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*Oct. 21.
*Dec. 22.

EDWARD GLESBY (PLAINTIFF).....APPELLANT;

AND

J. BERT MITCHELL (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Promissory note—Consideration—Alleged agreement not to negotiate after maturity—Admissibility of evidence—Questions for jury—Appeal—Jurisdiction—Appeal from order directing new trial—"Exercise of judicial discretion" (Supreme Court Act, R.S.C., 1927, c. 35, s. 38).

Plaintiff sued upon two promissory notes made by defendant to L. and transferred, after maturity, and not for value, to plaintiff. They were renewals for the balance unpaid of a previous note from defendant to L. There was conflicting evidence as to the reason and consideration for giving the original note. L. asserted that the note was given for the amount owing to him by defendant on a loan. Defendant asserted that the note was for L.'s accommodation; that the loan from L., asserted by L. to have been made to defendant, had in fact been made to one R., that subsequently L. wanted the money, R. could not then pay, that defendant gave the note (for the same amount as that owing by R.) to enable L. to raise money, but received no consideration, that it was agreed that defendant was not to be called upon to pay the note or any renewals, and that the note or any renewals would not be negotiated after maturity. The trial judge withdrew the case from the jury and gave judgment for plaintiff, holding that any verdict, other than that the original note was given in consideration either of a loan by L. to defendant or of a debt due by R. to L. (the taking of the note in such case involving a forbearance or suspension of L.'s remedy against R.) could not be sustained, and that, in either case, defendant was liable. The Supreme Court of Nova Scotia *en banc* (by a majority) ordered a new trial. Plaintiff appealed.

Held, affirming judgment of the Court *en banc* (3 M.P.R. 507), that there should be a new trial, as the questions whether the note was given simply for L.'s accommodation or in consideration of a debt due by

*Present at hearing of the appeal: Newcombe, Rinfret, Lamont, Smith and Cannon JJ. Newcombe J. took no part in the judgment, as he died before the delivery thereof.

defendant or by R., and whether there was an agreement, as alleged by defendant, that the note should not be negotiated after maturity, should have been submitted to the jury.

Parol evidence is admissible to shew that a promissory note was given without consideration, even though it contains the words "value received." In the present case, should it be found as a fact on parol evidence that the note was given simply for L.'s accommodation, the action must be dismissed, as plaintiff stood in no better position than L.

Extension of time for payment of a debt owing by a third person may be a good consideration from the payee to the maker of a promissory note. But in the present case, on the evidence, the jury, while they might have found, were not bound to find, that there was given such an extension of time in consideration of the note. A person, unable for the time being to collect from a debtor, may arrange with another to take that other's note for the same amount for his own accommodation, without thereby extending the time for payment by his debtor, and without imposing liability to him on the maker.

Even should the jury find that the note was given for a valuable consideration, but should find that the alleged agreement existed not to negotiate it after maturity, plaintiff's (though not L.'s) right to recover would be defeated. Oral evidence of such an agreement was admissible.

Per Lamont J.: Evidence of an oral agreement that the maker of a note is not to pay it at maturity, or that it is to be renewed, is not admissible.

Held, also, that this Court had jurisdiction to hear the appeal; the order of the Court *en banc* directing a new trial was not one "made in the exercise of judicial discretion" within the meaning of s. 38 of the *Supreme Court Act* (discussion as to when or when not an order for a new trial may be said to have been made in the exercise of judicial discretion). Where a party is held entitled to a new trial as a matter of right, the order granting it cannot be said to be made in the exercise of judicial discretion; and it is a matter of right where he is entitled under the law to have the facts of his case determined by the jury and that has been denied him.

APPEAL by the plaintiff from the judgment of the Supreme Court of Nova Scotia *en banc* (1), setting aside the judgment of Ross J. (2) in favour of the plaintiff, and ordering a new trial.

The action was upon two promissory notes. The trial judge, Ross J. (2), after hearing the evidence and argument of counsel, withdrew the case from the jury and subsequently filed his decision allowing the plaintiff's claim with costs. The Supreme Court *en banc* (1) ordered a new trial, holding that the case should not have been withdrawn from the jury.

(1) 3 M.P.R. 507; [1931] 2 D.L.R. 675.
(2) 3 M.P.R. 507, at 508; [1931] 2 D.L.R. 675, at 675-6.

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The material facts of the case and the questions at issue are sufficiently stated in the judgments now reported and are indicated in the above head-note. The plaintiff's appeal to this Court was dismissed with costs.

The respondent (defendant) moved by way of appeal from an order of the Registrar affirming the jurisdiction of this Court to hear the appeal, the ground taken by the respondent being that the judgment of the Supreme Court of Nova Scotia *en banc* ordering a new trial was an order "made in the exercise of judicial discretion" within the meaning of s. 38 of the *Supreme Court Act*. Respondent's motion was dismissed with costs.

