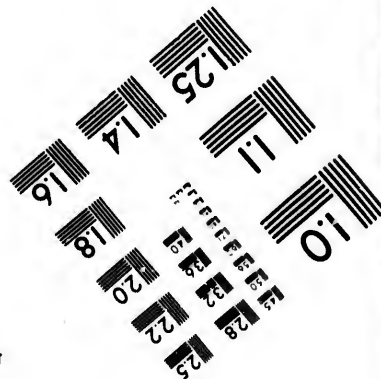
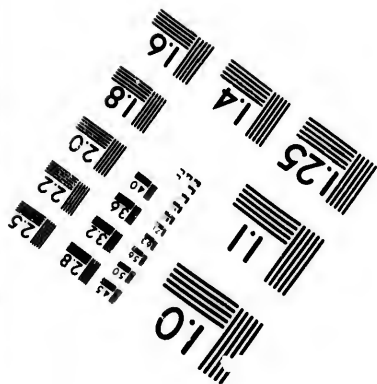
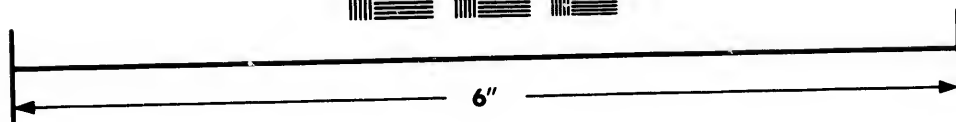
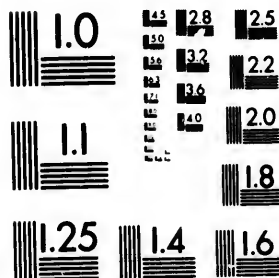


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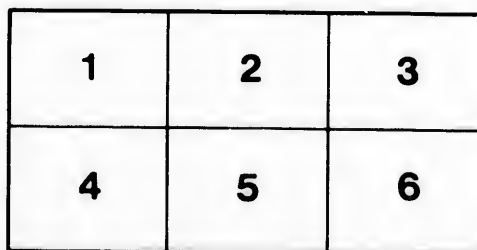
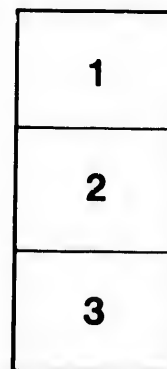
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J. P. P. Greer

IN THE
Supreme Court of British Columbia,

On Appeal to the Full Court.

BETWEEN

DONALD A. SMITH and RICHARD B. ANGUS,
PLAINTIFFS AND RESPONDENTS,

AND

SAMUEL GREER,
DEFENDANT AND APPELLANT.

CASE ON APPEAL.

J. ROLAND HETT,
SOLICITOR FOR APPELLANT.

DRAKE, JACKSON & HELMCKEN,
SOLICITORS FOR RESPONDENTS.

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B E T W E E N

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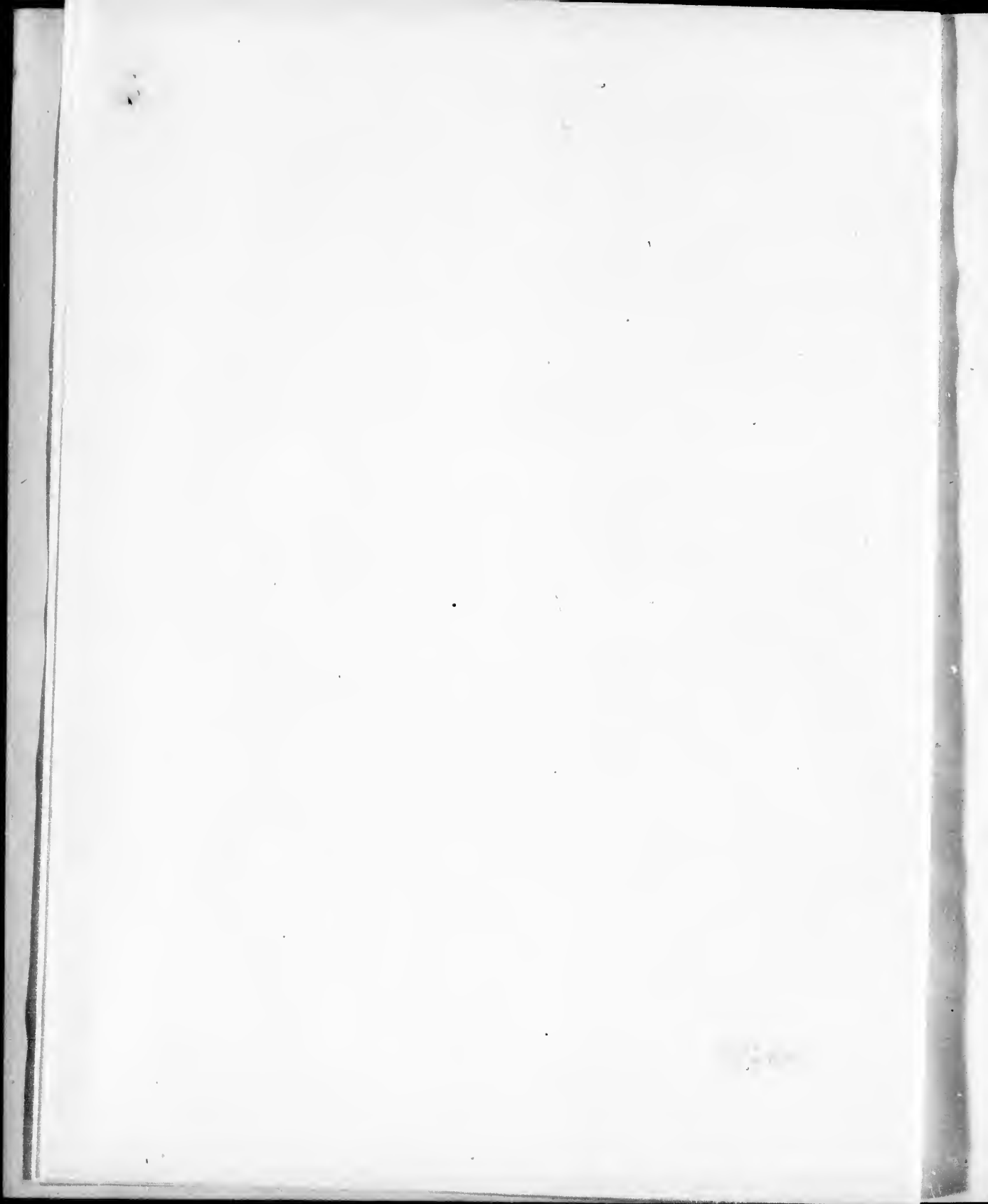
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In the Supreme Court of British Columbia. 10

On Appeal to the Full Court.

20

BETWEEN

DONALD A. SMITH AND RICHARD B. ANGUS,

PLAINTIFFS,

AND

SAMUEL GREER,

DEFENDANT.

30

STATEMENT.

This is an appeal from the refusal of the Honorable the Chief Justice made on the 40
7th day of February, 1888, to grant a nonsuit in favor of the defendant and the order
dated the 7th day of February, 1888, drawn up thereon and from the judgment dated the
5th day of April, 1887, and entered the 3rd day of April, 1888.

