CHARLES W. WELDON.....APPELLANT; 1880

AND

JAMES VAUGHAN AND DAVID MAURICE VAUGHAN..... } RESPONDENTS.

*Feb'y. 17.
*June 10.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Assumpsit—Contract—Damages—Construction of contract—"Accord and satisfaction."

Appellant, part owner of a vessel, brought an action against respondents, merchants and ship brokers in *England*, alleging in his declaration that while he had entire charge of said vessel as ship's husband, they, being his agents, refused to obey and follow his directions in regard to said vessel, and committed a breach of an agreement by which they undertook not to charter nor send the vessel on any voyage, except as ordered by appellant, or with his consent.

On the trial it appeared that *E. V.*, a brother of respondents, had obtained from appellant a fourth share in the vessel, the purchase being effected by one of the respondents; and it was also shown that the agreement between the parties was as alleged in the declaration. On the arrival of the vessel at *Liverpool*, respondents went to a large expense in coppering her, contrary to directions, and sent her on a voyage to *Liverpool*, of which he disapproved.

Appellant wrote to respondents, complaining of their conduct and protesting against the expense incurred. They replied, that appellant could have no cause of complaint against them in their management of the vessel, and alleged they would not have purchased a fourth interest in the vessel, if they had not understood that they were to have the management and control of the vessel when on the other side of the *Atlantic*. A correspondence ensued, and finally, on the 17th Nov., 1869, appellant wrote to them, referring to the fact that respondents complained of the "eternal bickerings," and that it was not their fault. He then re-

* PRESENT.—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J.J.

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asserted his right to control the vessel, stated, in detail, his grounds of complaint against them, and closed with the words: "To end the matter, if your brother will dispose of his quarter, I will purchase it, say for $4,200, in cash." This amount was about the same price for the share as appellant had sold it for some years before. Respondents accepted the offer, and the transfer was made to appellant.

Held, on appeal, reversing the judgment of the Supreme Court of *New Brunswick*, that the expression "to end the matter" should be construed as applying to the bickerings referred to, and there had not been an accord and satisfaction.

The contract having been made between appellant and respondents only, and being a contract of agency apart from any question of ownership, the action was properly brought by appellant in his own name.

(*Taschereau* and *Gwynne*, J.J., dissenting.)

APPEAL from the decision of the Supreme Court of the Province of *New Brunswick*, discharging a rule nisi obtained by the above named appellant, calling on the respondents to show cause why a non-suit granted in the above cause should not be set aside.

The facts of the case, as stated by the Hon. Mr. Justice *Duff* in the court below (1), are as follows:—

"This is an action of special assumpsit, brought by the plaintiff against the defendants, who are merchants and ship brokers in *Liverpool, England*. The declaration contains but one count, in which it is alleged that the defendants, at the time of the making of the promise, &c., were merchants in *Liverpool, England*, to wit, &c., under the name, style and firm of "*Vaughan Brothers & Co.*," that the plaintiff was interested in and part owner of a certain barque called the "*Ansel*," and had the entire charge thereof as ship's husband; and also had the sole management of the business of the said barque or vessel, and the direction of the voyages thereof; that the said barque was then lying in the port of *Saint John*, about to sail for

(1) 2 Pugs. & Bur. 70.

Liverpool aforesaid; and thereupon, in consideration that the plaintiff would consign her to the defendants on her arrival in *Liverpool*, and would retain and employ the defendants to act as his agents and brokers in *England*, for and in regard to the said barque, and the business connected thereunto, for certain commissions, &c., to be paid to them by the said plaintiff, they, the said defendants, undertook and promised the plaintiff, that whilst they, the said defendants, should be such agents and brokers, they would obey and follow the directions and orders of the plaintiff in regard to the said barque or vessel, and also as to what voyages she should go; and they would not charter or send the said barque on any voyage except as thereto directed and ordered by the said plaintiff, and with his consent and approbation, to wit, &c.

"*Averment*—That the plaintiff, trusting and confiding, &c., did afterwards, to wit, &c., consign the said barque to the defendants on her arrival at *Liverpool*, aforesaid, and did retain and employ them as her agents and brokers as aforesaid, in regard to the said barque, and the business connected therewith, for certain commissions, &c., to be paid to them by the said plaintiff; that on the arrival of the said barque at *Liverpool*, aforesaid, the plaintiff did direct and order the defendants not to copper or sheath her, but as soon as she should have discharged her inward cargo, to charter her on the best terms for a voyage for any port or ports on the Continent of *America*, north of *Baltimore*.

"*Breach*—That defendants, against the directions and orders of the plaintiff, and without his consent and approbation, coppered and sheathed the barque, and thereby and therefor expended a large sum of money, to wit, &c., which the plaintiff was forced and obliged to pay; and further that against the plaintiff's orders and directions, and without his consent or approbation,

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the defendants chartered and sent the said barque on a voyage to *New Orleans*, in the Gulf of *Mexico*, a port not north of *Baltimore*, but a great distance south of it; and in the course of the said voyage, and in consequence thereof, the plaintiff not only had to expend a large sum of money, to wit, &c., in and about the said barque and her disbursements, which otherwise he would not have done; but he also thereby sustained great loss and damage, and was deprived of great gains and profits, amounting to a large sum of money, to wit, &c.

"To this declaration the defendants pleaded (before "the Common Law Procedure Act, 1873," came into force) the general issue.

"On the trial before the learned Chief Justice, at the *Saint John* Circuit in August, 1876, the following facts appeared in evidence:

"On the 1st June, 1868, the plaintiff was registered owner of 48-64 shares in the barque "Ansel," then lying in the harbor of *Saint John*; and *Richard S. DeVeber* and *James S. Boies DeVeber* were registered owners of the remaining 16-64 shares.

James Vaughan, one of the defendants, being then in *Saint John*, called on the plaintiff and suggested to him the expediency of his having an agent in *Liverpool* to look after the vessel there. He spoke of purchasing an interest in her himself; and the plaintiff, after consulting with his co-owners, finally agreed to sell him one-fourth interest in her for $4,000. And on the part of the plaintiff it also appeared that he then employed the defendants as his agents in connection with the vessel in *Liverpool*, but upon the express and distinct understanding and agreement that he should retain the entire control and management of her; and thereupon by Mr. *James Vaughan's* directions, the plaintiff transferred one fourth of the barque unto the name of *Edwin Vaughan*, on the 26th June, 1868.

