 L. J. Q. B. 153.
(5) 6 Bing. 258.

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passing of the Act based upon an oral promise made before the passing of the Act but six months after the cause of the action first accrued. The decision there rested upon the fact that an express provision of the statute postponed the operation of it for a period of seven months after the date of its passing and this provision, it was held, enabling plaintiffs to protect themselves by commencing their action before the Act should take effect removed all possibility of the mischief which the canon was intended to prevent. With this decision Rolfe B. disagreed. *Moon* v. *Durden* (1). The same kind of question arose in *The Queen* v. *Leeds and Bradford Rly. Co.* in 1852 (2), where the Court of Queen's Bench had to consider a statute imposing a limitation of six months in respect of certain proceedings before a justice of the peace which provided that the enactment should not come into force until the expiration of 7 weeks after its passing. The Court held the statute to apply to proceedings taken after the passing of the Act in respect of a ground of complaint which had arisen before; but Lord Campbell is reported to have said in giving judgment

> if it had been enacted that the provisions of the statute should come into operation immediately I should have said that there was a hardship in their being construed retrospectively and I should have been unwilling so to construe them.

Crompton J. added

> all the conditions of the enactment might be carried out without unjustly excluding any remedy for existing complaints.

Two decisions both reported in 8 E. & B. illustrate the manner in which the courts have dealt with such statutes. In *Jackson* v. *Woolley* (3), the Court of

(1) 2 Ex. 22. (2) 18 Q.B. 343.
(3) 8 E. & B. 784.

Exchequer Chamber had to consider the effect of sec. 14 of the Mercantile Amendment Act of 1856. The precise point to be determined was whether (payments having been made within six years before suit by a co-contractor of the defendant and before the passing of the Act) the effect of that action was to deprive the plaintiff of his right of action. The Court, (Williams J., Martin B., Willes J., Bramwell, B., Watson B., and Byles J.) held that such operation could not be given to that section without offending against Lord Coke's canon. The other case is *Cornill* v. *Hudson* (1) already discussed.

The combined effect of these two decisions apparently is that a statute dealing with the subject of time limit upon actions is not to be given a retrospective effect and is not to be applied in such a way as to deprive the plaintiff of a right of action which he had at the time when the statute was passed unless the court can clearly see from the provisions of the statute that such was intended to be the effect of it or unless the circumstances in which the statute was passed shew that no injustice of the kind struck at by Lord Coke's maxim would result from giving such operation to it. The last of the relevant authorities dealing with statutes on this subject is *The Ydun* (2) in which it was held that the Public Authorities Protection Act, 1893, (prescribing a time limit of six months for actions against public authorities and imposing a liability to costs as between solicitor and client upon the unsuccessful plaintiff in any such action) was an answer to an action commenced after the passing of the Act and after the expiration of the period of six months limited by the statute. The trial judge, Jeune P., seemed to think the language of the Act too clear to admit of the

(1) 8 E. & B. 429.

(2) [1899] P. 236.

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application of any rule of construction but proceeded to say that it was a case of a statute relating to procedure and that, at all events, there was no hardship because of the fact that some weeks had elapsed between the passing of the Act and the date on which it was to come into force. In the Court of Appeal A.L. Smith L.J. and Vaughan Williams L.J., treated the Act as an act dealing with procedure only and therefore retrospective. Romer L. J. expressed the opinion that the Act was retrospective but gave no reasons for his opinion.

With great deference, it is questionable, I think, whether the judgments in this case are of such a character as to afford any real guide for the interpretation of another statute in so far as they profess to lay it down that an Act attaching a time limit to the assertion of rights of action is within the rule an enactment relating to procedure only. Such a proposition is difficult to reconcile with *Jackson* v. *Woolley* (1), and it was not competent to the Court of Appeal in 1899 to overrule a decision of the Court of Exchequer Chamber in 1858. I am not suggesting that the decision in 1899 was an erroneous decision or that the Court of Exchequer Chamber would have decided that case otherwise. I am inclined to think that the language of the Public Authorities Protection Act points very clearly to an intention that the Act should apply to existing causes of action as well as to causes of action arising after the passing of the Act. But the judgment in the later case cannot, in face of *Jackson* v. *Woolley* (1), be regarded as satisfactorily establishing the general proposition that such statutes are to be regarded as statutes dealing with procedure only and therefore *prima facie* retrospective.

