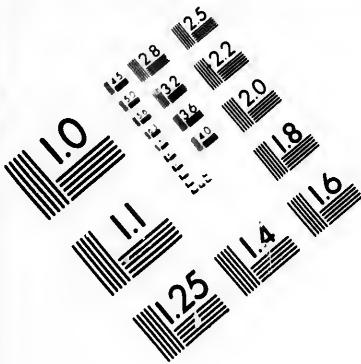

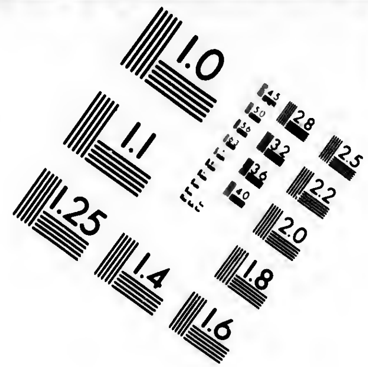

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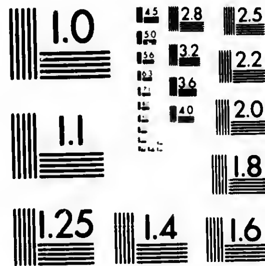

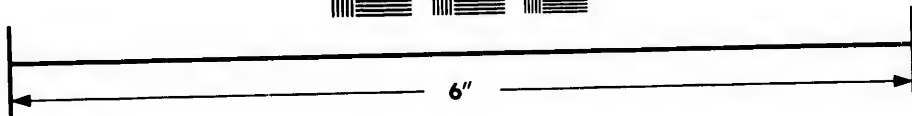


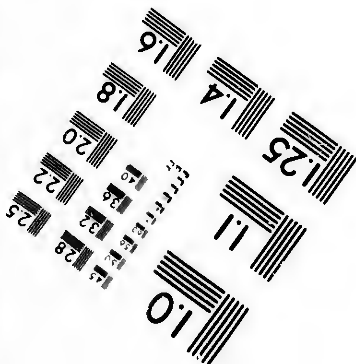

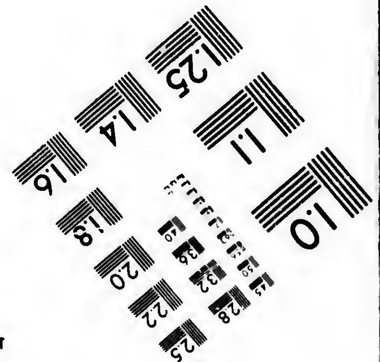

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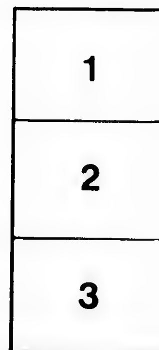


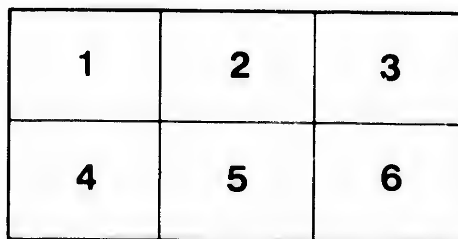

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# SUPREME COURT OF BRITISH COLUMBIA

## ON APPEAL TO THE FULL COURT.

BETWEEN

THE HONORABLE GEORGE ANTHONY WALKEM,
Plaintiff,

AND

DAVID WILLIAMS HIGGINS,
Defendant.

# CASE ON APPEAL.

H. DALLAS HELMCKEN,
Solicitor for Plaintiff.

THEODORE DAVIE,
Solicitor for Defendant.

VICTOR[illegible] B. C.:
"THE COLONIST" STEAM PRINTING HOUSE.
1887.

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The action of Walkem *vs.* Higgins is for an alleged libel. The writing complained of was published as an editorial in the Victoria "Daily Colonist" of the 20th November, 1885, and is as follows:

"THE McNAMEE-MITCHELL SUIT."

"In the sworn evidence of Mr. McNamee, defendant in the suit of McKenna *vs.*
"McNamee, lately tried at Ottawa, the following passage occurs: 'Six of them were
"in partnership (in the Drydock contract) out in British Columbia, one of whom was
"the premier of the Province.' The premier of the Province at the time referred to was
"Hon. Mr. Walkem, now a judge of the Supreme Court. Mr Walkem's career on the
"bench has been above reproach. His course has been such as to win for him the ad-
"miration of many of his old political enemies. But he owes it to himself to refute this
"charge. We feel sure that Mr. McNamee must be laboring under a mistake Had
"the statement been made off the stand it would have been scouted as untrue; but hav-
"ing been made under the sanctity of an oath it cannot be treated lightly nor allowed to
"pass unheeded."

# In the Supreme Court of British Columbia.

ON APPEAL TO THE FULL COURT.

BETWEEN

THE HONORABLE GEORGE ANTHONY WALKEM,

Plaintiff,

AND

DAVID WILLIAMS HIGGINS,

Defendant.

This is a motion to the Full Court, on behalf of the defendant, that the verdict of the Jury rendered at the trial of this action on the 30th day of June, 1887, may be reversed, 10 and a non-suit or judgment for the defendant be entered, or, in the alternative, for a new trial between the parties.

## PLEADINGS.

### STATEMENT OF CLAIM.

1. The Plaintiff was Premier, Chief Commissioner of Lands and Works, Attorney-General, and a member of the Executive Council of the Government of this Province, from the 26th June, 1878, until the 12th June, 1882, and was duly sworn to faithfully fulfil the trusts and discharge the duties by law and usage appertaining to the said offices, severally.

2. Ever since the said 12th June, 1882, he has been one of Her Majesty's Judges of 20 this Honorable Court.

3. As Chief Commissioner of Lands and Works the Plaintiff, by Indenture dated the 24th February, 1880, contracted, on behalf of the Government, with Francis Bernard McNamee, Anthony Gilbert Nish, and James Wright, constituting the firm of "F. B. McNamee and Company," contractors, for the construction by them of a Graving or Drydock at Esquimalt, in consideration of the payment to them of $350,997.20, or such other sums as might be due to them under specifications referred to in the said Indenture.

4. In June, 1880, the Plaintiff, as such Chief Commissioner, directed the said contractors to commence the construction of the Dock, but Mr. F. B. McNamee, on their behalf, requested the Plaintiff to allow work to be deferred until the following Spring; which 30 request the Plaintiff refused.

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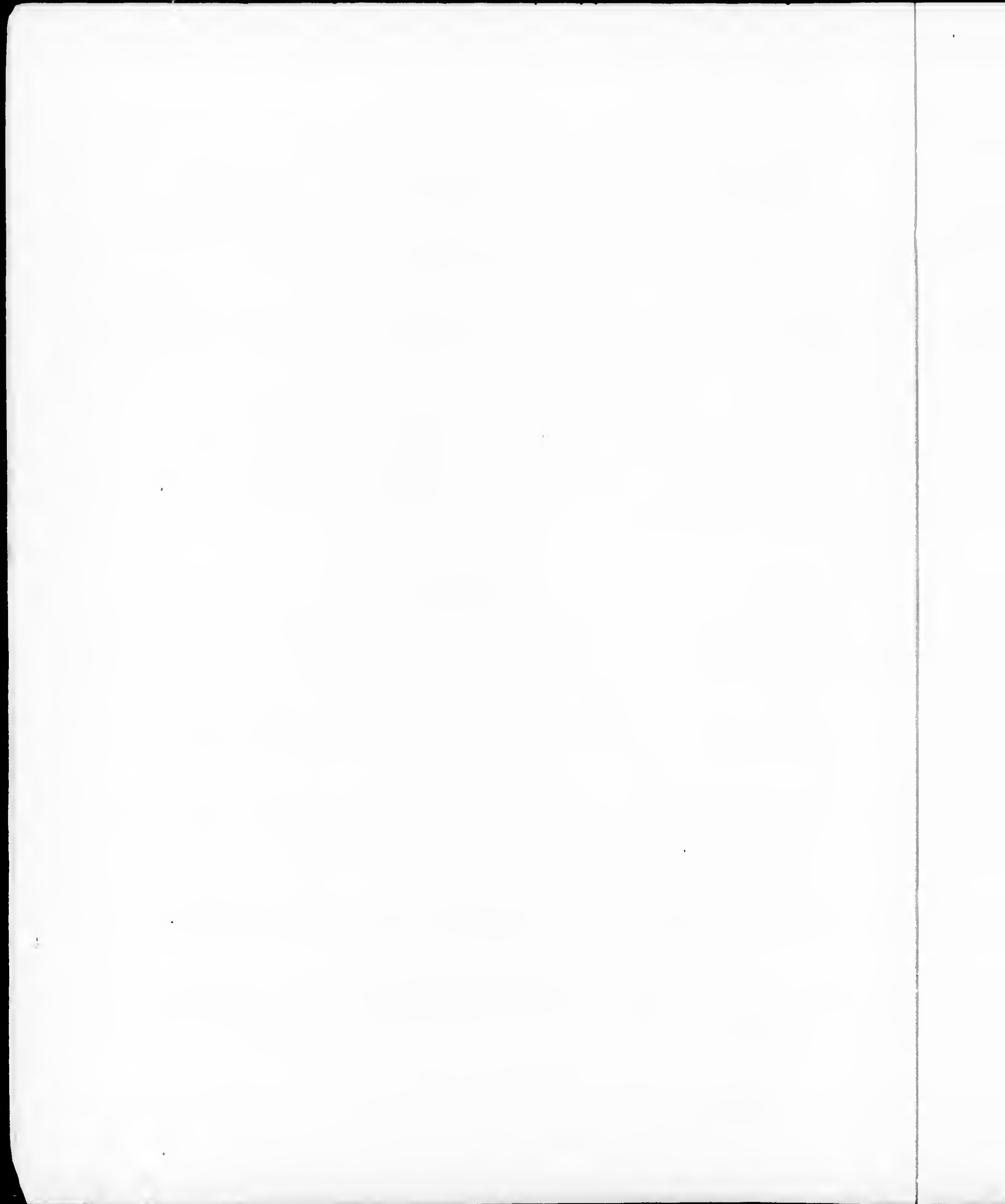


5. Owing to such refusal the said F. B. McNamee thereupon arranged with three residents of the Province named Robertson, Huntington, and Nicholson for immediate prosecution of the work by them as additional and temporary partners of the firm of "F. B. McNameeand Company," but the Plaintiff, though not objecting to this arrangement as between the parties themselves, declined to recognize such additional partners as contractors with the Government in respect of the Dock.

6. Subsequently, for greater security and with a view of placing the subject matter of the construction of the Dock within the terms of the Dominion and Provincial legislation which had taken place in relation to it, a further contract, dated the 4th of October, 1880, was entered into between the Plaintiff, as Chief Commissioner aforesaid, and the same 10 contractors, viz: Francis Bernard McNamee, Anthony Gilbert Nish, and James Wright, as constituting the firm of "F. B. McNamee and Company," whereby it was agreed that the former contract of the 24th of February, 1880, should be considered cancelled, and that, subject to certain legislative conditions mentioned, the Dock should be constructed by the said firm according to specifications referred to, and in consideration of the before-mentioned sum of $350,997.20, or such other sum as might be due to them under such specifications; and besides other security for the fulfilment of the contract, the sum of $10,000 was deposited for that purpose by the said firm with the Government.

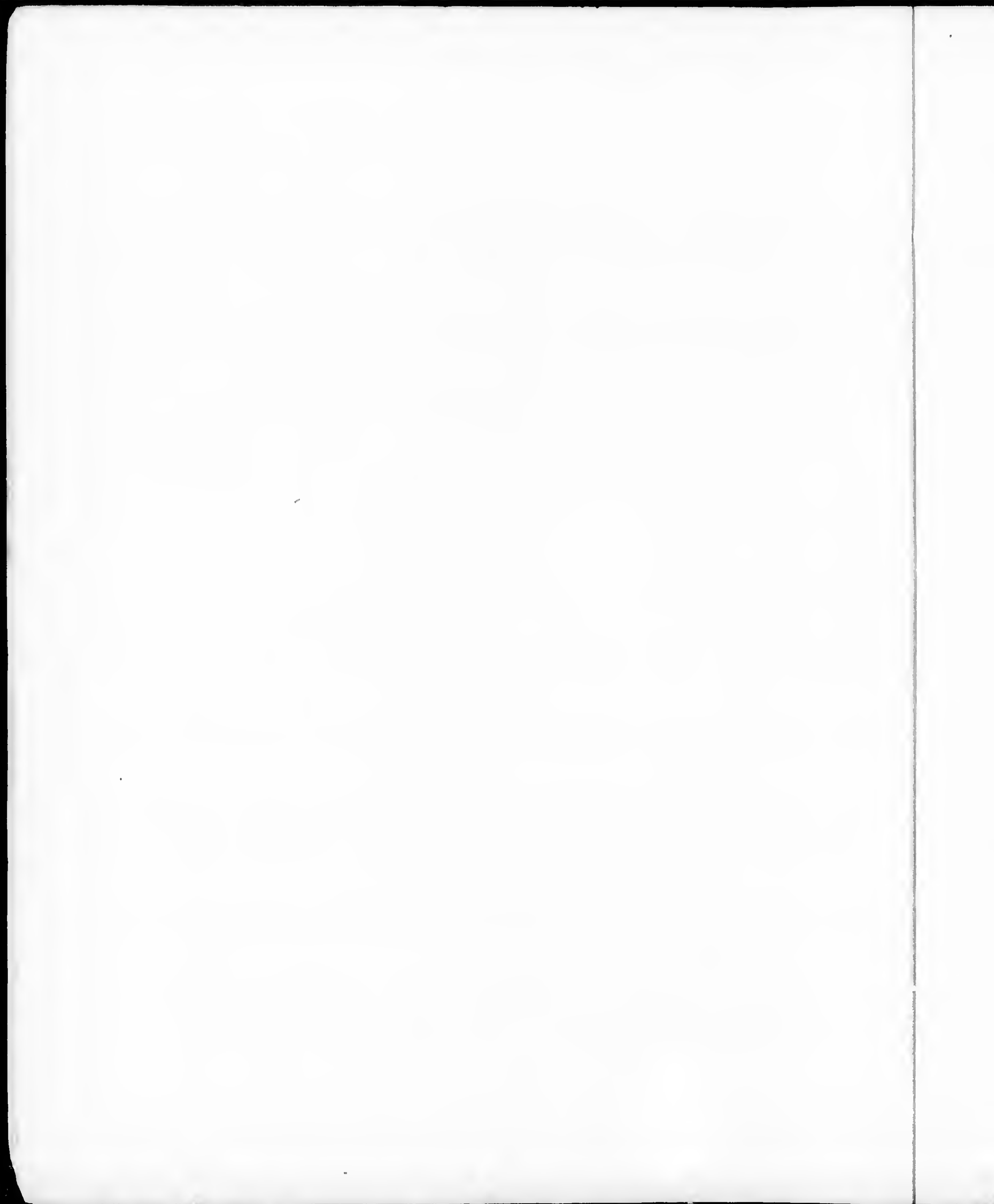
7. Prior to the execution of the last-mentioned contract, the various competitive tenders for the construction of the Dock, which had been received at the Lands and Works 20 Department, were submitted for consideration to the Lieutenant-Governor in Council, and the tender of the said "F. B. McNamee and Company" being much the lowest, was accepted, and the contract for the work awarded to them by the said Council, and the contract of the 4th of October, 1880, was thereupon executed, as stated in the last paragraph.

8. No contract or agreement, verbal or written, expressed or understood in relation to the Dock, except the said contracts of the 24th of February, and the 4th of October, 1880, was at any time made between the Plaintiff, in his official capacity, or otherwise, and the firm of "F. B. McNamee and Company,' or any of its members or alleged additional members. 30

9. The contract of the 4th of October, 1880, remained in force until about August, 1883, when the Dock, in an unfinished state, was transferred by the Province to the Dominion for completion by the latter, that is to say, the said contract was in force for nearly three years, during which time the Plaintiff successively filled the official and judicial positions mentioned in paragraphs one and two.

10. Under the contract of the 4th October, 1880, large sums of money were, from time to time, paid to the contractors therein mentioned, for work done on the Dock, the Plaintiff being Chief Commissioner at the time, and such payments were made with the Plaintiff's official sanction and approval, upon which they were dependent.

11. The Defendant is and has been for more than six years immediately preceding 40 the date of the commencement of this action, the proprietor and publisher of a newspaper called the "Daily British Colonist."



12. The Defendant in his said newspaper, dated the 20th of November, 1885, falsely and maliciously printed and published of and concerning the Plaintiff, and of and concerning the official conduct of the Plaintiff, while a member of the Government, and holding therein the offices of public trust and confidence, stated in paragraph one, the following libellous and defamatory words:

"THE McNAMEE MITCHELL SUIT.

"In the sworn evidence of Mr. McNamee," (meaning Francis Bernard McNamee, above mentioned) "Defendant in the suit of McKenna *vs.* McNamee, lately tried at Ottawa, the following passage occurs:

"'Six of them,' (meaning the witness McNamee and five other persons), were in 10 partnership in the Dry Dock contract,'" (meaning the contract of the 4th of October, 1880,) "'out in British Columbia, one of whom was the Premier of the Province.'"

"The Premier of the Province at the time referred to was Hon. Mr Walkem," (meaning the Plaintiff) "now a Judge of the Supreme Court" (meaning the Supreme Court of British Columbia). "Mr. Walkem's career on the Bench has been above reproach. His "course has been such as to win for him the admiration of many of his old political enemies. "But he owes it to himself," (meaning to the judicial character thus acquired as well as to "his character generally) "to refute this charge," (meaning the charge implied in the above "statement that he had been guilty of corruption in having been a partner with the "contractors in the said Dry Dock contract). "We feel sure that Mr. McNamee must be 20 "laboring under a mistake. Had the statement" (meaning the said charge of corruption) "been made off the stand it would have been scouted as untrue; but having been made "under the sanctity of an oath, it cannot be treated lightly nor allowed to pass unheeded."

Meaning and intending it to be believed, by the said false and malicious libel, that at the time the plaintiff held the several offices of public trust and confidence mentioned, he secretly, and by corrupt means, and for corrupt and unworthy considerations of personal gain and profit, and in betrayal of such trust and confidence, acquired and held a partnership interest conjointly with the said contractors "F. B. McNamee and Company," in their said Drydock contract of the 4th of October, 1880, and that as such secret partner with them, he fraudulently and unlawfully obtained large sums of public money, and made 30 large gains and profits at the expense of the Province, in respect of work done, or pretended to have been done, on the Dock under the said contract; and that he procured the award which was made of the said contract, and thereupon executed the said contract, and thereafter obtained the said public moneys, and made the said profits in manner mentioned, under cloak of his position and influence in the Government, and especially of his office and authority as Chief Commissioner of Lands and Works, and by falsely and fraudulently pretending that he was acting as such officer in the premises, solely on behalf of and in the interests of the Government, and not on his own personal behalf, as was the fact; and that he had by reason of the premises committed criminal offences punishable by law which should "not be treated lightly nor allowed to pass unheeded"; and further that the plain- 40 tiff actuated by the corrupt and unworthy motives and considerations above mentioned, continuously held his said secret partnership in the contract, while the latter remained in

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force; that is to say, for a considerable period before and after his resignation of office, and his appointment to his present position on the bench, as mentioned and referred to in paragraphs 1, 2 and 9 hereof.

13. The words set out in paragraph 12 are a false, unfair, garbled and incomplete report of the proceedings at the trial of the action at law of McKenna *vs.* McNamee, mentioned in the said paragraph.

14. By reason of the premises the personal, as well as judicial character and reputation of the plaintiff have been exposed to contempt and odium and greatly injured.

15. And in the alternative the plaintiff says that his character and reputation have by reason of the premises been exposed to contempt and odium and greatly injured. 10

The plaintiff claims $10,000 damages.

The plaintiff proposes that this action shall be tried in the City of Victoria.

Delivered the 1st day of February, 1886.

J. ROLAND HETT,
Langley Street, Victoria,
Plaintiff's Solicitor.

To MR. THEODORE DAVIE,
Langley Street, Victoria,
Solicitor for the Defendant.

RE-AMENDED STATEMENT OF DEFENCE.

Amended under order of Court dated the 27th March, 1886. Re-amended under order of Court 19th April, 1886.

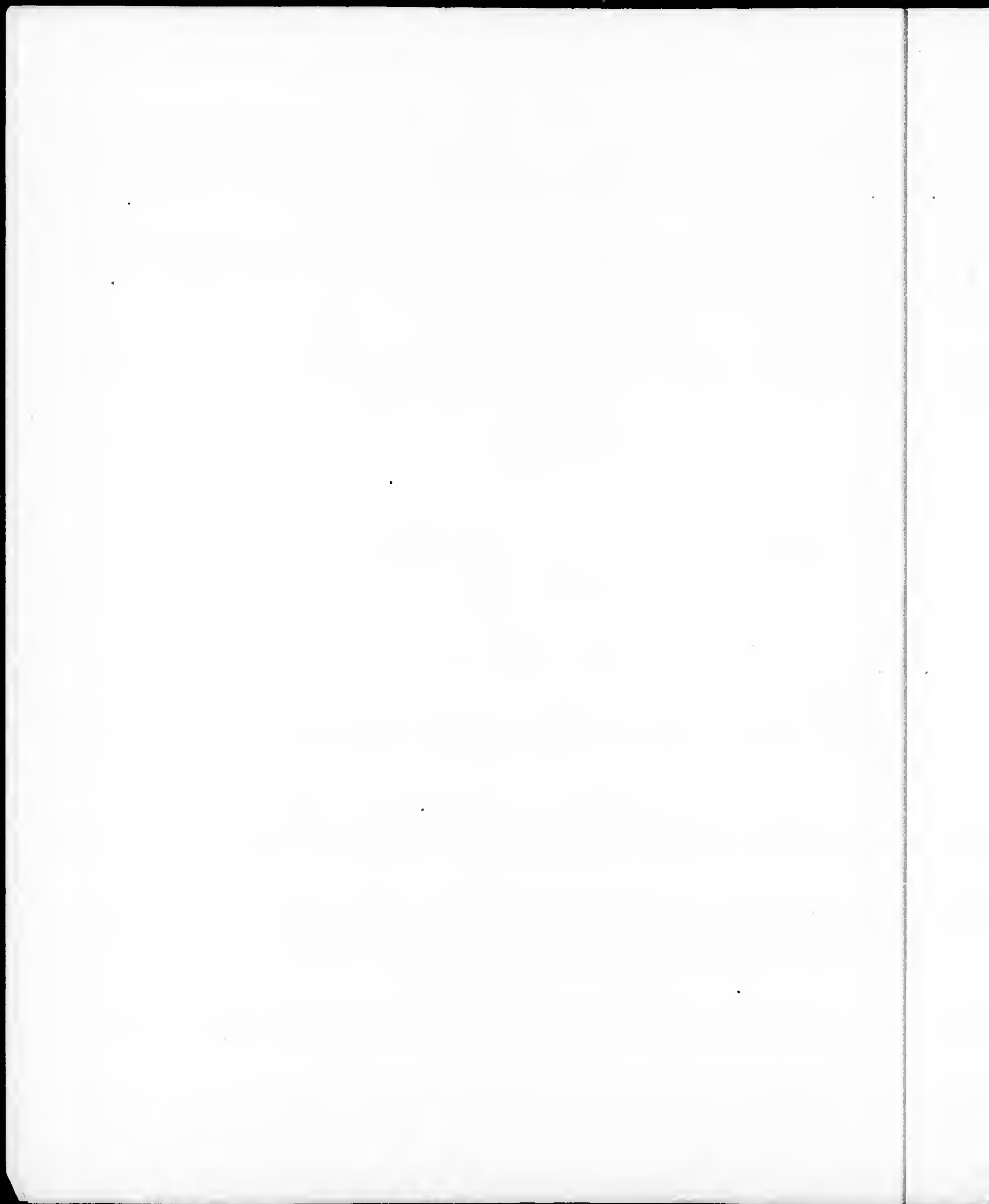
1. The defendant admits the allegations contained in paragraphs 1, 2 and 11 of the Statement of Claim. 20

2. The defendant has no knowledge as to the truth or falsity of the several allegations contained in paragraphs 3 to 10 inclusive of the said Statement of Claim, and does not admit them.

