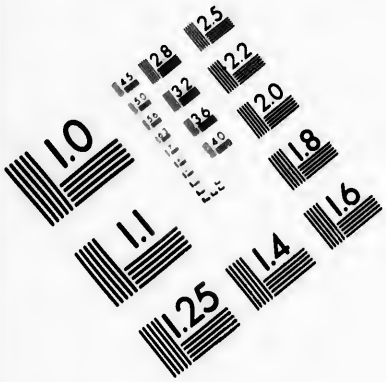

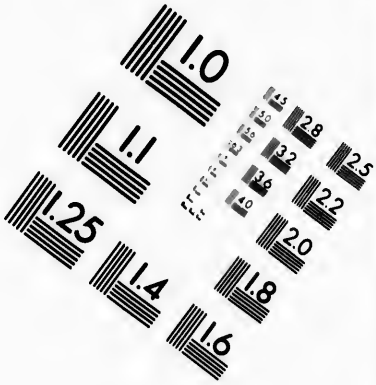

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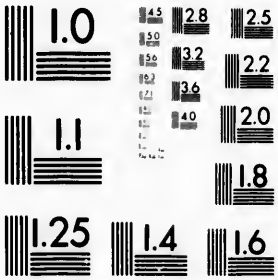

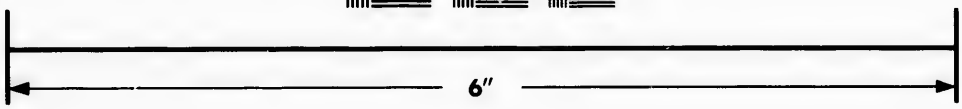

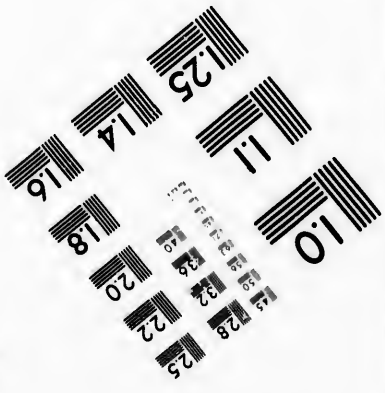

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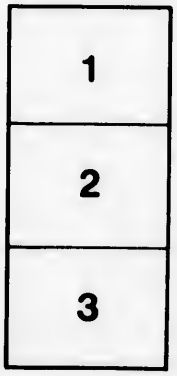

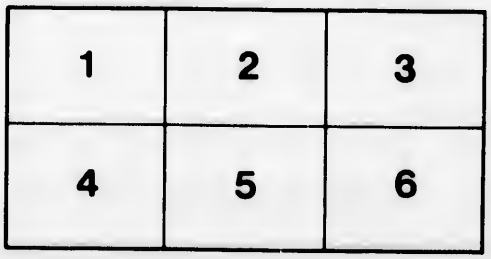

1887

In the Supreme Court of British Columbia.

BETWEEN

WILLIAM BUTLER ADAIR,

PLAINTIFF, RESPONDENT.

AND

ANDREW WELCH and ROBERT PATERSON RITHET carrying on business as Welch, Rithet and Company, and JOHN ADAIR, Junior, lately carrying on business as Adair and Company, on Fraser River, and JOSEPH DESPARD PEMBERTON.

(By original action)

AND BETWEEN

The said ANDREW WELCH and ROBERT PATERSON RITHET,

PLAINTIFFS, APPELLANTS,

AND

The said WILLIAM BUTLER ADAIR,

DEFENDANT, RESPONDENT.

(BY Counter Claim)

CASE ON APPEAL.

Messrs. DRAKE, JACKSON & HELMCKEN,
Solicitors for Appellants.

Messrs. DAVIE & POOLEY,
Solicitors for Respondents.

THEODORE DAVIE, Esq.,
Solicitor for Defendant, Adair & Company.

MUNROE MILLER,
PRINTER, BOOKBINDER AND PAPER RULER.
VICTORIA.

In the Supreme Court of British Columbia.

BETWEEN

WILLIAM BUTLER ADAIR,

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AND

ANDREW WELCH and ROBERT PATERSON RITHET carrying on business as Welch, Rithet and Company, and JOHN ADAIR, Junior, lately carrying on business as Adair and Company, on Fraser River, and JOSEPH DESPARD PEMBERTON.

(By original action) 10

AND BETWEEN

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PLAINTIFFS, APPELLANTS,

AND

The said WILLIAM BUTLER ADAIR,

DEFENDANT, RESPONDENT.

(By Counter Claim)

CASE ON APPEAL.

Messrs. DRAKE, JACKSON & HELMCKEN,
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Solicitors for Respondents.

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Solicitor for Defendant, Adair & Company.

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INDEX.

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DEFENDANTS, APPELLANTS, 10

(By original action.)

AND BETWEEN

The said ANDREW WELCH and ROBERT PATERSON RITHET,

PLAINTIFFS, APPELLANTS,

AND

The said WILLIAM BUTLER ADAIR,

DEFENDANT, RESPONDENT.

(By Counter Claim.)

This is an appeal by the defendants, Andrew Welch and Robert Paterson Rithet, to the Full Court from a Judgment of the Honorable the Chief Justice, pronounced the 1st day of December, 1886 in favor of the Plaintiff. 20

STATEMENT.

The writ of Summons in this action was issued on the 30th September, 1884, and is endorsed as follows:—

"The Plaintiff's claim is for an account to be taken of all transactions between the said "Welch, Rithet and Company, and Adair and Company, of Fraser River, fish canners "between the year 1881 and 1884. For an injunction to restrain the said Welch, Rithet "and Company, from carrying out a sale of lots 54, 55, 56, 57, Group II., New West. 30 "minster District, advertised to take place on Saturday October 4th, 1884, under the "power of Sale in an alleged Mortgage made by the Plaintiff in favor of the said Welch, "Rithet and Company, and dated 2nd of March, 1882, until the aforesaid accounts have "been taken by this Honourable Court, and for such further or other relief as the nature "of the case may require."

The same Solicitor acted for both parties in the preparation and execution of the Mortgage, referred to in the said endorsement.

On the 30th day of September ,1884, the Honourable Mr. Justice Crease, granted an injunction, *ex-parte*, on Respondent's application, restraining the said sale until judgment or further order.

The Respondent delivered his statement of claim on the 21st November, 1884.

The Appellants, Andrew Welch and Robert Paterson Rithet, delivered their statement of defence on the 11th December, 1884.

The Respondent delivered his reply on the 25th March, 1885.

On the 26th February, 1885, a Commission was issued directed to James A. Laidlaw, Esq., British Vice Consul at Portland, to take the evidence of John Adair, Junior, on behalf of Respondent. 10

This commission was executed and duly returned.

On the same day the learned Chief Justice, made an order referring the accounts between the appellants, and Adair & Co., to Mr. J. C. Bales, to report upon, and the respondent refusing to bring into Court any money on account of the money claimed to be due in respect of the said mortgage debt, or to give security and the appellants undertaking not to enforce the powers of sale under the Mortgage for 14 days from that date, the order of the 30th September, 1884 was dissolved.

In pursuance of said order, Mr. Bales made his report on the 17th March, 1885. 20

On the 27th March, 1885, the respondent obtained an order to amend the writ of summons herein by adding Joseph Despard Pemberton as a defendant, and to amend his statement of claim. The respondent amended his writ and statement of claim accordingly, and delivered his amended statement of claim on the 28th day of March, 1885.

On the 26th March, 1885, the appellants obtained leave to amend their statement of defence by adding a counter-claim, which was delivered on the 27th April, 1885.

On the 7th May, 1885, the respondent delivered his reply.

The defendant Pemberton delivered his statement of defence on the 11th day of April, 1885, and the respondent delivered his reply thereto on the 27th April, 1885.

On the 22d May, 1885, the learned Chief Justice made an order for the trial of this action to take place on the 1st June, 1885, before himself, without a jury. 30

This action was tried before the Honorable the Chief Justice on the 1st June, 1885, who took time to consider his judgment. On the hearing the learned Chief Justice ordered the Registrar to take certain accounts between appellants and John Adair & Co. On the 9th June, 1885, the learned Chief Justice, in a written judgment, held that the respondent was entitled to redeem on payment of the sum of $20,000 and interest, plus the further advances (not exceeding $25,000) in 1882, and interest from the date of each such further advance.

No appeal was taken by either party from the said judgment.

The appellants, in pursuance of the said order, brought in their accounts.

On the 29th December, 1885, the plaintiff obtained an order that in taking the accounts herein, the appellants should be bound by their accounts, delivered in the action and upon which Mr. Bales made his report on the 17th March, 1885, subject to the appellants' right to surcharge and falsify the said accounts by the 29th January, 1886. The time for surcharging and falsifying was on the 29th January, 1886, extended for one week, but the appellants did not amend the accounts in any way.

On the 7th May, 1886, the Registrar made his report showing a balance due to appellants of $27,617.60. On the 29th of June, 1886, the appellants moved before the Honorable, the Chief Justice for an order that judgment may be entered herein on their behalf for the amount due in the said report which motion was adjourned. 10

On the 5th November, 1886, the adjourned motion was heard by way of motion for decree on further directions by the learned Chief Justice who, on the 1st December, 1886, delivered a written judgment, finding that all moneys due, owing and secured under and by virtue of the said Indenture of Mortgage of the 2nd of March, 1882 were fully paid and satisfied before the commencement of the action, and further declaring that the appellants thereupon became bare trustees for the respondent and by consent the further consideration of this action particularly as regards relief prayed against the defendant J. D. Pemberton was adjourned.