H. P. MacKeen for the appellant.

A. W. Greene K.C. for the respondent.

The judgment of Rinfret and Smith JJ. was delivered by

SMITH J.—The respondent, Mitchell, and one Robinovitch, were interested in a joint stock company in the City of Halifax, and one, Lerner, was for a time an employee of the company. In the spring of 1924 Lerner received the sum of $19,000 from St. John, which Lerner in his evidence says he turned over to the respondent, Mitchell, as a loan. Mitchell in his evidence denies that this money was lent to him, and says that he never received any of it, but that Lerner lent it to his (Lerner's) brother-in-law, Rabinovitch, who, in turn, lent it to the company of which he was manager and chief stockholder. Four thousand dollars was paid to Lerner on this loan, which Mitchell says was paid by Rabinovitch out of the funds of the company. On March 7, 1925, Mitchell gave his promissory note to Lerner for $15,000 which was the amount of the balance then owing on Lerner's advance of $19,000. Two promissory notes payable to Lerner, one for $10,000, dated July 9, 1925, and the other for $2,500, dated December 23, 1925, were signed by Mitchell, the respondent, and given to Lerner, which are renewals for the balance unpaid of the $15,000 note. After maturity of these two notes Lerner transferred them to the plaintiff, appellant, Glesby, who paid nothing for them and holds them simply for collection on behalf of Lerner. The appellant, therefore, has no higher rights

against the respondent than if Lerner himself were the plaintiff. The learned trial judge, at the conclusion of the evidence, withdrew the case from the jury upon the following ground:

> I thought that any verdict of the jury, other than that the note was given either in consideration of an actual loan made by Lerner to defendant or in consideration of the debt due by Rabinovitch to Lerner, could not possibly be sustained. The taking of the note in the latter case involved a forbearance or suspension of plaintiff's remedy against Rabinovitch and would, it seems to me, constitute a good consideration. On the evidence of the defendant himself and his own witness, Mr. Dickie, it was clear that Lerner was pressing Rabinovitch for his money, and hence the reason for the making of the note by defendant. Russel on Bills, 2nd edit., pp. 203-208; Byles on Bills, 18th edit., p. 127.

A promissory note, like any other promise, cannot be enforced, as between the parties, unless there is a consideration for the promise, and it is open to the promisor, by parol evidence, to show the lack of consideration; *Abbot* v. *Hendricks* (1). Here the maker, Mitchell, swears that no money was advanced to him, that he owed Lerner nothing at the time of giving the note, that Lerner's loan was to Rabinovitch, and that the note was for Lerner's accommodation. It was open to the jury to believe all this.

Nevertheless, if, in consideration of the note, Lerner agreed to extend the time for payment by Rabinovitch, there was a good consideration. There is no evidence that any such agreement was made in express language and the effect of Mitchell's evidence is that there was no such agreement. There was, however, the evidence of what was said by Rabinovitch, Lerner and Mitchell in connection with the giving of the note and the jury could, had they seen fit, have drawn from that evidence the inference that there was given such extension of time in consideration of the note, but they were not bound to draw such inference. A party, being unable for the time being to collect a debt due to him from a debtor, may arrange with another to take that other's promissory note for the same amount for his own accommodation, without thereby extending the time for payment by his debtor, and without imposing liability to him on the maker.

It is a question of what the bargain in connection with the giving of the note really was, and where there is a dis-

(1) (1840) 1 Man. & G., 791.

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pute as to what the terms of the bargain were, the fact must be determined, in a jury trial, by the jury.

The learned trial judge here withdrew this question from the jury and undertook to decide it for himself under the erroneous impression that on the evidence the question could only be decided in one way, namely, that there was an agreement for extension of time.

The respondent, Mitchell, had a legal right to have this question with others passed upon by the jury, and the Appellate Court in granting a new trial was not exercising a discretion but, as in duty bound, was granting to the respondent what was his legal right.

Mitchell in his examination in chief says, " and the note was never to pass out of his hands, not to be placed for collection with anybody else."

Then on cross-examination he says that two affidavits made by him and filed as exhibits " truly set forth the circumstances to which they relate."

Next he says, Lerner told him he was going to raise money on the notes and supposes he would discount them.

One of the affidavits filed has the following statement:

> And it was expressly agreed between said Lerner and myself that the said note for $15,000 and any renewal or renewals thereof would not at maturity or thereafter be negotiated.

Mitchell's witness, Dickie, gives a somewhat different story of the conversation about negotiation of the note, but if the evidence was admissible it was open to the jury to find that there was an agreement between Mitchell and Lerner that the note should not be negotiated or transferred after maturity, as it in fact was.

It is urged on behalf of the plaintiff, appellant, that this oral evidence was not admissible because it tends to vary the terms of the written instrument.