"Mr. *James Vaughan* had been informed by the plaintiff, in the course of these negotiations, that there was a leak in the vessel, which the latter had been unable to discover; that he did not intend to have her coppered until it was found out, and that, therefore, she must be kept in the *North-Atlantic* in the meantime.

"She was despatched from *Saint John* about the 29th June, 1868, consigned to the defendants at *Liverpool*, with a letter of instructions from the plaintiff to send an onward freight to *Saint John* or *Boston*, or some port not south of the latter place. On the arrival of the vessel at *Liverpool*, the defendants proceeded to copper her; and against the plaintiff's instructions they sent her to *New Orleans*. An angry correspondence between the plaintiff and defendants ensued, which was continued for about fifteen months; and in the course of which the plaintiff claimed to represent three-fourths of the vessel—that is to say, his own shares and those of Messrs. *DeVebers*. He asserted his right to manage and control her, and charged the defendants with disobedience to his orders. In a letter under date of 31st Aug., 1868, addressed to the defendants, he enumerated a variety of grounds of complaint against them; and amongst others that they had improperly discharged Capt. *Graham*, the master who had taken her to *Liverpool*, and substituted for him a relative of their own—Captain *Thomas Vaughan*; that they had, without any authority, coppered the vessel in *Liverpool* at a heavy expense; and that, contrary to his express instructions, they had sent her to a southern port, viz., *New Orleans*. And against all these things, especially the coppering of the vessel, as well on his own behalf, as for the Messrs. *DeVebers*, he protested, as having been wholly unnecessary and unauthorized. In a subsequent letter, of date 28th Sept., 1868, he informed the defendants that the Messrs. *DeVebers* concurred with him in the

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view which he had taken of their conduct in relation to the vessel. Again on the 2nd of Nov., 1868, he wrote to them as follows: 'I must reiterate what I have already stated—that in coppering her you did so without the consent of the other owners, incurred a heavy expense *without consulting their wishes;* and also, in sending her to *New Orleans*, you acted contrary to the instructions contained in my letter, which, to my mind, expressed very clearly, upon what voyage I wished the vessel to proceed; and which, *I consider as representing three-fourths of the vessel, I had a right to direct.*' He also told them in that letter that Messrs. *De Vebers* concurred with him in thinking the extra expense, incurred by the dismissal of Captain *Graham*, was unauthorized and was improperly incurred.

"The defendants, on the other hand, denied the existence of any agreement or understanding, whereby the plaintiff was to have the management and control of the vessel. They allege, on the contrary, that they were to manage her in *Liverpool*; and that it was *upon that understanding only that they became purchasers of a share in her;* and having the management of her in *Liverpool*, they say that they acted for the best interest of all concerned in coppering her and sending her to a southern port. They assert that they *never would have purchased an interest in the vessel at all, but with a view to their having the management of her in England.* Finally, on the 17th of Nov., 1869, the plaintiff wrote to defendants a letter, of which the following is an extract:

"'You are well aware that there are other owners who are equally dissatisfied with the conduct of the matters by you, and the loss the barque has sustained by your assuming the responsibility.' 'You complain both in your letter to me, as in that to *Cudlip & Snider*, of the eternal bickerings; and you say it is not your fault. In reply: 'had I not reason to find fault when my instruc-

tions were not only disregarded, but what I requested not to be done was done, and at owners' expense, and the property treated as if neither Mr. *DeVeber* or I had any interest?' 'You were only my agents; and if you acted this way I had a right to complain, and you gave me every occasion.' 'To end the matter; if your brother wishes to dispose of his quarter, I will purchase it, say for $4,200 in cash, on proper transfer, after discharge at *Woolwich*.'

"The defendants accepted this offer, and they procured a transfer to be made by *Edwin Vaughan*, to the plaintiff, of the quarter of the vessel which stood in his name, upon payment by the plaintiff of the sum of $4,200.

"The learned Chief Justice, on the trial, held that this letter, coupled with the acceptance of it by the defendants, and the transfer of his share in the vessel by *Edwin Vaughan* to the plaintiff, operated as an accord and satisfaction of the plaintiff's cause of action; and he thereupon non-suited the plaintiff."

Mr. *Thomson*, Q. C., and Mr. *McLeod* appeared for the appellant and referred to *Taylor* on evidence (1); *Smith* v. *Thompson* (2); *Hussey* v. *Horne-Payne* (3); *Hardman* v. *Bellhouse* (4); *Bolckow* v. *Seymour* (5), and *Thomas* v. *Lewis* (6).

Mr. *Tuck*, Q. C., appeared for the respondents and referred to *Taylor* on evidence (7); *Giffard* v. *Whittaker* (8); *Furness* v. *Meek* (9).

RITCHIE, C.J.: [After reading the statement of facts hereinbefore given proceeded as follows:]

As the plaintiff was non-suited solely on the ground that an accord and satisfaction had been established,

(1) 5 Ed. sec. 36.
(2) 8 C. B. 44.
(3) 4 App. Cases 311.
(4) 9 M. & W. 596.
(5) 17 C. B. N. S. 107.
(6) 4 xE. D. 18.
(7) 5th Ed. sec. 1034.
(8) 6 Q. B. 249.
(9) 27 L. J. Ex. 34.

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it is not necessary on this point to consider the evidence, because in determining this question we must assume that the contract as alleged was proved, and the learned Chief Justice thought there was in connection with the question of accord and satisfaction nothing to leave to the jury, but rested his ruling entirely on a letter addressed by Mr. *Weldon* to the defendants, dated 17th Nov., 1869, containing an offer by plaintiff to purchase back from *Edwin Vaughan* the share transferred by him, holding that when that offer was accepted there was an accord, and when the shares were transferred to the plaintiff, there was a complete satisfaction of this matter. When the case was moved before the full bench, the Chief Justice adhered to the opinion that the non-suit was right, but, he says, "with some doubts, I admit."