(1) 8 E. & B. 784.

But a complete answer to all the reasoning based upon these decisions touching legislation upon limitation of actions is afforded by the decisions on the 4th section of the Statute of Frauds. The language of the statute now under consideration, so far as relevant to the present question, reproduces the language of that section almost *ad verbum*; and if a decision upon one statute can ever be a conclusive authority for the construction of another statute these decisions upon the Statute of Frauds if not overruled would appear conclusive here. Of these there are two: *Helmore* v. *Shuter* (1), and *Ash* v. *Abdy* (2). The first is a decision of the Court of King's Bench, the second of Lord Nottingham L.C. Both were decided in 1678. The second is never cited and its value as an authority, for the reasons given by Lord Campbell in the well known passage in vol. 4, Lives of the Chancellors, p. 271, may be slight. But no such doubt rests upon the decision of the King's Bench. In *Moon* v. *Durden* (3), *Helmore* v. *Shuter* (1) was accepted expressly by three of the judges, Platt, Rolfe and Parke BB., as being unquestionably a sound decision. And Rolfe and Parke BB. explicitly treated it as an example of the application of the rule that *prima facie* statutes are to be construed as prospective, which indeed is the ratio upon which the decision was in terms put by the Court that pronounced it. It was accepted as not open to dispute that the rights of promisees would be prejudiced if the statute were held to relate to past promises. The view which appears to have decided Mr. Justice Middleton in declining to apply the principle of these decisions is that the authority of them disappears in

(1) 2 Shower 17.
(2) 3 Swanston 664.
(3) 2 Ex. 22.

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consequence of the distinction which in modern times has been drawn between statutes directly invalidating contracts and statutes forming part of the *lex fori* as only affecting remedial rights; and the learned judge considers that because the effect of a statute is only to bar the

> legal remedy by which a contract might otherwise have been enforced

without directly invalidating the contract, it should for the present purpose be regarded as a statute relating to procedure only. The view of the 4th section which was taken in *Leroux* v. *Brown* (1) is that while contracts affected by it are not immediately vacated, the courts are prohibited from enforcing them, in other words, the right of action is taken away; this distinction was held to be sufficient to support the conclusion that the statute was a part of the *lex fori*. Upon that point the soundness of the decision has been doubted by at least one very eminent judge; see judgment of Willes J. in *Gibson* v. *Holland*, in 1865 (2), at page 8 and 1 *Smith's Leading Cases*, 5th ed., p. 272, and *Williams* v. *Wheeler*, in 1860, (3), at page 312.

It is quite clear, nevertheless, as Middleton J. says, that the rule of *Leroux* v. *Brown* (1), that the 4th section of the Statute of Frauds governs the proceedings on contracts in suit before an English court wherever made, is accepted law. *Maddison* v. *Alderson*, in 1883 (4), and *Morris* v. *Baron* (5). And it is quite true, also, that Lord Blackburn in *Maddison* v. *Alderson* (4), seems to say that the effect of the 4th section of the Statute of Frauds is only to prescribe certain indispensable evidence "when it is sought to

(1) 12 C.B. 801. (2) L.R. 1 C.P. 1.
(3) 8 C.B.N.S. 299. (4) 8 App. Cas. 467.
(5) [1918] A.C. 1.

enforce the contract." It may be doubted whether Lord Blackburn was for the moment adverting to the decisions in which (as Willes J. observed in *Williams* v. *Wheeler* (1), at p. 312, and in *Gibson* v. *Holland* (2) at p. 9, it had been held that the existence of the memorandum at the time of the commencement of the action is a condition of the right to sue, a rule as Lindley L.J. said in *In re Hoyle* (3), at page 97, is "founded upon the words of the statute;" and Lord Selborne, at all events, at p. 474 ascribes to the statute the wider effect of "barring the legal remedies" which but for the statute might have been available.

I will not repeat what I have said above in answer to the contention that a statute abrogating a right of action which otherwise a party to a contract might have asserted is not a statute prejudicially affecting an "existing legal right or status" but an enactment relating merely to procedure. With great respect, I think for the reasons mentioned it is one thing to affirm that a statute is a part of the *lex fori* but to conclude that it is consequently retrospective as relating to procedure only involves a *non sequitur*. The appeal ought therefore to be dismissed.