The rule against the acceptance of oral evidence to contradict or vary a promissory note is not different in principle from the rule in reference to other written documents, but there are cases in which, as among parties other than a holder in due course, parol evidence may be given to control what would, in the absence of other evidence, be the effect of the document. Byles on Bills, 19th ed., 104.

In the present case, if the jury should find that the note in question was made for the accommodation of Lerner the

action must be dismissed, because the plaintiff, having taken the note after maturity without giving any consideration for it, stands in no better position than Lerner himself. If, however, the jury should find that the note was given for a valuable consideration, then the question of the alleged agreement not to negotiate after maturity and of the admissibility of the oral evidence as to such an agreement must be considered.

That oral evidence of such an agreement is admissible seems to be settled by authority.

In *Sturtevant* v. *Ford* (1), Erskine J. says:

> The circumstance that the bill was overdue might have operated as evidence that the bill was an accommodation bill, but it should have been so averred. A jury might infer that the bill was accepted upon an understanding that it was not to be negotiated after it became due. But that would not be an inference of law; it should therefore have been made the subject of an averment.

He is evidently speaking of an inference to be drawn from oral evidence.

In *Parr* v. *Jewell* (2), the judgment is as follows:

> The court are unanimously of opinion in this case,—and after some little doubt at first entertained by one of its members,—that there should be a *venire de novo*. The case mainly relied on for the defendant in error was that of *Charles* v. *Marsden* (3), where it was held, that it is not a defence to an action by the indorsee of a bill of exchange, to plead that it was accepted for the accommodation of the drawer, without consideration, and was indorsed over after it became due. But, in that case, the question arose upon the pleadings; whereas, here it is presented upon the evidence. And we think that, under the circumstances stated in this bill of exceptions, there was evidence for the jury of an engagement on the part of Allen not to negotiate the bill mentioned in the second count after it became due; therefore, without going further into the case, it is enough to say that there must be a *venire de novo*.

The evidence there referred to was oral evidence. Platt B., in the course of the argument, says, "The fact of its being an accommodation bill is evidence for a jury that it was given for the purpose of being used before it should become due," and again, "Here it is a question of evidence."

In these cases their Lordships were dealing with an accommodation note, but an accommodation note is a written document just as a note for value is a written document and the same principle as to admissibility of oral evidence of a collateral agreement in connection with the one must

(1) (1842) 11 L.J.C.P. 245; 134 Eng. Repts. 42.
(2) (1855) 16 C.B. 684, at 712; 139 Eng. Repts. 928, at 939.
(3) (1808) 1 Taunt. 224.

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be applied to the other though the effect of such an agreement may be different according to circumstances. In the present case the effect of the agreement, if the jury should find that it existed, is to defeat this plaintiff's right to recover but not Lerner's right to recover if the note was for value.

It is, of course, always competent in such a case for the court to substitute or add as plaintiff, with his consent, the proper party to sue, and, if justice requires it, to impose terms.

The appeal must be dismissed with costs.

The motion must also be dismissed with costs.

LAMONT J.—In this action the appellant sues on two promissory notes, one for $10,000, dated July 9, 1925, and due 90 days after date, and the other for $2,500, dated December 23, 1925, and due one month after date and on which there was a balance claimed of $1,000. Both notes were made by the respondent in favour of M. H. Lerner, and were renewals of the amount unpaid on a note for $15,000, dated March 7, 1925, between the same parties. The defences of the respondent are:—

1. That the original note was given for the accommodation of Lerner and the respondent received no consideration therefor, and

2. That the renewal notes were negotiated to the plaintiff after maturity and in breach of an agreement between the respondent and Lerner that neither the note nor any renewal thereof would be negotiated after maturity.

At the trial the appellant did not give evidence but Lerner admitted that the appellant acquired the notes after maturity.

The story of the respondent is that in the spring of 1924 Lerner, his brother-in-law H. Rabinovitch, Rabinovitch's brother and himself were all interested in the Franco-Canadian Import Company; that the company was controlled by Harry Rabinovitch, but that he (respondent) was the financial man behind it and that the company's moneys were kept in a bank in a special account in his name, and that he was the one who signed cheques on behalf of the company; that during that spring Lerner received a bank manager's cheque for $19,000, his share of another trans-

action, which cheque was indorsed over to Rabinovitch who put it into the Franco-Canadian Import Company's business, and that the transaction constituted a loan from Lerner to Rabinovitch. The respondent further says that in November, 1924, the company paid to Lerner $4,000 on the loan; that shortly afterwards Lerner left the company's employ but before leaving he demanded from Rabinovitch the payment of $15,000, the balance of the loan; that Rabinovitch had not the money, nor could the company furnish it; that Rabinovitch offered Lerner his note but that Lerner said he was going west to start in business and he could not use either the note of Rabinovitch or that of the company, but that he could use the respondent's note. The respondent says that, after some consideration, he agreed to give Lerner a note to enable him to obtain money to start in business in the west but received no consideration therefor and it was understood and agreed that he was not to be called upon to pay it as it was not a debt of his, but that Rabinovitch or the company would meet it at maturity, or, if they could not, it would be renewed on the same terms.