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ENDORSEMENT OF CLAIM ON WRIT OF SUMMONS BEFORE AMENDMENT

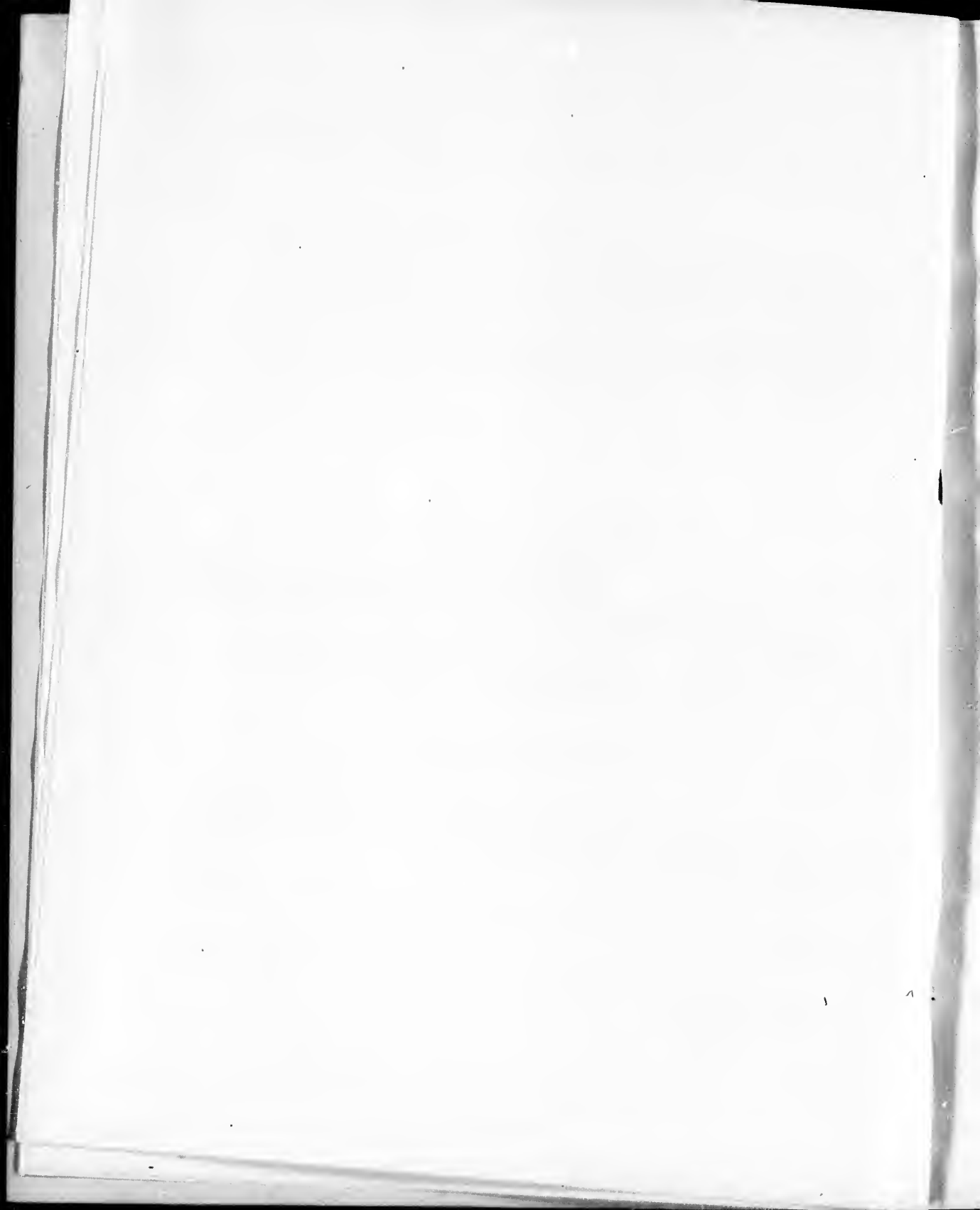
The Plaintiffs' claim is to recover possession of a certain piece or parcel of land and improvements thereon being part of Lot 526 Group 1 New Westminster District and more particularly described as follows viz:—Commencing at a point on the centre line of the Coal Harbour and English Bay extension or Branch of the Canadian Pacific Railway S. 61° 31' W 2114 feet from a point on the Western Boundary of the False Creek Indian Reserve 1085 feet North of its Southeast Angle, thence N. 1° 39' W. 323 feet thence North 69° W. 43 feet more or less to the shore of English Bay, thence Westerly following the shore of English Bay 663 feet, thence South 170° 31' E 65 thence S. 71° 30' East 341 feet, thence N. 13° 15' E. 380 feet more or less to the place of beginning, and for mesne profits and for an injunction. 10

The Plaintiffs also claim the sum of \$30.00 (or such sum as may be allowed on taxation) for costs. 20

THE FOLLOWING ARE THE PLEADINGS :—

STATEMENT OF CLAIM.

1. The plaintiffs are resident at Montreal, Canada; and are owners in fee of lot 526 Group 1 New Westminster District under a Crown Grant dated the 13th day of February A.D. 1886. 30
2. The defendant claims possession of a portion of the said land included in the said lot 526 Group 1 adjoining the Indian Reserve on False Creek and certain buildings thereon but has no title thereto.
3. In the month of August 1886 the Plaintiffs recovered judgment in this Honorable Court against the defendant for the said land and by a writ of possession were placed in possession thereof.
4. The defendant on the 19th day of November 1886 re-took possession of a house which had been erected on the said land and has ever since retained possession thereof and has cut down and destroyed the poles erected by the Plaintiffs for the construction of a telegraph line to False Creek. 40
5. The Plaintiffs require possession of the buildings and the said land for the purpose of constructing a line of Railway connecting the Canadian Pacific Railway with Coal Harbour and English Bay.
6. The houses claimed by the defendant will have to be removed for the purpose of making the said railway.



Plaintiffs Claim :

1. Judgment for possession of the said land, and costs of suit.

That an injunction be awarded restraining the defendant from interfering with the plaintiffs in the use and occupation of the said land, or from entering upon or interfering with the said land or improvements.

For such further and other relief as the nature of the case requires

10

The Plaintiff proposes that this action shall be tried at Victoria.

Delivered this 20th day of April A.D. 1887 by Robert Edwin Jackson, Plaintiff's Solicitor.

To J. Roland Hett, Esq.,
Defendant's Solicitor.

20

STATEMENT OF DEFENCE.

1. The defendant admits that the plaintiffs are resident at Montreal but denies that they are owners in fee of Lot 526 Group 1 New Westminster District under a Crown Grant or otherwise.

2. The defendant says that he is the owner in possession of a portion of the land included in the said Lot 526 Group 1 adjoining the Indian Reserve and denies that he has no title thereto *but says what*.