This decree was settled by the court on the 20th January, 1887 and was served on the 21st January, 1887. 20

On the 26th January, 1887 the appellants gave notice of appeal therefrom to the Full Court.

The appellants contend that the said decree should be reversed on the grounds amongst others viz :

I. That on further directions the court has no power to make an order which will have the effect of varying or impugning the original order in a material point.

II. That the respondent was liable for the full amount due to the appellants not exceeding $20,000 plus $25,000 and interest. 30

III. That the mortgage of the 2nd March, 1882 was an absolute mortgage and by the said deed all collateral securities were expressly reserved to the appellants.

IV. If the said mortgage was a guarantee it was a guarantee for $45,000, and was not subject to be reduced by the realization of collateral security.

V. The appellants could not have been and were not guilty of any misrepresentation, as the same solicitor having acted for both parties to the transaction, notice to the solicitor was notice to the principal.

PLEADINGS.

The pleadings in the action are as follows:—

In the Supreme Court of British Columbia.

Writ Issued 30th September, 1884.

Writ Amended 28th March, 1885.

BETWEEN

WILLIAM BUTLER ADAIR,

PLAINTIFF,

AND

ANDREW WELCH and ROBERT PATERSON RITHET, carrying on business as Welch, Rithet & Company, and JOHN ADAIR, Junior, lately carrying on business as Adair & Company, on Frazer River, and JOSEPH DESPARD PEMBERTON, 10

DEFENDANTS.

AMENDED STATEMENT OF CLAIM.

Amended pursuant to order of Sir Matthew B. Begbie, dated 27th day of March, 1885.

1. The Plaintiff was, until recently, a Fish Canner, carrying on business at Canoe Pass, on Fraser River.

2. The Defendants, Andrew Welch and Robert Paterson Rithet, are general Commission Merchants, carrying on business at the City of Victoria, British Columbia. 20

3. The Defendant, John Adair, Junior, was formerly a Fish Canner at Canoe Pass, on Fraser River, but is now resident at the City of Portland, Oregon.

4. The Plaintiff is the owner in fee of Lots Fifty-five (55), Fifty-six (56), Fifty-seven (57), and Fifty-four (54), except as to ten acres thereof, all in Group II, New Westminster District, and said to contain five hundred and ninety acres, (590) more or less.

5. That the said Andrew Welch and Robert Paterson Rithet, two of the above named Defendants, had certain dealings and transactions with, and made certain advances to John Adair, Junior, trading as Adair & Company, Fish Canners, Fraser River, the other above named Defendants, in the year 1881. 30

6. That the said Adair & Company were largely indebted to the said Welch,

Rithet & Company for such advances, and were unable to pay the same, as the fish then put up by them and forwarded to England by the said Welch, Rithet & Company were not sold.

7. That the said Welch, Rithet & Company were desirous of obtaining security for the advances so made to Adair & Company, and the said Adair & Company applied to the said Plaintiff to secure the sum of $20,000 00, then due by them to the said Welch, Rithet & Company, which the said Plaintiff agreed to do.

8. That the said Plaintiff did on the second day of March, 1882, execute a Mortgage upon the aforesaid Lots of land, in favor of the said Welch, Rithet & Company, to secure to them the said sum of $20,000, then due as aforesaid, and any further advances to be made by the said Welch, Rithet & Company to the said Adair & Company not to exceed in the whole the sum of $25,000, but for greater certainty the Plaintiff craves leave to refer to the Mortgage deed itself. 10

9. That on or about the 8th day of December, 1882, the said Welch, Rithet & Company rendered an account to the said Adair & Company, showing the said Adair & Company debtors to them on the catch of fish for the year 1881 in the sum of $18,920.53 with 6,000 cases of salmon still to be heard from.

10. That in the year 1882 the said Welch, Rithet & Company furnished the said Adair & Company with an account of their indebtedness to them for the season of 1882, showing that the balance due to the said Welch, Rithet & Company from the said Adair & Company, for advances over $4 per case against 20,308 cases salmon, was $18,758.73, (with 20,308 cases salmon, 1882 catch, no returns), showing a total liability from the said Adair & Company to the said Welch, Rithet & Company of $37,679.26. 20

11. That on or about the 8th day of December, 1882, the said Adair & Company paid the said Welch, Rithet & Company the sum of $3,653.00, and on or about the 28th February, 1883, the said Adair & Company made a further payment to the said Welch, Rithet & Company of $37,728.24, making in all the sum of $41,381.24, leaving a balance to the credit of the said Adair & Company with the said Defendants, Welch, Rithet & Company, of $3,701.98, or thereabouts.

12. That on the 3rd day of March, 1883, the said Welch, Rithet & Company honored the draft of Adair & Company upon them for the sum of $2,500, still leaving a balance in their hands to the credit of Adair & Company of $1,201.98, and on or about the 13th March, 1883, the said Adair & Company placed to their credit with the said Welch, Rithet & Company a sum of $500, and on or about the 17th day of March, 1883, a further sum of $350, making a balance to their credit with the said Welch, Rithet & Company of $2,051.98. 30

13. That the said Welch, Rithet & Company did not render any further statement of account to the said Adair & Company until on or about the 9th day of August, 1883, when they rendered an account shewing a balance due by Adair & Company to the said Welch, Rithet & Company on 1882 catch of $19,144.07, and a balance due on 1881 catch of $26,570.26. 40

14. That the said Welch, Rithet & Company have since furnished other accounts to the said Adair & Company showing a much larger indebtedness for the years 1881 and 1882, all of which said accounts are disputed by the said Adair & Company, and no settlement has yet been arrived at thereon between the said Welch, Rithet & Company and the said Adair & Company.

15. That the above named Plaintiff never executed any other mortgage on the aforesaid property to the said Welch, Rithet & Company to secure any other advances to Adair & Company, other than those mentioned in the said mortgage of the 2nd March, 1882.

16. That upon a proper account being taken of the transactions between the said Adair & Company and the said Welch, Rithet & Company, it will be found that all the moneys as security for which the said mortgage of the 2nd March, 1882, was given have been fully paid off. 10

17. That the said Defendant, John Adair, Junior, who was carrying on the aforesaid business under the name of Adair & Company, is residing at Portland, Oregon, beyond the jurisdiction of this Honorable Court.

18. Since the commencement of this action, to wit, on or about the 17th day of March, 1885, the Defendants, Welch, Rithet & Company, wrongfully sold and conveyed to the Defendant Joseph Despard Pemberton, the said lands and premises for the alleged price of $20,000. 20

19. The said J. D. Pemberton made the said alleged purchase and took the conveyance with full notice of this action and of the plaintiff's contention that the said mortgage had been paid off.

20. The alleged price of $20,000 is far below the fair market value of the property, and such alleged sale was made without notice to the Plaintiff or his Solicitor, and without the consent of either of them, and was not made by public auction, or in a manner calculated to realize the best price.

The Plaintiff claims:

1. That a full and complete account may be had and taken of all business transactions between the Defendants Adair & Company and Welch, Rithet & Company, between the years 1881 and 1884. 30

2. That it may be declared that the said mortgage has been paid off, and that it be ordered that the Defendants, Welch, Rithet & Company, reconvey the said lands to the plaintiff freed and discharged from the said mortgage; together with proper covenants that the lands have not been encumbered.

3. That it may be declared that the alleged sale and conveyance to the said J. D. Pemberton is null and void, and that he be ordered to execute a conveyance of the said lands to the plaintiff.

4. For such further or other relief as the nature of the case may require.

The Plaintiff proposes that this action be tried at the City of Victoria.

Delivered the 28th day of March, 1885, by

CHARLES E. POOLEY,
Plaintiff's Solicitor,
Langley Street, Victoria.

In the Supreme Court of British Columbia.

BETWEEN

WILLIAM BUTLER ADAIR,

PLAINTIFF, 10

AND

ANDREW WELCH, ROBERT PATERSON RITHET, and JOHN ADAIR, JUNIOR, and JOSEPH DESPARD PEMBERTON,

DEFENDANTS.

(By original action)

AND BETWEEN

The said ANDREW WELCH and ROBERT PATERSON RITHET,

PLAINTIFFS.

AND

The said WILLIAM BUTLER ADAIR, 20

DEFENDANT.

(By Counter Claim.)

Amended by Order 26th March, 1885.

STATEMENT OF DEFENCE AND COUNTER-CLAIM OF DEFENDANTS ANDREW WELCH AND ROBERT PATERSON RITHET.

1. The Defendants, Andrew Welch and Robert Paterson Rithet, were agents of the firm of Adair & Co., and in March, 1882, Adair & Company were indebted to

the Defendants in the sum of $20,000 and upwards, for which the Defendants held certain collateral securities, and in preparing for the fishing season of 1882 Adair and Co. required further advances, which the Defendants declined to make without further security. The Defendant, John Adair, Junior, offered to give security over the land mentioned in Paragraph 4 of the Statement of Claim, with the exception of two pieces of land, portion of Section 54, containing in all 25 acres.

2. The Defendants consented to make to the firm of Adair & Co., such further advances as were required by them, on obtaining a mortgage as aforesaid, and accordingly a mortgage, dated the 2nd March, 1882, was prepared and executed by the Plaintiff, but such further advances were not limited to the sum of $5,000, as alleged. 10

3. The Defendants did, from time to time, render accounts of the dealings and transactions between the Defendants and Adair & Co., and the amount due by Adair & Co. to the Defendants on the 30th of December, 1882, was $45,714.33, with interest, and not as alleged in Paragraph 10 of the Statement of Claim.