Lerner's story is very different. He says that when the cheque for $19,000 came to him the respondent asked for the loan of the money; that he indorsed the cheque and handed it to the respondent; that $4,000 had been paid upon it by respondent's cheque, "possibly on the special account," and that when he was leaving for the west he asked the respondent for the balance of the loan; that the respondent said he did not have the money but would give him a note for it, which he did. He said that Rabinovitch had not borrowed the money and did not owe it to him, and he makes no suggestion that he loaned it to the company.

The $19,000 cheque was not produced at the trial nor was Rabinovitch called to give evidence.

Another witness, one Fred W. Dickie, who for a time had been secretary of the company, testified that at the time Lerner was leaving for the west, he, Lerner and Rabinovitch were in the office together when there was a discussion between Lerner and Rabinovitch as to the repayment of the balance of the $19,000 loan made to Rabinovitch. Rabinovitch said he did not have the money and

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that the company could not raise it, but that he would give Lerner his note. Lerner was not willing to take his note, and just then the respondent came in and there was a general discussion in which the respondent was asked to sign or indorse a note, which at first he did not want to do, but finally agreed to do so on the understanding that it was to be paid by Rabinovitch or the company and that it would not be negotiated in a Halifax bank.

On the above evidence the trial judge withdrew the case from the jury on the ground that any verdict given by them, other than that the original note was given in consideration of a loan made by Lerner to the respondent or in consideration of a debt due by Rabinovitch to Lerner, could not be sustained and that, in either case, the respondent would be liable. He therefore gave judgment for the plaintiff. On appeal to the Supreme Court of Nova Scotia *in banco,* the court, by a majority, ordered a new trial, thinking that the case should have been left to the jury. From that decision this appeal is brought.

The appellant's first contention was that, if the jury accepted Lerner's evidence that the notes were given in consideration of a loan from Lerner to the respondent, judgment for the appellant would follow. The soundness of this proposition is admitted by the respondent.

The appellant's next contention was that, if the jury disregarded Lerner's evidence, no verdict, other than that the notes were given in consideration of a debt due by Rabinovitch to Lerner, could be sustained, and that, if given for such consideration, the defence based on the ground that it was an accommodation note must fail.

In support of this contention the appellant referred to Byles on Bills, 19th ed., at page 129, where the learned author says:—

> A subsisting debt due from a third person is a good consideration for a bill or note, at least if the instrument is payable at a future day, for then it amounts to an agreement to give time to the original debtor, and that indulgence to him is a consideration to the maker.

This statement of the law is quoted with approval by this court in *Gallagher* v. *Murphy* (1).

In *Allen* v. *Royal Bank of Canada* (2), Lord Atkinson, in giving the judgment of the Privy Council, said:—

(1) [1929] Can. S.C.R. 288, at 293; [1929] 2 D.L.R. 124, at 127.

(2) (1925) 95 L.J. P.C. 17, at 20-21.

In the last edition of *Byles on Bills*, that is, the edition of 1923, at p. 232, the rule of the law is stated in these terms: "If a bill or note be taken on account of a debt and nothing be said at the time, the legal effect of the transaction is this—that the original debt still remains, but the remedy for it is suspended till maturity of the instrument in the hands of the creditor." And the remedy is equally suspended if the bill or note be given, not by the debtor, but by a stranger.

With these statements of the law the respondent has no quarrel. He does quarrel, however, with their application to this case. He contends that here there could be no agreement, express or implied, to extend the time for payment by Rabinovitch of his debt, nor any forbearance to sue him, because Lerner himself swore that Rabinovitch did not borrow the money and was not indebted to him in respect thereof. If Rabinovitch was not indebted to Lerner, Lerner's acceptance of the respondent's note could not amount to an agreement to give time to Rabinovitch, which is the only consideration suggested for the respondent's note, other than that he borrowed the money himself.

In his notes the trial judge says:—

> I thought that any verdict of the jury, other than that the note was given either in consideration of an actual loan made by Lerner to defendant or in consideration of the debt due by Rabinovitch to Lerner, could not possibly be sustained. The taking of the note in the latter case involved a forbearance or suspension of plaintiff's remedy against Rabinovitch and would, it seems to me, constitute a good consideration. On the evidence of the defendant himself and his own witness, Mr. Dickie, it was clear that Lerner was pressing Rabinovitch for his money and hence the reason for the making of the note by defendant.