30

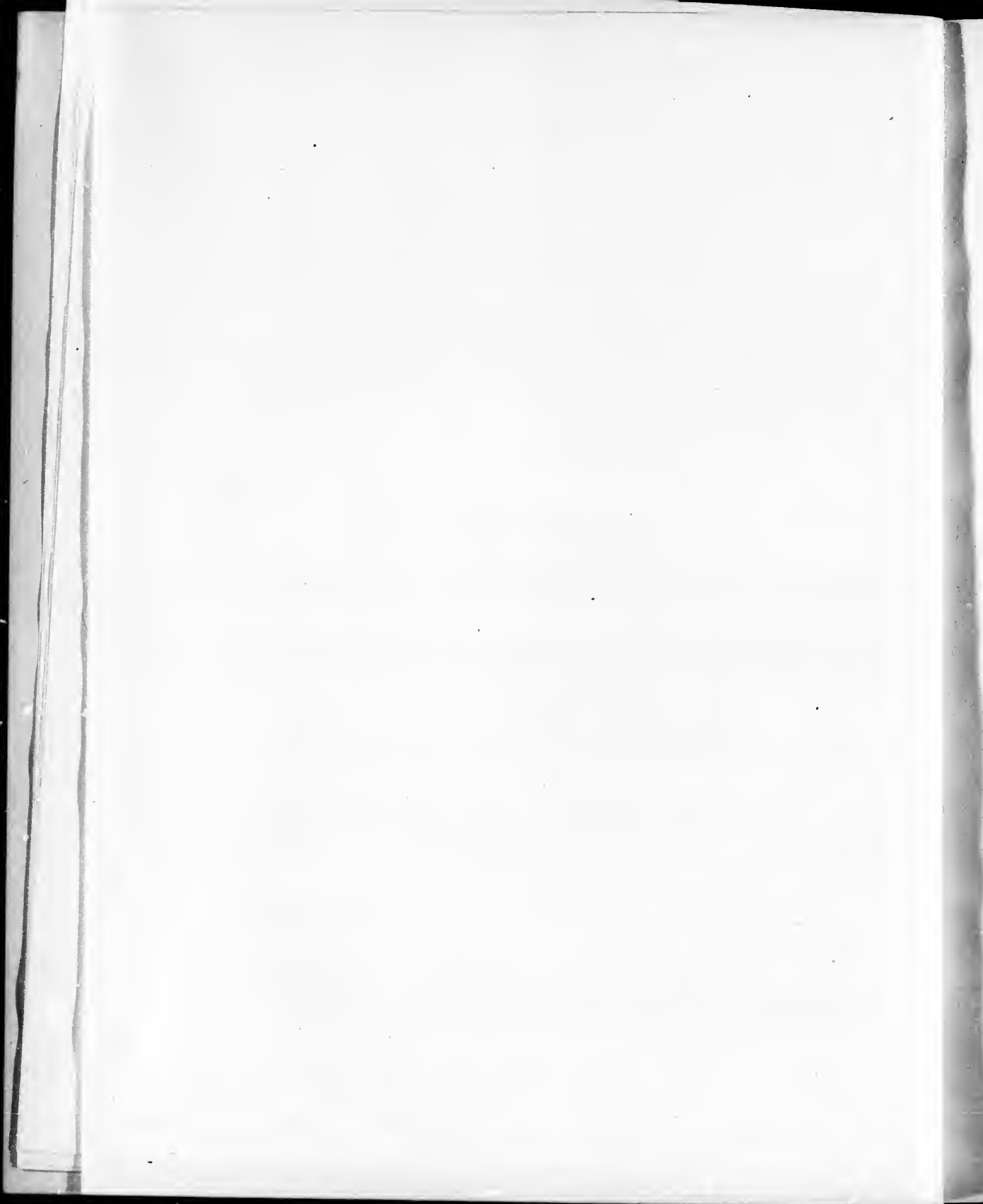
3. The defendant denies that the plaintiffs recovered a judgment in this Honorable Court against the defendant for the said land and that they were ever placed in possession of the said land and says that he has been in possession thereof since the month of June 1884.

4. The defendant denies the allegations contained in paragraph 4 of the Statement of Claim and says that he has always been in possession of the house upon the said land since the erection thereof by him and that the telegraph poles alleged to have been erected were erected by the Canadian Pacific Railway Company and not by the plaintiffs on land belonging to the defendant not in question in this action.

40

5. And the defendant further says that the alleged Crown Grant if any under which the plaintiffs claim to be entitled to the said land was illegally made to the plaintiffs and is void and of no effect.

6. And further that even if the alleged Crown Grant if any has been made shall be held to be valid the plaintiffs are not the owners of the hereditaments therein comprised as alleged but are trustees thereof for the Canadian Pacific Railway Company.



7. The Statutes under which the said Canadian Pacific Railway Company purport to be incorporated do not authorise or empower the said Company to extend their line of Railway up to or through or to construct a branch line of Railway through the said land or give the right of expropriation of the said land or of any other land of the defendant.

8. And further the conditions precedent and things to be done and performed by the plaintiffs or the Canadian Pacific Railway Company before acquiring any right or interest in the said land have not been done or performed. 10

9. The plaintiffs have no authority to construct a line of Railway connecting the Canadian Pacific Railway with Coal Harbour and English Bay or either of such places.

10. And the defendant further says that he is the owner in possession of the said land by virtue of a pre-emption record dated the 14th day of April 1873 or of a deed of conveyance dated the 24th day of November 1884.

Delivered the 6th day of May 1887 by J. Roland Hett of Langley Street Victoria
Solicitor for the defendant. 20

To R. E. Jackson, Esq.

STATEMENT OF REPLY.

The plaintiffs join issue upon the Statement of Defence of above named defendant herein.

Delivered this 20th day of June A.D. 1887 by Robert Elwin Jackson, Plaintiffs'
Solicitor. 30

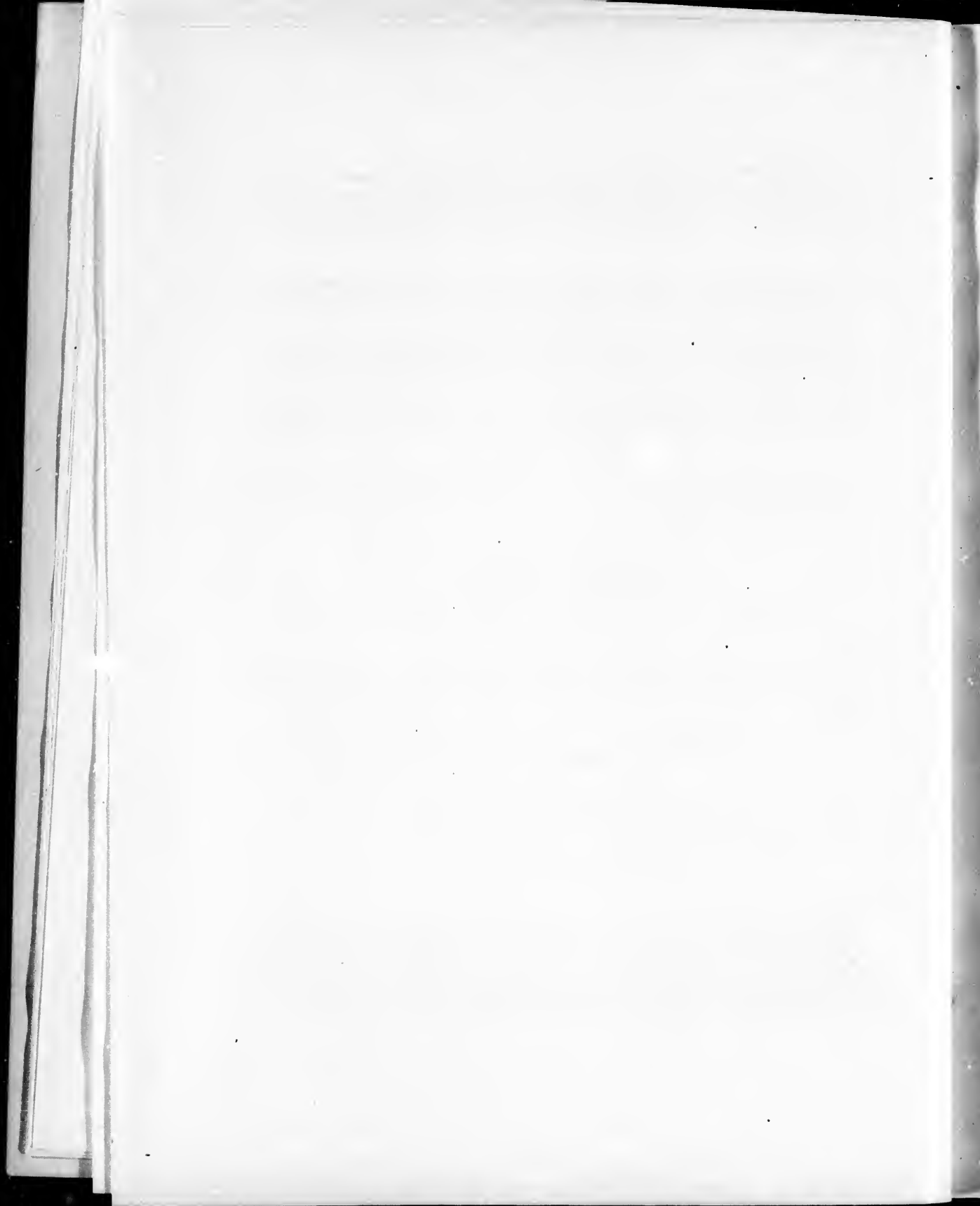
To J. Roland Hett, Esq.,
Solicitor for Defendant.

