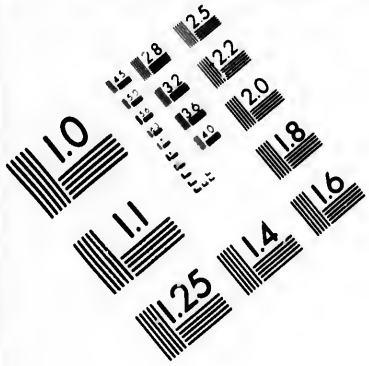

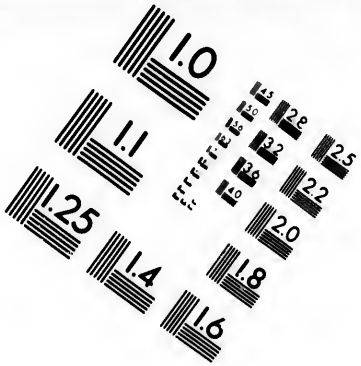

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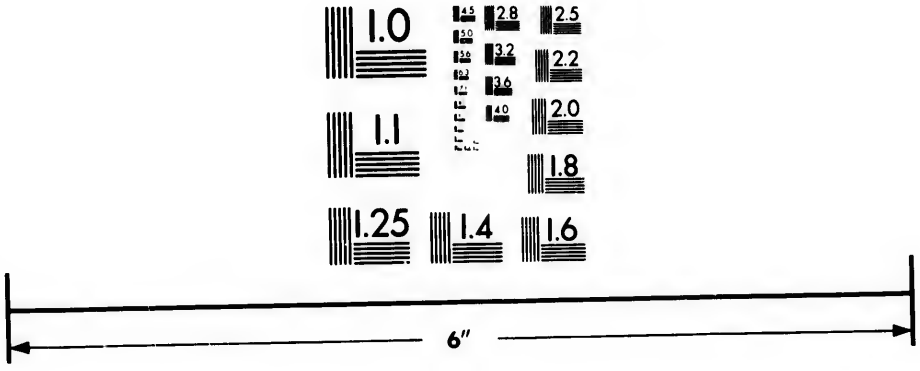

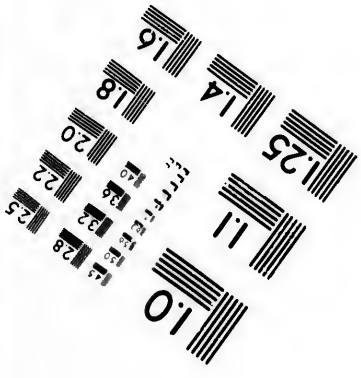

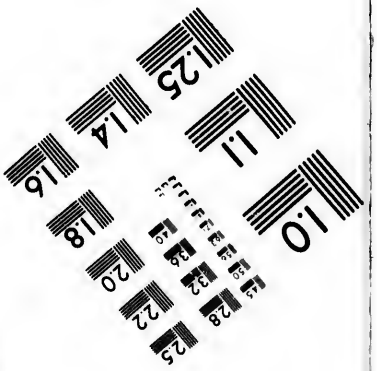

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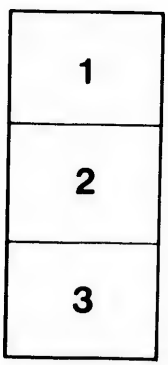

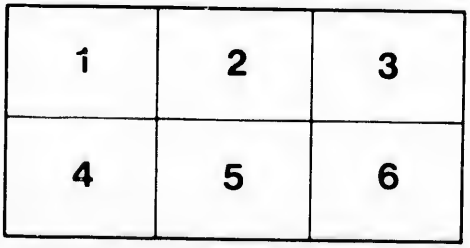

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IN THE

SUPREME COURT OF CANADA

On Appeal from the Supreme Court of British Columbia.

BETWEEN

DAVID WILLIAMS HIGGINS,

(Defendant) Appellant,

AND

THE HONORABLE GEORGE ANTHONY WALKEM,

(Plaintiff) Respondent.

Case on Appeal from the Order Discharging the Order Nisi for a New Trial.

THEODORE DAVIE,

Solicitor for Appellant,

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VICTORIA, B. C.
"THE COLONIST" STEAM PRINTING HOUSE,
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SHORT STATEMENT OF CASE.

This is an appeal by the Defendant from the judgment of the full court of the Supreme Court of British Columbia, pronounced on the 14th day of October, A.D., 1887 discharging the order *nisi* for a new trial made in this action on the 22nd day of July, A.D., 1887.

PLEADINGS.

STATEMENT OF CLAIM.

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

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

3. As Chief Commissioner of Lands and Works the Plaintiff, by Indenture dated the 24th of February, 1880, contracted, on behalf of the Government, with Francis Bernard McNamee, Anthony Gilbert Nish and James Wright, constituting the firm of "F. B. McNamee and Company," contractors, for the construction by them of a Graving or Drydock at Esquimalt, in consideration of the payment to them of $335,997.20, or such other sum as might be due to them under specifications referred to in the said Indenture.

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

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

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

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

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

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

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

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

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

"THE McNAMEE MITCHELL SUIT.

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

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

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

Meaning and intending it to be believed by the said false and malicious libel, that at the time the Plaintiff held the several offices of public trust and confidence mentioned, he secretly, and by corrupt means, and for corrupt and unworthy considerations of personal gain and profit, and in betrayal of such trust and confidence, acquired and held a partnership interest conjointly with the said contractors "F. B. McNamee and Company," in their said Drydock contract of the 4th of October, 1880, and that as such secret partner with them, he fraudulently and unlawfully obtained large sums of public money, and made large gains and profits at the expense of the Province in respect of work done, or pretended to have been done, on the Dock under the said contract; and that he procured the award which was made of the said contract, and thereupon executed the contract, and thereafter obtained the said public moneys, and made the said profits in manner mentioned, under cloak of his position and influence in the Government and especially of his office and authority as Chief Commissioner of Lands and Works, and by falsely and fraudulently pretending that he was acting as such officer in the premises, solely on behalf of and in the interests of the Government, and not on his own personal behalf, as was the fact; and that

he had by reason of the premises committed criminal offences punishable by law which should "not be treated lightly nor allowed to pass unheeded"; and further that the plaintiff, actuated by the corrupt and unworthy motives and considerations above mentioned, continuously held his said secret partnership in the contract, while the latter remained in force; that is to say, for a considerable period before and after his resignation of office, and his appointment to his present position on the bench, as mentioned and referred to in paragraphs 1, 2 and 9 hereof.

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

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

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

The plaintiff claims $10,000 damages.

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

Delivered the 1st day of February, 1886.

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

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

RE AMENDED STATEMENT OF DEFENCE.

Amended under order of Court dat. of the 25th March, 1886. Re-amended under order of Court 9th April, 1886.

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

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

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

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

4. The Defendant further says that that portion of the alleged libel which purports to be a report of a portion of the evidence of the said Francis B. McNamee in the said case of McKenna *vs.* McNamee, was prior to the publication alleged in said paragraph 12, printed and published in a certain newspaper published at Victoria, British Columbia, and known as the "Daily Evening Post," as and purporting to be a true and correct account and report of part of the evidence taken in the said case of McKenna *vs.* McNamee, at the said sittings of Assize and Nisi Prius, in and for the County of Carleton, in the Province of Ontario, holden at the City of Ottawa aforesaid, and the Defendant *bona fide* believing the said portion to be a fair, accurate and impartial report of that part of the said evidence, and conceiving it due to the Plaintiff's exalted position, that the charge conveyed by the said evidence should not be allowed to pass unrefuted, published the same *bona fide* and without malice, without unfavorable comment, but with comment shewing that the charge was not worthy of credit, and as proceedings of public interest and concern, and in the usual course of the Defendant's business and duty as a public journalist.

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

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

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

JOINDER OF ISSUE.

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

Delivered the 1st day of May, 1886.

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

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

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

GEO. M. EVANS,
Commissioner

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

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

By Mr. Walkem, Q. C.

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

A. Francis Bernard McNamee, contractor, Montreal.

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

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

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

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

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

A. Yes.

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

A. Yes; I believe that we had one duplicate of the agreement, and the Government had another.

Q. 6. Look at printed Exhibits "A. and B.," now produced and shewn to you, and respectively headed "Return to an Order of the Legislative Assembly, dated 16th April, 1880, for a copy of the contract entered into with Messrs. McNamee & Co., for the construction of the Esquimalt Graving Dock," and "Return to an Order of the Legislative Assembly for a copy of the contract between the Government and Messrs. McNamee for the construction of the Esquimalt Graving Dock," and purporting to be official copies, and also notarial copies of two contracts respectively dated February 24th, 1880, and October 4th, 1880, and made between the members of your firm of the one part and the said George Anthony Walkem as Chief Commissioner of Lands and Works of British Columbia of the other part, and state whether you identify them as true copies of contracts entered into by your firm for the construction of the Graving Dock at Esquimalt; and if either of them is not a true copy of its original please state in what respect it is incorrect?

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

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

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

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

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

Q. 9. Was such agreement made in writing, and have you it? If not, who drew up the agreement and before whom was it executed? What was its date, and with whom was it left or deposited by you, or by the other contracting parties?

A. The agreement was in writing; I had a copy of it and I think it is filed as an 10 exhibit in the suit of McKenna vs. McNamee. I think it was drawn by Mr. Robertson, who afterwards became a judge, and is now dead.

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

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

Q. 11. Look at the document now produced and shewn to you marked "C" purporting to be a notarial copy of an agreement of partnership dated the 28th day of August, 1880, 20 and made at Victoria between the members of the firm of E. B. McNamee & Co. of the one part, and John Johnston Robertson, John Huntington and John Nicholson of the other part, and state whether or not such document or agreement was executed by your firm and the parties whose names appear thereto and in the presence of the witness whose name appears thereto?

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

Q. 12. Look at the "Daily British Colonist" dated Victoria, British Columbia, Friday, November 20th, 1885, now produced and shewn to you marked "D" and particularly at 30 the article on the second page thereof headed "The McNamee Mitchell Suit," and state whether you or your firm were defendant or defendants in the action of McKenna vs. McNamee mentioned in the article, and whether you gave evidence on oath as a witness at the trial thereof at Ottawa, and if you were defendant in such an action state the names of the parties thereto, and the date of the trial thereof, and the place of trial? and the name of the presiding judge at the trial?

A. I look at exhibit marked "D," being a copy of the Daily Colonist newspaper published in Victoria, British Columbia, containing on the second page thereof an article headed "The McNamee-Mitchell Suit." My firm were the defendants in the suit of Mc-

Kenna vs. McNamee therein mentioned. The defendants were myself, Nish and Wright before mentioned, and McKenna and Mitchell were the plaintiffs. The date of the trial was the seventh of November, 1885, and the place of trial was Ottawa, the judge being Mr. Justice Rose.

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

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

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

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

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

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

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

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

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

A. Yes.

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

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

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

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

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

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

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

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

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

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

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

A. Yes.

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

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

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

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

F. B. McNAMEE.

GEO. M. EVANS,
Commissioner.

STATEMENT.

Milton Fisk Johnston was examined as a witness in this action under a commission issued herein on the 16th day of July, 1886, in order to prove the correctness of the short-hands notes taken by him, of the evidence of Francis B. McNamee, at the trial of the action of McKenna vs. McNamee at the city of Ottawa, on the 7th day of November, 1885.

EXTRACT FROM DAILY EVENING POST, PUBLISHED AT VICTORIA, B.C., NOVEMBER 18TH, 1885.

ESQUIMALT DRY DOCK.

THE GREAT CASE OF McKENNA VS. McNAMEE.

OTTAWA, NOV. 9TH.

His Lordship took his seat at 9.30 this morning at the Assize court, and the first half hour was occupied in calling over the jury list, and empanelling a jury to try the first case called. This was McKenna vs. McNamee, Mr. Dalton McCarthy, Q.C., and Mr. E. Mahon appeared for the Plaintiff's, and Mr. W. Lount, Q.C., and Mr. M. O'Gara, Q.C., for the Defendants.

Mr. McCarthy, Q.C., made application for a jury.

His Lordship stated that he had struck it as a case without a jury.

Mr. Lount, Q.C., objected to a jury, and finally it was decided to take it without one, and the jury was dismissed

Mr. Dalton McCarthy in opening the case, put Mr. Robert Mitchell in the box. Mr. Mitchell said he was a contractor, so was Mr. McKenna; knew three of the Defendants, Mr. McNamee, Mr. Wright and Nish. He entered into a contract with Defendant in the city of Toronto. The terms of the contract had been agreed on before going to Toronto. Agreement produced, and put in, dated 29th July, 1882. The contract was for the building of the Esquimalt Graving Dock in British Columbia, and by the agreement 90 per cent. of the work done was to be paid for on the making of periodical estimates, until the completion of the work. Witness left Ottawa on the 2nd August. When he got there he did not do the work as he could not obtain possession. The government was carrying on the work through Mr. McNamee. He communicated this by letter and telegram to Defendant. The letter was produced Witness reached British Columbia somewhere about the 15th of August. He wrote two letters before the one produced, dated the 3rd of September. In this letter witness informed Defendant that he had experienced considerable difficulty in obtaining work from Mr. Beaven, chief commissioner, and had had grave doubts as whether he should do so or not. Witness did not hear anything of the government being in charge of the work until he valued the place. Robertson and Huntington said they were in possession, but Mr. Bennett, the government engineer denied this. Mr. Beaven said they (the government) were in possession of the work and carrying it on for Mr. McNamee The British Columbia government handed over the work to the Dominion government, by whom it was now being completed. Witness would have made $75,000 profit had he obtained the work, as it was he lost twenty-two months and $2,000 in money, etc. Witness sent his bill to McNamee & Co., but never got the money.

After a considerable argument Mr. Lount called Mr. McNamee who testified as follows: The arrangement between himself and the Plaintiff was for the latter to carry out their contract and pay them 10 per cent. At that time the sub-contractors had failed, and the British Columbia government took possession of the plant, material, and everything in June, 1882. Mitchell boasted of the influence he had with the government, and said he would be able to get the contract back. Mitchell undertook to go out at his own expense and get the contract out of the hands of the British Columbia government. It was agreed that if the contract was not got back from the British Columbia government then the contract was to fall to the ground.

Cross-examined by Mr. McCarthy: When Mitchell applied to him for payment of his claim, witness told him to give the account properly drawn up, and submit it to him as it would be better for him to pay it than to have law-suits. Witness had a deed of dissolution of partnership prepared. Six of them were in partnership out in British Columbia one of whom was at that time the Premier of the Province. Witness never had any reason to believe that he had incurred any liability to pay Mitchell for the time. When Mitchell asked him for payment he told him he had no claim but as a matter of generosity he would pay part if an account was made out. At that time in July, 1882,

witness had no influence with the British Columbia government but as the Dominion government had given $250,000 towards this railway, witness used all his influence with them to obtain their interference to induce the British Columbia government to restore the contract. He had obtained the assistance of Mr. Schultz This was the only influence he had used except monetary influence

Mr. McCarthy "Do you mean to tell me that members of parliament are open to monetary influence?"

Witness "Yes, it has to be used occasionally. At the present time witness had a lawsuit against the Dominion government, but he had none against the British Columbia government. He would be content if they would give him back his deposit of $10,000 10 and his plan. He thought Mitchell's influence was greater with the Ottawa government than his own. Mitchell specially mentioned that Sir Charles, Sir John and Sir Hector were found to help him. Had Mitchell had no influence, witness would not have dealt with him. Witness promised to use his influence too."

Mr. Naish and Senator O'Donohoe having given their evidence, this concluded Defendant's case and counsel on both sides having addressed His Lordship, the court said that both parties knew at the time of the signing of the contract, that the British Columbia government had taken over the contract, and that the contract produced was good and solid. The question of damages must be reserved.

Extract from Ottawa Daily Free Press of November 9th, 1885. 20

Carleton Assizes—Continuation of the case of McKenna vs. McNamee.

On the assembling of the Court after lunch on Saturday, Mr. McKenna went into the witness box, his evidence was in the main corroborative of Mr. R. P. Mitchell with regard to the taking over of the contract, and give Defendant 10 per cent. of the contract price. He was satisfied with the bargain and signed the agreement willingly, after that he had no more to do with it. He left all the rest to Mitchell as a practical man: he had no recollection of any conversation which took place at the solicitor's office on the day of signing the agreement.

Mr. Archibald said he was a contractor with twenty-two years experience. He had never seen the specifications in this matter. The witness was put back to go through them. 30

Mr. Lount contended that it being impossible for the Defendant to sub-let or transfer the contract, there was no contract.