As the burthen is on the defendant of establishing an allegation of accord and satisfaction, he is bound to establish it beyond all reasonable doubt, and if the evidence was verbal, and had to be submitted to a jury, it would be the duty of the jury to find against the defendant on an issue of accord and satisfaction, unless defendant's evidence established it to their satisfaction beyond a reasonable doubt. So, if he relies on documents, which the court have to construe, as establishing his defence of accord and satisfaction, and they are so ambiguously worded as to be fairly capable of a construction inconsistent with his contention, I think the court, unless satisfied beyond a reasonable doubt that what is put forward as an accord and satisfaction was intended by both parties as such, and that there was an acceptance in satisfaction as an act of the will of party receiving, should not, by a doubtful construction, deprive a plaintiff of an unquestionable legal right which accord and satisfaction assumes he has.

The only accord that can be set up in this case is

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that *Weldon* agreed to accept an agreement that *Edwin Vaughan* should sell his shares in the vessel at their full value, in full satisfaction of all damages sustained by him by reason of defendants' alleged breach of contract, but I cannot bring my mind to the conclusion that the letters clearly establish this.

I take it to be clear that there must be a sufficient satisfaction, and that it must appear to be of some value or advantage to plaintiff, and I question very much whether the unexpressed idea of getting rid of a troublesome partner (which has been suggested) could be considered a sufficient and full satisfaction.

I think that the offer was for the purchase of the defendants' shares in the vessel only. That the consideration paid was for the price and value of the vessel; that the matter "to be put an end to" was the matter which the sale of the vessel would put an end to, viz., bickerings as to her future management. That there was no satisfaction for the breaches of the contract; that the burthen of showing a full satisfaction for the breach of the contract was on the defendants, and that the acceptance in satisfaction must be an act of the will of the party receiving. That the letters show nothing given in satisfaction for the unliquidated damages accruing from a breach of defendants' agreement with plaintiff. Defendants get the value of their shares in the ship and their connection with her ceases, and in their letter of Dec. 9th, 1869, accepting the offer, they do not treat or suggest even that the transaction is in satisfaction of damages, that they designed it as such, or that they considered plaintiff in purchasing the vessel received it as such,—they say

> We accept your offer for the fourth we are interested in, being $4,200, after completion of her voyage to *Woolwich*. The transfer and bill of sale will go out by next mail, on receipt of which please hand to our agent, Mr. *Lockhart*, the cash in cash.

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There is not the slightest allusion to any claim of *Weldon* against them, still less to the satisfaction of any such claim, or that the transfer of the vessel was to be accepted in satisfaction of anything but in consideration of the price paid for the shares sold. In effect, we are asked to read the words "to end the matter," not as referring to the "bickerings," but as if they were equivalent to end the matter of the bickerings, and in full satisfaction of all claims and demands that I have against you for all damages, for all breaches of your agreement with me.

In *McDowall* v. *Boyd* (1), an averment that a bill of exchange was given "for and on account of and in payment and discharge" of a debt, is held not equivalent to an averment that the bill was given in satisfaction of such debt. In that case *Wightman*, J., said:

> It is contended that the words express not merely a suspension, but a satisfaction of the debt: that is, that the words "in payment and discharge" are equivalent to satisfaction. I cannot attribute this meaning to these words. I always distrust the use of supposed equivalents, and the effect of the two cases referred to is this: in *Maillard* v. *The Duke of Argyle* (2) "payment" was considered not equivalent to "satisfaction"; and in *Emblin* v. *Dartnell* (3) "discharge" was decided not to mean "satisfaction."

The learned Chief Justice of the court below says:

> I will not say that the plaintiff's letter will not bear the construction which my learned brother *Duff* has put upon it, but I think that is not the natural meaning of the language, nor such a construction as the defendants would probably put and were justified in putting on it.

But notwithstanding this, it was not without some doubts that the learned Chief Justice, as he tells us, came to the conclusion he did. On the other hand, Mr. Justice *Duff* thinks that although the words "to end

(1) 17 L. J. N. S. Q. B. 295. (2) 1 Dowl. & L. 536.
(3) 12 M. & W. 830.

the matter" may certainly bear the construction which the learned Chief Justice has put upon them, he thinks it a somewhat forced and constrained one.

This is not, he says, the most appropriate language to express the satisfaction of a debt or the release of a cause of action.

And in a very able judgment, I think he very forcibly shows that the more consistent and reasonable construction, is to apply the expression "to end the matter" to the bickerings referred to, giving those words "to end the matter" their exact literal meaning rather than construing them as figurative, and as equivalent to the terms "satisfying and discharging." The very able and exhaustive manner in which Judge *Duff* has treated this question leaves nothing more to be said.

This was the only point discussed in the judgments delivered in the court below, but as one of the points taken on the motion for a non-suit was that there was "no contract with the plaintiff alone, but with the owners of the ship," and though this is not put forward in the respondents' factum, and, in fact, was not argued before us, still, as I understand one of my brother judges thinks that if the accord and satisfaction was not an answer still plaintiff could not recover in this action in his own name against the defendants, I do not think it right to discuss the question as to whether plaintiff or defendants supported their respective contentions as to the agreement alleged, in the declaration, nor as to whether plaintiff could, or could not, recover damages for all the matters he alleges he is entitled to. These questions must be tried out before a jury, if the appeal is allowed, but I feel it right to say a few words as to plaintiff's right to bring the action, supposing the allegations in the declaration shall be sustained on another trial.

