

1886

* May 5 & 6.

* Nov. 8.

THE CONFEDERATION LIFE ASSO- }
 CIATION OF CANADA (DEFEND- } APPELLANIS;
 ANTS)..... }

AND

EDMUND O'DONNELL, ADMINISTRA- }
 TOR OF ALPHONSE O'DONNELL, } RESPONDENT.
 DECEASED (PLAINTIFF)..... }

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Life insurance—Condition in policy—Not to be valid until counter-
 signed—Instructions to agent—Escrow—Admissibility of evi-
 dence—Entry in books of deceased—Not exclusively against
 interest—New trial.*

In an action on a policy of life insurance, which was not counter-
 signed according to the terms of a memorandum on its margin,
 the defence was that the premium was never paid and the
 policy was never delivered. On the trial the learned judge
 admitted in evidence an entry in the books of his father, made
 by the deceased holder of the policy, showing a payment to the
 agent of the company of an amount equal to the premium,
 which the evidence showed was paid by money given to deceased
 by his father. He also admitted the evidence of the agent, who
 had since died, taken at a former trial of the cause, to the effect
 that the premium was not paid, and that he would not counter-
 sign the policy until it was paid, and that the policy was only
 given to the deceased to enable him to examine it, and not as a
 duly executed policy. The jury found a verdict for the plaintiff,
 but stated, in answer to a question submitted by the court, that
 the agent had been instructed not to deliver the policy until it
 was countersigned. The Supreme Court of Nova Scotia affirmed
 the verdict. On appeal to the Supreme Court of Canada,
Held, per Ritchie C. J. and Gwynne J., that the policy was only
 delivered to the agent as an escrow, and as it was never duly
 executed and delivered the company was not liable.

Per Strong J.—That the memorandum as to countersigning was not
 a condition of the policy, and the plaintiff was not barred
 by non-compliance with its terms; but the evidence of the

*PRESENT.—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry and
 Gwynne JJ.

entry in the books of the deceased was improperly admitted, and there should be a new trial.

Per Fournier and Henry JJ.—That the policy was properly executed and delivered, and as there was sufficient evidence to sustain the verdict independent of the evidence alleged to have been improperly admitted at the trial, the appeal should be dismissed.

1886

CONFEDERA-
TION LIFE
ASS. OF
CANADA
v.
O'DONNELL.

Per Henry J.—Under the present practice the court is bound to uphold a verdict if there is sufficient legal evidence to sustain it independently of evidence improperly received, and cannot take into consideration the effect on the jury of such illegal evidence. *Strong J. contra.*

The court being thus divided in opinion a new trial was granted.

Opinions expressed in *The Confederation Life Association v. O'Donnell* (1) adhered to.

APPEAL from a decision of the Supreme Court of Nova Scotia refusing to set aside a verdict for the plaintiff and order a new trial.

This was an action on a policy of life insurance which contained a memorandum on its margin to the effect that it was not to be valid until countersigned by the agent, but which was not, in fact, so countersigned. The policy was in the possession of the deceased at the time of his death and was found among his papers. The company refused to pay the amount on the ground that the premium had never been paid, and that the policy was never duly delivered.

At the trial the company tendered in evidence the deposition of the agent who had effected the insurance, taken at a former trial of the cause, the agent having since died, which was received by the court subject to objection. This evidence was to the effect that the premium had not been paid, and that he, the agent, refused to countersign the policy without it; that the policy was only delivered to the deceased to enable him to examine it and was to have been returned but was not. To rebut this, the plaintiff offered in evidence, and the court received, an entry in the books of the

1886
 CONFEDERA-
 TOIN LIFE
 ASS. OF
 CANADA
 v.
 O'DONNELL.

deceased as follows:—"November 29th, paid F. Allison \$48.06," (Allison was the agent). This evidence was objected to as not being against interest. The plaintiff also swore that the agent had admitted the payment of the premium.

The jury found a verdict for the plaintiff, but stated, in answer to a question submitted by the court, that the agent had been instructed not to deliver the policy until it was countersigned. The Supreme Court of Nova Scotia refused to order a new trial. The company then appealed to the Supreme Court of Canada.