His Lordship—"What I should find in the evidence given so far is this: that it was necessary to use the name of the Defendant to secure the contract but would not interfere with the terms on which the contract was taken. The power of attorney gave them power to use the names of the Defendants."

Mr. Lount—"The power of attorney was only meant to enable them to secure the payments on the work. I contend the contract was merely a cloak to get the contract back."

His Lordship—" Who has said so, so far ?

Mr. Lount—" Mitchell said so."

His Lordship—" You must take all he said if you are founding on his evidence."

Mr. Lount contended that it was an agreement to take the work to pay Defendant 10 per cent. for taking it.

His Lordship—" I think this contract is a contract to do the work and be paid for doing it."

Mr. Lount—" Yes, by the Government. Mitchell said he expected the 90 per cent. from the Government."

His Lordship—" Yes, or from McNamee."

Mr. Lount then submitted that there was no work remaining to be done, but the learned judge maintained that the contract made it appear that there was.

After considerable argument Mr. Lount called Mr. McNamee, who testified as follows: The arrangement between himself and the Plaintiff was for the latter to carry out their contract and pay them 10 per cent. At that time the sub-contractors had failed and the British Columbia government took possession of the plant material and everything in June, 1882; under the terms of contract about $70,000 worth of work had been done at that time. He met Mitchell at the Russell house in July. No one else was present. Mitchell came to him and said that he saw that he had lost the British Columbia contract. Witness said "yes, the Government had taken possession of it." He said "What say you to giving me that contract, I am sick of farming and want to go back to contracting?" Mr. McCarthy here objected to the evidence. Mr. McNamee continuing said: Told Mitchell it would take an immense amount of interest to get the contract back. The question arose as to prices and referred Mr. Mitchell to Naish at Point Fortune. A second interview occurred at the Russell house when Naish was present and Mitchell took away the specification book. They met again next day and Mitchell proposed to give them 10 per cent. He knew of the clause by which the contract would not be sub-let or transferred. There was no arrangement that they were to pay Mitchell the 90 per cent. Witness himself drew Mitchell's attention to the clause against transferring. On the second occasion Mitchell boasted of the influence he had with the government, and said he should be able to get the contract back. Mitchell undertook to go out at his own expense and get the contract out of the hands of the British Columbia government. It was agreed that if the contract was not got back from the British Columbia government then the contract should fall to the ground.

Cross-examined by Mr. McCarthy—When Mitchell applied to him for payment of his claim witness told him to give the account properly drawn up and submit it to him as it would be better for him to pay than to have law suits. Witness had a deed of dissolution of partnership prepared. Six of them were in partnership out in British Columbia, one of whom was the Premier of the Province. Witness never had any reason to believe that he had incurred any liability to pay Mitchell for the time. When Mitchell asked him for payment he told him he had no claim, but as a matter of generosity he would

pay part if an account was made out. At this time, in July, 1882, witness had no influence with the British Columbia Government, but as the Dominion Government had given $250,000 towards this railway, witness used all his influence with them to obtain their interference to induce the British Columbia Government to restore the contract. He had obtained the assistance of Mr. Schultz. This was the only influence he had used, except monetary influence.

Mr. McCarthy—"Do you mean to tell me that members of Parliament are open to monetary influence?"

Witness—Yes; it has to be used occasionally. At the present time witness had a law suit against the Dominion Government, but he had none against the British Columbia Government. He would be content if they would give him back his deposit of $10,000 and his plan. He thought Mitchell's influence was greater with the Ottawa Government than his own. Mitchell specially mentioned that Sir Charles, Sir John and Sir Hector were bound to help him. Had Mitchell had no influence witness would not have dealt with him. Witness promised to use his influence too.

The Court adjourned at 6:30 for dinner, His Lordship resuming his seat at 8 o'clock.

Mr. Naish, sworn, said he was a partner in the firm of contractors in the Esquimalt Graving Dock. Knew [redacted]. Mitchell and met him at the Russell House about the 17th July. McNamee had told him that Mitchell was desirous of taking the contract. Several communications were held as to Mitchell's being taken into partnership. At a meeting of Mitchell, McNamee and witness final arrangements were made on the terms deposed to by McNamee. Did not know of anything being said as to their liabilities for damages if contract was not got back. The argument was signed in Mr. O'Donohue's office. At an interview with Mitchell, three months after, nothing was said as to any claim for damages.

Senator O'Donohue was the next witness called, and he said he was a member of the bar practising at Toronto. He drew up the argument first in (Exhibit No 1.) He received his instructions from Mr. McNamee and Mitchell. Mitchell was to continue the work nominally representing McNamee & Company. A lengthy discussion as to the non transfer clause took place on that occasion. Mitchell was quite positive he would re-obtain the contract. There was considerable discussion as to extras, but McNamee would make no allowance.

This concluded defendant's case, and Counsel on both sides having addressed His Lordship, the Court said that both parties knew at the time of the signing of the contract that the British Columbia Government had taken over the contract, and that the contract produced was good and solid. The question of damages must be reserved. It was mutually arranged to give fuller evidence on Thursday, and the Court adjourned at a quarter to ten till 9:30 this morning.

EXTRACT PUBLISHED IN THE OTTAWA FREE PRESS OF THE 16TH DECEMBER, 1885.

In the report of the evidence in the case of McKenna vs. McNamee at the last assizes for the County of Carleton, on Nov. 9th, Mr. McNamee is reported as saying that "he

had six partners, one of which was the Premier of British Columbia." Mr. McNamee states that what he said was: "I had six partners, three of them British Columbians, who were forced on me by the Premier of British Columbia. Their names were Nicholson, Huntingdon and Ross."

EXTRACT FROM THE DAILY BRITISH COLONIST, PUBLISHED AT VICTORIA, B. C., ON THE 20TH DAY OF NOVEMBER, 1885.

THE McNAMEE-MITCHELL SUIT.

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

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

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

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

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

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

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

A. It is a fact, to the best of my knowledge and belief, that the "Ottawa Daily Citizen" for twelve months last past has been published at Ottawa, Ontario; but it has

not, either as a Daily, Semi-Weekly or Weekly paper, at any time during that period been one of my exchanges by mail or otherwise, and I have had no Ottawa exchanges for at least twelve months prior to the commencement of this suit.

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

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

4. If you cannot state in reply to the last interrogatory whether you did, or did not, receive the said "Ottawa Daily Citizen" or other edition of the said journal at the time mentioned, did you, before you published the article complained of in this action, or at any other time, and, if so, when, ascertain or endeavor to ascertain, and, if so, from whom or in what manner, whether any number of the said "Ottawa Daily Citizen" or of its other editions, containing a report of the said trial of McKenna vs. McNamee had been received by any person on your behalf, or had been received by or at your office or place of business, or had been received by or at any of the several newspaper offices in this city, or in New Westminster, Nanaimo, or Kamloops, or had been received by or at any of the public libraries or reading rooms in this city, or in any of the places above-mentioned, or had been received by any person in this city as a subscriber or otherwise?

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

"THE DRY DOCK ENQUIRY."

"SIXTH DAY."

"EVIDENCE OF THE CHIEF COMMISSIONER."

WEDNESDAY, March 8.

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

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

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

6. If you have not printed or published the above matter on the 11th March, 1882, did you print and publish it in your said newspaper on any other day, and, if so, on what day?

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

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

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

J. ROLAND HETT,
Plaintiff's Solicitor.

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

" Sworn to before me at the City of Victoria, B. C., this 31st day of March, A. D., 1886. " D. W. Higgins."

" W. J. Taylor."

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

CORRESPONDENCE.

Between the Plaintiff and McNamee.

EXHIBIT " F."

Kamloops, B. C., Nov. 23rd, 1885.

Sir:

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

Now one of the local newspapers points me out as evidently the Premier meant—why, I cannot tell. I wish to know, first, whether you did make such a statement on oath : and secondly, if you did, who was the Premier referred to. As you must remember, I was virulently attacked, here, without reason, as being a silent partner of yours in the Dock contract, and this, too, by your own local partners and their unscrupulous friends or assistants. I emphatically stated before a Committee of the House of Assembly on Dock matters that, beyond official interest in the dock work, as the then C. C. of Lands and Works, I had no interest whatever in it. I said specifically that I never was directly or indirectly interested with you or your partners in any pecuniary or other advantage whatsoever connected in any way with the dock or any other work.

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

reported. I shall be glad of an immediate answer to this letter, as I cannot permit the matter to stand as it does, so far as I am concerned.

I remain, yours truly,

GEO. A. WALKEM.

F. B. McNAMEE, ESQ., MONTREAL.

EXHIBIT "A."

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

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

From Kamloops B. C., 27th.

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

(Signed) GEO. A. WALKEM.

EXHIBIT "B."

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

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

Kamloops, B. C.

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

(Signed) F. B. McNAMEE.

EXHIBIT "C."

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

To F. B. McNAMEE, Received at MONTREAL, DEC. 11TH, 1885.

From Victoria, B. C.

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

(Signed) GEO. A. WALKEM.

EXHIBIT "D."

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

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

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

(Signed) F. B. McNamee.

EXHIBIT "E." 10

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

To F. B. McNamee, Received at Montreal, Dec. 16th, 1885.
From Victoria, B. C.

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

(Signed) Geo. A. Walkem.

EXHIBIT "G."

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

Hon. G. A. Walkem, Judge. Montreal, Dec. 16th, 1885
Kamloops, B. C. 20

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

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

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

"Whether you did make such a statement on oath, and secondly, if you did, who 30 was the premier alluded to."

In answer to the above questions which can be answered together, I give it a most emphatic denial, viz: That I never asserted on oath or insinuated even that you were interested pecuniarily in the Graving Dock as far as I know or any other contract.

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

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

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

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

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

I am, Sir, Your Obedient Servant,

(Signed) F. B. McNAMEE.

EXHIBIT "H."

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

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

DEAR SIR:—I have had to proceed against the "Colonist" and "Post" newspapers, here, for the libels they inserted in November last in mis-reporting your evidence as to myself in the McKenna trial at Ottawa. I have got out a Commission to take your evidence and also the official reporter's. The Defendants have also taken out one to examine witnesses at Ottawa. The object of this, as far as I can see, is to take R. P. Mitchell's evidence and possibly the "Free Press" reporter's. I have been privately informed, that Mitchell intends to state on oath that you swore at your trial that "the Premier of the Province was one of the six partners in the dock contract." The official report of your evidence which I have got seems pretty complete and occupies no less than 70 long pages of type-written matter. The evidence in the whole case covers about 160 pages, so that the short account of it given in the "Post" is very incomplete, and is,

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

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

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

Yours truly,

(Signed) GEO. A. WALKEM.

To F. B. McNAMEE, Esq., Montreal.

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

Before me, William Drummond Hogg, the commissioner appointed by commission dated at the City of Victoria, in the Province of British Columbia, on the 23rd day of May, A. D., 1887, and hereto annexed, appeared Theodore Davie, Esquire, aforesaid, as Counsel representing the defendant, David Williams Higgins, and J. J. Gormully, of the said City of Ottawa, Barrister-at-Law, as Counsel representing the plaintiff herein on the 3rd day of June, A. D. 1887, at the hour of four thirty o'clock in the afternoon at my office, No. 83½ Sparks Streets, in the said City of Ottawa, and after having taken the oath prescribed by the said Commissioner, the said oath being hereto annexed, I proceeded then and there with the execution of the said commission as follows:

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

DIRECT EXAMINATION BY MR. DAVIE.

Q. What is your name?

A. Charles William Mitchell.

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

A. I am.

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

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

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

A. I was.

Q. Do you know Mr. Francis Bernard McNamee?

A. I do.

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

A. I believe he was.

Cross-examined by Mr. Gormully.

xQ. Were you present at Mr. McNamee's trial?

A. No, Sir.

xQ. You do not know what he swore to?

A. No, Sir.

xQ. Except from hearsay?

A. Except from hearsay.

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

A. Yes, to the reporter.

xQ. He did not state to you in what way he wished it corrected?

A. He may have done so.

xQ. But you don't remember?

A. I guess he did.

xQ. Do you remember what he said to you from your own memory?

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

xQ. You have never been in British Columbia?

A. No, Sir.

(Signed) C. W. MITCHELL.

OTTAWA, 3RD JUNE, 1887.

EVIDENCE OF FRANCIS B. McNAMEE TAKEN UNDER THE COMMISSION ISSUED HEREIN ON THE 8TH DAY OF JUNE, 1887.

Before me, William Drummond Hogg, the Commissioner appointed by Commission dated at Victoria, on the 8th day of June, in the year of Our Lord one thousand eight hundred and eighty-seven, hereto annexed, appeared Alexander Fraser McIntyre, Esquire, Barrister, of the City of Ottawa, in the Province of Ontario, as attorney representing the defendant herein, and J. J. Gormully, Esquire, Barrister, of the said City of Ottawa, as representing the plaintiff herein, on this 20th day of June, 1887, at the hour of four o'clock in the afternoon, at my office, No. 83½ Sparks Street, in the said City of Ottawa, and after having taken the oath prescribed by the said Commission, the said oath being hereto annexed, I proceeded then and there with the execution of the said Commission as follows:

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

Frances Bernard McNamee, of the City of Montreal, in the Province of Quebec, a witness produced by the defendant, who being duly sworn, as prescribed in the said Commission, deposed as follows:

DIRECT EXAMINATION BY MR. McINTYRE.

Q. You were one of the firm of contractors for the construction of the Esquimalt Graving Dock at British Columbia.

A. Yes, and have been already examined in this case last fall in Toronto.

Q. Who were your partners?

A. F. B. McNamee, A. G. Nish and James Wright, of Montreal.

Q. Who was the Premier and Commissioner of Lands and Works at the time you had the contract in British Columbia?

A. Mr. George A. Walkem.

Q. Did you ever hear anything of an alleged libel on the Premier of British Columbia?

A. Yes.

Q. When and how did you hear it?

A. By telegram from Mr. Walkem to me.

Q. Have you got that telegram?

A. Yes; but I wont produce the original, but will give you a copy. (Telegram from Walkem to McNamee dated the 28th November, 1885, read and handed in and marked Exhibit "A.")

Q. You say you first heard of the alleged libel upon Mr. Walkem by telegram from him to you?

A. Yes.

Q. What date was that?

A. The 28th November, 1885.

Q. Where did you receive it?

A. In Montreal.

Q That is the telegram you received. (Telegram produced.)

A. Yes.

Q. Was there any delay in the receipt?

A. I cannot tell.

(Mr. Cormully here objects generally to the questions.)

Q. Did you reply, and what was your reply to that telegram?

A. I replied and ~~I think that~~ that is the reply.

Copy of reply produced and marked Exhibit "B."

Mr. Cormully here objects and says that the Exhibit "B" is not evidence.

Copy of telegram dated 11th December, 1885, from Walkem to McNamee produced and marked Exhibit "C."

Answer to above telegram dated 12th December, 1885, produced and marked Exhibit "D."

Mr. Gormully objects to Exhibit "D" as not being evidence.

Copy of telegram from Walkem to McNamee dated 16th December, 1885, produced and marked Exhibit "E."

Letter from Walkem to McNamee dated 23rd November, 1885, produced and marked Exhibit "F."

Answer to letter marked Exhibit "F" dated 16th December, from McNamee to Walkem produced and marked Exhibit "G."

Q. And that answer was mailed in Montreal when?

A. I expect it was mailed in Montreal on the 16th December, 1885.

Q. What was that letter?

Letter read and put in.

Mr. Gormully here objects to a copy of a letter from McNamee to Walkem going in.

Q. Well you wrote him, however, on the 16th December, 1885, replying fully to his telegram?

A. Yes.

Q. Well who posted the letter of the 16th of December, 1885, you refer to?

A. My book-keeper in my presence.

Q. Where?

A. In Montreal.

Q. Did you write any other letter to Mr. Walkem?

A. Not on this subject that I know of, that is all the correspondence that I know of.

No Cross-Examination.

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

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

Friday, May 20th, 1887

Samuel Parker Tuck, being duly sworn, saith:

I know D. W. Higgins, the Defendant in this action. I saw an article in the "British Colonist" late in 1885, said to be the article complained of. I was in Mr. Higgins' editorial room the night preceding the publication of the article. Mr. Higgins' the editor of the "Colonist," was present then, the Defendant in this action, and Mr. Robert Dunsmuir We

had been conversing; Mr. Higgins was sitting at his desk; Mr. Dunsmuir either sitting or standing near him, and I somewhat further away. Mr. Dunsmuir and I were reading, Mr. Higgins apparently overlooking newspapers.

