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*Mar. 10.
*Nov. 20.

M. O'GARA (DEFENDANT).....APPELLANT;

AND

THE UNION BANK OF CANADA (PLAINTIFFS).....RESPONDENTS;

AND

STARRS, ASKWITH & CO.; JOHN E. ASKWITH, J. L. P. O'HANLY, M. STARRS.....DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Surety—Interference with rights of surety—Discharge.

The Union Bank agreed to discount the paper of S., A. & Co. railway contractors, indorsed by O'G. as surety, to enable them to carry on a railway contract for the Atlantic & North-west Ry. Co. O'G. endorsed the notes on an understanding or agreement with the contractors and the bank that all moneys to be earned under the contract should be paid directly to the bank and not to the contractors, and an irrevocable assignment by the contractors of all moneys to the bank was in consequence executed. After several estimates had been thus paid to the bank it was found that the work was not progressing favourably, and the railway Co. then, without the assent of O'G. but with the assent of the contractors and the bank, guaranteed certain debts due to creditors of the contractors and out of moneys subsequently earned by the contractors made large payments for wages, supplies and provisions necessary for carrying on the work. In October, 1888, the bank, also without the assent of O'G., applied for and got possession of a cheque of $15,000 which had been accepted by the bank and held by the company as security for due performance of the contract, in consideration of signing a release to the railway company "for all payments heretofore made by the company for labour employed on said contract and for material and supplies which went into the work." The contract under certain circumstances gave the right to the company to employ men and additional workmen, &c., as they might think proper, but did not

*PRESENT:—Sir Henry Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

give the right to guarantee contractors' debts or pay for provisions and food, &c.

Held, that there was such a variation of the rights of O'G. as surety as to discharge him.

Taschereau and Gwynne JJ. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the Common Pleas Division of the High Court of Justice, dismissing the appellants' motion to set aside the findings and judgment of Mr. Justice Ferguson.

The action was commenced by the respondents, the bank, in the Common Pleas Division of the High Court of Justice for Ontario upon four promissory notes held by the bank, upon which the defendants, Starrs, Askwith & Co. were sued as makers, and the defendants, John E. Askwith, J. L. P. O'Hanly, M. Starrs and M. O'Gara were sued as indorsers.

Judgment was entered at the trial by consent against all the defendants except the defendant O'Gara, who pleaded and went to trial upon a special defence, alleging that after the contract for constructing a line of railway known as the Short line through the State of Maine was awarded to Starrs, Askwith & Co. the contractors negotiated with the respondents' bank for a line of credit, which the bank agreed to make, provided they could procure the appellant to indorse their notes.

That after some time the appellant agreed to indorse for them, provided they would as security assign to the bank the moneys to be earned under the contract. This being done the appellant from time to time indorsed the notes of the firm to the bank which were from time to time renewed.

That the bank received all the moneys earned by the contractors down to March, 1888, which was partly applied on the notes and partly in the making of new

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advances, but in March, 1888, the C. P. R. Co. disregarded the assignment and paid the moneys earned to the other creditors of the contractors.

That afterwards the bank neglected to enforce its assignment or to collect the moneys earned, and on the 27th of October, 1888, without consulting with the appellant, and without any notice to him, the bank confirmed the payments already made by the C. P. R. Co. amounting to about $75,000.00.

That he was a surety on the faith of the security he had procured to be given to the bank, that the bank had wasted the security without his knowledge, that he was absolutely discharged by reason of the bank not fulfilling its duty to collect the money or at all events to the extent of the payments made by the C. P. R. Co.

The action was tried at the sittings of the court for the trial of action in the Chancery Division before Mr. Justice Ferguson, without a jury.

The documentary and oral evidence given at the trial in support of appellant's defence and the other material facts and pleadings are reviewed in the judgments hereinafter given.

Mr. Justice Ferguson gave judgment in favour of the plaintiff bank for the sum of $36,872.31 and costs of suit.

The defendant, O'Gara, thereafter moved in the Common Pleas Division of the High Court of Justice to set aside the findings and judgment of Mr. Justice Ferguson.

The motion was argued and judgment given therein against the defendant, directing the dismissal of his motion with costs.

The defendant O'Gara then appealed to the Court of Appeal for Ontario.

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The Court of Appeal was divided, the learned Chief Justice and Mr. Justice Osler being in favour of dismissing the appellant O'Gara's appeal, and Mr. Justice Burton and Mr. Justice Maclennan in favour of allowing the appeal, and the appeal was therefore dismissed.

D. McCarthy Q.C. and *A. Ferguson* Q.C. for appellants: There is no dispute as to the terms of the agreement or understanding upon which Mr. O'Gara undertook to indorse the contractor's notes, and both parties agree with the findings of the learned judge at the trial as to particular terms of agreement. The equitable assignment of the contract moneys was drawn up by the bank and sent to them and acted upon. There was, therefore, something more than the mere agreement to indorse; there was a pre-existing agreement between the contractors, the bank and Mr. O'Gara.

The payments of some $125,000 made under another and subsequent arrangement between the bank and the contractors and the company were made without the knowledge or consent of Mr. O'Gara, and as the work was never taken out of the contractors' hands under clauses 23 or 24 of the contract, the legal effect is that the indorser is released.

Amounts were paid directly by the company to parties who furnished supplies and although the company, by obtaining the release which the bank signed and for which the bank got back a sum of $15,000 which had been deposited as security for the due performance of the contract, cannot be sued, yet the indorser can claim that all such moneys so paid were diverted and not paid in accordance with the terms of the equitable assignment upon the faith of which alone Mr. O'Gara consented to become a surety. The law as stated in the following authorities is applicable to the facts of this case, viz.: *Walker* v. *London* and *North-*

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western Railway Co. (1); Hudson on Building Contracts (2); *Brice* v. *Bannister* (3); *Drew* v. *Josolyne* (4); *Polak* v. *Everett* (5).

