REPORTS OF CASES
IN THE SUPREME COURT OF
NEW BRUNSWICK.

Trinity Term, 6 William 4th.

THE QUEBEC AND HALIFAX STEAM NAVIGATION COMPANY *v.* CUNARD & ALLEN.

This was an action of assumpsit for Money had received, Plea General Issue, tried before *Botsford, J.* at the Northumberland Circuit in 1834. Verdict for Defendants.

It appeared in evidence, that the Defendants were appointed agents at Miramichi by the subscribers to the above-named company, resident there previous to the Incorporation of the Company to collect, receive, and remit, the amounts of the several shares to Quebec, where the same were required to be paid, the number of shares at Miramichi was at first 97, whereof 6 were abandoned, of the remaining 91, some paid the first Instalment to the Defendants, others remitted the money to Quebec, and some jointly gave Defendants Bills on Quebec, for the aggregate amounts due from them; part of the subsequent instalments were paid in like manner, the Defendants took promissory notes from several expressed payable to them "agents for the Quebec and Halifax steam Boat company, at specified periods, with such sum in addition as might be necessary to make good the remittance to Quebec;" some of these were paid, others remained unpaid, and were handed over subsequently to Plaintiff's solicitor.

When the company commenced business, the Defendants were their Agents at Miramichi, and settled the disbursements there of the Company's Steam Vessel, for which services they charged commission and rendered accounts stating the same at each voyage. A settlement between Plaintiffs' agent from Quebec and the Defendants, was made on 15th Oct. 1833, at which time the Defendants rendered an account current in which was the following item.

"Agency and compensation for trouble in attending to the business of the Association on 91 shares, at £25 each £2,275 at 5 per cent—£113 15s."

The account was settled except this item which was reserved for future consideration, and this action was brought to recover the amount so retained.

As the Trial Evidence was admitted of the Defendant's services as the general Agents of the Company, and the Defendants claimed to retain the amount as a compensation for their services generally rendered to Plaintiffs. His Honor left it to the Jury to consider if the Defendants were the agents of Plaintiffs, but did not distinguish between their capacities as agents for the Plaintiff and agents for shareholders.

In Michaelmas Term, a rule nisi was obtained, to set aside the verdict and grant a new trial on the following grounds:—

1st—The admission of improper evidence on the part of Defendants.

2d—The misdirection of his Honor the Judge.

3d—That the verdict was against evidence. The points were argued in Hilary Term, and stood over for the opinion of the Court until this Term.

CHIPMAN, CHIEF JUSTICE.—The question in dispute between the Parties in this cause, turned upon the right of the Defendants to retain the sum of £113 15s. mentioned in the account stated by them on 15th October 1833.

The shares mentioned in this charge it appears from other evidence were the shares in the capital stock of the Quebec and Halifax Steam Navigation, Company (the Plaintiff in the cause) that had been subscribed by Persons at Miramichi, which shares so subscribed amounted to the number of 91.

An obvious remark upon this charge upon the first reading of it in the manner in which it is framed, is that there seems to be neither justice nor propriety in making the compensation for trouble in attending to the business, that is, the general business of the Association after it was formed, to be rated by a per centage on a certain number of Shares which contributed to form it, especially as it appeared from other accounts, which were given in evidence that the Defendants uniformly charged, and were allowed a commission on all their receipts and disbursements in attending to the business of the Association, [after its business commenced] at Miramichi. These commissions, thus charged and allowed, must be considered as the compensation, for attending to the business of the Association after it went into operation.

There can be no propriety in charging a per centage, on the specific charges subscribed at Miramichi, unless it be for Agency in collecting the amount of those shares, and remitting the same to Quebec. And here arises the question whose agents were the Defendants in performing this service. Their appointment as agents took place at a meeting of the Subscribers at Miramichi on the 12th October, 1830, more than five months before the act of Incorporation of the Company, and they were at that meeting elected by such subscribers by ballot.