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

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

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

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

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

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

(Signed) SAMUEL PARKER TUCK

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

(Signed) JAMES C. PREVOST,
Registrar.

20TH MAY, 1887.

CHIEF JUSTICE'S NOTES OF THE TRIAL.

BEFORE HIMSELF AND A SPECIAL JURY ON THURSDAY, 30TH JUNE, 1887.

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

Mr. T. Davie, Q.C., and Mr. Bodwell for Defendant.

Evidence read. Documentary

1st. The evidence of McNamee taken on commission, 16th July, 1886. That in 1876 the firm of McNamee, Nish & Wright was formed, and continued to exist in 1880. That on the 16th April, 1880, the firm contracted with the Plaintiff, then the Chief Commissioner of Lands and Works, B. C., on behalf of the Provincial government (see A. and B. of printed return to a resolution to the B. C. House of Assembly. These were sworn to be true copies). That Mr. McNamee was in Victoria in July, August and September, 1880, and then entered into sub-partnership with Johnstone Robertson, Huntingdon & Nicholson, by an agreement drawn by the late A. R. Robertson, dated 28th August, 1880, etc., true copy produced, his attention being drawn to the article in the *Colonist* of 20th November, 1885, witness said he was the only witness of that name in the trial of McKenna v. McNamee, that he never made the reported statement as to the Premier of the Province either then or at any other time, that Plaintiff never was his partner or interested with him in any contract, but that he had stated that Plaintiff forced the above named local sub-partnership on his firm with the object of obtaining political influence. He met the Defendant about one month ago, (in November, 1886?) he said he knew nothing about it. I told Defendant I had never said what was reported, but that Plaintiff had forced the sub-partnership upon me for political purposes.

Next reads interrogatories delivered 6th March, 1886, by Plaintiff to Defendant and Defendant's answer, viz., that he first saw the Ottawa *Free Press* of 9th November, 1885, *after* the commencement of this action, etc. He, *after the commencement* of this action discovered that the *Post* had taken the libel from the *Free Press*. Referred to evidence published in the *Colonist* in 1882, with denial by Plaintiff, "saw no reason to doubt," etc.

VIVA VOCE EVIDENCE.

William Sinclair Gore sworn. Surveyor-General for British Columbia, in charge of documents in Land Office. I produce original document, viz: the Dry Dock contract, 24th February, 1880, and another October, 1880.

C. J.: Why were not examined copies of these documents, if they are necessary, procured and agreed to be admitted?

Mr. Drake said the other side refused.

D. M. Eberts sworn. I produce from my office the original sub-contract between McNamee & Co., and Robertson, Huntington & Nicholson.

Geo. A. Walkem, Plaintiff, sworn. I am Plaintiff, a judge of the Supreme Court Previous to 12th June I was Premier, Chief Commissioner, etc. I held the various offices mentioned in the pleadings. I left them in the early part of June, 1882 In 1880, at Montreal, I drew up this contract of the 24th February, 1880, between McNamee, Nish & Wright and myself. It was to construct a drydock at Esquimalt for $350,997.20. They were the lowest tenderers, $100,000 below any one in this Province, and lower than anybody else. By a minute of Committee of Council the Chief Commissioner of Lands and Works reports as to the different tenders. The others were Johnstone, Robertson & Nicholson for $476,589, etc. (See minute.) Some delay took place in getting to work. I gave the contractors notice to commence in June, 1880. I had often remonstrated about the delay, and in July or August McNamee saw me in my office and asked for further time.

After McNamee came here there was another contract entered into He had arranged to take in some local partners here, but I refused to recognize them, as it might have discharged the bondsmen in Montreal. Therefore the 2nd contract was drawn up in the form adopted because I refused to recognize the three others. McNamee submitted the matter to A. R. Robertson, who approved the draft, and then McNamee executed it, dated 4th Oct., 1880. The Dominion Legislature had passed an act and the House of Assembly here a similar act accordingly. I never had any interest in the contract. McNamee never suggested such a thing. We have been much opposed to each other, but I believe him to be above making such a suggestion.

The *Colonist* of the 20th Nov., 1885, I first saw at Kamloops. I afterwards got another copy. I compared it with a copy of the *Post* which some friend had sent me anonymously. Finding the two statements slightly differing, I thought that it was probably a substantially true report of what McNamee had said at the trial. There are some words in the *Colonist* which are not in the *Post*, and some words in the *Post* not found in the *Colonist*. I thereupon further supposed that the statement in the *Colonist* was not taken from the *Post*, but that both were taken from some third source. I therefore sent McNamee the telegram of the 26th Nov. [or 28th] [Exhibit A] to which I received a reply that he was not at home. Some days afterwards I received a telegram from him dated 10th Dec., at Montreal, [Exhibit B] ["just returned, deny most emphatically, etc."] [The letters from the plaintiff to McNamee, 23rd Nov., '85, and from McNamee to plaintiff in reply, dated 16th Dec., and also at Mr. Theodore Davie's request, the above mentioned telegrams put in. McNamee reiterates his denial that he gave any such evidence.]

CROSS-EXAMINED BY MR. THEO. DAVIE.

I sent another telegram to McNamee's office. That was after I had seen the *Free Press*. It was dated the 11th Dec. I received an answer 12th Dec. "I have "seen the *Report*—it is false—the first intimation I had of it was from yourself—see *Daily Citizen*." [Exhibits C. D]

Mr. Theo. Davie here insisted that the *Free Press* of the 9th November should go in to the jury.

Mr. Drake objected as inadmissible.

C. J. I cannot conceive anything more utterly irrelevant. It was not seen by the defendant for months after he had published this alleged libel. Irrelevant matter should not be allowed to go in, for it may confuse a jury. But I think this is so clearly immaterial it can scarcely do any harm, and to refuse it may perhaps form some ground for ulterior litigation.

Witness continued. I was not aware that McNamee had made any retraction. [The *Free Press* of 16th December, 1885, was tendered, in which McNamee's explanation was contained.]

Mr. Drake objected.

C. J. This is, if possible, more utterly immaterial for the defence in this action than the other paper. But it may perhaps go in for that very reason.

Mr. Drake asked that his objection be noted.

CROSS-EXAMINATION CONTINUED.

I gave the Defendant no notification of this intended action. His article was a direct challenge to sue.

Mr. Theo. Davie then proceeded to cross-examine on an application by summons in Chambers of the 27th January, 1887, for the Plaintiff to show cause why Defendant should not be at liberty to amend his Statement of Defence, and to publish a retraction, &c., with the order on it.

Mr. Drake objects, as quite irrevelant and inadmissible. The document is not proved.

C. J. The line must be drawn somewhere. This is as irrelevant as the last; but it possibly might confuse the jury. The Defendant has had every indulgence and more than he would have been allowed in an action by any other Plaintiff. [I offered to read my observations on granting Defendant's application of June 7th, etc.; but Mr. Davie declined.] There was in fact in the summons a double application to the Judge at Chambers. First, to make certain amendments to the Statement of Defence, which the Judge deemed improper, and refused. That refusal might have been reversed on appeal; but it was never appealed against, and so the Defendant must be taken to have seen, on reflection, that his proposed amendments were improper. As to the second branch of the summons, calling on the Plaintiff to show cause why Defendant should not be at liberty to publish something in his own newspaper, the Defendant might as well have taken out a summons calling on the Plaintiff to show cause why the Defendant should not be at liberty to ask him to dinner. He might publish what he liked, of course, on his own responsibility. And this part of the summons seems never to have been noticed in Chambers at all. All this interlocutory proceeding I reject as irrelevant now.

CROSS-EXAMINATION CONTINUED.

I disagree with what McNamee says about my seeking to benefit my political position. He afterwards wished to change the stone with which the dock was to be constructed. I refused permission unless the engineer approved the change. He then introduced politics. I declined to allow him to make the change.

As soon as I got out of McNamee the fact that he had not stated what Defendant reported him to have said, I dropped our correspondence (*i. e.* in 1885) I do not think I had any communication with him afterwards. I intended to write but I forget whether I did or not. This is my letter (produced by Mr. Theodore Davie), Plaintiff to McNamee dated 29th May, 1886. When I wrote this letter I had been given to understand that a man named Mitchell was prepared to swear that McNamee had said so at the trial of McKenna v. McNamee.

Q. It was to warn McNamee of that evidence that you wrote this letter?

A. Yes, and to defend myself also.

I held the Lytton Assizes in 1884 and 1885. In 1884 the grand jury presented an address. It was highly complimentary. It was published in the *Colonist*, (*Colonist* produced, 26th October, 1884).

Mr. Theodore Davie.—I shall tender this to show that the Defendant was not actuated by malice.

Court—How can that negative the malice in a libellous publication a year afterwards?

Mr. Davie proceeded to cross-examine on a "local item" referring to Plaintiff and his family in complimentary terms, on the 8th October, 1885, and another complimentary presentment by the grand jury, published in a prominent part of the *Colonist* on the 18th October, 1885.

C. J.—These are matters of local interest or information sent to the Defendant by correspondents of the country, perhaps by the foremen of the grand juries, which the Defendant could scarcely refuse. If he had, that perhaps might have been evidence of antecedent ill-will, but I do not see how the publication of such matters disproves the malice which the law implies from the publication of the alleged libel (if it be a libel) subsequently. And they may confuse the jury. I therefore reject them.

PLAINTIFF'S CASE CLOSED.

Mr. Theodore Davie opening the defence again formally tendered the evidence I had just ruled out. I formally rejected it.

Mr. Theodore Davie then asked me whether the words of the alleged libel were capable of bearing the meaning set out in the innuendo.

Court.—I certainly think that the main libel, (viz.) the alleged report of McNamee's testimony may bear the full meaning attributed to it. Whether the added remarks in the Defendant's editorial necessarily imply the full meaning as expressed in the subsequent

innuendo, is another question. I think they may bear that meaning, though they may also bear a meaning less than that the Plaintiff actually pocketed money: they may mean that he hoped to pocket money. But I cannot conceive that the whole, the alleged extract from McNamee's testimony, and the Defendants' comments thereon, bears a neutral meaning or other than a derogatory meaning.

Mr. Theodore Davie then opened the defence.

Read: Depositions of Chas. W. Mitchell of the Ottawa *Free Press* taken on the commission of 23 May, 1886, McNamee, 8 May, and Tuck, 18 May, 1887.

He cited Odger on Slander 201, 205; 3 Moo & P. 529; 5 Mann & Gr. 719; Bayles v. Roberts 295 (11 Ad. & Ell. 920) on a contest which arose between him and Mr. Drake as to the admissibility of Tuck's evidence. Mr. Drake contending that the question of intention is not for the jury save so far as it can be collected from the libel itself.

Court.—But what occurred during the very composition of the alleged libel is surely admissible. It is true the Plaintiff is suing for the publication on the 20th. Nov. Tuck deposes to what took place on the night of the 19th. Nov. But the publication is or may be regarded as one act from the time when the impeached document begins to take form in words up to the completion of the publication when it is flung in a printed form to the world at large. The mere fact of reading to these two witnesses is perhaps a publication though of course not what is sued: I think these conversations and comments are part of the *res gestæ* and admissible.

Mr. Drake asks his objection to be noted.

CORNELIUS BOOTH, SWORN.

But as his evidence relates to conversations with Defendant before he had even seen the alleged report, or conceived the idea of composing or publishing the matter complained of, I held his evidence inadmissible.

ROBERT DUNSMUIR, SWORN

I have heard Tuck's deposition. I was present that night in the editor's office. I and Tuck were there and defendant. There may have been a reporter. I forget. Tuck was reading to himself and defendant also. All at once defendant said "Listen to this." (I did not see what he was reading out of, but I afterwards found out it was from the *Post.*) I said "You are not going to publish that?" He said, "I don't know why I should "not, for if I do not, Walkem will have no chance to refute it. He will never probably "see the *Post.*" He then began to write. After a short time he read out what he had written. He said he did not believe a word of it; but that if he did not put it in the *Colonist* Walkem would never see it, and that he ought to have the opportunity to refute it. I never read it afterwards. Defendant's part in the conversation was quite friendly to Walkem.

Cross-examined. I recollect a conversation with Walkem: I do not say that I never have said the publication would necessarily injure Walkem. But I do not think I could have said so, for I don't think it would injure him.

C. W. Mitchell, publisher of *Free Press*, Ottawa, part of his evidence read.

Mr. Theodore Davie summed up.

Mr. Drake replied, commenting on the fact that the defendant had not put himself in the witness box, and that he had by his counsel in their presence absolutely refused all apology or expression of regret.

I charged the jury as follows:

GENTLEMEN of the JURY: I hope to be very short in what I have to say, and will read to you a portion of the charge of Baron Huddleston in a very celebrated case which took place,—that of Bryce vs. Rusden, as the view of the law which I shall give for your guidance. But I wish, first of all, to speak to you about a fallacy appearing on the pleadings with respect to what the defendant calls his duty as a public journalist. Now the occupation of a journalist is a self-imposed one, and a journalist has no duty to perform to the public; but if there is anything that can be construed as his duty it is to publish what is true. A public-house-keeper need not keep or sell liquors, nor a grocer sell pickles. A publisher can stop his paper or a publican close his saloon. It is no part of the duty of a public-house keeper to keep every description of liquor, and no part of the duty of the publisher of a morning paper to publish all sorts of articles; but it is their duty to produce fair, honest, unadulterated articles whether they be spirits or newspaper articles. They must be unadulterated, pure; and it is the duty of every journalist to abstain from publishing lies. The only question is to decide if this was a libel. That is to say, is the publication calculated to give pain to, and inflict injury upon the plaintiff? If so, then it is a libel. The law in that case infers malice. Then the next question is, Was it true? So far as that goes it is admittedly and wholly untrue from beginning to end. It is untrue that Mr. Walkem ever was in partnership with McNamee, and it is admittedly untrue that McNamee ever said so. And the matter published is this: "In the sworn evidence of McNamee, defendant in the suit of McKenna vs. McNamee, lately tried at Ottawa, the following passage occurs: 'Six of them were in partnership out in British Columbia, one of whom was the Premier of the Province.' Now that "following passage" did not occur; no such evidence was given at the trial; and if it had been it would have been false. That is all admitted. The subsequent part of the article which is not complained of,—at least it is not the particular libel from which any innuendoes are made, or on which an action is brought—the subsequent article is attached to it evidently for the purpose of trying to tone it down. It is to be considered that the pain and injury to the plaintiff is almost wholly due to the republication of the libel here. If some unknown paper not circulating here, for instance, the *Solid Muldoon*, published I think in Colorado, contained something calling you a murderer, swindler and thief, you would not care, perhaps you would never know that you had been libelled. But supposing the *Colonist* were to say: "We believe so and so to be a very fine fellow and an honest citizen," but this is what the *Solid Muldoon* says of him: "We do not believe it to be true, but we publish it because we say it is a lie." Then you would care very much. It is contrary to law that the Defendant should be allowed to publish a defamatory report even believing it to be true. But what can be said when he says I believe it to be false, but I publish it because it is so? I will now read to you some of the remarks of Baron Huddlesten in the case I mentioned. Mr.