But I am unable to concur with the view of the majority of the Court that the judgment of the court below is the right judgment. The appeal from the judgment of Middleton J. ought, in my opinion, to have been allowed and the defendant's motion to dismiss the action dismissed with costs.

Two paragraphs in the judgment of Mr. Justice Riddell give the grounds upon which the Appellate Division proceeded:—

(1) 8 C.B.N.S. 299. (2) L.R. 1 C.P. 1.
(3) [1893] 1 Ch. 84.

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In the view I take of the case the statutes have no bearing: the case has not been placed on the right basis. The real action is not to recover commission at all. Admittedly commission cannot be recovered under the contract between the parties and on its terms, for the money has not been received by the defendant, and therefore it is not payable to the plaintiff on the terms of the contract. *Adlar* v. *Boyle* (1). The real cause of action is damages for breach of the implied agreement on the part of the defendant not to do anything to prevent the payment by the purchaser of the purchase money out of which the plaintiff was to receive his commission. I place this duty on a minimum basis when so expressing it.

The statement of claim alleged facts giving rise to a cause of action at least for damages on the principle stated by Willes J. in *Inchbald* v. *Western Neilgherry Coffee &c. Co.*, in 1864 (2), in a passage cited with the approval of the Judicial Committee in *Burchell* v. *Gowrie & Blockhouse Collieries, Ltd.*, (3), at page 626 in the following words:—

> I apprehend that whenever money is to be paid by one man to another upon a given event, the party upon whom is cast the obligation to pay, is liable to the party who is to receive the money if he does any act which prevents or makes it less probable that he should receive it;

and I have no doubt that the facts disclosed in the statement of claim *prima facie* establish the right of the plaintiff to have the damages measured by the commission he would have been entitled to receive had the business proceeded to its conclusion in the ordinary course. See per Lord Atkinson, *Burchell* v. *Gowrie* (3), at page 626.

I do not discuss the question whether the statement of claim does or does not disclose a cause of action for the commission itself. I think that may be an arguable question; see the judgment of Lord Watson, *Mackay* v. *Dick*, in 1881 (4), at page 270, in addition to the judgment of Willes J. in the case already cited.

(1) 4 C.B. 635.
(2) 17 C.B.N.S. 733.
(3) [1910] A.C. 614.
(4) 6 App. Cas. 251.

I do not pursue the point, it is enough to say the statement of claim (whose function it is not to cast the plaintiff's right of action into formal legal shape but to state the constitutive facts giving rise to the right upon which he relies and to formulate the relief he demands), does state facts constituting a good cause of action and does ask for relief to which, as I have said, he is *prima facie* entitled, namely, the recovery of a sum equivalent to the amount of the commission to which he would have been entitled had matters proceeded in their normal course. True it is commission is claimed as commission and no doubt, if the view of the Court of Appeal be the right one, namely, that a right of action for the commission as such does not arise out of the facts stated, this in that view was not strictly accurate pleading; but there was a claim for "further and other relief" and, with all due respect, I am unable to perceive upon what ground it could be successfully contended that this claim for "further and other relief" would not embrace a claim for the amount of the commission as damages.

We have not been referred to the particular rule in the Ontario Rules of Procedure but no doubt under the Ontario practice as in the other judicature systems a prayer for further or other relief was unnecessary, the court having full power to grant such relief as it might deem to be just in addition to the specific relief claimed, this power being limited by two conditions as Fry J. said in *Cargill* v. *Bower*, in 1878 (1), at page 508, 1st, that the plaintiff is entitled to such relief upon the facts alleged and 2nd, that it is not inconsistent with the relief specifically prayed. It is unnecessary to point out that no such inconsistency

(1) 10 Ch. D. 502.

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could be suggested as between the claim for commission as commission on the principle stated by Willes J. and a claim for damages measured by the amount of the commission which the plaintiff ought to have been allowed to earn. In *Inchbald's Case* (1), the plaintiff claimed payment of the commission as such and the court held that he was entitled not to the full amount of the commission but to the amount which, making allowance for the chances against him, it was probable he would have earned but for the conduct of the defendants.

