

tried by a jury under sec. 49 of the Queen's Bench Act, 1895, unless a jury trial should be waived by the parties, and the subject matter of such counter-claim ought for that reason to be disposed of in an independent action.

It was shown, however, by affidavit, that the cause of action thus set up arose through the conduct of the plaintiff in connection with defendant's tenancy of the land in question, under an agreement set out in the statement of claim, and out of one connected series of transactions.

*Held*, following *Dockstader v. Phipps*, 9 P.R. 204, and *Goring v. Cameron*, 10 P.R., 456, that the counter-claim in question should not have been struck out; that it was not only natural and proper, but even desirable, that it should be disposed of in the present action; and that the fact that a jury might be called to determine this particular branch of the case is not sufficient ground for requiring the defendant to bring a separate action.

The order appealed from, in another clause, permitted the defendant to amend another paragraph of his defence within six days, in default of which amendment it was to be struck out, and the defendant availed himself of the privilege of amending that paragraph.

*Held*, that by compliance with such part of the order, he had not precluded himself from appealing against the other part.

Appeal allowed without costs.

*Clark*, for plaintiff.

*Wilson*, for defendant.

TAYLOR, C.J.]

[May 30.]

DOLL *v.* HOWARD.

*Misrepresentation—Rescission—Waiver.*

The defendant in this action had purchased from W. F. Doll at par certain shares in the stock of a jewelry company, and had given his notes for the purchase money. The plaintiff to whom W. F. Doll had indorsed the notes sued in this action upon one of them, which the defendant refused to pay, claiming that the payee of the note had been guilty of fraud and misrepresentation in the sale of the shares, and that the plaintiff was not the holder of the note in due course, or an indorsee for value. The learned Judge found, as a fact that there had been material misrepresentations which induced the defendant to enter into the contract of purchase and sign the note in question, but it also appeared that defendant, after he became aware of the misrepresentations did not repudiate the contract, but continued to carry on the business, and long afterwards paid two of the notes originally given, and renewed others, with the idea, as he said, of putting off Doll until he could secure further evidence of the fraud.

*Held*, following *Campbell v. Fleming*, 1 A. & E., 40; *Sharpley v. South & East Coast Railway Co.*, 2 Ch. D., 663; and *Walton v. Simpson*, 6 O. R., 213, that the defendant had waived his right to rescind the contract for misrepresentation, and that the plaintiff was entitled to a verdict for the amount of the note and interest.

*Martin* and *Mathers*, for plaintiff.

*Howell*, Q.C., and *Hough*, Q.C., for defendant.