4. The Defendants made advances to Adair & Co. from time to time in connection with the cannery business, and full accounts were rendered to Adair & Co. and no exception was taken to said accounts, and the said accounts are correct, and do not contain any item improperly inserted, nor do they want any item which ought to be inserted.

5. On 30th April, 1884, a final account was rendered, showing a balance due to 20 the Defendants of $27,617.63, of which amount $7,617.63 with interest thereon, is still due from Adair & Co. to the Defendants.

6. The Defendants do not admit that the account of Adair & Co. was at any time in credit with the Defendants, there always was a balance against them, the total amount of which it was impossible to ascertain until all the accounts sales of salmon were returned.

7. The shipments of the said Adair & Co.'s salmon when realized shewed a loss.

8. The Defendants deny that Adair & Co. ever disputed any accounts which was rendered by the Defendants, or raised any objection thereto, but on the contrary they admitted the correctness of the accounts, and expressed their regrets that the results 30 were so unsatisfactory owing to the market being so low for this class of goods.

9. The Defendants allege that the Plaintiff is well aware of all the circumstances connected with the transactions of Adair & Co. with the Defendants. John Adair jr. was interested in the land the subject of the said mortgage.

10. The Defendants deny that the Plaintiff is entitled to any accounts from the Defendants of the transactions of Adair & Co., full accounts whereof have been rendered to that firm.

AND BY WAY OF COUNTER CLAIM the Defendants Andrew Welch and Robert Paterson Rithet say:

The Defendant John Adair trading as Adair and Company was indebted to these Defendants in March, 1882, for advances made in respect of the canning operations of Adair & Co. under the terms of an agreement dated the first day of February as follows :

"Victoria, B. C., 1st February,

"Messrs. Adair & Co.,
"Canoe Pass, Fraser River.
"Dear Sirs :

"We now state in writing the terms upon "which we have arranged with you to act as agents for your Cannery for the present "season's catch of fish. 10

"We are to advance in cash the following sums :

"Viz. In February, $2,000. Two thousand Dollars.
" March, $1,000. One thousand Dollars.
" April, $1,000. One thousand Dollars.
" May, $1,000. One thousand Dollars.
" June, $2,000. Two thousand Dollars.

"To allow your present indebtedness to us to stand over until your salmon are ship-"ped, to provide what material you may from time to time require in such quantity as "you may order basing your estimates for the same on an estimated season's catch of 15,-"000 cases, and to come under these advances to the extent of $25,000, previous to the 20 "shipment of your catch. After shipment we are to advance, if required by you, a sum "equal to 75 per cent, of the market value of the salmon at the time of shipment not "exceeding under any circumstances $4 per case. Interest on our advances is to be "charged from the due date of the same to time of shipment of the catch at (10) ten per "cent. per annum and after shipment at the rate of (5) five per cent. per annum. Ship-"ments are to be made as soon as the fish are ready and as required by us. Our commis-"sion is to be (5) five per cent on the whole of your catch, which is to cover brokerage, "and we are authorized in making sale to guarantee the purchasers against 'swell heads' "and all other defects as is usual, against which you are to fully indemnify us as cus-"tomary. Your fish are to be packed in full weight cans and every care is to be taken 30 "to make the fish a first-class merchantable article. The advances made previous to ship-"ment as above stipulated are to be deducted from and considered part of the advance "above referred to after shipment.

"As security for our advances you are to execute a mortgage and bill of sale in our "favor covering the cannery and all the plant and material therein and to be supplied by "us hereafter and on the salmon as it is packed.

"(It is expressly agreed and understood that these advances are to be used exclusively "for the purpose for which they are intended and no other.)

"On purchase of goods for your account outside of our own stock we are to be al-"lowed a commission of (2½) two and a half per cent. 40

"We remain, Dear Sirs,
"Yours faithfully,
"Welch, Rithet & Co."

"Messrs. Welch, Rithet & Co.,
"Victoria,
"Dear Sirs:
"We hereby confirm the above as the terms agreed "on between us for the purposes therein named.

Adair & Co."

The Defendants agreed to make advances to Adair & Co. to the extent of twenty-five thousand dollars on similar terms to those lastly set forth upon receiving security over the lands mentioned in paragraph four of the Statement of Claim and as further and additional security to the securities then held by them and accordingly the mortgage mentioned in paragraphs one and two of the Statement of Defence was executed. 10

The Defendants made large advances to Adair & Co., and after realizing the securities held by them except the mortgage there remained due to the Defendants on the final winding up of accounts $27,617.63 which amount neither the Plaintiff nor the Defendant John Adair paid although demanded.

On or about the 17th day of March, 1885, the Defendants sold the lands mentioned in the said mortgage of the 2nd of March, 1882, for $20,000, and there now remains due to the Defendants $7,617.63 and interest from 30th April, 1884.

The Defendants Andrew Welch and Robert Paterson Rithet claim from the Plaintiff the sum of $7,617.63 and interest at ten per cent. 20

And such further and other relief as the nature of the case requires.

Delivered this 27th day of April, A. D. 1885, by
ROBERT E. JACKSON,
Solicitor for Defendants Welch, Rithet & Company.

To
Messrs. DAVIE & POOLEY
Solicitors for Plaintiff.

In the Supreme Court of British Columbia.

BETWEEN

WILLIAM BUTLER ADAIR,

PLAINTIFF.

AND

ANDREW WELCH and ROBERT PATERSON RITHET, carrying on business as Welch, Rithet & Company, and JOHN ADAIR, JUNIOR, lately carrying on business as Adair & Company on Fraser River, and JOSEPH DESPARD PEMBERTON,

DEFENDANTS. 10

(By original action)

AND BETWEEN

The said ANDREW WELCH and ROBERT PATERSON RITHET, carrying on business as aforesaid,

PLAINTIFFS.

AND

The said WILLIAM BUTLER ADAIR,

DEFENDANT.

(By Counter Claim.)

Amended by order of 26th March, 1885. 20

REPLY OF THE PLAINTIFF WILLIAM BUTLER ADAIR TO THE COUNTER CLAIM OF THE DEFENDANTS ANDREW WELCH AND ROBERT PATERSON RITHET.

The Plaintiff joins issue upon the Statement of Defence of the Defendants Andrew Welch and Robert Paterson Rithet. In reply to the counter claim of the Defendants Andrew Welch and Robert Paterson Rithet.

The Plaintiff, William Butler Adair, repeating the statements in his Statement of Claim herein further says in reply to the Counter Claim of the Defendants, Andrew Welch and Robert Paterson Rithet.

1. The Defendants did not agree to make advances to Adair & Co. to the extent of twenty-five thousand dollars on similar terms to those set forth in the agreement of 1st February, recited in the Defendants Counter Claim, upon receiving security over the 30

lands mentioned in Paragraph 4 of the Statement of Claim, but the Plaintiff says the mortgage was given to secure the sum of $20,000, or thereabouts, then due, and for a further advance, not to exceed $5,000.

2. The Plaintiff denies that Adair & Co. are indebted to the Defendants in $27,617.63, or any other sum in respect of which the Plaintiff is in any way liable.

3. The date of the sale by the Defendants, of the land set forth, was the 16th day of March, and not the 17th day, as stated in the Counter Claim.

Delivered the 7th day of May, A. D., 1885, by Charles E. Pooley, of Davie & Pooley, Langley Street, Victoria, Solicitors for the above named Plaintiff.

THE STATEMENT OF DEFENCE OF J. D. PEMBERTON. 10

The Defendant Joseph Despard Pemberton, as to clauses 18, 19 and 20, of the statement of claim, says that he purchased the lands in the pleading mentioned from the other Defendants, for $20,000, which sum was the full value of the said property, and he denies that he had any notice of the action, or of the contention of the Plaintiff, that the Mortgage was paid off.

As to the remainder of the Plaintiff's statement of claim, the Defendant does not admit the same or any part thereof, as he is ignorant of the facts therein alleged, and has no means of knowing.

Delivered this 11th day of April, A. D., 1885 by Robert Edwin Jackson, Solicitor for Defendant J. D. Pemberton. 20

To Messrs. DAVIE & POOLEY,
Plaintiff's Solicitors.

STATEMENT OF REPLY.

The Plaintiff joins issue upon the Statement of Defence of the Defendant Joseph Despard Pemberton.

Delivered this 27th day of April, 1885.

CHARLES E. POOLEY,
Plaintiff's Solicitor

The following is a copy of the order of the Honorable Mr. Justice Crease granting the injunction herein. 30

(Style of Cause.)

Tuesday, 30th September, 1884

Upon hearing Mr. Charles E. Pooley of counsel for the plaintiff, and upon reading the affidavit of William B. Adair filed herein this day, I do order that an injunction be awarded to restrain the defendants Welch, Rithet & Co., their servants or agents, from proceeding with the sale of Lots 55, 56, 57and 54 (except as to ten acres thereof) all in Group II, New Westminster District, as advertised to take place by public auction on Saturday, the 4th day of October next under and by virtue of an alleged mortgage from one William B. Adair to the defendants Welch, Rithet & Co., or in any other manner to deal with the said lands under the said alleged mortgage until judgment in this action or 10 until further order.

HENRY P. PELLEW CREASE, J.

The following is a copy of the order of the Honorable the Chief Justice dissolving the injunction granted by the order of the 30th September, 1884.

(STYLE OF CAUSE.)

Wednesday 25th February, 1885.

