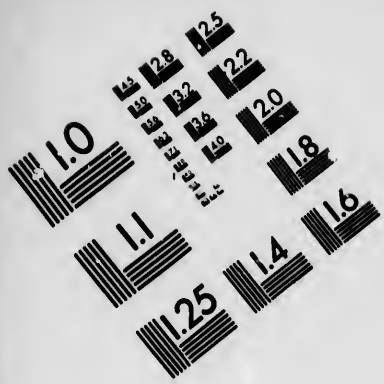

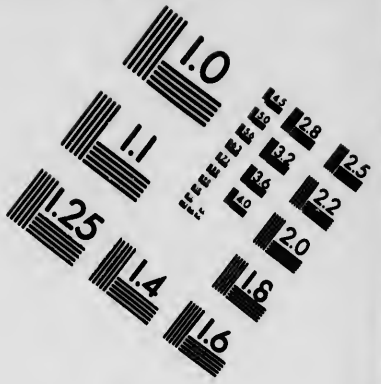

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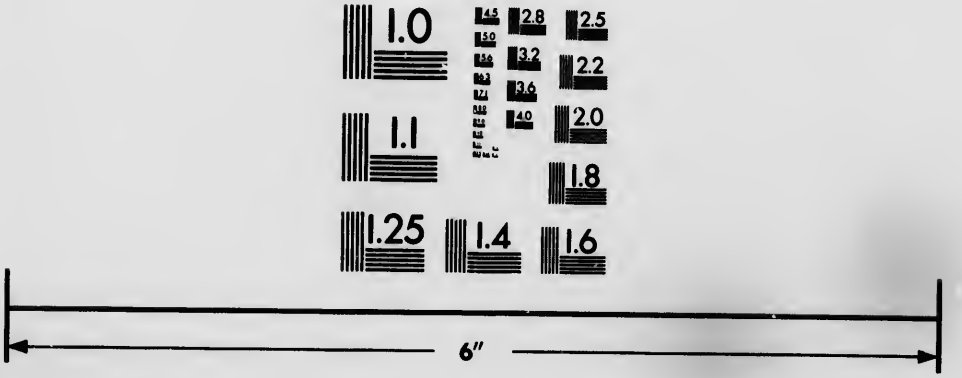

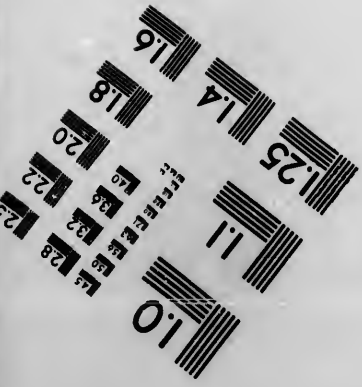

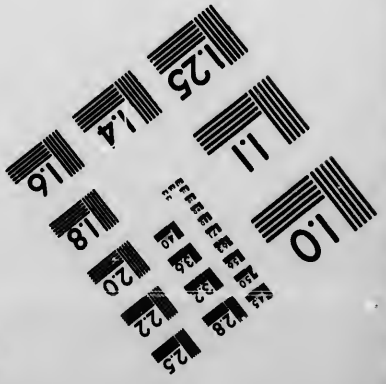

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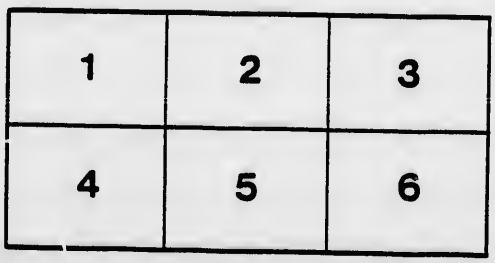

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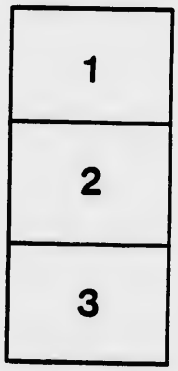

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EVIDENCE TAKEN FROM THE RECORD.

THOS. S. HIGGINSON, PLAINTIFF,

vs.

BENJAMIN LYMAN *et al.*, DEFENDANTS.

BEFORE MR. JUSTICE BADGLEY AND THE FOLLOWING SPECIAL JURY:—

1. THOMAS JAVERHILL,
2. JOHN W. MCGOVRAN,
3. PETER DONNELLY,
4. DAVID DUNCAN,
5. WALTER MCFARLANE,
6. JOHN MURPHY,
7. ANDREW G. HOLLAND,
8. ROBERT HUTCHESON,
9. ALEXANDER AULD,
10. GEORGE STARKE,
11. PATRICK BRENNAN,
12. THOMAS GORDON.

The evidence adduced at the trial in this cause on the 13th and 14th days of November last, was as follows:—

PRODUCED BY THE PLAINTIFF.

The first witness, BENJAMIN LYMAN, one of the defendants, deposed:—On the 4th April, 1857, the firm of Lymans, Savage & Co., was composed of myself, Henry Lyman, and Alfred Savage; I was then senior partner. On that day addressed a letter to plaintiff on my own responsibility, and at the time told plaintiff so; on that occasion I wrote the name of the firm. I told plaintiff I only expressed my own feelings and which might not be agreed to by the firm. He replied he thought they would. Plaintiff had asked me what I intended to do for him, and I told him I had always intended that he should take Mr. Savage's place. I approved of his qualifications for business, and believed him to be one of the most perfect young men in Montreal. I told him my brother Henry had a good opinion of him, and that Mr. Savage had frequently expressed, in fact, on several occasions, his opinion that his conduct in business was very excellent. Mr. Savage had, before this, expressed his wish to be released, a year before the expiration of the partnership, which was for five years, on account of ill health. Plaintiff asked me to, give him in writing what I intended, and I gave him the letter of the 4th April. This was written at time of his conversation with me (witness.) I did not receive any letter from plaintiff of date the 5th April, 1857. I did not see such a letter lying on the office desk. The firm did not, to my knowledge, receive such a letter. I never read such a letter or saw it or heard of it till a day or two ago, when my lawyers showed me a copy of it. In the conversation with plaintiff on the 4th April, 1857, money was spoken of. The firm received from plaintiff a thousand pounds a few days after the conversation. The circumstances were these: At the time the letter was written, plaintiff said he should be soon in receipt of money from the sale of land by his father, which he would like to place at interest. I said to give it to Mr. Clare and the firm would pay 8 per cent. The terms of the letter written were complied with by the firm, i. e., so far that the plaintiff received £200 a year and 5 per cent on the profits of the business for two years. Plaintiff had been in our employ for seven or eight years. Plaintiff was to receive the money so by him lent, on call. He never called for it, but I received a lawyer's letter demanding it, and the firm was sued for it before they got a chance to pay it; the firm gave a *bon* for the money. It was paid after the action was issued. The money remained with the firm for about two years at 8 per cent. When the money was given, the firm was not in difficulties at all. After the letter was written, plaintiff remained in the employ of the firm for two years. It was some time in the summer of 1857 that we first had some suspicions of plaintiff's morality. I wrote plaintiff from Toronto on the 1st April, 1859; letter now produced; I believe an answer was received by me to that letter on my return from New York. I cannot swear whether I did or did not reply to that answer of plaintiff's. The letter of the 16th April, now produced, was received by the firm from plaintiff. The letter of the 28th April, also produced, was received by the firm from plaintiff. The letter of the 30th April, now produced, was received by the firm from plaintiff. I believe the figures 1857 are wrong, and should be 1859. On the 2nd May, 1859, the firm wrote to plaintiff the letter now produced. I wrote that letter, and signed the name of Lymans, Savage & Co. The letter of the 3rd May, 1859, is in plaintiff's handwriting, and by him signed. The firm received that letter. The letter of the 16th April, 1859, was written and signed by me. I do not know of any other cor-

respondence on the subject. Our firm does a large business in its paints and drugs. I cannot say to what extent without consulting the books. It may be to the extent of seventy-five but I think not to the extent of £100,000 per annum. I am not aware that the plaintiff could have had, at the time, the Medical Hall. I heard that a partnership was spoken of with Mr. William Lyman, but plaintiff said he would not take it. William Lyman could not succeed. Never heard plaintiff could have had the Medical Hall. Plaintiff is one of the best persons for the business that I know of.

Cross-examined by the Jury:—The £200 a-year and 5 per cent were paid voluntarily, wishing to pay it without suit. The firm paid the £1000 when sued for it. Plaintiff could have had it on application. The £1000 was not a condition of his remaining with the firm.

Cross-examined:—The letter of the 4th April, 1859, was written in Plaintiff's room, in the store, when I was taking my luncheon. I told him I had not the sanction of my partners, and he said if they did not consent it would go for nothing. Plaintiff said he thought I could induce my partners to come into the arrangement. I had not the sanction of my partners; the first time I told my partners that I had written such a letter was after I wrote the letter of the 1st April, 1859. I recollect about a year after this that Plaintiff said he would like his per centage carried to his account. I then asked for the letter from Plaintiff, and was surprised to see it signed Lymans, Savage & Co. Till then I supposed I had written my own name. The firm was sued for the £1000; this copy of the declaration and writ now produced was served upon us, no mention of the partnership in it. The Plaintiff did not demand this money before the suit; I got the lawyer's letter first. I went up the same afternoon with a cheque, and met Mr. Cross, who seemed embarrassed, and referred me to Mr. Bancroft. Mr. Bancroft was absent, and I left the cheque with Mr. Dorman. The bailiff afterwards gave me the summons on my return to the office, on the same day as the letter. The account was made up as in the paper now put in—marked LM, allowing 8 per cent on £1000 the first year, and £1080 the second. The first entrance made in the books of the firm with reference to the 5 per cent was not made till this year. My partners knew nothing of it till about the time that Plaintiff demanded to be taken into partnership and was refused; the firm was sued afterwards for the 5 per cent. After the suit I and Mr. Clare made up the amount to the best of our ability; as many accounts were not collected and some were in suit, we decided that if the amount so made up were not accepted Plaintiff might go with the suit; it was accepted, and the receipt now fyled, marked N, given, signed by Plaintiff. The $1,200 so paid to Plaintiff, was charged to me individually, on the ground that I had promised it to Plaintiff—without my partners' consent, and that they were not responsible. Plaintiff called on the book-keeper about the time he was leaving to make up his account; this account was made up. I know that Plaintiff's account was credited by salary £200 per annum. When his salary was paid I was in England. It was I told Mr. Clare to credit £200 to Plaintiff about the time of his leaving.

By the Jury:—I never notified Plaintiff of his conduct in 1857, or previous to 1859. There were two actions, one for £1000 and another for the 5 per cent. I never tendered him any amount before the suit.

Re-examined:—The 5 per cent was paid at date of receipt, same time in 1860. The amount was not made up and offered before, because it could not be made up. Cannot say that the firm received the letter produced, of date 9th August, 1859, asking for an account of profits. Cannot say they did. I do not recollect ever seeing such a letter before now.

WILLIAM WORKMAN, Esq., merchant:—Knows the parties in this cause. Has seen the letter of the 4th April, 1857; about that date knew Plaintiff well. Had a favourable impression of his ability. Witness had that letter in his custody for a year, having been given to him by Plaintiff.

Question:—Had you any knowledge in April, 1857, of Plaintiff's prospects of business?

Answer:—I had. The late Wm. Lyman wished to have him in his business, and told me to hold out to Plaintiff the possibility of his being a partner, without naming a time. There was another party desirous of having Plaintiff. I told him to keep to the house he was in, and to get any offer of partnership put in writing. I was aware of plaintiff's offers. The party named was Mr. John Carter. I do not know if he was in treaty with Plaintiff. I always advised Plaintiff to keep to the concern he was in. The late Wm. Lyman requested witness to speak to Plaintiff. A position in Mr. Lyman's business witness would consider an advantageous position. W. Lyman has since died. Witness considers Plaintiff a competent person to have taken up the late William Lyman's business; which after his death no person carried on. Witness knows that £1000 was raised by Plaintiff for the firm of Lymans, Savage & Co., partly from funds in the hands of witness' late firm, say £700, and partly his own. The money in the hands of our late firm was part his own and part his father's. Money was scarce in 1857. The Defendants did as large a drug business as any in the province, and perhaps in America. It has been established over 30 years. Witness would value the good will of the whole business from eight to ten thousand pounds. The late Wm. Lyman retired with a large fortune from the firm. Wm. Lyman authorized witness to say to Plaintiff, as he was an old man he wished to have him to get the customers of the old firm for his business.

Cross-examined:—Our firm allowed 6 per cent interest on the moneys in their hands belonging to Plaintiff and his father.

JOHN CARTER, Chemist:—Knows the parties. Did not know personally Plaintiff in 1857. Witness wished in 1857 to have a person to superintend the Medical Hall, and Plaintiff was recommended. Witness was willing to take the Plaintiff as a partner. Saw Mr. Workman and also Mr. Malcolm, and was informed by them that it was too late, as Plaintiff had made arrangements with Defendants. Witness would have given Plaintiff a partnership and a handsome salary. Thinks the good will of the Defendants' business, which was established over 30 years, equal to the profits net of a year's business. Defendant's good will estimated at profits of a year. It is the

largest business in the province. Witness gave £750 perhaps 20 years ago for the good will of a retail house, corner Place d'Armes. Witness paid for everything besides. If a fair business was done it should give a net profit of ten per cent, that is such a business as witness supposes Defendants did. That is wholesale and retail. Witness was Executor to the estate of the late William Lyman. Defendants had to pay him from £18,000 to £20,000. Cannot say for what. From Plaintiff's reputation and high recommendations, witness was disappointed at not getting Plaintiff.

Cross-examined:—Witness took a Mr. Beers as partner in the place of plaintiff. He made no profit because a good many bad debts were made, and did not conduct business to witness' satisfaction. Beers is dead. It was into this business witness intended to put plaintiff. Had there been no bad debts at the balancing of the books, profits would have been good. They were better every year—£600 profit second year. Witness had a share in the business before taking Mr. Beers. Mr. Beers had £200 as salary and a share of profits.