If this vessel was by the owners placed in the possession and under the sole control of plaintiff,

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one of the part owners and the largest part owner, for the purpose of running and managing the vessel and all business connected with her, as he, in his judgment and discretion, should consider best for the interests of all concerned, which I understand from the case was the position of matters when plaintiff sold by bill of sale to *Edwin Vaughan*, not a member of *Vaughan Bros.*, a small interest in the vessel, $\frac{16}{64}$ shares, and which arrangement appears to have been communicated to *James Vaughan*, a member of the firm of *Vaughan Bros.*, who negotiated the purchase and directed the transfer to be made to *Edwin Vaughan*, and was acquiesced in by the new part owner as well as by *Vaughan Bros.*, as plaintiff alleges, the plaintiff, having the vessel in his possession and under his sole control, and the sole right, by himself and those it should be necessary for him to employ, at home or abroad, to manage and control the movements of the said vessel, and to do and transact all things necessary to the preservation and employment of the vessel, and he did enter into a contract with the plaintiffs such as is set out in the declaration in this case, whereby the vessel was by plaintiff consigned to them and placed under their control, not as part owners if they were interested in her, but as his (plaintiff's) agents and brokers for commission and reward to be paid them by plaintiff, as alleged, and if they broke the agreement, and in defiance of its terms acted in direct opposition thereto, and to the directions of plaintiff, I can see no reason why the plaintiff, the only party to that express agreement on the one side, should not bring an action at law in his own name for such a breach by the defendants; the parties on the other side, to the agreement, in like manner, as defendants, might sue *Weldon* for their commission and reward on their fulfilling their part of the

agreement and so earning such commission and reward (1).

Nor can I understand how they can justify such a breach as is alleged by any authority they may claim to have as claiming to be interested in the vessel, or which they may have received from *Edwin Vaughan*, a registered part-owner, holding a minority of shares in the vessel; having accepted the consignment of the vessel from plaintiff and agreed to act as his agent and broker, they were bound to obey his instructions and deal with the property he had so placed in their hands as his agent and broker, and as he directed them, or have given up the agency and restored the vessel to the possession and control of the plaintiff.

The only privity of contract that existed, as put forward by plaintiff, was with him and the defendants, and the contract was a contract of agency apart from any question of ownership. Mr. *McLachlan*, on the Law of Merchant Shipping (2), thus speaks of the position of the agent of a ship's husband and his non-accountability to the owners:

> The owners cannot reach the earnings of the ship if in the hands of the banker or other agent of the ship's husband, although a separate account of them is headed with the name of the ship; there being no privity of contract with the owners, and the banker being accountable only to his customer, or the customer's assignee, if bankrupt, or his executors, if dead.

And the case of *Sims* v. *Brittain* (3), fully sustains this doctrine; the marginal note of that case is this:

> *A. B.* and others were owners of a ship in the service of the East India Company. *B.* was managing owner, and employed *C.* as his agent for general purposes, and amongst others to receive and pay monies on account of the ship; and *C.* kept an account in his books with *B.*, as such managing owner. To obtain payment of a sum of money due from the East India Company on account of the ship, it was necessary that the receipt should be signed by one or more of

(1) See *Crawthorn* v. *Trickett*, 15 C. B. N. S. 754.

(2) P. 176.

(3) 4 B. & Ad. 375.

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the owners, besides the managing owner, and upon a receipt signed by *B.* and one of the other owners, *C.* received on account of the ship £2,000 from the *East India* Company, and placed it to *B's* credit in his books, as managing owner. The part-owners having brought an action for money had and received, to recover the balance of that account: *Held*, that *C.* had received the money as agent of *B.*, and was accountable to him for it; that there was no privity between the other part-owners and *C.*, and consequently that the action was not maintainable.

FOURNIER, J., concurred.

HENRY, J.:—

There are but two leading questions to be disposed of in this case: 1st. Whether the letter of the appellant to the respondent of the 19th November, 1869, and the acceptance of the offer contained in it, amounted to accord and satisfaction for the damages claimed in the declaration; and 2nd. Whether the appellant, being a part owner and agent of the other owners at the time of the alleged agreement for the consignment of the ship to the respondent's firm, can maintain the suit. It does not clearly appear that the latter objection was taken on the trial, but the consideration of it formed no part of the reason given by the learned Chief Justice, before whom the case was tried, for the non-suit he ordered. His decision was solely on the ground that the letter in question was, when its terms were accepted, evidence of accord and satisfaction. After full consideration of it and the whole of the previous circumstances, and the correspondence between the parties, I am of opinion that the decision was wrong.

To say the least, the expression referred to, "to end the matter," was of very doubtful meaning. It is, and must be, admitted that the words may be read in at least two ways. They may have been meant to be applied to putting an end to the "bickerings" complained of by the respondents' firm, and to prevent dis-

agreements likely to arise from the relative positions the parties occupied in regard to the management and employment of the ship, each differing from the other as to the control of her, both in *England* and in *St. John*. The appellant may be assumed to have felt that the only practical way to prevent the recurrence of such disagreements was by acquiring his former position; to do which, it would be necessary to purchase back the share of the ship he had sold and transferred to the brother of the respondents. As early as August, 1868, and before any claim for damage had arisen, the appellant wrote to the respondents' company that "being desirous of avoiding difficulties in the management of the ship," he and Mr. *DeVeber*, the other owner, would sell out to respondents' company their shares on the same terms the appellant had sold the quarter, and for the same reason repeats the offer in a subsequent letter in November of the same year. When, then, the offer was not accepted, he, it may, I think, fairly be assumed, for the same and no other reason, offered to purchase at a higher rate. In his letter of the 19th Nov., 1869, after referring to letters of the respondents' firm to himself and *Cudlip* complaining "of the eternal bickerings, &c.," of the appellant, he at first justifies himself against the charge, and winds up thus:

> You were only my agents, and if you acted in this way I had a right to complain and you gave every occasion. To end the matter, if your brother wishes to dispose of his quarter I will purchase it for say four thousand two hundred dollars in cash on proper transfer, after discharge at *Woolwich*.