3. The defendant admits that he printed and published the words set out in paragraph 12 of the Statement of Claim; but he denies that he printed such words maliciously, or with the sense or meaning alleged, or with any other defamatory or actionable sense or meaning, and the Defendant denies that such words convey any defamatory meaning.

3*a*. The Defendant says that on the 7th day of November, 1885 a certain action styled McKenna *vs* McNamee was being tried at the Assizes for the County of Carleton, in the Province of Ontario, holden at the City of Ottawa, in the said Province, and that 30 Francis B. McNamee, the defendant in the said action, on the said 7th day of November gave evidence as a witness before the said Court.

4. The Defendant further says that that portion of the alleged libel which purports to be a report of a portion of the evidence of the said Francis B. McNamee in the said case of McKenna *vs.* McNamee, was prior to the publication alleged in said paragraph 12, printed



and published in a certain newspaper published at Victoria, British Columbia, and known as the "Daily Evening Post," as and purporting to be a true and correct account and report of part of the evidence taken in the said case of McKenna *vs.* McNamee, at the said sittings of Assize and Nisi Prius, in and for the County of Carleton, in the Province of Ontario, holden at the City of Ottawa aforesaid, and the Defendant *bona fide* believing the said portion to be a fair, accurate, and impartial report of that part of the said evidence, and conceiving it due to the Plaintiff's exalted position, that the charge conveyed by the said evidence should not be allowed to pass unrefuted, published the same *bona fide* and without malice, without unfavorable comment, but with comment shewing that the charge was not worthy of credit, and as proceedings of public interest and concern, and in the usual course 10 of the Defendant's business and duty as a public journalist.

5. The Defendant does not admit the allegations contained in paragraphs 13 and 14 of the Statement of Claim, and the Defendant denies that either the personal or judicial character of the Plaintiff has, by reason of the premises been injured or exposed to contempt and odium, as alleged in said paragraph 14.

Re-amended and re-delivered this 14th day of April A. D. 1886.

By THEODORE DAVIE,
Corner of Bastion and Langley Streets,
Solicitor for the Defendant.

## STATEMENT OF REPLY. 20

The Plaintiff joins issue upon the Defendant's amended Statement of defence.

Delivered the 1st day of May, 1886,

By J. ROLAND HETT,
Of Langley Street, Victoria,
Plaintiff's Solicitor.

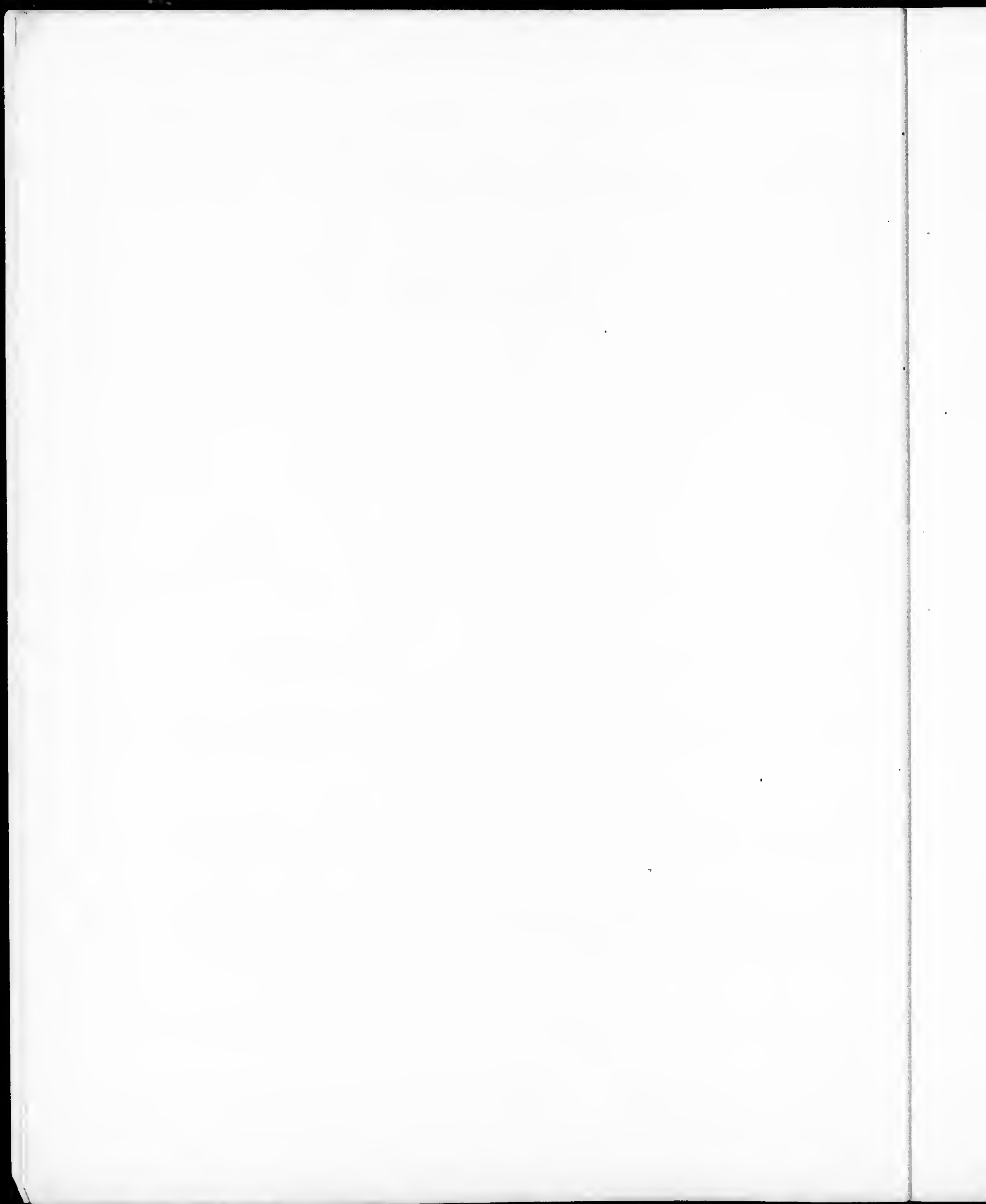
## ORDER FOR TRIAL.

Upon hearing Mr. Theodore Davie, Counsel for the Defendant, and Mr. Helmcken, Counsel for the Plaintiff and upon reading the affidavit of Henry D. Helmcken, sworn this day, I do order that the order made herein on the 23rd day of April, 1887, directing the trial of this action to take place on the 12th day of May, 1887, be rescinded, and that 30 the said trial be postponed and that the same do take place on Thursday, the 30th day of June, 1887, at the hour of 11 o'clock in the forenoon, before a Judge of this Court and a Special Jury, and that the Sheriff of Vancouver Island do summon a Jury accordingly.

And I do further order that the costs of and incidental to the said postponement and of this application be paid to the Plaintiff by the Defendant forthwith after taxation thereof.

"Matt. B. Begbie, C. J."

Dated this 25th day of April, 1887.



# DOCUMENTARY EVIDENCE.

EVIDENCE OF F. B. MCNAMEE TAKEN UNDER THE COMMISSION ISSUED ON THE 16TH DAY OF JULY, 1886.

The examination of Francis Bernard McNamee under the Commission issued herein, bearing date the 16th day of July, in the Year of Our Lord One thousand Eight hundred and Eighty-Six, and to me directed, taken before me, George Mountain Evans, the Commissioner therein named, at my office Equity Chambers, No. 20, Adelaide Street East, in the City of Toronto, this twentieth day of December, A. D. 1886,

GEO. M. EVANS,
Commissioner. 10

Present, R. T. Walkem, Esq., Q. C., for Plaintiff.

Francis Bernard McNamee, of the City of Montreal, contractor, being duly sworn, deposed as follows:

By Mr. Walkem, Q. C.

Q. 1. What is your name, and state your residence?

A. Francis Bernard McNamee, contractor, Montreal.

Q. 2. Are you a member of the firm of F. B. McNamee & Co., of Montreal, Contractors?

A. I was a member of that firm while it was in existence.

Q. 3. When was the firm established, and give fully the names of the persons 20 composing it?

A. I cannot say exactly without reference to my books, but I think it was in 1876. The other parties were Anthony Gilbert Nish and Captain Jarvis Wright. That was the constitution of the firm in 1880.

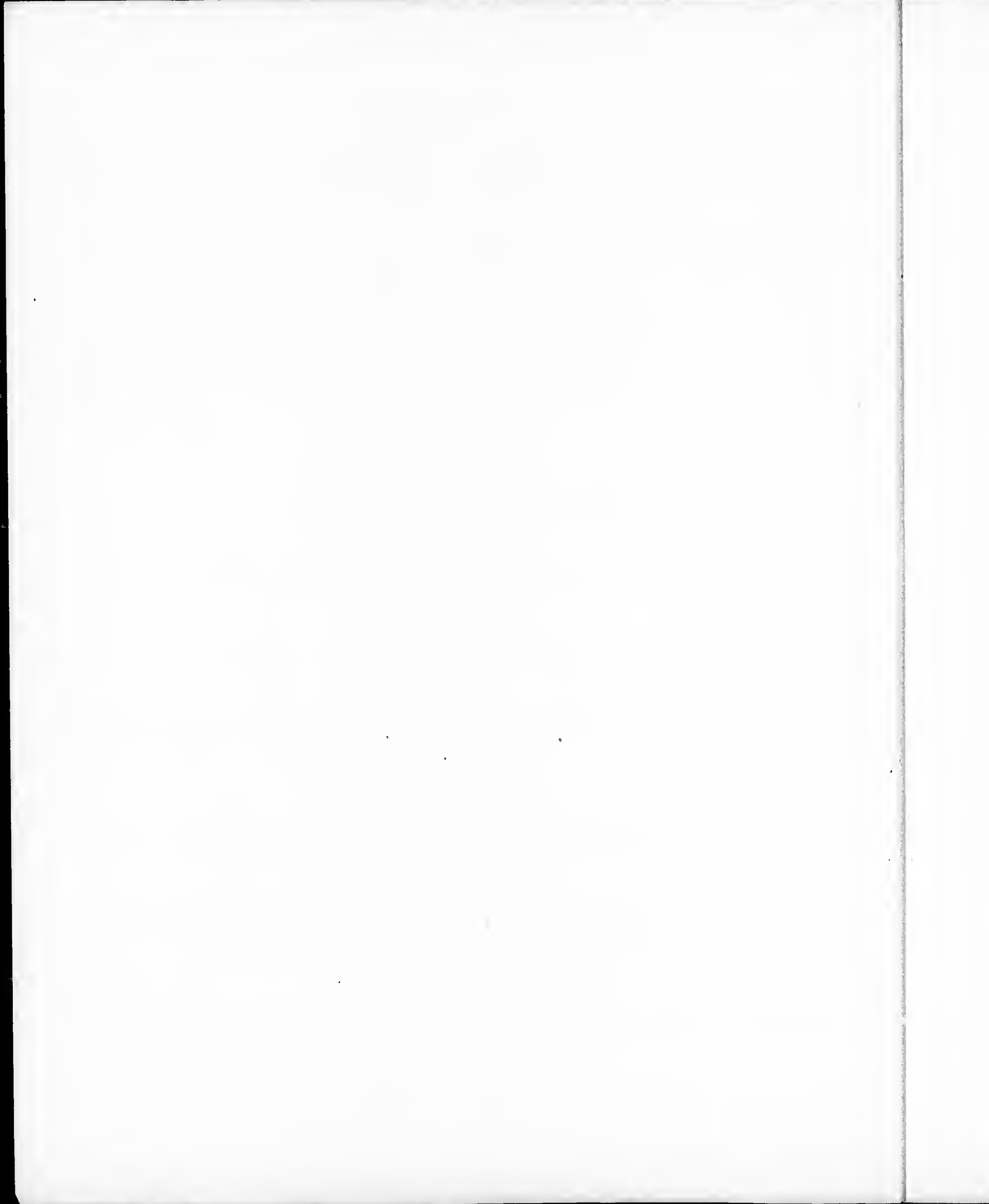
Q. 4. Did the firm, as so constituted, at any time in the year 1880 enter into any contracts with the above-named Plaintiff, George Anthony Walkem, as representing the Government of British Columbia, to construct a Drydock or Graving Dock at Esquimalt?

A. Yes.

Q. 5. Were such contracts made in writing, and, if so, were the originals thereof left in the possession of your firm or in that of the said Government? 30

A. Yes: I believe that we had one duplicate and the Government had another.

Q. 6. Look at printed Exhibits A. and B., now produced and shewn to you and respectively headed "Return to an Order of the Legislative Assembly, dated 16th April, 1886, for a copy of the contract entered into with Messrs. McNamee & Co. for the construction of the Esquimalt Graving Dock," and "Return to an Order of the Legislative Assembly for a copy of the contract between the Government and Messrs. McNamee for the construction of the Esquimalt Graving Dock," and purporting to be official copies, and also notarial copies of two contracts respectively dated February 24th, 1880, and October 4th, 1880, and made between the members of your firm of the one part and the said George Anthony Walkem as Chief Commissioner of Lands and Works of British Columbia of the 40



other part, and state whether you identify them as true copies of contracts entered into by your firm for the construction of the Graving Dock at Esquimalt: and if either of them is not a true copy of its original please state in what respect it is incorrect?

A. I look at the Exhibits A. and B., now produced and shewn to me, and I believe them to be true copies of the contracts of which they respectively purport to be copies.

Q. 7. Were you in Victoria, British Columbia, in 1880, and, if so, during what period of the year?

A. I was: in 1880, in the months of July, August, and September.

Q. 8 While in Victoria did your firm enter into any agreement of partnership, or otherwise, with persons resident in British Columbia, respecting the construction of the said Graving Dock, and, if so, what were the names of such persons? 10

A. Yes; with John Johnston Robertson, John Huntington, and John Nicholson, of the City of Victoria.

Q. 9. Was such agreement made in writing, and have you it? If not, who drew up the agreement and before whom was it executed? What was its date, and with whomwas it left or deposited by you, or by the other contracting parties? A. The agreement was in writing; I had a copy of it, and I think it is filed as an exhibit in the suit of McKenna *vs* McNamee. I think it was drawn by Mr. Robertson, who afterwards became a judge, and is now dead.

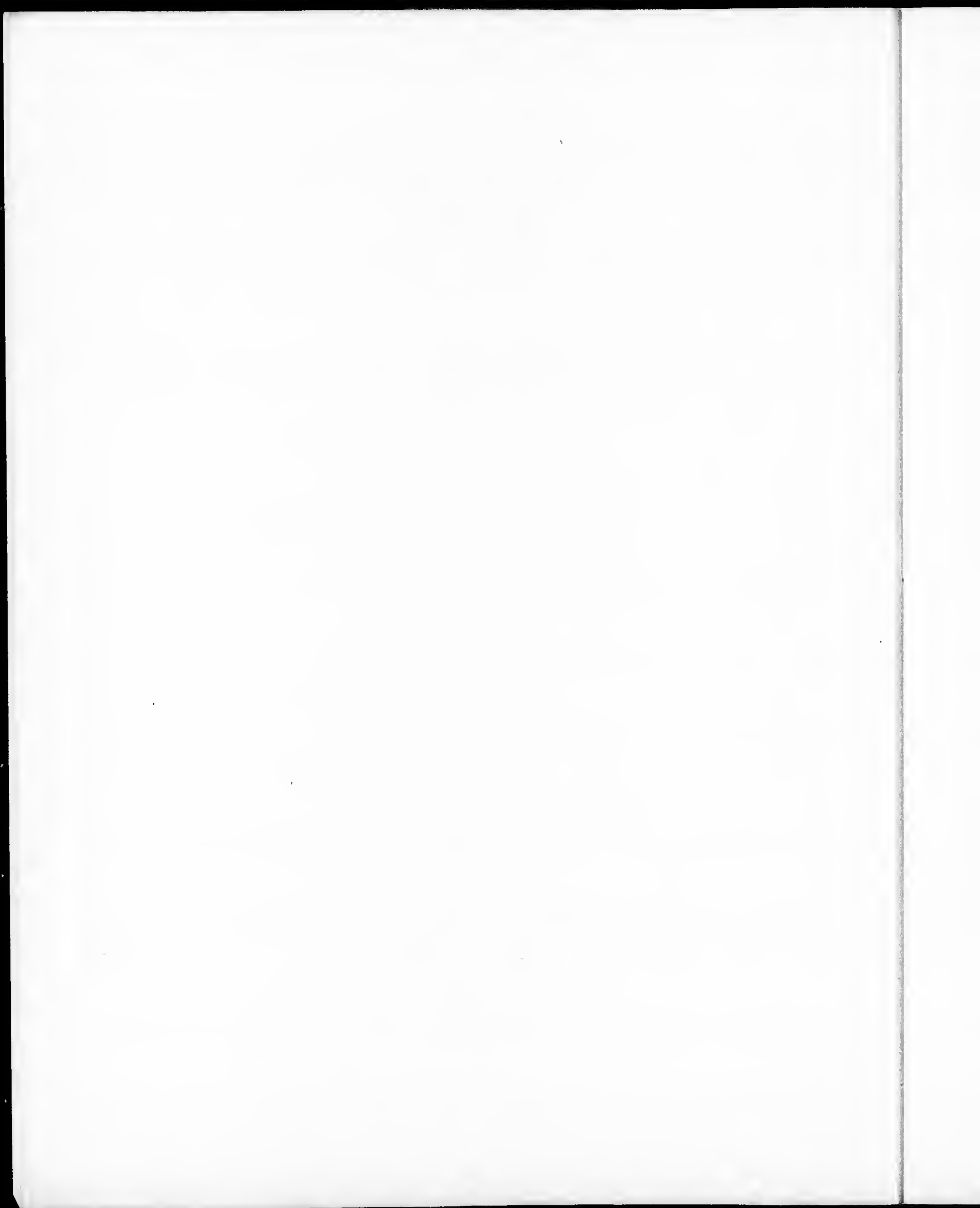
Q. 10. Did you know the late Mr. Justice Robertson when he was a practising barrister and solicitor in Victoria, and if so, can you state whether he had charge of the said agreement or not, or was in any (and, if so, in what) way professionally engaged in connection with its execution. 20

A. Yes; that was the gentleman I referred to in my last answer. Mr. Robertson had charge of one duplicate and was professionally engaged in connection with its execution.

Q. 11. Look at the document now produced and shewn to you marked "C" purporting to be a notarial copy of an agreement of partnership dated the 28th day of August 1880, and made at Victoria between the members of the firm of F. B. McNamee & Co. of the one part, and John Johnston Robertson, John Huntington and John Nicholson of the other part, and state whether or not such document or agreement was executed by your firm and the parties whose names appear thereto and in the presence of the witnesses whose names appear thereto? 30

A. I look at Exhibit "C" and I say that a document of which that appears to be a notarial copy was executed by myself and the other parties whose names appear thereto and was witnessed by the said Mr. Robertson.

Q. 12. Look at the "Daily British Colonist" dated Victoria, British Columbia, Friday, November 20th, 1885, now produced and shewn to you marked "D" and particularly at the article on the second page thereof headed "The McNamee-Mitchell Suit," and state whether you or your firm were defendant or defendants in the action of McKenna *vs.* McNamee mentioned in the article, and whether you gave evidence on oath as a witness at the trial thereof at Ottawa, and if you were defendant in such an action state the names of the 40



parties thereto, and the date of the trial thereof, and the place of trial? and the name of the presiding judge at the trial?

A. I look at exhibit marked "D," being a copy of the Daily Colonist newspaper published in Victoria, British Columbia, containing on the second page thereof an article headed "The McNamee-Mitchell Suit." My firm were the defendants in the suit of McKenna *vs.* McNamee therein mentioned. The defendants were myself, Nish and Wright before mentioned, and McKenna and Mitchell were the plaintiffs. The date of the trial was the seventh of November, 1885, and the place of trial was Ottawa, the judge being Mr Justice Rose.

Q. 13. Was there any other Mr. McNamee than yourself who gave evidence at the trial of the said action, or of any action at the same time betwe·n parties with similar names and at the same place and as to the same subject matter, viz., the Drydock contract out in British Columbia as indicated in the said newspaper article? 10

A. There was no other person of the name of McNamee than myself who gave evidence at the trial of the action, or any other action of the same name, or between the same parties tried at the same time and place.

Q. 14. Look at the portion of the article in the said newspaper which reads as follows: "In the sworn evidence of Mr. McNamee, defendant in the suit of McKenna *vs.* "McNamee, lately tried at Ottawa, the following passage occurs: 'Six of them were in "'partnership in the Drydock contract out in British Columbia, one of whom was the "'Premier of the Province.'" Did you ever make such a statement on oath as alleged with respect to the Premier of the Province? 20

A. I look at the article referred to in this question and contained in said Exhibit, and I say that I never made the statement on oath, either there or at any other time therein ascribed to me.

Q. 15. Look at the succeeding portion of the article which reads as follows: "The "Premier of the Province, at the time referred to, was the Hon. Mr. Walkem now a Judge "of the Supreme Court," and state whether Mr. Walkem as above described, or any person of his name, ever was interested with you or your firm or with any of the members thereof in Eastern Canada, or to your knowledge with any of the members thereof in British Columbia, directly or indirectly, or by any secret arrangement or understanding on his, your or their part, in any pecuniary advantage arising out of or connected with the Graving Dock contract or contracts already referred to? 30

A. I look at the succeeding portion of the article referred to in the question, and I say that he never was.

Q. 16. Did you ever on any occasion state, on oath or otherwise, or suggest, or have any reason for suggesting, that the present Plaintiff was in any way interested with you or your firm in the said contract. And if the Plaintiff was in any way interested in the said contract with you or your firm state what such interest was, and shew where and how he acquired it, and how long he held it?