NOTES OF EVIDENCE.

(Taken by Sir M. B. Begbie, C.J.) 40

LACHLAN A. HAMILTON sworn :-

I am an assistant Land Commissioner with the C.P.R. I know the land and made the plan produced. This represents a portion of lot 526. The defendant has placed a barricade on the West boundary of the Indian reserve. I saw it there two months ago. The construction of the railway has been stopped. That is a considerable distance from the defendant's house. I remember a judgment in a similar action to this. Possession



was taken under that judgment--possession of the defendant's house. The defendant retook possession and I believe has been there ever since. I have not been there to see whether he was there or not. I cannot state accurately what land he claims now but as far as I know he claims the land lying West of the Indian reserve. That is where he cut down the telegraph poles.

X Examined. --I really do not know what the land in dispute in this action is. Not the extent of it. When I say the defendant placed an obstruction, I mean that I saw the obstruction which was placed across the cut. But I have no knowledge who placed it there except from a document fixed on the obstruction--a long document to the effect that the defendant claims the ground and warns settlers off. It is signed by the defendant. 10

I did not see the telegraph poles cut down i.e., the actual operation of cutting, I saw them down, after they had been cut. I saw the writ of possession. It referred to a small portion about 7 acres. The C.P.R. took possession of that small portion at least I was told so by the Sheriff. I sent some servants of the Company along with the Sheriff to take possession. I saw him start on that errand but I cannot say that I ever saw him on the land and I do not know of my own personal knowledge that he went on the land. The nearest telegraph poles were 300 or 400 feet East of the 7 acres extending thence eastwards. 20

The 7 acres had been marked out before the Sheriff put us in actual possession I could not state the exact day. My knowledge of the Sheriff's second visit is only by report from the Sheriff and the employes of the Company. So as to the defendant retaking possession after the late judgment I have no personal knowledge only what I was told by the Sheriff and our employes.

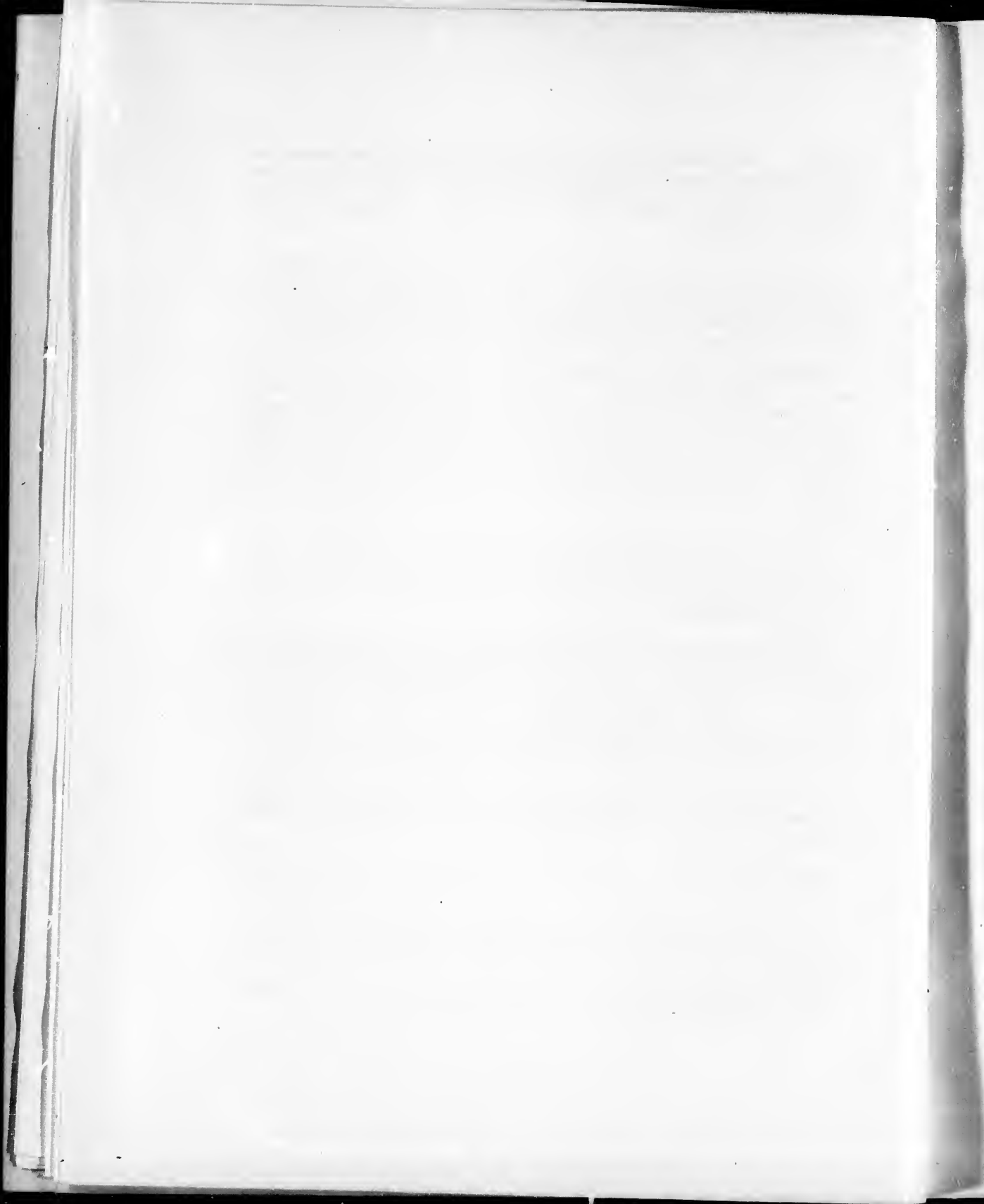
The C.P.R. are pushing the work of the extension. It was not completed before the 31st December 1886. I never offered on behalf of the Company to settle with the defendant in respect of these 7 acres, nor made any proposition with any such view, except perhaps a few years ago when he was employed with me on the survey there may have been some conversation. That may have been one year ago. I cannot recollect distinctly except that he agreed to give us peaceable possession and to withdraw: but I never made him any offer, I did not withdraw the proceedings. It was the Sheriff who withdrew. 30

To the Jury :--This writ of possession and the Sheriff's assistance was only as to the small piece of 7 acres. There were telegraph poles on it, the property of the Dominion Government. These poles were not cut. 40

The Crown Grant as to the lot 526 was put in, and the plans, and the judgment in the previous case.