Meredith Q.C. and *Chrysler* Q.C. for respondents: The main position of the appellant, Mr. O'Gara, is that being a surety he is entitled to avail himself of the equitable defences of a surety, and that in the present case his rights have been interfered with. In the first place we contend that the appellant was not a surety but a co-adventurer in the enterprise, being entitled to a share of the profits, and that the only contract with the bank was the obligation to pay at maturity if the notes he indorsed were presented for payment dishonoured, and notice of dishonour given to him. When in October, 1888, the contract proved to be a losing one, and when it was found that the $15,000 were in jeopardy, an arrangement was arrived at with Mr. O'Gara (for he was in daily communication with the contractors), by which, for the benefit of all concerned, the works were continued.

The findings of the trial judge are to that effect, and if they remain there is an end of the case.

But as it is contended that there was an equitable assignment of all moneys to be earned and that it constituted the bank assignee in equity of a chose in action, relying on *Brice* v. *Bannister* (3). We answer that that case is distinguishable, for if we adopt the reasoning of one of the judges, Lord Justice Bramwell, who stated an hypothetical case which is practically this case, we find there is no room for argument.

Is it not a fair answer to the appellant's contention to say that no moneys were subsequently earned after arrangement of October, 1888, because no supplies were furnished by the contractors?

(1) 1 C.P.D. 518.
(2) P. 420.
(3) 3 Q.B.D. 569.
(4) 18 Q.B.D. 590.
(5) 1 Q.B.D. 669.

Then again, we submit there has been no practical binding acceptance by the company of this assignment, for under section 27 of the contract the Atlantic and North-western Railway might have refused to be bound by the order on the Canadian Pacific Railway Company, and that all payments made are justified by sections 23 of the contract and 101 of the specifications and notices given thereunder.

The bank further contends that O'Gara was not a proper surety for the principal debtors at the date that the bank assented to the payments made by the Canadian Pacific Railway Company, because he was then merely an indorser of notes not then dishonoured nor overdue. Lord Blackburn in *Duncan Fox & Co.* v. *North and South Wales Bank* (1), and Lord Watson in same case at pages 21 and 22. Further, we say that there was no change or variation of any contract between the bank and the promissors so as to release the indorser O'Gara. The arrangement as to the estimates was purely collateral. *Sanderson* v. *Aston* (2). Parol evidence is not admissible to vary the terms of the contract embodied in the promissory notes. *Abrey* v. *Crux* (3).

Counsel also relied on *Buck* v. *Robson* (4); *Ex parte Nichols. In re Jones* (5); *Taylor* v. *Bank of New South Wales* (6); *Ward* v. *National Bank of New Zealand* (7); *Western Wagon Company* v. *West* (8); *Pearl* v. *Deacon* (9); Benjamin on Surety (10); Grant on Suretyship (11).

THE CHIEF JUSTICE and FOURNIER J. concurred with SEDGEWICK J.

TASCHEREAU, J.—I would dismiss this appeal.

(1) 6 App. Cas. 18.
(2) L.R. 8 Ex. 78.
(3) L.R. 5 C.P. 41, per Bovill C.J.
(4) 3 Q.B.D. 686.
(5) 22 Ch. D. 782.
(6) 11 App. Cas. 596.
(7) 8 App. Cas. 755.
(8) [1892] 1 Ch. 271.
(9) 24 Beav. 186.
(10) P. 238.
(11) Par. 373.

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I think that the defence fails for the reasons given by the learned Chief Justice in the court appealed from.

I cannot see, as a matter of fact, that the position of the appellant as surety has been in any way injuriously affected by any of the dealings that have been proved to have taken place between Starrs & Co. and the Bank or the Railway Company.

GWYNNE J.—This is an appeal by the indorser of certain promissory notes made by a firm of contractors, styled Starrs, Askwith & Co., payable to the appellant and indorsed by him, and, as so indorsed, discounted for the makers by the plaintiffs, in the course of their business as bankers, against a judgment rendered in favour of the plaintiffs in an action upon the promissory notes against the makers and indorsers.

A thorough understanding of the facts of the case is all, as it appears to me, that is necessary to remove all difficulty attending the determination of the appeal; and, first, as to the relationship which existed between the Canadian Pacific Railway Company and the Atlantic and North-western Railway Company, with which latter company the firm of Starrs, Askwith & Co. entered into the contract out of which the transaction which is the subject of litigation in the present suit arises, for the construction of a portion of their railway, situate in the State of Maine, one of the United States of America.

The Canadian Pacific Railway Company were no doubt interested in the construction of the work which Starrs, Askwith & Co. contracted with the Atlantic and North-western Railway Company to perform, because the Canadian Pacific Railway Company had accepted a lease whereby they were to be lessees of the railway as soon as it should be constructed by the

Atlantic and North-western Railway Company, which company had entered into a covenant with the Canadian Pacific Railway Company to build the railway, and entered into a contract with Starrs, Askwith & Co. for the construction by them of two sections of the railway. The proceeds of the sale of certain bonds of the Atlantic and North-western Railway Company were placed in the hands of the Canadian Pacific Railway Company to be disbursed by them by their cheques to the contractors, upon the authority and direction of the Atlantic and North-western Railway Company.

To this extent then, in so far as the present action is concerned, and to this extent only, can the Canadian Pacific Railway Company be said to have been the agents of the Atlantic and North-western Railway Company, namely, to pay out of the funds of that company placed in their hands the moneys which, from time to time, they should be authorized by the Atlantic and North-western Railway Company to pay to the persons with whom the latter company had entered into contracts for the construction of the railway.

