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*Feb'y. 9.

June 4.

THOMAS J. WALLACE.....APPELLANT;

AND

JOHN SOUTHER & CO.....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Promissory Notes—Joint Liability—Evidence, rejection of—Misdirection as to Interest.

Plaintiffs sued *W.* upon two promissory notes signed by one *T. E.* and *W.* The notes were dated at *Halifax* and made payable to Plaintiff's order in *Boston, U.S.* The notes were unstamped, but before action brought double stamps were affixed and no contract as to interest appeared on the face of them. *W.* pleaded, *inter alia*, that he had signed the notes upon an understanding and agreement that he should be liable thereon as surety only for *T. E.*, and that Plaintiffs, without his knowledge or consent, agreed to give and gave time to *T. E.*, and forbore to enforce payment when they might have been paid. At the trial *W.* sought to cross-examine one of the Plaintiffs on an affidavit made by the witness, and to which was annexed a letter to Plaintiffs from *T. E.* This evidence was rejected by the Judge, and a verdict was given for Plaintiffs with interest. A rule *nisi* to set aside verdict was discharged by the Supreme Court of *Nova Scotia*, but they referred the rate of interest to a Master of the Court.

Held,—That there was an improper rejection of evidence, and that the Jury should have been directed as to interest.

APPEAL from a judgment of the Supreme Court of *Nova Scotia* discharging a rule *nisi* for a new trial.

This was an action brought by Respondents against Appellant upon two joint and several promissory notes, dated, *Halifax*, the 15th Oct., 1873, made by one *Thomas Evans* and the Appellant, by which they promised to

*PRESENT:—Sir William Buell Richards, Knt., C. J., and Ritchie, Strong, Taschereau, Fournier and Henry, J. J.

pay to the order of the Respondents, at their office, at *Boston, U. S.*, the respective sums of $1,000 and $2,000 *U. S.* currency.

The pleadings and facts of the case sufficiently appear in the judgment of Mr. Justice *Henry*, hereinafter given.

The evidence rejected by the Judge at the trial was an affidavit made by *Chs. H. Souther*, to oppose an order for continuance, to which was annexed a letter signed by *Thomas Evans*, and about which the Appellant sought to cross-examine the said *Chs. H. Souther*, in support of the following plea :—

"The Defendant for an added plea in this cause, added by leave of a Judge, says for a plea on equitable grounds that he the said Defendant made the notes declared on in this action at the request of and for the sole accommodation of one *Thomas Evans*, as the surety only of said *Evans*, to secure a debt due to the Plaintiffs solely from the said *Evans*, and, save as aforesaid, there was not any value or consideration for the Defendant making the said notes or either of them, and the said notes were delivered to the Plaintiffs and accepted by them from the Defendant upon an understanding and agreement that the Defendant should be liable thereon as surety only for the said *Evans*, and the Plaintiffs, at the time the said promissory notes were made, had notice and knowledge of the same having been made by the said *Thomas J. Wallace* as such surety, as aforesaid, and that the Plaintiffs, without the knowledge or consent of Defendant, agreed to give and gave time for payment to the said *Evans* of said notes, respectively, and forebore to enforce payment of the same for a long time, and the Plaintiffs might and could, had they not given time, long since obtained payment from the said *Evans*, and by means of the premises the Defendant has been greatly prejudiced and damaged, and has been and is wholly

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discharged from all liability to pay the amount due upon the said notes, and each of them."

The case was tried before Mr. Justice *Wilkins* at *Halifax*, and a verdict given for the Respondents for $2,670 with interest.

A rule *nisi* was taken out under the Statute to set aside verdict, which was argued before the Court in Banc on the 8th January, 1877, and discharged on the 2nd May, 1877.

The Appellant in person :—

The papers which were declared on as promissory notes were only agreements. They were promises to pay *John Souther & Son*, but the action was brought by *John Souther & Co.* The notes were drawn in *Halifax* and were not stamped with any revenue stamps.