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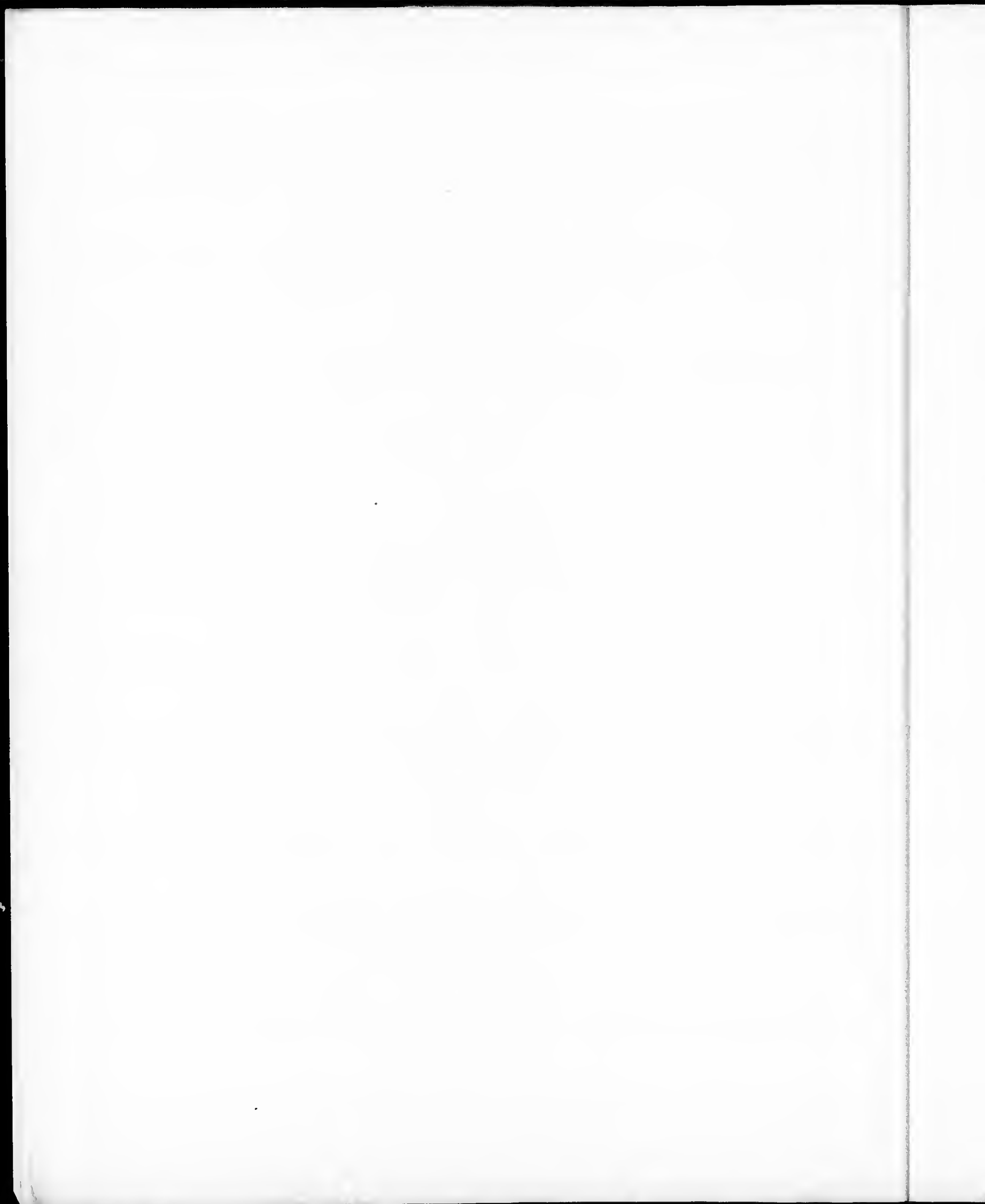
A. Certainly not; but I have stated that he forced those British Columbians as partners on to our Montreal firm for the purpose of retaining political influence in British Columbia.



Q. 17. On giving evidence on oath at the trial of the said action McKenna *vs.* McNamee did you state that six of you were in partnership, and when referring to the said Graving Dock contract, and if so, did you state the names of such persons?

A. Yes.

Q. 18. What names did you mention as composing the partnership of six?

A. Myself, Nish, Wright, Robertson, Huntington and Nicholson.

Q. 19. Look at the Daily Evening Post newspaper dated at Victoria, Wednesday, November 18th, 1885, now produced and shewn to you marked E, and particularly at the fourth column of the third page thereof headed "Esquimalt Drydock, the great case of McKenna *vs.* McNamee," and state whether or not you are the person referred to as defendant?

A. I look at the exhibit E the paper referred to. I see the article therein contained headed "Esquimalt Drydock, The Great Case of McKenna *vs.* McNamee." I am the person therein referred to as the defendant McNamee.

Q. 20. Look at the printed matter beneath the said heading in the same column purporting to be a report of the trial of the said case, and state with respect to the said report or pretended report, firstly, whether the date, viz., Ottawa, Nov. 9th, at the head of it is the correct date or not of the said trial, and if not, what was the date of the said trial? secondly, Was a jury empannelled for the trial as is alleged in the said report or pretended report? thirdly, Did you make the statement on oath attributed to you in the said report or pretended report of your evidence at the trial, viz., "that six of them were in partnership in British Columbia, one of whom was at that time premier of the province"? and if you did not make such statement, what statement did you make, and did you give the names of the six persons, and if so, what names did you mention?

A. I look at the printed matter beneath the heading of the said article purporting to be an account of the trial and I say: Firstly, That I think that the seventh of November was the date of the trial; secondly, That jury was empannelled but was discharged by the judge; thirdly, That I did not make the statement attributed to me, namely, "six of them were in partnership out in British Columbia, one of whom was at that time premier of the province." I have already given the names of the six who were partners and that is the statement that I made at the time.

Q. 21. Is the said report of the said trial a full, faithful and accurate one, and if not, in what respects besides those already mentioned by you is it incomplete, inaccurate or garbled?

A. I look at the report referred to, and I say it is neither full truthful nor accurate. An accurate report could not be given without publishing the whole of the evidence.

Q. 22. Did you see the Defendant when he was here about a month ago?

A. Yes; I met him at the Windsor Hotel, at Montreal.

Q. 23. Did you have any conversation with him with regard to the subject matter of this action?

A. Yes.

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Q. 24. How did he justify his action in putting the articles complained of in his paper?

A. He said it was copied from the "Ottawa Free Press," and that the first he saw of it was in print in his paper. I understood him to say that it was put in by some of his men, and that if Mr. Walkem had sent him my telegram and letter he would have published them willingly and that would be the end of the matter. I told Mr. Higgins that I had never stated as it was in the "Free Press;" that I had been to that paper and got them to contradict it. I believe he said that he had never seen the contradiction or that he would have given publicity to the contradiction. I told him that what I stated was that those three men in British Columbia were forced upon me by Mr. Walkem for his own 10 political ends. I told him that Mr. Walkem had telegraphed me and written me on the subject and that I had answered him. I told my book-keeper to give Mr. Higgins access to the telegram and letter that I had written.

Q. 25. There was an editorial article in the "Colonist," did he say how that came into his paper?

A. I have no knowledge of anything being in his paper but what was copied from the "Free Press." His justification extended to what he had copied from the "Free Press"

F. B. McNamee.

Geo. W. Evans,

Commissioner 20

Upon the application of the Plaintiff's counsel who stated that Mr. M. F. Johnston, whom he wishes to examine as a witness under the said Commission, is engaged to-day at Sarnia as Court stenographer at the sittings of the Chancery Division of the High Court of Justice there, I hereby adjourn the examination of witnesses under the said commission to the thirtieth day of December instant, at the hour of eleven o'clock in the forenoon, at my said office in Equity Chambers No. 20, Adelaide Street East, in the City of Toronto.

Dated December 20th, 1886.

Geo. M. Evans,

Commissioner.

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Evidence of Milton Fisk Johnston Taken Under the Commission Issued Herein 30 on the 16th Day of July, 1886.

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The examination of witnessess under the said Commission continued before me, Geo. Mountain Evans, the Commissioner therein named, at my office, Equity Chambers, No. 20, Adelaide Street East, in the City of Toronto, this thirtieth day of December, A. D. 1886.

Geo. M. Evans,

Commissioner.

Present: Mr. Boomer instructed by Mr. Walkem, Q. C., for Plaintiff.

Milton Fisk Johnston, of the City of Toronto, sworn. Examined by Mr Boomer.

Q. 1. What is your name and where do you reside?

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A. My name is Milton Fisk Johnston, and I reside at No. 6, Harbord Street, in the City of Toronto, in the Province of Ontario.

Q. 2. Were you acting as reporter or official reporter to the High Court of Justice or to any Courts of Assize in October in the year 1885?

A. Yes; and I was acting as official reporter at the Court of Assize held at Ottawa in the fall of 1885, and officiated there as such from the morning of the seventh day of November, 1885, until the end of said Assize. The said Assize had opened on the fifth of the said month of November, and had been attended by another reporter for the first two day's sittings thereof.

Q. 3. Do you remember an action between one McKenna and one Mitchell, jointly, 10 against F. B. McFamee & Co., shortly styled McKenna *vs.* McNamee, being tried at the Court of Assize held at Ottawa, in November, 1885, and, if so, did you make the report of the said trial?

A. Yes; I remember that action being tried, and I did make a report of the trial.

Q. 4. Have you your notes of the trial? and are they in long or shorthand.

A. I have my notes of the trial. I took them at the trial in shorthand and have them now both in their original form and also extended.

Q. 5. If you took the said notes in shorthand, have you extended them?

A. Yes.

Q. 6. Look at Exhibit F., now produced and shewn to you and headed as follows: 20 "In the case of McKenna *vs.* McNamee, tried at Ottawa, Nov. 7th, 1885, Hon. Mr. Justice "Rose presiding, the following is the evidence of the defendant, Francis B. McNamee," and state what the said exhibit is, and also look at the certificate at the end of the said exhibit, and state whether it is correct and whether the signature "M. F. Johnston" is yours or in your handwriting?

A. I look on Exhibit F. referred to in the above question. It is an extended copy of my shorthand notes of the evidence of the defendant, Francis B. McNamee, in the suit of McKenna *vs.* McNamee taken at the trial thereof. The certificate at the end of the said exhibit is correct, and the signature "M. F. Johnston," appended thereto, is mine and is in my handwriting. 30

Q. 7. Did you, in making and taking down the original notes of the evidence of the said Francis Bernard McNamee in shorthand, make them and take the evidence down in your own handwriting, and as fully, completely and accurately as was possible?

A. Yes.

Q. 8. When and where did you make the said shorthand notes?

A. At the trial in the court house at Ottawa, while the evidence was being given.

Q. 9. Is the Exhibit F., referred to, a true and correct copy of the said notes, as extended by you in the type written form in which the exhibit appears?

A. Yes.

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Q. 10. Does the Exhibit F. truly represent all the evidence given by the said Francis B. McNamee?

A. Yes.

Q. 11. Why is the said exhibit paged 85 on its first page?

A. It is paged 86 on its first page—not 85; and the reason therefor is that the previous pages of the full official copies furnished by me for use in the Divisional Court are occupied with the evidence of the other witnesses examined at the trial before Mr. McNamee was called and the proceedings had before the defendant's evidence was entered on.

Q. 12. How many pages, including those in Exhibit F., does your full report of the whole case, if you have made one, occupy; and are the extra pages of the same size, as those in Exhibit F? 10

A. I made a full report of the whole case, and it occupied, I think, 227 pages; the extra pages are of the same size, or nearly so, as those in Exhibit F.: perhaps some of them might be a quarter of an inch shorter.

Q. 13. Has not one of the Divisional Courts of the said High Court of Justice, and, if so, which Court, used and adopted your report of the said trial on a motion before it in respect of the judgment given at the said trial, and did not the evidence of Francis B. McNamee, as it appears in the said Exhibit F., form part of the said report so used and adopted. 20

A. I furnished a report of the said trial for the use of the Divisional Court, and I understand and believe that my said report was used and adopted by the Queen's Bench Divisional Court of the said High Court of Justice on the motion before it in respect of the judgment given at the trial: and I know that the evidence of the said Francis B. McNamee, as it appears on Exhibit F., formed part of the report so furnished by me.

Q. 14. State anything further that you know about the said report or the proceedings before the Divisional Court, and when they took place?

A. I know nothing further that I consider material about the report, and I know nothing about the proceedings before the Divisional Court except what I have heard, as I was not present, but I believe that they took place in Hilary term, February, 1886. 30

M. F. JOHNSTON.

GEO. M. EVANS,

Commissioner.

EVIDENCE OF CHARLES WILLIAM MITCHEL TAKEN UNDER the COMMISSION ISSUED HEREIN ON THE 23RD DAY OF MAY, 1887.

Before me, William Drummond Hogg, the commissioner appointed by commission dated at the City of Victoria in the Province of British Columbia on the 23rd day of May, A. D. 1887, and hereto annexed, appeared Theodore Davie, Esquire, aforesaid as Counsel representing the defendant David Williams Higgins, and J. J. Gormully, of the said City of Ottawa, Barrister-at-Law as Counsel representing the plaintiff herein on the 3rd day of 40

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June, A. D., 1887, at the hour of four thirty o'clock in the afternoon, at my office No 83½ Sparks Street, in the said City of Ottawa, and after having taken the oath prescribed by the said Commissioner, the said oath being hereto annexed, I proceeded then and there with the execution of the said commission as follows:

I first appointed Mr. Frederick Griffith Lear, of the said City of Ottawa, stenographer, my clerk under the said commission, and the oath therein prescribed and also hereto annexed, was administered to him by me.

Charles William Mitchell, of the City of Ottawa, a witness mentioned in the Commission, who, being duly sworn as prescribed in the said Commission, deposed as follows.

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### Direct Examination by Mr. Davie. 10

Q. What is your name?

A. Charles William Mitchell.

Q. Are you the proprietor of the newspaper published in the City of Ottawa called the "Ottawa Free Press?

A. I am.

Q. How long have you been proprietor of such paper?

A. For a number of years—I don't know just how long.

Q. Mr. Mitchell, you were the proprietor of the Ottawa Free Press on the 9th November, 1885?

A. I was. 20

Q. Look at the paper now produced and marked "A" (paper produced) and state whether that is a copy of the Ottawa Free Press issued on the 9th November, 1885?

(Mr. Gormully here objects to the reception of the newspaper marked "A" as evidence in the case. The commissioner allows the question subject to Mr. Gormully's objection.)

A. I decline to answer.

Q. On what ground do you decline to answer, Mr. Mitchell?

A. Well, it is out of my knowledge that it is really what you say it is, and I have no knowledge that it is so, and it might affect or incriminate myself to say so.

Q. Then you decline to answer because you might incriminate yourself?

A. I have answered that. 30

Q. Have you looked at this document marked "A"?

A. Oh, yes; I have looked at it.

Q. Do you identify it?

A. No, sir.

Q. Will you swear that that is not a copy of the Ottawa Free Press issued on that date?

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A. I have no knowledge either way.

Q. Have you any reason to believe that the document marked "A" now in your hands is not the document which it purports to be?

A. The best of all reasons, the want of knowledge.

Q. Will you swear that this is not a copy of the Ottawa Free Press issued on the 9th November, 1885?

A. I have already declined to answer that.

Q. Were you the proprietor of the Ottawa Free Press on the 9th November, 1885?

A. I was.

Q. Was a copy of the Free Press issued from your office on that date? 10

A. Yes.

Q. Do you know Mr. Francis Bernard McNamee?

A. I do.

Q. Was Francis Bernard McNamee examined as a witness at the Carleton assizes on or about the 9th November, 1885 in the case of McKenna *vs.* McNamee?

A. I believe he was.

(Mr. Gormully objects to this question and desires to ask whether Mr. Mitchell was present at the assizes.)

Q. Had you any conversation with Francis Bernard McNamee at any subsequent date in relation to the evidence which he then gave? 20

(Mr. Gormully here objects to the evidence of conversation between Mr. Mitchell and Mr. McNamee. The Commissioner allows subject to Mr. Gormully's objection.)

A. I had.

Q. In consequence of a conversation with Mr. McNamee in reference to that evidence did you on December 16th, 1885, or at any other and at what date, publish in the Free Press anything in relation to Mr. McNamee's evidence?

Mr. Gormully here objects to the question. Commissioner allows the question subject to Mr. Gormully's objection.

A., I will state what Mr. McNamee said.

(Mr. Gormully further objects to the statement being made which the Commissioner 30 allows subject to the objection of Mr. Gormully.)

The witness then proceeds with the statement as follows:

Mr. McNamee came into my office one day and said he had been incorrectly reported in his evidence at the assizes. He said he had not seen the report himself, but had received a telegram from British Columbia asking if he had given such evidence as was reported. He said to me a mistake had been made, and he wished to have it corrected. I told him I had no knowledge of it, but sent him to the man whom I believed was the reporter at the assizes, and gave him his correction and it was so published.

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Q. Look at the document "B" and see if that is the correction made under Mr McNamee's direction; that document is the Ottawa Free Press of the 16th, December, 1886, and state whether what is therein contained represents the explanation which Mr. McNamee desired you to put in.

A. Mr. McNamee the same evening of the day that he had spoken to me, said that the correction was published as he had desired it, and that its publication was quite satisfactory to him.

(Mr. Gormully here further objected The commissioner allowed subject to Mr. Gormully's objection.)

Cross-examined by Mr. Gormully. 10

xQ. Were you present at Mr. McNamee's trial? A. No Sir.

xQ. You do not know what he swore to? A. No, sir.

xQ. Except from hearsay? A. Except from hearsay.

xQ. When you had a conversation with Mr. McNamee and he desired to correct his evidence, you referred him to the reporter? A. Yes, to the reporter.

xQ. He did not state to you in what way he wished it corrected? A. He may have done so.

xQ. But you don't remember? A. I guess he did.

xQ. Do you remember what he said to you from your own memory? A. He said he had a telegram from British Columbia, stating that it had been published there that he 20 had said that the premier was a partner with him in a contract. He said I did not say so, but I said that he forced me to take others into partnership with me, which was just about the same thing, and he "damned" Walkem up and down. This was jocularly said by Mr. McNamee.

xQ. You have never been in British Columbia? A. No, sir.

(Signed) C. W. Mitchell.

Ottawa, 3rd June, 1887.

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Evidence of S. Parker Tuck Taken Under the Order Made Herein on the 18th May, 1887.

Examination of Samuel Parker Tuck under order of 18th May, 1887. 30

Friday, May 20th, 1887.

Samuel Parker Tuck, being duly sworn, saith:

I know D. W. Higgins, the defendant in this action. I saw an article in the British Colonist late in 1885, said to be the article complained of. I was in Mr. Higgins' editorial room the night preceding the publication of the article. Mr. Higgins, the editor of the Colonist, was present then, the defendant in this action, and Mr. Robert Dunsmuir. We had been conversing; Mr. Higgins was sitting at his desk; Mr. Dunsmuir either sitting or standing near him, and I somewhat further away. Mr. Dunsmuir and I were reading,

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Mr. Higgins apparently overlooking newspapers.

Mr. Drake objects to any evidence being given of any conversation that took place between the parties that were present at that occasion.

Mr. Higgins then speaking aloud, said: "Listen to this," and he read to us the paragraph that next morning appeared in the Colonist concerning McNamee's evidence concerning Mr. Justice Walkem; and as he finished reading he dropped the paper on his desk, saying: "What a cursed shame this is." I said: "Why, you don't believe it, do you?" and then I continued: "I know nothing about Mr Walkem politically, but since he has been on the bench even his political enemies admit that he has made a splendid judge. Mr. Higgins said: "Certainly I do not believe it, but ought not Mr. Walkem to have an 10 opportunity of denying it?" Mr. Dunsmuir joined in the conversation and said that although he and Mr. Walkem had never been politically very friendly, he did not believe he would do anything of the kind. He said that Mr. Walkem was entirely too shrewd a man to put himself to that extent in any man's power. Meanwhile Mr. Higgins was writing at his table, and the propriety of giving Mr. Walkem an opportunity of denying this article was discussed. It was suggested, by myself I think, that the article might be read by many of Mr. Walkem's friends and not seen by himself, and I thought might injure him if not contradicted. Mr. Higgins said yes; he ought to be given an opportunity of denying it. I said how could it be done? that Mr. Walkem being a Judge of the Supreme Court could not condescend to enter into a newspaper correspondence with a man like 20 McNamee. No, said Mr. Higgins, he need not do that; his simple denial would be worth more than the oaths of a dozen McNamees. Mr. Higgins read us the article which appeared the next morning in the Colonist. The tenor of the conversation was altogether friendly and complimentary to Mr. Walkem, and condemnatory of the testimony as published.

By Mr. Drake: I know Mr. F. B. McNamee personally, (slightly); never had any business relations with him. I have been six years in the province; I have always taken more or less interest in politics. I have taken a slight interest in British Columbia politics. I was always opposed to the Walkem and Beaven governments.

Q. Have you ever written any newspaper articles in opposition to the Walkem and Beaven governments? 30

A. I do not know but what I may have; in fact I have. I never wrote any articles with reference to the Drydock in any form. I did not see the paper from which Mr. Higgins read the paragraph. I do not know what paper it was.

Examined by Mr. Bodwell: The articles I mentioned as having been written by me against the Walkem and Beaven government were principally written during the late Dominion and local elections and previously, those written previous to the publication of the article in question were few in number, and were political and never personal.

(Signed) SAMUEL PARKER TUCK.

Signed by the above-named Samuel Parker Tuck in my presence, the same having first been read over to him. 40

(Signed) JAMES C. PREVOST,

20TH MAY, 1887. R.

INTERROGATO

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INTERROGATORIES EXHIBITED BY THE PLAINTIFF AND THE DEFENDANT'S ANSWERS THERETO.

Interrogatories on behalf the above-named plaintiff for the examination of the above-named defendant, and

The answer of the above-named defendant to the interrogatories for his examination delivered by the above-named plaintiff.

1. What is the date of the "Ottawa Daily Free Press" to which you refer in your Statement of Defence, and from whom and when did you receive the said paper, or when and where did you see or read it, or the alleged report therein of the trial of McKenna *vs.* McNamee, as referred to by you

A. The "Ottawa Daily Free Press," referred to in my Statement of Defence, is dated 10 the 10th day of November, 1885. The first time I saw the "Ottawa Free Press" of the 10th November aforesaid, was at my Solicitor's office after the commencement of this suit.

2. Is it not a fact that a newspaper called the "Ottawa Daily Citizen" has been published at Ottawa, in Ontario, for at least twelve months last past, and has it not been one of your exchanges by mail either as a Daily, Semi-Weekly or Weekly paper during that period, and, if so, state which of the said editions you have received as such exchange from Ottawa?