Mr. Taylor moved for a nonsuit. I reserved leave on all the grounds taken viz. Estoppel, want of notice, illegality of the grant, inability of the Company to hold the land, &c.

N.B. Crown Grant was not to the Company, but to two individuals. A Crown



Grant can only be impeached by the Crown, by information, *Osborne v. Morgan* (13 App. Ca. 234, 238) and see *Farnar v Livingstone* (5 Daval 222.)

[Semble even if the grant illegal or the Company unable to hold under it yet until set aside it must be allowed full effect. Semble also, the question cannot be inquired into in this action.]

SAMUEL GREER sworn :

I am the defendant. I know the land in dispute. I reside on it ever since June, 1884. I am not sure that it is within these lines on this map it is somewhere thereabouts on the beach. It extends below high-water mark. Logs come right up to my door on the tide. There are 7 houses in all including barn &c., and dwelling house—perhaps 100 fruit trees. It is not true to my knowledge that anybody was put in possession; but I do not know the exact lines. I have certainly never been put out of possession of my house nor my things turned out of it. The Sheriff told me that he did not know where the lines were but that he had \$30,000 security and that he would put me out right or wrong. I never cut down a telegraph pole there to my knowledge. [marginal note—How could he know, if he did not know where the lines were.] There are telegraph poles within 200 feet of my house. They were there before I went there. The nearest poles erected by the Company were 450 feet to the east of my house. That is where I cut the poles down. That was the nearest pole. 10 23

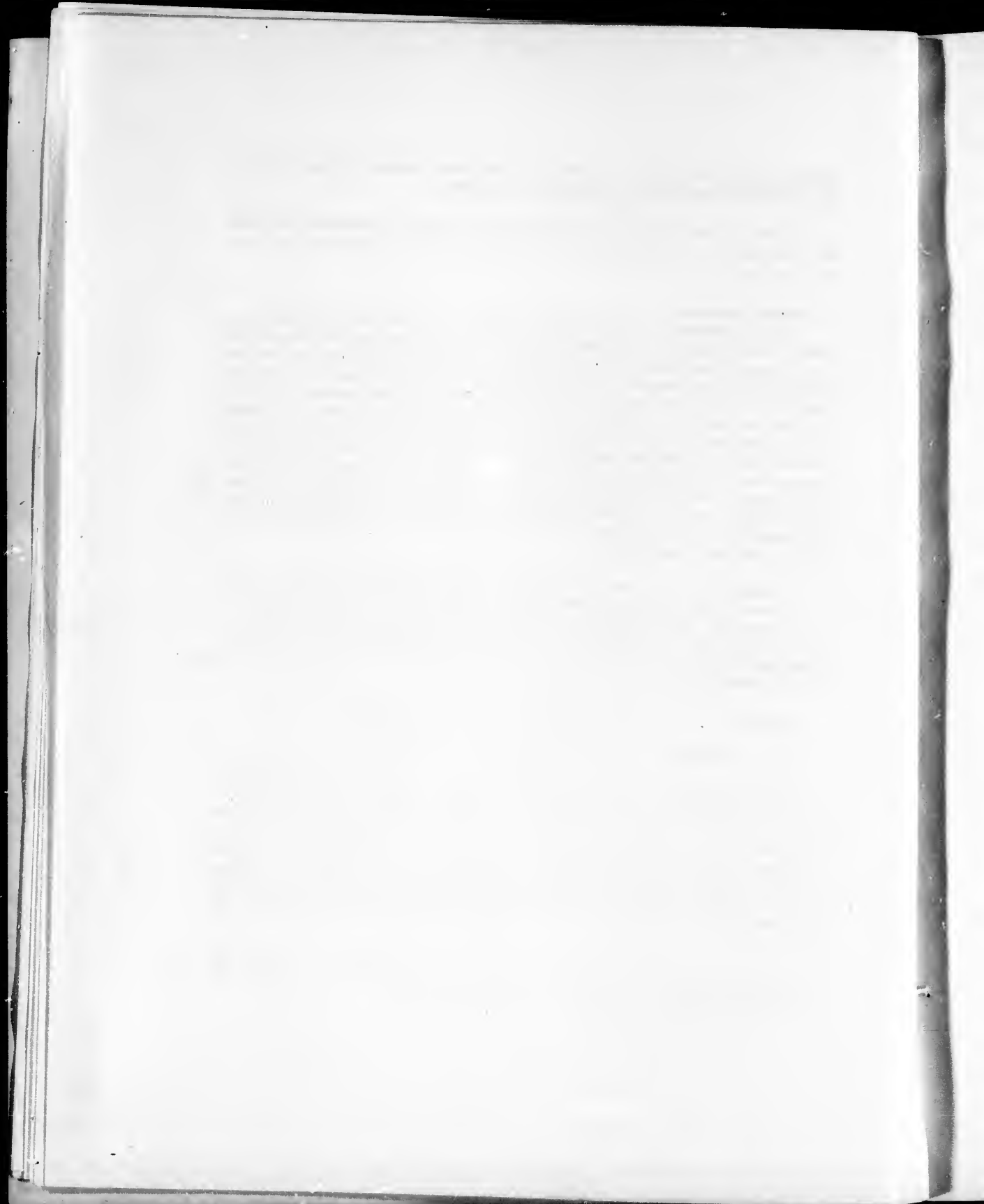
X Examined—I remember the 18th August. The Sheriff came to me with a writ to my house. I did not know the parties who were with the Sheriff; not their names. I do not remember things being moved by the Sheriff's officer "to my knowledge." I had no revolver I took an axe afterwards. They were then outside. I stood in the door defending it. (This was objected to as inadmissible and irrelevant. Objection overruled; on cross examination.) 30

Question.—Did you put up a barricade in the line of the Railway.

N.B. This might perhaps have been objected to, but was not.

I claim the land up to the Indian Reserve. I had no weapons when I made the claim. But I have been there with weapons. I often go shooting. I have no rifle. I have a shot gun. The barricade extends 50 feet across to the fence. I have warned people off. I never threatened to shoot them. The contents of the notice were to warn all parties not to cross that line nor to break any fences. I have cut telegraph poles 2 or 3 times could not say whether 12 times. I think, not so often as 20 times. I think from 9 to 12 times. They were on my land where I had my crops sown within 800 yards of the West boundary of the Indian reserve. I claim all the land up to the Indian reserve; by the same title. 40

I claim more than 7 acres perhaps 100 acres I never measured it. I cannot say where my boundaries are or where the lines are. It has never been surveyed. I never put any posts in the ground. I have no crown grant.



To the Court :--I bought the 7 acres from the former owners. The improvements were there when I entered.

To the Jury :--I bought from 3 different parties. I bought part from the Indian agent, the other portion of the land I acquired from a pre-emptor in 1863. His record is registered at New Westminster. No certificate of improvements.

I allowed Mr. Drake to amend pleadings to include all land claimed by Greer under the same title and directed the jury to find verdict for plaintiffs--allowing them at Mr. Taylor's request, to add if they thought fit a rider to their verdict, finding that the defendant has been in occupation of the land since June 1884. [No such issue was raised or raiseable between the parties however--and I did not myself see relevance of it, or what it has to do with this record. M.B.B.]