Rusden was the name of the defendant, and the plaintiff got £5,000 damages. After complimenting the learned counsel upon the manner in which they had dealt with the voluminous evidence, Mr. Baron Huddleston proceeded to direct the jury upon the law of libels, as follows: "By libel was meant anything which was written or drawn of a man which "was calculated to hold him up to public ridicule and contempt among his fellow men. Many "things might be said or spoken of a man which were not actionable, which if written and "an I published were actionable. Before what is known as Fox's Act the law was: the "judge who tried an action for libel told the jury whether or not the matter in question "was a libel. That Act, however, altered this, and it enacted that the judge should merely "direct the jury as to what the law said was libellous, and leave them to say in the light of "such direction whether or not the writing before them was a libel. That Act only applied "to criminal prosecutions for libel and did not deal with civil actions. Its provisions, "however, soon proved to be most wholesome in their effects, and the judges who adminis"tered the law adopted and applied them to civil actions, glad to be relieved of the "responsibility of deciding for themselves the question of libel. That therefore is the state "of the law now, and it would be for them to say when they had heard His Lordship's "explanation of what was and what was not a libel in law, whether the passage in question "came within His Lordship's ruling. Though on this subject His Lordship had no desire "or wish to infringe upon their special province, yet in this case he thought they might "safely take it from him that both those passages were clearly libellous"—and in the present case the Defendant himself, in the *Colonist* calls the statement respecting the Plaintiff "a charge." "No sane person reading them could contend that in themselves "those passages were not libels? The question however remained were they action"able libels? The defences which were set up were three. First it is said the "passages are true in substance and in fact"—That is not the case here for the charge, namely the accusation, is admitted to be utterly false. "The second ground of "defence was one which had been fully recognized by all the legal authorities, and particu"larly those of recent date. It was that the passages complained of were fair and *bona "fide* comment written about a public man's acts in connection with a matter of public "interest"—and this concerns the public conduct of a public man.—"The third defence "was that it was written in the honest and *bona fide* belief that it was true in substance "and in fact and without malice. As regarded that defence His Lordship had not the "slightest hesitation in at once ruling that in point of law, it was bad and no answer to the "the action"—All this applies *a fortiori* in this case when it was not claimed that the Defendant had the honest belief in the truth of the alleged libellous language. As to *bona fides* what the learned judge says is as follows: "Take for instance the case of a "gentleman engaged in commerce about whom something wholly untrue and which "affects his character has been written, and in consequence he is ruined and becomes "bankrupt both in character and capital—what answer is it for the person who has caused "all that mischief to say that he honestly believed at the time he had written what he "did that it was true, and that he had written it so believing and without malice? "If such defence were law how could character and honor be maintained in this "country? The law of England jealously protected the character of British subjects, "and properly so, for if a man's character is attacked and ruined he is shunned by "his fellow men. Any man who chose to circulate slanderous accusations must be pre"pared to answer for doing so. Even were this subject new law he would have no hesi-

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

Mr. Theo. Davie asked me to charge the jury.

1. If the publication were not malicious, then, although injurious, that it could only be visited with nominal damages.

2. If the alleged libel was "fairly" copied from another newspaper, and no malice, then again, nominal damages.

3. If neither malicious nor injurious, then verdict for defendant.

4. Was the object to injure the plaintiff's character, or to vindicate him?

I refused to charge the jury in that form; I said I should leave it simply to them to say whether the published words were a libel, *i. e.*, were they disparaging, or calculated to inflict mental pain and injury, apart from pecuniary loss. If so, they were a libel, and if a libel, then the law implied malice, and there was no necessity to give any further evidence of malice than the libel itself, to prove, in other words, express malice, which is only necessary when the occasion is privileged, which is not attempted to be set up here.

Q. Is it a libel? Is it true? What is a fair measure of damages?

The jury retired: and Mr. Theodore Davie handed me in a written objection "That "the jury should have been charged that if the whole publication taken together was not "injurious to plaintiff then in the absence of express malice defendant was entitled to a "verdict."

After 30 or 40 minutes jury returned with verdict: "We find that it is a libel Damages, $2,500."

In order to expedite an appeal judgment was given for the above amount, and parties put under mutual terms to move the Full Court on the 11th July.

MATT. B. BEGBIE,
C. J.

ORDER FOR JUDGMENT.

(Title of Court and Cause.)

THURSDAY, the 30th day of June, A. D., 1887.

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

By the Court, etc.

ORDER NISI FOR A NEW TRIAL.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

THE FULL COURT.

PRESENT: The Honorable Mr. Justice Crease.
The Honorable Mr. Justice Gray.
The Honorable Mr Justice McCreight.

BETWEEN

THE HONORABLE GEORGE ANTHONY WALKEM,

Plaintiff.

AND

DAVID WILLIAMS HIGGINS,

Defendant.

FRIDAY, THE 22ND DAY OF JULY, A.D., 1887.

Upon motion this day made unto this Court by Mr. Theodore Davie, Q.C., of counsel for the Defendant; upon reading the pleadings, documentary evidence, proceedings at the trial, the notes of the Chief Justice at the trial of this action of the 30th day of June, A.D., 1887, and upon hearing what was alleged by counsel for the Defendant it is ordered that the Plaintiff do, upon Tuesday, the 26th day of July, 1887, at the hour of eleven o'clock, in the forenoon, shew cause why the findings of the jury and the judgment directed to be entered in this action should not be set aside, and why a new trial should not be directed of this action upon the following grounds, that is to say:—

1. That at the trial of the said action the Chief Justice should have charged the jury that the publication in question was not a libel unless calculated to injure the Plaintiff, and that in deciding whether the publication was calculated to injure or not they must take it as a whole and not rely upon isolated passages; that although one passage might of itself be injurious yet they must consider whether other parts of the writing did not neutralize the injury, that the lane and the antidote must be taken together and if, judging by this test, the publication was not injurious the Defendant was entitled to a verdict.

2. That they must consider whether the object of the publication was to defame or to vindicate the Plaintiff's character; if the latter then the Defendant was entitled to a verdict.

3. That assuming the publication to be libellous, the report having been taken from another paper in good faith, and without any evidence of express malice, the Plaintiff having shewn no special damage, the jury should give only nominal damages.

4. That the Chief Justice misdirected the jury in telling them that the published words were a libel if they were disparaging or calculated to inflict mental pain and injury apart from pecuniary loss.

5. That the Chief Justice misdirected the jury in telling them to find whether the publication was true or not, or justified or not, as neither truth nor justification was pleaded.

6. That the Chief Justice erred in reading to the jury a case of Bryce vs. Pusden since that case was an improper guide with reference to the law applicable to this action.

7. That the Chief Justice should have told the jury that whilst if they found the publication libellous the law implied malice, yet, by such implied malice was meant merely the absence of legal excuse, and that they would not be justified in visiting Defendant with substantial, exemplary or vindictive damages unless satisfied that he was guilty of express malice, of which there was no evidence.

8. That the Chief Justice laid down no proper rule as a guide to the jury in assessing damages, but allowed them to understand that they were at liberty to give substantial damages without taking into consideration the question of express malice.

9. That the Chief Justice should have directed the jury that in the absence of express malice the Plaintiff was entitled to nominal damages only.

10. That the observations of the Chief Justice on the subject of the publication of reports of judicial proceedings were calculated to mislead the jury, since the question of the correctness of a report of a judicial proceeding only arises where what purports to be such a report is published without comment, and there is raised as a defence the plea of privilege.

11. That in directing the attention of the jury to the law respecting criticism of the public acts of public men the Chief Justice erred, in that he assumed as proved that the article in question imputed a charge of corruption to the plaintiff; whereas he should have left it to the jury to say whether the article could be so construed.

12. That the Chief Justice erred in instructing the jury that the intention of the article was not material.

13. That the Chief Justice should have ruled and charged the jury that the publication was incapable of the innuendo, and that it was not a libel.

14. That the Chief Justice improperly rejected the evidence of a summons to amend the pleadings tendered on behalf of the Defendant.

15. That the Chief Justice improperly rejected the newspapers containing favorable comment tendered as evidence on behalf of the Defendant.

16. That the Chief Justice improperly rejected the evidence of the witnesses Robson and Booth, tendered on behalf of the Defendant.

By the Court,

(Signed) HARVEY COMBE,
Deputy Registrar.

ORDER DISCHARGING ORDER NISI FOR A NEW TRIAL.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BEFORE THE FULL COURT.

PRESENT: The Honorable Mr. Justice Crease
The Honorable Mr. Justice Gray.
and The Honorable Mr. Justice McCreight.

BETWEEN

THE HONORABLE GEORGE ANTHONY WALKEM,

Plaintiff.

AND

DAVID WILLIAMS HIGGINS,

Defendant

FRIDAY THE 14TH DAY OF OCTOBER, A.D., 1887.

Upon reading the order nisi for a new trial made in this cause on the 22nd day of July, A.D., 1887, upon hearing on the 26th, 27th and 28th days of July, 1887, Mr. Theodore Davie, Q.C., of counsel for the Defendant in support thereof, and Mr. Drake, Q.C., of counsel, for Plaintiff. This court did order that the said matter should stand for judgment, and this matter coming on this day for judgment in presence of counsel aforesaid, this court doth order that the said order nisi be discharged with costs to be taxed and paid by Defendant to Plaintiff forthwith after taxation thereof.

By the Full Court,

HARVEY COMBE,
Deputy Registrar.

(SEAL.) Stamp $1.00
Sd. H. P. P. C. J.

Reasons for Discharging Order Nisi.

GRAY, J.

On the particular points raised in detail by the learned Counsel for Defendant on this motion for a new trial my learned brethren have left me but little to say, and no authorities to cite beyond those referred to. The Plaintiff is one of the judges of the Supreme Court. The Defendant had been for many years, and was at the time of the publication complained of, the proprietor and editor of the Daily British Colonist, a newspaper published in Victoria. In June, 1882, the Plaintiff was raised to the Bench. For ten years previous to that date he had been one of the leading politicians of the Province, and was from June, 1878, to June, '82, Premier of the Government, Chief Commissioner of Lands and Works, Attorney-General, and a member of the Executive Council of the Province.

Among the various duties pertaining to his position, in February, 1880, he had on behalf of the Government entered into a contract with one McNamee and others for the construction of a Graving or Dry Dock at Esquimalt for a sum in round numbers of $351,000, and in October, 1886, a second contract in lieu thereof for the same work, and in the same amount. In the progress of that work conflicts at different times arose between the contractors and the Plaintiff in the discharge of his official duties, and were still unadjusted at the time of his elevation to the Bench. On the 20th November, 1885, the Defendant published in his paper the following article:

The McNamee-Mitchell Suit.

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

For the publication of this article the Plaintiff brought an action alleging it to be a libel on his character. The Defendant admitted the publication, but denied that it was a libel, or was so intended. After various delays the case came on for trial at Victoria on the 30th day of June last before the Chief Justice and a special jury. The jury found that it was a libel and assessed the damages at $2,500, and the Chief Justice granted an order for judgment thereupon.

The Counsel for the Defendant moves for a new trial on the several grounds particularly set forth in the judgments of my two learned brethren.

Before adverting to these points it is well to make a few observations. An idea prevails that a greater latitude is allowed to publishers and proprietors of newspapers than to

other upon a presumed ground of public policy,—that in theory they are the dispensers of knowledge and ideas essential to the public welfare, and, therefore, to be less restrained than others. This is a grave mistake. The proprietor and publisher of a newspaper goes into the business to make money for himself and family, just as every other business man does. He shapes his course, not from any particular love of the people, but because it suits his ideas, or he thinks it will bring him in more subscribers, or in some way in the end best promote his pecuniary or personal interests. It is a matter of trade or business just as much as selling dry goods or groceries or liquors, and as a newspaper proprietor he is not (in that capacity alone) entitled to credit for heroism or philanthropy more than other traders, who never pretend that they sell their goods for the love of the people. On such a proprietor there is no public duty imposed other than is imposed on every other man, namely, to do what is right and honest and fair, or take the consequences. His facilities for doing good are greater, because he can give a greater circulation to his ideas when good than persons not similarly situated; equally are his powers for doing harm or injury greater, because his poison is more widely distributed.

With this distinct understanding then that newspaper proprietors have not, in law, one iota of privilege more than any other man, we naturally ask what is the general rule with reference to libel. It derives its origin from a source higher than human law. "Thou shalt not bear false witness against thy neighbor. A libel is that which, when written and published is calculated to injure a man in the estimate formed of him by his fellow men; not necessarily that has injured, but is calculated to injure, to bring him into contempt, to hold him up to ridicule, to expose him to contumely make decent people shun him, and to wound his feelings and hurt him by the fear of such consequences; and still more is it a libel when the allegation of fact is untrue. A man who acts rightly and honestly is entitled to the respect and esteem of his fellow citizens—it is a right which is valuable, which can be measured, and no person by false representations is justified in depriving him of that right. Is the representation be false the law, as the guardian of social and personal rights, implies malice and does not require proof of actual malice; if actual malice is proved it aggravates the offence and increases the damages.

It is only necessary to refer to so much of the law of libel as bears upon this case. Unquestionally the Defendant is entitled to have the whole article he published taken into consideration not a passage here or a passage there selected and dwelt upon, but the whole from its first to its last, and to be acquitted accordingly. Again, the intention with which he published it, in the abstract view, whether the publication be legal or not must be judged from the article. The publisher may say, in fact may persuade himself that his object was a good one but an injury to another is not excusable because you allege good intentions. A man of ordinary sense and intelligence (and it is not contented that the Defendant was otherwise) must be judged by his acts. He must be presumed to know the meaning of what he says, and the consequence of what he does. It is absurd to say you called a man, whom you had no reason to believe dishonest, a thief in order to afford him an opportunity of proving that he was honest, or to knock a man's teeth out who had given no offence, to save him from a possible tooth-ache hereafter. It is not what you intended, or allege you intended, but the possible effect which tests the legality and makes it an offence. Many persons of excellent intentions do much harm when they go beyond the bounds of common sense and ignore other people's rights.

Again, that the libellous article was published by mistake, is no excuse: one man has no right to injure another through carelessness; every man is bound to regulate his conduct and manage his business in such a way as not to injure another in the exercise or enjoyment of his legal rights. Society could not hold together for an hour if good intentions or carelessness were an excuse for an illegal act, and saying "I didn't intend it," operated as a legal discharge. The motive with which a thing is done, or a duty left undone, is a matter to be considered in the estimate of redress or compensation to be given for the wrong, but never as an excuse for doing the wrong.

Again you have no right to repeat a wrong because some one else has originated it before you see first whether it be a wrong. Enquire into its truth before you undertake to father it and renew it. An editor may say "We haven't time for this. If we stop to enquire whether everything we put in our paper is true we would never get the paper out." Very well, then, take the consequences. You sell your papers for money. If a trader sells unsound articles the purchaser demands his money back. The trader takes back his goods or makes restitution. In the newspaper or publishing business an editor has no greater privileges; when he finds he has made a wrong statement he must take it back, or stand the consequences.

It is useless supposing he can fold himself in a fancied robe of public importance, and like Cæsar, fall.

These points have a bearing on the present case. There are other points which arise sometimes in libel suits which have no bearing here. Our duty now is, not to try this case again, but to see whether the Chief Justice, in the conduct of the cause and the law he laid down to the jury, when it was tried, complied with the law so far as it was requisite in this case. If he did not there should be a new trial. If he did there should not be.

The strongest position taken by the learned Counsel for the defence was that the learned Chief Justice in his charge to the jury did not submit the whole article to their consideration, but limited their attention solely to that part which constituted the extract from the evidence alleged to have been given by McNamee on the trial at Ottawa, and by a most ingenious analysis of the charge gave a very strong colouring to that position. Unfortunately the report of that charge is not as carefully written as it might have been, but a careful examination of it throughout, shews that the learned Chief Justice did not limit the jury in the mode contended for. Their attention was directed to the whole article published—both the extract and the editorial observations thereon—and the newspaper itself with the article "pure and entire," without innuendo, was given to the jury as they retired.

I do not think that a Judge's charge, if it contain all that the law requires to be explained to the jury, should be invalidated or stripped of its effect by the evet observations he may make in answer to particular questions submitted by the counsel after the charge has been ~~submitted~~ received. It is to be borne in mind that before the judge charges, the counsel can always call his attention to any particular direction in law he may wish him to give, or the construction he may contend for as to any document or portion of the evidence; he can protect himself and the interests of his client most thoroughly in that respect, but raising

these points after the charge, tends (and is sometimes intended) to distract the attention of the jury from the consideration of the whole subject, and the judge might well refuse to permit them to be heard until after the jury had retired. If then, after discussion, the points are of sufficient importance to require re-instruction to the jury, the jury can be re called. If the judge is in error in not deeming them of sufficient importance to recall the jury, the counsel will have preserved his right to bring them before the Full Court. The question, therefore, here is, does the Chief Justice's charge cover all the ground that was necessary in law to be put before the jury in this case, remembering that in libel suits the jury are judges of the law as well as of the facts. If it does cover all the ground, it is of no consequence what answers he may give to counsel to questions raised in the mode to above indicated, if those answers however incomplete are not contradictory to, or inconsistent with the law he had already laid down. Counsel cannot ask for more than is sufficient.

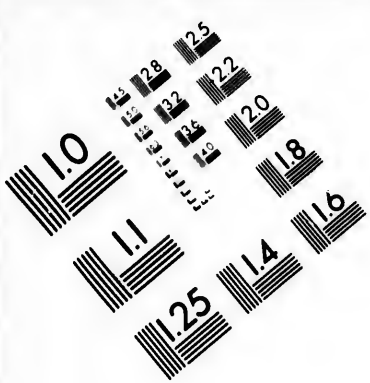
I think the Chief Justice's charge when fairly examined did cover all the ground and without commenting in detail upon Mr. Davie's objections, which have been answered by my learned brethren as far as was necessary, it does not seem to me that his objections are of sufficient weight to override the rulings and charge of the learned Chief Justice at the trial.

