

The judgment of the Court (FERGUSON, J., MEREDITH, J.) was delivered by

MEREDITH, J.—The action was rightly dismissed as against the defendant Marshall; though he had been willing to become jointly liable with defendant Thompson, that could not be accomplished without the latter's consent, and there is no evidence of such consent. If the plaintiff sue upon the transaction with Thompson, Marshall was neither directly nor indirectly a party to it: if upon the transaction with Marshall, he must recover against him only in the absence of evidence of his authority to bind Thompson; and if plaintiff sue Marshall as a guarantor of Thompson's debt, the action fails because the guarantee is not in writing. Holding judgment against Thompson, there was no other course but to dismiss the action, as was done, as against Marshall. Nor can the finding as to the balance due to the plaintiff upon his contract with the defendant Thompson be rightly disturbed; it is well supported in the great mass of contradictory evidence adduced at the trial. . . . It is enough to say that the conclusion as to the amounts has not been displaced upon, but is well supported by, the whole evidence in the case. Judgment, however, in such a case as this, ought not to have been given as if upon cross-actions, but the amount allowed in respect of defective work should have been deducted from the amount which would have been payable for the work if properly done, and in accordance with the contract, and judgment entered for the balance only. There is nothing to shew that any other than the usual judgment in such a case should be entered: see *Cope v. Hicks*, 2 Cr. & M. 214; *Lowe v. Holme*, 10 Q. B. D. 286; *Moore v. Gooderham*, 10 O. R. 451; *Girardot v. Welton*, 19 P. R. 162 and 201; *Ryan v. Fraser*, 16 L. R. Ir. 283. The defence of tender and payment into Court was not supported by the evidence.

Appeal allowed with costs. Judgment to be entered in the Court below for plaintiff for \$33.70 damages with costs as provided in Rule 1132.

Cross-appeal dismissed with costs, if there be any costs of it not taxable as costs of the appeal. The money in Court should be paid out to the defendant Thompson.

Blewett & Bray, Listowel, solicitors for plaintiff.

J. J. Stevens, Teeswater, solicitor for defendant Thompson.

Morphy & Carthew, Listowel, solicitors for defendant Marshall.