Then, secondly, as to the terms of the contract entered into by and between Starrs, Askwith & Co. and the plaintiffs, there appears to be no reason to doubt the evidence of Mr. O'Hanly, one of the members of the firm of Starrs, Askwith & Co., upon that point; and the learned trial judge has expressly found the contract to have been as stated by him, and at the trial it was finally conceded by the appellants so to be. Now, O'Hanly's evidence, in substance, is that in order to obtain the contract it was necessary for the firm to deposit with the Atlantic and North-western Railway Company $15,000 in money, or in a cheque accepted and certified as good by a bank. They therefore applied to Mr. Anderson, the plaintiffs' agent and manager at their Ottawa branch, and informed him that they

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wanted, in the first place, $15,000 as a security deposit, and afterwards, $25,000 to enable them to carry on the work, in all $40,000. The firm wanted to get the accommodation which they required upon their own security alone, but the plaintiffs' agent declined to give the accommodation without a good indorser. Eventually an agreement was arrived at between the firm and the plaintiffs, through their agent Mr. Anderson, to the following effect:—The bank agreed to give their acceptance of the firm's cheque for $15,000, and to honour the drafts of the firm to the further amount of $25,000, as they should want funds to carry on the work, upon their supplying their notes, with an approved indorser, the firm also agreeing that all moneys coming to them under their contract, upon their progress estimates, should be paid into the bank at Ottawa, against which the firm were to be at liberty to draw in order to carry on the work, and that, for so much of the notes discounted by the bank for the firm as upon maturity the firm could not afford to pay out of the progress estimates, these notes should be renewed by the bank until the work should be completed under the contract, which time was, by the contract, declared to be the first of November, 1887; and Mr. O'Gara was agreed to be accepted by the bank as an approved indorser.

Accordingly, on the 24th May, the bank discounted a note of the firm, dated 23rd May, and indorsed by Mr. O'Gara, for $15,500, payable six months after date, the proceeds of which, amounting to $15,023.53 were placed to the credit of the firm in the bank, and the firm drew thereon a cheque for $15,000 payable to the Canadian Pacific Railway, or order (security contract, sections one and two, Short Line Railway), which the bank certified as good. This cheque, so certified, was handed by the firm to a Mr. Ross, manager of the

Atlantic and North-western Railway Company. On the 1st of June, 1887, the bank discounted for the firm another note of that date for $10,000, made by the firm and indorsed by the appellant, and placed the proceeds to the credit of the firm; at the same time the firm left with the plaintiffs' manager, at their Ottawa branch, a letter dated the 30th May, 1887, addressed to the Canadian Pacific Railway Company, as follows:—

GENTLEMEN,—Please make all cheques payable to us for work done on our contract on Atlantic and North-western Railway (International Maine Division) to the order of the Union Bank of Canada, and send to their Ottawa branch, or any other estimate for said work, and we hereby agree that this authority shall be irrevocable on our part, without the assent of the said bank.

Yours truly,

(Sgd.) M. STARRS,
" JNO. E. ASKWITH,
" J. L. P. O'HANLY.

This letter the plaintiffs' agent at Ottawa enclosed in a letter dated 1st June, 1887, addressed and sent to W. Sutherland Taylor, treasurer of the Canadian Pacific Railway Company, which letter is as follows:—

DEAR SIR,—I enclose an authority from Messrs. Starrs, Askwith and O'Hanly, contractors for work on International Maine Division of the Atlantic and North-western Railway, requesting your company to make all payments, by cheque or otherwise, due them for work, to this bank, and to have same sent here when due. Will you please acknowledge this and say if you will comply therewith. If you are not the proper officer of the Canadian Pacific Railway Company to take this, will you kindly forward it to the proper person and notify me, and oblige.

Yours truly,

M. A. ANDERSON,
Manager.

To this letter Mr. Taylor replied by a letter, dated the 2nd June, 1887, as follows, addressed to Mr. Anderson:—

DEAR SIR,—I am in receipt of yours of yesterday. The order which you enclose is not satisfactory in so far as the firm of contrac-

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tors do not give the bank the authority to sign binding receipts to this company on their behalf for the moneys which may be monthly remitted to the bank as per estimates. Please supplement order in that way. I enclose form for the signature of firm.

The form sent in the above letter was signed by Starrs, Askwith & Co. per M. Starrs and as so signed is as follows :—

To the Canadian Pacific Railway Company.

The Union Bank of Ottawa is hereby empowered by us to grant valid and binding receipts on our behalf to you for moneys remitted by you in payment of our estimates under contract on Atlantic and North-western Railway, as per order given by us dated 30th May, 1887.

(Signed) STARRS, ASKWITH & CO.
Per M. STARRS.

This paper so signed Mr. Anderson enclosed in a letter dated June 3rd, 1887, addressed and sent by him to Mr. Taylor as follows :—

DEAR SIR,—I have received your letter of the 2nd inst., and now enclose form sent by you duly signed by firm. I suppose I may now consider the power of attorney to draw their estimates irrevocable by contractors for this work.

At the same time that Starrs, Askwith & Co. gave to the plaintiffs' agent the above letter of the date of 30th May, addressed to the Canadian Pacific Railway Company, they gave to him also the following letter :—

UNION BANK OF CANADA,
OTTAWA, May 30th, 1887.

Manager Union Bank,
Ottawa.

DEAR SIR,—Having requested the Canadian Pacific Railway to make all estimates for our work on the Main Division of the Atlantic and North-western Railway payable to you and sent to your office, we now hereby authorise you to use such estimates for the payment of any advances made by you to us and to charge such notes to our account by which ever of us made, without notice or protest of any kind, and we hereby waive all such notice and protest and ratify and confirm all agreements in this letter.

Yours truly,

Signed M. STARRS,
" JOHN E. ASKWITH.
" J. L. P. O'HANLY.

Afterwards the bank, from time to time, discounted for the firm other promissory notes made by them and indorsed by Mr. O'Gara to an amount in the whole of about $55,000, including the note for which the bank gave their acceptance of the said cheque for $15,000 as deposit security.

As to the terms upon which Mr. O'Gara agreed with Starrs, Askwith & Co., to indorse their paper for them, there is a discrepancy between the evidence of Mr. O'Hanly and of the appellant as to the time when that agreement was entered into. Mr. O'Hanly says that when Mr. O'Gara indorsed the note of the 23rd of May for $15,000, no agreement was entered into or spoken of; that Mr. O'Gara indorsed that note as he had frequently been in the habit of indorsing paper for Starrs & O'Hanly before they had formed a partnership with Askwith and the agreement was first spoken of and entered into upon the 31st May, and signed by Askwith and O'Hanly on the 1st of June, when O'Gara indorsed the note of that date for $10,000, as follows:

In consideration of Mr. O'Gara indorsing for us we agree to indemnify him against such indorsations and to pay him twelve and a half per cent of the net profits of our contracts on the short line of the Canadian Pacific Railway Company, we to charge for expenses only our actual expenses.