Mr. Drake asked for an injunction restraining the defendant from doing any act on any part of lot 526 whereby the plaintiffs may be hindered from construction of their railway or telegraph line or the works or approaches connected therewith respectively, ordered accordingly.

NOTE.

Mr. Taylor asked the Honorable the Chief Justice to direct the Jury to find whether or not the lands in question were required by the plaintiffs for the purpose of constructing a railway or for other purposes of public advantage.

This the Chief Justice refused to do.

COPY PART OF REGISTRAR'S NOTES ON TRIAL.

C. J. allows amendment of all lands besides the $7\frac{1}{2}$ acres.

Jury find a verdict for the plaintiffs and that S. Greer has been in possession of the land since 1884.

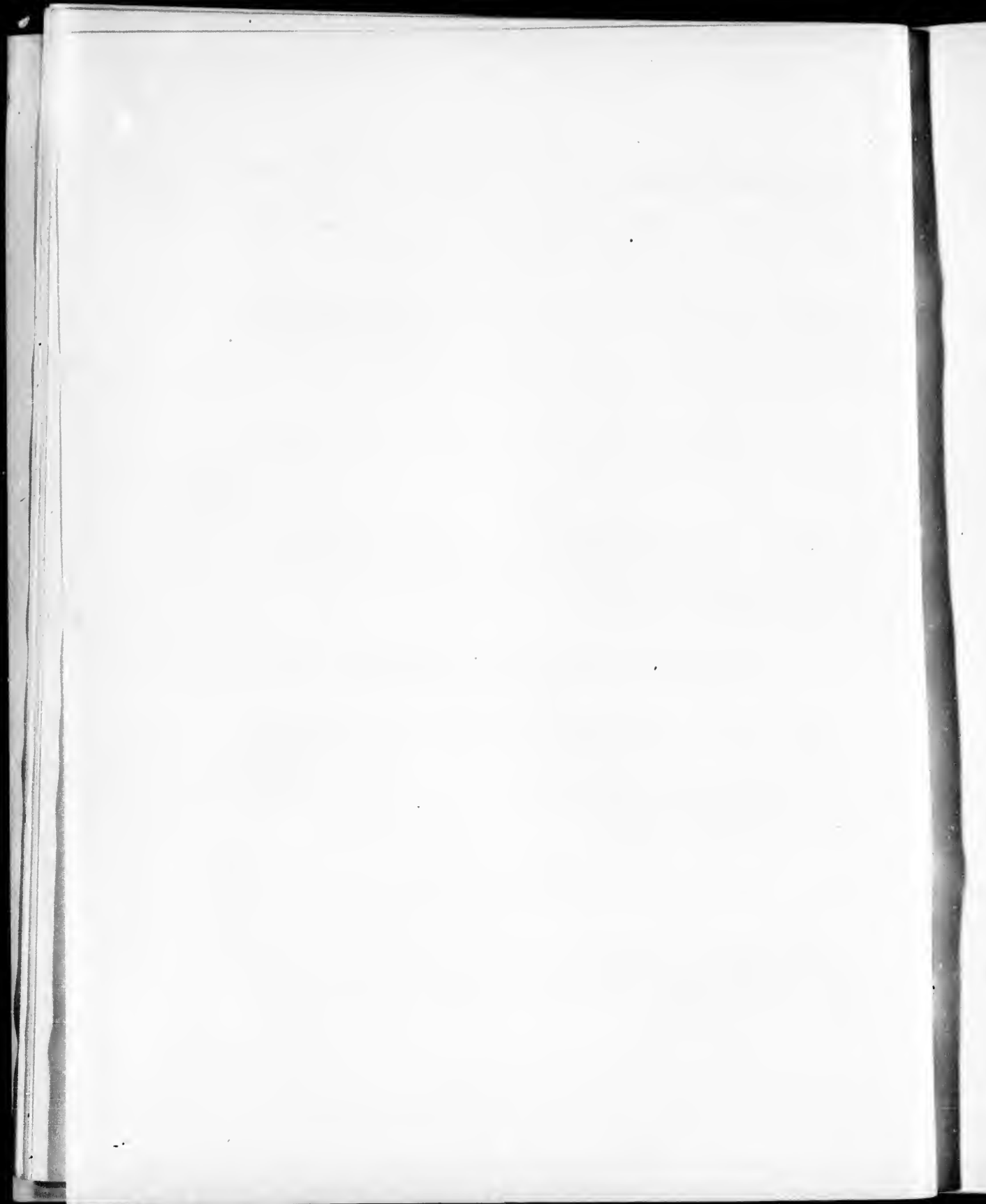
Mr. Drake asks for injunction leave given.

Adjourned till Tuesday at 12 noon.

ORDER FOR INJUNCTION MADE AT TRIAL.

Friday, the fifth day of August, A. D. 1887.

This action coming on for trial this day before the Honorable the Chief Justice and a Special Jury in presence of Mr. Drake, Q. C. of counsel for plaintiffs and of Mr. Hett and Mr. Taylor of counsel for defendant, and the special jury having found that the defendant was occupying part of the land in question herein since June, 1884, and a



verdict in favor of the plaintiffs and the writ having this day been amended in this action pursuant to leave from the said the Honorable the Chief Justice so as to include all the land claimed by the defendant in lot 526, group 1, New Westminster District, and upon the application of the plaintiffs, This Court Doth Order that the defendant, his servants, agents and workmen and all persons claiming under him be and he and they and each of them is and are hereby restrained and enjoined from interfering in any manner with the plaintiffs in the construction of the Railway and telegraph lines over the said land, being lot 526, group 1, aforesaid, or any part thereof, or any works connected therewith until judgment in this action or until the further order of this Court. 10

By the Court.

JAMES C. PREVOST,
Registrar.

ORDER FOR JUDGMENT.

