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*June 6.

*June 7.

THE SOUTH WEST BOOM CO.,.....APPELLANTS ;

AND

DANIEL McMILLAN,.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW
BRUNSWICK.*Additional Plea, Supreme Court no power to allow.*

D. McM., the respondent, sued *S. W. B. Co.*, the Appellants,
to recover damages alleged to have been sustained by
reason of the obstruction of the River *Miramichi*, by ap-

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

pellants' booms. The pleas were not guilty, and leave and license. On the trial the counsel proposed to add a plea, that the wrong complained of was occasioned by an extraordinary freshet. The counsel for the respondent objected on the ground that such plea might have been demurred to. The learned judge refused the application, because he intended to admit the evidence under the plea of not guilty.

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On appeal, the counsel for the appellant contended that the obstruction complained of was justified under the Statute 17 Vic., c. 10, *N. B.*, incorporating the *South West Boom Company*.

Held:—That the appellants, not having put in a plea of justification under the Statute, or applied to the Supreme Court of *New Brunswick* in *Banco* for leave to amend their pleas, could not rely on that ground before this court to reverse the decision of the court below.

APPEAL from a judgment of the Supreme Court of *New Brunswick*, discharging a *rule nisi* for a new trial.

This was an action brought by the Testator *Miles McMillan*, against the appellants and one *Daniel McLaughlin*, to recover damages alleged to have been sustained by reason of the obstruction of the River *Miramichi* by the appellants' booms, and also for short delivery of quantities of *McMillan's* lumber, which floated down the river into the appellants' boom.

The three first counts of the declaration were for obstructing the river, whereby the plaintiff was unable to float down a quantity of deals, and sustained damages by the loss in the price, from his inability to fulfil a contract he had made, and by the deterioration of the deals in value in consequence of lying in the water for four months. The fourth, fifth and sixth counts were for the loss of a quantity of logs through the defendants' negligence. The seventh count was in trover.

The *South West Miramichi*,—the river in question,—is a tidal river and navigable for some distance above the boom for boats and small steamers.

The appellants were incorporated by the Act of the *New Brunswick* Legislature, 17 Vic., cap. 10, (*N. Brun.*

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L. & P. Acts, p. 856.) Their act of incorporation, being about to expire in 1872, was extended by 35 Vic., cap. 44, (Acts of 1872, p. 86,) until the year 1882. By a subsequent Act, 37 Vic., cap. 107, (Acts of 1874, p. 334,) the capital stock of the Company was increased, and they were authorized to extend their works.

The pleas were not guilty and leave and license.

The following extract, taken from the Judge's *Fisher's* notes at the trial, and agreed upon as part of the case between the parties to be submitted to the Supreme Court of *Canada*, shows what took place in reference to the addition of pleas.

"Mr. *Davidson* moves for trial.

"Mr. *Wilkinson*—The pleas are, not guilty, and leave and license. I propose to add a third plea, that the defendant, *McLaughlin*, was a lessee of the company. 4th plea. That the wrong complained of was occasioned by the extraordinary freshet. (See proposed plea). It was through the extraordinary circumstances of the river that caused the difficulty.

"*Davidson* objects that they have no power to lease the boom.

"1. Dr. *Barker* objects that the pleas are demurrable, bad in form and substance, and under no circumstances can a plea be added which requires separate and distinct replication, because of the practice we are entitled to the time which we could not get.

"*Wilkinson*—As to separate replication, a general replication puts in issue the whole plea.

"2. Judge can impose such terms as are just.

"I refuse the application, as I intend to admit the evidence under the plea of not guilty."

The Jury found a verdict for the plaintiff on the count for obstructing the navigation of the river and also on the count in trover.

An application was made to the Supreme Court of

*New Brunswick*, and a rule *nisi* granted, calling upon the defendants to shew cause why the verdict should not be set aside and a new trial granted, which rule, after argument, and the court taking time to consider, was discharged.

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Mr. *Weldon*, Q. C., for appellants :

The first question is whether the *New Brunswick* Act of Incorporation which authorized them to construct these booms so "as to admit the passage of rafts and boats, and to preserve the navigation" is *ultra vires*.

[STRONG, J.:—How can that question be raised on the pleas to the first three counts? You plead *not guilty*, which only puts in issue whether the obstruction was put there by defendants.]

We contend that the *main boom* did not do damage, and we are not responsible for swing boom.

[STRONG, J.:—You should have pleaded justification under the statute.]

If the Court below had decided on the pleadings, I would have applied to amend, but Mr. Justice *Fisher* tried the case as if the plea of justification was put in and no preliminary objection has been taken here.

[HENRY, J.:—In this case it seems very hard, but we cannot send back the case because the pleas are insufficient.]

Dr. *Barker*, Q. C., for respondent was not called upon.

The judgment of the Court was delivered by  
THE CHIEF JUSTICE:—

A plea of justification under the statute was not pleaded, and we have no power to add one now. And there are many good reasons for that, one of them is that the defendant might raise, as in this case another issue altogether, which would have to be tried in the Court below; and the plaintiff might choose to demur to this additional plea, and that would have to

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stances the appeal should be dismissed.

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*Appeal dismissed with costs.*

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Solicitor for appellant : *L. J. Tweedie.*

Solicitor for respondent : *A. A. Davidson.*

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