Signed JOHN E. ASKWITH.
" J. L. P. O'HANLY.

June 1st, 1887.

Mr. O'Gara's recollection on the contrary is that the terms upon which he should indorse the firm's paper were discussed upon different occasions and finally verbally agreed upon before he indorsed the note of the 23rd May and that on the 1st June when asked to indorse the note of that date, he had it reduced into writing and signed, because in the interval he had become afraid "least there should be a failure of these people and he being paid by a percentage or promised

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to be paid by percentage, that might by any means be made out a partnership."

In the view which I take this discrepancy in the evidence is immaterial and the agreement both as to its terms and as to the time of its having been entered into may be taken as stated by the appellant. He says that when first applied to by Starrs and O'Hanly to indorse the paper of the firm for the contract under construction he at first refused; that his recollection is that he refused for a day or two; that he was reluctant to go into anything of the kind that would be dangerous; that although he had before indorsed for Starrs and O'Hanly he had security for such previous indorsations; that to the best of his recollection he held the matter in abeyance for a day or two, but finally, after it was talked over, his objections were overcome by the discussion which took place that there would be no risk; that all the moneys would come into the hands of the bank and that upon that understanding and upon that stipulation he agreed to indorse for them and did accordingly indorse the note of the 23rd May and when asked to indorse the note of the 1st of June he says that he "again spoke of the assignment to the bank and that it was then stated either that it was done or that it should be done at once" and thereupon he indorsed the note of the 1st June and had the agreement as above set out reduced into writing as he had fears there might be a misunderstanding as to what was the position he occupied. He was afraid that it might be argued, in the event of failure of the firm, that he was a partner, and so for his own protection he had the agreement reduced into writing. Then there is a discrepancy also between the evidence of Mr. O'Gara and Mr. Anderson upon the point whether Mr. Anderson had knowledge that O'Gara had made it a condition of his indorsing the

paper of the firm that the moneys coming to the firm should be assigned to the bank. Mr. O'Gara says that Mr. Anderson had such knowledge for he says that they both repeatedly discussed the matter and spoke of the moneys coming into the hands of the bank being the only security which the appellant had whereas Mr. Anderson expressly denies that any such conversation ever took place between him and the appellant, or that he had ever heard that there was any understanding of any sort between the firm and Mr. O'Gara upon the faith of which Mr. O'Gara had indorsed the paper of the firm. In the view which I take it is unimportant also whether Mr. Anderson had or had not any knowledge or notice of the terms upon which Mr. O'Gara indorsed the firm's paper.

At an early period of the progress of the work under the contract it became apparent that the work contracted for could not be performed at the prices fixed in the schedule of prices forming part of the contract, although, at the time the contract was entered into, it was deemed that the contract was a very profitable one. Influence on behalf of the contractors was exercised upon the Atlantic and North-western Railway Co., to try and get them to make alterations in the specifications and prices more favourable to the contractors. The contractors and their friends failed to succeed in the efforts in this behalf during the period limited in the contract for the completion of the work, but on the 7th November, 1887, seven days after the time limited by the contract for its completion, and while the work remained quite incomplete, an agreement was entered into by an indenture expressed to be made between the Atlantic and North-western Railway Co. represented herein by Thomas O'Shaughnessy, the company's assistant General manager of the one part, and Starrs, Askwith & Co. of Ottawa, Ontario, contractors

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of the other part, whereby it was mutually agreed that the specifications attached to the contract between the railway company and the firm should be and were altered in certain particulars in the interest of the contractors and whereby the prices named in the contract for certain work were increased and made more favourable for the contractors, and whereby it was expressly stated to be mutually agreed that the original contract should remain in full force and effect in all respects except those to which the alterations made therein in the interest of the contractors related.

Now the work having been continued upon these altered terms in favour of the contractors after the time fixed by the contract for the completion of the work contracted for, it is obvious that the company could not avail themselves of any of the provisions of the contract relating to the event of the work not being proceeded with with such diligence and such a force as to justify the expectation that the work contracted for should be completed by the 1st of November, 1887, the time named in the contract for its completion; but, whether the agreement of 7th of Novenber had been entered into or not the work subsequently done must be taken to be subject to all the other provisions of the contract and among these to all the provisions of secs. 23, 24 and 27 of the contract and of sec. 101 of the specifications which relate to other matters than the not proceeding with the work with such diligence and force as to justify the expectation that the work contracted for should be completed by the 1st of November. Sections 23 of the contract, and 101 of the specifications which form part of the contract are to the same purport and effect. As regards the work in progress subsequently to the 1st of November, sec. 23 will read as follows, omitting all that relates to the not proceeding with such diligence

and force as to justify the expectation of the work being completed by the first of November:—

If the manager shall at any time consider that the works are not, or that some part thereof is not, being carried on with due diligence, then in every such case the manager may by written notice to the contractors require them to employ or provide such additional workmen, horses, machinery, or other plant or materials as the manager may think necessary. And in case the contractors shall not thereupon within three days or such longer period as may be fixed by any such notice in all respects comply therewith, the manager may at the expense of the contractors, provide and employ such additional workmen, horses, machinery and any other plant, or such additional materials respectively as he may think proper and may pay such additional workmen such wages and for such horses, machinery and other plant and materials respectively such prices as he may think proper, and all such wages and prices respectively shall thereupon at once be repaid by the contractors or at the option of the company the same may be retained and deducted out of any moneys at any time payable to the contractors, and the company may use in the execution or advancement of the said work not only the horses, machinery and other plant and materials so in any case provided on the company's behalf, but also all such as have been or may be provided by or on behalf of the said contractors

So, in like manner, sec. 101 of the specifications will read as follows:—

If at any time in the opinion of the manager the works are, or some part thereof is, not carried on with due diligence then the said manager shall have the power to notify the contractors in writing to employ or provide such additional workmen, horses, material or plant as the said manager may think necessary; and in case the said contractors shall not thereupon within three days, or such longer time as may be fixed by any such notice, in all respects comply therewith, the manager shall have power to provide any workmen, horses, material or plant he may think proper and all moneys so expended by the company shall thereupon be paid by the contractors or may be deducted or retained out of any moneys due or to become due to the contractors, and should these moneys be insufficient the balance shall be recoverable in the usual way as a debt due by the contractors to the company.

