

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

issued in an action on the judgment, and had placed the defendant in the same position as if he had appeared in such action, and a statement of claim delivered after appearance was therefore regular.

Semble, sec. 34 of the C. L. P. Act has not been repealed by Rule 5, O. J. A.

Aylesworth, for the plaintiffs.

Shepley, for the defendant.

Mr. Dalton, Q.C.]

[Nov. 17, 21, 1885.]

Boyd, C.]

[Dec. 2.]

Rose, J.]

[Dec. 5.]

CONMEE ET AL. V. CANADIAN PACIFIC
R. W. Co.

CANADIAN PACIFIC R. W. Co. V. CONMEE
ET AL.

Jury notice—Cause of action—Cancellation of Certificates—Injunction—Reference—Complicated questions—Burden of proof—Vexatious action—Cross action—Counter-claim—Staying proceedings.

C. and M. were contractors for building the Canadian Pacific Railway, and sued the company for \$200,000, the balance alleged to be due upon their contract, the writ in their action having issued on the 5th October, 1885, in the Queen's Bench Division. On the 31st October, 1885, the Railway Company began an action in the Chancery Division against C. and M. to recover \$600,000, alleged to have been overpaid them, setting up that the measurements and progress certificates on which the payments were made had been obtained by fraud, and seeking the cancellation of these certificates, and an injunction to restrain the contractors from receiving a final certificate. The company did not counter-claim in the action brought by C. and M.

Held, that the action of the company was one which would have been begun as of course by a bill filed in Chancery, when that was a distinct Court, although it might have been possible to recover in a common law forum, if the action had been otherwise framed; it was also a case in which it was to be expected that a reference to take the accounts would be directed at some stage, and that difficult and complicated questions of law and fact would arise at the trial, which could be much better dealt with by a Judge than a jury; and the jury notice given by C. and M. was therefore struck out.

Held, also, that, as there was a large burden of proof upon the company, and no vexation or impropriety in their seeking to unravel the alleged fraudulent transactions, and as they were not advancing a counter-claim in the action brought by C. and M., the company's action should not be stayed till the final determination of the other action; but that the trial of the company's action was the proper preliminary step in endeavouring to adjust the rights of the parties, and should take place first.

Taylor v. Bradford, 9 P. R. 350, distinguished.

McCarthy, Q.C., Osler, Q.C., and Wallace Nesbitt for C. and M.

Robinson, Q.C., Moss, Q.C., and R. M. Wells, for the company.

An appeal to the Court of Appeal is pending.

C. P. Div.]

[January 2.]

CONMEE ET AL. V. CANADIAN PACIFIC RY.
Co. (No. 2).

Causes of action—Separation—Consolidation.

The plaintiffs in their first action claimed from the defendants a sum of \$200,000 as the balance due upon a construction contract, and in this action, begun more than a month after the first, they claimed from the same defendants a sum of \$3,000, the amount of a store account for goods sold and delivered. The cause of action arose before the commencement of the previous action.

Held, that the two claims should have been made in the one action, and that it was a proper exercise of discretion to consolidate this with the former action, so that the two might be tried together, and the same defences be made available in both.

Osler, Q.C., for the plaintiff.

Moss, Q.C., for the defendant.

Queen's Bench Division.]

[November 24.]

DUNCAN V. TREES.

Interpleader—Fus tertii—Execution creditor as plaintiff.

Held (varying the order of *Rose, J.*, 11 P. R. 66), that the execution creditor was entitled to set up against the claimants the right of the assignee, and an issue was directed, the execution creditors to be plaintiffs.