Beatty Q. C. and *C. H. Tupper* for the appellants:

As the agent had no authority to deliver the policy until it was countersigned the company are not bound by his acts, and the policy has never been delivered as an instrument binding upon us *Montreal Ass. Co. v. McGillivray* (1); *Xenos v. Wickham* (2).

The entry in the books of the deceased was clearly inadmissible. There is no case decided in which the written entry of the interested party himself has been so received, it must be an entry by a third person. See *Ganton v. Size* (3); *Higham v. Ridgway* (4); *Bewley v. Atkinson* (5); *Massey v. Allen* (6).

Weldon Q.C. and *Lyons* for the respondent:

If the agent chooses to deliver the policy without countersigning it the company are bound. The insured had no notice of the instructions to the agent.

Then as to admissibility of evidence. The entry in the books was made in the course of business and it is immaterial whether it is for or against interest. See *Bewley v. Atkinson* (5); *Price v. Earl of Torrington* (7); *Doe Pattestrall v. Turford* (8); *Prince of Wales ins. Co.*

(1) 13 Moo. P. C. 87.

(2) L. R. 2 H. L. 296.

(3) 22 U. C. Q. B. 473, affirmed
 in 2 E. & A. 368,

(4) 10 East 109.

(5) 13 Ch. D. 283.

(6) 13 Ch. D. 558.

(7) 1 Smith L. C. 344,

(8) 3 B. & Ad. 890.

v. *Harding* (1) ; *Marks v. Lahee* (2).

1886

Sir W. J. RITCHIE C. J.—I adhere to the opinion I expressed when this case was before this court on a former occasion, namely, that the instrument declared on as a policy of insurance was an incomplete instrument for want of the signature of the agent, and which instrument the agent had no right to deliver, or the deceased to accept, as a binding contract, and this view is confirmed by the finding of the jury on the last trial, the jury having found, as a matter of fact, that Allison, the agent, was instructed by the defendants not to deliver the policy until it was countersigned by him, thus establishing to the satisfaction of the jury that the policy was in Allison's hands as an escrow, not to be delivered until countersigned, and which there is evidence to sustain.

CONFEDERATION LIFE
ASS. OF
CANADA
v.
O'DONNELL.
Ritchie C.J.

The necessity of countersigning appearing on the face of the policy, and there being no evidence whatever to show that Allison had any right or authority to waive or dispense with the countersigning, but the finding of the jury being to the contrary effect, I think the defendants cannot be held bound by this as an instrument executed and delivered as their deed. I think, on this finding, that the judgment should be entered for the defendants.

STRONG J.—The plea of *non est factum* put in issue the due execution of the policy as a deed. If the effect of section 94 of the Revised Stats. (4th series) is to make such a plea inadmissible that point should have been raised by demurrer. As it is, issue is joined on the plea, and that issue had to be disposed of at the trial. To constitute the policy the deed of the defendants, it was essential to show that it had been duly sealed and delivered and the plea must be construed as if it had

(1) E. B. & E 183.

(2) 3 Bing. N. C. 418.

1886
 CONFEDERATION
 LIFE ASS. OF
 CANADA
 v.
 O'DONNELL.
 Strong J.

in extenso denied the sealing and delivering. So that if the plea of *non est factum* is generally excluded by the enactment in question, abolishing pleas of the general issue, still on this record it is to be read as a plea denying the sealing and delivering. I am however of opinion, that the plea of *non est factum* is still a proper mode of putting in issue the due execution of a deed declared on in an action, as being a specific denial of the fact of execution, and is not to be considered a general plea like not guilty in an action of trespass.

I have also to differ from the learned judge who presided at the trial in the view which he took of the law as to delivery of sealed instruments as escrows. The objection here is that there was never any effectual delivery of the deed. And I take the law to be now well settled that an instrument under seal, though handed over to the custody of a party taking under it, may be shewn to have been so delivered subject to a condition until the performance of which it was not to take effect as a deed' (1). Therefore, if it appears that the delivery of a deed already sealed to the grantee was with the intention that it should not take effect as a deed, but in order that he should read and examine it and return it to the grantor, upon which terms and conditions, according to the evidence of Allison, the policy was delivered in the present case, the grantee cannot retain it and insist upon his possession of the instrument as conclusive evidence that it was duly delivered to him as a completed instrument.