The learned Judge who tried the cause, among other misdirections, directed the jury that the papers declared on were promissory notes, requiring no stamps, gave them no directions as to the law by which they were to be governed in finding interest, if any, and told them that time given by one Plaintiff or partner to the principal would not discharge the surety, but that time should be given by all to have this effect. That they were not to go beyond the notes, or enquire into the consideration, and failed to give them such directions as the case demanded. Nor did he leave any question to the jury in closing, but gave them positive instructions to find a verdict against the Appellant. He should have told the jury that the notes, not having been made to the Plaintiffs but to *John Souther & Son*, they could not recover upon them, but did not do so.

Hillard on New Trials (1) ; *Roscoe* (2).

I complain also of the improper rejection of testimony offered by the Defendant, the Judge having

(1) Pp. 254 to 291, 386. (2) P. 138.

rejected an affidavit made in the cause by one of the Plaintiffs or Respondents with a letter of *Thomas Evans* attached, and also refused to admit an agreement made between *John Souther & Co.* and one *Charles Murdoch*, when offered by the Appellant, but afterwards admitted, when offered by Respondents, a paper, a duplicate of the rejected agreement, except a memorandum at the bottom of the first, not on the second offered agreement: *Roscoe* on Evidence (1); *Taylor* on Evidence (2); *Boileau* v. *Rutlin* (3); *Brickell* v. *Hulse* (4).

I also submit that the Appellant, being only surety for *Thomas Evans* on the notes and agreements, the rejection of the testimony offered by him prevented him from proving his discharge in consequence of the time given to *Evans*. If the evidence had been received the want of an allegation of consideration could have been supplied by amendment at the trial. *Evans's* offer to pay interest was a sufficient consideration. *Byles* on bills (5). In fact, the evidence does not establish a case for the Respondents. *Hilliard* on New Trials (6).

Mr. *Gormully*, for Respondents:—

The notes declared on were promissory notes and there is no sufficient evidence of suretyship between the Appellant and *Thomas Evans*. But, assuming the suretyship to be established, there is no evidence that time was given to the principal in such a manner as to discharge the surety.

Mere non-direction on the question of suretyship would be no ground for a new trial, unless the verdict were against the weight of evidence; but that point is not open to Appellant in this Court. *Great W. R. Co.* v. *Braid* (7).

(1) Pp. 196, 214, 129.
(2) Pp. 691, 723, 743 & 821.
(3) 7 A. & E. 454.
(4) 2 Exch. 675.
(5) P. 382, 11 Edition.
(6) Pp. 461, 124, 125, 129, 145, 138.
(7) 1 Moo. P. C. C. N. S. 101.

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Respondents are entitled to interest, and what was given here was the legal interest, and the rate of interest in *Boston*, in the absence of evidence to the contrary, must be taken to be the same as the rate in *Halifax*. See *Byles* on bills (1).

Now, as to the evidence rejected, the only evidence withdrawn from the jury was the affidavit and letter shown on pages 15 and 16 of the printed case. Such evidence was properly rejected. If admissible at all, it was never formally tendered, nor were the grounds of its admissibility distinctly pointed out to the Judge at the trial, consequently such improper rejection of evidence is no ground for a new trial.

Greene v. *Bateman* (2); *Bain* v. *Proprietors of the Whitehaven Railway Compay* (3).

Moreover, the evidence rejected, even if admitted, could have had no effect on the jury, and the verdict meets the justice of the case. A Court ought not to grant a new trial after a verdict for the Plaintiffs where the defence set up is unconscionable, and the verdict has been found according to the justice and honesty of the case. *Chitty Pr.* (4).