Upon motion this day made by Mr. Drake, Q. C., of Counsel for the Defendants Andrew Welch and Robert Paterson Rithet, and upon reading the affidavit of the said R. P. Rithet, filed the day of February, 1885, and upon hearing Mr. Pooley, of Counsel for Plaintiff, and Mr. Theodore Davie, of Counsel for John Adair, Junior, and 20 upon reading the order of 30th September, 1884. I DO ORDER that the accounts between the Defendants Andrew Welch and Robert Paterson Rithet and Adair and Company, be referred to James Chesney Bales, who is to make a separate report of the accounts of the pack for the years 1881 and 1882, and let an account be taken of all advances made by Welch, Rithet & Company to Adair and Company, and of all payments on account thereof, and of the proceeds of all sales made by Welch, Rithet and Company, for or on account of Adair and Company and in taking such account any account that has been settled between the parties is not to be disturbed, and it is further ordered that in taking such accounts the said J. C. Bales, is to report what sum if any was advanced by Welch, Rithet on the pack salmon for the year 1881, and whether the same was repaid. 30 The said J. C. Bales, is to ascertain whether any and what advances beyond those undertaken to be made in the Agreement on 2nd February, 1881, were made by Welch Rithet and Company, to Adair and Company, and whether such further advances or any part thereof have been repaid and when And the Plaintiff declining to bring any money into Court on account of the money claimed to be due in respect of the said Mortgage debt or to give any security for the same. And the Defendants Welch, Rithet and Company, undertaking not to enforce their powers of sale under the said Mortgage deed for the space of 14 days from the date hereof It is ordered that the injunction be dissolved and that the order of Mr. Justice Crease, dated the 30th September, 1884, be discharged

and reserved the consideration of all further directions and of costs of this suit until after the said James C. Bales, shall have made his report. With liberty to all parties to apply as they may be advised in the meantime.

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

MR. BALES REPORT.

VICTORIA, B. C., 17th March, 1885.

To the Registrar of the Supreme Court.

ADAIR *vs.* WELCH, RITHET & CO.

Sir,—In pursuance of an order of the Chief Justice of the Supreme Court, made in the above action on 25th February, 1885, I have examined the accounts and report as follows, *i. e.:* 10

PACK 1881. Statement of account herewith, marked "A," shows a debit of balance carried to general account, marked "C," on 30th Dec., 1882, of.....$ 26,542 81

Also, net advances and proceeds of that pack.

PACK 1882. Statement of account herewith, marked "B," shows a debit balance carried to general account, marked "C," of..... 44,306 46

Also, net advances and proceeds.

GENERAL ACCOUNT herewith, marked "C," shows that the above debit balances against which all credits, not the proceeds of the salmon shipments, have been placed, leaving a balance still due of..... 27,617 63 20

Also, advances made on each pack before shipments were made.

I have, &c., &.,

J. C. BALES.

A. 1881 PACK.

From 31st Dec., 1880, to 30th Dec., 1882.	DR.	CR.
To balance from 1880, as per agreement of 2nd Feb., 1881.....$	180 87	
Advances of cash and merchandise, and interest thereon.....	96,025 73	
Losses on realization of salmon shipments sold under $4.00 per case, the amount agreed to be advanced by Welch, Rithet & Co., ...	7,501 15	
	$103,707 75	

30

By drawbacks on tin		$ 848 79
Overcharges, returns, etc		267 43
Repayment of advances out of proceeds of salmon sales		73,750 78
Excess on realization of shipments over agreed advance of $4.00 per case		2,297 94
Balance due Welch, Rithet & Co., on 30th Dec., 1882		26,542 81
		$103,707 75
To balance on 30th Dec., 1882, carried to general account, marked "C,"	$ 26,542 81	
1881 pack, net advances	95,090 38	
Net proceeds	68,547 57	
Difference	$ 26,542 81	

B 1882 PACK.

From 16th Jan. 1882, to 30th April, 1884.	DR.	CR.
To advances of cash and merchandise and interest thereon	$107,685 50	
Loss on realization of salmon shipments sold under $4.00, the amount per case agreed to be advanced by Welch, Rithet & Co.	19,058 79	
	$126,744 29	
By drawbacks on tin, returned premiums, etc		$ 529 71
Repayment of advances of $4.00 per case		81,232 00
Excess on realization of shipments over agreed advances of $4.00 per case		676 12
Balance due Welch, Rithet & Co		44,306 46
		$126,744 29
To balance carried to general account, marked "C,"	$ 44,306 46	
1882 pack, net advances	107,155 79	
Net proceeds	62,849 33	
Difference	$ 44,306 46	

C. GENERAL ACCOUNT.

		DR.	CR.
1882. Dec. 30.	To balance of 1881 catch	$ 26,542 81	
1884. April 30.	To balance of 1882 catch	44,306 46	
		$ 70,849 27	
1882. May 11.	By draft		$ 1,000 00
1883. Feb. 28.	By sale of cannery		37,728 24
M'ch 13.	By D. Retort		500 00
" 17.	By D. Pulverizer		350 00
June 30.	By British Union Packing Co		3,653 40
	Balance		27,617 65
			$70,849 27

	To balance due Welch, Rithet & Co	$ 27,617 63	
1881.			
Sept. 27.	1881 Pack. Advances at this date in excess of the amount named in the agreement of Feb. 2nd, 1881		$ 32,598 47
1882.			
Aug. 27.	Entire advances at this date on 1882 pack		69,700 20

All repaid as shown in these statements, except the above balance of $27,617.63.

J. C. B.

The following is the order made for the trial of this action: 10

Style of Cause.

Friday 22nd day of May, 1885.

Upon hearing Mr. A. E. B. Davie on behalf of the Plaintiff and Mr. H. D. Helmcken on behalf of the Defendants Welch, Rithet & Co., and Joseph Despard Pemberton. I do order that the trial of this action do take place before me at the Supreme Court House James Bay Victoria on Monday the 1st day of June 1885, without a jury at 12 noon.

(Signed) MATT. B. BEGBIE,
C. J.

In pursuance of the said order for trial herein the action came on for trial on the 1st June 1885, before the Honorable the Chief Justice who reserved his judgment, and on the 20 hearing the learned Chief Justice made the following order as to accounts between appellants and Adair & Co.

(STYLE OF CAUSE.)

1st June, 1885.

Upon motion this day made by Mr. Charles E. Pooley, of Counsel for the Plaintiff, and upon hearing Mr. M. W. T. Drake, Q. C. on behalf of the Defendants Welch, Rithet and Company, and Mr. Theodore Davie, of Counsel for the Defendant John Adair, Junior, I DO ORDER the Registrar of this Honorable Court, do take an account of all monies due by the Defendant John Adair, Junior, to the Defendants Welch, Rithet and Company, on the 1st day of January, 1883, on account of any business transactions that 30 may have taken place between them in the fish Canning business on Fraser River, as more fully set out in the pleadings in this action And Also to take an account of all moneys (if any) paid to the said Welch, Rithet and Company, by the said John Adair Junior, or on account of the sundries on the 1st day of January, 1883, (if any). And let the further consideration of this cause be adjourned; and any of the parties are to be at liberty to apply to this Court as they may be advised.

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

On the 9th day of June 1885 made the following decree:—

(Style of Cause.)

Friday, the 9th day of June, A. D. 1885.

This action coming on for trial the first day of June, A. D. 1885 before the Honorable the Chief Justice without a jury, upon opening of the matter, upon hearing read the pleadings and the mortgage deed dated 2nd March, 1882, and upon hearing Mr. Pooley of counsel for plaintiff and Mr. Drake, Q. C of counsel for defendants other than the defendant John Adair and Mr. Theodore Davie of counsel for the said John Adair and what was alleged by counsel aforesaid This Court did order that this matter should stand for judgment, and this matter coming on this day for judgment in presence of counsel aforesaid, THIS COURT DOTH DECLARE that the plaintiff on the accounts being taken between the defendants Adair & Co. and Welch, Rithet & Co. do pay to the defendants Welch, Rithet & Co. in respect of what shall be found due by the defendants Adair & Co. to the defendants Welch, Rithet & Co. a sum not exceeding $20,000. and interest at the rate of 10 per cent. per annum and the further advances made by the defendants Welch, Rithet & Co. to Adair & Co. in 1882 not exceeding however the sum of $25,000. and interest from the date of each such further advance at the rate aforesaid. And upon the plaintiff paying the defendants Welch, Rithet & Co. what shall be certified to remain due for principal and interest let the defendants Welch, Rithet & Co. reconvey to the plaintiff the lands in the pleadings mentioned. Reserve the question of costs. The further consideration hereof be adjourned with liberty to all parties to apply as he or they may be advised. And this Court doth order and declare the same accordingly.

By the Court

(Signed) JAMES C. PREVOST, R.

[L. S. $1.00] [Seal]

The following are the reasons of the Honorable the Chief Justice for such decree:—

Tuesday, 9th June, 1885.

JUDGMENT.

The Honorable the Chief Justice.

The preliminary but very important question which at present arises to be decided is as to the amount of principal money in the whole secured by the mortgage of 2nd March 1882, given by the Plaintiff to the Defendants.

This question arises from an ambiguity in the recitals which are to govern the construction of the whole deed.

The mortgage between the Plaintiff of the one part and the Defendants of the other part; Adair & Company not being parties thought they very properly might have

been parties—The Plaintiff thereby undertakes to be surety for advances by the Defendants to Adair & Company. The question is "what advances?" or rather "how much ?"

