

if they are cut and if I am notified," etc. . . . Then follows an allegation that plaintiff, pursuant to the terms of "said agreement," hauled out "the said 800 cords," and the claim is for payment of \$500. . . .

The evidence given at the trial was very meagre, and nothing was shewn as to the circumstances under which the two documents indorsed on the Gallagher agreement were executed. . . .

Defendant's position, as presented before us in argument, does not depend upon novation having taken place. It is this, that the result of the transactions between him and plaintiff is that the latter became the assignee of his rights under the Gallagher contract, and that the second memorandum was intended to limit, and has the effect of limiting, the obligation which, without it, would have rested on plaintiff . . . to perform the contract in all its terms so far as they were to be performed by defendant; and to give to plaintiff the right to perform the contract according to its terms, but obliging him to perform it only in the modified manner mentioned in the second memorandum, and as between defendant and plaintiff without any personal liability on defendant's part to pay for the work to be done, leaving plaintiff to look to Gallagher, and to him alone, for payment. The other view . . . is that the second memorandum is in the nature of a sub-contract between plaintiff and defendant, that plaintiff should do for defendant the work which defendant had contracted to do for Gallagher, subject . . . to the variation . . . between the agreement and the second memorandum. . . .

Much may be said in favour of either view, and it is here that I feel embarrassment owing to the absence of any clear statement in the pleading as to the nature of the contract which plaintiff alleges was formed by the writings . . . and of any light being thrown by the evidence on the circumstances under which the transaction . . . was entered into.

The inclination of my mind is against plaintiff's contention, though I have formed no definite opinion either way, and it appears to me that . . . the best course to take will be to direct a new trial. . . .

The parties should have leave to amend as they may be advised. It may be that if, having regard to the terms of the second memorandum, plaintiff was not in default as to the 400 cords, but Gallagher is rightly withholding payment of the \$500 in respect of the 800 cords because of a claim for damages against defendant for breach of his agreement as to the 400 cords (for defendant may be liable to Gallagher,