RITCHIE, J.:—

I think there must be a new trial in this case. There was evidence rejected at the trial that ought to have been received, and this rejection requires this Court to make absolute the rule for a new trial. The notes sued on were the joint and several notes of *Thomas Evans* and Defendant *Wallace*. One of the defences was, that Defendant *Wallace* signed these notes for the accommodation of, and as surety for, *Evans*; that they were

(1) 12 Ed. p. 405.
(2) L. R. 5 H. L. 591.
(3) 3 H. L. 1.
(4) 3 Vol. p. 835.

delivered to and accepted by Plaintiffs, on the agreement that *Wallace* was to be liable thereon as surety only for *Evans*, and that Plaintiffs, without the knowledge or consent of Defendant *Wallace*, gave time for payment to *Evans*, whereby Defendant was discharged.

The evidence Mr. Justice *Wilkins* rejected was an affidavit by *Charles H. Souther*, one of the Plaintiffs, to oppose order for continuance, to which was annexed a letter from *Thomas Evans*, addressed to *John Souther & Co.*, upon which Mr. *Wallace* sought to cross-examine the said *Charles H. Souther*, when he was on the stand supporting his own case, in order to get evidence in support of his plea that he was a surety, and that time had been given to *Evans*.

On the cross-examination, the Judge's notes say:

The witness, one of the Plaintiffs, looks at an affidavit. The signature to it is mine. Looks at letter annexed. This is signed by *Thomas Evans*. I read that letter myself. Mr. *Wallace* asks, did you not on this letter—(Objected. I refuse to allow that question.)

Defendant, having opened his case, made the same Plaintiff his witness, and the Judge's notes say:

Mr. *Wallace* proceeded to interrogate *Souther* on the point of time having been given to a party. Mr. *Wallace* offers in evidence the affidavit of the witness submitted to him on cross-examination, and respecting which he spoke on his examination. Mr. *Wallace* did not in any way refer to this in opening his case to the Jury. I say to him that I require him to point out to me in what respect the affidavit which he offers contains matters contradictory of any evidence given by the witness on his cross-examination. This he declines to do, and I, therefore, refuse to receive the affidavit. * * * *Wallace* offers, in evidence, the letter annexed to the witness's affidavit. I refuse to receive it. He asks did you act on that letter? I refuse to allow him to do so.

Now, this was clearly all wrong. One finds it somewhat difficult to understand how, after a witness, a party in the cause, on cross-examination, looks at an affidavit, the signature to which he admits to be his own, and identifies a letter annexed thereto as signed

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by the co-contractor of Defendant, to whom it is pleaded time was given, and states that he had read that letter himself, the Defendant could be denied the privilege of asking the witness what he he did on this letter, it being testified by the witness, that the account referred to in the letter was in connection with the original transaction, and an examination of the affidavit shows that it was made and used by Plaintiffs in this very cause, and the contents of the letter treating exclusively of the subject matter of this suit, expressing inability to pay promptly, and craving further indulgence. It is still more extraordinary that the Defendant was stopped and his question rejected before it was even finished.

But strange as this is, it is more unaccountable that Defendant, being driven as it were by this rejection to make Plaintiff his own witness, the Judge should reject the same affidavit when offered as part of Defendant's case. Surely the Defendant had a right to give in evidence an affidavit made and used by Plaintiff in the cause, having reference to the subject matter in dispute, whether it contradicted a previous statement of the party or not. Surely anything a party says or does in reference to the matter in controversy, his opponent has a right to prove, without being limited to whether it contradicts a previous statement or not; and, as to the letter annexed to the affidavit, it, having been read and used by Plaintiff and annexed to his affidavit, was, in like manner, receivable, and Defendant had a right to ask witness whether he acted on that letter. Without doubt the acts of a party to a suit are,equally with his declarations, evidence his opponent is entitled to use; and in this case, where the giving of time was solicited by the principal, if principal he was, the surety had a right to know whether that application was made and acted on by the creditor, the witness. This is the more

obvious when the Defendant proves that Plaintiff said he had a letter from *Evans* asking for time and he had given it.

Whether the whole evidence would have made out *the suretyship* and the giving of time or not, is not now the question. Most material evidence was rejected, bearing on the very point in issue, the want of which may have most effectually embarrassed Defendant in his defence, and for ought we know prevented him from establishing his case.