From this it is contended the words in question contain an offer to receive, in accord satisfaction of his present claim, the re-transfer of the ship on the terms stated. Not only so, but that that is the only construction to be put upon them, because, to sustain the non-suit, that position is necessary. If such were, at the time, in the mind of the appellant, he, I think, failed to say

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so, or at all events to use language necessarily conveying that idea. It must not be forgotten that up to the date of that letter not a word had passed between the parties as to any claim for damages on the part of the appellant, except for the costs caused by the alleged improper dismissal of the master. No reference is made to the subject in the letter itself. There is no evidence even that, at that time, the appellant had determined to make any such claim for damages, except as I before stated. No disagreement in reference thereto then existed, and if not, how can the respondents now contend that they so understood the words? How could the respondents' firm think, when getting their brother to resell the vessel—and for her full value too—to the appellant, they were doing so in accord and satisfaction of a demand and claim that had never been made against them? If the appellant paid, as the evidence shows, the full value for the quarter he repurchased, what consideration had he for the accord and satisfaction of his claim, amounting to as much at least as the value of the shares he got back, and if he got nothing but considered his claim well founded, how can it be presumed or concluded he intended it to be included in his offer? His offer may fairly be said to have been made "to end the matter" in respect of the bickerings he referred to, and nothing more, and I cannot see how the respondents' firm could have understood it as referring to or including anything further. It is shown that when that letter was written, the appellant and the respondent had never had any settlement of accounts in respect of the ship. The appellant wanted further statements and more information, and some charges in the accounts of the respondents' firm he disputed, and at that time the latter claimed a large balance from him. The respondents' firm took legal proceedings to recover that balance. If, then, the words

in question be construed to cover the appellant's claim, why not the counter one? If the expression really meant "to end the matter" as between them—that is, the dealing with the ship-why should it not include the claim on one side as well as the other? It must be construed as a final and full settlement of all their dealings, or it must have a restricted construction. Did the respondents' firm accept it as a final settlement? The evidence shows they did not. I am inclined to conclude there is but one reasonable construction to be put on the offer of the appellant, and that is the very opposite of that put upon it by the majority of the court below. The issue is raised by the respondent; his defence depends on proving it. If his evidence is unsatisfactory the result must be against him. The defence here rests, at the best, upon an ambiguous expression. It is the duty of the respondents, by evidence, to explain that ambiguity before it is sufficient evidence of their plea or defence. They have not done so, and the reasonable conclusions in my mind are against the construction they contend for. It is quite true that every one's language is to be construed against him, but there are limits to that rule, and it can never be applied to force one into a position which the context and surrounding circumstances do not warrant.

Whether the conclusion I have reached be the correct one or not, I fail to see how the non-suit can be sustained. The judge, on a trial, would no doubt have the right to decide upon the legal questions arising, but I can find no authority to warrant a judgment of non-suit in this case. The construction of the letter was, according to all governing authorities, for the jury and not for the judge. If the letter furnished explicit evidence to sustain the defence, the case would be essentially different. Here the meaning is to be gathered from the general terms of the letter, and the whole of

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the surrounding circumstances. If a judge had also to assume the functions of a jury, his decision would be a verdict founded on facts as well as law; but when a jury is sworn it is solely their province to resolve as to doubtful evidence and decide upon doubtful circumstances; and a judge has no power or right to usurp their peculiar functions. The authorities are, I think, too clear and decided upon the point to leave any doubt about it.

The second question is as to the right of the appellant to bring the present suit, he being a part owner and ship's husband, and the agent of the other owners. This position was shown by evidence for the appellant on the trial, which, if affected by negative proof, should have been submitted to the jury.

Story in his work on agency (1) says:—

> It may be laid down as a general rule that whenever an agent, although known to be such, has a special property in the subject matter of the contract and not a bare custody thereof, or when he has acquired an interest in it, or has a lien upon it, he may, in all such cases, sue upon the contract.

The authorities he cites, and others, fully sustain the position (2). The agreement set up is an oral one, and for a breach of it an action lies as well in the name of the agent having an interest as part owner, as in the name of the owners. In relation to the rights of agents against third persons, *Story*, after giving two positions in which agents may sue on contracts made with them, says (3):—

> Thirdly, where by the usage of trade or the general course of business, the agent is authorized to act as the owner or as a principal contracting party, although his character of agent is known. Fourthly, when the agent has made a contract in the subject matter of which he has a special interest or property, whether he professed at the

(1) Sec. 397.
(2) See amongst the later ones *Cawthron* v. *Trickett*, 15 C. B N. S. 754.
(3) Sec. 393.

time to be acting for himself or not. In all these cases the agent acquires personal rights, and may maintain an action upon the contract in his own name without any distinction whether his principal is or is not entitled also to similar rights and remedies on the same contract.

I think the appeal should be allowed, the judgment below reversed, the non-suit set aside, and a new trial granted with costs.

TASCHEREAU, J. :—

I am of opinion this appeal should be dismissed. That the construction of the letters between the parties belonged to the court alone admits of no doubt. That the Chief Justice, at the trial, and the court, in giving judgment upon the appellant's motion to set aside the non-suit granted by the Chief Justice, have properly construed these letters, seems to me also clear. The appellant, in the face of his letter of the 17th November, 1869, and the respondent's answer thereto of the 9th December, 1869, cannot now be allowed to say that he did not accept *Edwin Vaughan's* share in the vessel in accord and satisfaction. He proposed to "end the matter" by the purchase of this share. Now, the *matter to be ended* consisted in the various causes of complaint set forth in the appellant's letter of the 17th November; and the respondents could reasonably expect, when accepting the appellant's offer, that all matters in dispute between them were settled.

GWYNNE, J. :—

It is an invariable rule of law that the construction of all written documents is for the court and not for the jury, unless there are any mercantile terms introduced having a meaning different from what they ordinarily bear (1); or, unless it be shewn *by extrinsic* evidence that the terms are so ambiguous as to require

(1) *Furness* v. *Meek*, 27 L. J. Ex. 34.

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explanation, in which case, parol evidence being admissible to explain the ambiguity and to shew what was really meant, the whole becomes open for the jury.

In *Hussey* v. *Horne-Payne* (1), it was held that no contract ought to be held established by letters which would otherwise be sufficient for the purpose, if it is clear upon the facts that there were other conditions of the intended contract, beyond and beside those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no intention of concluding any agreement; but if the question is, whether or not certain documents produced in evidence contain any, and, if any, what contract; and it is admitted that the documents contain all the terms of such contract, if there be any, and there are no mercantile terms introduced, and there is no extrinsic evidence bearing on the question, beyond and beside what is contained in the written documents, it is not competent for a judge to ask the assistance of a jury in construing the documents (2). Here there was no extrinsic evidence given or offered to shew that any expression in the written documents was used in a particular sense different from what would be its natural meaning—nothing controlling the meaning of the words used—there was no suggestion that the letters did not contain the whole contract, if any there was contained in them. The question was one of construction wholly, namely, did, or not, the letters contain, as the defendants insisted that they did, an agreement for the accord and satisfaction of all claim of the plaintiff in respect of the matters which formed the subject of the action; and that was, in my judgment, a question wholly for the court and not for the jury to deter-

(1) 4 App. Cases 311.