It is quite clear that the trial judge did not believe Lerner when he swore that he had loaned the money to the respondent, and it may be that the jury would not have believed him either, but, even so, they might have had difficulty in ascribing to Lerner "a suspension or forbearance of his remedy against Rabinovitch" in the face of his own sworn statement that Rabinovitch did not owe him any money. Apart from that, however, the respondent argues that if the jury had rejected Lerner's evidence they were not driven to find that the note was given for Rabinovitch's indebtedness; that they had another alternative, testified to by the respondent, namely, that the note was given simply for the accommodation of Lerner to enable him to raise money with which to start business in the west and on the understanding that the respondent was not to be called upon to pay it, but that it was to be paid by

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others, and if they did not meet it at maturity, it was to be renewed.

As against this, the appellant contends that evidence of an oral agreement that the respondent was not to be called upon to pay the note or that it would be renewed or was not to be negotiated, is inadmissible as it would contradict or vary the terms of the written contract contained in the note.

In my opinion, evidence of an oral agreement that the maker of a note is not to pay it at maturity, or that it is to be renewed, is inadmissible. *New London Credit Syndicate* v. *Neale* (1); *Young* v. *Austen* (2); *Abrey* v. *Crux* (3). The terms of the contract contained in each of the notes sued on are that at a certain time after date the respondent will pay to M. H. Lerner the sum therein set out at the place therein specified. Parol evidence to contradict these terms is not admissible. Parol evidence, however, is admissible to shew that the original note was given without consideration even although it contained, as do the renewals, the words " value received." Taylor on Evidence, 11th ed., 780 and 781.

In Phipson on Evidence, 7th ed., at page 563, the author says:—

> Want or failure of consideration may, under proper pleadings, always be proved to impeach a written agreement not under seal, even though, as in the case of bills and notes, the words "for value received" are inserted.

And in *Barton* v. *Bank of New South Wales* (4), the Privy Council stated the law as follows:—

> Where there is simply a conveyance and nothing more, the terms upon which the conveyance is made not being apparent from the deed itself, collateral evidence may easily be admitted to supply the considerations for which the parties interchanged such a deed; but where in the deed itself the reasons for making it, and the considerations for which it is granted, are fully and clearly expressed, the collateral evidence must be strong enough to overcome the presumption that the parties in making the deed had truly set forth the causes which led to its execution.

In Falconbridge on Banking and Bills of Exchange, 4th ed., at page 662, the rule is summed up in these words:—

> Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value (s. 58), but evidence may be given of absence of consideration, or its failure, total or partial.

(1) [1898] 2 Q.B. 487.
(2) (1869) L.R. 4 C.P. 553.
(3) (1869) L.R. 5 C.P. 37.
(4) (1890) 15 App. Cas. 379, at 381.

In my opinion, the words "value received" do not constitute a term of the contract the varying or altering of which by parol evidence is prohibited by the rules. They are no more than an acknowledgment or receipt which in general is only *prima facie* evidence, and does not prevent the real consideration from being shewn. Original absence of consideration for the giving of a note is a matter of defence against an immediate party or a remote party who is not a holder for value. *Bills of Exchange Act,* s. 55 (2). Parol evidence was, therefore, admissible to shew that the note was given simply for the accommodation of Lerner.

There is no evidence before us that the appellant was a holder for value. In the statement of claim it is not alleged that he was, and his counsel admitted on the argument that he could not stand in any better position than Lerner himself had be brought the action. If, therefore, it should be found as a fact that the note was given simply for Lerner's accommodation, it would, in my opinion, be a good defence, for where an accommodation note is paid in due course by the party accommodated, the note is discharged. *Bills of Exchange Act,* sections 139 and 186. And if Lerner ever discounted the renewals, he must have paid them himself at maturity for they were in his possession when he indorsed them after maturity to the appellant. The duty of determining whether the note was given simply for Lerner's accommodation or in consideration of a debt due by the respondent or by Rabinovitch, was a matter for the jury and, in my opinion, the trial judge erred in withdrawing the case from them.

The respondent also raises a further point. In his affidavit put in as evidence by the appellant, he states as follows:—

> And it was expressly agreed between said Lerner and myself that the said note for $15,000 and any renewal or renewals thereof would not at maturity or thereafter be negotiated as I did not want said original note or renewal notes to fall into the hands of any person or persons for collection.

If the note was given pursuant to such an agreement, its negotiation, in breach of the agreement, would, in my opinion, constitute a defence against the plaintiff. In *MacArthur* v. *MacDowall* (1), Mr. Justice Patterson says:

(1) (1893) 23 Can. S.C.R. 571, at 594-595.

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The plaintiff took a note which was overdue and which was an accommodation note. The circumstance that it was an accommodation note would not in itself interfere with the negotiation of it after it was due; but, being overdue, the plaintiff could take it only as subject to its equities. An agreement not to negotiate an accommodation note after it was due would be such an equity. We find that asserted in a series of cases from *Charles* v. *Marsden* (1) downwards. All the cases on the subject, as late as the year 1868, will be found commented on by Mallins V.C. in *Ex parte Swan* (2), in a dissertation which may be referred to in place of citing the various cases.

