

ments of the Statute of Frauds, and that the writing could not be enforced because it was shewn not to be the real agreement, and the real agreement could not be enforced because it was not in writing. Pollock on Contracts, 7th ed. 511; *Price v. Ley* (1863) 4 Giff. 235, and *Green v. Stevenson*, 9 O.L.R. 671, followed.

Plaintiff contended that, if the evidence disclosing terms not inserted in the writing was admissible, he could now amend his pleading and ask for a rectification of the agreement in accordance with the evidence and for specific performance of the agreement thus rectified, relying on *Martin v. Pycroft*, 2 De.G. M. & G. 785, and *Olley v. Fisher*, supra.

Held, distinguishing those cases, and following Fry on Specific Performance, p. 352; Pollock on Contracts, p. 510, 575; *Attorney-General v. Sitwell*, 1 Y. & C. Ex. at p. 593, *Davies v. Fitton*, 2 Dr. & Mar. 232; *May v. Platt* (1900), Ch. 616, and *Woolman v. Hearn*, 7 Ves. 211, that, before there can be rectification of an instrument, there must be clear evidence of a common intention that the instrument to be rectified should contain the whole contract and that the omitted terms were left out owing to fraud, accident or mistake. In other words, if the writing purports to contain all the terms of the bargain but omits some material part thereof and there was no common intention to put the whole bargain into writing, the document cannot be rectified. Specific performance refused.

Robson, for plaintiff. *Hoskin*, for defendant.

Macdonald, J.]

BATES v. CANNON.

[June 22.

Fraudulent preference—Assignments Act, R.S.M. 1902, c. 8, s. 41
—Chattel mortgage—Exemptions.

Action to set aside as fraudulent and void against creditors a chattel mortgage given by one James Speed to the defendant, for a past due indebtedness, less than sixty days before Speed made an assignment to the plaintiff for the benefit of his creditors. At the time of the giving of the chattel mortgage Speed was in insolvent circumstances to the knowledge of the defendant, and there was no doubt that the mortgage was void as against the plaintiff under s. 41 of R.S.M. 1902, c. 8. Some of the chattels covered by the mortgage, however, were such as would be