Sec. 24 relates to the event of the company taking the work absolutely out of the contractors' hands and need not be here set out.

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Sec. 27 provides that the company may from time to time "pay all wages of mechanics and men employed in and about the works and charge the contractors therewith, and deduct the same from any moneys then due or afterwards to become due to the contractors."

In the month of February, 1888, Mr. Lumsden the manager in charge of the construction of the railway for the Atlantic and North-western Railway Company, being of opinion that the works contracted for by Starrs, Askwith & Co., were not being carried on with due diligence, served the contractors with the notice of the 25th February, 1888. This notice not having had the desired effect, Mr. Lumsden on the 14th of March, 1888, addressed and sent to the contractors the notice of that date.

The contractors were wholly unable to comply with these requirements. In the month of February, 1888, the men employed by one of the sub-contractors on the work had stopped working because of their not being paid. Mr. O'Hanly says that the work turned out quite different from what they had expected when the contract was entered into; that at that time they expected to realize a profit of three or four thousand dollars a mile, but that no one of the greatest experience could have foreseen the difficulties they encountered in executing the work; and the consequence was that in March, 1888, after having put all they had into the work, they had become practically insolvent and the contract itself had become their sole remaining asset. In short, not only had the men on the work been ceased to be paid their wages, but the credit of the contractors had become so destroyed that persons with whom they had contracted or were desirous of contracting for the supply of materials and supplies generally, and absolutely necessary for carrying on the works, refused to supply such materials at all upon the credit of the

contractors, nor unless they should receive the guarantee of the company for their payment. In fact Mr. O'Hanly was of opinion that the best thing the firm could do would have been to abandon the contract and he himself, on the 22nd of March, 1888, withdrew from the firm. Such was the state of things, that it was apparent that of necessity the work must have been utterly abandoned by the contractors, or taken off their hands under sec. 24 of the contract, if the company had not, upon the application and request of the contractors, come to their relief, which they did in the following manner: namely, they undertook to assume the payment of the wages of the men employed upon the work and to authorize Mr. Lumsden, the superintendent of construction, to purchase all materials and supplies necessary for the works upon the credit and guarantee of the company. Accordingly, in this manner the work was proceeded with from the month of April until the month of September or October, 1888, when, the work being still incomplete, the company assumed its completion themselves and under this arrangement so entered into for the benefit of and in the interest of the contractors, the company disbursed $79,160 in payment of the wages of the men employed on the work and $24,983 in the purchase through Mr. Lumsden, upon the credit of the company, of timber, lumber, iron, hay, oats and other things which were absolutely necessary for the carrying on of the work, and for this amount the Canadian Pacific Railway Company was authorized by the Atlantic and North-western Railway Company to issue and did issue their cheques in favour of Mr. Lumsden for payment of the materials so supplied. It is admitted by the appellant that $79,160 paid as the wages of the men employed on the work, was properly paid to them under sec. 27 of the contract, but the contention of the appellant is that the contractors were

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entitled to be allowed credit in their estimates for, and to be paid, the said sum of $24,983 so as aforesaid paid by the company to the persons from whom materials to that amount had been purchased and used in the works, in discharge of Mr. Lumsden's liability to such persons on behalf of the company; that is to say, that notwithstanding the arrangement between the contractors and the company of the month of March or April, 1888, the company were liable to pay twice for the said materials, namely, to the persons selling the materials upon the company's credit, and also to the contractors who never did supply the materials in question; and the appellant contends that the bank, in virtue of the contractors' letters of June, 1887, and so likewise the appellant, as indorser of the notes of the firm discounted by the bank, had a legal claim upon such amount, as being money due and payable to the contractors under their contract, and that, as is further contended, the bank, by the document in evidence dated 27th October, 1888, released and discharged such claim to the prejudice of the appellant, and have thereby discharged the appellant from all liability as indorser of the notes of the firm, or at least to the said amount of $24,983. But the contractors, under their contract, were only entitled to claim payment of certain scheduled prices for certain specified materials furnished by them in the fulfilment of their contract, and it cannot, I think, admit of a doubt that the contractors had a perfect right to enter into the arrangement which they did, for their benefit, with the Atlantic and North-western Railway Company in the month of March or April, 1888, in virtue of which the materials for which the said sum of $24,983 was paid were furnished upon the credit of the company, and that the payment of such sum by the company, in the manner in which it was paid, was authorized by section 23 of

the contract and section 101 of the specifications, as the payment of the men's wages was authorized by section 27, and so the amounts of $79,160 and $24,983, amounting together to $104,183, so paid by the company, never became due by the company to the contractors, nor had the contractors any right to have had either of those sums, or any part thereof, allowed to them as being due and payable to them under their contract, and as the bank had no claim whatever upon anything except the amount actually due and payable to the contractors under their contract, and which, as such, the Canadian Pacific Railway Company were authorized to issue their cheques in favour of the bank, the appellant could not be in any respect prejudiced even by a formal release, if any such had been executed by the bank, expressly releasing the Atlantic and North-western Railway Company, and also the Canadian Pacific Railway Company from all claim against them for the said several sums amounting to the $104,183, so as aforesaid paid by the company, at the request of the contractors. But in truth no such release was ever executed. It is admitted that the appellant has no defence whatever to the action brought by the bank against him as indorser of the notes sued upon, unless he can establish his contention that the bank has executed a document amounting in law to a release of a legal claim which they had against the Canadian Pacific Railway Company and the Atlantic and North-western Railway Company, to demand and receive payment of the said sum of $24,983, so paid as aforesaid by the latter company, the effect of such release being, as is contended, to deprive the appellant of a common fund specially assigned to the bank for payment of the notes indorsed by the appellant. The document which is relied upon as such release was signed by the solicitor of the bank, having been first approved by Starrs, Ask-

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with & Co., who expressly authorized and directed the same, and is as follows:—

Whereas, on the 23rd of May, 1887, Starrs, Askwith & Co. deposited with the Canadian Pacific Railway Company a certified cheque of the Union Bank of Canada for $15,000, to be held by the railway company as security for the performance of a certain contract by Starrs, Askwith & Co. on the Atlantic and North-western Railway;

And whereas, by orders made in June, 1887, said contractors assigned, and directed payment of all moneys payable under said contract to the said bank;

Application, therefore, having been made by the bank to the railway company to return to the said bank the said $15,000, the railway company have consented to do so on receiving from the bank the receipt for the same, it being understood that any payments heretofore made by the company for labour employed on same contract, or for material and supplies which went into the said work, were for the benefit of all concerned and not in conflict with the orders in favour of the bank;

Except as above, this receipt is not to affect the order in favour of the bank. Dated Montreal, the 27th October, 1888.