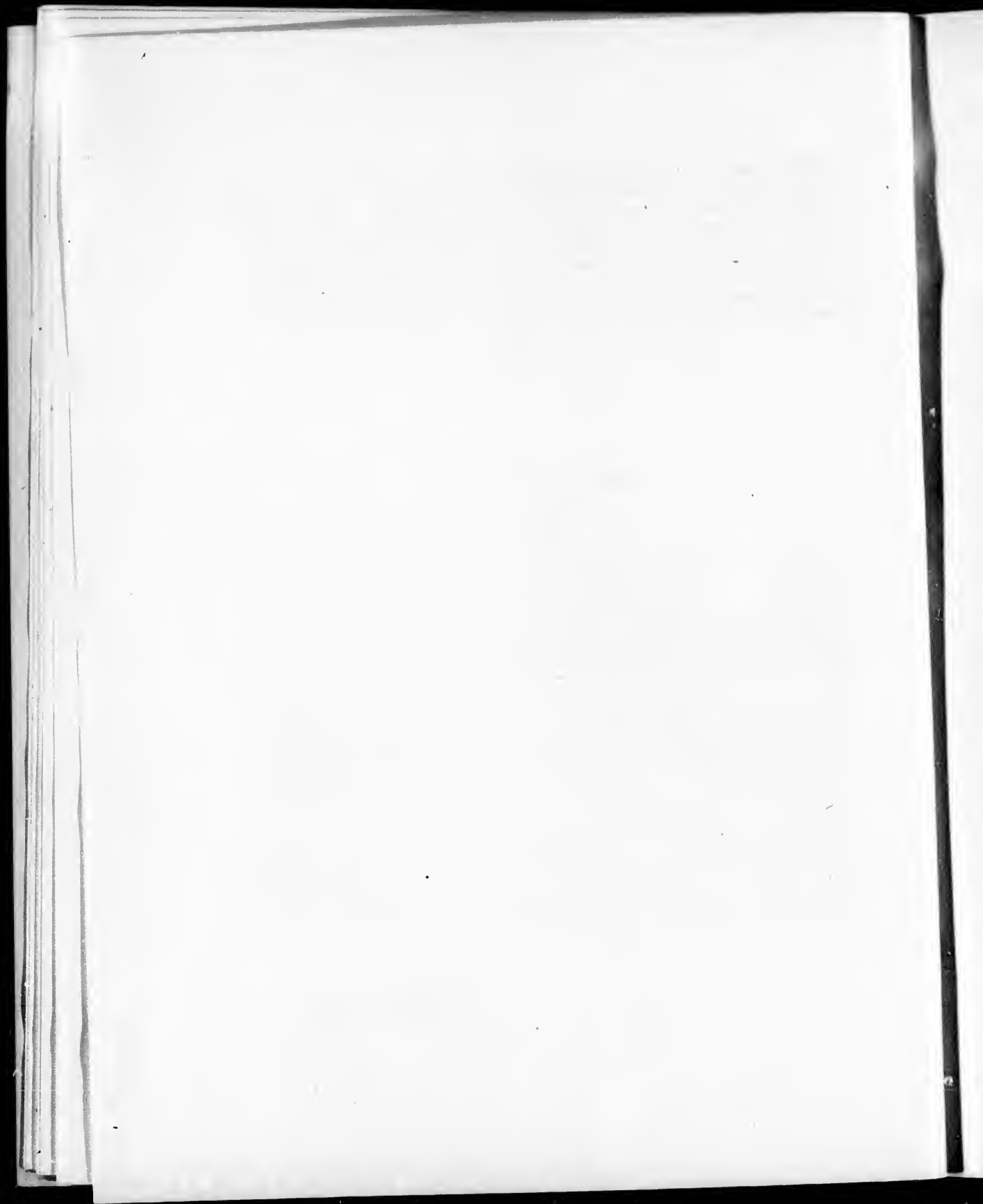
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Friday, the fifth day of August, A. D. 1887.

This action coming on for trial this day before the Honorable the Chief Justice and a Special Jury in presence of Mr. Drake, Q. C. of Counsel for the plaintiffs, and of Mr. Hett and Mr. Taylor of Counsel for the defendant, and the Special Jury having found a verdict in favor of the plaintiffs, and that the defendant was occupying part of the land in question herein since June, 1884, and the writ of summons having this day been amended pursuant to leave from the Honorable the Chief Justice so as to include all the land claimed by defendant in lot 526, Group 1, New Westminster District and the said the Honorable the Chief Justice having ordered that judgment herein be entered in favor of the plaintiffs subject to leave to the defendant to move to set aside the judgment or for judgment of nonsuit to be entered. This Court Doth Order and adjudge that the plaintiffs recover possession of the land in the said writ mentioned being part of lot 526, Group 1, New Westminster District and more particularly described as follows, viz.: commencing at a point on the centre line of the Coal Harbor and English Bay Branch or extension of the Canadian Pacific Railway, S. 61° 30' W., 2114 feet from a point on the Western boundary of the False Creek Indian Reserve, 1035 feet, north of its South West angle, thence North 1° 30' W. 323 feet, thence North 69° W. 43 feet more or less to the shore of English Bay, thence Westerly, following the shore of English Bay 663 feet, thence South 17° 31' E. 66 feet, thence South 71° 30' East 341 feet, thence North 13° 15 East 330 feet more or less to the place of beginning, together with the possession of all other lands claimed by the defendant in the said lot 526. This Court Doth Farther Order and Adjudge that the defendant do pay to the plaintiffs their costs of suit to be taxed. 30 40

By the Court,

HARVEY COOMBE,
Deputy Registrar.

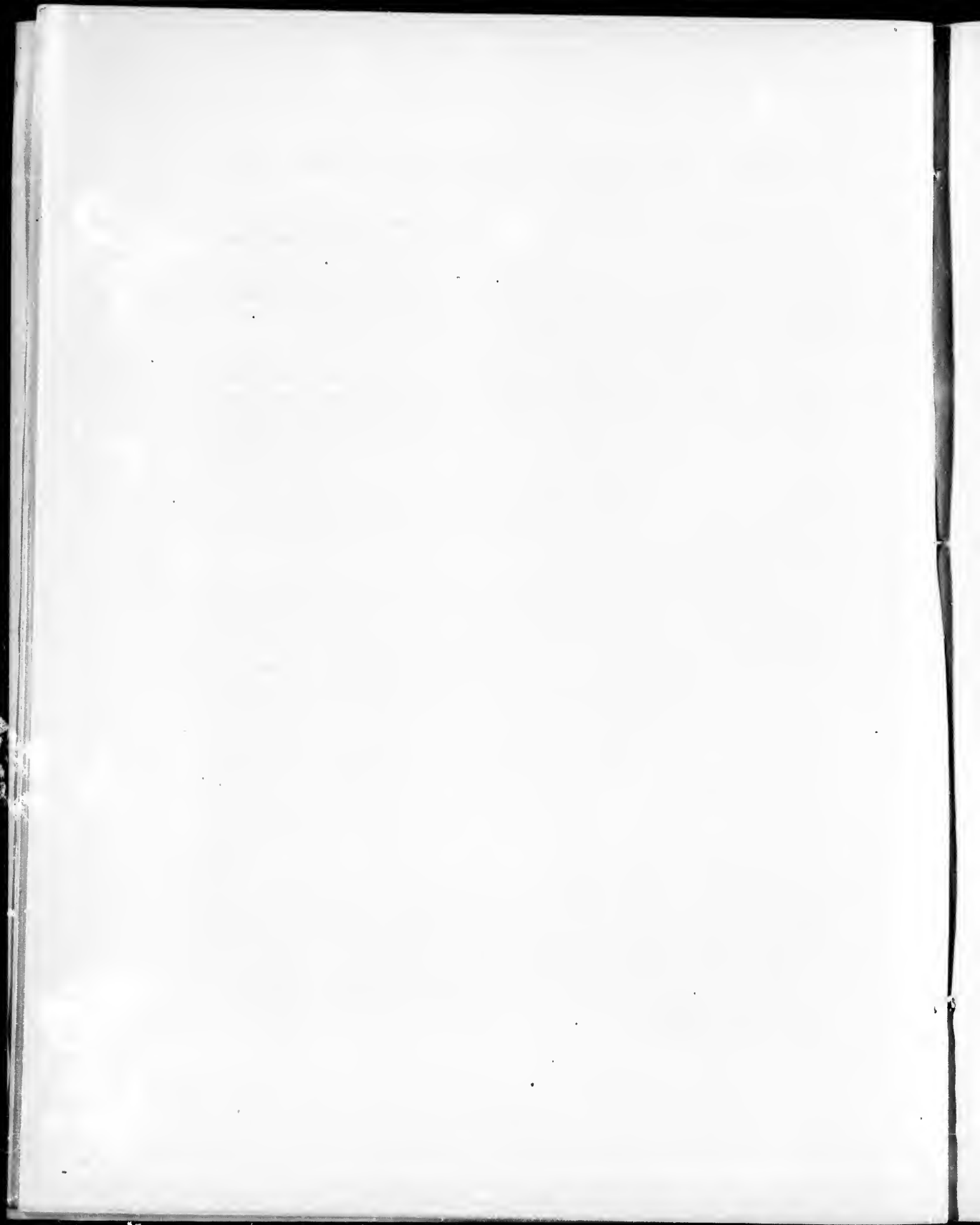


JUDGMENT OF SIR M. B. BEGGIE, C. J. ON REFUSING TO GRANT A NON-SUIT IN FAVOR OF THE DEFENDANT.