I entirely agree with the court below that the printed memorandum found in the margin of the policy in the following words :

(1) *Watkins v. Nash*, L. R. 20, Jones on Construction Commercial Instruments, p. 226.
 Eq. 262; *Trust & Loan Company v. Ruttan*, 1 Can. S. C. R. 564;

This policy is not valid unless countersigned by.....
agent at.....
 Countersigned this.....day of.....
 Agent.

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.
 Strong J.

does not in any way affect the validity of the policy as a deed, though I think it has some weight as a mere fact confirmatory of Allison's evidence. There was no evidence to go to the jury shewing that Allison had been instructed not to deliver the policy until it was countersigned. The learned judge should not, in my opinion, and as he himself upon further consideration thought, have left to the jury the question which evoked this finding, and the finding itself was therefore rightly disregarded in entering the verdict. Had there been evidence of any instructions from the company to Allison, not to deliver the policy until it was countersigned, and not to countersign it until the premium was paid, it would not affect the validity of the policy, at all events it could not have that effect in the absence of any notice to the assured of such instructions having been given, and the mere existence of the blank, incomplete skeleton memorandum by itself, entirely insensible, would not have been sufficient to establish notice to the assured that the policy was not to be a complete instrument until the memorandum had been filled up and some agent's signature attached to it. If any authority is wanted for this position, the case of the *Prince of Wales Assurance Co. v. Harding* (1), referred to by Mr. Justice McDonald is amply sufficient for that purpose. The question to be decided at the trial was therefore, in my view, purely one of fact. Was the policy delivered to the assured, as Allison says, merely to be read and examined by him and then to be returned to the agent, to be retained until the premium was paid, or was the premium in fact paid and the policy

(1) E. B. & E. 183.

1886
 CONFEDERATION LIFE
 ASS. OF
 CANADA
 v.
 O'DONNELL.
 Strong J.

delivered as a complete instrument to take effect as such. It is manifest that the question of the intent with which the policy was delivered, must now be regarded as altogether dependent on the other fact as to the payment of the premium; and if there was legal evidence of this fact of payment proper for the consideration of the jury, and their finding proceeded upon legal and admissible evidence, it should not now, in my judgment, be disturbed. At the former trial of this action when Allison was examined as a witness, there was no admissible evidence of the payment of the premium beyond the presumption arising from the policy having been in the possession of William O'Donnell at the time of his death and for some time before. Allison gave direct evidence that the premium had not been paid, and he was able to point to the incomplete state of the memorandum in the margin of the policy and the absence of his countersignature as confirming his testimony. I thought sufficient weight had not been given to this, the attention of the jury not having been called to it, and that the great preponderance of this evidence in favor of the defendants, confirmed as it was by this circumstance, entitled them to a new trial. Since the first trial Allison has died and upon the last trial additional evidence was given as to the payment of the premium, some of which would not have been admissible during Allison's life. First there was put in evidence an entry made by the assured in a cash book of his father's, charging himself with the amount of this premium as having been paid by him to Allison on the 29th November, 1872, out of his father's cash. The entry is as follows: "1872, Nov. 29.—Paid F. Allison "\$48.06." This sum, \$48.06, is the exact amount of the annual premium payable under the policy. This evidence was, I think, inadmissible, both upon prin-

ciple and authority. I do not dispute the proposition that an entry against interest, by a deceased person, is admissible in favor of his own personal representatives, his executors or administrators, or others claiming under him. However anomalous such a rule may seem, the cases relating to endorsements upon bonds and notes make it impossible to deny that such is the law. I am of opinion, however, that upon another ground this entry was inadmissible. It does not come within the principles upon which entries of deceased persons are considered evidence as being against interest, for although as between his father and William O'Donnell himself it was an admission against the interest of the latter, yet as regards the present defendants it was in his own interest and favour, and being so was inadmissible. The cases of *Ganton v. Size* (1) and *Massey v. Allen* (2) are in point and conclusive as authorities shewing that this evidence ought not to have been admitted. This evidence was tendered at the former trial, but being objected to it appears not to have been pressed by the learned counsel for the plaintiff, and the objection to it therefore prevailed. Other additional evidence of what Allison (who died after the first trial) said when applied to by the plaintiff for a settlement was also given by the plaintiff himself at the last trial in 1885. Whether this evidence was properly receivable as the admission of an agent of the defendants within the scope of his authority as such, is a point on which I express no opinion. In favor of its admissibility, it might be said that as Allison was the agent of the defendants, to whom the plaintiff had to apply for a settlement of the loss, it was within his authority to recognize the validity of the plaintiff's claim under the policy, and anything he said to that effect was binding on the defendants, at least in the absence of any evi-

1886
 CONFEDERATION LIFE ASS. OF CANADA
 v.
 O'DONNELL.
 Strong J.

(1) 2 Er. & App. Rep. 368.