See also Falconbridge on Banking and Bills of Exchange, at page 663; Byles on Bills, 19th ed., page 178.

If the note was not given for value the fact that it was given pursuant to such an agreement is immaterial. But if it be found that the note was given for value, and also found that it was given pursuant to the alleged agreement, the action would fail unless Lerner were made a party plaintiff. Whether or not there was such an agreement is a question of fact to be determined by the jury.

The respondent launched a motion to quash the appeal. That motion was based upon the contention that this court had no jurisdiction to hear the appeal because the order directing a new trial was made by the court *in banco* in the exercise of its judicial discretion, and from such an order no appeal lies to this court.

The relevant sections of the Act are sections 36 and 38, which read:—

36. Subject to sections thirty-eight and thirty-nine hereof, an appeal shall lie to the Supreme Court from any judgment of the highest court of final resort now or hereafter established in any province of Canada pronounced in a judicial proceeding, whether such court is a court of appeal or of original jurisdiction (except in criminal causes and in proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge, or in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty) where such judgment is,

(*a*) a final judgment; or

(*b*) a judgment granting a motion for a nonsuit or directing a new trial.

38. No appeal shall lie to the Supreme Court from any judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the province of Quebec.

An appeal, therefore, lies to this court from an order directing a new trial made by the highest court of final

(1) (1808) 1 Taun. 224.

(2) (1868) L.R. 6 Eq. 344.

resort in a province unless the order was made by the court in the exercise of its judicial discretion.

We were not directed to any case in which this court laid down the test by which to determine when an order for a new trial would be appealable under section 36, and not appealable as made in the exercise of judicial discretion. The circumstances of each case must be considered. One thing, however, is clear, and that is, that where a party in whose favour the order is made is entitled to a new trial as a matter of right, the new trial cannot be said to have been made in the exercise of the court's discretion. Where a party is entitled under the law to have the facts of his case determined by the jury and that has been denied to him, he is entitled to a new trial as a matter of right.

On the other hand, where a new trial is directed because the first trial was unsatisfactory, whether from a failure on the part of the jury to so answer the questions as to enable the court to dispose of the rights of the parties, or where the evidence has left material matters in a state of uncertainty, the order for a new trial may be said to have been made in the exercise of judicial discretion. On this point the following authorities are instructive: *Barrington* v. *The Scottish Union and National Ins. Co.* (1); *Accident Insurance Company of North America* v. *McLachlan* (2); *Town of Aurora* v. *Village of Markham* (3); *Canada Carriage Company* v. *Lea* (4).

The respondent's motion should be dismissed with costs, as should also the appellant's appeal.

CANNON J.—The plaintiff, appellant, recovered judgment before the Supreme Court of Nova Scotia as endorsee against the defendant, respondent, as maker of two promissory notes dated the 9th day of July, 1925, and the 23rd December, 1925, for $10,000 and $2,500 respectively, in favour of one Moses Harry Lerner and endorsed by him to the appellant. An amended defence was filed on the 24th February, 1930, in which the respondent pleaded in effect:

(*a*) that the notes sued on were given for the accommodation of Lerner, the respondent receiving no consideration therefor;

(1) (1891) 18 Can. S.C.R. 615.
(2) (1891) 18 Can. S.C.R. 627.
(3) (1902) 32 Can. S.C.R. 457.
(4) (1906) 37 Can. S.C.R. 672.

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(*b*) that the said notes were negotiated to the appellant after maturity, in breach of an agreement between the respondent and Lerner, made in April, 1925, whereby it was agreed that the said notes should not be negotiated after maturity.

The appellant appealed from the order allowing the amendment, on the ground that the respondent's own affidavit, used in support of his application to amend, showed that the amended defences were false and no answer to respondent's claim.

The court *in banco* (Harris C.J. and Paton J. dissenting) dismissed the appeal; and Mellish J., with whom Chisholm and Graham JJ. concurred, said:

> The amended defence allowed by Mr. Justice Ross in chambers is to the effect that the note sued on was given for the accommodation of the payee who negotiated it after maturity. This defence is, I think, a good one if established and I do not think it is disproved by the evidence before us.
>
> The appeal should therefore be dismissed with costs.

