to the defendants, who continued to work the several railways, and after some years introduced for use thereon smaller cars drawn by one instead of two horses, as had been done previously, and with only one man in charge instead of two as on the large cars.

In 1882, the Council of the city passed a by-law (No. 1264) prohibiting the operation of any car within the city limits without two men in charge, one as driver, the other as conductor. The defendants refused to conform to this by-law, and this action was brought to compel defendants to do so, the agreement of 1861 being relied on as warranting that relief.

Held [reversing the judgment of the court below] (1) that the by-law in question was not within the terms of the agreement, its provisions not being aimed at the protection of the public, that term as used in the agreement not including passengers in the defendant's cars, and that it was therefore *ultra vires*; (2) that the by-law was also invalid, as it was an invasion of the domestic concerns of the company.

HIGH COURT OF JUSTICE FOR ONTARIO.

Queen's Bench Division.

Divisional Court.] [June 23.

CLARKE *v.* JOSELIN.

Rectification of contract—When ordered—Evidence—Exchange of mortgages—Liability of assignors.

In order to secure the rectification of an instrument the clearest evidence is required to be adduced: but the court need not stay its hand because one of the parties to the instrument chooses to deny that there is any mistake in it. The writing must stand as embodying the true agreement between the parties until it is shown beyond reasonable doubt that it does not.

If the court, after considering all the circumstances surrounding the making of the instrument, whether it accords with what would reasonably and probably have been the agreement between the parties, gauging the credibility of the witnesses, paying due regard to their interest in the subject matter, and weighing their testimony, is satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, it should order rectification.

The transaction between the plaintiff and defendant was an exchange of mortgages. The plaintiff in assigning his mortgage to the defendant guarded himself against personal liability, but the defendant in assigning her mortgage did not do so, and the plaintiff sued her upon the covenant in her assignment that the mortgage assigned was a good and valid security, alleging that it was not so.

Held, upon the evidence, that the true agreement was that neither the plaintiff nor the defendant should be personally liable in respect of the mortgage which each assigned to the other; and rectification according to such agreement was adjudged.

S. R. Clarke, the plaintiff in person.

J. Reeve, for the defendant.

Divisional Court.] [June 23.

HOUSINGER *v.* LOVE.

Partnership—Judgment against partners—Payment by one—Enforcing against the other—R. S. O. (1887) *c.* 122, *ss.* 2, 3, 4—*Partnership accounts—Statute of Limitations.*

The plaintiff and defendant were partners, and judgment was recovered against them in 1876, by a bank upon certain promissory notes of which they were respectively maker and indorser. The plaintiff paid the judgment immediately after its recovery, took an assignment of it, and in 1886 proceeded to enforce it against the defendant.

The partnership accounts were taken by a referee whose finding, approved by the court, was that the defendant should have paid one-half of the judgment.

Held, that the plaintiff was entitled to that extent to stand in the place of the original judgment creditor, and enforce the judgment against the defendant.

Per ARMOUR, C.J.—The Mercantile Amendment Act, R. S. O. (1887), c. 122, ss. 2, 3, 4, applies to the case of partners. *Small* v. *Riddel*, 31 C. P. 373; *Potts* v. *Leask*, 36 U. C. R. 476; and *Scripture* v. *Gordon*, 7 P. R. 164,