JOHN M. WOOD (DEFENDANT) .....APPELLANT; 1906

AND *Dec. 7, 10. *Dec. 15.

LEONARD ROCKWELL (PLAINTIFF) .RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Jury trial—Judge's charge—Practical withdrawal of case—Evidence —New trial.

On trial of an action against a surety, the defence was that he had been discharged by the plaintiff's dealings with his principal. The trial judge directed the jury that the facts proved in no way operated to discharge him; and that while, if they could find any evidence to satisfy them that he was relieved from liability they could find for defendant he knew of no such evidence and it was not to be found in the case.

Held, that the disputed facts were practically withdrawn from the jury, and as there was evidence proper to be submitted and on which they might reasonably find for defendant there should be a new trial.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the verdict at the trial in favour of the plaintiff.

The action was on a promissory note to which defendant pleaded *inter alia* that he only signed it as surety for the other maker, and was discharged by dealings with his principal. At the trial the jury were directed by the judge that they were at liberty to find for the defendant on this issue if there was any evidence, but that none was to be found in the case and that the facts proved did not operate as a discharge. A verdict was given for the plaintiff which the full court upheld, the Chief Justice dissenting.

*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

1906

WOOD
v.
ROCKWELL.

Roscoe K.C. for the appellant.

J. J. Ritchie K.C. for the respondent.

The judgment of the court was delivered by

DAVIES J.—Much as I regret reaching the conclusion that there must be a new trial in this case I cannot help so finding.

The trial judge charged the jury explicitly: (1) that the defendant, Wood, was a principal debtor and not a surety on the note sued on; (2) that the facts proved in no way and no matter whom they believed operated to discharge Wood and that, while if they could find any evidence to satisfy them that Wood was relieved from liability they could find for defendant, he knew of no such evidence and it was not to be found in the case.

By this charge he practically withdrew from the jury all the disputed questions of fact.

I assume he must have held the view, afterwards expressed by Graham J., in which Townshend J. concurred, that there was no evidence in the case from which a jury could fairly find for the defendant.

The Chief Justice very emphatically dissented from this view, while Russell J. admitted that he had held different views, but finally determined to refuse a new trial.

At the argument before us it was conceded by Mr. Ritchie that the defendant Wood must be considered as only a surety on the note for one Porter, another maker, and that the questions open were whether he had been discharged from his suretyship obligation by any action of the plaintiff, Rockwell.

Mr. Roscoe contended there was ample evidence to

go to the jury to shew that time had been given to the principal debtor, Porter, by the acceptance from him of another note signed by himself and one D. E. Ross, at five months, for the full amount of the indebtedness.

Whether or not this note was so accepted depended entirely upon whose version of the facts was to be believed. We had the evidence, on one side, of plaintiff and his son supported, as it was argued, by the inherent probabilities. On the other side was the evidence of Porter and his wife and the defendant. If the evidence of these latter parties was accepted by the jury in preference to that of the plaintiff's witnesses, I cannot say that a verdict for the defendant on the question of the acceptance of the new note would be such as reasonable men, under all the circumstances, could not fairly find. It might not be such a verdict as I would find myself but that is another thing altogether.

The acceptance of the version of defendant's witnesses would relieve the defendant from any difficulty arising from the terms of the letter of Porter enclosing the note. If the story told by Porter and his wife is accepted as the true and correct one, then the offer which came from the plaintiff to Porter, the principal debtor, to send him back his note (which Rockwell admittedly had taken to Porter's house and left with Porter's wife), signed by Porter and some third party, no names being mentioned, was accepted when the note was returned into plaintiff's hands with D. E. Ross's name on it, and plaintiff's retention of it for four months without objection was corroborative evidence of his acceptance. I think there is evidence in these facts combined with Rockwell's subsequent as-

1906

WOOD
v.
ROCKWELL.

Davies J.

sumption of dominion over the new note in his conversation with the defendant Wood, which ought to have been submitted to the jury on the point, and I, therefore, refrain from further discussion so that neither party may be prejudiced on the new trial.

The appeal should be allowed with costs in this court and in the court *en banc* and a new trial ordered; costs of the first trial and new trial to abide the event.

Appeal allowed with costs, and new trial ordered.

Solicitor for the appellant: *A. E. Dunlop.*

Solicitor for the respondent: *W. P. Schaffner.*