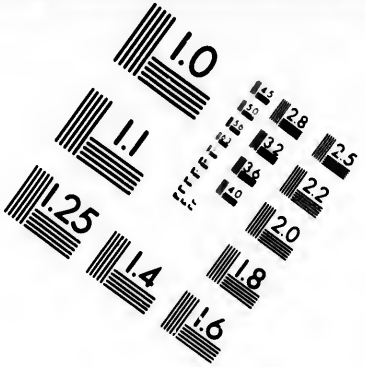
Rule 287 of our Supreme Court rules, says expressly: "A new trial shall not be "granted on the ground of misdirection, or of the improper admission or rejection of "evidence unless in the opinion of the full court some substantial wrong or miscarriage has "been thereby occasioned in the trial of the action," and after the most careful consideration, we cannot say that any substantial wrong or miscarriage has been occasioned by the rulings or charge of the Chief Justice at the trial.

With reference to the damages found I am bound to say they seem to me to be severe unnecessarily severe. The constructive malice in law was amply sufficient to sustain a verdict, but no express malice was proved; no actual damage was shewn, none contended for. The damages were certainly exemplary, though it cannot be said they were vindictive. The law, however, emphatically makes the jury in libel cases the sole judges of the amount, and in no case does the Court interfere unless the amount is so unreasonable that no doubt can exist of improper influences having operated on the minds of the Jury.

In this case nothing of that kind has been shewn or suggested. The Jury was a special Jury, and it may be that for many reasons they considered it essential to the best interests of this Province that libellous attacks upon those prominently connected with the administration of justice should not be permitted, and that in this particular case the Defendant had within his own reach proof that the charge against the learned judge, which he published, was entirely without foundation, and indeed was not so pointed at him as to be applicable without suggestion, or on his behalf to require contradiction.

In fact that his publication of the extract *with his comments* was the promulgation of a statement by himself directed at the Plaintiff, calculated to damage the Plaintiff, which the Defendant had the means of knowing to be untrue, and which he could from the files of his own newspaper have denied when he published the article, had he chosen so to do. Also his omission to go upon the stand as a witness, and his refusal during the trial to





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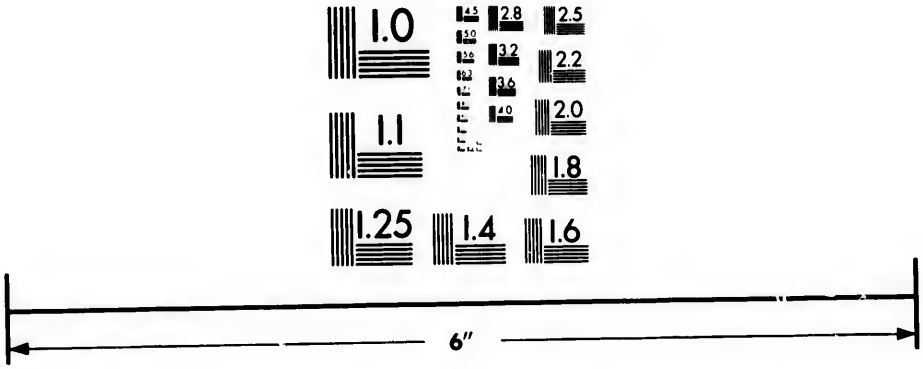

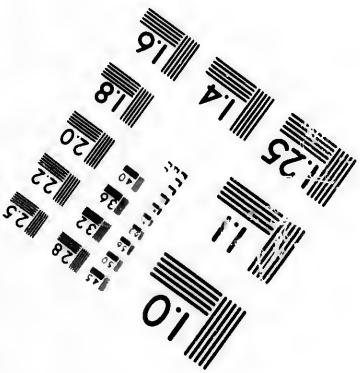

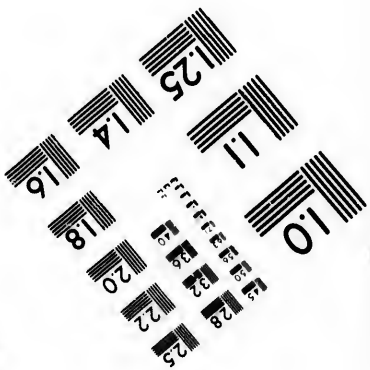

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withdraw the libel, retract or apologize (it is to be hoped from a mistaken view of his right as a journalist) may have produced an effect upon the Jury.

At any rate, it must be assumed in law as now held with reference to libel, that the jury being judges both of the law and the facts, considered their finding as no restraint upon the liberty of the press; but simply the vindication of a principal essential to good government, namely, that the administration of the law ought to be, and should be, pure and impartial and that those engaged in the discharge of official duty connected therewith should not be untruly assailed in their personal characters so as to create in the public mind a possible doubt of that purity and impartiality.

After careful reflection I do not see how we can disturb the verdict, whatever be my personal opinion as to the amount of damages. The rule must be discharged with costs.

McCREIGHT, J.

Mr. Theodore Davie moved on the 26th. of July last, on Defendant's behalf, that the order to show cause why a new trial should not take place should be made absolute.

His first point was:

1. "That at the trial of the said action the Chief Justice should have charged the "Jury that the publication in question was not a libel unless calculated to injure the "Plaintiff, and that in deciding whether the publication was calculated to injure or not, "they must take it as a whole, and not rely upon isolated passages; that although one "passage might of itself be injurious, yet they must consider whether other parts of the "writing did not neutralize the injury; that the bane and the antidote must be taken "together, and if judging by this test the publication was not injurious, the defendant was "entitled to a verdict.

"The alleged libel is as follows:

"The McNamee-Mitchell Suit."

"In the sworn evidence of Mr. McNamee, Defendant in the suit of McKenna v. Mc-"Namee, lately tried at Ottawa, the following passage occurs:

"Six of them were in partnership in the Dry Dock contract out in British Columbia, "one of whom was the Premier of the Province.

"The Premier of the Province at the time referred to was Hon. Mr. Walkem, now a "judge of the Supreme Court. Mr. Walkem's career on the Bench has been above re-"proach. His course has been such as to win for him the admiration of many of his old "political enemies. But he owes it to himself to refute this charge. We feel sure that Mr. "McNamee must be laboring under a mistake. Had the statement been made off the stand "it would have been scouted as untrue; but having been made under the sanctity of an oath "it cannot be treated lightly nor allowed to pass unheeded."

Mr Theodore Davie argued at length with a view to show that the learned Chief Justice in his charge had treated of the first part of the publication, viz.:

Six of them were in partnership in the Dry Dock contract out in British Columbia, "one of whom was the Premier of the Province," as being alone of importance in the question of libel or no libel, and went through the summing up for that purpose. No doubt there are remarks open to such criticism, though I do not think the jury could have so understood them: for that passage taken *per se* is almost harmless to the Plaintiff, referring as it does indifferently to any of the several gentlemen who had filled the position of Premier. The force and point of the alleged libel consists in the subsequent comments applying the passage to the Plaintiff distinctly by name, and calling upon him "to refute this charge" etc., etc., "in the sworn evidence of McNamee" and adding "that having been made under the sanctity of an oath it cannot be treated lightly nor allowed to pass unheeded," an observation which might readily be understood as a challenge, especially as the suggestion that "McNamee must be laboring under a mistake" as to who were his own partners, could not have been intended to be taken as true.

Mr. Theodore Davie made no such objection, as he now makes, during the trial, on the contrary he urged the Chief Justice to charge the jury that "if the alleged libel was fairly "copied from another newspaper and no malice, then there should be nominal damages" thereby adopting the view that the first two or three lines of the article alone constituted the libel, if any. No doubt this course was prudent for him and in aid of his ingenious contention that in the first few lines there was "the bane" and the comment on it was the "antidote." To me it seems that the exact opposite is the truth, viz: that those lines taken alone are nearly harmless and the comment on them libellous and baneful. Anyhow, he cannot complain of an undue advantage being given to his client with which, of course, he was well satisfied at the trial.

Even before the Supreme Court Rules of 1880 (Rule 287), which say that "a new trial "shall not be granted on the ground of misdirection unless in the opinion of the Full Court "some substantial wrong or miscarriage has been thereby occasioned," I think the Court would have disregarded this argument for a new trial.

2. His second point was: "That they must consider whether the object of the publi- "cation was to defame or to vindicate the plaintiff's character; if the latter then the "defendant was entitled to a verdict."

In Haire vs. Wilson, 9 B. and C., p. 643, the judge appears to have directed the Jury in this way, and the Court of Queen's Bench held that he did wrong. The actual intention of the Defendant is immaterial, and there is no instance of a verdict for the Defendant on the ground of want of malice. [See Odgers, p. 264, and cases cited.]

3. Mr. T. Davie's third point was: "That assuming the publication to be libellous, the report having been taken from another paper in good faith, and without any evidence of express malice, the plaintiff having shewn no special damage, the jury should give only nominal damages."

I need not repeat my observations on the Defendant's first point, to the effect that the report as taken from another newspaper was nearly harmless, and that in the application of it and comment on it alone consisted the libel, and I do not think the Chief Justice was bound to assume that the Defendant acted in good faith, considering that he declined to come forward as a witness.

4. The fourth point was, "That the Chief Justice misdirected the jury in telling them that the published words were a libel, if they were disparaging or calculated to inflict mental pain and injury, apart from pecuniary loss." But this is nearly the exact expression used by Kelly, C. B., in Cox vs. Lee, L.R., 4 Ex. 284, and clearly falls within the definition of libel given by Lord Bramwell in the Capital and Counties bank vs. Henty, 7 App. cases 790, by Lord Blackburn in the same case at p. 771 and by Baron Parke in O'Brien vs. Clement (15 M. & W. 435.)

5. Mr. T. Davie's fifth point was: "That the Chief Justice misdirected the jury in telling them to find whether the publication was true or not: justified or not, as neither truth nor justification was pleaded."

Mr. T. Davie never objected to these observations at the trial: and no doubt he acted prudently, for they were calculated to give the Defendant the benefit of a plea of justification without the peril incidental to pleading it. In fact the expression "Is it true? Is it justified?" seems to have been an inadvertence, unchallenged by Defendant's counsel, and without any effect on the jury who, in their verdict, only say: "We find that it is a libel." Even before our *Supreme Court Rule 287* was in force, this objection would probably have been untenable; and certainly is so now. Points 6 and 7 may be conveniently dealt with together. They are:

6. "That the Chief Justice erred in reading to the jury the case of Bryce vs. Rusden "since that case was an improper guide with reference to the law applicable to this action."

7. "The Chief Justice should have told the Jury that whilst if they found the pub- "lication libellous, the law implied malice, yet by such implied malice was merely meant an "absence of legal excuse, and they would not be justified in visiting Defendant with sub- "stantial, exemplary or vindictive damages, unless satisfied that he was guilty of express "malice, of which there was no evidence."

The question is whether the Jury were misdirected, so that "some substantial wrong or miscarriage has been occasioned in the trial of the action?" Bryce vs. Rusden does not seem to have been questioned. Mr. Theodore Davie says that there Baron Huddleston told the Jury not to give vindictive damages, and that here the Chief Justice virtually told them to find them, but it is not pointed out how he did so. He refused to direct them that if the publication was not malicious then, although injurious, that it could only be visited with nominal damages [See page 28 of printed case] and obviously he was right in so refusing, for according to this contention a serious injury might be inflicted by a libel without any practical redress, and I do not think he was called upon to lay much stress on the *assumed absence* of express malice, considering that the defendant did not appear as a witness to explain his conduct. The Chief Justice does not appear to have referred to this important circumstance in his charge: and if he had been suggesting vindictive damages to the Jury, he would, no doubt, have done so.

Mr. Theodore Davie referred to Odgers on Slander, p.p. 291, 292, 286, 558 and 559, but it is not there suggested that the mere absence of express malice points to merely nominal damages.

8. Points 8 & 9. "That the Chief Justice laid down no proper rule as a guide to

"the jury in assessing damages, but allowed them to understand that they were at "liberty to give substantial damages without taking into consideration the question of "express malice," and

9. "That the Chief Justice should have directed the jury that in the absence of "express malice the Plaintiff was entitled to nominal damages only."

Mr. T. Davie discussed these points together, and argued that the Chief Justice should have told the jury that malice was only the want of legal excuse, and that the jury must have thought from the charge that malice was to be necessarily implied without any proof.

The objection as it appears on the notes of the Chief Justice, with which alone I have to deal, is stated thus: "That if the publication was malicious then, although "injurious, it could be visited with nominal damages;" and that I have described under points 6 and 7, but I cannot do better than repeat what Baron Huddleston said in Bryce vs. Rusden, i e. "Take for instance the case of a gentleman engaged in commerce about whom something wholly untrue, and which affects his character, has been written, and in consequence he is ruined, and becomes bankrupt both in character and capital. What answer is it for the person who has caused all that mischief to say that he honestly believed at the time he had written what he did, that it was true and that he had written it so believing and without malice? If such a defence were law, how could character and honor be maintained in this country, etc., etc.?" Surely this affords a common sense and legal answer to points 8 and 9.

10. Point 10. "That the observations of the Chief Justice on the subject of the "publication of reports of judicial proceedings were calculated to mislead the Jury, since the "question of the correctness of a report of a judicial proceeding only arises when what pur-"ports to be such a report is published without comment, and there is raised as a defence the "plea of privilege." This seems to be only a different way of putting the objection raised as point 1, and I need not repeat my observation on it; but I may say that if the report had been published without comment the plaintiff would have very little or no reason to complain.

11. Points 11 & 12 are: "That in directing the attention of the jury to the law "respecting criticism of the public acts of a public man the Chief Justice erred, in that he "assumed, as proved, that the article in question imputed a charge of corruption to the "Plaintiff, whereas he should have left it to the Jury to say whether the article could be "so construed.

12. "That the Chief Justice erred in instructing the jury that the intention of the "article was not material."

Mr. T. Davie made few or no observations on these points. I have, I think, shewn in discussing his first point that the Chief Justice left the case to the jury in a manner which was decidedly favorable to the Defendant and he does not seem to have assumed as proved "that the article, etc, imputed a charge of corruption to the Plaintiff" for he left it to the jury to say "whether" the published words were a libel, i.e. "were they

disparaging or calculated to inflict mental pain and injury apart from pecuniary loss," and as regards the 12th point, the Chief Justice only acted in accordance with *Haire vs. Wilson, 9 B. and C. 643* and the law laid down by Baron Huddleston to which I have referred in my observations on points 8 and 9.

13. Point 13. "That the Chief Justice should have ruled and charged the Jury that "the publication was incapable of the innuendo, and that it was not a libel."

Mr. T. Davie did not raise this objection to the charge at the proper time, and cannot avail himself of it now [See *Archbolds' Practice, page 1212, Ed. 1879,* and cases cited, and compare *per curiam* in *Grand Trunk Railway Company vs. Rosenberger, 9 Sup. Ct., Canada,* 325.] Indeed it seems to have been taken for granted at the close of the Plaintiff's case, and certainly at the end of the trial, that the innuendoes were to be disregarded. The Chief Justice but once refers to them in his charge, and then only casually [See p. 26 printed notes], and on the Jury retiring he told them they might disregard them. No allusion is made to them in the questions submitted to the Jury. The question put to them was: "Is it a libel?" and their answer was "We find it is a libel." It is agreed that they took the "Colonist" newspaper with them on retiring, and I have no doubt they found their verdict upon a perusal of it; and it is very unlikely that they troubled themselves with pleadings and innuendoes when no one invited them to do so. Mr. T. Davie relied upon the Chief Baron's observations in *Cox v. Lee* at p.p. 287, 288, L. R. 4 Ex., but those of Lush J. in Walkin vs. Hall, L. R. 3, Q. B., p. 403 (when a judge of the Queen's Bench) are more applicable to this case.

14. Point 14 was: "That the Chief Justice improperly rejected the evidence of a "summons to amend the pleadings tendered on behalf of the Defendant."