As to stamps, I say nothing, as it does not appear where the notes were made, whether in *Nova Scotia* or the *United States*.

Another point was in reference to the interest. The jury found the full amount of these notes and interest. The Appellant took exception to that, and contended that they could not allow interest, because no evidence was given as to what the rate of interest in *Boston* was, and that it should have been found specifically by the Jury. The Court, finding the difficulty there was, said, "Oh! we will refer it to the Master to compute the interest" (assuming the Master had the right to compute it), but gave no directions as to how that was to be done. But where, as here, interest was not made payable by the note itself, any interest given would be in the nature of damages; I think it should be found by the Jury and not by the Master; and, I think, it was the duty of the learned Judge to direct the Jury by what rule that interest should be governed. Because cases are abundant that, where a note or agreement is payable in a particular place, the rate of interest is to be governed by the rate at the place where the note is payable. As in this case the notes were payable in *Boston*, and there was no evidence as to the rule by which the interest might be computed, nor any evidence of the legal rate of interest in *Boston*, neither

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the jury nor the master had any rule or rate for their guidance. This might have been avoided if the Plaintiff had given up the interest, but the other is a substantial objection, and I am of opinion, therefore, that the rule should be made absolute for a new trial.

STRONG, J., delivered an oral judgment in favour of allowing the appeal.

TASCHEREAU and FOURNIER, J. J., concurred.

HENRY, J.:—

This is an appeal from the Supreme Court of *Nova Scotia*. The Respondents seek to recover upon two promissory notes set out in their writ, as drawn by the Defendant, dated the 15th day of October, 1873, payable one for $1,000 in one month, the other for $2,000 in three months, "to the Plaintiffs at their office, *South Boston, U. S.*" The Plaintiffs allege that they were duly presented for payment at the said office *of Plaintiffs*. The pleas to the notes declared on are:—

1st. A denial of the making of them.

2nd. No consideration.

3rd. That they were not stamped as required by law.

4th. Setting out that they were given as part payment of machinery, for a dredge that was insufficient to perform certain work which it was agreed to be capable of performing; that the same was not worth more than the sum which had been already paid for it; that the Defendant was not aware of the insufficiency when he made the notes; and that, therefore, the Plaintiffs ought not to recover the amount of the notes or any part thereof.

5th. On equitable grounds, that Defendant signed only as surety for one *Thomas Evans* to secure a debt due by him, *Evans*; that there was no consideration for

the Defendant making the notes; that they were received by Plaintiffs on the agreement that Defendant should be answerable only as such surety; and that time was given by the Plaintiffs without the knowledge or consent of the Defendant to said *Evans*, by which his liability was discharged.

6th. That the notes were not duly presented.

The case was tried in 1876 and a verdict given for the Plaintiffs "for amount claimed $2,670 with interest."

A rule *nisi* having been refused, one was taken out under the Statute, the grounds argued before the Court at *Halifax*, and the rule discharged with costs. From that judgment the Defendant has appealed to this Court, and we are to decide whether that judgment should be confirmed or set aside and a new trial granted. A rule for judgment was granted as follows: "On argument of the rule *nisi* to set aside the verdict herein, it is hereby ordered that the said rule *nisi* be discharged with costs."

A number of grounds (eighteen) were taken in the rule *nisi*, but, according to the practice in *Nova Scotia*, they are all covered by the objections taken generally.

1st. That the verdict is against law and evidence.

2nd. For the improper rejection of evidence.

3rd. For the improper reception of evidence, and

4th. For misdirection.

The other objections contained in the rule need not be specifically referred to, as the four I have stated comprise them all.