Their duty under this appointment appears in the minute of a previous meeting of these subscribers on the 8th October which declares the object of the meeting which was to be held on the 12th, to be "that of "appointing an Agent to the Shareholders in Miramichi, whose business "it shall be to receive the Instalments now due, and to take notes in his "own name for the balance and to transmit the sum when collected, to "the Treasurer at Quebec, pursuant to the resolution of the Quebec "Committee." It appears from the evidence of W. Stevenson that the resolutions of the Quebec Committee required "£25 net per share free of all deductions to be paid in Quebec."

At the above mentioned meeting on the 12th October, it was resolved "that the Miramichi Shareholders should not be liable for any more than "the sum of £25 for each Share subscribed, *except any loss or exchange "in remitting to Quebec.*"

The Notes given by the Miramichi subscribers for their respective balances were in the following terms, "being balance due by me for—shares in the Quebec and Halifax Steam Boat Company, with such sum in "addition as may be necessary to make good the remittance to Quebec."

All these things shew incontestibly that it was the understanding and stipulation of the Miramichi Subscribers before the Incorporation of the Company, that £25 per share without any deduction was to be paid into the hands of the Treasurer at Quebec. The act of incorporation passed on the 21st March, 1831, speaks the same language, for sec. 2 provides, that the shares shall be £25 each to be paid "into the hands of the Treasurer of the said Company;" indeed it is evident that any deduction from the amount of the shares paid at Quebec would have been pro tanto a diminution of the capital stock of the Company which it is obvious was inadmissible.

It is clear I think, that it was considered at the time the Agents were appointed, that the collecting the amount of the Shares at Miramichi, and remitting the same to Quebec, should be a gratuitous service on their part, so far as they should be called upon to perform it, for in many instances the Subscribers made their own remittances to Quebec. Nothing appears upon the proceedings of the meeting of the Miramichi Subscribers with regard to compensation for the service. Johnson in his testimony states, that nothing was said about commission at the time—that he was a candidate for the appointment of agent—that he expected if appointed agent for the Miramichi Subscribers he should be appointed General Agent for the Company in Miramichi, which was his sole object in seeking the former appointment.

The conduct of the Defendants themselves shew clearly that they did not consider themselves entitled to any compensation for this service of collecting and remitting the shares at least from the Company. In several of their letters they enclose remittances for shares to Quebec, and say nothing about commissions: these remittances were made before the act of Incorporation. In June, 1831. they state an account with the Company after its Incorporation, and give credit for amount received on Shares, and charge a remittance for the full sum without making any charge or deduction for commission. In subsequent accounts they charge commission on receipts of freight, &c. and their disbursements for the Company, and still make no charge of commission on the shares; and it is not until their last account of 15th October, 1833, after a lapse of nearly three years, that they bring forward this claim, and it does appear to me that they are not upon any principle entitled to it.

It remains to apply this view of the case to the proceedings at the trial. It appears to me that these proceedings were much complicated and perplexed, and that the attention of the learned Judge was for the greater part of the time kept away from the true merits of the case by the Defendants withholding till a very late period of the Trial, the production of the account of the 15th October, 1831. I think that all the evidence which was given as to the trouble which the Defendants were put to in attending to the general business of the Company was entirely irrelevant to their claim for a commission on the amount of shares as developed in the account of 15th October, 1833 and was therefore inadmissible.

Moreover the point, that the Defendants were (in the business of collecting and remitting the shares) to be viewed entirely in their original character as Agents of the Miramichi Shareholders only, and therefore were not entitled to make any charge for this service against the Company, was not put by the learned Judge to the jury so distinctly, as upon full consideration I think the case required.

On these grounds I am of opinion, that the rule for a new Trial should be made absolute.

CARTER, J.—This was an action for money had and received by the Defendants to the use of the Plaintiffs, and the defence set up by the Defendants was that they were entitled to retain £113 15s. the sum in question as Commissioner at the rate of 5 per cent on the whole amount of 91 shares of £25 each which they were employed by the Company as their Agents to collect. To establish this defence it would be necessary to shew two things: 1st, that these Defendants were the Agents of the Company for this purpose; and as such Agents were entitled to a commission of 5 per cent on the amount of shares received; and 2dly, that this money claimed to be retained by the Defendants was part of the money received by them as such Agents on account of the 91 shares.