This document was signed for the Union Bank by their solicitor, J. Travers Lewis, having been first approved in writing by Starrs, Askwith & Co. as the terms upon which the cheque of the firm for the $15,000 deposit security should be and was given up to the bank, and when given up, the amount was carried to the credit of the contractors' account with the bank,

The payments referred to in the above receipt as having been made by the company for labour and materials and supplies are the payments of $79,160 and $24,983 respectively, already mentioned, and made in pursuance of the arrangement entered into in March or April, 1888, between the contractors and the Atlantic and North-western Railway Company, whereby the company abstained from taking the contract absolutely out of the hands of the contractors as they might under the circumstances have done under section 24, and agreed to proceed in the manner in which they did and as they were authorized to do under the provisions of section

23 of the contract and section 101 of the specifications. Now it cannot be disputed that the payments so made were made for the benefit of the contractors and so also of the appellant who was interested to the extent of 12½ per cent of the profits of the contractors, and the payments having been made by the authority of the contractors and in pursuance of provisions in the contract, authorizing them to be made as they were made under the circumstances which arose, they cannot be said to have been made in conflict with the orders of June, 1887, in favour of the bank which orders only authorized the bank to receive whatever sums should become payable to the contractors under the contract. The insertion, therefore, in the receipt signed by the bank's solicitor upon behalf of the bank of a statement which, as appears, was absolutely true and which was expressly authorized by the firm of contractors to be inserted in the receipt, was free from all objection and there is nothing in the receipt so signed which can be construed as being a release by the bank of any claim which the bank in law had against either the Canadian Pacific Railway Company or the Atlantic and North-western Railway Company. The appellant has not been in any manner prejudiced by anything contained in that receipt, nor has he been thereby deprived of any right, if any he had, to compel the payment of these sums or any of them a second time by the Atlantic and North-western Railway Company or by the Canadian Pacific Railway Company in liquidation of any part of the moneys due to the bank upon the notes of the firm indorsed by the appellant; and it is admitted by the appellant that he has not and that he does not claim to have any defence to the present action, unless the same can be found in the terms of the said receipt.

The utmost right insisted upon by the appellant is that as indorser of the notes of the firm of contractors,

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he had a right to require the bank to realize the equitable assignment which, as he contends, was executed to the bank as well for the security of the appellant as of the bank, and that the bank have released the railway company from all liability upon such equitable assignment, and have thereby discharged the appellant from all liability as indorser of the notes of the firm of contractors, and the sole question is whether the facts of the case bring it within principle and authorities applicable to such contention, and I am of the opinion that they do not.

The cases cited on behalf of the appellant are all distinguishable from the present; that chiefly relied upon as having most resemblance, was *Brice* v. *Bannister* (1), but in that case the judgment of Lord Justice Cotton proceeded upon the foundation that the advances made by Bannister to Gough for which the defendant Bannister claimed credit in preference to an equitable assignment made by Gough to the plaintiff Brice of the specific sum of £100 due or to become due to Gough under his contract with the defendant, were in no way sanctioned by Bannister's contract with Gough. The learned Lord Justice says:

> The advances made by the defendant were in no way sanctioned by the contract, and in no sense an equity between Gough and the defendant existing or arising from circumstances existing at the time of the notice to the defendant of the assignment to the plaintiff. The plaintiff was the assignee for value of the moneys payable under the contract, without any deduction for cost of materials or other cost of construction. The defendant for his own purposes determined not to complete the ship himself, but to let Gough do it under the contract. To enable him to do so, he, after notice of the assignment to the plaintiff paid money to Gough so as to exhaust the contract price. By so doing, he could not, in my opinion, defeat or prejudice the plaintiff's right.

But in the present case the moneys advanced by the Atlantic and North-western Railway Company, in

(1) 3 Q.B. D. 569.

payment of wages and materials and supplies furnished and purchased by the railway company under the arrangement of March, 1888, were, as already shown, made in the interest of the contractors, and so in the interest of the appellant who was interested in the success of the contractors to the extent of 12½ per cent of their ultimate profits, and were also, as also already shown, sanctioned by the original contract between the contractors and the railway company, so that in the present case the element exists, the absence of which, in *Brice* v. *Bannister* (1), was made the foundation of the judgment of the Lord Justice Cotton. Then the language of Lord Justice Bramwell, who concurred in the result arrived at by Lord Justice Cotton upon the facts of that case, is very applicable in the present case against the contention of the appellant.

If, says the learned judge, it were only money payable according to the terms of the contract, the plaintiff would fail, for no money became due according to the terms of the contract.

In the present case the order of June, 1887, which is claimed to be an equitable assignment to the bank, had relation only to such moneys as should become due and payable to the contractors under their contract. But the moneys which are under consideration, and which were paid by the order and authority of the Atlantic and North-western Railway Company, under the arrangement with the contractors made in March or April, 1888, for wages to the men employed, and for materials, &c., &c., furnished, not by the contractors, but purchased upon the credit of the railway company, and so supplied by them to their contractors, were not moneys which ever became due and payable to the contractors, who, by their contract, were only entitled to certain scheduled prices for such materials, &c., &c., as should be supplied by them.

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The present case, therefore, is very distinguishable in its facts from *Brice* v. *Bannister* (1), and the judgment in that case can afford no support to the contention of the appellant in the present case.

For the above reasons, I am of opinion that this appeal must be dismissed with costs.

SEDGEWICK J.—This action is brought upon four promissory notes amounting in the aggregate to $40,000, made by the firm of Starrs, Askwith & Company, and indorsed by several persons, among others the appellant O'Gara.

