

shortly afterwards to a third party. This new machinery, having been shipped to fill the order as named, was wrecked in a railway accident while in transit. Plaintiff then served defendants with a notice calling for delivery in four days of the machine ordered under the first agreement, and informing them that, if it was not delivered by that time, the contract would be rescinded. Delivery was not made by the date specified and the plaintiff purchased an engine from another company.

Held, 1. The new agreement entered into between the parties, though, by reason of the Statute of Frauds it was one that could not be enforced, had the effect of discharging the written one, and the plaintiff could neither enforce the new agreement nor recover damages as for a breach of the written one. *Goss v. Lord Nugent*, 5 B. & Ad. pp. 55 and 56; *Morgan v. Bain*, L.R. 10 C.P. 15, and *Ogle v. Lord Vane*, L.R. 3 Q.B. 272 followed.

2. The plaintiff was entitled to recover from the defendants the actual value of the old engine which they had taken and sold, but not necessarily the amount at which it had been taken over, as that appeared to have been a high valuation allowed in order to put through a sale of new machinery.

Verdict for plaintiff for \$900 and interest and costs of suit.

Haggart, K.C., for plaintiff. *Howell*, K.C., and *Metcalfe*, for defendants.

Perdue, J.]

JOHANNISON v. GALBRAITH.

[June 15.]

Arbitration and award—Setting aside award—Pleading—Allegation that award relied on is invalid—King's Bench Act, Rules 773-775—9 & 10 Wm. III. c. 15.

The plaintiffs sued for the balance due on a contract for the erection of a house. The defendant pleaded a submission to arbitration of all matters in difference, an award made thereunder, and payment in accordance with the award. Plaintiffs then amended the statement of claim setting up that the award was invalid because the arbitration made it without giving the plaintiffs an opportunity of adducing evidence or of being heard in respect of the matters in dispute. Defendant demurred to this amendment. The pleadings did not shew whether or not the submission to arbitration contained a clause providing that it might be made a rule of Court so as to bring it under the operation of 9 & 10 Wm. III. c. 15, under which proceedings to set an award aside have to be taken before the last day of the next term after the publication of the award.

Held, that, upon the pleadings as they stood, judgment on the demurrer must be for the defendant, but that the plaintiffs