If the Chief Justice refused an order to amend the pleadings, such refusal might have been appealed from; and the Defendant by omitting to do so, must of course be taken to have acquiesced in the decision of the Chief Justice. No authority was produced to shew that such proceedings might be proved at the trial; and such a course might confuse a jury by inducing them to suppose they had some jurisdiction in the matter. If the summons was admissible, the proposed amendments of the pleadings would likewise be admissible, but no one ever heard of rejected amendments being admitted as evidence before a jury (and compare the judgment in *Boileau vs. Rathin 2 Ex. 676, 682.*) If the Defendant intended to avail himself of Lord Campbell's libel act 6 and 7, Vic. c. 96, s. 2, and see 8 and 9 Vic. c. 75, s. 2, which are in force here, he seems to have adopted the wrong course (Odgers p. 487.) Again, there was no notice in the statement of defence that evidence would be offered, the rejection of which is now complained of, and on this ground alone the rejection may be supported, i.e. for non-compliance with the order xix, rule 4 (of our rules) which is the same as the English rule, as to pleading facts if they are material, see Scott vs. Sampson, 8 Q.B.D. 496, 507. Pursley vs. Bennett, 11 Ont. Prac. Rep. 64 and per Brett, L. J., in Phillipps vs. Phillips, 4 Q.B.D., 133 C.A., and Lord Selborne in Millington vs. Loring 6 Q.B.D., 194, C.A.

15. Mr. Theodore Davie's 15th point was "That the Chief Justice improperly rejected "newspapers containing favorable comments tendered as evidence on behalf of the "Defendant."

"The absence of malice, though it may not be a bar to the action, yet may have a "material effect in reducing the damages, etc., and the Defendant may in mitigation of "damages, give evidence to shew that he acted in good faith and with honesty of purpose "and not maliciously," (Odgers 302) and the rejected evidence had perhaps a tendency, though I think very remotely, to negative malice.

Grand Jury reports (which are referred to) are published by the newspapers as matter of business and throw little light on the question of malice or good will on the part of the editor of a newspaper, and I think the same observation applies to the local item referring to the Plaintiff and his family in complimentary terms in November, 1885. But the question is [see rule 287 of our Supreme Court rules] whether "some substantial wrong, or miscarriage, has been occasioned" by the rejection of this evidence, and I do not think there has. If the Defendant had come forward as a witness to explain his motives, he would no doubt have been cross-examined with a view to shew malice; and he might then, in re-examination and perhaps previously, have put forward these and other facts, if any, to negative malice, and in mitigation of damages. Considering the course he has adopted and no doubt it was well considered, I do not think he can say that he has sustained any "substantial wrong" or that the admission of this evidence would have had any effect compared with that which no doubt was produced on the jury by his absence as a witness, and by a perusal of the libellous article in the newspaper.

I must also repeat that there was no notice in the statement of defence that any such evidence would be offered, and on this ground the rejection may be supported according to the cases previously referred to.

16. Point 16 was: "That the Chief Justice improperly rejected the evidence of the "witnesses Robson and Booth, tendered on behalf of the Defendant."

There seems to be no note of the rejection of Robson's evidence, but with respect to the evidence of Booth it seems to have been rightly rejected as being no part of the *res gestæ*, and as having no connection with the principal fact under investigation, viz., the writing and publishing of the libel. [1. Taylor, Ev. 533, Ed. 1872.] The evidence of Tuck and Dunsmuir, who were present when the Defendant wrote the article, was perhaps rightly received; but evidently Booth was not so present, and I think the Chief Justice rightly ruled that "as his evidence related to conversations with Defendant before he had even "seen the alleged report or conceived the idea of composing or publishing the matter com-"plained of" this evidence was inadmissible.

I need hardly repeat that there was no notice on the statement of defence that such evidence would be offered, and that on this ground the rejection may be supported. [See cases already cited.]

I think the order to shew cause should be discharged with costs.

NOTICE OF APPEAL TO THE SUPREME COURT OF CANADA.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

THE HONORABLE GEORGE ANTHONY WALKEM,

Plaintiff.

AND

DAVID WILLIAMS HIGGINS,

Defendant.

Take notice that the Defendant appeals to the Supreme Court of Canada from the judgment of the Full Court of the Supreme Court of British Columbia rendered in this cause on the 14th. day of October, 1887, dismissing the Defendant's appeal from the judgment of the Chief Justice rendered herein on the 30th. day of June, 1887, and discharging the order *nisi* for new trial, and affirming the judgment.

Dated this 25th. day of October, A. D. 1887.

THEODORE DAVIE,
Solicitor for David Williams Higgins, the above named Defendant.

To H. D. HELMCKEN, ESQUIRE,
Solicitor of Record for the above named Plaintiff.

ORDER ALLOWING APPEAL.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

THE HONORABLE GEORGE ANTHONY WALKEM,

Plaintiff.

AND

DAVID WILLIAMS HIGGINS,

Defendant.

Upon hearing Mr. Theodore Davie, Q. C., as of Counsel for the Defendant, and Mr. Helmcken as of Counsel for the Plaintiff, and upon reading the Notice of Appeal to the Supreme Court of Canada from the judgment of the Full Court rendered herein on the 14th. day of October, A.D. 1887, dismissing the Defendants appeal from the judgment of the Chief Justice rendered on the 30th. day of June, A.D., 1887, and discharging the order *nisi* for a new trial dated the 22nd. day of July, 1887.

I do order that the Bond of the Plaintiff, with Robert Dunsmuir as surety, in the penal sum of four thousand five hundred ($4,500) dollars, conditioned as to five hundred ($500), that the Defendant will effectually prosecute his appeal to the Supreme Court of Canada from the said judgment of the Full Court discharging the said order *nisi* for a new trial, and will pay such costs and damages as may be awarded against him by the Supreme Court; and as to the sum of four thousand dollars ($4,000) upon condition that if the judgment, or any part thereof, is affirmed, the said David Williams Higgins will pay the amount thereby directed to be paid, or the part thereof as to which the judgment is affirmed (if it is affirmed only as to part), and all damages awarded against the defendant on such appeal, be accepted as good and sufficient security as well for the appeal against the said judgment discharging the said rule *nisi* for a new trial, as for staying execution upon the judgment in the Supreme Court of British Columbia.

And I do further order that the said David Williams Higgins do also furnish his own additional bond, with the said Robert Dunsmuir as surety, in the sum of ($500) five hundred dollars, conditioned that he, the said David Williams Higgins, will effectually prosecute his appeal against the said judgment of the Full Court dismissing his appeal against the said order of the Chief Justice, dated the 30th day of June, A. D., 1887.

And I do lastly order that upon the filing by the said Defendant of the said respective bonds for $4,500 and $500, in form to be approved by a Judge of this Court, that the appeal of the said David Williams Higgins to the Supreme Court of Canada be allowed.

HENRY P. PELLEW CREASE.

Dated the 28th day of October, A. D. 1887.

ORDER SETTLING CASE ON APPEAL.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

THE HONORABLE MR. JUSTICE CREASE.

BETWEEN

THE HONORABLE GEORGE ANTHONY WALKEM,

Plaintiff.

AND

DAVID WILLIAMS HIGGINS,

Defendant.

TUESDAY, THE 8TH DAY OF NOVEMBER, A. D. 1887.

Upon the application of the Defendant to settle the case on appeal to the Supreme Court of Canada, and upon hearing Mr. Theodore Davie, Q. C. of Counsel for the Defendant, and Mr. Drake, Q. C. of Counsel for the Plaintiff, I do order that two cases shall be printed of the appeal in this action to the Supreme Court of Canada: the first to contain the case on appeal from the order of the Full Court of the Supreme Court of British Columbia discharging the order *nisi* made in this action on the 22nd. day of July, A. D. 1887: and the second to contain the case on appeal to the Supreme Court of Canada from the judgment of the Full Court of the Supreme Court of British Columbia dismissing the Defendant's appeal from the order for judgment made herein on the 30th. day of June, A. D. 1887.

And I do further order that the case on appeal from the judgment of the Full Court of the Supreme Court of British Columbia discharging the said order *nisi* for a new trial be settled in the following form, and contain the following matters, namely:

1. Short statement of case.

2. Pleadings in the action

3. The evidence of Francis Bernard McNamee taken under commission of the 16th. July, A. D. 1886.

4. A statement that the evidence of M. F. Johnston taken under the commission issued herein on the 16th. day of July, A.D. 1886, was so taken for the purpose of proving the correctness of his short-hand notes of the evidence given by the said Francis Bernard McNamee at the trial of the action of McKenna vs. McNamee at the City of Ottawa, on the 7th. day of November, A.D. 1885.

5. Extract published in the Daily Evening Post of November 18th. A.D., 1885, headed "Esquimalt Dry-dock. The great case of McKenna vs. McNamee" and put in evidence at the trial of this action.

6. Extract from the Ottawa Free Press of the 9th. of November, 1885, and put in evidence at the trial of this action.

7. The extract from the Ottawa Free Press of the 16th. of December, 1885, put in evidence at the trial of this action.

8. The extract from the Daily British Colonist of the 20th. November, 1885, put in evidence at the trial of this action.

9. The interrogatories exhibited by the Plaintiff on the 6th. day of March, 1886, for the examination of the Defendant, and the Defendant's answers thereto, sworn the 31st day of March, 1886.

10. Correspondence and telegrams between the said Francis B. McNamee and the Plaintiff, put in evidence at the trial of this action and printed in the Plaintiff's case used in the full court at pages 18 to 21, inclusive.

11. So much of the evidence of Charles W. Mitchell taken under the commission issued herein on the 23rd day of May, 1887, as went to the jury at the trial of this action and which is set out upon pages 15 and 16 of the Plaintiff's case on appeal to the full court of the Supreme Court of British Columbia.

12. The evidence of Francis Bernard McNamee taken under the commission issued herein on the 8th. day of June, 1887.

13. The evidence of Samuel Parker Tuck, taken under the order made herein on the 18th. day of May, 1887

14. The notes of the Chief Justice at the trial of this action on the 30th. day of June, 1887.

15. The order for judgment made herein on the 30th. day of June, 1887.

16. The order *nisi* for a new trial made herein on the 22nd. day of July, 1887, as amended by the full court.

17. The order of the Full Court discharging the said order *nisi* made herein on the 14th day of October, 1887.

18. Reasons for the said order.

19. The Defendant's notice of appeal to the Supreme Court of Canada, dated the 25th. day of October, A.D., 1887.

20. The order allowing the said appeal dated the 28th. day of October, 1887.

21. The order settling the case on appeal to the Supreme Court of Canada.

AND I DO FURTHER ORDER that the case on appeal to the Supreme Court of Canada from the judgment of the Full Court of the Supreme Court of British Columbia dismissing the Defendant's appeal from the order for judgment made in this action on the 30th. day

of June, 1887, be settled in the same form and contain the same matters as the case on appeal from the judgment of the said Full Court of the Supreme Court of British Columbia discharging the order *nisi* for a new trial made herein on the 22nd. day of July, 1887, with the following exceptions, namely :—

1. Instead of the order *nisi* for a new trial that there be printed, the notice of appeal, as amended by direction of the court, served by the Defendant on the 4th. day of July, 1887, from judgment made herein on the 30th. day of June, 1887.

2. Instead of the order discharging the said order *nisi* the order of the Full Court made in this action on the 14th. day of October, 1887, dismissing the Defendant's appeal from the Order for judgment made herein on the 30th. day of June, A. D. 1887.

3. Instead of the reasons for discharging the said order *nisi*, the reasons for dismissing the said appeal.

(Signed) HENRY P. PELLEW CREASE. J.

Stamps 60 cts.

CREASE, J.

This was a motion by Mr. Theodore Davie, Counsel for the defendant, for a new trial, on the several grounds hereinafter specified.

On the 30th June, 1887, the case was tried before the learned Chief Justice and a special jury, and a verdict given in favor of plaintiff for $2,500; and subsequently, on motion, judgment was rendered for plaintiff for that amount.

An appeal, which was taken by defendant from the Chief Justice's judgment was in compliance with our practice, first heard separately. It has, therefore, been dealt with separately in a joint judgment of the Court.

The motion now under discussion questions the verdict.

The principle which is to guide our decision, whether a new trial shall be granted, or not, is set forth in our Supreme Court Rule 287, Order XXXIX, R. 24, as follows:

"A new trial shall not be granted on the ground of misdirection, or of the improper "admission or rejection of evidence, unless in the opinion of the Full Court, some substan- "tial wrong or miscarriage has been thereby occasioned in the trial of the action."

Now this rule is framed in the strongest manner negatively, "A new trial *shall not* be granted, unless," etc

It may not be amiss to call attention here to the unusual manner in which the grounds upon which a new trial is sought are placed before us.

They are not in the ordinary shape of special heads of objection, with a statement of the reasons for each, as they ought to be; but they appear in a mass, thrown together without order or arrangement, some being repetitions in a different form, of grounds already advanced; some again containing assumptions of fact, which, on examination, are not at all warranted; yet, proceeding on such erroneous assumptions to erroneous conclusions, the latter are then applied to detached portions of the Chief Justice's charge, and improperly used to make him responsible for having misled the jury, because he did not adopt them in his exposition of the law for their guidance.

Defendant's Counsel, at the outset of his argument, and when commencing his comment on the Chief Justice's charge, rightly contended that it should be construed according to the rule for construing judges' charges which was laid down by Lord Bramwell in Clarke v. Molineux, 3 Q. B. D., p. 243, where he says: "I certainly think a summing up "is not to be rigorously criticized, and it would not be right to set aside the verdict of a "jury, because in the course of a long and elaborate summing up the judge has used inac- "curate language. The whole of the summing up must be considered in order to deter- "mine whether it afforded a fair guide to the jury; and too much weight must not be "allowed to isolated and detached expressions."

This rule he signally departed from when dealing with the *first objection* which was:

1. "That the learned Chief Justice should have charged the jury that the publication "was not a libel, unless calculated to injure the plaintiff"; and that in deciding whether the "publication was calculated to injure or not, they must take it as a whole, and not rely upon "isolated passages. That, although one passage might of itself be injurious, yet they must "consider whether other parts of the writing did not neutralize the injury. That the bane "and the antidote must be taken together, and if judging by this test the publication was "not injurious the defendant was entitled to a verdict."

Instead of construing the charge as a whole Defendant's Counsel picked out a few sentences here and there and endeavored, with some ingenuity, to shew that the Chief Justice had, according to Counsel's view of the grammatical construction of the extract, wholly confined the attention of the jury to that part of the defendant's publication which contains the alleged extract, viz.: "Six of them were in partnership (in the Drydock) out in British "Columbia, one of whom was the Premier of the Province,' as being the libel sued upon and which he, the learned Counsel, termed the "bane" of the article; and that in so doing the Chief Justice had deprived the defendant of the benefit of his comment upon it, which according to Counsel's view was the "antidote." This construction is incorrect as a closer examination proves. If the extract had appeared without any comment, the plaintiff might possibly not have felt himself much injured, as there were other Premiers besides himself, during the existence of the Drydock contract. But the defendant went further, and in his comment pointed out Mr. Walkem as being the particular Premier to whom the four line extract applied. The Chief Justice must have had this in view it could not well have been otherwise when he referred to Mr. Walkem at all in the beginning of his charge where he says: "It is untrue that Mr. Walkem ever was a partner with Mr. McNamee, and it is "admittedly untrue that McNamee ever said so." Of course he was here dealing with the comment and evidence then before the jury, including the defendant's newspaper the "Colonist," which had been put in as appears by his notes. It must also be borne in mind that the pleadings, comprising the plaintiff's grounds of complaint were necessarily before the jury before they were charged. It was, therefore, useless to repeat to them what they already knew, namely that the libel complained of was the extract, accentuated by the assurance given to the public by the defendant in his "comment" on it, that Mr. Walkem alone was the Premier referred to as being one of the six partners in the Drydock contract.

The Chief Justice also quoted the defendant's comment that the extract had been taken from the "sworn evidence of McNamee, in the suit of McKenna v. McNamee," which assurance turned out to be untrue. But even the so-called antidote was not passed over by the Chief Justice; for he referred to it as that part of the article which, in his opinion, was evidently inserted "for the purpose of trying to tone it down." The antidote though not clearly pointed out by the learned Counsel must have meant the allusion to Mr. Walkem's judicial career as having won for him admiration as well as to the observation that "if the statement had been made off the stand, it will have been scouted as untrue" and possibly to the suggestion that McNamee might have erred in his evidence, or in plain English, did not know his own partners.

This so-called antidote cannot be said to have "neutralized" the effect of the "extract" because it was followed in the same breath by a "charge" against Mr. Walkem—not taken—as defendant alleged in his Statement of Defence from the "Post" newspaper, but from

"the sworn evidence of McNamee" in the McKenna suit just as it might have written, supposing the defendant had been there himself, and heard what McNamee swore.

The Chief Justice again deals with the comment, when he points out to the jury the fact that defendant designates McNamee's alleged evidence as a "Charge" against Mr. Walkem, and of course for a premier to be a partner in a Government Contract like the Drydock would have been, had it been true, indeed a charge of the gravest character, for to use the Chief Justice's language "Scandalous in the extreme"; nay more it would have been gross corruption.