The action was tried before Mr. Justice Ferguson, who gave judgment in favour of the plaintiff bank. This judgment was sustained by the unanimous decision of the Common Pleas Divisional Court, as well as by the Court of Appeal that court being equally divided. The facts would appear to be somewhat as follows:—

On the 24th May, 1887, the firm of Starrs, Askwith & Company entered into a contract with the Atlantic and North-western Railway Company for the purpose of constructing a portion of a railway known as the Short Line Railway, through the State of Maine. It was necessary that the contractors should from time to time obtain advances in addition to the moneys payable under the contract, and an arrangement was thereupon entered into by which it was agreed that all moneys payable to the contractors under the contract should be assigned to the Union Bank; that the contractors should deposit with the bank, from time to time, negotiable paper indorsed by Mr. O'Gara and others, which paper was to be discounted in the ordinary way as the contractors might require funds. The trial judge states his finding as follows:—

(1) 3 Q. B. D. 569.

I find the real understanding and agreement was that the moneys referred to in these papers were to come to the plaintiff's bank, and that the contractors were to draw out of the same from time to time sufficient money to carry on the contract and that the security in this respect to the bank and to the defendant O'Gara was the fact that the whole of the moneys was to come to the bank, so that any surplus there might be, after the amounts necessary to carry on the work, should be in the bank (the plaintiff's bank) to meet advances made.

In other words, the defendant O'Gara indorsed the notes in question upon the understanding, not only between himself and the contractors, but also with the manager of the bank itself, that all the moneys payable to the contractors under the contract were to be paid, not to them but directly to the bank. After the execution of the contract the contractors signed and sent to the Canadian Pacific Railway Company the following document:—

Please make all cheques for work done on our contract on Atlantic and North-western Railway (International Maine Division) payable to the order of the Union Bank of Canada and sent to their Ottawa branch or any other estimates for said work. And we hereby agree that this authority shall be irrevocable on our part without the consent of the said bank.

On the same day they gave to the plaintiff's bank the following document:—

Having requested the Canadian Pacific Railway Company to make all estimates for our work on the Maine Division of Atlantic and North-western Railway payable to you and sent to your office, we now hereby authorize you to use such estimates for the payment of any advances made by you to us, and to charge such notes to our account by whichever of us made without notice or protest of any kind, and we hereby waive all such notice or protest and ratify and confirm all agreements in this letter.

In reply to the letter sent to the Canadian Pacific Railway Company inclosing the first document that company pointed out that it was not stated that the bank had power to give binding receipts and asked to have it supplemented, when a further document

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signed by the contractors was sent to the Canadian Pacific Railway which is as follows:—

The Union Bank of Canada is hereby empowered by us to grant valid and binding receipts on our behalf to you for moneys remitted by you in payment of our estimates under contract on Atlantic and North-western Railway, as per order given by us dated 30th, May, 1887.

The connection of the Canadian Pacific Company with the Atlantic and North-western Railway Company was as follows:—The Canadian Pacific Railway Company had no charter to build a railway through the State of Maine, the Atlantic and North-western Railway Company had. An arrangement was entered into by which the road was to be nominally built by the Atlantic and North-western Railway Company, but was to be paid for and operated when completed by the Canadian Pacific Railway Company. As a matter of fact, all moneys which went into the construction of the road were moneys raised by the Canadian Pacific Railway Company and actually disbursed by them, that company being the agents of the Atlantic and North-western Railway Company for the purpose of paying any obligations which the latter company might assume in connection with the work. The whole transaction having reference to the assignment of the moneys payable under the contract clearly constitutes an equitable assignment of that fund, absolute in its terms and irrevocable without the consent of all parties affected by it. It was not merely an assignment of cheques which might be issued in favour of the contractors, but of all moneys found due the contractors under the estimates referred to in the contract, and it conferred upon the Union Bank the sole right of obtaining from the company all moneys which might under the provisions of the contract at any time become payable to the contractors.

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The work was proceeded with. The rights of the Union Bank under the equitable assignment were recognized by the Canadian Pacific Railway Company and for several months all moneys estimated as due the contractors were paid direct to it. About the month of March, 1888, the contractors, it would seem, were not apparently in possession of sufficient funds to carry on the work with due expedition, and the company was obliged to pay the wages of the workmen employed by the contractors, as it had a right to do under clause 27 of the contract.

On the 14th March, however, Mr. Lumsden, the superintendent of construction for the company, purported to give notice in pursuance of clauses 23 and 24 of the contract making certain demands upon the contractors, requiring them, among other things, to provide additional men, plant, machinery and material, and notifying them that in case of default in carrying out that requisition for six days the company would take the work out of their hands and employ such means as it might see fit to complete the same.

The evidence as to what was done under this notice is unsatisfactory. It is certain, however, that the work was not taken off the contractors' hands; they went on as theretofore and completed it. I gather from Mr. Lumsden's evidence that all that they did was to pay debts which the contractors had contracted either before or after the giving of the notice. In other words, he paid certain of their debts contracted before the giving of the notice, and in respect of other goods purchased by the contractors subsequent to that time he guaranteed the payment. He admits that he paid or guaranteed the payment of accounts which certain parties had for supplying the contractors with butter, beef, pork, hay, oats and other provisions. The evidence does not show the exact amount

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paid in this way by the contractors. The first payment guaranteed, Mr. Lumsden says, amounted to something like $10,000, and the whole amount guaranteed was largely in excess of that sum. These payments made directly to the contractors or to their creditors notwithstanding the provisions of the equitable assignment, were made possibly without the knowledge, but certainly without the consent, either of the Union Bank or Mr. O'Gara. It is now contended by the bank that these direct payments were payments under the provision of sections 23 and 24 of the contract.

I think the payment of wages by the company was within the contract, but that the payments for provisions, &c., referred to in the evidence of Mr. Lumsden were not within the contract. Clause 23 of the contract is the only authority for such payment and it does not authorize the payment of money for provisions or food supplies such as those indicated by Mr. Lumsden. The company could under certain circumstances provide and employ such additional workmen, horses, machinery or any other plant or such additional materials respectively as it might think proper and deduct the sum from any moneys payable to the contractors, that is all. It does not, it seems to me, authorize the guaranteeing by the company of any contractors' debts, even though those debts had reference to horses, machinery and plant, such less does it justify a deduction from the amount due the contractors of any debts which the company might have guaranteed in connection with provisions—"provisions" not being "material" within the meaning of the contract.

