caused by the falling of the wall, even if the falling takes place seven days after the fire during a high wind.

Appeal dismissed with costs.

Laflamme, Q.C., *Cameron*, Q.C., and *Butler*, Q.C., for appellant.

Duhamel, Q.C., and *Marceau*, for respondent.

SCHWERSENSKI *v.* VINEBERG.

Action for account of money paid—Receipt—Error—Parol evidence—Art. 1234—Art. 14 C.C.—Findings of fact—Duty of appellate court.

S. brought an action to compel V. to render an account of the sum of $2,500 which S. alleged had been paid on the 6th October, 1885, to be applied to S.'s first promissory notes maturing, and in acknowledgment of which V.'s bookkeeper gave the following receipt: "Montreal, October 6th, 1885. Received from Mr. D.S. the sum of two thousand five hundred dollars, to be applied to his first notes maturing. M. V., Fred."; and which V. failed and neglected to apply. V. pleaded that he never got the $2,500, and that the receipt was given in error and by mistake by his clerk. After documentary and parol evidence had been given, the Superior Court, whose judgment was affirmed by the Court of Queen's Bench, dismissed S.'s action.

On appeal, the Supreme Court of Canada

Held, 1. that the finding of the two courts on the question of fact as to whether the receipt had been given through error should not be interfered with.

2. That the prohibition of art. 1234 C.C. against the admission of parol evidence to contradict or vary a written instrument is not *d'ordre public;* and that if such evidence is admitted without objection at the trial, it cannot subsequently be set aside in a court of appeal.

3. That parol evidence in commercial matters is admissible against a written document to prove error. *Ætna Ins. Co.* v. *Brodie*, 5 Can. S.C.R. 1, followed.

Appeal dismissed with costs.

Cooke for appellant.

Hutchison for respondent.

Nova Scotia.] [May 12.

MERCHANTS BANK OF HALIFAX *v.* WHIDDEN.

Bank—Agent of—Excess of authority—Dealing with funds contrary to instructions—Liability to bank—Discounting for his own accommodation—Position of parties on accommodation paper.

K., agent of a bank and also a member of a business firm, procured accommodation drafts from a customer of the bank, which he discounted as such agent, and without indorsing the drafts used the proceeds, in violation of his instructions from the head office, in the business of his firm. The firm, having become insolvent, executed an assignment in trust of all their property, by which the trustee was to pay "all debts by the assignors or either of them due and owing or accruing or becoming due and owing" to the said bank as first preferred creditor, and to the makers of the accommodation paper, among others, as second preferred creditors. The estate not proving sufficient to pay the bank in full, a dispute arose as to the accommodation drafts, the bank claiming the right to disavow the action of the agent in discounting them and appropriating the proceeds in breach of his duty; the makers claiming that they were really debts due to the bank from the insolvents. In a suit to enforce the carrying out of the trusts created by the assignment,

Held, affirming the judgment of the court below, GWYNNE, J., dissenting, that the drafts were "debts due and owing" from the insolvents to the bank and within the first preference created by the deed.

Per RITCHIE, C.J.: K. procured the accommodation paper for the sole purpose of borrowing the money of the bank for his firm, and when the firm received that money they became debtors to the bank for the amount.

Per STRONG and PATTERSON, JJ., that the agent being bound to account to the bank for the funds placed at his disposal became a debtor to the bank, on his authority being revoked, for the amount of these drafts as money for which he failed to account. The right the bank had to elect to treat the act of the agent as a tort was not important, as in any case there was a debt due.

Per GWYNNE, J.: The evidence does not establish that these drafts were anything else