The case then proceeded on the merits before the Honourable Mr. Justice Ross, with a jury. The presiding judge withdrew the case from the jury and gave judgment for plaintiff for the following reasons:

> At the conclusion of the trial and on the application of counsel for the plaintiff I withdrew the case from the jury as I was of opinion that there was no evidence on which the jury could properly find in favour of the defendant. Whether the note was given in consideration of a loan made by Lerner to the defendant or in consideration of the debt due by Rabinovitch to Lerner, in either case the defendant would be liable. I thought that any verdict of the jury, other than that the note was given either in consideration of an actual loan made by Lerner to defendant or in consideration of the debt due by Rabinovitch to Lerner, could not possibly be sustained. The taking of the note in the latter case involved a forbearance or suspension of plaintiff's remedy against Rabinovitch and would it seems to me constitute a good consideration. On the evidence of the defendant himself and his own witness, Mr. Dickie, it was clear that Lerner was pressing Rabinovitch for his money and hence the reason for the making of the note by defendant. Russell on Bills, 2nd edit., pp. 203-208; Byles on Bills, 18th edit., p. 127. Plaintiff will have judgment for his claim with costs.

Defendant gave notice of appeal and asked for an order setting aside the decision of the trial judge and directing a new trial with a jury. The case came a second time before the Supreme Court of Nova Scotia *in banco,* and defendant's demand for a new trial was granted by Mellish, Graham and Carroll JJ., Paton and Chisholm JJ., dissent-

ing. This second judgment of the appellate court of Nova Scotia is now before us.

The jurisdiction of this court was affirmed by the Registrar, and notice of appeal from his decision was duly given and the respondent moves to quash the appeal under section 38 of the *Supreme Court Act,* upon the ground that the judgment or order of the Supreme Court of Nova Scotia directing a new trial was made in the exercise of judicial discretion.

Section 36 (*b*) of our Act gives an appeal to this court from any judgment of the highest court of final resort in any province of Canada directing a new trial, subject, however, to sections 38 and 39. The requirements of section 39 as to the amount in controversy in the appeal are assumed to be fulfilled in the present case; the only question raised by the motion is whether or not the judgment directing a new trial was made in the exercise of judicial discretion.

Order LVII of the Nova Scotia *Judicature Act,* paragraph 5, enacts:

* * * The court shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case requires. * * *

6. If upon the hearing of an appeal, it appears to the court that a new trial ought to be had, it shall be lawful for the court to order that the verdict and judgment be set aside, and that a new trial be had.

The following is found in Stroud's Judicial Dictionary, second edition, *verbo* Discretion, pp. 541-542:

"There be several degrees of Discretion,—*Discretio generalis, Discretio legalis, Discretio specialis,*—

"*Discretio generalis,* is required of every one in everything that he is to do, or attempt;

"*Legalis discretio,* is that which Sir E. Coke meaneth and setteth forth in *Rooke's and Keighley's Cases* (1), and this is merely to administer justice according to the prescribed rules of the law;

"The third Discretion is where the laws have given no certain rule . . . and herein Discretion is the absolute judge of the cause, and gives the rule."

* * *

You cannot lay down a hard-and-fast rule as to the exercise of Judicial Discretion, for the moment you do that "the discretion of the Judge is fettered" (per Brett, M.R., *The Friedeberg* (2); Vf, per Bowen, L.J., *Jones* v. *Curling* (3).

(1) *Rooke's Case,* 5 Rep. 100 a; *Keighley's Case,* 10 Rep. 140 b.

(2) (1885) 54 L.J.P.D. & A., 75; 10 P.D. 112.

(3) (1884) 53 L.J. Q.B. 373, 13 Q.B.D. 262.

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Bouvier's Law Dictionary, Rawle's Third Revision, *verbo* Discretion, says:

That part of the judicial function which decides questions arising in the trial of a cause, according to the particular circumstances of each case, and as to which the judgment of the court is uncontrolled by fixed rules of law.

The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.

In *National Life Assurance Company* v. *McCoubrey* (1), the present Chief Justice of this court, in discussing section 38, stated that

the judge in chambers (in granting speedy judgment), and the Court of Appeal in affirming him, necessarily determined judicially that the matters urged in answer to the plaintiff's plea were devoid of merit and afforded no substantial ground of defence. Such a decision and the order giving effect to it are not discretionary, although an order dismissing a motion for judgment, if based on the view that the suggested defences disclose matter which should be disposed of after trial rather than summarily upon motion, may be discretionary as well as not final.

This pronouncement, which was the unanimous judgment of this court composed of Anglin C.J.C., and Idington, Duff, Mignault and Newcombe JJ., should help us to determine the merits of the motion to quash. Can the judgment *a quo* be considered as given "*proprio motu*" by the appeal court under section 6 of the above Rule, or is it simply the giving, on legal grounds, of the order which ought to have been made by the trial judge? It is, I believe, the exercise of the power and duty of the court to enforce the rule that the jury must be allowed to pass on the facts as alleged by the parties, when the pleadings disclose a good defence in law and there is evidence to support it. Let us examine the reasons given by the majority judges of the Supreme Court of Nova Scotia. Have they determined judicially that the matters urged in answer to the action afforded a substantial ground of defence?