But apart from all this, I cannot refrain from observing that the defendant's proceeding was a proceeding taken under consolidated rules 122 and 123, and that the point of law raised under the first mentioned rule was strictly limited to this, namely, that the statute was an answer to the action, and that the proceeding before Mr. Justice Middleton was a proceeding taken by consent for the purpose of having that specific question decided under that rule. And indeed as one might have expected in these circumstances the only point raised before Mr. Justice Middleton and the only point dealt with by him, indeed, the only point raised by counsel for the defendants prior to the judgment of the Appellate Division was that specific point.

I assume that, in the proceeding under rule 122, a judge might (according to the Ontario practice) have power to dismiss an action on the ground that the statement of claim disclosed no reasonable cause of action; but that is a power which could not properly be exercised where the facts stated in the statement of claim did disclose a cause of action however inappro-

(1) 17 C.B.N.S. 733.

priate the relief demanded might be unless it should appear that the action was brought solely for the purpose of obtaining some relief which the court had no power to grant, as in *Dreyfus* v. *Peruvian Guano Co.* in 1889 (1).

ANGLIN J.—A curious situation is presented by this appeal. The action is brought on a contract made in 1913, to recover commission on a sale of land. The facts stated (2), disclose rather a cause of action for damages for breach by the defendant of an implied term of the contract sued upon whereby it made the coming into existence of the state of facts on which the plaintiff would have been entitled to payment of the commission sued for impossible. Amongst other defences section 13 of the Statute of Frauds (R.S.O., c. 102), first enacted by 6 Geo. V, c. 24, s. 19, assented to on the 27th of April, 1916, and amended by 8 Geo. V, c. 20, s. 58, was pleaded. That provision is as follows:—

> No action shall be brought to charge any person for the payment of commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing (separate from the sale agreement) and signed by the party to be charged therewith or some person thereunto by him lawfully authorized. This section shall come into force on the 1st day of January, 1917.

The words which I have put in brackets were added by the amendment of 1918.

The applicability of this statutory provision was brought before Mr. Justice Middleton for determination as a point of law, under Ontario Con. R. No. 122. That learned judge, while fully recognizing the general rule excluding retrospective construction,

(1) 41 Ch. D. 151.

(1) 47 Ont. L.R. 37; 48 Ont. L.R. 120.

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(*Gardner* v. *Lucas*, (1), at page 601), on the authority of *Towler* v. *Chatterton* (2), and *Grantham* v. *Powell*, (3), held the statute applicable, notwithstanding that the plaintiff was thereby deprived of a right of action, complete or accruing, existing when it was enacted. *Moon* v. *Durden* (4), and *Gillmore* v. *Shooter* (5), had been relied on by the plaintiff. The learned judge distinguished the former on the ground that by the statute there in question the contracts affected by it were declared null and void, and the latter he held in effect over-ruled by the distinction made in *Leroux* v. *Brown* (6), between statutes which avoid contracts and those that have to do merely with the enforcing of them by action. The statute now before us, says the learned judge,

> bars the legal remedy by which the contract might otherwise have been enforced, and so affords an answer to this action not by any retrospective effect but because it speaks from its date and prohibits the action.

He accordingly directed judgment dismissing the action.

On appeal the Second Divisional Court of the Appellate Division made an order setting this judgment aside and allowing the plaintiff to amend his statement of claim within a stated period, but in default of such amendment being made confirmed the dismissal of the action. The amendment contemplated, as appears from the principal judgment delivered by Mr. Justice Riddell, and concurred in by Clute J., and *sub modo* by Sutherland J., was the substitution of the claim for damages, above indicated, for that to recover commission which, it was thought, must fail because the conditions on which the commission claimed would have become payable (through whose fault is not material) had not been realized.

(1) 3 App. Cas. 582.
(2) 6 Bing. 258.
(3) 10 U.C.Q.B. 306.
(4) 2 Ex. 22.
(5) 2 Mod. 310.
(6) 12 C.B. 801.

The making of this order would seem to imply that the Divisional Court, or at least a majority of the judges composing it, held the view that although the statute invoked would afford a defence to the action as presented it would not be an answer to it if amended as suggested. That was certainly the opinion of Mr. Justice Sutherland, who expressly states his agreement with Middleton J., and, unless it was shared by the learned Chief Justice of the Exchequer Division and Mr. Justice Masten, inasmuch as they also agreed with Mr. Justice Middleton, I find it difficult to understand their concurrence in the order allowing the plaintiff to amend.