JOHN C. SPENCE:—Knew plaintiff in 1857. Knew of his receiving a letter from defendants. Plaintiff brought the letter to witness who saw a draft of the reply in 1857, shortly after he first saw the said letter from Lymans, Savage & Co. Witness saw plaintiff one Sunday in the store, and plaintiff said there is my answer to their letter lying in the desk. This was shortly after my seeing the letter to him from Lymans, Savage & Co.

Cross-examined:—Plaintiff showed witness the draft of his reply shortly after his receiving the original letter; cannot say how long after the letter that I speak of as having been pointed out to me by plaintiff; was so pointed out on Sunday; none of the firm were present, nor any one in the employ of Lymans, Savage & Co. Plaintiff had the key of the premises, and was apparently in charge of them. On that day witness did not read the letter lying on the desk, but has read the copy shewn to him by plaintiff. It was pointed out by plaintiff as being the letter, and this by plaintiff. To the best of his knowledge it was the Sunday after the 5th of April, 1857, that witness saw the letter lying on the desk that plaintiff pointed out to him.

JOHN SINCLAIR:—Plaintiff called at witness' office and said he had offers from the defendants, and wished his advice. He spoke of other offers from Mr. W Lyman and Mr. John Carter; when he told witness all, witness advised him to accept the offer of Lymans, Savage & Co. There was nothing of a private matter about it.

Cross-examined:—Plaintiff did not shew the letter to witness. He only consulted him about his offers.

HENRY T. LAMPLOUGH:—Knows parties. The defendants do a very large business; estimates good will of such a business at from £8,000 to £10,000. Is not aware they were in need of money in 1857; was not asked for accommodation paper.

Here the plaintiff's enquete closes.

EVIDENCE FOR DEFENDANTS.

JOHN O'LEARY:—Knows parties. On the 28th May, 1857, witness had some conversation with the defendant Savage about plaintiff. Savage said he had heard something about plaintiff, and wished me to find out whether it was true or not. On the same evening witness went to the store of defendants, and remained there till half-past eight, when plaintiff came out; went up St. Joseph Street to Little St. James Street, through St. Mary Street, and went down a little street to a place where one of Mrs. Scott's daughters lived. He rapped at the door; it was opened, and he went in. Witness returned to the store, and plaintiff returned at 12.30 p.m. in a cab. Witness took cabman's number. This was a house kept by Mrs. Scott's daughter, as far as witness knows. The daughter is known as Martha Scott; have known her for 5 or 6 years. About four years ago she lived with her mother, who kept a bawdy house, and does so still. Since that time she lives in a house adjoining. Witness was in there only once, and that was about three years ago. Since then witness does not know her character, as when on duty witness was told not to go there, as the only person who visited her was Mr. Higginson. Cannot say if she was a prostitute in her mother's house; to the best of belief witness says her sister was living in the same house with Martha Scott. Her sister's name is Emma; all I know of her is the same as her sister. The general repute as to plaintiff's character, is that he consorted with Miss Scott. Witness has heard so, and heard that plaintiff goes there still.

Cross-examined:—In that house at the time resided Martha Scott and her sister. Not to my knowledge is that a bawdy house; never prosecuted as a bawdyhouse. Witness heard several times this 3 years from Emilie Duval that plaintiff was often in her house. He never saw him enter any other house than Miss Scott's. Witness has seen over fifty young men enter bawdy houses. Mr. Savage, defendant, requested me to go after plaintiff. Before then witness never knew of his going to any house at all. Witness watched till half-past 12 o'clock at defendants' store, and saw plaintiff return. He did not again go out. Watched on another evening, but did not go out.

FRANCIS TURNER:—knows Plaintiff and Defendants by sight—knows their store, knows Martha Scott, her sister Emma, and their mother. Has seen Plaintiff in company with Martha Scott. Mrs. Scott keeps a house of ill-fame, and has done so for a number of years. Witness some years ago when Defendants were in their old store, probably five or six years ago, first began driving Martha to the store. When in the new store witness has driven both Martha and Emma Scott together to the new store at half-past seven or eight o'clock when the store was open. Witness has done this several times. Both went into the new store. In the old store Plaintiff used to come and drive round with her, Martha, and go in again. Witness would drive down and she would go in, after she would come out they would wait in the neighborhood until he would come out. Once witness drove to Hibbard's store down on St. Paul Street. Paintiff followed down and overtook witness and the Misses Scott. Witness has seen Plaintiff in her house in the evening and mornings often and often. The last time a few days ago. In 1857 and 1858 saw him there frequently. He passed the night frequently there in 1857 and 1858; that is, he would come late at night and go away early in the morning.

Martha Scott is kept by Plaintiff, and has been for a good many years. Witness believes, that she, Martha Scott, has two children by him. There is a third on the road. Among her companions she goes by the name of Martha Higginson. Has seen Plaintiff at Mrs. Scott's frequently. This is a house of ill-fame. Mrs. Scott is mother of Martha and Emma Scott. Never drove Plaintiff down there. Has seen him there almost every night in the week. Has known him to pass the night there four or five times a week. Plaintiff has paid me for driving himself. She has paid me also. Of the children spoken of witness thinks the oldest three or four years old. The Misses Scott have always lived at their mother's till acquaintance with Plaintiff. The sister has been visited by other men. Martha only by Plaintiff. Has seen Plaintiff in his shirt sleeves at her house in the morning and dressing. Have seen him leaving at 8 or 9 A.M.

Cross-examined:—Witness does not swear Martha Scott received visits from other men.

By the Jury:—Miss Martha Scott left her mother's house two or three years ago. She is backwards and forwards now. Eating and drinking at her mother's. Before two or three years ago, she lived with her mother in her mother's house.

Julie Gervais:—Does not think she would recollect plaintiff. But should she see him pass would know him. He has light hair; wore a light hat. And she understood his name was Higginson. Never saw his face well. Has only seen him pass very quick. Knows Emma Scott and Martha Scott, but never spoken to Miss Scott. Lives next door to Martha Scott. Never saw Higginson at Martha Scott's; saw him pass, generally in the evening about half past 8 or 9; he was the only person who used to go there, and was told his name was Higginson. Saw this person leave in the morning, about 9 or 10 o'clock; but never took much notice of time; but it was in the morning any way that witness used to see this person pass. Last summer saw such a person pass pretty often. Before the summer before last not very often. He could have passed without witness seeing. To see him enter, witness had to look out of a window. Did not do so. Emma and Martha lived in the same house. Martha down stairs and Emma up stairs. Lived in that house about two years. Witness lived next door only for two years. The Scotts have had this house for over four years. Does not know where they lived before; never saw the person on the gallery or in the yard to remark who. Saw a man there in the yard with the children but did not notice who he was. I thought he was the person who passed the window. Has seen several gentlemen go in to see Emma, but thinks Martha was true.

Cross-examined:—A gentleman went to see Emma and another to see Martha: the person who goes to see Martha I have heard was named Higginson.

Emilie Duval:—Knows the Plaintiff. Sees him in Court. Knows Martha Scott and Emma Scott, and also Mrs. Scott. Knows nothing of Plaintiff's connection with Martha Scott. He has often spoken to me about her. Cannot recollect what he said exactly. Witness used to ask "how is Martha?" He said "I haven't seen her." He never told witness of his keeping her. Plaintiff talked about the baby: witness asked how she was. There was some talk of his breaking off with her. This was about a year and a-half ago; was aware as far as conversation goes, he was intimate with Martha Scott. He said he knew her. Never saw him go there. Plaintiff often came to witness' house once or twice a week for a couple of months, or for a winter, that is about four years ago, to see Kate McGuire; Martha may have been jealous of her. Women are always jealous about their man. I kept girls at that time.

Cross-examined:—No one asked me to give evidence. Mr. Abbott came to my house about my evidence. This was in the evening. Mr. O'Leary was with Mr. Abbott at the time. Higginson went to see Martha Scott. That is what witness knows.

Felicite Gauthier, femme Perrault, *sage femme:*—Connait pas Mr. Higginson, ni de nom ni de vue. Temoin a assistee a l'accouchement de Martha Scott, a l'accouchement de deux enfants. Il y avait la sa mere, sa sœur, et une vielle servante. C'etait sur la rue Craig, dans une vielle maison. Il n'y avait pas un monsieur present.

No cross-examination.

Margaret Kinney:—Knows parties. Was employed in 1857 and 1858 about the store of Lymans, Savage & Co. Have been going backwards and forwards many years. Since their going to the new store, have there made the plaintiff's bed; now and again when I went there it was plain no one had slept in the bed the night previous—I found the bed in the same state as the night before. It happened now and again the last winter plaintiff was there; witness spoke to plaintiff about it and said she had not so much work to do, referring to her pay for making the bed, and he said it was not witness' fault.

Cross-examined:—Plaintiff sometimes left home about his employers' business. Benjamin Lyman spoke to me about my testimony. Sometimes witness had plaintiff's bed only once or twice in a week to make. Mr. Lyman spoke to witness when plaintiff left; never before. Plaintiff came in at 8 or after a.m. The store was open before that time.

Richard Power:—Knows defendants' new store, where they have been two or three years back. About two or three years ago, one night between 12 and 1, saw a man and a woman coming out of the store, walk up little St. Joseph Street and take a cab; the same man came back afterwards and entered the store; I did not know the man; it was two or three years ago.

Cross-examined:—Do not know who was the man or the woman; to the best of my belief it was the same who entered afterwards who previously went out with the woman. The man had the key, and unlocked the door. I do not know all the partners in the firm. Do not know if witness mentioned it; thinks he spoke of it to Mr. Lyman, who is a jeweller. Never spoke of it to any one since. Mentioned it that same evening at the Police Station. The woman was a smart, young looking woman, respectably dressed.

William H. Clare:—Witness is now a partner of the Messrs. Lyman. Previously, and since 1846 was a clerk with them. Knows Plaintiff, who was a fellow clerk. Witness drew up the bon produced, marked Q. Had no

onversation with Plaintiff. He deposited the money with me, and witness considered it as a deposit in interest, and gave the bon. Plaintiff then said nothing about the bon, and nothing about a partnership. Witness made up the document marked M. Nothing was said between witness and Plaintiff about a partnership. Mr. Benjamin Lyman instructed witness to credit Plaintiff with a salary of £200 per annum. It was credited during the spring or summer of 1858, when the books were made up. The Plaintiff had free access to the books then kept by witness. Plaintiff never objected till 4th May, 1859, when he was going to leave. He asked witness for a statement of his account, and witness gave it him; he objected to it, and asked why he had not been credited with five per cent per annum. Was first aware of the £1000 being demanded by the suit. Witness made the account the 4th May. Thinks the summons came on the 4th May. No demand came before the summons. Plaintiff's salary had previously been £150 per annum. At the end of first year witness gave Plaintiff credit for interest on the £1000. Plaintiff staid in rooms fitted up in the store for the purpose of being on hand at all hours—and for the security of the place. It was perfectly understood in the store that it was Plaintiff's duty to remain there. Witness has no doubt that Plaintiff understood it. Plaintiff had a bed made up in the apartments which were furnished by the firm His bed was made upon the premises, and he had a key to the premises. No charge was made to Plaintiff for the use of these rooms. As book-keeper witness had free access to all books and letters to or from the firm. Was constantly in the office. Witness never heard of the letter of date the 5th April, 1857; never saw it; only heard of it a few days since. Had such a letter been left lying on the office desk witness would certainly have seen it; he thinks he would have seen it if lying as Mr Spence says. It is his practice to put away papers; as they accumulate they are fyled away. The 5 per cent claim of Plaintiff was charged Mr Benjamin Lyman in the books of the firm. Witness received instructions to have it so entered from Mr. Benjamin Lyman. Understood the other members of the firm objected to its being allowed, and so it was charged to Mr. Lyman. This charge was made in May, 1860. There were, to witness' knowledge, three keys to the shop. Each of the Messrs. Lyman had one, and Plaintiff one—the third.

Cross-examined:—Knows of late W. Lyman. Witness understood something of his being a partner with the late Mr. Lyman. He was not one. It was the habit of the defendants to allow so much per cent on the profit of the business. Witness is a partner of the Messrs. Lyman now. His agreement to have a per centage of the profits was made thus: At the time of the dissolution Mr. Benj. Lyman promised witness a partnership. It was not reduced to writing.

Question:—Was Mr. Benj. Lyman in the habit of making contracts to allow clerks, yourself among the number, the per centage in the business of the firm, to the knowledge of and sanctioned by the other partners?