Mr. Justice Mellish says, in part:

This is an amended defence allowed in Chambers by Mr. Justice Ross. This court last year refused to strike out this defence as false on an appeal from that judge's decision allowing the amendment, the court being of opinion that the case should go to trial on the issues on the record.

The action came on for trial before Mr. Justice Ross with a jury. After the evidence was taken, he decided there was no case for the jury and gave judgment for the plaintiff.

(1) [1926] Can. S.C.R. 277, at 282.

I think the case should have been left to the jury.

We are bound by our previous decision and I think the evidence given on the trial strengthens it.

The term "accommodation note" was freely used by some of the witnesses without perhaps precisely realizing what it meant. There is a good deal of evidence that the notes were not to be negotiated at any time, and a jury, I think, would be quite justified in so finding, and if the notes were given without consideration such evidence would be quite admissible whether they were accommodation notes or not in the ordinary sense. Of course, as ordinarily understood, an accommodation note is intended to be negotiated before maturity but a note given as security for another man's debt may be without consideration and evidence, I think, can be adduced as against an overdue holder to show this and that the note was not to be negotiated. These questions are, I think, open on the evidence and have not been tried. The Defendant, whether legally bound to do so or not, recognized his liability to Lerner on the notes, but repudiated liability when they were negotiated. There must be consideration for a contract of guarantee or suretyship and there is, I think, none proven here.

There remains a further question which does not appear to have ever been decided, viz: whether the defence can be successfully maintained, by the maker as against the overdue holder from the payee of a note for good consideration, that it was negotiated, when overdue, in breach of an oral agreement entered into when the note was made between the maker and the payee. The answer to this, I think, depends upon whether evidence of such an agreement is admissible, and I have come to the conclusion that evidence of an oral agreement not to negotiate a note after it becomes due is admissible as it does not contradict the terms of the note.

The appeal should be allowed with costs and a new trial ordered.

Mr. Justice Graham agreed that there should be a new trial. These two learned judges exercised not a discretion, but considered themselves bound by their previous decision and their interpretation of certain rules of law.

And Mr. Justice Carroll:

I think, with deference, that there was a question which should have been submitted to the jury, namely: Was there an agreement between Mitchell and Lerner that the note or notes should not be negotiated after maturity? I think there is not any doubt that if the note was an accommodation that such an agreement is an equity which attaches to the note in the hands of a holder who takes it after maturity. *MacArthur* v. *MacDowall* (1); *Grant* v. *Winstanley* (2).

* * *

On the appeal or motion for a new trial defendant's counsel took the objection that the evidence concerning the agreement was not admissible in that it added to or changed the contract evidenced in writing by the note. This objection was not taken before the trial judge, but in any event I am of opinion that the rule regarding oral extrinsic evidence is not applicable here, as the evidence complained of here is introduced to

(1) (1893) 23 Can. S.C.R. 571. (2) (1871) 21 U.C. C.P. 257.

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prove a distinct collateral agreement, which I think is not inconsistent with the agreement set out in the written document.

I think there should be a new trial to determine the issue of facts outstanding.

There again, in my opinion, we find the judicial determination of legal questions and not the mere exercise of discretionary power. Paton J., who also dissented in the first appeal, held that evidence of a verbal agreement not to negotiate a time note is not admissible, as it contradicts the express words of the note. Here we have the application of the law, as understood by the learned Justice, and not the exercise of any discretionary power. I take it that the obvious sense of these words in section 38 refers not to "discretio legalis" as described in the first part of these notes, but to judgments rendered by a court, not according to fixed rules of law, but in the exercise of the power of acting, in certain cases and within certain limits, according to its will. And even in such cases, this court would be entitled, before granting a motion to quash under section 38, to reserve the motion until after hearing the merits of the appeal, in order to see, "that a case for the exercising of the judge's discretion has been raised by the evidence." See *Williams* v. *Guest* (1). We cannot, therefore, grant the motion to quash the appeal and it should be dismissed with costs.

Besides, on the merits of the judgment *a quo*, I clearly reach the conclusion, with my brother Smith, that the trial judge was wrong in deciding that there were no facts to submit to the jury.

Contradictory evidence by respondent and Dickie on one side and Lerner on the other having been given as to the facts, the respondent, under his plea, as previously approved by the Court of Appeal, was entitled, as a matter of right, to have this evidence weighed by the jury and to secure a definite finding as to these facts. If no evidence had been given to support the plea, the case might have been properly withdrawn; but such a situation does not exist here. The issues cannot be satisfactorily disposed of, according to the record of this case, in the summary manner adopted by the learned trial judge. I also agree that

(1) (1875) L.R. 10 Ch. App. 467.

oral evidence of the agreement not to negotiate after maturity is admissible.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Respondent's motion to quash dismissed with costs.

Solicitor for the appellant: *C. B. Smith.*

Solicitor for the respondent: *A. W. Jones.*