Counsel for the respondent, however, stated, with the assent of counsel for the appellant, that Mr. Justice Riddell had subsequently intimated that in his opinion the statute was not applicable to the action in either form. That may be what the learned judge meant when he wrote

> in the view I take of the case the statutes have no bearing; the case has not been placed on the right basis.

Counsel for the respondent contended that section 13, if applicable at all, would afford the same defence to the action whether amended as proposed or as originally framed. With great respect for the learned judges of the Divisional Court who appear to have thought otherwise, I share that view. Both actions are based on the contract for payment of commission. Both alike require proof of it in support of the claim made. That proof under the statute, if it applies, must be made in writing and if such evidence be lacking any remedy by action is taken away.

Counsel for the respondent (plaintiff) then stated that the determination of the issue as to the applicability of the statute to the action in either form is

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what his client really desires. But he omitted to give notice of intention to cross-appeal, as prescribed by our rule No. 100, from the portion of the judgment of the Divisional Court which directs the dismissal of the action in default of the amendment allowed being made.

On the other hand the only part of that judgment from which the defendant can appeal is that setting aside the judgment of Middleton J. and allowing the plaintiff to amend. In so far as that order may be regarded as discretionary an appeal from it does not lie. But if the action, in the form which the Divisional Court proposes it should take, would be equally open to the statutory defence invoked by the defendant, the order allowing the amendment could scarcely be upheld as an exercise of discretion. There can be no discretion to direct a futile amendment. It should be assumed that the amendment was allowed only because in the opinion of the court, or a majority of its members, the statute would not preclude the action so amended being maintained. On the questions whether the statute applies to an action based on a pre-existing contract and if so whether the claim, if amended as proposed, will be equally within its purview with that originally preferred, the defendant's appeal may be entertained and, the purpose of a cross-appeal by the plaintiff being thus attained, it probably becomes unnecessary to accede to his request for a dispensation from R. 100.

I am, with great respect, of the opinion that the rule against the retrospective construction of statutes, which is fundamental in English law, *Lauri* v. *Renad* (1), at page 421, applies to this case. In the first place, section 13 of the R.S.O., ch. 102,

is not retrospective by express enactment or by necessary intendment

(1) [1892] 3 Ch. 402.

On the contrary the words

unless the agreement shall be in writing

point rather to future contracts than to those already made. See observations of Baron Platt in *Moon* v. *Durden* (1), at page 30. The negative implication in section 5 of the Interpretation Act should also not be overlooked.

The language of section 13 is the same as that of the fourth section of the Statute of Frauds—

No action shall be brought (whereby) to charge any person, etc., unless, etc.

We have in *Ash* v. *Abdy* (13th June, 30 Car. 2) (2), the view of Lord Nottingham (who states that "he brought the Bill into the Lords' House") that the Statute of Frauds (29 Car. 2) did not apply to an action which though begun after, was brought on a contract made before, its enactment. His Lordship overruled a demurrer based on the statute. It is no doubt to *Gillmore* v. *Shooter* (3) (30 Car. 2, Trin.) that Lord Nottingham refers as

another case in the King's Bench this very term where the same point being specially found was likewise adjudged upon argument.

It was there held that

it could not be presumed that the Act has a retrospect to take away an action to which the plaintiff was then intituled.

Lord Nottingham naively adds

which I was glad to hear of, but said, if they had adjudged it otherwise, I should not have altered my opinion.

Gillmore v. *Shooter* (3) has never been overruled. It is cited in many later cases without a question or adverse comment (e.g., *Re Athlumney* (4), at page 552),

(1) 2 Ex. 22.
(2) 3 Swanst. 664.
(3) 2 Mod. 310; Jones T. 108.
(4) [1898] 2 Q.B. 547.