The recitals are as follows :—

(I) Whereas Adair & Company" (Salmon Canners) "are indebted to (Defendants) in the sum of $20,000," advances. (II) And Whereas the said Adair & Company have applied to the said (Defendants) to make to them the said Adair & Company (such) further and other advances from time to time for the purpose of conducting their business aforesaid during the season of 1882 not exceeding however the sum of $25,000. (III.) (On this recital the question arises, Does this limit apply to the whole advances or only to the further and other advances ?) And Whereas the Defendants have agreed to make the advances aforesaid upon having the repayment thereof together with interest for the same respectively secured as hereinafter mentioned such security forming an additional security to the securities already held by Defendants." Then comes the conveyance and then (IV.) The proviso for redemption viz:—Provided . . . that if the mortgagor &c. shall on or before the 1st January 1883 pay to the said Defendants the sum of $20,000, (with interest at 10 per cent.) AND also such further and other moneys if any as shall then be owing to Defendants by Adair & Company on the security of these presents, then the mortgagees will reconvey—Adair & Company not being parties to the deed nothing can be owing by them on the security of the deed—which is another oversight. Then come Covenants (V.) Covenant by mortgagor that he "will on the 1st January 1883, repay to the mortgagees &c. the sum of $20,000," (with interest at 10 per cent) and if not then will pay the interest thereon. (VI.) "And will also on demand repay to the mortgagee such sum or sums of money as shall or may hereafter be advanced by the said mortgagees to Adair & Company;" (with interest from date of advance.) (VII.) "And that until repayment of the principal moneys to be hereafter advanced by the mortgagees as aforesaid" with interest as aforesaid "the said principal moneys and interest shall be charged on the hereditaments hereby granted in addition to the said sum of $20,000, and the interest thereon. (VIII.) The Power of Sale arises "in default of payment of any of the moneys and interest hereby secured or any part thereof at the time hereby appointed for the payment thereof" then etc.

It is noticeable that clause VI is quite unlimited and stipulates for the repayment by the mortgagor, of all future advances (i. e. beyond the $20,000) without any limit of time, or amount. But the recitals govern the whole deed. The Plaintiff according to recital III has only agreed to guarantee "the advances aforesaid" i. e. the advances mentioned in (I) and (II), (viz.) $25,000 either in addition to or inclusive of the $20,000.

After the best consideration I can give the matter, I incline to think that it is the "further and other advances" mentioned in II which are stipulated not to exceed $25,000, and that these notwithstanding the ungrammatical "such" are to be held to be distinct from the "advances" mentioned in I, which amounted to $20,000, so that the whole amount of principal moneys chargeable under the mortgage may be $45,000, if in fact $25,000 was advanced in 1882.

The limit "not exceeding the sum of $25,000" is not recited as the limit imposed by the guarantor on the extent to which he will be liable, but it is a recital of the limit placed by the creditor and the principal debtor on the amount which the one will be entitled to require and the other will be bound to supply.

The arrangement for guaranteeing advances recited in (III) appears to be made solely in consideration of future advances. The $20,000 had been already advanced before this guarantee was stipulated. The language used also shows this: it is not Defendants "agreed to make the advances aforesaid (which might include the $20,000)," but "have agreed to make the advances aforesaid" which seems more naturally to refer to future advances though it is a strange oversight not to have recited the agreement to guarantee the $20,000 as well, which was clearly a main intention of the lenders. Having no guarantee for that $20,000 they seem to have been partly induced to promise future advances in order to get a guarantee for the whole, which they did not then possess. The $20,000 therefore not being advanced on the security of this deed, though correctly enough referred to as "advances" that sum seems to be excluded from the "advances" aforesaid in this recital III; and then going back to recital II it is the "advances aforesaid" thus understood which are not to exceed $25,000, so in the covenant to repay (V and VI) the $20,000 is kept quite distinct from the future advances, though it is very difficult, perhaps dangerous, to place any reliance on the precise language and form in an instrument which contains so many serious errors and obscurities of substance. For instance this same covenant No. VI is quite unlimited as to the amount and times of making the future advances covenanted to be repaid, and it undertakes to repay them on demand. Whereas on the whole deed it seems clear that it was only intended to guarantee future advances (1) made during the season of 1882, (2) not exceeding $25,000, and (3) to be repaid on the 1st January, 1883. And this error is in strong contrast with the last previous error of importance (viz)., that in the proviso for reconveyance (No. IV) which is to be made on payment by the mortgagor to the mortgagees of the sum of $20,000 and interest, and such other sums, if any, as may then be owing to the mortgagees by Adair and Company on the security of these presents i. e. nothing at all; since Adair and Company are not parties to the deed, and cannot possibly owe anything on the security of the deed.

In the face of these grammatical and other errors it is a very difficult matter to construe the deed at all, but on construction of the instrument itself I incline to the above opinion.

Then I should incline to the same view from the nature of the transaction itself. Adair & Co. are about to start in the season of 1882. They have no ready money, on the contrary they are already under advances of $20,000 to their Agent for the shipments of 1881. They require fresh advances during the coming season. It is not likely that they would limit the statement of their probable wants to $5,000. And if that had been all they anticipated that they would require, they would probably have been able to procure accommodation to that extent upon their own sole credit. $25,000 seems a much more reasonable sum that prudent owners would wish to provide; and that is a sum which they probably could not under the circumstances, expect to provide without additional security besides their own.

The maxim "verba proferentis," also points in the same direction. In Sea vs. MacLean I laid down the sense in which an ambiguous promise ought to be performed. "Where a promisee actually understands and believes a promise in a particular sense the promiser must perform it in that sense it the words of the promise and the surrounding circumstances so far as known to the promisee justify a reasonable man in forming such belief."

"If the words of the promise are susceptible of two interpretations, the promisee and not the promiser has, in general, the right to choose whichever he prefers."

Here the Plaintiff makes a promise: I cannot say that the Defendants construction of it is unreasonable and thus if I am to adhere to my own rule of morals the Defendants are justified in claiming the limit of $45,000. 10

Every one of these arguments may perhaps be turned the other way: e. g. as to the last topic it may be said that the mortgage being drafted by the mortgagee the language is his. not the mortgagor's. But this is a mere incident in the practice of conveyancers and does not alter the fact that the promise to repay is the promise of the mortgagor. And so of the other grounds: none is beyond cavil, but I think on the whole I have correctly estimated their force and direction.

There will therefore be (subject to the questions arising under the exercise of the power of sale) a declaration that the Plaintiff is entitled to redeem on payment of the $20,000 and interest plus the further advances (not exceeding $25,000,) in 1882 and interest from the date of each such further advance. 20

The following is a copy of the mortgage deed dated 2nd March 1882:

THIS INDENTURE made the second day of March, in the year of Our Lord one thousand eight hundred and eighty-two (A. D. 1882) BETWEEN William B. Adair of the County of Clatsop and State of Oregon, United States of America (hereinafter called the "said Mortgagor") of the one part, and Andrew Welch of San Francisco, State of California, United States of America. and Robert Paterson Rithet, of Victoria, Province of British Columbia, trading at Victoria aforesaid under the firm name of Welch, Rithet & Company (hereinafter called "the said Mortgagees") of the other part,

WHEREAS Adair & Company carry on business as packers and canners of Salmon on Fraser river, British Columbia, and are indebted to the said firm of Welch, Rithet & Company in the sum of twenty thousand dollars ($20,000,) for advances. 30

AND WHEREAS the said Adair & Company have applied to the said Welch, Rithet & Company to make to them the said Adair & Company such further and other advances from time to time for the purpose of conducting their business aforesaid during

the season of the year 1882 not exceeding however the sum of Twenty.five thousand dollars ($25,000.)

AND WHEREAS the said Welch. Rithet & Company have agreed to make the advances aforesaid upon having the re-payment thereof together with interest for the same respectively secured to them in a manner hereinafter mentioned (such security forming an additional security to the securities held by the said Welch, Rithet & Company.

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the premises "the said Mortgagor" doth hereby grant unto the said Mortgagees their heirs and assigns, ALL those certain pieces or parcels of land situate in the District of New Westminster, Province of British Columbia aforesaid, and on the official map or plan of said District known numbered and described as lots Fifty-five (55) Fifty-six (56) Fifty-seven (57) and lot Fifty-four (54) except as to ten (10) acres thereof in the North West corner sold to John Adair, Junior, and further as to Fifteen (15) acres thereof being a square piece of land in the North East corner, all in group Two (II) in the said District, TO HAVE AND TO HOLD the hereditaments hereby granted or expressed so to be unto and to the use of the said Mortgagees their heirs and assigns forever subject to the Proviso for redemption hereinafter contained.