(2) 13 Ch. D. 588.

1886
 CONFEDERA-
 TION LIFE
 ASS. OF
 CANADA
 v.
 O'DONNELL.
 ———
 Strong J.

dence showing that his authority was restricted. I think, however, the admission of Allison deposed to by the plaintiff was good evidence against the defendants upon the same principle as that on which it was attempted to support the entry in the book, namely, as a declaration of a deceased person against his interest. It is now quite clearly established that the rule of evidence first authoritatively recognized in the case of *Higham v. Ridgway* (1) that a declaration by a deceased person opposed to his pecuniary or proprietary interest, in respect of a matter which he had no interest to misrepresent, is admissible not only when the declaration is embodied in some entry or memorandum in writing but also when it is merely oral. In the 8th and last edition of Taylor on Evidence (2) the rule is thus stated :

It is now determined both with reference to this exception and also to that which relates to declarations made in the course of business or duty that the term "declaration" includes a mere oral statement as well as a written memorandum. The former may indeed be entitled to less weight with the jury than the latter, but the law of England recognizes no distinction between statements made by word of mouth and those made in writing, except when the writing is by deed or is rendered necessary by some statute.

And the learned writer cites numerous authorities to show that his text is a correct deduction from the decided cases. It follows that the plaintiff's testimony of Allison's statement to him that the premium was paid was admissible evidence, and was properly submitted to the jury. The weight to be given to this evidence was, of course, solely a question for the jury, and, therefore, if the illegal evidence of the entry in the cash book had not been let in I should not have been disposed to interfere with the verdict. It is impossible to say, however, that the jury may not have been exclusively influenced by the evidence of the entry in the cash book, which was improperly received, and therefore,

(1) 10 East. 109, 2. Smith L. C. (2) P. 591.
 270.

although the court has power under Order 38, Rule 10, of the Nova Scotia Judicature Act of 1884, in its discretion, to give judgment now on the legal evidence taken at the trial, rejecting that of the entry in the book, yet for the reason given I think the case not a proper one for the exercise of such a power, but that the case ought to go down to another trial, in order that a jury may pass on the evidence of Allison's admission, as stated by the plaintiff, without the complication of the illegal and inadmissible evidence of the entry.

I think the rule in the court below should be made absolute for a new trial.

FOURNIER J.—This case comes up before us for the second time. When the first appeal was before this court, I was of opinion that the appeal should be dismissed, and my reasons are reported in the 10th Vol. Canada Supreme Courts Reports, page 92. The circumstances under which this case comes up again before this court have not altered my opinion, and I again think the respondent is entitled to succeed, and therefore, the present appeal should be dismissed with costs.

HENRY J.—I am of the same opinion. I gave my reasons in a former appeal, reported in 10 Can. S. C. R. 101, why I consider that it was not necessary for the agent to countersign the policy. The instructions to him not to deliver the policy until it was countersigned I think were directory only, and under all the circumstances I think the evidence conclusive to show that the policy was delivered, not as an escrow, but for the purpose of giving it all the force of a duly executed policy.

I am of opinion that the verdict should be sustained on the strength of the statute which provides that if the court sees that there is sufficient evidence by other

1886
CONFEDERATION LIFE
ASS. OF
CANADA
v.
O'DONNELL.
Strong J.

1886
 CONFEDERA-
 TION LIFE
 ASS. OF
 CANADA
 v.
 O'DONNELL.
 Henry J.

testimony, independent of any effect that might be produced on the jury by evidence that should not have been admitted, they should sustain the verdict. It is, I think, mandatory to the court not to question whether the evidence received has had an effect on the minds of the jury or not, and it is the duty of the court to ascertain if there is sufficient evidence to warrant them in confirming the verdict, and I think the intention of the statute is, that where there is such evidence the verdict should be sustained. Before that statute it was a matter for the consideration of the court whether the evidence improperly admitted had any effect on the minds of the jury, but since the statute it is different.