A. It is a fact, to the best of my knowledge and belief that the "Ottawa Daily Citizen" for twelve months last past has been published at Ottawa, Ontario; but it has not, either as a Daily, Semi-Weekly or Weekly paper, at any time during that period been one 20 of my exchanges by mail or otherwise, and I have had no Ottawa exchanges for at least twelve months prior to the commencement of this suit.

3. Is it not a fact that about the time, as you would have it understood by your Statement of Defence, that you read the matter in the "Ottawa Daily Free Press," you received by mail, or otherwise, and as an exchange, or otherwise, a number of the "Ottawa Daily Citizen" or a number of some other edition of the said journal of the 9th November, 1885, or of some other, and of what date, which contained what purported to be a report of the said trial of McKenna *vs.* McNamee?

A. In answer to the third interrogatory, as to what I would have understood, I refer to the fourth paragraph of my Statement of Defence, and I say that I did not at 30 any time before publication of the matter complained of in this action, receive by mail or otherwise, or as an exchange or otherwise, a number of the "Ottawa Daily Citizen" or a number of some other edition of the said journal of the 9th November, 1885, or of any other date containing what purported to be a report of the said trial. The source from which I gathered the matter complained of was the "Victoria Daily Post" in its issue of November the 18th, 1885, which gave what purported to be an account of the trial. After the commencement of this suit I ascertained that the "Post's" article had been taken from the "Ottawa Free Press" and I instructed my Solicitor to procure the original report in the last-mentioned newspaper.

4. If you cannot state in reply to the last interrogatory whether you did, or did 40 not, receive the said "Ottawa Daily Citizen" or other edition of the said journal at the time mentioned, did you, before you published the article complained of in this action, or at any other time, and, if so, when, ascertain, or endeavor to ascertain, and, if so, from

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whom or in what manner, whether any number of the said "Ottawa Daily Citizen" or of its other editions, containing a report of the said trial of McKenna vs. McNamee had been received by any person on your behalf or had been received by or at your office or place of business, or had been received by or at any of the several newspaper offices in this city, or in New Westminster, Nanaimo, or Kamloops, or had been received by or at any of the public libraries or reading rooms in this city, or in any of the places above-mentioned, or had been received by any person in this city as a subscriber or otherwise?

5. Did you not print and publish in your newspaper, the "Daily British Colonist," on several days during the month of March, 1882, under the title of "The Dry Dock Enquiry," a report of evidence then taken by and before a Select Committee of the Legislative Assembly of this Province with respect to the Esquimalt Graving Dock, and with respect to the contract made by the Government with F. B. McNamee and Company as contractors for the work; and did you not under the headings hereinafter stated print and publish in your said newspaper, on the eleventh day of March, 1882, certain evidence given on oath by the plaintiff (then being Chief Commissioner of Lands and Works) with respect to the said dock contract; which headings and evidence were and are as follows: 10

"THE DRY DOCK ENQUIRY."

"SIXTH DAY."

"EVIDENCE OF THE CHIEF COMMISSIONER." 20

WEDNESDAY, MARCH 8.

"Q. Have you any interest direct or indirect in the contract?

"A. I have not nor never had in this or any other contract in connection with any government matter. McNamee & Co., besides, have been threatened, as I "(have)" already stated and shewn, by telegram of September, '81, with the loss of their contract, and the $10,000 deposit, as well as the $25,000 security to which they are parties with the bondsmen. I am glad of this opportunity of answering this on oath, as slanderous statements utterly without foundation have been openly made to members of the House, as I am informed, and to members of the community here that I was interested with McNamee & Co. These statements I declare on oath to be false and, as I have reason to believe, malicious." 30

A. I find upon reference to the files of my newspaper that on several days during the month of March, 1882, there was published therein reports of the evidence taken before a Select Committee of the Legislative Assembly of this Province with respect to the Esquimalt Graving Dock, and that on the 11th day of March, 1882, the matter quoted in the said interrogatory appeared in the edition of the "Daily Colonist" of that date as report of portion of the said evidence, but I am not aware that my attention was ever called to that portion of the evidence in the said enquiry until the interrogatory I am now answering, and at the time of the publication of the matters in question in this suit it was not present to my mind that the said evidence was ever given by the plaintiff or that it had been published in the newspaper. 40

6. If you have not printed or published the above matter on the 11th March, 1882,

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did you print and publish it in your said newspaper on any other day, and, if so, on what day?

7. Since the publication of the said evidence have you had any good or valid reason for disbelieving the said evidence, and is it not a fact that you have believed and do believe that the said evidence, so far as it states that the plaintiff never had any interest with F. B. McNamee and Company in the dock contract referred to, was and is strictly true?

A. In answer to paragraph 7, I say that I have no reason to doubt the correctness of the said evidence and I believe it to be strictly true, and I further say that the article complained of answers this interrogatory. 10

The above interrogatories were delivered the sixth day of March, 1886.

J. ROLAND HETT,

Plaintiff's Solicitor.

And the following is a copy of the jurat appended to the answers thereto:

"Sworn before me at the City of Victoria, B. C., this 31st day of March, A. D. 1887. } "D. W. HIGGINS."

"W. J. TAYLOR,"

A Commissioner for taking affidavits to be used in the Supreme Court of British Columbia.

## CORRESPONDENCE. 20

BETWEEN THE PLAINTIFF AND MCNAMEE.

"EXHIBIT F."

KAMLOOPS, B. C. NOV. 23RD, 1885.

SIR:

A copy of the "Daily Evening Post" of November 18th inst., which has been sent to me, contains a report of a recent trial between you and one McKenna at Ottawa, in which you are alleged to have sworn as follows:—"Mitchell applied to me for payment "of his claim. I told him to give the amount properly drawn up and submit it to me, "as it would be better for me to pay it than to have lawsuits. I had a deed of dissolu- "tion of partnership prepared. Six were in partnership out in British Columbia, one 30 "of whom at the time was the premier of the Province."

Now one of the local newspapers points me out as evidently the premier meant—why, I cannot tell. I wish to know 1st whether you did make such a statement on oath; and 2ndly if you did, who was the premier referred to. As you must remember, I was virulently attacked, here, without reason, as being a silent partner of yours in the Dock contract, and this too by your own local partners and their unscrupulous friends or assistants. I emphatically stated before a Committee of the House of Assembly on Dock matters that, beyond official interest in the dock work, as the then C. C. of Lands

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and Works, I had no interest whatever in it. I said specifically that I never was directly or indirectly interested with you or your partners in any pecuniary or other advantage whatsoever connected in any way with the dock or any other work.

My evidence in this respect was published at the time in the daily papers here, and may have been reprinted elsewhere for all I know; at all events you telegraphed to me from Montreal some time afterwards, to the effect that you had read this evidence, and that you could endorse every word of it as being strictly true. I had, as you are aware, no correspondence with you on the subject, and never asked you to support or endorse my statement in any way. Nor did I consider it necessary to do so, as it was the truth and incapable of contradiction. Your telegram was wholly voluntary on your part, and was, as I considered, a very manly one, in view of the fact that I had been, and was then, threatening to cancel your contract and forfeit your deposit of $10,000. For these reasons I cannot conceive that the statements attributed to you were made, or putting it briefly, that you committed yourself to a wilful and deliberate falsehood on oath as reported. I shall be glad of an immediate answer to this letter, as I cannot permit the matter to stand as it does, so far as I am concerned.

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I remain, yours truly,

GEO. A. WALKEM.

F. B. McNAMEE, ESQ., MONTREAL.

"EXHIBIT A."

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*Telegram from Geo. A. Walkem to F. B. McNamee.*

To F. B. McNAMEE, MONTREAL, 28TH NOV., 1885.

From Kamloops, B. C., 27th.

Local newspapers report that in McKenna's action against you at Ottawa, you swore as follows: Six of us were in partnership in the Dock contract, in British Columbia, one of whom was premier of the province, disbelieving you committed such perjury, telegraph immediately what you did swear, will pay reply.

(Signed) GEO. A. WALKEM.

"EXHIBIT B."

*Telegram from F. B. McNamee to Hon. G. A. Walkem.*

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To HON. G. A. WALKEM, MONTREAL, DEC. 10TH, 1885.

Kamloops, B. C.

Have just returned to town to-day. Deny most emphatically such as local papers report. Consider your insinuations as to perjury most impertinent. Will answer your letter more fully.

(Signed) F. B. McNAMEE.

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"EXHIBIT C."

*Telegram from Hon. Geo. A. Walkem to F. B. McNamee.*

To F. B. McNamee, 85 Cathedral St., Montreal, Dec. 11th, 1885.

From Victoria, B. C.

See Ottawa Free Press, ninth and semi-weekly twelfth Nov., also reporting, you swore premier here was partner Dock contract, you now telegraph that report is untrue, why not have stated this publicly at the time and protected me from unwarrantable defamatory attacks. I have every reason to indignantly complain.

(Signed) Geo. A. Walkem.

"EXHIBIT D." 10

*Telegram from F. B. McNamee to Hon. G. A. Walkem.*

To Judge G. A. Walkem, Montreal, Dec. 12th, 1885.

Victoria, B. C.

Have seen Free Press to-day, report false. Will write them to that effect. See Ottawa Citizen of tenth. Will mail you one. First intimation had of the charge was from yourself by your telegram of 28th. Nov. Your Attorney General has applied for official report of evidence.

(Signed) F. B. McNamee.

"EXHIBIT E."

*Telegram from Geo A. Walkem to F. B. McNamee.* 20

To F. B. McNamee, Montreal, Dec. 16th, 1885.

From Victoria, B. C.

Please telegraph when Attorney General applied for official copy, and through whom and to whom. Be particular awaiting promised letter.

(Signed) Geo. A. Walkem.

"EXHIBIT G."

*Letter from F. B. McNamee to Hon. G. A. Walkem.*

Hon. G. A. Walkem, Judge, Montreal, Dec. 16th, 1885.

Kamloops, B. C.

Dear Sir:—I beg to acknowledge yours of the 23rd Nov. drawing my attention to 30 certain reports in some of the local papers as you say the Daily Evening Post, in which I am accused in giving my evidence at Ottawa in McKenna vs. McNamee, of saying under oath that you were a partner in the firm of F. B. McNamee & Co. in the contract for construction of the Graving Dock at Esquimalt &c.

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I have been away from Montreal from that time in the West, but on my return here your telegram of 28th Nov. was laid before me, when I lost no time to reply to it, which you have no doubt duly received.

In reference to the first question in yours of 23rd ulto. you ask

"Whether you did make such a statement on oath, and secondly, if you did, who was the premier alluded to."

In answer to the above questions which can be answered together, I give it a most emphatic denial, viz: that I ever asserted on oath or insinuated even that you were interested pecuniarly in the Graving Dock as far as I know or any other contract.

But what I did say, was, that I was induced by you to enter into certain arrangements with three gentlemen of British Columbia, the result of which has proven to me very disastrous, you assured me that if these three gentlemen had an interest in the above work, it would be of great assistance to your tottering seat I did so at your request, and how have I been repaid; by incurring your ill-will, and not one single act of gratitude or friendship have I received from you. When you urged upon me the necessity of re-taking the contract from the local men did you assist us? No. When McNish, my partner, went out to Victoria to try and secure that point, you were the first to suggest to him that a capias was probably in order, and in reference to the security of $10,000, what has become of it?

The Chief Commissioner of Lands & Works of the Province solemnly agreed by contract to deposit it in some chartered Bank in B. C. I have enquired at all the Banks there, and find that there is no such deposit, and you were the Commissioner at the time and perhaps you can inform me.

When next you wire me over the public wires, I would ask you to be a little more guarded in your language, as, although I am not very thin-skinned, I dislike being accused of perjury.

And as to your implied threat at the close of your letter, you can do as you please.

You are at liberty to publish this letter if you choose.

I am, Sir, Your Obedient Servant,

(Signed) F. B. McNamee.

## EXHIBIT "H."

*Letter from Geo. A. Walkem to F. B. McNamee.*

Victoria, B. C., May 29th, 1886.

Dear Sir:—I have had to proceed against the "Colonist" and "Post" newspapers, here, for the libels they inserted in November last in mis-reporting your evidence as to myself in the McKenna trial at Ottawa. I have got out a Commission to take your evidence and also the Official Reporter's. The defendants have also taken out one to examine witnesses at Ottawa The object of this, as far as I can see, is to take R. P. Mitchell's evidence and possibly the "Free Press" reporter's. I have been privately informed that Mitchell intends to state on oath that you swore at your trial that "the

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premier of the Province was one of the six partners in the Dock contract." The official report of your evidence which I have got seems pretty complete and occupies no less than 70 long pages of type-written matter. The evidence in the whole case covers about 160 pages, so that the short account of it given in the "Post" is very incomplete, and is, besides, viciously garbled in respect of your statements as to my connection with the contract. The official report shows that you stated your firm was established about 1877 and constituted of yourself, "Nish & Wright in Eastern Canada," and that the firm afterwards, on the 28th of August, 1880, took in as partners out here in the Dock contract Robertson, Nicholson & Huntington; but there is no suggestion on the reporter's notes that I was a partner. The "Citizen" which you sent me, makes you state that the 10 partners taken in here were Robertson, Nicholson and *Parker*, which is, of course, wrong; hence the evidence of the reporter of that journal will be of little or no value. The reporter of the Ottawa "Free Press" will also probably stand by his incorrect report. I therefore wish you to be as decidedly clear and positive in your answers on the commission as you can conscientiously be, and to state, if you will voluntarily, so that it may be taken down by the commissioner, that you have been informed, for I now tell you so, that R. P. Mitchell intends swearing that you said on oath "the premier of B. C. was one of the six partners, etc.," and that if he (Mitchell) does so, or has done so, his statement to that effect is a deliberate falsehood, made with a view, as you believe, of injuring or annoying you and from feelings of spite and illwill towards you. I can see no other 20 motive for his doing so, and it is only fair and just to you as well as myself that his conduct should appear in its proper light when his evidence is placed before the jury here.

The official reporter can't be expected to remember all that was said at the trial and he can only say that he has no note of your having made the statement attributed to you by the newspapers here. Such evidence is weak.

The Nicholson, Robertson and Huntington deed of partnership with your firm was deposited by both parties with the late Mr. Robertson, and is in Mr. Eberts hands, who has charge of his papers. It was agreed, I am told, that it should not be parted with, hence I can't get it. I have, therefore, sent a notarial copy of it to the commissioner to be proved and identified by you. The deed was drawn up and witnessed by Mr. Rob- 30 ertson, and is dated the 28th of August, 1880. Yours truly,

(Signed) GEO. A. WALKEM.

To F. B. McNAMEE, Esq., Montreal

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SUMMONS FOR LEAVE TO AMEND STATEMENT OF DEFENCE TENDERED IN EVIDENCE BY DEFENDANT.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

HONORABLE GEORGE ANTHONY WALKEM,

Plaintiff,

AND

DAVID WILLIAMS HIGGINS,

Defendant.

Let all the parties, their Solicitors or Agents, attend the Judge in Chambers at the Court House, James Bay, on Saturday, the 29th day of January, 1887, at the hour of 12 noon, upon an application on the part of the defendant for an order that the defendant be at liberty to further amend the defendant's Statement of Defence herein by inserting therein the following paragraph: 10

4A. The defendant further says, repeating the allegations hereinbefore contained, that since the commencement of this action he has discovered that the report of the said portion of the said evidence of the said Francis B. McNamee, in the said case of McKenna *vs.* McNamee, as published in the "Daily Evening Post" and as repeated by the defendant is not accurate; but that the evidence which the said McNamee actually did give at the said trial was as follows: 20

Q. And among other jobs you took this job in British Columbia?

A. Yes.

Q. I understand you to say it was under a species of compulson that you sub-let this contract in B. C. in the first place?

A. Yes.

Q. You did not do that willingly?

A. I did not.

Q. You were forced to do that by the local Government?

A. Yes.

Q. And the way that was done was at the suggestion of one of the members of that Government that in order to get round the clause against sub-letting you took in three partners? 30

A. Yes, and he named those three partners.

Q. And that partnership consisted of McNamee & Co. in British Columbia it consisted of the three members of the firm proper here and these three gentlemen there.

A. Yes.

Q. And the business was carried on in the name of McNamee & Co

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Q. The contract, as I understand, was let to you in 1880?

A. Yes.

And the defendant has always, since the said date, been ready and willing, and is now ready and willing, and hereby offers to cause to be published in the said "Daily Colonist" newspaper a correct report of the evidence which was actually given by the said McNamee as aforesaid, together with any reasonable statement or explanation with reference to the said evidence which may be satisfactory to the plaintiff, or to publish a statement that the evidence as reported in the "Evening Post" and repeated by the defendant was inaccurately reported, together with any reasonable statement or explanation with reference to the said evidence which may be satisfactory to the plaintiff. 10

MATT. B. BEGBIE, C. J.

Per H. C. D. R.

This Summons was taken out by Theodore Davie, corner of Bastion and Langley Street, Solicitor for the defendant.

To H. D. HELMCKEN, Esq., Plaintiff's Solicitor.

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ORDER DISMISSING APPLICATION TO FURTHER AMEND STATEMENT OF DEFENCE.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

IN CHAMBERS,

BEFORE THE HONORABLE THE CHIEF JUSTICE.

BETWEEN 20

THE HONORABLE GEORGE ANTHONY WALKEM,

Plaintiff.

AND

DAVID WILLIAMS HIGGINS,

Defendant.

Saturday, the 29th day of January, A. D. 1887.

Upon the application of the defendant to amend his Statement of Defence herein, and upon hearing Mr. Theodore Davie in support thereof, upon reading the Summons herein dated the 27th day of January, 1887, and upon hearing Mr. Drake, Q. C., of counsel for the plaintiff. It is ordered that the said application be and the same is hereby dismissed 30 out of this Court with costs of and incidental to this application to be taxed and paid by the defendant to the plaintiff.

"MATT. B. BEGBIE, C. J."

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# SHORTHAND WRITER'S NOTES AT TRIAL.

June 30th, 1887.

## WALKEM vs. HIGGINS.

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Before Sir Matthew B. Begbie and a Special Jury.

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Mr. Drake, Q. C., and Mr. Helmcken for Plaintiff.

Mr. Theodore Davie, Q. C., and Mr. Bolwell for Defendant.

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Mr. Drake having opened the case for plaintiff,

W. S. Gore, called and sworn.

Examined by Mr. Drake.

Q. Mr. Gore, what is your Christian name? A. William Sinclair Gore. 10

Q. Are you Surveyor-General? A. Yes.

Q. Have you control of the records of the Lands and Works office? A. I have charge of them.

Q. Do you produce a contract dated 24th February, 1880, made between the Provincial Government and McNamee, Nish and James Wright? A. Yes.

Q. That is the original? A. Yes.

Q. Do you prod[illegible] contract of the 4th October, 1880? A. Yes.

Q. That is the orig[illegible] A. Y[illegible].

(Documents marked as Exhib[illegible] A" and "B.")

Q. These are the only contracts in your office between the Government and Francis 20 Bernard McNamee or McNamee & Co? A. Yes; they are the only ones.

C. J. It ought to have been acceded on both sides that printed copies of these should be admitted as correct.

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D. M. Eberts called, sworn, examined by Mr. Drake.

Q. Do you produce the original agreement betw[illegible] McNamee & Co. and Robertson, Huntington and Nicholson? A. That is the [illegible]nal agreement. (Handed in and marked as Exhibit C.)

Q. That is the partnership deed? A. Yes.

Q. That is the only document you have relating to that matter? A. I believe it is dated the 28th day of August, 1880. That is the only copy and I wish it to be returned 30

Mr. Drake. It is not on file. It is only an exhibit.

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George A Walkem, called and sworn, examined by Mr. Drake.

Q. You are the plaintiff in this action? A. I am.

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Q. You are at present a judge of the Supreme Court of British Columbia? A. Yes.

Q. Were you prior to the 12th June, 1882, premier of this Province? Yes; I held the several offices which are stated here and admitted: Premier, President of the Council Attorney-General and Chief Commissioner of Lands and Works. I left about the fore part of June, 1882.

Q. When you were raised to the Bench? A. Yes.

Q. On the 24th February, 1880, did you enter into a contract with McNamee and Company? A. Yes: I entered into one which I suppose is the one produced by Mr. Gore, the 24th February, 1880. It is a contract I drew up at the desk in a gentleman's office at Montreal when McNamee was present. It was written off rapidly and signed by McNamee, Nish and James Wright, and by myself as Chief Commissioner of Lands and Works. It was witnessed as to all the signatures by Mr. Wurtell who is now a Judge of the Queen's Bench there. 10

C. J. The date of that is the 24th February, 1880? A. The 24th February, 1880.

Mr. Drake. What was that contract for? A. The contract, as it states, was for the construction of the Esquimalt Graving Dock in accordance with the specifications, and. mentioned in round numbers, for $350,000. I entered into the contract with them as being the lowest tenderers, nearly $100,000 lower than anybody in this Province and considerably lower than anybody anywhere else. The tenders were placed before the Executive Council. It is on a schedule drawn up by myself, this being a certified copy of the Order-in-Council, certified by Mr. Elwyn as Clerk of the Executive (reads document) This is signed by myself as President of the Executive Council and approved of by His Honor Mr. Richards who was Lieut.-Governor at that time, and certified by Mr. Elwyn The tenders were signed by Mr. Gore as Surveyor-General, and the contract was drawn up for the amount of money I stated. 20

Q. Did you in June, 1880, direct the contractors to proceed with the construction of the Dock? A. I did that under the contract. That contract was drawn up in February at Montreal, and as the accepting parties did not come to time I gave them formal notice to commence the Dock in June. I waited until my patience was exhausted.

Q. Did they make any application with regard to the dimensions of the Dock? A. There is some correspondence in the Lands and Works Office; but in July or August McNamee came over here himself, after repeated remonstrances, which were placed before the Legislative Assembly at the time, and he saw me in my office about further delay. Do you want to know what occurred? 30

Q. Only to the extent of the application for further delay. I understand that was not granted? A. There is a little statement of his with regard to my tottering seat. I think I would like to put this in; (to Mr. Davie) it won't hurt you at all.

Mr. Davie objects that the evidence should be confined to matters which are of import to the case.

Witness. He asked for further delay. It is stated in my Statement of Claim, and my reason for refusing it. 40

Mr. Davie again objects that the matter is irrelevant, and asks his Lordship for a ruling on the point.

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C. J. What have we to do with what McNamee is supposed to have suffered at the hands of his antagonist? The question is whether the statement published in the "Colonist" is derogatory, and in the next place, is it true? If derogatory and untrue, then was it privileged?

Mr. Drake. No question of privilege arises at all. It is not on the pleadings.

Mr. Davie. It is on the pleadings. Privilege is claimed by its having been copied from another paper in good faith.