Answer:—Witness believes he is the first clerk who received a remuneration in that way, and it was with the sanction of the other partners. Witness was book-keeper at the time. No writing was made at the time, nor entry in the books. An entry was made at the close of the year. Witness had a conversation with Mr. H. Lyman as well as Mr. B. Lyman at the time of the agreement. My per centage was 7½ per cent. At the end of the year the books shewing profits were made up. It took some time to make up the books, say to April each year. For 1855, witness does not remember what was his share of the profits. The profits for 1855 appeared to be large, for, at the dissolution of the firm of W. Lyman & Co., a deduction for the depreciation of the stock was made. For 1855, witness thinks his share was £400; that is his impression. The balance sheets are made by witness. Cannot recollect the profits of 1855; difficult to say what the profits are, as the bad debts are not considered so, and written off; real balance is not then ascertained; never was a deduction of bad debts of any consequence made. The deduction made was from year to year; cannot swear no deduction was made in 1855. Witness got a subpœna. He read it. It did not say to bring the books. In 1856 profits were not very large. Witness does not recollect his share of the profits for that year. The balance of 1856 was £2,245 15s. 11d., without allowing the deduction of bad debts; if any, very trifling. That year was a bad year. Profits in the year 1855, £7,393; in 1856 the balance to profit, £2,255 15s. 11d; in 1857, £2,166; in 1858, $22,156, or £5,539 cy. 1859 is not yet balanced. The business has largely increased since 1858. No sheet has been attempted to be made for 1859. Witness would suppose the profits for that year fall under £8,000 or £10,000. Witness estimates them at from four to five thousand pounds for each year. At the end of the year there may be bad debts, and their deduction will reduce the profits. The bed-room fitted up for the plaintiff was on the third flight; thinks his sleeping there contributed to the safety of the building. The office was on the second flight. Plaintiff might have heard robbers if they were in the office; would not swear any one was sleeping in the store when plaintiff was away. He was only away twice on business for the firm. In 1856 he was in Upper Canada for the firm, to receive orders. The letter marked R. is in the handwriting of Mr. Benj. Lyman. When plaintiff had this letter, he was absent about two months. Witness cannot swear that any person slept in the store during these two months. Plaintiff was sent to Quebec in the fall of 1856. He was only absent there for two days. Nobody slept in the store during that absence. Witness knows plaintiff, from time to time, went to Hawkesbury to see his parents. Knows of nobody sleeping in the store during that time. Plaintiff was an efficient salesman. Early and late in his business. He was there before witness in the morning. Witness supposes witness sometimes left in the evening before plaintiff, and as a general thing, before plaintiff took his meals at Mrs. O'Brien's, or the Ottawa Hotel. Never saw the letter of the 5th April, 1857, nor that of the 4th of April, 1857. Saw none of his correspondence at all. The taking in of a partner was, to me, something to be known. Do not know where plaintiff got the £1,000. Nothing was said at the house but that it was at deposit at 6 per cent. with Mr. Workman, and

transferred to the firm at 8 per cent. Cannot say how many cheques were made out to repay it to plaintiff. It was first offered at 7 per cent interest. Plaintiff was not furnished with an account of his 5 per cent profit account. The firm do not acknowledge it to this day. Do not remember when plaintiff asked for an account or statement. Does not remember of Bancroft's Express men coming with a note to the firm. Witness became aware that plaintiff was to have the 5 per cent in May, 1859. This was known when plaintiff left. The question then came up. It was paid in August, 1860. The profits were made up in April. My 7½ per cent had not been settled; witness drew an account of it; account is not yet adjusted. The amount due plaintiff for his 5 per cent. profits was not offered him till he sued for it.

To the Jury:—In 1858 the books were balanced up to 1st January, in May or June.

To Mr. Cross:—Witness saw all the letters that came into the firm. He did not put them away. It might have been a couple of days before they were fyled away. Witness thinks he saw the letter marked S. Very trifling discrepencies, say $50.00, or $60.00, sometimes occur in the Balance every year. My family visits sometimes the families of the other partners. Never saw Plaintiff visiting my partners' families. Was not at marriage of Miss Fanny Lyman. It occurred in 1859.

Evidence for Defendants' case closed.

EVIDENCE ADDUCED BY PLAINTIFF IN REBUTTAL.

BENJAMIN LYMAN,—Defendant:—The note of 22nd July, 1854, now produced, is in my writing and marked Z. Another is in my daughter's handwriting. It is marked D.D. Cannot say what date it was written; must have been some time ago. Swears it was previous to 1859; cannot swear as to 1858. Does not know handwriting of paper marked E.E. Believes it proceeded from witness' house. No date to it. Note marked F.F. is invitation to Plaintiff to my daughter's wedding. She was married 21st April, 1859. Note marked G.G. of June 18—is an invitation to Plaintiff to Mr. Lyman's, no date. My daughter wrote the invitation to Plaintiff for the wedding. Knows that writing in pencil, is in Plaintiff's handwriting. The invitation was declined. Plaintiff was invited to witness' house perhaps half-a dozen times a year. Does not know if so often before 1858. During his apprenticeship he was oftener at my house than after.

Cross-examined:—Was in New York at the time of the invitation to the wedding. Did not tell Mrs. Lyman what witness had heard of plaintiff till he saw the refusal, when she inquired about it. My daughter selected the guests for the evening. Witness left home about the close of navigation and returned home once or twice during the winter.

ADAM DARLING:—Knows plaintiff. Plaintiff in 1857 and 1858 took his meals at the Ottawa Hotel—regularly. Never missed him. In the latter part of 1858, and in 1859 he slept several times at the Ottawa Hotel. He appeared to be well known among the boarders. He came home about the usual hour and got up at the usual hours. Thinks he is a good business man. Plaintiff told witness he slept at the hotel because his eyes suffered from drugs. Witness boarded at the Ottawa in the latter part of 1858.

JOSEPH LEE, Salesman for Messrs. Molson, knows Francis Turner, witness examined yesterday, he is well known to me, know him since a boy. He is a carter, stands at Dalhousie Square. Is not my associate by any means. From his knowledge of that man witness would not believe him on oath, says so deliberately.

Cross-examined:—Says so from knowledge of his general character. That is his manner of conducting himself. He is a loose character full of petty tricks. When in employ of Jones Lyman, this man came driving a fancy woman and left her in the carriage and said he wanted a bottle of Jockey Club perfume. He took it, gave it her, and never returned to pay. It is my impression he is a bad character. That is all he knows about him.

THOMAS HIGGINSON, Senior:—Well acquainted with Defendants. Has known them a good many years. Plaintiff is my son Witness relied on Mr. Benjamin Lyman, he knew him as a friend, during the last two or three years, the relationship was mostly of a mercantile character. He was frequently invited to the houses of the members of the firm in 1858 and previously, but rarely availed himself of the invitation. They never whispered anything of witness' son to witness till after the rupture late in April, 1859. Supposed had they known it they would have done by witness as witness would have done by them. Witness and his wife have frequently spent evenings with Plaintiff when they came to town and Plaintiff with them at the Ottawa Hotel. This was done openly—done on Sunday. Frequently assisted Plaintiff to raise money. Witness received most of it himself, part of this money was witness' money. Plaintiff was never allowed to want for anything.

By the Jury:—Within 3 or 4 years came to this city 5 or 6 times a year. Madame came as often as she could. She has been with me in Plaintiff's room even on Sunday.

By Mr. Abbott:—Thinks she was never there alone till late or one o'clock a.m.

JAMES RENAGHAN:—Knows Francis Turner. He drives bawdy women. He drove Mrs. Scott, and he fell out with her. Witness is a carter. He is known as a bawdy house runner. It is notorious Turner fell out with Mrs. Scott. Witness recognizes him in Court.

By the Jury:—Cannot say if witness would believe him on oath or not.

EMILIE DUVAL:—Gave evidence yesterday. Two years ago saw Mr. Higginson in my house.

Question:—Did you ever see Mr. Alfred Savage in your house?

Upon objection taken by Defendant's Counsel, this question was rejected.

Witness:—Knows Mr. Alfred Savage. He came to witness' house. My house is on St. Nicholas Street. Has known him for a few years. Knew him from buying drugs at his store. Opened the door for him, he enquiring for a lady.

Cross-examined:—He is a low sized man. Swears he has been in my house. The person he came to see was called Annie Brown. She is dead He was very particular, and witness does not know if any one saw him. Believes he saw another person named Sarah. She has

gone to the States. This woman, Brown, died three weeks ago.

Joseph Trowels:—Resided in Montreal 15 or 16 years; has seen Mr. Benj. Lyman for 14 or 15 years. Have known him; 12 months last May, saw him in the evening. Knows woman named Mrs. Landry, whose house is known in the neighbourhood as an assignation house.

Question:—Have you ever seen Mr. Benjamin Lyman, defendant now sitting in Court, go to a house of assignation and ill-fame in this city in company with a female within the last two years?

Objected to by defendant's Counsel, and question overruled by the Court.

To the Jury:—My business is labouring by the day. Never worked for Mr. Benjamin Lyman. Never quarreled with him or any of the firm. First spoken to this morning. Never saw plaintiff before then, never told me what to say or offered money to me. Never had conversation as to evidence; what witness knew he never kept secret.

John O'Leary:—Not examined.

Alexander Cross, Advocate.

Question:—Look at the letter of date 5 April, 1857, written by the plaintiff to the defendant, and when it first came into your hands?

Objected to by defendants' Counsel as not evidence in rebuttal.

Objection maintained by the Court.

The plaintiff declares that he avails himself of the evidence of Mr. Benjamin Lyman, and

Here plaintiffs' evidence in rebuttal closes.

Copy of Correspondence between T. Higginson *and* B. Lyman, *and between* T. Higginson *and* Lymans, Savage & Co:—

Montreal, 4th April, 1857.

Thomas Higginson, Esq.:

Dear Sir,—Touching the conversation the writer had with you, the present is to say that we will allow you £200, say two hundred pounds per annum, and also five per cent on the profits of the business carried on here for the next two years, after which time we will admit you as a partner on terms that will be mutual and satisfactory. This letter to be strictly private and confidential.

Yours very truly,
LYMANS, SAVAGE & CO.

Toronto, 1st April, 1859.

Dear Sir,—Since I left home poor Beers died, and I suppose the Medical Hall will be in the market. I have thought it my duty to say to you, that perhaps you can purchase the concern on your own account. I do so from the following reasons, that circumstances have come to my knowledge that will prevent me from recommending to my partners that you should be admitted a partner in the concern; the matter is a personal matter with you, but is of such a nature that I could not go into the circumstances with satisfaction, and I know you would not care to become a partner without we had the fullest confidence, consequently I thought it best to give you early intimation, to enable you to make such other arrangements as you think best. I am sorry that such is the case, but it is not my fault.

I am off this afternoon for New York, and I hope to reach home by the end of next week.

Yours truly,
BENJAMIN LYMAN.

Thomas Higginson, Esq.,
Montreal.

Montreal, 16th April, 1859.

Dear Sir,—In answer to yours of the 2nd instant, I have to say that I should have been willing to consent that you be received as a partner in the firm of L., S. & Co., upon such terms as we could have agreed upon, and as the other members of the firm would consent to, were it not, as I stated in my former letter, that certain facts have come to my knowledge, which put it out of the question, and render your admission into the firm under the circumstances.

Yours very truly,
BENJAMIN LYMAN.

Montreal, 2nd May, 1859.

Dear Sir,—Having taken communication of your letter of the 30th inst, in which you state that you consider yourself a partner in the firm of Lymans, Savage & Co.; we have to say that such an assumption on your part is certainly without foundation. You are well aware that no partnership, nor any agreement of partnership, has ever been entered into between you and us. It is surprising that you should set up any such pretensions. Your position, as you are well aware, is that, (and always has been,) and still is that of a clerk in our employ, and nothing more.

We may further say, that there are insuperable objections to entertaining any proposition for your adoption into the firm as a co-partner with us.

Your obedient servants,
LYMANS, SAVAGE & CO.

Thomas S. Higginson, Esq., Montreal.

Montreal, 3rd May, 1860.

Dear Sir,—We understand from your letter of this morning that you decline to remain longer in our employ as a clerk, and shall govern ourselves accordingly.

We are your,
Obedient servants,
LYMANS, SAVAGE & CO.

Thomas Higginson, Esq.,
Montreal.

Montreal, April 6, 1860.

£1000 0 0 cy.,

Good to Thomas S. Higginson, Esq., or order for one thousand pounds cy., with interest from date. Cash on deposit.

(Signed,) LYMANS, SAVAGE & CO.
Per W.H. CLARE.

Endorsed,—

Received the amount of the within written Bon from Lymans, Savage & Co., 21st May, 1859. THOMAS S. HIGGINSON.

Benj. Lyman, Esq., at Messrs. Lymans, Savage & Co.'s, Montreal:

DEAR SIR,—I have to acknowledge the receipt of yours from Toronto, dated 1st April, 1859, declining to consent to my admission into the firm of Lymans, Savage & Co., on the 4th of the month, in accordance with their written agreement with me of 4th April, 1857, This agreement was entered into after mature consideration, on conditions that on my part I should advance four thousand dollars in cash, which I did at a time when cash was very valuable and scarce. Now, having kept my part of the contract, and not being aware of having ever said or done anything to cause you or any of your partners to break through yours, or to forfeit that confidence in me which you acknowledged to have lost at the period of our agreement, I beg to ask you to state explicitly, in a private note to me, the nature and cause of your charge. When you answer this, I shall have great pleasure in having a conversation with you.

Yours respectfully,
THOMAS S. HIGGINSON.

MONTREAL, 16th April, 1859.

B. Lyman, Esq., Montreal:

DEAR SIR,—You will oblige me by answering mine of the 2nd inst, received by you yesterday, as requested.

Yours truly,
THOMAS S. HIGGINSON.

MONTREAL, 16th April, 1859.

Messrs. Lymans, Savage & Co., Montreal:

I beg to enclose:

1st.—Copy of my engagement with you of the 4th April, 1857, containing agreement for my admission as partner into your firm.

2nd.—Copy of a letter received by me from B. Lyman, Esq., dated Toronto, 1st April, 1859.

3rd.—Copy of my reply thereto with demand of explanation.

4th.—Copy of a request for an answer to the last.

5th.—Copy of Mr. B. Lyman's answer.

The intimation contained in Mr. B. Lyman's letter of the 1st instant, surprised me very much. Being unaware, as expressed in my reply, of having said or done anything to cause a forfeiture of the confidence reposed in me at the time of entering into the engagement. I entertained a reasonable hope that Mr. B. Lyman's explanation would have afforded me an opportunity of removing any objections he might personally entertained. I therefore waited for his reasons, but as he declines being explicit, I now, in asking a fulfilment of my agreement, must insist on Mr. B. Lyman disclosing the reasons for his strange action in this matter. I am altogether unconscious of any good ground for excluding me from the benefits of my agreement, and trust that the matter will be so received by the rest of the partners, and by Mr. B. Lyman himself, after more mature consideration.

Yours, very truly,
T. S. HIGGINSON.

MONTREAL, 28th April, 1859.

Messrs. Lymans, Savage & Co., Montreal:

DEAR SIRS,—Will you permit me to remind you of the subject of my note to you of the 16th instant, to which I would feel obliged to you for a reply.

Yours, very truly,
THOMAS S. HIGGINSON.

MONTREAL, 30th April, 1859.

Messrs. Lymans, Savage & Co., Montreal:

DEAR SIRS,—I regret to have again to call your attention in a particular manner to the subject of our agreement of the 4th April, 1857, but justice to myself compels me to urge it on your consideration until our relative situations shall be clearly understood.