PROVIDED ALWAYS and it is hereby agreed and declared that if the said Mortgagor his heirs executors administrators or assigns shall on or before the first (1st) day of January one thousand eight hundred and eighty-three (1883) pay to the said Mortgagees their executors administrators or assigns the sum of Twenty thousand dollars ($20,000.) together with the interest for the same sum after the rate of ten per cent per annum (10 p. a.) AND also such further and other moneys (if any) as shall then be owing to the said Welch, Rithet and Company by the said Adair & Company upon the security of these presents, Then and in such case the said Mortgagees their heirs or assigns shall upon the request and at the cost of the said Mortgagor his heirs or assigns reconvey the hereditaments and premises hereby granted or expressed so to be unto and to the use of the said Mortgagor his heirs or assigns or as he or they shall direct, AND the said Mortgagor doth hereby for himself his heirs executors and administrators covenant with the said Mortgagees their executors administrators and assigns that he the said Mortgagor his heirs executors or administrators will on the first day of January one thousand eight hundred and eighty-three (1883) repay to the said Mortgagees their executors administrators or assigns the sum of Twenty thousand dollars ($20,000.) together with interest on the said sum after the rate of ten (10) per cent per anum as aforesaid, And if the said sum of twenty thousand dollars ($20,000.) shall not be repaid on the said first (1st) day of January one thousand eight hundred and eighty-three (1883) then will pay to the said Mortgagees their executors administrators or assigns interest upon the said sum, or so much thereof as shall remain unpaid after the rate of ten (10) per cent. per annum as aforesaid, such interest to be thenceforth paid monthly until the principal sum shall be fully repaid. And will also on demand repay to the said Mortgagees their executors administrators or assigns such sum or sums of money as shall or may hereafter be advanced by the said Mortgagees to the said Adair & Company together with interest thereon at the rate of ten (10) per cent. per annum as aforesaid to be computed from the time or respective times of advancing the same. AND IT IS

HEREBY AGREED AND DECLARED that until re-payment of the principal moneys to be hereafter advanced by the said Mortgagees as aforesaid with interest thereon after the rate of ten (10) per cent. per annum as aforesaid the said principal moneys and interest shall be charged on the hereditaments and premises hereby granted or expressed so to be in addition to the said sum of Twenty Thousand dollars ($20,000) and the interest due thereon, And the said Mortgagor doth hereby for himself his heirs executors administrators covenant with the said Mortgagees their heirs and assigns that he the said Mortgagor now hath good right to grant the hereditaments hereby granted or expressed so to be unto and to the use of the said Mortgagees their heirs and assigns in manner aforesaid free from incumbrances And further that he the said Mortgagor and all other persons having or lawfully or equitably claiming any estate or interest in the said hereditaments and premises or any part thereof shall and will from time to time and at all times hereafter at his or their own cost or expense during the continuance of this security, and afterwards at the cost or expense of the person or persons requiring the same make do and execute or cause to be done and executed all such actsdeeds and things for further and more perfectly assuring the said hereditaments and premises unto and to the use of the said Mortgagees their heirs and assigns in manner aforesaid as shall or may be reasonably required, AND IT IS HEREBY AGREED and declared that in case default shall be made in payment of any of the moneys and interest hereby secured or any part thereof at the time hereby appointed for payment thereof then it shall be lawful for the said Mortgagees their executors administrators or assigns at any time or times without any further consent on the part of the said Mortgagor his heirs or assigns to sell the hereditaments and premises hereby granted or expressed so to be or any part or parts thereof either together or in lots and either by public auction or private contract and either with or without special conditions or stipulations relative to title or otherwise with power to buy in at sales thereof by auction, and to rescind contracts for sale and to resell without being answerable for any loss or diminution in price, and with power also to execute assurances give effectual receipts for the purchase moneys, and to do all other acts and things for completing the sale which the said Mortgagees their executors administrators or assigns shall or may think proper, AND IT IS HEREBY AGREED AND DECLARED that the said Mortgagees their executors administrators or assigns shall with and out of the moneys to arise from any such sale or sales as aforesaid, in the first place repay and retain the costs and expenses attending such sale or sales or otherwise incurred in relation to this security, And in the next place repay and satisfy all moneys which shall or might then be owing upon the security of these presents, And shall pay the surplus (if any) to the said Mortgagor his heirs or assigns.

PROVIDED ALWAYS and it is hereby declared that no purchaser or purchasers upon any sale under the powers hereinbefore contained shall be bound or concerned to see or enquire whether any such default as aforesaid has been made or otherwise as to the necessity or propriety of any such sale or sales.

IN WITNESS WHEREOF the said parties to these presents have hereunto set their hands and seals the day and year first above written.

"WM. B. ADAIR (Seal)."

Signed, sealed and delivered by the within named William B. Adair in presence of John Davis.

British Vice-Consulate, Portland, Oregon.

To all to whom these Presents shall come:

I, James Laidlaw, British Vice-Consul, for Portland, Oregon, do hereby certify that S. D. Adair whose signature and seal is attached to the annexed instrument is a Notary Public duly commissioned and practicing in Clatsop County, State of Oregon, to whose acts full faith and credit can be given both in judicature and thereout. IN Testimony whereof I have hereunto set my hand and seal of office in Portland, this tenth day of March, A. D. One thousand eight hundred and eighty-two. 10

(Signed) JAMES LAIDLAW,
British Vice-Consul.

[Seal]

(Endorsed.)

ADAIR vs. WELCH, RITHET & COMPANY.

"LAND REGISTRY ORDINANCE, 1870."

FOR MAKER OF A DEED.

I HEREBY CERTIFY that William B. Adair personally known to me, appeared before me and acknowledged to me that he is the person mentioned in the annexed Instrument as the maker thereof, and whose name is subscribed thereto as party that he knows the contents thereof, and that he executed the same voluntarily. 20

IN TESTIMONY whereof I have hereto set my Hand and Seal of Office, at Clatsop County, State of Oregon, this Second day of March, in the year of Our Lord One Thousand eight hundred and eighty-two.

"S. D. ADAIR,"
Notary Public,
Clatsop County, State of Oregon.

[Seal.]

The appellants brought in their accounts, but on the 29th December, 1885 the respondent obtained the following order:—

(Style of cause)

Tuesday, 29th December, 1885.

Upon hearing Mr. Pooley, on behalf of the Plaintiff, and Mr. Helmcken on behalf of the Defendants, Welch, Rithet & Company, I do order that in taking the accounts herein, the Defendants, Welch, Rithet & Company, shall be bound by their accounts already delivered in this action and upon which a report was made by Mr. J. C. Bales, on the 17th March, 1885, subject to the right of the said Defendants, Welch, Rithet & Company, to surcharge and falsify the said accounts on or before the 29th day of January, 1886.

The time limited by this order for appellants to exchange or falsify was extended for one week, but the appellants did not alter the accounts in any way. 10

MATT. B. BEGBIE, C. J.

MASTERS REPORT.

(Style of Cause.)

I, James C. Prevost, Registrar of the Supreme Court of British Columbia, hereby certify

That, in pursuance of the order made herein on the 25th day of February, 1885, I have taken the accounts therein directed and find as follows:—

The account hereunto annexed, marked "A", shows the general account of advances between Adair & Co. and Welch, Rithet & Co., up to the 30th December, 1883, and leaves a balance owing by Adair & Co. up to that date of $127,056,33. 20

The account "B" shows an account of further payments made by Welch, Rithet & Co., on account of Adair & Co., from the 1st of January, 1884, to the 30th April, 1884, showing a balance in favour of Adair & Co. of $99,438.70, and this amount, deducted from the previous debit balance, shows a debit against Adair & Co., of $27,617.63.

And I further certify that the account hereunto annexed, marked "C", is a report made by J. C. Bales, by direction of this Court, which I adopt, the dates and items not being disputed, and shows the separate account of the parts of the years 1881 and 1882, and that the sum of $26,542 81 was due on the 30th December, 1882, for advances to that date, and that the sum of $44,306.46 was the balance of advances over receipts from

January, 1882, to April 30th, 1884, and that the said balances were carried to the journal account and were all repaid, except as to the sum of $27,617.63, as before mentioned.

[Signed] JAMES C. PREVOST,
R.

May 7th, 1886.

The appellants served the following notice of motion :— 10

(Style of cause.)

Take notice that this Honorable Court will be moved before the Honorable the Honorable the C. J., on Tuesday the 29th day of June instant, at the hour of 12 o'clock or so soon thereafter as Counsel can be heard by Mr. Drake Q. C. of Counsel for Defendants, Andrew Welch and Robert Paterson Rithet on their behalf for an order that Judgment may be entered for the said Defendants for the amount found due by the Master's Report dated May 7th A. D. 1886, and for such further and other relief as the nature of the case requires.

Dated June 23rd A. D., 1886.

Yours, etc., 20
ROBERT EDWIN JACKSON,
Solicitor for said Defendants.

To Messrs. Davie and Pooley,
Solicitors for Plaintiff.

This motion was on the 29th June, 1886 adjourned and came up for argument by way of motion for decree on further directions on the 5th November, 1886 before the Chief Justice who reserved his judgment.

Before the delivery of the judgment of the 1st December, 1886, the following questions by the learned Chief Justice were by consent of counsel for both parties handed in 30 to Mr. J. C. Bales to be answered viz :—

Further information on the following questions.

QUESTIONS.

1. What was the whole amount due by Adair & Co. to Messrs. Welch, Rithet & Co. on the 2nd March, 1882 in respect of advances made by the latter firm to the former firm on the packs of 1881 ?—irrespective of any securities, consignments, etc., not at that date converted into money and received by Welch, Rithet & Co.

2. Do the accounts, or the manner of keeping the accounts, indicate any difference between advances made either in goods or cash at the cannery during the preparation of the pack, and the advance of $4 per case which I understand was made or allowed by Welch, Rithet & Co. to Adair & Co. so soon as any cases were actually put on ship board? or are advances whether made before or after consignment, and whether made in order to enable the cases to bo prepared, or in consideration of the receipt and consignment of the prepared cases, treated in the accounts on the same footing, and all covered by the same securities?

ANSWERS.

The following are the answers returned thereto by the said Mr. J. C. Bales: 10

Answer to question 1.

The amount due by Adair & Co. to Welch, Rithet & Co. on pack of 1881 on 2nd March, 1882 was $92,607.81, but during the autumn of 1881 advances on salmon shipped amounting to $50,126. were credited to 1881 pack thus reducing the balance due on that pack to $42,481.81.

