

Sup. Ct.]

NOTES OF CASES.

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by the defendants, to their own use of ice taken off the lakes through which the canal was intended to run.

The declaration contained six counts, the plaintiff claiming as assignee of Fairbanks. Among the pleas were denials of committing the alleged wrongs, of the property being that of the plaintiff, and of his possession of it, the last plea being that "the said Creighton was not nor is such assignee as alleged."

After the trial both counsel declined addressing the Judge, and it was agreed that a verdict should be entered for the plaintiff with \$10 damages, subject to the opinion of the Court, that the parties should be entitled to take all objections arising out of the evidence and minutes, and that the Court should have power to enter judgment for or against the defendant without costs, a rule nisi for a new trial to be granted accordingly and filed.

The following rule was taken out: "On reading the minutes of the learned Judge who tried this cause, and the papers on file herein, and on motion, it is ordered that the verdict entered herein formally by consent, subject to, etc., be set aside with costs, and a new trial granted, etc."

This rule was made absolute in the following terms: "On argument, etc., it is ordered that the said rule nisi be made absolute with costs, and judgment be entered for the defendants against the plaintiff with costs." Thereupon the plaintiff appealed to the Supreme Court of Canada, and it was

Held, that by traversing, the plaintiff, as assignee the defendants, put in issue the fact implied in the averment that the plaintiff was assignee in insolvency, that Fairbanks was a trader within the meaning of the Insolvent Act of 1869, and as the evidence did not establish that Fairbanks bought or sold in the course of any trade or business, or got his livelihood from buying or selling, that the plaintiff failed to prove this issue.

Appeal dismissed with costs, but the rule appealed from varied and made absolute for a new trial.

Per GWYNNE, J.:—That assuming Fairbanks to be a trader still, the defendants were entitled to judgment upon the merits, which had been argued at length. That the agreement at *nisi prius* authorized the Court to render a verdict plaintiff or defendants, accordingly as they

should consider either party successful upon the law and the facts; that the Court having exercised the jurisdiction conferred upon them by this agreement, and rendered judgment for the defendants, this Court was also bound to give judgment on the merits, and, as the judgment of the Court below, in favor of the defendants, was substantially correct, to sustain it; and it having been objected that as the rule nisi asked for a new trial, the rule absolute in favor of the defendants was erroneous, that such an objection is too technical to be allowed to prevail, and that the rule nisi having, as it did, recited the agreement at *nisi prius*, and the Court below having rendered a verdict for the defendants, it should not be varied, as to order a new trial would be but to protract a useless litigation at great expense.

Thompson, Q.C., for appellant.

Rigby, Q.C., for respondent.

Appeal dismissed with costs.

ROSS V. HUNTER.

Trespass—Easement—Registration—Notice—Rev. Stat. N. S., 4th series, c. 79, secs. 9 and 19.

This was an action brought by appellant against the respondent for having erected a brick wall over and upon the upper part of the south wall or cornice of plaintiff's store, pierced holes, &c. To that respondent pleaded, besides not guilty and not possessed, special pleas to the effect that he had done the acts complained of for a valuable consideration. In the Supreme Court, by permission of the Court, an added replication was filed setting up the provisions of the Registry Act, and the defendant pleaded an equitable rejoinder, alleging that plaintiff and those through whom he claimed, had notice of the defendant's title to the easement at the time they obtained their conveyance. In 1859, one Caldwell, who then owned appellant's property, granted by deed to respondent the privilege of piercing the south wall, carrying his stove pipes into the flues, and erecting a wall above the south wall of the building to form at that height the north wall of respondent's building which was higher than plaintiff's (appellant). The appellant in 1872, purchased the property from the Bank of Nova Scotia, who got it from one Forman, to whom Caldwell had conveyed it. All these conveyances being for valuable considera-