

ment (*Odhams v. Brunning* (1896), 12 Times L.R. 303) was reversed on appeal to the Lords (1896), 13 Times L.R. 65.

The Statute of Frauds is a defence which a litigant need not avail himself of, and there may be litigants who decline to use it as a defence against a just claim; and it appears to me that where, as in this case, it was obvious at the trial that the Statute of Frauds would be a complete defence to the respondents' counterclaim, if they had failed to prove an agreement in writing, and no application for leave to amend was made, the appellants may fairly be assumed to have deliberately refrained from making the application, and should not now be permitted to amend.

Although the respondents' case as to the wages of the checker was not made out very satisfactorily. . . . I am unable to say that the learned trial Judge was clearly wrong in allowing them. It may be that he accepted the excuse given by Browne for not claiming them sooner, and there was evidence that it was part of the agreement made in Toronto that the appellants should pay one-half of the checker's wages.

The only other item allowed was that in respect of the wire unloaded at another wharf, and as to this there was evidence that amply warranted the conclusion that there was no justification for not unloading the wire at the respondents' wharf.

The appeal should be dismissed with costs.

MAGEE, J.A.:—I agree that the weight of evidence leads to the conclusion that there was a written contract for five years. As to the plaintiff company's application to plead the Statute of Frauds against the counterclaim, it is, I think, unnecessary, and, therefore, should not be allowed. The counterclaim alleged a written contract. If the defendants could not prove one, they would need to amend. Having proved one, they did not require, and do not now ask, any amendment. If they were being allowed to amend now in order to do justice, then the plaintiff company should, I think, have liberty also to amend by setting up the statute, which hitherto, as against the defendants' allegation of a writing, was not called for.

MACLAREN, J.A., and LEITCH, J., agreed that the appeal should be dismissed.

Appeal dismissed with costs.