From your protracted silence, it would appear that some aversion exists on your part to a distinct recognition by you of my position. I have, in vain, tried to remove this, and have several times desired to know your views on the subject. I have now no alternative but to intimate to you, which I do most respectfully, yet in a decided manner, what I claim as my rights.

By the agreement of the 4th of April, 1857, I was to be admitted as a partner on the 4th instant, having previously had a small interest in the business without my name appearing in it.

From the 4th instant I consider myself, and claim to be a partner, having an equal share in the business with the oth r partners of the house—that is, as there will now be four partners, my interest will be one-fourth share. Should any change be desired to be made in the name of the firm in consequence, I will be glad to fall in with your views on this point. I think my name should, at all events, appear as a partner, when the separate names of the partners are used, and there should be a new registration. You will please accept this as an intimation that I am, and claim to be a partner in the business to the extent of one-fourth share since the fourth instant, and I remain and perform my duties in the establishment on that condition and on the footing of being such a partner. I trust that you will excuse this intimation which the necessity of the case seems to impose upon me. In regard to the existence of any grounds of objection personal to me as suggested by Mr. B Lyman, I must suppose they originate with himself, and are not participated in by the other partners. As he has witheld any explanation, and being unconscious as already stated of any just cause for the imputation, I hope I shall not be deemed uncharitable for entertaining the suspicion that his objections proceed from other grounds which he does not choose to state, viz.: a reluctance on his part to fulfil the engagement.

Yours, very truly,
THOMAS S. HIGGINSON.

MONTREAL, 3rd May, 1859.

Messrs. Lymans, Savage & Co.:

DEAR SIRS,—I have received your letter of the the 2nd instant, refusing to acknowledge or carry out your agreement of the 4th of April, 1857. I have to express my deep regret at the conclusion to which you have arrived, and which

inflicts an unmerited injury upon me. To resume the position of a clerk is what you cannot for a moment expect me to do. I was afraid, from the delay occurring, and the objections made by Mr. B. Lyman, that a difficulty existed which I hoped would be overcome, and for that reason felt it to be my duty to press a matter of such vital importance to me until it should be placed on a satisfactory footing. I never apprehended that it could have resulted in a complete repudiation on your part of the agreement. I am sure that I have shown no want of disposition to perform my part of the engagement which I earnestly desire to carry out, but as you decline to do so on your part, I must try if no other remedy is left to repair the injury I sustain.

Yours truly, THOS. S. HIGGINSON.

MONTREAL, 8th August, 1859.

Messrs. Lymans, Savage & Co., Montreal:

GENTLEMEN,—As there is besides the subject of the unfortunate litigation now pending, an unsettled account between us which it is desirable should be adjusted; I beg leave to call your attention to the conditions on which I remained in the establishment of Lymans, Savage & Co., between the 4th April, 1857, and the 4th April last, viz.: that besides the £200 (two hundred pounds per annum, I should have 5 p. c. (five per cent) on the profits of the business. I have respectfully to request that you will furnish me with an account of the profits of these two years, in order that I may be better enabled to make a correct statement of this claim.

Yours, &c., T. S. HIGGINSON.

P.S.—Please address answer to me at Ottawa Hotel here.

MONTREAL, 18th May, 1860.

$1,200.00.

Received from Benjamin Lyman the sum of twelve hundred dollars in full of all claim or demand against him or the firm of Lymans, Savage & Co., for five per cent. of the profit of their business, from the fourth of April, eighteen hundred and fifty-seven, to the fourth of April, eighteen hundred and fifty-nine, and in full settlement of the suit I have instituted against the said firm, claiming five per cent. of said profits as compensation for my services as clerk, in addition to eight hundred dollars per annum already received by me.

(Signed,) THOMAS S. HIGGINSON.

The following, purporting to be a copy of a letter addressed by plaintiff to defendants, was produced and fyled by the plaintiff:—

MONTREAL, 5th, April 1857.

Messrs. Lymans, Savage & Co., Montreal:

DEAR SIRS,—In reply to yours of the 4th inst., the present is to say that I accept your offer of two hundred pounds per annum and five per cent on the profits of your business for two years from this date, after which you are to admit me as a partner upon terms mutually satisfactory.

Yours truly,

(Signed,) T. S. HIGGINSON.

P.S.—My name, of course, to appear in the firm.

The questions referred to the Jury by the Court of Appeals were as follows:—

1. Did the Defendants, as a commercial firm, contract with the Plaintiff to admit him as a partner, in manner and form, as set forth in the declaration?

2. Have the Defendants refused to admit the Plaintiff as such partner?

3. Did the Plaintiff, between the 4th of April, 1857, and the 4th of April, 1859, co-habit o only with a woman of profligate character, and did he maintain her in a state of prostitution?

4. Was the Plaintiff bound to remain upon the premises in charge during the night time?

5. Did the Plaintiff, during the said period of time, absent himself from the Defendants' store at night, in order to pass his time at brothels?

6. Did he introduce women of bad fame into the said store within the said period?

7. What is the Plaintiff's general character, and is he a person of irregular morals and discreditable conversation and repute?

8. Did the Plaintiff suffer any damage by reason of not being admitted into the said firm as a partner? If so, at what sum do you assess the damage?

THE JUDGE'S CHARGE.

The Hon. Mr. Justice B LEY said:—

The magnitude of the amount demanded, and the importance of the legal points involved, compel me to extend my observations somewhat more than I had originally intended in charging the Jury in this case. The action seeks the recovery by the Plaintiff of £6,500 for damages, said to be suffered by him by reason of the Defendants' refusal to admi him into their Co-partnership firm of Lymans, Clare & Co., as dealers in drugs, &c., at Montreal and elsewhere in Canada. The declaration sets out that by a paper writing, dated the 4th April, 1857, written on behalf of the Defendants, by Benj. Lyman, one of the Defendants, and senior partner of the firm, and signed with the co-partnership name, the Defendants agreed to his admission as a partner in their co-partnership, which should be permanent and continuous, alleges the Plaintiff's refusal of advantageous offers in consequence, states his good business capacity, their refusal to admit him although often requested, and his privation of profits and advantages from so large and profitable a business, becoming more extended from the 4th April, 1859, estimates the value of his share at £6,500, and concludes that by means of their refusal to admit him into their co-partnership, he has been deprived of profits and advantages from that co-partnership business to the amount of £6,500, which he claims with interest and costs of suit.

The action is therefore based upon this alleged contract made by one partner, as an absolutely binding agreement upon his co-partners, for the admission of the Plaintiff into their co-partnership.

The issues raised by the Defendant's pleas, are:

1st. Their denegation of such an agreement.

2nd. Their exemption from such agreement of their partner, being without their consent or participation; and

3rd. Hypothetically their relief from such agreement if it existed, by reason of the Plaintiff's mis-conduct.

The written evidence adduced by the Plaintiff, consists 1st, of the agreement or paper writing referred to in the declaration; and 2nd, of two setts of correspondence the first between the Plaintiff and Benjamin Lyman, and the second between Plaintiff and the firm of Lymans, Savage & Co. The first commences with a letter from B. Lyman to the Plaintiff, written at Toronto, on the 1st April, 1859, in which the writer suggests to the Plaintiff that he might get the Medical Hall, as Beers was dead, and that from circumstances that had come to his (B. L.'s) knowledge, he will be unable to recommend to his partners the Plaintiff's admission into their firm as a partner. On the 2nd April, 1859, the Plaintiff acknowledges the receipt of that letter, denies his interference with the contract by any act of his, and asks for an explicit relation to himself, in a private note, of the nature and cause of the charge. His letter of the 16th April, calls B. L.'s attention to his letter of 2nd April, to which the latter replies on the same day, declaring his own willingness to admit the Plaintiff into the firm, upon terms which could be agreed upon between them, and as the other partners should consent to, but for the facts which had come to the knowledge of the writer. The correspondence with the firm then opens, with the Plaintiff's letter to them of this last date, 16th April, covering copies of the agreement and of the correspondence above, states his unconsciousness of any action by him to break or forfeit that agreement, and requests that it may be carried out by the other partners and by B.L. himself; on the 28th and 30th he draws their attention to his note of the 16th instant, and by the latter claims their favorable notice of the agreement, under which he is intitled to ¼ part of the business, as there will now be four partners, and thinks his name should appear at all events as partner, &c, and demands to act as such partner. The reply of the firm, dated 2nd May, denies his assumption of being their partner, declares it unfounded within his own knowledge, ignores the existence of such partnership between them and him, qualifies him as their clerk, and finally asserts the existence of insuperable objections against any proposition for his admission into their firm as a partner. On the 3rd May, 1859, this portion of the correspondence closes by Plaintiff's letter, acknowledging the answer of the firm, and intimating his intention to seek a reparation of the injury done to him. The action followed almost immediately, the declaration being dated the 7th of May, 1859.

No reference will at present be made to the other written evidence produced nor to the receipts for the monies paid as they do not specially apply to the contract.

The testimony consists of the evidence of Benjamin Lyman and of a few other persons. That of Benjamin Lyman is taken under the authority of a recent statute 23 V. Chap. 97 sec. 49, which enables a party in a cause to be brought up and examined and cross-examined as a witness. Benjamin Lyman explains the origin of agreement, which he says was written at Plaintiff's request, and represented his Benjamin Lyman's own feelings towards the Plaintiff, but not those of the firm who might not agree to it; told Plaintiff he had not their sanction for it, to which Plaintiff replied if they did not it would go for nothing; says that the conditions of the two years service at £200 per annum and the 5 per cent on the profits *here*, were subsequently carried out—that he had suspicions of Plaintiff's morality in the summer of 1857, proves the correspondence produced, states the gross business of the firm at £75,000 per annum, denies all knowledge of a letter from Plaintiff of 5th April, 1857, accepting his proposal of agreement asserts that the £1000 was offered by the Plaintiff as a loan on call at interest of 8 per cent and was only called by a lawyer,s letter after the rupture with the Plaintiff, he did not tell his partners of the agreement until after his letter of the 1st April, 1859. The 5 per cent was not entered in the books of the firm until this year, and was unknown to his Co-partners until the Plaintiff's demand to them to take him into partnership. £300 was received by Plaintiff in full for that claim and was charged to Benjamin Lyman's private account, as having been proposed by him without their consent. Heard of a copartnership spoken of between Plaintiff and late Wm. Lyman, Plaintiff said Wm. Lyman could not succeed, never heard that Plaintiff could have had the Medical Hall. Plaintiff's salary at £200 per annum was credited to the Plaintiff, and at his departure his account was made up by the Book-Keeper, who had been directed by witness about time of his Benjamin Lyman's departure for England, to credit the Plaintiff with the £200 per annum. Did not notify the Plaintiff in 1857 of his conduct, or previous to 1859, never tendered the £1000 or the 5 per cent, for which separate actions were brought. The latter was paid in 1860. That account of profits could not be made up before Admits the good business capacity of Plaintiff.

Mr. Workman testifies to having seen the letter of the 4th of April 1857, about that date received it from Plaintiff and kept it in his possession for a year, states that Plaintiff had prospects of business connection with the late Wm. Lyman, by whom he was requested to speak to the Plaintiff about a connection—a connection also was proposed or spoken of with Mr. Carter, but advised Plaintiff to continue with his house and to get any offer of partnership in writing, mentions that a part of the £1000 paid over to Lymans, Savage & Co., £700 was held by the late firm of witness, only paid 6 per cent on the £700 being partly the Plaintiff's and partly his father's money.

Mr. Carter testifies to his willingness to have received Plaintiff into a share of Medical Hall business. Defendants business largest of the kind in the province, the good will a years profits, net profits of a fair business, that is wholesale and retail, was Executor of late Wm. Lyman's estate to which Defendants had to pay £18 to £20,000.

Mr. Sinclair was aware of offers made to Plaintiff from Defendant and others, and advised him to accept the former, did not see the letter of proposal.

Mr. Spence, saw the Defendants letter and Plaintiff's reply in a copy shortly after his receipt of the original document signed Lymans, Savage & Co.; on a Sunday in Defendants store, shortly after seeing Defendants letter, Plaintiff said "there is my answer to their letter lying on the desk," did not read it, read a copy, draft of reply shewn to him by Plaintiff, none of Defendants present at the time nor any one in De-

fendants employ. Plaintiff had key of the premises and apparently in charge of them.

Mr. Lamplough estimates the good will of defendant's business at from £8,000 to £10,000. With this evidence such as it is the plaintiff closed his case. The evidence advanced by the defendants refers mainly to the defendant's conduct in connection with a woman named Martha Scott, his nightly and untimely absences from the defendants premises of which he had charge and in which he had an appartment provided for him to sleep at night—his visits to houses of ill-fame and his connection with the woman above named. It is unnecessary at this time to detail this testimony with more particularity; it will be fresh in your recollection and you will be able to supply omissions; it may be observed however that it is of a positive and direct character, that O'Leary's testimony stating Savages application to him on the 28th May 1857, with reference to plaintiff's conduct is confirmatory of the testimony of Benjamin Lyman as to the suspicions of the firm against the plaintiff in the summer of that year and whilst in their employ. As to the evidence of Mr. Clare, the material parts shew that plaintiff never spoke to him of his partnership with the firm—that the letter of the 5th April 1859 was not seen by him, that the £1000 was a loan on call at 8 p. ct., offered by the plaintiff himself and that plaintiff had a sleeping apartment in the premises, without charge, and had charge of the premises that the two Messrs. Lymans had each a key and the plaintiff the third one, that plaintiff had ready access to the books, made no complaint in regard to his account until about the time of his departure on the 4th May 1859—states the annual profits from 1855 to 1859 both inclusive to average about £4,000 or £5,000 per annum—subject to bad debts—Large increase of business since 1859—states plaintiffs absence on the business of the firm for 2 months in 1855 and two days in 1856. Cannot swear if his sleeping appartment was occupied by any one else during plaintiffs absence—would have seen the letter spoken off by Spence if it had been lying on the desk. The $1200 paid to plaintiff for the 5 per cent. claim was charged to B. L. on account of refusal of other partners to allow it &c. The balance of 1858 was made up to 1st January in May or June of that year—that of 1859 is not yet made up.

