

Province of Nova Scotia.

SUPREME COURT.

Full Court.] MARKS v. DARTMOUTH FERRY COMMISSION. [April 11.

*Master and servant—Contract of hiring—Termination and variation of—Assent—Burden of proof—Permanent and temporary illness—Effect of—Continuing contract—Obligation to pay.*

M. was employed by the defendant Commission to act in the capacity of captain of ferry steamer, under a contract in writing, the employment to commence March 1, 1899. On Jan. 8, 1900, defendants passed a resolution that after that date no employee would be paid for any time he or she might be absent from duty. This resolution was never formally communicated to M. but there was evidence that he was aware of its terms and that on two occasions a portion of his wages was deducted for absence from duty. On Dec. 15, M. was taken ill, and was thereafter continuously absent from duty until the time of his death, which occurred on July 16. In an action by the executrix of M. claiming payment of wages for the time during which he was so absent from duty,

*Held*, per WEATHERBE, J., and GRAHAM, E. J., affirming the judgment appealed from, that plaintiff was entitled to recover.

Per TOWNSHEND and MEAGHER, J. J., that deceased having been aware of the passage of the resolution, and of the change which it purported to make in the terms of his contract, and having assented to the resolution by accepting his wages less the deductions made therefrom, the action could not be maintained.

Per WEATHERBE, J., that the contract was a continuing one, and if not put an end to the obligation to pay continued.

*Also*, that if the illness of deceased was so treated as temporary the like obligation existed.

*Also*, that if defendants relied upon permanent illness as a defence they were bound to prove it.

Per GRAHAM, E. J., that the resolution was not effective in the absence of evidence that it was submitted to and approved of by the Governor in Council. That in the face of the contract the resolution, so far as absence from duty was concerned, was ultra vires. That the burden was on defendants to show acquiescence, and that this was not to be inferred from the deductions made on two occasions from deceased's wages. That to establish acquiescence it must be shewn that deceased was aware of his legal rights. That permanent illness is not of itself sufficient to terminate a contract of hiring; that defendants were bound to make an election, and that by retaining deceased in their employ and not requiring him to work.