(2) *Bolckow* v. *Seymour*, 17 C. B. N. S. 115.

mine; and as to the construction put upon the letters by the court below, I am not prepared to pronounce it to be erroneous. It was contended that it is erroneous, upon the ground that, as the claim sued for is one in which other co-owners of a ship were interested as well as the plaintiff, it could not reasonably be supposed that the plaintiff was effecting to bind the interests of such other co-owners in the arrangement he was making with the defendants; but assuming this to be so, there could be no doubt that he could bind his own interests, and that is all the defendants insist upon, in so far as regards their contention upon this point. The fact, however, which is involved in this argument, a fact which does not admit of dispute, namely, that the cause of action, in respect of which recovery is sought in this suit, is one in which all co-owners are alike interested, is, to my mind conclusive that this action cannot be maintained, and that the non-suit is supportable upon the other grounds taken at the trial, although the court below has proceeded upon the ground of accord and satisfaction only.

These objections were—that there was no evidence of the contract alleged in the declaration; that the only agreement between plaintiff and the defendants was in writing, and it contained no such terms as those declared upon; that the contract, if any, was not with the plaintiff alone, but with the owners of the ship, and that plaintiff could not sue in his own name only; that the plaintiff proved no damage; that there was no evidence of payment by the plaintiff of any money, as alleged in the declaration, as a consequence of the alleged breach of contract therein stated; and as to coppering the vessel that there was no evidence of that having been done, as alleged, after the plaintiff had given his directions that it should not be done. The evidence was that it was done before these directions were given.

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Now, the declaration is, that whereas the defendants were merchants doing business in *Liverpool, England*, under the name and style of *Vaughan Brothers & Co.*; and whereas, to-wit, on the 1st day of June, 1868, the plaintiff was interested in and part-owner of a certain barque or vessel called the "*Ansel*," then lying in the port of *St. John*, and about to sail for *Liverpool*, and had the entire charge and control thereof as ship's husband, and also had the sole management of the business of the said barque or vessel, and direction of the voyages thereof, and thereupon, *in consideration* that the plaintiff would consign the said barque or vessel to the said defendants on her arrival in *Liverpool*, and would retain and employ the defendants to act as *his* agents and brokers in *England*, for certain reward and commission to be paid to the defendants *by the plaintiff*, they the defendants then and there undertook, and faithfully promised the plaintiff, that while they the defendants were such agents and brokers they would obey and follow the directions and orders of the plaintiff in regard to the said barque or vessel, and also as to what voyage or voyages she might go, and that they would not charter or send the said barque or vessel for or on any voyage or voyages, except as thereto directed and ordered by the said plaintiff, and with his consent and approbation; and the plaintiff averred that, confiding in said promise of the defendants, he did afterwards consign the said vessel to the defendants on her arrival at *Liverpool*, and did retain and employ the defendants as *his* agents and brokers in regard to the said vessel, and the business connected therewith, for certain reward and commission to be paid to the defendants by the plaintiff; and the plaintiff further saith that on the arrival of the said vessel at *Liverpool*, to wit, &c., the plaintiff did direct and order the defendants not to copper or sheath the said vessel,

but as soon as she discharged her inward cargo to charter the said vessel at the best terms for a voyage to any port or ports on the Continent of *America*, north of *Baltimore* and not south of the said port of *Baltimore*. Yet the defendants, not regarding the said promise and undertaking, and against the directions and orders of the plaintiff, and without his consent and approbation, did copper and sheath the said barque or vessel, and thereby and therefor expended a large sum of money to wit, the sum of $5,000 which the plaintiff was obliged and forced to pay; and further, against the directions and orders of the plaintiff, and without his consent and approbation, chartered and sent the said vessel on a voyage to *New Orleans*, a port on the Continent of *America*, not north of *Baltimore*, but a great distance south of that port, and that in the course of the said voyage, and in consequence thereof, the said plaintiff not only had to pay and expend a large sum of money, to wit, the sum of $5,000, in and about the said vessel, and the disbursments thereof, which otherwise he would not have done, but also thereby sustained great loss and damage, and was deprived of great gains and profits amounting to a large sum of money, to wit: the sum of $10,000, which he otherwise would have made, to the plaintiff's damage of $20,000, and therefore he brings his suit.

It will be observed that the cause of action here stated is rested upon a special agreement alleged to have been made with the plaintiff, a co-owner and ship's husband of the vessel, whereby, in consideration merely of the defendants being appointed agents and brokers in *England* of the plaintiff, as such ship's husband, and in consideration of certain commission and reward to be paid by the plaintiff to them as such his agents and brokers, they (not being otherwise interested in the vessel than as such agents and brokers of the plaintiff)

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promised as alleged, and that the damage occasioned by the breach of the defendants alleged promise is damage alleged to have been sustained by the plaintiff in his character of co-owner of the vessel, and not as ship's husband. This is the gist and substance of the declaration and of the plaintiff's claim as therein stated.

To this claim the defendants' defence is, that no such contract or promise as is alleged in the declaration was ever entered into or made by the defendants, and that they did the acts which are complained of in right of their being co-owners also of the vessel with the plaintiff, and under the authority also of *Edwin Vaughan*, who, as their nominee, appeared upon the registry as owner of sixteen shares owned by them in the vessel, and in virtue also of their having been, as they claim to have been, ship's husband in *England* of the vessel. Upon the discussion, however, of this question of non-suit we must proceed upon the plaintiff's evidence of the transaction out of which the alleged promise stated in the declaration arose, and the question will simply be: does that evidence, taken in connection with other undisputed evidence which was given by the defendants, support or displace the cause of action set out in the declaration?