C. J. Is it justified by being copied from another paper? And in the first place, is that true? Was it copied? You (to Mr. Drake) say it was not a copy?

Examination continued:

Mr. Drake. Was there, after McNamee's presence in the Province, another contract entered into by you with him? A. Yes; after he had been present here some time, and had arranged, satisfactorily to myself, to take in some local partners here whom I refused to officially recognize (as the official recognition would have discharged the bondsmen in Montreal), I told him I thought before he went away we had better execute a second contract.

Q. And that is the contract of the 4th October, 1880? A. That is the contract of the 4th October, 1880, which was drawn up in substitution of the first, I refusing in that contract, as you will see, to recognize the local partners here, who had joined him, as Mr. Eberts has shewn here, in August—28th August. I did so because it would have discharged the bondsmen in Montreal. This contract McName submitted to Robertson—the second contract with me. Robertson approved of it, and McNamee took it to Montreal and executed it apparently on the date filled in there, on the 4th of October, 1880. The second contract was executed after I left. In the Spring of 1880 the Legislature passed an Act, agreeable to what was agreed upon between Sir John Macdonald and myself, with respect to the Esquimalt Graving Dock, and this contract was executed for the purpose of bringing this work under that legislation.

Q. Had you any interest, direct or indirect, in the contracts or either of them? A. As stated by McNamee himself, none whatever. I never had, and I might say this, the man was never dishonest enough to propose it. He never suggested the thing.

Q. Did you see the newspapers of the 20th November, 1885; did you see the "Daily Colonist" of that date? A. The Colonist I saw first is attached to the document relating to McNamee there. The "Colonist" of the 20th November, 1885, that I have before me now in my hands is that which I sent to Ottawa. These Exhibits I got at Kamloops.

Mr. Davie. I should like that put in.

C. J. It is put in.

Witness. The other copy is one I purchased at the "Colonist" office. I happened to have a little fine pencil mark up here in the corner to keep it identified. These are the two documents I think: the paper I got up there, and the other. The paper I got up there I got by mere accident from the library, for, although a subscriber, I am not a constant reader there. I went there one morning and looked for the daily news and found this paper on the table. I took it, replacing it with another newspaper which I got down at Edwards' barroom—a "Colonist"—so that the library should not be deprived of the paper.

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C. J. Here suggests that as a copy of the pleadings will go in to the jury at any rate, the best plan would be to draw a line through all the innuendoes, leaving them all legible of course; though the forcible (?) parts referred to by Mr. Higgins should be read at the same time, adding that the matter was perfectly fairly set out in the Statement of Claim.

Examination continued.

Mr. Drake. When you saw that newspaper with that editorial in it what steps did you take? A. Well; I read the newspaper over and went off then to compare it with a copy of the "Daily Evening Post" which some would-be friend had sent up to me all marked over without a name on it. I have got that here. The paper has a lot of line crosses on the top of it, in order to draw my attention to it, and the crosses continue down here. 10 That is just as I received it from the mail; it came up anonymously. I was not a subscriber.

C. J. I never look at the papers for any comments upon myself, because anything laudatory nobody cares about. Nobody cares about the praise of newspapers, and if they contain anything derogatory some good natured friend is bound to draw your attention to it

Witness. I took this paper and the "Colonist," a copy of which you have there, and I compared them as to the language quoted, to see if they were alike or not. The language of this paper I have found to be different from that paper which convinced me, in a measure, at the time, that it was true. The two papers not exactly concurring in the language I concluded that some such language had been used by McNamee. I will read the language here. "Witness had a deed of dissolution of partnership prepared. Six of them 20 were in partnership out in British Columbia. Mr. Walkem was at that time (these words are not in there) the premier of the Province." There are several words interpolated there which are not here, and so I consequently inferred from that there was some truth in fact of McNamee having made some such statement. If you like you will find the quotation marks stating that it was taken from the sworn evidence in the McKenna suit; and, of course, I knew that it was not taken from this, and did not purport to be taken from this little document, the "Evening Post," and as it has quotation marks I made up my mind that the statement in the "Colonist" was true. I read the article and found afterwards that he vouched for its truth. "Had the statement been made off the stand it would 30 have been scouted as untrue, but having been made under the sanctity of an oath it cannot be treated lightly nor allowed to pass unheeded." I felt very humiliated at the time, and I sent some telegrams over, which I have been asked to produce, although probably they are not strict evidence—they should have had the operators here;—but it will shew more than anything else the impression on my mind at the time.

Mr. Davie. Notice to produce those telegrams have been given.

Witness.

I saw this paper of the 20th Nov. I don't think I saw it for four or five days after it was published, owing to the way the trains run. I read the little paper first, and after reading the second one, I thought I must take some action in the matter. (Reads telegram. 40 Exhibit "A.")

I received a reply—the telegram which I have been asked to put in. The telegram from his clerk was immaterial, being to the effect that McNamee was away. Then some days afterwards I received this reply from Montreal:

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"Have just returned to town to-day. Deny most emphatically such as local news-"papers report. Consider your insinuation as to perjury most impertinent." (So that there was no collusion there.) "Will answer your letter more fully." Before I received that, I had written the following letter, of which McNamee has sent in the original and which I have been asked to produce. (Reads Exhibit "F.") That is dated the 23rd November.

C. J. The date of this alleged libel is the 20th November. Surely you would have received that on the 26th November.

Mr. Davie. No; he received it before that.

Witness. I said about the 25th or 26th because I had forgotten. I said that the railway trains did not always run regularly with regard to the mails.

C. J. If this letter was written on the 23rd he must have had the newspaper before the 26th. I rather fancy there must be some mistake in the dates because when that letter was written it is evident he had not only received the Colonist newspaper, but that he went and compared it with the Evening Post.

Mr. Drake. He received the "Post" two days anterior.

C. J. But first of all he had the Colonist at Kamloops.

Witness. I had the Post first. I say the Colonist was the newspaper which points me out as being the premier referred to. I received the Post immediately after it was published: the mail may have brought me that. I kept it a few days, and after going into the library I found the Colonist. The Post was dated the 18th and the Colonist the 20th. When I saw the Colonist I sat down and wrote this letter to McNamee. That is the original letter, in Tunstall's handwriting.

C. J. And the envelope?

Witness. I am sure the date is correct because I say "one of the local newspapers" —I use the plural number— "points me out as the premier meant." Now, the Colonist was the only one which pointed me out as premier. I got this telegram from McNamee and afterwards I received this original letter from him; although it certainly is not his signature: but he puts it in himself, and I am asked to put it in. I know his signature and his handwriting. Reads letter from McNamee to plaintiff. (Exhibit "G.")

EXHIBIT "G."

C. J. Lord Bacon says that it adds to the dispatch of business if, once every quarter of an hour, the question be read, and I ask, What have we got to do with the quarrels of McNamee and the former Chief Commissioner of Lands and Works? The only questions for the jury to consider are, first of all: Is this statement derogatory? In the next place, Is it true? and in the third place, if not true nor derogatory is it privileged? Is there any justification here, as there sometimes is in some cases if a person publishes what is false and what is libellous?

Mr. Drake. During the time you were in politics on what terms were you with Mr. Higgins? Was he a supporter of your Government? A. We were not on friendly terms.

Mr. Davie. Are you going into politics?

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Witness. I was not on friendly terms with the defendant, and have not been with him since, nor he with me.

Mr. Drake. You claim $10,000 damages in respect of the libel. Of course it is not necessary for you to prove special damages in a question of this sort? A. Under ordinary circumstances I should have something to say about that; but as it is, it is a matter that I intend to leave to the jury altogether.

CROSS-EXAMINED BY MR. DAVIE.

Q. Now there was another telegram you sent to McNamee was there not? A. Yes.

Q. And that telegram was sent to him after you had seen a copy of the Ottawa "Free Press"? A. It must have been. 10

Q. Then you saw a copy of the Ottawa "Free Press"? A. I sent for it. I got it in the "Sentinel" office,—at Hagan's office.

Q. Was that dated the 9th November? A. I cannot tell you.

Q. Have you a copy?

C. J. (to Mr. Davie). You ask whether it was after the what?

Witness. There is a telegram dated 11th December, 1885, which I sent McNamee. "Montreal, 11th December, 1885." I do not see how that is Montreal. I was not there then.

Mr. Davie. No; it was received in Montreal.

Witness. It does not say so. (Reads): "See Ottawa "Free Press" ninth and semi- 20 "weekly twelfth November, also reporting you swore premier here was partner Dock "contract. You now telegraph that report is untrue. Why not have stated this at the "time and protected me from unwarrantable defamatory attacks. I have every reason to "indignantly complain." He answers: "Have seen "Free Press" to-day. Report false. "Will write them to that effect. See Ottawa "Citizen" of tenth. Will send you one. "First intimation had of the charge was from yourself by your telegram of 28th November. "Your attorney-general has applied for official report of evidence." A further telegram says—

Q. I think that was a mistake, was it not, about the attorney-general? A. I know nothing about it. 30

Q. However, you heard nothing further? A. I did not go further because I knew all I wanted.

Q. Have you in your possession the "Free Press" to which you refer—the one of November 9th? A. Whether this cut-up one is the one or not I do not know. I forgot, really. The "Free Press" that I got from Hagan's office, whether this is the one I don't know. That is a "Free Press" copy.

Q. What is the date? A. The "Free Press" of November 9th.

Q. Does the "Free Press of Nov. 9th, which you now hold in your hand and which you say you got from Hagan's office contain the report of this alleged trial? A. This has not the whole report. It has a portion. 40

Q. The portion containing the article complained of? A. Yes.

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Q. Will you be good enough to read it? A. (reading): "When Mitchell applied to "him for payment of his claim witness told him to get an account properly drawn up and "submitted to him as it would be better for him to pay than to submit to lawsuits. Wit- "ness had a deed of dissolution of partnership prepared. Six of them were in partnership "out in British Columbia, one of whom was at that time premier of the Province."

Q. That is the same as was published in the Post was it not? A. That is the same.

Mr. Davie. I should like to put that in.

C. J. Is it quite the same? because some words in the Post differ from those in the Colonist. Now where are the words "at that time?" They are in the Post you see, but not herein or in the Colonist. It is very odd that the Colonist should have followed this paper 10 which the Post is supposed to have followed. It is, however, of very little importance, because the questions before the jury are three. Shall I repeat them? Are these words derogatory? Secondly, Are they false? Thirdly, Are they justified?

Mr. Davie. The term derogatory, your lordship, I suppose might be implied to mean defamatory—injurious?

C. J. Not in the sense of including pecuniary injury, but hurting a man's feelings.

Mr. Davie. I think the true definition is whether the words are injurious or not.

C. J. That is not published by the defendant at all. The defendant never saw,—in his answer to the interrogatories he swears he never saw that paper until months afterwards. 20

Mr. Drake.—I submit, my lord, that that is no proof in (of?) the paper, at all, and that it cannot go as evidence to the jury

Mr. Davie. It has everything to do with the case. According to the view which I take of the matter, and a view which I shall submit by-and-bye, as I do not care about introducing it just now, it has everything to do with the case.

C. J. Do you think that because a man sees an article in another paper, and copies it, that because of its having been in another paper is a justification? On the contrary, I think very often it is an aggravation. However, let it go in.

Mr. Drake. I object to its going in because it is not part of the defence raised in this case. He did not copy it from that paper, and states so in his defence. Whatever appears 30 in another paper is not evidence.

Mr. Davie. I wish to put it in and submit that it is very essential, as I shall prove afterwards.

C. J. (to Mr. Drake). I shall let it go in, but will note your objection.

Mr. Davie.—I think I shall be able to prove the relevancy of this document, and my ground is rather different to what is, I think, in your lordship's mind at the present time.

Examination Continued.

Q. I see in your telegram of the 11th December, you ask McNamee why he did not state this publicly at the time, and have thus protected you from unwarrantable defamatory attacks. A. Yes. 40

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Q. Now do you know as a matter of fact that McNamee afterwards on the 16th December caused a correction of this matter to be published in the Ottawa Free Press? A. No: because I hunted all through the papers and I did not find it.

Q. Do you know now that such is the case? A. I do not.

Q. Did you see the Ottawa Free Press of the 16th December? A. I say I hunted carefully through all the papers and did not see it, though I hunted carefully because I wanted to see it.

Q. Now will you look at this paper please, which is an issue of the Ottawa Free Press, and see?—you will see the place marked with pencil there. A. Well: what about it? I never saw it before.

Q. You were not aware, then, that McNamee had made any retraction or any correction in the paper? A. No: I hunted carefully all through the Sentinel as each of these papers came there, and told them to take care of them for me.

Mr Davie. I wish to put that paper in, my Lord.

Mr. Drake objects that the document is irrelevant.

Witness. As he says, it has nothing to do with it. He states what is untrue. It is not on oath.

Mr. Davie. He stated the same thing on oath.

C. J. Mr. Davie, I have given you during the conduct of this suit every possible advantage. I have told you (and I am afraid I have done wrong) I have given you advantages which in no other action I would have given to any other suitor. This is an action against the publisher of a newspaper brought by a judge of the Supreme Court; and in order that it might not be said with a shadow of truth that you have not had every means of defence, I have given you every latitude. But really, I must draw the line somewhere. I cannot let you put that in. It is trash, perfect trash.

Mr. Davie. I must object to your lordship's remarks as prejudicial to the jury against my client.

C. J. Not prejudicial at all but conducive to justice. I repeat that in no other case would I have allowed you such latitude. When the question of the commission came up I said that it was useless. But the plaintiff is a judge of the Supreme Court; he comes here to retrieve his character, and a verdict in his favor will be useless—worse than useless—if it can be said with a shadow of anything like truth that anything had been kept out. But that you should take up the time of the Court by producing the excuses or retractions made by McNamee, which the plaintiff has never seen, is futile.

Mr. Davie. I do not claim here any other privilege than I would have done in any other case. I may say that I read your lordship's remarks in reference to the commission and entirely disagree with them, because I cannot see how a judge of the Supreme Court when he comes into court to fight a case is to be treated in any other way than as an ordinary litigant.

C. J. You seem to think Mr. Davie, that because any one differs with you, he must be wrong.

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Mr. Davie. I do not say so; but I do maintain that when you say Mr. Higgins is getting more favor shewn to him on account of the position of the plaintiff that it is highly prejudicial to the ~~jury~~ (*defendant*).

C. J. That is what you say. I say that it is conducive to justice.

Mr. Davie. It is not conducive to justice; and though very sorry to say so, I may have to move against your lordship's remarks, and probably will, owing to the way in which you have chosen to frame them. I now submit that this should go in, and I do so without asking any favor. If you wish to rule it out, do so.

C. J. I will read them out.

Mr. Davie. I have no wish for you to read them out. If your lordship chooses to do so, you can. My lord, I hope you will not conceive I am asking you not (?) to read anything which I regard as entirely prejudicial to the defendant's case. I conceived it was out of place at the time, and think that it would be more so, now. Will your lordship allow me to put in this newspaper of the 16th December? *i.s. "The Free Press, Ottawa".*

C. J. No.

Mr. Davie. Well, I wish you to note my objection to your ruling.

C. J. Well; let it go in, Mr. Drake.

Mr. Drake. I wish you to note that I object to it, my lord.

C. J. What can it have to do with this case?

Mr. Drake. That is the very reason that I object.

Mr. Davie. Mr. Walkem says that he never saw it. (?)

C. J. The defendant never saw it, either.

Mr. Davie. From my point of view it is totally immaterial whether he saw it or not. The point I wish to press is that owing to what Mr. Higgins published, Mr. Walkem obtained a refutation of this statement in Ottawa.

Then I am at liberty to put it in?

C. J. Oh, put it in. What is the number of it?

Mr. Davie It is the issue of the 16th December, 1885.

(Document handed in, marked Exhibit G.)

Mr. Drake. Your lordship notes my objection?

C. J. Yes.

EXAMINATION CONTINUED.

Mr. Davie. Now before commencing this action for libel—of Walkem vs. Higgins—you caused no communication to be sent to the defendant, did you? A. No.

Q. The first notification you gave him was a Writ of Summons? A. Yes; because the article was a challenge to sue.

Q. Now since the commencement of this action and since the defendant's Statement of Defence, do you remember that on the 29th January in the present year

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the defendant applied by summons before the Chief Justice for leave to amend his defence in an alternative manner? A. It was struck out in 1886, and he applied in 1887 and put in the same thing.

Q. Did he not apply for leave to amend in this particular? A. Yes; I recollect. I suppose this is the summons about the evidence?

Q. To do one of two things: Either to state what the evidence was that was given by McNamee or else to state simply that the evidence published by him, the defendant, was incorrect or inaccurate, and to publish any reasonable statement or explanation which you might wish? A. I did not understand that and I do not understand it now, (reads from summons to amend Statement of Defence)—"together with any reasonable "statement or explanation with reference to the said evidence which may be satisfactory "to the plaintiff, or to publish a statement that the evidence, as reported in the Evening "Post and repeated by the defendant, was inaccurately reported, together with any "reasonable statement or explanation with reference to the said evidence which may be "satisfactory to the plaintiff." I saw this, and Mr. Drake, being my counsel, I took his advice. It came up before the Chief Justice, and, of course, it was disallowed. I considered that it was simply throwing dirt at me. The offer made there is to put in a perjured statement.

Mr. Davie. Pardon me: you are entirely misconceiving it, I am sure. A. It was to put in a statement which McNamee made about me which was absolutely false.

Q. You would not intentionally misrepresent this to the Jury, but you are mistaken. He offers you two things: Either to put in the evidence as McNamee gave it, and as you produced it yourself, or else to leave that out and simply publish a statement that the evidence, as published by Higgins, was incorrect? A. Excuse me, I have not produced McNamee's evidence, nor do I believe my counsel is going to produce it. We leave that for you to do. (Reads.) "And among other jobs you took "this job in British Columbia? A. Yes. Q. I understand you to say it was under "a species of compulsion that you sub-let this contract in B. C. in the first place. A. "Yes. Q. You did not do that willingly? A. I did not. Q. You were forced to do "that by the local Government? A. Yes. Q. And the way that was done was at the "suggestion of one of the members of that Government that in order to get round the "clause against sub-letting you took in three partners? A. Yes; and he named those "three partners. Q. And that partnership consisted of McNamee & Co., in British "Columbia it consisted of the three members of the firm proper here and these three "gentlemen there? A. Yes."

Mr. Davie. Does not that summons offer you the alternative of publishing the evidence as given, or simply to publish a statement that the evidence as published in the Colonist is incorrect. Now I ask you to answer this? A. This is a summons to place this thing on th[illegible] and state on the pleadings improper matter. It is an offer to place what you see on the pleadings.

Q. All I can say then, is that you have not read it. You certainly have read it aloud, but have not understood it. A. "Hereby offers to cause to be published in the "said Daily Colonist newspaper a correct report of the evidence which was actually given "by the said McNamee as aforesaid, together with any reasonable statement" (any

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*reasonable* statement!) "or explanation which may be satisfactory to the plaintiff."

Mr. Davie. That is one thing we offer? A. Now, that is clear enough. I, of course, could not consent to a set of libellous statements being introduced, some of them nothing but dirt. "Or to publish a statement that the evidence, as reported in the "Evening Post and repeated by the defendant, was inaccurately reported, together with "any reasonable statement or explanation, with reference to the said evidence, which "may be satisfactory to the plaintiff." That is not a letter of apology nor an attempt at it.

Q. At all events you refused that? I am not asking you what was the effect of that, but I am asking you whether you knew what was there, and knew what the effect of it was? A. The Chief Justice, when it came up, disallowed it, being aware of the rules of pleadings. Placing it on the pleadings is quite a different thing to placing it in the newspaper. If it had been an offer to place it in the newspaper, and fairly, I should not have objected probably. 10

C. J. The application was made to a Judge in Chambers. Has the application been appealed from? A Judge in Chambers can make mistakes, and if a mistake was made why not have appealed from it?

Mr. Davie. That is one way of putting it, but not an accurate one.

C. J. Probably no one can put it accurately but yourself?

Mr. Davie. No; but I called attention to this to prove that Mr. Higgins was at first, and is now, willing to put anything in the paper, in the way of a reasonable statement, with regard the matter. 20

C. J. There is nothing there about putting it in the paper.

Mr. Davie. It has been said by your Lordship and by Mr. Walkem, and both of you are mistaken, that there is not an offer to publish that the evidence was incorrectly reported. I will read it: "Or to publish a statement that the evidence, as reported in "the Evening Post and repeated by the defendant, was inaccurately reported, together "with any reasonable statement or explanation, with reference to the said evidence, "which may be satisfactory to the plaintiff."

C. J. That is no apology at all.

Mr. Davie. That is another matter; but you said a moment ago there was no offer to publish it. There was an offer to publish it. 30

Witness. Of course I cannot argue these things with you, but it bears no such construction. It was to place it on the pleadings, but as no offer was made to publish it in the newspaper I declined.

Mr. Davie. I wish to put that in. What we offered to publish was anything which would be reasonably satisfactory to the plaintiff.

C. J. That was not before me.

Witness. It was not on the summons for leave to add to the plea.

Mr. Davie. Pardon me; what you are stating is a mis-construction of language? A. I do not intend to argue with you. Ask me a question and I will answer it. 40

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Mr. Drake objects to the summons for leave to amend the Statement of Defence going in.

Mr. Davie. I ask your Lordship to note that I offer this in evidence. It is only put in for the purpose of shewing in contradiction of Mr. Drake saying there is no evidence of anything like an apology having been offered to the plaintiff. Will your Lordship allow it to go in? I ask no favor, but simply want to know.

C. J. I don't see how it can go in. The question when the application was made was that you should be at liberty to amend your pleadings and was refused. No appeal was taken and I do not see how I can admit that as evidence.

Mr. Davie. The offer made then was to publish a statement that the evidence was in- 10 accurately reported, together with any reasonable explanation or statement which might be satisfactory to the plaintiff. It was an offer to the plaintiff and took the form of a summons because it was the only way in which it could be made.

C. J. There was no need for it to take that form. You might as well take out a summons in chambers to shew cause why you should not ask me to dinner.

Mr. Davie. The parties were at arm's length, and it was necessary to bring the matter up in that way. At all events I wish to put it in, and either to have it accepted, or the tender of it noted.

C. J. It is as I said before. I gave you an inch and you have taken a mile.

Mr. Drake asks that evidence be confined to the questions strictly at issue. 20

C. J. The questions are: Is the statement derogatory? Is it false? Is it justified?

Mr. Drake. The summons to amend contains no offer of apology at all.

Mr. Davie. That is a matter for the jury.

C. J. You are not to go back to the year one, but to consider the conduct of the parties since the publication.

Mr. Davie. This is since the publication, and my argument is that it goes to shew that the defendant was willing to do anything that was fair and reasonable. I tender it anyhow.