Matters went on until the month of October, 1888.

There had been all along on deposit with the Canadian Pacific Railway Company an accepted cheque of the contractors upon the plaintiffs' bank for $15,000,

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that amount having been deposited with the company as security for the performance of the contract, and the bank was anxious to obtain possession of this cheque in order to reduce the amount of the contractors' liability to it, and made application to the Canadian Pacific Railway Company for it. The Canadian Pacific Railway had been, from time to time, paying directly to the contractors, or to their creditors, the moneys above referred to, and were probably doubtful as to whether such payments might not be in violation of the bank's rights under its equitable assignment of the contract moneys, and thereupon an agreement was entered into between the Canadian Pacific Railway Company, the bank and the contractors, of which the following is a copy:—

Memorandum of Agreement between the Union Bank of Canada and the Canadian Pacific Railway Company.

Whereas, on the 23rd of May, 1887, Starrs, Askwith & Co. deposited with the Canadian Pacific Railway Company a certified cheque on the Union Bank of Canada for $15,000, to be held by the railway company as security for the performance of a certain contract by Starrs, Askwith & Co. on the Atlantic and North-western Railway.

And whereas, by orders made in June, 1887, said contractors assigned and directed payment of all moneys payable under the said contract to the said bank.

Application therefor having been made by the bank to the railway company to return to the bank the said $15,000, the railway company have consented to do so on receiving from the bank the receipt for the same, it being understood that any payments heretofore made by the company for labour employed on said contract, or for material and supplies which went into the said work, were for the benefit of all concerned, and not in conflict with the orders in favour of the bank.

Except as above, this receipt is not to affect the order in favour of the bank. Dated Montreal, the 27th October, 1888.

For the Union Bank (Ottawa).

(Sgd.) J. TRAVERS LEWIS,
Solicitor.

" W. SUTHERLAND TAYLOR,
Treasurer, C.P.R.

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MONTREAL, October 27, 1888.

We, Starrs, Askwith & Co., of Ottawa, contractors on the Atlantic and North-western Railway, having been consulted by the Union Bank of Canada with respect to the conditions of the release by the C.P.R. Co. of the $15,000 deposit with that company to the said bank, and having read the memorandum of agreement made this day between the railway company and the bank, hereby agree to and confirm the same, and authorize and direct the bank to sign said memorandum so far as we are concerned.

(Signed,) STARRS, ASKWITH & CO.
J. E. A.
M. STARRS,
JOHN E. ASKWITH.

To this agreement Mr. O'Gara was not a party, nor did he ever assent to it in any way, and the question now is: To what extent did these documents affect his liability to the bank upon his indorsations? The ratification by the bank in the month of October of all payments made by the company for labour employed or for material and supplies has the same effect as if there had been an agreement between the bank and the company before these payments were made.

The transaction was substantially this: The bank said, in consideration of your paying to us the $15,000 which you hold as security for the completion of the contract we authorize you, instead of paying all the contract moneys to us under the equitable assignment which we hold, to pay out direct to the contractors all such moneys as you please for the work, material and supplies in connection with the contract. This was, I take it, a clear variation from the terms of the original understanding between the bank and Mr. O'Gara in regard to the equitable assignment, upon the faith of which he made the indorsement in question. If this is the correct view the principles of law applicable to the case are not in the least difficult.

Any material variation of the terms of the original contract made between the principal debtor and the

creditor will always discharge the surety. *The General Steam Navigation Company* v. *Rolt* (1). *Calvert* v. *London Dock Co.* (2). If it clearly appears that the surety became surety on the faith of the original contract he is likewise discharged irrespective of the question of materiality. *Sanderson* v. *Aston* (3).

A *fortiori* must this be so where, as in the present case, the surety actually stipulates that securities shall be given to the creditor, and the creditor, without the assent of the surety, subsequently relinquishes such securities.

Execution by the plaintiff company of the document of the 27th October, 1888, being as I think unquestionably a variation of the contract between the principal debtors and the bank to the effect that all the contract moneys were to be paid directly to the bank and not to other parties, absolutely released the defendant O'Gara from his obligations as indorser of the notes sued on. The contention that if there was a release at all it was a release *pro tanto* only does not, I think, apply. The principle, I take it, is that there is a total discharge where there is any variation by the creditor in a contract upon the faith of which the surety entered into his obligation. Where, however, the creditor has assets or securities in his hands (the surety having no connection with them) which may be applied by the creditor in reduction of the debt secured, any improper or careless dealing in respect of such securities may discharge the surety to the extent of the loss occasioned thereby. If, in the present case, after Mr. O'Gara had indorsed the notes in question, the bank as security for the payment of the contractors' indebtedness had obtained from them the assignment of their contract without the knowledge of, or apart altogether from,

(1) 6 C. B. (N.S.) 550. (2) 2 Keen 638.
(3) L. R. 8 Ex. 73.

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Mr. O'Gara, and if the bank through its negligence had failed in its duty in respect of such assignment so that a loss occurred, Mr. O'Gara would be released only to the extent of the loss, but certainly not to a greater extent. The following authorities may be usefully referred to in support of the above propositions. *Wulff* v. *Jay* (1); *Capel* v. *Butler* (2); *Strange* v. *Fooks* (3); *Pledge* v. *Buss* (4).

See also *Duncan Fox & Co.* v. *North & South Wales Bank* (5); *Brice* v. *Bannister* (6).

I am of opinion the appeal should be allowed.

Appeal allowed with costs.

Solicitor for appellant: *A. Ferguson.*

Solicitors for respondents: *Chrysler & Lewis.*

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(1) L. R. 7 Q. B. 756.
(2) 2 Sim. & Stu. 457.
(3) 4 Giff. 408.
(4) Johns. 663.
(5) 6 App. Cas. 1.
6) 3 Q. B. D. 569.