I am not sure that the evidence was improperly received. As to that I give no opinion. I entertain the same opinion as in the former case. The plaintiff has shown himself entitled to our judgment, and I think the judgment of the court below should be affirmed with costs.

GWYNNE J.—I also remain of the opinion which I announced when this case was before the court on a former occasion as reported in 10 Can. Sup. Co. Rep. 92.

Upon that occasion the court sent the case back for a new trial upon the ground that the evidence relied upon by the plaintiff was wholly insufficient to support a verdict in his favor in view of what appeared on the face of the document produced as the policy declared upon, and of the evidence of the witness, Allison, who testified that this document had been sent to him at Halifax from the head office of the defendants at Toronto as an escrow not to be issued to Wm. A. O'Donnell named therein, since deceased, and of whose estate the present plaintiff is administrator, until the premium should be paid, and he, Allison, should countersign the policy; he also testified that the premium never had been paid and that for this reason he never did countersign the document or issue it as a policy

binding upon the defendants' company, and that in point of fact the policy had never been delivered to the deceased, O'Donnell, as a contract, but that he, Allison, had let him have it merely to read its conditions.

Before the recent trial took place the witness Allison had died, but his deposition taken on the former trial was received in evidence at the recent one, and the only additional evidence adduced by the plaintiff consisted of an entry (said by the plaintiff to be in the handwriting of his deceased son,) in a book which the plaintiff said related to the business of himself and his son, and was the only cash book kept between the two of them, and of a statement made by the plaintiff in his evidence that although Allison after the decease of William A. O'Donnell, upon the occasion of being applied to by the plaintiff for payment of the policy, said that he thought the premium never had been paid, yet that on a subsequent occasion, on meeting the plaintiff on the street, he said to him that he (the plaintiff) "had the policy now and the money was "paid," by which the plaintiff said that he understood Allison to mean that the premium had been paid. The entry in the book was under date Nov. 29th, 1872, as follows, under the word "Paid," at the head of a number of entries chiefly in the handwriting of the plaintiff himself, "F. Allison, \$48.06 " There cannot, I think, be entertained a doubt that this entry was improperly received in evidence as lacking the only element which could have made it admissible, for it was not an entry made by the deceased against his own interest. As to the statement alleged to have been made to the plaintiff by Allison casually on the street, the proper time for the plaintiff to set it up was upon the former trial, when Allison gave his evidence upon oath, and not now after his decease. It is singular that the plaintiff should never, after the making of this alleged statement by Allison, have applied to him for payment of the

1886

CONFEDERATION LIFE
ASS. OF
CANADA

v.

O'DONNELL.

Gwynne J.

1886
 CONFEDERA-
 TION LIFE
 ASS. OF
 CANADA
 v.
 O'DONNELL.
 Gwynne J.

policy, as he appears never to have done, for the plaintiff says in his evidence, after mentioning the statement as above, "I did not call at his office after that. He "should have sent me the money." But apart from the consideration that, even if admissible, little weight should be attached to evidence of this nature now, after the decease of the witness, offered (for the first time, so far as it appears,) by way of impeachment of evidence given on oath in the plaintiff's presence on the former trial, without any allusion having been made to any such acknowledgment as is now relied upon, I am of opinion that the evidence was inadmissible as being an attempt to bind the defendants by a statement alleged to have been made by Allison at a time when he had no authority to affect the defendants by any statement of his other than one made upon oath and subject to cross examination by the defendants, the parties sought to be affected. Although no action had yet been brought, it is, I think, sufficiently apparent that before and at the time of the making of the alleged statement the defendants were disputing their liability to the plaintiff upon the ground that the premium never had been paid and that the instrument had never lost its character of an escrow in the hands of Allison. The declarations or acknowledgements of an agent are never admitted as evidence against his principal unless they are part of the *res gesta* and they become admissible, not as admissions, but solely on the ground that they are part of a transaction then being conducted by the agent for his principal. An agent's declaration of a past transaction is not admissible although it may have some relation to an act which the agent may be doing for the principal when he makes the declaration, but if the declaration be made at a time when the agent is not transacting any business for his principal it can not be received, there being in such case no *res gesta* of which the declaration forms a part. In *Fairlie v. Hastings*