The first step on the trial of the issues was to prove the making of *the notes declared on*, which are alleged to be notes payable *to the Plaintiffs*. Those given in evidence were made payable to "*John Souther & Son*," not *to the Plaintiffs*. They are not declared on as payable to the Plaintiffs, as co-partners by the name and firm of "*John Souther & Son*," but under the name and firm of

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John Souther & Co., nor is it in any way alleged that any firm of such a name as the former existed. And I am at a loss to ascertain how they, under the declaration, could have been received in evidence as the notes declared on. On proof of the Defendant's signature, as appears by the Judge's notes of the trial, they were "read," and then Defendant objected that they were not properly stamped. It does not appear that any objection on any ground was taken before the reading of the notes. The admission of them in evidence may therefore be considered regular; but the question still remains what do they prove? Certainly, not that the Defendant made two notes *to the Plaintiffs*, but to *John Souther & Son*. If, therefore, *John Souther & Son* are the payees, what right have *Charles H. Souther* and *George A. Souther*, by being members of the firm of "*John Souther & Co.*, to sue for or collect money when no promise is shown to have been made to them? No evidence is given to show who the "son" is; and he may possibly be another son of *John Souther* altogether. If, therefore, the Defendant has not concluded himself by a clear agreement on the trial not to raise the objection, or rather has agreed that "*John Souther & Son*," means "*John, Charles H.* and *George A. Souther*, I must unhesitatingly say that the Plaintiffs wholly failed to make out a case.

Evidence was given that the consideration of the notes passed from the firm of *John Souther & Co*, as a balance for machinery furnished by them. They might, if the Defendant were the original contractor or debtor, have recovered on the common counts; but the claim in this action is limited by the particulars to the notes, and the Plaintiffs must show a contract by them (the notes) to pay the Plaintiffs the amount of them either as members of the firm or otherwise. If by them, the notes, there is no contract to pay the amount of them *to the*

Plaintiffs, it matters not that the Defendant owed them an equal amount as a balance for goods sold and delivered or otherwise. The whole evidence upon this point by the Plaintiffs is, that the Defendant owed the Plaintiffs, and that for the debt he gave the notes payable to "*John Souther & Son.*" The claim is not for the balance previously due; and the case of the Plaintiffs stands on the promise contained in the notes. There is no evidence, in my opinion, to sustain the allegation that the notes were made payable to the Plaintiffs; and I do not see how they can recover on a promise not made to them. I have looked carefully through the notes of trial and the judgment given by the Court below, but I can see nothing by which the Defendant is concluded from raising the ground of want of the proof necessary to sustain the claim set out in the writ that the notes were made payable *to the Plaintiffs.* It is clear to me that the objection was taken and considered on the argument below of the objections in the rule *nisi*; and I am, therefore, to assume it was raised on the trial. The judgment refers to it as an objection "that there was no proof of partnership of the Plaintiffs," which shows that the objection was taken and disposed of in reference to the question of the right of *the firm* to recover on the notes. Being, therefore, of the opinion that the objection was open to the Defendant on the argument before us, he is entitled to the benefit of his defence on the plea denying the making of the notes declared on, and consequently, in respect to that issue, to a judgment in his favor. The case in 4 *Allen* R. p. 234, cited in support of the judgment, does not, in my opinion, affect the case. There, the surnames of all the Plaintiffs were given as the payees of the notes, and after the commencement of the suit the Defendant acknowledged his liability, and promised he would intruct his Attorney to give a confession. The objection was that the

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Christian names of the payees were not mentioned in the note, but the Court overruled the objection, because the Defendant had been "served with process at their suit," and said he had no defence. It is authoritatively laid down that in a bill or note the person to whom it is to be paid must be designated with certainty; and that uncertainty, in this particular, will destroy the validity of the instrument (1). So far as the evidence in this case goes, there is every uncertainty as to the payees of the notes in question. We might assume a good deal, but we cannot supply legally deficient evidence.

The objection to the rejection of evidence is another point demanding attention, and in considering it we must keep in mind the several issues.