If there has been any difficulty in considering this case it seems to me to have arisen mainly if not entirely, from confusing the characters of the Defendants in the collection of the shares where their agency was confined to the 91 shares, and that in which they afterwards acted, when they attended generally to the concerns of the Company, by superintending all business connected with the Company and the Boat at Miramichi. From the evidence it seems to me quite clear, that at the time when the agency of the Defendants was confined to the 91 shares, they were not the Agents of the Plaintiffs. It is quite clear they were not originally appointed to act in that capacity by the Plaintiffs, and every thing which was proved respecting what took place at that time is perfectly consistent with the fact of their acting as Agents for the holders of the 91 shares, while the regulations of the Company, that the whole and complete amount of every share was to be remitted and made good at Quebec, is wholly inconsistent with the fact of their having appointed agents at Miramichi, who were to have a right to retain a certain proportion of each share. The fact too of the Defendants having rendered accounts in which commission is charged on disbursements made by them; and no commission is mentioned on the amount of shares received, shews very strongly that the Defendants themselves did not consider themselves entitled to such commission, but that this claim was an after-thought.

With respect to the 2d point I have mentioned, it is quite clear on the evidence, that supposing it had been established beyond doubt, that the Defendants were the agents of the Company for the collection of these 91 shares, and were as such entitled to 5 per cent commission on the amount of these shares, that the amount of £113 15s. for which the verdict now stands is far beyond the sum which was proved to be in their hands on amount of the 91 shares, and which alone they could in such case be entitled to retain.

From the confused and complicated manner in which the evidence in this case, most of it being wholly irrelevant, seems to have been produced, I think the attention of the learned Judge who tried this cause in his direction to the Jury, was not confined to the distinct and clear points on which the case turned, and therefore I am of opinion that the rule for a new trial should be made absolute.

PARKER, J.—I am quite of the same opinion; this case might indeed be decided on a very narrow ground, for supposing the Defendants to have been entitled to remuneration for their services from the Plaintiffs, they should have resorted to a set off, and not relied on a mere right to *retain* the balance in their hands.

There is no doubt that a right to reduce a Plaintiff's demand, or wholly to defeat it on account of some matter connected therewith, may in some cases be supported, and is distinct from a cross claim which is the subject matter of a set off or action; the right to retain for agency and commission is I think, properly exercisable only, on the specific monies received on the shares for which the charge is made, and could not be made on the general balance of accounts without some particular usage of trade or distinct agreement, neither of which existed in the present case. Remuneration for other services in the general business of the Company, has certainly no necessary connection with one part of the stock more than another; and ought not to have been blended with the charge of agency on the Miramichi shares.

It may however, be more satisfactory to decide the case on the broader ground which the parties themselves have taken at the trial and argument: and this depends on the question, whether or no there was evidence to support the charge of per centage, for agency and compensation for trouble in attending to the business of the association on 91 shares in whole or in part; and on a careful consideration of all the facts, the time, nature and purpose of the Defendant's original appointment; the effect which such a charge would have in reducing the capital stock; the absence of any evidence from which it could be inferred that such was ever contemplated or sanctioned by the Company, or indeed that such was intended by the Defendants until the unfortunate progress and termination of the adventure made the Company's business less profitable than had been anticipated; I think the Jury were not warranted in the verdict they have found; but that the Plaintiffs were entitled to recover the sum of £113 15s. which the Defendant had received on their account, and that consequently the rule for a new trial must be made absolute.

BOTSFORD J. concurred.

JOHNSTON *v.* WINSLOW.

This was an action of Trespass, for seizing and carrying away Plaintiff's Timber; Plea the general issue.

At the Trial before *Chipman, C. J.* at the Carleton Circuit in Sept. 1834. The taking having been proved, the Defendant (who is Sheriff of Carleton) offered in Evidence an exemplification of a Judgment, and an alias writ of fieri facias thereupon issued against one Bishop ats Phillips, to whom it was offered to be proved, the property in question belonged; an objection was taken by the Solicitor General for Plaintiff, that the Writ offered was so altered and interlined, that it could not be received in evidence as a writ; after some discussion it was omitted, that the original writ of heri facias had been returned by the Defendant, and had been altered by Mr. Hazen the Plaintiff's Attorney, and re-issued as an alias. His Honor determined that it was a void writ, and refused to receive it as evidence.