Mr. Drake. If you once admit a document like that you might as well admit any number of them. 30

Mr. Davie. I do not intend to conduct this defence in an unfair way at all, and I am quite satisfied when the case is finished the jury will think so, and your Lordship also. I have a duty to perform to my client. I may misconceive it: if I do, that is to his disadvantage. But I conceive it to his interest that that document should go in, and I therefore tender it.

Mr. Drake. I really must object to this. It is not fair to the plaintiff that such documents should be put in merely to have them set aside hereafter.

C. J. If it were not Mr. Davie, I might suspect that that was the object of getting this admitted.

Mr. Drake. The refusal or admission of a document of that nature is simply a case of 40 difference of opinion.

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C. J. I am not sure the jury might not see it. It might operate to some extent in mitigation of damages.

Mr. Drake. It simply goes to this extent. He takes out a summons to shew cause why the defendant should not put something in his paper. There was no need for that. If, however, he had first published such an apology he might afterwards have pleaded that he had so published it.

C. J. It is just as if a man took out a summons before me in chambers to shew cause why he should not ask me to dinner. There was one matter he proposed to reproduce in his pleadings. I thought it exceedingly improper and refused to allow it, and defendant submitted. Then he took out a summons to shew cause why he should not publish a certain statement in—I do not know that he said his paper? 10

Mr. Drake. If he had published it in his paper and then asked leave to plead that he had done so, the case might be different.

Mr. Davie. We claim that no apology is or was ever necessary and do not wish the contrary to be understood. We claim that the document is not defamatory in any way nor injurious. However, as there might be a conflict of opinion on the subject, we offered to publish whatever Mr. Walkem might desire.

C. J. I think it will be better to let it go in, Mr. Drake, subject to your objection.

Mr. Drake. I certainly object.

C. J. In order to save further litigation. 20

Mr. Drake. I don't know about saving further litigation. Probably letting it go in might be the very means of causing further litigation.

Mr. Davie. It is very clear there is more likely to be litigation if it does not.

C. J. I certainly hold it to be inadmissable.

Mr. Davie. Make a note then that I have tendered this summons of the 29th January:—that was the date when it was to be heard. There is no date when it was taken out. I suppose it was the day before.

Examination continued.

Mr. Davie. You do not agree, Mr. Justice Walkem, with some remarks which McNamee made in relation to this matter? A. I cannot agree with them, because they are not true. 30

Q. Then McNamee, in his evidence, has not stated everything which is true? A. He states from his own point of view with regard to the contract and as to my conduct.

Q. I do not wish to go into it. A. I have not the slightest objection, because all was perfectly free, above board, and upright. I am sorry to state he has stated certain things which are inaccurate. The only thing which he has stated correctly is that I was not his partner.

Q. There is no suggestion of it? A. You are trying to do it.

Q. You stated that you disagreed entirely with what McNamee said? A. Assuredly. He came to me to change the stone from Newcastle to Seattle stone. I asked him why he 40

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wanted it changed, and said it would be better to leave the matter in the hands of the Engineer. He said, "Oh, a scratch of the pen from you will do it." He then said, ~~"Come inside" and added~~. "Look here. How is your district at Esquimalt?" I said, "My district is all right, and I have a vote in the House of 18 to 6," and so on. He waited a long time and then he said, "I can manage things all right for you," and the next thing he said was, "I want you to help me about the stone." I said "Go to the Engineer." He said "What does he know about it? I can guage such a man as that!" I said Mr. Bennett has a better knowledge of stone than ever you had, and as for you, you are a better judge of paving stones at an election than any others.

Q. You have told me a good deal which I didn't ask you about, please answer this. In 10 his letter to you he makes a statement which you say is untrue: did you write to him about it? A. Not at all. I did not wish to bandy words with him.

Q. You had further correspondence, had you not? A. I really forget whether I did. There may have been one letter I intended to write warning him against Mitchell's statement. I do not think, however, I wrote it. (Document handed to witness.) Well, I have got no copy of this. (Reads.) "Dear Sir:—I have had to proceed against the Colonist and Post newspapers here for the libels they inserted——"

Mr. Davie. I don't ask you to read it. I merely wish you to say whether it is your letter or not? A. I dare say. I intended to write him a letter warning him against Mitchell's evidence. I don't know whether I did or not. (Exhibit handed in marked H.) 20 Go on asking questions: don't keep me standing here all day. This (referring to the letter) is all right enough.

Mr. Davie. That is a letter which you sent to him?

C. J. A letter?

Witness. A letter I intended to write and may have written, but I have got no copy of it. It was a letter written about Mitchell's evidence, saying the whole report was garbled?

C. J. Did I understand you to say that until the letter was handed to you, you had forgotten that you might have written it? A. I said I did not think I wrote to him again.

C. J. Then this letter was an answer? A. Yes: I told him I intended to write but 30 do not know whether I did it.

C. J. But now, you do recollect? A. I declare I would not have unless I had seen it.

C. J. But now you do recollect it? A. Yes: the "tottering seat" business I did not take any notice of, because he was writing smarting, evidently, under the forfeiture of his $10,000, and it was no use annoying the man or taking any notice of it.

Q. At this time—the time you wrote the letter—had you been given to understand (I don't wan't to know how unless you choose to say) that a man named R. P. Mitchell was prepared to state that McNamee actually did state what was reported in the Colonist? A. Yes: I had been given to understand that Mitchell who was out here and who turned out to be a different Mitchell from yours, was prepared to say or to swear that McNamee 40 had said so.

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Q. And it was to prepare McNamee against that evidence and warn him about it it that you wrote the letter? A. Yes, and to defend myself, too.

Q. I see the innuendo which I presume you are quite aware of is in this Statement of Claim, which you make here, is that Mr. Higgins meant and intended it to be believed "that at the time the plaintiff held the several offices of public trust and confidence mentioned, he secretly and by corrupt means, and for corrupt and unworthy considerations "of personal gain and profit, and in betrayal of such trust and confidence, acquired and held "a partnership interest conjointly with the said contractors"? A. Yes: I say that is counsel's inference.

Q. And your inference, too? A. Yes, drawn from reading that article in the Colonist 10

Q. Did you hold the Lytton assizes in 1884? A. I suppose so. I don't know.

Q. And in 1885, also? A. Very likely.

Q. Do you remember in 1884 the grand jury presenting an address to you? a highly complimentary one? A. I forget, I am sure.

Q. Will you look at this? (producing document.) A. I suppose it is so. Yes.

Q. And that is published in the Colonist is it not? A. Yes.

Q. Will you be good enough to read it? MWB

Mr. Drake objects that it is not evidence. the publication in 1885

C. J. The questions in the matter at issue are whether be a libel, whether it be true 20 or false, and whether it be justified. Now a grand jury charge in 1884, what can it have to do with these questions?

Mr. Davie. There is another question, and that is malice. It is alleged in the Statement of Claim and also now that the publication was malicious.

C. J. Every libel is malicious.

Mr. Davie. Yes; but it lies upon the defendant to refute malice.

C. J. If it is incumbent on a journalist to do anything it is to publish what is true.

Mr. Davie. I ask your Lordship merely to note that I tender a copy of the Daily Colonist newspaper of October 26th, 1884, containing a complimentary address by the grand jury to Mr. Justice Walkem on the occasion of the assizes. 30

C. J. You tender that in order to shew no malice?

Mr. Davie. Yes; that is one of the instances.

Witness. This libel was published in 1885.

C. J. Yes, twelve months afterwards.

Mr. Davie. I also tender the grand jury report of 1885. I tender also the Colonist of November 8th, 1885, twelve days before the alleged libel

Mr. Drake. Then you produce as evidence what took place before to prove that it is not a libel?

Mr. Davie. I do not say that; but it is evidence to show that no malice existed.

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Witness. This is all it is. (Reads.) "Mr. Justice Walkem, Mrs. Walkem and child "are at present in Kamloops, at the Cosmopolitan, and will leave for Victoria in a few "days. Both Mr. and Mrs. Walkem are held in high esteem by the residents of Kamloops." About being held in high esteem, that might be by the residents, not by your client.

Mr. Davie. In order to ascertain whether the defendant is guilty of malice you have to take into consideration his conduct before and afterwards.

C. J. You would say then that if a man asks you to dinner and then gives you a kick the next day that he can plead the invitation as evidence of his having had no malice. It would be absurd.

Mr. Davie. I may say that your Lordship's opinion is at variance with the authorities. (Quotes Odger, 271.)

Witness. If you want to go into libels you will find one when I was elevated to the Bench. You don't want to go into these things.

C. J. Certainly not.

Mr. Davie. I wish to put in the Colonist of 18th October, 1885.

C. J. But that local article about "high esteem" was on the 6th November.

Mr. Davie. On the 8th November, twelve days before the alleged libel. This is one of the 18th October, 1885, containing, in a prominent part of the paper, the report of the Lytton Grand Jury, which includes matter complimentary to Mr. Justice Walkem.

Witness. Let me look at that. It is a report from McLeod the Foreman of the Grand Jury, which I believe he sent down himself.

Mr. Davie. I wish to know whether it is going in?

C. J. No. If he had kept these things out of his paper, though that might be evidence of additional malice; but because this is put in cannot be admitted as evidence of absence of malice.

Mr. Davie. I say that the publication complained of is not injurious, and that the Jury have to judge from all the surrounding circumstances.

C. J. Gentlemen of the Jury; do any of you want to ask any further questions?

The Jury having nothing to ask, a recess was ordered from 2:15 p. m. until 3 p. m.

## AFTER RECESS.

Upon the Court re-assembling, Mr. Drake announced the close of the plaintiff's case.

Mr. Davie. Before going to the Jury, My Lord, I wish now (as it may be contended that I did not offer this rejected evidence at the right time) to formally tender it. The summons to further amend the Statement of Defence and the order dismissing it with costs.

C. J. I have taken an opportunity of looking at it. I do not see that I have taken the slightest objection to the last part of the application.

Mr. Davie. I did press it at the time. I wish to tender it formally as evidence, and now is the proper time. I also tender the Colonist of 16th October, 1884 containing, as I stated before, a complimentary allusion to the plaintiff at Lytton; and also that of October

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18, '85, containing a similar report complimentary to the plaintiff and the Colonist of November 8, '85, containing a paragraph which Mr. Justice Walkem himself read.

C. J. Were these objected to? Oh yes.

Mr. Davie. Yes.

Mr. Davie. I have to ask your Lordship at this stage of the proceedings to rule whether the language contained in the article complained of is capable of the innuendo ascribed to it by the plaintiff. I submit that it is not.

C. J. That is a question for the jury, not for me, you know. Do you wish me to state plainly my opinion?

Mr. Davie. Merely to rule whether it is or not?

C. J. What other meaning has it got? You cannot suggest any other meaning.

Mr. Davie. I will state my position briefly. The alleged libel is this, that Mr. Higgins writes: "In the sworn evidence of Mr. McNamee, defendant in the suit of McKenna "*versus* McNamee lately tried at Ottawa, the following passage occurs: 'Six of them were "partnership in the Drydock (*contract*) out in British Columbia, one of whom was the pre- "mier of the Province.' The premier of the Province at the time referred to was the Hon. Mr. "Walkem, now a judge of the Supreme Court. Mr. Walkem's career on the bench has been "above reproach. His course has been such as to win for him the admiration of many of his "old political enemies. But he owes it to himself to refute this charge. We feel sure that "Mr. McNamee must be laboring under a mistake. Had the statement been made off the "the stand it would have been scouted as untrue; but having been made under the sanctity "of an oath it cannot be treated lightly nor allowed to pass unheeded." Now the innuendo that the plaintiff chooses to infer is this: "Meaning and intending it to be believed by the "said false and malicious libel that at the time the plaintiff held the several offices of public "trust and confidence mentioned, he secretly and by corrupt means, and for corrupt and "unworthy considerations of personal gain and profit and in betrayal of such trust and con- "fidence, acquired and held a partnership interest conjointly with the said contractors, F. "B. McNamee & Co. in their said Drydock contract and that he fraudulently and unlaw- "fully obtained large sums of public money and made large gains and profits in respect "of work done or pretended to have been done under the said contract, etc." Now, I submit that that innuendo is altogether unwarranted by what has preceded it.

C. J. That he made large profits is not exactly implied in the article; but that he hoped to make large profits might be inferred against the plaintiff which would be equally corrupt.

Mr. Davie. I submit that no part of that innuendo is warranted. I can understand, taking a familiar instance a libeller calling a person an honest lawyer intending it to be taken the very reverse. I can understand that there may be some plausible reason for such an interpretation; but when defendant has contented himself with re-producing the words of a document it is outrageous to place such a construction upon them.

C. J. What do you mean by these words? "He owes it to himself to refute this charge." The statement refers to the charge brought by McNamee of course. But what Mr. Higgins is being tried for is that he published this accusation. Nobody supposes that he invented the libel altogether, or that they are his own words. But what does he mean

by the charge? He calls it a charge himself.

Mr. Davie. That does not deal with the question I am intending to raise.

C. J. But what is the meaning. It does not matter whose were the words originally, but perhaps some of these words were Mr. Higgins' words originally. But supposing they are not, he repeats them in his paper. I think that the innuendo goes a little too far by saying, "Meaning and intending it to be believed that the plaintiff had actually gained a large amount of money in consequence of the alleged partnership." I don't say that it will bear the construction that he got the money, but it might that he hoped to get the money.

Mr. Davie. I beg respectfully to except to Your Lordship's ruling, and submit that the Jury should be (*so?*) instructed.

C. J. If you can suggest any other meaning.

Mr. Davie. Taking the entire writing together, it conveys a totally opposite meaning. I would like to have Your Lordship take a full note of my point in this matter. I refer to the case of Hunt *vs.* Goodlake, 43 Law Journal Common Pleas, page 54, and also to Huber *vs.* Crookall, 10 Ontario Reports, page 487.

C. J. Your objection is that the words used are incapable of bearing the meaning expressed by the innuendo. My opinion is that they may bear the full meaning. Whether they may imply less is a question. I cannot conceive that they bear a neutral meaning or other than a derogatory meaning.

Mr. Davie. Before addressing the Jury upon evidence which I intend to offer, I will state what that evidence will be. It may be that Your Lordship, consistently with your previous ruling, may rule my evidence out, and I do not wish to state the circumstances under which Mr. Higgins published this article, if the evidence of those who called his attention to the article in another paper, and who canvassed and discussed it with him at the time of the writing of this article, (*is not to be admitted?*)

C. J. I think that is evidence which is capable of being admitted in mitigation of damages.

Mr. Drake. I propose to deal with that when it comes up.

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Mr. Davie then opened the case for the defence, and at the conclusion of his address tendered the evidence of Samuel Parker Tuck, taken under commission by order, of the 20th May, and also the order, and an affidavit of the defendant to the effect that the said witness was absent from Victoria.

Mr. Drake. I object to that evidence. The evidence of Mr. Tuck, as I understand, is evidence of a certain occurrence that took place before the publication of the libel and cannot be admitted. The authority for that point is perfectly clear. The Jury have to judge, not by what the intention of the person was before the publication of the libel, but the effect of the intention (*libel?*) itself. The intention itself has nothing whatever to do with it. (Folkard on Libel, page 293.)

C. J. I really believe that the publisher of a newspaper, who once published an article which concerned myself and was of the most offensive character, thought he was doing me a good action, when in reality, of course, he was guilty of the grossest libel.

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Men rush into newspapers here who really do not understand their right hand from their left. What happened before the publication of the libel surely cannot have the slightest effect upon the Jury, and should not have. (Quotes Folkard, page 293.) The intention really has nothing to do with it, and all the Jury have to do is to judge from the effect.

Mr. Davie. Your Lordship overrules the evidence then?

C. J. Supposing Mr. Higgins proves that he was on terms of the greatest intimacy and affection with the plaintiff previous to this, and he publishes this document; if the jury think it a libel they are not to judge of the effect of it by the terms upon which the men formerly existed. They are simply to answer, Was it a libel? Was it derogatory? or calculated to inflict injury upon the plaintiff? Was it false? Is it justifiable or justified? Is it privileged? These are the only questions, and if you prove that Mr. Higgins had the greatest affection for the plaintiff and held him in esteem and even worship, would not affect the case. 10

Mr. Davie. I submit, respectfully, that the evidence is very material.

C. J. You may possibly influence the minds of the jury by it, and in that sense it would be very material; but they should not allow it to do so. It has nothing to do with the case any more than the clouds which passed ten years ago.

Mr. Davie. Your lordship might see Mr. Tuck's evidence and ascertain that it is not of the same character as that of the other two witnesses who spoke to the defendant before Mr. Tuck did. I mean the two other witnesses who called his attention to the matter. 20

C. J.—I am not sure that the conversation with Mr. Tuck was entirely before. Was that entirely before the libel, Mr. Drake?

Mr. Drake. It was before the publication.

C. J. It was in process of gestation. It was before the libel was actually born.

Mr. Drake. Until the publication, there was no libel. We are not suing for what took place in Mr. Higgins' room.

C. J. I say it was during the process of gestation. (To Mr. Davie.) You led me to believe this was before the other two called his attention to the publication in another paper.

Mr Davie. What I said, or intended to say, was that the evidence of Mr. Tuck and Mr. Dunsmuir was as to what had occurred before the article was written, and that of Mr. Booth and Mr. Robson was as to what took place before anything occurred at all with regard to Mr. Higgins' article. 30

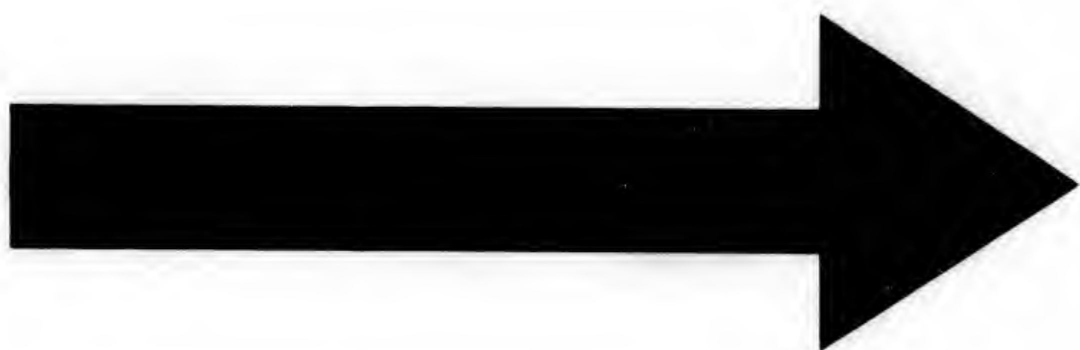
C. J. I feel disposed, Mr. Davie, to allow that to go in.

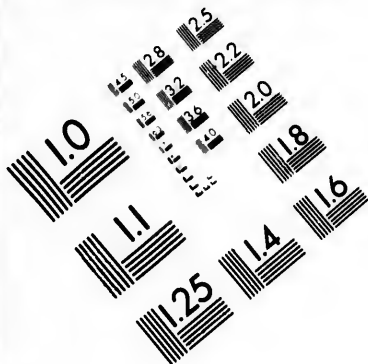
Mr. Drake. My lord, you will note my obection.

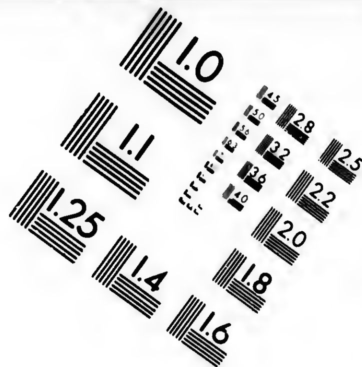
C. J. I repeat it was before publication in the paper, but it is a question whether there was not a publication at that time by reading it to those gentlemen. I think I may admit that; but, Mr. Drake, you object?

Mr. Drake. Yes, my lord.

Mr. Drake quotes Folkard, pages 293 and 295, and Baylis vs. Lawrence, 11 Adolphus & Ellis 920. 40







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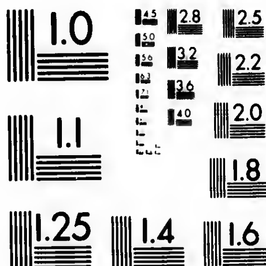


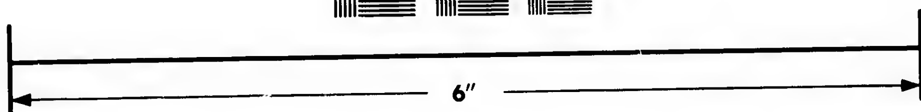


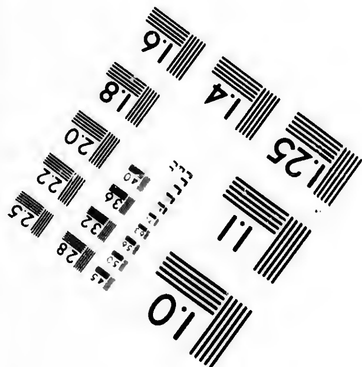

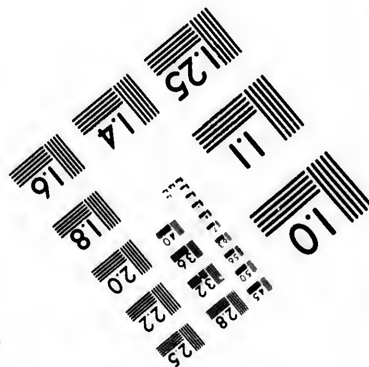

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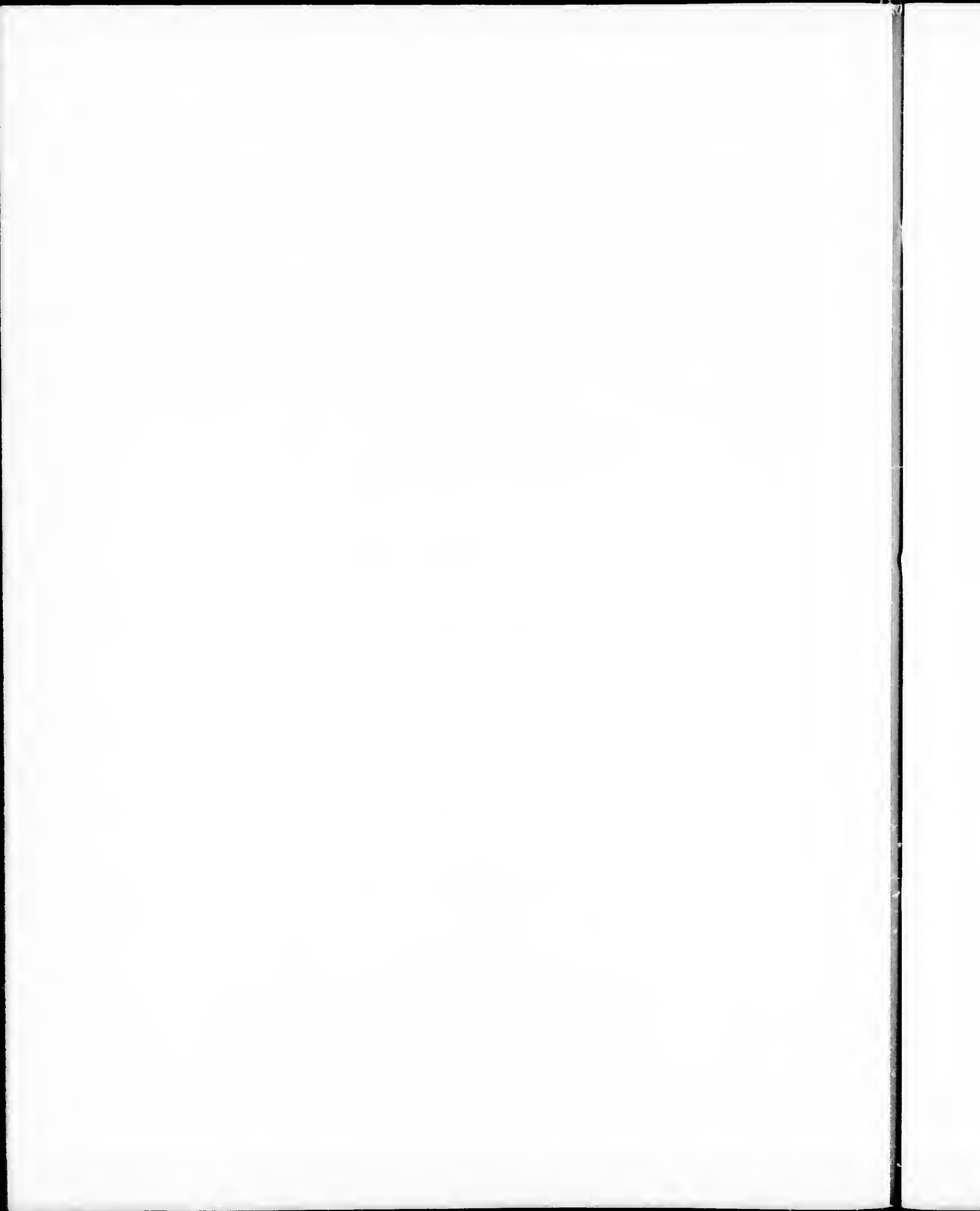

Mr. Davie refers to Odger on Slander, pages 271 and 305. Saunders vs. Miles, Moore and Payne 529, and Pearson vs. ~~Lamb~~ 5 Manning and Granger, 719.
Le Maitre

Cornelius Booth, called and sworn. Examined by Mr. Davie.

