

The alleged repudiation consisted in defendant having written to plaintiff asking for the name of his indorser for the promissory notes which plaintiff was to give for the unpaid purchase money, and saying that he must have negotiable paper. . . .

Defendant did not say that he must have indorsed paper; his statement was that he must have negotiable paper, meaning, as the context shews, paper that he could discount at a bank, and he expressly says that if the bank will take defendant's paper without an indorser "it will be all right." In the next place, in order to determine whether there has been a repudiation, the question to be considered and determined is not whether the conduct of defendant was inconsistent with the contract, but whether his conduct was really inconsistent with an intention to be bound any longer by the contract; and the answer to the question, on the facts of this case, should be that defendant's conduct was not of the latter character; and further that plaintiff did not act upon what defendant did and elect on account of it not to perform the contract on his part.

It was also urged that the resale of the goods by defendant was not warranted, and an amendment was asked to enable plaintiff to set up a new case based upon that view.

It would, I think, serve no good purpose to allow such an amendment to be made, as I would allow it only on the terms of plaintiff paying the costs of the action up to the present time; and it is, I think, the better course to dismiss this action without prejudice to any action which plaintiff may choose to bring based upon the alleged wrongful act of defendant in selling the goods, or for an account of the proceeds of the sale . . . ; and the action will, therefore, be so dismissed, and the dismissal will be with costs.

I must not to be taken to indicate that, in my opinion, any such action, on the facts of this case, is maintainable.

Moss, C.J.O.

JULY 16TH, 1904.

C.A.—CHAMBERS.

SCOTT v. TOWNSHIP OF ELLICE.

*Appeal—Court of Appeal—Leave—Special Circumstances—
Absence of.*

Motion by plaintiff for leave to appeal from order of a Divisional Court, ante 38, dismissing appeal by plaintiff from