The evidence of the defendants was closed and the plaintiff adduced evidence in rebuttal of the defendants evidence. B.L. was again brought forward to establish the plaintiff's intimacy with his family. Darling proves the plaintiff lodging several times at the Ottawa Hotel in latter part of 1858-1859. Lee and Renaghan as to character of Turnout, a witness of the defendants. Thomas Higginson the plaintiffs father was intimate and friendly with defendants. Never was told by them of his son's conduct until after the rupture—often visited by plaintiff at the Ottawa Hotel, when witness and wife came to town, and that they visited his son at his room at the store but not late at night. Other evidence was offered but not being in rebuttal was rejected. With this evidence for the defence which has been gone over cursorily including that of Mr. B. L. of which latter the plaintiff avails himself under the statute, it will be for the jury to render their verdict upon the suggestions submitted for their consideration. It is proper to observe that the statute has introduced nothing new in the matter of the examination of a party except the mode of it—under the former law the party was examined upon interrogatories, now by the statute he is examined and cross-examined as a witness, but as to himself the result is the same by both laws, he cannot turn his evidence to his own advantage. It is proper to premise *in limine* before stating to you the law of the case, that both judge and jury have particular duties to perform in such cases as this. Their respective provinces are sufficiently distinct to enable both to keep apart from each in their respective functions. In a general way it is the duty of the judge to point out to the jury any rule of law which either renders evidence necessary or gives peculiar weight to one species of evidence or defines the manner in which a certain fact must be proved. He should also distinctly explain to the jury, what principles of law are applicable to the point in issue, and in order to enable him to do so correctly he must distinguish questions of law from questions of fact. In matters of contracts, the construction rests with the Court alone. On the other hand it is the duty of the jury to take the construction from the Court either absolutely or conditionally according as the words of the contract and the surrounding circumstances require or not to be ascertained as facts by the jury. In matters of law also it is scarcely necessary to observe that juries must take the law from the judge and not from their own opinions; unless this were so there would be no certainty in the law, for a misconstruction by the Court is the proper subject for redress by a higher tribunal, such as a Court of Error or Appeal but a misconstruction by a jury cannot be set right at all effectually. Bearing these observations in mind, it is my duty to state to you the law in connection with the issues and evidence of record. It will be in your recollection that there were three issues noticed to you upon the pleadings filed in this cause. 1st. The absoluteness or imperfection of the agreement relied upon by the plaintiff. 2nd. The legal power of one partner of a firm to introduce a person as a partner into the firm without the sanction of his co-partners and 3rdly the dissolution of an existing co-partnership or of a contract for the formation of one by the misconduct of an actual partner or of the intended partner; this last issue is hypothetical. As subsidiary to these it may be necessary to advert to the legal means required for establishing the damages demanded and sought to be recovered.

As before observed the Plaintiff relies upon an absolute agreement, between himself and the Defendants as co-partners under the firm of Lymans, Savage & Co, which is in the following terms and must be taken in its own words as they are on the face of this instrument itself, and not as it appears in the Plaintiff's declaration. (The agreement is read.) It may be at once observed that no legal evidence has been adduced by the Plaintiff of his acceptance of this agreement. The copy of a letter dated the 5th April, 1857, seen by Mr. Spence as he says shortly after the Plaintiff's receipt of the alleged agreement and the Plaintiff's pointing to a letter lying on the office desk and saying "there is my answer" are not in themselves proof of the existence of the original letter under

that date. No such letter is known to Mr. B. Lyman, or to the witness Clare, who would have seen it had it been on the office desk as stated. The Plaintiff never mentioned neither the agreement or his acceptance of it to his fellow clerk, Clare, and has not in any way adverted to it as part of his case, it is not referred to in his declaration, no copy of that letter of acceptance was transmitted by him to the firm under cover of his letter of the 16th of April, 1859, nor is it mentioned in any part of his correspondence with the firm or made known to them until after his proceeding at law against them. The copy offered in evidence by Plaintiff is not proof; it is only secondary evidence which cannot be admitted without first showing the previous existence of the original, and its non-production after notice. The discrepancy in Mr. Spence's testimony as to the Sunday on which he says he saw this copy is not important except as to the exact date of the letter of acceptance. It might have been the second Sunday or some time after, but not the first Sunday. The agreement was written on Saturday the 4th of April, it was written in the afternoon, and the Plaintiff consulted several of his friends: the answer would scarcely be the 5th of April. The Plaintiff's counsel have presented this agreement to the Court and Jury as a proposal of agreement if so it only becomes binding and absolute upon its proved acceptance which has not been shown; if it was such a proposal it was competent for the proposer to retract and withdraw it until after its acceptance—until that event it was imperfect as an agreement. It is a clear principle of law that the parties to a mutual contract or bargain must mutually consent and that consent must be made known in some way or manner recognized by the law. The terms of the agreement show its imperfectness as a co-partnership contract, the principal elements of such a contract are wanting, the terms, conditions and duration of the co-partnership, the shares of the partners respectively their advances or otherwise to the business, the partnership name, and all this moreover with the statement written in the agreement itself, that the Plaintiff's admission was on terms to be agreed upon. The Plaintiff's counsel has also qualified it as an offer for entertaining a proposal of co-partnership, but so again it as not a contract and manifestly it is not a contract absolute in itself and in its own terms. Upon this first issue therefore it is my duty to tell you that the paper wanting, produced in support of the Plaintiff's action is not in the face of the agreement binding in law upon the firm of Lymans, Savage & Co., or upon the Defendants.

We have now reached the second issue which embraces a very interesting point of co-partnership law, which the jury will receive from the Court, inasmuch as but little matter of fact that is uncontradicted, is connected with it, and is, that the proposal was written by B. Lyman, the senior partner of the firm, and that it was signed with the co-partnerships name. This issue involves the entire question of the nature and establishment of partnerships, the powers of individual partners particularly to introduce third persons into their subsisting co-partnerships, and to use the co-partnership name The law which is clear and explicit upon all these points will be found in standard authorities which will be given in their own language as more explicit and plain that my own. It must be premised that a general concurrence of opinion exists among law writers upon the subject, in England and Scotland France, the United States and this province. The contract of partnership is defined by Story on Co-partnership—Sect. 2—to be "a voluntary contract between two or more competent persons to place their money, effects, labour and skill or some or all of them in lawful commerce or business with the understanding that there shall be a communion of profits thereof between them."—Pothier Contrats de Societe, Nos. 5, 11, 12—"C'est un Contrat, &c.,—it is a contract formed by the consent alone of the parties:—it is essential to the contract that the partnership be established for the common interest of the parties, each hoping to have a share or part in proportion to what he shall have brought into it"—Delangle Tr. de la So. No. &c., "La Societe nait de la volonte des parties, &c." Similar authorities will be found in Domat Bh. 1 trt. 801—Code Civ. art. 1842. Collyer on Partnership, part 182.

The contract of partnership being therefore especially and altogether dependent for its existence upon the consent of each of the parties, is eminently exclusive in its nature and character; hence it is an established principle of law (Story No. 5) "that as it can only commence by the voluntary consent of the parties, so when it is once formed no third person can be afterwards introduced into the firm as a partner, without the concurrence of all the parties who compose the original firm. It is not sufficient to constitute the new relation that one or more of the firm shall have assented to this introduction, for the dissent of a single partner will exclude him, since it would in effect amount to a right of one or more of the partners to change the nature, the terms and obligations of the original contract and to take away the *delectus personæ* which is essential to the constitution of a co-partnership." So also Collyer No. 8.—"And first, the contract must be voluntary, therefore no stranger can be introduced into a firm as a partner without the concurrence of the whole firm: this *delectus personæ* is so essentially necessary to the constitution of a partnership that even the executors and representatives of a deceased partner themselves do not as such succeed to the state and condition of partners"—a special contract to that effect is required. So also is the law of Scotland—Bell's Comments—Pothier No. 91, says:—"Chacun des Associes, &c., each of the co-partners having the right to dispose of the partnership effects only for his own share therein, he may in consequence, without the consent of his co-partners, unite to himself a third person in his own share of the partnership, but without their consent, he cannot unite him with the co-partnership. Wherefore, if I think proper to unite a third person to myself, he will be my partner in my share of the partnership which was established between us, but having no right to bring him into our partnership without your consent, except for my own part, he will not be your partners, because the rule of Law *socii met socins meus socius non est.* In No. 95, Pothier goes on to say that "even if the partner had the sole and entire management of the business, he cannot of himself make a third person a partner

of the firm, as to give to the partners a partner whom they have not chosen exceeds the bounds of the simple administration of co-partnership property." Delangle, No. 194, says:—"In civil and commercial partnerships, in which the choice of persons is one of the principal elements of their constitution, no partner can, without a stipulation to that effect or without the consent of his co-partners, substitute his assignee in his place. The consent is determined by and rests upon the social position—the morality, solvency and intelligence of the parties. No contractor, partner, can of his own will modify the conditions under the faith of which the partnership was formed." Troplong, Ti. de Soc., No. 755, observes:—"A partner in a civil or commercial partnership may give himself a partner in his own partnership share. This sub-partner is not a member of the first partnership: his admission into the partner's share forms a particular and distinct co-partnership independent of the original one;" and 4 Pardessus, 973, says:—"It is the essential part of a partnership for the partners to choose each other. None can force his co-partner to receive in his place any person to whom he may have assigned the whole or part of his rights in the co-parnership, nor even if he were sole manager of the business can he admit a new partner without the consent of the old one; that admission, whenever it may occur, must, in principle, be the result of a unanimous consent and will. The majority cannot govern the minority in this, although he or they who compose the latter should state no reason or ground for refusing—and the opposition against such refusal could not support a contestation in law, upon which a judgment could be rendered to compel the acceptance of the new partner." So also Duvergier, No. 373, who, after going over the same ground, thus concludes:—"Personal confidence is the root of the contract, and the friend of my partner may not possess my confidence."

The decisions of the U. S. Courts uphold this same doctrine:—"A person who shares the profits of a member of a firm, may be a partner with that member, and yet not a member of the whole partnership."—14 Robinson Lou. R. p. 368-9, 7 Pick 235. 1 Hill Rep.:—"One of several partners cannot receive another person into a firm without the consent of his co-partners;" and in 14 Johns 322, the judge calls it "a very the mandataires of their firm and of each other, and that equal authority is given by the law to each to act for all; but that administrative power is limited within the co-partnership's transactions for which the partnership itself was formed and constituted. Pothier at No. 66 says, "this power consists in making all necessaryacts and agreements for the partnership selling the goods, receiving the monies from sales, &c. 2. Troplong says every civil and commercial co-partnership has a precise and settled object, which the manager is bound to carry out in virtue of the duties of his functions." No 712:—"Each partner has the right of managing the partnership affairs—he is presumed to have received from the co-partnership a mandate to manage and administer under the control of his co-partners for the advantage of the undertaking. This tacit mandate, a consequence of the confidence between them, comprehends the powers contained in a general procuration to purchase, sell, pay, receive, &c., the co-partnership effects;" and at No. 908 an express power to the partners in such commercial partnerships is more easily presumed the interests of commerce have so established it. The partners are presumed, by the mere fact of their association together, to be mandatories for each other, to have given to each other the power of binding themselves and them jointly *solidairement* and indefinitely for all the legitimate objects of the co-partnership; and within the sphere of that administration, each partner has an implicit mandate from his co-partners to treat with third persons." So also Duvergier 385 and Delangle No. 126-128—this last author restrains the power to the "*appreciation des actes et des faits relatifs a l'exploitation des affaires sociales.*"

The English authorities are equally plain and positive on this point. Story No. 94 observes—"In virtue of this community of rights and interests in the partnership funds, stock and effects, such partner possesses full power and authority to sell, pledge or otherwise dispose of the entirety of any particular goods or other personal effects belonging to the partnership, within the scope of his partnership, he is properly deemed to do such acts as their agent, and as the accredited representation of the firm." Collyer No. 384:—"One partner has an implied authority to bind the firm by contracts relating to the partnership: he may draw, endorse, &c., and do any other acts and enter into any contracts in reference to the business of the firm which are incident or appropriate to such business according to the ordinary course and usage thereof." So also Gow on Part p. 32.

Now this power is essential to the well conducting of commercial transactions and is necessarily implied in the very existence of partnerships: that implication however carries with it its own limitation and restriction, and comprises its application to the business of the firm, the actual concerns of the partnership for which it was established and formed; under no circumstances can this power be extended or presumed to extend to the formation of new partnerehips or the admission of strangers into old ones, these are not the objects nor the business of the subsisting co-partners. Where could this abusive power be stopped if it were once allowed to operate. If one stranger could be introduced twenty might by the same rule and the shares and capitals of the original partners would be materially changed from those contemplated by the original contract: in fact their capitals original or acquired might be divested by the participation of strangers without capital or capacity. There is but one mode of maintaining an introduced partner of this kind as a member of a firm and that is the aquiescence of the other partners, if that be express his adoption is perfect, but it may also be implied from the acts of the partners themselves as if the other partners choose to adopt his acts as a partner, if they choose to adopt managements made by him as their partner *ex gra* by joining in an action for a demand subsequently contracted they may do so, and the action will be maintained and it becomes the act of the firm.—I. Hill, Rep. But knowledge is not enough, acquiescence in the acts of the person so intended to be admitted as a partner must be clearly

and positively brought home to all the other partners in order to bind them.