Q. What is your occupation? A. I am at present occupied as Assessor and Collector of Revenue.

Q. You were so employed in the month of October, 1885. A. I was.

Q. Do you remember seeing the Evening Post of the 18th November, 1885. Will you look and see if you have seen that document? A. I have never seen it before.

Q. But did you see a copy of it? A. I saw something of it in the Colonist purporting to be taken from the "Post." 10

Mr. Drake. It does not purport to be taken from the Post.

Mr. Davie. But in relation to the same article, do you remember a conversation with Mr. Higgins that took place the day previous? (Objected to by Mr. Drake.)

C. J. I admitted the other—the conversation of Mr. Tuck because the alleged libel was on the anvil, but I think that is as far as you can go. I have stretched it as far as I can.

Mr. Davie offers to hand up the note of the evidence to be given by Booth and Robson.

Mr. Drake objects on the ground that it is not proper in the conduct of a Nisi Prius Court (*trial?*) that the evidence intended to be given should be handed up to the Court. 20

C. J. thinks it is just, for the purpose of obviating its going to the jury if he decides it to be improper, that the proposition is made.

Mr Davie. You do not know the character of the evidence I am about to tender.

C J. No; but you tell me it is of what took place before the alleged libel was published.

Mr. Davie. Yes.

C. J. Well, then, I cannot admit it.

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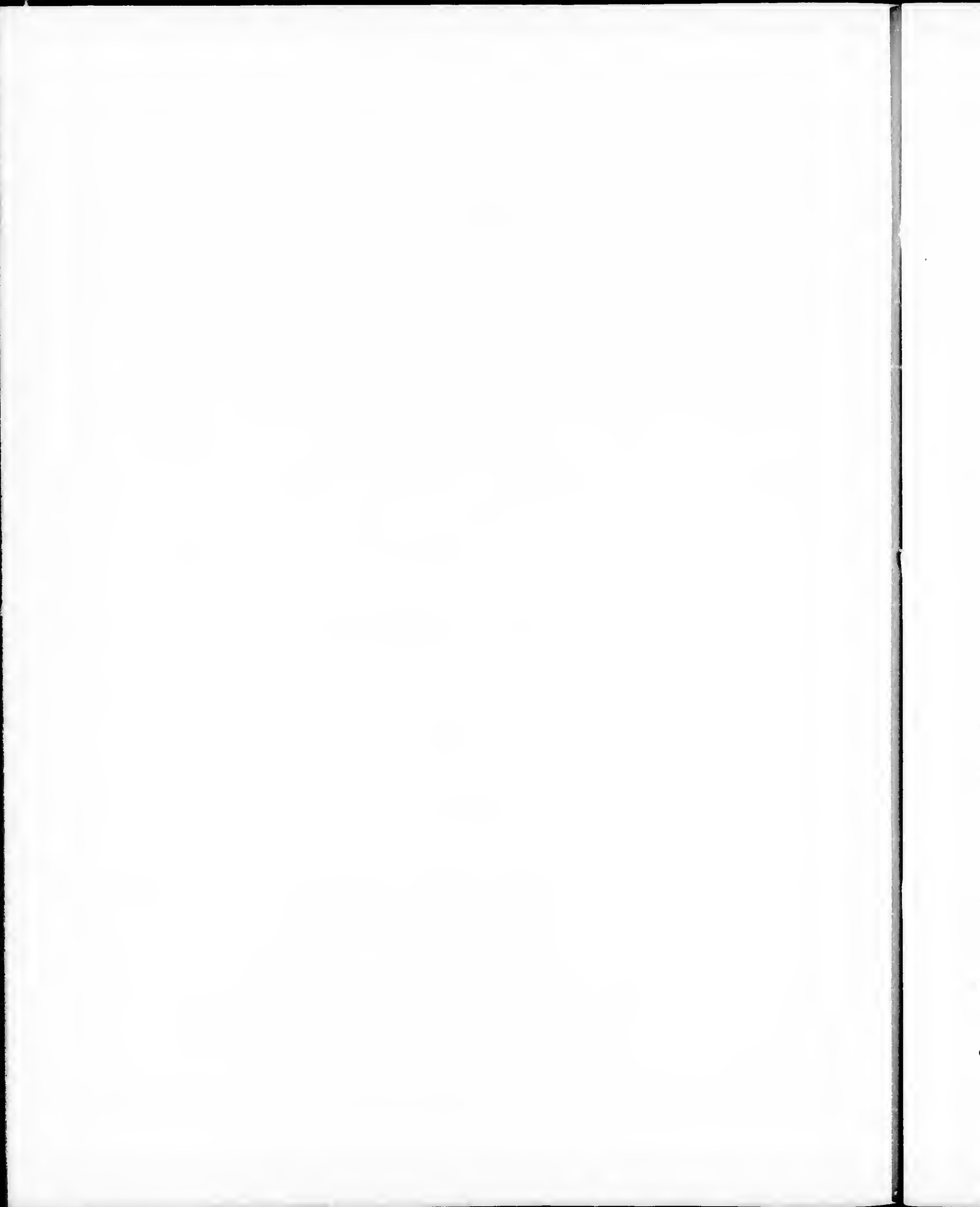
Robert Dunsmuir, called and sworn. Examined by Mr. Davie.

Q. Robert Dunsmuir is your name? A. Yes.

Q. You have heard me read the evidence of Mr. Tuck? A. Yes. 30

Q. Do you remember being in Mr. Higgins' editorial room on the occasion referred to, (*by?*) Mr. Tuck? (Objected to by Mr. Drake.) A. I do.

Q. Do you remember what took place on that occasion? A. There was Mr. Higgins present and Mr Tuck, and I am not sure whether there was one of the reporters there or not, but I was there. Mr. Higgins was sitting writing at the desk. I do not remember whether I was reading. I remember Mr. Tuck was reading. I do not remember whether I was reading at a shelf which stands there or not, but, all at once, Higgins said "Listen to



this." He read it. I did not see what he was reading from, but I knew afterwards it was out of the Post he was reading. Then there was nothing said for a little while. I said, "You are not going to publish that, Mr. Higgins?" He said, "I do not see why I should not, because if I do not publish it Walkem will never have a chance to refute it." He was writing all this time we were talking, and then, after some time, he read what purported what I expected he was going to publish—and I think I remember saying to him, "Why you seem to think if it does not go into the Colonist no one will know you have the greatest circulation," or something like that, and he said, "Yes, that is the reason, I have great faith in the Colonist." Higgins said he did not believe one word of it. Mr. Tuck and I said the same and that it was probably all nonsense to put it in the paper. 10

Q. Was the propriety of putting what Mr. Higgins wrote in the paper discussed? A. Mr. Higgins read out what he wrote and I considered it would do no harm at all, and the article, in my mind, was not libellous and would do Mr. Walkem no harm.

Q. You did not dissent from the publication? A. Not at all, after he read the second. The first time what he did read, as I expect, was from the Post. I said I thought it could do no harm.

Q. In fact, the three of you concluded it was proper? A. Well, not about it being proper, but not improper.

Q. And the conversation as to Mr. Walkem was not unfriendly? A. The other way, friendly. 20

Cross-examined by Mr. Drake:

Q. Do you recollect telling Mr. Walkem about that meeting you had in the Colonist office? A. Not about the meeting, but I recollect speaking to Mr. Walkem.

Q. Do you recollect a conversation with him about this matter in the Government grounds? A. Yes.

Q. Don't you recollect telling Mr. Walkem on that occasion that you told Mr. Higgins that if he inserted that paragraph it would very materially injure Mr. Walkem? A. No.

Q. Nor words which would have that meaning? A. No: I could not, because I did not think so.

Q. And you did not say to Mr. Walkem that if necessary you would go into the witness box? A. Not about this, but about another lie. 30

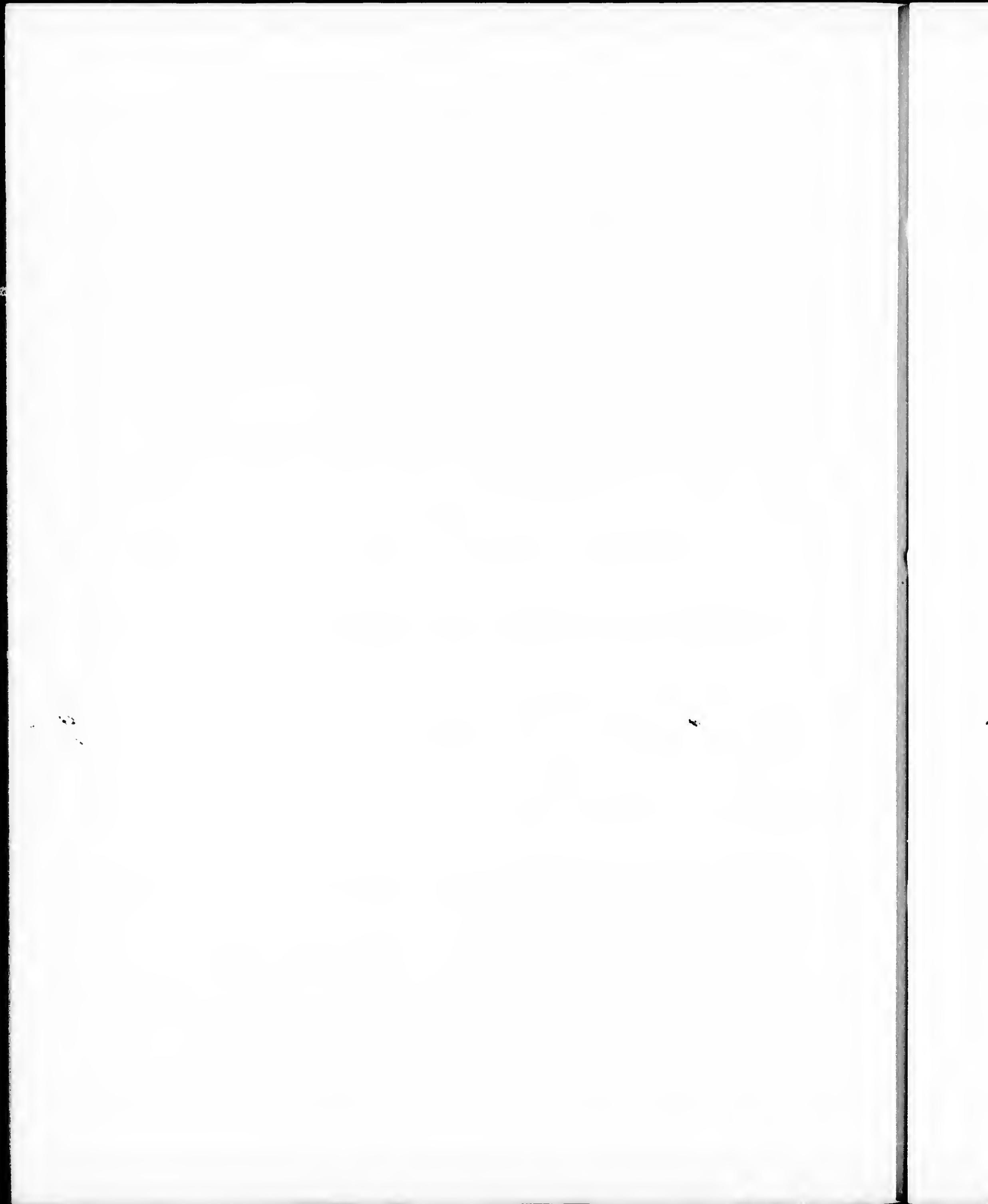
Q. We don't want to hear about another lie, we want to hear about this. You remember being in conversation with him? A. Oh, yes; perfectly.

Q. And you did not say to him then that you told Mr. Higgins that if he inserted that paragraph in his paper it would injure Mr. Walkem? A. I did not; it was about something else. I would like to tell you what this conversation was about.

Q. Did you say anything to this effect, that you had told Mr. Higgins that if he published that it would unnecessarily injure Mr. Walkem? A. I could not say that, because I did not think it would injure Mr. Walkem.

Q. Are you perfectly sure? A. Perfectly sure. 40

Mr. Drake. It is a matter upon which Mr. Walkem's recollection is very clear and distinct.



Mr. Davie offers the evidence of Charles William Mitchell, taken under commission and also the evidence of M. F. Johnston, the shorthand reporter, as having reported McNamee in the same way as he (McNamee) had said, to shew that what first appeared in the Free Press, and the corrected report of the evidence given by McNamee, which also appeared in that paper, was not mere poetry.

C. J. You see, it is quite different when you take a full and distinct report of a trial. You cannot say that this was a report of the case of McKenna *vs.* McNamee. The original report, I believe, was a fair one.

Mr. Drake. No, no.

C. J. Fairly meant then. It was fairly and honestly meant to be a correct report of the case, but it is impossible to pretend that the publication in the Colonist pretended to be a report of the case of McKenna *vs.* McNamee. It merely repeated a particular paragraph. It is not a duty of the press, it is a privilege, and, in my opinion, rightly a privilege, to publish a full and complete account of the proceedings of a Court that the public should have an opportunity of knowing what is going on. But they have not the right to put in this sentence and that isolated part of the case, and say "This was said at the trial." That is not a fair report. Unless it be a concentrated essence of the whole it cannot claim to be a fair report. Take our Law Reports. The marginal notes are the essence of the case, and very often, though condensed, form a very fair report. Here is an imputation against Mr. Walkem under the sanction of an oath, and it is claimed he has no opportunity of contradicting it. "Oh," says Mr. Higgins, "I will soon manage that," and he repeats it in his paper. In England they have published these pamphlets on Parnellism and Crime, and when threatened with the consequences they turn round and say: Come into Court; we are ready to prove the truth of what we said.

Mr. Davie. The difference is that they claim justification and Mr. Higgins does not

C. J. No: but Mr. Higgins says this is untrue, and yet publishes it. He says: This charge, made under the sanctity of an oath, cannot be allowed to pass uncontradicted. It is incapable, says Mr. Tuck, of being contradicted. "Oh," says Mr. Higgins, "I will soon give him a chance," and he does so by repeating the charge in his paper.

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Mr. Davie offers the evidence of Charles William Mitchell and the exhibits annexed, the Free Press of the 9th and 16th November, '85.

Mr. Drake. A good many objections have been taken to that evidence, and those objections I reiterate now.

Mr. Davie. I do not wish to introduce anything in this evidence which is not admissible, but one part is admissible, and that is the points brought out by Mr. Gormully. Regarding the remainder of the evidence in chief it is only conversation that took place between the witness and McNamee, which, of course, is not admissible, but in the course of the witness repeating that conversation, Mr. Gormully asks questions the answers to which are evidence.

C. J. Why should not those questions go in?

Mr. Davie. I think I can discriminate between what is and what is not evidence.

(Reads that part of commission in which Mitchell is examined by Mr. Gormully.) I may say, the newspaper of the 9th November was proved by Mr. Walkem in evidence, and a document cannot be first in and then out of evidence.

The evidence of Mr Robson and Mr. Booth is merely produced in order to show the intention of the defendant in writing. That is all. I wish to rest my case there.

Mr. Drake proposes re-calling Mr. Walkem in regard to the statement which Mr. Dunsmuir denied having made to the plaintiff to the effect that he (Mr. Dunsmuir) had advised the defendant not to publish the article in question.

C. J. It has no bearing on the case. Mr. Dunsmuir's evidence is most direct on that point, and what he may have said he may have misrepeated, or Mr. Walkem might have misheard, and, besides, if he had pointed out to Mr Higgins that it would be better not to publish the article, that it was calculated to hurt Mr. Walkem, to injure his reputation, and expose Mr. Higgins to an action for libel, still Mr. Higgins might have said, "You are wrong; it will do him good," and yet have done it for the best and most benevolent purpose

JUDGE'S CHARGE.

Counsel having addressed the jury, his lordship proceeded to sum up.

GENTLEMEN of the JURY: I hope to be very short in what I have to say, and will read to you a portion of the charge of Baron Huddleston in a very celebrated case which took place,—that of Bryce vs. Rusden. But I wish, first of all, to speak to you about what the defendant calls his duty as a public journalist. Now the occupation of a journalist is a self-imposed one, and a journalist has no duty to perform to the public; but if there is anything that can be construed as his duty it is to publish what is true. A public-house keeper need not keep, or sell liquors nor a grocer sell pickles. A publisher can stop his paper or a publican close his saloon. It is no part of the duty of a public-house keeper to keep every description of liquor, and no part of the duty of the publisher of a morning paper to publish all sorts of articles: but it is their duty to produce fair, honest, unadulterated articles whether they be spirits or newspaper articles. They must be unadulterated, pure. The only question is to decide if this was a libel. That is to say, is the publication calculated to give pain to, and inflict injury upon, the plaintiff? If so, then it is a libel. The law in that case infers malice, unless malice be disproved. Then the next question is, Was it true? So far as that goes it is admittedly and wholly untrue from beginning to end. It is untrue that Mr. Walkem ever was in partnership with McNamee, and it is admittedly untrue that McNamee ever said so. And the matter published is this: "In the sworn evidence of McNamee, defendant in the suit of McKenna vs. McNamee, lately tried at Ottawa, the following passage occurs: 'Six of them were in partnership out in British Columbia, one of whom was the premier of the province.' Now that 'following passage' did not occur; no such evidence was given at the trial: and if it had been it would have been false. That is all admitted. The subsequent part of the article which is not complained of, at least it is not the particular libel from which any innuendoes are made, or on which an action is brought—the subsequent article is attached to it evidently for the purpose of trying to tone it down. But you are to consider what the effect would be if the Solid

All this applies *a fortiori* in this case where it is not claimed that the deft. had the honest belief in the truth of the alleged libellous language. As to *bona fides* what the learned Judge says is as follows

*Muldoon*, published I think in Colorado, contained something calling you a murderer, swindler and thief. You would not care; but supposing the *Colonist* were to say: We believe so and so to be a very fine fellow and an honest citizen, but this is what the *Solid Muldoon* says of him. We do not believe it to be true, but we publish it because we say it is a lie. Then you would care very much. It is contrary to law that the defendant should be allowed to publish a defamatory report even believing it to be true. But what can be said when he says I believe it to be false, but I publish it because it is so? I will read to you the remarks of Baron Huddleston in the case I mentioned. Mr. Rusden was the name of the defendant, and the plaintiff got £5000 damages. After complimenting the learned counsel upon the manner in which they had dealt with the voluminous evidence, Mr. Baron Huddleston proceeded to direct the jury upon the law of libels, as follows: 'By libel was 'meant anything which was written or drawn of a man which was calculated to hold him 'up to public ridicule and contempt among his fellow men. Many things might be said or 'spoken of a man which were not actionable, which if written and published were actionable. 'Before what is known as Fox's Act the law was the judge who tried an action for libel 'told the jury whether or not the matter in question was a libel. That act, however, 'altered this, and it enacted that the judge should merely direct the jury as to 'what the law said was libellous, and leave them to say in the light of such direction 'whether or not the writing before them was a libel. That act only applied to criminal 'prosecutions for libel, and did not deal with civil actions. Its provisions, however, soon 'proved to be most wholesome in their effects, and the judges who administered the law 'adopted and applied them to civil actions, glad to be relieved of the responsibility of 'deciding for themselves the question of libel. That, therefore, was the state of the law 'now, and it would be for them to say when they had heard his lordship's explanation of 'what was and what was not a libel in law, whether the passage in question came within his 'lordship's ruling. Though on this subject his lordship had no desire or wish to infringe 'upon their special province, yet in this case he thought they might safely take it from him 'that both those passages were clearly libellous. No sane person reading them could con'tend that in themselves those passages were not libels. The question however remained: 'were they actionable libels? The defences which were set up were three. First, it is 'said the passages are true in substance and in fact.' (That is not the case here; they are utterly false.) The next defence is 'The second ground of defence was one which 'had been fully recognized by all the legal authorities, and particularly those of recent 'date. It was that the passages complained of were fair and *bona fide* comment written 'about a public man's acts in connection with a matter of public interest. The third 'defence was that it was written in the honest and *bona fide* belief that it was true in sub'stance, and in fact and without malice. As regarded that defence his Lordship had not 'the slightest hesitation in at once ruling that in point of law, it was bad and no answer to 'the action. Take for instance the case of a gentleman engaged in commerce, about whom 'something wholly untrue and which affects his character has been written, and in conse'quence he is ruined and becomes bankrupt both in character and capital—what answer is 'it for the person who has caused all that mischief to say that he honestly believed at the 'time he had written what he did that it was true, and that he had written it so believing 'and without malice? If such defence were law how could character and honour be main'tained in this country? The law of England jealously protected the character of British 'subjects, and properly so for if a man's character is attacked and ruined he is shunned by

Here you have the
whole thing in a
nutshell

M. B.

'his fellow men. Any man who chose to circulate slanderous accusations must be prepared 'to answer for doing so. Even were this subject new law he would have no hesitation in 'deciding it, but it was not, for it was laid down in the case of Campbell v. Spottiswoode '3 B. and S., 769) by Lord Chief Justice Cockburn, in his judgment that in the interest of 'society the public conduct of public men should be criticized without any other limit than 'that the writer should have an honest belief that what he writes is true. But it seems to 'me that the public have an equal interest in the maintenance of the public character of 'public men, and public affairs could not be conducted by men of honor with a view to the 'welfare of the country if we were to sanction attacks destructive of their honor and charac-'ter made without foundation. I think the fair position of the law is this—that where the 10 'public conduct of a public man is open to animadversion, and the writer who is comment-'ing thereon makes imputations which arise fairly out of his conduct, so that a jury shall 'say the criticism is not only honest but well founded, an action is not maintainable. But 'it is not because a public writer fancies that the conduct of a public man is open to the 'suspicion of dishonesty he is therefore justified in assailing his character as dishonest,' and *a fortiori* if he thinks his character is not open to the imputation of dishonesty how can he be justified in circulating a report that is scandalous in the extreme? Now Baron Huddleston says: 'Were these passages written by Mr. Rusden fair and *bona fide* comment upon 'Mr. Bryce in his public capacity about a matter of public interest? We may take it I 'think that the matters in question were of public interest. Was the comment fair? Now, 20 as to its being a fair comment, it is a mere utter mis-statement; it is not a true statement of what occurred. Moreover, it does not pretend to be a full report of what occurred. A report of what takes place to-day, for instance, is perfectly privileged although it may contain libellous passages, provided it be a fair, full and *bona fide* record of what took place. But no man has a right to lay hold of a particular expression which has fallen from judge, counsel or witness. That is not a *bona fide* and fair report of what took place. Now, is this a libel judging by what I have read? Is it true? Is it justified? If you find those things in favor of the plaintiff then a question you have equally to consider is the amount of damages. Then as to what was said about its being proper and necessary to find malice—the law itself implies malice. If a man utters or circulates 30 slanders concerning another man the law is not so thick-witted as to believe that he circulated the libel with benevolent motives, and will not permit him to say that he did. If you find for the plaintiff it is for you to say what is the amount of damages. There are no special damages here, but you have to take into account the amount of mental anxiety, worry and annoyance that has been given. You may if you choose, find general damages such as you think fit; but if you find that the libel was utterly without foundation, and that want of caution was shewn in its publication then you may find, I think, a sum for substantial damages, the amount of which entirely rests with you.