10 Ves. 126, Sir Wm. Grant thus states the law.

As a general proposition what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal, or the representations or statements made may be the foundation of, or the inducement to, the agreement; therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make that statement or representation. So with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party therefore to be bound by the act must be affected by the words, but except in one or other of those ways I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it though it may have some relation to the business in which the person making that assertion was employed as agent. * * * The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting anything any person has asserted as to him as to his contract or agreement merely because that person has been an agent of his. If any fact material to the interest of either party rests in the knowledge of an agent it is to be proved by his testimony, not by his mere assertion.

In *Betham v. Benson* (1), Dallas C.J. says:

It is not true that where an agency is established the declarations of the agent are admitted in evidence merely because they are his declarations; they are only evidence where they form part of a contract entered into by the agent on behalf of his principal and in that single case they become admissible. The declarations of an agent at a different time have been decided not to be evidence; indeed the cases on the subject draw the distinction between the declarations of an agent accompanying the making of, and therefore forming a part of the contract, and those declarations which are made either at a subsequent or an antecedent period. The case of *Biggs v. Lawrence* (2), has been disapproved of by Lord Kenyon; the receipt in that case being merely the written declaration of the agent ought not to have been admitted. *Fairlee v. Hastings* (3), is the latest authority on the subject, and it was there held by the late Master of the Rolls, on a review of all the decisions, that although an agency is

(1) Gow. 42.

(2) 3 T. R. 454.

(3) 10 Ves. 123.

1886

CONFEDERATION LIFE ASS. OF CANADA v. O'DONNELL.
Gwynne J.

1886

CONFEDERATION
LIFE
ASS. OF
CANADA

established a declaration of the agent can only be evidence against the principal where it accompanies the transaction about which he is employed, and if made at another time it is not admissible.

In *Mortimer v. McCallan* (1), Lord Abinger C.J. says :

O'DONNELL.

As a general principle it is undoubtedly true that conversations with an agent after the transaction are not evidence against his principal, but the question is whether this be or be not a part of the *res gesta*.

Gwynne J.

And so the rule is laid down in the text books.

Mr. Phillips in his treatise on evidence (2) says :

It is only the statements or representations of the agent made in effecting an agreement or doing an act within the scope of his authority that are evidence against his principal, and the reason is because they may be explanatory of the agreement or determine the quality of the act they accompany.

Now, at the time of the statement having been made, if it was made by Allison to the plaintiff on the street as alleged by the latter, the former was not engaged in the transaction of any business for the defendants to which the statement could attach. There was no transaction whatever then being conducted by Allison for the defendants of which the statement could form a part. The statement, if made, related wholly to a past transaction, and the evidence offered of its having been made, was therefore inadmissible. Upon the former trial, when Allison gave his evidence upon oath, testifying that in point of fact the premium never had been paid, the plaintiff's evidence, as now offered, could only have been received by way of impeachment of the credit of Allison's evidence, and this only by causing him to be asked on cross-examination whether he had not made the statement which the plaintiff now says he did make, drawing at the same time Allison's attention to the time and place of his having, as is alleged, made the statement, which, if Allison denied, the plaintiff's evidence might have then been received by way of contradiction. The plaintiff thus had then full opportunity of laying the necessary foundation for the

(1) 6 M. & W. 69.

(2) Vol. 1 p. 79.

introduction of the evidence which he now relies upon and did not do so. Nor does he appear to have then suggested that Allison had ever made such a statement. To permit this evidence now to be received after Allison's death would, in my opinion, be to lay the axe to the root of a well recognized and salutary rule of law and evidence.

1886
 CONFEDERATION LIFE ASS. OF CANADA
 v.
 O'DONNELL.
 Gwynne J.

I concur, therefore, in the opinion of the Chief Justice, that the verdict should have been in favour of the defendants upon the evidence which was admissible and the findings of the jury having relation to that evidence, and that our judgment should now be in favor of the defendants upon the issues joined.

Appeal allowed and new trial ordered.

Solicitor for appellants: *Charles H. Tupper.*

Solicitor for respondents: *James N. Lyons.*