This is an action of ejectment in which verdict and judgment have been entered for the plaintiffs, but Mr. Hett, according to leave reserved at the trial, has moved to set aside that judgment and enter a nonsuit on the grounds mentioned at the close of the plaintiff's case, (viz.) 1st. The want of notice to the defendant before action:—2nd. That a former judgment in the plaintiffs' favor against this same defendant was no estoppel on the defendant:—and 3rd. That the grant from the Crown on which the plaintiffs relied was unconstitutional and void not being in conformity with the statute. 10

The first two grounds may very shortly be dismissed. The notice to the defendant required to be given by the plaintiffs in ejectment is not necessary when the defendant is an ostentatious trespasser. It is required when a landlord seeks to enforce possession against a tenant holding over. And as to the second objection, although the judgment in the previous action between the same parties having been a judgment in the defendant's absence, has not perhaps the force of an estoppel, there is no doubt but that it is evidence for the plaintiffs, and this is accordingly stated in the case *Wrightman v. Field* 19 Grant, (Chap. 539) relied upon by the defendant's own counsel, besides I am not at all sure that being between the same parties and embracing the same lands, this judgment has not, until set aside the force of an estoppel. However, the plaintiffs have not relied upon this at all but have proved their title over again. Certainly neither of these grounds would justify me in directing a nonsuit.

Nor is the third ground much more material. It is true this is an action of ejectment, and the plaintiffs must succeed by the strength of their own title, and not by the weakness of the defendant's title. They must show a title to possession, which precludes the possibility of the defendant's having such a right. Accordingly they produce a grant from the Crown dated in 1886. The question immediately arises is this a good grant? The defendant may impeach it by showing that it has never been duly executed, perhaps, (as he certainly might impeach a will, if the plaintiff claimed e. g. as devisee) that it had been obtained by fraud or mistake; not carrying out the real intention, etc. But he does not assail the execution of the grant or suggest that its effect was not deliberately intended: he says that the crown can only grant lands according to the terms and provisions of the statute: and that these have not been complied with. That the grant was made to the plaintiffs under S. 58 of 1834 C. 16, which authorized "such free or partially free grants to be made of the unoccupied and unappropriated Crown Lands for the encouragement of immigration or other purposes of public advantage with such provisions, restrictions and privileges as to the Lieutenant Governor in Council may seem advisable." And the defendant urges three objections against the validity of the grant. He says "these lands were not unoccupied or unappropriated, because I was there and I had appropriated the portion I now claim for my own benefit, moreover the grant does not mention the purpose of public advantage for which the lands were granted or that the lands were granted from any such motive, or in trust for any proposed benefactor and so the grantees are enabled to sell the land and put the money in their own pockets. Besides I deny that this grant was for the public advantage at all, it was merely to swell the assets of the C. P. R., for whom the plaintiffs are trustees, though that is not expressed in the grant nor in the action. 30 40



As to this last objection, I have repeatedly had occasion to observe that no judge of a Civil Court has under our constitution any authority to examine into the expediency or the imprudence of the advice given by a ministry to the Lieutenant Governor. The Ministry have come to the conclusion that the issue of the Crown Grant is advantageous and have advised that it should issue, they are responsible for that advice in the House of Assembly alone. I cannot listen to the defendant urging such a topic at all, as the trusts not being set forth in the deed, that is merely a matter of the form of the conveyance and is so far from being a fatal defect, that it is not even an irregularity. It is the commonest and most convenient method that when trust property is intended to be sold, all notice of the trusts should be kept of the deed which vests it in the trustees and as to Mr. Greer's occupation and appropriation of the land, he is and has been often judicially declared to be a mere trespasser on land which has been publicly reserved: which he must be taken to have well known to be reserved and his claims, moreover, extend beyond what any subject, except and under very peculiar circumstances, can possess or acquire which no preemptor could acquire and which perhaps even the Provincial Legislature could not by itself bestow. He claims land extending even below high water mark: where the tide ebbs and flows. The occupation and appropriation, referred to in the statute, must be taken to mean something legal or capable of being legalized or recognized, otherwise the 58th section would confer little or no power on the Lieutenant Governor if any grant under it (which is evidently intended of wild and unfrequented localities) were liable to be defeated by the accident of some unknown or wilful trespasser having pitched a tent or erected a shanty within the limits mentioned in the grants. 10

I think therefore that the judgment in favor of the plaintiffs must stand, and this application must be refused with costs. 20

ORDER ON APPLICATION FOR NONSUIT.

Tuesday, the 7th day of February, 1888. 30

This action having on the fifth day of August, A. D. 1887 been tried before the Honorable the Chief Justice and a Special Jury and the said jury having found a verdict in favor of the plaintiffs, and the said the Honorable the Chief Justice having ordered that judgment be entered for the plaintiffs subject to leave to the defendant to move to set aside judgment, or for judgment of nonsuit to be entered. Now on motion before the Court for judgment on behalf of the defendant made unto this Court the 9th day of August, A. D. 1887, by Mr. Hett and Mr. Taylor of Counsel for defendant and having heard Mr. Drake, Q. C. of counsel for plaintiffs. This Court did order that the said motion should stand for judgment, and this matter coming on this day for judgment in the presence of counsel for both parties, This Court doth Order that the said judgment do stand and the plaintiffs recover against the defendant their costs of and consequent upon this motion to be taxed. And the Court doth order and adjudge the same accordingly. 40

By the Court

JAMES C. PREVOST,
Registrar.



JUDGMENT.

Friday the 5th day of August A.D. 1887.

Pursuant to the order of this Honorable Court made herein the 5th day of August A.D. 1887 whereby it was ordered that the plaintiffs recover possession of the land in the said writ mentioned being part of lot 526 Group 1 New Westminster district and more particularly described as follows, viz : commencing at a point on the centre line of the Coal Harbour and English Bay Branch or extension of the Canadian Pacific Railway S.61° 30' W. 2114 feet from a point on the Western boundary of the False Creek Indian Reserve 1085 feet North of its South West angle, thence North 1° 30' W. 323 feet, thence North 69° W. 43 feet more or less to the shore of English Bay, thence Westerly following the shore of English Bay, 663 feet, thence South 17° 31' E. 66 feet, thence South 71° 30' East 341 feet, thence North 13 15 East 380 feet more or less to the place of beginning together with the possession of all other lands claimed by the defendant in the said lot 526, and costs of suit. It is this day adjudged that the plaintiffs do recover possession of the above mentioned lands and that the plaintiffs recover of the defendant \$242.70 taxed costs.

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Judgment signed this 3rd day of April A.D. 1888.

HARVEY COOMBE,
Deputy Registrar.

 NOTICE OF APPEAL.

Take notice that the Full Court will be moved on Monday the 9th day of July 1888 or so soon thereafter as Counsel can be heard by Mr. Taylor of Counsel for the defendant on his behalf that the order of this Honorable Court made herein and dated the 7th day of February 1888 and the Judgment made herein dated the 5th day of August 1887 and signed on the 3rd day of April 1888 may respectively be rescinded and Judgment be entered for the defendant.

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Dated the 2nd day of June 1888.

Yours &c.,

J. ROLAND HETT,
Solicitor for the above named defendant. 40

To Messrs. Drake & Co.,
Plaintiffs' Solicitors.