Such a charge therefore was calculated to injure in the worst kind of way, the plaintiffs judicial reputation.

To my mind the so called "antidote" read as the law requires, viz., like ordinary English, brings out in stronger relief the "Charge" to which it so emphatically relates, the alleged remedy is worse than the disease.

In short we are all of opinion that the sting of the article is in the defendants comments.

Again. When quoting to the jury Baron Huddleston's observations in Bryce v. Rusden, with reference to the comments on the acts of public men, the Chief Justice deals with the article in question as a comment on a public man, and an alleged report of something sworn of him as a public man in open Court in a judicial proceeding. He applies the Baron's observations to the present case, for instance, "Was the comment (Mr. Higgins') fair? Now as to its being a fair comment" it is a mere "utter misstatement" clearly meaning thereby if "we are to take words in their natural sense" and in such as the "hear-"ers (here readers) were given by the utterers to understand them," (Folkard, p. 69), that the statement attributed to McNamee and the allegation by defendant in his comment that it had been "taken from the sworn evidence of McNamee" were utterly untrue.

Further on the Chief Justice puts this question to the jury, "Now is this publication "(he does not say extract) a libel" judging by what I have read? What was read referred to a published comment on a public man.

The Chief Justice finally charged the jury in these words: "If you find that the pub-"lication is on the whole a libel, and that the libel was utterly without foundation and that "want of caution was shewn in its publication, you may find, I think, a sum for substantial "damages, the amount of which rests entirely with you."

Defendant's Counsel had some difficulty in dealing with this passage and labored to convince the Court that the extract alone was meant, because the Chief Justice used the words "publication on the whole" instead of "publication *as a whole*." Supposing the Chief Justice was slightly inaccurate in his mode of expression we consider that in view of the different passages referred to and the fact that the "Colonist" was handed to the jury on retiring, the whole publication was placed before them, and to repeat Lord Bramwell's words, "it would not be right to set aside the verdict of a jury because in the course of "a long and elaborate summing up the judge has used inaccurate language."

The Chief Justice thus placed the whole publication before the jury pointed out in his

charge, that if the publication was calculated to give pain and inflict injury it was a libel, then gave Baron Huddleston's definition of a libel as applied to published comments on a public man, and finally left it to them to say, whether judging from what he had read of Baron Huddleston's charge, the publication was a libel or not, and the verdict was "we find "it is a libel."

Under all these circumstances the defendant's objection appears to me to be groundless. Much of what I have said will apply to other of the defendant's objections, the points in some of which overlap each other.

I might add, that even had the Chief Justice confined his charge to the four line extract, the plaintiff, and certainly not the defendant, would have had good ground for complaining of misdirection.

2. The *second* ground is, "That the jury should have been told to consider whether "the object of the publication was to defame or to vindicate the plaintiff's character; if the "latter then the defendant was entitled to a verdict."

This ground is untenable for it is the effect, not the object, of the publication which constitutes the libel. The Courts for this purpose look at the tendency of the publication, not the intention of the publisher. Hare v. Wilson, 2 B. & C. 643; Fisher v. Clement, 10 B. & C. 472; Wenman v. Ash, 13 C. B. 845; and other cases therein cited.

3. The *third* ground for a new trial is as follows: "Assuming the publication to be "libellous, the report having been taken from another paper in good faith and without any "evidence of express malice, the plaintiff having shewn no special damage, the jury should "give only nominal damages." This cannot be sustained. In the first place, this ground of objection is founded on a hypothetical state of *facts* which does not exist here. There is no evidence of the good faith alleged beyond that remotely suggested in the evidence of Messrs. Dunsmuir and Tack. The defendant might have sworn to his having acted in good faith, if he thought he could successfully have done so; but though present in Court throughout the trial he avoided the witness box.

Nor was it proved, though asserted, that the report "six of them, etc," was taken from any other newspaper. On the contrary the extract or report in the "Colonist" differs from the report in the "Post." The defendant by not appearing as a witness must be taken to have advisedly left this difference unexplained.

The Court has a right to expect that a suitor will place before it all his facts, and throw all the light possible on his case, and if he purposely avoids doing so, as in this case he must take the consequences, and presumably submits to do so.

In the next place, as a matter of law, no newspaper has the right "to take" and publish, whether in good faith or otherwise, and without express malice, an article derogatory to, or calculated to inflict injury on, any man merely because it is found in another paper. In fact the paper so copying increases the mischief by adding its own circulation to the further propagation of the libel, in quarters which it might not otherwise have reached.

The absence of proof of special damage, in no way betters the libeller's position, so as to exculpate him from liability to damages. The plaintiff need give no evidence of actual

damage, where as here, the publication is defamatory, he will, nevertheless, be entitled to substantial damages. Tripp v. Thomas, 3 B. & C., 427; Ingram v. Lawson, 6 Bing. N. C., 212; Odgers on Libel, p. 293.

4. The *fourth* ground of objection, viz.: "That the Chief Justice misdirected the jury "in telling them that the published words were a libel, if they were disparaging or calcu "lated to inflict mental pain and injury apart from pecuniary loss" is manifestly unsound. The Chief Justice in so charging merely adopted almost the very language used by the Chief Baron in Cox v. Lee, L. R. 4, Exc. 284, Lord Bramwell and Channell, B., coinciding.

Probably the Chief Justice had this case, and Clement v. O'Brien, 14 M. & W. 435, (cited in treating of objection No. 12) in his mind, when he so charged.

5. The *fifth* objection: "That the Chief Justice misdirected the jury in telling them "to find whether the publication was true or not, or justified or not, when neither truth nor "justification was pleaded."

This objection does not appear of any value. It could not have affected the minds of the jury adversely to the defendant. Really, such a question would only be in his favor by giving him a new loop-hole for escape. Although justification was not pleaded defendant's contention throughout has been, that what he did was justifiable, and (in the common use of the word) justified. If the charge had been true, this question would have been in defendant's favor, although justification, in its legal sense, was not pleaded. The Chief Justice was bound to notice it, for the plaintiff, from the form of his Statement of Claim, undertook to prove, and therefore had to prove as he did at the trial—that the "charge" in the defendant's article was not true and therefore not justified: and that there was no "sworn evidence" as alleged in the article to support that charge.

The Chief Justice's phrase "Is it true?" "Is it justified?" must clearly refer to these circumstances. It would be absurd to suppose he was speaking technically instead of colloquially to the jury. That question might have seriously affected the plaintiff, and was, as I have said, in the defendant's favor, and is therefore no ground of complaint on his part.

6. With the *sixth* ground alleged "That the Chief Justice erred in reading to the jury "a case of Bryce v. Rusden, since that case was an improper guide with reference to the "law applicable to this action" we cannot for a moment concur.

What neater definition of libel can there be than that there laid down? "By libel, "was meant anything which was written or drawn of a man calculated to hold him up to "public ridicule and contempt among his fellowmen." And again, "The judge should "merely direct the jury as to what the law said was libellous; and leave it to them to say "in the light of such direction, whether or not the writing before them was a libel," and so for the rest of his charge. (*Vide* the Chief Justice's charge, p. 27, line 10, *et seq.*)

7. The *seventh* objection is this: "That the Chief Justice should have told the jury "that whilst, if they found the publication libellous, the law implied malice, yet by such "implied malice was meant merely the absence of legal excuse; and that they would not be "justified in visiting the defendant with substantial, exemplary, or vindictive damages, "unless satisfied that he was guilty of express malice" of which there "was no evidence."

It will only be necessary, after my previous observations and cases cited, to say with regard to this objection, it is bad law, A libel might be made without any ill feeling, or even knowledge of the parties which might ruin the persons libelled, say a large firm in London. The judge would be at liberty in such case to tell the jury they should find substantial damages

"If I have in fact wrongfully injured another's reputation I must compensate him; "although I may have acted from the noblest of motives, just as if I break a window acci- "dently in an attempt to save a child from falling down a grating—I am still bound to "pay the owner the value of the broken pane. If then I have defamed "A" without "lawful excuse (that is, on an occasion like the present not privileged) malice forms no part "of the issue, and the jury may, if they think the facts in their judgment warrant it, give "substantial damages" Hooper v. Truscott, 2 Scott, 672; Gordon v. Horne, 1 Br. and B. 3 Moore, 223. "Besides it is an assumption on counsels part to say, or imply, that the "damages are "vindictive" & substantial," not "vindictive" damages were alluded to in the Chief Justice's charge.

The jury, who are the judges of the proper amount of damages, must be presumed to have given substantial damages only: for it is not right to assume as an acknowledged fact, that which is not proved: and then argue from it, that the judge ought to have charged, as if it had been so acknowledged.

8. On the *eighth* objection, viz., that. "The learned Chief Justice laid down no proper "rule as a guide to the jury in assessing damages; but allowed them to understand, that they "were at liberty to give substantial damages without taking into consideration the question "of express malice."

I would observe, that the judge was not challenged, as he might have been, to do so. Had he been so challenged and then overruled the point, Defendants Counsel would have been entitled to bring it up, but having omitted to raise the point, he cannot, according to well known rules, raise it now; but, it was quite correct, for the Chief Justice, to say, as he did, that the jury were at liberty to find substantial damages, without express malice if they were satisfied that the publication was a libel calculated to injure the plaintiff in character, and reputation.

The authorities are too numerous and too clear, to admit of further discussion on the point.

Besides what could be more calculated to injure Mr Walkem in character and reputation than the "charge" here, that he, when Premier of a Government, was a partner in a very large government contract, such as the Drydock, under his own department as Chief Commissioner of Lands and Works.

9. The *ninth* objection: "That the Chief Justice should have directed the jury, that "in the absence of express malice the plaintiff was entitled to nominal damages only" has no foundation in law, when applied to the circumstances of this case.

"Implied malice carries substantial damages where (as in this case) the occasion is not

"privileged, the defendants motive or intention in using the words is in fact immaterial; he "must be taken to have intended the consequences, naturally resulting from words publish- "ed by him without lawful excuse."

The jury have evidently found that an injury was done warranting in their judgment substantial damages. Wenman v. Ash, 22 L. J., C. P. 190. Hooper v. Scott. And while on the question of damages I would observe, that the evidence, such as it was, of previous good will, if admitted to the fullest extent contended for, is, in the present state of the law, no answer to the action.

It may, or may not, have operated to an appreciable extent in migitation of the damages, the injury to the feelings and reputation of the plaintiff, by such a charge, has been made apparent. Moreover the defendant acted most carelessly: for it appears from the evidence, that a little research by the defendant in his own newspaper office, would have reminded him that the charge had been already publicly refuted under oath, before a committee of the House of Assembly; or assuming him to have forgotton all that, yet that a private reference by the defendant to the plaintiff apprising him of the article in the 'Post" from which it professed to have been copied, or, of the "Free Press" at Ottawa in which it was thought to have taken its rise, might have been made, if good feeling on the defendants part had existed, or he desired to act cautiously. This would have obviated the necessity of that recourse to a court of law, to which the article in question was a direct provocation, under pain of a ruined reputation.

Then again when the real facts were ascertained by defendant from McNamee (see the latter's evidence) a suitable apology, even after the action had progressed might have been given: and thereby obviated the necessity of further litigation.

There was therefore; such a libel once proved, no reasonable or legal pretext for imposing merely nominal damages.

10. The 10th objection is:—"That the observations of the Chief Justice upon the "subject of the publication of the reports of judicial proceedings were calculated to mis- "lead the jury, since the question of the correctness of a report of a judicial proceeding "only arises, where, what purports to be such a report, is published without comment, and "there is raised as a defence, the plea of privilege.

This is all very vague and obscure. It could scarcely be more so. It does not say how the jury could have been misled, or specify what the alleged observations were.

If this objection refers to the extracts delivered to the jury from Baron Huddleston's charge in Bryce v. Rusden, I can only say these appear to me to have been well timed and useful.

The "charge" was based on an alleged report of "the sworn evidence of McNamee" in a judicial proceeding at Ottawa, the Chief Justice was bound, therefore, to explain to the jury, the law of libel as affecting judicial proceedings.

It is quite in order for a Judge to quote a case which deals with the general subject he has under consideration, and lead upwards or downwards, as the facts before him may

require, and apply the report under quotation, or proper portions of it, to the particular case he has in hand. If this 10th objection, however, apply to the Chief Justice's observations which followed his quotations from Bryce v. Rusden, I can only say that such observations were apt and to the point. The words used and applied to the "Colonist" article, as having been "written about a public man in his public capacity about a matter of public interest" were as follows:— [The objections are so framed that I am obliged occasionally to repeat.]

"Was the comment" (of the defendant) "fair?" Now as to its being a fair comment, "it is an utter misstatement. It is not a true statement of what occurred. Moreover, it "does not pretend to be a full report of what occurred. A report of what takes place to-day in this court, for instance, is perfectly privileged, although it may contain libellous "passages, provided it be a fair, full and *bona fide* record of what took place; but no man "has a right to lay hold of a particular expression which has fallen from Judge, counsel or "witness. That is not a *bona fide* fair report of what took place. Here you have the "whole thing in a nutshell. Now, is this publication a libel judging by what I have read?" I fail to see how the jury could have been misled by observations such as these, referring, as they did, to a public man, whose public conduct is alleged by the defendant to have been spoken of in open court, and is then commented on by the defendant, and referred to as being open to "a charge" which "could not be treated lightly."

In order to do it justice, a Judge's charge, as I have already said, must be taken as a whole, not in detached pieces, picked out here and there, grammatically analyzed and critically examined, as if it were a treatise. The test is—was it—fairly considered—calculated to mislead the jury? I think not. In this case it was the duty of the Judge to explain to the jury, as he did, the general principles governing the different kinds of libel, and, among them, those connected with the reports of judicial proceedings.

A special jury is not easily misled, particularly in such plain matters.

The 11th objection is:—"That in directing the attention of jury to the law respecting "the criticism of the public acts of public men, the Chief Justice assumed as proved that the "article in question imputed a charge of corruption to the Plaintiff, whereas he should have "left it to the jury to say whether the article could be so construed."

This is not correctly stated. The Chief Justice left it to the jury to say whether the publication was libellous or not. The actual words were:—"I shall leave it simply to them" (the jury) "to say whether the published words were a libel, *i. e.*: Were they disparaging "or calculated to inflict mental pain and injury apart from pecuniary loss." (Vide the Chief Justice's printed notes, page 28, last three lines.)

So long as a Judge does that, and leaves the decision as to the libel to the jury, there is nothing to prevent his giving his own opinion upon it, which they, as sole judges of the fact, may disregard or not as they choose. Before Fox's act the Judge was obliged to give this opinion; since then he may do so or not as he likes, so long, as in this case, he leaves it entirely to the jury to decide, libel or no libel.

The 12th objection, viz:—"That the Chief Justice erred in instructing the jury "that the intention of the article was not material," is in itself a mistake.

In O'Brien v. Clement, 15 L. J., Exc. 286, Baron Parke says: "Counsel is mistaken "who says that no action for libel can be maintained without proof of a malicious inten- "tion. Everything printed or written, which reflects on the character of another, and is "published without lawful justification or excuse, is a libel. *whatever the intention may "have been.*"

On this point Pollock on Torts, p. 169, says:—"The actionable or innocent character of "words depends *not on the intention* with which they were published, but on their actual "meaning and tendency when published." Citing Capital and Counties' Bank v. Henty, 7 App., C. A., in which the law of libel is elaborately discussed, p. p. 768, 780, 782, and p. 787.

The 13th objection—which is put so late should have come first—for once established all others would have become unnecessary. It is:—"That the Chief Justice should have "ruled and charged the jury that the publication was incapable of the innuendo; and was "not a libel." In other words, should have withdrawn the article from the jury, and directed a non-suit.

Substantially, it is a repetiton with variations of the first objection, and goes over very much of the same ground.

The argument of defendant's counsel in support, is based on the same narrow assumption that pervades objection No. 1: namely, that grammatically considered, according to counsel's view, the four line extract is the libel of the Chief Justice's charge. Such isolated expressions as appeared to harmonize with this construction were picked out by defendant's counsel, such as "the libel," "the passage," "the published words," "the charge," and the like.

The broader conclusions of Hunt v. Algar, 6 C. & P. 245; Chalmers v. Payne, 2 Camp. & Ros., 15; Cox v. Lee, 38 L. J., Exc. 214; Odger, 27, 551; Capital and Counties' Bank v. Henty, 5 C. P. D., were narrowed down by him to suit his assumption. With these were ingeniously blended unproved claims of good feeling and favorable notice; and the court was boldly asked to conclude upon such weak materials as these, that the article was not a libel; but calculated to be beneficial rather than injurious to the Plaintiff.