The plaintiff's evidence is that on the 1st of June, 1868, he owned 48 shares of the vessel, one *Richard S. DeVeber* owning eight shares, and one *J. S. Boies DeVeber* owning the other eight shares; that on that day the defendant *James Vaughan* came to his office and talked about purchasing an interest in the vessel, and about the advisability of having a person in *Liverpool* to look after her. That he told *Vaughan* that he, plaintiff, was ship's husband, and that if he, *Vaughan*, would take one-fourth he could be plaintiff's agent of the vessel in *England*. That *James Vaughan* said he would purchase the one-fourth share, and would let the plaintiff know

into whose name the transfer should be made, and he afterwards told plaintiff that it should be in the name of *Edwin Vaughan*. That he, plaintiff, drew up a memorandum of the agreement, which was signed by himself and *James Vaughan*, and which he produced, and is as follows:—

Bought of *Charles W. Weldon* sixteen sixty-fourth shares of the ship *Ansel*, 818 tons register, for the sum of $4,000 currency, payable on the proper transfer being duly executed, and the vessel to be taken on discharge of her present cargo in *St. John*, in as good order as she left *Philadelphia*.

St. John, June 1, 1868.

I accept the above terms.

(Signed,) CHARLES W. WELDON.
JAMES VAUGHAN.

The plaintiff also produced a transcript from the registry, by which it appeared that on the 26th June, 1868, there was registered a bill of sale, dated the 4th June, 1868, whereby the plaintiff assigned and transferred to *Edwin Vaughan* sixteen shares in the vessel. The plaintiff further says that the vessel was to be sent to *Vaughan Brothers* and not to *James Vaughan*, to which *James Vaughan* assented. There was no evidence whatever to the effect that *Vaughan* had agreed, or that it was proposed to him, as part of the terms of purchase of the sixteen shares, that such purchase should be in any respect qualified, or that the transfer of those shares should not carry with it all the rights and incidents of ownership without any qualification, nor was any evidence given to the effect that, nor was it suggested that, *James Vaughan* had in terms expressly made any such undertaking and promise as in the declaration alleged. Such promise, therefore, can be established only as arising by implication from the circumstances attending the consignment of the vessel to the defendants and the information given by plaintiff to *James Vaughan* that the plaintiff was ship's husband when

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on the 1st June, 1868, *Vaughan* was negotiating with him for the purchase of an interest in the vessel.

Now, in so far as this case is concerned, the transfer of the sixteen shares to *Edwin Vaughan*, by the direction of *James Vaughan*, in pursuance of the agreement for the purchase of those sixteen shares by *James Vaughan* upon behalf of *Vaughan Brothers & Co.*, must be regarded as a purchase of those shares by *Vaughan Brothers*, who are, as between them and the plaintiff, to be treated as the owners thereof. That this was the view of the transaction taken by the plaintiff himself at the time of the purchase appears from certain letters from the plaintiff to the defendants, which were produced in evidence, dated respectively the 29th June, and the 13th and 25th July, and 2nd Nov., 1868, and the 20th Jan., 1869. In that of the 29th June, after mentioning the despatch of the vessel to them, he says:

> I have made up her accounts to the 10th instant, when she had finished discharging her inward cargo, including seamens' wages, of which I have made a statement, so that all her expenses up to that date will be charged three-fourths to me and the balance to Messrs. *DeVeber;* and in paying the men in *Liverpool*, on her arrival, the amount will be distributed in that way. The mortgage I had given when I purchased *Glasgow* and *Black* out I could not get discharged until Wednesday last, when the transfer to Mr. *Edwin Vaughan* was completed and the money paid over. I hope you will have secured an outward freight for her before her arrival either for this port or *Boston*, as I think for the present she should not go south of the latter port, and I trust you may be able to secure a freight of railway iron for this place. I send you the account of her cargo, *and hoping that you will be fully satisfied with the ship.*
>
> I am, yours truly,
>
> CHARLES W. WELDON.

In the letter of the 13th July he says:

> I had the pleasure, on the 29th ult., of informing you of the "*Ansel*" having left, and as we heard of her two days after she left, clear of the Bay, I trust she will be in *Liverpool* before this letter reaches

you. I now enclose you an account of her disbursements for loading here, including repairs; also a memorandum of moneys received by Capt. *Graham*. You will see in the disbursements I only charge him with the balance after settling up his wages to the 10th June, the day the vessel began her outward voyage and discharged her cargo inwards. In paying off the men, in the like manner, the wages up to that date *will be charged* by you, *three-fourths to me, and one quarter to Messrs. DeVeber, and after that one-half to me and one-quarter to Messrs. DeVeber, and same to yourself.*

In the letter of the 25th July he says:

I am in receipt of yours of last mail and note its contents. I sent you by last mail an account of disbursements outward, as I thought you would not care for the inward account, *you not being liable for it.* I, however, now enclose it as you wish it.

In the letter of the 2nd Nov., he says:

While I am ready to admit that you were fully satisfied you were acting best for the owners, and the expenses certainly do not appear large, yet I must reiterate what I have already stated, that in coppering her you did it *without the consent of the* OTHER *owners*, and incurred a heavy expense *without consulting* THEIR wishes; and also in sending her to New Orleans you acted contrary to the instructions contained in my letters, which, to my mind, expressed very clearly upon what voyage I wished the "*Ansel*" to proceed, and which I consider, *as representing three-fourths of the vessel, I had a right to direct.*

It may be observed in passing that the plaintiff's right of controlling the defendants as owners of one-fourth only of the vessel is claimed only in right of the plaintiff representing the other three-fourths. Again, in the same letter he says:

As we certainly differ very much in our views in reference to the barque and her employment, *a matter always to be avoided between part owners*, and as you seem perfectly satisfied as to her success,

* * * * * * * *

and he repeats an offer previously made that the defendants should purchase the three-fourth parts represented by plaintiff, and he concludes:

Trusting we shall soon hear of her safe arrival at *New Orleans*, I am, yours truly ———

And in his letter of the 20th Jan., 1869, he says:

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I enclose my account against the ship to the beginning of the year. Trusting she will have a speedy voyage, I am yours, &c.