The introduction of a third person into a firm is a contract with each of the partners to which each must consent individually, and it may be said that there are as many contracts as there are partners. Norwill the approbation of the managing partner alone suffice, nor is the mere knowledge by the other partners of the act of their partner sufficient. Knowledge is not acquiesence nor can any legal inference in support of their partners act be drawn or allowed from their knowledge or their silence upon the subject during the interval until the time of when the contract might be expected to take effect Acts and words may be sufficient to constitute a co-partnership contract when they are those of all the partners and shew an acceptance by the partners, therefore, to bind them, Evidence of this acceptance is required. 6 Madd: 5 Jac. 284. If the contract attempted to be enforced against a firm, in its inception secured their sanction and countenance, the joint obligation attaching upon them to perform it is plain and manifest as a general principle. Each member is necessarily presumed to participate in the expected or resulting benefits of such a contract, and to countervail that advaantage, the joint duty obliging them to fulfill it, is imposed: such an engagement by the firm in no respect differs from that of a single member the only difference is in the number of the parties, the consequences and responsibilities which ensue upon a breach of it are precisely the same, but where the inception of the contract was unknown to the other partners who rejected it upon the arrival of the period when it was to take effect, and no evidence of their acceptance was given by act or word, and no acquiescence shewn, their responsibilities are their own, and whether the other partners be many or few, they are in no way compelled to fulfil what they have not sanctioned. It has been argued that the payment of the 5 per cent cent on the profits here allowed to the plaintiff during the two years mentioned in the proposal of agreement, is a sanction of it by the other partners. The circumstances attending the inception of that matter are within your recollection; the charge was unknown to the other partners until after the rupture—it was never entered in the partnership books until after the event. Mr. Clare, the book-keeper, was not aware of it, until on being required to make out the plaintiff's account after the rupture, the latter, for the first time, objected, because the 5 per cent had not been credited to him: he never previously had objected to the entries in the books to his credit, although he had free access to them. Moreover, so far from acquiescing in this charge, the other partners immediately compelled B. L., the proposing partner, to charge himself with the sum received by the plaintiff in discharge of that claim, because he had proposed it without their sanction, and further, it was not paid until 1860. The payment of the 5 per cent is no proof of the sanction of the defendants and does not bind them or him. Upon this issue how stands the case—the paper writing produced by the plaintiff shews it to lie the act of the writer, B. L., alone, who, on plaintiff's application, proposes to him a continuance of his service with the firm for two years at an increased rate of wages—instead of £150, £200 per annum with 5 per cent on the profits *here*, that is in Montreal, after that time the writer proposes to plaintiff his admission into the firm upon terms to be agreed upon and to be mutually satisfactory. This was to take place after the two years: this proposal had never been communicated to the other partners, Mr. H. Lyman or Mr. Savage, either by B. L., or what is more strange, by the plaintiff himself, until his demand of admission into the firm, although B. L. informed him he had not his partners' sanction for making the proposal. Until that time there is no approach to evidence to even to their knowledge of this proposal, much less of their acceptance of the agreement or the acquiesce in it by either of them by word or act—the plaintiff is not only silent upon this important subject with the partners, but he is equally so with Mr. Clare—there is no proof of his having done, or been concerned in any partnership act which the co-partners had adopted, or of his having been considered by them in any other quality than their clerk and manager as before the rupture. The law refuses to compel non-consenting partners to submit to proposals of this character, whilst it denies to the partnership signature subscribed by one partner for objects beyond the scope of the partnership business, and mandate any effect whatever—no general procuration, however large, could validate it. Take away from this case the assumed power of one partner to bind his co-partners in this matter, and remove any legal responsibility which could be supposed to have arisen from the use of the partnership name to the abuse of the partnership mandate, and it will be manifest that you cannot fail to perceive by a recurrence to the plaintiffs testimony in support of his case in chief, that there is no case for you, this issue is clearly against the plaintiff. To maintain it in his favor would be against law, as it would be against principle, it would give rise to contentions subversive of a co-partnership system altogether—it is my duty to state this to you who are commercial men, engaged in commercial pursuits and possibly some of you connected with partnerships, for your consideration. The law has settled the point as I have endeavoured to explain it to you and it ignores all acts such as this of individual partners upon the responsibility of co-partners, either as to all or any of them; hence it necessarily follows that if the agreement were perfect which it is not, no responsibility in the plaintiffs favour is cast upon the firm of Lymans, Savage & Co. or upon the defendants as partners of that firm by the act of B. Lyman.

Upon these two main issues, the plaintiff must rest upon his own strength for success; as regards the plaintaiff there is nothing to support the case either in evidence or in law. I had hoped to have discharged you yesterday at the close of the plaintiffs evidence; had the defendants then moved for a nonsuit I should not have hesitated to grant the application but although the legal aspect of the case since then is quite unchanged, subsequent proceedings have been adopted which now compel me to submit to you, the third or hypothetical issue together with the law affecting it. It is not my purpose at present to detail the evidence adduced on this part of the case, it must be still in your recollection, and I shall therefor confine myself to remark that it appears to sustain the

complaints made by the Defendants; this, however, is for your consideration. The sum of that testimony is as follows: that the Plaintiff has kept Martha Scott for several years past, and during the time of his service with the Defendants, and specially during the two years mentioned in the proposal; that she has had two children during his connection with her, and that a third is coming. That this woman and her sister lived with their mother until the last four dangerous principle to admit into the doctrine of partnership."

It must too therefore be admitted by both judge and jury as well settled to require any comment, that in principle and in law when a partnership is once formed, no third person can be afterwards admitted or introduced into the firm as a partner without the concurrence of all the partners who compose the original firm.

But it may be said that the partnership signature to the proposal made to the plaintiff binds the firm. The authorities already cited are too precise and perspicuous to be set aside by any implication to be derived from the use of the co-partnership signature by any of the parties. It is true that the individual partners are years, that the latter keeps a bawdy house, that living next door to their mother's house they go backwards and forwards to her frequently; that the Plaintiff has frequented the mother's house, and also that of one Emelie Duval, where he appears to have been connected some time since with the girl McGuire; that he has frequently left his employers' premises intrusted to his charge and spent his nights in these places, with other facts and circumstances that I need not repeat. These are facts sworn to and proved before you, and moreover about in so many words admitted and commended by the Plaintiff's Counsel. If you can bring your minds to consider them as things of no importance, as mere venial errors, conduct not disreputable in itself, which should not debar a person from entering into partnership with respectable firms or with any of yourselves, should you be placed in such circumstances, or with any other respectable persons, you will declare it by your verdict; on this point you are the judges of the fact, and the decision rests with you. You must bring the matter home to yourselves, in what way such conduct should be considered by you. I have only now to state to you the law upon the subject of a partner's misconduct, and its result. Admitting, for argument sake, that a partnership did actually exist, with a partner guilty of mis-conduct, his copartners, with all their business responsibities upon them, must have some means of escaping from his connection, and here the law comes to their assistance against the party himself, who might attempt to enforce the continuance of the co-partnership, or the binding nature of an executory contract. The dissolution of the contract of partnership is admitted by the law of England for a variety of considerations. Where the period of the partnership is unlimited, it is a partnership at will, and in such case it is competent for any partner at any time to withdraw from it and dissolve the partnership. Hence, Story, No. 271, says, "a partnership at will, may be dissolved not only by a positive or express renunciation thereof by one partner, but also by implication from his acts and conduct, whether by acts or in writing." So also Collyer, No. 105. So Bell's Comment. B. 7, ch. 2, p. 631-2. The French law has similar principles and doctrine Pothier 65. De Langle, No. 662, says: "la loi &c. The law allows every partner to free himself from the servitude of an unlimited partnership and it is enough for him to manifest his inclination, at once to dissolve all the links that connect him with the partnership, provided that he does not take advantage of the occasion to enrich himself by the detriment of his co-partners or to cause them damage. "Section 2, Troplong, No. 911." The same freedom, however, is not assured for limited partnership: In those cases ground must be shewn for making the demand, such, according to English law, is bankruptcy, insanity, or other real or just ground for giving the required redress by a Court of Equity. This jurisdiction is of a most extensive and beneficial character, and may declare partnerships void *ab nitio* or decree their dissolution from the date of the decree. In this category of grounds for dissolution are the misconduct, fraud or violation of duty of a partner, but every trivial departure from duty or violation of the articles of partnership or every trifling fault or mis-conduct will not set these courts in operation, such as mere defects of temper, casual disputes, difference of opinions and other minor grievances which may be somewhat inconvenient and annoying, but do not essentially obstruct or destroy the ordinary rights interest or operations of partnership. Story, No. 287.—"On the other hand, if a case of gross misconduct, abuse of authority, gross want of good faith or diligence, such as is and must be productive of serious injury to the success and prosperity of the business of the partnership, Courts of Equity will interfere. Habitual intoxication, gross extravagance or negligence would lead to a like result. But a strong and clear case must be made ont of positive or meditated abuse. There must be an unequivocal demonstration by overt acts or gross departures from duty, that the danger is imminent or the injury accomplished. For minor misconduct or grievances, if redress be required, the Courts will go no further than to act upon the guilty or faulty party by way of injunction." Gow, p. 227—Collyer, p. 227,—"Though the Courts stand neuter with respect to occasional breaches of agreement between partners which are not so grievous as to make it impossible for the partnership to continue, yet when they find that the acts complained of are of a character that relief cannot be given except by a dissolution, the Court will so decree, though it is not especially asked." You will observe that these remarks apply to actual partnerships where the existing contract is dissolved, and it does appear reasonable that it should be so whenever the objects of the partnership are no longer attainable or the partner's misconduct so seriously mischievous that it ought not to be tolerated. Now if this be judicial action upon a perfect and subsisting contract, how much more should it apply to intended and imperfect contracts and thereby prevent parties coming together as partners only to be separated." The French law offers similar principles. Delange, No. 673.—"Mais la Societe, &c., but the partnership, like all other conventions, may cease before its term, if the state of things become such, that the object originally contemplated by the partners can not

be attained as if the conduct of one of the partners casts discredit upon the partnership *si ita injuriosus aut damnosus socius sit ut non expediat eum pati* also Pothier 152, 2 Troplong 983 who says "judges should notice the changes which destroy that harmony which is necessary for the prosperity of the partnership, they must consider the personal habits, the disposition, the character whose influence of no consideration in other contracts, is so great in this marriage or union of civil and commercial interests. Union gives them strength, but discord ruins the best formed enterprizes; discord among co-partners is then a serious cause for the dissolution of their partnership: the same result follows from every thing that shakes the confidence placed in the personal qualities of a partner charged and intrusted with a part of the partnerships action. The mutual confidence of partners among thmeselves respectively is the true link of the contract of co-partnership. That the partners who shall have become a gambler, a dissipated, *prodigue* spend thrift and he whose ill conduct unknown at the time of the contract but since then revealed would occasion serious apprehensions as to his administration of the co-partnership. "So also Duvergier p. 393, 575,"—La confiance &c., personal confidence is the basis of the contracts of partnership. If the conduct of a partner be such that this confidence can no longer subsist in the minds of his co-partners, *ex gra.* if he commit repeated faults a dissolution of partnership may be demanded against him. He promised to be careful and honest, he fails in his engagements, his partners are discharged from him. It is not from their intercourse with each other alone that the morality of partners is to be appreciated, acts and matters foreign to the co-partnership business which might take from one of them, the consideration which he enjoyed at the formation of the partnership, will justify a demand for its dissolution. Who would condemn honorable and reputable men to the penalty of a perpetual contrast with a man stigmatized by judicial condemnations or by public opinion. The gravity of the facts, the nature and frequency of the intercourse required by the special character of the contract of partnership should be weighed by the judges and if they consider that the partnership bond has become insupportable from the fault of one of the partners who formed it, they will order it to be dissolved." It would be poor sophistry to deny the applicability of these authorities to the case in hand simply because they refer in terms to existing partnerships; they apply as well to contracts of co-partnership about to be entered into, and justify the defendants if justification were needed, that the plaintiff's conduct before his entry into the co-partnership would be a fair sample of what it would be after. But we are left in no doubt upon the effect of the law, inasmuch as the Court of Appeals has itself settled the special questions suggested for your answers and has given to them a legal significance and purport that cannot be contradicted or diminished. You have the case before you in the fact of an old and long established firm having had a young man in their service for a considerable period of time. Upon his natural application to the senior partner, who appears to have entertained a strong personal regard for him, to know what he proposed to do for him, the partner stated to him his own views and feelings towards him and which at the request of the applicant he put into writing and as it happened signed the writing with the partnership signature, but intimating at the same time that he had not the sanction of his co-partners, the Plaintiff's other employers,—which the applicant was to obtain. The writing secured an increase of salary from £150 to £200 per annum and 5 per cent on the profits of the business at Montreal, and proposed his admission into the firm after two years upon terms to be settled. No knowledge by Mr H Lyman and Savage of this proposal, until the rupture had occurred, or acquiescence in it by them either by word or act at any time is in evidence; the law invalidates this unauthorized proposal of one partner and nullifies the partnership signature subscribed by him, thereby relieving them and the firm from any liability or responsibility towards the Plaintiff for the nonfulfilment of the agreement by reason whereof he claims damages for loss of profits and advantages from the business of the firm. But what profits? Of those of a partnership at will which has not existed at all and which if it had existed any partner might dissolve at his pleasure, or refuse to carry it into effect if only intendeed to be established, or those of a limited partnership brought to dissolution by the misconduct of any of the co-partners. In this case there is no partnership at all, no privity of contract between the Plaintiff and the Defendants. He was no partner in their firm, had no control or right in its management, nor under any responsibility for its engagements or losses: in fact there is neither a contract nor agreement between them nor foundation for a claim to damages against them and therefore if profits be the measure of damages, no profits in the business of the firm for his participation or distribution. The Plaintiff's case is one of not unfrequent occurrence at law, that of a person contracting with one without authority he must himself bear the result. Under this view of the case there can be no assessment of damages against the Defendants.

