Snelling and *Keefer, contra.*

Mr. BOYD, Master in Ordinary.—Both parties cited and relied upon the decision of the Court of Queen's Bench in *Re Chaffey*, 30 U. C. Q. B. 64; but it was not very much help to a solution of the question discussed on this claim. That decision was upon the effect of certain clauses of the Insolvent Act of 1864 The facts were, that a partnership firm made a promissory note, which was endorsed by one of the partners to a creditor. The firm and the partner both became insolvent, and their joint and several estates were being administered in the Insolvent Court It was held that the endorsement of the partner was a security for the payment of the creditor's claim, but not a security from the insolvent firm or from the estate of that firm within the meaning of sec 5, subsec. 5, of that Act; consequently that that Act did not require the creditor proving on the partnership estate to put a value on this endorsement. In truth the case was not within the Act at all, but was governed by the general law as to securities held by a creditor, viz., that he can prove against the bankrupt estate retaining his security. Then the decision goes one step further—that if the partner's estate is in insolvency, the creditor retaining his security cannot rank upon the partner's separate estate as well as upon the joint estate of the partnership

The case before me was argued as if the question arose entirely under the Insolvent Act of 1869. Assuming this for the moment, then section 60 of that Act supplies words sufficient to include the endorsement of an insolvent partner, *i.e.*, one who has been made an insolvent under the Act, not merely a person unable to pay his debts in full—one of an insolvent firm, under the foregoing state of facts, within the securities which are to be valued and dealt with by the Insolvent Court. In this view the question should have been raised before the Insolvent Court when Bray proved his claim there. But here the partner who endorsed is dead, and his estate is being administered, not in insolvency, but by the Court of Chancery, and the special provisions of the insolvent Act do not apply to the case. The rights of the creditors proving claims in this office are to be measured by the extent of their rights if they had been suing at law the executrix of the partner on his endorsement, after proving upon the partnership estate in insolvency, such procee ings in insolvency being instituted after the partner's death Now, supposing Bray had been suing the executrix on her husband's endorsement, I know of no defence at law which she could set up: see per Mansfield, C. J., in *Heath* v. *Hall*, 8 Taunt. 328.

The rule laid down by Lord Lyndhurst, in *In re Plumner*, 1 Phil. 59, applies here: "If the creditor of a bankrupt *holds a security on part of the bankrupt's estate*, he is not entitled to prove his debt under the commission, without giving up or realizing his security. But if he has a security on the estate of a third person, that principle does not apply; he is in that case entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than twenty shillings in the pound." Now, here the insolvent firm of Dawbarn & Co. are the makers, and Baker the deceased partner of that firm is the endorser; the claim of Bray is against the executrix of the endorser, clearly a third party as regards the partnership estate in insolvency. This is the opinion of the court in *Re Chaffey*, p. 70, though not necessary in that case for the decision of the appeal. See also *In re Sharpe*, 20 C.P. 82; and *Beas'y* v. *Beasly*, 1 Atk. 97. My conclusion is, that the creditor is entitled to prove for his full claim, and that my duty is to report the circumstances specially to the court, that they on further directions may impose any conditions that they think advisable upon this creditor, in view of his proving on the Dawbarn estate in insolvency. As to the mere right to prove without being obliged to elect, I may remark that even in Bankruptcy it is held that a joint and separate creditor ought to prove against both estates, but elect which he will be paid out of before he takes a dividend: *Ex parte Beatty*, 2 Cox. 218.

The case of *Ex parte Thornton*, 3 De G. & J. 454, a note of which Mr. Snelling very properly handed me, though it makes against his contention, is quite in point, and confirms the view I have taken, as it establishes the principle that the doctrine against double proof applies only when both estates are being administered in Bankruptcy. I also refer to *Ex parte Baurman*, Mont & Ch. 573; s.c. 3 Deac. 476; *Ex parte Stanborough*. 5 Madd. 89.

NOVA SCOTIA.

SUPREME COURT.

[Before the Chief Justice, Sir William Young, Kt.; Dodd, DesBarres, Wilkins, Ritchie, and McCully, JJ.]

DODGE v. THE WINDSOR AND ANNAPOLIS RAILWAY COMPANY.

The measure of damages where goods are injured in transitu — Payment into Court—Reduction of damages—New trial.

Where defendant, as a common carrier, tenders plaintiff at the place of destination, goods received to be forwarded, but injured so as no longer to be suitable for the purpose designed by the owner, the measure of damages to be recovered is their deterioration in value at the place of destination, in consequence of defendant's negligence, misconduct or neglect.

Plaintiff has no right to refuse to accept a deteriorated article, and claim the full amount of its value uninjured as damages.

[HALIFAX, Michaelmas Term, 1871.]

This cause came on for argument before the full Court in Banco, upon a rule *nisi*, granted by Mr. Justice Ritchie, who tried the same on the Western Circuit

MCCULLY, J., now (15th January, 1872.) delivered the judgment of the Court as follows:—

This was an action brought by plaintiff against defendant, tried before His Lordship, Mr. Justice Ritchie, at Kentville, in the Spring Circuit of 1871, and a verdict found for plaintiff A rule *nisi* to set aside the verdict was obtained by the defendants, and was argued during this present Term. The grounds taken and relied on were that the verdict was against law and evidence, and for misdirection.

The action was brought against the defendants as common carriers, and sets out in the usual way in the first count a contract to carry for hire from Halifax to Middleton, in Annapolis County, goods to be delivered by plaintiff to defendants.