time was sufficient, and gave judgment for plaintiffs, holding that it was not necessary that they should have been the holders at the time this action was brought. He held also that the alleged agreement to postpone payment had not been made out.

Before the Divisional Court defendant again relied upon the defences put forward at the trial, and by that Court the judgment at the trial was reversed, on the ground that plaintiffs were not the holders of the note when the action was brought. Plaintiffs now appeal, and, while urging but faintly that the judgment below was wrong on this point, contend that, inasmuch as they were liable to the bank as sureties on the note for defendant, they had the right to bring or to maintain the action to compel him to pay it to the bank, and to indemnify them in respect of it. This cause of action was not set up on the pleadings, and was put forward for the first time on the appeal to this Court.

It is now, in my opinion, too late for plaintiffs to attempt to recover their lost ground. The note was outstanding in the hands of a third party when they commenced their action, and so they had no title to sue in the shape in which they launched it and in which they have presented it up to the present stage. See Davis v. Reilly, [1898] 1 Q. B. 1, on which we understand the Court below relied.

A new trial on payment of the costs of the former trial and of the Divisional Court and of this appeal—nearly all the costs of the action—would be but an illusory favour. Moreover, having contested the case throughout on one ground and failed, it would be, under the circumstances, unreasonable to permit plaintiffs now to set up another inconsistent with it, and one which, even if it was open to them while the bank were still the holders of the note, ceased to be a cause of action or ground of equitable relief when plaintiffs took it up and became, as payees and holders, entitled to sue upon it. That is now their cause of action, if they have one, and, as it is not affected by anything which has been decided in the present suit, there is no reason to interfere with the judgment.

Appeal dismissed with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.