Answer to question 2.

The accounts show that all advances made in cash and merchandise during the preparation of a pack were charged against that pack, and as soon as the salmon was shipped the account was credited with $4 a case thus reducing the net balance owing to Welch, Rithet & Co. from time to time, and upon the final disposal of the salmon in England or elsewhere the account was debited with the loss if any or credited with the gain if any. 20

The balances of the separate accounts were transferrrd to the general accounts marked C.

(Signed) J. C. BALES, Accountant

Thereupon the learned Chief Justice pronounced the following decree on further directions:—

In the Supreme Court of British Columbia.

BETWEEN

WILLIAM BUTLER ADAIR.

PLAINTIFF.

AND

ANDREW WELCH and ROBERT PATERSON RITHET, carrying on business as Welch, Rithet and Company, and JOHN ADAIR, Junior, lately carrying on business as Adair and Company on Fraser River, and JOSEPH DESPARD PEMBERTON

DEFENDANTS

Wednesday, the First day of December, A. D. 1886. 10

THIS CAUSE coming on for further directions the 5th day of November A. D. 1886 before this Court in the presence of Counsel for the Plaintiff and the Defendants Andrew Welch and Robert Paterson Rithet and Joseph Despard Pemberton and no one appearing for the Defendant John Adair junior UPON READING the pleadings and Indenture of mortgage bearing date the 2nd day of March 1882 made between the Plaintiff of the one part and the Defendants Andrew Welch and Robert Paterson Rithet of the other part—the mortgage from John Adair junior of part of Section 57 Group II New Westminster district to Andrew Welch and Robert Paterson Rithet dated the 26th day of March 1881—a certified copy of a Bill of Sale by way of mortgage dated the 6th day of April 1882 made between the Defendant John Adair junior and the Defendants Andrew Welch and Robert Paterson Rithet—a certified copy of a Bill of Sale by way of mortgage dated the 1st day of February 20 1881 made between the Defendant John Adair junior and the Defendants Andrew Welch and Robert Paterson Rithet.—A certified copy of a Bill of Sale dated the 2nd day of March 1883 made between Robert Paterson Rithet and Andrew Welch and John Adair junior to Thomas Elijah Ladner and Francis Page—the reports of the Registrar and of Mr. Bales the Accountant—and such of the exhibits attached to the evidence of John Adair junior taken at Portland on the 6th day of March 1885 by James Laidlaw, Esquire under a Commission issued out of this Honorable Court on the 27th day of February 1885 as are marked exhibits 1, 5, 10 and letter B. and all the accounts of Welch, Rithet and Company attached as exhibits to the said evidence—and upon hearing what was alleged by Counsel aforesaid-this Court did order that this cause should stand for judgment and this action standing for Judgment this day in the paper in the presence of Counsel aforesaid THIS COURT DOTH ADJUDGE 30 AND DECLARE that all moneys due owing and secured under and by virtue of the said Indenture of mortgage of the 2nd day of March 1882 were fully paid and satisfied

before the commencement of this action AND THIS COURT DOTH DECLARE THAT THE Defendants Robert Paterson Rithet and Andrew Welch thereon became bare trustees for the Plaintiff William Butler Adair and this Court doth by consent direct that that the further consideration of the cause particularly as regards relief prayed against the Defendant Joseph Despard Pemberton be adjourned by consent and that the costs of the action be reserved and that the parties respectively may have liberty to apply as they may be advised.

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

[Legal Stamps 60 cts.]

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The following are copies of the said Exhibits 1, 5, 10 and Letter B :—

EXHIBIT 1.

VICTORIA, B. C., 1st February,

Messrs. Adair & Co.,
Canoe Pass, Fraser River.

Dear Sirs:

We now state in writing the terms upon which we have arranged with you to act as Agents for your cannery for the present season's catch of fish.

20

We are to advance in cash the following sums:—

Viz. In February, $2000. Two thousand Dollars.
" March, $1000. One thousand Dollars.
" April, $1000. One thousand Dollars.
" May, $1000. One thousand Dollars.
" June, $2000. Two thousand Dollars.

to allow your present indebtedness to us to stand over until your salmon are shipped and provide what material you may from time to time require, in such quantity as you may order basing your estimates for same on an estimated season's catch of 15,000 cases, and to come under these advances to the extent of $25,000 previous to the shipment of your catch. After shipment we are to advance, if required by you, a sum equal to 75 per cent. of the market value of the salmon at the time of shipment not exceeding under any circumstances $4 per case. Interest on our advances is to be charged from the due date of same to time of shipment of the catch at ten (10) per cent. per annum, and after shipment at the rate of (5) five per cent. per annum. Shipments are to be made as soon as the fish are ready and as required by us. Our commission is to be (5) five per cent. on the whole of your catch (which is to cover brokerage) and we are authorized in making sales to guarantee the purchasers against "swell heads" and all other defects as is usual against which you are to fully indemnify us as customary.

30

Your fish are to be packed in full weight cans, and every care is to be taken to make the fish a first-class merchantable article.

The advances made previous to shipment, as above stipulated, are to be deducted from, and considered part of the advance above referred to after shipment.

As security for our advances you are to execute a mortgage and bill of sale in our favor covering the cannery and all the plant and material therein, and to be supplied by us hereafter, and on the salmon as it is packed.

(It is expressly agreed and understood that these advances are to be used exclusively for the purposes for which they are intended and for no other.)

On purchases of goods for your account, outside of our own stock, we are to be allowed a commission of (2½) two and a half per cent. 10

We remain, Dear Sirs,

Yours Faithfully,

WELCH, RITHET & CO.

Messrs. Welch, Rithet & Co.,
Victoria.

Dear Sirs:

We hereby confirm the above as the terms agreed on between us for the purposes therein named.

ADAIR & CO.

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EXHIBIT NO. 5.

VICTORIA, B. C., 8th December, 1882.

Messrs. Adair & Co.,
Canoe Pass.

Dear Sirs:

We hereby demand from you the payment of the following amounts:—

Viz.	Balance due on catch of season 1881,	$18,920.53
	Balance due on catch of season 1882,	18,758.73
		$37,679.26

as per accounts rendered to date.

The above amounts are subject to change as the security held by us may be realized. 30

Your attention to the above payments before Monday next will oblige,

Yours Faithfully,

WELCH, RITHET & CO.

EXHIBIT No. 10.

August, 7th 1883.

Messrs. Welch, Rithet & Co.,

Victoria, B. C.

Dear Sirs:

In May last the writer requested you and Mr. Rithet to render us a statement of our account with your firm, and he promised to have it made up and forwarded shortly. We have, since, received no statement although several months have elapsed. Be good enough to let us have a statement of our account, as well as your latest advices as to condition of our salmon 1882 pack still in your hands, at your earliest convenience, 10

And oblige,

Yours Truly

ADAIR & CO.

LETTER B.

Messrs. Adair & Co.,
Ladner's Landing.

Dear Sirs:

Your favor of the 7th inst. is to hand, and we now hand you all the accounts made up so far, relating to your transactions with us during last and previous years which have been prepared and ready for some time awaiting your call. We were under the impression these had been handed to you some time ago, but we understand the reason they were not is because you have not asked for them. We hope you will find them all in order. 20

We remain, Dear Sirs,

Yours Faithfully,

WELCH, RITHET & CO.

JUDGMENT.

The following are the reasons therefor of the Honorable the Chief Justice:— 30

December 1st, 1886.

The Chief Justice.

It now becomes necessary, the accounts between the parties having been taken at considerable length, to determine on the validity of the Plaintiff's contention, that all the monies, the repayment of which from Adair & Co. to the Defendants was guaran-

teed by him, have been repaid with interest: either directly or by marshalling the other securities held by the Defendants and of which the Plaintiff claims the benefit. At the first hearing, and as a preliminary to the taking of the accounts, I held that the Plaintiff's guarantee extended at least to two sums of $20,000 and $25,000 respectively, and was not as the Plaintiff then contended limited to $25,000 in all. This decision has been acquiesced in, the time for appealing having long since elapsed. It is now therefore binding probably on all parties. But the taking of the accounts has incidentally disclosed (to me at least for the first time) a circumstance of very great importance not noticed in the pleadings, not alluded to in arguments, and which might materially have influenced my opinion as to the Plaintiff's liability. But as I do not think it necessary for the determination of the question now before me I do not call for any additional argument in respect of it. 10

I was informed by the Counsel on both sides that the question of Mr. Pemberton's liability was for the present reserved, without prejudice, until the preliminary question now before me was answered. I therefore confine myself to the consideration of the Plaintiff's contention as above set forth.