This objection so urged appeared at first sight to be plausible, but its value disappeared entirely upon examination.

Enough has already been said to show that looking into the published words, and taking the Chief Justice's charge, as a whole, it is impossible that he could have confined his observations to those four lines, or the jury have understood him to have done so; and that once proven, all the argument based upon defendant's assumption falls valueless to the ground.

The pleadings themselves show that more than the mere "extract" was dealt with.

The statement of claim covers the whole article; and it was admitted in argument, and shewn by the Registrar, in answer to any enquiry by the court, that the newspaper containing the whole article, was given to the jury along with the pleadings, which already had been particularly explained to them.

Indeed, the article and the pleadings shew more.

The defendant, in his article, virtually admits that the charge was one of corruption, which was necessarily calculated to injure the plaintiff, and especially so as a judge, by damaging his reputation and character; inasmuch as after acknowledging Mr. Walkem's judicial career to have been successful, he immediately adds, "but he owes it to himself to re-"fute the charge"—one, which at the end of his comment, he clearly gives the public to understand is of so grave a nature that "it can neither be treated lightly, nor allowed to "pass unheeded."

In paragraph 4 of his statement of defence, to which his counsel frequently referred, we find the Defendant saying: "And conceiving it due to the plaintiff's exalted position" (he was then a Judge of the Supreme Court) "that the charge conveyed by the said evi-"dence" (of course the alleged evidence of McNamee) "should not be allowed to pass un-"refuted: I published the same with comment, shewing that the charge was not worthy of "credit."

Now, as to the comment being a favorable one, the contrary is the fact, as I have, I think, already demonstrated.

Indeed, as I have before declared, we are all of opinion that the sting of the whole article is in the comment.

The question of the extent of the innuendo, and how far the article is capable of the innuendo, is dealt with in our joint judgment on the appeal to reverse the Chief Justice's judgment, and enter a non-suit, so I need not dwell much on it again here, beyond observing that neither Judge nor counsel appeared to have questioned the innuendo attached to the "extract" when the jury were charged. Indeed, the meaning given by the innuendo to the "extract" was part of the defence. Without it, according to his counsel's contention, there was no "charge," no "blame." The innuendo was only casually alluded to during the trial; but, as I have said, the Chief Justice was not asked to direct the jury with respect to it.

But of this we are certain, viz: That the Chief Justice altered a printed copy of the statement of claim, by striking out all the innuendoes, and gave this so altered to the jury, with the "Colonist" and "Post" as they were retiring to consider their verdict. There is no memorandum of this on the Chief Justice's notes; but the statement of claim so altered, was placed before us on the argument as part of the papers returned by the jury to the Registrar, when they gave their verdict. This ought to settle the question about the innuendo. But even from a legal point of view, it must be held that if the innuendo had gone to the jury, and was too extensive, the defect was covered by the verdict.

From what I have said, one thing I think is clear, the Chief Justice would never have been justified in saying that the article was not capable of the innuendo; and therefore not a libel.

There was, in my opinion, a double libel, "the extract" (which first introduced the Drydock contract) admitted to be one; and the "comment" (which nailed "the charge" to the Plaintiff) another.

The necessary and natural inference to be deduced from the words of the article, of its defamatory character, was irresistible.

Indeed, no other inference could be drawn from them, if the test be applied to them, which is given in the Capital and Counties' Bank v. Henty, 5 C. P. D., 525, by Grove, J., viz.: "What inference would be drawn by a person reasonably reading the published "words; what is the result likely to be produced on his mind?" The Defendant assumes to himself unasked, the right to take charge of the Plaintiff's character: and, forthwith, spreads the statement by giving it the full circulation of his paper—without any word of comment to say it could not be believed. On the contrary he proclaimed that it had to be met by Plaintiff and disproved, if possible.

The jury, no doubt, as they were fully entitled to do, naturally looked to the relation, past and present, of the parties to each other; and, indeed, all the surrounding circumstances which could throw any light on the meaning of the words. They shared, of course, in the knowledge the community would have of a public work of that magnitude, carried on under a public act, with which everybody was familiar. With that knowledge they could not exclude from their consideration the connection of the Plaintiff with it; that he, with his colleagues, as a member of the executive, had the letting of the contract for building the Dock; that he, as Attorney-General, had the framing of it; and as Chief Commissioner of Lands and Works, the supervision over the execution of it, and the issuing of the certificates on which alone the payments under the contract had to be made. With these considerations before them, it is not reasonable to suppose they could draw any other inference than a libellous one from the published words. So—with Lord Bramwell's dictum before him—"If a libellous inference *can* be drawn from written words, as a necessary and "natural inference, it is a libel," the Chief Justice would not have been warranted in withdrawing the article from the jury.

In connection with this objection No. 13, a point referring to the innuendo was raised by Defendant's counsel—that, as the old pleadings in a libel suit, must be understood as consisting of two counts:

1. Of libel upon the article complained of *without* the innuendo, and

2 Of a count upon the libel *with* the innuendo, and that the verdict being general, and it being impossible to distinguish as to which count it referred to, an arrest of judgment would have been had.

But, on reference to the Chief Justice's charge, and the documents themselves in the possession of the Court which were sent in to the jury, including the "Colonist" newspaper and the "Post," we observe that the Chief Justice does not refer much to the innuendo, beyond assuming that the published words are of a defamatory nature.

Walkin v. Hall, 3 Q. B., 396, is an authority that, assuming Defendant's hypothesis to be correct, and even that the innuendo went too far, that would not make the count with the innuendo bad, if the other count were sustained. For that case says: "If the innu-"endo went too far it did not make the count bad. If the Plaintiff prove either count," which was done here, "it is sufficient." It would have been unnecessary to dwell on this

point had not counsel advanced it; for our Judicature Act and Rules, which are borrowed from those of England, make that hypothesis as to counts no longer of value.

The verdict is an effective cure. In Blagg v. Sturt, 16 L. J. Q. B., 39, the Court of Queen's Bench, although the innuendo was not supported by evidence, refused to set the verdict aside, (and see Mulligan v. Cole, L. R., 1 Q. B. D., 546.) Juries do not care much for innuendoes at any time; and here they had the article in the "Colonist" itself, which they had no difficulty in understanding. The aforegoing remarks, after all, perhaps seem quite superfluous, for the Chief Justice directed the jury to disregard the innuendoes, handing them the Plaintiff's statement of claim, with the innuendoes struck out by himself in their presence. He also gave directions that the original articles in the "Colonist" and "Post" should be given to them, and these which were all shewn to us during the argument were taken by the jury with them on retiring, and on them, no doubt, the jury came to their verdict.

The 14th objection, viz:—"That the Chief Justice improperly rejected the evidence of "a summons to amend the pleadings tendered on behalf of defendant," must, in my opinion, fail.

There has never been a case that I know of, and no precedent was quoted of one, where such a summons has been brought in as evidence of readiness to give an apology; or what appeared intended merely to bear the air of one, without actually being one.

The proposed amendment was, in substance, that defendant would make any explanation in the "Colonist" that might be satisfactory to the Plaintiff, provided it was reasonable (i. e., of course in Defendant's opinion.) No explanation or offer of one had been given.

How could such a plea be allowed? How could it be pleaded? As Mr. Drake, Plaintiff's counsel observed: "You cannot plead an intention; you cannot take issue upon it; "you can only plead a fact." It is also impossible to see what statement in a newspaper could have neutralized the effect of what the defendant himself publicly designated as a "charge" made "under the sanctity of an oath which could not be lightly treated nor allowed to pass unheeded."

This was a direct public challenge to the Plaintiff to disprove the charge in a Court of Justice.

The summons could, therefore, have no effect on the jury, if it had been admitted.

An explanation or apology, if really intended, could very easily have been made at any time by the Defendant without a summons.

Before us, his counsel repudiated the idea of making an apology. He claimed to be justified in writing the article; and at the trial, before the case went to the jury, positively refused all apology or explanation.

The dismissal of the summons on the ground that it was contrary to the rules of pleading, really seems to have been anticipated by Defendant's counsel, if one may judge from his acquiescence in the result.

He abstained from appealing against the dismissal, as he might have done at once, to our new Divisional Court, established for the express purpose of giving immediate relief in interlocutory proceedings. (Vide B. C. Appellate Jurisdiction Act, 1885.) No authority was cited, nor can I find anywhere a rejected summons or other interlocutory proceeding of the kind has been admitted as evidence at a trial. Were the practice otherwise it would be virtually creating an appeal to the jury instead of the Divisional Court. Bodeau v. Rutlin, 2 Exc., 665, though not exactly in point may be usefully referred to.

The 15th objection, viz:—"That the Chief Justice improperly rejected the newspapers "containing favorable comments tendered as evidence on behalf of the Defendant."

Like the rejected summons these published reports, containing presentments or reports made in courteous terms by grand jurors to the Plaintiff as presiding judge, were tendered as evidence of good feeling on the Defendant's part, with a view of mitigating the damages.

How they could have had that effect, had they been admitted, I fail to see.

The complimentary allusions, which they contained, were those of the grand jury—certainly not those of Defendant. Yet his counsel says he ought to have credit for them, as if they had been his own; although, in fact, they were not so.

The mere fact of his having published the reports, could not, to my mind, have influenced the jury in his favor, for, apart from brief allusions made in them to the Plaintiff and his family, they refer to matters of public concern, and, as such, it is only reasonable to believe, they were published by Defendant from a mere newspaper point of view, as any other current news of the day. The McNamee evidence had not then come to light.

The Defendant made no editorial comments on these reports favorable to the Plaintiff If he had, they might have been of some value.

It is not proved that Defendant ever even saw them.

Besides the Defendant, by abstaining from going into the witness box to establish, if he could, his allegation of good faith in respect of his defamatory article, deliberately threw away the opportunity which would have arisen in the course of his evidence of giving point, if he could, to the mere fact of publishing such public documents. Take a parallel case by way of illustration. Would the publication of the report of a vote of thanks to some one at a public meeting, excuse an editor, who happened to see it, for a libel which he afterwards published on the same man. Proceedings of public interest, if published at all, are published for the benefit of the paper like other general news, and there is nothing to shew that these newspaper reports were any exception to the rule. This brings me to

The 16th objection:—"That the Chief Justice improperly rejected the evidence of the "witnesses, Messrs. Robson and Booth, tendered on behalf of the Defendant."

Mr Robson's name is not on the Judge's notes: so that the question of admitting his evidence was not raised as it ought to have been, by swearing that witness, and then, if his evidence was objected to, getting a decision on the objection, and the objection on the notes.

The evidence was stated in argument, but I find the statement nowhere else, to have been a conversation, like Mr. Booth's, with the Defendant before the alleged libel was printed, or ever thought of or composed. Mr. Booth, we know, was sworn, but his evidence objected to as relating to conversations with the Defendant before he even thought of making the publication complained of. If these conversations referred to the "charge," they would at best go to prove against the Defendant that the publication complained of was not quite the impromptu article which the Defendant, in the evidence of Messrs. Dunsmuir and Tuck, sought to make us believe it was.

It is singular that on the argument for a new trial, no importance was attached to the non-appearance of the Defendant in the witness box, although, at the trial, Mr. Drake commented on it strongly. Yet, what more fitting opportunity could he have had for there proving, if he could, the truth of the alleged good feeling towards the Plaintiff, with which his counsel wishes us to credit him.

The jury could not have failed to consider this abstention of the defendant, who was present in court throughout the trial, as a significant fact.

He might, if he could possibly have done so, have explained the extent of the good feeling which was claimed for him towards the Plaintiff, and this would have far outweighed any second hand or hearsay evidence on the point which might have been attempted to be given by Messrs. Booth and Robson.

The effect of reading written interrogatories and answers, which referred to the Plaintiff's position, to a jury, and the giving of second hand evidence, had it been permitted, could not be compared to that which would have been produced in their minds by a few minutes successful and straightforward oral evidence in the face of a lively cross-examination in witness box.

It is for this reason that courts lay great stress on the absence of the principal witness from the stand; and notwithstanding carefully prepared answers in writing to cut and dried interrogatories, when the motion, like this one, is for a new trial on the ground of the rejection of evidence, especially in the face of our Supreme Court rule 287, it materially weakens the application when one of the principals in an action, who is also a principal witness, has deliberately avoided the witness box.

Thus much for the grounds directly advanced by the Defendant.

Underlying these, and indirectly springing out of them, were some points which invite remark.

Objections Nos. 3, 7, 8, 9 all imply that the Defendant complains that the damages were excessive. It was so mooted by him during the argument, and, therefore, claims passing notice. These damages were fixed by the jury. "In libel cases the amount to which "damages are assessed lies entirely in the discretion of the jury," and they were so charged. "The courts will never interfere with their verdict, merely because the amount "is excessive" Odgers 291 and cases.

A new trial will only be granted when it appears to the court that there is some intentional and marked injustice on the part of the jury, or their verdict is the result of

some gross error in a matter of principle. None such appears or is suggested here. The damages in such an action are not limited to the pecuniary loss the Plaintiff is able to prove. "It is no ground for a new trial that the jury may have" (as in this case) "taken "into consideration the relation of the parties, the mode of publication, the extent of the "circulation given to the words complained of, the fact that the attack was entirely un-"provoked, or the fact that the Defendant could have easily ascertained that the charge he "made was false"—and here had already been disproved, and the facts chronicled in his own columns—"In short, the jury may and should take into their consideration every "consequence which the words used would have a natural tendency to produce." (Odgers, p. p. 292, 293, and cases there cited.) We have no reason to think, and there is nothing to suggest, that the jury had any idea of remote damages in their mind or that they did not strictly confine themselves to the issues directly before them, when assessing the damages, particularly after the Chief Justice's caution that "no special damages were before them."

I confess, considering all things, that I see nothing excessive in the sum at which the damages were assessed; certainly nothing in the amount warranting a new trial.

Nor could the verdict be said to be against the weight of evidence, tried by Lord Selborne's excellent test in Metropolitan Railway Co. v. M. A. Wright, 11 App., C. A., 182 (as amended by the House of Lords on appeal) which is as follows:—

"There must be a great preponderance of evidence on the other side before such a ver-"dict can be set aside on the ground of being against the weight of evidence."

"It is not enough that the Judge who tried the case might have come to a different "conclusion on the evidence; that the jury, or the Judges, where the new trial is moved "for, might have come to a different conclusion; but there must be such a preponderance "of evidence, assuming there is evidence on both sides to go to the jury, as to make it un-"reasonable and unjust" (the House of Lords amendment) "that the jury when assisted "and properly instructed by the Judge should return such a verdict."

The evidence in the present case may be briefly summed up.

The publishing and consequently wide circulation of the article is admitted. The article itself is, as I have shewn, proved to be a defamatory libel. No justification is pleaded or lawful excuse shewn. No apology is pleaded or offered, or intended; and the injury to the feelings and reputation of the Plaintiff is undoubted.

The evidence on behalf of the Defendant of alleged previous good will, if admitted to the fullest extent contended, is of the weakest possible kind, and no answer in law to the action; and the defendant himself, though he had every opportunity of doing so, refrained from going into the witness box.

With such facts as these before them, and the preponderance of evidence so largely against the Defendant, what other verdict could a jury of reasonable men come to? I see no reason, therefore, on the ground of the verdict being against the weight of evidence for granting a new trial.

So much stress was laid on the right of publishing criticisms on a public man, and the length to which it can lawfully go, that it will be useful to give the rule laid down by Lord Herschell in Davies v. Shepstone, 11 App., C. A. 190, where he says:—

"There is no doubt that the public acts of a public man may be lawfully made the "subject of fair comment or criticism, not only by the press, but also by all members of "the public. But the distinction cannot be too strongly borne in mind, between comment "or criticism, and allegations of fact, such as, that disgraceful acts have been committed, or "discreditable language used. It is one thing to comment upon or criticize, even with se- "verity, the acknowledged or proved acts of a public man; and quite another to assert "that he has been guilty of particular acts of mis-conduct.

How far the Defendant in this case has transcended this wholesome rule I have already shewn.

I cannot but conclude, therefore, upon a careful review of the arguments on both sides, and of the facts and the law applicable in this case; that upon every ground which has been advanced, the present motion has entirely failed; and this is especially apparent when the effect of the above grounds is tested by our Supreme Court Rule 287, first quoted, which lays down the principle that guides our decision.

The Order Nisi, therefore, for a new trial must be discharged with costs.