

Full Court.]

MORTON v. JUDGE.

[March 8.

*Contract—Part performance—Accord and satisfaction.*

On the trial of an action brought by plaintiff for balance of price of goods sold and delivered defendant proved an agreement between plaintiff and defendant subsequent to the date of sale whereby defendant, in consideration of the goods sold and delivered by plaintiff, agreed to prepare and deliver to plaintiff a monument or headstone of the value of \$20, and to prepare and deliver to plaintiff a second monument or headstone of the same value at any time when plaintiff required the same. The agreement was carried out in part by the delivery to plaintiff of the first mentioned stone, but the second stone was not delivered in consequence of some difference between the parties as to the size of the stone required.

It was contended for defendant that the agreement was in accord and satisfaction of the plaintiff's claim for goods sold and delivered, and that the plaintiff could only claim under the agreement for damages for breach of contract, and also that as the agreement set out as the consideration for the goods supplied the promise of delivery of the headstones was in writing it could not be varied by parol evidence of any sale, and that the contract was one of barter, not sale. It was contended for plaintiff that the performance of the agreement alone could constitute accord and satisfaction, and that until performance there was no consideration for the agreement, and that the plaintiff could claim under the original cause of action for goods sold and delivered.

*Held*, reversing the judgment of the county court judge and dismissing the action with costs, that the agreement entered into and partly executed was a complete accord and satisfaction of plaintiff's original cause of action, and that the plaintiff's only remedy was for breach of contract, if defendant had not carried out terms of the agreement.

*T. R. Robertson*, for appeal. *J. J. Ritchie*, K.C., contra.

Townshend, J.]

REX v. SWAN.

[May 4.

*Canada Temperance Act—Third offence—Failure to shew commission of offence after information for first offence—Affidavit shewing compliance with statutes properly received—Conviction in Form VI., Dominion Acts, 1888, c. 34, s. 14, sufficient—Omission to state that second and third convictions were for separate offences.*

Defendant was convicted by the Stipendiary Magistrate of the town of Springhill, on the 7th April, 1904, for unlawfully selling intoxicating liquor within said town between the 15th day of March, 1904, and the 5th April, 1904, contrary to the provisions of the second part of the Canada Temperance Act then in force in and throughout the said county of Cumberland, the said conviction being a conviction as and for a third offence against the second part of the Canada Temperance Act. On application