The Plaintiff's liability arises on a mortgage deed dated the 2nd March, 1882. The recitals state in effect that Adair & Co. (with which firm the Plaintiff is quite unconnected in business) were salmon canners on the lower Fraser, that Adair & Co were already indebted to the Defendants their factors in Victoria in the sum of $20,000 for advances in respect of the pack of 1881, for which they had given some security, and had applied to the Defendants for additional advances, not to exceed $25,000, to enable them to secure the pack of 1882 (then just about to commence); and that the Defendants had agreed to advance the $25,000 to Adair & Co. if the Plaintiff would give them this mortgage security in addition to the securities already held. The Plaintiff thereupon conveys lots 55, 56, 57 and part of 54 in Group II, New Westminster District to the Defendants, with a proviso for reconveyance in case the mortgagor shall on or before the 1st January, 1883 pay to the mortgagees 1st, the sum of $20,000 with interest, and 2nd, "such further and other monies, if any, as shall then be owing to the Defendants by Adair & Co. on the security of these presents." There is also a covenant by the Plaintiff to "repay" to the Defendants on the 1st January, 1883 the said sum of $20,000 with interest; and also "on demand repay to the said mortgagees such sum or sums of money as shall or may hereafter be advanced by them to the said Adair & Co." 20

There are in these clauses several manifest inaccuracies. The recitals make it quite clear that the deed is intended purely as a guarantee by William Adair, for the liabilities of John Adair & Company, but the latter are not made parties to the deed as they very probably might have been. The surety of course can only be called upon in case the principal debtors make default: but the condition and covenant by the Plaintiff are absolute. This perhaps is not important, both in the condition for reconveyance of the mortgaged premises, and also in the covenant by the mortgagor, the future advances which the surety the mortgagor is to discharge are quite unlimited in amounts, which not only does not carry out the agreement in recital, but quite contradicts the recital. This is I suppose a mere error of the draftsman: not so singular an error perhaps, as that 30

which in the condition for reconveyance speaks of the monies due by John Adair & Company, as security of these presents. John Adair & Company, are not parties to the deed and of course nothing can be due by them on the security of the deed.

Notwithstanding these irregularities the meaning of the deed is I think clear enough, There are Creditor and principal and surety. The Creditor is bargaining with the surety. He represents that the principal debtor desires an advance in the ensuing season, not to exceed $25,000, but as the principal already owes him $20,000, he declines to make any further advances although holding some security from the principal debtor, unless the surety will additionally guarantee both the $20,000, and the $25,000. The surety responds on the same and gives the guarantee accordingly. 10

Now in all bargains between a Creditor and a surety,—perhaps, especially when the principal debt or is not a party to the bargain,—there are one or two principles apply, for which really no authority is wanting, but which are laid down by all the authorities. First, there must not only be perfect openness and candor ; but the surety must not be misled, even innocently. Speaking generally, if the creditor make a material misrepresentation, although in perfect innocence and good faith, it avoids the whole contract of suretyship. So if a creditor represent what his future conduct is to be, he must conform to that representation. . He can not pursue a line of conduct inconsistent with it, and yet hold the surety to his bond. The surety has the right to say "That is not my bargain non hnec in foedera veni." Now here I think it quite clear on the deed that the Defendants (who alone could know Adair & Co. were not parties, the Defendants alone therefore are responsible for the statement, which the Plaintiff was justified in trusting) the Defendants when obtaining the guarantee, represent to the Plaintiff: "Adair & Co. owe us at present $20,000 and it is proposed that we make them fresh advances this season to the extent of $25,000, and no more." What were the facts ? On that 2nd March 1882 Adair & Co. owed the Defendants, according to the accounts taken since the case was last before me $92,607.81, and the Defendants then arranged with Adair & Co. for advances in respect of the pack of 1882 extended not to $25,000 merely, but were quite indefinite in amount, and actually were for more than $100,000. It is true there were securities held by the Defendants, cargoes of salmon etc. which ultimately greatly reduced the amount of $92,607 : but all these securities might have failed ; and the actual indebtedness of the second of March 1882 was as above stated. 20 30

If W. B. Adair on the 2nd March 1882 had been informed that Adair & Co. already owed the Defendants for arrears on one year's advances more than double the total amount which he was asked to guarantee in respect of the two years together or had been told that the Defendants were about to advance in respect of 1882 alone a still larger amount than they had advanced in 1881 he most obviously might have declined the guarantee altogether.

A surety always hopes and often fully expects, that he will never be called on under his guarantee at all, that the principal will be able to make full payment out of his own funds. And a man may clearly with much more readiness guarantee the whole of a debt of $20,000 than even $5,000 or $1,000 of a debt of $92,600. The Plaintiff may have felt every confidence that Adair & Co. would in the two years have been able to satisfy a claim of 40

$45.00 without feeling any such confidence that they could satisfy unlimited claims which in fact as it turned out amounted to more than $2,000,000. It is not necessary to consider this as a wilful misrepresentation of fact. It is quite sufficient to treat it as an erroneous opinion common to both parties, of such gravity that it might well have deterred the Plaintiff from entering into a contract of suretyship at all. Speaking generally an error of this extent might well be held to avoid the contract of suretyship altogether (St Eq. Jur. S 215 and cases there cited.) However the Plaintiff does not claim to have his contract annulled on the ground of this misrepresentation or mistake nor was the true state of the account known to me at all during the argument. The Plaintiff only prays that his liability may be limited to the making good of the two sums of $20,000 and $25,000 respectively, which I think he really intended to guarantee, under this very grave misconception however.

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The Defendants contend that this is not the right construction of the contract of suretyship in this case. They insist that the Plaintiff's contract with them on the 2nd March, 1882, was "Whatever the amount of Adair & Co.'s indebtedness be for advances on last year's pack, I will see that you are paid, and if not I will make up the deficiency, so long as I am not called on to pay more than $20,000 on that score. And whatever amount you may advance for the pack of the present year, 1882, I will see that Adair & Co. repay you, and if not, I will make up the deficiency, so long as I have not to pay more than $25,000 on account of these new advances." It would have been perfectly easy if they had meant this to say this, and I think perfectly intelligible if they had said so. Perhaps the present Plaintiff would have entered into such a contract of suretyship, if it had been proposed. But in my opinion the deed of 2nd March, 1882, does 20 not say this, but something very different. And the Plaintiff is only bound by the deed to which he has set his hand, and not by what it may or may not be now conceived he would have been ready to accept, if it had been proposed to him.

It is true the Defendants held against that sum, $92,607 advanced in 1881, certain other securities, among other securities, about 12,000 or 13,000 cases of salmon. And inasmuch as the deed of 2nd March expressly stipulates that the security thereby given is to be in addition to any other securities the Defendants may have for repayment of their advances, they claim that they have a right to apply the proceeds of the sales of these cases in satisfaction of one part of their advances, while still retaining a right to come upon the Plaintiff's mortage for the balance of those advances. And if the contract of suretyship had been expressed so as to bind the Plaintiff to the meaning to which the 30 Defendants assign to it, no doubt that would have been so. But having represented that the total indebtedness for 1881 is only $20,000, so soon as that amount is justified, there is no longer any debt remaining which the surety is to guarantee. This is the simple principle which *ex vi termini* pervades every contract of suretyship: if the principal debtor satisfies the guaranteed debt all the creditor's rights against the surety are at an end. However absolutely the guarantee may be drawn up, without the least reference to suretyship, if it be established that there was merely a contract of suretyship, that relation cannot continue when the principal debt is extinct.

Now in the present case the indebtedness in the principal (Adair & Co.) in respect of the pack of 1881, cannot, according to the construction I put upon the deed which binds the surety, be put at more than $20,000 on the 2nd March, 1882. And it so happens that just one week later, on the 9th March, 1882, the Defendants appear to have received on account of the cargo of the "Buston Vale", part of the pack of 1881, a sum of $22,000, that amount appearing in the accounts at that date.

That would more than extinguish the principal's alleged debt of $20,000, which was all that the surety had undertaken to guarantee: and that debt being extinct the surety can be no longer under any liability in respect of it. Then as to the advances of 1882, the surety is distinctly informed that they are not to exceed in the whole the sum of $25,000. Long before the commencement of this action (Writ dated 30th September, 1884, served 21st November, 1884,) advances to that amount in respect to the pack of 1882, had been repaid to the Defendants out of sales monies the proceeds of that pack. Therefore again as to these advances all that the surety had undertaken to guarantee had been satisfied by the principal, and the liability of the surety was at an end before the commencement of this action; And the Plaintiff has, in my opinion, established the truth of the proposition in the 16th paragraph of his claim. So soon as that was the case the Defendants became bare trustees for the Plaintiff, with no rights to exercise or duties to perform except to reconvey the mortgaged premises to him at his own expense. There will be a declaration to that effect and the further consideration of the case, particularly as regards the position of Mr. Pemberton, the other Defendant, and all questions of costs will be reserved. Liberty to apply.

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The appellants, on the 26th January, 1887, served the following Notice of Appeal to the full Court :

In the Supreme Court of British Columbia.

BETWEEN

WILLIAM BUTLER ADAIR,

PLAINTIFF, 10

AND

ANDREW WELCH and ROBERT PATERSON RITHET and JOHN ADAIR JUNIOR and JOSEPH DESPARD PEMBERTON

DEFENDANTS.

(By original action)

AND BETWEEN

The said ANDREW WELCH and ROBERT PATERSON RITHET,

PLAINTIFFS,

AND

The said WILLIAM BUTLER ADAIR,

DEFENDANT.

(By Counter Claim). 20

Take notice that the above named Defendants Andrew Welch and Robert Paterson Rithet appeal from the judgment pronounced herein in favor of the Plaintiff, the first day of December, 1886 by the Honorable the Chief Justice and from the order made therein and signed and served herein the 21st inst. And further take notice that the Full Court will be moved on Monday, the 14th day of March, A. D., 1887 at the hour of 12 o'clock noon or so soon thereafter as Counsel can be heard by Mr. Drake, Q. C. of Counsel for 30 said Defendants on their behalf for an order that the said judgment may be reversed and that judgment be entered herein in favor of the Defendants, and that the costs of this appeal and in the Court below may be paid by the Plaintiff to the said Defendants.

Dated this 26th day of January, A. D. 1887.

ROBERT E. JACKSON,
Defendants Solicitor.

To the above named Plaintiff and to Messrs. Davie & Pooley his Solicitors