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and is referred to as authority in such standard text books as Maxwell on Statutes, 6 ed., 384; Craies' Hardcastle on Statutes, 2 ed., 348, and Potter's Dwarris on Statutes, 163; see too 27 Hals. L. of E., No. 305. We thus have that "*contemporanea expositio*" which the oft quoted maxim declares to be "*optima et fortissima in lege.*" (Maxwell, 6 ed., pages 531 *et seq.*)

It was as an addition to the Statute of Frauds, incorporated in the R.S.O. 1914 as c. 102, that the legislation now under consideration was enacted. The same form of words is used as is found in what is perhaps the most important provision of the principal Act. It is not unreasonable to assume, notwithstanding section 20 of the Interpretation Act, that these words were intended to bear the same meaning. *Casgrain* v. *Atlantic & North Western Rly. Co.* (1). At all events the construction put upon the like words used elsewhere in the same statute is perhaps the safest guide to their construction in section 13 (*Blackwood* v. *the Queen* (2); *Cox* v. *Hakes*, in 1890 (3); and authorities dealing with them should be followed rather than decisions upon the language of other Acts however close the resemblance. I therefore abstain from examining numerous decisions upon other statutes in which the same construction as prevailed in the Gillmore and Ash cases was put upon provisions somewhat similar to that of the fourth section of the Statute of Frauds. A collection of them will be found in 27 Hals. L. of E. No. 305, note h.

Towler v. *Chatterton* (4), and *Grantham* v. *Powell* (5), cited by Mr. Justice Middleton, deal with Lord

(1) [1895] A.C. 282, 300.
(2) 8 App. Cas. 82, 94.
(3) 15 App. Cas. 506, 529.
(4) 6 Bing. 258.
(5) 10 U.C.Q.B. 306.

Tenterden's Act, the latter merely following the former. Of *Towler* v. *Chatterton* (1), Baron Rolfe says in *Moon* v. *Durden* (2), at page 36, that

> It is worthy of remark that Lord Tenterden's Act points to a writing to be signed by the parties—that is, to future Acts only; and consequently the decision giving to that section a retrospective effect was not a just one even if in conformity with the most narrow construction of its language.

Some observations on one of the chief factors in the decision of the Towler and Grantham cases will be found in *Re Athlumney* (3), at p. 553.

While *Moon* v. *Durden* (2) may not aid the respondent as much as it would if the action there dealt with had not been begun before the statute came into force, it is of value because *Gillmore* v. *Shooter* (4), is cited by Barons Platt, Rolfe and Parke as authority on the construction of the Statute of Frauds. Baron Parke certainly did not regard the second member of the section of the Gaming Act under consideration in that case—

> no suit shall be brought or maintained in any court, etc.—

as an enactment merely affecting procedure, because he thinks (p. 44) that if it stood alone it would not apply to pending actions. The case of *Knight* v. *Lee* (5), dealing with a similar provision of the Gaming Act of 1892, may also be referred to. Bruce J. there says at page 44,

> Here the plaintiff had a vested right of action acquired before the statute came into force and it cannot be supposed that the statute was intended to take such right away.

(1) 6 Bing. 258.
(2) 2 Ex. 22.
(3) 2 Q.B. 547.
(4) 2 Mod. 310.
(5) [1893] 1 Q.B. 41.

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When carefully considered the foundation of Mr. Justice Middleton's judgment holding the section now under construction applicable to the present action, seems to be that it falls within the exception made, in the case of statutes dealing with procedure, to the general rule prohibiting retrospective construction. The learned judge in his reference to *Leroux* v. *Brown* (1), indicates that he thought the effect of that decision was to bring the fourth section of the Statute of Frauds within that exception. What *Leroux* v. *Brown* (1) actually decided was that as a provision dealing with and affecting merely the remedy for, and not the right created by a contract, the fourth section of the Statute of Frauds forms part of the *lex fori* and as such is applicable to all actions brought in English courts to enforce contracts within its purview wherever made. No doubt Chief Justice Jervis does say that the fourth section "relates only to procedure," but he uses the word procedure in contradistinction to "the right and validity of the contract itself" and probably meant no more than that it formed part of the adjective law In the same sense Maule J. says:

> It is part of the procedure and not of the formality of the contract;

and Talfourd J.

> That section has reference to procedure only and not to what are called by jurists the rights and solemnities of the contract.