Before I close this case, it is proper to refer to one or two circumstances that have been mentioned in the course of the trial; but you must bear in mind that in coming to a decision upon the points to be submitted to you that the reckless assertion of counsel, their suppositions or beliefs are not to be taken as proof, and though they may move feelings, the rights of parties are to be decided upon the evidence adduced before you. The counsel in stating his case represented the paper writing first as a proposal for agreement, you must be reminded that if it was so, by his own shewing it is not an absolute contract in itself, and secondly he represented it as only entertaining a proposal for an agreement,—in this case the law requires it to be accepted; in the former case, it is no contract and cannot support damages, in the latter the acceptance being not proved cannot support the action. It has been asserted that there has been error in the ruling rejecting the testimony of Duval, there is none in fact, but if there were it is not matter for the Jury to pass upon, the testimony rejected was not testimony in rebuttal of the defendant's evidence. The evidence of Turnout, a witness for defendant, has

also been questioned, and an attempt has been made to discredit his testimony. Lee and Renahan have been brought up for the purpose. The latter says nothing at all, and the former, Lee, speaks as to Turnout's driving a prostitute in his cab and getting a small bottle of essenbe for her at a druggist's. If that were an impropriety in a cabman, it is not an indication of his being generally unworthy of belief—impropriety of conduct such as his, if it even be improper, is no indication of perjury—it might as well be said that impurity of conduct would be perjury. Formerly two witnesses were necessary in perjury, because there would be no more than one oath against another in a matter of perjury, but though that strictness has long been relaxed, the evidence must more than counterbalance the oath of the witness, therefore an opposing witness will not avail against a fact sworn to unless corroborated by other independent circumstances. Now Lee has not opposed any fact sworn to by Turnout, but draws his conclusions from the bottle of essence. Turnout's evidence has been supported by others and has been well nigh admitted by the defendant's Counsel. It has also been asserted that the woman with whom the plaintiff had connection was not impure. She lives in a house having brothels on each side; she was backwards and forwards to the house of her mother who kept a brothel, and had lived with her mother four years before when her mother was in the same line of business. The old proverb applies to her—"We are known by our acquaintance." Her character is for your consideration, not mine. But to prevent any misconception on these points, and to bring to your mind the testimony attempted to be discredited, the evidence for the defence, as well as that in rebuttal will be read to you (here that evidence was read). As before stated the appreciation of this testimony is for you, not for me. It is for you to answer the suggestions that are submittal for your verdict as you may see fit. I have only to add that in law no contract with defendants in the plaintiffs favour has been proved in any manner against them.

The Jury retired at half-past four, and returned into Court at seven o'clock, with the following verdict on each of the points submitted to their consideration:—

Answer to Question 1. Yes.

Answer to Question 2. Yes.

Answer to Question 3. According to the evidence, the Plaintiff visited one Martha Scott, a woman of doubtful character; but there is no proof of his having co-habitated with her or maintained her in a state of prostitution.

Answer to Question 4. No.

Answer to Question 5. No.

Answer to Question 6. No.

Answer to Question 7. From the evidence, his general character is good, nor is he a person of irregular, immoral or discreditable conversation or repute.

Answer to Question 8. He did. We assess the damages at £1250 currency.

TUESDAY, Nov. 27, 1860.

THE HIGGINSON-LYMAN CASE—JUDGMENT SETTING ASIDE THE VERDICT OF THE JURY.

Mr. Justice Monk, this morning, proceeded to give judgment on the motion of the counsel for the defendants to set aside the verdict already given in this case, as follows:—

This case is before the Court on two motions by the defendants—one to set aside the verdict of the jury and to dismiss the action, and the other for a new trial. These motions are combined in one and presented in an alternative form—that is, the defendants move to set aside the verdict and to dismiss the action, and in the event of the Court refusing to grant that motion, they move that a new trial of the issues be granted.

This mode of offering two or more motions in an alternative form, seems to have been sanctioned by this Court and also by the Court of Appeals. Being sanctioned by precedent, the Court holds that the proceeding adopted by the defendants is regular. Ten reasons are assigned in support of these motions, and in the view of the law and the practice of our Courts taken by the defendants, these reasons are applicable to both. Before examining the validity of these reasons, it may not be amiss to state briefly the grounds upon which motions for new trial, in arrest of judgment and for judgment *non obstante veredicto* are based, and the reasons in law and in fact, usually urged in support of such motions respectively, and, in doing so, I shall speak more particularly of the law as it stood previous to the introduction of our Statute 14 and 15 Vic., Cap. 89. The ground of a motion for new trial may be any irregularity in the proceedings connected with the trial, or any matter extrinsic to the record, shewing that the trial may have been in due form, yet that it has not done justice between the parties. For instance, where it appears by the judge's notes of testimony that the jury have brought in a verdict without or contrary to evidence—that illegal evidence has been adduced, or that legal evidence has been overruled and refused; that exorbitant damages have been given, or that the Judge himself has misdirected the Jury, so that they found an unjustifiable verdict. For these and similar reasons, it is competent to the unsuccessful party to move that the verdict which has been given, be set aside and a new trial had

Arrests of judgment arise from intrinsic causes appearing on the face of the record—as if in an action for slanderous words, the Defendant denies the words and issue is joined thereon, if a verdict be found for the Plaintiff that the words were actually spoken, the fact is established; yet the Defendant may move in arrest of judgment, that the words are not in their nature actionable, and if the Court be of that opinion, judgment is arrested and reversed for the Plaintiff, and it is an invariable rule that whatever is alleged in arrest of judgment must be such matter as upon demurrer would have overturned the action. But the rule will not hold *e converso* that everything that may be alleged as cause of demurrer will be good in arrest of judgment; for merely *formal* objections which might have been sufficient ground of demurrer will be cured or aided by verdict—by it the facts are ascertained which before from the inaccuracy of the pleadings might be dubious.

The motion for judgment *non obstante veredicto* is also made by reason of some intrinsic objection apparent on the face of record but differs in this particular from the motion in arrest of

judgment that it is made on the part of the plaintiff and not usually on the part of the defendant. It is accordingly grounded, when made by the plaintiff, on an objection to the pleading of the latter. Thus when the plea confesses and attempts to avoid the declaration by some matter, which amounts to no sufficient avoidance of it, in point of law, and the plaintiff, instead of demurring, has taken issue upon the truth of the plea in fact, and that a verdict has been found for the defendant, yet the plaintiff may move that, without regard to the verdict, the judgment be given in his favor, notwithstanding the verdict—for the plea having confessed it by an allegation which, though true in fact, is bad in law, it appears upon the whole, that the Plaintiff is entitled to maintain his action and have judgment. Formerly an impression prevailed that this motion could be made only on behalf of the plaintiff—but a contrary opinion seems to prevail now in England and instances of motions of this description have been made on behalf of the defendant. It is certain that since the introduction of the statute 14 and 15 cap. 89 the courts of Lower Canada, both those of original and appellate jurisdiction, have entertained and adjudicated upon such motions, made on the part of defendant. The cases are numerous and it is quite unnecessary to cite them here.

The Court has deemed it right to advert to these elementary principles, laid down in all English text books of authority, in order to show that there has been, in some respects, a deviation in our Courts from the strict practice in England and the United States in regard to motions for judgment *non obstante veredicto*. This no doubt has resulted from the recent modification of our jury system. General verdicts were abolished by the Act of our Legislature 14 and 15 Vic. Cap. 89, and special verdicts or findings are substituted in their stead. The 4th section of that Act also confers on the Superior Court the power to set aside on motion verdicts and grant new trials—to arrest judgment and to set aside verdicts with the view no doubt of entering judgment notwithstanding or contrary to the verdict; and it appears to me that the decisions, as well of this Court, as of the Court of Appeals, recognize a power, in the tribunal of original jurisdiction, to set aside verdicts of juries, upon mixed questions of law and fact, and upon questions of law alone and of fact alone.

I think the decisions go this length. The cases are numerous but familiar to the Bar and need not be cited. Upon a careful review of these cases I am therefore clearly of opinion that under our system of jury trials the motion for judgment *non obstante veredicto*, for the reason that no evidence or no sufficient evidence has been adduced, in support of the verdict, is a proceeding sanctioned by the practice of our Courts. If there be an objection to the technical term *non obstante veredicto*, we may call it simply a motion to *set aside* the verdict and to enter judgment for Plaintiff, or for the Defendant, as the case may be, notwitstanding the finding of special facts by the jury—in other words notwithstanding the verdict. Holding then that these motions are regular, in the particulars above adverted to, it now becomes my duty to enquire whether either of them should be granted in this case, and if either, which of them?

Taking up first the question of evidence, we have to weigh the value of that evidence if it appear that any has been adduced in support of the Plaintiff's pretensions as he has presented them in the present action. The Plaintiff claims £6500 damages resulting from the breach of an alleged contract entered into by Defendants, as a commercial firm, to take him into partnership. He avers that he sustained that amount of damage from having been "deprived of profits and advantages, and of position resulting from a partnership in the best and most extensive establishment of the kind in Canada." By their plea, the Defendants deny the existence of any such contract, and that even if any such contract had been entered into by them (which they expressly deny) they set forth what they consider sufficient reasons to show that Plaintiff had forfeited all right to the fulfilment on their part of the pretended contract. Issue being joined, the first question submitted by the Court to the Jury was in these words, and it is obvious that, upon their answer to this, the Plaintiff's case mainly depended:—"Did the Defendants, as a commercial firm, contract with the Plaintiff to admit him as a partner in manner and form alleged in the declaration?"

To this question the Jury answered unanimously in the affirmative, and it is their finding and the evidence in support of it I have now to consider. The Defendants contend that this part of the verdict is wholly unsustained by evidence; that, in point of fact, it is contrary to the testimony adduced in the cause.

The first reason in support of their motion is "that no evidence was adduced at the said trial to prove that the Defendants, as a commercial firm, did contract with the Plaintiff to admit him as a partner in manner and form as alleged in Plaintiff's declaration." And their sixth reason—

"That the said findings and each and every of them were contrary to law and to the evidence of records." The paper writing referred to in the Plaintiff's declaration as embodying the contract, was written by Benjamin Lyman, the senior partner in the firm of Lymans, Savage & Co., the Defendants, and in the form of a letter from him to Mr. Higginson, the Plaintiff. The terms and purport of that letter are as follow:

"MONTREAL, 4th April, 1857.

"*Thomas S. Higginson, Esq:*

"DEAR SIR,—Touching the conversation the writer had with you, the present is to say that we will allow you £200, say two hundred pounds per annum, and also five per cent on the profits of the business carried on here for the next two years, after which time we will admit you a partner on terms that will be mutually satisfactory.

"This letter to be strictly private and confidential.

"Yours very truly,

"LYMANS, SAVAGE & CO."

This is the written contract upon which the Plaintiff relies, and I proceed now to enquire into the evidence relating to it. The testimony of Benjamin Lyman in relation to this paper, is as follows:—

"On the 4th April, 1857, I was senior partner of the firm of Lymans, Savage & Co. On that day I addressed a letter to Plaintiff on my own responsibility, and at the time told Plaintiff so;

on that occasion I wrote the name of the firm I told Plaintiff I only expressed my own feelings, and which might not be agreed to by the firm. He replied, he thought they would. Plaintiff had asked me what I intended to do for him, and I told him I had always intended that he should take Mr. Savage's place. Plaintiff asked me to give him in writing what I intended, and I gave him, in writing, the letter of the 4th April. This was written at the very time of his conversation with me. After the letter was written Plaintiff remained in the employ of the firm for two years."

In cross-examination, he says:—

"The letter of the 4th April, 1857, was written in Plaintiff's room, in the store when I was taking my luncheon. I told him I had not the sanction of my partners, and he said if they did not consent it would go for nothing. Plaintiff said he thought I could induce my partners to come into the arrangement. I had not the sanction of my partners. The first time I told my partners that I had written such a letter was after I wrote the letter of the 1st April, 1859."

As a matter of fact resulting from this evidence which is precise and direct, and is uncontradicted by any other testimony of record, but, on the contrary, is corroborated by the very terms of the letter and other circumstances, it is manifest and so manifest as to leave no doubt whatever, in any reasonable mind, that this letter was written without the knowledge sanction or authority of the other co-partners, Henry Lyman and Alfred Savage. This fact being thus legally and conclusively established, the rule of law applicable is plain. The two other partners were not bound by this letter, unless they became so by subsequent ratification. This is beyond controversy, and therefore requires no comment or citation of authority. A few legal maxims dispose of this part of the case. It is admitted that each partner is the general agent of the firm, for all purposes connected with the partnership. He may therefore dispose of the whole, or any part of the personal property belonging thereto in like manner as if he were sole owner. So all transactions by a partner, as agent of the firm, will bind the firm. The contract of co-partnership is consequently one of the most important known to the law. Hence it is that the express and unequivocal consent of all the other partners is required in the admission of new members. As between the partners therefore it cannot be created by mere operation of law, but depends solely upon the fact of agreement. No third person can be introduced, by one or more partners, into a firm, but with the consent express or intelligibly implied from acts, unequivocal in their nature, of all the other parties. This is the law, and bearing this principle in mind, we have to enquire, whether evidence has been placed of record proving a subsequent ratification, of this act of Benjamin Lyman, by the other partners, or not. If such ratification be proved, the verdict of the Jury so far is good; if, however, there be no evidence whatever, or evidence to the contrary, the verdict in this particular finding, is bad. Before proceeding further, however, in this enquiry, it is right, that the Court should examine the evidence in regard to another important point in this case; and that is whether it be proved, by any kind of evidence whatever, that this offer of partnership was ever accepted by Mr. Higginson in a way to make that acceptance known to the firm, or in any way to bind him or the firm? It will be recollected that the letter written by B. Lyman bore date the 4th April 1857,—and it is pretended that the plaintiff answered it by a letter dated the following day, that is the 5th April 1857—this may or may not be true—the Court is not called upon to discuss moral probabilities, or to appreciate the value of conflicting presumptions, which escape the ingenuity of legal argument, but as a matter of fact there is no proof whatever adduced to prove that this letter of the 5th April 1857 was ever written, was ever sent to, or received by the firm of Lymans, Savage & Co. or even Benjamin Lyman himself. A young gentleman by the name of Spence was examined by the Plaintiff to prove that such a letter of acceptance was written, and his own words will demonstrate the value of his evidence in this particular. "Knew Plaintiff in 1857—Knew of his receiving a letter from Defendants. Plaintiff brought the letter to witness, who saw a draft of the reply in 1857, shortly after he first saw the said letter from Lyman, Savage & Co. Witness saw Plaintiff in the store on Sunday, and Plaintiff said 'there is my answer to their letter lying on the desk.' This was shortly after my seeing the letter to him from Lymans, Savage & Co."