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### Exceptions to Charge.

Mr. Davie. There are several things which I submit that Your Lordship must ask the 40 Jury to find distinctly, one of which is whether this publication was malicious?

C. J. If it is a slanderous publication they cannot find any other way.

Mr. Davie. I except to that ruling, and I ask Your Lordship to leave to them the

distinct question of malice, and to tell them that if they find the article complained of was not written or published maliciously, but was injurious to the plaintiff, then that the plaintiff is entitled only to nominal damages.

C. J. Supposing that I accidentally break your window, are you only to get nominal damages?

Dr. Davie. I submit my point; please to take it.

C. J. You seriously ask me to charge the Jury that if a man is injured without malice he can only recover nominal damages?

Mr. Davie. Again I ask Your Lordship to charge the Jury that if they find that that portion of the evidence of what was published in the Free Press when re-published here in the Colonist or Post was a fairly accurate copy of what appeared in the Free Press, then in the absence of malice, the plaintiff would only be entitled to nominal damages.

C. J. You mean, if the alleged libel was a fairly accurate copy from the Post?

Mr. Davie. Yes; and that if written without malice, then that the plaintiff is only entitled to nominal damages. Also to charge the Jury that if they find that the whole publication, taken altogether, is not injurious to the plaintiff and was not written maliciously by the defendant, that they must find for the defendant.

C. J. Oh, certainly. I think that if they find that it is not injurious nor malicious, then they must find for the defendant, no doubt. In fact, I rather think you have not gone nearly far enough in saying if this publication was not malicious then they must find only nominal damages. I think if it is not malicious it is no libel at all; but if it is a libel, then there must be malice.

Mr. Davie. No; I except to that. They should be asked to find if there is evidence of actual malice.

C. J. If they find it is a libel the law implies malice.

Mr. Davie. Of course there is a difference between actual and implied malice. If they find that it is a libel the law implies malice; but I wish you to ask the Jury to find whether there was actual malice or not, apart from implied malice.

C. J. I don't know what you mean exactly by actual malice.

Mr. Davie. By actual malice I mean ill-will against the plaintiff.

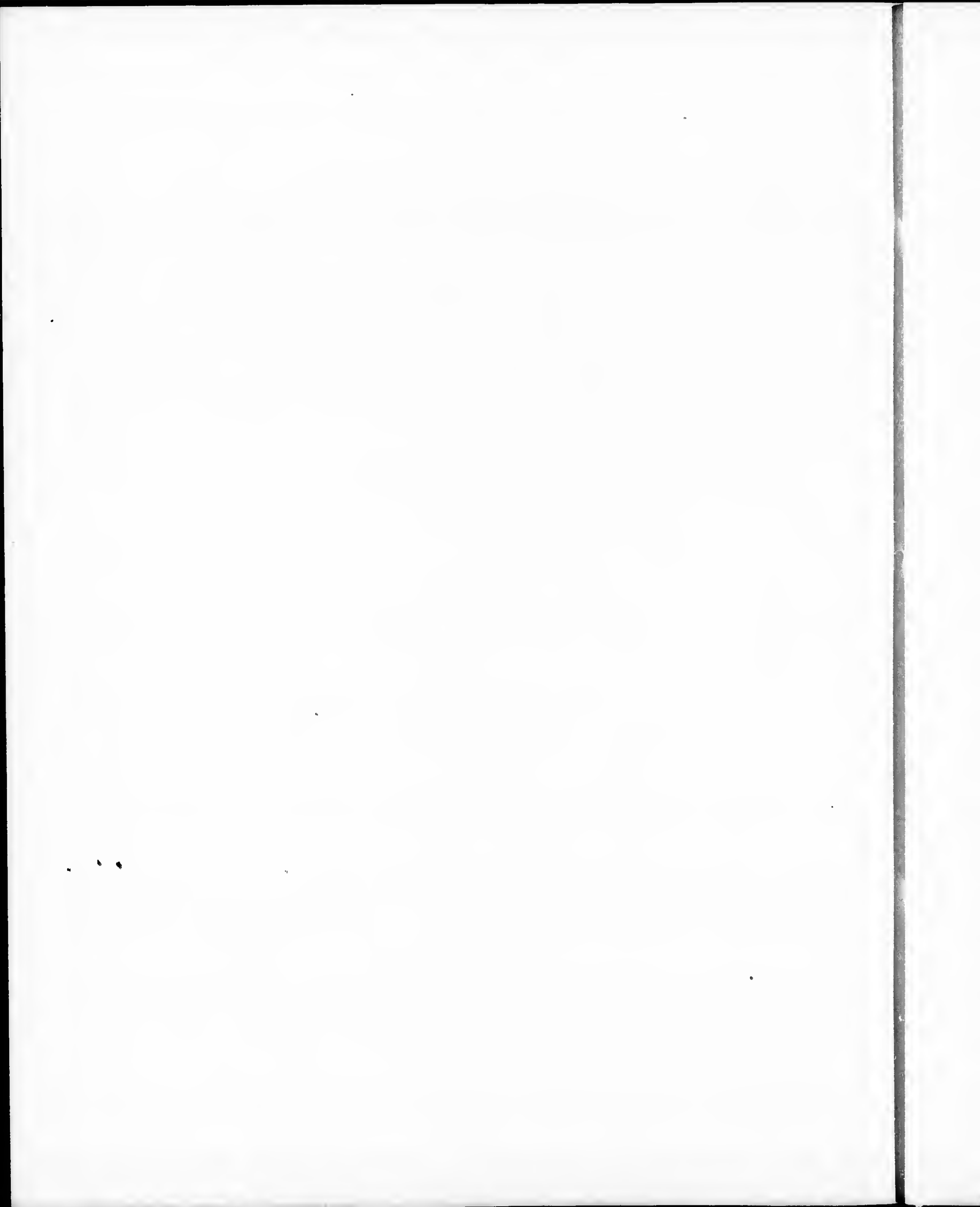
C. J. Does any man who publishes a libel shew any good-will?

Mr. Davie. I must ask Your Lordship to leave to the Jury whether there was express or implied malice. I must except to that portion of your ruling which says they must find malice in any event, and request you to ask them, do they find malice against the defendant or do they not?

C. J. The law implies that if a man throws a lighted torch about indiscriminately it must be taken that he implies malice. He may not propose to set fire to a building, or injure a garden, but some malicious intention is clear.

Mr. Davie. Will Your Lordship leave it to the Jury to say whether there was implied *(express?)* malice?

— There was no such ruling — 2nd if a libel then malice follows — unless where privilege be. Then the question of express malice would arise, but only then — and wo'd be for the Jury. M.B.B.



C. J. No.

Mr. Davie. Or direct them to say whether it was the object of the defendant to vindicate the plaintiff's character, or whether it was the defendant's design to injure him.

C. J. You see, it does not very much matter what the particular intention was. It is the effect we have to consider.

Mr. Davie. The intention has everything to do with the matter, because the question is whether to punish the defendant or not.

C. J. You say, was the object of the defendant to vindicate the plaintiff's character or to injure him? I do not charge them to that effect. (To the Jury)—It is for you, Gentlemen, and has been ever since Fox's Act, to say, is this a libel or not? If you say it is, then you have to consider whether there was any justification, and, if no justification, then consider the amount of damages.

Mr. Drake objects that these exceptions should be taken after the Jury have retired, as being taken in their presence they practically amount to counsel making another speech.

Mr. Davie. If I don't take them now it will be of no use to take them at all. I again ask Your Lordship to direct the Jury to say if, when they take the whole publication together, it is injurious.

C. J. No: to say whether it is a libel.

Mr. Davie. No; whether it is injurious.

C. J. I shall not listen to anything further, and I leave it to the Jury to say if it be a libel or not. If it is a libel, all they have got to do is to name the amount of damages. The record will go into the Jury and all these documents; ~~but really I do not see what the Post and Free Press have got to do with it. The Colonist is the only thing you have got to look at, gentlemen. You see, Mr. Davie, the matter is in the pleadings and you can immediately strike out all the innuendoes.~~

The Jury retired at 6:20 p. m., returning at 6:50 p. m., with a verdict for the plaintiff. Damages, $2,500.

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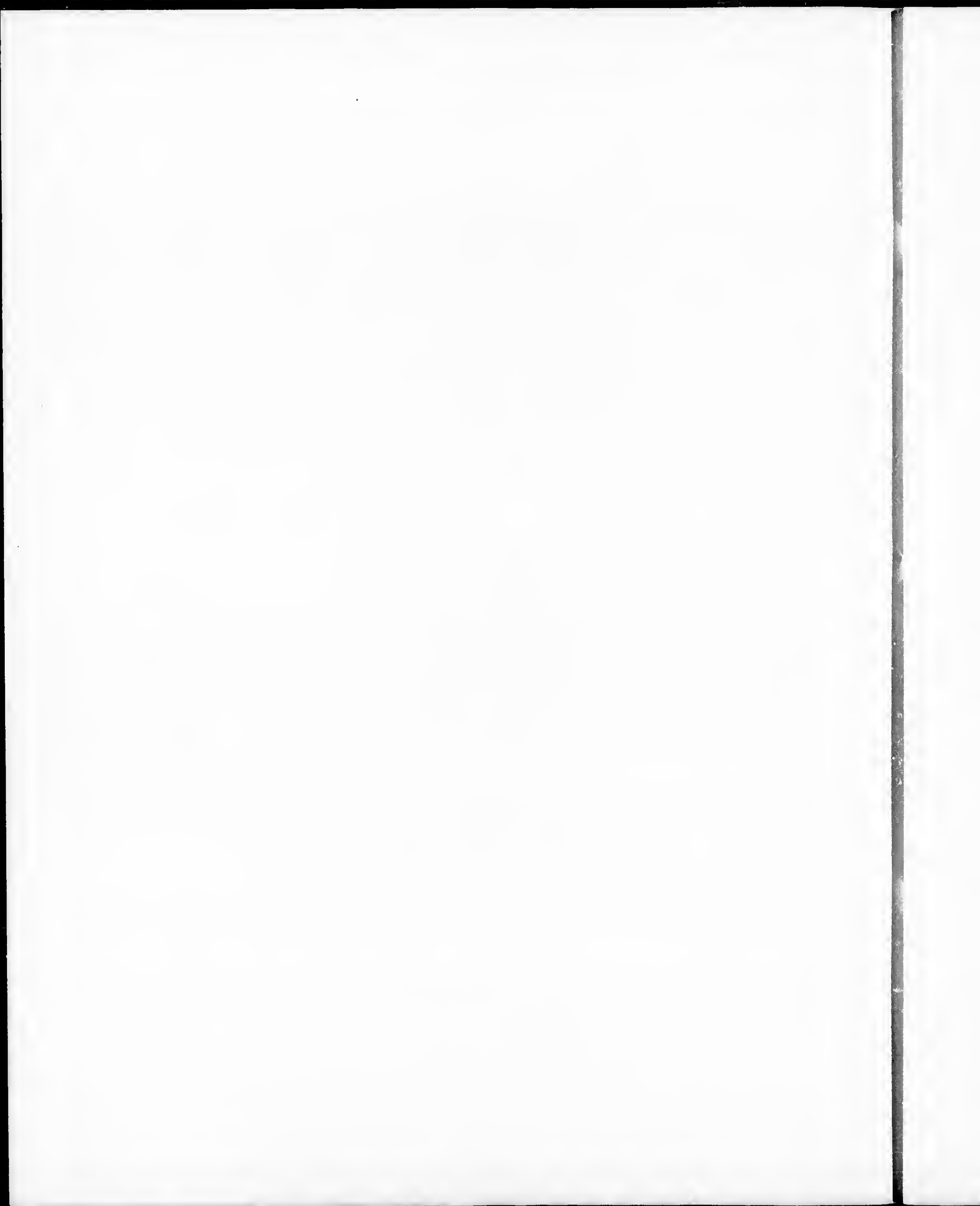
VERDICT.

"We find a verdict for the plaintiff, that the publication is a libel: damages two thousand five hundred dollars."



Order for Judgment.

## In the Supreme Court of British Columbia.

BEFORE THE HONORABLE THE CHIEF JUSTICE.

BETWEEN

THE HONORABLE GEORGE ANTHONY WALKEM,

Plaintiff.

AND

DAVID WILLIAMS HIGGINS,

Defendant.

Thursday, the 30th day of June, A. D. 1887. 10

This action coming on for trial this day before the Honorable Sir Matthew Baillie Begbie, Knight, Chief Justice, and a special jury, in the presence of Mr. Drake, Q. C., and Mr. Helmcken, of Counsel for the Plaintiff, and Mr. T. Davie, Q. C., and Mr. Bodwell, of Counsel for Defendant, upon opening of the matter upon hearing read the Pleadings, the evidence of Francis Bernard McNamee and Mr. M. F. Johnston taken on commission before George Mountain Evans, Esquire, at Toronto, Province of Ontario, on the 20th day of December, 1886, and the 30th day of December, 1886, and the exhibits thereunto annexed, the interrogatories exhibited on the 6th day of March, 1886, and the answers of the Defendant thereto, dated 31st day of March, 1886, the evidence of Charles William Mitchell taken on commission before William Drummond Hogg, Esquire, at the City of Ottawa, and 20 Province aforesaid, on the 3rd day of June, A. D. 1887, the further evidence of Francis Bernard McNamee also taken before the said William Drummond Hogg, Esquire, on the 20th day of June A. D. 1887, and the evidence of witnesses on both sides and what was alleged by Counsel aforesaid, and the Special Jury having found a verdict in favor of the Plaintiff damages assessed at $2,500, and the said The Honorable Sir Matthew Baillie Begbie, Knight, Chief Justice, having ordered that judgment be entered for the Plaintiff for $2,500 and costs of suit, This Court doth order and adjudge that the Plaintiff do recover against the defendant $2,500 damages and his costs of suit to be taxed.

By the Court,

(Signed) James C. Prevost,
Registrar. 30

{ SEAL. } Law Stamp, $1.00.

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NOTICE OF APPEAL.

# IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

THE HONORABLE GEORGE ANTHONY WALKEM,

Plaintiff.

AND

DAVID WILLIAMS HIGGINS,

Defendant.

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Take Notice of appeal on behalf of the above named defendant to the Full Court from the verdict and judgment herein for $2,500 rendered and given in favor of the above named plaintiff on the 30th day of June, A. D. 1887, and that the Full Court will be moved on Monday, the 11th day of July, A. D. 1887, (by special leave of the Chief Justice) at the opening of the court or so soon thereafter as counsel can be heard by Mr. Theodore Davie, Q. C., of counsel for the above named defendant, that the said verdict and judgment may be reversed and annulled and in lieu thereof a non-suit or judgment for the defendant entered on grounds to be urged in support of the motion including the following:

1. That the Chief Justice should have held the publication complained of incapable of the innuendo, and should have non-suited the plaintiff or have given judgment for the defendant.

2. That upon the Pleadings and evidence the defendant was entitled to the verdict and judgment.

And in the alternative should the above motion be refused, Take Notice that the defendant will move for an order calling upon the plaintiff to shew cause why the verdict and all subsequent proceedings should not be set aside and a new trial had between the parties, on grounds to be urged in support of the motion, including the following;

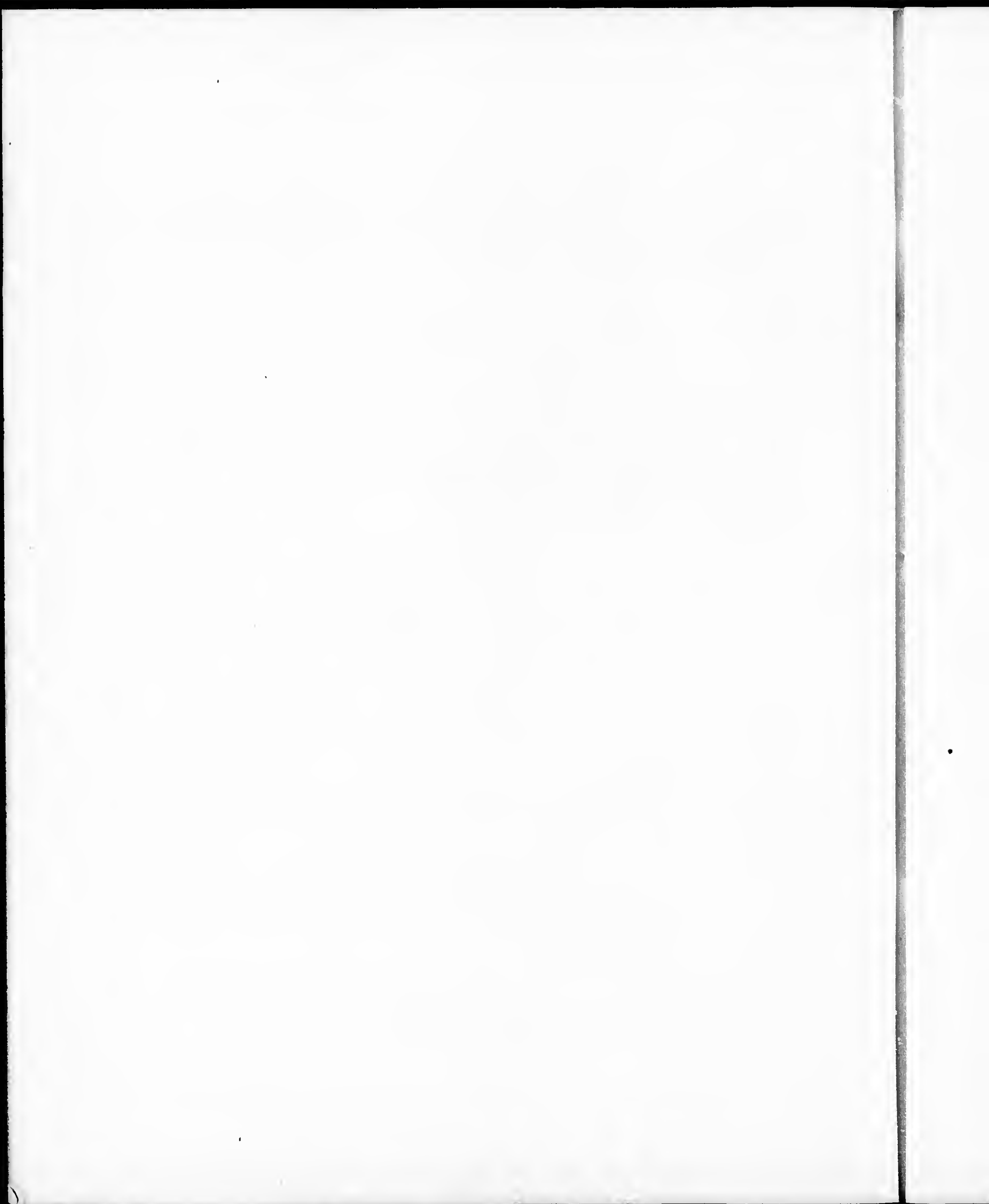
1. Innuendo not warranted by publication.
2. Mis-direction.
3. Non-direction.
4. Non-submission of proper questions to jury.
5. Rejection of evidence.
6. Defendant's case prejudiced by ~~the conduct of~~ the Chief Justice, at the trial particularly by his intimation that owing to plaintiff being a Judge of the Supreme Court, indulgence had been granted to defendant which he was not entitled to.
7. Verdict contrary to evidence.
8. Excessive damages.

Dated this 4th day of July, A. D. 1887.

THEODORE DAVIE,
Defendant's Solicitor.

To MESSRS. DRAKE, JACKSON & HELMCKEN,
Plaintiff's Solicitors.

12 July 87 Struck out by ye Ct without prej. to Mr. Davie's right to move for N. T.



## Memorandum.

The evidence of Booth and Robson, offered by the defendant at the trial was tendered to shew that they first called defendant's attention to article in Post. Friendly comment regarding plaintiff. Resolved between the three that it would be only fair and just to plaintiff to call attention to it by an article in Colonist. This occurred day before Higgins' article appeared.

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## Eatract from Report Published in "Evening Post":

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"When Mitchell applied to him for payment of his claim, witness told him to give the "account properly drawn up, and submit it to him, as it would be better for him to pay is "than to have lawsuits. Witness had a deed of dissolution of partnership prepared. Six "of them were in partnership out in British Columbia, one of whom was at that time "the Premier of the Province." 10