Under the equitable plea, that Defendant was only a surety for *Evans* in the notes, he was justified in tendering evidence to show that the original indebtedness was not his, and he could not show that better than by a document signed by the Plaintiffs. The rejection of the document was therefore improper. Oral evidence of Defendant having been the original debtor had been received, and the document in question, showing the agreement with another party, was legitimate evidence in contradiction of that evidence and in support of this plea. I don't think it should have been considered "irrelevant" or its reception declined. It was a document signed by the Plaintiffs referring to what had been alleged as the consideration of the notes, and, under any circumstances, legitimate evidence. The affidavit of the witness, *Charles H. Souther*, and the letter referred to therein and annexed thereto was, on the same and other grounds, legitimate evidence, and was also, I think, improperly rejected. I know of no rule which would have required the Defendant to have

(1) Chitty on Bills 10th Ed. 106, and references in note 3.

referred to the affidavit in opening his case to the jury. Nor do I think it a good reason for rejecting it, that the Defendant declined to point out wherein it contained "matters contrary of any evidence given by the witness on his cross-examination." This affidavit, made by one of the parties to the suit, and adopting, as it did, a letter which was alleged as the beginning of a negotiation for further time by *Evans*, for whom Defendant alleged he was security, should have been received as a matter of right, and not of favor, or subject to the condition imposed. When that affidavit and letter were *proved*, the Defendant could not, of course, *then* tender them in evidence; but he had a perfect right to question the witness as to what he or the other Plaintiffs did on receipt of that letter. He was not allowed to do so. He may, therefore, have been thereby prevented from proving an important issue, that time had been given to *Evans* in a manner to have released the Defendant. We, of course, cannot say that would necessarily have been the result. It is enough, however, that legitimate evidence that might have affected the verdict was rejected. As it was, the evidence that a binding contract for time which alone would have discharged the Defendant under the plea in question, was deficient; but we cannot tell what the result might have been, had the evidence in question not been rejected. I think, therefore, the verdict should be set aside on that ground.

The notes were payable in *Boston*, and the legal rights and liabilities of the parties to them are governed by the *lex loci contractus*. An objection was taken that they were not properly stamped. If that was a requisite to their validity at the place of payment, the law requiring such should have been proved by the Defendant; and in the absence of that proof, the plea must, in that respect, fail. They are dated at *Halifax*, but that, in my view, is un-

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important. They were not notes at all till delivered in *Boston*, and besides, if even delivered in *Halifax*, but payable in *Boston*, they become subject to the laws at the place of payment.

It is adopted by the common law, as a general rule, in the interpretation of contracts, that they are to be deemed contracts of the place where they are made, unless they are positively to be performed or paid elsewhere (1).

The place of payment, according to every legal authority, settles, therefore, the point in this case, that the notes in question are to be deemed contracts of the place of payment, even if they had been fully executed and delivered in *Halifax*; but, as I before said, the delivery of them in *Boston* totally does away with any objection that might otherwise be raised. The whole contract was made there, and the formalities, proofs or authentications which are required by the *lex loci* are indispensable to their validity everywhere else. If, by the laws of the state of *Masschusetts*, the notes would have been void if not stamped, they would be held void here even before stamps were required in this country. Not good there, they would not be good anywhere. If, then, the notes could be recovered by the *lex loci contractus* without stamps—and we must so assume, in the absence of proof to the contrary—is stamping necessary before they can be sued upon in this country? And if so, how and when must the stamps be affixed? By section 11 of 31 *Vic.*, ch. 9, it is provided that:—

If any one in *Canada* makes, draws, accepts, indorses, signs, becomes party to or pays any promissory note, draft or bill of exchange *chargeable with duty under this Act*, before the duty (or double duty, as the case may be), has been paid by affixing thereto the proper stamp or stamps, he shall incur a penalty of one hundred dollars, and save only in the case of the payment of double duty, as hereinafter mentioned, such instrument shall be invalid and of no effect in law, or in equity, and the acceptance, or payment, or protest thereof, shall be of no effect.

(1) Story on Prom. Notes, 164.