An exemplification of another judgment and execution, Banks against Bishop and another, was then offered, the execution so exemplified was indorsed, as received by the Sheriff 16th August, 1834. the trespass was committed in October, 1833, the Defendant's counsel offered evidence, to shew that there was a mistake either in the exemplification or the indorsement of the Writ, that the writ was in the Sheriff's hands at the time of the seizure, and that he levied under and by virtue thereof, but His Honor refused to admit any Evidence to contradict the record. Whereupon the Plaintiff obtained a verdict.

In Michaelmas Term, a rule nisi was obtained to set aside the verdict and grant a new trial, on the ground of the improper rejection of evidence at the trial.

Cause was shewn in Hilary Term by the *Solicitor General* and *Wilmot* for Plaintiff who contended, that the Sheriff having taken Goods out of the possession of a person not named in the writ, must shew, that the judgment and every proceeding down to the execution, and the writ itself were regular and correct, or he must be considered a mere wrong doer. As to the execution, Banks *v.* Bishop, the Sheriff's Indorsement shewed that he did not receive it, until after the Trespass was committed; and that indorsement being part of a record, could not be disputed.

Berton in support of the rule, as to the first writ, urged that a Sheriff could only be required to take reasonable precaution; if he found on record a judgment, to warrant the execution, he could not determine what erasures or interlineations would vitiate the writ: it came to him under the seal of the Court. and knowing the property in question to belong to the Person against whom the Execution issued, he levied upon it; but even if there were an irregularity in the writ, he contended it was not sufficient to make it as void writ—and if only irregular, then it was a sufficient justification until set aside: as to the execution Banks *v.* Bishop, evidence was not offered to vitiate but to support a record:—by the Sheriff's Indorsement, it appeared that the Execution was received in his office in Aug. 1834, the writ was returnable in Hilary 1834, which was an absurdity; the evidence offered was to shew the mistake of 1834 for 1833, and that would have supported the writ, and have rendered it effective. He cited Dickson *v.* Fisher, 1 W. Bl. 664. Watson's Sheriff, 53, n. 4. 3 Wils. 345. 2 Burrow, 964. 15 East. 614, (d). 3 Bac. Abr. 419, 420. Curia adv. vult.

The Court delivered Judgment at this Term.

BOTSFORD, J.—I am of opinion that this rule must be discharged upon both grounds. The Writ of Fieri facias having been changed into an alias, by the interlineation of the words "as before we have commanded you,"—and by the alteration of the teste and return may be said to be destroyed, and the alias so called with such interlineations and alterations upon the face of it, and without having been resealed, must be considered as a nullity in the hands of the Sheriff.

With respect to the second ground, I think the case of Dickson and Fisher, 1 W. Bl. 664 is decisive, there it was held by the Court, "That Parol "evidence ought not to be admitted to vitiate the record, and prove it to "have been wrong, though it may have been admitted in order to pro- "nounce it right."

CARTER J.—This was an action of Tresspass against the Defendant for taking certain Timber alleged to be the Plaintiff's property. The defence was that Defendant as Sheriff of Carleton seized the Timber in question under two executions issued on judgments in two actions against a person named Bishop, and in support of this defence, two documents were offered in evidence;—the first which purported to be an alias fieri facias issued against Bishop, at the suit of Phillips, was admitted to be the original fieri facias, altered by erazures and interlineations into the form of an alias.

In the case of Pluchart *v.* Greenes, 2 Keble 705, Trespass was brought against a Sheriff and his Bailiff for false imprisonment, and they justified by warrant or writ to the Sheriff. Plaintiff replied,—no writ was then taken out, to which Defendant demurred, and judgment was given for the Plaintiff, for "albeit the Bailiff hath a warrant, yet he is liable if there be "no writ, contra if the writ be void, if delivered."