"Procedure" in the exception to the rule of construction under consideration is used in a more restricted sense. It has to do with the method of prosecuting a right of action which exists, not with the taking away of such right of action. As Lord Hatherly observes in *Pardo* v. *Bingham* (2), at page 741, referring to section 10 of

(1) 12 C.B. 801. (2) 4 Ch. App. 735.

the Mercantile Law Amendment Act (19 & 20 Vic., ch. 97) which did away with the disability of absence overseas as an answer to the Statute of Limitations (21 Jac. 1, ch. 16).

There is a considerable difference between this case and a case where the right of action is actually taken away.

Although statutes creating new remedies have sometimes been held available to enforce rights which had accrued before they were enacted, *The Alex Larsen*, (1), at page 295; *Boodle* v. *Davis* (2), it is a very different thing to hold that a statute has, in the absence of express provision or necessary intendment, the effect of destroying an existing right of action. The taking away of a right of action is more than mere procedure and a statute which has that effect is *prima facie* within the general rule and not within the exception.

In dealing with Acts of Parliament which have the effect of taking away rights of action,

says Baron Channell in *Wright* v. *Hale* (3), at page 231,

we ought not to construe them as having a retrospective operation, unless it appears clearly that such was the intention of the legislature; but the case is different where the Act merely regulates practice and procedure;

and Baron Wilde adds:

The rule applicable in cases of this sort is that, when a new enactment deals with rights of action, unless it is so expressed in the Act an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act.

This passage from the judgment of Baron Wilde is expressly approved in *The Ydun* (4), at page 245.

(1) 1 W. Rob. 288.
(2) 22 L.J. Ex. 69.
(3) 6 H. & N. 227.
(4) [1899] P. 236.

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The thirteenth section under consideration prohibits the bringing of an action. Therefore, if retrospective, it takes away the right of action itself. It does more than prescribe

what evidence must be produced to prove particular facts,

which Pollock C.B. in *Wright* v. *Hale* (1) describes as a matter of procedure merely. It does not merely regulate the method or the means of enforcing the remedy; it takes the remedy wholly away. This subject is satisfactorily dealt with in Hardcastle on Statutes (Craies, 2 ed.), pages 343-355.

When it is borne in mind that statutes excepted from the application of the general rule because they deal with procedure are held to apply to pending actions unless the contrary intention appears, *R E Joseph Suche & Co., Ltd.*, (2), the decisions with regard to the operation of statutes taking away rights of appeal appear to be in point. Of these perhaps *Colonial Sugar Refining Co.* v. *Irving* (3), may best be referred to. The right to appeal from the Supreme Court of Queensland to His Majesty-in-Council given by the Order-in-Council of June 30th, 1860, was taken away by the Australian Commonwealth Judiciary Act of 1903 and an appeal to the High Court of Australia substituted therefor. This legislation was held not to affect the right of appeal to the King in Council in a suit pending when the Act was passed, but decided by the Supreme Court afterwards. Lord Macnaghten after adverting to the general rule and the exception and to the fact that

the Judiciary Act is not retrospective by express enactment or necessary intendment,

proceeded as follows:—

(1) 6 H. & N. 230. (2) 1 Ch. D. 48, 50.
(3) [1905] A.C. 369.

And therefore the only question is, was the appeal to His-Majesty-in-Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure * * * . There is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

The same view had prevailed in this court in *Hyde* v. *Lindsay* (1), and their Lordships' decision was followed and applied in *Doran* v. *Jewell* (2). If the right to appeal be a right of such a character that its abolition is not a matter of procedure, *a fortiori* the taking away of an existing right to bring an action would seem to be so and the construction of section 13 involving that result

an interference with existing rights contrary to the well-known general principle.

As Baron Parke said in *Moon* v. *Durden* (3), at page 43:

It seems a strong thing to hold that the legislature could have meant that a party who under a contract made prior to the Act had as perfect a title to recover a sum of money as he had to any of his personal property should be totally deprived of it without compensation.

I am for these reasons of the opinion that section 13 of the Statute of Frauds, R.S.O., ch. 102, does not apply to this action either as originally framed or as it is proposed that it should be amended.

Rule 122, under which the proceeding now in appeal was instituted by consent, provides for the disposition before the trial of points of law raised on the pleadings. It is common ground upon the pleadings that

(1) 29 Can. S.C.R. 99. (2) 49 Can. S.C.R. 88.
(3) 2 Ex. 22.

