Another strong reason is this—I do not think that this amendment is necessary to bring out the real question between the parties. I think this amendment is proposed merely to enable the appellant to avail himself of what I may call a technical rule of law, supported by the cases which have been referred to, and not in order to determine the real issue which ought to be determined in this action. Further, this objection was not taken and insisted upon at once by Cohen, the present appellant, in the Court below; it was first mentioned, and the objection was first taken by counsel, who then appeared for another defendant, and it was only raised and insisted on on behalf of Cohen after substantially all the evidence had been taken, and he had taken his chance of the evidence turning out in his favour."

In *Edevain* v. *Cohen*, as it appears, evidence was given and an application to amend was made at the trial, whereas in MacMillan's case no evidence of the release was given, nor was any application to amend made at the trial.

It is almost impossible to believe that Chief Justice Ritchie, deciding as he did, was not under the impression that the release in question was pleaded, and that evidence of it had been adduced at the trial.

The respondent in the present case appears in his factum to have relied upon the case of *Morton* v. *G. T. R.*, which is reported along with *Vogel* v. *G. T. R.*, in 10 A.R., 162, and 11 S.C.R., 612. In Morton's case, the contract, just as in the present case, was to carry from a point in Ontario to a point in Manitoba. The goods were damaged in Ontario by the negligence of the defendants or their servants, and it was held that, under the Railway Act, the defendants could not avail themselves of any conditions.

The only difference between that case and MacMillan's was, that in the latter the goods appeared to have been damaged in Manitoba.

It is to be regretted that Mr. Justice Strong, in his judgment, disposed of this point without discussing the case of *Dickson* v. *G. N. R.*, 56 L.J., Q.B., III, upon which the respondent appears to have based one of his strongest arguments, and in which, as in MacMillan's, the loss occurred on the line of another Railway Company.

Another argument put forward by the respondent was, that the defence was bad at common law.

The case usually cited on behalf of carriers within Ontario as justifying conditions exempting them from liability for their own negligence is *Hamilton* v. G.T.R., 23, U.C., Q.B., 600.

In that case, as appears by the report, *but not by the head note*, the defendants' charges were not prepaid, whereas in MacMillan's case the charges were prepaid.

The respondents' factum argues this point at considerable length, making extracts from many English, Canadian, and American decisions, and points to the conclusion that *Hamilton* v. *G. T. R.* was itself wrongly decided, and at all events that it is not decisive of MacMillan's case on this point.

Mr. Justice Strong passes over what appears to be a point deserving attention, with the remark, "There was no statutory or other legal impediment to a