In this account is a charge of "allowance for half year, acting as ship's husband, $50.00," and the total amount of plaintiff's charge against the ship for the half year ending 1st Jan., 1869, amounting to $158.68 is distributed by him as follows:

Charles W. Weldon $79.34 = $\frac{1}{2}$ or $\frac{32}{64}$
L. H. DeVeber & Sons 39.67 = $\frac{1}{4}$ " $\frac{16}{64}$
Vaughan Brothers & Co. 39.67 = $\frac{1}{4}$ " $\frac{16}{64}$

It appears, then, from the plaintiff's own evidence, that the consideration of the vessel being consigned to *Vaughan Brothers* was not that laid in the declaration, but that the vessel was consigned to them in consideration of their having become co-owners of the vessel by the purchase from the plaintiff of sixteen shares therein, the agreement for which purchase was produced and contained no terms qualifying the rights incident to co-ownership in a vessel, nor was there any evidence that the defendants, or *James Vaughan* on their behalf, had ever consented that the purchase should be qualified or restricted as to the exercise of any of the rights and priviliges by law incident to co-ownership and vested in a co-owner.

The defendants then, being regarded as the unqualified purchasers of sixteen shares sold to them by the plaintiff, the promise laid in the declaration could not be established without an express agreement made by the defendants in restraint of their claim to exercise the rights and privileges incident to co-ownership, and as no evidence of any such agreement was offered, it follows that the evidence wholly failed to support the cause of action stated in the declaration, and it is unnecessary to enquire to what extent such a promise, if made and proved, would be binding upon a co-owner.

It was proved by the evidence of *James* and *Edwin*

Vaughan, which evidence was not contradicted, that the vessel was coppered and sheathed, and despatched to *New Orleans*, by the authority of the defendants as beneficial owners, and of *Edwin Vaughan* as registered owner of the sixteen shares purchased by the defendants from the plaintiff, and the plaintiff in his letter of the 2nd Nov., 1868, admits this, and that in doing so the defendants were satisfied they were acting best for all the owners, and however much the plaintiff may have been originally opposed to the voyage to *New Orleans*, there are passages in his letters of the 22nd Sept. and Nov. 2nd, 1868, and the 20th Jan., 1869, which seem to show that, however strong that objection may have originally been, he adopted the adventure, and was willing to share in the profits resulting from its proving successful, as the defendants represented they anticipated it would prove. But I do not dwell upon this seeming acquiescence, as the question under discussion is, does this action lie, acquiescence or no acquiescence?

The plaintiff's letters, however, and his evidence clearly show that the defendants, through *Edwin Vaughan* as registered owner, were the real beneficial owners of the one-fourth part of the vessel. Now, as to the coppering the vessel, the expense of which forms one item in the plaintiff's claim, the averment in the declaration is, that the defendants "thereby and therefor expended a large sum of money." By the light of the undisputed evidence, we see that this expenditure was incurred by the defendants in virtue of their authority as co-owners of the vessel, backed by the authority (if that were necessary) of *Edwin Vaughan* as registered owner. The expenditure was, however, that of the defendants. It is not pretended that the plaintiff had ever any demand made upon him for that expenditure, or any part thereof, by the persons who did

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the work; the expense, therefore, alleged to have been incurred by the defendants in coppering the vessel, is either unpaid to them, and still remains part of the account to be taken between the co-owners, to be adjusted upon the taking of such accounts, or the plaintiff has already paid his proportion to the defendants and is now suing to recover it back.

The allegation in the declaration is that he has been *obliged* and *forced* to pay the monies expended by the defendants in coppering the vessel. It is part of the plaintiff's case, that the defendants incurred that expenditure without any authority whatever or consent of the plaintiff. Now *as ship's husband*, it is plain that he could not be *obliged* and *forced* to pay to any one, much less to the defendants, a sum of money expended upon the vessel by the defendants as co-owners without the authority of and against the will of the *ship's husband*, and the plaintiff, as a *co-owner*, could not be *obliged* and *forced* to pay, or to contribute to the payment of, expenditure authorized by another co-owner in coppering the vessel which is the subject of co-ownership, unless he was legally liable so to pay or contribute; if therefore he was, as is alleged in the declaration, *obliged* and *forced* to pay the expenses incurred by them in coppering the vessel, no action at plaintiff's suit will lie to recover back from the defendants that which he was legally obliged and forced to pay to them. As to the coppering, therefore, the plaintiff is by the evidence placed in this predicament: that he either has as yet paid nothing, and the subject is still matter of account yet to be taken between himself and his co-owners, or, if he has paid anything, he must be taken, upon the allegation in the declaration, to have been legally liable to pay the defendants whatever he did pay them, and so cannot recover back money so paid. The evidence, however, fails to shew any payment whatever made by the plaintiff of

the expense of coppering, and upon the taking of the accounts, if any there be still to be taken, between the co-owners, in respect of the defendant's dealings with the vessel, the plaintiff must assert, if he can, his claim of exemption from liability to contribute to the expenditure attending the coppering and sheathing of the vessel.

Then, as to the loss of profits and alleged expenditure upon the voyage to *New Orleans*. As to the alleged expenditure, the same observations will apply; and as to the loss of profits, it is clear, upon the authority of *Holderness* v. *Schackles* (1), and *Green* v. *Briggs* (2), that, although part owners are but tenants-in-common of a ship, yet they are jointly interested in her use and employment, and the law as to the earnings of a ship, whether as freight, cargo or otherwise, follows the general law of partnership. The question as to the plaintiff's rights in respect of the profit or loss upon the voyage, being one relating to a partnership matter in which all the co-owners are interested as partners, must be alone discussed in a proper suit instituted for adjusting the rights and interests of all parties interested. It is difficult to understand how the plaintiff can claim any damages for the loss of this adventure, without an account being taken of the profits of the adventure, which account can only be taken between the partners; and neither for this cause of action, any more than for the coppering of the vessel, can the plaintiff as ship's husband maintain this action.

For the above reasons, I am of opinion that this action clearly is not maintainable, and that the non-suit must be upheld, and the appeal dismissed with costs.

Appeal allowed with costs.

Solicitor for appellant: *E. McLeod.*

Solicitor for respondents: *W. H. Tuck.*

(1) 8 B. & C. 612.

(2) 6 Hare 395.