Cross-examined:—"Plaintiff showed witness the draft of his reply shortly after his receiving the original letter. Cannot say how long after. The letter I speak of as having been pointed out to me by Plaintiff was pointed out on Sunday. None of the firm were present, nor any in the employ of Lymans, Savage & Co. Plaintiff had the key of the premises and was apparently in charge of them on that day. Witness did not read the letter lying on the desk, but has read the copy shewn to him by Plaintiff. It was pointed out by Plaintiff as being the letter. To the best of his knowledge it was the Sunday after the 5th April, 1857, that witness saw the letter lying on the desk that Plaintiff pointed out to him."

Mr. Spence says he never read the original but has read the copy shewn to him by plaintiff. Both parties seem to unite in speaking highly of the character and credibility of this witness; and, therefore, giving the fullest weight to his testimony, I am bound to say that there is no positive or legal evidence whatever of the existence of this letter of acceptance. The most that can be said is, that there exists a presumption that such a letter was written as Mr. Spence's evidence seems to imply. But this presumption is refuted by the testimony of Mr. Clare, bookkeeper of the firm, and of Benjamin Lyman. Mr. Clare says:—"As book-keeper witness had access to all books and letters to or from and of the firm. Was constantly in the office. Witness never heard of the letter of date the 5th April 1857. Never saw it. Only heard of it a few days since. Had such a letter been left lying on the office desk, witness would certainly have seen it. He thinks he would have seen it if left lying as Mr. Spence says. It is his business to put away papers. As they accumulate they are filed away".

Mr. Benjamin Lyman says:—

"I did not receive any letter from Plaintiff, of date the 5th April, 1857. I did not see such a letter lying on the office desk. The firm did

not, to my knowledge, receive such a letter. I never read such a letter or saw it, nor heard of it till a day or two ago, when my lawyers shewed me a copy of it."

The letter here referred to, and of which an alleged copy is produced, is in these words:—

"MONTREAL, 5th April, 1857.

"*Messrs. Lymans, Savage & Co., Montreal:*

"DEAR SIRS,—In reply to yours of the 4th inst., the present is to say that I accept your offer of two hundred pounds per annum, and five per cent on the profits of your business for two years from this date, after which time you are to admit me a partner, upon terms mutually satisfactory.

"Yours truely,

"T. S. HIGGINSON.

"P.S.—My name of course to appear in the firm."

Had proof been offered that this letter had been written on the day it bears date, or about that time, and that the firm had then received it, such a formal acceptance, it must be conceded, would have had a very serious significance in the present case, but as a matter of fact the Court does not find in the evidence adduced any proof that such a letter was ever written at the time it purports to bear date or at any time during the two years, or that it was sent to, or received by the firm of Lymans, Savage & Co., or Benjamin Lyman, and we look in vain for any other testimony to shew that the Plaintiff formally or expressly accepted the proposed offer of Benjamin Lyman to become a partner in the firm, before the expiration of the two years. It is quite true that he remained in the Defendant's employ—received the £200 per annum and 5 per cent upon the profits. It results clearly from these facts that so far he did accept the offer, and it may be urged, with some appearance of truth, that the acceptance and compliance with part, was, or was equivalent in fact to, an acceptance of the whole. The jury, no doubt, thought so, and that so far as it was a contract, it was completed and rendered binding upon both parties, and the Court is of opinion that in so far as the acts of Higginson tend to prove an acceptance of the whole contract by him, the proof of these acts was evidence to go to the Jury and that it was their duty to appreciate that testimony. It would be going too far therefore, to say that there is no proof of the accceptance by Mr. Higginson of Benjamin Lyman's offer of co-partnership. Assuming however, that there was the tacit acceptance contended, for it could only be such in regard to Benjamin Lyman unless it be proved that the other partners were aware of the letter of the 4th of April, 1857 written by their partner Benjamin Lyman and of the offer of 5 p c't on profits and of the prospective partnership therein contained. It was urged in argument by Higginson's counsel, that we must infer or presume the other partner's knowledge of the offer of partnership and of the 5 p c't profits from the fact that the plaintiff's salary was raised to £200 per annum after the 4th April, 1857, and that he remained in their employ during two years. Now the Court is of opinion that even in the absence of all evidence to the contrary, we could presume no such thing. No legal presumption or inference of fact could arise here and for this simple reason:—The engagement of Mr. Higginson, by the senior partner, for two years at £200 per annum bound the firm—their acquiescence was not necessary—they, as a firm, were bound in law to fulfil that engagement. If this part of the contract required their ratification, and they had ratified it by paying him £200 a year, a presumption might arise that they had ratified the entire engagement. There is an obvious distinction here, and one we must not lose sight of. The Court must, as a matter of law, regard this engagement to pay 5 per cent on the profits and the offer of a partnership separately from the hiring of the plaintiff for two years at £200 per annum, and suppose, as we must in examining the force of presumptions, and the applicability of evidence, that Mr. Benjamin Lyman had offered without the sanction of the firm, 5 per cent on profits and a partnership alone, would complete silence and inaction upon that engagement, raise a presumption in law or in fact that the other partners had ratified the engagement? Assuredly not. And the Court is of opinion that this is undoubted law, even if they were aware of such an agreement having been entered into by their partner. Silence and inaction during the period prior to the time when the contract was to take effect, is not, in a case like the present, a ratification of the contract; and no presumption of acquiesence is legally deducible from such silence and inaction, even if they were aware of the existence of such an engagement. But let us enquire a little further into this matter and examine the evidence touching their knowledge or ignorance of Benjamin Lyman's letter of the 4th April 1857. And first as to the 5 per cent, respecting which a good deal has been said. This credit of 5 per cent to plaintiff was never entered in the books. Mr. Clare the book-keeper says he became aware of it only in May 1859. The charge was made in the books of the firm in 1860 and was then charged to Benjamin Lyman because the other member of the firm objected to it. Benjamin Lyman says. "The first entry made in the books of the firm with reference to the 5 per cent was made in 1860. His partners knew nothing of it till about the time that plaintiff demanded to be admitted into partnership and was refused. The firm was sued afterwards for the 5 per cent. After suit I and Mr. Clare made up the amount to the best of our ability, and we decided that if the amount was not accepted, the plaintiff might go on with his suit. The amount $1,200 was accepted by the Plaintiff and was charged to me individually on the ground that I had promised it to Plaintiff without my partners' consent, and that they were not responsible."

It will be remarked that the payment of 5 per cent was made by Benjamin Lyman himself, on the 18th May, 1860, after the action was brought, and appeared then for the first time in the Defendant's books and to the debit of Mr. B. Lyman. That his partners were ignorant of his engagement to pay the 5 per cent till then, and they then disavowed his act. This testimony corroborated as it is by Clare and by all the circumstances relative to this charge of 5 per cent as proved, is, in the opinion of the Court, conclusive: unless indeed we discard the whole statment as a tissue of falsehoods from beginning to end, which nothing in the

Higginson, by the years at £200 per ieir acquiescence was a firm, were bound in ıont. If this part of ratification, and they him £200 a year, a hat they had ratified There is an obvious ve must not lose sight matter of law, regard per cent on the profits ship separately from or two years at £200 s we must in examin- ons, and the applica- Benjamin Lyman had on of the firm, 5 per ership alone, would ction upon that en- tion in law or in fact ratified the engage- And the Court is of ted law, even if they eement having been r. Silence and in- or to the time when ect, is not, in a case on of the contract; acquiesence is such silence and were aware of an engagement. ther into this mat- nce touching their Benjamin Lyman's And first as to the h a good deal has per cent to plaintiff oks. Mr. Clare the aware of it only in ıade in the books of n charged to Ben- her member of the min Lyman says. books of the firm cent was made in nothing of it till ff demanded to be and was re- l afterwards for I and Mr. Clare the best of our f the amount was ght go on with his accepted by the ne individually on ed it to Plaintiff , and that they

he payment of 5 n Lyman himself, r the action was r the first time in the debit of Mr. were ignorant of r cent till then, ct. This testi- Clare and by all this charge of 5 opinion of the leed we discard ıe of falsehoods nothing in the

character of the witness, or on the record will justify.

Then as to the partnership. Mr. Clare never heard of it. Mr. Higginson never spoke to him of it and B. Lyman swears that his partners knew nothing of the letter of the 4th April, 1859, and when he made demand of a partnership he is met by a peremptory refusal on the part of the firm, and yet in the face of all this the Jury found they had ratified the engagement entered into by B. Lyman. The Court has no hesitation in saying that such a finding is not only without evidence, but contrary to evidence. That the verdict in this particular is bad and that all the findings must be set aside, I have felt it my duty to dwell at length upon this part of the case, because the Jury who rendered this verdict was composed of men of high character and great intelligene, and in deciding, as I feel bound to decide that their finding is contrary to evidence, it is proper that the parties immediately interested in this cause should be made fully aware of the grounds upon which this Judgment of reversal rests.

The Court is confirmed in the view here taken, inasmuch as it is sanctioned by the charge of the honorable and learned Judge who tried this cause, and I entirely concur in the opinion he expressed in his charge to the Jury that had a non-suit been asked for by the Defeodants such an application should have been granted.

The first finding of the jury being thus disposed of, it is obvious that the remaining seven findings share the same fate—they can offer no obstacle to the setting aside of the verdict *in toto*, but it is proper that the Court should offer some observations respecting the last finding of the jury assessing the damages, and in doing so, it is necessary to advert, not only to the evidence, but also to the allegations of the plaintiff's declaration. The contract is thus set out:

"And whereas heretofore, to wit, on or about the 4th day of April, 1857, at the said city of Montreal, by a certain writing, *sous seuig prive*, written on behalf of the said defendants, by said Benjamin Lyman, the senior partner of the firm of the said firm of Lymans, Savage & Co., the defendants undertook and declared that they would allow the plaintiff £200 per annum, and also five per cent on the profits of the business carried on there, to wit, in the said city of Montreal for the next two years, to wit, after the date of the said writing, after which time, to wit, after the expiry of the said two years, which two years expired on the fourth of April last past, to wit, 1859; they agreed to admit the plaintiff as a partner into the said business of the defendants, which writing is herewith produced to form part of these present." There is a strange allegation following, that the connection was intended to be permanent and continuous.

Apart from this averment of perpetuity in the co-partnership we have not a word about the terms and conditions of the proposed association—and on looking at the paper writing of which *profert* is here made—we find that not only were no terms whatever agreed upon or mentioned, but that they were to be subsequently determined upon to the mutual satisfaction of both parties. The allegations of the declaration leave us completely in the dark upon this essential point, and the letter but increases the obscurity, except in this that it demonstrates that the terms of the connection were to be the subject of future negotiation—and that as a matter of fact the conditions were expressly left unsettled—they were reserved by the very terms of the letter for future adjustment, and were to be arranged so as to be mutually satisfactory. Now what is the present action brought for? For the recovery of damages resulting from the breach of this alleged contract. And what are the damages claimed? For loss of prospective profits only.

In order that there may be no misapprehension upon this important point, I will quote the very words of the declaration:—

"And the Plaintiff avers that by the said refusal of the Defendants to admit him as such partner he had been deprived of profits and advantages and of position resulting from being thereby established in the best and most extensive establishment of the kind in Canada, and has suffered injury and damage in all to the amount of £6,500 currency and upwards."

It is quite true that in a previous part of his declaration he says "that relying on this agreement he refused other advantageous offers"—but he does not assign these refusals as causes of damage, nor does he claim indemnity for such lost opportunities of improving his fortunes, but exclusively and expressly for loss of future, prospective profits in the firm of Lymans, Savage & Co., and for this alone.

Now let us enquire into the nature of these damages and consider the possibility of adjusting them under these allegations.

It is perhaps unnecessary to say that in a case like the present, there can be neither nominal nor vindictive damages. The loss must be determined by the plain process of figures, and the damages fixed with something approaching to arithmetical accuracy—they may amount to more or less, according to the judgment of the jury, but there must be a basis upon which the award is to rest, and a calculation susceptible of some kind of analysis. Now, neither under the allegations of the Plaintiff's declaration, nor upon the evidence adduced had the Jury any such basis, nor had they any means of making such a calculation of the damages claimed. It is not alleged nor is it proved (in fact it could not be proved) whether it was money or labour and skill, the Plaintiff was to contribute. No amount is mentioned or proved—nor any mention of skill and labour as his contribution. It is not alleged nor is it proved what share of profits he lost. Now holding as we must, with this declaration before us, that loss of profits alone are claimed, how did or how could the Jury award £1250? To what share of the profits was this sum equivalent? With this statement of his case and this proof in support of it, how could the Jury find that he lost £1250 when he omits to tell them the proportion of the profits he was to receive? In this particular, both the allegations of the declaration and the evidence are fatally defective. Whether the loss of profits be accrued or prospective the same insuperable difficulty presents itself. The action is so brought and the evidence is of such a character, that no legal, no intelligible adjudication of damages could, or in the opinion of this Court, can ever take place in this cause. In a case not only analogous but similar to this, Chief Justice Abbott, afterwards Lord Tenter-

[illegible] gave [illegible] opinion in the following terms:—"He was of opinion that the action was not maintainable in the absence of evidence to shew the terms upon which the parties were to become partners, and said that he had never heard any instance in which such an action had been supported without proof of the terms." This was the case of Figes vs. Cutler, and has not, as I am aware, been overruled. The case in [illegible]gham, cited by the plaintiff's Counsel, is entirely different from the present.

This, as it appears to me, is not only sound law, but from pure necessity and the plainest dictates of common sense is entirely conclusive.

For all these reasons combined, and in view both of the pleadings and the evidence adduced, the Court is of opinion that the motion to set aside the findings of the Jury and to dismiss the action must be granted, and the action is dismissed accordingly with costs.

It only remains for me to express my obligations to the Counsel who argued this case both in behalf of the plaintiff and the defendants for the learning and remarkable ability with which they urged their respective pretensions, and from which I have been so much aided in my deliberations.

The Counsel engaged were :—

For the Plaintiff:

Messrs. Cross & Bancroft,
F. G. Johnson, Esquire, Q.C.

For the Defendants:

Messrs. Abbott & Dorman,
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