Now, can it be said in the case before the Court that there was any writ? In its original form it clearly was a writ of fieri facias; but in its altered form where it purports to be an alias, it seems to me to be nothing more than a piece of parchment issuing from an Attorney's office, and carries with it no authority as a writ. As well might the Attorney here made such alterations and interlineations as would have transformed it into a cap. ad sat., and offered it as a justification for the Sheriff in making an arrest.

The 2d document was an exemplification of a writ of fieri facias against Bishop at the suit of Banks, which appeared by the Sheriff's indorsement not to have been received till the 16th Aug. 1834, whereas the seizure which was the ground of this action took place in October, 1833. It was proposed to shew by the Sheriff's book, that the writ was in fact received on the 16th Aug. 1833, but this evidence was rejected by His Honor the Chief Justice as tending to falsify a record.

I see nothing in this case to make it an exception to that which is well known as a rule of evidence, and which is distinctly recognized by Lord Kenyon in a case of Reed *v.* Jackson, 1 East. 357, where it was attempted to shew by other evidence that a verdict which had been entered generally, had been so entered by mistake of the officer, instead of having been entered on a particular plea. Lord Kenyon in his judgment, says, "The Evidence offered by the Defendant went to impeach the authenticity of a record, and therefore was inadmissible."

This case is a stronger one, inasmuch as the part of the record which is sought to be contradicted, is an entry made by the very person who now seeks to contradict it. I think His Honor the Chief Justice was right in refusing to admit the evidence offered in both cases, and that this rule must therefore be discharged.

PARKER, J.—I think on both the points which have came before the Court in this case, the Chief Justice was right in rejecting the evidence offered at the trial.

As regards the first execution, had the question merely turned on the effect of erasures and interlineations, it would have been a matter of consideration whether they were in material parts, and at what time made; Crowther *v.* Wheat, 8 mod. 243—6 com. dig. 290; but when it appeared that what was produced as an *alias fieri facias*, had in fact been the original *fieri facias*, which had as such been already in the Sheriff's hands, I think it was properly treated as a nullity; and could no more warrant the Sheriff's proceeding, than if it had been a mere blank. In 2 Dowl. P. R. 745, a summons originally issued into Middlesex but altered to Surrey without resealing, was treated as a nullity.

This new doubt is a case of great hardship so far as the Sheriff is concerned, but if the Attorney has put into his hands to execute that which purported to be the writ of the Court but in fact is not, he must have his recourse on him.

The nature of the Sheriff's office exposes him to much risk; nothing perhaps more exemplifies this, then the decision in Lake *vs.* Billers, 1 L. R. 773, fully confirmed by Martin *v.* Podger, 5 Burr. 2631 and 2 Bl. 701, that in an action by third persons against the Sheriff for seizing goods under execution, he must not only shew a good execution; but a judgment to warrant it.

Another objection in the present case as strongly put by the Solicitor General, is that there is no original Execution remaining to warrant the award of an *alias*, but the first ground is I think sufficient.

With regard to the second Execution offered in evidence by the Defendant; I think the Indorsement made by the Sheriff of the time of receiving it, pursuant to the direction of the Provincial Statute of Frauds, 26, Geo. 3, c. 14, s. 13, was conclusive. To allow evidence at the trial on the part of the Sheriff to contradict this, would in effect render nugatory that which the Legislature has provided for the better manifestation of the time of the Executions coming into his hands. Besides in the present case *the* writ had actually been returned to the Court; and was with the Indorsement thereon exemplified as a record, which on clear principles of Law, could not be contradicted by parol testimony.

Upon a proper application to this Court, shewing a mistake in the Indorsement, an amendment might, I conceive, have been allowed, 1 T. R. 732; and the Defendant, who must have been aware of the necessity of this evidence, should have applied before the trial to have the error, if such it were, corrected.

CHIPMAN, C. J.—I remain of the same opinion I expressed at the trial. The Sheriff in an action by a third person must shew himself right in omnibus. That which purported to be a writ was a nullity.

The 2d Writ was a record taken from the files of the Court, and exemplified under the Seal of the Court. I had no hesitation in rejecting evidence to contradict its contents. No evidence can be admitted to contradict a record. The Rule nisi must be discharged.

The Solicitor General and Wilmot for Plaintiff.
Dibblee, Wetmore and Berton for Defendant.