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the defendants have received only $244,000 (in payment in full for one parcel) of the purchase moneys payable under the agreement for sale in respect of which commission is claimed by the plaintiff and that the plaintiff has been paid $6,100, which exceeds the proportion of commission payable to him in respect of the moneys so actually received by the defendants. It is also common ground that as to the rest of the property the agreement for sale has been rescinded by mutual consent of vendor and purchaser. By the third paragraph of the statement of claim the plaintiff avers that the sum of $25,000 which he was to receive as a commission for affecting the sale, was made payable proportionately as the purchase money for the property should be paid. An issue of law is thus presented involving the plaintiff's right to maintain this action in the form in which it was launched, i.e., to recover the balance of the $25,000 commission. If of the opinion that the position taken in the defence, that under the stipulation of the contract admitted in the third paragraph of the statement of claim, commission cannot be recovered on unpaid purchase money, is sound, it was within the discretion of the Appellate Divisional Court, instead of dismissing the plaintiff's action because upon the facts stated by him it was wrongly conceived, to permit an amendment of the statement of claim. The exercise of that discretion, as already stated, is not a proper subject of appeal to this court. But, in so far as it may be appealable by the defendant I should incline to support the order made. I should have thought the allowance of such an amendment under the circumstances almost a matter of course in modern practice. There is no appeal by the plaintiff against the holding that he had misconceived his remedy.

I am by no means so well satisfied, however, that, as Mr. Justice Riddell puts it,

> the amount of money he (the plaintiff) would have received had the defendants not broken their implied contract with him, will give a very satisfactory measure of damages.

In the third paragraph of the statement of defence it is alleged that it was expressly stipulated and agreed by the plaintiff that in the event of the contract of sale being rescinded as to any portion of the lands embraced in it for any cause whatever, all right and claim of the plaintiff to commission in respect of such lands should be thereby determined and the contract therefor rescinded. This allegation is denied in the reply. The existence of the implied term of which the breach would be alleged in the action, if amended as proposed, is thus in issue. Moreover, other circumstances beyond the control of the defendants might have resulted in the purchase moneys not being paid in full. In this connection reference may be had to the recent decision of this court in *Gold* v. *Stover* (1), But these are questions with which we are not presently concerned. They will have to be considered when the action comes to trial.

The appeal should be dismissed with costs.

BRODEUR J.—I concur with my brother Anglin.

MIGNAULT J.—If the construction of the 13th section of the Statute of Frauds, R.S.O. 1914, ch. 102, added by 6 Geo. V, ch. 24, as amended by 8 Geo. V, ch. 20, be still open to us, in view of the decisions under section 4, my opinion would be that this section

(1) 60 Can. S.C.R. 623, 632.

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does not apply to actions brought after the statute on agreements for the payment of a commission on the sale of real property made before its enactment and which, before this statute, did not require to be in writing. This section reads as follows:

> No action shall be brought to charge any person for the payment of a commission or other remuneration for the sale of real property unless the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorized.

If the question of the meaning of this provision be not concluded by authority, I would have no hesitation in saying that, in my opinion, it applies to subsequent agreements only. The language of the statute clearly shows this.

> No action *shall* be brought * * * unless the agreement * * * *shall* be in writing.

I cannot conceive this language being applied to prior agreements, for if that had been the intention, the natural language would be "unless the agreement *is* in writing." The word "shall" refers to the future, and is used in connection with both the bringing of the action and the form of the agreement. If saying that the agreement *shall* be in writing means past as well as future agreements, then stating that no action *shall* be brought unless the agreement *shall* be in writing would bar actions validly brought before the amendment but not decided at the time it came into force. Therefore if the appellant's counsel be right in applying the 13th section to an agreement made before, where the action is brought after, the statute, he would also be right in extending it to actions brought before the statute on a parol agree-

ment for commission, where the action was still pending at the time of the enactment, that is to say to pending cases. I cannot think that such was the intention of the legislature.

This is my reading of the statute if its construction be still open to us. My brother Anglin has shewn that it is still open, his quotation of the words of Lord Nottingham in *Ash* v. *Abdy* (1), being especially illuminating. It is with considerable satisfaction, therefore, that I concur in my learned brother's judgment.

I also agree that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Arnoldi & Grierson.*

Solicitors for the respondent: *Lawrence & Dunbar.*

(1) 3 Swanst. 664.