injuries were not due to that negligence, but to the neglect of the deceased himself to obey the directions of defendant to trim the shaft, and that deceased voluntarily took the risk which he incurred in going down the shaft.

G. Lynch-Staunton, K.C., for plaintiff.

H. Carscallen, K.C., for defendant.

The judgment of the Court (MEREDITH, C.J., MACMAHON, J., IDINGTON, J.), was delivered by

MEREDITH, C.J.—. . . We think that there was evidence for the jury to support the contention of plaintiff that defendant was guilty of negligence in not casing the shaft, but that it was not made clear to the jury that an affirmative answer to the first question involved two propositions, one that there was negligence, and the other that that negligence was the cause of the accident.

We think also that the jury should have been asked to find whether, had the deceased obeyed the direction given him to trim the shaft, the accident would have been avoided. Although there was much to lead to the conclusion that, had that been done, the accident would not have happened, we are unable to say that the jury might not have reached a different conclusion. . . .

That the deceased continued in the employment of defendant with knowledge of the omission to case the shaft, would not, according to the express provisions of the Workmen's Compensation Act, of itself justify a finding that deceased had voluntarily incurred the risk of the injury which happened to him, and that should, we think, be pointed out to the jury.

New trial. Costs of last trial and of appeal to be costs in the cause, unless the Judge before whom the action is ultimately tried otherwise directs.

JANUARY 7TH, 1905.

DIVISIONAL COURT.

LEMON v. LEMON.

Mortgage—Payment — Evidence — Admissibility — Contract —Specific Performance—Credit for Sum Paid—Burden of Proof—Scope of Reference.

Appeal by defendant from order of ANGLIN, J., 3 O. W. R. 734, setting aside report of Master in Ordinary finding that there was nothing due upon the mortgage in question.