The provisions of that section are confined to promissory notes, drafts or bills of exchange, "*chargeable with duty under this Act*," and we are thereby referred to section 1 of the same Act, by which stamp duties are imposed. The latter provides that:—

> Upon and in respect of every promissory note, draft or bill of exchange * * * made, drawn, or accepted in *Canada* * there shall be levied, collected and paid to her Majesty, the duties hereinafter mentioned, &c.

"Made," "drawn" and "accepted," are construed in their technical sense. The first applies to promissory notes and the other two to drafts, or bills of exchange. "Drawing," in reference to bills of exchange, has the same application as "making" to promissory notes, and includes, not only the writing and signing, but also the full execution by delivery. "Drawing," however, in reference to a promissory note, means nothing more than the writing without execution of it. I am, therefore, of opinion that the mere drawing and signing a promissory note in this country, delivered and payable in another, does not bring such a note within the terms of section 11, and, therefore, I think the notes in question may be recovered on although not stamped.

I need hardly refer to the objection of "misdirection," as my decision on other points is in favor of setting the verdict aside. The report of the Judge's charge is very general. He reports that he expressed a very decided opinion that the notes in view of the Stamp Acts, and the "proved facts in connection with them" were due and recoverable in point of law, and that to the Plaintiff's right to recover a verdict for the amount due on them no defence was made out under any of the pleas. From what I have said it will be seen that, as regards the objection on the ground of the want of stamps, I entirely agree with him. But

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from what I have said it will be as plainly seen that, I think, under the evidence the Plaintiffs did not make out a case, and that the learned Judge should have so charged.

One other point will I refer to. The verdict includes interest, and the question is, can it be sustained when so including it? The notes contain no reference to interest, and there is, therefore, no contract to pay it. No evidence was given that by the laws of *Massachusetts* the Plaintiffs could recover interest in such a case, nor what the rate of interest, if any, there was. It is clear to me, therefore, it cannot be recovered in this action under the evidence in it. The learned Judge who delivered the judgment of the Court below assumed that the learned Judge on the trial instructed the jury properly on this point, and he could "see no difficulty in a judgment being entered for the Plaintiffs for interest, within the scope of the claim in the declaration at the legal rate thereof at *Boston* at the time of the trial to be referred to a Master of the Supreme Court to ascertain." I feel bound to dissent from that decision. There is neither law nor established practice to sustain such a reference. For mere matters of computation, reference may be made to a Master; but the Defendant here had the right to have the law, as applicable to such a case, expounded by a Judge, and the opinion of the jury upon the point. Interest may be allowed or not, when not of the essence of the contract, and a jury is not bound by the law in *Nova Scotia* to give interest; and the rate of it may affect the judgment of a jury as to allowing it. To give that power to a Master might, in some cases, virtually leave the right of a party to recover a judgment, or not, dependent on the report of a Master, for, in a case where several claims existed on both sides, allowing or refusing interest on notes similar to those in question, might decide the verdict; or rather, leave the

final result not be settled wholly by the jury under the direction of a Judge as to law, but, possibly, the most important part of it left to the decision of a Master. Cases in *Nova Scotia* are, as in other places, supposed to be tried by law and established practice, and issues decided by Judges and jurors. I can find no authority for calling in the aid of a Master in such a case. Were the interest merely a matter of computation under our own law, and the jury added it generally, the amount, no doubt, could be ascertained by a Master; but there is no law that I can find by which one part of an issue shall be found by a jury, directed as to the law by a Judge, and the remainder by a Master. We are in this Court authorized and required to give the judgment we think should have been given by the Court below; and, if this were the only objection to the verdict, we might possibly be justified, under the evidence, in directing a judgment for the Plaintiffs for the amount of the notes without interest; but I do not consider it necessary to decide as to that, because, for the other reasons given, I am of opinion the verdict cannot stand. It, in my opinion, should be set aside, and a new trial granted, and the appeal allowed with costs.

Appeal allowed with costs.

Solicitor for Appellant: *Wallace Graham.*

Solicitors for Respondents: *Meagher & Chisholm.*